

Term Paper for Module C 2007

<% '-----Eeva Puumala-----%>

Examine the lacunae in the 1951 Refugee convention and how it could be addressed and gaps filled from other International Law provisions.

by *Marini*

The structure of International Refugee Law is built on the 1951 Convention relating to the Status of Refugees. The 1951 Convention defines the term 'refugees' and sets minimum standards for the treatment of persons who are found to qualify for refugee status.

The legal framework that supports the international refugee protection regime was built by the States, through the years; States have affirmed their commitment to protecting refugees by acceding to the 1951 Convention relating to the status of Refugees, the cornerstone document of refugee protection. The Convention which was developed and drafted by the States, enumerates the rights and responsibilities of refugees and the obligations of States that are parties to it.

While the international community has generally responded swiftly and generously to refugee crises over the past half century, in recent years, some worrying trends have begun to emerge. Countries that once generously opened their doors to refugees have been tempted to shut those doors for fear of assuming open-ended responsibilities, of abetting uncontrolled migration and people-smuggling, or of jeopardizing national security. Real and perceived abuses of asylum systems as well as irregular movements have also made some countries more wary of refugee claimants and concerned that resources are being sufficiently focused on those in greatest need. Refugees have been refused admission to safety or have been expelled from asylum countries. Those who have reached a potential country of asylum have sometimes been turned away or sent back without being able to apply for asylum.

Refugees have been the target of violent attacks and intimidation, largely because they were perceived as "different" from the communities in which they had temporarily settled. Tensions between refugees and local populations have erupted when refugees were seen as competitors for natural and economic resources. Armed combatants have been allowed to mingle freely with-and intimidate with seeming impunity-the civilians who sought safety in refugee camps and settlements. And, increasingly, governments have resorted to detention of illegal entrants, including women and children, many of whom are seeking asylum. Some have done so to discourage or to dissuade those who have already arrived from applying for refugee status. Some regard detention as an effective way of managing illegal entrants regardless of their asylum status while identity, national security and the elements on which he claim to refugee status or asylum is based are explored, and that it facilitates removal of those who have no grounds to stay.

Some asylum countries around the world have become increasingly concerned about the economic and social costs of asylum and are moving to harmonize their refugee determination systems in part to address inequities which may result from different levels of entitlements. Some donor governments are struggling with the costs of their domestic systems for receiving refugees and determining their claims, while also supporting large numbers of refugees over long periods of time in other, less wealthy nations. Developing countries argue that the burdens of asylum are not shared equally: while they host thousands and sometimes millions of refugees, wealthier countries are restricting access to their own territories and reducing support to the countries of first asylum. UNHCR itself is facing budgetary shortfalls and has been forced to cut back on staff and programmes.

Problems of racism, discrimination, xenophobia and intolerance thwart international efforts to protect refugees. Racism may force people into becoming refugees, complicate efforts to protect them and pose obstacles to finding solutions to their problems.

Refugees and asylum-seekers, particularly when they arrive in large numbers, can have a major impact on a country of asylum and the local population. Some host communities see refugees as a threat to their way of life or culture, or even to their national security and stability. Others may regard all foreigners as competition for limited resources. The positive contribution that refugees can make to the country of asylum and their need for the humanitarian support and protection that is lacking in their home countries are often lost in emotional debates about 'unwanted' migrants.

Racism and Discrimination can hound refugees through each stage of their displacement experience.

Ethnic and racial tension can cause refugee flows. Discrimination against one ethnic group can be the result or an integral part of political strategies to exploit differences between ethnic groups to rally support for one group over another. Despite the fact that most States contain a variety of ethnic groups, the ethnic identity of a single group is too often made into the defining characteristic of a nationality. When this happens minority groups may be seen as obstacles to nation-building. If a state is unwilling to perform its mediating role effectively or is party to ethnic conflict, "ethnic cleansing" or other forms of segregation of populations, may result. Indeed the deliberate expulsion of an ethnic group may be the intended object of the conflict.

During their displacement, refugees may be seen as an unwelcome disruption in the lives of local people among whom they have sought safety. The host community may regard them as competition for limited resources, even a threat to the local culture. Discrimination may follow, in acts of overt violence against the refugees or in more subtle ways, such as offering exploitatively, low wages for work.

Even when a solution to the refugee's plight has been identified - local integration in the host country, resettlement to a third country or voluntary repatriation to the refugee's country of origin - discrimination against the refugee or returnee can thwart any hope of resuming a normal life. Increasingly, repatriation is taking place in less than ideal circumstances, sometimes in conditions of continued conflict and general insecurity. A weak state and civil society make the process of peace building and reconciliation difficult, if not impossible. If large numbers of refugees return home at the same time local resources and infrastructure may be strained hampering the progress of economic reconstruction. Large scale returns can also influence the policies and legitimacy of the State, especially in the context of elections or when returns may change the military or political balance of power from one ethnic group to another. Both of these consequences can, in turn, result in

discrimination against the returning refugees who may be seen as the "cause" of unwanted economic, military and political outcomes.

Who is a refugee?

According to the 1951 Convention relating to the Status of refugees, a refugee is someone who:

Has well founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion and is outside his /her country of origin and is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution.

If we look closely, we see that the Refugee Convention definition of a refugee can be interpreted quite narrowly. It does not reflect today's realities. The Refugee Convention focuses on persecution aimed at the individual, not at groups of vulnerable people. According to the definition, a person fleeing from war or civil unrest is not a refugee, even if their lives are in danger; unless they are persecuted because of race, religion, nationality, membership in a particular social group or hold a particular political opinion. If not they do not count as 'true' refugees.

Some governments have chosen to interpret the Convention as offering protection only to refugees fleeing persecution by government agents – even though the Convention does not explicitly say this. As a result, refugees fleeing from "non-state agents"-such as paramilitary groups or private individuals are denied protection.

Another serious limit of the Refugee Convention is the lack of explicit protection for women. The drafters of the Convention have not considered different forms of discrimination and persecution aimed at women and men. The Convention says nothing of women fleeing societies that regulate and control women's lives or fail to protect them from abusive situations.

Also refugee children must benefit from the same protection as adult refugees; and given their special needs and vulnerabilities, refugee children should also receive special protection and assistance.

Since the Refugee Convention was drafted in the wake of World War II, its definition of refugee focuses on persons who are outside their country of origin and are refugees as a result of events occurring in Europe or elsewhere before 1 January 1951.

A new refugee crises emerged during the late 1950s and early 1960s, it became necessary to widen both the temporal and geographical scope of the Refugee Convention. Thus, a Protocol to the Convention was drafted and adopted.

The 1967 Refugee Protocol is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention's refugee definition.

Together, the Refugee Convention and Protocol cover three main subjects:

The basic refugee definition, along with the terms for cessation of, and exclusion from, refugee status.

The Legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return, or refoulement, to a territory where their lives or freedom would be threatened.

States' obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention.

By acceding to the Protocol, States agree to apply most of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.

With regard to the definition of the term refugee it is interesting to focus on the manner in which Regional Laws and standards have expanded the definition.

The conflicts that accompanied the end of the colonial era in Africa led to a succession of large -scale refugee movements. These population displacements prompted the drafting and adoption of not only the 1967 Refugee Protocol but also the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Asserting that the 1951 Refugee Convention is "the basic and universal instrument relating to the status of refugees", the OAU Convention is, to date, the only legally binding regional refugee treaty.

Perhaps the most important portion of the OAU Convention is its definition of a refugee.

The OAU Convention follows the refugee definition found in the 1951 Convention, but includes a more objectively based consideration: any person compelled to leave his/her country because of "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality."

This means that persons fleeing civil disturbances, widespread violence and war are entitled to claim the status of refugee in States that are parties to this Convention regardless of whether they have a well-founded fear of persecution.

Also in 1984, a colloquium of government representatives and distinguished Latin American jurists was convened in Cartagena, Colombia to discuss the international protection of refugees in the region. This gathering adopted what became known as the Cartagena Declaration. The Declaration recommends the definition of a refugee used throughout the Latin American region should include the 1951 Refugee Convention definition and also persons who have fled their country "because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

Although the Declaration is not legally binding on States, most Latin American States apply the definition as a matter of practice; some have incorporated the definition into their own national legislation. The Declaration has been endorsed by the Organization of American States (OAS), the UN General Assembly and UNHCR's advisory Executive Committee.

Article 14(1) Universal Declaration of Human Rights states that everyone has the right to seek and enjoy in other countries asylum from persecution." As acknowledged in the OAU Convention, the Cartagena Declaration and the 1967 UN Declaration on Territorial asylum, granting asylum is a humanitarian and apolitical act. The word "asylum" is not defined in international law; but has become the umbrella term for the sum total of protection provided by a country to refugees on its territory. Asylum means, at the very least basic protection - i.e. no forcible return (refoulement) to the frontiers of territories where the refugee's life or freedom would be threatened - for a temporary period, with the possibility of staying in the host country until a solution outside that country can be found. In many countries it means not only incorporating the rights set out in the 1951 Convention but going far far beyond those.

