

AN ANALYSIS

ON THE RIGHT TO RECOGNITION

AS A PERSON BEFORE THE LAW

December 2006

Legal Guide

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INTRODUCTION -- HISTORY OF HUMAN RIGHTS' DEVELOPMENTS

The concept of human rights has existed for many centuries under many names in the world. The human rights were recognized, accepted and/or protected from the times of classical Greece and Romans. The study of the history of recognition and further declaration of human rights shows that the need for stipulation and protection of individual and/or collective human rights in almost all nations rose from certain difficulties that the people were facing. Thus Athenians recognized the rights of individuals in the sense of providing protection against tyranny; however they did not stipulate any concert rights of individuals but rather defined it as the corresponding duties.

Year by year the need and importance of stipulation of relevant individual human rights became of extreme need in terms of the recognition of human rights at the state level and stipulation guarantees for the further protection of those rights. In the seventeenth and eighteenth centuries, the concept of “natural rights”¹ has been seriously considered focusing on the fact that individuals, being natural beings, have rights that cannot be violated by anyone or by any society². The natural rights concept in many countries became a justification for revolutions, in particular France and the United States. In France, “the Rights of Man” was declared by the National Assembly after the French Revolution. The core need for the recognition of individual rights in the “the Rights of Man” was the belief of:

“...the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties;... ”³.

In addition to the specific notions indicated in the Rights of Man above, several classic expressions of natural rights are declared in the English Bill of Rights (1689)⁴, the

¹ The concept of “natural rights” grew out of the ancient and medieval doctrines of natural law, meaning that that people, as creatures of nature and God, should live their lives and organize their society on the basis of rules and precepts laid down by nature or God

² See for example R. Tuck, *Natural Rights Theories* (1982); L. L. Weinreb, *Natural Law and Justice* (1987).

³ The Rights of Man, Declaration of the Rights of Man and of the Citizen, Approved by the National Assembly of France, August 26, 1789, the Preamble

⁴ English Bill of Rights, An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, adopted on December 16, 1688

American Declaration of Independence (1776)⁵, the French Declaration of the Rights of Man and the Citizen (1789), the first 10 Amendments to the Constitution of the United States (1791)⁶.

As far as the recognition of human rights on the international rather than national level is concerned, it was only after the Second World War, when the consequences of the Holocaust, revelations coming from the Nuremberg war crimes trials, the Bataan Death March, the atomic bomb, and other horrors raised the importance of declaration of human rights at the universal level. The *Universal Declaration of Human Rights of the United Nations* (UDHR)⁷ for the first time officially universally declared human rights and freedoms. UDHR is the first multinational declaration mentioning human rights by name by declaring that:

“... Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”⁸.

UDHR guarantees legal, civil, political and social freedoms and rights. The UDHR declares that all human beings are born free and equal in dignity and rights, without distinction of any kind. In addition, the UDHR proclaims the right to life, liberty and security of person. According to the UDHR, everyone has the right to recognition everywhere as a person before the law, the right to equal protection of the law, the right to a fair and public hearing before an impartial tribunal. It also guarantees other rights and freedoms. The UDHR is the first document that universally recognized the right to be recognized as a person before the law.

After the adoption of the UDHR a number of other international and regional human rights protection instruments were introduced and adopted, which had been continuously developing the scope of human rights and freedoms as well as guarantees and mechanisms for the protection of those rights. The UDHR and other international human rights protection instruments will be further discussed in this Analysis within the context of the right to recognition as a person before the law.

5 The unanimous Declaration of the thirteen United States of America; Congress, July 4, 1776

6 The Bill of Rights, Amendments 1-10 of the Constitution, 1791

7 Universal Declaration of Human Rights of the United Nations, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

8 *Ibid*, the preamble

PART I -- THE RIGHT TO RECOGNITION AS A PERSON BEFORE THE LAW AND THE MAIN INTERNATIONALLY RECOGNIZED PRINCIPLES REGULATING THE RIGHT TO “LEGAL PERSONALITY”

A) The Right to Legal Personality

The right to legal personality (often used as the right to recognition as a person before the law) is one of the vital fundamental rights. It has a very important role and meaning for the protection of human rights and freedoms. The right to legal personality requires recognition of everyone as a subject to the protection offered and the responsibilities required by the legal system of a certain country and at the international level.

