

Credit :

UTokyo Online Education, Refugee Recognition

- Understanding the Essentials 2019 Allan Mackey

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The International Refugee, Complementary Protection,  
Migration and Human Rights regime - Course 1 : Oct 2019

*“Understanding the Essentials”.*

***The essential Human  
Rights/Dignity/Security linkages -  
“Refugee/Protection law is NOT Migration law”***

Course leader : Allan Mackey, former Judge(UK), Tribunal  
Chair(NZ) and President International Association of Refugee &  
Migration Judges (IARMJ)

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*Kia ora, nau mai, tena kato katou tuhinga ka whai mai Aotearoa  
A warm welcome from New Zealand and the privilege of  
addressing you all.*

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The HAKA

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*“Understanding the essentials – The law and the linkages”.*

## **Opening comments**

*“Migration and refugee protection are currently hot topics and are, sadly, seriously dividing societies all across the world.*

*When we speak about ‘Human Rights’, we may think it is just dry ,lawyers” talk about treaties and conventions”... **BUT***

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*S1: “Understanding the essentials - The law and the linkages”.*

....Opening comments

***“But there is far more to it than that. We should not forget the reality that, within these treaties, are the actual norms we all chose to live by! And that every person is a unique individual ,and so is their right to life, to asylum and access to justice etc”***

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Where are these “actual norms” we cherish ? And are they clearly recorded?

The so called: “International Bill of Rights”\* is the starting point:

Thus: **The Universal Declaration of Human Rights 1948(UDHR)** states in the Preamble-

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

\* Comprised of the :UDHR, International Covenant on Civil & Political Rights,1966(ICCPR) and International Covenant on Economic, Social and Cultural Rights,1966(ICESCR)

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UDHR Preamble goes on...

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

Whereas it is essential to promote the development of friendly relations between nations,” .....

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

Then in the UDHR Articles themselves:-



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**UDHR Art 1.** All human beings are born **free and equal in dignity and rights**. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

**Article 2.** 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**. Furthermore, **no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs**, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

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**UDHR :Article 3.** Everyone has **the right to life, liberty and security of person.**

**Article 4.** No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

**Article 5.** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment....

**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....**

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**AND Importantly :UDHR. Article 14.**

(1) Everyone has **the right to seek and to enjoy in other countries asylum from persecution.**

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

**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....

**And let us look at The ICCPR and ICSECR 1966 which formally brought these rights & others into International law.**

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*“Understanding the essentials - The ICCPR and ICSECR 1966*

**ICCPR Preamble: Same as UDHR –then:**

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want *can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,*

Considering the obligation of States under the Charter of the United ***Nations to promote universal respect for, and observance of, human rights and freedoms,***

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*“Understanding the essentials - The ICCPR and ICSECR 1966*

The ICCPR -look at all Articles 1- 27 and get to know them all as they are extremely important as they set out core or basic human rights which every country should endeavour to provide as part of the obligations of “State protection”. (A full copy is in your pack.)

They provide essential linkages to the Refugee Convention, the concepts of surrogate protection and “being persecuted” & serious harm .

We will discuss all these later in the course.

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*:"Understanding the essentials The ICCPR and ICSECR 1966 -"*

ICSECR 1966: look at Articles 1-15 these are also highly relevant and include some core rights as well – and the linkages to the RC51 concepts of “State and Surrogate Protection”, “being persecuted” and “serious harm” ...

**And now let’s look at some history – 1790s -the French revolution ;  
17th-century theorists -- "liberty, equality, fraternity" etc**

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*“Understanding the essentials -*

**AND the US Declaration of Independence 1776:**

***“We hold **these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.**--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness” ....***

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**AND the European Convention for the Protection of Human Rights  
and Fundamental Freedoms ---Rome, 4.XI.1950**

**Preamble**

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, **ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the UDHR ....**



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:*“Understanding the essentials -*

## ECHR 1950

### **ARTICLE 1: Obligation to respect Human Rights.**

The High Contracting Parties shall secure to everyone within their jurisdiction ***the rights and freedoms defined in Section I of this Convention***

Then follows in Section 1: Articles 2-18 containing  
Right to life , Prohibition of torture, Right to Liberty,  
Fair trial, Family Life etc.

