

# THE OPERATION OF UNHCR'S ACCOUNTABILITY MECHANISMS

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## I. 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.<sup>1</sup> These actions have a direct impact on the lives of refugees. While this impact has helped millions, it is not always positive, and refugees' human rights have been violated by the UNHCR's actions.<sup>2</sup> In well-developed national legal systems, institutions and principles of domestic administrative law enable refugees to hold the state to account for violations the state commits, at least to some extent. The same is not true for the UNHCR as a global administrative body. In considering how to fill the glaring gap between domestic and international standards of accountability, it is necessary to consider principles of global administrative law.

This paper analyzes the accountability mechanisms that currently operate within the UNHCR. It argues that these mechanisms do not render the UNHCR accountable to refugees, and that this situation should be rectified. It considers from a normative perspective the legal and political standards that should apply when the UNHCR is held to account. Using the criteria of access, outcomes, and ability to promote compliance with relevant standards as benchmarks, the paper criti-

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1. UNHCR, *HELPING REFUGEES: AN INTRODUCTION TO UNHCR* 7 (2005), available at <http://www.unhcr.ch/cgi-bin/tehis/vtx/basics/opendoc.pdf?tbl=BASICS&id=420795964>.

2. See generally GUGLIELMO VERDIRAME & BARBARA HARRELL-BOND, *RIGHTS IN EXILE: JANUS-FACED HUMANITARIANISM* 319-24 (2005) (addressing multiple failures of UNHCR in protecting refugee rights in Africa).

ques the accountability mechanisms currently employed by the UNHCR. It argues that these mechanisms are primarily top-down tools which owe accountability to those who have delegated power and that these mechanisms offer only minimal opportunities 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 the 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 before the law and puts all their interactions with the UNHCR on a more level playing field.

Accountability is also important because, in its camps, the UNHCR is in almost all senses the refugees' government, controlling all important aspects of their lives. Whether the 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*"<sup>3</sup> 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 favor than the "participation" models representing the latter approach.<sup>4</sup> In practice, delegation models are easier to implement and thus more popular. More fundamentally, in the theory of an

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3. Paul Weis, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193 (1954).

4. See Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 11-13 (Inst. for Int'l Law & Politics, Working Paper 2004/7, 2004), available at <http://www.iilj.org/papers/2004/2004.7.htm>.

emerging regime of 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 seemingly ineluctable democracy–participation link means that “bracketing questions of democracy”<sup>5</sup> 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 conceptualized in a more fluid manner, as a critical concept for evaluating political arrangements using 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 to play an active role in global administrative law through participatory accountability mechanisms.

## II. RELEVANT RULES

### A. *Approaches to the Problem*

Establishing the standards against which those exercising power should be held accountable is a vital first step in thinking about accountability. This section discusses a number of

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5. Benedict Kingsbury, Nico Kirsch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS., 15 (Summer/Autumn 2005).

different rules, including both hard-law and soft-law rules. These rules are sometimes more and sometimes less binding on the 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 which can be used to hold the UNHCR to account.

The most formal level of analysis involves establishing whether any laws actually bind the UNHCR. Through the legal obligation to act in accordance with such laws, they become unequivocally relevant as standards to which the UNHCR can be held. The International Law Commission has been considering the responsibility of international organizations in international law for many years but has reached few decisive conclusions. 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.<sup>6</sup>

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 jus cogens norms and customary international law—can and do bind them in many circumstances.<sup>7</sup> This creates an unusual situation in which an organization could be bound by custom formed through a process which it had not contributed to. However, as Verdirame suggests, this situation is not so different from the situation faced by ex-colonies at the time of independence.<sup>8</sup>

A second approach to applying human rights law to the UN relies on the fact that one of the purposes of the UN is to

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6. See sources cited *infra* note 8, 10, 11.

7. G. VERDIRAME, *THE ACCOUNTABILITY OF THE UNITED NATIONS FOR VIOLATIONS OF HUMAN RIGHTS*, Ch. II (Cambridge University Press, forthcoming 2007) (pagination subject to change).

8. *Id.*

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.”<sup>9</sup> The effect of this approach is to apply the entire corpus of international human rights law to the UN in one fell swoop! The downside is that such arguments leave large areas of indeterminacy when it comes to defining precise rules and precise legal consequences of particular actions. However, they do form a solid baseline from which to build a normative case for holding the UNHCR accountable to human rights standards.

A third approach considers the state-like functions exercised by the UNHCR, and leads to the idea that the 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.<sup>10</sup> On a firmer legal basis than the other approaches, this idea is hampered practically because many of the states where the UNHCR operates are not party to international human rights treaties, or have entered numerous reservations.<sup>11</sup> It is also often unclear whether state functions have actually been transferred to the UNHCR. In the grey legal areas that so often surround the UNHCR's relations with a host state, it can be hard to claim anything more than that the UNHCR should be bound just because an obligation theoretically exists on a host state. Despite this legal obstacle, this ap-

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9. Frederic Megret & Florian Hoffman, *The UN as a Human Rights Violator?: Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q., 314, 317-18 (2003).

10. See Ralph Wilde, *Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of 'Development' Refugee Camps Should Be Subject to International Human Rights Law*, 1 YALE HUM. RTS. & DEV. L.J. 107, 119 (1998); VERDIRAME, *supra* note 7, at 72 (pagination subject to change); Waite and Kennedy v. Germany, App. No. 26083/94, ¶ 67 (1999), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search by Application Number). It should be noted, however, that the flip-side of this approach—the responsibility of states for the conduct of international organizations—is an issue on which states are yet to agree and on which considerably more work must be done.

11. For example, Pakistan is a longtime host to many refugees from Afghanistan, but Pakistan is not a party to the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights. See UNHCR, *Status of Ratifications of the Principle International Human Rights Treaties* (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf>.

proach retains political weight: Who would disagree with the proposition that the UNHCR should be prohibited from offering a lower standard of protection than the state in which it is operating?

Just as “hard” human rights law can be relevant to the UNHCR, so can “soft” law. General Assembly resolutions are a case in point. The UNHCR’s Statute provides that it “shall follow policy directives given [to it] by the General Assembly or the Economic and Social Council [ECOSOC].”<sup>12</sup> 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.”<sup>13</sup> It is unclear whether such reasoning means that the UNHCR is obliged to comply with all General Assembly resolutions—including declarations on human rights—or simply those that are directly addressed to it.

“Soft law” is also used to refer to the UNHCR policy guidelines, handbooks, and perhaps most importantly, the resolutions of the UNHCR’s advisory committee on refugees<sup>14</sup>—the Executive Committee of the High Commissioner’s Programme (ExCom).<sup>15</sup> Chimni has pointed out that, in the

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12. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), annex 1.3 (Dec. 14, 1950).

13. VERDIRAME, *supra*, note 7 at 79.

14. Statute of the Office of the United Nations High Commissioner for Refugees, *supra* note 12, at 1.4. ExCom is mandated to, *inter alia*, review and approve the material assistance program of UNHCR and, on the request of the High Commissioner, advise on his or her functions under the Statute. ECOSOC Res. 565 (XIX), U.N. Doc. E/RES/565 (XIX) (Mar. 31, 1955). Its members are elected by ECOSOC and currently comprise representatives from 68 states. See UNHCR, Executive Committee Homepage, <http://www.unhcr.ch/excom> (follow “Members and Observers and How to Apply” hyperlink) (last visited Sept. 23, 2005). 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,” UNHCR, Executive Committee Homepage, *Conclusions on International Protection*, <http://www.unhcr.ch/cgi-bin/texis/vtx/excom?id=3bb1cb676> (last visited Sept. 23, 2005).

15. A legal argument can be made that documents can formally bind UNHCR if they are deemed to constitute “internal law.” See PHILIPPE SANDS & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* 466 (5th ed., London Sweet & Maxwell 2001) (1964). Internal Law includes “Manuals,

Global Administrative law context, “the distinction between soft law and hard law does not stand to reason.”<sup>16</sup> This is especially true when establishing standards applicable to the UNHCR. The UNHCR promulgates policies and conclusions, and publicly expresses the wish that they become relevant standards for protection.<sup>17</sup> Just as the UNHCR holds governments to their promises,<sup>18</sup> it is right to expect the UNHCR to be held to its own standards.

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circulars and other statements issued by the administration [which] have a law-creating character.” C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 287 (Cambridge University Press 2d ed. 2005) (1996). Internal law can also include the “established practice” of the organization. See generally Santiago Torres Bernárdez, *Subsidiary Organs*, in *MANUEL SUR LES ORGANIZATIONS INTERNATIONALES* 100, 110 (René-Jean Dupuy ed., 1998) (A distinction “should be made between ‘contractual’ and ‘institutional’ aspects of international organizations, taking duly into account the two differentiated, albeit co-ordinated and supplementary, sources of law for international organizations, namely its ‘constitution’ (treaty concluded between States) and its ‘internal law’ (normative acts and established practice emanating from the organs of the organization).”) (footnotes omitted). 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.” Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art. II, section 1(j), Mar. 21, 1986, 25 I.L.M 543, 547. Internal law can also include the “established practice” of the organization (See generally Santiago Torres Bernárdez, *Subsidiary Organs*, in *MANUEL SUR LES ORGANIZATIONS INTERNATIONALES* 106, 110 (René-Jean Dupuy ed., 1998) (A distinction “should be made between ‘contractual’ and ‘institutional’ aspects of international organizations, taking duly into account the two differentiated, albeit co-ordinated and supplementary, sources of law for international organizations, namely its ‘constitution’ (treaty concluded between States) and its ‘internal law’ (normative acts and established practice emanating from the organs of the organization) (footnotes omitted).

16. BHUPINDER S. CHIMNI, *GLOBAL ADMINISTRATIVE LAW: WINNERS AND LOSERS* 2 (2005), [http://iilj.org/global\\_adlaw/documents/ChimniPaper.pdf](http://iilj.org/global_adlaw/documents/ChimniPaper.pdf).

17. See, e.g., UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*, <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=4317223c9> (Sept. 1, 2004).

