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The Operation of UNHCR's
Accountability Mechanisms

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Abstract:

The office of the United Nations High Commissioner for Refugees (UNHCR) is mandated to provide protection to the world's refugees. Amongst its activities, it decides who is entitled to protection and runs refugee camps. These take place on a massive scale and affect the lives of millions: UNHCR single-handedly conducts refugee status determination in 80 countries worldwide and during 2004 it had at least 75,000 asylum applications to deal with, making it the largest single status determination body in the world. In 2002 the total number of people in camps administered by UNHCR was well over four million, with UNHCR exercising or superintending many administrative, judicial, or quasi-judicial powers in these camps. Its work has helped millions. But during refugee status determination, appeal rights and other elements of due process are often limited, and in UNHCR camps, numerous violations of the human rights of refugees have occurred, including sexual abuses, collective punishments, inhuman or degrading treatment, and coercive limits on freedom of expression. This paper examines UNHCR's existing accountability mechanisms and proposes substantial improvements, including a rights-based focus.

The Operation of UNHCR's Accountability Mechanisms

*Mark Pallis**

'The principal consumers of the UNHCR's services, the refugees themselves, have little or no means of influence or recourse in cases where the Office's programmes and policies may be unsatisfactory or may even lead to increased suffering or even death in some situations.' Gil Loescher¹

1. Introduction

Across the world, the office of the United Nations High Commissioner for Refugees (UNHCR) is running refugee camps and carrying out refugee status determination. These actions have a direct impact on the lives of refugees. This impact has helped millions but is not always positive, and refugees' human rights have been violated by UNHCR's actions.² In well-functioning national systems, institutions and principles of domestic administrative law to some extent enable refugees to hold the state to account for violations the state commits. As a global body however, the same is not true for UNHCR. To think about how to fill this glaring gap it becomes necessary to consider principles of global administrative law.

This paper analyses the accountability mechanisms that currently operate within UNHCR. It argues that these mechanisms do not render UNHCR accountable to refugees, and

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¹ G. Loescher, *The UNHCR and World Politics: a perilous path* OUP, 2001 at 358.

² For numerous examples of violations, see G. Verdirame and B. Harrell-Bond, *Rights in Exile: Janus faced humanitarianism* Berghahn, OUP, 2005.

that this situation should be rectified. It considers from a normative perspective the legal and political standards which should apply when UNHCR is held to account. Using as benchmarks the criteria of access, outcomes, and ability to promote compliance with relevant standards, a critique is made of the accountability mechanisms currently employed by UNHCR. It is argued that these mechanisms are primarily top-down tools in which accountability is owed to those who have delegated power. These mechanisms offer minimal scope for refugee participation. The paper then discusses the political factors that have led to this situation, and concludes by making proposals for action.

Two preliminary questions underlie this analysis: *why* is accountability important, and *who* should be entitled to hold UNHCR to account? Accountability is essential because it is a means of ensuring more effective protection of rights by providing individuals with the opportunity to seek redress for rights violations. Institutional subservience to human rights entrenches the view that refugees are possessed of inalienable rights. This betters their status and puts all their interactions with UNHCR on a more level playing field.

Accountability is also important because in camps UNHCR is - in almost all senses - the refugees' government, controlling all important aspects of their lives. Whether UNHCR can be held to account for its actions will determine whether it is a responsive government, or a benevolent dictator, and will determine whether the refugees are simply 'flotsam, *res nullius*'³ or real people, citizens with rights and aspirations.

Most agree with the idea that an exercise of public power that directly affects the status of individuals should be subject to accountability mechanisms. There is less consensus however, over who is entitled to hold the decision-maker to account in such circumstances: those who entrust the decision maker with power, or those who are affected by its actions? At present, the former idea – expressed in the form of 'delegation' models of accountability – is finding more favour than the latter, 'participation' models.⁴ In practice, delegation models are easier to implement and thus more popular. More fundamentally, in the theory of the emerging global administrative law, the idea of participatory accountability has lost its connection with the goal of rights protection and has become tangled up with questions of democratic participation – questions that are immensely complex at a global level, and beyond the scope of this paper. This

³ P. Weis 'The International Protection of Refugees' 48 *American J of Int'l Law* 1954 at 193.

⁴ See R. Grant and R. Keohane, *Accountability and Abuses of Power in World Politics*, *IILJ Working Paper* 2004/7.

seemingly ineluctable democracy–participation link means that ‘bracketing questions of democracy’⁵ risks weakening the case for participatory accountability mechanisms and in doing so risks removing, or at least reducing, the role that people can play in the new field of global administrative law.

Abstract questions about the flaws in global democracy should not sound the death-knell for participatory accountability mechanisms in global administrative law. As Susan Marks has urged, there is no need for a final resolution of all the democracy questions at this stage. Democracy can be seen in a more fluid manner, as a critical concept for evaluating political arrangements with anti-paternalism, inclusion, equality and the rule of law as key evaluative principles. Thinking of democracy in this way avoids the technical quagmire of global democracy, and brings the protection of rights back to the heart of the normative foundation for participatory accountability. Instead of being bracketed, democracy can become shorthand for ‘people’: an ever-present reminder of the centrality of the individuals affected by the administrative decisions of global bodies.

It is hoped that this paper, by illustrating how one global body could become more accountable to those affected by its actions, will provide some useful practical suggestions for reform, but also demonstrate that it is not only desirable but possible for people, through participatory accountability mechanisms, to play an active role in global administrative law.

2. Relevant Rules

2.1. Approaches to the problem

A vital step in thinking about accountability is establishing the standards against which those exercising power should be held accountable. This section discusses a number of different rules, including hard law and soft law rules. These rules are sometimes more and sometimes less binding on UNHCR and in light of this variety, this paper uses the notion of ‘relevant’ standards rather than ‘applicable’ standards: its aim is to establish a coherent and politically viable set of standards to which UNHCR can be held to account.

⁵ B. Kingsbury, R. Stewart, N. Krisch, *The emergence of Global Administrative Law, IILJ Working Paper, 2004/1* at 38.

The most formal level is establishing whether any laws actually bind UNHCR. Through the legal obligation to act in accordance with such laws, they become unequivocally relevant as standards to which UNHCR can be held to account. The International Law Commission has been considering the responsibility of international organizations in international law for many years but few decisive conclusions have been reached. However, the UN's changing role in the world has provided a new imperative for research into its legal obligations. Academics now suggest that traditional legal assumptions about the scant nature of these legal obligations need to be rethought.

The central challenge for those seeking to show that international human rights law is applicable to the activities of the UN is that the UN is not itself a party to human rights treaties. There are, however, alternative ways of making human rights apply to the UN. Scholars have suggested three main approaches. The first argues that UN bodies have sufficient personality to be bound by human rights law and that general principles of international law – including *ius cogens* and customary international law – can and do bind them in many circumstances.⁶ This creates the anomalous position that an organization could be bound by custom the formation of which it had not contributed to, but as Verdirame suggests, this is no different from the situation faced by ex-colonies at independence.⁷

A second approach relies on the fact that one of the purposes of the UN is to promote and encourage respect for human rights and for fundamental freedoms. This leads to the idea that 'the United Nations is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order, without any added judicial finesse.'⁸ This approach applies the entire corpus of international human rights law to the UN in one fell swoop!

The downside is that such arguments leave large amount of indeterminacy when it comes to precise rules, and to precise legal consequences of particular actions. However, they do form a solid baseline from which one can build the normative case for holding UNHCR accountable to human rights standards.

⁶ G. Verdirame, *The accountability of the United Nations for violations of human rights*, forthcoming, CUP 2005. Chapter II.

⁷ *Ibid.*

⁸ F. Megret and F. Hoffman, 'The UN as a Human Rights Violator: some reflections on the United Nations changing human rights responsibilities'. 25.2 *Human Rights Quarterly* 2003 pp314-342 at section a2.

A third approach considers the statal functions exercised by UNHCR, and leads to the idea that UNHCR must respect international human rights by virtue of the fact that it is exercising functions that have been transferred to it by a state.⁹ On a firmer basis legally, this idea is hampered practically because many of the states where UNHCR operates are not party to international human rights treaties, or have entered numerous reservations. It is also often unclear whether statal functions have actually been transferred to UNHCR. In the grey legal areas that so often surround UNHCR's relations with a host state, it can be hard to claim anything more than that UNHCR should be 'bound' just because an obligation theoretically exists on a host state. Despite this legal hiccough, this approach retains political weight: who would disagree with the proposition that UNHCR should not offer a lower standard of protection than the state in which it is operating?

Just as 'hard' human rights law can be relevant to UNHCR, so can 'soft' law. General Assembly resolutions are a case in point. UNHCR's Statute provides that it 'shall follow policy directives given [to it] by the General Assembly or the Economic and Social Council [ECOSOC]'.¹⁰ Further, Verdirame suggests that 'the General Assembly, as a parent organ, can expect its own subsidiaries, over which it has greater clout than over states, to comply with the standards it sets.'¹¹ It is unclear whether such reasoning means that UNHCR is obliged to comply with all General Assembly resolutions – including declarations on human rights – or simply those that are directed to it.

'Soft law' is also used to refer to UNHCR policy guidelines, handbooks and perhaps most importantly, the resolutions of UNHCR's 'advisory committee on refugees'¹² – the

⁹ See R. Wilde '*Quis Custodiet Ipsos Custodiet?*: Why and How UNHCR Governance of 'Development' Refugee camps should be subject to international human rights law.' 1 [5] *Yale Human Rights Dev Law J*, 1998 at para 24; Verdirame, *supra* n7 at 72 (pagination subject to change); see also *Waite and Kennedy v. Germany* (Judgment), Application No. 26083/94, 18 February 1999, at para. 67. It should be noted, however, that the flip-side of this approach - the responsibility of states for the conduct of international organisations - is an issue on which states are yet to agree and on which considerable more work must be done.

¹⁰ UNHCR Statute, Art 1(4).

¹¹ Verdirame *supra* n6 at 79.

¹² Statute of the Office of the United Nations High Commissioner for Refugees, 1950, Art 4. ExCom is mandated to, *inter alia*, review and approve the material assistance programme of UNHCR and, on the request of the High Commissioner, advise on his or her functions under the Statute (Economic and Social Council Resolution 565 (XIX) of 31 March 1955, adopted pursuant to General Assembly Resolution 832 (IX) of 21 October 1954.) Its members are elected by ECOSOC and currently comprise representatives from 64 states. ExCom conclusions are 'relevant to the interpretation of the international protection regime. ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. The specialist knowledge of ExCom and the fact that its Conclusions are taken by consensus add further weight.' (Source: www.unhcr.ch/excom). Once

Executive Committee of the High Commissioner's Programme (ExCom).¹³ Chimni has pointed out that, in the Global Administrative law context, 'the distinction between soft law and hard law does not stand to reason.'¹⁴ This is especially true when establishing standards to which UNHCR should be held to account. UNHCR is promulgating policies and conclusions, and publicly expressing the wish that they be relevant standards for protection. Just as UNHCR holds governments to their promises,¹⁵ it is right to expect UNHCR to be held to its own standards.

