

# **NEW ISSUES IN REFUGEE RESEARCH**

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## **Human rights and refugees: enhancing protection through international human rights law**

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## Introduction<sup>1</sup>

There are a number of universal, regional<sup>2</sup> and domestic human rights instruments and mechanisms which can be employed to enhance the protection of refugees and asylum seekers.<sup>3</sup> This area of human rights law is vast and varied, and cannot be fully reviewed in the limited scope of this essay. Instead, this article focuses on UN mechanisms of human rights protection and illustrates how this body of law and related mechanisms can be used as a practical and analytical tools to enhance the protection of refugees.

The focus on UN-based human rights law is intended to inform advocates, interest groups and others who are working with refugee protection issues at the national level and who may not be as familiar with the workings of the UN system. This lack of familiarity is understandable given the practical difficulties often experienced in gaining access to information concerning the UN human rights bodies. These difficulties stand in contrast with some regional systems of human rights protection which have developed sophisticated jurisprudence on protection issues concerning refugees and other foreigners. The sophistication of these systems, especially in Europe<sup>4</sup>, has resulted in wide attention from scholars when compared to the applicability of UN mechanisms.

This essay suggests that UN human rights law and related mechanisms can make a significant contribution to refugee protection. Although UN mechanisms may not provide a framework of protection as expansive, reliable and accessible as some domestic systems, recent developments in international human rights law have contributed to this international legal system which can be invoked in support of both specific cases and more broad-based advocacy on behalf of refugees. This article draws on specific examples to argue that UNHCR and refugee advocates can use these laws and mechanisms to enhance protection principles and give effect to forms of enforcement. To this end, refugee advocates, NGOs and international organisations including UNHCR all have important roles to play if this positive evolution is to continue.

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<sup>1</sup> This paper appears in the *Nordic Journal of International Law*, vol. 69, no. 2, 2000.

<sup>2</sup> Human rights machinery has been established on a regional basis in Europe, Africa and the Americas. For an accessible introductory work on the UN and regional human rights systems a reliable source is Thomas Buergental, *International Human Rights*, 2nd ed., West Publishing Co, St Paul, Minnesota, 1995.

<sup>3</sup> For the purposes of this essay the terms 'refugee' and 'asylum seeker' are used interchangeably. The term refugee is defined in the international refugee instruments such as the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol*, the *1969 Organization of African Unity Convention governing the specific aspects of Refugee Problems in Africa* and the *1984 Cartagena Declaration on Refugees*. UNHCR has advocated a broad interpretation of those in need of international protection. See for example the *Note on International Protection* submitted by the High Commissioner to the 47th Session of the Executive Committee of the High Commissioner's Programme, UN Doc ref: A/AC.96/830 of 7 September 1994.

<sup>4</sup> DJ Harris, M O'Boyle, C Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, 1995; also see Richard Plender, 'International (Human Rights) Law on Asylum and Refugees', paper presented at the International Judicial Conference on Asylum Law and Procedures, London, December 1995 and 'Applying the European Convention on Human Rights', paper presented at ELENA Conference, Strasbourg, 28 May 1994 (on file with the author). In this context it is also noteworthy that UNHCR has produced a 'Regional Policy and Strategy Paper on the Applicability of the European Convention for the Protection of Human Rights and Fundamental Freedoms to UNHCR's Protection Work for the Period 1999-2002 (15 August 1999) (on file with the author).

This essay has four sections. The first section provides an overview of the current barriers to refugee protection which have developed through increasingly restrictive state practice and have had a negative impact on the international regime of refugee protection. Section two reviews the system of refugee protection which has been established by international law and is overseen by UNHCR. Against this background, section three outlines the legal obligations of states under international human rights law before turning to a more specific examination of the role the principle UN human rights mechanisms can play in the protection of refugees.

The final section illustrates the contribution that these mechanisms and fora, namely the UN Commission and Sub-Commission on Human Rights, the Committee Against Torture, the Committee on the Rights of the Child and the Human Rights Committee can play in specific refugee protection concerns. The final section further illustrates how select UN human rights enforcement mechanisms can, in practice, be effectively used to uphold and enhance the protection of refugees. In response to recent criticism of this line of reasoning, the conclusion argues that UNHCR and other actors should continue to actively develop and promote the practical and analytical links between human rights and refugee protection. In fact, developing these links should be viewed as an integral part of UNHCR's protection mandate within the UN system.

## **The System of International Refugee Protection in Crisis**

Refugees in the world today, although growing in numbers in recent years<sup>5</sup>, are swiftly losing ground in terms of legal protection provided by a number of states. Many states that have subscribed to the international legal regime of refugee protection by acceding to the international refugee instruments are currently undertaking radical changes through legislative and inter-state arrangements which result in restricting access to asylum and the provision of legal rights to refugees. These restrictions include, notably but not exclusively, limiting access to refugee status determination procedures and employing an increasingly restrictive interpretation of the refugee definition. This trend has been described as "a pull back from the legal foundation on which effective protection rests."<sup>6</sup>

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<sup>5</sup> The UNHCR publication *The State of the World's Refugees 1997* provides the following figures: "UNHCR is now responsible for the welfare of some 22 million people around the world, around 13 million of whom are refugees in the conventional sense of the word: people who have left their own country to escape from persecution, armed conflict or violence. To this figure can be added a very large number of uprooted people who do not receive any form of international protection or assistance, the majority of whom remain within the borders of their own country. In total, some 50 million people around the world might legitimately be described as victims of forced displacement" (at p 2). The 1999 publication *UNHCR by Numbers* notes a figure of 21,459,620 persons of concern to UNHCR.

<sup>6</sup> A former UNHCR Director of International Protection has described some of these practices by states as: "the narrowing of formal recognition [of refugee status] to minimal levels; attempts to streamline procedures to the exclusion of fair appeals before deportation; efforts to constrict entitlement to basic rights for various categories of victims of civil conflict. Temporary protection has generally been a positive response by states to the problem [of refugees from the former Yugoslavia], but in some cases it, too, has kept refugees for years in temporary, albeit safe, limbo, sometimes unable to get work or to reunite with their immediate families. These tendencies are, of course, of particular concern to UNHCR when they involve the nations that founded our system of human rights and refugee protection, those whose jurisprudence continues to be closely followed by the rest of the world." Statement of Dennis McNamara to the Sub-Committee of the Whole on International Protection, Executive Committee of the High Commissioner's Programme, 13 October 1995.

These restrictions on the international protection regime have taken on numerous forms. For example, one state temporarily introduced extraordinary measures to develop off-shore or extraterritorial procedures for dealing with asylum seekers in order to avoid the related difficulties, expense and responsibility for protecting them on their own territory.<sup>7</sup> At the time this practice was reportedly attractive to a number of European states. In the former Yugoslavia and Northern Iraq, "safe zones" offered a poor alternative to the practice of facilitating the access of persons seeking international protection to leave their countries of origin.<sup>8</sup> Efforts to provide protection to Rwandan refugees in the former Zaire and UNHCR's role in the former Yugoslavia have also been criticised as a distortion of the Office's mandate and evidence of a lack of commitment to protection principles by states. It has even been argued that humanitarian relief activities offered in a climate of armed conflict may result in a perpetuation of the conflict rather than an expedited peace.<sup>9</sup>

More common, yet by no means less serious, practices of some states which may have the effect of deterring asylum-seekers include the use of administrative detention<sup>10</sup>, the misuse of readmission agreements<sup>11</sup>, the application of so-called "safe third country" principles<sup>12</sup>, the use of first country of asylum<sup>13</sup>, the imposition of carrier sanctions<sup>14</sup>, visa restrictions and

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<sup>7</sup> Here I am thinking of the interdiction, refugee-screening and 'safe-haven' protection exercised by the US government in July 1994 for Haitian asylum seekers and August 1994 for Cubans. The writer participated in the UNHCR Haiti Operation in Jamaica aboard the US Naval Ship 'Comfort' in 1994. This operation of offshore refugee screening has been described by many commentators as ill-advised and something which should not be repeated.

<sup>8</sup> For a discussion of 'safe zones' in international law and practice see Karin Landgren, 'Safety Zones and International Protection: A Dark Grey Area', *International Journal of Refugee Law (IJRL)*, vol 7, no 3 (1995). A critical analysis is offered by BS Chimni, 'The Incarceration of Victims: Deconstructing Safety Zones', in *International Legal Issues Arising under the United Nations Decade of International Law*, N Al-Naumi and R Meese (eds), Kluwer Law International (1995).

<sup>9</sup> See for example, S Alex Cunliffe and Michael Pugh, 'The Politicisation of UNHCR in the Former Yugoslavia', *Journal of Refugee Studies*, vol 10, no 2 (1997); Michael Barutciski, 'The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992-1994)', *IJRL*, vol 8, no 1/2 (1996); Bill Frelick, 'Preventing Refugee Flows: Protection of Peril?', *World Refugee Survey 1993*, US Committee for Refugees, Washington, DC. In a news article in *Le Monde* of 29 May 1997 a representative of Medecins sans Frontieres Foundation targeted UNHCR for criticism as head of the UN's repatriation operation for Rwandese refugees from the former Zaire thus: "Instead of standing up for the right of asylum and security guarantees for refugees in Rwanda itself, [UNHCR] is undertaking this repatriation under international pressure." The MSF representative went on to criticise the international community's "understanding" of the Rwandan government whose representatives "are killing refugees by the thousands," and then posed the question: "should UNHCR bring refugees back to the country of their oppressors in the name of humanitarianism?". Also see Edward N Luttwak, 'Give War a Chance', *Foreign Affairs*, July/August 1999, pp 36-44. For a counterview see Nicholas Morris, 'Protection Dilemmas and UNHCR's Response: A Personal View from within UNHCR', *IJRL*, vol 9, no 3 (1997).

<sup>10</sup> The use of detention of asylum-seekers by states in Europe has been extensively documented by UNHCR. See 'Detention of Asylum-Seekers in Europe', *UNHCR European Series*, vol 1, no 2 (1995).

<sup>11</sup> See 'Working Paper on Readmission Agreements' prepared by the Secretariat of the Inter-Government Consultations on Asylum, Refugee and Migration Policies in Europe, North American and Australia, Geneva, August 1994.

<sup>12</sup> See 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', *UNHCR European Series*, vol 1, no 3 (1995), at pp 12-14.

<sup>13</sup> *Ibid*, pp 14-21.

<sup>14</sup> See Erika Feller, 'Carrier Sanctions and International Law', *IJRL*, vol 1, no 1 (1989); and RIR Abeyratne, 'Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees', *IJRL*, vol 10, no 4 (1998).

inspection of travelers in foreign airports<sup>15</sup>, the absence of domestic refugee law or functioning determination procedures, restricting access to determination procedures including the right of appeal, and the imposition of airport regulations.<sup>16</sup> These trends and practices, considered on the whole, have resulted in global restrictions on accessing asylum procedures and more generally restrict the rights of refugees.<sup>17</sup>

These largely regressive approaches have found favour amongst a number of traditional asylum countries that claim to be overburdened with asylum applicants. Although there is understandable concern that the arrival of increasing numbers of asylum applicants and the potential abuse of asylum procedures have resulted in a significant burden on some states, it should be recalled that the system of international refugee protection could not have foreseen these unprecedented and wide-ranging developments to avoid state responsibility. In this regard there is a definite 'gap' in the international protection regime. Although some states and academic commentators are calling for a new international legal framework or revised international refugee convention, it is unlikely that the international community would be willing to engage in reforming the current international legal regime with a view to making it more generous. In fact, as anticipated by UNHCR, revisiting the international legal instruments for the protection of refugees in the current political climate should be considered a very limited option.<sup>18</sup>

Despite the general focus of the majority of states to enhance immigration control mechanisms, and as described, the difficulties of reconciling such control objectives with obligations founded in international refugee law<sup>19</sup>, it is useful to take account of another body

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<sup>15</sup> Saad Al Attar, 'Preinspection of Travelers in Foreign Airports: An Obstacle to Asylum Seekers', *Journal of International Relations*, vol 3, no 2 (1996), Dhaka, Bangladesh.

<sup>16</sup> Concerning airport procedures in Europe refer to 'Working Paper on Airport Procedures in Europe, European Consultation on Refugees and Exiles (ECRE) (1993). Also see Maryellen Fullerton, 'Restricting the Flow of Asylum-Seekers in Belgium, Denmark, The Federal Republic of Germany, and The Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights', *Virginia Journal of International Law*, vol 29, no 1 (1988).

<sup>17</sup> As early as 1993 the High Commissioner for Refugees expressed her concern on the measures taken by some European states to control illegal immigration, which may result in the creation of "unreasonable barriers and impossible burdens for people in need of protection." re: *Towards a European Immigration Policy*, The Phillip Morris Institute for Public Policy Research, Brussels, October 1993 (on file with the author).

Much has been written on the European experience of common immigration control mechanisms and their negative impact on international refugee protection. See, for example, Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, Martinus Nijhoff Publishers, 2000; Jens Vedsted-Hansen, *Europe's response to the arrival of asylum seekers: refugee protection and immigration control*, New Issues in Refugee Research, Working paper no. 6, UNHCR Geneva, May 1999; Karin Landgren, *Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests*, New Issues in Refugee Research, Working paper no 10, UNHCR Geneva, June 1999; Also refer to *The trafficking and smuggling of refugees: the end game in European asylum policy?*, UNHCR-commissioned study prepared by John Morrison, Geneva, July 2000.

<sup>18</sup> See the UNHCR *Note on International Protection* 1994, UN Doc ref: A/AC.96/830 at paras 52-53. Others have argued that due to the current irrelevance of international refugee law to states there is a need to develop a new paradigm of refugee protection based on standards and mechanisms to implement common but differentiated responsibility towards refugees. Also refer to James C Hathaway and R Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, vol 10 (1997).

<sup>19</sup> Although several of the examples of obstacles to refugee protection have largely found their genesis in developed countries, serious refugee protection problems also occur in less-developed countries. For a study of

of international law – namely international human rights law – to provide a complementary legal framework for refugees. The High Commissioner for Refugees noted in her address to the 54th session of the Commission on Human Rights that: “there is an impressive array of international, regional and national human rights standards and structures which must continue to evolve to ensure that gaps and weaknesses are identified”. The “gaps and weaknesses” the High Commissioner was referring to, no doubt, are those in the international protection regime for refugees. A primary objective of this essay is to review the record of some of the principal UN human rights mechanisms with a view to considering how they can provide a helpful and complementary body of law and jurisprudence. In this regard it is considered that a human rights perspective provides a positive approach towards enhancing the protection of refugees through strengthening the normative and operational framework.

### **The International Refugee Protection Regime and the Emerging Human Rights Focus**

Approximately two-thirds of the world’s countries are state parties to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.<sup>20</sup> Despite, as some would argue, concerns as to whether these international instruments are sufficiently up-to-date to take account of today’s refugee problems, they remain the principal body of international law for the protection of refugees. Furthermore, the refugee definition and a number of the rights provisions contained in these instruments have been widely incorporated into regional instruments and domestic legislation.<sup>21</sup>

As concerns the human rights focus of the 1951 Refugee Convention, it is noteworthy that the direct line of descent from the UN Charter and the Universal Declaration of Human Rights is stated in its preamble. The Convention affirms "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination". International refugee law instruments also codify a number of specific rights which states are obliged to provide to refugees. In view of rapid developments in the domain of human rights law which may complement and inform the interpretation of the refugee instruments, the Refugee Convention

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refugee protection problems in Africa see *African Exodus: Refugee Crises, Human Rights & the 1969 OAU Convention*, Lawyers Committee for Human Rights, New York, 1995. In the Latin American context a UNHCR report noted that: "Numerous countries [in the region] have indeed acceded to the 1951 Convention and/or 1967 Protocol, but few have a fully operational national legislation and, [for those that do] fewer do apply them systematically if UNHCR is not there to remind concerned authorities of their duties. While it is true that we are rarely confronted with very serious protection problems, there are still numerous situations in our countries which justify our presence and monitoring role. This is more so when we note that [UNHCR's] main challenge for this end of century is to ensure that effective protection of refugees and asylum-seekers goes hand-in-hand with activities geared to ensure effective institution building and training programmes (on behalf of both governmental and non-governmental counterparts) and the enactment or revision and effective application of refugee law." (UNHCR Regional Office Costa Rica Report of 28 February 1996, on file with the author)

<sup>20</sup> 1951 *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, as updated by the 1967 *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267; these instruments are also reproduced in the *Handbook on Procedures and Criteria for Determining Refugee Status* which is available from UNHCR Geneva. According to UNHCR’s RefWorld CD-ROM (7th ed., January 1999) there are presently 136 state parties to either the 1951 Refugee Convention and 1967 Protocol, and 43 state parties to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

<sup>21</sup> See for example Guy S Goodwin-Gill, *The Refugee in International Law*, 2nd edition, Clarendon Press, Oxford (1996) at pp 20-25.

is very much a living document which, despite its vintage, maintains its relevance in respect of providing a normative framework to address contemporary refugee problems.<sup>22</sup> Notwithstanding the satisfactory scope of human rights guaranteed to refugees under the international refugee instruments, these provisions are all too commonly ignored by states and other actors as a disproportionate amount of energy and resources<sup>23</sup> tends to be focused on determining *who* is a refugee.<sup>24</sup> International refugee instruments nonetheless provide a full complement of human rights standards for refugees. For example, article 3 of the 1951 Refugee Convention provides that state parties shall apply the provisions of the Convention without discrimination as to race, religion or country of origin of the beneficiary. Article 4 governs freedom to practice religion and religious education. Article 16 provides that a refugee shall have free access to the courts of law on the territory of all contracting states. Articles 17, 18 and 19 govern the granting of access to employment opportunities to refugees; and Article 21 provides that refugees shall be accorded, as regards housing, treatment as favourable as possible and in any event not less favourable than that accorded to aliens generally in the same circumstances.

