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Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights

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Introduction

The International Covenant on Civil and Political Rights of 1966 (ICCPR) is one of the seven universal human rights treaties.¹ Together with the International Covenant on Economic, Social and Cultural Rights, it mirrors, though with differences, the Universal Declaration on Human Rights of 1948 and turns this soft-law into binding obligations for States parties. The ICCPR contains classic civil liberties developed during the Enlightenment, such as freedom from torture, freedom of opinion, equality before the law and due process.

A number of reservations to the ICCPR have been entered on signature and/or ratification.² With the exception of very broad reservations on Article 13, however, very few pertain to aspects and rights that are of importance for refugee protection.³ At 26 January 2006, 156 states have ratified the ICCPR. Out of the 40 most populous countries,⁴ only the People's Republic of China, Pakistan and the Union of Myanmar are not parties to the ICCPR.

The Human Rights Committee

States' compliance with the guarantees of the ICCPR is monitored by the Human Rights Committee⁵ (hereafter "the Committee"), consisting of 18 independent human rights experts elected by the States parties.⁶ There may not be more than one Committee member per State party, which ensures that various legal cultures are represented. The Committee's main functions are the review of state reports, the review of individual complaints and the issuance of General Comments.⁷

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¹ International Covenant on Civil and Political Rights. International Covenant on Economic, Social and Cultural Rights. International Convention on the Elimination of All Forms of Racial Discrimination. Convention on the Elimination of All Forms of Discrimination against Women. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Convention on the Rights of the Child. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

² See a complete list at http://www.ohchr.org/english/countries/ratification/4_1.htm.

³ See e.g. reservation of India: "With respect to Article 13 of the International Covenant on Civil and Political Rights, the Government of India reserves its right to apply its law relating to foreigners." Further reservations on Article 13 entered e.g. by Iceland, Liechtenstein, Malta and Mexico.

⁴ For a list of the world's most populous countries, see:

<<http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html>>.

⁵ A general overview on the work of the Human Rights Committee can be obtained in OHCHR fact sheet No. 15 "Civil And Political Rights: The Human Rights Committee".

⁶ See Article 28 to 34 of the Covenant for relevant provisions on the Committee.

⁷ Other rarely or never used functions are special reports and inter-state complaints, which are therefore not considered in this article.

Review of State Reports

States parties have an obligation under Article 40 (1) ICCPR⁸ to submit reports on “the measures they have adopted which give effect to the right recognized [under the ICCPR] and on the progress made in the enjoyment of these rights.”⁹ The Committee then examines these reports and pronounces its findings in so-called Concluding Observations. Since states may show a certain reluctance to be self-critical and limit their submission to a description of the national legal system, far from being implemented in reality, the Committee relies on additional information supplied by NGOs and relevant UN institutions such as UNHCR.¹⁰

A flaw in the reporting system stems from the insufficient discipline of states to fulfill their reporting obligations. States could therefore escape the scrutiny of the Committee, sometimes for decades, as in the past the Committee did not issue Concluding Observations unless a state had submitted a report.¹¹ Still in 2001, Thomas Buergenthal, a former member of the Committee, lobbied for a change to this practice in order to close the door for those states that attempt to “hide” their human rights record.¹² In the same year, the Committee responded to this challenge by changing its rules of procedure, which now allow for the issuance of provisional Concluding Observations that can even be converted into final Concluding Observations.¹³ The Committee subsequently applied this rule with respect to Gambia and Equatorial Guinea.¹⁴

The importance of Concluding Observations derives from the fact that the state report mechanism is the only mandatory instrument under the ICCPR to examine states’ human rights record. The Concluding Observations mirror the understanding and interpretation of the ICCPR by the Committee, and though not binding, Buergenthal considers them “authoritative pronouncements on whether a particular state has or has not complied with its obligations under the Covenant.”¹⁵ The Committee has made

⁸ All Articles without further reference referred to in this text apply to the International Covenant on Civil and Political Rights.

⁹ See also: General Comment No. 2 “Reporting Guidelines”, 28 July 1981 and No. 30 (replacing General Comment No. 1) “Reporting Obligations under Article 40 of the Covenant”, 18 September 2002.

¹⁰ See Article 40 (3) for specialized agencies. Information from non-governmental actors is not put on an official footing but part of the members’ right to consult different sources of information.

¹¹ It has to be noted that some states do not act in bad faith and just do not have the resources to respond to their reporting obligations. At 31 July 2005, 47 state reports were overdue for either five years or following a special decision of the Committee, see: Report of the Human Rights Committee, 2005, A/60/40 (Vol. I), 19f. This problem had already been seen in General Comment 1 “Reporting Obligation”, 27 July 1981.

¹² Thomas Buergenthal: The U.N. Human Rights Committee. In: Max Planck Yearbook of United Nations Law 5: 341 – 398, 2001, 391f.

¹³ See: Rules of Procedure of the Human Rights Committee (CCPR/C/3/Rev.8), 22 September 2005, Rules 68 to 70. See also General Comment No. 30 (replacing General Comment No. 1) “Reporting Obligations under Article 40 of the Covenant”, 18 September 2002.

¹⁴ Gambia (CCPR/CO/75/GMB), 12 August 2004 and Equatorial Guinea (CCPR/CO/79/GNQ), 30 July 2004.

¹⁵ Buergenthal, *op. cit.*, 351.

careful use of its competence and earned respect by establishing a ‘constructive dialogue’ with States parties.¹⁶

Concluding Observations in recent years have covered a wide range of possible and actual human rights violations of persons that UNHCR seeks to protect and approximately every third examination of state reports touched upon concrete issues of interest to UNHCR.

Review of individual complaints

When the first optional protocol to the ICCPR entered into force on the same day as the ICCPR, an additional review mechanism was created that complements the state report procedure. Individuals can send a “Communication” to the Committee, which will then examine if a state party has violated this individual’s human rights, as laid down in the ICCPR. Manfred Nowak calls it “one of the most important procedures for the international protection of human rights”, closely followed by states and literature.¹⁷

The procedure, although written and confidential, can be compared to court proceedings. The Committee’s decision, which is called a ‘View’, is not ‘directly’ legally binding.¹⁸ States have, however, accepted the Committee’s competence to interpret the ICCPR. If the Committee then finds a human rights violation, states parties have an obligation to repair this violation, under the provisions of the ICCPR, which are in turn legally binding.¹⁹ As Buergenthal summarizes: “A Committee determination that a state has violated a right guaranteed in the Covenant therefore enjoys a normative and institutional legitimacy that carries with it a justifiable expectation of compliance.”²⁰

With 105 states parties,²¹ the Optional Protocol enjoys significantly higher adherence than the individual complaint procedures under Article 14 of the International

¹⁶ For further appraisal see: Manfred Nowak: U.N. Covenant on Civil and Political Rights: CCPR Commentary. 2nd revised edition, Kehl am Rhein / Strasbourg / Arlington, Va.: N.P. Engel, 2005; Article 40, para. 4 and list in fn. 12 and paras. 33f.

¹⁷ Nowak, op. cit., Preamble First OP, para. 2.

¹⁸ Dominic McGoldrick, *The Human Rights Committee: its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford, 1999; 151. Buergenthal, op. cit., 397.

¹⁹ In case of a violation, the Committee usually concludes its Views with:

“The Human Rights Committee, acting under Article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations [...]

In accordance with Article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. [...]

Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to Article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.”

See for example Communication No. 1051/2002, §§ 11 – 13.

²⁰ Buergenthal, op. cit., 397.

²¹ At 19 April 2006, see: < <http://www.ohchr.org/english/countries/ratification/5.htm>>.

Convention on the Elimination of Racial Discrimination²² and Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²³ A further major advantage of the individual complaint procedure is the possibility to demand interim measures, which is of utmost importance in cases of expulsion.²⁴ In the Committee's view, these measures are binding²⁵ although states parties reject this interpretation.²⁶

A significant number of states unfortunately refuse to comply with the Committee's Views despite the fact that Views are made public and thus create a certain pressure. They either do not respond to the Committee's request for information on the implementation of the View, reiterate that the Committee made a wrong decision or simply refuse to take appropriate measures. In this regard, the last annual report of the Human Rights Committee, summarizing follow-up activities, depicts a disappointing situation.²⁷

Very few communications are submitted by asylum-seekers or refugees, and even fewer are found admissible by the Committee. This Article cannot provide a societal analysis on the reasons why refugees and asylum-seekers rarely try to avail themselves of the protection the Human Rights Committee offers. Some suggestions will nevertheless be offered, bearing in mind the specific situation of refugees and asylum-seekers. Upon exhaustion of local remedies rule²⁸ (which might take years and already deters persons in uncertain situations), individuals might be expelled before having a chance to file their communication. Moreover, the Committee itself takes years to consider a communication.²⁹ Most refugees cannot afford legal counsel without financial aid, which is not made available for communications to the Committee. Lawyers also prefer regional systems, which are usually more familiar to lawyers and more accepted by states. Lastly, expulsion proceedings are far more often taken to the Committee against Torture, possibly due to its explicit *non-refoulement* obligation.³⁰

Issuance of General Comments

Under Article 40 (4), the Committee has the competence to issue General Comments. These comments constitute an interpretation of the ICCPR and carry a similar authority as the Views. Hence, General Comments contribute to standard setting in

²² At 24 February 2006: 47 states, <http://www.bayefsky.com/complain/cerd_statesparties.php>.

²³ At 24 February 2006: 58 states, <http://www.bayefsky.com/complain/cat_statesparties.php>.

²⁴ See for example Communication No. 1222/2003, § 1.2.

²⁵ As an example, see Communication No. 869/1999, §§ 5.1 – 5.4.

²⁶ See for example Canada's response to View 1051/2002. In: Report of the Human Rights Committee 2005 (A/60/40 (Vol. II)), 499.

²⁷ Report of the Human Rights Committee 2005 (A/60/40 (Vol. II)), 490 – 555. No state response on follow up for example from Angola (490), Australia (492), Guyana (517f.), Libya (509f.). Refusal to accept Committee's View for example from Australia (493), Belarus (498), Canada (499f.), The Netherlands (511 – 513) and The Philippines (517f.).