The foregoing analysis has used legal and political arguments to suggest that human rights form the core standards to which UNHCR should be held to account. The reasons for the strong focus on political standards rather than legal ones are pragmatic: international organisations can avoid even the most elegant legal arguments by invoking their immunity;¹⁶ heavy reliance on judicial mechanisms makes remedies slow to arrive, and expensive to obtain; and finally, highly legalized and bureaucratized institutional accountability mechanisms can become ossified and unresponsive to the problems they were intended to solve.

Using legal standards as relevant rules to form a political bottom-line creates a flexible accountability toolkit and ensures that important non-legal/soft-law standards are given a weight that is commensurate with their practical significance. These relevant standards can be used as a

ExCom has reached a conclusion, they are then developed by UNHCR as a secretariat, which interprets them and gives them practical effect.

¹³ A legal argument can be made that documents can formally bind UNHCR if they are deemed to constitute 'internal law'. P Kliein and P Sands, *Bowett's Law of International Institutions* 5th edn 2003 at 465. Internal law includes 'manuals, circulars and other statements issued by the administration which have a law making character' (C.F Amerasinghe *Principles of the Institutional Law of International Organisations*, Cambridge University Press, Cambridge 1996 n8 at 339). Internal law can also include the 'established practice' of the organisation (See generally Santiago Torres Bernardez 'Les organs des organisations internationales' Chapter 3, Section 4, in R. J Dupuy (ed) *Manuel sur les organisations internationales* 1998 p109. The term 'established practice' is found in the 1986 Vienna Convention on the Law of Treaties, both a treaty and an authoritative statement of customary international law. It provides: ' "rules of the [international] organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.' Article 2(1)(j).) Internal law can also become 'part of the conditions of employment' for staff. World Bank Administrative Tribunal Reports [1981], Decision No. 1 at pp11-12, cited by Amerasinghe.

¹⁴ BS Chimni, 'Winners and Losers in Global Administrative Law', 2005. www.iilj.org at 2.

¹⁵ 'The UN refugee agency's top legal official told governments today in Geneva that too many of them do not "practise what they preach" ... and urged them to live up to their own call for more "effective protection".' UNHCR News, www.unhcr.ch

¹⁶ There is a growing body of literature to suggest that immunity will not apply in all circumstances and by analogy, may not always apply to refugee status determination and the running of refugee camps. This question will not be discussed here. Immunity must be invoked if it is to take effect, and this is a political decision. See Michael Singer, 'Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns' 36, 1 *Virginia J of Int'l Law* 1995 53 at 97; Karel Wellens, *Remedies against International Organisations*, CUP Cambridge, 2002 at 215; August Reinisch, *International Organisations before National Courts*, CUP, Cambridge, 2000 at 369.

springboard to create inventive, flexible accountability mechanisms than can bring rights to life, and create participation outside of judicial processes.

2.2. *Specific accountability standards for UNHCR's activities*

UNHCR is 'mandated to safeguard the rights and well-being of refugees, to lead and coordinate international action for their worldwide protection and to seek permanent solutions to their plight.'¹⁷ Its operational role 'encompasses full responsibility and accountability to the international community for all aspects of the complete life-cycle of a refugee situation'.¹⁸ UNHCR has the most direct impact on refugees' lives in refugee status determination and refugee camp administration and it is consequently these activities that are discussed in this paper.

2.2.1 *Refugee Status Determination*

Refugee status determination is the application of a legal test (a refugee definition¹⁹) to a person who seeks refugee status. It is carried out either on an individual or a group basis. Once the refugee definition has been met, a further legal test of 'excludability' is applied to establish whether the individual is 'worthy' of refugee status. If that proves no bar, they go on to enjoy asylum in the country of refuge.

Under its statute, UNHCR is charged with the task of 'promoting the conclusion and ratification'²⁰ of international refugee conventions. This is no mean task, especially because many states are deterred from acceding to the conventions owing to the high financial cost of determining whether asylum seekers meet the refugee definition. It appears that a tacit *quid pro quo* has been reached between UNHCR and certain governments: accession to the refugee convention in return for UNHCR agreeing to bear the costs of 'identify[ing] the refugees

¹⁷ N, Kelley, P Sandison, S Lawry-White 'Enhancing UNHCR's capacity to monitor the protection, rights and well-being of refugees' Synthesis of findings, EPAU/2004/06, para 17.

¹⁸ *Partnership: an operations management handbook for UNHCR's partners* UNHCR, Geneva, Revised Edn, February 2003. Section 1.5 at 1.

¹⁹ Commonly Art 1 of the 1951 Geneva Convention Relating to the Status of Refugees.

²⁰ Statute of the Office of UNHCR, Art. 8(a).

eligible'.²¹ So whilst most western states conduct refugee status determination for themselves, UNHCR conducts it in many of the poorest states of the world.

UNHCR single-handedly conducts refugee status determination in 80 countries worldwide; during 2004 it had at least 75,000 asylum applications to deal with, making it the largest single status determination body in the world.²² In many circumstances, the life of the individual hinges on the quality of the status determination procedure, for example on whether the legal test is correctly applied, or on whether the facts of the individual's case are properly communicated and understood. A procedural failure can leave a refugee at risk of return to the country from which they fled (*refoulement*), it can deny them a durable solution, and it may cost them their lives.

Studies have shown that the risk of procedural failure is not merely a theoretical possibility. In a paper based on evidence gathered from UNHCR's refugee status determination activities in Egypt and Jordan, Mike Kagan set out a number of grave procedural failings including: specific reasons for rejection are not provided to asylum seekers; evidence considered in cases is withheld from applicants concerned; critical parts of standard operating procedures are withheld from the public²³; most appeals are rejected without an in-person re-hearing and appeals are not considered by a fully independent unit.²⁴

²¹ Extract from Art 2 of the 'Agreement Between the Egyptian Government and The United Nations High Commissioner for Refugees', Cairo, 10 Feb. 1954, unofficial translation. Copy on file with Author.

²² Source, www.rsdwatch.org. Figures correctly derived from 2004 Global Refugee Trends, UNHCR June 2005.

²³ In a recent study conducted in Cairo, only three of the sixteen known UNHCR Standard Operating Procedures had been released with the remained either being actively withheld, or simply not made public. M. Kagan, 'Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002' section 2(a) source: <http://www.aucegypt.edu/academic/fmrs/Reports/RSDReport.pdf>. This significantly hampers legal representation: for example, in 2001 the author was engaged in trying to secure refugee status for a group of Sierra Leonean asylum seekers in Cairo. During an attempt to secure the resettlement of a group of 60 Sierra Leoneans in Cairo, and aware that there were UNHCR 'Policy Guidelines on Sierra Leone' the author requested to be allowed to see a copy in order to assist in drafting relevant legal submissions. The request was politely denied. (Email from UNHCR Representative to Mark Pallis 2nd July 2001. Copy on file with Author).

²⁴ M. Kagan, 'The Beleaguered Gatekeeper: protection challenges posed by UNHCR refugee status determination', forthcoming, *Int'l J of Refugee Law*. In relation to appeals, the existing practice of UNHCR is grossly discordant with existing principles. For example, in a recent Excom paper on 'Fair and Efficient Asylum Procedures' it found that it is 'essential ... that the appeal be considered by an authority different from and independent of that making the initial decision.' (UNHCR Background paper, 'Asylum Processes (Fair and Efficient Asylum Procedures)' 31 May 2001 EC/GC/01/12 at para. 42.) This position is supported by the EU Council directive which recognises that individuals 'have the right to appeal against any decision taken on the admissibility or the substance of their application for asylum. Appeal may be both on the facts and on points of law'. Article 32, proposed EU Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, C 62 E/238 27/2/2001.

When refugee status determination is conducted by states, asylum-seekers benefit from domestic procedural safeguards including appeal and often also judicial review. Furthermore, questions can be asked in national parliaments about the governmental agency conducting the status determination; refugees who feel aggrieved have access to non-governmental organisations (NGOs) that may follow up their complaints; UNHCR monitors states' refugee status determination procedures as part of its 'supervisory role', and the media also takes a keen interest in immigration issues. Refugees facing status determination by UNHCR do not have recourse to these avenues. Whilst UNHCR monitors states' refugee status determination, it does not oversee its own determination activities in the same way²⁵ and it is only very recently that NGOs have begun to do so.²⁶

There are four main bodies of rules that are relevant to UNHCR's refugee status determination, and constitute standards to which it should be held to account. The core rule is the 'RSD obligation'.²⁷ The obligation is derived from the *ius cogens*²⁸ / customary international law rule of *non-refoulement* which prohibits the return of 'refugees'. That prohibition implies that there will be an effective way of finding out who is and who is not a refugee. When the rule of *non-refoulement* is combined with the 'guarantee of effective legal protection' – a general principle of law – the RSD obligation is created: an obligation to conduct refugee status determination in a manner which provides effective legal protection against the possibility of *refoulement* or denial of rights due under the refugee convention.

Second, refugee status determination should accord to the due process standards of Article 14(1) of the International Covenant on Civil and Political Rights which provides that 'in the determination of ... his rights and obligations in a suit at law everyone shall be entitled to a fair public hearing by a competent, independent and impartial tribunal established by law'. There is no consensus on whether this paper has customary international law status nor on the

²⁵ See s 4.1 below.

²⁶ See www.rsdwatch.org

²⁷ M. Pallis, 'Obligations of States towards asylum seekers at sea' 14 2/3 *Int'l J of Refugee Law* 2003 at 346-7. See also R. Marx, '*Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*' 7 *Int'l J of Refugee Law* 393 1995. Also of relevance is the customary international law principle of 'effectiveness', and the 'general principle of law' of the guarantee of effective legal protection. (Wellens, *supra* n17 at 16). The RSD obligation has also been conceptualised by courts as an asylum seekers' 'right to a hearing in order to determine whether that person meets the criteria of the Convention' (*The Haitian Centre for Refugees et al v The United States* Case 10/675, Report no. 51/96, 13 March 1997, 5 IHRR 1998, para. 155).

²⁸ Jean Allain 'The Jus Cogens nature of *non-refoulement*' 13 4 *Int'l J of Refugee Law* at 533-558.

question of whether refugee status determination constitutes a 'suit at law'.²⁹ The arguments in support of an RSD determination being a 'suit at law' include the broad point that it is essential that there is no generic bar to the applicability of due process standards to administrative tribunals – otherwise states wishing to avoid the rules could simply transfer certain judicial matters to tribunals or international organisations and subsequently operate above the law.³⁰ Perhaps most importantly, in practice, UNHCR has instructed its officers to respect Article 14(1) during refugee status determination³¹ - a very strong indication that it is reasonable to include it as a standard for accountability, regardless of whether it is customary international law or not.

Third are the agreements signed between UNHCR and the host state which govern refugee status determination and make explicit reference to the tasks which UNHCR is entrusted to perform.³² In many cases, these tasks are statal functions: for example, in the Memorandum of Understanding between UNHCR and the Government of Jordan, explicit reference is made to refugee status determination.³³ This indicates that Jordan relies on UNHCR to enable it to meet

²⁹ Australia argued to the UN Human Rights Committee that refugee status determination did not constitute a suit at law (A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997). For an analysis of the case law supporting the conclusion that refugee status determination is a 'suit at law' see M. Alexander, 'Refugee Status Determination conducted by UNHCR' *Int'l J of Refugee Law* Vol. 11, No. 2, 1999 at section 1.5. See also Verdirame, *supra* n7 who argues 'Firstly, there is ultimately no persuasive reason for excluding refugee status determination from fair trial provisions, particularly since, in many ways, refugee status determinations is so unequivocally a 'suit at law' for determining an individual's rights and obligations (Art. 14, ICCPR). Secondly, the protection regime for refugees cannot be effective if the underlying determination is improperly conducted thus increasing the probabilities of wrong decisions. Finally, when the practice on a particular aspect of refugee law differs, UNHCR ought to promote the best practice, which is the practice that is most respectful of the rights of refugees and is consistent with the 1951 Convention.'

