

PROTECTION OF INDIVIDUAL HUMAN RIGHTS
IN ALL FORMS OF STATE ACT OF RETURN

A DISCUSSION PAPER

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SUMMARY

The paper briefly distinguishes asylum from the principal focus of the paper, return by a State. When a State act of return is explicitly or implicitly at issue in an asylum decision, the standard of procedure must be capable of protecting the human rights at issue in the return. The paper develops an approach which views the international and world regional human rights treaties as elaborating, never weakening, some of the rights declared universally.

The paper shows return is related to certain human rights by these treaties and by decisions of the UN Human Rights Committee and of the European and American Commissions and Courts. These rights include: 1951 Convention Concerning the Status of Refugees, Article 33, (life and liberty), Convention against Torture, Article 3.1, (no torture), International Covenant on Civil and Political Rights, Article 7, (no cruel or unusual treatment or punishment), European Convention, Article 3, (no cruel or unusual treatment or punishment), Article 8, (family life), Article 6, (fair trial). The principle emerges that the sending state is responsible for anticipating and protecting the individual from violations of these rights as a result of a state act of return. This is true despite the caution applied by these bodies that the rights are at issue only in certain situations.

The discussion paper considers the Fourth Geneva Convention and argues that states who wish to return nationals to armed conflicts are situated with respect to these nationals as would be a Detaining Power and therefore should be governed by Article 45. Under this provision, protected persons (civilians) may not be transferred to a Power by a Detaining Power until "after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention". The Fourth Convention, in Article 3, sets out the violations prohibited and the human rights at issue.

The paper notes that in a return procedure, the standard of justice must be able to protect all these rights shown to be at issue, including the "life and liberty" at issue for refugees or asylum seekers. Most of these rights are shown to be non-derogable and a case is made that the due process or fair trial involved must itself be non-derogable.

The paper examines what procedural standard should apply. Since liberty is involved, detention standards apply. Since life is at issue in return and also in only the most serious of criminal cases, at least the provisions for criminal cases should apply. Procedural provisions for several treaties are reviewed and an appropriate procedural standard deduced.

The paper discusses the effect of interaction between treaty provisions and the effect of equality rights provisions. Whereas examination of the class of person may be appropriate in identifying a "refugee" from a historic context, a person cannot be discriminated against on a class of person basis in a procedure to protect fundamental rights at issue in a proposed current state act of return. This is true even when the distinction is made between aliens legally on a territory and those not. Only the potential violation of the rights at issue in the act of return should be considered.

Noting the need of states to have a simple procedure to implement, the paper suggests that the Fourth Geneva Convention Article 45, expanded to refer to elements of Article 3, is a test for safety in return and suggests that procedures used for asylum granting could be relatively easily improved to deal with state responsibilities to protect in proposed acts of forcible return.

1.0 INTRODUCTION

1.1 Practical Needs

The need for updating refugee and asylum law is clear in events. Technically, the UNHCR Statute Article 8 gives the UNHCR the mandate to protect the individual refugee. The UNHCR has repeatedly affirmed that the paramount element in this protection is non-refoulement. Yet over the years, other international treaties have come into force which also protect persons from what amounts to non-refoulement, the Protocol to the International Covenant on Civil and Political Rights, ICCPR, the Convention against Torture and the European Convention on Human Rights. The overlapping responsibilities results in a confusion of obligation for states and for international treaty bodies.

1.2 Human Rights Commission

The need for "updating refugee, nationality and labour law and fresh consideration of asylum practices" was raised in the first recommendation from the "Study of Human Rights and Massive Exoduses" in ECUSOC Document E/CN.4/1503, December 1981.

After a recent review of asylum and refugee matters in paragraphs 477 to 492 of the Final Report "The Right of Everyone to Leave any Country... and to return to his Country", E/CN./Sub/2/1988/35, Special Rapporteur to the Subcommission of the UN Commission on Human Rights Mr. Mubanga-Chipoya concludes in paragraph 532 "The right of asylum should be better defined in international law and should be extended to members of the family" and "The recourse procedures included in national legislation, should be left to independent judicial or non-judicial bodies". He goes on to say, in recommendations III, 5, page 116 "...The question may be raised whether an organ (international agency) should be created with the specific purpose of following up the implementation of the right to leave, to return and additional matters relating to entry, refugees and migration".

1.3 High Commissioner for Refugees

The desirability of an update of refugee and asylum law is clear in a recent statement of the UNHCR. Speaking to the 45th Session of the UN Commission on Human Rights, Mr. Arnaout, Director of the Division of Refugee Law and Doctrine, United Nations High Commissioner for Refugees, UNHCR, noted "there is considerable scope for constructive cooperation between UNHCR and the Commission, as well as the Centre for Human Rights".

Mr. Arnaout spoke specifically of the work of the Sub-Commission on the right to leave and return in order to "encourage further discussion to focus... on the consequences of return, including ... non-discrimination and physical safety." Similarly, Mr. Arnaout spoke to UNHCR experience and concern with the Commission's work on detention and noted the conclusions of the Executive Committee of the UNHCR that "detention should normally be avoided".

1.4 This Paper

As a contribution to the updating, this paper will examine the several treaties which require a state to protect the rights of the individual in a proposed act of forcible return, will identify the rights at issue, will deduce the elements required for "due process" or "fair trial", and will explore structural possibilities for implementation of the organs associated with the treaties. The paper will not examine the issue of asylum in any detail nor will it examine related problems of detention.