²⁸ Article 5 (2) (b) First Optional Protocol.

²⁹ Average of four years to issue a view on the merits, see: Michael O'Flaherty: Human Rights and the UN: practice before the treaty bodies, 2nd edition, The Hague, Kluwer Law International, 2002, 41.

³⁰ This seems paradox because Article 3 CAT is restricted to torture itself (see section below on *non-refoulement*), see: Sarah Joseph, Jenny Schultz and Melissa Castan: The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary. 2nd edition, Oxford, Oxford University Press, 2004, para. 9.68.

international human rights law. Unlike Concluding Observations and Views, whose standard setting force might be challenged due to their specific context, General Comments are truly general in scope. As of 30 April 2006, there are 31 General Comments that deal with diverse issues of states' obligations under the ICCPR. Most of the provisions in the ICCPR this essay deals with have been the subject of a General Comment. In addition, General Comment No. 15 covers the position of aliens under the ICCPR. Reference will be made accordingly in this article.

Use of human rights treaty bodies for protection

International human rights law complements international refugee law. Refugee law does not supersede human rights law as *lex specialis* if the human rights norm offers more protection.³¹ Hence, the 1951 Convention relating to the Status of Refugees (1951 Convention) and the 1967 Protocol relating to the Status of Refugees (1967 Protocol) are the primary instruments for the protection of refugees and asylum-seekers, but international human rights law and the treaty bodies established under international human rights treaties can offer additional protection in different situations.³² These situations will be briefly presented in general and in their specific application on the ICCPR:

- i) A state has ratified the ICCPR but is not a party to the 1967 Protocol, which abolishes the temporal limitations of the 1951 Convention. Even though the 1967 Protocol and the ICCPR have a similar number of ratifications, this situation applies to 22 states as of 1 March 2006.³³ In this case, main protection concerns like *non-refoulement* can be effectively addressed via the ICCPR.
- ii) Some issues of importance for asylum-seekers and refugees are not covered by the refugee law instruments. This article will *inter alia* deal with the right to leave one's country, the question of conditions of detention of asylum-seekers, and the right to return.
- iii) In some instances, the 1951 Convention does not foresee protection as far-reaching as the more recently drafted ICCPR. Whereas the 1951 Convention often requires equal treatment with non-nationals, the ICCPR in principle

³¹ See Article 5 of the 1951 Convention that reads as follows: "Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention." In 2003, Conclusion No. 95 of the Executive Committee of the United Nations High Commissioner's Programme explicitly acknowledged "the multifaceted linkages between refugee issues and human rights" and recalled "that the refugee experience, in all its stages, is affected by the degree of respect by States for human rights and fundamental freedoms": (No. 95 (LIV) – 2003) para. (k). Furthermore, the Committee acknowledged "the complementary nature of international refugee and human rights law, as well as the possible role of the United Nations human rights mechanisms in this area": (No. 95 (LIV) – 2003) para. (l).

³² On the possible use of treaty bodies to monitor the guarantees of the 1951 Convention and the limits of this approach, see: Saul Takahashi, "Recourse to Human Rights Treaty Bodies for Monitoring of refugee Convention," Netherlands Quarterly of Human Rights, Vol. 20/1, 53-74, 2002. As an example protection offered under a different treaty body, namely the Committee on the Rights of the Child, see: Christoph Bierwirth: The Protection of Refugee and Asylum-Seeking Children, the Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child. In: Refugee Survey Quarterly, Vol. 24, Issue 2, pp. 98 - 124.

³³ At 19 April 2006: Bangladesh, Barbados, Democratic People's Republic of Korea, Eritrea, Grenada, Guyana, India, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Madagascar, Monaco, Mongolia, Nepal, San Marino, Sri Lanka, Syria, Thailand, Uzbekistan and Viet Nam.

provides equal treatment for all individuals. Another example of this situation is Article 33 of the 1951 Convention, which allows for *refoulement* if necessary for national security. Article 7 on the other hand provides absolute protection against *refoulement*.

- iv) The development of human rights interpretation can influence the interpretation of refugee law provisions, e.g. with regard to the link of human rights violations and persecution.
- v) In the case of internally displaced persons, no specific international instrument has been designed for their protection. They depend on international human rights standards, which set the basis for the 'Guiding Principles on Internal Displacement'.³⁴

These examples demonstrate that asylum-seekers and refugees can benefit from protection under the ICCPR in very different circumstances, be it when they leave their home country, reach a country of refuge or seek protection against *refoulement*.

Non-refoulement

The core norm of international refugee law is the principle of *non-refoulement* according to which no "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."³⁵ This principle has found entry³⁶ and has been developed in international human rights law. It is nowadays a norm of customary international law.³⁷ Not only refugees, for whom the state of refuge has recognized a risk of persecution in the country of asylum, but also asylum-seekers benefit from the duty of *non-refoulement*, since their claim might be founded.³⁸ In its jurisprudence, the Committee developed a concept of *non-refoulement* obligations under the ICCPR.

Scope

In numerous Concluding Observations, Views and two General Comments the Committee pointed out that States parties are under an obligation to ensure that no person is removed to a country, where her/his right to life or her/his rights under Article 7 risk being violated.

³⁴ UN Doc. E/CN.4/1998/53/Add.2, 17 April 1998.

³⁵ Article 33 (1) of the 1951 Convention.

³⁶ Explicitly, e.g. Article 3 CAT, and implicitly by means of interpretation, as done by the Human Rights Committee, see below.

³⁷ Sir Elihu Lauterpacht and Daniel Bethlehem: The Scope and Content of the Principle of Non-refoulement: Opinion. In Erika Feller, Volker Türk and Frances Nicholson: Refugee Protection in International Law; 163f.

³⁸ Guy S. Goodwin-Gill: The Refugee in International Law. 2nd edition, Oxford, Oxford University Press, 1996, 137.

General Comment No. 31 consolidates earlier findings of the Committee, especially that of General Comment No. 20,³⁹ and summarizes the *non-refoulement* obligations under the ICCPR as follows:

Moreover, the Article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 ICCPR, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.⁴⁰

Several points with regard to the scope of the *non-refoulement* obligations under the ICCPR are noteworthy:

In contrast to the *non-refoulement* obligation under Article 3 CAT, the ICCPR also covers inhuman or degrading treatment or punishment in addition to torture itself. In addition, the Committee explicitly refers to the practice of “*chain-refoulement*”.

Furthermore, Article 3 CAT does not protect the right to life. This Article does not elaborate on the complex issue of extradition of persons facing death penalty,⁴¹ as the relevance of the death penalty in the refugee context remains rather small. It suffices here to state that the right to life under Article 6 (1) enjoys protection under a duty of *non-refoulement*.

The definition presented in General Comment No. 31 leaves room for an extension of *non-refoulement* obligations, since violations of rights “such as” – but not exclusively – those in Articles 6 and 7 are covered.⁴² In previous Views the Committee already hinted at the possibility that potentially all rights under the ICCPR could give rise to *non-refoulement* obligations. For example in *Kindler v. Canada*:

However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.⁴³

³⁹ General Comment No. 20 “Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment”, para. 9.

⁴⁰ General Comment No. 31 “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, 26 May 2004, para. 12.

⁴¹ For further information on the Committee’s Views and the uncertainty, whether the ratification of the 2nd optional protocol to the Covenant on the abolition of the death penalty by the extraditing state plays a role, see: NOWAK, op. cit., art. 6 paras. 51 to 55.

⁴² An example illustrating the importance of a broader interpretation would be that of modern slavery, which is prohibited under Article 8 .

⁴³ Communication No. 470/1991, § 6.2.

Moreover, there is no compelling reason to limit the extraterritorial effects of the ICCPR to Articles 6 and 7. Unfortunately, the Committee interpreted Article 2 in a way that only a “real risk of irreparable harm” would trigger non-refoulement obligations. The notion “irreparable harm” remains quite obscure, unless understood as meaning permanent bodily harm such as death or amputation. In the past, however, the Committee found that extraditing a person to a country, where this person would face a real risk of inhuman or degrading treatment or punishment, constitutes a violation of the duty of *non-refoulement*.⁴⁴ One can have serious doubts as to whether degrading punishment is more difficult to repair than arbitrary detention, since reparation cannot provide restitution of the victim's *status quo ante* but only compensate.

In view of the general principle of *non-refoulement* that refers to every kind of torture, one must presume that harm is “irreparable” when serious human rights violations occur. Based on this definition, human rights violations other than those related to Article 6 or 7 might fall within the scope of the *non-refoulement* duty under the ICCPR. A clear distinction whether a violation is serious or not could be made along the lines of Article 4 (2), which distinguishes derogable and non-derogable rights. However, this definition would include minor violations of freedom of thought but would not comprise cumulative human rights violations nor violations like prolonged arbitrary detention. Instead of Article 4 (2), a criterion of degree is needed, which can only be developed on a case by case basis. Not only in light of refugee protection, the interpretation of Article 1 (A) (2) in conjunction with 33 of the 1951 Convention could be a better indicator on how to assess whether a human rights violation is serious, since persecution “comprise[s] serious human rights violations or other serious harm, often but not always, perpetrated in a systematic or repetitive way.”⁴⁵ The Committee could refer to the large body of national jurisprudence and legislation and subsequently fully develop the doctrine of extraterritorial effects of the ICCPR.

No exceptions

As already mentioned, the *non-refoulement* obligations under the ICCPR are not subject to any exception whatsoever, in contrast to the exceptions foreseen in Article 33 of the 1951 Convention. Discussing Canada’s report, the Committee left no doubt that national security cannot be invoked to remove persons to a country where they are at risk of violations of their rights under Article 7.

The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under Article 7 ICCPR. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel,

⁴⁴ General Comment No. 20 “Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment”, para. 9. Communication No. 706/1996 § 8.4 – 8.6 and Communication No. 692/1996 § 6.14.