Other rights granted to refugees include freedom of movement in the territory of the contracting state (Articles 26 and 31), and facilitating assimilation and naturalization (Article

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<sup>22</sup> Not all subscribe to this view. In fact, what has become common rhetoric amongst some states who are not parties to the international refugee instruments is that the 1951 Refugee Convention is outdated and Euro-centric and thereby of limited relevance in dealing with refugee problems in less developed countries. Similar views, which have been applauded by many developing nations, were expressed by the former Indian Permanent Representative to the UN at the 48th Session of the UNHCR Executive Committee as follows: “The 1951 Refugee Convention was adopted in the specific context of conditions in Europe during the period immediately after the second world war. International refugee law is currently in a state of flux and it is evident that many of the provisions of the Convention, particularly those which provide for individualised status determination and social security have little relevance to the circumstances of developing countries today who are mainly confronted with mass and mixed inflows. Moreover, the signing of the Convention is unlikely to improve in any practical manner the actual protection which has always been enjoyed and continues to be enjoyed by refugees in India. We therefore believe that the time has come for a fundamental reformulation of international refugee law to take into account present day realities ... it has to be recognised that refugees and mass movements are first and foremost a ‘developing country’ problem and that the biggest “donors” are in reality developing countries who put at risk their fragile environment, economy and society to provide refuge to millions. An international system which does not address their concerns adequately cannot be sustained in the long run [...]”. For a perspective which argues that the origins of the 1951 Refugee Convention are premised on its universal application to all refugee situations see Ivor C Jackson, ‘The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection’, *IJRL* vol 3, no 3 (1991).

<sup>23</sup> Hathaway has made a stark comparison of refugee burden sharing between Northern and Southern states wherein he notes that: “Of the 26 states hosting at least one refugee per 100 citizens, 21 were among the world’s poorest (i.e. they had a per capita income of less than \$1000 per year ... The Refugee Convention speaks about the importance of sharing, but incorporates no mechanism to make it happen. Northern states each year spend at least \$12 billion to process the refugee claims of about 15% of the world’s refugee population, yet contribute only \$1-2 billion to meet the needs of 85% of the world’s refugees who are present in comparatively poor states...” ‘Keynote Address of Professor James Hathaway at New Delhi Workshop on International Refugee Law’, *Indian Journal of International Law*, vol 39, no 1, January-March 1999, at p. 11.

<sup>24</sup> Goodwin-Gill offers a helpful analysis of how the refugee definition has evolved to include “not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds (so-called ‘statutory refugees’); but also other often large groups of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their state of origin (now often referred to as ‘displaced persons’ or ‘persons of concern’) [...] On the basis of state and international organization practice, the above core of meaning represents the content of the term ‘refugee’ in general international law. Grey areas nevertheless remain [...]” *op cit*, at p 29.

34). And what is considered the cornerstone of international protection, prohibition of expulsion or return of a refugee (*non-refoulement*) is found in Article 33, which includes prohibiting return from a potential asylum country at its frontiers. Still other provisions include freedom of association with non-political and non-profit-making associations and trade unions (article 15), free access to courts of law (article 16) and provision of administrative assistance by the contracting state authority to allow a refugee to exercise a right under the Convention (Article 25). Article 5 further provides that nothing in the Convention shall be deemed to impair any additional rights and benefits granted by a contracting state apart from the Convention.<sup>25</sup> Thereby, states parties should consider the rights provisions in the Convention as minimum standards of treatment.

A brief review of the above-noted provisions reveals that the Convention is an extraordinary 'Bill of Rights' for refugees. Furthermore, many of the rights found in the international refugee instruments such as enjoying non-discrimination and protection from persecution (i.e. denial of life, liberty and personal security), are in one form or another enshrined in international human rights treaties, for example, the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Social, Economic and Cultural Rights (ICESCR), the 1984 Convention against Torture and the 1989 Convention on the Rights of the Child. Under the terms of the 1951 Refugee Convention many of the rights are granted to refugees without restrictions, while others require that state parties provide treatment as favourable as that provided to other foreigners subject to the jurisdiction of the concerned state. Although the 1951 Convention provides an impressive array of rights, international human rights instruments such as the ICCPR and ICESCR may provide even broader legal protection than the refugee instruments. As an example, in relation to housing rights and social security the 1951 Refugee Convention guarantees equality of treatment to refugees with other non-nationals, while the relevant international human rights instruments provide such guarantees *equally to all persons without restriction*.

Apart from variances of scope and application in the international treaties, as with any international human rights regime the overriding difficulty is how to enforce the specified rights. In the case of the principal UN human rights treaties there is a system of treaty bodies that play a supervisory and enforcement role in ensuring compliance by state parties with the treaty provisions. This is done through examination of periodic state party reports by the human rights treaty body or committee which is established under authority of a particular treaty and, in theory, is made up of an independent group of experts. Depending on the agreement of individual states and the specific provisions of the human rights treaty, a treaty body may also deal with inter-state and individual complaints and conduct field investigations on the human rights situation in a particular country. Notwithstanding the considerable authority, both real and symbolic, exercised by the human rights treaty bodies as part of the broader system of international human rights protection, several commentators have argued that the present set-up of ensuring compliance with international human rights standards is unsatisfactory and should be reformed.<sup>26</sup>

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<sup>25</sup> For a comparative study of state practice in granting rights to refugees see James C Hathaway and John A Dent, *Refugee Rights: Report on a Comparative Survey*, York Lanes Press, Toronto (1995).

<sup>26</sup> Much has been written on reforming the UN Treaty Body System in recent years. Several practical proposals for reforming and re-activating this particular aspect of the UN human rights system are contained in the

By comparison with the system of international human rights protection, the international refugee regime can be considered as having greater potential to ensure compliance with *international refugee protection standards*, whether in states which are parties to the 1951 Refugee Convention or otherwise. To support this view it should be borne in mind that through its extensive field presence in 120 countries, UNHCR can play an effective supervisory and *de facto* enforcement role in the application of international refugee law and related human rights standards. However, the system of international refugee protection differs from the human rights mechanisms of the UN in some significant ways.

Firstly, to argue the limitations of the international refugee regime, the following points should be noted. One, unlike the international system of human rights protection there is no formal mechanism in international refugee law to receive individual or inter-state petitions or complaints. Two, UNHCR has till date not given full effect to article 35 of the 1951 Refugee Convention whereby contracting states undertake to provide UNHCR with information and statistical data on *inter alia* the implementation of the Convention. Three, as a consequence of the above, there is no system of review of country practices through the public examination of state party reports or other such information which can be used to formulate concluding observations and recommendations for states and thereby help ensure compliance with international standards of refugee protection. Four, the extent of UNHCR's involvement in protection and human rights issues concerning refugees very much depends on the scope permitted to UNHCR to exercise its mandate in a particular country as well as the resources available for a specific operation. In this connection, a significant handicap in delivering its protection mandate is UNHCR's limited human and financial resources. This means that many field operations may be inadequately staffed and thereby addressing refugees' problems may be delayed or neglected. This observation is not an excuse for inaction on the part of UNHCR, but it is an operational reality which inevitably impacts on the ability of the Office to fulfill its protection obligations.

To argue the positive side, the advantages of the UNHCR's 'rights enforcement' approach are many. First and foremost, and as noted above, a fundamental strongpoint is the day-to-day presence of UNHCR protection officers in field situations. This considerable field presence permits UNHCR officials to develop an appreciation of the country conditions and potential solutions to refugee protection problems, as well as the likelihood of various approaches having a favourable outcome. A continuous field presence is also important for assessing and monitoring the level and extent of human rights problems (which may impact on protecting or even producing refugees) in a particular country or region. Such assessments may thereby develop into a strategy to take remedial action through intervening and working with

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'Conclusions and Recommendation' from the proceedings of a Conference *Enforcing International Human Rights Law: The Treaty System in the Twenty-First Century* held at York University, Toronto, on 22-24 June 1997. Also see Anne F Bayefsky, 'Making the Human Rights Treaties Work', in *Human Rights: An Agenda for the Next Century*, Louis Henkin and John Lawrence Hargrove (eds), Studies in Transnational Legal Policy, No 26, The American Society of International Law, Washington, DC, 1995; Interim report by Philip Alston entitled 'Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights, UN report ref: A/CONF.157/PC/62/Add.11/Rev.1 of 22 April 1993; Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal*, Clarendon Press, Oxford, 1992.

government authorities, legal or national human rights institutions and NGOs. Along these lines UNHCR alone, or in conjunction with other actors, can develop assistance programmes and protection initiatives geared towards safeguarding the human rights of refugees and other victims of human rights violations.<sup>27</sup>

As part of a sharpened focus on human rights issues which affect refugees, UNHCR has incorporated a number of human rights principles and strategies in its policies and programmes. Protection activities in countries of origin; working with states in the area of legal rehabilitation, institution building and law reform; enforcement of the rule of law; and developing specific protection guidelines for refugee women and children are all relatively recent areas of activity for the Office. It is also worth underlining that in reference to a particular aspect of these activities in 1995 the UNHCR Executive Committee called upon the Office “to strengthen its activities in support of national legal and judicial capacity building, where necessary, in cooperation with the UN High Commissioner for Human Rights”. For example, this means not only that UNHCR should support developing justice systems in post-conflict situations, but the Office should also work towards making judicial authorities and the legal community aware of human rights problems facing refugees and other persons of concern. Building awareness and expertise amongst legal and administrative institutions and other actors can have a positive impact on developing favourable administrative practices and in some instances policies and jurisprudence.<sup>28</sup>

The extent of UNHCR’s involvement in such initiatives very much depends on the country conditions and the political commitment on the part of governments to comply with international refugee law standards and cooperate with the Office and other actors. Such achievements can only be undertaken through building a working relationship with government authorities and other actors taking into account the needs of the country concerned, and related sensitivities which respond to local diversities. The strength of UNHCR’s field presence should not, therefore, be underestimated in respect of its overall potential to build upon the system of international refugee and more broadly human rights protection.

With regards to the promotion of human rights principles as part of its protection policies, programmes and related activities, UNHCR adopted a policy paper entitled ‘UNHCR and Human Rights’. The policy paper constitutes the first time UNHCR addressed the interrelationship of human rights and refugee protection in a comprehensive manner. The paper states that in UNHCR’s “goals, aims and objectives” the Office “must comply with

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<sup>27</sup> See Chapter 2 of *The State of the World’s Refugees*, ‘Defending refugee rights’, UNHCR (1997); and William Clarence, ‘Field Strategy for the Protection of Human Rights’, *IJRL*, vol 9, no 2 (1997).

<sup>28</sup> In the UNHCR Policy Paper entitled ‘UNHCR and Human Rights’ it is noted *inter alia* that “UNHCR must strengthen its involvement in [refugee and human rights] standard-setting exercises, in particular with the UN, as well as in the development of case law by human rights Commissions and Courts. It must do so in order to ensure proper reflection of the Office’s interests and concerns and to safeguard a liberal interpretation of these standards as they apply to refugees and others persons of concern”. The policy paper is reproduced in the UNHCR RefWorld CD-ROM, *op cit.* Also see the UNHCR training module ‘Human Rights and Refugee Protection’ (Geneva 1995), and ‘A Practical Guide to Capacity Building as a feature of UNHCR’s Humanitarian Programmes’ (Geneva 1999, on file with the author). Since 1993, UNHCR has maintained two professional posts in the Department of International Protection whose main tasks are training, liaison and advocacy in relation to human rights and refugees.

international human rights standards”. It further notes that “not only must UNHCR staff be careful not to compromise fundamental protection principles and norms, but they must make programme goals compatible with international human rights standards”. Finally, it goes on, UNHCR “must also try to enhance the observance of these [human rights] standards by [its] government and NGO partners”.<sup>29</sup>

This policy statement is significant as it provides a general guideline for UNHCR in respect of how to incorporate human rights *standards, information and mechanisms* in its protection activities. Some have suggested that such a policy was long overdue, and the absence for so many years of a specific directive on what is an obvious linkage between refugee protection and human rights protection reflected the ambivalence of UNHCR on human rights issues. However, as one UNHCR Director once remarked: “Perhaps there was an advantage to not openly articulating our human rights stance”, which may be reflective of the perceived, albeit erroneous, notion during in particular the cold war that human rights concerns were somehow ‘political’.<sup>30</sup> Notwithstanding this earlier approach, the age of subtlety has ended and human rights concerns have become a much closer part of UNHCR’s discourse and practice.<sup>31</sup> The

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<sup>29</sup> Ibid.

<sup>30</sup> Another reason UNHCR may have historically avoided articulating the refugee problem as a human rights issue was that it wished to emphasise the ‘non-political and humanitarian’ nature of its mandate. It was only in 1981 that the UNHCR Executive Committee drew upon basic human rights standards in formulating its Protection Conclusions (eg. No 22 on *the Protection of Asylum-Seekers in Situations of Large Scale Influx*). In this regard, in 1988 the Executive Committee in its Conclusion number 50 recognised “the direct relationship between the observance of human rights standards, refugee movements and problems of protection”.

<sup>31</sup> More recently the Office has identified the need to focus on the causes of the refugee problem and not just its manifestations. The 1996 UN General Assembly resolution (A/RES/50/152) on the ‘Office of the UNHCR’ *inter alia* took note of “the relationship between safeguarding human rights and preventing refugee situations, recognises that the effective promotion and protection of human rights and fundamental freedoms, including through institutions that sustain the rule of law, justice and accountability, are essential for states to address some of the causes of refugee movements and for states to fulfil their humanitarian responsibilities in reintegrating returning refugees and, in this connection, calls upon the Office of the UNHCR, within its mandate and at the request of the government concerned, to strengthen its support of national efforts at legal and judicial capacity-building, where necessary, in co-operation with the UN High Commissioner for Human Rights.” The UNHCR *Note on International Protection* submitted to its Executive Committee in 1998 begins with the following observation: “There is a natural complementarity between the protection work of UNHCR and the international system for the protection of human rights. The protection of refugees operates within a structure of individual rights and duties and state responsibilities. Human rights law is a prime source of existing refugee protection principles and structures; at the same time, it works to complement them.” The *Note* further describes the range of human rights related activities the Office was undertaking as follows: “UNHCR has ... intensified its co-operative involvement with system-wide human rights promotion activities and protection mechanisms, where this was judged to be of tangible benefit to refugee protection, or to addressing the root causes of refugee flows. This co-operation has included support for national human rights institutions to strengthen local capacity to protect human rights; assistance in training the judiciary and government officials in refugee and related human rights concepts; and working along with non-governmental organisations to spread awareness of human rights instruments, principles and practices directly impacting on refugee situations. UNHCR has also intensified its co-operation with the human rights treaty implementation machinery, while at the operational level, a positive interaction is developing between the human rights field missions and UNHCR operations on the ground. At Headquarters, the co-operation between UNHCR and the Office of the High Commissioner for Human Rights has been very positive and is expanding ... In all these activities, UNHCR has been guided by its clear awareness of the complementarity but difference between the refugee specific mandate of UNHCR and the broader human rights mandates of other concerned organs and institutions, including the Office of the High Commissioner for Human Rights. The need to maintain mutually supportive but separate character of respective mandates is particularly clear in the area of monitoring. While human rights monitoring missions must investigate

Office is now taking more determined steps to formalise a human rights protection approach on behalf of its particular group of beneficiaries, and this is clearly an area in which the doctrine and practice of the Office will continue to mature.

## **International Legal Obligations (State Responsibility) and International Human Rights Standards**

The idea of developing a system of human rights protection is not new. Indeed, many states have been established on the basis that individuals have certain inherent rights which must be respected by those governing.<sup>32</sup> The idea of establishing a system of human rights law at the international level is a more recent development and has taken shape through the United Nations itself. The UN Charter proclaims as one of the purposes and principles of the UN “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.” Furthermore, member states of the UN pledge themselves to take action in cooperation with the UN to achieve this purpose.<sup>33</sup> It is important to recall these provisions whenever one considers the general obligation of UN member states to cooperate with the Organisation and by consequence specific UN agencies which deal with human rights issues such as UNHCR.<sup>34</sup>

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and encourage prosecution of human rights violations, action in support of refugees and returnees is essentially humanitarian, involving confidence-building and creation of conditions conducive to peace and reconciliation. This being said, because the activities of human rights field missions are very relevant to UNHCR’s work, UNHCR has been repeatedly supporting the need for a more operational human rights machinery as a necessary complement to its own protection efforts.” (UN Document ref: A/AC/96/98 of 3 July 1998). Also see the UNHCR Policy Series Paper on ‘Prevention’ of 28 September 1998 (on file with the author).

<sup>32</sup> This point was made in the 1981 Commission on Human Rights ‘Study on Human Rights and Massive Exoduses’ which was prepared by former UN High Commissioner for Refugees, Sadruddin Aga Khan, wherein he noted: “Since the individual is the ultimate beneficiary in any system of international law and practice, the need to respect human rights is all the more important. These rights, as embodied in the 1948 *Universal Declaration of Human Rights* constitute a set of guidelines, a code of conduct, of how, in an ideal society, the nation-state should deal with an individual. The former should not abuse the latter. The rule of law should reign supreme and impartial courts must enforce this even against governments ....”, UN Document ref: E/CN.4/1503 of 31 December 1981, at pp 8-9.

<sup>33</sup> *Charter of the United Nations*, articles 55 & 56. The International Court of Justice has had the opportunity to consider the legal effect of these particular provisions and has stated, albeit as *obiter dicta*, that they “bind member states [of the UN] to observe and respect human rights” (Advisory Opinion on *The Legal Consequences of the Continued Presence of South Africa in Namibia*, ICJ Reports 1971, 16). Or as Brownlie has opined: “... while it may be doubtful whether states can be called to account for every alleged infringement of the rather general [UN] Charter provisions, there can be little doubt that responsibility exists under the Charter for any substantial infringement of the provisions, especially when a *class of persons*, or a pattern of activity, are involved. (emphasis added), *Principles of Public International Law* (4th ed.), Clarendon Press, Oxford (1990) at p 570. General Assembly Resolution 428 (V) of 14 December 1950, which established the Office of the UNHCR also calls upon governments to co-operate with the Office in the performance of its functions. The necessity for states to co-operate with UNHCR has since been acknowledged in successive General Assembly resolutions and in a variety of international instruments including the preamble to the 1951 Refugee Convention, the 1967 UN Declaration on Territorial Asylum, the Final Act of the 1968 Teheran International Conference on Human Rights, the preamble to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa *et al.*

<sup>34</sup> In addition to these general principles the UN Charter also provides the legal authority for the establishment of a number of UN bodies which *inter alia* deal with human rights issues. These include the International Court of Justice, the UN General Assembly, the Security Council, and the Economic and Social Council (ECOSOC).