1.5 The Treaties Involved

Beginning with the Universal Declaration in 1948, states have continued to affirm human rights. In 1966, international treaties opened for signature: the International Covenant on Civil and Political Rights, which has been referred to as the International Covenant, and the International Covenant on Social and Economic Rights. Related world regional human rights treaties are in force: the European Convention 1950 and subsequent Protocols, the American Convention 1969 and the African Charter on Human and Peoples Rights 1981. In February 1989, the Draft Concluding Document of the Vienna Meeting 1986 appeared. In this paper it is referred to as the Vienna Document. Along with substantive rights relevant to refugees such as life, liberty and security of person and work or subsistence, these documents also elaborate procedural rights. Within this evolution of general treaties, the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol require signatory states to grant certain rights to a defined class of persons of concern to the international community: refugees. The 1949 Geneva Conventions, especially the Fourth Convention and Protocol II are relevant to protecting citizens and other non-combatants in time of war or certain forms of insurrection and civil conflict. The treaties impinge in two ways. There are rights protected and related procedural standards. The fact that rights and standards must be upheld in extreme threats to state security guides interpretation of conditions for waiving of rights in the human rights treaties.

In addition to these international human rights treaty standards, in the several states of the Commonwealth group of nations, the British common law tradition has evolved procedural standards referred to as natural law. Indeed, this tradition has put a special emphasis on procedural safeguards. In Canada the Courts seek to integrate the older British standards with the newer standards in the Canadian Charter of Rights and Freedoms within the Constitution. These newer Charter standards parallel international human rights treaty standards. Thus natural law and international standards can be related in some jurisdictions such as Canada.

1.6 Method of Interpreting the Body of Treaties

It is important to develop a systematic way of interpreting the joint application of international human rights treaties, including the Convention and Protocol as they apply to the matter of return. There are several principles. The general principle of international law is that to determine the intended meaning of a treaty one examines the origins of the treaty. This principle must be expressed in a special way to assess the combined force of the human rights treaties because the several treaties are part of an evolutionary process involving the same state parties. In this process, the Universal Declaration is acknowledged as the common source for the several human rights treaties. This approach was accepted for example in 1981 with acceptance of the Report on Human Rights and Massive Exoduses, E/CN.4/1503.

The later Geneva based treaties such as the International Covenant on Civil and Political Rights are elaborations of specific aspects of the Universal Declaration. The treaty against torture is a further elaboration of one specific element. The Helsinki human rights accords are more specific affirmations within the International Covenants for the parties involved. It is considered with other Geneva based treaties because the parties involved span major world powers of the UN Security Council, including East and West Europe and North America. The evolutionary nature of the UN treaty process based on the Universal Declaration leads to two proposed principles for interpreting the assembly of these treaties together:

1. A treaty cannot be interpreted as taking away rights granted in the Universal Declaration.
2. The more specific statements of later treaties take precedence.

Like the UN based treaties, the world regional treaties are also derived from the Universal Declaration. These treaties and the Commission or Court decisions stemming from them can be regarded as clarifying the application of rights set out in the Universal Declaration. By clarifying the Universal Declaration, these decisions also influence interpretations of the UN based treaties which derive from it. This is especially true where the several regional treaties are consistent in their greater precision. This leads to a third proposed principle:

3. To the extent that the treaty rights are substantially similar, regional Commission or Court decisions can be taken as clarifying the intent and application of an international treaty and the Universal Declaration.

2.0 ASYLUM, THE RIGHT TO REMAIN

2.1 Nature of Asylum

The right to seek and obtain asylum from persecution is a fundamental human right proclaimed in the Universal Declaration, reaffirmed in the Declaration on Territorial Asylum, and elaborated in two of the three world regional human rights treaties: those in Africa and America. The fact that it has proven an undeveloped right outside continental Africa and Central and Southern America where by and large it already applies, makes it no less important. Asylum works where states take the generous view that all those who arrive from apparent persecution can either remain indefinitely or can transit to another country in the region where asylum is guaranteed. Asylum cannot work when states choose to exclude some classes of person. In this case, there is no matching of the individual's right to asylum and the state's right to lay out in law who it will and whom it will not treat as an asylum seeker. Like the social rights to education and health, the right to asylum depends on proactive measures by a state.

Mr. Mubanga Chipoya presents the concept of asylum on page 103 of the report cited as a gift of a state which may be laid down in state law. Thus even when states agree to provide asylum, they retain discretion in how this is done so that an individual claiming her or his right to asylum may not have it granted by any given state. The world regional treaties, for example the American Convention of Rights Article 22(7) and the African Charter on Human and People's Rights Article 12(3) reinforce this view, presenting asylum in terms of a matter for the state to set out in state law. Despite provisions in law of several European states, the European Convention on Human Rights is silent on asylum as is the International Covenant on Civil and Political Rights.

2.2 Content of Asylum

The elements stated by Mr. Mubanga Chipoya are the right to admit, to allow to remain, not to expel or extradite and not to persecute punish or otherwise restrict liberty. These seem a reasonable pragmatic content to work with. Most of the elements accrue to a person in any event under international human rights treaties.

2.3 Arrival and the Problem of Avoiding Sovereignty

States are reluctant to agree to admit. Obviously, the right to leave one's country and return implies arrival somewhere as the UNHCR has repeatedly noted. However in practice, the right to admit can be treated as moot. Despite draconian measures by several states, asylum seekers present their case physically on the territory of the state being asked and under its legal jurisdiction. Therefore there is some merit in avoiding the issue of arrival as the 1951 Geneva Convention does. The Convention assumes people have arrived and proceeds from there. This paper takes this position. It is consistent with the African approach to refugees which Mr. Mubanga Chipoya's report favours. A special situation deserves note.

The efforts of some states to try to control arrival by deeming persons not to be on their territory when they are physically present poses serious problems. The system of international law is based on the principle of state sovereignty over their territory. For states to unilaterally abdicate in whole or in part leaves a legal vacuum and can be regarded as an attack on the international system. There are practical problems. For example if a person is not deemed on a state's territory, are decisions made by the state about such persons valid? Does another state have any obligation to take back any such person from a state if they never technically arrived there? Can there be military incursions in pursuit if the person has not arrived in another state?