The wide scope of the protection of this right allows regulating not only the rights touching upon the equality of persons in relation amongst themselves but also before the law. The right to recognition as a person before the law incorporates very many components and important rights, freedoms and duties, which include but are not limited to:

- a) *The right to be recognized by the legal system of a certain country* -- The right to be recognised by the legal system of a certain country includes existence of relevant legal frameworks, which shall ensure *everyone's* protection by the law. The key feature here is that the legal frameworks of a particular country recognize a certain person, regardless of his/her legal or other status and define relevant regulations;
- b) *The right to be equally protected everywhere by law and in practice* -- This right requires existence of not only relevant legal frameworks recognizing the right of a recognition as a person before the law, but also adequate practical mechanisms for the protection of that right in practice;
- c) *The right to be equally legally protected everywhere* -- It is very important to note that the right to recognition before the law guarantees protection not only in a country which a person is a citizen of, (where citizens may have different kinds of benefits and privileges than non-citizens), but also outside of that country. Thus, legal system of a certain country must recognize and protect everyone, including a non-citizen, as a ‘person before the law’;
- d) *The right to be equal before the law* -- The law should guarantee the same protection for everyone and it should be applied in the same way to all. This right, among other things guarantees equal protection by the law without any discrimination;

- e) *The right to be protected by law* – This right incorporates a number of other rights, including the right to be equal before the courts and tribunals, and to be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;
- f) *The right to be subjected to the protection of human rights and freedoms defined at the national, regional and international levels*—It is important to note, that the right to recognition as a person before the law requires implementation of that right *everywhere* i.e. in one’s own country and outside of the border of the particular country;
- g) *The right to equality* – This right is considered as a basic component of the right to be recognized as a person before the law, since it forms the root of the meaning of the latter; and other rights and freedoms.

The right to “recognition as a person before the law” is defined by many international human rights protection instruments. It figures in UDHR, International Covenant on Civil and Political Rights⁹ (ICCPR) as well as other instruments, in the constitutions of all European countries as a fundamental principle and right.

B) The Scope of the Protection of the Right to Recognition as a person before the Law under the International Human Rights Protection Instruments

For the purposes of the present Analysis selected international, rather than regional human rights protection instruments will be studied in the context of the scope of the protection of the right to recognition as a person before the law, however no specific study will be made on the regulations of the right of legal personality under the International Humanitarian Law. Meantime, rather detailed study will be conducted on the specifics and the guarantees of the implementation of the rights of refugees to recognition as a person before the law.

Table 1 below provides the list of international human rights protection instruments that guarantee the protection of this right.

⁹ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Table No. 1

<i>N/N</i>	<i>Human Rights Protection Instruments</i>	<i>The Article defining the right to recognition as a person before the law</i>
1.	Universal Declaration of Human Rights	Article 1 All human beings are born free and equal in dignity and rights...
2.	Universal Declaration of Human Rights	Article 6 Everyone has the right to recognition everywhere as a person before the law.
3.	Universal Declaration of Human Rights	Article 13 (1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country.
4.	Universal Declaration of Human Rights	Article 15 (1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.
5.	International Covenant on Civil and Political Rights	Article 12 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter

		his own country.
6.	International Covenant on Civil and Political Rights	Article 16 Everyone shall have the right to recognition everywhere as a person before the law.

1. Universal Declaration on Human Rights

The study of the UDHR shows that the right to recognition as a person before the law, including other rights that are part of this right, is illustrated in more than one Article of UDHR. Article 6 of UDHR provides general guarantees to the protection of everyone's right to be recognized everywhere as a person before the law and Articles 13 and 15 cover more specific rights and freedoms that are a component of the right to be recognized before a law. In particular Article 13 of UDHR guarantees to everyone the right to freedom of movement and residence within the borders of each state, and the right to leave any country, including his or her own, and to return to that his or her country. It is evident that Article 13 goes beyond the right provided by Article 6 of UDHR on "recognition *everywhere* as a person before the law", since it guarantees everyone the right of movement and residence *everywhere*. Article 15 goes even further, specifically stating that everyone has the right to a nationality, and that no one shall be arbitrarily deprived of his or her nationality nor denied the right to change his or her nationality.

