

The «rights turn» in refugee protection: an analysis of UNHCR's adoption of the human rights based approach

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Abstract

In this article, the significance of UNHCR's adoption of the «human rights-based approach» (HRBA) for refugee protection and assistance in camp settings is analysed. The value of the HRBA in humanitarian action is questioned, for refugees and humanitarian organizations alike. Given the absence of accountability for the human rights of refugees, it is argued that these rights are rendered meaningless in practice. To have full meaning, rights must be accompanied by remedies. This requires accountability mechanisms and the allocation of responsibility for violations of refugees' rights. Furthermore, where rights are selectively and uncritically applied in camp settings, the result may not be conducive to refugee protection or even to durable solutions. It is argued that the current western vision of rights is not necessarily appropriate in all refugee settings, and that it may be time to adopt a more dialogical approach to 'rights', such as that advocated by the notion of «tactical humanism».

Key words: rights-based approach, humanitarian assistance, UNHCR, refugees, refugee policy, human rights, protection, durable solutions

Resumen

En este artículo se analiza la importancia de la adopción por parte de ACNUR de un «enfoque basado en los derechos humanos» (HRBA, por sus siglas en inglés) para la protección de los refugiados y la asistencia en los campos. Se cuestiona el valor del HRBA en la acción humanitaria tanto para los refugiados como para las organizaciones humanitarias. Dada la ausencia de responsabilidad hacia los derechos humanos de los refugiados, se argumenta que, en la práctica, estos derechos carecen de significado. Para tener un significado pleno, los derechos deben ir acompañados de soluciones. Esto último exige mecanismos de compromiso y distribuir la responsabilidad por las violaciones de los derechos de los refugiados. Además, en el caso en que los derechos se aplican de forma selectiva y sin sentido crítico en los campos, el resultado podría no dar lugar a la protección de los refugiados o ni siquiera a soluciones duraderas. Se defiende que la visión occidental actual de los derechos no es necesariamente la apropiada en todos los campos de refugiados y que podría llevar tiempo adoptar un enfoque más dialógico hacia los 'derechos', como el defendido por el concepto del «humanismo táctico».

Palabras clave: enfoque basado en los derechos, asistencia humanitaria, ACNUR, refugiados, política sobre los refugiados, derechos humanos, protección, soluciones duraderas.

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Introduction

Although there is no single definition of a «human rights-based approach» (HRBA), it is commonly understood as ‘a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.’¹ As UN agencies began adopting this approach in the late 1990s and early 2000s, it also became the underlying ideal behind UNHCR’s programming and implementation of assistance and protection for refugees.

The move from a needs-based to a rights-based approach to assistance in the late 1990s and early 2000s was widely believed to contribute to the dignity of refugees as beneficiaries of humanitarian assistance.² Where the needs-based approach permits a view of assistance as charity, a human rights-based approach conceives of beneficiaries as «rights-holders». Instead of helpless victims, they are perceived as responsible actors who should be involved in decisions that affect them.³ The rights-based discourse approaches refugees in a less sentimental and paternalistic, more egalitarian and empowering way than the needs-based discourse.⁴ Moreover, where needs-based approaches common to the relief sector tended to focus only on immediate and basic needs, the human rights-based approach considers economic, social and cultural rights as indivisible from civil and political rights. Civil and political rights, which were generally unconsidered in humanitarian assistance, were thereby pulled into the realm of humanitarian action.⁵

As of late, however, questions have begun to arise about the value and potential of the human rights-based approach in bringing about meaningful change for the beneficiaries of development interventions.⁶ Following from the growing experi-

ence of the United Nations High Commissioner for Refugees (UNHCR) with the rights-based approach in its own work, the theoretical and practical limits of this approach to humanitarian action and refugee assistance are also becoming apparent. By focusing on UNHCR’s implementation of the HRBA in refugee camps settings, this article analyses the implications of the approach. It brings to the fore a number of theoretical and practical consequences of the HRBA, both for refugees and for refugee-assisting organisations.

Some of the problems identified, such as the gap between the promise of rights and accountability for those rights, render rights meaningless in practice and may weaken the credibility of the rights-regime itself. On another level, UNHCR’s selective, western-oriented take on human rights may clash with communal practices or «traditions» and undermine social mechanisms that serve to maintain safety and harmony within the camps. By neglecting cultural and communal factors, a one-sided rights focus can undermine rather than strengthen protection—particularly from the point of view of refugees’ personal security. Lastly, an uncritical and incomplete emphasis on rights can potentially reduce refugees’ chances of finding sustainable, durable solutions to their plight.

These risks and dilemmas will be discussed in detail below. They present credible reasons to be sceptical of what the HRBA can achieve in refugee settings as it is currently applied, and of its potential to contribute to the lives of refugees or the quality of humanitarian assistance.

1. UNHCR’s adoption of the human rights-based approach

The United Nations (UN) has drawn attention to the fundamental importance of human rights from the moment of

¹ Robinson, Mary (2001) cited in Nyamu-Musembi, Celestine and Cornwall, Andrea (2004): «What is the «rights-based approach» all about? Perspectives from international development agencies», *IDS Working Paper 234*, p. 13.

² See, for example, Harrell-Bond, Barbara, «Can Humanitarian Work with Refugees be Humane?» *Human Rights Quarterly*, 24, 2002, pp. 51-85.

³ Posner, Michael. and Clancy, Deirdr, «A Human Rights-Based Approach to Refugee Assistance», *Human Rights First*, New York, 2005. http://www.humanrightsfirst.org/intl_refugees/regions/approach_refugees.pdf, accessed 23 Jul 2009.