18. *Top UN Refugee Official Calls on States to Practise What They Preach*, UNHCR NEWS STORIES, Oct. 1, 2003, <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.htm?tbl=NEWS&id=3f7af8771&page=news> (“The UN refugee agency’s top legal official told governments today in Geneva that too

The foregoing analysis has used legal and political arguments to suggest that human rights form the core standards to which the UNHCR should be held to account. The reasons for the strong focus on political standards rather than legal ones are pragmatic: International organizations can avoid even the most elegant legal arguments by invoking their immunity;<sup>19</sup> 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.

Law does not always have to be used in a “legal” manner. Legal standards can also be used as “relevant rules” in policy discussions. As such, soft law standards can be given greater prominence and can be an active part of a flexible accountability toolkit. These relevant standards can be used as a springboard to create inventive, flexible accountability mechanisms that can bring rights to life and create participation outside of judicial processes.

### B. *Specific Accountability Standards for UNHCR’s Activities*

The 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.”<sup>20</sup> Its operational role “encompasses full responsibility and accountability to the international community for all aspects of the complete life-cycle of a refugee

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many of them do not ‘practice what they preach’ . . . and urged them to live up to their own call for more ‘effective protection.’”).

19. 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 Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT’L L. 53, 97-98 (1995); KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANIZATIONS 215 (2000); AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 396 (2000).

20. UNHCR, Evaluation & Policy Analysis Unit, *Enhancing UNHCR’s Capacity to Monitor the Protection, Rights and Well-Being of Refugees: Synthesis of Findings*, ¶ 17, EPAU/2004/06 (June 2004) (prepared by Ninette Kelley, et al.) [hereinafter *Enhancing UNHCR’s Capacity*].

situation.”<sup>21</sup> The UNHCR has the most direct impact on refugees’ lives through its powers of refugee status determination and refugee camp administration: Consequently, these activities are the focus of this paper.

### 1. *Refugee Status Determination*

Refugee status determination is the application of a legal definition of “refugee” to an individual or group seeking refugee status.<sup>22</sup> 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.<sup>23</sup>

Under its statute, the UNHCR is charged with the task of “promoting the conclusion and ratification”<sup>24</sup> 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 the UNHCR and certain governments: accession to the refugee convention in return for UNHCR agreeing to bear the costs of “identify[ing] the refugees eligible.”<sup>25</sup> So while most western states conduct refugee status determination for themselves, the UNHCR conducts it in many of the poorest states of the world.

The 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

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21. UNHCR, *Partnership: An Operations Management Handbook for UNHCR's Partners*, § 1.5 subsec. 1, [http://www.unhcr.ch/cgi-bin/texis/vtx/template?page=partners&src=static/partnership\\_handbook/partnership.htm](http://www.unhcr.ch/cgi-bin/texis/vtx/template?page=partners&src=static/partnership_handbook/partnership.htm) (Feb. 2003).

22. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19.5 U.S.T. 6260, 189 U.N.T.S. 137.

23. UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, § 4.8.2 (2005), available at <http://www.unhcr.ch/cgi-bin/texts/publ/opendoc.pdf?tbl=PUBL&id=4317223c9>.

24. Statute of the Office of the UNHCR, G.A. Res. 428V, Art. 8(a), U.N. Doc. A/Res/428 (Dec. 14, 1950).

25. Agreement Between the Egyptian Government and The United Nations High Commissioner for Refugees, art. 2, 10 Feb. 1954 (unofficial translation, on file with author).

largest single status determination body in the world.<sup>26</sup> In many circumstances, the life of the individual hinges on the quality of the status determination procedure on, for example, 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 refugees at risk of return to the country from which they fled (*refoulement*),<sup>27</sup> 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 the UNHCR's refugee status determination activities in Egypt and Jordan, Mike Kagan set out a number of grave procedural failings, including: failure to provide asylum seekers with specific reasons for rejection; withholding evidence considered in cases from applicants; withholding critical parts of standard operating procedures from the public;<sup>28</sup> rejecting most appeals without an in-person re-hearing; and failing to refer appeals for consideration by a fully independent unit.<sup>29</sup>

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26. See RSDWatch.org, *2004 UNHCR RSD Statistical Portrait*, [http://www.rsdwatch.org/index\\_files/Page2091.htm](http://www.rsdwatch.org/index_files/Page2091.htm); see also UNHCR, *2004 Global Refugee Trends*, <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=42b283744> (June 17, 2005).

27. See Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 195 U.S.T. 6260, 189 U.N.T.S. 137.

28. In a recent study conducted in Cairo, only three of the sixteen known UNHCR Standard Operating Procedures had been released with the remaining either being actively withheld, or simply not made public. Michael Kagan, *Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002*, <http://www.aucegypt.edu/academic/fmrs/Reports/RSDReport.pdf>, at 19 (2002). 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. E-mail from Vincent Cochetel, UNHCR Representative, to Mark Pallis (July 2, 2001) (on file with author).

29. Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 17 INT'L J. REFUGEE L. (forthcoming 2005) (manuscript at 14, on file with author). In relation to appeals, the existing practice of UNHCR is grossly discordant with existing principles. For example, a recent Excom paper on "Fair and Efficient Asylum Proce-

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 organizations (NGOs) that may follow up on their complaints;<sup>30</sup> the UNHCR monitors states' refugee status determination procedures as part of its "supervisory role", and the media takes a keen interest in immigration issues. Refugees facing status determination by the UNHCR do not have recourse to these avenues for protection. While the UNHCR monitors states' refugee status determination, it does not oversee its own determination procedures in the same way<sup>31</sup> and only very recently have NGOs begun to do so.<sup>32</sup>

There are four main bodies of rules that are relevant to the UNHCR's refugee status determination (RSD), and constitute standards to which it should be held. The first, core rule is the "RSD obligation"—the rule that obliges states to determine whether an individual who is seeking asylum in their territory meets the relevant definition.<sup>33</sup> The obligation is de-

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dures" found that it is "essential . . . that the appeal be considered by an authority different from and independent of that making the initial decision." UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, ¶ 43, U.N. Doc. EC/GC/01/12 (May 31, 2001). This position is supported by the EU Council directive which recognizes 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." *Commission Proposal for a Council Directive on minimum standards on procedures in member States for granting and withdrawing refugee status*, art. 32, COM (2000) 578 final (Oct. 24, 2000). *C.f.* Council Directive 2005/85, art. 39, O.J. 2005 5 (L 326) 13, 31 (EC) (adopted version).

30. AMNESTY INTERNATIONAL, REFUGEES HAVE RIGHTS – QUESTIONS & ANSWERS (2005), <http://web.amnesty.org/pages/refugees-background-eng>.

31. *See infra* Part IV.A.

32. *See* What is UNHCR-RSD?, [http://www.rsdwatch.org/index\\_files/Page630.htm](http://www.rsdwatch.org/index_files/Page630.htm) (last visited Sept. 26, 2005).

33. Mark Pallis, *Obligations of States Towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes*, 14 INT'L J. REFUGEE L. 329, 346-47 (2002). *See also* Reinhard Marx, *Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*, 14 INT'L J. REFUGEE L. 383, 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* note 19, at 16. The RSD obligation has also been conceptualized by courts as an asylum seeker's "right . . . to a

rived from the customary *ius cogens*<sup>34</sup> rule of *non-refoulement* which prohibits the return of “refugees.”<sup>35</sup> That prohibition presupposes 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 be conducted in accord with 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.”<sup>36</sup> There is no consensus on whether this instrument has customary international law status, nor on the question of whether refugee status determination constitutes a “suit at law.”<sup>37</sup> The arguments in support

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hearing in order to determine whether that person meets the criteria of the Convention.” The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 155 (1997).

34. See Jean Allain, *The jus cogens Nature of non-refoulement*, 13 INT’L J. REFUGEE L. 533, 538-41 (2001).

35. See UNHCR, Executive Committee, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, No. 6 (XXVII); *id.* No. 25 (XXXIII). See also, Elihu Lauterpacht & Daniel Bethlehem, *Opinion: The Scope and Content of the Principle of Non-Refoulement*, 61-62, 64-65 (June 20, 2001), available at [www.unhcr.org](http://www.unhcr.org).

36. International Covenant on Civil and Political Rights art. 14(1), *open for signature* on Dec. 16, 1966, 999 U.N.T.S. 14688.

37. 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, UNHCR, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997). For an analysis of the case law supporting the conclusion that a refugee status determination is a “suit at law,” see Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 INT’L J. REFUGEE L. 251, 257 (1999). See also VERDIRAME, *supra* note 7 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 im-

of an RSD determination being a “suit at law” include the broad point that it is essential that there be 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 organizations and subsequently operate above the law.<sup>38</sup> Perhaps most importantly, the UNHCR has instructed its officers to respect Article 14(1) during refugee status determination<sup>39</sup>—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.

The third set of rules relevant to the UNHCR's refugee status determination are the agreements signed between the UNHCR and the host state which govern refugee status determination and make explicit reference to the tasks which the UNHCR is entrusted to perform.<sup>40</sup> In many cases, these tasks are statal functions. For example, in the Memorandum of Understanding between the UNHCR and the Government of Jordan, explicit reference is made to refugee status determina-

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properly 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.”

38. 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 & Hoffman, *supra* note 9, at 340.

39. Kagan *supra* note 29, at 6.

40. *See, e.g.*, Agreement Between the Egyptian Government and the United Nations High Commission for Refugees, *supra* note 25, at art. 2. It is “[w]ithout prejudice to Egyptian legislation” and states that specific tasks have been “entrusted” to UNHCR, among them to “[c]ooperate 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* 102 (Cambridge University Press, 2002).

tion.<sup>41</sup> The agreement indicates that Jordan relies on the UNHCR to enable it to meet its obligation of *non-refoulement*. In other words, whether Jordan incurs responsibility under that obligation depends on the 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 the UNHCR’s own guidelines or ExCom conclusions.”<sup>42</sup> These agreements are of most practical relevance when it is states seeking to hold the UNHCR to account, rather than vice versa. However, from a political point of view there is no reason why the 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 the UNHCR can reasonably be held.