Since the adoption of the UN Charter in 1945, the 1948 Universal Declaration of Human Rights and the Refugee Convention in 1951, a number of other international human rights treaties were developed, some of which have been already highlighted, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966. In 1965 the UN enacted the Convention on the Elimination of Racial Discrimination. The remaining principal human rights instruments are the Convention on the Elimination of Discrimination Against Women (1979), the Convention Against Torture (1984) and the Convention on the Rights of the Child (1989).

In addition to the central foundational status of the Universal Declaration of Human Rights, more than 195 states have ratified or adhered to at least one (or in the majority of cases more) of the six principal human rights treaties, thus creating multilateral binding legal obligations of a *continuing nature*.<sup>35</sup> These treaties have also generally benefited the formulation of human rights law and principles, as they use more precise and inclusive language than the Universal Declaration of Human Rights (and even at times international refugee law). Furthermore, they establish supervisory mechanisms which can provide authoritative interpretation of the treaty provisions<sup>36</sup>, in addition to addressing compliance of the standards by state parties and receiving and adjudicating on inter-state and individual complaints.

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Article 68 of the Charter authorises ECOSOC to: "... set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions". Under this specific Charter-based authority ECOSOC has established the Commission on Human Rights, the Commission on the Status of Women, the Commission on Sustainable Development, and the Commission for Social Development. In addition to these "functional commissions" of ECOSOC, the related organs and programmes of the UN which constitute the economic and social machinery of the Organisation, and which function within the framework of Chapters IX and X of the Charter include: UNICEF, UNDP, WFP, UNEP, the UN Population Fund (UNFPA), and UNHCR.

<sup>35</sup> The *continuing nature* of international human rights treaty obligations was addressed by the UN Human Rights Committee in its general comment 26 on 'Issues relating to the continuity of obligations to the ICCPR' (8 December 1997). In its comment the Committee noted that the Covenant, along with the ICESCR, codifies in treaty form the universal human rights enshrined in the UDHR. Accordingly the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted. The Committee went on to add that: "... *once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the state party, including dismemberment in more than one state or state succession or any subsequent action of the state party designed to divest them of the rights guaranteed by the Covenant.*" (emphasis added). In addition to the two International Covenants, only the Convention on the Elimination of Discrimination against Women (CEDAW) does not permit denunciation by a state party. All the other principal human rights treaties including the CRC, CAT and CERD allow for denunciation. However, denunciation of a human rights treaty obligation by a state is an extremely rare occurrence. It may be politically more expedient for a state to suffer periodic criticism of a treaty body and the international community for human rights violations rather than be permanently marked as a state which has denounced a major human rights treaty.

<sup>36</sup> As a general rule of international law it should be recalled that in the event of disparity between two or more human rights standards then the more generous provision would be applicable. In comparison with refugee law, some may argue that if the provisions in the international refugee instruments are more specific than those found in universal human rights instrument, then the more specific legal provision should apply. However, this view can only be considered correct where the more generous provision is ambiguous or unclear as to whether it benefits refugees. Furthermore, as has been repeatedly emphasised by the human rights treaty bodies, states should not interpret the scope and content of their treaty obligations in an overly restrictive fashion.

Despite the more precise language embodied in the international human rights instruments, problems of legal interpretation remain. In commenting on whether a state can be said to have implemented an international legal obligation, Goodwin-Gill has expressed the following view:

... the relative imprecision of the terminology employed in standard-setting conventions; the variety of legal systems and practices of states; the role of discretion, first, in the state's initial choice of means [to enact treaty obligations], and secondly, in its privilege on occasion to require resort to such remedial measures as it may provide; and finally the possibility that the state may be entitled to avoid responsibility by providing an 'equivalent alternative' to the required result ....<sup>37</sup>

Apart from the inherent difficulty in defining and assessing the compliance of states with international human rights standards, an underlying aspect of creating legal obligations is the requirement to give effect to and enforce these obligations. As noted by Goodwin-Gill, this can take a variety of forms depending on the nature of the obligation and the approach for implementation adopted by the state. Whether states choose to formalise international obligations through enacting legislation; establishing national mechanisms which can deal with human rights complaints; promoting broad interpretation of constitutional human rights provisions; or otherwise ensuring that state agents are obliged to respect certain norms may vary from country to country. What cannot be disputed is that these obligations must be implemented in good faith. Thus, with regard to the legal obligations stemming from the 1951 Refugee Convention and the 1967 Protocol the test should be "whether, in light of domestic law and practice, including the exercise of administrative discretion, the state has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned."<sup>38</sup> The same test could be employed in respect of the corresponding obligations found in international human rights law.

Beyond domestic considerations of implementation of treaty obligations is the fact that the system of international law, including international human rights and humanitarian law, has recently been strengthened. The establishment and functioning of International Criminal Tribunals for the former Yugoslavia and Rwanda, the adoption of a Statute to form an International Criminal Court, in addition to corresponding developments at regional and national levels are all examples of the growing consensus to consolidate human rights principles into effective binding legal instruments and enforcement mechanisms which the international community of states are obligated to respect and maintain.<sup>39</sup>

In addition to institutional arrangements, related questions which arise in respect of international legal obligations, and which are of particular relevance in the refugee context concern the geographical (*rationae loci*) and personal scope (*rationae personae*) of the obligations.<sup>40</sup> These issues have been addressed in various legal fora including the UN treaty

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<sup>37</sup> Goodwin-Gill, *op cit*, p 238.

<sup>38</sup> *Ibid.*, p 240.

<sup>39</sup> See Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford (1994), in particular Chapters 1-3. Also see Thomas Buergenthal, 'The Normative and Institutional Evolution of International Human Rights', *Human Rights Quarterly* 19 (1997).

<sup>40</sup> Many of the ideas expressed on these aspects of international human rights law have been developed by

bodies, in particular the Human Rights Committee in its general comments<sup>41</sup> and during examination of state party reports. In its general comment on Article 2 (1) of the ICCPR, the Human Rights Committee asserted that states are obliged to ensure rights to all “individuals under their jurisdiction”. Furthermore, in its general comment on Article 27, the Committee referred to its earlier interpretation of Article 2 (1) as applying to all individuals “within the territory or under the jurisdiction of the state”. More recently, the Human Rights Committee stated in strong terms in its general comment on Article 41 that “[the] intention of the Covenant is that the rights contained therein should be ensured to all those under a state party’s jurisdiction.”

In its general comment 15 on ‘the position of aliens’, the Committee took note that while the Covenant does not recognise the right of aliens to enter or reside in the territory of a state party, in certain circumstances “an alien may enjoy the protection of the Covenant *even in relation to entry or residence*, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect of family life arise.” However, once aliens are permitted to enter the territory of a state party “they are entitled to the rights set out in the Covenant.”<sup>42</sup> It is also noteworthy that most of the rights in the Covenant are applicable to “everyone”, or to “all persons” or “every human being”.<sup>43</sup> One finds similar language in the other UN human rights treaties.

Concerning the extra-territorial application<sup>44</sup> of the rights under the ICCPR, this matter has

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Theodor Meron in his lectures on ‘Obligations of states to respect and ensure human rights’ delivered at the International Institute of Human Rights, Strasbourg, July 1995 (on file with the author). Also see *Taking Duties Seriously: Individual Duties in International Human Rights Law, A Commentary*, International Council for Human Rights Policy, Geneva (1999).

<sup>41</sup> The general comments of the UN treaty bodies including the Human Rights Committee are reproduced on the UNHCR RefWorld CD-ROM, *op cit*.

<sup>42</sup> In setting out the specific rights applicable to aliens the Human Rights Committee provided a lengthy description as follows: “Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant”.

<sup>43</sup> See Dominic McGoldrick, *The Human Rights Committee*, Clarendon Press, Oxford (1996) at pp 20-21.

<sup>44</sup> See M Gibney, K Tomasevski and J Vedsted-Hansen, ‘Transnational State Responsibility for Violations of Human Rights’, 12 *Harvard Human Rights Journal*, Spring 1999. For an exhaustive analysis of the scope of extraterritorial protection under international human rights law see Gregor Noll, *op cit*.

been dealt with during examination of state party reports. During consideration of the report of the United States of America under article 40, the Committee expressed its “concern” that excludable aliens are dealt with by lower standards of due process than other aliens. The Committee also expressed concern regarding “the situation of a number of asylum seekers and refugees”. The Committee added, in what was clearly a reference to the practice adopted in 1994 of not permitting Haitian asylum seekers to enter the United States, that it “does not share the view expressed by the government that the Covenant lacks extraterritorial reach under all circumstances”. The Committee took the position that such an opinion as expressed by the United States government “is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject matter jurisdiction of a state party even when outside that state territory.”<sup>45</sup>

Consistent with the above reasoning, the Committee took a similar stance when it considered the report of Israel under Article 40 wherein the Committee expressed it was “deeply concerned” that the state party continues to deny its responsibility to fully comply with the Covenant in the occupied territories. The Committee went on to note that the Covenant must be held applicable to the occupied territories “and those areas of southern Lebanon and West Bekaa where Israel exercises effective control.”<sup>46</sup>

More restrictive language is however found in other international treaties with the Convention against Torture, under article 2, requiring a state to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. The Convention on the Elimination of Racial Discrimination employs a formulation which requires state parties to “assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions”. The Convention on the Rights of the Child, in its Article 2, also provides that “state parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction.”

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<sup>45</sup> Comments of the Human Rights Committee, Fifty-third session, United States of America, at its 1413rd meeting held on 6 April 1995.

<sup>46</sup> Report of the Human Rights Committee to the General Assembly, Official Records, Fifty-third session, UN Doc ref: Supplement No 40, A/53/40 of 15 September 1998, at para 306. The Committee has made similar observations in respect of extra-territorial actions of states being subject to compliance with the Covenant, most notably during its examination of the actions of Iraq during the events in Kuwait under Iraqi occupation in 1990-91. At that time the Committee noted expressed “particular concern” over the failure of Iraq’s periodic report to address these events “given Iraq’s clear responsibility under international law for the observance of human rights during its occupation of that country.”

The consistency of the language used in the international human rights treaties, as well as the authoritative reasoning of the Human Rights Committee as well as other international and regional human rights bodies, would confirm the legal obligation of state parties to ensure that human rights are extended to individuals who befall a state's formal jurisdiction or exercise of authority. In the case of refugees, human rights principles are readily applicable as usually there is an identifiable state, as demarcated by a border or territorial crossing, which gives rise to a claim by a refugee to seek human rights protection from that state. Even in the case of a state actively pursuing a policy outside of its territorial jurisdiction, as in the case of the United States preventing Haitian asylum seekers from reaching its territory, the Human Rights Committee concluded that such actions were in violation of the ICCPR. These pronouncements by the treaty bodies are not hollow as they provide legal benchmarks which should serve to govern and inform state policy and practice, and not least they serve to progressively develop international law.

A second aspect of international legal obligations which requires examination is the personal scope (*rationae personae*) of the obligations and the duty of the state to ensure that human rights are respected, whether by state or non-state actors. Some human rights treaties such as the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) extend certain obligations on states parties to ensure that discrimination is eliminated in the public and in some aspects of the private sphere. This public/private interface is exemplified in article 2 (1)(b) of CERD whereby state parties are obliged "not to sponsor, defend or support racial discrimination by any persons or organisations". In this context, the scope and meaning of "support" can be considered as the failure to take positive action to prevent a discriminatory act or extending benefits to an actor which serves to support the offending behaviour. Thus, for example, granting financial benefits to a private organisation which discriminates on the basis of race may be interpreted as a violation of article 2 (1)(b).

CEDAW takes an even broader view of state parties' obligations to ensure compliance with the rights provisions in various aspects of public and private life. Under Article 2 (e) states are obliged to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake ... to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise." In the following subsection (f), the Convention prescribes that state parties must "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." CEDAW thus extends the elimination and prohibition of discrimination against women to all aspects of public and private life which may, in turn, give rise to other conflicting human rights obligations in respect of freedom of association, equality rights, and personal and family life.

That the state must take pro-active steps to ensure compliance by public and private actors in respect of human rights obligations was echoed by the Human Rights Committee in its general comment on article 2, which states that:

... the obligation under the Convention is not confined to the respect of human rights, but that states parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for

specific activities by the states parties to enable individuals to enjoy their rights.

Going further, in its general comment on Article 7, the Human Rights Committee noted that “it is the duty of the state party to afford everyone protection through legislative or other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”

The Committee likewise observed that there can be no derogation from the provision of Article 7 (prohibition of torture or cruel, inhuman or degrading treatment) even in times of public emergency. Furthermore, no “justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority.” Taking into account the flexible and practical nature and scope of human rights standards, the Committee went on to state that it did not consider it necessary to “draw up a list of prohibited acts” or omissions which may give rise to a violation of this provision as such “distinctions depend on the nature, purpose and severity of the treatment applied.”

In its general comment 24 on issues relating to reservations, the Human Rights Committee reiterated what is in essence the purpose and intent of the Covenant, and in most cases is missing in respect of ensuring that international human rights standards are implemented.

The intention of the Covenant is that the rights contained therein should be ensured to all those under the state party’s jurisdiction. To this end certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the domestic level.

Another common feature of the UN human rights treaties is the non-discriminatory nature and application of the standards and the duty to ensure the equal treatment of all persons. Although distinctions may be made in respect of granting certain rights, by example, the right to vote exclusively to citizens, the human rights treaties require state parties to respect and ensure that the rights of a particular convention are granted equally to all persons without discrimination of any kind. Drawing on the definitions of prohibited discrimination in the CERD and CEDAW, in its general comment 18 the Human Rights Committee elaborated on the concept as follows:

While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

In addition to this very comprehensive definition of “non-discrimination” the Committee was careful to consider that equal treatment does not necessarily mean that all persons be treated the same in every instance, thereby recognising that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation is reasonable and objective if the aim is to achieve a purpose which is legitimate under the Convention.” The Committee further noted that the principle of equality may require state parties “to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.”

Notwithstanding the broad and instructive language which can be interpreted from the international human rights treaties and relevant commentaries including the limited scope of reservations which state parties may invoke<sup>47</sup>, a considerable limitation of this body of law is the effectiveness of its enforcement capacity. Although the human rights treaty system of the UN incorporates the use of supervisory treaty bodies, this is no guarantee that individual states will comply with the decisions and recommendations of the respective committee. To ensure compliance with international legal obligations by necessity requires that states choose to behave in certain ways and adopt and implement policies which are consistent with international standards. Of course, if isolated states wish to act in violation of human rights norms it may not pose serious challenges to the international system of human rights law over the short term. It would nonetheless be cause for concern to the overall legal and moral responsibility of that particular state in upholding its international legal obligations and, more generally, would create an unfavourable precedent. The international system of human rights protection must therefore guard against the violation of international legal standards by states becoming prevalent or the norm.

### **The Work of the UN Human Rights Mechanisms and the Protection of Refugees**

The record of the UN treaty bodies and other human rights mechanisms in addressing violations of refugees’ human rights, though patchy, is developing in a positive manner. The body of jurisprudence coming out of the UN human rights mechanisms is also encouraging and has made significant advances in recent years. The scope and impact of the numerous decisions, pronouncements, and conclusions and recommendations of the UN human rights mechanisms, in particular the treaty bodies, is also proving to be a well-developed and articulated legal foundation which adds support to advocacy efforts on behalf of refugees. This is the strength of international human rights law as a universal system of standards and obligations which states, whether through consent or some degree of imposition, are required to uphold. The particular aspects of the UN human rights mechanisms and the corresponding developments in the jurisprudence which can be employed to enhance the protection of refugees will be the focus of this section.

An NGO publication entitled ‘The UN and refugees’ human rights’ posed the following

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<sup>47</sup> See general comment 24 of the Human Rights Committee on issues relating to reservations made upon ratification or accession to the Covenant or Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (adopted at its fifty-second session, 1994).

question: How can UN human rights mechanisms be used to enhance refugee protection?<sup>48</sup> Any response to this question, it went on to note, will depend on a number of factors including the rights at stake and the mandate and effectiveness of a particular body. It was further suggested that a difficulty of making the system of international human rights protection fully operational is that the UN human rights machinery is complex, multi-faceted and at times confusing. To make matters worse, although it may be assumed that members of various human rights bodies should act in an independent capacity the experience, competence and objectivity of some personnel leaves much to be desired.

It should also be stated that some UN human rights fora are excessively politicised. An example of this trend is the Commission on Human Rights (the Commission) which is the principal UN forum at which human rights issues are discussed. The members of the Commission are normally represented by government officials of UN member states, and it is a rare occurrence that some member states engage independent experts or academic advisors to attend as part of what is effectively a government delegation. As a consequence, a political bias is often reflected in the agenda, debate, decisions and issues that are raised (or fail to be raised) before the Commission. Despite the general importance states give to discussions and decisions of the Commission, the handicap of its over-politicisation has on occasion prevented it from acting on issues and human rights situations which sorely merit attention.