³⁰ It should be noted that in the sphere of criminal proceedings, which are in many respects similar to refugee status determination as far as the consequences for life and liberty are concerned, 'the protection of human rights seems of particular importance since due process guarantees are ontologically intertwined with dominant liberal conceptions of what due process means.' (Megret and Hoffman *supra* n9, section B.)

³¹ UNHCR Standard Operating Procedure, Cairo 2002. Cited by M. Kagan, *supra* n24.

³² Agreement between the Government of Egypt and the United Nations High Commission for Refugees 1954 (unofficial translation, Copy on file with Author). It is 'Without prejudice to Egyptian legislation' and states that specific tasks have been 'entrusted' to UNHCR, among them to 'Cooperate with the governmental authorities in view of ... identifying the refugees eligible under the mandate of the High Commissioner.' The use of the word 'entrusted' arguably evidences delegation. Although UNHCR is exercising discretion when conducting refugee status determination, 'an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the state' (J. Crawford, *International Law Commission Articles on State Responsibility: introduction, text and commentaries*, CUP 2002 at 102).

³³ Memorandum of Understanding between the Government of Jordan and UNHCR 1998 (unofficial translation, copy on file with Author). Art 2 provides: 'In order to safeguard the asylum institution in Jordan and to enable UNHCR to act within its mandate to provide international protection to persons falling within its mandate, it was agreed; (1) that the principle of *non-refoulement* should be respected that no refugee seeking asylum in Jordan will be returned to a country where his life of freedom could be threatened because of his race, religion, nationality,

its obligation of *non-refoulement*: in other words, whether Jordan incurs responsibility under that obligation depends on UNHCR and the accuracy of its refugee status determination procedures. Additional norms may also be part of the agreement: Wilde argues that ‘there is no limit on the sorts of obligations that can be included, and they may well include UNHCR’s own guidelines or ExCom conclusions.’³⁴ These agreements are of most practical relevance when it is states seeking to hold UNHCR to account. However, from a political point of view there is no reason why UNHCR should not be expected to meet the terms of its agreement with a state, and it is therefore fair to include rules contained in these agreements as standards to which UNHCR can reasonably be expected to be held to account.

Soft law provides extensive relevant rules for refugee status determination.³⁵ As stated above, ExCom produces authoritative interpretations of relevant standards. Although these standards are soft from a legal perspective, when assessed in terms of their practical impact, they are of intense importance. It is this practical significance which imbues Excom conclusions with the authority to be standards to which it is fair to hold UNHCR to account.

2.2.2 Refugee camps

In 2002 the total number of people in camps administered by UNHCR was well over four million.³⁶ Camps vary, but many refugees live in so-called ‘development camps’ which have been described as:

‘sophisticated polities, with marketplaces, schools, hospitals, mosques, churches, running water, and decision-making fora. Demographics within them are not necessarily homogenous, and often coexisting refugee populations manifest profound differences in country of origin, culture, religion and education.’³⁷

UNHCR’s role includes ‘a wide range of administrative, judicial, or quasi-judicial and semi-judicial, powers.’³⁸ These powers are broad: in the field of punishment, in Kenyan camps for

membership of a particular social group or political opinion; (2) above does not include persons whose applications for asylum were rejected by UNHCR.’

³⁴ Wilde *supra* n9 at para 25.

³⁵ There is a vast body of other UNHCR procedural guidelines on RSD, see Alexander, *supra* n26, and see also M. Kagan, *supra* n24

³⁶ Total = 4,439,158. Source: 2002 UNHCR Population Statistics (Provisional) http://www.unhcr.ch/static/statistics_2002/asr02-dr2-Table15.pdf .

³⁷ Wilde *supra* n9.

example, domestic law is rarely applied, with decisions that affect human rights being ‘taken “informally” either by humanitarian agencies or by the “customary courts”’.³⁹ It is often difficult for domestic officials to exert their jurisdiction, indeed in Nepal, according to the Superintendent of Police in the Jhapa District Police Office, UNHCR asked the local police to inform it before they enter the refugee camps.⁴⁰

UNHCR ostensibly exercises these powers to provide protection for refugees until they can return home. It was therefore extremely shocking when a comprehensive socio-legal study, based on three years’ fieldwork in refugee camps in Kenya and Uganda, revealed that UNHCR was responsible for numerous violations of the human rights of refugees in its camps, from collective punishment through violations of the prohibition on inhuman or degrading treatment, to limiting freedom of expression.⁴¹ To its credit, UNHCR has begun to face up to this reality:

‘I would certainly not try to discount the possibility that there hadn’t been miscarriages of justice, or even examples of collective punishment in refugee camps ... in many cases various traditional forms of justice are administered within the refugee community itself, and in many instances those traditional forms of justice don’t conform to international human rights standards.’⁴²

When thinking about relevant standards for accountability, it is important to remember that the buck for protection stops with UNHCR. UNHCR can be understood as both government and gatekeeper: gatekeeper in deciding who is entitled to protection, and the government in being entirely responsible for the running of the camps.⁴³ The day-to-day tasks such as providing education, healthcare, and activities are carried out in many instances by UNHCR’s partner organisations: to a limited extent by operational partners⁴⁴ and predominantly by implementing partners.⁴⁵ Although tasks are ‘contracted out’, UNHCR still bears ‘responsibility and

³⁸ Wilde *supra* n9 at 168.

³⁹ Wilde *supra* n9 at 169.

⁴⁰ Source, Kathmandu Post, ‘UNHCR wakes up to violence against women, but still mum’ 5 Nov 2002.

⁴¹ Verdirame and Harrell-Bond, *supra* n2.

⁴² Extract from Interview with Jeff Crisp, Head of UNHCR’s evaluation and policy analysis unit, cited in ‘Combining refugee relief with local development in Africa’ ID21 Media www.id21.org/id21-media/refugees/refugeecamps.html.

⁴³ Wilde *supra* n9.

⁴⁴ Defined by UNHCR as: ‘Governmental, inter-governmental and non-governmental organisations and UN agencies that work in partnership with UNHCR to protect and assist refugees, leading to the achievement of durable solutions.’ *UNHCR Partnership Manual* section 1.6, at 2.1 (source: www.unhcr.ch).

⁴⁵ Defined by UNHCR as: ‘Operational partner that signs an implementing agreement and receives funding from UNHCR’. *Ibid* section 1.6, at 2.1.

accountability for the effective planning and design of UNHCR funded projects, and their overall supervision, monitoring and evaluation.⁴⁶

Often, the responsibility is almost absolute with host countries simply ceding control and full responsibility of the camps to UNHCR:

‘[t]he result is that instead of being just responsible for the protection of refugees, and providing humanitarian assistance to refugees, the UNHCR and its implementing partners actually become responsible for the whole administration of very large populations – it could be 50,000, 100,000, or even 200,000 people.’⁴⁷

Another way of expressing the concept of ‘full responsibility’ is to say that ‘there is no practical difference between the exercise of authority by UNHCR and that which the host state would exercise if it were capable.’⁴⁸ The legal consequences of this are disputed, but the author finds merit in the opinion of Verdirame that a legal obligation is created on UNHCR not to do anything to engender the responsibility of the host state. From an accountability perspective, this would translate as incorporating any rule, the breach of which would engender the host state’s responsibility, as a standard to which it would be fair to hold UNHCR to account.

It is also important to mention – just as in the case of refugee status determination – the relationship between UNHCR and the domestic law of the host state. Memoranda of Understanding setting out the relationship between UNHCR and states determine their respective rights and responsibilities. The General Assembly has underlined that ‘the ultimate responsibility for the refugees within the mandate of the High Commissioner falls in fact on the

⁴⁶ *Ibid.* Section 1.5 at 2.2. It is beyond the scope of this paper to extend its analysis to the accountability of the partner organisations to refugees, and the diverse Refugee Committees that exist in camps (such as those with ‘significant problems’) in Guinea (T. Kaiser, ‘A beneficiary-based evaluation of UNHCR’s programme in Guinea, West Africa’ EPAU/2001/02 January 2001) but it is suggested that this is an imperative project. (See generally E. Aukot ‘It is better to be a refugee than a Turkana in Kakuma: Revisiting the relationship between hosts and refugees in Kenya’ *Refuge* Vol 21, 3 2003 where he states ‘For example the International Rescue Committee was accused of “overtly abusing and offending the local community in ways which left it with no alternative except its exit from Kakuma in the shortest time possible.” ... Whilst it is understandable that NGOs cannot participate in “local politics” this does not warrant disrespect and ignoring complaints that would affect refugee protection.’ (footnotes omitted) See also ‘All About Protection: an examination of the immunity of UNHCR and its implementing partners’ Peter Dennis (unpublished manuscript, copy on file with author).

⁴⁷ The quote continues, ‘Of course, we don’t have the capacity or probably don’t have the expertise to administer and manage population settlements of that size.’ Extract from Interview with Jeff Crisp, *ibid.*

⁴⁸ Wilde *supra* n9.

countries of residence’,⁴⁹ but on a day-to-day level, UNHCR remains bound by the terms of the agreement as well as by the state’s domestic law.

In conclusion, UNHCR believes that refugees should enjoy the full range of rights in camps:⁵⁰ ExCom has held that refugees ‘should enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights; ... they are to be considered as persons before the law, enjoying free access to courts of law and other competent administrative authorities.’⁵¹ As such, this position creates a strong rationale for including these rules as relevant standards for accountability.

The UN position was clarified with the UN’s Office of Internal Oversight Service conducted an investigation into alleged child sex abuse in UNHCR-run refugee camps in West Africa. It held that UNHCR’s and other NGOs’ conduct should be measured against a legal framework that encompassed more than simply the basic human rights norms: ‘it was determined that the applicable legal framework to deal with cases of sexual exploitation would be contained within the following texts: the Convention of the Rights of the Child, of 1989; the African Charter on the Rights and Welfare of the Child, of 1999; the penal laws of the three countries and the codes of conduct of international organisations and NGOs.’⁵²

The moral force of the imperative to uphold human rights law, combined with the political argument that one should ‘practice what you preach’, and legal arguments for the applicability of law to UNHCR, all work together to create a framework of rules to which it is fair to hold UNHCR to account. Whether in relation to UNHCR’s activities running camps or conducting refugee status determination, the foregoing analysis has shown that refugees are entitled to expect UNHCR to operate with respect for their rights and welfare, and that they are entitled to hold it to account if this does not take place.

⁴⁹ GA Res 832, UN GAOR, 9th Sess., Supp. No 21, at 19, UN Doc. A/2890 (1954).

⁵⁰ See for example, Secretary General’s bulletin 9 Oct 2003 – special measures for protection from sexual exploitation and sexual abuse. ST/SGB/2003/13. See also A. Jamal, ‘Minimum Standards and essential needs in a protracted refugee situation: a review of the UNHCR programme in Kakuma, Kenya’, EPAU Doc EPAU/2000/05, November 2000.