2.4 Human Rights for Everyone a State Obligation

Assuming persons arrive, under international human rights treaties persons on a state's territory and under its jurisdiction already have at least non-derogable rights including the right to due process, even though this has not been widely publicized. It is not the primary concern of this paper to explore the realizing of rights of those persons who have arrived. However, the implications of the word "everyone" are important later in this paper. The understanding of these implications has evolved in national and international jurisprudence to include legally what the term included logically : everyone physically on the territory of a state. The International Covenant requires, Article 2(1) "Each State ...

undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant..." Thus all the fundamental rights of the Covenant are open to everyone. The Supreme Court of Canada Singh et al decision 1985 confirmed substantially the same point for the rights set out for "everyone" in the Canadian Charter of Rights and Freedoms.

Current international human rights texts reinforce the Covenant view that the rights are to apply to everyone physically on the territory of a state and subject to its jurisdiction. "The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment", Principle 5. is an example.

Before leaving the matter of rights of those who arrive, it should be noted that the High Commissioner for Refugees has raised the right to work as key, for example in the Protection Statement to the Executive Committee, 1988. This concern is echoed by agencies working with refugees on many continents. For urban aliens it means the right to seek and obtain work. For rural aliens it means the right to subsist. In both cases the right is closely linked with the rights to life and security of person. The matter of return and the rights associated with it are dealt with below.

2.5 Right to Remain

The novel and significant element in asylum is the right to remain. This too requires clarification, but the clarification goes beyond the scope of this paper. Travel is now widespread, yet to arrive and stay as a traveller requires no special asylum declaration. The matter becomes how long do people remain? When does a person claim the right to adopt a nationality and the rights which accrue to a citizen? When does remaining without family become a deprivation of the right to security of person?

2.6 Procedural Rights in Asylum Granting

Under the Universal Declaration, the determination of any right, including this right to remain which is the core right in the right to asylum, requires an independent and impartial tribunal. As for any issue, the principle obligation of the state is to act fairly without discrimination. However, if the hidden issue at stake is return which might threaten the right to life or the right to freedom, the procedural standards must be capable of upholding the more serious rights at issue. Many states set up asylum procedures at a time when they intended granting the right to remain to all those seeking it. As a consequence, many states have simple administrative decision making procedures. Unfortunately, these may be unsuited for a decision to return, implicit or explicit, because the consequence of return can be

loss of life or liberty - rights which are involved in the most serious civil cases which might arise under treaties such as the International Covenant on Civil and Political Rights.

2.7 Summary

The right to asylum belongs to an individual, but states have discretion to grant it. This poses problems unless states grant asylum to all on their territory who need it. The principal content of asylum is the right to remain. Other rights such as the right not to be expelled derive directly from the human rights treaties.

3.0 RETURN: REFUGEES AND EVERYONE

It will be shown that "return" is related to certain fundamental human rights by treaty provisions and by Committee, Commission and Court decisions. Also, the principle emerges that a state is responsible for anticipating and protecting the individual from violations of these fundamental rights as a result of a state act of return.

3.1 1951 Geneva Convention Protections

If a state wishes to forcibly return a person, there may be constraints. As Mr. Mubanga Chipoya notes in paragraph 482 of the cited report "The state has no obligation to grant asylum, but has an obligation not to return a refugee to a country where he would be subjected to persecution (principle of non-refoulement)." The 1951 Convention and 1967 Protocol Concerning the Status of Refugees establish the fundamental obligation for non-refoulement in Convention article 33 "No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion." The rights to life and liberty are explicitly linked to the principle of non-refoulement. Also, article 33 establishes the principle that for a refugee, threat to the fundamental rights of life and liberty as a result of an act of return must be anticipated by the sending state.

Guy Goodwin Gill outlines the content of the Convention in "Human Rights and Refugee Protection under International Law", Canadian Human Rights Foundation/ The Institute for Research in Public Policy, December 1987, "The refugee treaties are concerned with definition of status, with certain critical entitlements such as non-refoulement, exemption from penalties for illegal entry, restrictions on expulsion, and with minimum standards of treatment due, in particular, to the lawfully resident refugee." However, his reference to lawfully resident can be questioned in the face of the rights granted to everyone, even those excluded

from the refugee treaties. When return is foreseen, fundamental rights are at issue which apply to "everyone".

Applying the principles set out above for interpreting the human rights treaties, the rights granted or withheld from those falling under the refugee treaties cannot be said to remove the fundamental human rights granted to everyone in other later treaties stemming from the Universal Declaration.

3.2 Human Rights and State Acts of Return

3.21 Limits of the 1951 Geneva Convention and Protocol

Article 33 of the Convention makes clear that the basis for concern is the refugee's right to life and liberty. The Supreme Court of Canada decision Singh et al 1985 declares the threat to life or freedom in return a deprivation of security of person in the sending state. Under Convention Article 33, the sending state is responsible for the consequences of return and must anticipate them. The refugee definition, Article 1, provides a convenient way of defining persons who benefit. The UN General Assembly resolutions relating to the High Commissioner for Refugees from 1980 to 1989 clarify that the benefit of non-refoulement (Article 33) extends to "asylum seekers", those not yet determined to be refugees. However, there are certain classes of person "excluded" from the benefits of refugee status by the Convention, such as criminals and terrorists. Also, unlike other later human rights treaties, the Convention lacks any formal compliance reporting obligation on states and lacks any complaints mechanism to serve as an international recourse.

In the remainder of this section of this paper, further court decisions will be cited which extend to other fundamental rights the principle that the returning state is responsible for ensuring a fundamental human right is upheld in an act of return.

3.22 No Exclusions, protection beyond the Convention

The 1951 Convention excludes from the benefits of refugee status certain groups such as criminals or terrorists. The later human rights treaties contain obligations which apply to all persons whether refugees or not. The treaties preserve the concept of responsibility of the sending state. For example one judge in a recent European Court for Human Rights decision argued that in certain circumstances the risk of deprivation of life alone can require a state not to forcibly return even an indicted murder under an extradition treaty, Soering Case, July 1989. From this case, and the face of the treaty, it can be inferred that any person whose life, liberty or security of person is at risk, not just a refugee determined under the Convention, may not be returned by a state under certain circumstances. This raises the

possible extension of the protection of life and liberty in return to persons who cannot be protected as refugees.