⁴⁵ UNHCR, An Introduction to International Protection: Protecting Persons of Concern to UNHCR, self study module 1, 2005, 56.

inhuman or degrading treatment. The State party should clearly enact this principle into its law.⁴⁶

This difference between the 1951 Convention and the ICCPR has recently gained significance with regard to terrorist suspects. Even measures taken in connection with Security Council resolution 1373 do not dispense states from their obligations.⁴⁷

Internal flight alternative

Another “trend” in restricting refugee protection is to invoke the so-called internal flight or internal relocation alternative. An asylum-seeker, who could have sought refuge in another part of her/his home country, can thus be sent back without violating *non-refoulement* obligations. This approach is generally in conformity with states’ obligations under the ICCPR, as long as the assessment of the alternative properly reflects reality. In March 2006 the Committee discussed the Norwegian practice and noted with concern that

asylum requests may be rejected on the basis of the assumption that the persons concerned can find protection in a different part of their country of origin even in cases, where information, including recommendations by UNHCR, is available indicating that such alternatives might not be available in the specific case or country of origin.

Such an alternative must not only provide absence of persecution but has a human rights dimension beyond persecution. The Committee therefore called upon to Norway to

apply the so-called internal relocation alternative only in cases where such alternative provides full protection for the human rights of the individual.[emphasis added]⁴⁸

Since the Committee referred to UNHCR’s assessments, it is most probable that a state violates its obligations under Article 2 (3), 6 or 7, if it ignores recommendations given by UNHCR that in a country or a specific case no internal flight alternative exists.

Expulsion procedure under Article 13

The main procedural guarantee protecting aliens against expulsion is laid down in Article 13.⁴⁹ In a recent View, the Committee declared that with regard to expulsions

⁴⁶ Canada (CCPR/C/CAN/CO/5), 2 November 2005, para. 15.

⁴⁷ Lithuania (CCPR/CO/80/LTU), 4 May 2004, para. 7. See also: Yemen (CCPR/CO/84/YEM), 9 August 2005, para. 13. Morocco (CCPR/CO/82/MAR), 1 December 2004, para. 13.

⁴⁸ Norway (CCPR/C/NOR/CO/5), 24 March 2006, para. 11.

⁴⁹ The corresponding proviso in the 1951 Convention is Article 32 (2), which reads as follows:” The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the

it considered Article 13 – if applicable – to be the *lex specialis* with regard to Article 14.⁵⁰ However, Article 13 can only be invoked if the alien “lawfully” stays in the territory. Since refugees, who have been recognized by states authorities, are granted the right to stay in the country, they always benefit from the guarantees under Article 13. It is self-evident that states cannot render a stay unlawful by issuing an expulsion order, since this would put the right at the discretion of national authorities.⁵¹

The interpretation of the notion “lawfully” is, however, of utmost importance if one bears in mind that most asylum-seekers enter the country of asylum in violation of this country’s legal provisions, which are decisive for the determination of lawful stay.⁵² In this context, one can refer to the Committee’s findings on the same wording in Article 12.

In its General Comment No. 27, the Committee found that States parties have the right to determine whether the entry into their territory is lawful or not, thus imposing restrictions on the entry of an alien, “provided [the restrictions] are in compliance with the State's international obligations.”⁵³ This latter safeguard ensures that a person, who cannot be rejected at the border without violating *non-refoulement* obligations, automatically enjoys procedural guarantees under Article 13 in possible expulsion proceedings because she/he has a right to enter the country. An assessment of this question is usually undertaken in asylum proceedings, under which states allow individuals to stay in the country for the time of the proceedings. In that regard, it is important to note that every legal entitlement to stay – no matter how short it may be – suffices to render a stay ‘lawful’.⁵⁴ All asylum-seekers, whose claim is assessed by states’ authorities, therefore enjoy guarantees under Article 13.⁵⁵ Open questions remain to which extent Article 13 applies in cases of manifestly unfounded claims or interceptions on the high sea.

Guarantees

Article 13 distinguishes two stages, first the expulsion order itself and second the review of this order.

The expulsion order must be taken “in accordance with law”. The question whether the ICCPR requires a legal standard beyond the mere existence of a legal basis, has to be answered in the affirmative, although the corresponding Article 32 (1) in the 1951 Convention states “due process of law”. In a Swedish case, the Committee required the legal basis to be in conformity with provisions of the ICCPR (Nowak cites 2, 3 and 26⁵⁶). However, it restricted its review of whether a decision was taken in

purpose before competent authority or a person or persons specially designated by the competent authority.”

⁵⁰ Communication No. 1051/2002 § 10.9.

⁵¹ Nowak, op. cit., Article 13 para. 7: “[...] there is not need to be ‘lawfully established’ but only a requirement of some (even very short term) legal title under domestic or international law.”

⁵² General Comment No. 15 “The position of aliens under the Covenant”, 11 Apr 1986, para. 9.

⁵³ General Comment No. 27 “Freedom of Movement (Article 12)”, 2 Nov 1999, para. 4.

⁵⁴ Nowak, op. cit., Article 13, para. 7.

⁵⁵ See as an example: Communication No. 58/1979, § 9.2, where an asylum-seeker in Sweden obtained a residence permit.

⁵⁶ Nowak, op. cit., Article 13, para. 11. See also the reference to discrimination in General Comment No. 15 “The position of aliens under the Covenant”, 11 Apr 1986, para. 10.

accordance with law i.e. to a standard of arbitrary application.⁵⁷ In addition, collective expulsions constitute a violation of Article 13⁵⁸ since they do not prevent arbitrariness.⁵⁹

Article 13 guarantees that a person facing expulsion “shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

As the expulsion must not be arbitrary, one can infer that the competent authority must be independent and impartial. Such an interpretation finds backing in General Comment No. 31, where the Committee establishes such requirements⁶⁰ for procedures of inquiry into human rights violations, which *a fortiori* should be applied in a procedure guaranteed under a ICCPR provision.

Some uncertainty exists as to the standard of review required under Article 13. The provision is based on Article 32 of the 1951 Convention,⁶¹ but presents some differences that might be essential in that regard. Whereas Article 32 (2) of the 1951 Convention guarantees that an individual may “submit evidence to clear himself” and to “appeal”, the ICCPR contains weaker wording (see above, “submit reasons against the expulsion” and “have his case reviewed”). Therefore, doubts arise as to whether a review guarantees a second procedure subsequent to the initial expulsion order and allows for challenges to factual findings made by the authority that issued the expulsion order.⁶²

On different occasions, the Committee speaks of appeal in the context of expulsion, indicating that the review is not part of the initial proceedings but a subsequent procedure.⁶³ As to the possibility of a review of factual findings, cases before the Committee did not present a factual background allowing the Committee to express itself on the issue.⁶⁴ Nowak makes a passing reference to an analogy with Article 14 (5).⁶⁵ The Committee construed the latter provision and the notion “reviewed” in a way that it required an evaluation of the evidence.⁶⁶

⁵⁷ Communication No. 58/1979 § 10.1: interpreted and applied in good faith or that it is evident that there has been abuse of power. See also: General Comment No. 15 “The position of aliens under the Covenant”, 11 Apr 1986, para. 10 : “[Article 13’s] purpose is clearly to prevent arbitrary expulsions.”

⁵⁸ General Comment No. 15 “The position of aliens under the Covenant”, 11 Apr 1986, para. 10.

⁵⁹ Joseph, Schultz, Castan, op. cit., 13.04.

⁶⁰ General Comment No. 31 “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, 26 May 2004, para. 15. “Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”

⁶¹ Nowak, op. cit., Article 13 para. 4.

⁶² Doubts expressed in: Joseph, Schultz, Castan, op. cit., para. 13.14; and: James C. Hathaway: *The Rights of Refugees under International Law*. Cambridge, Cambridge University Press 2005; 671 fn. 70.

⁶³ General Comment No. 15 “The position of aliens under the Covenant”, 11 Apr 1986, para. 10. Lithuania (CCPR/CO/80/LTU), 4 May 2004, para. 7. Uzbekistan (CCPR/CO/83/UZB), 26 April 2005, para. 12.

⁶⁴ Communication No. 155/1983 and Communication No. 193/1985.

⁶⁵ Nowak, op. cit., Article 13 para. 16.

⁶⁶ See references under Nowak, op. cit., Article 14, para. 82.

With regard to both questions, the seriousness of the possible human rights violation and the fact, that – once expelled – further remedies are often out of reach, provide arguments in favour of a broad interpretation of ‘review’. In a different context, the Committee found States parties under extended obligations to provide an effective remedy, if a serious human rights violation had occurred.⁶⁷ This being said, it seems appropriate to conclude that in light of the object and purpose of Article 13, the provision guarantees the right to a legal remedy that allows for the subsequent evaluation of the facts and the legal grounds the expulsion order was based upon.

Lastly, the individual facing expulsion has the right to be represented and consequently the right to appoint counsel of her/his choice.⁶⁸ As with asylum claims, the Committee stressed that remedies against expulsion orders must have suspensive effect, even when national security is invoked.⁶⁹ If a person is actually expelled, the expelling state cannot determine which country the person will be expelled to.⁷⁰

Cycle of displacement

The following observations follow the cycle of displacement, which describes the various stages that a person fleeing persecution experiences: flight, life as a refugee abroad and the quest for a durable solution to her/his plight.

Flight and access to asylum

There are many reasons why a person may wish to leave her/his home country, such as persecution, general insecurity, natural disasters or the search for better economic opportunities. However, only a person with a well-founded fear of persecution can claim refugee status per Article 1 (A) (2) of the 1951 Convention. The 1951 Convention does not define the term “persecution” but in its Article 33 (1) refers to a threat to “life and freedom”. Reading this provision together with Article 1 (A) (2), one must conclude that human rights violations are a strong indication of persecution if they occur on grounds laid down in Article 1 (A) (2) of the 1951 Convention.⁷¹ The development of the understanding of human rights norms can therefore impact on the interpretation of persecution.⁷²

⁶⁷ Disappearances in Colombia, Communication No. 563/1993 and Communication No. 612/1195: necessity of criminal investigation in a case of abduction and later assassination.

⁶⁸ Nowak, op. cit., Article 13 para 20.