Soft law provides extensive relevant rules for refugee status determination.<sup>43</sup> As stated above, ExCom produces authoritative interpretations of relevant standards.<sup>44</sup> 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 sufficient to constitute standards that can fairly be applied to the conduct of the UNHCR.

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41. Memorandum of Understanding between the Government of Jordan and UNHCR art. 2, Apr. 5, 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, membership of a particular social group or political opinion; (2) above does not include persons whose applications for asylum were rejected by UNHCR.”

42. Cf. Wilde, *supra* note 10, at 119-20 (on how identical international human rights law can be enforced differently depending on the context).

43. See Alexander, *supra* note 37, at 254-55 (providing examples of procedural guidelines on UNHCR practices); see also M. Kagan, *supra* note 29.

44. See *infra* note 15.

## 2. *Refugee Camps*

In 2002, well over four million people lived in camps administered by the UNHCR.<sup>45</sup> 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.<sup>46</sup>

Among other functions, the UNHCR's role includes wielding administrative, judicial, and semi-judicial powers.<sup>47</sup> These powers are broad: In the field of punishment, for example, domestic law is rarely applied in Kenyan camps, with decisions that affect human rights being “taken ‘informally’ either by humanitarian agencies or by the ‘customary courts.’”<sup>48</sup> It is often difficult for domestic officials to exert their jurisdiction. Indeed, according to the Superintendent of Police in Nepal's Jhapa District Police Office, the UNHCR asked the local police to inform it before local officials enter the refugee camps.<sup>49</sup>

The UNHCR ostensibly exercises these powers in order 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 the UNHCR was responsible for numerous violations of the human rights of refugees in its camps,<sup>50</sup> from collective punishment,<sup>51</sup> through violations of the prohibition on inhuman or degrading treat-

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45. The sum of the populations at each camp totaled 4,115,577. U.N. High Comm. for Refugees, 2002 UNHCR Population Statistics (Provisional) (Aug. 4, 2003), [http://www.unhcr.ch/static/statistics\\_2002/asr02-dr2-Table15.pdf](http://www.unhcr.ch/static/statistics_2002/asr02-dr2-Table15.pdf).

46. Wilde, *supra* note 10, at 108.

47. See Wilde, *supra* note 10, at 108.

48. Wilde, *supra* note 10, at 169.

49. Damakant Jayshi, *UNHCR Wakes Up to Violence Against Women, But Still Mum*, KATHMANDU POST, Nov. 5, 2002, available at <http://www.nepalnews.com.np/contents/englishdaily/ktmpost/2002/nov/nov05/index1.htm>.

50. VERDIRAME & HARREL-BOND, *supra* note 2, at 15-16 (“The research for this book was carried out in conjunction with a collaborative study funded by

ment,<sup>52</sup> to limiting freedom of expression.<sup>53</sup> To its credit, the UNHCR has begun to face up to this reality. As Jeff Crisp, head of the UNHCR's evaluation and policy analysis unit stated:

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.<sup>54</sup>

When thinking about relevant standards for accountability, it is vital to remember that the buck for protection stops with the UNHCR. The UNHCR can be understood as both government and gatekeeper: It acts as a gatekeeper when deciding who is entitled to protection, and acts in a governmental capacity in that it is entirely responsible for the running of the camps.<sup>55</sup> Day-to-day tasks, such as providing education, healthcare, and other such activities are carried out in many instances by the UNHCR's partner organizations: to a limited extent by operational partners<sup>56</sup> and more predominantly by

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the European Union (EU) on the health and welfare of refugees in Kenya and Uganda in 1996-99.”).

51. *Id.* at 120, 193-94 (describing occurrences of collective punishment at Kenyan refugee camp).

52. *Id.* at 137-41 (discussing, among other things, the “debasement” way in which refugees are subjected to headcounts: “refugees are forced in enclosures, sometimes referred to as ‘corrals,’ like cattle, often having to wait in the scorching sun for many hours; the whole process is managed in a cold, impersonal, and bureaucratic manner, engendering a sense of humiliation.”).

53. *Id.* at 198-200 (“At times UNHCR officials interfered with freedom of speech in a direct way.”).

54. Jeff Crisp, Head of the UNHCR's Evaluation and Policy Analysis Unit, quoted in id21 media, *Is the UNHCR Doing Its Job? Combining Refugee Relief with Local Development in Africa* (2003), <http://www.id21.org/id21-media/refugees/refugeecamps.html>.

55. Wilde, *supra* note 10, at 114.

56. Defined by UNHCR as “governmental, inter-governmental and non-governmental organizations and UN agencies that work in partnership with UNHCR to protect and assist refugees, leading to the achievement of durable solutions.” UNHCR, *supra* note 21, at § 1.6 subsec. 1.2.

implementing partners.<sup>57</sup> Although these tasks are often contracted out, the UNHCR still bears “responsibility and accountability for the effective planning and design of UNHCR-funded projects, and their overall supervision, monitoring and evaluation.”<sup>58</sup>

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

The 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.<sup>59</sup>

Another way of expressing this concept of “full responsibility” is to say that “there is no practical difference between the exercise of authority by the UNHCR and that which the host state would exercise if it were capable.”<sup>60</sup> The legal consequences of this state of affairs are disputed, but this author finds merit in Verdirame’s opinion that a legal obligation is created on the UNHCR not to do anything to engender the responsibility of the host state. What this means when seen

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57. Defined by UNHCR as “operational partner that signs an implementing agreement and receives funding from UNHCR.” *Id.*

58. *Id.* at § 1.5 subsec. 2.2. It is beyond the scope of this paper to extend its analysis to the accountability of the partner organizations to refugees, and the diverse Refugee Committees that exist in camps (such as those with “significant problems”) in Guinea. UNHCR, Evaluation and Policy Analysis Unit, *A Beneficiary-Based Evaluation of UNHCR’s Program in Guinea, West Africa*, ¶ 99, EPAU/2001/02 (Jan. 2001) (prepared by Tania Kaiser). 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, 21 REFUGEE 73, 77 (No.3 2003) (“For example the International Rescue Committee (IRC) 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.’ . . . Whereas 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, Peter Dennis, All about Protection? An Examination of the Immunity of UNHCR and Its Implementing Partners 30 (Fall 2003) (unpublished paper, on file with author).

59. Crisp, *supra* note 54. 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.” *Id.*

60. See Wilde *supra* note 10.

from an accountability perspective is that it would be fair to hold the UNHCR to any standard which, if breached, would engender the responsibility of the host state.

It is also important to mention, as in the case of refugee status determination, the relationship between the UNHCR and the domestic law of the host state. Memoranda of Understanding setting out the relationship between the UNHCR and host states determine their respective rights and responsibilities.<sup>61</sup> The General Assembly has emphasized that “the ultimate responsibility for the refugees within the mandate of the High Commissioner falls in fact on the countries of residence,”<sup>62</sup> but on a day-to-day level, the UNHCR remains subservient to the agreement as well as to the state’s domestic law.

In conclusion, the UNHCR believes in principle that refugees should enjoy the full range of rights in camps:<sup>63</sup> 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.”<sup>64</sup> Coming as it does from the top levels of the organization, this position creates a strong rationale for including these rules as relevant standards for UNHCR accountability.

The UN position was clarified when the UN’s Office of Internal Oversight Service conducted an investigation into al-

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61. UNHCR, *UNHCR Global Appeal 2000 – Armenia* 181, 182 (Dec. 1, 1999), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3e2ebc0f0> (stating that “In March 1999, Armenia adopted refugee legislation, and UNHCR and the Ministry of Social Security signed a Memorandum of Understanding which lays out cooperation on refugee issues, and the organizational structures and procedures for handling asylum applications.”).

62. G.A. Res. 832, at 19, U.N. GAOR, 9th Sess., Supp. No. 21, U.N. Doc. A/2890 (Oct. 21, 1954).

63. See generally The Secretary-General, *Secretary-General’s Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003). See also UNHCR Evaluation and Policy Analysis Unit, *Minimum Standards and Essential Needs in a Protracted Refugee Situation: A Review of the UNHCR Program in Kakuma, Kenya*, ¶¶ 39-40, U.N. Doc. EPAU/2000/05 (Nov. 2000) (prepared by Arafat Jamal) [hereinafter Jamal].

64. See UNHCR, Exec. Comm., *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, No. 22 (XXXII) (Oct. 21, 1981). Also relevant are the customary human rights standards such as freedom from torture or inhuman and degrading treatment and also the prohibition on collective punishment.

leged child sex abuse in the UNHCR-run refugee camps in West Africa. The investigation concluded that the conduct of the UNHCR and other NGOs should be measured against a legal framework that encompasses more than the basic human rights norms:

[I]t 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 [Guinea, Liberia, and Sierra Leone], and the codes of conduct of international organizations and NGOs.<sup>65</sup>

The combined moral force of the imperative to uphold human rights law, the political argument that organizations should practice what they preach, and the legal arguments for the application of international law to the UNHCR all work together to create a framework of rules by which the UNHCR may reasonably be expected to abide. Whether in relation to the UNHCR's activities running camps or conducting refugee status determination, the foregoing analysis has shown that refugees are entitled to expect the UNHCR to operate with respect for their rights and welfare, and that they are entitled to hold it to account when that respect is not present.

### III. ASSESSMENT OF EXISTING MECHANISMS

The 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 that the UNHCR has on the lives of refugees. States, in other words, are regarded as the power-wielders, with the UNHCR acting as the trustee who will perform the duties of office faithfully. The mechanisms which the UNHCR currently has in place have reflected this conception, with emphasis consistently placed on effectiveness and performance, and

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65. The Secretary-General, *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](http://www.un.org/Depts/oios/reports/a57_465.htm). (Oct. 11, 2002).

with accountability and refugee participation forced into a position of subsidiary concern.