International Refugee Law should be understood against a backdrop of international human rights law and international humanitarian law. Human Rights Law constitutes the broad framework within which refugee law provisions should be seen. Most of the rights crucial to refugee protection are also the fundamental rights stated in 1948 Universal Declaration of

Human Rights. These are the right to life, liberty and security of the person, right to seek and enjoy asylum, freedom from torture, cruel, inhuman and degrading treatment or punishment, freedom slavery and servitude, recognition as a person before the law, freedom of thought, conscience and religion. Freedom from arbitrary arrest and detention. Freedom from arbitrary interference in privacy, home and family, freedom from arbitrary interference in privacy, home and family, freedom of opinion and expression, right to be educated, right to participate in the cultural life of a community.

The International Covenant on Civil and Political Rights has been to prohibit return to torture; In addition, nearly all of its provisions apply to non-citizens.

Refugees are entitled to partially overlapping sets of rights: those rights accorded to them as individuals and guaranteed under international human rights standards and specific rights related to their status as refugees.

Two international human rights treaties have a particular significant role in international refugee law:

- The Convention against torture and other cruel, inhuman or degrading treatment or punishment provides for protection from refoulement or forced return, to situations where there is a substantial risk of torture. The non-refoulement provision of the Convention against Torture is absolute, unlike the non-refoulement provision of the Refugee Convention, which requires that protection be linked to a fear of persecution because of a person's race, religion, nationality, membership of a particular social group or political opinion. In addition, no exceptions may be made to the Convention against Torture's non-refoulement obligation. Unlike the Refugee Convention, the Convention against Torture does not have any provision excluding perpetrators of particularly serious crimes or other undeserving persons from its protection.

- The Convention on the Rights of the Child, to which nearly every state in the world is a party, applies to all children without discrimination including child refugees and asylum seekers. The Convention specifically stipulates that every child seeking refugee status has a right to protection and humanitarian assistance in the enjoyment of the rights set forth in that Convention and in others to which the State is a party.

International Humanitarian Law provides that victims of armed conflict, whether displaced or not, should be respected, protected against the effects of war, and provided with impartial assistance. Because many refugees find themselves in the midst of international or internal armed conflict, refugee law is often closely linked to humanitarian law. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) contains an article that deals specifically with refugees and displaced persons (Article 44). The Additional Protocol I (1977) provides that refugees and Stateless persons are to be protected under the provisions of Part I and III of the Fourth Geneva Convention.

A humanitarian and non-political organization, UNHCR is mandated by the United Nations to protect Refugees and help them find solutions to their plight. As the problem of displacement has grown in complexity over the past half century, UNHCR has also grown to meet the challenge. The office founded in 1950, has expanded from a relatively small, specialized agency to an organization with offices in 120 countries.

At the international level UNHCR promotes international refugee agreements and monitors government compliance with international refugee law. UNHCR staff promotes refugee law among all people who are involved in refugee protection, including border guards, journalists, NGOs, lawyers, judges and senior government officials.

At the field level, UNHCR staff work to protect refugees through a wide variety of activities, including responding to emergencies, relocating refugee camps away from border areas to improve safety; reuniting separated families; providing information to refugees on conditions in their home country so they can make informed decisions about return; documenting a refugee's need for resettlement to a second country of asylum; visiting detention centers; and giving advice to governments on draft refugee laws, policies and practices.

UNHCR seeks long-term solutions to the plight of refugees by helping refugees repatriate to their home country, if conditions are conducive to return, integrate into their countries of asylum, or resettle in second countries of asylum.

The Refugee Convention and Protocol provide States Parties with a legal foundation for refugee protection. For its part, UNHCR has been given a mandate to provide international protection to refugees and seek solutions to their problems through its Statute, adopted by the UN General Assembly in December 1950.

The statute sets forth the High Commissioner's functions, including his/her authority to protect refugees as defined in terms similar, although not identical, to the Refugee Convention. Over the years, the General Assembly has expanded UNHCR's responsibility to include protecting various groups of people who are not covered by the Refugee Convention and Protocol. Some of these people are known as "mandate" refugees; others are returnees, stateless persons and, in some situations, internally displaced persons.

UNHCR's mandate is now, therefore, significantly more extensive than the responsibilities assumed by State Parties to the Refugee Convention and Protocol. One of the challenges facing refugees and countries of asylum today consists of bridging the "protection gap" which exists in situations where UNHCR seeks to protect persons with respect to whom concerned States do not recognize that they have a responsibility under any of the refugee instruments.

Then, the problem of Statelessness is widespread in certain parts of the world and may be particularly acute among children of parents of mixed origin, or who are born in a country other than their parents' country of origin, since they do not necessarily gain citizenship of the place where they are born. Like refugees, stateless persons may be compelled to move because they cannot receive adequate protection. In 1994, UNHCR's Executive Committee urged UNHCR to strengthen its efforts with respect to statelessness, including promoting accession to the 1954 and 1961 conventions on statelessness, arranging for training and systematic gathering of information on the dimensions of the problem. The resulting study, suggests that millions of people may be stateless worldwide.

UNHCR's involvement with stateless persons is based on the strong links between statelessness and displacement. For example:

- Displacement can cause statelessness (when, for example, a person's displacement is followed or accompanied by a redrawing of territorial boundaries.)
- Displacement can be a consequence of statelessness (when, stateless and denationalized populations are forced to leave their usual place of residence).
- Statelessness can be an obstacle to the resolution of refugee problems (when for example countries refuse to readmit former refugees on grounds of statelessness).

The 1954 Convention relating to the Status of Stateless Persons helps regulate and improve the status of stateless persons and helps ensure that stateless persons enjoy fundamental rights and freedoms without discrimination.

The 1961 Convention on the Reduction of Statelessness defines ways in which persons who would otherwise be stateless can acquire or retain nationality through an established link with a State through birth or descent. The Convention covers such issues as the granting of nationality, the loss or renunciation of nationality and transfer of territory. Retention of nationality, once acquired, is also emphasized.

Accession to the 1954 Convention provides stateless persons with many of the rights necessary to live a stable life. Accession to the 1961 Convention helps resolve many problems which result in statelessness. It also serves as a reference point for national legislation.

Nationality is a status from which other rights derive. The 1961 Convention on the Reduction of Statelessness states that a person may not be deprived of her nationality on racial, ethnic, religious or political grounds; sketches out measures to prevent statelessness resulting from the transfer of territory; and establishes rules for granting of nationality to persons born in a country who would otherwise be stateless. It stipulates that a UN body would supervise claims under the Convention. That body was never established as such, but UNHCR has been entrusted with its functions by the UN General Assembly (resolution 3274XXIX).

International concern for the plight of internally displaced persons has acquired a degree of urgency in recent years as greater numbers of people, uprooted by internal conflict and violence, are exposed to danger and death. However, there is no single international agency, nor is there an international treaty, that focuses on internal displacement. As a result, the international response to internal displacement has been selective, uneven and in many cases, inadequate. Large numbers of internally displaced persons receive no humanitarian assistance or protection at all. It is heartening that the international community is now exploring ways to provide more sustained and comprehensive protection and assistance to this group.

UNHCR has a concern in internally displaced persons because the causes and consequences of their forced flight are frequently linked closely with those of refugees.

The concern, arising from UNHCR's humanitarian mandate and endorsed by successive UN General Assembly resolutions may take the form of UNHCR activity to:

- Advocate on behalf of internally displaced persons
- Mobilize support for them
- Strengthen the organization's capacity to respond to their problems
- Take the lead in protecting and assisting them in certain situations

UNHCR's advocacy for internally displaced persons is based on the Guiding principles on Internal Displacement. The Guiding Principles, which consolidate many of the important international protection principles applied to internally displaced persons, were presented to the UN Commission on Human Rights in April 1998. The principles reflect and are consistent with human rights and humanitarian law and draw on relevant parts of refugee law. They address all phases of internal displacement and are intended to provide guidance to States, non-State actors, other authorities and inter-governmental and non-governmental organizations on issues of internal displacement.

International Refugee Law will ultimately be judged by the impact it has on people's lives; people who can be labeled as refugees or others who are hurt, scared and tired strangers-the victims of persecution and violence. We have now moved beyond the first stage which is the articulation of internationally accepted standards. We are now in the more difficult stage – of integrating these standards into policy and legislation and ensuring that they make a positive impact on all members of the human family.