3.23 No Torture

Article 3.1 of the international Convention against Torture requires "No state shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture". The article goes on to require competent authorities to take into account all relevant information including a consistent pattern of gross, flagrant or mass violations of human rights. The treaty came into force 1987 and so represents the most recent level of clarification around the matter of torture and cruel and unusual treatment or punishment. The principle of responsibility of the sending state is explicit in this treaty.

3.24 No Cruel or Inhuman Treatment

Under the Protocol to the International Covenant, the Human Rights Committee can give views on individual complaints of violations of rights granted in the treaty. Under this complaints procedure, the Committee has asked states not to extradite individuals pending its review of cases on various provisions. Interlocutory decision #22/1977 of 26 July 1978 requested "the committee is of the view... that the alleged victim, having sought refuge in S, should not be handed over or expelled to country X." This action confirms the principle that the sending state must ensure that certain rights are not violated as a consequence of return to another state.

More significantly, under the European Convention, the Commission and Court have prevented acts of forced return, deportation, extradition, and expulsion, using article 3 of the European Convention "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The issue is whether the act of forcible return would violate this right as a result of acts anticipated in the receiving state.

Consider the European Commission decision on the case X vs FDR 1802/62, Yearbook 6, page 462 " ... deportation of a foreigner to a particular country might, in exceptional circumstances, give rise to a question whether there has been inhuman treatment within the meaning of article 3...; whereas similar circumstances might apply to cases where a person is extradited to a particular country in which, due to the very nature of the regime ... basic human rights such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed; ..."

In the Soering Case, July 1989, the European Court found exceptional circumstances and prevented the extradition of an indicted murderer by the UK to the USA on grounds that it would violate article 3. As has been noted, one judge argued against extradition on grounds that "his life would be put in jeopardy by the extradition".

3.25 Disrupt Family Life

In some cases the European Commission has made references to the relevance of the European article 8, rights for respect of family life, with respect to deportation, in the context of article 3, such as the case of KW vs Netherlands DR 43, 116.

3.26 No Fair Trial

In a reference to European Convention Article 6, the right to a fair trial, the European Court noted in the Soering decision "The court does not exclude that an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."

3.27 Rights in Expulsion

Most treaties require that aliens on the territory and facing expulsion be given opportunity to state reasons against expulsion in a fair trial. The International Covenant article 13. provides that aliens must have a hearing in law where they can give reasons why they should not be removed. Unfortunately, the acceptable reasons are not elaborated. There is an exception "where compelling reasons of national security otherwise require". Also, the alien must be "lawfully in the territory". The article requires careful reflection.

A fair trial for an alien in deportation does not depend on article 13 alone. An alien is part of "everyone". In 2.4 above this paper argues that everyone includes refugees or aliens physically on the territory of a state. The above discussion of restraints imposed on various proposed acts of return by a state by the UN Human Rights Committee and by the European Commission and Court of Human Rights establishes that other fundamental treaty rights than article 13 can in and of themselves oblige a state not to return a person - alien or not. Also the primary intent of Article 13 is not to limit rights in expulsion, but to grant them. As will be shown below, at this time everyone has a non-derogable right to a fair trial in the determination of non-derogable rights such as those reviewed above in this paper.

Therefore, in practice for a state to ensure it meets its treaty obligations, it must ensure in a fair trial that issues of life, liberty and security of person are not violated in return

of any person, including aliens. To do this it must offer every alien the opportunity to give reasons against return in a fair trial. In addition to this pragmatic reason, the matter of equality of protection in non-derogable rights arises. The equality of protection of fundamental rights is a primary principle of the Covenant as well as the basis on which the universal Declaration stands. It takes precedence over the limiting phrase "lawful presence" within another article. Also, when the issue is violation of a non derogable right it would be discrimination to distinguish on grounds of legality or otherwise in the territory. The equality rights provisions of the treaties, for example, the International Covenant, Article 2(1) specifically prohibit discrimination on any grounds including "other status".

Section 13 is thus largely redundant when non derogable rights are at stake. However, because article 13 requires that the procedure for hearing aliens facing deportation be made in law, it can be argued that a deportation trial must always be in law. If the process must be in law for lawful aliens, then equality rights provisions require it for others who face the same violation of a non-derogable rights by an act of return.

It can be deduced that any alien can only be deported by a decision made in accordance with law and, more importantly, has an opportunity to present reasons against the return, presumably before an independent tribunal. The tribunal must be competent to deal with the range of fundamental rights at issue and the conditions in the country of intended dispatch.

Other world regional treaties add weight to this interpretation. The clarification sub 8 in article 22 of the American Convention notes "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country, if in that country his right to life or personal freedom is in danger ...".

Using this non-discrimination argument with respect to "status" it can be shown that the right granted to refugees under the Convention, Article 31, not to be penalized for illegal entry, extends to other persons facing similar risks to fundamental human rights by the same proposed act of forced return by a state.

The treaty provisions require non-discrimination of one social group against another on the matter of the fundamental right which is at issue, for example, life.