⁶⁹ Lithuania (CCPR/CO/80/LTU), 4 May 2004, para. 7. Uzbekistan (CCPR/CO/83/UZB), 26 April 2005, para. 12. The Committee called upon Belgium to publish a ministerial circular on the suspensive effect of remedies against expulsion orders, thus furthering legal certainty, see: Belgium (CCPR/CO/81/BEL), 12 August 2004, para. 23.

Morocco (CCPR/CO/82/MAR), 1 December 2004, para. 13.

⁷⁰ General Comment No. 15 “The position of aliens under the Covenant”, 11 Apr 1986, para. 9.

⁷¹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1992, para. 51.

⁷² See as an example: General Comment No. 6 of the Committee on the Rights of the Child “Treatment of Unaccompanied and Separated Children Outside Their Country of Origin”, para. 28 on the question of underage recruitment.

Persecution

The Concluding Observations and Views of the Committee are one source amongst many on the human rights situation in a country. However, reports based on facts gathered on the ground, be it by NGOs or UN institutions, provide a much stronger basis for evaluating the risk of human rights violations and possible persecution. The role of the Committee lies more in the assessment as to whether certain events amount to a human rights violation or not. As an example, if the Committee finds that the detention of a person on grounds of political opinion was arbitrary, that person is most likely persecuted and holders of the same opinion might be at risk of persecution. The development towards a right to conscientious objection to compulsory military service provides a valuable example how human rights and persecution are linked.⁷³

As a third example, international human rights law has contributed to recognition of women as a social group under Article 1 (A) (2) of the 1951 Convention in cases of sexual and gender-based violence.⁷⁴ In 2001, the Committee recommended to the Netherlands to grant asylum to women having a well-founded fear of genital mutilation.

11. [...] However, [the Committee] remains concerned that a well-founded fear of genital mutilation or other traditional practices in the country of origin that infringe the physical integrity or health of women (Article 7 ICCPR) does not always result in favourable asylum decisions, for example when genital mutilation, despite a nominal legal prohibition, remains an established practice to which the asylum-seeker would be at risk.

The State party should make the necessary legal adjustments to ensure that the female persons concerned enjoy the required protection under Article 7 ICCPR.⁷⁵

Right to leave the country of origin

A most essential provision in order to seek protection lies in Article 12 (2), which guarantees the right to leave every country, including the home country. Every person at risk of persecution therefore has the right to flee this persecution. Accordingly, the Committee recently condemned the practice of so-called “exit visas” in Uzbekistan and Syria.⁷⁶ A restriction based on the limitation of Article 12 (3) has to fulfil several strict requirements. Most importantly in the context of flight from persecution, a

⁷³ Guy S. Goodwin-Gill: *The Refugee in International Law*. 2nd edition, Oxford, Oxford University Press, 1996. 54 – 59. The Committee however pursues a rather hesitant approach with regard to conscientious objection, see: Nowak, op. cit., Article 18, paras. 27 – 32.

⁷⁴ For further reference, see: Rodger HAINES: *Gender-related Persecution*. In: Feller, Türk, Nicholson, op. cit., pp. 319 – 350.

⁷⁵ The Netherlands (CCPR/CO/72/NET), 27 August 2001, para. 11. See also General Comment No. 28 “Equality of rights between men and women”, 29 March 2000, para. 17: “States parties should ensure that alien women are accorded on an equal basis the right to submit arguments against their expulsion and to have their case reviewed, as provided in Article 13. In this regard, they should be entitled to submit arguments based on gender-specific violations of the Covenant such as those mentioned in paragraphs 10 and 11 above.” [inter alia rape, female genital mutilation, forced sterilisation].

⁷⁶ Uzbekistan (CCPR/CO/83/UZB) 26 April 2005, para. 19 and Syrian Arab Republic (CCPR/CO/71/SYR), 24 April 2001, para. 21

limitation has to be in conformity with other rights of the ICCPR. A state hindering a person from leaving a country on grounds laid down in Article 1 (A) (2) of the 1951 Convention would violate the non-discrimination provisions in Article 2 and 26. The restriction would therefore not be justified.⁷⁷ During flight, asylum-seekers frequently face life-threatening situations or might become victims of trafficking.⁷⁸

Right not to be refouled at the border

States' sovereignty comprises the right to regulate entry of non-citizens to their territory and the ICCPR does not grant aliens the right to enter a foreign country.⁷⁹ However, as described above, the ICCPR does impose an obligation of *non-refoulement* in the context of the right to life and the prohibition of torture.

In order to ensure that individuals claiming to flee persecution do not run the risk of being *refouled*, states are obliged to assess their claim. Rejecting individuals at the border even before the claim could be assessed would therefore violate the principle of *non-refoulement*.⁸⁰ In general terms, the principle of *non-refoulement* and thus the respective obligations under the ICCPR guarantee a right to enter the country, if removal resulted in *refoulement*.⁸¹

Access to asylum procedure

It is important to note that there is no right to asylum under international law.⁸² Furthermore, unlike the Universal Declaration of Human Rights in its Article 14 (1), the ICCPR does not guarantee a right to seek and enjoy asylum. Consequently, the duty of *non-refoulement* imposed on States by the ICCPR must not be confused with asylum.⁸³ Whereas the former prevents a state from removing a person to a situation of danger, the latter describes the act of a state protecting a person by granting her/him refuge on its territory.

The Committee, however, relates asylum to Article 6, 7, and 13, seeing it as a measure to guarantee effective protection against *refoulement*. It therefore demanded States parties on several occasions to grant individuals access to asylum procedures. In 2004, the Committee demanded Lithuania to

⁷⁷ Nowak, op. cit., Article 12, para. 32.

⁷⁸ This Article cannot further elaborate on trafficking in the context of asylum. The Committee recently addressed the trafficking in its Concluding Observations, see for example: Norway (CCPR/C/NOR/CO/5), 24 March 2006, para. 12. Slovenia (CCPR/CO/84/SVN), 25 July 2005, para. 11; Thailand (CCPR/CO/84/THA), 8 July 2005, para. 20.

⁷⁹ General Comment No. 15 "The position of aliens under the Covenant", 11 Apr 1986, para. 5.

⁸⁰ Lauterpacht, Bethlehem, op. cit., 114: on Article 33 (2) of the 1951 Convention. Pointing in the same direction: General Comment No. 15 on "The position of aliens under the Covenant", 11 Apr 1986, para. 5.

⁸¹ Guy S. Goodwin-Gill: *The Refugee in International Law*. 2nd edition, Oxford, Oxford University Press, 1996. 123f. See also General Comment No. 27 "Freedom of Movement (Article 12)", 2 November 1999, para. 4. This Article will not examine the difficult question of assessing asylum claims on the high sea or outside the state territory.

⁸² Lauterpacht, Bethlehem, op. cit., 113.

⁸³ Hathaway, op. cit., 300 – 302.

[...] take measures to secure access for all asylum-seekers, irrespective of their country of origin, to the domestic asylum procedure, in particular when applications for asylum are made at the border.[...] ⁸⁴

With regard to aliens arriving on the Italian island of Lampedusa, the Committee

[was] concerned that some asylum-seekers may have been denied the right to apply for asylum.[...] ⁸⁵

Guarantees in asylum procedure

The Committee not only implicitly promotes a right to seek asylum via Articles 6 and 7 but also pronounced itself on numerous occasions on procedural guarantees in the asylum procedure. In this context, some put forward the application of Article 14 (1),⁸⁶ stating that an asylum claim was a suit at law.⁸⁷ The critical argument in that context relates to the individual's "rights and obligations": an asylum claim is essential for the realization of an individual's rights. The interpretation of the notion led to controversy, also within the Committee, which is even aggravated by different wordings in English and Russian on the one hand and French and Spanish on the other.⁸⁸ The Committee thus far avoided revealing its position on whether asylum claims constitute a suit at law,⁸⁹ but in view of its broad interpretation⁹⁰ it seems quite open in that regard.

The Committee's practice allows, however, to draw the conclusion that its exigencies towards procedural guarantees for asylum procedure would hardly fall short of the guarantees provided in Article 14 (1). Bearing in mind that States parties are under an obligation to ensure the enjoyment of the rights in the ICCPR, Article 2 (1), it would be difficult to understand how a biased, subordinate body could ensure that rights under Articles 6, 7 and 13 would not be violated by the rejection of an asylum claim. In its Concluding Observations on Latvia, the Committee explicitly considered asylum procedure as a remedy in the sense of Article 2 (3) against *refoulement*.

While welcoming the entry into force of the new asylum law, the Committee remains concerned at the short time limits, in particular for the submission of an appeal under

⁸⁴ Lithuania (CCPR/CO/80/LTU), 4 May 2004, para 15.

⁸⁵ Italy (CCPR/C/ITA/CO/5), 28 October 2005, para. 15.

⁸⁶ The relevant sentence 2 of paragraph 1 reads as follows: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

⁸⁷ Hathaway, op. cit., 647 ff.

⁸⁸ For further information on this question see: Nowak, op. cit., Article 14 paras. 16 – 20.

⁸⁹ Communication No. 654/1995, § 6.3: "In the circumstances, the Committee need not decide whether or not the decision in the author's refugee claim was a determination "of his rights and obligations in a suit at law", within the meaning of Article 14, paragraph 1, of the Covenant." Similar: Communication No. 560/1993, § 9.7.

⁹⁰ For further information on the Committee's jurisprudence, see: JOSEPH, SCHULTZ, CASTAN, op. cit., paras.14.04 – 14.09.

the accelerated asylum procedure, which raises concerns regarding the availability of an effective remedy in cases of refoulement (Articles 6, 7 and 2.3).⁹¹

It is therefore possible to refer to General Comment No. 31, in which the Committee sets out requirements for an effective remedy under Article 2 (3):

The Committee attaches importance to States parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. [...] Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.⁹²

With regard to asylum claims that relate to a risk of being subjected to an attack on the right to life, to torture or inhuman or degrading treatment, invocation of Article 14 (1) therefore seems superfluous. If alleged persecution relates to other human rights violations, such as arbitrary detention, Article 14 (1) might have a role to play.