"It is said that the "Convention mandates protection for those whose civil and political rights are violated, without protecting persons whose socio-economic rights are at risk", Discuss the relevance and implications in the context of 'paradigm shift' in post-cold war era".

by Sriram Hari Das

The Universal Declaration of Human Rights, adopted in 1948, is a statement of basic rights and fundamental freedoms owed to all human beings. As a declaration, it does not have binding force, but it is internationally recognized as a cornerstone of human rights protection (Feller, 2001). Article 14 states "Everyone has the right to seek and to enjoy in other countries asylum from persecution." This principle is at the root of refugee rights worldwide, and forms the basis of the 1951 UN convention on the status of refugees (Sarre, 1999).

The 1951 refugee convention was the first truly international agreement covering the most fundamental aspects of a refugee's life. It defined the term refugee and spelled out a set of basic human rights for refugees which should be at least equivalent to freedoms enjoyed by foreign nationals living legally in a given country and in many cases those of citizens of that state. It recognized the international scope of refugee crises and the necessity of international cooperation, including burden-sharing among states, in tackling the problem.

But the conventions at the time of the adoption also had certain limitations to it. The 1951 Convention could benefit only persons who had become refugees as a result of events occurring prior to 1 January 1951 and also had a specific geographic focus. However, the years following 1951 showed that refugee movements were not merely the temporary results of the Second World War and its aftermath. Throughout the late 1950s and 1960s new refugee groups emerged and were in need of protection which could not be granted to the time limit attached to the 1951 convention. The global refugee crisis outgrew parts of the original document and a 1967 Protocol to the Convention eliminated the time and geographical constraints.

Nevertheless the definition of the convention has been criticized because of, among other things, its limitation on the grounds of civil and political rights, excluding any reference to economic, social and cultural rights (Sainz-Pardo, 2002). In order to qualify as a refugee under the 1951 convention, a person's civil and political rights must have been violated in

his/her country of origin or habitual residence. The 1951 convention also places emphasis on fear of persecution but it does not define the term clearly. The Convention leaves the concept of persecution" the basis for granting asylum-vague. It also upholds the right of Governments to determine who qualifies as a refugee (D'Adesky & Christine, 1991). Its article 33 refers to threats to life and freedom of the individual "on accounts of race, religion, nationality, membership of a particular social group or political opinion". This ambiguity in the refugee definition has been subjected to intense debate in the recent times. Experts say that this definition was drawn up in the context of the post-war years and does not correspond to many of today's refugee situations.

Refugee scholar Millbank (2000) says that the convention-based asylum regime has fostered characterizations of asylum seekers as either political and thus 'genuine' and 'legitimate' and 'deserving', or economic and thus 'abusive' and 'illegitimate' and 'undeserving'. But most asylum seekers however come from countries where economic failure and political instability and persecution and poverty are inextricably mixed. If people cannot earn a living because their country is wracked by civil war, are they victims of political persecution? If a natural disaster strikes and area residents flee across a border to safety, do they qualify for the "right of asylum"?

50 years after its adoption, a lively debate is underway. Former British Prime Minister Tony Blair says though the treaty's "values are timeless" it is now time to "stand back and consider its application in today's world." (Wilkinson, 2001) More recently, several Western European governments, including Austria and the U.K., have suggested that the Refugee Convention is outdated and ill-equipped to deal with modern migration movements and have proposed that it should be adapted accordingly.

According to Collinson (1993) the 1951 Refugee Convention is a product of the Cold War environment, and it reflects both European experience of Nazi war-time persecutions and Western political interests as these were perceived at the time. Sarre (1999) argues that during the cold war period the convention was used by Western states to preserve their global political agendas as states were keen to accept those who fought against communism as refugees. In the past, in pursuit of this aim, asylum-seekers from Afghanistan, Cuba, Cambodia, Somalia, Nicaragua and Viet Nam were received willingly as refugees while those fleeing from El Salvador and other dictatorships supported by the West were not (Sarre 1999). But, since the end of the Cold War, very few, if any, asylum seekers have geo-political value, and they are seen to be a burden to be avoided. The dissolution of the Soviet Union in 1991 also resulted in massive population movements in subsequent years as inter-ethnic conflicts began to heat up with the end of the Cold War (Lubbers, 2004).

After the cold war era asylum have become increasingly concerned about receiving large numbers of refugees and the impact on the international refugee-- protection regime was grave. Large-scale refugee flows were, and continue to be, perceived as a threat to political, economic, and social stability in the host countries. As former UN Refugee high Commissioner Mr. Lubbers puts it "In traditionally hospitable asylum countries, the presence of refugees came to provoke hostility and violence. Governments increasingly closed their borders or pushed refugees back to danger and, in some cases, even death".

The end of the cold war also saw many countries closing their doors to asylum seekers (Sarre, 1999). Greece toughened its entry requirements in 1991. Austria introduced an arsenal of new measures in 1992. New laws restricting the right of immigrants to apply for asylum have applied in Britain since 1993. The situation has only got worse aftermath of the 9/11 incident. There has been noticeable growth in an overly restrictive application of the 1951 Refugee Convention and its 1967 Protocol, coupled with a formidable range of obstacles erected by states to prevent legal and physical access to their territory.

The growing tendency among some governments to interpret the Convention's provisions restrictively is a reaction to the strain imposed on asylum systems by the rise in uncontrolled migration and both real and perceived abuse of those systems (Achiron, 2001). Cheap international travel and global communications are prompting increasing numbers of people to abandon their homes and to try to improve their lot elsewhere, whether for economic or refugee-related reasons. Smugglers and traffickers have exploited the vulnerable and human smuggling has become a multi-billion dollar trade. Economic migrants and genuine refugees often become hopelessly entangled in the race to reach 'promised land.' As the distinction between the two becomes blurred, sometimes intentionally so, the rhetoric against all those perceived as 'foreigners' and 'bogus refugees' and, increasingly, against the Refugee Convention, itself, has become more barbed.

Kofi Annan, the former UN secretary-general, in 2004 launched a scathing attack on "fortress Europe", warning that its "dehumanizing" policies towards immigrants are leading many to their deaths. In his address to European parliament Mr. Annan noted that "The public has been fed images of a flood of unwelcome entrants, and of threats to their societies and identities..... In the process, immigrants have sometimes been stigmatized, vilified, even dehumanized" (Guardian, 2004).

The immigration doors are closed in most countries to economic migrants. Thus, they clog up the asylum procedures which cannot function normally any longer. While the official doors have closed, unofficial ones remain open, and contribute to a new form of exploitation of foreign labor. Many persons have been used below the standards without any protection. In Western Europe, that exploitation has also been accompanied by xenophobia and racial attacks on new migrants by citizens (D'Adesky & Christine, 1991).

Contemporary refugee movements are different from those of the period immediately following the Second World War. In 1951, when the refugee convention was adopted, most of the refugees originated from Europe. The situation has changed and the majority of today's refugees are from Africa and Asia. Current refugee movements unlike those of the past increasingly take the form of mass exoduses rather than individual flights and majority of today's refugees are women and children. Reasons for leaving are very often complex and not simply the result of immediate persecution. The causes of exodus have also multiplied and now include natural/ecological disasters and extreme poverty which are not accepted as valid reasons for displacement by the 1951 convention. Therefore many do not qualify as refugees on the basis of the United Nations definition. The refugee world also became more crowded, with millions of refugees, economic migrants and others on the move. All of this, some critics argue, has made the Convention outdated and irrelevant.

The end of the Cold War changed the context in which refugee protection is conceived. Since the convention does not protect persons' whose socio - economic rights are at risk, states often find it convenient to label all asylum seekers as economic migrants. Even should the United Nations or regional intergovernmental organizations expand treaty protections and strengthen enforcement mechanisms, governments may still reduce the protection of refugees and displaced persons through various approaches that have been recently attempted (Helton, 1994). Governments, particularly those of Western

developed countries, are increasingly treating those once considered to be refugees as unauthorized migrants. Security and budgetary constraints now supplant humanitarian and legal obligations, and governments see the refugee issue not as an ideological frontline, but rather as a problem in migration management. Today, host countries stereotype most asylum-seekers from less-developed countries as economic migrants (Lawyers Committee for Human Rights, 1991).

From a human rights perspective, this situation raises great concern. It will not always be possible to distinguish with certainty, between a refugee and an economic migrant. Telling refugees and migrants apart is difficult: both use people smugglers, have fraudulent or no documents, and have similar stories. It may be argued that if the emphasis is placed on threats to life and freedom, there is little to between a person facing death though starvation because his/her economic rights were violated and another threatened with arbitrary execution because of his/her political beliefs.