As for other UN human rights mechanisms, the mandates, experience and competence of a particular actor or group of actors may vary enormously. For example, some human rights bodies may be unwilling or unable to deal with cases of individual refugees or issues concerning a state's general asylum practice. A related obstacle is that the members of the human rights bodies may lack exposure or expertise on human rights issues concerning refugees. In fact, it was not so long ago that refugee protection issues generally remained outside the mainstream of the UN human rights machinery. The fact that refugees are the responsibility of a specific UN agency -- that is UNHCR -- has also tended to keep refugee issues apart from the UN human rights programme. Nevertheless, UNHCR's involvement in the work of "the human rights treaty bodies and other UN human rights mechanisms, through information sharing, exchange of views, and promotion of human rights standards that augment the protection and assistance provided to victims of forced displacement"<sup>49</sup> has taken shape.

### **The UN Commission on Human Rights**

The principal human rights body which deals with standard setting, creates new human rights mandates and acts as a repository of the United Nations for reporting on country specific and

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<sup>48</sup> *The UN and Refugees' Human Rights: A manual on how UN human rights mechanisms can protect the rights of refugees*, Amnesty International and the International Service for Human Rights (1997). This publication is an excellent compilation and sourcebook on the workings of the principal UN human rights bodies and includes suggestions and practical information on how NGOs, advocates or other actors may access these bodies to raise refugee protection issues. The manual also includes a chapter on how refugee advocates can lobby UNHCR to act on particular issues. Copies are available from the International Service for Human Rights office at: 1, rue de Varembe, P.O. Box 16, 1211 Geneva.

<sup>49</sup> The High Commissioner for Refugees highlighted these particular activities in her address to the Commission on Human Rights in 1995.

thematic human rights issues is the Commission on Human Rights. The Commission was established by ECOSOC in 1946 and has met annually since that time. It is an inter-governmental body currently made-up of 53 government members who are elected on a regional basis.<sup>50</sup> The Commission meets once a year for six weeks in Geneva. It can also hold special sessions and has done so in recent years in respect of the Former Yugoslavia and Rwanda.

The Commission has a broad mandate to discuss any issue related to the protection of human rights although its main activities have focussed on standard-setting and investigating violations of human rights relating to particular themes (egs. torture, detention, disappearances, violence against women) or individual countries. The Commission can solicit studies, make recommendations and prepare drafts of international instruments relating to human rights. Through passing resolutions at its annual sessions, it may also recommend the establishment of specific procedures in the form of Working Groups and Country and Thematic Rapporteurs.

Apart from the issues on the agenda of the Commission in relation to the internally displaced, mass exodus, violence against women, detention, torture and other agenda items where refugee issues may logically be raised and discussed, the Commission has never given specific attention to the protection of refugees. Moreover, the Commission has rarely considered cases of individuals whose human rights have been violated and it is equally rare for individual cases to be mentioned in a resolution of the Commission. An additional reason for the Commission's failure to focus on refugee issues is that many states are understandably reluctant to allow any discussion in such a prominent UN human rights fora of their asylum policies. For this reason the Commission may not be an appropriate body in which to raise problems faced by individual refugees. Despite these limitations the Commission has nonetheless shown an ability to address more broad-based issues which impact on refugee protection.

An additional feature of the Commission is that member states tend to vote and coordinate policy as part of regional groups. For example the 'Western Europeans and Others Group' which is made up exclusively of western countries, is particularly sensitive to any asylum-related discussions taking place. Another practical reason why refugee issues may not appear on the Commission's agenda is due to the enormous pressure to cover existing items during its six-week session. As a result, it is extremely difficult to get new issues included on an already overloaded programme. Despite the rather mixed track record of the Commission in addressing refugee issues<sup>51</sup>, UNHCR has since the late 1980s taken a close interest in its

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<sup>50</sup> The Membership of the Commission for the year 2000, during its 56th session, will include: 11 Latin American and Caribbean states: Argentina, Brazil, Chile, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Mexico, Peru, Venezuela; 10 Western European and other states: Canada, France, Germany, Italy, Luxembourg, Norway, Portugal, Spain, United Kingdom, USA; 15 African states: Botswana, Burundi, Congo, Liberia, Madagascar, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Sudan, Swaziland, Tunisia, Zambia; 12 Asian-Pacific states: Bangladesh, Bhutan, China, India, Indonesia, Japan, Nepal, Pakistan, Philippines, Qatar, Republic of Korea, Sri Lanka; and 5 Eastern European states: Czech Republic, Latvia, Poland, Romania, and the Russian Federation.

<sup>51</sup> The 55th session (1999) of the Commission naturally paid a great deal of attention to the situation in Kosovo which, of course, gave rise to an equal amount of discussion on the plight of refugees. Till date, the 1999 session marked the greatest involvement of UNHCR in the Commission which commenced with the High

work. The present United Nations High Commissioner for Refugees, Sadako Ogata, has addressed the Commission every year since 1992 and her speech is considered a major statement for the Office. Indeed, the High Commissioner's speech in 1997 is a good example of UNHCR raising the volume of its voice on human rights protection for refugees. In her 1997 statement, the High Commissioner used strong language to urge states to uphold and strengthen the institution of asylum and the principles of refugee protection which she noted were an integral part of the human rights regime and under serious threat. The more solid focus on human rights concerns as they related to refugee protection has continued, with the High Commissioner declaring in 1999 that:

My Office has witnessed over recent years an intensification of human rights violations in countries of origin of refugees, and a considerable decline in the level of protection and assistance to refugees and asylum seekers in countries of asylum -- all this at a time when the international community is taking not unjustified pride in the human rights framework it has put in place through a myriad of instruments and monitoring mechanisms. The plight of hundreds of thousands of refugees is always a graphic reminder of our inability to bring peace and security to the lives of too many ordinary people.

The strength and compassion of the High Commissioner's remarks, though rarefied in the absence of action by states to remedy situations gone wrong, are a poignant reminder that the link between human rights and refugees is intricately bound and the remedy of refugee problems relies on ensuring the human rights of all persons.

In recent years, the Commission's agenda item on 'Human Rights and Mass Exodus' generated considerable interest amongst refugee advocates and UNHCR. In fact, the 1999 session of the Commission is the first time in several years that the resolution adopted under this item did not include a specific focus on refugees.<sup>52</sup> Refugee issues were nevertheless highlighted in a number of other resolutions. Previously, the resolution on 'Human Rights

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Commissioner's speech on 23 March 1999, as well as various statements delivered on the Kosovo crises by senior UNHCR officials including the Assistant High Commissioner, the Special Envoy to Yugoslavia, and the Deputy High Commissioner. The Deputy High Commissioner made an intervention on the last day of the 55th session and spoke in strong terms of UNHCR deploring "the gross and systematic violation of human rights that has led to the mass displacement of civilians from Kosovo, both internally and across frontiers". He added that: "Human rights violations are at the core of this refugee crisis -- one of the largest and most catastrophic that Europe has seen since the end of World War II [and in] the coming months, the delegated functions of the Commission will be of great importance." Lastly, he added: "The search for truth, justice and accountability will be crucial elements of any process towards peace, reconstruction and reconciliation". It is noteworthy that during a special meeting on the situation of Kosovo held at the Commission on 1 April 1999 a number of countries, including Norway and Canada, called for the International Tribunal for the Former Yugoslavia to investigate the crimes taking place in Kosovo.

<sup>52</sup> It is regrettable that during its most recent session the Commission resolution on 'Human rights and mass exodus' did not include any specific references to the plight of refugees. Not only is this a set-back in respect of developing the 'soft law' of the Commission on this particular issue, but in previous years refugee concerns were often raised in the text of the resolution and during discussion under this agenda item. As noted in an Amnesty International/International Service for Human Rights manual: "The resolution on human rights and mass exodus at least provides a place on the agenda where NGOs can raise refugee protection issues. Even if they are not taken up in the resolution, governments do feel the pressure when their restrictive policies are exposed." 'The UN and refugees' human rights', *op cit*, at p. 19.

and Mass Exoduses’ (which was later known as ‘Human Rights, Mass Exoduses and Displaced Persons’) addressed such issues as the link of human rights and refugees, the prevention of refugee flows, early warning, and the protection of refugees’ human rights. Of equal importance was the regular adoption of language in the resolution which requested all UN bodies, including the treaty bodies and specialised agencies, and governmental and inter-governmental and non-governmental organisations to “cooperate fully with all mechanisms of the Commission and, in particular, to provide them with all relevant information in their possession on the human rights situations creating or affecting refugees and displaced persons.”<sup>53</sup> This resolution thereby created a legal mandate for UN bodies and agencies to share information on human rights concerns which may impact on forced displacement.

Traditionally, the ‘Human rights and mass exoduses’ resolution encouraged states that had not already done so to accede to the 1951 Refugee Convention and its Protocol of 1967, the Statelessness Conventions of 1954 and 1961 and other relevant regional instruments and international human rights instruments. In 1997 the resolution was strengthened from a refugee protection perspective as the Commission expressed its “distress” at the “widespread violation of the principle of *non-refoulement* and the rights of refugees.” Another paragraph of the same resolution included reference to the need for enhanced “international solidarity and burden sharing” in relation to the global refugee problem.<sup>54</sup>

An offshoot of the ‘Human rights and mass exoduses’ resolution had been the preparation of a report which reviewed the efforts of the entire UN system to address the issue of coerced displacement. The quality of the reporting exercise varied over the years as it largely relied on the views and comments submitted by member states of the Commission and UN agencies. Nevertheless, the reports from 1996-98 provide an excellent summary of activities undertaken by the UN human rights mechanisms, UN agencies including UNHCR and select NGOs and governments on issues concerning human rights and refugees.<sup>55</sup>

Beyond better known country situations such as the Former Yugoslavia, the 1998 report included information on human rights violations which resulted in forced displacement in the Sudan, Burma, Sri Lanka, Colombia and Bhutan, among others. The report addressed the issue of preventing refugee flows and summarised a response from UNHCR which noted that “preventing refugee flows often requires adequate human rights protection within the country of origin.” UNHCR’s response went on to say that “the basis for UNHCR’s involvement in legal and judicial capacity building in countries of origin is derived from the mandate to seek lasting and durable solutions to refugee problems.”<sup>56</sup> Such language may be considered as remote from the Office’s core mandate to provide international protection for refugees, but it is consistent with the need to seek permanent solutions for the problem of refugees as mandated in UNHCR’s Statute. It also provides recognition of the inter-relationship between safeguarding and implementing human rights standards and mechanisms within

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<sup>53</sup> Commission resolution 1996/51 on ‘Human rights and mass exoduses’.

<sup>54</sup> Commission resolution 1997/75.

<sup>55</sup> See UN Documents: E/CN.4/1996/42; E/CN.4/1997/42; and E/CN.4/1998/51. Also see Maria Stavropoulou, ‘Displacement and Human Rights: Reflections on UN Practice’, *Human Rights Quarterly*, vol 20, no 3 (1998) at pp 523-528.

<sup>56</sup> ‘Report of the High Commissioner for Human Rights submitted pursuant to Commission resolution 1997/75’, UN Document ref: E/CN.4/1998/51, at para 43.

countries of origin, not only to better prevent against refugee flows, but as a natural corollary to ensure that human rights mechanisms are in place for the benefit of refugees who may need to seek asylum in a particular country. Improving operational cooperation with actors including the Office of the High Commissioner for Human Rights and national human rights institutions is a necessary derivative of this broader approach to refugee protection and prevention.

Another function of the Commission which may serve to enhance refugee protection is its ability to highlight instances of violations through its reports. Not only does the information in many of the Commission's reports bring to light or provide updates on the effects of human rights violations on the forcible displacement of individuals, but this may assist in identifying the causes of refugee flows and in some instances the scope and nature of the displacement problem. As a result of the presence at the Commission of a number of important states, governmental and non-governmental bodies and the media, this can further serve to notify the international community of particular problems as well as put pressure on an offending state to remedy a situation. Needless to say, attention to humanitarian crises publicised through the Commission can assist in soliciting support and funds for the work of humanitarian agencies which are involved in operational responses.

### **Special Procedures of the Commission: Country and Thematic Rapporteurs and Working Groups**

It is through the adoption of specific resolutions of the Commission that recommendations for establishing or continuing a human rights mechanism can occur. These resolution-based mechanisms are known as Special Procedures and are serviced by the Office of the United Nations High Commissioner for Human Rights. The authority to establish these mechanisms is found in ECOSOC resolution 1235 (XLII) which was adopted on 6 June 1967 and is cited as the legal basis for any public discussion or activity undertaken by the Commission in respect of violations of human rights. This resolution provides *inter alia* that the Commission may "in appropriate cases and after careful consideration of the information thus made available to it ... make a thorough study of situations which reveal a consistent pattern of violations of human rights ... and report, with recommendations thereon, to ECOSOC".

During its 1999 session the following countries were the subject of specific resolutions or reports adopted by the Commission on the human rights situation in a particular country: Afghanistan, Burundi, Cuba, East Timor, Democratic Republic of the Congo, Equatorial Guinea, Guatemala, Haiti, former Yugoslavia, Iran, Iraq, Burma, Nigeria, the Occupied Arab territories including Palestine, Rwanda, Sudan, Former Yugoslavia, Rwanda, Somalia, Sudan, Southern Lebanon and West Bekaa. The content of these country-specific resolutions varies, although it is generally understood that the Commission only adopts a resolution to express its concern about the human rights situation in a particular country. In terms of a linkage between the passage of country resolutions and refugees it is a trite observation that many countries which are currently the subject of Commission resolutions are also countries from which vast numbers of refugees have fled in search of international protection.

It is also through country-specific resolutions that the Commission can recommend the

establishment of Special Procedures including mandates for Special Rapporteurs and Special Representatives of the UN Secretary-General. The Special Rapporteurs and Representatives are normally individuals with expertise on human rights issues and are authorised by the Commission to study the human rights situation in a particular country. In addition to undertaking an in-depth study, Special Rapporteurs and Representatives may choose to issue urgent appeals to governments in specific cases of human rights violations. The reports of these various actors are submitted annually to the Commission and over the years they have included regular references to human rights violations concerning refugees.<sup>57</sup>

In addition to the work of the Special Rapporteurs and Special Representatives, the Commission may recommend the appointment and establishment of a number of Thematic Rapporteurs and Working Groups. These mechanisms are established to deal with a particular human rights topic or theme. The Thematic Rapporteurs or Working Groups have a mandate to receive information, correspond with governments and report back to the Commission on their findings. The mandates of the thematic mechanisms varies, but there are several ways to bring refugee protection issues to their attention. For example, a number of NGOs and in some cases UNHCR have successfully brought refugee issues to the attention of the Special Rapporteur on Torture, the Working Group on Arbitrary Detention, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Special Rapporteur on Violence against Women. One of the most useful features of the thematic mechanisms is that they can take action, at any time, on cases involving human rights violations in any UN member state, not just state parties to particular treaties. The reports prepared through the thematic mechanisms also serve as an authoritative source of country of origin information.

### **Assessing Human Rights Complaints by the Commission: The 1503-Procedure**

In 1970, ECOSOC adopted resolution 1503 which established a procedure for the consideration of communications alleging that governments have committed a "consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms."<sup>58</sup> Although the Commission makes the decision as to whether action will be taken on a communication submitted under the 1503-procedure, it is the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a subsidiary body of the Commission) which initially assesses a communication with regard to its admissibility. In practice, a five-member Working Group of the Sub-Commission -- which is made up of human rights experts which serve in their individual capacity and about which Rosalyn Higgins once described "is able to

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<sup>57</sup> A good example of reporting to the Commission which addresses human rights violations which give rise, for example, to refugee flows was that of the Special Rapporteur on Iraq, Mr Max van der Stoep, who in 1995 noted that: "The Special Rapporteur commented on the situation of refugees in his first report to the Commission. It was noted at that time that neighbouring States had in previous years experienced mass influxes of refugees, both from the southern and the northern parts of Iraq, especially following the uprisings of March 1991. Today, there remains hundreds of thousands of [Iraqi] refugees [in neighbouring countries and throughout the world] ... Overall, it is clear that the choice of flight is a hard choice, made only out of necessity. Many sources describe the state of mind of these refugees as one of continuing fear. These persons are all victims of the current situation of human rights in Iraq, UN Doc ref: E/CN.4/1995/56 at pp 16-17.

<sup>58</sup> For a concise review of the communications procedures under the '1503' procedure see Human Rights Fact Sheet No 7 on 'Communications Procedures' (1992), which is available from the Office of the UN High Commissioner for Human Rights, UN Office at Geneva, 8-14, Ave de la Paix, 1211 Geneva.

work in a slightly less politically charged atmosphere" -- meet for two weeks each year just before the Sub-Commission's annual session to consider all the communications and governments' replies it has received (which between 1972 to 1991 numbered over 800,000 communications and several thousand government replies). It is estimated that the Working Group currently deals with 20,000 to 25,000 communications annually.

The 1503-procedure is confidential, so it is not possible to assess whether the procedure functions fairly and effectively. Nor is one able to specifically ascertain why certain communications are admitted while others are not. Nevertheless, the general test which is elaborated by resolution 1503 is that a communication will only be admitted if there are reasonable grounds to believe there is a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms taking place in a particular country. To further clarify the criteria for admissibility of a communication under this procedure, the Sub-Commission adopted resolution 1 (XXIV) at its 1971 session which provides that:

... communications may originate from a person or group of persons who ... are victims of the violations ... any person or group of persons who have direct and reliable knowledge of those violations, or NGOs acting in good faith in accordance with recognized principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the UN and having direct and reliable knowledge of such violations.

After communications have jumped through the procedural hoops of the Working Group of the Sub-Commission, the Sub-Commission as a whole and the Commission (which also considers whether to take action on a communication after considering it in private session for several days during its annual session) there are four potential outcomes: one, the Commission may decide to drop the matter and take no action; two, it could keep the communication pending until the next session whether or not the concerned country is the subject of new communications; three, the Commission could decide to appoint an independent expert or special rapporteur to study the situation in a country and report back to the Commission, or it may send a member of the Commission or a staff person from the Office of the High Commissioner for Human Rights to the concerned country to make contact with the government; or four, the Commission could decide to move the communication to a public procedure which would entail appointing a special rapporteur or a working group to study the situation in the country concerned.