The following paragraphs seek to give an overview of the Committee's findings on asylum procedure. As a basis for the assessment of asylum claims, the Committee sees States under an obligation to create an asylum procedure. Facing a situation of mass influx of asylum-seekers from Myanmar in Thailand, the Committee

[noted] with concern the lack of a systematic adjudication procedure for asylum-seekers

and requested the Government of Thailand to:

[...] establish a mechanism to prohibit the extradition, expulsion, deportation or forcible return of aliens to a country where they would be at risk of torture or ill-treatment [...].⁹³

An essential point with regard to asylum procedure is the right to an individual assessment of the claim. An effective right to freedom from torture does not allow States parties to apply a general safe country of origin concept without giving all asylum-seeker the opportunity to successfully lodge a claim, even if they originate from a 'safe' country of origin. When assessing Lithuania's compliance with the ICCPR, the Committee requested that Lithuania

[...] should take measures to secure access for all asylum-seekers, irrespective of their country of origin, to the domestic asylum procedure [...].⁹⁴

In its Concluding Observations on Italy, the Committee left no doubt about the necessity of individual procedures for all asylum-seekers.

⁹¹ Latvia (CCPR/CO/79/LVA), 06 November 2003, para. 9.

⁹² General Comment No. 31 "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 26 May 2004, para. 15. It has to be noted that Article 2 (3) can be construed in a way that it obliges States parties to take preventive action, see: NOWAK, op. cit., Article 2, paras. 72 – 75.

⁹³ Thailand (CCPR/CO/84/THA), 8 July 2005, para. 17.

⁹⁴ Lithuania (CCPR/CO/80/LTU), 4 May 2004, para. 15.

The Committee recalls the absolute nature of the right of each person not to be expelled to a country where he/she may face torture or ill-treatment, and the obligation of the State party, consequently and in all circumstances, to ensure that the situation of each migrant is processed individually.⁹⁵

An asylum-seeker must be allowed sufficient time to lodge her/his claim⁹⁶ and conversely access to asylum procedures must be granted within reasonable time. The Committee called upon the Russian Federation to change its administrative practice, under which some asylum-seekers had to wait for more than two years before being admitted to asylum procedure.⁹⁷

With regard to unaccompanied children, the Committee invoked Article 24 to secure that States respect the child's best interest⁹⁸ and provide children with a guardian for asylum proceedings.⁹⁹

In cases where asylum-seekers face expulsion, suspension of expulsion procedures is of utmost importance to ensure the effective enjoyment of the rights under Articles 6 and 7. This holds equally true for an appeal against a rejected asylum claim. The Committee has therefore repeatedly called upon states to suspend expulsion procedures while the claim is being processed, e.g. in its Concluding Observations on the report of Uzbekistan.

The State party should adopt the necessary norms to prohibit the extradition, expulsion, deportation or forcible return of aliens to a country where they would be at risk of torture or ill-treatment, and should establish a mechanism allowing aliens who claim that forced removal would put them at risk of torture or ill-treatment to file appeals with suspensive effect.¹⁰⁰

Detention of asylum-seekers

Some states detain asylum-seekers if they have illegally entered the country.¹⁰¹ Detention of asylum-seekers raises questions under Articles 9 (1) and (4) and 10. The scope of Article 9 (1) and (4) not only covers detention in criminal proceedings and punishments,¹⁰² but also administrative detention explicitly acknowledged for the case of immigrants in General Comment 8.¹⁰³

⁹⁵ Italy (CCPR/C/ITA/CO/5), 28 October 2005, para. 15.

⁹⁶ Latvia (CCPR/CO/79/LVA), 06 November 2003, para. 9.

⁹⁷ Russian Federation (CCPR/CO/79/RUS), 6 November 2003, para. 25.

⁹⁸ Greece (CCPR/CO/83/GRC), 25 April 2005, para. 17.

⁹⁹ Russian Federation (CCPR/CO/79/RUS), 6 November 2003, para. 25.

¹⁰⁰ Uzbekistan (CCPR/CO/83/UZB), 26 April 2005, para. 12. See further: Finland (CCPR/CO/82/FIN), 2 December 2004, para. 12; Thailand (CCPR/CO/84/THA), 8 July 2005, para. 17. See especially in the context of terrorist suspects Lithuania (CCPR/CO/80/LTU), 4 May 2004, para. 7.

¹⁰¹ On detention of asylum-seekers and refugees and states' practice, see: Guy S. GOODWIN-GIL: Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention and protection. In: Feller, Türk, Nicholson, op. cit., pp. 185 – 252.

¹⁰² As a restriction to sanctions for illegal entry, see also: Article 31 (1) of the 1951 Convention.

¹⁰³ General Comment No. 8 "Right to liberty and security of persons (Article 9)", 30 Jun 1982, para. 1: "The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, [...] immigration control, etc.

Limitations to detention. With regard to the Australian practice of detaining immigrants, the Committee issued a series of Views¹⁰⁴ that were rejected by the Australian government, which stated that Australia exercised its sovereignty to decide whether or not to admit an alien to its territory.

Article 9 (1) prohibits arbitrary detention. While stating that detention of asylum seekers is not “*per se* arbitrary”,¹⁰⁵ the Committee found that prolonged detention can become arbitrary if the state does not put forward specific reasons to justify it.¹⁰⁶ In general terms, every detention must not be inappropriate and has to be proportional.¹⁰⁷ It is here that specific respect for the plight of asylum-seekers should be taken into consideration. States should only resort to detention as a final measure, while endeavouring to find less restrictive means of controlling an asylum-seeker’s whereabouts. Accordingly, the UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers¹⁰⁸ call upon States to principally avoid detention of asylum-seekers.¹⁰⁹ Detention should be limited to exceptional situations such as: verification of identity, determination of elements of asylum claim, destruction of identification documents and concerns of national security.¹¹⁰

When detained, detainees have a right under Article 9 (4) to appeal their detention and must obtain a decision “without delay”. As a precondition for an effective remedy, the ICCPR obliges States parties to inform detainees of their rights.¹¹¹

In the case of Australia, the Committee further declared that mandatory detention of non-nationals, and therefore also asylum-seekers, constitutes a violation of Article 9 (4), if the state does not allow the detainee to appeal his detention on individual grounds beyond the mere determination of whether the detainee is a non-national or not.¹¹²

¹⁰⁴ Communication Nos. 560/1993, 900/1999, 1014/2001, 1069/2002.

¹⁰⁵ Communication No. 560/1993, § 9.3.

¹⁰⁶ Communication No. 560/1993, § 9.4.

¹⁰⁷ Communication No. 560/1993, § 9.2: “9.2 On the first question, the Committee recalls that the notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author’s detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.” See also Nowak, *op. cit.*, Article 9, paras. 30 ff.

¹⁰⁸ UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999. Available on:
<<http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3bd036a74>>

¹⁰⁹ *Ibid.* para. 1 and Guideline 2.

¹¹⁰ *Ibid.* Guideline 3.

¹¹¹ Australia (A/55/40, paras. 498-528), 24 July 2000.

¹¹² Communication No. 560/1993; Communication No. § 9.6; Communication No. 900/1999 § 8.3; Communication No. 1014/2001 § 7.2; Communication No. 1069/2002 §§ 9.4 and 9.5.

Conditions of detention

As asylum-seekers often lack documentation, their detention occurs fairly often, in this case most likely in compliance with Article 9 (1). In order to best respond to the asylum-seekers' claims and their possible plight, the conditions of detention are of utmost importance. Being under distress and in a situation of uncertainty, asylum-seekers are at risk to develop traumas or mental illnesses in detention.

Article 10 foresees conditions for treatment of detainees and conditions of detention. The Committee also refers to Article 7 where detention might amount to cruel or inhumane treatment, especially when detainees experience violence from state authorities. In discussing detention centres on Lampedusa, Italy, the Committee addressed all major concerns regarding detention, namely ill-treatment, overcrowding, hygiene, nutrition and healthcare:

It is further concerned about information that detention conditions in this centre are unsatisfactory in terms of overcrowding, hygiene, food and medical care, that some migrants have undergone ill-treatment, and about the fact that regular independent inspections do not seem to be carried out in CPTAs [temporary stay and assistance centre for foreigners]. (Articles 7, 10 and 13)

The State party should keep the Committee closely informed about the ongoing administrative and judicial inquiries into these matters, and take all necessary action to ensure the respect of its obligations under Article 7, 10 and 13.¹¹³

Policies of detaining asylum-seekers may result in detention of minors, either as children of asylum-seekers, or seeking asylum on their own behalf. The consequences of detention for the child's development have to be taken into account under Article 24 (1), trying to find a solution that lies in the best interest of the child.¹¹⁴

In many cases, children will be detained to enable family unity with their detained parents. It may, however, be more adapted to permit family unity, while not detaining children. Article 24 (1) should therefore be construed in a way as to oblige States parties to increase their efforts to seek a solution other than detention when children are involved. This approach would be in conformity with other international norms calling upon states to detain children only if absolutely necessary.¹¹⁵ In its Concluding Observations on Lithuania the Committee demanded that Lithuania

¹¹³ Italy (CCPR/C/ITA/CO/5), 28 October 2005, para. 15. See also on the detention of foreigners awaiting expulsion in airport transit areas: Belgium (CCPR/CO/81/BEL), 12 August 2004, para. 17.

¹¹⁴ The principle of the child's best interest has been explicitly acknowledged in Article 3 (1) of the Convention on the Rights of the Child.