⁴ Slim, Hugo, «Not Philanthropy But Rights: Rights-Based Humanitarianism and the Proper Politicisation of Humanitarian Philosophy in War», *Humanitarian Practice Network Conference Paper*, February 2001. Overseas Development Institute, London.

⁵ Development Research Centre on Migration, Globalisation & Poverty, «Rights-based Policies and Forced Migrants». Briefing No. 8, January 2007.

⁶ Cornwall, Andrea and Nyamu-Musembi, Celestine, «Putting the ‘rights-based approach’ to development into perspective». *Third World Quarterly* 25, 8, 2004, pp. 1415-1437.

its founding. The preamble of the 1945 UN Charter highlights 'reaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small' as one of the main purposes of the UN. A large body of international human rights law has developed and taken shape under its auspices, and various UN sub-organs have been charged with the monitoring and implementation of different human rights treaties. In 1997, UN Secretary General Kofi Annan re-emphasized the position of human rights as pivotal to the United Nations system as a whole when he called on UN agencies to integrate human rights into all of aspects their programming.⁷ The same year, he held a speech in which he called for 'a reorientation of the UN's mission to reflect the realisation of human rights as the ultimate goal of the UN'.⁸

In line with Annan's request, UN agencies began to «mainstream» human rights into their programming. Between the late 1990s and early 2000s, many organizations adopted what became known as a human «rights-based approach». While the notion of rights in the context of development activities and even the right to development were much older, it was not until the late 1990s that the term «rights-based approach» became part of the lingua franca of development discourse.⁹ As Annan's request was implemented by agency after agency, by 2005 rights-based action had gained enough ground to be identified as 'a new orthodoxy in humanitarian and development action'.¹⁰ With very few exceptions and little perceptible reservation, it was embraced by UN agencies, development and humanitarian organizations.

Unlike the development-minded sister-organizations within the UN system, such as the United Nations Development Programme (UNDP) or United Nations Children's Fund (UNICEF), humanitarian and relief-oriented UN agencies like UNHCR were not front-runners in the adoption of the human rights-based approach. At the dawn of the 21st century, UNHCR still lacked a specific process for identifying the possible implications of integrating human rights into its work, and a clear organizational vision on human rights. Human rights policy was only selectively applied and UNHCR's operations in various countries, like Colombia, presented evidence of the persistence of a needs-based approach.¹¹ According to Bakewell, the needs-based approach still constituted UNHCR's primary mode of assistance provision as late as 2003.¹²

In 2006, UNHCR stated that its human rights focus was 'founded in Article 55 of the UN Charter which commits the UN to promote «universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion»'.¹³ Although UNHCR claims that its mandate for international protection means that international law has always formed the conceptual framework informing its work and assistance activities,¹⁴ human rights standards were not incorporated into its trainings of protection officers until 1995.¹⁵ From 2004 onwards, the term begins to appear sporadically in policy documents addressing specific areas of UNHCR's work.¹⁶ Recently, the rights-based approach was explicitly recognized as the framework for its programming,¹⁷

⁷ United Nations General Assembly, «Renewing the United Nations: A Programme for Reform. Report of the Secretary-General» Fifty-first session. Agenda item 168, A/51/950. UNGA, 1997, New York.

⁸ UNDG, cited in Nyamu-Musembi, Celestine and Andrea Cornwall, *op. cit.*, 2003, p. 15.

⁹ Nyamu-Musembi, Celestine and Andrea Cornwall, *op. cit.*

¹⁰ Muggah, Robert, «Distinguishing Means and Ends: The Counterintuitive Effects of UNHCR's Community Development Approach in Nepal» *Journal of Refugee Studies*, 18, 2, 2005, pp. 151-164. p. 155.

¹¹ Kenny, Karen, «When Needs are Rights: An Overview of UN Efforts to Integrate Human Rights in Humanitarian Action». *Occasional Papers. The Thomas J. Watson Jr. Institute for International Studies*. Brown University, Providence, 2000.

¹² Bakewell, Oliver, «Community Services in Refugee Aid Programmes: A Critical Analysis» Working Paper No. 82. New Issues in Refugee Research. UNHCR, Geneva, 2003.

¹³ UNHCR, *Practical Guide to the Systematic Use of Standards & Indicators in UNHCR Operations*, 2nd Edition. UNHCR, Geneva, 2006b, p. 17.

¹⁴ UNHCR, *Handbook for the Protection of Women and Girls*, First Edition. UNHCR, Geneva.

¹⁵ Kenny, Karen (2000), *op. cit.* 2008a.

¹⁶ Brief mention of the RBA is made, for example, in UNHCR's (2004) *HIV Aids and Refugees. UNHCR's Strategic Plan 2002-2004* and (2005) *Handbook for Planning and Implementing Development Assistance for Refugees (DAR) Programmes*.

¹⁷ See UNHCR, *Agenda for Protection, Third Edition*, UNHCR, Geneva and UNHCR (2006) *Practical Guide to the Systematic Use of Standards and Indicators in UNHCR Operations*, 2nd Edition, UNHCR, Geneva, 2003.

and in 2007, UNHCR's endeavour to integrate the HRBA into its work was officially endorsed by the Executive Committee (EX-COM) when it called for the use of the rights-based approach to underpin all UNHCR's strategies and actions.¹⁸ The following year, it urged UNHCR, its implementing partners and States to adopt a rights- and community-based approach in engaging with persons of concern.¹⁹

The move from a needs-based to a rights-based approach is not insignificant for the provision of humanitarian assistance. By emphasising that beneficiaries are rights-holders, the HRBA appears to imply that refugees have a «right to assistance». Although this idea is controversial at best, it is not new in humanitarian circles. In 1998, long before its adoption of the HRBA, UNHCR already framed different components of humanitarian assistance as important elements of protection, basing these claims on the language of rights:

'While the management of large-scale relief programs was not envisaged by UNHCR's Statute, the provision of assistance has come to play an important role in the organization's efforts to fulfil its mission. Food, shelter, health care and other forms of assistance are essential to the survival and safety of displaced populations, and constitute a vital form of human rights protection in their own right, especially in situations where civilian populations are subject to deliberate deprivation—including starvation—by the parties to the conflict.'²⁰

Kofi Annan adopted a similar stance when he stated that a rights-based approach '[d]escribes situations not simply in terms of human needs, or developmental requirements, but in terms of society's obligations to respond to the inalienable rights of individuals, empowers people to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed'.²¹

The existence of a «right to humanitarian assistance» has also been endorsed by the International Federation of Red Cross and Red Crescent Societies (IFRC). Its Code of Conduct, which applies to all IFRC branches and was voluntarily signed by 480 other national and international humanitarian NGOs around the world,²² names the «humanitarian imperative» as its first operative principle. In the explanatory text, the Code states that: 'The right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries.'²³ This principle was elaborated by participants to the Sphere Project, which formulates minimal standards for humanitarian assistance on the basis of a rights-based approach. The core belief underlying the project is that disaster-affected people have the right to a life with dignity, and therefore a right to humanitarian assistance. The minimum levels of assistance to which they are entitled by virtue of this right are expressed as the Sphere standards.²⁴

The specific make-up of UNHCR's HRBA cannot be derived from a standard interpretation of the approach as applied by other UN agencies. As Cornwall and Nyamu-Musembi note, the term «rights-based approach» is subject to many different interpretations, methodologies and practices both within and across agencies.²⁵ Although the complexity of humanitarian and organizational policy implies that policy statements cannot and should not be taken as conclusive for the normative influence of rights upon its work, a cursory glance at UNHCR's rhetoric does reveal some of the idiosyncrasies of UNHCR's interpretation of the HRBA. Even if not applied consistently between or within field offices, these documents do bear some correlation to the policies that are implemented in specific refugee camp settings.

¹⁸ UNHCR Executive Committee, Conclusion on Children at Risk, 5 October 2007, No. 107 (LVIII), 2007, para (b)(x).

¹⁹ UNHCR Executive Committee, General Conclusion on International Protection, 10 October 2008, No. 108 (LIX), 2008.

²⁰ UNHCR. UNHCR Strategy Towards 2000, UNHCR Refworld, 1998, available at: <http://www.unhcr.org/refworld/docid/3ae6b31c38.html>, accessed on 26 March 2009. See also Gilber, G. (1998). «Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order», *International Journal of Refugee Law*, 10, 3, pp. 349-388., p. 360.

²¹ UN Secretary-General 1998, cited in Nyamu-Musembi, Celestine and Cornwall, Andrea, *op. cit.*, 2004, p. 13.

²² Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief.

List of signatories http://www.ifrc.org/cgi/pdf_disasters.pl?codeconduct_signatories.pdf, accessed 01 August 2009.

²³ Available online at: <http://www.ifrc.org/publicat/conduct/code.asp>, accessed on 01 Aug 2009.

²⁴ Dufour, Charlotte, Véronique de Geoffroy, et al., «Rights, Standards and Quality in a Complex Humanitarian Space: Is Sphere the Right Tool?» *Disasters* 28, 2, 2004, pp. 124-141.

²⁵ Cornwall, Andrea and Celestine Nyamu-Musembi, *op. cit.*, p. 1425.

Various documents now set out UNHCR's understanding of the HRBA. In a recent confirmation of its use of human rights as the basis for its planning and implementation of protection and programme activities for refugees and other persons of concern, UNHCR—expanding and adapting Mary Robinson's 2001 definition—described the human rights-based approach as

'a conceptual framework that integrates the norms, standards and principles of the international human rights system into the policies, programmes and processes of development and humanitarian actors. It therefore focuses on both procedures and outcomes... A rights-based approach is founded on the principles of *participation* and *empowering individuals and communities* to promote change and enable them to exercise their rights and comply with their duties. It identifies rights-holders (women, girls, boys and men of concern) and duty-bearers (principally the State and its agents), and seeks to strengthen the capacities of rights-holders to make their claims and of duty-bearers to satisfy those claims. This requires an attitudinal shift in how we work with and for persons of concern: They are no longer viewed as beneficiaries of aid, but as rights-holders with legal entitlements.'²⁶

Connecting the HRBA to its mandate, UNHCR defines «protection» in a way that includes not only physical security but refugees' rights under international refugee, humanitarian and human rights law:

'Protection, which includes physical security and the restoration of human dignity, involves supporting communities to rebuild their social structures, realize their rights, and find durable solutions. Protection encompasses all activities aimed at ensuring that women, girls, boys and men of all ages and backgrounds have equal access to and can enjoy their rights in accordance with the letter and spirit of the relevant bodies of law, including international refugee law, international human rights law and international humanitarian law.'²⁷

Consequently, UNHCR emphasizes that believes that all its practices should contribute to the realization of refugees' rights.²⁸ Increasingly, its assistance and protection activities are being framed in the language of rights. The growing integration

of the HRBA into UNHCR's work since the mid-2000s is reflected by changing discourse on humanitarian assistance and increasing reference to human rights norms—and legal texts—in its policy documents. More than just a normative background to its work, rights are referred to in a strongly legalistic sense and staff are encouraged to draw on applicable conventions and treaties to make policy choices.