At the annual session of the Commission, the Chairperson announces the list of countries which have been the subject of discussion under the 1503 procedure. The Chair neither explains the substance of the decision nor the nature of the complaints received. The Chair only remarks that the Commission has decided to keep a country under consideration or terminate its consideration under the procedure. There is nothing preventing refugee protection issues from forming the basis of a communication under the '1503 procedure'. However, the volume of communications received and the delay which is inevitably associated with this process make it impractical for redress in urgent cases of violations of refugees' rights. A more expedient approach may be to contact one of the thematic procedures such as the Special Rapporteur on Torture or the Special Rapporteur on Violence against

Women if a timely intervention from a Commission-based mechanism is sought.<sup>59</sup>

### **The Sub-Commission on Human Rights**

The Sub-Commission, as a subsidiary body of the Commission on Human Rights, reports annually to the Commission. The Sub-Commission is composed of 26 members who are elected by the Commission to serve in their individual capacities. In contrast to the Commission, the Sub-Commission generally operates in a politically less-charged atmosphere although there have been instances where some members have not acted as independently as desired.

The Sub-Commission meets annually for four weeks in Geneva. Government representatives, NGOs and international organizations are permitted to attend its meetings as observers. The Sub-Commission's principal activity has been to initiate studies on human rights questions which often lead to the development of new international standards. It can also take up human rights issues in particular countries. The Sub-Commission has no specific agenda item dealing with refugee protection issues. However, at its 1992 session it adopted an agenda item entitled 'Freedom of Movement'; and in 1994 UNHCR was able to spearhead the adoption of a resolution on 'The right to freedom of movement'<sup>60</sup> which *inter alia*:

“... affirms the right of persons to remain in peace in their homes, on their own lands, and in their own countries ... and the right of refugees and displaced persons to return, in safety and dignity, to their country of origin ... and urges governments and other actors involved to do everything possible in order to cease at once all practices of forced displacement, population transfer and ethnic cleansing in violation of international legal standards ....”

At its 1995 and 1996 sessions, the Sub-Commission adopted further resolutions under this item. The 1995 resolution urged “all state parties to the Convention relating to the Status of Refugees to safeguard and give effect to the right to seek and to enjoy in other countries asylum from persecution.”<sup>61</sup> In 1996 the resolution was further strengthened by affirming that “the rights of refugees and internally displaced persons to return of their own free will under conditions of security and dignity to their country of origin.” It also called for an end to “all practices of forced displacement, population transfer<sup>62</sup> and ethnic cleansing” and for all states to “respect the principle of *non-refoulement* and to guarantee the right of each person to

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<sup>59</sup> Of course, if there are serious and immediate human rights concerns affecting refugees then it may also be a practical first step to raise the matter with the local UNHCR Office in the respective country or via UNHCR Headquarters. Apart from UNHCR and the Commission mechanisms, however, it is also noteworthy that the Office of the UN High Commissioner for Human Rights has opened a *Human Rights Hot Line*, which in reality is a 24-hour fax line which was set-up to enable the Office in Geneva to react to emergency on violations of human rights. According to the Geneva-based NGO, the International Service for Human Rights, “the Hot Line is available to victims of human rights violations, their relatives, and NGOs.” It is not known how effectively this Hot Line system is working given the very limited human resources in the UN Human Rights Office. The Hot Line Fax number is: (41 22) 917 0092.

<sup>60</sup> Sub-Commission resolution 1994/24.

<sup>61</sup> Sub-Commission resolution 1995/13.

<sup>62</sup> For a detailed study of the Sub-Commission undertaken in relation to ‘Human rights and population transfer’ see the Final Report of the Special Rapporteur, Mr Al Khasawneh, UN Doc ref: UN/CN.4/Sub.2/1997/23 of 27 June 1997.

seek and find asylum in other countries to escape persecution.”<sup>63</sup>

Apart from the specific resolution on ‘Freedom of Movement’, a number of country-specific resolutions of the Sub-Commission have made reference to specific violations of human rights of refugees. As one example, in its resolution on the Situation of human rights in the Islamic Republic of Iran the Sub-Commission extraordinarily called upon the Iranian government to investigate fully the alleged various human rights violations in the country and stop harassing Iranian refugees abroad.<sup>64</sup> More recently, the Sub-Commission took account of the plight of Bhutanese refugees in Nepal and India and called for negotiations “in good faith” between Bhutan and Nepal to resolve this long-standing refugee problem. One would not normally expect such specificity being highlighted in resolutions coming out of the Commission on Human Rights.

What is evident from the work of the Sub-Commission is that there is wide scope to place refugee protection issues on its agenda. The work of NGOs in particular, in raising issues concerning refugees’ human rights before the Sub-Commission is commendable. UNHCR has also taken an interest in the Sub-Commission’s work and similar to its activities at the Commission over the last several years the Office has been closely involved in highlighting issues before the Sub-Commission, by making public statements and through lobbying efforts with individual members to press for human rights standard setting which may benefit refugee populations.<sup>65</sup>

### **The Work of the Treaty Bodies**

The principal UN human rights conventions establish committees or treaty bodies to oversee or supervise the implementation of the provisions of the treaty. The authority of these treaty bodies varies depending on the convention, but in general they have two main functions as follows: examining periodic reports submitted by state parties which indicate the steps taken by the concerned state to implement the provisions of the convention; and secondly, receiving and deciding on petitions from individuals or states concerning specific violations of the treaty rights.

In addition to these principal functions, the work of the treaty bodies serves to publicise findings of human rights violations. During examination of state party reports government representatives may be called upon to explain why there are shortcomings in complying with international human rights standards and they may be encouraged to work towards remedying difficulties. The ‘observations and recommendations’ prepared by the committees which address a state’s level of compliance with the provisions of a treaty, as well as decisions on

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<sup>63</sup> Sub-Commission resolution 1996/9.

<sup>64</sup> See Sub-Commission resolution 1996/7. Clearly, this language was adopted as a result of some Iranian refugee leaders being murdered in Germany which later resulted in criminal charges being brought in Germany against the perpetrators who were deemed to be agents of the Iranian state, although Iran vehemently denied these allegations.

<sup>65</sup> See for example UNHCR’s statement to the 1998 session of Sub-Commission made under agenda item 10 on ‘Freedom of movement’ which *inter alia* called upon the Sub-Commission and other UN human rights mechanisms to assist in articulating human rights standards which take account of the property and housing rights of refugees returning to war-torn countries.

individual complaints, also form an important source of country of origin information and human rights jurisprudence.

Concerning individual complaints procedures which are available under some conventions, such procedures may be employed as a legal remedy for refugees. However it is not always straightforward to submit an individual petition, as generally in order for the application to be accepted for consideration by a treaty body the applicant (who must be the actual victim or someone with appropriate *locus standi*) must satisfy that he or she has exhausted all available domestic legal remedies and the matter is not being dealt with before another international procedure. Furthermore, individual complaints procedures are only available in respect of those state parties which have recognized the competence of a committee to deal with such petitions. Not surprisingly a large number of states have failed to recognise the competence of the respective Committees to deal with such communications.

In addition to the procedure to receive and decide upon individual petitions, some international human rights treaties provide for an inter-state complaint procedure which permits state parties to lodge a complaint against another state party. In order to initiate an inter-state complaint it is necessary that both states have recognized the competence of the committee to deal with such complaints. Due to the sensitive nature and implications of the inter-state complaints procedures, they have never been used and are unlikely to be used in the future.

There are currently six UN treaty bodies: the Human Rights Committee (HRC) which began its work in 1976 and has eighteen members and was established under the International Covenant on Civil and Political Rights; the Committee Against Torture (CAT) which began work in 1988 and is composed of ten experts and was established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Committee on the Rights of the Child (CRC) which was established under the Convention on the Rights of the Child and began working in 1989 and is composed of ten experts; the Committee on the Elimination of Racial Discrimination, established by the Convention on the Elimination of All Forms of Racial Discrimination which was adopted in 1965 and is composed of eighteen experts; the Committee on the Elimination of Discrimination against Women, which consists of twenty-three experts and is established by the Convention on the Elimination of All Forms of Discrimination against Women (1979); and the Committee on Social, Economic and Cultural Rights (CESCR), which has eighteen experts and is established by the International Covenant on Economic, Social and Cultural Rights of 1966.

Each of the treaty bodies have adopted 'rules of procedure' apart from the specific procedural requirements contained in the relevant convention. These rules of procedure govern such matters as the form and content of state party reports; procedures for examination of state party reports; procedures for submitting individual or inter-state complaints; election of members the committee; and establishment of pre-sessional working group meetings. Currently only the HRC, CAT and CERD have established procedures for considering individual complaints. However, both the Committee on Economic, Social and Cultural Rights and CEDAW are in the process of developing draft protocols which provide for the establishment of procedures to deal with individual petitions.

Some committees, such as CAT and the CRC, have been involved in fact-finding missions. The authority for CAT to get engaged in such matters is found in article 20 of the Convention Against Torture which provides that: "If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a state party ... a confidential enquiry [can be made and] in agreement with that state party such inquiry may include a visit to its territory". Till date, CAT has only exercised this Article 20 power twice in relation to Turkey in 1993 and Egypt in 1996. The CRC has also been involved in field visits jointly organized by UNICEF and the Office of the High Commissioner for Human Rights in order to assist the Committee to gain firsthand experience concerning the problems in safeguarding the human rights of children.

In recent years UNHCR has been involved in the work of a number of treaty bodies, in particular the CAT, the CRC and the HRC. UNHCR's participation with these committees has been to share information, either informally or during pre-sessional working group meetings, and to follow and report on the committee sessions during examination of state party reports. The 'concluding observations and recommendations' of these committees, as well as published summaries of discussions coming out of the public sessions serve as a point of departure in negotiating and discussing specific refugee protection issues with governments. In the following discussion we will examine the records of the CAT, the CRC and the HRC in the area of refugee protection.

### **The Convention and the Committee Against Torture**

Of all the treaty bodies, the Committee against Torture has till date been the most active in terms of developing its jurisprudence on behalf of refugees. Many unsuccessful asylum seekers are looking to human rights treaties for alternative protection against expulsion and return to their countries of origin. The protection provided for refugees under the concept of *non-refoulement* of the 1951 Refugee Convention is paralleled in article 3 of the Convention against Torture which prohibits the return (*refouler*) of any individual who would face "torture or cruel, inhuman or degrading punishment or treatment." However, the scope of the protection granted to persons fearing 'torture'<sup>66</sup> in their country of origin or any other territory to which they could be returned, is considerably broader than that offered by the corresponding provision under the 1951 Refugee Convention. Article 3 of the Convention against Torture declares that:

No state party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he [or she] would

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<sup>66</sup> Under the Convention against Torture, the term 'torture' is defined in article 1 as: "... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions." (emphasis added)

be in danger of being subjected to torture ... For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence of the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights. (emphasis added)

It is noteworthy that the Convention against Torture is also devoid of any exclusion provisions (unlike international refugee law<sup>67</sup>) which may require that a person be considered as not deserving of protection under the treaty. What the Convention against Torture does provide, however, is the universal jurisdiction of state parties to take legal action against a person who has committed acts of torture.<sup>68</sup> Further, as we will see in the following discussion, the growing body of jurisprudence being developed by CAT is complementary to refugee protection.<sup>69</sup>

The CAT normally holds two regular sessions a year in Geneva. Its sessions can last three weeks and its functions are to examine state party reports, raise issues of concern and make observations and recommendations; review states and individual complaints in respect of states which have made declarations under articles 21 and 22; and conduct confidential inquiries where reliable information about systematic practice of torture in a state party is received pursuant to its authority under Article 20. Under Article 19 state parties are obliged to submit periodic reports to the Committee which describe the measures they have taken to give effect to their undertakings under the Convention. After the initial report which is required one year after ratification, additional reports are due for submission every four years. Under Articles 21 and 22 of the Convention against Torture a state party may at any time declare that it recognises the competence of the Committee to receive and consider inter-state and individual complaints respectively. The Committee considers such communications during *in camera* sessions. However, the Committee may decide to make public its views relating to an individual or inter-state complaint.

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<sup>67</sup> Article 1F of the 1951 Refugee Convention provides that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission to that country as a refugee;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations.

See Guy S Goodwin-Gill, *The Refugee in International Law*, *op cit*, at chapter 3.

<sup>68</sup> Articles 4-9 of the Convention against Torture. *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* (1999) "WLR 827; Goodwin-Gill, GS, 'Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute', in Goodwin-Gill, GS & Talmon, S, eds., *The Reality of International Law: Essays in Honour of Ian Brownlie*, Clarendon Press, Oxford, 1999, 199-223.

<sup>69</sup> The relevance of the Convention against Torture and the work of the CAT in relation to refugee protection have not been lost on UNHCR as the Office issued an internal memorandum on the CAT in 1998. The memorandum summarises UNHCR's interest in this international human rights mechanism as follows: "As a rule, UNHCR's interaction with the human rights mechanisms generally, and the torture provisions in particular, should be linked to its mandate to protect from *refoulement*, all *bona fide* refugees and other individuals "of concern" to the Office. Where the treaty mechanisms and the torture provisions can be used to prevent the *refoulement* of *bona fide* refugees or other cases of concern, then UNHCR will have a legitimate interest in those alternative and parallel systems." (IOM/FOM No 57/98 & 61/98 of 28 August 1998, at para. 1.9, on file with the author).

Although presently 108 states<sup>70</sup> have ratified the Convention against Torture, only 39 states<sup>71</sup> have made declarations to permit the Committee to hear individual complaints under Article 22. A refugee will only be able to individually petition the CAT if the country which is threatening to deport him or her has made a declaration under this provision. It is therefore in the interests of international human rights protection in general, and refugee protection more specifically, that efforts be made to achieve further ratification of this important human rights treaty and to seek further declarations under article 22.

### **Individual Complaints Procedures under the Convention against Torture**

The application procedure for Article 22 complaints is as follows. Similar to other international human rights remedies, the Committee will not consider any communication unless it has ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement. Further, the applicant must have exhausted all available domestic remedies so asylum seekers petitioning the Committee will have to have availed themselves of every effective remedy in the country of asylum. Also of importance in relation to refugee and asylum seeker applicants are the Committee's 'rules of procedure'<sup>72</sup>. Rule 108 authorises the Committee, when considering the admissibility of a communication, to request the concerned state party to take steps to avoid a possible irreparable damage to the person or persons who claim to be victims of the alleged violation. The Committee can thereby request the state party to refrain from removing from its territory a person who is the subject of a complaint.

In a number of cases where the Committee has been called upon to decide on petitions from asylum seekers, it has been able to make a positive contribution to the legal framework of refugee protection. The general reasoning and considerations the Committee has developed in

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<sup>70</sup> States which have signed (s) or are parties to the Convention against Torture through ratification, accession or succession at 26 February 1999 are: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Bahrain, Belarus, Belgium (s), Belize, Benin, Bolivia (s), Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic (s), Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Gabon (s), Gambia (s), Georgia, Germany, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, India (s), Indonesia (s), Ireland (s), Israel, Italy, Jordan, Kazakhstan, Kenya, Republic of Korea, Kuwait, Kyrgyzstan, Latvia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, The former Yugoslav Republic of Macedonia, Mauritius, Mexico, Republic of Moldova, Monaco, Morocco, Namibia, Nepal, Netherlands, New Zealand, Nicaragua (s), Niger, Nigeria (s), Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Senegal, Seychelles, Sierra Leone (s), Slovakia, Slovenia, Somalia, South Africa (s), Spain, Sri Lanka, Sudan (s), Sweden, Switzerland, Tajikistan, Togo, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen, Yugoslavia (Serbia and Montenegro).

<sup>71</sup> States which have made declarations under article 22 of the Convention at 22 January 1999 are: Algeria, Argentina, Australia, Austria, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, Greece, Hungary, Iceland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Russian Federation, Senegal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Togo, Tunisia, Turkey, Uruguay, Venezuela, Yugoslavia.

<sup>72</sup> Rule 108, paragraph 9; The 'Rules of Procedure' of the CAT are found in UN Doc ref: CAT/C/3/Rev.1 of 29 August 1989, or they are available in full text on the UNHCR RefWorld CD-ROM.

its jurisprudence on communications from asylum seekers can be summarised as follows<sup>73</sup>:

- The asylum seeker is in the jurisdiction of a state party to Convention and can substantiate that he or she is *personally at risk of being subject to torture* through action or inaction of the State;
- There is a *causal link to this risk with the applicant's background*, including ethnic origin, political affiliation, history of detention, etc;
- There is *no internal flight alternative* available to the applicant;
- The Committee has expressed an understanding that *inconsistencies in an asylum applicant's presentation of facts which do not raise doubts to the material elements of the claim, will not undermine an application* because accuracy is rarely to be expected of survivors of torture;
- The Committee will *consider medical reports* which corroborate bodily scars compatible to torture wounds in addition to diagnosis of post traumatic stress disorders;
- The Committee will consider the status of ratifications of international human rights instruments and whether a state is a party to the CAT, as well as *states human rights records*;
- *Findings of UN Special Rapporteurs, as well as Working Groups and Human Rights mechanisms of the Commission on Human Rights may also be considered* in order to assess the human rights situation in the concerned states;<sup>74</sup>
- *Any opinions or positions of UNHCR* may also be considered.

In 1997 the Committee adopted a general comment on the 'Implementation of article 3' of the Convention in the context of Article 22 which *inter alia* provides that "it is the responsibility of the author to establish a *prima facie* case for the purpose of admissibility of his or her communication under Article 22 by fulfilling each of the requirements of rule 107 (admissibility procedures). In brief, rule 107 requires that: (a) the communication is not anonymous and that it emanates from an individual subject to the jurisdiction of a state party recognising the competence of the Committee under Article 22; (b) the individual claims to be a victim of a violation by the state party concerned; (c) the communication should be submitted by the individual himself or herself or by his or her relatives or designated representatives, or by others on behalf of an alleged victim when the victim is unable to submit the communication; (d) the communication must not be considered an abuse of the right to submit a communication under Article 22; (e) the communication must not be incompatible with the provisions of the Convention; (f) the same matter has not been and is not being examined under another procedure of international investigation or settlement; and (g), the individual has exhausted all available domestic remedies.