⁵¹ Executive Committee Conclusion 22 (XXXII) – 1981, ‘Protection of Asylum-seekers in situations of large scale influx.’ In addition, also relevant the customary human rights standards such as freedom from torture or inhuman and degrading treatment and also the prohibition on collective punishment.

⁵² Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa. http://www.un.org/Depts/oios/reports/a57_465.htm , Summary.

3. Assessment of existing mechanisms

UNHCR is funded by states, and it is states that have entrusted it with the power to act. In the creation of its accountability mechanisms, this fact has loomed larger than the direct impact which UNHCR has on the lives of refugees. States are regarded as the power-wielders, with UNHCR acting as the trustee who will perform the duties of office faithfully. The mechanisms which UNHCR currently has in place have reflected this conception, with consistent emphasis being placed on effectiveness and performance, and with accountability to refugees and their participation being a subsidiary concern.

The main relevant bodies in UNHCR are the Evaluation and Policy Analysis Unit (EPAU), the Inspector General's Office and the UN-wide body the Office of Internal Oversight Services (OIOS). These are referred to as forming part of UNHCR's 'oversight and performance review'⁵³ mechanism, the overall purpose of which is to 'assess and enhance the organisation's operational efficiency, effectiveness and impact.'⁵⁴ At the same time as providing an oversight function, recently, more and more emphasis has been placed on creating accountability, and these mechanisms have been placed under pressure to provide it. UNHCR has described 'effective investigations and the follow-up action that these entail' as being 'among the key priorities of the Office.'⁵⁵ In response to suggestions from the Government of Canada and the spate of alleged sexual exploitation scandals, UNHCR commissioned a report on 'Enhancing UNHCR's capacity to monitor the protection, rights and well-being of refugees',⁵⁶ and has launched special appeals to provide for accountability.⁵⁷

This section discusses the three existing mechanisms, focusing on how they work and what they achieve. The principles of access, outcomes and ability to promote compliance with

⁵³ Executive Committee of the High Commissioner's Programme, 'UNHCR's Organisational Oversight and Performance Review Framework', 18 September 2000, UNHCR Doc. EC/50/SC/INF.6.

⁵⁴ *Ibid.* Para. 2.

⁵⁵ Enhancing Oversight and Accountability in UNHCR: A joint supplementary funding appeal for UNHCR's Inspector General's Office, Division of Human Resources Management and Legal Affairs Section (August 2003 – December 2004) para 1. Source www.unhcr.ch.

⁵⁶ N, Kelley, P Sandison, S Lawry-White, *supra* n18.

⁵⁷ *Supra* n55.

relevant standards are used as analytical springboards to suggest changes which could be made to help create greater participatory accountability.

3.1 The Office of Internal Oversight Services

The Office of Internal Oversight Services (OIOS) is the central UN-wide mechanism established in 1994 to ‘enhance oversight functions, in particular with regard to evaluation, audit, investigation and compliance.’⁵⁸ One of its goals is bringing about ‘a culture of accountability’.⁵⁹ As its name suggests, it focuses predominately on internal issues.⁶⁰ It is a classic example of an institutional check and balance; a way for the UN to ensure that its organs are carrying out tasks in accordance with their mandate. An examination of its previous activities relating to UNHCR will help to establish whether it is a mechanism that has the potential to enhance UNHCR’s accountability to refugees.

The relationship between the UN’s OIOS and UNHCR’s own accountability mechanisms is not formalised. The OIOS investigations of UNHCR conduct (the West African sex abuse scandal⁶¹ and - indirectly via an independent task force - the Nairobi resettlement scandal⁶²) both predate the creation of Investigations Unit of the Inspector General’s Office (see 3.2 below) and it seems likely that in future such investigations may be carried out by the Investigations Unit. On the other hand, UNHCR still maintains a close relationship with OIOS, and stated in 2003 that ‘referrals and other forms of collaboration between the OIOS Internal Audit Service for UNHCR and the Inspector General’s Office have contributed to increased cooperation between

⁵⁸ GA Res. 48/218B, 23 December 1993, para. II.9.

⁵⁹ <http://www.un.org/Depts/oios/>. It defines its ‘mission’ as ‘To provide internal oversight for the United Nations that adds value to the Organization through independent, professional and timely internal audit, monitoring, inspection, evaluation, management consulting and investigation activities. To be an agent of change that promotes responsible administration of resources, a culture of accountability and transparency and improved programme performance.’

⁶⁰ See <http://www.un.org/Depts/oios/achievements.htm>

⁶¹ The scandal involved allegations of sexual abuse of minors and others by UNHCR and other staff. It arose from the following documents: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission 22 October – 30 November 2001. February 2002. Source: www.reliefweb.int.

⁶² The scandal involved, amongst other things, allegations of bribery and corruption at the UNHCR office in Nairobi. Investigation into allegations of refugee smuggling at the Nairobi Branch Office of the Office of the United Nations High Commissioner for Refugees 21 December 2001 A/56/733.

these oversight functions.’⁶³ The OIOS has distinct advantages over the Investigations Unit: greater access to resources; public reporting; a higher place in the UN hierarchy; and greater potential to bring pressure to bear on those in strong positions to effect changes, such as the UN Secretary General. In light of the ongoing relationship between the OIOS and UNHCR, it is useful to examine the previous investigations in order to determine how future collaboration could be used to maximise accountability to refugees.

The West African sex abuse allegations were investigated by the OIOS at the request of UNHCR.⁶⁴ The OIOS ‘assembled a carefully composed investigation team from eight countries comprising professional investigators, lawyers, refugee protection and human rights specialists, translators and a paediatric trauma specialist.’⁶⁵ The result was a strong report which, whilst finding that the original allegations against UNHCR staff were unverifiable, did trigger disciplinary conduct in some cases and did acknowledge the gravity of the problem of sexual abuse of refugees.

The investigation into corruption at UNHCR Nairobi had a longer history. Neither the UNHCR Representative at the Kenya office, nor the Regional Director for the East and Horn of Africa, both of whom ‘were convinced that corruption was taking place’⁶⁶ were able to find any definite evidence of it. As a next step, the United Nations Office at Nairobi Security and Safety Service undertook an investigation, which turned up no evidence of corruption. After this, the Inspector General was requested to investigate. After an investigation, the Inspector General referred the matter to the OIOS. The OIOS soon realised that the ‘very nature of the case required a prompt investigation by highly skilled and specially trained investigators’⁶⁷ and an International Task Force was set up comprising experts from Australia, Canada, Kenya, UK and USA. The Task Force was an *ad hoc* international body set up with a very specific mandate. It was impartial, dedicated and thorough; it was proactive and solution oriented; its report was public; its conduct was scrutinised both in the media and by national parliaments of those states

⁶³ ‘Report on UNHCR’s oversight activities’ Executive Committee of the High Commissioner’s Programme 5 August 2003, A/AC.96/976 para 76.

⁶⁴ Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa. http://www.un.org/Depts/oios/reports/a57_465.htm .

⁶⁵ *Ibid.*

⁶⁶ *Supra* n62, Recommendation 4, at 19.

⁶⁷ *Supra* n62, Recommendation 4, at 5.

contributing experts.⁶⁸ However, it took a number of years for the UN system to generate enough momentum to create the Task Force, during which time considerable extra hardship was suffered by refugees. Also, it remains unclear under what circumstances such task forces would be used again in future investigations, and this makes it difficult to factor them in as a reliable part of a long-term accountability structure.

Access to the OIOS is limited, as may be expected from an ‘internal’ oversight mechanism. What is revealing however, is that both of the requests for OIOS investigations came from UNHCR itself. On one hand, this may be a testament to UNHCR’s commitment to be open to scrutiny, (although the tremendous publicity surrounding both incidents made it almost impossible for UNHCR not to respond in a comprehensive manner) but on the other, it shows that, at least as far as UNHCR is concerned, the OIOS does not appear to be a watchdog on the lookout for potential problems, but rather a standing facility for ad hoc investigation. This goes against the grain of the idea that OIOS exercises ‘oversight’ over UN organs.

If the OIOS is simply a standing investigatory body, it is important for its role to be clarified in light of the existence of UNHCR’s own Investigations Unit. If the OIOS is to carry out its oversight functions effectively, it should have the capacity to institute investigations into UNHCR of its own volition when UNHCR is unwilling or unable to act. Given resource constraints, the OIOS could solicit information and possible topics for investigation from refugees, their advocates and non-governmental organisations. This would make the OIOS more effective, and at the same time would increase refugee participation in accountability structures.

When investigations have been carried out, they have delivered positive outcomes. Investigations have led to disciplinary action against individuals, they offered both specific and system-wide recommendations for future conduct, and they were high profile enough to generate the political will to push through the changes recommended at an institutional level, indeed - a spate of recommendations and guidelines were issued in response to the report into sexual abuse. Such guidelines are an important means of promoting compliance by ensuring that there are no gaps in the training or advice which UNHCR staff and partners receive.

The OIOS is not an appropriate body to provide remedies for refugees in individual cases, and it is not a substitute for a direct complaints mechanism. However, it is an important

⁶⁸ See for example the Parliamentary Questions tabled by T. Spelman MP House of Commons Hansard 19 September 2002, column 419.

accountability tool and refugees would benefit from participating in its processes: systemic problems which may have huge impacts on the lives of refugees can be addressed with an extremely thorough, ‘no expense spared’ approach; these investigations can lead to the dismissal of staff and consequently a bettering of the lives of those people who were being harmed; and finally, investigations can lead to new standards that can in turn become rules to which UNHCR can be held to account.

3.2 Inspector General’s Office

The Inspector General’s Office of UNHCR is an in-house monitoring and oversight mechanism, which will also follow-up on individual complaints brought to it. It was created in 1994 to ‘strengthen UNHCR’s oversight capacity, to assess, monitor and recommend improvements in operational management.’⁶⁹ Its functions are inspecting the management of field offices and Headquarters, investigating reports of misconduct lodged by UNHCR staff or refugees, and also undertaking *ad hoc* enquiries into incidents of violent attacks on UNHCR staff. They serve the ultimate aim of ‘support[ing] the effective and efficient management of UNHCR operations, including preventing waste of resources, and, through a range of preventive and pre-emptive measures, minimiz[ing] the need for remedial action.’⁷⁰

The most common activity of the Inspector General’s Office is inspecting UNHCR field offices. These inspections have an impact on the lives of refugees: in the thirteen inspections undertaken between 2000 and the end of 2003, 43% of all the Office’s recommendations have been on operational management, and of those recommendations, 47% have been directed towards protection issues.⁷¹

An additional function of the Office is ‘upon the High Commissioner’s request, [to] conduct enquiries into other types of incidents that could directly impact the credibility and integrity of the Office.’⁷² A dedicated Investigations Unit of the Inspector General’s Office carries out most of these enquiries. The Investigations Unit was created in September 2002 –

⁶⁹ ‘Report on UNHCR’s Inspection and Oversight Activities’ Executive Committee of the High Commissioner’s Programme 30 May 2002 EC/52/SC/CRP.12.

⁷⁰ Report on UNHCR’s oversight activities, *supra* n63, at para 41.

⁷¹ Report on UNHCR’s oversight activities, *supra* n63, figure 3.