3.28 Limits to Protection of Rights in Return under Human Rights Treaties

The detailed analysis of all complaints submitted to the European Commission and the Geneva based Human Rights Committee relating to the protection of rights in acts of return is beyond the scope of this paper. However, cautious preliminary observations can be usefully made to direct further work:

- many complaints of substance are not admitted because they do not satisfy technical criteria such as a 6 month deadline.
- these bodies emphasise "exceptional circumstances" in decisions or views
- they tend to rely on interpretation of state law and wording of the treaty in a positivist manner, rather than seeking to protect the right put at risk as a consequence of the effect of a law or state practice (For example, expulsion is acceptable if the procedure followed is in law. The issues of impact on other rights does not arise)
- complaints have not always carefully examined the fundamental rights at issue

In general, the treaty bodies do not appear eager to protect the fundamental rights to life and liberty when these relate to possible refugees under the 1951 Convention. An example of the several problems would be the decision of the Human Rights Committee on the admissibility of the case of a Chilean facing expulsion from the Netherlands, communication 173/1984. The matter of whether procedures in the Netherlands were adequate to protect the Chilean was not raised. Also, states have not been required to put in place adequate procedures to protect fundamental human rights in return even in the case of the Treaty against Torture which specifically requires consideration of a fundamental right in the state act of return. In general, state procedural bodies for refugee determination do not have competence in law to protect rights in act of return or to interpret and apply treaty obligations beyond the 1951 Geneva Convention. (See for example the Note on Procedures for the Determination of Refugee Status ... A/AC.96/INF.152 Rev.8 1989)

Despite these limitations, the treaty bodies have been able to show that fundamental human rights are at issue in state acts of return and that in certain circumstances, the protection of these rights take precedence over the state's desire to return.

3.3 Rights from International Humanitarian Law

The Fourth Geneva Convention relative to the protection of Civilians in time of war, provides in Article 45:

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

According to article 4 "persons protected ... are those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals."

The provisions apply to "persons taking no active part in the hostilities". Section II of the treaty makes clear that aliens are included within protected persons. There is provision to extend the Convention protections for armed insurrections or liberation movements which are non international armed conflicts in Protocol II to the Conventions. This applies in practice if the International Committee of the Red Cross is able to establish the provisions with parties to these conflict situations.

Signatories to the Fourth Geneva Convention agree to "undertake to respect and to ensure respect for the present Convention in all circumstances" (Article 1). Arguably, any signatory, not just an active party in a conflict, can be placed in the same role as a Detaining power with respect to nationals of a party to the conflict who fall under that signatory's jurisdiction. In this situation, article 45 makes clear that protected persons shall not be transferred to a Power by a Detaining Power until "after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention." In considering this willingness and ability, a Detaining Power must consider whether the transferee can satisfy Common Article 3 of the Geneva Conventions.

Common Article 3 of the four Geneva Conventions requires states parties to prohibit "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon human dignity, in particular humiliating or degrading treatment" and in general treat all persons not involved in such conflict "humanely, without ... distinction founded on race, colour, religion, sex, birth wealth or other similar criteria" and to provide judicial due process. Protocol II even prohibits the threat of these prohibited acts.

This means that the Fourth Geneva Convention can prevent return of nationals by a state to their home country where the government is unwilling or unable to fulfil its obligations to protect civilian populations under its jurisdiction from the dangers of non international armed conflict. An example would be the forced return of expatriate El Salvadoreans to El Salvador, immediately following events of November 11, 1989.

In addition, the Fourth Geneva Convention defines a social group of Protected Persons. This group falls within the meaning of social group in the 1951 Geneva Convention on refugees who have a well founded fear of persecution as a result of their social group.

Read together, the sources define a generally applicable norm which would protect persons who had fled from armed conflict from arbitrary forced return to it by another state. Indeed, such a position has been demonstrated by the UNHCR who in many regions of the world has identified such persons as of concern to his office. It can be argued that the UNHCR is acting as the mandated international body to serve as the Protecting Power of the Fourth Geneva Convention for nationals outside their homeland during serious civil conflict. Also, the principle that a sending state is responsible for ensuring the protection of an individuals rights in an act of return is reinforced by the 1949 Geneva Conventions and Protocols. The fundamental rights associated with transfer of persons are right to life, security of person, no torture or cruel or unusual treatment, equality of treatment and a fair trial.

The Geneva Conventions bring an additional insight to our issue of protection of rights in acts of return. If an individual right prevails over state interests under one of the most serious envisaged threat to state security, armed insurrection or international war, the right cannot be waived under a lesser threat to the state. Indeed, it is hard to conceive of other grounds for derogating from this principle. Also, the protection goes beyond refugees to "protected persons".

3.4 Consequences of Rights in Return for Procedural Standards

To determine rights under the Universal Declaration, the International Covenant on Civil and Political Rights and other human rights treaties an independent and impartial tribunal is required. The consequence of the refugee convention and the fundamental rights to which it relates, life, liberty and security of person is to require highest standards in the due process. Decisions about return can result in death, detention, torture, cruel or unusual treatment or punishment, no fair trial. The standard of justice must be capable of defending life or liberty against a threat to these rights by an act of return.

4.0 SPECIAL NATURE OF THE RIGHTS IN QUESTION

The human rights which have been identified in treaties and in decisions and views of treaty bodies are also special rights. The limits on the waiving of these rights have implications for the state in an act of return.

4.1 The Non-Derogable Nature of the Rights in Question

Three of the international human rights treaties allow certain rights to be "derogated" in certain circumstances. The circumstances and how derogation occurs is important to the content of the rights. However, some rights cannot be derogated under the International Covenant, ICCPR art.4 (2), European Convention EC art.15 (2) and American Convention AC art.27 (2):

- Recognition as person before law ICCPR art.16, AC art.3
- Right to life ICCPR art. 6, EC art.3, AC art.4
- No Torture, Cruel Treatment ICCPR art.7, EC art.3, AC art.5
- No Slavery, Servitude ICCPR art.8(1)&(2), EC art.4(1), AC art.6
- No retroactive law ICCPR art.15, EC art.7, AC art.9
- Freedom Conscience, Religion ICCPR. 18, AC art.12

As shown above, the human rights committees, commissions and court have established that a state is responsible for maintaining these rights in an act of return.

As noted above, protected persons in international armed conflict under the 1949 Geneva Convention cannot be transferred to a country where they may have reason to fear persecution. Refugees cannot be returned to a country where life or freedom may be threatened under the 1951 Geneva Convention on refugees.

The treaties give the grounds for derogation: ICCPR art.4(1) "public emergency which threatens the life of the nation", EC art.15 "war or other public emergency threatening the life of the nation", AC art.27 "war, public danger, or other emergency that threatens the independence or security of a State".