The responsibility for upholding human rights is seen, first and foremost, as a State responsibility, and UNHCR policy documents unanimously identify States as the primary duty-bearers. Refugees themselves are also identified as duty-bearers, who have an important role to play in contributing to the realisation of rights within their communities.²⁹ UNHCR's Manual on a Community-based Approach in UNHCR Operations (hereafter the Manual),³⁰ stresses the importance on refugee participation and community and individual empowerment. Refugee empowerment is dually aimed at strengthening their compliance with rights and duties, and at enabling refugees to make claims and governments to meet their obligations. While the Manual recognizes that there can be not one interpretation of the rights-based approach as all field contexts and refugee situations are different, it encourages refugee participation in decision-making, and advocates that they are to be treated as *partners* rather than beneficiaries.

Lastly, UNHCR acknowledges that it, too, has an important role within this approach and framework, and its manuals correspondingly set out specific responsibilities of the organization and its staff. Although UNHCR has also identifies itself as a duty-bearer, it limits its own obligations to the supervisory and «enabling» level:

'[U]tilizing a rights-based approach requires UNHCR, as a duty-bearer, to work towards the enjoyment of these rights by persons of concern, by capacity-building measures assisting governments in fulfilling their human right obligations and where necessary to protect fundamental human rights by direct assistance measures...'³¹

²⁶ UNHCR, *op. cit.*, 2008, p. 16.

²⁷ UNHCR, UNHCR Manual on a Community-based Approach in UNHCR Operations, First Edition. Geneva, United Nations High Commissioner for Refugees, 2008, p. 11.

²⁸ UNHCR, Operational Protection in Camps and Settlements: A Reference Guide of Good Practices in the Protection of Refugees and Other

Persons of Concern. Geneva, United Nations High Commissioner for Refugees, 2006a.

²⁹ UNHCR, *op. cit.*, 2006a, p. 18.

³⁰ UNHCR, *op. cit.*, 2008.

³¹ UNHCR, *op. cit.*, 2006a, p. 18.

The HRBA, from UNHCR's point of view, entails four specific activities: (1) understanding the structural causes of non-realization of rights; (2) assessing and developing the capacities of rights-holders to claim their rights, and of duty-bearers to uphold them; (3) monitoring and evaluating programs according to human rights standards and principles; (4) informing programming and policy design on the basis of the recommendations of international bodies.³²

The policy descriptions above show how UNHCR defines the HRBA approach, assigns responsibilities for rights, and has begun to change its policies through increasing reflection of legal human rights norms. On the surface, it seems like an unambiguously positive development. To fully understand the HRBA, however, we need to look further than policy statements emanating from UNHCR Headquarters. In the following section, the meaning of the HRBA is addressed from a theoretical perspective that considers the relationship between rights, responsibility and accountability. It is followed by an assessment of the practical implications of the approach, based on examples from specific refugee situations on the ground.

2. The accountability gap in refugee assistance

To have full impact, the shift towards rights in refugee programming must go further than a change in discursive practice alone. Rights have *legal* value, entailing that when they are violated, claims may be made by the rights-holder. This, in turn, demands aligning responsibility for rights and the availability of accountability mechanisms. As Grabska points out, '[r]ights provide a legal component that points to the institutional duty to protect, respect, fulfil and safeguard them.'³³ When methods for holding rights violators do not exist to match claims of violations, 'claims lose meaning'.³⁴

Ordinarily, the parties responsible for international law—and therefore also for refugee rights—are States. Refugee camps,

after all, are located on State territory. By attaining refugee status, refugees gain legal access to this territory, and theoretically to the corresponding entitlements that accrue from the regime of refugee protection. Of course, access to entitlements on paper does not automatically imply that rights are met in practice. Even when these States may have signed onto other international human rights instruments, they often lag behind in implementation. Many human rights instruments, particularly those focusing on economic, social and cultural rights, contain 'progressive implementation' clauses that allow States to gradually improve their conduct as they gain the means to do so. Most refugee-producing and refugee-receiving countries are among the poorest in the world, and are in no position to assume responsibility for the protection of refugees. The existence of a 'right', therefore, does not necessarily translate to immediate positive action by States. General human rights treaties aside, many developing refugee hosting countries that host large numbers of refugees, such as Bangladesh, Jordan, Pakistan, Nepal and Thailand, have not ratified the 1951 Convention Relating to Refugees.³⁵ This implies that apart from *non-refoulement*—a principle elevated to the status of customary international law—refugees in these countries may not even legally have the rights contained in the 1951 Convention.

In its role of «enabling» and «facilitating» State respect for refugee rights, UNHCR tries to enhance respect for refugees' rights in such countries by encouraging states to ratify the relevant conventions, and to fulfil the legal obligations that follow from the conventions that have already been ratified. This is generally done through advisory functions and lobbying. While UNHCR has had notable successes in this area, when faced with strong State resistance its ability to bring about real change is inherently limited. In 2003, Bakewell warned that the adoption of the rights-based approach might remain at the level of rhetoric, failing to lead to fundamental transformations in the relationship between aid agencies and those they serve.³⁶ Any shift in programming that might take place, he cautioned, is

³² UNHCR, *op. cit.*, 2006a, p. 17.

³³ Grabska, Katarzyna, «Who Asked Them Anyway? Rights, Policies and the Wellbeing of Refugees in Egypt», Development Research Centre on Migration, Globalisation and Poverty, University of Sussex, Brighton., 2006, p. 12.

³⁴ Uvin 2004, p. 131 cited in Cornwall, Andrea and Nyamu-Musembi, Celestine, *op. cit.*, 2004, pp. 1417-1418.

³⁵ For the complete list of signatories of the 1951 Convention and 1967 Protocol as of October 2008, see: <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>, accessed 16 April 2008.