But how do we address this situation? Does it mean that the 1951 convention has lost its relevance in the contemporary era? Refugee law scholars like Ranabir Samaddar feel that the contemporary humanitarian refugee regime has got institutionalized and the 1951 convention has failed to negotiate the population flow of the world today. Refugee protection today is confronted by a number of major challenges and experts agree that the refugee protection regime needs an immediate transformation. There are repeated calls nowadays to revisit and revise the 1951 convention so that the population flow could be better managed. The Austrian government, while holding the E.U. presidency, first proposed this in a July 1998 strategy paper that depicted the 1951 convention as a product of the Cold War period that had never been intended to deal with contemporary large-scale refugee movements caused by civil war, inter-ethnic violence, and persecution by non-state agents. The Austrians proposed a comprehensive, integrated approach to migration that addressed trade and development, as well as migration policy. This proposal, particularly its reference to the need to amend the 1951 convention, was considered too radical by most E.U. states at the time (HRW, 2001)

However one should understand that the repeated calls to revisit and revise the 1951 convention do not mean that the convention has become obsolete. After 50 years after its adoption, the Refugee Convention remains the only international instrument for the protection of refugees, and the United Nations High Commissioner for Refugees (UNHCR) is still exhorting Western governments to respect and uphold it as the 'cornerstone' and 'foundation' of the international refugee system (Millbank, 2000). Some even argue that the 1951 Convention and 1967 Protocol are of even greater relevance today despite global political and economic trends. According to UNHCR, the convention which was never intended to be a migration control tool has survived many centuries and has shown great resilience and cannot be held accountable for what it has not achieved in relation to problems for which it was never intended as a response. (Feller, 2001).

On the other hand some refugee scholars fear that if the convention is put in any way into discussion, we may end up with a convention and a protection regime of much more limited rights. Refugee advocates White and Rowman (2007) argue that states are also keen on amending the 1951 convention partly in response to the rise in criminal trafficking across borders, and partly in an attempt to better balance the refugee's well founded fear of persecution with the demands for increased security aftermath the 9/11 incident.

However fearing negative consequences and not revising the current refugee protection set up and 1951 convention might not be the right way to go about. While the convention remains as the 'foundation' of the international refugee system, even its strongest supporters agree that it does not address all the displacement situations. The UNHCR's protection Chief Erika Feller also agrees. According to her "UNHCR's perception is that refugee protection stands at a crossroads. Its most important tool—the 1951 Convention—sets out a basic framework that remains directly relevant to many, *but not to all*, displacement situations."

The need for amendments to the refugee convention is being felt more than ever and reforming processes are essential to resolve or mitigate the factors/causes resulting in forced migration and displacement, and especially to end protracted displacement situations. Given the nexus between asylum and migration, amending the convention should be seriously considered in order to make the law more relevant to the necessities of this new era. Attention should be also paid to protect those whose socio-economic rights are a risk to the law complete and effective. Taking into consideration the socio-economic rights of migrants would only improve the quality of asylum as a whole and would help to protect the rights of the some of the vulnerable populations of the 21st century: it is time for a change.

References

- Achiron, M. 2001 'A Timeless Treaty Under Attack' *Refugees Magazine*, Vol 2 (123)
- Black, I. 2004. 'Annan attacks fortress Europe over migrants: UN chief pleads for warmer welcome as French broadcaster launches drive for ethnic minority presenters', *The Guardian*. Manchester (UK): Jan 30, 2004 pg. 19
- Collinson, S. 1993. 'Beyond Borders: West European Migration Policy Towards the 21st Century', *Royal Institute of International Affairs*, London,.
- D'Adesky and Christine, A. 1991 'UNHCR: facing the refugee challenge', *UN Chronicle* accessed at <http://www.encyclopedia.com/doc/1G1-11547649.html>
- Feller, E. 2001, 'The Convention at 50: the way ahead for refugee protection' *Forced Migration Review* 10, April 2001, 6-9.
- Hathaway, J. C 1991, '*The Law of Refugee Status*', Toronto: Butterworths, pp. 69-97
- Hathaway, J. C 2002 'The Causal Nexus in International Refugee Law' *Michigan Journal of International Law*, Vol. 23:207
- Hathaway, J. C & Hicks, (2005) 'Is There a Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear?', *Michigan Journal of International Law*.
- Helton Arthur C. 1994 'Displacement and Human Rights: Dilemmas in Refugee Protection', *Journal of International Affairs*, Vol. 47, Iss 2. pg. 379
- Human Rights Watch, '*Refugees, Asylum Seekers, and Internally Displaced Persons 50 Years On: What Future for international Refugee protection?* Accessed at <http://www.hrw.org/wr2k1/special/refugees2.html>).
- Lawyers Committee for Human Rights, 1991 '*Uncertain Haven: Refugee Protection on the Fortieth Anniversary of the 1951 United Nations Convention*' New York.
- Lubbers, R. 2002 'Asylum for all', *Harvard International Review*, Vol. 24, Iss. 1; pg. 60, 5 pgs

Millbank, A 2000, "The Problem with the 1951 Refugee Convention", *Social policy group*" accessed at www.aph.gov.au/library/pubs/rp/2000-01/01RP05.htm

Sainz – Pardo, 2002, 'The contemporary relevance of the 1951 convention relating to the status of refugees', *The international journal of the Human Rights* Vol. 6 No 2 pp 23 – 34

Samaddar, R. 'Power, Fear, Ethics' *Refugee Watch*, No. 14

Sarre, R. 1999, 'Justice for the world's dispossessed: Going beyond contemporary refugee Law to establish a new world order' *Contemporary Justice Review*, Vol (2) 1, pp 37 – 48

White & Rowman , 2007 '*Fear of Persecution: Global Human Rights, International Law, and Human Well-Being*', Littlefield Publishers, Inc.,.

Wilkinson, R. 2001, 'Refugee Convention at 50..' *Refugees Magazine*, Vol 2 (123)

Will H. Moore & Stephen M. Shellman, 'Fear of Persecution: Forced Migration, 1952-95' *Journal of Conflict Resolution*, October 2004, 48(5):723-745.

The role and responsibility of UNHCR vis-à-vis its mandate of refugee protection in practice: A critical analysis by Tiina Kanninen

Introduction to the draft paper

In this essay, I will assess the role and responsibility of the United Nations High Commissioner for Refugees (UNHCR) through its contemporary mandate of refugee protection. The paper is filled with a complex set of argumentation which arguably requires much restructuring and sophistication of the theoretical framework until being a presentation of a coherent analysis. However, the paper is roughly divided into four parts. In the first part, I will briefly discuss the UNHCR's origins and the mandate as defined in the Statute. In the second part, I will argue that the extension of the organisation's roles in the field of protection have effectively also extended the mandate in practice. This section will also discuss the tasks that the organisation has today and the ways in which these tasks have evolved since the early days. In the third part, I will try and show that the role of UNHCR is not only determined by its tasks but that the organisation's roles and identities gain myriad forms as it performs its tasks by interacting on various levels of global refugee regime. Thus, the organisation becomes characterised by situational identities that effectively make it a transnational hybrid. As for the question of responsibility, I feel that this transnational nature of the organisations overwhelming immanence in refugee protection makes the assessment of its responsibility a very complex and confusing task. However, in the existing text I do not make this point very clear at all. Instead, I will try and bring my analysis back to where the very idea of UNHCR should build on: that is, refugees as individual, experiencing human beings with inalienable rights. In the last section, I will briefly analyse UNHCR as a responsible actor, asking whether and by whom it can be held accountable if something goes wrong in its measures of protection. Here, I will argue that as long as the refugees as beneficiaries do not have the means to hold UNHCR accountable for actions that affect their lives, the organisation cannot be perceived as serving its mandate in a fully responsible manner. Please, note that while this introduction states the overall aims of my essay, this draft still requires a great amount of editing in order to reach those aims. Apologies for not being able to provide you with anything more complete.

UNHCR's mandate of refugee protection

Exile and the granting of asylum to foreigners have been common practices for thousands of years,^[i] but it was not until the 20th century that the modern system of nation-states started to develop a systematic legal regime for the organisation of human displacement. These developments, the resulting international "refugee regime"^[ii] and, indeed, the very historically constructed category of 'the refugee'^[iii] have roots in the European experiences of displacement during the two world wars. The First World War and its subsequent upheavals, for example, put some ten million Europeans on the move^[iv], which at the time was an unprecedented number of refugees. These movements were long perceived as a temporary phenomenon or, a 'problem' to be 'solved' by concerted but interim efforts by the international community. Thus, in the aftermath of the First World War, during the inter-war years and throughout the Second World War, a series of *ad hoc* instruments were applied so as to protect refugees and manage international displacement.^[v] Of course, the 'problem' was never 'solved' – quite the opposite – and, in December 1949, the UN General Assembly decided for the establishment of United Nations High Commissioner for Refugees (UNHCR).^[vi] A year later, the General Assembly adopted the Statute of the Office of the United Nations High Commissioner for Refugees^[vii], which instituted the organisational structure, nature and duties for the Commissioner.