¹¹⁵ Hathaway, *op. cit.*, pp. 433f. See also: Article 37 (b) of the Convention on the Rights of the Child: "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;" See also: UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999: Guideline 6. "Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity."

ensure that minors are only detained when justified in the particular circumstances of the case and their detention is regularly reviewed by a court or judicial officer.¹¹⁶

Freedom of movement

Even if asylum-seekers are not detained, states do seek to restrict their freedom of movement, though to a different degree. The distinction between the two has not been explicitly clarified by the Committee although it entails significant consequences since detainees can rely on extensive safeguards under Article 9 and 10 described above. A useful criterion, which appears to underly related decisions of the Committee,¹¹⁷ seems to be whether or not the confinement allows for self-reliance (in the case of asylum-seekers, one has to disregard that their situation obliges them to accept help). Closed camps would therefore interfere with the liberty of the person, whereas measures such as reporting requirements or obligations to stay within a certain town or district fall within the scope of Article 12 (1). The latter provision can be invoked in the context of asylum since asylum-seekers whose claims are being processed are lawfully in the country.¹¹⁸

However, states can restrict freedom of movement on grounds of, *inter alia*, public order (*ordre public*), Article 12 (3). Since states have the right to decide whether or not to admit an alien to its territory, they must have the possibility to ensure the exercise of this right and to prevent rejected asylum-seekers from evading lawful expulsion by keeping track of their whereabouts. Measures taken by State authorities must be proportional.¹¹⁹ At its 70th session, the Committee referred to a Danish practice of discouraging or restricting asylum-seekers from freely choosing their residence in specific municipalities, and requested strict compliance with Article 12.¹²⁰ The Committee apparently deemed incompatible with Article 12 a Lithuanian practice under which asylum claims were rejected as a sanction for the claimant's failure to observe restrictions imposed on her/his the freedom of movement.¹²¹

Standard of treatment for refugees

In their country of refuge, refugees face manifold problems when trying to adapt to their new environment. Unfortunately, many host communities do not sufficiently acknowledge the plight of refugees and fail to provide a stable and safe environment, which in turn puts the refugees at risk of human rights abuses. The standards laid down in the human rights treaties oblige states to promote human rights and therefore to protect refugees. Primary concerns of refugees, for which the ICCPR provides important rights, are physical security with regard to forced removal (*non-refoulement*), family unity, non-discrimination and minority rights.

¹¹⁶ Lithuania (CCPR/CO/80/LTU), 4 May 2004, para. 15.

¹¹⁷ See references in NOWAK, op. cit., Article 12, paras. 12f.

¹¹⁸ See above on the right not to be *refouled* at the border.

¹¹⁹ General Comment No. 27 "Freedom of Movement (Article 12)", 2 Nov 1999, para. 14.

¹²⁰ Denmark (CCPR/CO/70/DNK), 31 October 2000, para. 16.

¹²¹ Lithuania (CCPR/C/79/Add.87), 19 November 1997 para. 15.

In its efforts to promote respect for human rights, the Committee usually concentrates on states' practice and calls for the full respect of rights guaranteed under the ICCPR in light of a specific concern. In the case of Mauritanian refugees in Mali the Committee departed from this practice and recommended that Mali "enter into discussions with the Office of the United Nations High Commissioner for Refugees (UNHCR), with a view to improving the status and conditions of these persons",¹²² thus acknowledging UNHCR's expertise as a means to ensure protection.

Family unity

Although asylum seekers and refugees tend to flee together with their families many become separated during flight or flee separately from the outset. Given the enormous distress caused by fleeing into an unknown environment, the family unit is a crucial "source of protection" for each family member.¹²³ Ensuring or re-establishing family unity therefore is of utmost importance for most refugees. In general terms, General Comment No. 19 supports this interest. "[T]he possibility to live together [under Article 23 (2)] 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."¹²⁴ The term 'family' has to be understood broadly "as understood in the society of the State party concerned."¹²⁵

In the context of asylum, expulsion of a parent represents a major menace to family unity. The Committee found a violation of Article 17 (1) in conjunction with Article 23 where the State party cannot "demonstrate additional factors justifying the removal" in cases where the family deserved special protection. Examples for such a need include: long duration of stay and acquisition of host state nationality by the child;¹²⁶ and a family with very small children, having undergone traumatic experiences.¹²⁷ However, the expulsion of a family member is not considered to be arbitrary *per se* and the mere fact that a child is a national of the host state does not automatically serve as a ground to prevent expulsion.¹²⁸ Moreover, in Nowak's words, the Committee has been reluctant to "interfere with domestic immigration policies."¹²⁹

¹²² Mali (CCPR/CO/77/MLI), 16 April 2003, para. 20.

¹²³ Kate Jastram and Kathleen Newland: Family Unity and Refugee Protection. In: Feller, Türk, Nicholson, op. cit., pp. 555 – 603 (pp. 562 – 563).

¹²⁴ General Comment No. 19 "Protection of the family, the right to marriage and equality of the spouses", 27 July 1990, para. 5.

¹²⁵ General Comment No. 16 "The right to respect of privacy, family, home and correspondence, and protection of honour and reputation", 8 April 1988, para. 5.

¹²⁶ 930/2000, § 7.3. See also General Comment No. 15 "The position of aliens under the Covenant", 11 Apr 1986, para. 5: "However, 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.**" (emphasis added).

¹²⁷ Communication No. 1069/2002 § 9.6.

¹²⁸ Communication No. 930/2000, § 7.1 and 7.3.

¹²⁹ Nowak, op. cit., Article 23 para. 21.

Non-discrimination

Many refugees face discrimination in their daily lives, which impedes their integration and hampers their access to human rights. Articles 2 (1) and 26 prohibit discrimination. The Committee defines discrimination as “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”¹³⁰ Refugees and asylum-seekers might be discriminated against on many of the above-mentioned grounds, in particular race, colour, religion, national origin (which is not the same as nationality) or their status as non-citizens, refugees or asylum-seekers.¹³¹

Whereas Article 2 (1) guarantees an accessory right, i.e. non-discrimination can only be invoked with regard to a right guaranteed in the ICCPR, “the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant.”¹³²

While the 1951 Convention only guarantees equal treatment of refugees with other aliens (e.g. Article 15, Right of Association), Article 2 (1) provides for equal treatment between nationals and aliens with regard to similar rights guaranteed under the ICCPR (e.g. Article 22, Right of Association).

However, the provisions of the ICCPR do not *per se* prohibit any differential treatment of nationals and non-nationals.¹³³ Like every other form of differential treatment, it may be justified “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”¹³⁴

James C. Hathaway provides an extensive analysis on the practice of the Committee with regard to this test on the differential treatment of non-citizens.¹³⁵ He criticizes the Committee for assuming that different categories automatically justify differential treatment; for not paying enough attention to discrimination in practice when legislation appears neutral; and for giving states a too large margin of appreciation. He concludes that “non-discrimination law has not yet evolved to the point that refugees and other non-citizens can safely assume that it will provide a sufficient answer to the failure to grant them rights on par with citizens.”¹³⁶

This being noted, it should be emphasized that some of the Committee’s Concluding Observations promote non-discrimination with regard to non-citizens, but always in very general terms. With regard to Germany, the Committee warned that anti-

¹³⁰ General Comment No. 18 “Non-Discrimination”, 10 Nov. 1989, para. 7.

¹³¹ The Committee has frequently understood ‘other status’ to comprise non-citizens (see e.g. Communication No. 196/1985, § 9.4) and its broad understanding, including e.g. age (see e.g. Communication No. 983/2001 §§ 8.2, 8.3), allows to infer that refugee or asylum-seeker status constitute an ‘other status’ as well.

¹³² General Comment No. 18 “Non-Discrimination”, 10 Nov. 1989, para. 12.

¹³³ Nowak, *op. cit.*, Article 26, paras. 37 and 38.

¹³⁴ General Comment No. 18 “Non-Discrimination”, 10 Nov. 1989, para. 13.

¹³⁵ Hathaway, *op. cit.*, pp. 128 – 147.

¹³⁶ Hathaway, *op. cit.*, 238.

terrorism measures might create an “atmosphere of latent suspicion” towards foreigners, in particular asylum-seekers, and referred to Article 26 in support of its observations.¹³⁷ In its Concluding Observations on Latvia the Committee expressed

“its concern over the perpetuation of a situation of exclusion, resulting in lack of effective enjoyment of many Covenant rights by the non-citizen segment of the population, including political rights, the possibility to occupy certain state and public positions, the possibility to exercise certain professions in the private sector, restrictions in the area of ownership of agricultural land, as well as social benefits (Article 26).”¹³⁸

Birth registration helps to ensure adequate treatment of the children of refugees and helps to prevent discrimination by enabling them to benefit from public services and to be recognized as a person before the law. Article 24 (2) obliges states to immediately register children after birth. In its Concluding Observations on Thailand, the Committee recalled this obligation, referring *inter alia* to asylum-seeking and refugee children.¹³⁹

Rights of minorities, Article 27

Under Article 27, ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Although the interpretation of the term minority remains complex, only few aspects need be discussed with respect to refugees. The classic characteristics of minorities (numerical inferiority, non-dominant position, distinctive linguistic, religious or ethnic features and sense of solidarity)¹⁴⁰ will be found in most refugee groups. The wording of Article 27, however, raises questions as to whether only nationals can be members of a minority and whether minorities have to be historically established in the State in question. The Committee answered both questions in the negative.¹⁴¹ As to duration of establishment, the Committee even includes visitors in the definition of minority straining its meaning beyond the common everyday understanding of the word. On the other hand, it seems inappropriate to insist upon permanent settlement given the phenomenon of global migration. One can therefore infer that migrants and refugees fall within the scope of Article 27 if their settlement has attained a certain degree of stability.¹⁴²

Article 27 not only obliges States to refrain from interferences but also to protect minorities against private interferences.¹⁴³ The Committee also hints at obligations to

¹³⁷ Germany (CCPR/CO/80/DEU), 4 May 2004, para. 20.

¹³⁸ Latvia (CCPR/CO/79/LVA) 6 November 2003, para. 18.

¹³⁹ Thailand (CCPR/CO/84/THA), 8 July 2005, para. 22.

¹⁴⁰ See for further reference, Nowak, *op. cit.*, Article 27, para. 14.

¹⁴¹ General Comment No. 23 “The rights of minorities”, 8 April 1994, paras. 5.1 and 5.2.

See for arguments in favour of this interpretation: NOWAK, *op. cit.*, Article 27, paras. 17 – 22.

¹⁴² In this sense also: Nowak, *op. cit.*, Article 27 para. 21.