The main relevant bodies in the UNHCR are the Evaluation and Policy Analysis Unit (EPAU), the Inspector General's Office, and the UN-wide body of the Office of Internal Oversight Services (OIOS). Collectively, these bodies form part of the UNHCR's "oversight and performance review"<sup>66</sup> mechanism, the overall purpose of which is to "assess and enhance the organization's operational efficiency, effectiveness and impact."<sup>67</sup> At the same time as providing an oversight function, these mechanisms have been placed under pressure to provide accountability. The UNHCR has described "effective investigations and the follow-up action that these entail" as being "among the key priorities of the Office."<sup>68</sup> In response to suggestions from the Government of Canada and the spate of sexual exploitation allegations, the UNHCR commissioned a report on "enhancing the UNHCR's capacity to monitor the protection, rights and well-being of refugees,"<sup>69</sup> and has launched special appeals to provide for accountability.<sup>70</sup>

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

### A. *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."<sup>71</sup> One of its goals is to

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66. UNHCR, Exec. Comm., *UNHCR's Organizational Oversight and Performance Review Framework*, ¶¶ 3, 17, EC/50/SC/INF.6 (Sept. 18, 2000).

67. *Id.* ¶ 2.

68. U.N. High Comm'r for Refugees, *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*, at 1 (Aug. 2003 – Dec. 2004), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/partners/opendoc.pdf?tbl=PARTNERS&id=3f83d0f84>.

69. *Enhancing UNHCR's Capacity*, *supra* note 20.

70. U.N. High Comm'r for Refugees, *supra* note 68.

71. G.A. Res. 48/218B, ¶ II.9, U.N. Doc. A/RES/48/218 (Dec. 23, 1993).

bring about “a culture of accountability.”<sup>72</sup> As its name suggests, the OIOS focuses predominately on internal issues.<sup>73</sup> It is a classic example of institutional checks and balances, a way for the UN to ensure that its organs are carrying out tasks in accordance with their mandate. An examination of the OIOS’s previous activities relating to the UNHCR will help to determine whether it is a mechanism with the potential to enhance the UNHCR’s accountability to refugees.

The relationship between OIOS review and the UNHCR’s own accountability mechanisms are not formalized. The two OIOS investigations of UNHCR conduct (the West African sex abuse scandal<sup>74</sup> and—indirectly via an independent task force—the Nairobi resettlement scandal<sup>75</sup>) both predate the creation of Investigations Unit of the Inspector General’s Office (see Section III (B) below) and it seems likely that in the future such investigations may be carried out by the Investigations Unit. On the other hand, the UNHCR still maintains a close relationship with OIOS, and in a 2003 document stated that “referrals and other forms of collaboration between the OIOS Internal Audit Service for the UNHCR and the Inspector General’s Office have contributed to increased coopera-

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72. OIOS Homepage, <http://www.un.org/Depts/oios>. OIOS defines its “mission” as “[t]o 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 program performance.” OIOS Mission, <http://www.un.org/Depts/oios/mission.htm>.

73. See OIOS Homepage, <http://www.un.org/Depts/oios> (follow “Achievements” hyperlink).

74. The scandal involved allegations of sexual abuse of minors and others by UNHCR and other staff. See generally 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 (Feb. 26, 2002), <http://www.reliefweb.int/rw/rwb.nsf/db900SID/SKAR-649JUE?OpenDocument> (draft report of assessment mission to gather information on “the nature and extent of sexual violence and exploitation of refugee children and other children of concern to UNHCR in the Mano River Sub Region in West Africa.”).

75. The scandal involved, amongst other things, allegations of bribery and corruption at the UNHCR office in Nairobi. The Secretary-General, *Investigation into allegations of refugee smuggling at the Nairobi Branch Office of the Office of the United Nations High Commissioner for Refugees, delivered to the General Assembly*, U.N. Doc. A/56/733 (Dec. 21, 2001).

tion between these oversight functions.”<sup>76</sup> The OIOS has distinct advantages over the Investigations Unit such as 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. Thus, the OIOS is likely to continue to play a role in UNHCR oversight. In light of the ongoing relationship between the OIOS and the UNHCR, it is useful to examine previous investigations in order to determine how future collaboration could be used to maximize accountability to refugees.

The West African sex abuse allegations were investigated by the OIOS at the request of the UNHCR.<sup>77</sup> The OIOS “assembled a carefully composed investigation team from eight countries comprising professional investigators, lawyers, refugee protection and human rights specialists, translators and a pediatric trauma specialist.”<sup>78</sup> The result was a strongly worded report which, while finding that the original allegations against the 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 the 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 were able to find any conclusive evidence, despite the fact that both “were convinced that corruption was taking place.”<sup>79</sup> As a next step, the United Nations Office at Nairobi Security and Safety Service undertook an investigation, which turned up no evidence of corruption.<sup>80</sup> After this,

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76. U.N. GAOR, Executive Comm. of the High Commissioner’s Programme, *Report on UNHCR’s Oversight Activities*, ¶ 76, U.N. Doc. A/AC.96/976 (Aug. 5, 2003).

77. The Secretary-General, *Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa: Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, Summary, U.N. Doc. A/57/465 (Oct. 11, 2002), available at [http://www.un.org/Depts/oios/reports/a57\\_465.htm](http://www.un.org/Depts/oios/reports/a57_465.htm).

78. *Id.*

79. The Secretary-General, *supra* note 75, at ¶ 86.

80. The Secretary-General, *Investigation into allegations of refugee smuggling at the Nairobi Branch Office of the Office of the United Nations High Commissioner for Refugees*, U.N. Doc. A/56/733 (Dec. 21, 2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/excom/opendoc.pdf?tbl=EXCOM&id=3deb346c5>.

the Inspector General was obliged to investigate. Following an investigation, the Inspector General referred the matter to the OIOS<sup>81</sup> which soon realized that the “very nature of the case required a prompt investigation by highly skilled and specially trained investigators,”<sup>82</sup> and an International Task Force was set up comprising experts from Australia, Canada, Kenya, the UK and the US.<sup>83</sup> The Task Force was an ad hoc international body with a very specific mandate. In the final analysis, the Task Force was impartial, dedicated, and thorough; it was proactive and solution oriented; its report was public;<sup>84</sup> and its conduct was scrutinized both in the media and by national parliaments of the states contributing experts.<sup>85</sup> However, it took a number of years for the UN system to generate enough momentum to create the Task Force, during which time refugees suffered considerable extra hardship. Also, it remains unclear under what circumstances such task forces would be used again in future investigations, making 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 the UNHCR itself.<sup>86</sup> On one hand, this may be a testament to the UNHCR’s willingness to be open to scrutiny, although the tremendous publicity surrounding both incidents made it almost impossible for the UNHCR *not* to respond in a comprehensive manner. But on the other hand, the OIOS investigations show that, as far as the UNHCR is concerned, the OIOS is not a “watchdog” on the lookout for potential problems, but rather a standing facility for ad hoc investigation. This atti-

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81. *Id.*

82. The Secretary-General, *supra* note 75, at ¶ 6.

83. *Id.* at 19.

84. *See id.* at 5-6, 10-11.

85. *See, e.g.,* Parliamentary Questions Tabled by T. Spelman MP. 390 Parl. Deb., H.C. (6th ser.) (2002) 418-19W, *available at* [http://www.publications.parliament.uk/cgi-bin/newhtml\\_hl?DB=semukparl&STEMMER=en&WORDS=spelman&ALL=&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=spelman&COLOR=red&STYLE=s&ANCHOR=20919103.html\\_wqn1&URL=/pa/cm200102/cmhansrd/vo020919/text/20919103.htm#20919103.html\\_wqn1](http://www.publications.parliament.uk/cgi-bin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=spelman&ALL=&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=spelman&COLOR=red&STYLE=s&ANCHOR=20919103.html_wqn1&URL=/pa/cm200102/cmhansrd/vo020919/text/20919103.htm#20919103.html_wqn1).

86. *See* The Secretary-General, *supra* note 77.

tude undermines the idea that OIOS exercises direct 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 the 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 the UNHCR on its own initiative when the 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 organizations. This would make the OIOS more effective, and at the same time increase refugee participation in accountability structures.

Promisingly, when investigations have been carried out, they have delivered positive outcomes. Investigations have led to disciplinary action against individuals, offered both specific and system-wide recommendations for future conduct, and were high profile enough to muster 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.<sup>87</sup> Such guidelines are an important means of promoting compliance by ensuring that there are no gaps in the training or advice which the UNHCR staff and partners receive.

It is not appropriate for the OIOS to provide remedies for refugees in individual cases, and it is not a substitute for a direct complaints mechanism. However, the OIOS is undoubtedly an important 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" investigations; these investigations, in turn, can lead to the dismissal of staff whose actions harmed refugees; and, finally, such investigations can lead to new standards that can in turn become standards of behavior for UNHCR operations.

### B. *Inspector General's Office*

The Inspector General's Office of the UNHCR is an in-house monitoring and oversight mechanism, which also fol-

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87. *Id.*

lows up on individual complaints brought to it. It was created in 1994 to “strengthen the UNHCR’s oversight capacity, to assess, monitor and recommend improvements in operational management.”<sup>88</sup> Its functions include inspecting the management of field offices and Headquarters, investigating reports of misconduct lodged by the UNHCR staff or refugees, and undertaking ad hoc inquiries into incidents of violent attacks on the 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.”<sup>89</sup>

The most common activity of the Inspector General’s Office is inspecting the UNHCR field offices. These inspections impact the lives of refugees: In 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.<sup>90</sup>

An additional function of the Office is to, “upon the High Commissioner’s request, conduct [i]nquiries into other types of incidents that could directly impact the credibility and integrity of the Office.”<sup>91</sup> A dedicated Investigations Unit of the Inspector General’s Office carries out most of these inquiries. The Investigations Unit was created in September 2002, partly as a result of the scandal over corruption in the UNHCR’s Nairobi office.<sup>92</sup> Between the Unit’s creation and July 2003, its four staff had investigated 207 complaints, leading to UNHCR disciplinary action in 14 cases and decisions by NGO partners

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88. Executive Comm. of the High Commissioner’s Programme, *Report on UNHCR’s Inspection and Investigation Activities*, ¶ 1, U.N. Doc. EC/52/SC/CRP.12 (May 30, 2002).