The operative time-limit for the office was originally three years^[viii], but still today the Statute functions as the legal basis of the UNHCR mandate. While the role of the Commissioner in refugee protection – and hence its mandate *in practice* – has been expanded since the writing of the Statute, what is especially valid still today is the Statute's definition of 'the refugee'. According to the Statute, a refugee is a person, who has been forced to leave her/his country of nationality – or, if s/he has no nationality, the country of habitual residence – because of a well-founded fear of persecution based on 'race', religion, nationality or political opinion and is unable or unwilling to return.^[ix] I will not analyse the deficiencies of the definition in great detail but it should be noted that the Statute's definition largely fails to serve its purposes to protect. It does not, for example, recognise the plight of the internally displaced; it leaves people escaping indiscriminating violence outside protection; and it does not recognise the special position and needs of women, children and other vulnerable groups in situations of displacement.^[x] These and other deficiencies of the definition have been widely recognised^[xi] and, as is discussed below, the UNHCR's practical role has been gradually extended to meet these challenges.

Apart from the Statute text, however, the definition has been further established in the international refugee law via the 1951 Refugee Convention and its 1967 protocol^[xii]. Many national asylum legislations heavily relying on these arguably deficient but widely acknowledged agreements^[xiii], the Statute's original categorisation of 'the refugee' remains to be practiced all over the world. In other words, while the General Assembly has gradually amended the UNHCR mandate to better meet the reality of human displacement^[xiv], and while there are other international humanitarian^[xv] and human

rights[xvi] legislation for the protection of all people, much refugee legislation tends to lag behind – especially on the national level[xvii].

The High Commissioner's office, however, was not established so as to allow the governments to lag behind in questions of refugee protection, but to facilitate and supervise their efforts in this field. Article 8 of the Statute defines the means by which the Commissioner should serve its mandate and, here, also his/her relationship vis-à-vis the states is implicitly defined. The article lists specifically nine tasks through which the Commissioner "shall provide for the protection of refugees falling under the competence of [her]his Office". These include (a) promoting international refugee conventions to governments; (b) promoting special agreements with states that could improve particular situations of the displaced; (c) assisting all efforts to promote voluntary repatriation of refugees or their integration in new societies; (d) encouraging states to admit refugees – including the most vulnerable groups - to enter their territories; (e) facilitating refugees' possibilities to transfer their assets; (f) keeping records of national legislation and data regarding refugees; (g) working closely together with governments and inter-governmental institutions concerned; (h) being in touch with private organisations concerned with refugee protection, and; (i) facilitating the co-ordination of private organisations working in refugee relief.[xviii] As the list shows, UNHCR's role in the protection of refugees was originally coordinating rather than operational by nature and, in this sense, the organisation's way of practicing its mandate has changed quite drastically since the early days.

Being a key institution in the field of refugee protection, the range of UNHCR action has quite naturally - considering its enduring challenges - continuously evolved. The official view of the Commissioner is that, although "the environment in which [it] works and the types of activity undertaken by the organisation have changed significantly over the past 50 years" its "core mandate" remains what it was in 1950: the protection of refugees and the search for permanent solutions to their plight.[xix] As my text above already has implied, however, considering the scope in which the organisation's responsibilities have amplified, I would argue that also its mandate of protection *in practice* has evolved. Below, I briefly discuss the development of UNHCR's operational role under its mandate and, here, it is possible to see that with the multiplication of its roles, also the very mandate has been notably extended.

The development UNHCR's Roles in Protection and the practical extension of the mandate

In line with the Statute text, the practical expansion of the mandate has been realised through a series of General Assembly resolutions[xx], touching the UNHCR's scale of operations, its range of activities and beneficiaries, its role vis-à-vis non-governmental relief organisations, and even its the environment of operations. For example, while in the early days the organisation practiced its mandate through facilitating states in finding solutions for some 400,000 refugees displaced by the Second World War in Europe[xxi], it today assists nearly 33 million people across the world[xxii]. Moreover, while the early activities focused on administering the resettlement and repatriation of refugees, the organisation today is involved on each level of refugee protection from the provision material assistance, healthcare, social services and education to addressing root causes by means of development programmes in both countries of origin and asylum. Although much of UNHCR action is channelled through its over 500 partner NGOs, the expansion of its tasks has also had the effect of bringing the organisation from its earlier administrative position to the more local level of relief. This means that, since the 1990s, the organisation has been increasingly involved in situations of ongoing conflicts – a role quite different from the one enshrined in the Statute.[xxiii] Naturally, this general expansion of activities also shows in UNHCR's number of staff that has increased from the original number of 33[xxiv] to the present 6,300 employees[xxv].

The gradual extension of UNHCR activities is directly related to the changing dynamics of involuntary displacement. During the last five decades, the nature of conflicts has changed so that, more often than not - and against the most basic principles of humanitarian law[xxvi] - acts of warfare are deliberately directed at civilian populations.[xxvii] Consequently, those fleeing a conflict tend to escape violence *en masse* rather than as individuals persecuted due to 'race', religion or other such reasons enshrined in the legal definition of 'the refugee'. Moreover, while the granting of refugee status to only *internationally* displaced people might have been an arbitrary limitation in the first place, today's realities of internal displacement across the world certainly proves it as such. In order to credibly serve its mandate to protect, UNHCR has been downright obliged to adjust its range of action in these changes[xxviii] and, indeed, some such adjustments could be seen as compensating the Statute and UN refugee conventions' narrow and gender-neutral definition of the beneficiaries. Examples could include the extension of UNHCR actions to the protection of internally displaced people (IDPs) and the stateless people as well as the Commissioner's efforts to improve the lives of local populations living in 'refugee-affected areas'.

However, while the organisation arguably has made attempts to respond to the challenges of protection, and while it is continuously searching for new ways to do so[xxix], the responses often come with a considerable delay. The Executive Committee (ExCom) did not, for example, recognize until 1985 – that is, over thirty years after the establishment of UNHCR - that the majority of refugee populations consist of women and girls, and that "many of them are exposed to special problems in the international protection field"[xxx]. One can only wonder how it took so long for an organization devoted to refugee protection to take notice of such a fact. In the same conclusion, however, the ExCom also recognized that women asylum seekers who were victims of gender-related abuse could be considered as a 'particular social group' under the 1951 Convention. Better late than never, in the form of 'soft law' this conclusion - like many other ExCom conclusions[xxxi] - arguably adjusted the interpretation of existing refugee legislation so as to better meet the realities of displacement. Given its major role in refugee protection, the understanding of such realities - and the provision of *prompt* responses to them – is, I think, one of most pivotal responsibilities of UNHCR.

The vast expansion of UNHCR activities in all refugee related questions is part of the 'comprehensive approach' that the organization has followed since the 1990s. This approach

"recognizes that the underlying causes of large scale displacement are complex and interrelated and encompass gross violations of human rights, including in armed conflict, poverty and economic disruption, political conflicts, ethnic and inter-communal tensions and environmental degradation, and that there is a need for the *international community* to address these causes in a *concerted and holistic manner*"[xxxii]

Addressing complexities of forced displacement requires cooperation from states, non-governmental organizations and other actors concerned, but – being the coordinator and supervisor of refugee protection mechanisms - the comprehensive approach puts UNHCR in a pivotal role in these efforts, thus widening its scope of operation[xxxiii]. Now acknowledging that

displacement consists from processes and multifarious causalities rather than sudden emergencies, the Commissioner is getting more profoundly involved in development and resettlement programs, emergency preparedness and other activities considered as preventing displacement. [xxxiv] As for internal displacement, UNHCR still emphasizes that IDPs “remain within the territorial jurisdiction of their own countries” [xxxv] and that the primary responsibility of their protection still falls to the states. However, since the early 1990s UNHCR has recognized that

“[internal displacement is] a problem of global dimensions [...and] that the many and varied underlying causes of involuntary internal displacement and of refugee movements are often similar, and that [both problems] call for similar measures [...Moreover,] in many instances, the internally displaced [being] present alongside refugees, returnees or a vulnerable local population [...] it is neither reasonable nor feasible to treat the categories differently in responding to their needs of assistance[...]” [xxxvi]

Observations like this have made the ExCom conclude – under the approval of General Assembly [xxxvii] - that the Commissioner should, under certain conditions [xxxviii] and especially if such action would prevent or solve actual refugee problems, extend its mandate of protection to include also internally displaced populations. [xxxix] This is certainly but another sign of the adjustment of UNHCR’s practical mandate to the realities of forced displacement.

Thus far, I have discussed the role of UNHCR in refugee protection in terms of its tasks. However, its statutory mandate also inflicts different roles onto the organization depending on which level and with whom it conducts these tasks. These multi-level interactions of the Commissioner, makes her/his office a hybrid transnational actor that administrates its humanitarian policies in a truly global sphere. Consequently, the role of the organization is characterized by multiple identities and a sense of complexity that makes the assessment of UNHCR’s responsibility a task of confusion. In order to elaborate the hybridity that I understand to embrace the organization, the following section will briefly discuss the UNHCR role in relation to its interactions on different levels of the global refugee regime.