¹⁴³ General Comment No. 23 “The rights of minorities”, 8 April 1994, para. 6.1.

fulfil,¹⁴⁴ but the extent of these obligations must depend on the quality a minority has achieved in terms of numbers, establishment and inner solidarity. The volatility found in most refugee situations – in comparison to long-term societal developments – must limit obligations to short term measures. On the other hand, the extreme vulnerability of refugees necessitates special assistance to exercise their minority rights. Balancing these two poles might lead to an obligation upon a host state to provide schooling to refugees in their own language (for example by employing a teacher from the refugee community) or to provide a venue for cultural and religious practice.

Freedom of movement

Not only asylum-seekers but also refugees experience restrictions of their freedom of movement, especially refugees, who live in camps. In the case of refugees, given that their status is one that is already explicitly recognized by the State, information as to their whereabouts ought to be of lesser importance to State authorities. Consequently, it will be more difficult for States to justify restrictions upon the freedom of movement of refugees in comparison to asylum-seekers.¹⁴⁵

Durable solutions

Usually three kinds of solutions to a refugee situation are distinguished, voluntary repatriation, local integration and resettlement. All of them aim at the full and durable integration of the refugee into a community. Respect for all human rights is an essential prerequisite for refugees' full integration. This article cannot elaborate on the role of all human rights but will concentrate on those human rights that pertain to a specific solution to a refugee situation.

Voluntary return builds upon the right to return, guaranteed in Article 12 (4). Furthermore, State obligations under the ICCPR to repair human rights violations might facilitate reintegration upon return. With regard to local integration, the Committee's work emphasized the granting of citizenship, which is generally the culmination point of local integration. The difficult question concerning whether and under which conditions former refugees might have a right to remain in their host country beyond cessation will be addressed here as well. Resettlement to a third country is the least frequent durable solution. This article will not further deal with resettlement, since the ICCPR does not provide any specific rights in this context. Depending on the individual case, the family unity under Article 17 and 23 might be invoked to promote resettlement.

¹⁴⁴ General Comment No. 23 "The rights of minorities", 8 April 1994, para. 7.

¹⁴⁵ See also: Ireland (A/55/40, paras.422-451), 24 July 2000, para. 26. "[The State party] should also ensure that requirements relating to the place of residence of refugees do not infringe the rights to liberty of movement protected under Article 12." Furthermore: Thailand (CCPR/CO/84/THA), 8 July 2005, para. 17: "The Committee is also concerned that the relocation plan of March 2005 requires all refugees from Myanmar in the State party to move to the camps along the border and that those who do not comply will be considered illegal migrants and will face forcible deportation to Myanmar."

Voluntary return

Although very difficult to assess in numbers, many refugees take the risk of returning to their country of origin even though they can still claim protection. The ICCPR grants important rights to ensure these return movements.

Return. As already explained above, Article 12 (2) prevents the country of refuge to hinder the refugee from leaving by e.g. requiring 'exit visas'. Article 12 (3) limits the right to leave a country, but in the context of return only very carefully implemented considerations of safety in the destination state might be valid grounds for restrictions.¹⁴⁶ Article 12 (4) guarantees every person the right to return to their home country.¹⁴⁷ The value of this right in the context of voluntary repatriation has been explicitly acknowledged by the Committee in its General Comment No. 27.¹⁴⁸ Since the proviso of Article 12 (3) does not apply to Article 12 (4), "[t]he Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."¹⁴⁹ There is a current of opinion which holds that mass return does not fall within the scope of Article 12 (4) because a right to return for all persons concerned would impede finding political solutions, which sometimes cannot guarantee return for everyone. However, nothing in the wording of Article 12 (4) hints at such an interpretation and excluding mass returns from its scope would be at variance with object and purpose of the provision, i.e. to ensure the right to return for all individuals regardless of the situation.¹⁵⁰

The question whether the right to return to one's "own country" extends to countries other than the country of nationality, is of little importance in the context of return and shall therefore be dealt with in the context of local integration. The right to return to their former place of residence is protected as an exercise of freedom of movement under Article 12 (1).

The voluntary character of return before refugee status ends is guaranteed by the duty of *non-refoulement*. Articles 2, 6, 7 and 12 (1) and (2) impose an obligation upon States to ensure the safety of returning refugees while en route to their final destination.

Reparation to facilitate reintegration

Upon return to the country where they were formerly at risk of persecution, returnees often need assistance in order to successfully reintegrate their community and become self-sufficient. The country of origin is under an obligation to redress those human rights violations that the returning refugees suffered on the State's territory prior to

¹⁴⁶ Hathaway, op. cit., 955 – 956.

¹⁴⁷ With regard to states' interference with this right the Committee called upon Syria to issue passports for its nationals, who wanted to return. See Syrian Arab Republic (CCPR/CO/71/SYR), 24 April 2001, para. 21.

¹⁴⁸ General Comment No. 27 "Freedom of Movement (Article 12)", 2 Nov 1999, para. 19.

¹⁴⁹ General Comment No. 27 "Freedom of Movement (Article 12)", 2 Nov 1999, para. 21.

¹⁵⁰ Eric Rosand: The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent. In: Michigan Journal of International Law, Vol. 19, 1091 – 1139. (1129 – 1135). Also: Kathleen Lawand: The Right to Return of Palestinians in International Law. In: International Journal of Refugee Law, Vol. 8 No. 4, 532 – 568 (542f.).

their flight into exile.¹⁵¹ Returnees could thus find substantial financial and material aid to improve their integration process, subject to the financial means available in the country of origin, which might be in a post-conflict situation. In its General Comment No. 31, the Committee provides a list of measures a state can take to repair human rights violations.

In addition to the explicit reparation required by Articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the ICCPR generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.¹⁵²

Punishments imposed on returnees solely for the fact that they had left the country illegally would not be justified under Article 12 (3), since they would not be in conformity with other rights guaranteed in the ICCPR.

Local integration

On several occasions the Committee promoted avenues of local integration. The best way to promote local integration is to grant citizenship to refugees, who apply for it. Bearing in mind that new born children of refugees have a weak link to their parents' home country, states should especially consider granting citizenship to refugee children born on their territory as to promote the children's best interest, Article 24.¹⁵³

In its Concluding Observations on Latvia in 2003, the Committee stressed the use of naturalization for social integration and underlined that states should promote integration of non-citizens, in particular by naturalization, but also through interim measures such as by enabling them to participate in local elections.

The State party should further strengthen its efforts to effectively address the lack of applications for naturalization as well as possible obstacles posed by the requirement to pass a language examination, in order to ensure full compliance with Articles 2.

[...] The State party should take all necessary measures to further encourage registration of children as citizens.

[...] The State party should prevent the perpetuation of a situation where a considerable part of the population is classified as "non-citizens". In the interim, the State party should facilitate the integration process by enabling non-citizens who are long-term

¹⁵¹ See for return after displacement based on racial discrimination: General Recommendation XXII of the Committee on the Elimination of Racial Discrimination "Article 5 and refugees and displaced persons", 24 August 1996, para. 2 (c).

¹⁵² General Comment No. 31 "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 26 May 2004, para. 16.

¹⁵³ Article 24 (3) provides that "[e]very child has the right to acquire a nationality." However, a state is not obliged to grant its own citizenship to a new born child but must "adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born." See General Comment No. 17 "The Rights of the Child (Article 24)", 7 April 1989, para. 8.

residents of Latvia to participate in local elections and to limit the number of other restrictions on non-citizens – in order to facilitate participation of non-citizens in public life in Latvia.¹⁵⁴

Right to stay beyond cessation

Currently, local integration is a solution that UNHCR pursues in close cooperation with host countries, since it is seen as an option that host countries should integrate into their policies, not as a legal obligation.¹⁵⁵ Contrary to this perception, a right to stay after cessation of a refugee situation might arise under Article 12 (4), which foresees the right enter one's "own country". Conversely, a state must not remove an individual from her/his own country, since the individual could immediately return. Refugees and asylum-seekers are, however, by definition, not in the country of their nationality. The question arises then if the country of refuge can become a refugee's own country, so that a former refugee would have the right to stay in this country of refuge and to integrate locally. The Committee accepted that the wording "own country" does not only apply to nationals but also to aliens. It pursued a very restrictive approach, limiting the application with regard to non-nationals to those, who 'should under international law' be nationals, such as persons arbitrarily deprived of their nationality.¹⁵⁶

In contrast, Nowak suggests a much more open interpretation, finding support in the preparatory work to Article 12 (4).¹⁵⁷ Furthermore, a strong minority in the case of *Stewart v. Canada* stated that "strong personal and emotional links"¹⁵⁸ between individual and country would be sufficient. Nowak explicitly refers to refugees and stateless persons, who might "lack a 'home country'" and children of immigrants, "who no longer have a home in the country of nationality."¹⁵⁹

The implications of such an interpretation could revolutionize the system of refugee protection, however it would not necessarily be for the better. After cessation of a protracted refugee situation, the host state could not lawfully remove many former refugees, either because they have strong ties with their host community or because their children are at home on the host state's territory, perhaps enabling their parents to invoke family unity (see above).¹⁶⁰ Even taking into consideration that many refugees nowadays prefer the avenue of voluntary repatriation, every host state would face considerable numbers of refugees, who would prefer to establish a permanent

¹⁵⁴ Latvia (CCPR/CO/79/LVA), 6 November 2003, paras. 16 - 18.

¹⁵⁵ Framework for Durable Solutions for Refugees and Persons of Concern, Core Group on Durable Solutions, UNHCR, Geneva, May 2003. Available on: <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=4124b6a04>>.

¹⁵⁶ General Comment No. 27 "Freedom of Movement (Article 12)", 2 Nov 1999, para. 20. See the similar, but probably broader approach by Kathleen Lawand, op. cit., pp. 549 – 558. She puts forward the "Nottebohm" (Nottebohm case, *Liechtenstein v. Guatemala*, 1955, ICJ Rep. 4) genuine link criteria to determine *de facto* nationality.

¹⁵⁷ Nowak, op. cit., Article 12, para. 52.

¹⁵⁸ Communication No. 538/1993, dissenting opinions.

¹⁵⁹ Nowak, op. cit., Article 12, paras. 58, 59.