If an individual human right prevails over state interests in an international armed conflict, an insurrection or a major war, it cannot be set aside under lesser threats to state security. Thus non-refoulement should be considered a non-derogable right. The High Commissioner has affirmed in his report to ECUSOC GE.89-01559, 1989, that non-refoulement is jus cogens.

Taken together, these rights, and the related court interpretations affirm that a returning state must uphold these human rights of an individual in an act of return. A state cannot waive its responsibility to protect persons in acts of return.

4.2 The Non-Derogable Right to A Fair Trial

Several pointers lead to the conclusion that the right to a fair trial is itself a non-derogable right. First, the international community asked for more effort to realise rights in its favorable review of the work of the Human Rights Commission, 1989. Logically, it is meaningless to declare certain rights non derogable rights without corresponding non derogable procedural rights which can guarantee them. The fair trial is the procedure designated in the treaties. Second, the 1949 Geneva Conventions provide for fair trial during international armed conflicts or insurrections and specifically for aliens. Again, it can be argued that fair trial cannot be waived for any lesser threat to state security than that of an international armed conflict or an armed insurrection. Third, the world regional American Convention of Human Rights, article 27, para. 2 speaks specifically of the non-derogable nature of the indispensable judicial guarantees necessary to uphold the non-derogable rights and the advisory opinions of the Inter-American Court, Numbers 8, 9 1987 affirm this.

5.0 ELEMENTS OF A FAIR TRIAL FOR RETURN

The international human rights treaties include procedural standards associated with the granting and taking away of rights. When such procedural standards from a number of international sources are examined in detail, they converge and a common minimum set of procedural safeguards can be deduced.

The Supreme Court of Canada decision in the case of Singh et al, April 1985 links the universal human right to security of person to the right to non-refoulement of a refugee under the 1951 Geneva Convention. The European Commission and Court of Human Rights has given interpretations of Article 3 of the European Convention for the Protection of Human Rights and Freedoms which may preclude forcible return of a person to a territory where he or she may be subjected to torture or to inhuman or degrading treatment or punishment. Hence decisions on expulsion or return in general can involve serious civil human rights. Such civil rights invariably require the full set of procedural safeguards to be applied. The rights in question cannot be derogated and therefore have special priority over other state considerations such as national security.

In developing the common obligations, there will be a brief review of the Commonwealth common law or natural justice tradition. As set out in section 1.6, the body of the argument will develop around the Universal Declaration and the International Covenant. The world regional treaties and finally the Helsinki accords will be used to clarify or amplify the overall international treaty.

5.1 Natural Justice

The following are often cited as elements of natural justice:

- prior notice of what is at issue
- to know the case against one and have the opportunity to refute it,
- to appear in person before the decision maker,
- disinterested and impartial tribunal,
- legal representation,
- equality of treatment,
- reasons for decision,
- appeal

Interestingly, the Canadian Singh Decision refers to several of these elements, especially "to know the case against one..." and "to appear in person...", interchangeably as "natural justice" and "fundamental principles of justice." These are related to refugee status determination and to decisions resulting in expulsion or removal of potential refugees.

It is worth adding reference to the standard for "disinterested and impartial" as it applies to a judge or tribunal as it has evolved in natural justice or common law:

- not an appearance of bias,
- no financial interest,
- no relationship with a party involved, (including not an employee)
- not involved in an appeal of own decision,
- no personal hostility or prejudice,

The concept of impartial decision making for acts associated with leaving one's country and returning was specifically noted by Mr. Mubanga Chipoya in a conclusion, paragraph 533, of his report, op. cit. :

The recourse procedures included in national legislation, should be left to independent judicial or non-judicial bodies.

The implication is that states should provide such recourse procedures in national legislation. The World Council of Churches pointed out the importance of such decision-making in its Statement to the UN Subcommittee at its 41st Session, 1989:

Independent decision making is a key to the protection of human rights for foreigners, travellers or refugees, and indeed for any other vulnerable minority social group.

5.2 Universal Declaration

The basis for a fair trial for everyone in determination of rights springs from the Universal Declaration:

Article 8:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

This concept of effective remedy...for acts violating rights can be linked to the principle of appeal which appears in a more explicit form in the Vienna Document. Presumably this concept is linked to the notion of verification. The remedy must be one which can be determined to be effective on the face of it and in fact by some international authority. Indeed, the Optional Protocol to the International Covenant provides an explicit mechanism for international review of a negative national decision.

Article 10:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Note that the standard here applies equally to rights and any criminal charge. The standard is unconditional. Under the International Covenant, the standard is elaborated for a criminal charge, but not for "rights". In the Final Draft Conclusions of Vienna, a related set of guarantees appear for "rights" in general and not just "crime". For a refugee, the rights would include the rights associated with refugee status by means of treaty or law, plus rights granted "everyone" under the Constitution, treaty such as an International Covenant or law.

5.3 International Covenant on Civil and Political Rights, 1966

Since the rights to life and liberty are at issue in an act of return, the related procedural standards apply. Therefore, the procedural standard for return derives from article 9 on liberty, article 14(1) on trial in general and 14(3) on trial for a crime because the most serious consequence of crime is death, loss of life, or incarceration, loss of liberty.

Article 9

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

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

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

The right to liberty is linked through the 1951 Geneva Convention relating to the Status of Refugees with the right to non-refoulement of a refugee. The Canadian Supreme Court Singh Decision links the right to security of person in Canada to the threat of return by Canada of a refugee to the frontiers of a territory where life or freedom would be threatened.

In the International Covenant subclause 4 the right to liberty is linked to a standard which requires access to a court. One of the rights of a refugee under Article 16 of the 1951 Convention is free access to the courts. Hence refugee status determination and decisions exposing potential refugees to risks by expulsion or return requires court or comparable tribunal decision making.