The Transnational UNHCR: The myriad roles and identities of UNHCR in action

While the 1951 United Nations Convention Relating to the Status of Refugees [xi] did not exactly add to the organisation’s basic duties as defined by the Statute, it was arguably an important assertion of the organisation’s supervisory position in international refugee law. Namely, in line with the Statute text, articles 35 and 36 of the Convention denominate the High Commissioner as the promoter and supervisor of the agreement and its related member-state obligations [xli]. This role has been reinstated in 1967 Protocol Relating to the Status of Refugees [xlii], and further established in various General Assembly resolutions as well as in national level jurisdictions. Thus, on the level of international and inter-state relations, as well as in the bilateral relations between the organization and states, UNHCR is acting through a *legally defined* mandate. Over years and with the extension of its operative role, this legal position has placed the organization into the very centre of international management of human displacement – making it an important actor in international relations. Indeed, the Commissioner’s office forming the core and brains in the “network of national, international and UN relief agencies”, it has been argued that the organization today practically functions like “a global state [...in the management of] refugee problems” [xliii]. This metaphor works well to the extent that UNHCR’s institutional apparatus does have an immense impact on the ways in which refugee policies are conducted and refugee conventions interpreted in different situations. However, its relation to states is more complex than the metaphor simply interpreted would have us understand. One way to explore the complex position of UNHCR on the inter-state level - and the implicit paradoxes of the *humanitarian* organization’s juridical position in international *politics* – is to question its allegedly non-political nature on one hand and its relative autonomy from the states on the other.

According to its very Statute, UNHCR is meant to be purely humanitarian and social actor by nature [xliv]. Humanitarianism in the modern political order is understood to be a sphere outside politics and, correspondingly, UNHCR’s efforts to provide international protection and to facilitate governments and private organisations in this field are meant to be strictly non-political. [xlv] To secure the political void in UNHCR’s sphere of action, the Statute posits the powers to direct refugee policies with the General Assembly, the Economic and Social Council and, of course, with sovereign states [xlvi]. Implicitly, however, the Statute as well as the later extensions in the Commissioner’s operational role tend to give the UNHCR a leverage over what these policies should entail. For example, the Commissioner’s annual report is posited as a separate item on the General Assembly’s agenda [xlvii], and hence the Commissioner is specifically heard as *the* expert, thus having the position to lobby the Assembly for desired policies. The special relationship of the Commissioner with States also unavoidably gives her/him an important, advising, role in the construction of national refugee policies. Moreover, as for the political economy of international relief, the High Commissioner plays a pivotal role by administering “any funds which he receives for the assistance to refugees”. The 10th article in the Statute also gives her/him the authority to distribute such money among the private and public agencies. [xlviii] With an initial budget of 300,000 USD [xlix], this task might have not provided the Commissioner with very high powers but, with a peak annual budget at 1.4 billion USD [l], the 10th article certainly provides the humanitarian organisation with some leverage in the complex *political* economy of refugee relief.

Whether or not this relative autonomy gives UNHCR a political role that it is not meant to have is, of course, irrelevant to the fact that the management of funds and lobbying the decision-makers is a necessity for the organisation to function properly. However, if this observation is turned the other way around, it is possible to see that, *for the organisation to function properly and fill its duty to protect*, it cannot avoid an involvement in politics. David Forsythe has written a very good article about UNHCR’s humanitarian “politics of being non-political” [li], and while it would be outside the confines of this essay to include all the argumentation here, some of his points well illustrate the paradoxically complex role that the UNHCR has in the juridico-political sphere of global refugee regime.

In his article, Forsythe points towards the extension of UNHCR’s practical mandate asking, how it is possible for the organisation to provide effective protection, and address roots causes of displacement often in conflict-torn situations, and simultaneously remain strictly non-political with these efforts. The author’s answer is that this is an impossible task and, realistically speaking, “the overall mandate requires UNHCR to be a political agency in the sense of trying to influence public authorities to protect refugees” [lii]. Thus, lobbying to influence states and intergovernmental political actors is an important instrument for the UNHCR to pursue its aims to protect. [liii] The agency itself may wish to camouflage this kind of political action under the semantics of “humanitarian advocacy and management”, but lobbying for humanitarian policies is struggling

for policies all the same and thus choosing certain perspectives over others. The organisation having the legally defined task of advocating the rights of the displaced, it cannot but *get involved with the policy-making processes* that affect the displaced – and what role does such involvement imply if not a political one?

On the other hand, however, when compared to the political roles that governments or political parties take vis-à-vis each other, the political stance of UNHCR is of a particular kind. Namely, the High Commissioner is meant to exert its (inherently political) influence strictly in behalf of its beneficiaries without taking a stand to the question “who governs”. Thus, it cannot influence on policies other than those relating to involuntary displacement, or take a position for one or the other party in conflicts that cause displacement.^[iv] Here, however, it is necessary to distinguish between the motivations and practical influence of UNHCR action. Namely, while the organisation in principle should avoid participation in “partisan politics”^[v], in practice, its operations have an impact on issues of governance. Decisions to establish a refugee camp in one site rather than another, or cutting down relief in one camp in favour of another can have a coercive influence on displaced people’s movements.^[vi] In other words, while UNHCR’s

“intention may [be] the neutral care of refugees [...] the by-product [is] an impact on power struggles. We should not expect absolute neutrality from essentially humanitarian protection agencies, [as i]t is often an impossible standard to meet.”^[vii]

Moreover, although UNHCR would not explicitly condemn the actions of certain governments or accuse their actions for displacement, its determinations over who is a refugee and who isn’t are also determinations over who is persecuted in their country of origin and who isn’t. Thus, these determinations make implicit accusations towards persecutors and thus the organisation statements over government policies.^[viii] This brings us to the awkward relationship that the Commissioner has vis-à-vis the state actors.

From the Statutory or legal point of view, UNHCR’s position in both inter-state relations and in its bilateral relations with states is supervisory, facilitating and strictly confined to questions relating to refugee protection. In practice, however, the relationship between states and the High Commissioner’s office is more complex than that. Namely, the state-UNHCR relationships take myriad forms, depending on issues such as whether the state is a member of the 1951 Convention and its Protocol^[ix]; whether the state itself conducts the refugee status determination processes, or whether UNHCR does the job for them^[x]; whether the state is generally a country of asylum or origin, or maybe both; whether UNHCR has an office in the country, or works through another organisation, and so on. This list could be much longer as, indeed, each sovereign state has its own, continuously changing, approach to asylum policies. The High Commissioner must, according to its Statute, keep record of all such policies and their changes and, thus, her/his relationship with each State is inevitably unique.

There is, however, one feature in UNHCR’s organisational identity that remains the same regardless of the state that it works with. This is the paradox between the Commissioner being a supervisor – and even a critic – of states’ refugee policies on one hand and, on the other, an organisation financially dependant on governments’ voluntary donations. In the 1990s, for example, an average of less than three percent of UNHCR’s annual spending has come from the UN regular budget, the rest from government contributions and private donors. As payers of the organisation’s actions, states thus have a remarkable leverage over how it operates. This does not mean that the Commissioner would be advertently biased towards the interests of the ‘most-paying’ states, or that it would in all situations follow their instructions on how and whom to protect: in the end, the statute gives it the powers to administer the funds that it receives for protection purposes. However, the fact that “donor countries tend to earmark funds pledged to UNHCR for particular countries, programmes or projects, depending on their national priorities” arguably diminishes the Commissioner’s leeway to direct the funds to the most vulnerable. In 1999, for example, only one fifth of assistance was allocated to a specific purpose, and while it the same year received over 90 percent for the funds it requested for the former Yugoslavia, some of its programmes Africa received not more than 60 percent of the required.^[xi] Thus, the autonomy of UNHCR vis-à-vis its government partners remains relative, if not limited. The UNHCR may well supervise and facilitate governments’ asylum policies but this work largely is done at the conditions of the latter. In all its work, the Commissioner cannot but respect states’ sovereignty but, via earmarked funding, some states have more sovereignty than others to decide whom the Commissioner is capable of protecting. From this point of view, the non-political and humanitarian organisation seems to be but one instrument of inter-state power politics. But this view, of course, would be a rather too simplistic one of the hybrid transnational that UNHCR effectively is.