***Moving from the largely European background...***

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**The Constitution of Japan 1947**

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world..... We recognize that all peoples of the world have the right to live **in peace, free from fear and want** .AND then...

**Article 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.** And further in Articles 12, 13 etc through to Art 40.

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And also in the Bangkok Declaration 1993 signed by a wide group of Asian states:

Article 1 : “Reaffirm their commitment to the principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights as well as the full realization of all human rights throughout the world;” ...

*Now moving to the recent international linkages that are part of the full international background...*

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### *S 1 & 2 The relationship of Human Security , Protection and the International Human Rights (IHR) Framework*

*We need to look briefly at:*

The relationship between, Human Dignity, Human Rights, Human Security, “R2P” \*and Refugee rights/obligations and all other asylum/international protection law. AND

The recognised obligations of States to provide “*Protection*” and “*Security*” to their nationals and, when they do not ,the individual right to seek and enjoy “*surrogate protection*”.

See : Article by Judge Hisashi Owada: (former Justice at ICJ , The Hague :“Human Security and International Law” .....

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*The relationship of Human security and IHR Framework*

As very useful background look at Judge  
Owada's audio-visual lecture, titled "Human  
Security and International Law", which is now  
accessible through -

*<[http://legal.un.org/avl/ls/Owada\\_HS.html](http://legal.un.org/avl/ls/Owada_HS.html)>*

on the U.N. Audio-visual Library of  
International Law... AND UN material...

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*The relationship of Human security and IHR Framework*

On 10 September 2012, the United Nations General Assembly adopted Resolution 66/290,12 in which it “[recognized] that development, human rights and peace and security, which are the three pillars of the United Nations, are interlinked and mutually reinforcing”

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*The relationship of Human security and IHR Framework*

**Resolution 66/290,12 included:**

[...] The right of people to live in freedom and dignity, free from poverty and despair. All individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential[.]

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*Summary of the essentials –*

AT this point noting all this international consensus is it thus correct and logical to say these are the fundament core norms of human dignity, human security and human rights we all want, or aspire, to live by?

AND, having agreed and recorded them so widely, it seems self evident that:



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*S1 and 2 : Summary of the essentials –*

***Logically we should (must) turn to  
these essentials elements of  
international law and practice for the  
vital knowledge and reference points  
in making all refugee and  
complementary protection decision  
making? AND...***

*Summary of the essentials –*

Perhaps a little cynically, and without trying to take any political stance, but a simple lawyer's or academic's "rule of law" view:

***“Why, presently, in so many countries are these essentials now being ignored, overlooked, ridiculed and blatantly flouted more and more?”...***

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*“Understanding the essentials -*

:And you can see why as a former judge, sworn to uphold the Rule of Law, as all judges are, I want to come back to the opening comment, and ask you, as students of Human Security, law, and related topics, to think about the following questions throughout the two courses .

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*“Understanding the essentials -*

*“ 1. Is there a correct balance between these established and virtually universal norms of : the international rule of law , with its links to Human rights, Human dignity and security.. **And** the growing “nationalist” or “populist” “closed border’ approaches to refugee and migration issues?” ...*

*“Understanding the essentials –*

*2. “If not why not?”*

As you see it seems to me there may be a major disconnect here ? Or maybe I am wrong and many human beings do not want to live by these actual norms and find human rights, rule of law, solutions for human problems any more??...

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*“Understanding the essentials -*

So , at minimum, we can agree we should endeavour to find a workable balance and continue to believe the Rule of law and Human Dignity should still be universally respected. AND we have the essential background mind-set to approach the issues.

AND we can now look at the appropriate application of IHRL to the refugee and complementary protection context...

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*The International Human Rights Framework*

## **Application of International Human Rights to Refugee Context**

- è legal interpretation of refugee concepts
- è treatment of refugees in country of asylum
- è monitoring and protection from *refoulement*
- è prevention and solution of refugee situations