2. International Covenant on Civil and Political Rights

The consideration of the relevant Articles of ICCPR shows that Article 16 of ICCPR is identical with Article 6 of UDHR and provide the same protection and guarantees i.e. that everyone shall have the right to recognition everywhere as a person before the law; whereas Article 12 of ICCPR has more detailed provisions. The latter Article specifically states that everyone lawfully within the territory of a state shall have the right to liberty of movement and freedom to choose his or her residence; the right to leave any country, including his or her own and goes one step further in defining the circumstances in which these rights may be restricted. Those circumstances, as provided in Article 12 of ICCPR, should be provided by law, be necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and be consistent with the other rights recognized in ICCPR. The Article also states that no one shall be arbitrarily deprived of the right to enter his or her own country.

It should be mentioned that under the ICCPR the right of everyone to recognition as a person before the law is non-derogative. Article 4 of ICCPR provides:

“1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant ...

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 [right to recognition everywhere as a person before the law] and 18 may be made under this provision.”...¹⁰

A state’s actions during an emergency have the potential to affect every ICCPR right and freedom. A state has a legal obligation to protect the rights of every individual that are under its jurisdiction. The Human Rights Committee¹¹ (HRC) has made clear that the ICCPR is not a relativist document to be interpreted and applied differently simply because a country is experiencing unrest. The HRC has indicated that full compliance with Article 4 requires protection for human rights despite the occurrence of a state of emergency. Any derogation from a human rights norm must be understood to be an exceptional and temporary step.

Table No. 2 below specifies the scope of the limitations applicable to all rights under the UDHR and ICCPR.

Table No.2

<i>Limitations Applicable to All Rights under UDHR & ICCPR</i>		
<i>Name of the Treaty</i>	<i>Derogation from Rights During Emergencies</i>	<i>Non-Derogable Rights</i>
Universal Declaration of Human Rights	No provision on the derogation from the rights during the emergency situations	No provision on non-derogable rights
International Covenant on Civil and Political Rights	Article 4 (1) In time of public emergency	Article 4 (2) lists non-derogable rights as follows:

¹⁰ ICCPR, Article 4 (1)(2).

¹¹ The Human Rights Committee is the body of independent experts that monitors implementation of the ICCPR by its State parties.

URL: <http://www.ohchr.org/english/bodies/hrc/index.htm>

	<p>which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin....</p>	<p>§ The right to life (with the exception of deaths resulting from lawful acts of war);</p> <p>§ Freedom from torture;</p> <p>§ Protection against slavery;</p> <p>§ Protection against retrospective criminal penalties;</p> <p>§ Right to recognition as a person before the law;</p> <p>§ Right to freedom of thought, conscience and religion;</p> <p>§ Right not to be imprisoned merely for failure to fulfill a contractual obligation.</p> <p>In Addition <i>Article 5(2)</i> provides:</p> <p>There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.</p>
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HRC's comment suggests that it would not find any derogation from the ICCPR justified by the exigencies of the situation where it involved disregarding the rights set out above.

Although Article 4 (2) of ICCPR provides a specific list of non-derogable human rights and freedoms, on July 2001, the United Nations Human Rights Committee (HRC), in its very

General Comment 29, has recognised that a number of other rights should be added to the list of rights prescribed by Article 4 (2) of ICCPR during a state of emergency, in part to give effect to obligations of non-discrimination, customary law obligations or those under international humanitarian law. These rights include:

- ü Prohibition on taking hostages;
- ü Prohibition on forced displacement of persons;
- ü The rights of minorities;
- ü The right of all detained people to be treated in a way which respects their dignity;
- ü Fundamental aspects of the right to fair trial, such as the presumption of innocence, especially if the death penalty is available;
- ü Arbitrary deprivation of liberty.