³⁶ Bakewell, Oliver, *op. cit.*, 2003.

likely to be highly circumscribed and might well be resisted by the policy framework of host and donor governments. Indeed, UNHCR's attempts to bandage States' neglect or violation of their responsibilities towards refugees under international law through assistance provision are restricted by the willingness of the same states to allow it access, and of others to fund its initiatives. Efforts to lobby effectively for the ratification of or compliance with international and regional conventions and treaties, thereby acting as a catalyst to facilitate the implementation of policies regarding refugees and others of concern in a way that is consistent with the international human rights obligations of states, are continually confronted with the need to remain on good standing with States. The souring of relations with refugee host States could result in a loss of assistance or access privileges for UNHCR.

When considered in light of its actual responsibilities in camps, however, one might begin to wonder how meaningful UNHCR's restrictive interpretation of its role as duty-bearer can realistically be. In many countries, especially in the developing world, it is not States but UNHCR which recognizes and provides assistance and protection to refugees. This assistance is often provided in refugee camps. Refugees gain access to these camps when they are recognized and attain 'refugee status'. Refugee status, in this way, is comparable to a definition of citizenship given by the US Supreme Court, in Arendtian terms, as 'the right to have rights'.³⁷ In camps, the construct of 'refugee status' entails—like Somers and Roberts' hallmarks of citizenship³⁸—membership, exclusion (of those found ineligible for refugee status), attachment to a territory (the camp), and particularistic freedoms.

Only for all apparent purposes, the party granting refugees their «citizenship» in the majority of camps is not a state

but an international organization. This is done through a process known as Refugee Status Determination (RSD), which is essentially a legal assessment of whether a particular individual meets the requirements for being considered a refugee as set out in Article 1 of the 1951 Convention Relating to the Status for Refugees. According to a statistical analysis presented by the non-governmental organisation (NGO) RSD Watch, UNHCR conducted RSD in fifty-two countries, and having received applications from 75,088 asylum seekers in 2007, was the largest refugee status decision-maker in the world.³⁹

Even after fulfilling its function as gate-keeper to the camps, UNHCR's role extends well beyond the mere «assistance» of States. Particularly in developing countries in Africa and Asia where most of the world's refugee camps are located, UNHCR has accepted almost sole responsibility for the every-day management of numerous refugee camps that together host millions of people. The nature of refugee camps and their management by UNHCR confuses the roles and responsibilities of States and international organizations. Who, in camps, is to be held responsible for the provision of humanitarian assistance or for ensuring refugees' rights? The sheer extent of UNHCR's activities has led some to describe the organization as *de-facto* sovereign,⁴⁰ and to 'a widespread perception that the organization was a surrogate state, complete with its own territory (refugee camps), citizens (refugees), public services (education, health care, water, sanitation, etc.) and even ideology (community participation, gender equality)'.⁴¹ As Gilber remarks, 'The increase in number in [refugee] camps... has left UNHCR, not necessarily willingly or happily, with responsibility to co-ordinate a worldwide mini-empire with a population numbered in the millions.'⁴² Although host States retain some say in what goes on in camps, they rarely exert meaningful sovereignty in these areas. In prac-

³⁷ *Coppage v. Kansas*, 235 U.S. 1 (1915), cited in Glendon, M. A. (1991). *Rights Talk: The Impoverishment of Political Discourse*. New York, The Free Press (Macmillan, Inc.), p. 12.

³⁸ Somers, M. R. and C. N. J. Roberts, «Towards a New Sociology of Rights: A Genealogy of «Buried Bodies» of Citizenship and Human Rights», *Annual Review of Law and Social Science*, 4, 2008, pp. 385-425.

³⁹ http://www.rsdwatch.org/index_files/Page386.htm, accessed 21 July 2009.

⁴⁰ Wilde, Ralph, «Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of «Development» Refugee Camps Should Be Subject to

International Human Rights Law», *Yale Human Rights and Development Law Journal*, 1, 1999, pp. 107-128.

⁴¹ Slaughter, Amy and Crisp, Jeff, «A surrogate state? The role of UNHCR in protracted refugee situations». In Loescher, Gill, James Milner et al., «*Protracted refugee situations: Political, human rights and security implications*». United Nations University Press, Tokyo., 2008, p. 132.

⁴² Gilber, Geoff., *op. cit.* 1998, pp. 359-360.

tice, UNHCR assumes responsibility for these areas, and for their inhabitants. The comparison of camp governance by UNHCR with a light form of international territorial administration is not at all far-fetched.

The tension, then, arises from UNHCR's position as *de-facto* sovereign and its simultaneous rejection of responsibility for human rights, which it considers a state prerogative. This position is not unique to UNHCR but is widely held within the UN system. Legally, international organizations and UN agencies do not have the same obligations as States when it comes to carrying out their functions. They are not signatories to international conventions or human rights treaties, by which they are consequently not legally bound.⁴³ Drawing from international legal practice regarding UN governance missions, Stahn contends that there are serious double standards in structural conceptions of international governmental legitimacy by States *vis-à-vis* international organizations or institutions. The latter are perceived more as organizations than as state actors, and tend to be governed by systems of privileges, immunities, and intra-domestic power-sharing rather than standards of domestic law, 'even where they [exercise] governance functions in the role of a «surrogate state»'.⁴⁴

In 1991, a UNHCR management consultant remarked: 'We work for no other organization in the political, governmental, or commercial world which has such an absence of mechanisms for determining citizen or consumer satisfaction.'⁴⁵ Direct accountability to the ultimate recipients of aid is non-existent in the de-

velopment context, whether aid distributors are non-NGOs or multilateral or bilateral development agencies.⁴⁶ Regardless of changing notions of state sovereignty and the expanding role of the United Nations, there are still no independent, external accountability mechanisms for UN agencies, even where these are engaged in more comprehensive forms of international territorial administration, as may happen in the context of peacebuilding and reconstruction missions.⁴⁷ UNHCR, as an international organization, enjoys functional immunity in carrying out its official functions.⁴⁸ Although the legitimacy of the United Nations' legal immunity is increasingly coming under fire,⁴⁹ accessible judicial remedies for violations of human rights by humanitarian organizations do not yet exist. The one potentially meaningful initiative to improve accountability in the humanitarian sector by creating a humanitarian ombudsman (the Humanitarian Ombudsman Project) was met with significant opposition by humanitarian agencies, and was ultimately abandoned over fears of possible negative consequences.⁵⁰