89. U.N. GAOR, Executive Comm. of the High Commissioner’s Programme, *supra* note 76, ¶ 41.

90. U.N. GAOR, Executive Comm. of the High Commissioner’s Programme, *supra* note 76, at 17 fig.3.

91. U.N. High Comm’r for Refugees, *supra* note 68, at 1.

92. “The revelation of the Nairobi corruption and the subsequent investigation have served as a wake up call for the Office.” *Supra* note 88, ¶ 15.

to dismiss at least 34 staff as a result of two cases. Other investigations are still pending.<sup>93</sup>

The procedure for follow-up of complaints varies. According to UNHCR statistics, as of July 2003, only 11% of complaints required an investigation mission, with the other investigations being conducted by telephone and email.<sup>94</sup> One positive aspect of this approach is that it allows the Investigations Unit to deal with a large number of complaints. The downside, of course, is the fact that investigation teams are not physically present prevents them from acting 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 who feel aggrieved at having their office's name sullied in Geneva.

Although public statistics on the implementation of recommendations are available, showing that just over half are fully or partially implemented,<sup>95</sup> it is important not to be seduced into thinking that this makes the Inspector General's

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93. U.N. GAOR, Executive Comm. of the High Commissioner's Programme, *supra* note 76, ¶¶ 69-70.

94. U.N. GAOR, Executive Comm. of the High Commissioner's Programme, *supra* note 76, ¶ 74.

95. A total of 56% of the recommendations have either been satisfactorily implemented, or have been partially implemented. No data is provided as to whether it is the central or peripheral recommendations that are being implemented. U.N. GAOR, Executive Comm. of the High Commissioner's Programme, *supra* note 76, ¶ 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 organization, has faced in conducting complex professional investigations." The Secretary-General, *supra* note 77, at 19. While understandable, this overlooks the fact that many of the problems in the office were relatively easy to identify: taking the example of "violent assault" of refugees by security staff, as described in the Secretary-General's report, *supra* note 77, at 14, 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 & HARRELL-BOND, *supra* note 2, at 137-138 (noting 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 maintains,

Office a transparent body.<sup>96</sup> There is simply not sufficient openness when it comes to the most important substantive matter: 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"<sup>97</sup> in Nepal has remained out of the public domain. Its contents were revealed—in part—only when British Members of Parliament insisted that details be disclosed.<sup>98</sup> Indeed, this lack of transparency has been criticized by Human Rights Watch:

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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.

96. One study, the One World Trust's "Global Accountability Report 2003," described UNHCR as having "excellent access to online information." See Hetty Kovach, Caroline Neligan & Simon Burall, *Power without accountability?* REP. (One World Trust: Global Accountability Project), Jan. 2003, at 12, available at <http://www.oneworldtrust.org/documents/GAP20031.pdf>. While UNHCR does put a tremendous amount of material online and has an easy-to-use web site, it is not comprehensive. Had the *One World Trust* known of UNHCR's refugee status determination work, or of 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 don't seem to mind, that they are so enthralled by transparency that they have lost the will to fight." Jodi Dean, *Why the Net is not a Public Sphere*, 10 CONSTELLATIONS J. 95, 110 (2003), available at <http://www.blackwell-synergy.com/doi/abs/10.1111/14678675.00315?cookieSet=1>, at 110.

97. *Rape Allegation Talks In Nepal*, BBC, Nov. 25, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/2509727.stm](http://news.bbc.co.uk/2/hi/south_asia/2509727.stm).

98. See, e.g., Parliamentary Questions Tabled by O. King MP. 430 Parl. Deb., H.C. (2005) 526W, available at [http://www.publications.parliament.uk/cgi-bin/newhtml\\_hl?DB=semukparl&STEMMER=en&WORDS=oono%20King&ALL=&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=oono%20King&COLOR=red&STYLE=s&ANCHOR=50127w23.html\\_wqn1&URL=/pa/cm200405/cmhansrd/cm050127/text/50127w23.htm#50127w23.html\\_wqn1](http://www.publications.parliament.uk/cgi-bin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=oono%20King&ALL=&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=oono%20King&COLOR=red&STYLE=s&ANCHOR=50127w23.html_wqn1&URL=/pa/cm200405/cmhansrd/cm050127/text/50127w23.htm#50127w23.html_wqn1). ("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 willfully 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

“The 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.”<sup>99</sup> 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 motivate non-governmental organizations and others to find out more about the problem in question, and to raise the alarm about similar concerns elsewhere in the world. The UNHCR will never be able to receive outside assistance in its mission to resolve systemic problems if the public is kept in the dark about things that are going wrong.

Because the Inspector General’s Office is the only partially participatory UNHCR accountability mechanism, it is crucial to examine the nature of refugee access to that Office’s remedies. A positive sign is that such access is readily available the volume of such complaints has been increasing, year-to-year. In fact, the number of such complaints recently reached a level that led the UNHCR to submit a request for extra funding “to enable it to address the high number of complaints of misconduct that it is currently handling.”<sup>100</sup> 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 an effective recourse for their grievances.

The UNHCR funding request explains the result of the increase in complaints by reference to five factors, the most pertinent of which was the establishment of “local complaints mechanisms” in certain host countries—at the UNHCR’s own initiative. The idea behind this move originated from the 2001 report of the OIOS-appointed International Task Force.<sup>101</sup> The UNHCR agreed with the Task Force’s recom-

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staff code of conduct, reinforcing the need for a zero tolerance approach to sexual abuse.”) [hereinafter Hansard].

99. Human Rights Watch Web Site, <http://www.hrw.org/press/2003/09/nepal-bhutan092403.htm>.

100. UNHCR, *supra* note 68, at 2.

101. 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 organization 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

mendations, and insisted that “action is being taken at different levels to address this recommendation.”<sup>102</sup> Disappointingly, however, the most recent statistics suggest that local refugee complaints mechanisms account for only a very small proportion of the total complaints received. The sources of the complaints received by the Investigation Unit during 2003<sup>103</sup> were as follows: UNHCR 71%; NGO 11%; other/unknown 7%; OIOS 6%; host government 4%; and refugees 1%. Indeed, the percentage of complaints from refugees is actually falling year-on-year: That figure was a full 7% in 2002.<sup>104</sup>

Why is the interest among refugees so low? One problem is that complaints mechanisms exist only in a limited number of offices; making them mandatory would give all refugees an equal opportunity to complain. Moreover, emailing or telephoning Geneva directly is almost impossible for most refugees. Knowledge of rights is also a critical factor in explaining the low level of refugee participation: Refugees need to have greater access to information about their rights and entitlements and about the kind of conduct they can expect from the UNHCR. Possession of this information would make them empowered participants in the complaints system. Finally, it is essential that refugees have confidence in the system—which is not always easy under the circumstances on the ground, as illustrated by the following anecdotes from the Lawyers’ Committee for Human Rights:

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

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should be made available . . . [and] should be posted in plain sight (large poster form) at all UNHCR facilities and partner non-governmental organizations facilities.” Secretary-General, *supra* note 75, at ¶ 87.

102. *Id.*

103. U.N. GAOR, Executive Comm. of the High Commissioner’s Programme, *supra* note 76, at 19 fig.4.

104. *Id.*

responsible called in those who had complained and told them that they would now lose refugee status.<sup>105</sup>

Such incidents show the need for safeguards to both protect against such possible instances and, more importantly, against the perception that such serious repercussions could be in store for a refugee who files a complaint.

There is certainly ample opportunity for the Inspector General's Office to play a much greater role in creating accountability to refugees. This would be of most importance in refugee camps, and in relation to any other concerns about the operation of UNHCR offices. The Office's role is negligible, however, in relation to injustices that may arise in the course of refugee status determination cases. It lacks both the expertise and the manpower needed to serve as an effective appeals unit, and it is no substitute for the proposed UNHCR Appeals Tribunal for the review of refugee status determinations, or an Ombudsperson's office with relevant legal expertise.

### C. *The Evaluation and Policy Unit (EPAU)*

The EPAU was created in 1999 and is essentially a UNHCR think tank with a primary objective of "provid[ing] the UNHCR managers, staff and partner organizations with useful information, analysis and recommendations, thereby enabling the organization to engage in effective policymaking, planning, programming and implementation."<sup>106</sup> It seeks to achieve this by writing evaluations and reports and by publishing a series of working papers—117 working papers have been published since 1999, on a huge variety of topics.

The EPAU is small and has only three staff members, plus a support staff of one.<sup>107</sup> However, a broad range of other interested groups and individuals are also involved with the

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105. RICHARD CARVER, VOICES IN EXILE: AFRICAN REFUGEES AND FREEDOM OF EXPRESSION 16 (2001), available at <http://www.article19.org/docimages/1008.htm>.

106. UNHCR, Evaluation and Policy Unit, *UNHCR's Evaluation Policy*, ¶ 1.2, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/research/opendoc.pdf?tbl=RESEARCH&id=3d99a0f74> (Sept. 2002).

107. UNHCR, Executive Comm. of the High Commissioner's Programme, *UNHCR's Organizational Oversight and Performance Review Framework*, ¶ 14, U.N. Doc. EC/50/SC/INF.6 (Sept. 18, 2000).

EPAU,<sup>108</sup> and it often contracts out its evaluations to consultants selected through a competitive bidding process.<sup>109</sup>

EPAU evaluations have seven general purposes: reinforcing accountability, facilitating institutional and individual learning, team building, strengthening partnerships, promoting understanding, supporting advocacy efforts, and influencing organizational culture.<sup>110</sup> The EPAU is a tool that reflects the UNHCR's desire to fulfill its mandated tasks as effectively as possible. The mere existence of the EPAU is a way of reassuring donors that the UNHCR is making its best efforts to exercise its authority with care. In that sense, it is an institutional tool, rather than a device to facilitate refugee participation.<sup>111</sup>

As one might expect, the outcomes of EPAU reports tend to be geared towards learning lessons and improving management. The Unit does take care to make sure that its evaluations lead to change, and to this end it 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 avoiding a situation in which EPAU recommendations are "perceived as unrealistic or inappropriate by program staff,"<sup>112</sup> 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 for addressing flaws in the entire policy of encampment may well be shot down as unrealistic. Such a situation would be

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108. *Id.* ¶ 13.