2.1. The term “everyone”

The study of the scope of the protection of the right to be recognized as a person before the law provided by UDHR and ICCPR shows, that both treaties protect the rights *of everyone* to the recognition as a person before the law (Article 6 of UDHR and Article 16 of ICCPR).

Further, the United Nations Declaration on the “Human Rights of Individuals who are not Nationals of the Country in which they Live”¹² considering that the UDHR:

“... proclaims further that everyone has the right to recognition everywhere as a person before the law, that all are equal before the law and entitled without any discrimination to equal protection of the law, ...,

Being aware that the States Parties to the International Covenants on Human Rights undertake to guarantee that the rights enunciated in these Covenants will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Conscious that, with improving communications and the development of peaceful and friendly relations among countries, individuals increasingly live in countries of which they are not nationals,

¹² Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by General Assembly resolution 40/144 of 13 December 1985

...

Recognizing that the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live... ”¹³.

According to the same Declaration the term "*alien*" shall apply to any individual who is not a national of the State in which he or she is present¹⁴. This definition is very inclusive, since it makes clear distinction between nationals of a certain country and all others, including refugees, immigrants and etc. The Declaration specifically underlines the rights and freedoms that aliens are entitled to, however, in many instances it leaves certain regulations to be solved by the laws of different countries.

Furthermore, HRC in its General Comment No 15 specifically indicated that once aliens are allowed to enter the territory of a State party to ICCPR¹⁵, they are entitled to the rights set out in the Covenant. The Committee then goes further and provides the detailed list of those rights which, among other things include the *right to be recognized before the law*.

The study of the right to be recognized before the law shows that it imposes not only certain rights and freedoms but also some duties to individuals and the States. The duties to be carried out by States are very important for the proper implementation of the right to be recognized before the law. The scope of the responsibilities of the States to insure everyone's right to recognition as a person before the law is discussed in paragraph below.

¹³ *Ibid* the preamble

¹⁴ *Ibid* at Article 1

¹⁵ Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant: 11/04/86. CCPR General Comment No. 15. (General Comments), Adopted on 1986, at the twenty-seventh session

3. The scope of responsibilities of States to ensure everyone's right to recognition as a person before the law

The examination of the scope of the rights and freedoms within the sphere of everyone's right to recognition as a person before the law guaranteed both by UDHR and ICCPR shows, that it inflects certain duties to the Member States.

In the preamble of UDHR the General Assembly proclaims:

*"... keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."*¹⁶

Article 2 of ICCPR similarly imposes certain obligations on the Members States with respect of ensuring the protection of the rights and freedoms guaranteed under ICCPR to everyone within the jurisdiction of certain Member State. Article 2 of ICCPR specifically provides:

"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

¹⁶ UDHR, the preamble

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted”.¹⁷

For ensuring that everyone’s right to recognition as a person before the law is duly implemented, States are obliged to ensure that relevant domestic legal frameworks and implementation mechanisms are in place. Those legal acts and mechanisms should meet the internationally recognised standards as well as ensure the rights and freedoms defined by international human rights instruments, that a certain country is bound by, not only with respect of the citizens of those particular states but also aliens.

The experiences of different countries suggest that:

“There are two recognised schools of thought as regards the treatment of foreigners by a host state: the national or equality treatment standard and the international minimum standard of treatment”.¹⁸

The national or equality standard of treatment is followed by many developing countries, which among other things suggest that both citizens and aliens should enjoy the same level of protection and there should not be any positive or negative discrimination towards aliens; whereas the international minimum standard of treatment suggests that a foreigner may enjoy a greater degree of protection and consequently positive discrimination may be applied whenever relevant.

States have certain duties under the intentional human rights instruments that they are part of and therefore they have to ensure that the rights and guarantees provided by those instruments are equally applied to every person under their jurisdiction. The human rights instruments studied herein define that everyone, including refugees are entitled to the same rights and freedoms. Therefore States are to fulfil their responsibilities towards aliens, refugees in a manner consistent with the principles of international human rights and refugee laws on the one hand, and legitimate national security, social and economic interests on the other hand.