This link between loss of life or liberty in a country of return and implicit loss of life or liberty by the act of returning is supported by the issuing of a Habeas Corpus writ by the Quebec Court in the case of Noor, 1989 to stay deportation of a potential refugee by the federal government from Canada. The writs are normally used as a remedy for wrongful detention in the British legal system.

Article 14

1. All persons shall be equal before the courts and tribunals. 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...any judgement... shall be made public...

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(d) To examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(f) Not to be compelled to testify against himself or to confess guilt.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

The guarantees of article 14(1) grant a fair and public hearing by a competent and independent body for rights and obligations in suit at law. The reference to "suit at law" is unusual. The article clearly parallels and is intended to cover the Universal Declaration fair trial for determination of all rights of all persons. The UN Human Rights Committee's general comment on Article 14 is that "the provisions of article 14 apply to all courts and tribunals within the scope of that article, whether ordinary and specialized." The French version of article 14(1) refers to rights and obligations "de caractère civil".

The American Convention, article 8 is more explicit: "Every person has the right to a hearing with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature." The European Convention, article 6, is also clearer: "In the determination of his civil rights and obligations, everyone...". The African Charter Article 7 (1) "Every individual shall have the right to have his cause heard. This comprises: a. The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;" and "d. the right to be tried within a reasonable time by an impartial court or tribunal."

Under all the treaties a fair trial is required for determining all rights and obligations. Non-derogable rights are "de

caractère civil". So for the rights at issue in return, at least the fair and public hearing of International Covenant article 14(1) is required.

The provisions of article 14(3) set a standard to be applied for any crime, whatever the consequences. These provisions are closely parallel with the American Convention which, in addition provides, article 8(2) (c): "adequate time and means for the preparation of his defence"; and (e): "the inalienable right to be assisted by counsel provided by the state paid or not as domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;" The European system closely follows the International Covenant, with a nuance in its article 6(3)(c): "to defend himself in person or through legal assistance of his choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

The most serious rights that could be at stake in a criminal suit are life and liberty. A wrong judgement could cause, for some crimes in some states, the loss of life, the death penalty, and the loss of liberty, incarceration. The rights involved in state decisions which can result in return of a person to another country are among the most serious associated with a wrong decision on a criminal charge: life, liberty and security of person, torture or cruel or unusual treatment or punishment. At least a similar standard to that defined for any crime must apply to a decision which can result in consequences more serious than those from the most serious criminal charge. The African Charter is explicit. Its provisions under Article 7 apply to every individual who has the right to "have his cause heard" and confirm the rights to be presumed innocent unless proven guilty, right to counsel of choice as well as the right to appeal. Hence these standards set out for crime in the International Covenant apply to return decisions.

The right to appear in person is clearly set out in item the Article 14 (2)(c). However, this right might also be inferred from the nature of the issue in hand. More clearly than in some criminal charges, the credibility of the person is invariably an element in refugee status determination or decisions about the safety of return in general. It stems from the subjective elements in the definition of a refugee in the 1951 Convention, Article 1 - the well-founded fear of persecution. This subjective element in the decision also stems from the right of everyone to "security of person" and "no cruel or unusual treatment or punishment" and of the assessment of the "threat" to the individual person of forced return. A tribunal could not give a "fair" hearing as Article 1 implies if it was not able to determine this credibility or subjective "threat" effectively because the person was not present to be examined.

The concept of full equality is emphasized in Article 26 which states "all persons are equal before the law" and explicitly precludes "discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." This equality cannot be derogated in the International Covenant article 4(1). The concept of equality raises questions with respect to expulsion or deportation. For example, two persons face a comparable threat to life or liberty as a consequence of expulsion or return by a state. One faces persecution as a result of membership of a particular social group, the other does not. The individual human right to security of person does not depend on the cause of the deprivation. Either security of person will be denied or it will not be. The cause is irrelevant. To distinguish the procedural safeguards applied to removal of these two persons would be to discriminate on status in violation of Article 26 and Article 14. Yet, one of these persons might be a Convention Refugee, the other not.

5.4 Draft Concluding Document, Vienna, 1989

Article 13.7

- ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion or social origin, property, birth or other status;

Article 13.9

- ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, inter alia, effectively apply the following remedies:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs,

- the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;

- the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

This document is important because it comes from a current political will of East and Western block countries to reduce tensions and improve security in Europe. The human rights elements form critical tests of good faith within the overall accords.

Surprisingly, these "remedies" apply to all human rights and fundamental freedoms. The argument was made above that at least the "guarantees" for a person facing criminal charges under the Covenant above must apply to the life or freedom threatening decisions at stake in refugee status determination and expulsion. Many of these guarantees appear in the Vienna text as explicit remedies which apply to all rights. The key elements are: to appear in person; to be able to present arguments; an independent and impartial tribunal; legal counsel and, less explicitly, an appeal.

Significantly, the remedies apply to everyone physically on a state's territory and subject to its jurisdiction. This includes aliens unlawfully present at airports or on shores. It includes refugees, so determined or not. This provision makes explicit what was implicit before. It parallels other more explicit references to the breadth of state sovereignty and related state obligations in, for example, the recent 1989 Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principle 5 (1).

There is a clarification in the Vienna Document of some standards in earlier international treaties. Vienna refines "legal representation" to "counsel of choice". Reasons for the decision must be "official", "as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies"

The reference to "further available remedies" in relation to the reasons for a decision and the specific reference to an appeal as a remedy in article 13.9 suggests some form of appeal on the merits when human rights and fundamental freedoms are at issue. Article 13.9 tolerates an appeal to "executive, legislative, judicial or administrative organs". For a crime, the International Covenant requires that the conviction and sentence be reviewed by a higher tribunal according to law.

Therefore, for non-derogable rights, as for a crime, there must be a review. Read together, the Helsinki provisions of reasons to allow a further remedy and a remedy which includes an appeal imply that the 'review' of the International Covenant should take the form of an appeal on the merits.