109. *Id.*

110. Jeff Crisp, Head, Evaluation and Policy Analysis Unit of UNHCR, What is the Purpose of Evaluation?, Presentation to UNHCR's Standing Committee, (June 25, 2002), [www.unhcr.ch/cgi-bin/texis/vtx/research/](http://www.unhcr.ch/cgi-bin/texis/vtx/research/.opendoc.pdf?tbl=RESEARCH&id=3d20238e2)  
[opendoc.pdf?tbl=RESEARCH&id=3d20238e2](http://www.unhcr.ch/cgi-bin/texis/vtx/research/.opendoc.pdf?tbl=RESEARCH&id=3d20238e2).

111. 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 2* (UNHCR Evaluation & Policy Unit, New Issues in Refugee Research Working Paper No. 51, 2002), available at [http://www.unhcr.ch/cgi-bin/texis/vtx/research/](http://www.unhcr.ch/cgi-bin/texis/vtx/research/.opendoc.pdf?tbl=RESEARCH&id=3c7527f91)  
[opendoc.pdf?tbl=RESEARCH&id=3c7527f91](http://www.unhcr.ch/cgi-bin/texis/vtx/research/.opendoc.pdf?tbl=RESEARCH&id=3c7527f91).

112. UNHCR, Evaluation and Policy Unit, *supra* note 106, ¶ 3.5.

most regrettable, as it would prevent decision makers from considering the full range of solutions to a given problem.

Selection of topics for evaluation through the EPAU mechanism is a highly centralized, top-down affair. The first of two factors considered when selecting topics for EPAU's work program 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 organization of, at least one joint or inter-agency evaluation; and, finally, that any large scale emergency operation should be evaluated within six months of its initiation.<sup>113</sup> The second factor is a requirement that the EPAU work program "incorporate project proposals identified by senior management, other entities within the UNHCR, external stakeholders and by the EPAU itself."<sup>114</sup> Tight control of what is evaluated does not mean that the UNHCR is hostile to external inputs, but simply reflects the extent to which the UNHCR finds the EPAU useful, and that it wants to remain in control of deciding which areas are most in need of evaluation.

These clearly defined functions were altered on January 1, 2003 when, in a pronounced shift in emphasis, the UNHCR adopted a new evaluation policy. This policy placed greater emphasis on human rights<sup>115</sup> and refugee rights.<sup>116</sup> In the words of the UNHCR, the policy "introduces procedures that will maximize 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."<sup>117</sup> The intention behind the change was to provide "stakeholders, especially refugees, with an opportunity to present their perceptions and assessments of the UNHCR's activities" and to "reinforce UNHCR's accountability to refugees, partner organizations and the Executive Committee."<sup>118</sup>

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113. *Id.* ¶ 2.3(a).

114. *Id.* ¶ 4.1.

115. *Id.* ¶ 1.4.

116. *Id.*

117. Crisp, *supra* note 110, ¶ 1.

118. UNHCR, Evaluation and Policy Unit, *supra* note 106, ¶ 1.2.

This lofty language is a testament to the pressure which the UNHCR has been under to increase 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."<sup>119</sup> This approach can be described as evaluative accountability.

Merging evaluation and accountability is a novel concept, but one which the UNHCR had discounted some years earlier: "[A]lthough 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."<sup>120</sup> One reason for this lack of success is that ideas of evaluation and of participatory accountability are conceptually distinct. Participatory accountability recognizes that organizations must be subservient to law, and thus legally responsible for the consequences of their acts. It also recognizes that individuals are possessed of legal rights, including human rights, which organizations cannot ride roughshod over. Evaluation, on the other hand, is "the action of appraising or valuing."<sup>121</sup> This distinction is brought into sharp focus when seen through the eyes of refugees involved with the mechanism: Evaluations are based on the view 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 the UNHCR more accountable?" seems reasonable, answers to that ques-

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119. UNHCR, Executive Comm. of the High Commissioner's Programme, *supra* note 108, ¶ 17.

120. UNHCR, Inspection and Evaluation Service, *Planning and Organizing Useful Evaluations*, ¶ 5, <http://www.unhcr.ch/cgi-bin/texis/vtx/research/opendoc.pdf?tbl=RESEARCH&id=3f5dcc779> (Jan. 1998) (*prepared by* Lowell Martin).

121. OXFORD ENGLISH DICTIONARY ONLINE (2d ed. 1989), <http://dictionary.oed.com> (search "Find Word" for "evaluation"; last visited Sept. 22, 2005).

tion run the risk of only being institution-based initiatives, ideas that are inexorably colored by the institutional mindset.

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

Management styles matter. An organization that has not developed a participatory, empowering management structure cannot run a participatory program. The way things are organized in the offices will have an impact on the operations on the ground. For all its rhetoric about participation, the UNHCR's systems and management structure do not facilitate the participation of refugees or even its implementing partners in the field.<sup>122</sup>

This analysis shows that evaluative accountability is not a step towards greater participatory accountability, as the UNHCR's rhetoric might seem to suggest. Expectations for this accountability mechanism would be more accurate if the UNHCR did not make grandiose claims, and simply presented it as a step to gain greater refugee involvement in its own "delegation" model.

The EPAU undoubtedly performs a valuable role in the operation of the UNHCR. Indeed, this paper has drawn on ideas developed in EPAU working papers. Attempts to put the rights of refugees at the heart of evaluations and the suggestion that there should be greater refugee involvement in those evaluations are both positive steps. The UNHCR should build upon this momentum for change and should continue to seek refugees' suggestions for topics ripe for evaluation. Although seeking refugees' views places an administrative burden on the UNHCR,<sup>123</sup> it is a burden well worth meeting. However, the fact that the most contentious issues are off the agenda for

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122. Oliver Bakewell, *Community Services in Refugee Aid Programmes: A Critical Analysis* 15 (UNHCR Evaluation & Policy Unit, New Issues in Refugee Research Working Paper No. 51, 2003), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/research/opendoc.pdf?tbl=RESEARCH&id=3e71f15a4>.

123. 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]." UNHCR, Evaluation and Policy Unit, *Organizing participatory self-evaluations at UNHCR: Guidelines*, 7 (May 2005), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/research/opendoc.pdf?tbl=429d7b e52>.

participatory evaluations<sup>124</sup> highlights the fact that “evaluative accountability” is not a substitute for direct refugee access to mechanisms that can provide remedies in individual cases.

Accountability is too important to be adopted simply because it sounds good. Despite the difficulties associated with accountability mechanisms, they must be instituted and instituted seriously. Strong accountability tools are often a thorn in the side of an institution; and yet, the accountability function of the EPAU does not appear to have the capacity to inflict so much as a scratch on the UNHCR.

#### IV. THE POLITICS OF ACCOUNTABILITY

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

##### A. UNHCR's Supervisory Role

One of the UNHCR's primary responsibilities is “supervising the application of the provisions of [the 1951 Convention].”<sup>125</sup> This is often understood to mean that the UNHCR

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124. PSEs are not envisaged as an appropriate forum for hotly contested issues to be raised with UNHCR: “[in] a program characterised by strained relationships amongst UNHCR, the government and/or refugees: convening a PSE [participatory self-evaluation] under very tense conditions could be counterproductive.” *Id.* at 7. Second, because it is an important feature of evaluations to give a holistic view of a program so that positive feedback can be obtained and 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 allocated for “Strengths, Weaknesses, Opportunities, Constraints,” and up to 2.5 hours on assessing progress against UNHCR objectives. *Id.* at 22. 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). *Id.* at 12.

125. Convention Relating to the Status of Refugees art. 35, July 28, 1951, 189 U.N.T.S. 176, available at <http://www.unhcr.ch> (select “1951 Conven-

carries out only this function and nothing else, as the quote below illustrates:

What needs to be remembered in this context is that the UNHCR does not implement refugee protection—states do. While the UNHCR may play a role in the development of certain policies . . . the office is hardly ever determinative of the protection actually implemented.<sup>126</sup>

This misconception means that the UNHCR's active role in the lives of refugees on a day-to-day basis is often overlooked. One vivid example of this played out at the recent Global Consultations initiative run by the UNHCR, where the session which examined "ways to enhance the effective implementation of the 1951 Convention"<sup>127</sup> did not discuss the ways in which the UNHCR is itself responsible for implementing the Convention: namely, conducting refugee status determination and administering refugee camps. At the time, it was suggested that the UNHCR's refugee status determination activities can be seen as part of its monitoring function<sup>128</sup> and that

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tion" under "Quick Find Topics"; then follow "Text of the 1951 Convention" hyperlink) (last visited Sept. 22, 2005).

126. Erik Roxstrom & Mark Gibney, *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 37, 43 (Niklaus Steiner, Mark Gibney & Gil Loescher eds., 2003).

127. Cambridge Expert Roundtable, Cambridge, U.K., July 9-10, 2001, *Summary Conclusions – Supervisory Responsibility*, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bbd798a4> at ¶ 1.

128. 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 . . .'" Global Consultations on International Protection, 2nd Expert Roundtable, Cambridge, U.K., July 9-10, 2001, *Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond*, at 6 (written by Walter Kalin), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3b3357a69> (quoting The Executive Comm. of the High Commissioner's Programme, No. 28 (XXXIII) *Follow-Up on Earlier Conclusions of the Sub-Committee of the Whole on International Protection on the Determination of Refugee Status, Inter Alia, with Reference to the Role of UNHCR in National Refugee Status Determination Procedures* (1982), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=41b041534> [hereinafter Executive Comm. Conclusion No. 28 (XXXIII)]).

The actual wording, which is even less indicative of "monitoring" is "[n]oted with satisfaction the participation in various forms of UNHCR in

running camps can be understood as a part of its supervisory responsibilities.<sup>129</sup> This position is tenuous at best, and does not reflect the realities on the ground. Until there is greater awareness and acceptance of the UNHCR's role in this area, and acceptance that UNHCR *does* implement protection and *does* have the power to recognize or deny the rights of individuals, questions of accountability will continue to suffer from a paucity of scholarly and political attention.