¹⁷ ICCPR, Article 2

¹⁸ Rhona K.M. Smith, Textbook on International Human Rights, 2nd edition, para.2.4.2; page 9

PART II -- THE INTERPRETATION OF THE RIGHT TO “LEGAL PERSONALITY OF REFUGEES” AND THE EXERCISE OF THAT RIGHT BY REFUGEES

1. Definition of a refugee

The importance over the issues of refugees was in the center of concern and consideration starting from as early as the beginning of the 20th century¹⁹. After the Second World War the refugee problem raised more and more unresolved questions and therefore there was a need to establishing additional internationally recognized protection mechanisms.

On 28 July 1951 the United Nations adopted a Convention on Status of Refugees, following a resolution of the UN General Assembly in 1950, which entered into force on 21 April 1954. By adopting the Refugee Convention the legal status as well as the definition of a refugee had been defined, replacing the past practice on adopting individual Ad Hoc Agreements in relation to particular refugee situation, where the definition and legal status of a refugee might vary given the Country and the concrete situation. Under the Refugee Convention (as modified by the Protocol of 1967 to the Convention) a refugee is a person who:

*"As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*²⁰

Currently 146 States have signed the 1951 UN Refugee Convention and/or its 1967 Protocol²¹ and therefore they recognize people who fall under a category of refugees as defined by the 1951 Refugee Convention as modified by the Protocol of 1967. In 1951, when the UN Convention on the Status of Refugees was adopted there were about one

¹⁹ See e.g. the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. HCR/IP/4/Eng/REV.1, reedited, Geneva, January 1992, UNHCR 1979, Para. 1

²⁰ Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, Entry into force: 22 April 1954, in accordance with article 43, Article 1(2)

²¹ URL: <http://www.unhcr.org>

million refugees in all over the world²² and as of 2005 there were 9,559,100 refugees within a permit of the United Nations High Commissioner for Refugees (UNHCR)²³. Meantime, UNHCR reports that by the start of 2006:

“... the global refugee population had dropped from 9.5 million to 8.4 million – the lowest total since 1980, largely as a result of more than 6 million refugees (two-thirds of them Afghans) returning home over the past four years: 24

However, despite the positive changes with respect of the reduction of the number of refugees in comparison of previous years the issue of refugees is very timely even 55 years following the adoption of the Refugee Convention since they continue facing a number of issues which needs to be improved and the protection mechanisms should be strengthened. The study conducted by the Human Rights Watch shows, that:

*“The global refugee crisis affects every continent and almost every country. In 2001, 78 percent of all refugees came from 10 areas: Afghanistan, Angola, Burma, Burundi, Congo-Kinshasa, Eritrea, Iraq, the Palestinian territories, Somalia and Sudan. Palestinians are the world's oldest and largest refugee population, and make up more than one fourth of all refugees. Asia hosts 45 percent of all refugees, followed by Africa (30 percent), Europe (19 percent) and North America (5 percent)”.*²⁵

Refugees, who very often are obliged to leave their homes and countries without any documents proving their identity, name and nationality and even minimum personal belongings, should be treated with special protection and care. Below are defined internationally recognized minimum standards of treatment of refugees.

2. Minimum standards of treatment for refugees—right to be recognized as a person before the law

The standards that form the basis and framework for action by the UNHCR and governments to ensure protection of refugees adopted by the conclusions of the Executive

22 Rhona K. M. Smith, Textbook on International Human Rights, 2nd edition, para. 22.5.1., page 356

23 UNHCR, Refugees by Numbers 2006 edition

URL: <http://www.unhcr.org/cgi-bin/texis/vtx/basics/opendoc.htm?tbl=BASICS&id=3b028097c>

24 *Ibid*

25 Human Rights Watch, Refugees, URL: http://hrw.org/doc/?t=refugees&document_limit=0.2

Committee of the UNHCR²⁶, among other things, specifically underline the right of refugees:

- a) To enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights; and
- b) To be a person before the law enjoying free access to courts of law and other competent administrative authorities.