Of course, UNHCR's lack of clearly delineated human rights obligations or legal responsibility towards refugees should also be considered in light of the fact that it lacks the full powers of governments. Its ability to act in a given situation or to contribute to the rights of refugees, encamped or otherwise, is seriously constrained by political and statist factors.⁵¹ Listing some of the limitations it faced in pursuing a rights-based approach, UNHCR named government policy and practice curtailing rights, such as the freedom of movement, right to work or education,

⁴³ Mégret, Frédéric and Florian Hoffman, «The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities» *Human Rights Quarterly*, 25, 2003, pp. 314-342.

⁴⁴ Stahn, Carsten, «Governance Beyond the State: Issues of Legitimacy in International Territorial Administration». *International Organizations Law Review*, 2, 2005, pp. 9-56., p. 17.

⁴⁵ KRC Research and Consulting 1991, cited in Harrell-Bond, Barbara., «Can Humanitarian Work with Refugees be Humane?» *Human Rights Quarterly*, 24, 2002, pp. 51-85., p. 53.

⁴⁶ Nyamu-Musembi, Celestine. and Cornwall, Andrea, *op. cit.* p. 47.

⁴⁷ Stahn, Carsten, *op. cit.*

⁴⁸ UNHCR's functional immunity derives from Article 105 of the UN Charter and the 1946 Convention on the Privileges and Immunities of the United Nations.

⁴⁹ UN immunity was recently challenged in the District Court of The Hague in the Netherlands, in a case brought against the United Nations

and the Dutch government by the Mothers of Srebrenica, alleging UN responsibility for the abandonment of the safe haven in Srebrenica by Dutchbat, and subsequent killing of 8,000 Muslim boys and men by the Bosnian Serb forces in 1995. In the Court's dismissal of the case, UN immunity was upheld. On 7th April 2009, the Mothers of Srebrenica appealed this judgment, alleging that UN immunity is not absolute, and that immunity is incompatible (even unreasonable and absurd) with the object and purpose of the relevant human rights treaties. For a copy of the Appeal, see: <http://www.vandiepen.com/en/international/srebrenica/proceedings-the-hague.html>, accessed 28 July 2009.

⁵⁰ Hilhorst, D., «Being Good at Doing Good? Quality and Accountability of Humanitarian NGOs». *Disasters* 26(3), 2002, pp. 193-212, Dufour, C., V. de Geoffroy, *et al.*, «Rights, Standards and Quality in a Complex Humanitarian Space: Is Sphere the Right Tool?» *Disasters* 28(2), 2004, pp. 124-141.

⁵¹ Bakewell, Oliver, *op. cit.*

and resource constraints restricting the availability of essential services as important limiting factors. In light of these constraints, UNHCR has acknowledged that the fulfilment of the rights of all persons of concern could be challenging or even impossible.⁵²

Even so, rights education and awareness-raising constitutes remain part and parcel of the HRBA. By emphasizing rights for which no party is willing to take responsibility, and which refugees may not even legally have from the perspective of their host country, UNHCR risks raising expectations that are unlikely to be met. The distinction between UNHCR as rights facilitator/enabler versus actual guarantor (or violator, for that matter) may not be clear to refugees, who moreover may not fully appreciate the organizational complexities with which the organization is confronted. The image of UNHCR as the 'all-powerful' actor in the camp does not, at first sight, rhyme with the extent of its dependency upon or lack of political clout vis-à-vis states to ensure that the conditions for respect of refugees' full set of rights are met. Refugees, whose awareness of human rights is first raised in camps, are thus paradoxically confronted with a situation where the very party that educates them about rights subsequently holds back from taking responsibility for ensuring that those rights are met. Under the HRBA refugees are empowered to make human rights claims, but have no realistic prospect of legal redress for human rights violations. It is hardly surprising that, in this context, changes that adversely impact upon refugees' rights can lead to profound dissatisfaction among refugees, as Muggah reports from Nepal.⁵³

Since their flight from Bhutan in the early 1990s, Bhutanese refugees inhabit seven sprawling refugee camps in southern Nepal. Although their rights in Nepal are restricted and they do not enjoy freedom of movement or the right to work in their host country, the camps themselves have been widely praised as models of good practice.⁵⁴ Early on, UNHCR adopted a developmental and community-based approach towards camp governance, and the camps are characterized by a very high degree of

refugee participation in different facets of assistance and service provision. The refugees are highly educated, and the refugee-run organizations that have emerged in the camps have learned to mirror their donors' use of language. Muggah describes the Bhutanese refugees as acutely 'rights-aware'.⁵⁵

As the camps endured, humanitarian organizations provided assistance in a developmental manner devoid of ceilings or standards, with the objective of raising indices to the highest possible standard. Nevertheless, as the refugee situation lost its status as an «emergency» and became protracted, donor funding began to dwindle. From US\$ 5 million in 1993, UNHCR's Nepal budget was cut to a projected US\$ 2.8 million in 2002. As a result, it was necessary for the organization to scale back on some of its programs and activities in the camp, with healthcare being one example. These developments, says Muggah, were 'met with fierce resistance from a comparatively educated and rights-aware population. Predictably, dissatisfaction with the assistance provided by UNHCR and its implementing partners is growing.'⁵⁶