### B. *Emergency Mindset*

The UNHCR was established on a temporary basis to deal with the specific emergency presented by post World War II refugees in Europe.<sup>130</sup> While its role has changed since then, the nature of the refugee phenomenon has not, and so the UNHCR still operates primarily in emergency situations. This creates an emergency mindset which permeates all of the UNHCR's areas of operation including refugee status determination and the operation of long-term development camps. This "crisis management" approach has the significant downside of leaving little or no room for long-term planning, a strategic problem exacerbated by the fact that the UNHCR must continually seek voluntary contributions from states, rather than being paid annually out of the general UN budget.<sup>131</sup> This means that appeals for funds tend to be issue- or crisis-specific. Recently, however, the temporary mandate of the UNHCR has been indefinitely extended—a positive step, to be sure, and one seen by some states as being directly linked to increased accountability along the lines of the delegation model.<sup>132</sup> Although this indefinite mandate extension does

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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." Executive Comm. Conclusion No. 28 (XXXIII).

129. "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, *supra* note 128, at 1.

130. UNHCR, *Helping refugees: an introduction to UNHCR* (2004), <http://www.unhcr.ch/cgi-bin/texis/vtx/basics/opendoc.htm?tbl=BASICS&id=420cc0432>.

131. *Id.*

132. "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

not address the funding issue, it should hopefully give rise to an impetus to create the structures that are associated with a permanent body—systems of accountability being chief among them.

The UNHCR carries out refugee status determination because states, at one point or another, were unwilling or unable to do so. Adopting this role was a response to needs that arose in the midst of emergencies. It is not a task that is naturally suited to the UNHCR, and it is a testament to its dedication to refugee protection that it stepped in to assume this role.<sup>133</sup> In many cases, it appears that the UNHCR is trying to hand the status-determination function back to states; the 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 the 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."<sup>134</sup> In order for greater attention to be focused on improving accountability in refugee status determination, the UNHCR's extensive role in the process must be fully acknowledged. Although it may theoretically be an interim measure, the facts indicate that these "interim measures" are not necessarily short term.

The situation is similar, if not worse in the operation of refugee camps: States are often unwilling to recognize the fact that the refugee problems in their country are unlikely to be resolved in the near future, and they work with the UNHCR to maintain a sharp focus on repatriation. The trouble is, 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. The UNHCR's reliance on the good will of the host state makes it unlikely that it will put good relations at risk

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of its activities, and enhanced visibility and accountability on the management of funds that it receives from donors." Shigeyuki Shimanori, First Secretary, Permanent Mission of Japan to the United Nations, Statement on Item 112, "Report of the UN High Commissioner for Refugees" (Nov. 4, 2003), <http://www.un.int/japan/statements/shimamori031104.html>.

133. Volker Turk, *UNHCR's Supervisory Responsibility* 15 (UNHCR Evaluation & Policy Unit, New Issues in Refugee Research Working Paper No. 67, 2002), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/research/open.doc.pdf?tbl=RESEARCH&id=3dae74b74>.

134. Alexander, *supra* note 37, at 252.

in order to design participatory accountability systems that may appear to threaten the authority of the host state.

In addition, there appears to be an institutional “emergency mindset” in the camps themselves: An EPAU report highlighted the lack of long-term planning in Kenya’s Kakuma Camp, stating that even with “[t]he mass influx emergency long over, Kakuma still operates in a state of what one UNHCR official termed a ‘rampant emergency.’”<sup>135</sup> The UNHCR’s budgetary priorities reflect this mindset, funneling funds to practical, assistance-based areas,<sup>136</sup> making it necessary to seek funds to enhance accountability through special supplementary appeals.<sup>137</sup>

The basic problem 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 hierarchical distinction between rights. The challenge for the UNHCR is to move away from the emergency mindset in order to more fully embrace the realities on the ground.

### C. Humanitarianism

Academic and humanitarian circles are only recently accepting the fact that “human rights violations may occur even within organizations dedicated to the protection of these very rights.”<sup>138</sup> The UNHCR is seen, and sees itself, as a humanitarian organization trying its best to help refugees in difficult circumstances around the world.<sup>139</sup> Consequentially, as with any human rights organization, any criticism of the UNHCR risks being perceived as “unsporting”—raising questions of accountability is, as has been said elsewhere, somewhat like sending mom’s apple pie to the FDA for chemical analysis.<sup>140</sup>

When criticisms are brought up, the defense tends to be: “It’s better than nothing; imagine what would happen if we

135. Jamal, *supra* note 63, at 7.

136. See generally UNHCR ANNUAL PROGRAMME BUDGET 2004 (2004), <http://www.unhcr.ch/cgi-bin/texis/vtx/excom/opendoc.pdf?tbl=EXCOM&id=3f4ca7834>.

137. See, e.g., UNHCR, *supra* note 64.

138. Singer, *supra* note 19, at 88-89.

139. For a critique of humanitarian assistance, see Barbara Harell Bond, *Can Humanitarian Assistance with Refugees Be Humane?* 24 HUM. RTS. Q. 51 (2002).

140. *Id.* at 52.

weren't helping."<sup>141</sup> This underlines a serious problem with humanitarianism generally—the idea that different standards apply to organizations committed to “helping out” in difficult situations. The UNHCR, for example, 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.”<sup>142</sup> To take the idea one step further, it often appears that the simple fact of “helping the vulnerable” is seen as obviating any need for accountability—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 proposition, humanitarianism also puts refugees in a weak position. As noted earlier, refugees are seen as mere “beneficiaries” for the purposes of the UNHCR’s evaluations. An EPAU report encapsulated the problem: “UNHCR programs are predicated on refugees and other beneficiaries functioning as the recipients of assistance and not as decision makers and judges of it.”<sup>143</sup> Seeing refugees in this way is a relatively common approach, and is so entrenched that people speak passionately in defense of it. For example, the Director of *Medicins Sans Frontiers* in the Netherlands recently had this to say on the subject of accountability to refugees and others:

How can one seek to be accountable to victims when the nature of victimization means disempowerment, control manipulation and abuse . . . In broken societies, the complex institutional architecture needed to generate adequate checks and balances simply does

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141. Indeed, Loescher points out “When confronted with criticism, the UNHCR frequently rationalizes its actions and eschews blame by claiming that it is an operational and humanitarian agency . . . .” LOESCHER, *supra* note 126, at 358. Tangentially, while it is perhaps understandable that institutions are 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 recognize that it is in its own interest to be more transparent. It is only on 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.

142. Verdiramé and Harrell-Bond, *supra* note 2, at 289-90.

143. Kaiser, *supra* note 58, at ¶ 128.

not exist. This is not our fault. We must remember that victims are victims.<sup>144</sup>

Hence, refugee status comes to equal status as a victim, a recipient of the “gift” of aid,<sup>145</sup> a beneficiary, an object of charity—rather than as someone to whom accountability is owed.<sup>146</sup> This precludes effective accountability because it denies refugees the moral authority to raise concerns, and does not recognize the full range of their legal entitlements. Seeing refugees as being possessed of inalienable rights—like all other humans—is an essential step in changing current perceptions of refugees. The challenge is to entrench this view to the extent that views start to change and differences begin to be discernable in practice.

#### D. *The Media*

The media plays a central role in influencing accountability outcomes: The more attention it draws to an issue, the greater the reaction to it. This dynamic 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.<sup>147</sup> In Nepal—a story covered, as far as the author’s research can determine, only by the Kathmandu Post—a two-person UNHCR team traveled to the region and produced an investigation, the contents of which

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144. Austen Davis, *Accountability and Humanitarian Actors: Speculations and Questions*, HUMANITARIAN PRACTICE NETWORK, ¶ 1 (Nov./Dec. 2003), available at <http://www.globalpolicy.org/ngos/aid/2003/12question.htm> (“Accountability is a relatively straightforward concept. So why is humanitarian accountability so peculiarly complex?”).

145. On the “debasement” of people through the receipt of gifts that cannot be repaid, see generally Marcel Mauss, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (Ian Cunnison trans., W.W. Norton & Co. 1967) (1925).

146. 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 a nude . . . . The nude is condemned to never being naked. Nudity is a form of dress.” JOHN BERGER ET AL., *WAYS OF SEEING* 54 (Penguin Books 1972). The refugee is condemned to never being a person, but always a “beneficiary.”

147. See, e.g., BBC, *Child Refugee Sex Scandal*, Feb. 26, 2002, <http://news/bbc.co.uk/1/hi/world/africa/1842512.stm>.

were internal and only publicly disclosed after questions were raised in the British Parliament.<sup>148</sup>

This response is not surprising, given how well it dovetails with the UNHCR's stated position: "UNHCR recognizes the value of external and externally led evaluations, particularly when the program or activity under review is a large, highly publicized or controversial one."<sup>149</sup> While concerted independent reports are certainly useful, they do not remove the need for the UNHCR's own reports to be impartial and transparent. Regardless of media attention, the UNHCR should investigate all allegations with the same vigor.

The resolution of the Nairobi resettlement scandal also seems to have been dependent on publicity. As stated above, the UNHCR's own investigations resolved neither the office's significant problems nor even its minor ones. While this may have been partially due to the complexity of the investigation, it seems likely that the international attention to the scandal created an impetus for action from the UNHCR to put its office in order.

Top-down accountability mechanisms, such as those used by the UNHCR, need publicity to generate real motivation for action. This is problematic because it decreases the likelihood of substantive responses in low-profile cases. Those who cannot draw attention to their problems must not be overlooked.

### E. *Donors*

The UNHCR represents, in many ways, an ideal beneficiary of donations: It is well known, humanitarian and non-political. The opportunity for donors to fund specific projects also allows governments to be seen to be responding to a particular crisis at a particular time, when political circumstances so demand.<sup>150</sup> While this may be useful on one level, it reduces the incentives for states to contribute to less exciting projects, such as long-term accountability, which is often seen

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148. Jayshi, *supra* note 49. See Hansard, *supra* note 98.