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<sup>73</sup> See Oldrich Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures', *IJRL*, vol 9, no 3 (1997) at pp 407-410.

<sup>74</sup> In the first decision concerning a rejected asylum seeker *Mutombo v Switzerland*, in finding a violation of article 3, the CAT applied the objective test stipulated in article 3(2) (i.e. the existence of 'a consistent pattern of gross, flagrant or mass violations of human rights' in Zaire. In particular the Committee referred to reports of the Special Rapporteurs and Working Groups of the UN Commission on Human Rights established in the framework of special procedures in accordance with ECOSOC Resolutions 1235 (XLII) and 1503 (XLVIII).

In its general comment<sup>75</sup> the Committee also articulated a number of considerations which it employs in assessing the application of article 3 to the merits of a case. For example, the burden is upon the applicant to present an arguable case. This means there must be a factual basis for the applicant's position sufficient to require a response from the state party. Secondly, the risk of torture to the applicant must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. Thirdly, the applicant must establish that he or she would be in danger of being tortured and that the grounds for so believing are substantial and that such danger is personal and present. Fourthly, the Committee will consider information emanating from the following questions, which are not exhaustive, but are considered pertinent:

- Is the state concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights?
- Has the applicant been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past?
- Is there medical or other independent evidence to support a claim by the applicant that he or she has been tortured or maltreated in the past?
- Has the internal situation in respect of human rights in the concerned state altered?
- Has the applicant engaged in political or other activity within or outside the state concerned which would appear to make him or her particularly vulnerable to the risk of being placed in danger or torture were he or she to be expelled, returned or extradited to the state in question?
- Is there any evidence as to the credibility of the author?
- Are there factual inconsistencies in the claim of the author? If so, are they relevant?

Not surprisingly given the parallel nature of assessing an individualised risk of 'torture' or 'persecution', the questions which are posed and the evidence sought by the Committee in considering an article 22 communication are similar to those one may seek in assessing a claim to refugee status.

### **The Jurisprudence of the Committee against Torture**

One state which has recognised the competence of the Committee to receive and consider individual complaints is Switzerland. The decision in the matter of Mr Balabou Mutombo<sup>76</sup> represents the first time the Committee has favourably considered the case of a *rejected* asylum seeker under Article 22 of the Convention. As a result of this decision the Swiss authorities were obliged to refrain from removing Mr Mutombo to the former Zaire or any other country where he runs a risk of being expelled or returned to his country of origin or of being subjected to torture. In reaching its decision the Committee took in to account the applicant's ethnic background, alleged political affiliation, the fact he had deserted from the army, as well as the various statements he had made against his country. Based on this

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<sup>75</sup> CAT general comment 1 of 21 November 1997, available on the Office of the UN High Commissioner for Human Rights website: (<http://www.unhchr.ch>)

<sup>76</sup> Communication no 13/1993.

background the Committee concluded that Mr Mutombo would be at real risk of being detained or tortured if returned to his country of origin. Accordingly, he was granted temporary admission to Switzerland. Since this first decision was adopted the Committee has received and has dealt with a number of other applications that concern rejected asylum seekers.

Another article 22 decision that involved the case of a rejected asylum seeker is that of Mr Tahir Hussain Khan who was a member of the Baltistan Student Federation, which was a political movement claiming independence for Kashmir<sup>77</sup>. Little information was known about this group, and thereby the CAT had to rely on the country of origin information provided by Mr Khan's legal counsel. In this case the Committee found that the state party, Canada, had an obligation to refrain from forcibly returning the applicant, a citizen of Pakistan of Kashmiri origin, to Pakistan.

The case of *Ismail Alan v Switzerland*<sup>78</sup> concerned a Turkish citizen and sympathiser of an outlawed Kurdish organisation who claimed to have been detained several times, tortured, and sentenced to imprisonment and internal exile in his country of origin. The Swiss government denied Mr Alan's asylum claim on appeal. The Committee found that Mr Alan would be at risk of torture if he were returned to Turkey because of his background of political activity and evidence of having been subject to detention and internal exile. The Committee additionally noted that the Swiss Government's allegation of inconsistencies in the applicant's story to be unfounded as "complete accuracy is seldom to be expected by victims of torture."

In the case of *Aemei v Switzerland*<sup>79</sup> an Iranian citizen who had been a sympathiser of the Peoples' Mujahideen Organisation of Iran (PMOI) was refused asylum in Switzerland. In assessing the article 22 communication, the Committee took into consideration Mr Aemei's affiliation to an outlawed opposition political party, his participation in the activities of the organisation, his record of detention in 1981 and 1983 in Iran, as well as his involvement with Iranian opposition groups in Switzerland which had come to the attention of the Iranian authorities. Furthermore, the Committee accepted evidence that the Iranian authorities in Switzerland had personally threatened Mr Aemei as a result of his anti-government activities. The Committee found a breach of Switzerland's obligations under Article 3 of the Convention. However, it concluded that its finding in no way affected the decisions of the competent Swiss authorities concerning the granting or refusal of asylum.<sup>80</sup> The Committee

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<sup>77</sup> See Communication no 15/1994. The author was in contact with the legal counsel in the *Khan* case and the success of this particular decision of the CAT must to a considerable degree be attributed to the exceptional efforts he made to represent his client. Not only did Mr Khan's lawyer prepare a comprehensive written brief arguing points of fact and law, but he submitted a 'book of authorities' which included specific country reports on Kashmir, video footage and documented news reports, as well as sworn statements from experts who had detailed knowledge of the human rights situation in Mr Khan's country of origin. Quite exceptionally, Mr Khan's legal counsel also flew to Geneva in order to meet with Committee members, answer their queries and argue for relief for his client.

<sup>78</sup> Communication no 21/1995.

<sup>79</sup> Communication no 34/1995.

<sup>80</sup> In this case the CAT distinctly noted that its conclusions concerning a breach of article 3 should not impact on a decision to grant refugee status by a competent authority. However, apart from the fact that the CAT has no legal authority to take a decision on the grant or refusal of asylum claims it is logical that a positive finding by

further noted that the concerned state party was obliged to find a solution that would enable it to take all necessary measures to comply with Article 3. This could include a legal solution such as temporarily admitting Mr Aemei to Switzerland, or a political solution including action to find a state willing to admit Mr Aemei to its territory and undertaking not to return or expel him.

In *Tala v Sweden*<sup>81</sup> an Iranian citizen claimed to be a political activist with the opposition Mujahiddin party and as a result had been detained and tortured for three months in his country of origin. The Committee found that Sweden's rejection of the asylum claim based on "inconsistencies and contradictory descriptions" could be explained as possible reactions to previous torture. The Committee also determined that the applicant's return to Iran or any other country where he would be threatened with expulsion to Iran would constitute a violation of article 3. The case of *Pauline Muzonzo Paku Kisoki v Sweden*<sup>82</sup> concerned an activist of a Zairian opposition party who claimed to have been arrested by the security forces, detained for one year without trial, raped more than ten times and subjected to torture. The Swedish government rejected Ms Kisali's asylum request in a final decision, noting contradictions and inconsistencies in her story. The Swedish authorities also argued that country conditions had changed to a sufficient degree to allow Ms Kisali to return to her country of origin. In its decision the Committee recognised "complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims." In reaching this conclusion the Committee *inter alia* referred to the position of UNHCR that country conditions indicated that persons who have a high political profile continue to be at risk of persecution in the former Zaire.

The case of *Tapia Paez v Sweden*<sup>83</sup> concerned a Peruvian national and active member of the militant group *Sendero Luminoso* ('the Shining Path'), who was excluded from the grant of refugee status by the Swedish authorities pursuant to Article 1F of the 1951 Refugee Convention as he had been armed and engaged in crimes during his political activities in Peru. The Committee found that notwithstanding Mr Tapia Paez's militant activities in his country of origin he fell under the protection of article 3 as there were substantial grounds for believing he would be tortured if returned to Peru. In reaching this conclusion the Committee noted that the nature of the acts in which the person engaged in not a relevant consideration in the taking of a decision in accordance with Article 3 of the Convention against Torture.

The case of *Korban v Sweden*<sup>84</sup> concerned an Iraqi citizen who was formerly a resident of Kuwait and remained there after the Gulf war due to his opposition to the Iraqi regime. However, because of his nationality he was imprisoned and tortured and eventually deported to Iraq. Upon arrival in Iraq he was again detained and after his release was required to report daily to the Iraqi authorities. He managed to leave Iraq to Jordan which was his wife's

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the CAT in respect of an article 3 communication would be a relevant consideration in favour of granting asylum or refugee status to an individual who is the subject of the communication and applies for refugee status.

<sup>81</sup> Communication no 43/1996.

<sup>82</sup> Communication no 41/1996, views of 8 May 1996.

<sup>83</sup> Communication no 39/1996.

<sup>84</sup> Communication No. 88/1997

country of nationality. The applicant eventually traveled to Sweden where he had a son who had been granted a permanent residence permit after having deserted from the Iraqi military. The applicant's claim for a permanent residence permit was rejected by the Swedish Immigration Board (SIB) as they found that his connections with Jordan constituted substantial grounds to assume that he would be received in that country and that there was no danger for him to be sent from Jordan to Iraq. The Alien Appeal's Board adopted the decision of the SIB and dismissed the applicant's numerous appeals.

The applicant applied to the CAT on the basis that his return to Iraq would constitute a violation of article 3. Moreover, the applicant claimed, not having a residence permit for Jordan would make it unsafe for him to return to that country. In support of his application the author provided the Committee copies of two letters from UNHCR which informed the SIB that foreigners married to Jordanian women did not enjoy preferential treatment when applying for or being granted residence permits in Jordan. The UNHCR correspondence also advised on cases of Iraqis denied entry or readmission into Jordan upon being returned from Sweden. In reaching its decision the CAT concluded that the state party, Sweden, had an obligation to refrain from forcibly returning the applicant to Iraq. Further, Sweden had an obligation to refrain from forcibly returning the applicant to Jordan in view of the risk he would run of being expelled from that country to Iraq. In reaching this decision the Committee took note that although Jordan is a party to the Convention against Torture it has not made a declaration under Article 22 and consequently the applicant would not have the possibility of submitting a new communication to the CAT if he was threatened with deportation from Jordan to Iraq.

In the case of *Halil Haydin v Sweden*<sup>85</sup> a Turkish national who was seeking refugee status in Sweden claimed that his return to his country of origin would constitute a breach of article 3 as a result of his family being active sympathisers of the PKK (Partya Karkeren Kurdistan), an outlawed political organisation in Turkey. In reaching its decision that Mr Haydin's return to Turkey would constitute a violation of Article 3, the Committee considered the complainant's family background, his political activities and affiliation with the PKK, his history of detention and torture in Turkey, as well as indications that he was presently wanted by the Turkish authorities. The CAT also took note of the serious human rights situation in Turkey including reports from reliable sources that suggest that persons suspected of having links with the PKK are frequently tortured by law enforcement personnel and that this practice is not limited to particular regions of the country. The Committee also referred to an observation of the Turkish government wherein it noted that it shares the view of UNHCR and the Swedish Aliens Appeal Board that no internal place of refuge would be available for persons who are suspected of being active with or sympathisers of the PKK. The CAT concluded that Sweden was obliged to refrain from forcibly returning Mr Haydin to Turkey or any other country where he runs the risk of being expelled or returned to Turkey.

The Committee decided *Elmi v Australia*<sup>86</sup> during its May 1999 session. The complainant was a Somali national of the Shkal clan who contended that members of the Hawiye militia had persecuted members of his clan living in his area. Australia attempted to resist the

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<sup>85</sup> Communication No. 101/1997

<sup>86</sup> Communication No. 120/1998

complainant's submission that he would be subjected to torture if deported to Somalia on the basis that the communication was inadmissible because the feared torture by the Hawiye militia did not constitute acts by 'public official[s] or other persons acting in an official capacity' as required under article 1 of the Convention against Torture. The CAT held that a number of factors supported the view that the clans in Somalia operated in a quasi-governmental fashion and that these groups could be likened to official authorities for the purposes of article 1. Amongst the factors considered was that the international community had negotiated with warring factions and that some factions had in fact set up quasi-governmental institutions with education, health and taxation systems. The area of Mogadishu where the applicant was from was under the effective control of the Hawiye clan which had set up 'quasi-governmental' institutions and had not formally or otherwise promised the protection of the Shkal clan. The Committee went on to find that the complainant had successfully established that he would be at risk of torture if he were returned to Somalia.

The Elmi decision is a significant development in the CAT's jurisprudence as it shows the Committee's willingness to adopt a flexible and broader protection-based approach in interpreting the Convention. This is of particular interest to refugee advocates as the parallel concept of 'persecution', UNHCR has argued, should extend to state and non-state entities.<sup>87</sup> Overall, the cases that have been decided by the CAT in respect of asylum seekers have moved the law on refugee protection in a positive direction. In reflecting on this jurisprudence, however, a few points should be noted. After the *Mutombo* and *Khan* decisions there was an increase of individual complaints under article 22 of *rejected* asylum seekers who were faced with the threat of forcible return by Northern governments. However, human rights treaty bodies such as CAT are considerably overburdened and under-resourced. Given the pressures placed on these treaty bodies due to the increased number of cases they are obliged to review, it is not inconceivable that this may result in a stricter application of their respective mandates and the adoption of higher evidentiary burdens and legal tests, as well as a more strict application of the rules of procedure.

In many cases which are rejected at the admissions stage, it is often difficult to assess the reasons for the Committee's decision as the written decisions lack detail and specificity. Perhaps to dissuade asylum seekers from viewing the Committee as an international refugee appeals board, the CAT has declared a considerable number of complaints by asylum seekers from the former Zaire, Nigeria, Ghana, Algeria, Georgia and Iran, against Canada, Switzerland, France, Spain, Sweden and the Netherlands inadmissible, either because the claims were not substantiated, domestic remedies had not been exhausted or the complaint

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<sup>87</sup> As noted above, the 1951 *Refugee Convention* does not distinguish as to who may be considered the persecutor in the context of assessing a claim to refugee status, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* provides that although "persecution is normally related to action by national authorities, it may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned." By example, the Handbook suggests that "A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." (UNHCR Handbook, Geneva 1992, at para 65).

had been submitted to another procedure of international investigation or settlement.<sup>88</sup> For example, in *N.D. v France*<sup>89</sup> the Committee found the communication to be inadmissible because the asylum claim was at the moment being appealed. In *K.K.H v Canada*<sup>90</sup> the Committee similarly determined the communication inadmissible as the asylum applicant still had the opportunity to present new facts on his case to the Canadian authorities.

A restrictive application of rules of procedure and the adoption of higher evidentiary burdens will impede the development of human rights and refugee law and must be guarded against. An Expert Workshop on Human Rights and Refugees sponsored by UNHCR and held in Athens in December 1998 took note that underfunded and overburdened human rights treaty bodies may be unable to deal with claims fairly and expeditiously which will be “to the detriment of vulnerable individuals, to the state parties and to the integrity of the human rights system itself.”<sup>91</sup> The Workshop report concluded that there is an “urgent need for states to develop and rationalise refugee and human rights procedures nationally and regionally, if they were to comply fully with their obligations under both refugee and human rights instruments.”<sup>92</sup> Indeed, as the Expert Workshop suggested, it is a narrow interpretation of the 1951 Refugee Convention which is driving rejected asylum seekers to human rights treaty bodies and there would be no need for asylum seekers to have recourse to CAT and other such bodies if states honour the spirit of their obligations under the refugee instruments.

In its conclusions and recommendations the Expert Workshop noted the need to train officials at all levels in international human rights law and to ensure their awareness of the views and comments adopted by the treaty bodies. It further stated that government officials should be familiar with the approach adopted by the CAT which considers that discrepancies in statements made by victims of torture are not uncommon as long as the inconsistencies do not raise doubts about the general veracity of an application.<sup>93</sup> Despite the many cases which are not admitted for further examination by the Committee purportedly for procedural deficiencies, the Committee has continued to grant relief to a growing number of asylum seekers and refugees. The contribution of the CAT’s decisions in developing a body of jurisprudence which is complementary to refugee protection is a most positive offshoot of the individual complaints process.

### **Refugee Issues raised during Examination of State Party Reports**

During examination of state party reports the CAT has been able to raise issues concerning the need for refugee legislation, refugee rights and allegations of torture. Similar to other UN human rights treaty bodies, reports are prepared and submitted to the CAT by the concerned

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<sup>88</sup> This point is made by Manfred Nowak in ‘Committee against Torture and Prohibition of *Refoulement*’, *Netherlands Quarterly on Human Rights*, vol 14/4 (1996), at p 435. For example, see Communication nos. 17 and 18/1994, 22, 23, 24, 26, 30, 31, 32 and 35/1995.

<sup>89</sup> Communication no 32/1995

<sup>90</sup> Communication no 35/1995

<sup>91</sup> Summary Report of Expert Workshop on Human Rights and Refugees, ‘*Human Rights Violations, Persecution and Non-state Agents*’, UNHCR Athens, 18-20 December 1998 (on file with the author).

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

state party and examination of these reports is normally undertaken during public meetings.<sup>94</sup> Representatives of the state parties, who are usually government officials, attend the public sessions and may be asked to provide an oral summary of the report to the Committee. Thereafter Committee members can ask state party representatives specific questions on issues of concern or seek clarification on matters raised in the report.

Although NGOs and international organisations are not permitted a formal role in respect of making representations during the Committee's sessions, nor does CAT's procedures provide for pre-sessional working group meetings, NGOs can provide information to CAT members outside of the formal sessions. Some international human rights NGOs including Amnesty International, Human Rights Watch and the International Service for Human Rights have been particularly active in providing information to the Committee and following and reporting on its sessions. On refugee issues, UNHCR has shared information with the CAT and in some instances followed-up with the concerned state party to monitor compliance with the Committee's recommendations.