⁷² UNHCR funding appeal, *supra* n55.

partly as a result of the scandal over corruption in the Nairobi office of UNHCR.⁷³ Between its creation and July 2003, its four staff had investigated 207 complaints, leading to UNHCR disciplinary action in 14 cases, and decisions by NGO partners to dismiss at least 34 staff as a result of two cases. Other investigations are still pending.⁷⁴

The procedure for follow up of complaints varies. As of July 2003, according to UNHCR statistics, only 11% of complaints required an investigation mission, the other investigations being conducted by telephone and email.⁷⁵ On the positive side, this allows for a large number of complaints to be dealt with. More negative, however, is the fact that by not being physically present, investigation teams cannot act as personal intermediaries between the complainant and the accused. Given the common practice of immediately referring a complaint back to the office or individual against whom it has been lodged, there is a risk that a complainant may be discriminated against by local staff feel aggrieved at having their own of their office's name sullied in Geneva.

Although public statistics are produced on the implementation of recommendations, (showing that just over half are fully or partially implemented⁷⁶) it is important not to be seduced into thinking that this makes the Inspector General's Office a transparent body⁷⁷ - there is not

⁷³ 'The revelation of the Nairobi corruption and the subsequent investigation have served as a wake up call for the Office.' *Supra* n62 at para 15.

⁷⁴ Report on UNHCR's oversight activities, *supra* n63 at para 69-70.

⁷⁵ Report on UNHCR's oversight activities, *supra* n63 at para 74.

⁷⁶ A total of 56% of the recommendations have either been satisfactorily implemented, or have been partially implemented. No data are provided as to whether it is the central or peripheral recommendations that are being implemented (Report on UNHCR's oversight activities, *supra* n64 at para 64). In addition, the statistics have no way of demonstrating whether investigators have made recommendations on all of the problems of a particular office. The Inspector general's investigation into the Nairobi UNHCR office is a pertinent example. The case was referred to the OIOS by the Inspector General, who did not take action. Defending this, UNHCR highlighted 'the difficulties that UNHCR, as a humanitarian organisation, has faced in conducting complex professional investigations.' (*Supra* n64, Recommendation 4, p19) Whilst understandable, this overlooks the fact that many of the problems in the office were relatively easy to identify: taking the example of 'violent assault' (*Supra* n64 at 4.) of refugees by security staff, this appears to have an endemic problem, with the UNHCR office being alerted to it at least as early as three years before the Task Force investigation (see Verdirame and Harrell-Bond, *supra* n2 who note an incident in 1998 where guards at the Nairobi Office seriously assaulted a refugee under the eyes of UNHCR staff). Why did the Inspector General not deal with this? If the problem was as blatant as the Task Force maintain, even if technically outside of allegations of people smuggling, it is shocking that a body charged with inspecting field offices did not solve the problem.

⁷⁷ In a 2003 study, the One World Trust 'Global Accountability Report' described UNHCR as having 'excellent access to online information' (*GAP report* 2003, One World Trust www.oneworldtrust.org at 12). Whilst UNHCR does put a tremendous amount of material on line and has an easy to use website, it is not comprehensive. Had the One World Trust known of UNHCR's refugee status determination work, or some of the Inspector General's reports, they would probably not have ranked its transparency so highly. The volume of material does not necessarily make it comprehensive. And of course, transparency should not be seen as a panacea: as Jodi Dean has pointed out 'All sorts of horrible political processes are perfectly transparent today. The main problem is that people

sufficient openness when it comes to the most important area: the content of the reports themselves. Unlike OIOS investigations, many Inspector General's Office investigations are not public. For example an investigation into allegations of 'rape and child abuse involving UNHCR employees'⁷⁸ in Nepal has remained out of the public domain. Its contents were revealed – in part – only when British Members of Parliament insisted that details were disclosed.⁷⁹ This lack of transparency in relation to the Inspector General's reports has been noted by Human Rights Watch: 'UNHCR should promote transparency and set a standard of accountability for its staff and partners by providing information on the disciplinary measures it has taken.'⁸⁰ Public reports are vital; they are essential in empowering refugees to assess the adequacy of the institutional response to their concerns. The press coverage that public reports generate is also significant, helping to galvanise non-governmental organisations and others to find out more, and to raise the alarm about similar concerns elsewhere in the world. No assistance can be given to UNHCR to help it solve systemic issues if the public are kept in the dark about things that are going wrong.

As the only partially participatory UNHCR accountability mechanism, it is crucial to examine the nature of refugee access to the Inspector General's Office. A positive sign is that, year-on-year, the volume of complaints has been increasing. It recently reached the point where UNHCR had to publish a request for extra funding 'to enable it to address the high number of complaints of misconduct that it is handling.'⁸¹ This increase is a positive sign; showing that awareness of the mechanism is increasing, and that more and more people believe that it will give them a satisfactory outcome.

The UNHCR funding request explains the result of the increase in complaints by reference to five factors, the most pertinent being the 'setting up in some asylum countries of

don't seem to mind, that they are so enthralled by transparency that they have lost the will to fight.' J Dean, *Why the net is not a public sphere*, *Constellations*, 10, 1, 2003.

⁷⁸ Source BBC news online, Monday 25th November 2002 source www.bbc.co.uk/news

⁷⁹ Question from Ms Oona King, 209719, 27 Jan 2005 : Column 526W, House of Commons Hansard,

'Mr. Alexander: The 2002 report made allegations of sexual abuse by 18 people, including 16 Bhutanese refugees and two Nepalese officials. None of the 18 worked for UNHCR. But three UNHCR staff were accused in the report of gross negligence for failing to respond adequately to the abuse. Following a rebuttal of these allegations by the three UNHCR staff as well as a legal analysis of the case, a final review in 2004 concluded that there had been no wrongdoing by UNHCR staff, that no instructions had been wilfully disregarded, and that the conduct of the staff did not justify disciplinary action. The Government take any such allegations very seriously. We welcome the steps UNHCR has taken since 2002 to review its staff code of conduct, reinforcing the need for a zero tolerance approach to sexual abuse.'

⁸⁰ Source: <http://www.hrw.org/press/2003/09/nepal-bhutan092403.htm>

⁸¹ UNHCR Appeal supra n55 at 3.

local complaints mechanisms for refugees at UNHCR's initiative.' This idea stems from the 2001 report of the OIOS appointed International Task Force.⁸² At the time that recommendation was made, UNHCR agreed and stated that amongst other things, 'action is being taken at different levels to address this recommendation'.⁸³ Disappointingly however, the most recent statistics suggest that local refugee complaints mechanisms only account for a very small proportion of the total complaints received. The sources of the complaints received by the Investigation Unit during 2003⁸⁴ were as follows: UNHCR 71%; NGO 11%; Other/unknown 7%; OIOS 6%; Government 4%; Refugees 1%. Indeed, the year on year percentage of complaints from refugees is actually falling (it was 7% in 2002).⁸⁵

Why is the take-up from refugees so low? Complaints mechanisms only exist in a limited number of offices, making them mandatory would give all refugees equal opportunity to complain. Emailing or telephoning Geneva is almost impossible for refugees. Knowledge of rights is also a critical factor: refugees need to have greater access to information both about their rights and entitlements, and on the kind of conduct they can expect from UNHCR. This would make them empowered participants in the complaints system. Finally, it is essential that refugees have confidence in the system. The Lawyers Committee for Human Rights noted:

'In one Kenyan case of this sort, the complaint's file was "lost" in the office after a complaint had been sent to Geneva. His application for refugee status was never processed. In another Kenyan case, refugees participating in a UNHCR loan scheme complained to Geneva because they had not received the full funds that they had signed for. The UNHCR official responsible called in those who had complained and told them that they would now lose refugee status.'⁸⁶

This shows the need for safeguards to be put in place, to both protect against such possible instances and more importantly, against the perception that such repercussions could follow a complaint.

⁸² It was found that 'UNHCR has no external reporting process for refugees or asylum-seekers who are victimized or otherwise mistreated by UNHCR or its partner non-governmental organisation staff members' and recommended that '[a]n external reporting process, that is, a telephone number or mailing address to the UNHCR Office of the Inspector General should be made available ... [and] should be posted in plain sight (large poster form) at all UNHCR facilities and partner non-governmental organisations facilities.' *Supra* n62, Recommendation 4 at 20.

⁸³ *Ibid.*

⁸⁴ *Supra* n63, Figure 4.

⁸⁵ *Ibid.*

⁸⁶ *Voices in Exile: African Refugees and freedom of expression. Article 19*, April 2001 at 16, footnotes omitted. (www.article19.org/docimages/1008.htm).

There is certainly scope for the Inspector General's Office to play a much greater role in creating accountability to refugees. This will be of most importance in refugee camps, and in relation to any other concerns about the operation of UNHCR offices. Its role is negligible, however, in relation to injustices that may arise from inadequate refugee status determination cases. It lacks both the expertise and the person-power needed to be an effective appeals unit and is no substitute for the suggested UNHCR refugee status determination Appeals Tribunal, or an Ombudsperson's office with legal expertise.

3.3 The Evaluation and Policy Unit (EPAU)

The EPAU was created in 1999. It is essentially a UNHCR think tank with a primary objective of 'provid[ing] UNHCR managers, staff and partner organisations with useful information, analysis and recommendations, thereby enabling the organisation to engage in effective policymaking, planning, programming and implementation.'⁸⁷ It seeks to achieve this by writing evaluations and reports and by publishing a series of working papers – there have been 117 working papers since 1999 on a huge variety of topics.

The EPAU is small and has only three staff members, plus one support staff. However, a broad range of other interested groups and individuals are also involved with the EPAU⁸⁸ and it often contracts out its evaluations to 'consultants and consultancy companies' who are 'normally selected through a process of competitive bidding.'⁸⁹

Seven purposes of EPAU evaluations have been identified: reinforcing accountability; facilitating institutional and individual learning; team building; strengthening partnerships; promoting understanding; supporting advocacy efforts; and influencing organisational culture.⁹⁰ It is a tool that reflects UNHCR's desire to try and make itself as effective as possible in fulfilling its mandated tasks. The existence of the EPAU is also a way of reassuring donors that

⁸⁷ UNHCR's Evaluation Policy, EC/50/SC/INF.6, at para. 1.2.

⁸⁸ 'The unit also encourages the direct involvement of personnel from governments, NGOs and other stakeholders in its activities' UNHCR's Evaluation policy 2003, *ibid* para. 13.

⁸⁹ *Supra* n87 para. 13.

⁹⁰ Jeff Crisp, 'What is the Purpose of Evaluation' Presentation to UNHCR's Standing Committee, 25 June 2002. Source www.unhcr.ch.

it is using its best endeavours to exercise its authority with care. It is an institutional tool, rather than a device to facilitate refugee engagement.⁹¹

As one may expect, the outcomes of EPAU reports tend to be geared towards learning lessons and improving management. It does take care to make sure that its evaluations lead to change, and to this end has adopted a ‘utilization focused’ approach: projects include mid-term consultations and sharing draft reports with stakeholders for comments so that the evaluation team’s initial findings can be reviewed. Although there is value in recommendations not being ‘perceived as unrealistic or inappropriate by programme staff’,⁹² excessive comment on preliminary findings is not helpful either. It may create a tacit pressure on the evaluation team to lower their sights – if, for example, an evaluation was being conducted into a specific problem related to life in a refugee camp, a recommendation on flaws of the entire policy of encampment may well be shot down as ‘unrealistic’. Such a situation would be regrettable because it would prevent decision makers from considering a full range of solutions to a problem.