The first standard, entitling everyone, including refugees to enjoy the internationally recognized rights and freedoms is a very fundamental standard, which is aimed at ensuring that the refugees are adequately treated and protected. Both standards are narrowly studied below.

a) The right to enjoy the internationally recognized fundamental civil rights

The fundamental civil rights are defined by a number of international treaties, which provide equal protection for citizens and non-citizens. Below are underlined relevant provisions in the international instruments:

United Nations Charter

Article 1 (3) of the Charter of the United Nations²⁷, which states the purposes of the United Nations, specifically underlines the equality of everyone by stating that:

“...To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and ...”²⁸

26 Executive Committee of High Commissioner's Programme, Conclusion No. 22 (XXXII, 1981) "Protection of Asylum Seekers in Situations of Large-Scale Influx", Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, U.N. Doc. HCR/IP/2/Eng/REV.1994, at 48 (1995)

27 The United Nations Charter, signed at the United Nations Conference on International Organization in San Francisco on June 26, 1945 by the 50 member states. It entered into force on October 24, 1945, after being ratified by the five founding members—the Republic of China, France, the Soviet Union, the United Kingdom, and the United States—and the majority of the other signatories

28 Charter of the United Nations, Article 1(3)

Universal Declaration of Human Rights

The UDHR states in Article 2, paragraph 1 that:

“(1) everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”²⁹.

The Article specifically entitles the mentioned rights and freedoms to “everyone” and thus protects all persons, including refugees, from race discrimination and other forms of discrimination. The use of the words “such as” indicates that this is not an exhaustive list, and make clear that the operative phrase is: “without distinction of any kind.”

Further UDHR provides in Article 15 that:

“(1) everyone has the right to a nationality:

(2) No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.”³⁰

Article 14(1) of the UDHR provides:

“(1) everyone has the right to seek and to enjoy in other countries asylum from persecution... ”³¹.

For ensuring further effective implementation of this norm the General Assembly, in its Resolution 428(V)³², calls on States to cooperate with the High Commissioner in the performance of his/her functions, *inter alia*, by “admitting refugees to their territories... ”³³.

In addition in 1986 the HRC has issued General Comment No. 15, setting forth the rights of aliens under the International Covenant on Civil and Political Rights, and those aliens would include refugees. The HRC indicates:

²⁹ Universal Declaration of Human Rights, Article 2(1)

³⁰ *Ibid* at Article 15

³¹ *Ibid* at Article 14 (1)

³² United Nations, General Assembly, Resolution 428 (V), Statute of the Office of the United Nations High Commissioner for Refugees, adopted on 14 December 1950 at the Fifth Session

URI: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/060/26/IMG/NR006026.pdf?OpenElement>

³³ *Ibid* at 2 (c)

“1. Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone ... irrespective of his or her nationality or statelessness.... ”³⁴.

The rights of non-citizens are protected in a number of international instruments that embody the principles of equality and non-discrimination. The United Nations Charter, for example, contains a non-discrimination clause in Article 1(3), which states that one purpose of the United Nations is to promote and encourage: “... *respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.*”³⁵

International Covenant on Civil and Political Rights

Article 2, paragraph 1, of the ICCPR states that:

“(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...”³⁶

There are only a few provisions in ICCPR which cover the rights of citizens or otherwise distinguish between citizens and non-citizens. Article 25 of ICCPR specifically defines political rights of citizens. This Article covers rights and freedoms of citizens of a certain Member State only rather than everyone. Further, Article 13 of ICCPR provides certain rights and freedoms to aliens, in particular:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by,

34 See Human Rights Committee, General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994), para. 1

35 See the Charter of the United Nations, signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945; Article 1(3)

36 ICCPR, Article 2 (1)

and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority”³⁷.

The rights and guarantees provided by ICCPR to the aliens are further interpreted by the HRC in its General Comment No. 15³⁸.

The Human Rights Committee reaffirms that:

“...the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”³⁹

Non-citizens:

“...receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in Article 2 thereof. This guarantee applies to aliens and citizens alike.”⁴⁰

Meantime, the Committee underlined a few exceptions where certain rights which are specifically applicable to citizens (e.g. Article 25 of ICCPR) recognized in Article 25 are expressly applicable only to citizens.