149. UNHCR, Evaluation and Policy Unit, *supra* note 106, ¶ 3.2.

150. Cf. UNHCR, Donors/Partners: Donors, <http://www.unhcr.ch/cgi-bin/texis/vtx/partners?id=3b963b874> ("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.").

as an institutional problem that is less worthy of donations than refugee protection issues. The challenge for the UNHCR under these circumstances is to create sustained donor engagement.

Because of the UNHCR's extensive expertise, states are usually happy to simply let the UNHCR get on with the task of protecting refugees once the requirements for financial accountability have been met. This *laissez faire* attitude on the part of states 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 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 can be argued that funds donated to the UNHCR is not used efficiently if part of it is not allocated to accountability mechanisms.

#### F. NGOs

Pressure on the UNHCR from international NGOs is sporadic. The refugee offices of Amnesty International and Human Rights Watch are relatively new, and the pressure that comes from them tends to be directed towards specific, high-profile issues. At the 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, claiming that it is fully occupied on issues such as the President's prospective third term in office and the war in the 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 occasion, writes a letter stating that the refugee has come to see Amnesty with their concerns.<sup>151</sup> This seeming lack of constructive engagement on the broad issues raised by individual cases is deeply regrettable, and creates the impression that Amnesty would rather rig-

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151. *Id.*

idly adhere to its institutional priorities than engage 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 the UNHCR, given that they are often wholly dependent on the UNHCR for their funding.<sup>152</sup> Even those that are not funded by the UNHCR may find that taking a critical stance puts them at risk of being pushed out of the sphere of non-political advocacy.<sup>153</sup> Legally oriented refugee advocacy groups are slowly emerging, such as the Refugee Law Project based at Makerere University, Uganda, and the Africa and Middle East Refugee Assistance, based in Cairo. Both represent refugees and lobby on their behalf.<sup>154</sup>

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

### G. *Refugees*

Pressure from the refugees themselves on the UNHCR and donors has been almost entirely absent. Given that refugees by definition lack the protection of their government,

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152. See VERDIRAME & HARRELL-BOND, *supra* note 2, at 20 (“Because of their close partnership with UNHCR, humanitarian NGOs were reluctant to get involved for serious advocacy for refugee rights.”); *cf. id.* at 319-24 (describing relationships between UNHCR and NGOs as “less than ideal”).

153. See, e.g., Susan Dicklitch & Doreen Lwanga, *The Politics of Being Non-Political: Human Rights Organizations and the Creation of a Positive Human Rights Culture in Uganda*, 25 HUM. RTS. Q. 567 (2003).

154. See Refugee Law Project, <http://www.refugeelawproject.org> (“Refugee Law Project (RLP) seeks to ensure fundamental human rights for all asylum seekers, refugees, and internally displaced persons within Uganda. Ultimately, we wish Uganda to treat all such people with the same standards of individual respect and social justice that it applies to the rest of its citizens.”) (last visited Nov. 10, 2005); See Africa and Middle East Refugee Assistance, <http://www.amera-uk.org/> (“AMERA Objects are: 1. To provide for the relief of refugees by the provision of legal advice of assistance on matters relating to asylum determination, settlement of migrants, family reunification and other matters relating to the enjoyment of the fundamental rights which they could not otherwise afford owing to the property or social or economic circumstances of such persons. 2. To advance education of the public, in particular lawyers and paralegals, in matters relating to forced migration and law affecting refugees in Africa and the Middle East.”) (last visited Nov. 10, 2005).

they cannot rely on their government to lobby on their behalf. Nor can they rely on the UNHCR in the same way as refugees in countries where the host state conducts refugee status determination. Refugees may not always be aware of their rights, and may lack access to UNHCR complaint mechanisms. Furthermore, in the many instances where the UNHCR is responsible for status determination or for running refugee camps, refugees are unwilling to take a stand for themselves, out of a fear of being seen to be “rocking the boat.” It seems that such 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 organization.”<sup>155</sup>

In many instances, refugees form community groups or committees through which they can streamline their interaction with the UNHCR on general issues. These initiatives are welcome, but must be treated with circumspection because, in many instances, these groups are not representative of all members of the community in question. “Traditional justice” in refugee camps is another way that refugees are commonly left to control themselves, with the result that human rights violations are carried out in the name of respecting traditional cultural practices. Such problems highlight the need for the application of minimum human rights standards in camps,

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155. 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 organization of such lectures as you conducted in Kakuma Refugee Camp.’

Article 19, *Voices in Exile: African Refugees and freedom of expression*, at 36 (Apr. 2001) (quoting Letter from Roberto Quintero, UNHCR Protection Officer (Jul. 19, 1997)) (on file with author).

and for the establishment of a mechanism to handle individual complaints.

The UNHCR has made efforts to elicit the views of refugees outside of the structures already discussed. The most notable recent initiative was introduced during the UNHCR's Global Consultations exercise amid much fanfare, with both a dedicated section on the UNHCR website, and a mention in the UNHCR's report to the General Assembly.<sup>156</sup> The website section entitled "Listening to Refugee Voices" makes reference to the "Refugee Parliament,"<sup>157</sup> although its "Declaration" is somewhat bland, speaking only in glowing terms and arguing that without the UNHCR, refugees "would be abandoned to violence, persecution and oppression."<sup>158</sup> The other examples of UNHCR initiatives listed on the website<sup>159</sup> merely serve to highlight the fact that there is little systematic, structured exchange with refugees.

Achieving active and meaningful engagement with refugees during the course of the Global Consultations was clearly a logistical challenge. However, the fact that the UNHCR places such a great emphasis on its efforts to do so, however insufficient they may be, demonstrates that it was under a great deal of pressure to take account of refugee opinions throughout the Consultations.

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156. The High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees, 2002*, ¶ 12, delivered to the General Assembly 58th Session, U.N. Doc. A/58/12 (2003), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=EXCOM&id=3f813e6e7&page=exec>.

157. UNHCR, GLOBAL CONSULTATIONS: LISTENING TO REFUGEE VOICES 1 (2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3c0b819c3> (last visited Sept. 10, 2003).

158. *Id.*

159. "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." UNHCR Web Site, "Global Consultations Listening to Refugee Voices," Protecting Refugees, ¶ 5, <http://www.unhcr.ch/cgi-bin/texis/vtx/protect?id=3c0b82cd4>.

## V. CONCLUSIONS AND RECOMMENDATIONS

Global administrative law is an emerging field that will help shape the complex processes of international laws functioning in a globalized 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 is essential and worth fighting for.

The UNHCR's accountability mechanisms have evolved on a piecemeal basis and are now fairly broad. Initially instituted to provide institutional memory and internal evaluation, these mechanisms are now charged with the task of starting to secure accountability to refugees, among other things. It is fair to say that, taken together, these mechanisms 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 International Task Force's recommendation of increased access to the Inspector General's Office should be implemented. In addition, the 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 among refugees that their complaints are allowed and addressed, and improve the quality of follow-up by allowing more contact than is possible by email or phone. The rules and procedures for investigations should also be made clear in order 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 the UNHCR conducts refugee status determination. If independent or UNHCR-wide refugee status determination appeals units are established (as in 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 or abuse.

The Evaluation and Policy Analysis Unit should continue its evaluation work, and should continue to consult with refugees. It should allow refugees or their representatives to suggest topics for evaluation. One refugee-recommended 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 the UNHCR's operations, especially in situations where the UNHCR is unwilling or unable to investigate.

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

The essential point is that accountability is not a luxury, but rather an essential part of the 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 recognize the scale of its role in refugee status determination throughout the world, and has taken steps towards trying to improve the process,<sup>160</sup> the most notable being the creation of a Refugee Status Determination Unit. This Unit is currently recruiting staff, but when it is fully operational its role will include

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.<sup>161</sup>

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160. UNHCR, Exec. Comm., *Agenda for Protection*, ¶ 2, A/AC.96/965/Add.1 (June 26, 2002).

161. UNHCR Web Site, Protecting Refugees Page, <http://www.unhcr.ch/cgi-bin/texis/vtx/protect?id=3d3d26004>.

This Unit will hopefully also be instrumental in judicializing the refugee status determination process.

The UNHCR's protection role in refugee camps is already relatively well known, as are—to a lesser degree—its violations of the rights of refugees. The UNHCR's legal obligations in the camps has been subject to much less attention, however. This too is beginning to change as refugee camps are fast becoming the prime case study for broader discussions of UN responsibility for 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 be seen as holders of rights rather than as beneficiaries of assistance. It will not be easy to change a mindset so deeply ingrained in the UNHCR, NGOs, donors, and the general public. However, the fact that a group of people is being denied access to their rights to due process is so disturbing that this author remains optimistic that it will not continue indefinitely. The first step is a simple one that merely entails embracing the rule of law and promoting human rights. Acceptance of the fact that the 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 organization that is not acting in accordance with standards that it recognizes as binding. This would help to foster more sustained donor engagement and would help to focus donor attention 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 the dialogue between the UNHCR and refugees.

The final trend is the increasing NGO awareness of this issue. Groups like RSDWatch are starting to spread the word about the critical importance of the UNHCR's role in refugee status determination.<sup>162</sup> Non-governmental organizations issued a joint statement during the October 2004 EXCOM meet-

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162. See generally RSDWatch.org, <http://www.rsdwatch.org>.

ings which noted their “concerns that some of the 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.<sup>163</sup> This is to be welcomed.

A UNHCR that is more accountable to the refugees it serves could yet emerge. For this to happen, sustained UNHCR support, donor engagement, NGO oversight, continuing legal evolution and pressure from refugees are all essential prerequisites. Refugees are owed accountability as a matter of right—accountability is not an option, but a requirement. Organizations with the ability to create such accountability should not hesitate in making it a reality.

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163. INTERNATIONAL COUNCIL OF VOLUNTARY AGENCIES, INTERNATIONAL PROTECTION NGO SUBMISSION AGENDA ITEM 6(1), SUBMITTED TO THE 55TH SESSION OF THE UNHCR EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER’S PROGRAMME (2004), *available at* <http://www.icva.ch/cgi-bin/browse.pl?doc=doc00001257> (last visited Sept. 15, 2005).