Access to the EPAU mechanism, in the sense of selecting topics for evaluation, is a highly centralised, top-down affair. The first of two factors feeding into decisions on the EPAU’s work programme are the ‘minimum levels of evaluation’. These dictate that each year, there should be at least one global, thematic or policy evaluation; at least two self-evaluation exercises in the field; participation in or organisation of at least one joint or inter-agency evaluation each year; and finally, that any large scale emergency operation should be evaluated within six months of its establishment.⁹³ The second factor is the commitment that the EPAU work programme will ‘incorporate project proposals identified by senior management, other entities within UNHCR, external stakeholders and by the EPAU itself.’⁹⁴ Tight control of what is evaluated does not mean that UNHCR is hostile to external inputs, but simply reflects the extent to which UNHCR find the EPAU useful, and that consequently it wants to remain in control of deciding which areas are most in need of evaluation.

This clear function was altered on 1st January 2003 when, in a pronounced shift in emphasis, UNHCR adopted a new evaluation policy. This policy placed greater emphasis on

⁹¹ Typically, the ‘notion that beneficiaries might have a role to play as anything other than recipients of improved assistance, albeit a laudable intention in itself, has rarely figured.’ Tania Kaiser, ‘Participatory and beneficiary-based approaches to the evaluation of humanitarian programmes’, EPAU Working Paper No. 51, February 2002, para. 99, source www.unhcr.ch.

⁹² UNHCR’s Evaluation policy 2003, www.unhcr.ch para. 3.6.

⁹³ *Supra* n87, at para. 2.3(a).

⁹⁴ *Supra* n87, at para. 4.1.

human rights⁹⁵ and refugees' rights.⁹⁶ In the words of UNHCR, the policy 'introduces procedures that will maximise the extent to which evaluation serves the purpose of reinforcing accountability. These include a pledge to facilitate the active participation of beneficiaries in evaluation activities, as well as a commitment to the highest possible standards of transparency and independence.'⁹⁷ The intention behind the change was to provide 'stakeholders, especially refugees, with an opportunity to present their perceptions and assessments of UNHCR's activities' and to 'reinforce UNHCR's accountability to refugees, partner organisations and the Executive Committee.'⁹⁸

The lofty language is a testament to the pressure which UNHCR has been under to be seen to be increasing its accountability to refugees. The evaluation policy is less clear on exactly how this reinforced accountability to refugees will come about, and speaks in general terms about the EPAU taking 'particular interest in the development of new evaluation methodologies, including 'beneficiary based' and participatory approaches'⁹⁹ This approach can be described as evaluative accountability.

Merging evaluation and accountability is a novel concept, but one which, some years earlier, UNHCR had discounted: 'although evaluations are sometimes intended as a means of providing analytical information on results that can be used for control or accountability, they are generally much less successful in this role.'¹⁰⁰ A reason for this lack of success is that ideas of evaluation and of participatory accountability are conceptually distinct. Participatory accountability recognises that organisations need to be subservient to law and thus legally responsible for the consequences of their acts. It also recognises that individuals are possessed of legal rights, including human rights, which cannot be ridden roughshod over. Evaluation, on the other hand, is 'the action of appraising or valuing'.¹⁰¹ This distinction is brought into sharp focus in relation to the perception of refugees within the mechanism: evaluations are based on the view

⁹⁵ 'To the extent possible, all evaluations undertaken or commissioned by UNHCR will include a focus on protection and human rights issues.' *supra* n93 at Para. 1.4.

⁹⁶ A subsection of UNHCR's evaluation policy is entitled 'Beneficiary rights', and explains that the 'rights and welfare of refugees are the primary concern of all evaluations.' In addition, the following commitment was made 'UNHCR will strive to develop evaluation methods that enable refugees and other beneficiaries to articulate their opinions and aspirations.' *supra* n87 at Para. 1.4.

⁹⁷ Crisp, *Supra* n90, para. 1.

⁹⁸ *Supra* n87 at para. 1.2.

⁹⁹ *Supra* n87. Para. 17.

¹⁰⁰ Planning and Organising Useful Evaluations, UNHCR Inspection and Evaluation Service January 1998. Source, www.unhcr.ch.

¹⁰¹ Oxford English Dictionary Online. Checked November 2003.

that refugees are merely beneficiaries of assistance, whereas accountability mechanisms see them as the holders of inalienable rights. A combination of ‘top-down’ and ‘bottom-up’ may not meet in the middle.

A second problem is that evaluative accountability presents accountability from a purely institutional perspective. Even though the question: ‘how can we make UNHCR more accountable?’ seems reasonable, answers to it run the risk of only being institution-based initiatives, ideas that are inexorably coloured by the institutional mindset.

Finally, some have doubted whether UNHCR’s institutional culture is capable of adapting to such an approach:

‘Management styles matter. An organisation that has not developed a participatory, empowering management structure cannot run a participatory programme. The way things are organised in the offices will have an impact on the operations on the ground. For all its rhetoric about participation, UNHCR’s systems and management structure do not facilitate the participation of refugees or even its implementing partners in the field.’¹⁰²

The foregoing analysis shows that evaluative accountability is not a step towards greater participatory accountability, as UNHCR’s rhetoric seemed to suggest. It would be more accurate if UNHCR did not make grandiose claims, and simply presented it as a step to gain greater refugee involvement in its own ‘delegation model’ accountability tool.

The EPAU performs a valuable role. Indeed, this paper has drawn on ideas developed in EPAU working papers. The attempt to put the rights of refugees at the heart of evaluations and the suggestion that there should be greater refugee involvement in evaluations are both positive steps. The impetus for change should be built upon and refugees’ suggestions for topics for evaluation should also be sought. Seeking refugees’ views places an administrative burden on UNHCR¹⁰³ but it is one worth meeting. However, the fact that contentious issues are off the

¹⁰² O. Bakewell, Community Services in refugee aid programmes: a critical analysis. *EPAU working paper* number 82, March 2003 at p15.

¹⁰³ The Deputy Representative or Senior Programme Officer ‘should allocate at least one working day per week, for eight weeks, to the PSE [participatory self-evaluation].’ ‘Organising participatory self-evaluations at UNHCR: Guidelines.’ EPAU 2005/9, May 2005, at 7.

agenda for discussion at participatory evaluations¹⁰⁴ highlights that ‘evaluative accountability’ is not a substitute for direct access to mechanisms that can provide remedies in individual cases.

Accountability is too important to be co-opted simply because it sounds good. Strong accountability tools are often a thorn in the side of an institution; the accountability function of the EPAU does not appear to have the capacity to even cause the UNHCR a scratch.

4. The politics of accountability

The sphere of accountability is plagued by patchy politics. Developments tend to be driven by episodic crises, and this creates lurches from neglect to sudden and large engagement on certain issues – such as sexual behaviour in certain refugee camps. This section discusses the political factors that have a bearing on debates about the accountability of UNHCR, with a view to understanding why accountability has not been forthcoming and how it may be brought about in the near future.

4.1 UNHCR’s supervisory role

One of UNHCR’s primary purposes is ‘supervising the application of the provisions of [the 1951 Convention]’.¹⁰⁵ This is often understood to mean that UNHCR only carries out this function, as the quote below illustrates:

‘What needs to be remembered in this context is that UNHCR does not implement refugee protection – states do. While UNHCR may play a role in the development of certain policies ... the office is hardly ever determinative of the protection actually implemented.’¹⁰⁶

¹⁰⁴ *Ibid.* PSEs are not envisaged as an appropriate forum for hotly contested issues to be raised with UNHCR: ‘[in] a programme characterised by strained relationships amongst UNHCR, the government and / or refugees: convening a PSE [participatory self-evaluation] under very tense conditions could be counterproductive’. Second, because it is an important feature of evaluations to give a holistic view of a programme so that positive feedback can be obtained be applied elsewhere, a bias is created against ‘too much’ concentration on the negative issues, so UNHCR suggests 45-60 minutes of the evaluation to be spent on ‘what is not working well’ with 2 hours should be allocated for ‘Strengths, Weaknesses, Opportunities, Constraints’, and up to 2.5 hours on assessing progress against UNHCR objectives. Also, it is very difficult to get a representative sample of all of the concerned parties: there should be no more than 25 people per session (including refugees, government officials, NGO partners, donors, UNHCR).

¹⁰⁵ United Nations Convention related to the Status of Refugees, Geneva 1951, Art. 35.

This misconception means that UNHCR's active role in directly affecting the lives of refugees on a day-to-day basis is often overlooked. As a vivid example of this, as part of the recent Global Consultations initiative run by UNHCR, the session which examined 'ways to enhance the effective implementation of the 1951 Convention'¹⁰⁷ did not discuss the ways in which UNHCR is itself responsible for implementing the convention: conducting refugee status determination and administering camps. It was suggested that UNHCR's refugee status determination activities can be seen to be part of its monitoring function¹⁰⁸ and that running camps can be understood to be 'supervision'.¹⁰⁹ This is tenuous and does not reflect the realities on the ground. Until there is greater awareness and acceptance of UNHCR's role in this area, and acceptance that UNHCR does implement protection, and does have the power to recognise or deny the rights of individuals, questions of accountability will continue to suffer from a paucity of scholarly and political attention.

4.2 *Emergency mindset*

UNHCR was established on a temporary basis to deal with a specific emergency: post World War II refugees in Europe. Whilst its role has changed since then, the nature of the refugee phenomenon has not, and so UNHCR still operates primarily in emergency situations. This creates an emergency mindset which permeates all of UNHCR's areas of operation including refugee status determination and running long-term development camps. This 'crisis management' approach has the significant downside of leaving little or no room for long-term planning. This strategic problem is exacerbated by the practical hurdle that UNHCR has to

¹⁰⁶ E Roxstrom and M Gibeny 'The legal and ethical obligations of UNHCR: the case of temporary protection in Western Europe' in *Problems of Protection: the UNHCR, refugees, and Human Rights* eds N. Steiner, M. Gibney, and G. Loescher, Routledge, London, 2003 at 43.

¹⁰⁷ Summary Conclusions, Cambridge Expert Roundtable, para 1 9-10 July 2001 Source: www.unhcr.ch.

¹⁰⁸ It was stated that UNHCR 'monitor[s]' refugee status determination procedures by, *inter alia* 'participating in various forms ... in procedures for determining refugee status in a large number of countries.' W Kalin, Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond, Global consultations paper at 6. Professor Kalin quotes from ExCom conclusion No 28 (XXXIII) 1982. The actual wording, which is even less indicative of 'monitoring' is 'Noted with satisfaction the participation in various forms of UNHCR in procedures for determining refugee status in a large number of countries and recognized the value of UNHCR thus being given a meaningful role in such procedures.'

¹⁰⁹ 'The term "supervision" as such covers many different activities which [include] the protection work UNHCR is carrying out on a daily basis in its field activities ...' Kalin, *ibid* at 1.

continually seek voluntary contributions from states, rather than being paid annually out of the general UN budget. This means that appeals for funds tend to be issue or crisis specific. Recently, however, the temporary mandate of UNHCR has been indefinitely extended – a positive step and one seen by some states as being directly linked to increased accountability along the lines of the ‘delegation’ model.¹¹⁰ Although this indefinite mandate extension does not address the funding issue, it should hopefully engender an impetus to create the structures that are associated with a permanent body; chief amongst them being systems of accountability.