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights establishes rights that apply to everyone, regardless of citizenship. Article 6 grants everyone the right to work. Article 7 grants everyone just and favorable working conditions. Article 8 ensures everyone the right to establish trade unions. Article 9 guarantees the right to social security for everyone. Article 11 ensures the right of everyone to an adequate standard of living including adequate food, clothing and housing, and to the continuous improvement of living conditions. Article 12 grants the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Article 13 requires the right of everyone to education, and finally Article 15 grants the right of everyone to take part in cultural life.

37 ICCPR, Article 13

38 See Human Rights Committee, General Comment 15, The position of Aliens Under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994)

39 *Ibid* at para. 2

40 *Ibid*.

The International Covenant on Economic, Social, and Cultural Rights also can be construed to forbid discrimination on the basis of nationality. Article 2, section 2, states that:

*“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”*⁴¹.

Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (1985 Declaration)

On 13 December 1985 the General Assembly adopted by consensus a Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they live⁴². This Declaration was the result of a Sub-Commission study, completed in 1976, on the rights of non-citizens⁴³. The Declaration covers all individuals who are not nationals of the State in which they are present⁴⁴. The Declaration provides for the respect of fundamental human rights of aliens, including the right to life; the right to privacy; equality before the courts and tribunals; freedom of opinion and religion; and retention of language, culture, and tradition⁴⁵. In addition, it also provides rights to safe and healthy working conditions and the right to medical care, social security, and education⁴⁶. It is also noticeable that the provisions of the 1985 Declaration are reflected in the HRC’s General Comment 15 (1986).

Individuals who are not nationals of the country in which they live can generally be divided into several categories: migrant workers, refugees, documented and undocumented aliens, and individuals who have lost their nationality. All individuals from each category are protected under the 1985 Declaration. Article 1 defines the term “alien” as “*any individual who is not a national of the State in which he or she is present*”

41 International Covenant on Economic, Social, and Cultural Rights, Article 2(2)

42 See Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, UN Doc. A/RES/40/144 (1985)

43 See Baroness Elles, The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who Are Not Citizens of the Country in Which They Live, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/392 (1977)

44 Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, UN Doc. A/RES/40/144, art. 1 (1985)

45 *Ibid* at Article 5

46 *Ibid* at Article 8

(emphasis added). Article 5, section 1, grants “aliens” specific rights, without specifying any particular sub-group of aliens. Articles 9 and 10 refer to “no alien” and “any alien” respectively.

It should be noted that Article 5 (1)(e) may allow States to distinguish between classes of aliens, by restricting aliens’ freedom of thought, opinion, conscience and religion, subject “only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.” Hence, if a State were to determine that distinguishing between documented and undocumented aliens is necessary to protect public safety, such a distinction would not be forbidden by the Declaration.

Convention Relating to the Status of Refugees

Article 5 of the Convention Relating to the Status of Refugees⁴⁷ (Refugee Convention) entitled “Rights granted apart from this Convention” provides:

*“Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention”.*⁴⁸

- b) The right to be a person before the law enjoying free access to courts of law and other competent administrative authorities

Under the UDHR, ICCPR and the Refugee Convention refugees are entitled to the same basic minimum standards of treatment which apply to everyone.

Those rights include the right to be a person before the law enjoying free access to courts of law and other competent administrative and state authorities. The right of refugees to be recognized as a person before the law is one of the core rights of refugees, which provides a real guarantee for equal protection of their violated right and freedoms. This right is aimed at ensuring that refugees like everyone else, including the citizens of a certain country have equal access to domestic courts and other decision making and dispute resolution bodies within a certain country. This also provides assurance for just solution of any issue, which refugees might face, before judicial and other authorities

⁴⁷ Convention Relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, entry into force 22 April 1954, in accordance with article 43

⁴⁸ *Ibid* at Article 5

entitled to exercise judicial powers, as well as administrative and other decision making authorities.

Article 16 of the Refugee Convention entitled “access to courts” defines:

“1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi .

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence”⁴⁹.

Refugees, being persons whose home state has failed to secure their basic needs, rights and freedoms, such as personal security and liberty, personal and family life and etc should be treated in accordance with a requirements of the international human rights protection instruments, including Refugee Convention while in the host Country. Both the host County and the Country of the origin i.e. where refuges come from, have certain duties to ensure that the refugees effectively exercise their rights to legal personality as well as other rights and freedoms.