During examination of state party reports the Committee regularly requests state party representatives to describe the efforts made to ensure implementation of article 3. This practice has been especially helpful in drawing the attention of states to the plight of asylum seekers who have entered their territory or have presented themselves at the border and are seeking international protection. In this context the Committee has raised the obligation of state parties to ensure that education and information concerning the prohibition against torture and the general provisions of the Convention are disseminated to law enforcement, medical personnel and public officials.

For example, during examination of the initial report of Nepal in 1994, the Committee expressed its concern that NGOs and the UN Special Rapporteur on Torture had reported several cases of police mistreatment of asylum seekers. However, there was no evidence of criminal prosecution of the officers involved in such incidents. In its concluding observations the Committee recommended that "a vigorous programme of education be undertaken by police officers and border guards, so that they may more readily understand their obligations as agents of the state pursuant to the Convention against Torture."<sup>95</sup> After the Committee communicated these recommendations to the concerned state party it was later reported that the situation at the border areas in respect of Tibetan refugees had significantly improved. As a result the Nepalese authorities and other actors including UNHCR and NGOs have focused considerable attention on these protection concerns which is practice that continues today.

Another example of the Committee's procedure having positive effect on refugee protection can be seen in the case of Liechtenstein. In the Committee's consideration of Liechtenstein's initial report<sup>96</sup> held in November 1994, it recommended that the government finalise the drafting of its asylum law to ensure compliance with article 3 of the Convention against Torture. Not long thereafter, it was reported, Liechtenstein indeed enacted a national refugee law.

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<sup>94</sup> For a detailed explanation of the practice of reviewing state party reports refer to the CAT's 'Rules of Procedure', *op cit*.

<sup>95</sup> See UN Doc ref: CAT/C/SR.180 of 26 April 1994 at p 5.

<sup>96</sup> UN Doc ref: CAT/C/12/Add.4

An examination of the Committee's 16th Session<sup>97</sup> also provides examples of the potential for this procedure to positively contribute to the development of refugee law and standards. At its 16th session held on 30 April to 10 May 1996, the Committee considered reports from a diverse group of countries namely, Armenia, Senegal, Finland, China, Croatia and Malta. Upon examination of the initial periodic report of Armenia<sup>98</sup>, the Committee welcomed the ratification of the 1951 Refugee Convention. However, it expressed concern to the Armenian government delegation that the laws, regulations and practices existing in Armenia did not effectively protect persons from being returned to countries where they may face torture. The Committee therefore recommended that Armenia should take legal and practical measures to comply with Article 3. In its examination of the second periodic report submitted by Senegal<sup>99</sup>, the Committee was able to express its concern about allegations of torture raised by a number of non-governmental organisations as well as reported incidents of *refoulement* of refugees that raised national security issues. In its examination of the second periodic report of China<sup>100</sup>, the Committee asked the Chinese delegation to clarify its implementation of article 3 in its domestic legislation. In its examination of Croatia's initial report<sup>101</sup> the Committee raised the issue of *refoulement* of refugees and asylum seekers.

In the Committee's examination of Finland's' second periodic report<sup>102</sup> it questioned the practice of detaining asylum seekers in the same prisons as convicted criminals. The Committee also expressed concern about the absence of sufficient legal protection for persons who were denied asylum through the use of a 'safe countries' list introduced under the Finnish Immigration Act. In its discussion of Malta's initial report<sup>103</sup>, the Committee raised concerns about the expulsion of Sudanese refugees to Libya and the administrative mechanisms Malta had for reviewing claims for refugee status. In sum, the Committee urged full implementation of article 3 by the Maltese authorities. The Committee also considered the periodic report of the Government of the United Kingdom of Great Britain and Northern Ireland in November 1995<sup>104</sup>, during which it recommended a review of the practices relating to deportation or *refoulement* of asylum-seekers in circumstances that may breach Article 3. The Committee also posed questions to the government representatives on the standards of detention of Vietnamese boat people in Hong Kong.

There are several other examples of the Committee raising refugee-protection issues with state parties during examination of periodic reports. The value of dialoguing with states on these issues should not be underestimated as it brings into the public domain concerns regarding particular violations of treaty rights. Of equal importance, the dialogue with state representatives can provide impetus and awareness to the state party and other actors that deficiencies in law and practice in a particular state should be remedied. In this respect the conclusions and recommendations of the CAT, as with other treaty-based human rights mechanisms, serve as a benchmark against which a state party's compliance with a treaty can

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<sup>97</sup> For a summary of the Committee's 16th session see *IJRL*, vol 8, no 3 (1996) at pp 408-412.

<sup>98</sup> CAT/C/24/Add.4/Rev.1

<sup>99</sup> CAT/C/17/Add.14

<sup>100</sup> CAT/C/20/Add.5

<sup>101</sup> CAT/C/16/Add.6

<sup>102</sup> CAT/C/25/Add.7

<sup>103</sup> CAT/C/12/Add.7

<sup>104</sup> CAT/C/SR.234 and 235

be measured. This human rights jurisprudence can thereby be used in efforts to improve the protection situation of refugees in a particular country. Overall, the work of the CAT on issues concerning refugee protection has set a high standard which the other treaty bodies would do well to consider as a positive example.

## **The Convention and the Committee on the Rights of the Child**

The CRC was established under the Convention on the Rights of the Child and began its work in 1989. The CRC is composed of 10 expert members<sup>105</sup> who amongst themselves represent a wide range of interests, professional experience and geographical representation. The Committee meets three times a year in Geneva during sessions which lasts for four weeks. There are currently 191 state parties<sup>106</sup> to the Convention on the Rights of Child, making it the most widely ratified international human rights treaty.

Like all other international human rights treaties, ratification of the Convention on the Rights of the Child creates binding legal obligations of a continuing nature. Similar to other international human rights treaty bodies, a principal focus of the CRC's supervisory role is to monitor state compliance with the Convention through examining period reports. There is no provision for the CRC to deal with individual or inter-state complaints. State parties are obliged to submit an initial report within two years of entry into force of the Convention, and thereafter every five years. These reports are required to indicate factors and difficulties affecting the degree of fulfillment of the obligations under the Convention. Moreover, they

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<sup>105</sup> Given its enormous workload it was proposed that the membership of the CRC be increased from 10 to 18 members. During its 50th session, the UN General Assembly has carried the motion adopted by the Conference of state parties to the Convention on the Rights of the Child to increase the Committee's membership. This decision will enter into force when two-thirds of the state parties to the Convention communicate their acceptance of the decision.

<sup>106</sup> As of December 1998 state parties to the Convention on the Rights of the Child are: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Korea, Democratic People's Republic of Korea, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Monaco, Republic of Moldova, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Nieu, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tomé and Príncipe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Tanzania, Thailand, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, Uruguay, United States of America (signatory only), Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, and Zimbabwe.

should contain sufficient information to provide the CRC with a comprehensive understanding of the implementation of the Convention in the concerned state.

In order to prepare lists of issues to be discussed with government delegations during formal examination of reports, the CRC has established *in camera* pre-sessional working group meetings. The pre-sessional working group meetings take place immediately following the end of a session to consider matters regarding the state parties due to report at the following session. These pre-sessional meetings provide an opportunity for the CRC to receive information from international organizations and NGOs. Of the latter, the CRC is the only human rights treaty body that has a full-time NGO Coordination Group. The NGO community and Swedish SIDA fund this Coordination Group, which is based in Geneva and facilitates participation of NGOs from throughout the world during the CRC's regular sessions.

UNHCR has attended every session of the CRC since it officially began its work in the Fall of 1991. UNHCR provides information to the Committee on issues of concern to refugee and asylum seeking children, and much of the information that is contributed is gathered from field reports. With respect to protection principles for refugee children, a number of policy papers including the UNHCR Guidelines on Protection and Care of Refugee Children have been shared with the CRC and establish the underlying framework for UNHCR's advocacy before the Committee. As part of the examination of state party reports, the CRC also prepares 'concluding observations' which in many instances make reference to refugee protection issues.

In addition to the regular sessions of the CRC, UNHCR has participated in the general discussions of the CRC on such themes as 'The Administration of Juvenile Justice', 'Protection of the Girl Child', and 'International Cooperation and Technical Assistance'. UNHCR has also participated in regular meetings held with UN Bodies and Specialized Agencies and on a few occasions the Office has cooperated with CRC members in providing logistical and other assistance during its field investigations. Overall, UNHCR's work with the CRC provides an opportunity to dialogue with a well-respected human rights treaty body in order to raise awareness, share relevant information and advocate specific principles and concerns relating to the protection of refugee children. Again, these activities are premised on the views that cooperation with the human rights mechanisms can enhance the protection of UNHCR's specific group of beneficiaries. Furthermore, the principles of the Convention on the Rights of the Child have been specifically incorporated into the development of UNHCR's protection policies and strategies for refugee children.<sup>107</sup>

It is important to recall that the Convention on the Rights of the Child is based on three fundamental principles which are: non-discrimination; the best interests of the child; and

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<sup>107</sup> See *Refugee Children: Guidelines on Protection and Care*, UNHCR Geneva (1994), Chapter 2 on 'Refugee Children and the Rights of the Child' at pp 17-28, and 'Separated Children in Europe Programme: Statement of Good Practice', Save the Children Alliance/UNHCR, December 1999. Also see Cynthia Price Cohen, 'The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children', *IJRL*, vol 3, no 3 (1992); and Marta Santos Pais, 'Quelle Protection pour les Enfants Refugies?', *Boletim do Ministerio da Justica*, No duplo 61/62, Lisboa (1995).

participation of the child in decisions regarding his or her welfare. In the refugee context, non-discrimination implies that refugee and asylum seeking children have access to fair and efficient determination procedures and implementation of protection measures. The ‘best interests of the child’ principle, as articulated in article 3, is a key consideration to ensure that children are fully protected in the country of asylum. It is also a useful principle for evaluating, by example, possibilities for repatriation or family reunification. Furthermore, the Convention requires that the child must be able to express his or her own views concerning all decisions affecting his or her interests. Of particular interest is Article 22 of the Convention which requires that state parties ensure that a refugee child, whether accompanied or unaccompanied, receives “appropriate protection and humanitarian assistance in the enjoyment of the applicable rights” set forth in the Convention and other international human rights and humanitarian instruments. Article 22 further provides that state parties should cooperate in any efforts with the United Nations or other competent organisations or NGOs to protect and assist refugee children. This may include providing assistance in tracing parents or other family members, and in the event the child is unaccompanied, he or she shall be accorded the same protection as any other child deprived of his or her family environment.

Although the present scope and rules of procedure of the CRC do not provide for an individual complaints procedure, it has regularly and with great effect raised refugee protection issues during examination of state party reports. A summary of some instances where the Committee has highlighted refugee protection concerns is reviewed in the following.

*The Committee on the Rights of the Child: Refugee Issues raised during Examination of State Party Reports*

During examination of the initial report of Finland held during its 11th session, the CRC inquired how the principle of the ‘best interests of the child’ affected the granting of family reunification to the parents of children who had been determined to be refugees by the Finnish authorities. The CRC recommended that all arriving unaccompanied minors seeking refugee status should immediately be informed in their own language of their rights, and that family reunification cases should be decided through a coordinated effort between the departments responsible for immigration matters and children’s welfare.<sup>108</sup> The CRC also addressed the issue of discrimination and noted the worrying increase in negative attitudes in Finnish society against foreigners. In its concluding recommendations the Committee stated that the government should make concerted efforts to reduce any negative feelings and racism towards foreigners.

In its examination of Germany’s initial report, the CRC asked the German government to clarify its family reunification policy’s compatibility with the ‘best interests of the child’ principle. The Committee also questioned the state party about its procedures for interrogating children seeking asylum.<sup>109</sup> In its recommendations the CRC requested that Germany reexamine the expulsion of children to so-called safe “third countries”, and it requested the state party to ensure that medical treatment and services are made available to asylum seeking children. The Committee further requested the German authorities to

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<sup>108</sup> See UN Doc ref: CRC/C/15/Add.53.

<sup>109</sup> CRC/15/Add. 43.

consider withdrawing its reservation to the Convention which purports to allow the government to pass laws “concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens”. In the Committee’s view such a reservation was incompatible with article 2 (non-discrimination) of the Convention.

The issue of family reunification for refugee children has been regularly raised by the CRC during examination of state party reports. In its examination of Canada’s initial report<sup>110</sup>, the CRC was assisted by a detailed brief prepared by the Inter-Church Committee for Refugees, a Canadian-based NGO. In its conclusions, the CRC recommended that the Canadian authorities should take measures to facilitate and expedite family reunification where one family member has been found eligible for refugee status, and it should avoid expulsions that would cause family separations. The CRC further urged Canada to treat unaccompanied children and children refused refugee status in compliance with the provisions of the Convention. During its examination of the state party report of Denmark, the Committee recommended that the Danish authorities ensure that applications for the purpose of family reunification are dealt with in a positive, humane and expeditious manner.<sup>111</sup> Similarly, the CRC recommended that Norway seek solutions to avoid expulsions that cause family separation.<sup>112</sup> During its examination of Spain’s report, the Committee advised the Spanish authorities to ensure that refugee children and asylum seeking children enjoy the rights recognised by the Convention and that applications for family reunification purposes be dealt with in a positive, humane and expeditious manner.<sup>113</sup>

In relation to the right to survival and development of children as referred to in article 6 of the Convention to the Rights of the Child, during its examination of the state party report of Sudan the CRC voiced concern over the civil war situation which affected refugee and internally displaced children and it that urged humanitarian assistance be permitted to protect the lives of these children.<sup>114</sup> In another country situation involving armed conflict, during consideration of the initial report of the Federal Republic of Yugoslavia (Serbia and Montenegro)<sup>115</sup>, the CRC recommended that Yugoslavia develop rehabilitative programmes for the treatment of post-traumatic stress disorders identified primarily in refugee children.

The CRC has also promoted the protection of refugee rights by urging state parties to accede to the treaty most relevant for effective and adequate refugee protection, that being the 1951 Refugees Convention and its 1967 Protocol. For example, the CRC recommended that Jordan ratify the international refugee instruments in order to ensure that all refugee children and children seeking refugee status enjoy their rights under the Convention on the Rights of the Child.<sup>116</sup> After reviewing Mongolia’s initial report<sup>117</sup> the CRC recommended that Mongolia ratify the 1951 Refugee Convention in order to promote the protection of refugee children. The CRC also recommended that Tunisia, which is party to the 1951 Refugee

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<sup>110</sup> CRC/C/11/Add.3.

<sup>111</sup> CRC/C/38.

<sup>112</sup> CRC/C/15/Add. 23.

<sup>113</sup> CRC/C/8/Add.6.

<sup>114</sup> CRC/C/16 and CRC/C/20.

<sup>115</sup> CRC/C/8/Add.16.

<sup>116</sup> CRC/C/15/Add. 21.

<sup>117</sup> CRC/C/3/Add.32.

Convention, consider implementing the refugee treaty provisions into domestic legislation in consultation with UNHCR.<sup>118</sup> The CRC similarly urged Honduras to enact domestic legislation to protect the rights of refugees in accordance with international standards including the 1951 Refugee Convention, and it suggested seeking assistance from the UNHCR in this regard.<sup>119</sup>

The CRC has addressed a variety of other issues faced by asylum seeking children. For example, the Committee has expressed its concern about the techniques for interviewing unaccompanied asylum seeking minors<sup>120</sup>, and in considering Denmark's initial report<sup>121</sup> the CRC noted children who remained in Denmark after being denied refugee status were only provided health care and education in a *de jure* but not *de facto* manner which the CRC found incompatible with obligations under the Convention. In considering Sri Lanka's initial report<sup>122</sup> the Committee urged the authorities to ensure that refugee children have access to basic services in the fields of education, health and social rehabilitation. In considering Portugal's initial report<sup>123</sup> the CRC recommended that effective measures be taken to promote and improve the situation of illegal immigrant children and unaccompanied children. Further, the Committee recommended that information on children's rights should be made available to all refugee children in their own language.

In considering Poland's initial report<sup>124</sup> the CRC urged the authorities to address the issue of unaccompanied children and children refused refugee status who are awaiting deportation and to seek assistance from UNHCR in ensuring proper assistance is provided to the concerned children. As concerns the issue of the birth registration for refugee children, the CRC has stressed the importance that refugee children be registered to ensure their enjoyment of rights contained in the Convention including access to education and health care. Thus, during examination of Pakistan's initial report<sup>125</sup> the CRC acknowledged Pakistan's willingness to accept refugee children and it recommended that a comprehensive system of refugee registration be established.

Articles 37 and 40 of the Convention *inter alia* address issues relating to torture and deprivation of liberty and administration of juvenile justice respectively. These provisions require that a child shall not be arbitrarily deprived of his or her liberty, and if lawful deprivation of his or her liberty occurs then the child shall as a general rule be separated from adults.<sup>126</sup> Furthermore, whenever a child is in conflict with the law the child shall have the right to treatment which promotes the child's sense of dignity and worth. Thus, the child is entitled to fundamental guarantees taking into account that institutional incarceration shall be

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<sup>118</sup> CRC/C/15/Add.39.

<sup>119</sup> CRC/C/3/Add.17.

<sup>120</sup> CRC/C/8/Add.7 and Corr.1 and 2.

<sup>121</sup> CRC/C/8/Add.8.

<sup>122</sup> CRC /C/8/Add.13.

<sup>123</sup> CRC/C/3/Add.30.

<sup>124</sup> CRC/C/8/Add.11 and HRI/CORE/1/Add.25.