UNHCR carries out refugee status determination because states, at one point or another, were unwilling or unable to do so; it was an emergency response. It is not a natural task for UNHCR and it is a testament to their dedication to refugee protection that they stepped in and assumed this role.¹¹¹ In many cases, it appears that UNHCR is trying to hand the status determination function back to states. UNHCR views its refugee status determination function as a temporary task. This means that it is not a natural protection priority, despite the grave consequences it can have on the lives of refugees. Indeed, the delicacy of UNHCR entering into the realms of a state’s sovereignty means that its role in this area is often ‘played down in [its] official reports’.¹¹² In order for greater attention to be focused on improving accountability in refugee status determination, UNHCR’s role in the process must be fully acknowledged. It may theoretically be an interim measure, but the fact that in some countries it has continued for over 50 years indicates that interim measures are not necessarily short term.

The situation is similar, if not worse for refugee camps: states are often unwilling to recognise the fact that the refugee problems in their country are unlikely to be resolved in the near future, and they work with UNHCR to maintain a sharp focus on repatriation. This means that the creation of systems of accountability in the camp might be seen by the host state as entrenching and prolonging the life of the camps. UNHCR’s reliance on the good will of the

¹¹⁰ ‘Let me conclude my remarks by expressing our support for the extension of the term of the [UNHCR] until the refugee problem is solved. At the same time, we would like to stress in particular that UNHCR will be strongly expected to demonstrate heightened quality and focused priorities of its activities, and enhanced visibility and accountability on the management of funds that it receives from donors.’ Statement by S. Shimanori, First Sec, Permanent Mission of Japan to the United Nations on Agenda Item 112, Report of the UN High Commissioner for Refugees. 3rd Cttee, 58th Sess of General Assembly, 4 Nov 2003.

¹¹¹ ‘Although a number of states have found it appropriate to entrust the UNHCR with a substantive role in their determination procedures, in the UNHCR’s view, it is neither necessary, nor in line with its general functions to assume alone the decision-making responsibility.’ V. Turk, ‘UNHCR’s Supervisory Responsibility’ New Issues in Refugee Research Working Paper No. 67, October 2002 (original not paginated).

¹¹² Alexander, *supra* n29 at 252.

host state makes it unlikely that good relations would be put at risk in order to design participatory accountability systems which may appear to negate the authority of the host state.

In addition, however, there appears to be an institutional culture of an ‘emergency mindset’ in camps: an EPAU report highlighted the lack of long term planning in Kakuma Camp, in Kenya stating ‘[t]he mass influx emergency long over, Kakuma still operates in a state of what one UNHCR official termed a “rampant emergency”.’¹¹³ UNHCR’s budgetary priorities reflect this and relate to practical, assistance-based areas¹¹⁴ and funds to enhance accountability have to be sought in special, supplementary appeals.¹¹⁵

The basic point is that in ‘emergencies’ accountability will always be subservient to other needs. Food and shelter may well be priorities for survival, but legally there is no hierarchy between rights. The challenge is to move away from the emergency mindset and embrace the realities on the ground.

4.3 Humanitarianism

It is only just becoming accepted that ‘human rights violations may occur even within organisations dedicated to the protection of these very rights.’¹¹⁶ UNHCR is seen, and sees itself, as a humanitarian organisation trying its best to help refugees in difficult circumstances around the world.¹¹⁷ A consequence is that, just as with any human rights organisation, any criticism of UNHCR risks being perceived as ‘unsporting’; raising questions such as accountability is, as has been said elsewhere, like sending mom’s apple pie to the FDA for chemical analysis.¹¹⁸

When criticisms are brought up, the defence tends to be: ‘it’s better than nothing; imagine what would happen if we weren’t helping’.¹¹⁹ This underlines a serious problem with

¹¹³ Jamal, *supra* n51.

¹¹⁴ UNHCR Annual budget 2004. Source: www.unhcr.ch.

¹¹⁵ For example, UNHCR Appeal, *supra* n55.

¹¹⁶ Singer, *supra* n17 at 88-89.

¹¹⁷ For a critique of humanitarian assistance, see Barbara Harrell-Bond, ‘Can Humanitarian work with Refugees be humane?’ 24.1 *Human Rights Quarterly* 2002 at 51-85.

¹¹⁸ S. Waldron, ‘Blaming the Refugees’, 3 *Refugee Issues* (Apr. 1987) (FDA is the acronym for Federal Drug Administration).

¹¹⁹ Indeed, Loescher points out ‘When confronted with criticism, the UNHCR frequently rationalises its actions and eschews blame by claiming that it is an operational and humanitarian agency ... [operating] in extremely complex and difficult situations’. *Supra* n1 at 358. Tangentially, whilst it is perhaps understandable that institutions are

humanitarianism: the idea that ‘helping’ means that different standards apply. UNHCR has ‘deep-seated cultural relativist beliefs: ... for African refugees a different, and lower standard was applied and was not perceived as shocking because the different socio-cultural context was believed to warrant different standards.’¹²⁰ To take the idea one stage further, it often appears that the simple fact of ‘helping the vulnerable’ is felt to obviate any need to be accountable – as if doctors could work without the possibility of redress simply by virtue of the fact that they had sworn the Hippocratic Oath.

In addition to making criticism a delicate issue, humanitarianism also puts the refugees into a weak position. It was noted earlier that refugees are termed ‘beneficiaries’ for the purposes of UNHCR’s evaluations. An EPAU report encapsulated the problem: ‘UNHCR programmes are predicated on refugees and other beneficiaries functioning as the recipients of assistance and not as decision makers and judges of it.’¹²¹ Seeing refugees in this way is a relatively widely-held view, and is so entrenched that people speak passionately in defence of it: the Director of *Medicins sans Frontiers*, Holland, recently wrote on the subject of accountability to refugees and others:

‘How can one seek to be accountable to victims when the nature of victimisation means disempowerment, control manipulation and abuse ... In broken societies, the complex institutional architecture needed to generate adequate checks and balances simply does not exist. This is not our fault. We must remember that victims are victims.’¹²²

Refugees’ status, as well as being that of a ‘victim’ becomes that of a recipient of the gift of aid,¹²³ a beneficiary, an object of charity, rather than as someone to whom accountability is owed.¹²⁴ This precludes effective accountability because it denies refugees the moral authority

reluctant to embrace criticism, there can be no justification for the degree of secrecy that surrounds UNHCR’s own Inspector General’s reports. Apart from the need to retain anonymity of victims, UNHCR should recognise that it is in its own interest to be more transparent. It is only the basis of its reports that pressure to make things better will arise. No state can provide extra financial support for say, sexual rights awareness in Nepal, unless it is aware of a problem that needs to be rectified.

¹²⁰ Verdirame and Harrell-Bond, *supra* n2.

¹²¹ T. Kaiser, *supra* n46, para. 128.

¹²² 31 July 2003 ‘Accountability is a relatively straightforward concept. So why is humanitarian accountability so peculiarly complex?’ Source: www.odihpn.org .

¹²³ On the ‘debasement’ of people through the receipt of gifts that cannot be repaid see generally Marcel Mauss, *The Gift* (Translated by Ian Cunnison) New York, Free Press, 1925.

¹²⁴ In many ways, this idea of only becoming something when the seer determines it, recalls a point made over 30 years ago by John Berger: ‘A naked body has to be seen as an object in order to become nude ... The nude is

to raise concerns, and does not recognise the full range of their legal entitlements. Seeing refugees as holders of inalienable rights – just like all other humans – is an essential step in breaking the current perception of refugees. That challenge is to entrench this view to the extent that views start to change and differences begin to be discernable in practice.

4.4 The media

The media plays a central role in engendering accountability outcomes: the more attention it draws to an issue, the greater the reaction to it. This is highlighted by the differing UNHCR responses to two similar alleged sexual scandals. In the West Africa incident - a story which was covered extensively by the global media - a full-scale international team was appointed and produced a detailed public report to the Secretary General of the UN. In Nepal - a story covered, as far as the author's research can determine, only by the Kathmandu Post - a two person UNHCR team travelled to the region and produced an investigation, the contents of which were internal and only publicly disclosed after a question was asked in the British Parliament.

This response dovetails with UNHCR's stated position: 'UNHCR recognises the value of external and externally led evaluations, particularly when the programme or activity under review is a large, highly publicised or controversial one.'¹²⁵ Whilst concerted independent reports are useful, they do not remove the need for UNHCR's own reports to be impartial and transparent. Regardless of media attention, UNHCR should investigate all allegations with the same vigour.

The resolution of the Nairobi resettlement scandal again seems to have been dependent on publicity. As stated earlier, UNHCR's own investigations resolved neither the large nor small problems of the office. Whilst this may have been partially due to the complexity of some aspects of the investigation, it seems likely that the international attention to the scandal created an impetus from action from UNHCR to put its office in order.

Top down accountability mechanisms, such as those in UNHCR, need publicity to generate real impetus for action. This is problematic because it mitigates against substantive

condemned to never being naked. Nudity is a form of dress.' The refugee is condemned to never being a person, but always a 'beneficiary'. (Extract from John Berger, *Ways of Seeing* Penguin Books, London 1972 p54.)

¹²⁵ *Supra* n87 at para 3.2.

responses in low-profile cases. Those who cannot draw attention to their problems must not be overlooked.

4.5 Donors

UNHCR represents, in many ways, an ideal donee: it is well known, humanitarian and non-political. The possibility to fund specific projects also allows governments to be seen to be responding to a particular crisis at a particular time.¹²⁶ Whilst this may be useful, it reduces the incentives for states to contribute to less exciting projects such as long term accountability, which is often seen as an institutional problem, rather than a protection issue. The challenge is to create sustained donor engagement.

UNHCR's expertise means that in most cases, once the requirements for financial accountability have been met, states have tended to be happy to simply let UNHCR get on with the task of protecting refugees in accordance with the terms set out in its statute. This has been compounded by a lack of transparency regarding the Inspector General's reports, which has made it difficult for concerned parliamentarians to scrutinize UNHCR's operations. States need to appreciate that accountability is vital to effective protection. Indeed, if states insist on viewing the issue through the optic of financial accountability, it should be argued that the money donated to UNHCR is not used efficiently if part of it is not allocated to accountability mechanisms.

4.6 NGOs

Pressure from international NGOs is sporadic. Amnesty International and Human Rights Watch's refugee offices are relatively new, and even here the pressure tends to be directed towards specific, high profile issues. At Field Office level, refugee problems are overshadowed by other 'more important' concerns. Amnesty International's Regional Office in Uganda, for example, is not presently engaged in advocacy on refugee issues in Uganda, as it says it is fully occupied on issues such as the President's prospective third term in office and the war in the

¹²⁶ 'UNHCR's budget peaked in 1994 when its requirements exceeded US\$ 1.4 billion, primarily because of refugee emergencies in former Yugoslavia, the Great Lakes region of Africa and elsewhere.' http://www.unhcr.ch/cgi-bin/texis/vtx/partners/+1wwFqzvxK_vx8s6xFqzvxK_vx8s6mFqo7E2RN02IhFqhT0NuItFqopwGBDnG5zFqo7E2RN02IAFqwDzmwwwwww1Fqo7E2RN02I

north of the country. However, the volume of refugees coming to the Amnesty Office to alert them to their problems was so great that Amnesty felt obliged to employ a dedicated Refugee Officer. He does not write reports or keep statistics on the types of cases brought to him, but instead provides oral advice on other service providers or, on occasions, writes a letter stating that the refugee has come to see Amnesty with their concerns. This lack of constructive engagement on the broad issues raised by individual cases is deeply regrettable, and creates the impression that Amnesty is keener on rigidly sticking to its institutional priorities than on engaging with issues brought to them by people fleeing human rights abuses and facing further abuse in their country of refuge.