5.5 Joint Effect and Reinforcing of Rights

It should be noted that most "rights" associated with refugee status are granted to "everyone" by other human rights instruments and treaties. Yet the rights of the Convention Refugee are important because they inform the general procedural standards for fundamental human rights associated with expulsion and return. Experience with the refugee definition is of great value in the practice of realizing related non-derogable rights.

As we have seen, the right of non-refoulement gives a concrete expression to the right to security of person. The Canadian Supreme Court Singh Decision makes the threat of refugee refoulement a deprivation of security of person. However, the link then informs the general procedural safeguard. Such a deprivation of security of person could occur whether or not the individual is a Convention Refugee whose violation of security of person is the result of membership in a social class or group. The procedural safeguards cannot discriminate between such causes of the deprivation of security of person. Hence the procedural standard of a Convention Refugee must apply to others facing similar deprivation of basic rights and freedoms as a consequence of expulsion or deportation. This includes the Convention Refugee's right to free access to the courts.

A similar flow of informing of procedural safeguards applies to the right of an alien lawfully on the territory to give reasons against an expulsion. The no penalties right in the Convention makes a Convention Refugee eligible to give reasons because the Convention Refugee cannot be held to be unlawfully on the territory. However, if the Convention Refugee has the right, the equality rights provisions grants the same procedural standard to anyone facing a similar deprivation of the right to security of person as a consequence of expulsion or removal. Hence everyone in an expulsion or removal process must enjoy the same safeguards as the alien legally in the territory and as the refugee to the courts.

This linking of provisions reinforces the observations made above. The more explicit procedural safeguards in the international treaties for crime and detention, loss of life or liberty, apply to rights associated with expulsion and removal because the same serious fundamental rights to life and liberty are at stake. The human rights of everyone on their territory is the responsibility of a host state. These would include many of the rights associated with refugee status. The procedural safeguards associated with refugee status are particularly concerned about potential future expulsion or removal.

6.0 Conclusions: Procedural Safeguards for Protecting Human Rights in any form of Return from one State to Another

The procedural safeguards deduced by applying the principles of section 1,6 of this paper to the International Covenant provisions as clarified by the Helsinki Accords are:

1. a fair and public hearing for everyone in full equality before an independent and impartial tribunal,
 - a) the tribunal must be "competent" to deal with rights at issue is an act of return
 - b) the hearing must take place "in a reasonable time"
2. to know what is at issue in the hearing so as to effectively prepare,
3. to be present and to present legal arguments,
4. to be represented by the counsel of choice and without payment by the person without sufficient means to pay for it,
5. to examine or have examined any evidence and witnesses against one and to obtain evidence and witnesses on one's behalf under the same conditions as evidence and witnesses against one.
6. to have the free assistance of an interpreter if one cannot understand or speak the language used in court,
7. not to be compelled to testify against one's own person,
8. in the event of a negative decision, to be promptly and officially informed of the decision, including the legal grounds on which the decision was based, usually in writing and in any event in a way that will enable one to make effective use of further available remedies,
9. to have any such negative decision reviewed by a higher tribunal according to law,
10. the same access to courts as a national.

7.0 PRACTICAL SUMMARY

It is daunting but important to try to synthesize the many human rights and principles into a simple formula which can be used to facilitate the protection of persons who are theoretically protected now in international human rights treaties. The Fourth Geneva Convention Article 45 and the 1951 Geneva Convention on the Status of Refugees from a useful basis for a formulation:

- no state may transfer any person directly or indirectly to the jurisdiction of another state if the receiving state is unwilling or unable to protect the person from persecution, that is, to guarantee at least the person's non-derogable rights.

- all states party to the cited international treaties are obligated to provide in law an independent and impartial tribunal competent to apply the above principle to all acts of return by the state and governed by the procedural standard set out above.

In several continents there are refugee related tribunals which could be adapted with relative simplicity to satisfy the human rights treaty obligations as this paper interprets them. In Asia, the screening and related appeal committees for refugees could be adapted especially to take into account the independence required. In North America, the Canadian screening and determination system could be adapted to provide appeal, ensure equal oral hearing for all and strengthen the independence of decision making. In Europe, the French refugee determination system could be adapted to allow the independent body to do border hearings, provide counsel of choice, and ensure coordination of decision making at the appeal level so as to ensure equality of treatment.

7.1 State Obligations

The several human rights treaties converge to require the state to provide in law an impartial tribunal for the determination of rights in return. Clearly it is most practical for a state to provide a single state body competent in theory and in practice to judge these several rights in return issues together. The procedures are best developed around the 1951 Geneva Convention for refugee determination and these provide guidelines for the setting up and operation of even a wider tribunal for protection of other rights.

7.2 International Review

Beyond the obligations of a state, the issue of international competence also arises. Several international organs can claim an interest in forced return. The Human Rights Committee under the International Covenant, the regional human rights organs, the Committee related to the Convention against Torture and, of course, the UNHCR.

The office of the UNHCR is clearly responsible for protecting a broad range of persons assigned under its mandate. This is the agency responsible for protecting all persons of concern to the international community under mandate article 8. Arguably, the UNHCR is the agent responsible for at least protecting all persons whose non-derogable human rights are at risk in an act of return. Goodwin Gill notes, *Op. Cit.*, "UNHCR has certain specific responsibilities in regard to the human rights of refugees, which mean that it must focus on both the causes or flows, to determine who is within the mandate, and the substantive rights of those who fled" page 155. "its (the office) field of concern starts naturally with those rights considered to fundamental as to benefit everyone and to permit no derogation, even in exceptional circumstances... The obligation to respect human dignity and integrity also encompasses, at least generally, liberty and security of person and protection from arbitrary arrest and detention." page 159. The issues the UNHCR deals with are the issues involved in protecting human rights in return.

If the UNHCR is clearly the active agent of the international community, the UN Commission on Human Rights has clearly filled the twin roles of standard setter and arms length monitor. It fills the latter role by means of reports and complaint bodies. There would seem no reason why these roles should not be applied to matters of human rights in return.