<sup>125</sup> CRC/C/3/Add.13

<sup>126</sup> In its concluding observations on the report of Sweden, the CRC expressed its concern regarding the practice of not ensuring that children in detention are separated from adults. The CRC noted that the practice of placing foreign children into custody and detention under the Aliens Act may be discriminatory in so far as Swedish children generally cannot be placed in detention as minors. See CRC/C/15/Add. 2, at para 9.

avoided and only used as a measure of last resort.

Applying these principles in its concluding observations for Canada, while the CRC recognised the efforts the Canadian authorities had made in accepting a large number of refugees and immigrants, it noted that the principles of non-discrimination, the best interests of the child and respect for the views of the child were not always given sufficient attention by the administrative authorities dealing with refugee and immigrant children. The Committee expressed its particular concern with regard to the practice of the immigration authorities to resort to deprivation of liberty of children for security and other related purposes. To address this phenomenon the Committee recommended that the Canadian authorities should only deprive children of their liberty, particularly unaccompanied children, for security or other purposes as a measure of last resort in accordance with article 37(b) of the Convention on the Rights of the Child.<sup>127</sup>

What one can glean from the recommendations and conclusions of the CRC is that they have consistently identified a number of violations and negative practices which many states have been requested to rectify in order to comply with the rights enshrined in the Convention on the Rights of the Child. In recommendations concerning refugee children, the CRC has also made specific references to the need for state parties to seek assistance from UNHCR. The pronouncements of the Committee not only establish a positive reinforcement of the practices which states should follow to ensure compliance with the Convention, but it shows the way for advocacy efforts and approaches which UNHCR, NGOs and other actors can promote with concerned governments. Although the conclusions and recommendations of the Committee may not be readily apparent as binding legal decisions, they can be used as standards against which compliance with the treaty provisions can be measured. This in turn can lead to incorporation of the Convention rights into domestic law and practice, thereby making these 'children's rights' more readily enforceable and justiciable.

As part of this process, international organisations and NGOs can play a helpful role thereby strengthening the overall enforcement and implementation objectives of the treaty mechanisms. They can also play a key role in ensuring that the CRC's recommendations are implemented, which is a recurring problem affecting the treaty bodies more generally. Till date, however, the CRC has developed a progressive and increasingly comprehensive protection approach for refugee children. It is thus hoped that the CRC's interest and work on behalf of refugee children will take on more precision in the future and will be applied with increasing regularity to all state parties.

### **The Covenant on Civil and Political Rights and the Human Rights Committee**

The Human Rights Committee was established in 1976 under the International Covenant on Civil and Political Rights. The HRC is composed of eighteen members who are elected by state parties to the Covenant. There are presently 140 state parties to the ICCPR.<sup>128</sup> The HRC

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<sup>127</sup> CRC/C/15/Add.37.

<sup>128</sup> As of December 1998 there are 140 states parties to the ICCPR as follows: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cambodia, Cameroon, Canada, Cape Verde,

meets three times a year alternatively in Geneva and New York. Its sessions normally last for three weeks. Similar to the CAT, the HRC's two main functions are to review reports from state parties and consider individual complaints made against states parties. The ICCPR also provides for review of inter-state complaints under article 41. The Committee also regularly issues general comments on the interpretation of Articles in the Covenant. State parties must submit an initial report to the HRC after becoming a member, and thereafter must submit periodic reports every five years. The Committee as required may request supplementary reports from state parties.

Reports submitted to the HRC are examined in public meetings. NGOs are permitted to attend the public meetings, but are not allowed to formally participate during regular sessions. NGOs are nevertheless afforded the opportunity to provide information to the HRC prior to consideration of a state party report. However, pursuant to the HRC's mandate under Article 40 international organisations have been invited to present information during *in camera* pre-sessional working group meetings which are attended by four members of the Committee. As noted above, the First Optional Protocol to the ICCPR, if ratified by a state party, enables individuals to file communications alleging violation of rights under the ICCPR.<sup>129</sup>

The rights provisions of the ICCPR complement those of the 1951 Refugee Convention, as many articles of the Covenant are readily applicable and relevant to the protection of refugees. For example, under Article 7 of the ICCPR no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and, in accordance with article 2 (1), Article 7 applies to foreigners. A practical application of Article 7 thereby embodies the principle of *non-refoulement* as it can be argued that the *refoulement* of an individual whose life, liberty or physical integrity would be threatened, may amount to cruel, inhuman or

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Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, The former Yugoslav Republic of Macedonia, Gabon, Gambia, Georgia, Germany, Grenada, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Korea, Democratic Republic of Korea, Republic of Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritius, Mexico, Moldova, Republic of Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, San Marino, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syria, Tanzania, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, and Zimbabwe.

<sup>129</sup> As of December 1998, 93 states have ratified the First Optional Protocol. They are: Algeria, Angola, Argentina, Australia, Armenia, Austria, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Bulgaria, Cameroon, Canada, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Estonia, Finland, France, Gambia, Georgia, Germany, Greece, Guinea, Guyana, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Kyrgyzstan, Korea, Republic of Latvia, Libyan Arab Jamahiriya, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Madagascar, Malawi, Malta, Mauritius, Mongolia, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Saint Vincent and the Grenadines, San Marino, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, Spain, Sri Lanka, Suriname, Sweden, Togo, Trinidad and Tobago, Turkmenistan, Uganda, Ukraine, Uruguay, Uzbekistan, Venezuela, Yugoslavia, and Zambia.

degrading treatment. Other provisions of the ICCPR, such as Article 9, provide that everyone has the right to “life and security of the person” and “no one shall be subjected to arbitrary arrest or detention”. Article 10 ensures that refugees deprived of their liberty must be treated with humanity and respect for the inherent dignity of the person. Further, Article 12 provides that everyone lawfully with the territory of a state shall be entitled to “liberty of movement and freedom to choose his [or her] residence”. Article 13 provides that an alien lawfully in the territory of a state party may appeal against expulsion, and the entitlement to review by a competent authority may only be departed from when “compelling reasons of national security” otherwise require. Finally, Article 2 obliges each state party to respect and ensure that *all individuals* within its territory and subject to its jurisdiction are provided the rights recognised under the Covenant.

### **The Human Rights Committee: Refugee Issues raised during Examination of State Party Reports**

Over the last several years, the HRC has paid more attention to refugee protection issues during its examination of state party reports. This has proven to be very helpful, and in some cases has resulted in positive changes in national policies and practices towards refugees. A review of the some of the Committee’s practice in this area is provided below.

Two notable examples of the Committee raising refugee protection issues during examination of state party reports concern Estonia and Latvia. After reviewing Estonia’s initial report<sup>130</sup> the HRC urged the Estonian authorities to accede to the 1951 Refugee Convention as well as the 1967 Protocol and for this purpose to seek assistance from UNHCR. Similarly, after reviewing Latvia’s initial report<sup>131</sup> the Committee suggested that the Latvian government adopt domestic legislation governing the treatment of refugees and asylum seekers to comply with its obligations under the ICCPR and international refugee law. The Committee further urged Latvia to ratify the international refugee instruments. The HRC also expressed its concern regarding the excessive use of detention and removal of asylum seekers in Latvia and these issues featured prominently during discussions with the state party delegation and in the Committee’s conclusions. Interestingly, both Estonia and Latvia acceded to the 1951 Refugee Convention in 1997 and they adopted national refugee legislation the same year. These developments may not have been exclusively because the HRC suggested that they do so, but it is nonetheless a most positive development in compliance with the views of the Committee. Prior to and after becoming parties to the international refugee instruments, UNHCR indeed played a consultative role to the respective governments in providing technical advice and other assistance.

In respect of detention of asylum seekers, during its consideration of the fourth periodic report of Sweden<sup>132</sup> the HRC recommended that the government revise its legislation to limit the use of detention. It also urged the Swedish authorities to ensure that asylum seekers should have a right of review by a competent authority of decisions in matters of detention, expulsion

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<sup>130</sup> See UN Doc ref: CCPR/C/81/Add.5 and HRI/CORE/1/Add.50.

<sup>131</sup> CCPR/81/Add.1 Rev. 1.

<sup>132</sup> CCPR/C/95/Add.4 and HRI/CORE/1/Add.4.

and refusals of refugee status. In reviewing Finland's fourth periodic report<sup>133</sup>, the Committee expressed its concern that asylum seekers may be held in public prisons and police detention centres during the refugee status determination process. The HRC recommended that in the event detention of asylum seekers was deemed necessary, then separate detention facilities should be provided.

In its consideration of France's third periodic report<sup>134</sup>, the Committee found that France's treatment of asylum seekers did not comply with the ICCPR. Furthermore, the HRC was concerned with reports of asylum seekers not being permitted to disembark from ships at French ports in order to make claims to refugee status. The Committee welcomed the fact that France was considering abolishing such practices. However the HRC remained concerned by the restrictive definition given to the concept of 'persecution' for refugees by the French authorities, which did not take account of possible persecution from non-state actors. The Committee thereby recommended that France adopt a wider interpretation of 'persecution' as part of its domestic refugee law. Finally, the HRC voiced concern that UNHCR had no right of access to places where persons seeking asylum or awaiting deportation were kept. It accordingly recommended that UNHCR be granted fuller access by the French authorities.

In consideration of the fourth periodic report of the United Kingdom<sup>135</sup>, the HRC expressed its concern regarding the length of incarceration of rejected asylum seekers and the use of excessive force in execution of deportation orders. The HRC also noted that adequate legal representation was not available for asylum seekers which undermined their ability to effectively challenge administrative decisions.

In consideration of the fourth periodic report of United Kingdom relating to Hong Kong<sup>136</sup>, the HRC commended Great Britain's cooperation with UNHCR to care for the needs of Vietnamese asylum seekers. The HRC nonetheless expressed its concern that many Vietnamese asylum seekers were subjected to long-term detention under deplorable conditions. The Committee raised the issue that children living in the camps were deprived of their rights under the ICCPR due to their parent's status as illegal immigrants. Finally, the HRC expressed general concern regarding the conditions under which deportations of non-refugee Vietnamese were being carried out.

After reviewing India's third periodic report<sup>137</sup>, the HRC expressed concern regarding reports of forcible repatriation of asylum seekers including those from Burma (Chins), the Chittagong Hills and the Chakmas. Accordingly, the Committee recommended that steps be taken to enact domestic legislation that would incorporate the provisions of the ICCPR, and in the process of repatriating asylum seekers or refugees the HRC recommended that due attention be paid to the provisions of the Covenant and "other applicable international norms".

Although the extent of refugee issues raised by the HRC during examination of state party reports remains inconsistent, it is encouraging to see the Committee requiring states to

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<sup>133</sup> CCPR/95/Add.6.

<sup>134</sup> CCPR/C/76/Add.7.

<sup>135</sup> CCPR/C/95/Add.3.

<sup>136</sup> CCPR/95/Add.5 and HRI/CORE/1/Add.62.

<sup>137</sup> CCPR/C/76/Add.6.

acknowledge that compliance with the ICCPR includes ensuring the human rights of refugees. The fact that the Committee has in some instances recommended that the concerned state party contact UNHCR for assistance is also encouraging. As noted earlier conclusions and recommendations of a human rights treaty body, even a prominent one such as the HRC, are no panacea to improving state policies and practices in respect of refugees, but they can serve as useful objectives which states and other actors must work to implement in domestic law, policy and practice.

### **Jurisprudence of the Human Rights Committee in relation to Refugee Protection**

Somewhat surprisingly, the HRC has not developed a substantial jurisprudence relating to asylum seekers under its individual complaints procedure. As noted by one commentator, the presence of relatively few cases which concern the rights of refugees and asylum seekers which have been positively dealt with by the Committee “are testimony to the fact that few individuals (or their lawyers) place their trust in achieving redress by resorting to this human rights body.”<sup>138</sup> In this connection it should be noted that the ICCPR does not incorporate the right to asylum. This has been confirmed by the HRC in a decision concerning an El Salvadoran asylum seeker in Canada. Although this particular case turned on whether the HRC would question the fairness of the procedure which determined that the applicant was a risk to national security, in *obiter* it noted that “a right of asylum is not protected by the Covenant.”<sup>139</sup> Of course it is not surprising, albeit it remains disappointing, that the HRC would fail to challenge a state party’s claim of national security as a similar ‘hands off’ approach has been consistently taken by other treaty bodies and at the national level by the courts in several countries.<sup>140</sup>

Beyond concluding there is no ‘right to asylum’ in the ICCPR, the HRC has closed the door on examining what may be considered a ‘fair procedure’ in administrative practices governing refugees. For example, in numerous decisions which have arisen in the criminal law context, the HRC has carefully side-stepped judging the substantive content or merit of a state party’s legal procedures. Thus the Committee has taken a narrow view in its deliberations by generally accepting that if the procedure, which is commonly assumed to have a minimum content of fairness, is followed, then it will not concern itself with assessing compliance of the procedure with the provisions of the ICCPR. By analogy, if this is the approach taken by the HRC in respect of procedural standards on criminal law, which is generally more rigorous and permits a lesser degree of flexibility than administrative arrangements which normally govern refugee and immigration matters, it is unlikely the HRC will articulate the form and content of a fair procedure in the refugee context.

Till date, the furthest the HRC has gone is in the case of *A v Australia*<sup>141</sup>, which concerned a

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<sup>138</sup> Andrysek, *op cit*, at p 405.

<sup>139</sup> Communication no. 236/1987, *VMRB v Canada*, Decision adopted on 18 July 1988 at the HRC’s thirty-third session.

<sup>140</sup> For a discussion of this practice in national security cases in the Canadian context, see Brian Gorlick, ‘The Exclusions of Security Risks as a Form of Immigration Control: Law & Process in Canada’, *Immigration and Nationality Law and Practice*, Frank Cass Publishers, UK (July and October 1991).

<sup>141</sup> Communication no. 560/1993; reported in UN Doc ref: CCPR/C/59/D/560/1993.

detained asylum seeker. In its decision, the Committee noted that the “effects” of any review under article 9 (4) of the Covenant (i.e. assessing the lawfulness of a detention) must be “real and not merely formal”. This latter phrase was interpreted to mean that the reviewing authority should be empowered to order the release of a detainee if legally warranted, which in the context of a substantive review of the “lawfulness” of an order of detention is a most basic requirement. The HRC did not go further, however, to articulate what was meant by procedural fairness in this case.

As concerns the protection against *refoulement* as enshrined in the ICCPR, it should be recalled that pursuant to Article 7 and in its general comment 15, the HRC has interpreted Article 7 as encompassing *non-refoulement* as it relates to refugees. General comment 15 further provides that aliens must be given a full opportunity to pursue remedies against expulsion, which may only be suspended for compelling reasons of national security. Therefore, it only seems logical that in order for a state party to assess whether a person has a genuine fear of being at risk of ‘persecution’ and *inter alia* in order to determine if the rights of the ICCPR have not been violated, an individual should be permitted to enter to the territory of the concerned state party in order to have such assessment undertaken. The fact that the HRC has pronounced during examination of state party reports that the provisions of the ICCPR may in some circumstances have extraterritorial application, would support this view. Much has been written on the scope and application of the principle of *non-refoulement*, and according to one leading authority the debate on this particular principle is certainly not conclusive.<sup>142</sup>

## Conclusion

The human rights machinery of the UN is plentiful, evolving and provides a number of complementary legal standards which can be employed to enhance the protection of refugees. Not only do some human rights mechanisms provide legal remedies in the form of complaints procedures, but the decisions, reports, information and attention that these bodies focus on refugee issues provide a rich source of international jurisprudence, country of origin information and modes of cooperation with states and other actors in order to better ensure the protection of refugees.

This is not to say that the UN human rights mechanisms can in all instances provide an effective remedy. The sheer number of these mechanisms and the fact that many of them have a universal mandate and are severely overburdened results in delays and unnecessary overlap which, in turn, may lead to confusion and problems of coordination. Despite these shortcomings the ways and means in which NGOs, legal representatives, refugees and UNHCR can use these international human rights mechanisms to advocate, however modestly, for the protection of refugees should be further explored.

Finally, UNHCR should continue to be closely involved with the UN human rights machinery, and should promote human rights standards and practices which are

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<sup>142</sup> See Goodwin-Gill (1996), *op cit*, at Chapter 4 on ‘Non-Refoulement’.

complementary and supportive of the international refugee protection regime. Moreover, as a result of the numerous resolutions of the Commission on Human Rights and recent statements of policy which UNHCR has developed in relation to promoting a human rights perspective, it can be argued that the Office has a legal obligation and moral duty to continue along these lines. UNHCR should use the opportunity, again in cooperation with states, other UN agencies and the NGO community to follow-up on implementing the myriad resolutions and recommendations of the UN human rights bodies. To this end, UNHCR is developing closer institutional and technical links with the Office of the UN High Commissioner for Human Rights and the International Criminal Tribunals in order to better promote human rights standards and ensure compliance, and to act on behalf of victims when those standards break down.

This line of reasoning runs counter to recent critiques of UNHCR's increasing involvement in the area of human rights. Some critics have argued that refugee situations are fundamentally different from human rights issues and that an increased focus on human rights may, in fact, weaken refugee protection.<sup>143</sup> This position is flawed. In a world where refugee protection is rapidly being eroded and pegged to the lowest common denominator, individuals and groups committed to refugee protection must employ all means possible to uphold the rights of refugees.

In this sense, the positive developments in international human rights law and its related mechanisms provide a complimentary body of legal principles which buttress refugee protection. As argued in this essay, international human rights standards and mechanisms have been demonstrated to provide both a practical and analytical tool to enhance the protection of refugees. Although the system is far from perfect, the overall developments are extremely positive. In a world where refugee protection may be compromised by state practice and shortsighted policies, individuals and organisations including UNHCR must take advantage of every means at their disposal to fulfill their fundamental mandate of protecting the world's refugees. The effective realisation of the potential contribution of UN human rights mechanisms is a significant step in the right direction.

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<sup>143</sup> See, for example, Daniel Warner, 'Refugees, UNHCR and Human Rights: Current Dilemmas of Conflicting Mandates', *Refuge*, Centre for Refugee Studies, York University, Canada, vol 17, no 6 (December 1998).