It seems to me that the High Commissioner in international and national levels of its actions is best perceived as an organisation with multiple identities – each constructed by and for the particular states and issues it deals with. Indeed, considering also the changing authority of the organisation vis-à-vis the state actors, it is possible to talk about UNHCR as having situational identities – meaning that its role and position varies from one situation to another. This feature multiplies further when the organisation is examined as an actor in the regional, local, inter-organisational, or personal levels. With its comprehensive approach, UNHCR programmes today involve a complex set of actors from other UN and intergovernmental organisations to its non-governmental partners. The Commissioner focusing increasingly on root causes and having also other beneficiaries than statutory refugees, the programmes are often regional by their reach – involving not only more than one state but also particular localities within those states. Vis-à-vis each particular actor of the programme and each particular situation, the High Commissioner presents itself in a particular form and through particular personnel or bureaucracy. In an area with large refugee settlements coordinated by UNHCR, for example, the role of the Commissioner seems quite different to the national authorities or the local township leader than it is for the NGO that is implementing UNHCR relief on the ground. Similarly, the tents and the presence of UNHCR probably mean a whole another thing to a person who receives relief in an UNHCR administered camp than they do for a local living in the town nearby the camp. And again all these roles and identities are situational, involving particular individuals with particular problems or achievements in the particular space that is created through their interaction.

While the space and theme of this essay will not allow me to go very far with this analysis, it is sufficient to reinstate that as a highly bureaucratic organisation functioning on various levels of global refugee protection, the UNHCR bears multiple identities that are constructed in situational interactions between organisations, organisations and states, individual persons representing states or organisations, and so on. In all these interactions, there are power relations that continuously shape the identities and roles of the actors involved. Between UNHCR and most actors, the power relations shift from one actor to another, and sometimes the organisation has more leverage to influence what the other does and sometimes less. As stated earlier, as a humanitarian actor specifically devoted for the protection of refugees, the Commissioner’s involvement in all

interactions – and hence power relations – is motivated by its commitment to advocate the interests of the displaced. What is missing in this analysis however, is the UNHCR's interactions with the displaced themselves – the roles, identities and power positions that the protector takes vis-à-vis the protected. Here, we are also coming closer to the questions of responsibility.

While UNHCR's roles and positions may take different forms in its relations to other actors in the field of refugee protection it seems that, with regard to refugees themselves, the organisation's role may vary but the power relations remain unchanged. A person displaced can encounter UNHCR in a variety of situations: as a camp administrator, as a conductor of her/his refugee status determination; as an assistant of her/his repatriation or third-country settlement, and so on. I could continue this list of potential encounters much longer, but in all the situations I see the encounter as being dominated by UNHCR. I admit this view to be a too simplistic one regarding particular situations and arguably refugee populations continue to place challenges to the Commissioner. However, an individual refugee facing the global organisation cannot much impact on the ways in which UNHCR advocates her/his rights.

In the following section, I will discuss the responsibility that follows the UNHCR as a hybrid transnational actor in the field of refugee protection. The myriad roles and identities of the organisation could inflict a thesis-long discussion if various kinds of situational identities be included in the analysis. Protection of refugees being the primary duty of the organisation, however, I will focus the discussion on the interests of UNHCR's 'beneficiaries' - that is, persons for whom the organisation is responsible in the very first and last instance, regardless of the programme, situation, locality or other actors concerned. Its practical mandate to pursue refugee protection in a comprehensive scale has involved the UNHCR very deeply in the lives of the world's displaced. In what follows, I have taken the viewpoint that this involvement comes with an immense responsibility and, consequently, it should be possible for the refugees to hold the organisation accountable if something goes wrong in situations of their protection. This kind of accountability the UNHCR, however, does not seem have vis-à-vis the individuals falling under its mandate to protect.

The responsible conduct of the mandate: an Assessment through UNHCR Accountability

UNHCR's crucial role in the protection of refugees comes with a crucial responsibility - a position that could be underscored by asking if UNHCR would not be doing all the work that it does, who would? However, with this great involvement and responsibility also comes a great potential to cause harm via operations gone wrong. Indeed, the greater the responsibility to care the greater the possibility of causing harm. Caring for over 32 million people, the organisation is in the position of influencing the lives of just as many individuals. What happens with this responsibility when the work of the organisation makes the lived of individuals worse, not better? As Mark Pallis has shown, it seems that at the time being, in such situations individuals being wronged have little chance to hold the agency responsible for the harmful influence that the organisation has had on her/his life. Thus, UNHCR's responsibility is strangely one-sided: the organisation declares openly its responsibility to care but somehow neglects its responsibility not only for the results of its care but also towards the objects of its care. In this model, the 'beneficiaries' of UNHCR protection are perceived as thankful receivers of relief without a possibility to complain about its quality.

Mark Pallis^[ixii] has examined this clearly non-symmetric relationship between UNHCR and its beneficiary groups through an analysis of the organisation's accountability mechanisms. He points out that while the organisation prefers to present itself as the administrator of care, it nevertheless has the power to decide who is entitled to care and who runs the refugee camps. Such decisions affect the lives of millions. The organisation "single-handedly" conducts refugee status determination in about 80 countries^[ixiii], and during 2006 only it received some 91,500 individual applications^[ixiv], which makes it the world's largest single refugee status determining body.

However, that the organisation continuously makes decisions that affect the directions of individual people's lives does not, according to Pallis, show in UNHCR's accountability mechanisms. While in situations where refugees or asylum seekers receive care and protection under "well-functioning national systems", the domestic administrative law should, at least in principle be able to hold the administrators accountable for mistreatment and violation of their human rights.^[ixv] However, whereas UNHCR supervises that such accountability mechanisms are in place and that the refugee and other related conventions are respected, the organisation itself lacks mechanisms to ensure that it follows the same principles that it preaches to others. Thus, when a procedural failure takes place in the refugee status determination process conducted by the UNHCR, the applicant can be returned to her/his country of origin without a channel to file complaint.^[ixvi] Whose responsibility is it to protect this person, and whom can s/he hold accountable for her/his lack of protection?

The organisation is not missing accountability mechanisms all the same, however. The existing mechanisms include the Evaluation and Policy Analysis Unit (EPAU), the Inspector General's Office and the UN-wide body the Office of Internal Oversight Services (OSIO). These three form

"part of UNHCR's 'oversight and performance review' mechanism, the overall purpose of which is to assess and enhance the organisation's operational efficiency, effectiveness and impact."^[ixvii]

That the emphasis is on the organisation's "efficiency, effectiveness and impact" already imply that the mechanisms are not planned to measure just procedures from the point of view of the beneficiaries, but to serve the interests of those who fund the organisation and have entrusted it with powers to act. Thus, it is states as the ones delegating powers that can hold UNHCR responsible, not refugees whose lives UNHCR policies most affect.^[ixviii]

In Pallis's analysis, none of UNHCR's three existing accountability mechanisms get very high marks when judged from the point of view of the beneficiaries. Even if they could, in principle, be used to the filing of individual refugees' complaints - as for example the Inspector General's Office is - the problem is that the people being protected by UNHCR are not either aware of their rights, or do not have an access to the complaint mechanisms.^[ixix] Pallis notes that all the three bodies could be improved so as better include the experiences and viewpoints of refugees but this would require at least gradual changes in "the politics of accountability" within the UNHCR.^[lxx] Such changes would include, among other things, a variety of discursive turns in the way humanitarian space is imagined. One turn would be a further acknowledgement that human rights should apply also in humanitarian situations, and that the violation of these rights "may occur even within organisations dedicated to the protection of these very rights"^[lxxi]. Another turn could be an acceptance that "helping the vulnerable" does not make one eligible to evade the responsibility that this involvement entails.^[lxxii] And, perhaps the most important turn would be to develop an understanding that refugees in humanitarian spaces are not just receivers of aid, but

active makers of that space and hence eligible judges over how the space and their lives within it are formulated by others. Perhaps, this requires elementary change in the common understanding of UNHCR's role as protector: that, in all levels of global protection regime it should promote protection as an act of hospitality rather than as an act of charity. UNHCR is a global body, a transnational hybrid that administers refugee relief in complex ways and with multiple identities. This tendency of the organisation to evade and circumvent its accountability towards the people it works for is reminiscent of other transnational organisations' ability to evade their responsibilities. Transnationally operating multinational corporations, and institutions such as the World Bank, International Monetary Fund or even the EU, could be examples of such actors. Operating in-between and across the spheres of international and national legislatures and being constructed by myriad kinds of interactions on different levels of global government, such institutions easily become inaccessible for people whose lives their policies direct. However, UNHCR being a humanitarian agency, its accessibility is an important aim if the organisation wishes to appear as fully responsible for the people it aims to protect.