The accountability gap for refugees' human rights is painfully clear. Hannah Arendt realized this when she criticized the modern notion of universal human rights by arguing that in the absence of the power to defend them, the rights of people such as the stateless, refugees and others falling outside the traditional realms of citizenship, were little more than a chimera.⁵⁷ Living in refugee camps —territories under extra-territorial administration by UNHCR as *de-facto* sovereign— refugees are, equally *de-facto*, rightsless. From a human rights perspective, UNHCR's lack of accountability and organizational immunity is incompatible with its role as part and parcel of a municipal order,⁵⁸ even when this is the result of a *de facto* rather than a *de jure* reality. Furthermore, the existence of a regime that lacks any institutionalized means whereby refugees can challenge or politically contest UNHCR's decisions is at odds with UNHCR's own stated role as duty-bearer of enabling refugees to make rights claims. Not only is the absence of a viable and transparent

⁵² UNHCR, *op. cit.*, 2006a.

⁵³ Muggah, Robert, «Distinguishing Means and Ends: The Counterintuitive Effects of UNHCR's Community Development Approach in Nepal», *Journal of Refugee Studies*, 18, 2, 2005, pp.151-164.

⁵⁴ *Ibid.*, p. 156.

⁵⁵ *Ibid.*, p. 159.

⁵⁶ *Ibid.*

⁵⁷ Arendt, Hannah, *The Origins of Totalitarianism*. Harcourt, Brace, New York, 1952. See also Birmingham, Peg, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility*. Indiana University Press, Bloomington and Indianapolis, 2006.

⁵⁸ Stahn, Carsten, *op. cit.*

claims mechanism for refugees a major set-back for the plausibility of a «rights-based» approach—but potentially, also for human rights in general. Refugees' complaints regarding human rights violations fall on deaf ears, undermining the credibility of the UN and potentially, of the international human rights regime as a whole.

3. Rights, power and politics

In his far-reaching critique on legitimacy of international territorial administration, Stahn argues that entities exercising effective control over territories should be bound by common governance obligations, irrespective of whether they are organized as states, groups of states, or international organizations, and that the ability of actors to directly impact the lives and rights of individuals requires new forms of accountability.⁵⁹ In the absence of any discernable way for refugees to hold UNHCR responsible, the organization's actions in refugee camps directly impact the lives of refugees every day, and may even directly *violate* human rights. In this context, the accountability gap described above becomes even more problematic. This is particularly evident when one delves more deeply into the implications of UNHCR's role in camp management.

In line with the classical humanitarian principles of humanity, independence, neutrality and impartiality, UNHCR's Statute dictates that its work shall be humanitarian, social, and 'of an entirely non-political character'.⁶⁰ Many arguments have been presented belying the possibility of truly apolitical engagement by humanitarian actors and by UNHCR in particular—not in the least, because of its continued dependence upon States. The reliance upon the rights-based approach further underscores the impossibility of true non-political action in refugee camps. The underlying reason is that, in many ways, rights *are* political. As Keebet and Franz von Benda-Beckmann and Anne Griffiths ob-

serve, '[h]uman rights are part of governance structures and are therefore political, but they are also cultural and legal constructs.'⁶¹ Despite the participation of various countries and international actors in the establishment of the current human rights regime, its foundations are intrinsically western and have consequently often been critiqued as ethnocentric. The Sphere standards for humanitarian assistance, which were designed by a group of Northern NGOs, have similarly been criticized for reflecting the logic of industrialized countries with their own cultural specificities and disregarding the diversity of cultural and political contexts.⁶²

UNHCR's application of human rights in camp contexts is strongly influenced by the interests and political conditions in its member states.⁶³ Donors 'have always exercised 'undue influence' on the organization.'⁶⁴ Since its founding, UNHCR has consistently received the lion's share of its funding from a small number of industrialized countries. Between 1990 and 2005, its top five donors (the USA, Japan, European Commission, Sweden and the Netherlands) jointly provided roughly 66.2 per cent of UNHCR's funding, with the USA responsible for nearly half of this amount. Denmark, Canada, Germany, Switzerland, Norway and the UK were jointly responsible for another 21.9 per cent.⁶⁵ Expectedly, many UNHCR documents reflect normative priorities following from a distinctly western vision of rights.

Decisions involving rights are not «value neutral», but reflect an organizational culture with its own political values and priorities. The influence of key donors on UNHCR's decision-making and norm adoption highlights the influence of politics on its identity and organizational vision. Over the past decade and a half, foreign policy in many countries has been increasingly expressed in terms of international humanitarian law and human rights. The instrumental use of rights rhetoric for foreign policy purposes is evident when abuses are addressed in some parts of

⁵⁹ Stahn, Carsten, *op. cit.*

⁶⁰ Statute of the High Commissioner for Refugees. UN General Assembly, 325th Plenary Meeting. A/RES/428., Article 2, 1950.

⁶¹ Von Benda-Beckmann, Franz, and Von Benda-Beckmann, Keebet et al. (eds), *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*. Ashgate Publishing Ltd, Aldershot, 2005, p. 2.

⁶² Dufour, Charlotte, Véronique de Geoffroy, et al., *op. cit.*

⁶³ Hyndman, Jennifer, «Change and Challenge at UNHCR: A Retrospective of the Past Fifty Years», *Refugee* 19, 6, pp. 45-53, 2001, p. 45.

⁶⁴ Chimni, B. S., «Globalization, Humanitarianism, and the Erosion of Refugee Protection», *Journal of Refugee Studies*, 13, 3, pp. 243-263, 2000, p. 256.