¹⁶⁰ See also: Michael Barutciski: "Involuntary Repatriation when Refugee Protection is no longer necessary: Moving forward after the 48th session of the Executive Committee". In: *International Journal of Refugee Law*, 1998, 10 (1/2), 236 – 255. At 245 he concludes that states have never agreed to a legal obligation that would impose on them to provide refuge even after cessation.

residence on its territory. Most host states nowadays are developing countries facing severe economic problems and should therefore be commended for hosting large numbers of refugees. Forcing them to permanently absorb large numbers of former refugees might strain their economies beyond their capacities and cause unrest and new internal conflict. Furthermore, the formerly persecuting state would be relieved of its duty vis-à-vis the formerly persecuted citizens. Under this perspective states would have a strong incentive to discourage refugees from local integration and to reduce cooperation and support to a minimum. Lastly, if Nowak's view is to prevail, it would contradict the migration policies of most developed countries. Disrespect for the ICCPR and the Committee's findings would be the imperative consequence. While the writer certainly sympathizes with Nowak's concern to further strengthen human rights through a liberal interpretation of the Article, the writer fears that the political implications of such an interpretation might actually prove to be counterproductive with this goal. The writer would therefore argue for a restrictive interpretation of Article 12 (4) on the basis of practical rather than legal considerations, possibly leaving room for granting a right to stay in exceptionally protracted refugee situations.

Protection of stateless persons and internally displaced persons

As already stated in the introduction, stateless persons and internally displaced persons can benefit from the ICCPR's protection as well. In comparison to refugees and asylum-seekers, their specific problems have received much less attention by the Committee. The following paragraphs will briefly point out how the ICCPR and the Committee's work contribute to the protection of these groups.

Stateless persons – victims of discrimination

In its General Comments No. 15 and 31, the Committee points out that stateless persons are also covered by those provisions of the ICCPR that are not restricted in their application to citizens.¹⁶¹

The major challenge facing stateless persons is that of discrimination, hampering their access to a wide range of rights.¹⁶² Unlike Article 15 of the Universal Declaration of Human Rights, the ICCPR does not guarantee a right to nationality for all humans but only for children, Article 24 (3).¹⁶³ Nevertheless, the Committee called upon Estonia

¹⁶¹ General Comment No. 15 "The position of aliens under the Covenant", 11 Apr 1986, para. 1. General Comment No. 31 "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 26 May 2004, para. 10.

¹⁶² See for example: Thailand (CCPR/CO/84/THA), 8 July 2005, para. 22: "[...] the Committee remains concerned that a significant number of persons under its jurisdiction remain stateless, with negative consequences for the full enjoyment of their Covenant rights, as well as the right to work and their access to basic services, including health care and education. The Committee is concerned that their statelessness renders them vulnerable to abuse and exploitation. The Committee is also concerned about the low levels of birth registration, especially among Highlander children. (arts. 2 and 24)."

¹⁶³ See also See General Comment No. 17 "The Rights of the Child (Article 24)", 7 April 1989, para. 8: "Special attention should also be paid, in the context of the protection to be granted to children, to the right of every child to acquire a nationality, as provided for in Article 24, paragraph 3. While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their

to “reduce the number of stateless persons, with priority for children, inter alia by encouraging their parents to apply for Estonian citizenship on their behalf and by promotion campaigns in schools”¹⁶⁴ and on Thailand to “continue to implement measures to naturalize the stateless persons who were born in Thailand and are living under its jurisdiction.”¹⁶⁵ Discussing the report of Syria, the Committee took up a clear stance in favour of stateless persons’ rights:

The Committee remains concerned at the situation of the large number of Kurds treated as aliens or unregistered persons and the discrimination experienced by them. The Committee reminds the State party that the Covenant is applicable to all individuals subject to its jurisdiction (arts. 2 (1), 24, 26 and 27). The State party should take urgent steps to remedy the situation of statelessness of Kurds in Syria and to protect and promote the rights of non-citizen Kurds. The Committee further urges the State party to allow Kurdish children born in Syria to acquire Syrian nationality.¹⁶⁶

With regard to discrimination, Articles 2 (1) and 26 oblige states not to discriminate against persons based on their “status”, i.e. as stateless persons. However, as already underlined above, the non-discrimination provisions under the ICCPR provide little protection in this respect due to the restrictive practice of the Committee.

In some instances States and private actors wilfully ignore the mere existence of a stateless person and prevent them from entering into civil obligations, often due to a lack of documentation i.e. passport, birth certificate etc. Article 16 guarantees the right to be recognized as a person before the law and in consequence the capacity to act.¹⁶⁷ It is therefore possible to argue that Article 16 requires states to ensure that stateless persons are not deprived of their capacity to act and to protect them against discrimination from private persons in this regard. States might be under a further obligation to issue stateless persons with documentation so that they can enjoy legal personality.

Internally Displaced Persons

Internally Displaced Persons (IDPs) are persons, who have abandoned their homes due to conflict or persecution and also natural disaster, but do not cross the borders of their countries. UNHCR, to a limited extent, seeks to help persons that are victims of conflict or persecution induced displacement because their situation is comparable to that of refugees. There is no specific international treaty on the protection of IDPs, which is why they depend solely on international human rights law to offer them international legal protection.

nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.”

¹⁶⁴ Estonia (CCPR/CO/77/EST), 15 April 2003, para. 14.

¹⁶⁵ Thailand (CCPR/CO/84/THA), 8 July 2005, para. 22.

¹⁶⁶ Syrian Arab Republic (CCPR/CO/84/SYR), 9 August 2005, para. 19.

¹⁶⁷ General Comment No. 28 “Equality of rights between men and women (article 3)”, 29 March 2000, para. 19 for the case of discrimination against women: “This right [laid down in Article 16] implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground.”

In its General Comment No. 27 the Committee explicitly points out that Article 12 (1) guarantees the right to freely choose one's residence, which "includes protection against all forms of forced internal displacement."¹⁶⁸ While it would be naïve to believe that this guarantee protects against displacement in practice, such a violation¹⁶⁹ entails, however, an obligation to repair.¹⁷⁰ States, which have caused forced internal displacement, are therefore generally under an obligation to assist IDPs in their return in order to repair the harm suffered. The return of IDPs is governed by Article 12 (1) and is subject to the limitation clause of 12 (3).¹⁷¹

During their displacement, IDPs enjoy similar, or if citizens, even stronger protection than refugees under the ICCPR. States must respect and protect their human rights. They must not be returned to areas where they might face grave human rights violations. The Committee addressed this aspect in its Concluding Observations on the Hong Kong Special Administrative Region in a way covering both refugees and IDPs.

The HKSAR should establish an appropriate mechanism to assess the risk faced by individuals expressing fears of being victims of grave human rights violations in the locations to which they may be returned.¹⁷²

In its discussion of Uganda's report, the Committee called for the protection of IDPs from attacks on their physical security.

The Committee regrets that the State party has not taken sufficient steps to ensure the right to life and the right to liberty and security of persons affected by the armed conflict in northern Uganda, in particular internally displaced persons currently confined to camps (arts. 6 and 9).

The State party should take immediate and effective measures to protect the right to life and liberty of the civilian population in areas of armed conflict in northern Uganda from violations by members of the security forces. In particular, it should protect internally displaced persons confined in camps, which are constantly exposed to attacks from the Lord's Resistance Army.¹⁷³

Conclusion

This article sought to demonstrate that the ICCPR is a strong tool for the protection of refugees and asylum-seekers as well as stateless persons and IDPs, thanks to the efforts undertaken by the Human Rights Committee. There is still room, however, to overcome *lacunae* that have so far not been sufficiently addressed. After consolidating its jurisprudence on *non-refoulement* in General Comment No. 31, the Committee has yet to establish whether it intends to pursue the allusion to a possible

¹⁶⁸ General Comment No. 27 "Freedom of Movement (Article 12)", 2 November 1999, para. 7.

¹⁶⁹ For examples, when displacement is arbitrary and thus constitutes a human rights violation, see: Walter Kälin: Guiding Principles on Internal Displacement: Annotations. In: Studies in Transnational Legal Policy, No. 32, 2000. 13 – 19.

¹⁷⁰ See above for local integration of refugees.

¹⁷¹ Walter Kälin, op. cit., 69.

¹⁷² Hong Kong Special Administrative Region (CCPR/C/HKG/CO/2), 30 March 2006, para. 10. See also: Walter Kälin, op. cit., pp. 38f.

¹⁷³ Uganda (CCPR/CO/80/UGA), 4 May 2004, para. 12.

extension of rights that entail *non-refoulement* obligations, given states' reluctance in that regard. One of the provisions that has not so far been the focus of a General Comment is Article 13. The uncertain scope of the right to review and the vagueness of reservations on the provision should be explicitly addressed. The revised General Comment on Article 14 will hopefully allow future considerations as to whether asylum claims fall within the scope of Article 14 (1).

Through its Concluding Observations, General Comments and Views, the Committee can improve the legal framework and contribute to a general climate conducive for human rights protection. The Committee's strength lies in its capacity to set standards and not in rendering justice in individual cases, a task, which is already hampered by the limited number of Views the Committee can issue.¹⁷⁴ The standard setting potential of a case should, therefore, be born in mind before taking it to the Committee.¹⁷⁵

Unfortunately, it has to be recalled that states are far too often disinclined to fully implement the legal protection that the ICCPR provides. Violations of reporting obligations, lack of respect for the Committee's interpretation and sometimes blunt refusal constitute a serious threat for the protective power of the ICCPR, notwithstanding progress made in the field of human rights in the last decades. It can only be hoped that the future Human Rights Council will strengthen states' acceptance of treaty bodies and encourage cooperation with treaty body mechanisms and in particular the Human Rights Committee.

¹⁷⁴ Henry Steiner: Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee? In: Philip Alston and James Crawford: The Future of Human Rights Treaty Monitoring, Cambridge University Press, Cambridge, 2000; 15 – 53 (32 – 38).

¹⁷⁵ This proposal takes up Steiner's call for a focus on expounding the Covenant in the Communication procedure, see: Steiner, op. cit., 38 – 48. It is less far-reaching to avoid the protection gaps a discretionary Communication procedure might bring along, see: Steiner, op. cit., 45 – 48.