Local NGOs and implementing partners are much less likely to criticize UNHCR given that they are often wholly dependent on UNHCR for their funding.¹²⁷ Even non-UNHCR funded NGOs may find that critical advocacy risks pushing them out of the sphere of non-political action.¹²⁸ Legally oriented refugee advocacy groups are slowly emerging, such as the Refugee Law Project based in Makerere University, Uganda, and Africa and Middle East Refugee Assistance, based in Cairo. Both represent refugees and lobby on their behalf.

Accountability may have technical elements, but it is essentially about the protection of human rights and due process, and as such, it is hoped that more NGOs will seek to push for greater accountability in the future.

4.7 Refugees

Discernable pressure from the refugees themselves which impacts UNHCR and donors has been almost entirely absent. Given that refugees by definition lack the protection of their government, they cannot rely on their government to lobby on their behalf. Neither can they rely on UNHCR in the same way as refugees in countries where the host state conducts refugee status determination. Awareness of rights may be a problem, as may be accessibility of UNHCR complaint mechanisms. Furthermore, in the many instances where UNHCR is responsible for status determination or for running refugee camps, refugees are unwilling to be seen to be taking a stand for themselves, lest it be perceived as ‘rocking the boat’. It seems that on occasions, such

¹²⁷ See Verdirame and Harrell-Bond, *supra* n2, section on ‘ParInAc: a study in co-optation’.

¹²⁸ See S. Dicklitch and D. Lwanga ‘The Politics of Being non-political: Human rights organisations and the creation of a positive human rights culture in Uganda’ *Human Rights Quarterly* 25.2 (2003) 482-509.

concerns may be well founded: ‘UNHCR admitted that the rejection of their [a group of Congolese refugees] application for refugee status had to do with “having got on the nerves of our representative” because of their continued and very public criticism of this organisation.’¹²⁹

In many instances, refugees form ‘community groups’ or ‘committees’ through which they can streamline their interaction with UNHCR on general issues. These initiatives are welcome, but must be treated with circumspection because in many instances these groups will not be representative of all members of the purported community. ‘Traditional justice’ in refugee camps is also an area where refugees are commonly left to control themselves, with the result that violations of rights take place in the name of respecting traditional cultural practices. Such problems highlight the need for minimum human rights standards to apply in camps, and for there to be scope for individual complaints to be dealt with.

There have been efforts by UNHCR to elicit the views of refugees outside of the structures already mentioned. The most notable recent attempt was during UNHCR’s Global Consultations exercise. It has been widely referred to, having both a dedicated section on the UNHCR website, and also being mentioned in UNHCR’s report to the General Assembly.¹³⁰ The website section entitled ‘Listening to Refugee Voices’ makes reference to the ‘Refugee Parliament’¹³¹ although its ‘Declaration’ was somewhat bland, speaking only in glowing terms and mentioning that without UNHCR, refugees ‘would be abandoned to violence, persecution and oppression’.¹³² The other examples listed on the website¹³³ merely serve to highlight the fact that there was little systematic, structured exchange with refugees.

¹²⁹ In addition, the Lawyers Committee for Human Rights documented one, it is hoped atypical, example of what happens to refugees who promote their human rights: ‘In April 1994, some refugees burned down a food distribution centre that had been built by UNHCR. [An] Ethiopian refugee gave lectures on human rights *after* this incident, but he was nonetheless blamed for it. On 19th July, 1994, UNHCR’s Senior Protection Officer explained to this refugee that: ‘it is the view of UNHCR that the lectures were a direct cause of the wave of tension and the disruption of public order in the camp ... UNHCR noted your unwillingness to be transferred to Dadaab but regrets to inform you that there are no viable options available at the moment. Once in Dadaab, you will be expected to refrain from any conduct likely to disrupt public order in the camp. This includes the organisation of such lectures as you conducted in Kakuma Refugee Camp.’ *Voices in Exile: African Refugees and freedom of expression*. Article 19. April 2001. p20 Footnotes omitted. (www.article19.org/docimages/1008.htm). Footnotes omitted.

¹³⁰ Report of the United Nations High Commissioner for Refugees, 2002. (GAOR A/58/12) Para. 12.

¹³¹ Extract from ‘Paris Appeal by Refugees at the French National Assembly’. The term ‘Refugee Parliament’ is referred to by UNHCR with seeming approval. www.unhcr.ch checked on 10th September 2003.

¹³² *Ibid*

¹³³ ‘At the June third track meeting in Geneva, Aischa, a young refugee woman, spoke of her experience in seeking asylum, including a period of detention. Her direct testimony ended with a ringing plea of “Action, please”, on behalf of all refugees seeking asylum and a safe haven. At the Regional Meeting in Cairo, focusing on strengthening the capacity of first asylum countries in the region to offer adequate protection, a Somali refugee woman participated in the discussions.’ www.unhcr.ch.

Active and meaningful engagement with refugees during the course of the Global Consultations was clearly a logistical challenge. However, the prominence which UNHCR gives to its attempts indicates to do so, despite their evident insufficiency shows that UNHCR feels under pressure to demonstrate that it took account of refugees' opinions during the consultation.

5. Conclusions and recommendations

Global administrative law is an emerging field that will help shape the complex processes of international laws functioning in a globalised world. This paper has sought to highlight the cases of people who are affected by the administrative decisions of global bodies, and to serve as a reminder that their participation in the system must be sought out and fought for.

UNHCR's accountability mechanisms have evolved on a piecemeal basis and are now fairly broad; from providing institutional memory and evaluation, these mechanisms are now charged with, amongst other things, the task of starting to secure accountability to refugees. It is fair to say that taken together, they constitute an emerging accountability framework. What would this framework look like if developed further?

The Inspector General's Office should be a first point of contact for individual complaints. The recommendation of the International Task Force about greater access to the Inspector General's Office should be implemented. In addition, UNHCR should consider having a permanent representative from the Inspector General's Office in every refugee camp. This would facilitate access to the system, make a tangible contribution to perceptions amongst refugees that complaints and results are possible, and improve the quality of follow-up of cases by allowing for more contact than is possible by email or phone. The rules and procedures for investigations should also be made clear so as to provide transparency and faith in the integrity of the system. A representative from the Inspector General's Office should also be placed in locations where UNHCR conducts refugee status determination. If independent, or UNHCR-wide, refugee status determination appeals units are established (as has happened at the UNHCR office in Cairo), the Inspector General's representative should not be involved with the merits of individual cases but should be on hand to investigate any allegations of corruption, abuse etc.

The Evaluation and Policy Analysis Unit should continue its evaluation work, and should continue to consult with refugees. It should allow for refugees or their representatives to suggest

topics for evaluation. One refugee-identified topic per year should be included in the EPAU's minimum levels of evaluation. The EPAU is well placed to work with the Inspector General's Office to provide systemic analysis of the individual complaints. A process should be established whereby the EPAU establishes trends in the complaint figures and produces recommendations on them to the Inspector General and ExCom.

The Office of Internal Oversight Services should retain its capacity to proactively examine UNHCR's operations, especially in situations where UNHCR is unwilling or unable to investigate.

As a first step to achieving a more coherent accountability framework, UNHCR should prepare an accountability strategy, setting out its long and short terms goal for increasing accountability and how it plans to achieve them. Such a document would also give states the opportunity to consider funding new mechanisms.

The essential point is that accountability is not a luxury, but an essential part of UNHCR's protection function. There are three encouraging trends which show that this idea is becoming entrenched: the first is that UNHCR has begun to publicly recognise the scale of its role in refugee status determination throughout the world, and has taken steps towards trying to improve it,¹³⁴ the most notable development being the creation of an Refugee Status Determination Unit. This Unit is currently recruiting for staff, but when it is fully operational it will be 'providing advice to Field Offices on procedural as well as substantive issues pertaining to refugee status determination; facilitating the development of appropriate standard operating procedures in refugee status determination operations; coordinating the design and delivery of comprehensive training to staff who are performing refugee status determination; evaluating UNHCR refugee status determination operations; and participating in oversight / investigation missions in significant refugee status determination operations'.¹³⁵ This Unit should hopefully be instrumental in judicialising the refugee status determination process.

UNHCR's protection role in refugee camps is already relatively well known, as is – albeit to a lesser degree – its actions in violation of the rights of refugees. The legal position, however, has been subject to much less attention. This too is beginning to change as refugee camps are fast becoming the prime case study for broader discussions of UN responsibility for

¹³⁴ UNHCR's 2002 Agenda for Protection called for UNHCR to 'commit more resources to improve the quality and consistency globally of its mandate refugee status determination processes.' (Source: www.rsdwatch.org).

¹³⁵ Source www.unhcr.ch.

administration of territory, and new books and articles are emerging. As this topic grows in significance, more attention will be paid to camps and the legal loopholes that exist.

The second emerging trend is the notion of a ‘rights-based’ approach to refugee protection. This trend is discernable across the humanitarian sector. At its heart it involves a change in the way that refugees are perceived, demanding that refugees are seen as holders of rights, rather than as beneficiaries of assistance, and serving as an antidote to ‘humanitarianism’. It will not be easy to change approaches because the old view is so deeply ingrained in UNHCR, NGOs, donors, and the general public. However, the fact that a particular group of people are being denied access to their rights and to due process is so disturbing that this author remains optimistic that it will not continue indefinitely. The first step can be taken by embracing the rule of law and promoting human rights. An acceptance of the fact that UNHCR is formally bound by certain international standards would kick-start the process of reform, both internally, as well as in the minds of donor states, who would be reluctant to be seen to be funding an organisation that was not acting in accordance with standards that it has stated are binding upon it. This would help to foster more sustained donor engagement and would help to focus donor’s minds on the importance of accountability mechanisms. Promotion of rights, coupled with avenues for complaints and participation would lead to more remedies for individuals and greater parity in dialogue between UNHCR and refugees.

The final trend is the increasing NGO awareness of this issue. Groups such as RSDwatch are starting to spread the word about UNHCR’s role in refugee status determination.¹³⁶ Non-governmental organisations issued a joint statement in the October 2004 EXCOM meetings which noted their ‘concerns that some of UNHCR’s refugee status practices in some countries in Africa, the Middle East and Asia do not always meet the standards of fairness to which UNHCR urges states to adhere’ and provided a detailed list of issues and suggestions for further action.¹³⁷ This is to be welcomed.

A UNHCR that is accountable to refugees could emerge. For this to become a reality, sustained UNHCR support, donor engagement, NGO oversight, continuing legal evolution and pressure from refugees are all essential. Accountability to refugees is owed to them as of right, and there should be no delay in taking the process forward.

¹³⁶ See www.rsdwatch.org .

¹³⁷ See www.icva.org for the full document.