United Nations’ General Assembly in its Resolution 428 (V) calls upon the governments for:

“(f) Providing refuges with travel and other documents such as would normally be provided to other aliens by their national authorities, especially documents which would facilitate their resettlement;

(g) Permitting refugees to transfer their assets and especially those necessary for their resettlement; ... ”⁵⁰

The study of the state practices shows that the cooperation amongst the host Countries and the Country of origin as well as with the UNHCR in addressing the needs of refugees and ensuring effective exercise of their rights is of vital importance.

⁴⁹ *Ibid* at Article 16

⁵⁰ United Nations, General Assembly, Resolution 428 (V), Statute of the Office of the United Nations High Commissioner for Refugees, adopted on 14 December 1950 at the Fifth Session

URI: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/060/26/IMG/NR006026.pdf?OpenElement>

The exercise of the right of refugees on recognition as a person before the law, including enjoying free access to the courts and other decision making authorities very often depends on the availability of certain documents and information, given the fact that refugees, very often have to flee their homes without identity cards, basic documents and even cloths. This is where the cooperation amongst the host County and the Country where the refugees come from becomes very important.

The study of the intentional practice shows, that complementarily programs and exchange of data and information is conducted as a result of cooperation of state authorities and with the support of international and regional organizations. For example in Balkans the restoration of rights for refugees was also support by the cross-border network of International Legal Alliances (ILA)⁵¹, which is a network of lawyers and other specialists who are prepared to help refugees to obtain their documents. According to ILA it has impacted on more than 50 cases supported a number of refugees to obtain their documents, after which those refugees were able either to apply to a court for getting compensation or to apply for a loan, pension and etc⁵² (50 impact cases can be found in the website of ILA—URL: <http://www.intall.org/HTML/impact50cases.htm>).

As far as the cooperation between state authorities of the hosting Country and the Country of origin is concerned good example of a successful cooperation is illustrated in the “Report on Return of Displaces Persons and Refugees in the Republic of Croatia from 2000-2003: Repossession of Property, Housing and Reconstruction” prepared by the Ministry of Public Works, Reconstruction and Construction of Croatia suggests that exchange of data on property of temporary occupants in Bosnia and Herzegovina with the authorised Bosnia and Herzegovina’s Ministry of Human Rights and Refugees and other international organizations and direct donors in Bosnia and Herzegovina began in the second half of 2001⁵³.

PART III -- CONCLUSION

The study conducted in this Analysis on everyone’s and in particular a refuge’s right to recognition everywhere as a person before the law has shown that human rights, including the right to legal personality shall apply equally to all individuals, including

51 International Legal Alliances is an international, independent foundation established in 1996 in the Netherlands

52International Legal Alliances, Integration of refugees in SCG: original Croatian documents are needed. URL: <http://www.intall.org/HTML/impact50cases.htm>

53 “Report on Return of Displaces Persons and Refugees in the Republic of Croatia from 2000-2003: Repossession of Property, Housing and Reconstruction”, Ministry of Public Works, Reconstruction and Construction of Croatia, Zagred, October 2003, para. 7; page 18. URL: <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN015746.pdf>

refugees without any distinction. However, given the specifics of the issues of refugees and the fact that very often because of the political issues between or within states hinder the effective exercise of certain rights of refugees, such as the right to be a person before the law enjoying free access to courts and tribunals and other decision making authorities, making cooperation between the host Country and the Country of Origin possible becomes of extreme need. The importance this cooperation as well as the cooperation with UNHCR was raised by the General Assembly in as early as in 1950 as one of the main guarantees for ensuring the effective exercise of the rights and freedoms of everyone provided by international human rights instruments.

In addition a number of international and regional organizations and group of consultants/experts are continually working towards improving the protection mechanisms of the rights and freedoms of refugees and provision of more safeguards to them. This is a global concern and the States' political will, among other financial, economic and humanitarian issues, play a vital role in supporting refugees to permanently solve issues they face.