List of references:

Books and articles

- Chimni, B.S. (2000): *International Refugee Law: A Reader*, Sage: New Delhi/Thousand Oaks/London.
- Forsythe, David (2001): "UNHCR Mandate: The Politics of Being Non-Political", *New Issues in Refugee Research*, working paper no. 33, March 2001. Available online at ..., last accessed...
- Hein, Jeremy (1993): "Refugees, Immigrants and the State", *Annual Review of Sociology*, Vol. 19, pp. 43-59.
- Malkki, Liisa H. (1995): "Refugees and Exile: From 'Refugee Studies' to the National Order of Things", *Annual Review of Anthropology*, Vol. 24, pp. 495-523.
- Pallis, Mark (2005): "The Operation of UNHCR's Accountability Mechanisms", *Institute for International Law and Justice Working Papers (Global Administrative Law Series)*, 2005/12. Available online at [<http://www.iilj.org>], last accessed 7 November, 2007.
- Proudfoot, Malcolm (1956): *European Refugees 1939-1952*, North-Western University Press: Evanston, IL.
- Sen, Sarbani (2003): "Paradoxes of International Regime of Care: The Role of UNHCR in India", *Refugees and the State: Practices of Asylum and Care in India, 1947-2000* edited by Ranabir Samaddar, Sage: New Delhi/Thousand Oaks/London.
- UNHCR (2000): *The State of World's Refugees: Fifty Years of Humanitarian Action*, University of Oxford Press: Oxford.
- Zolberg, Aristide; Astri Suhrke and Sergio Aguayo (1989): *Escape From Violence: Conflict and the Refugee Crisis in the Developing World*, Oxford University Press: NewYork/Oxford.

Other sources

- RSDwatch: "Statistical Summary of UNHCR RSD", available online at [http://www.rsdwatch.org/index_files/Page386.htm]. last accessed 11 November, 2007.
- UNHCR: *Convention Plus at a Glance*, available online at [<http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=403b30684>], last accessed 7 November 2007.
- UNHCR: *Donors*, available online at [<http://www.unhcr.org/partners/3b963b874.html>], last accessed 11 November, 2007.
- UNHCR: *Statute for the Office of the United Nations High Commissioner for Refugees*, with an introductory note by the Office of the United Nations High Commissioner for Refugees, available online at [<http://www.unhcr.org/protect/PROTECTION/3b66c39e1.pdf>], last accessed 1 November, 2007.
- UNHCR: *Convention and Protocol relating to the Status of Refugees*, with an introductory note by the Office of United Nations High Commissioner for Refugees, available online at [<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>], last accessed 1 November, 2007.
- UNHCR: *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, available online at [<http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>], last accessed 6 November, 2007.
- UNHCR: *Basic Facts*, [<http://www.unhcr.org/basics.html>], accessed 6 November, 2007.
- Executive Committee Conclusions no. 39 (XXXVI), 1985; no. 62 (XLI), 1990; no. 71 (XLIV), 1993; no. 75, 1993; no. 80 (XLVII), 1996; no. 81(h) (XLVIII), 1997; and no. 100 (LV), 2004 in UNHCR: *A thematic compilation of executive committee compilations*, available online at [<http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf>], last accessed 5 November, 2007.
- UN General Assembly: Resolution 319 A (IV), 3 December, 1949.
- UN General Assembly: Resolution 428 (V), 14 December 1950.
- UN General Assembly: Resolution 48/116, 20 December, 1993.

[i] Chimni 2000, pp. 82-83, 91-109.

[ii] Zolberg et al. 1989, esp. chapters 1 and 10.

[iii] Malkki 1995b.

[iv] Zolberg et al. 1989, p. 18.

[v] Zolberg et al. 1989, Proudfoot 1956.

[vi] Proudfoot 1956, p. 433; UN General Assembly: Resolution 319 A (IV), 3 December, 1949.

[vii] UN General Assembly: Resolution 428 (V), 14 December 1950; UNHCR: "Statute for the Office of the United Nations High Commissioner for Refugees, with an introductory note", UNHCR: Geneva. [WWW-source], hereafter, referred to as UNHCR Statute.

[viii] UNHCR Statute, article 5.

[ix] UNHCR Statute, article 6b.

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[xiii] As of 1 October 2007, there are 144 states parties to the 1951 Convention and its 1967 Protocol. In addition, USA, Cape Verde and Venezuela are member only to the latter mentioned. Source: UNHCR: *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, [WWW-source].

[xiv] Article 9 of the Statute gives the General Assembly the right to determine on additional activities for the High Commissioner – that is, on activities not prescribed in the Statute.

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[xviii] UNHCR Statute, article 8.

[xix] UNHCR 2000, p.3.

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[xxi] UNHCR 2000, p.3.

[xxii] According to the UNHCR web page, the organization has 111 offices around the world, which assist altogether 32,9 million people. UNHCR: *Basic Facts*, [http://www.unhcr.org/basic.html], accessed 6 November, 2007.

[xxiii] UNHCR 2000, pp. 1-11.

[xxiv] UNHCR 2000, p. 3.

[xxv] UNHCR: *Basic Facts*, [WWW-source].

[xxvi] Geneva Conventions

[xxvii]

[xxviii] All adjustments of UNHCR operative actions are, of course, also the obligation of the General Assembly and the states concerned.

[xxix] See, for example, 'the Convention plus initiative', UNHCR: 'Convention Plus at a Glance', [WWW-source].

[xxx] Executive Committee Conclusion no. 39 (XXXVI), 1985 on Refugee Women and International Protection in *A thematic compilation of executive committee conclusions* compiled by the UNHCR Department of International Protection, 2nd edition, July 2005, [WWW-source].

[xxxi] Pallis (2005, p. 11) has argued that "Soft law provides extensive relevant rules for refugee status determination...ExCom produces authoritative interpretations of relevant standards. Although these standards are soft from a legal perspective, when assessed in terms of their practical impact, they are of intense importance."

[xxxii] Executive Committee Conclusion no. 80 (XLVII), 1996, 'Comprehensive and Regional Approaches within a Protection Framework'. Emphasis added.

[xxxiii] ExCom Conclusions no. 71(n) (XLIV), 1993; no. 100(j-m) (LV), 2004.

[xxxiv] For the nature of comprehensive approach, see also Executive Committee Conclusions no. 62 (XLI), 1990; no. 81(h) (XLVIII), 1997.

[xxxv] ExCom Conclusion no. 75(d) (XLV), 1993.

[xxxvi] ExCom Conclusion no. 75(a-b), 1993.

[xxxvii] General Assembly Resolution 48/116, 20 December, 1993.

[xxxviii] The conditions including specific requests from the Secretary General and the state concerned.

[xxxix] ExCom Conclusion no.75(j) (XLV), 1993.

[xl] UNHCR: *Convention and Protocol Relating to the Status of Refugees*, with an introductory note by the Office of United Nations High Commissioner for Refugees, UNHCR: Geneva. [WWW-source].

[xli] Forsythe 2001, p.11.

[xlii] UNHCR: *Convention and Protocol Relating to the Status of Refugees*, [WWW-source].

[xliii] Hein 1993, p. 47.

[xliv] UNHCR Statute, article 2.

[xlv] UNHCR Statute, article 1.

[xlvi] UNHCR Statute, articles 1 and 3.

[xlvii] UNHCR Statute, article 11.

[xlviii] UNHCR Statute, article 10.

[xlix] UNHCR 2000, p. 3.

[l] UNHCR: *Donors*, [WWW-source]

[li] Forsythe 2001.

[lii] Forsythe 2001, p. 1.

[liii] Forsythe 2001, p.11-16.

[liv] Forsythe 2001, pp.1-2.

[lv] Forsythe 2001, pp. 32-33.

[lvi] Forsythe 2001, p.3, 5-6.

[lvii] Forsythe 2001, p. 7.

[lviii] Forsythe 2001, p.18.

[lix] Although the conventions are relatively widely accepted, there are still some 50 states that remain outside their effect and for example none of the South-Asian states have signed the treaties. Often, however UNHCR has specifically tailored relations with non-members, too. See e.g. the case of India in Sen 2003.

[lx] Mark Pallis has made me aware of something I - as a citizen of a wealthy Western country that receives very few asylum seekers annually – never came to think about. Refugee status determination procedure is expensive and many states are deterred to join conventions for this reason. Thus it seems that, with some governments, UNHCR has made an agreement to bear the costs of status determination if the state accesses the convention. UNHCR conducts refugee status determination in some 80 countries. Pallis 2005, pp. 7-8.

[[xi](#)] UNHCR 2000, pp. 166-167.

[[xii](#)] Pallis 2005.

[[xiii](#)] Pallis, p. 8.

[[xiv](#)] RSDwatch: "Statistical Summary of UNHCR RSD", [[WWW-source](#)].

[[xv](#)] Pallis 2000, p. 1.

[[xvi](#)] Pallis 2000, p. 8-9.

[[xvii](#)] Pallis 2000, p. 15.

[[xviii](#)] Pallis 2000, pp. 2, 15.

[[xix](#)] Pallis 2000, pp. 19–23, 34–36.

[[xx](#)] Pallis 2000, p. 27ff.

[[xxi](#)] Quited in Pallis 2000 p. 30.

[[xxii](#)] Pallis 2000, p. 31.