⁶⁵ UNHCR, *Global Report 2005*, UNHCR, Geneva., 2006, p. 16.

the world but ignored in others.⁶⁶ By framing value-choices in the language of so-called universal human rights, UNHCR's political preferences and those of its donors are placed outside the morally acceptable realm of discussion. In this way, the political is de-politicized.

Once the decision to base policies on rights has been made, the next question is *which* rights are applied in any given situation. The first UNHCR training module used to educate protection officers about human rights taught them that all human rights are universal, interrelated and indivisible. The module urges UNHCR staff to 'feel confident that in defending refugees' rights they are not showing bias for or against any type of human right'.⁶⁷ It quickly becomes apparent that this is much more easily said than done. Rights interrelate in complicated manners and often conflict in practice. One look at the jurisprudence of courts that deal primarily with human rights violations, such as the European Court of Human Rights (ECtHR) in Strasbourg, reveals the extent of potential collisions of legal norms and rights. Multiple human rights often come into play in a single case. The resolution of conflicts between rights requires a determination regarding the relative importance of particular rights over others, or the permissibility of intruding upon one right to satisfy another. In adjudicating cases, ECtHR judges carefully weigh and balance rights to come to appropriate decisions. Their decisions are supported with carefully set out argumentation, and can be appealed. This is important, because ECtHR judgments can have far-reaching impacts on the lives of individuals and on legislation in European states.

UNHCR's decisions have equally far-reaching impacts on the lives of camp-based refugees, but do not require careful motivation and are not open to appeal. The impacts of the agency's choices begins with the decision to establish (or support the establishment of) refugee camps. In the greater interest of protecting refugees from *refoulement* (forcible repatriation back to the country of origin), UNHCR often accepts refugee camps as an interim solution to mass influxes of refugees. Encampment usually entails the violations of various rights, such as refugees' freedom of movement or their right to work in the formal

economy of the host country. Once camps are established and UNHCR takes on the task of camp management, the issue becomes even more complicated. In its governing role, the agency assumes responsibility for decisions that are complicated, potentially far-reaching and implicate (and may violate) differing and potentially contradictory sets of rights. UNHCR itself has recognized the complexity of taking policy decisions in accordance with a rights-based approach, admitting that '[r]ights may even appear to conflict—for example, the right to participate vis-à-vis the protection of minorities who may not be represented'.⁶⁸ It may not always be easy to identify all the rights that come into play in a given situation, and UNHCR's staff members are confronted with a different set of applicable legal norms in each country in which they work.

Both at the level of policy-makers in Geneva and in the management of refugee camps «on the ground», idealistic notions of the inseparability and indivisibility of human rights are constrained by a pragmatic need to govern. Contrary to the agency's proclamation that all rights are of equal importance, more recent UNHCR policy documents reveal far greater emphasis on some rights than on others. Whilst this may not be overly worrying in emergency situations requiring the provision of life-saving assistance—the activity with which humanitarianism is traditionally associated—it becomes more so when refugee situations become protracted. As assistance provision turns into governance, the basis for legitimacy changes, and decisions that may constitute 'non-issues' in an emergency context take on a different meaning.

Policies that have a potentially large impact on refugee lives are designed and implemented on the basis of UNHCR's own conceptualisation of what constitute the «more important» human rights, and do not necessarily have a great deal to do with the interests of (groups of) refugees, concerns about 'justice' or the specific local contexts of refugee communities. Refugees are rarely asked which rights they want; these choices are made for them. This is very visible in policies that have recently been formulated on the administration of justice in refugee camps. In a list of legal and quasi-legal texts designed to serve as a point of

⁶⁶ Hilhorst, Dorothea, «Dead Letter or Living Document? Ten Years of the Code of Conduct for Disaster Relief», *Disasters* 29, 4, pp.351-369., 2005, p. 357.

⁶⁷ UNHCR, *Training Module on Human Rights and Refugee Protection*. UNHCR, Geneva, 1995.

⁶⁸ UNHCR, *op. cit.*, 2006a, p. 18.

reference from which (neo-)traditional legal systems⁶⁹ are to be addressed, the principles that are emphasized are overwhelmingly those regarding women's rights, gender equality and non-discrimination (i.e. of minorities).⁷⁰ While these are important, much less attention is paid to other rights —such as the right to religion or to practice one's culture— that may be equally important for refugee communities. In fact, in reference to cultural practices and rulings by these neo-traditional camp-based legal systems, UNHCR emphasises that 'community values and traditions, including religious practices and traditions, may condone, foster or even facilitate gender inequalities and violence against women and girls and may violate their rights'.⁷¹ Where UNHCR perceives culture as clashing with international human rights standards, its Code of Conduct dictates that the staff will be guided by the applicable human rights instrument or standard in deciding a course of action,⁷² and not by culture, tradition or refugees' preferences.

Such selective and de-contextualized application of norms is far from benign to the human rights regime itself. Critics of the Sphere Project have admonished that 'the very fact of extracting only selected rights and principles from existing bodies of law is inappropriate and risks weakening the strength of the original texts'.⁷³ Furthermore, this selection is made without dialogue or participation. Unlike «tactical humanism», proposed by Randolph Kent as a possible norm for humanitarian aid of the future⁷⁴ and described by Appadurai as 'a humanism which is prepared to see universals as asymptotically approached goals, subject to endless negotiation, not based on prior axioms',⁷⁵ the present rights regime does not allow for participation or for the (re-)negotiation of values. This is at odds with the principle of refugee participation, which is central to UNHCR's own definition of its rights-based approach. As presently applied in the refugee protection regime, participation does not allow refu-

gees to part-take in the regime of governance to which they are subjected.

4. Rights or protection?

Providing 'international protection' for refugees continues to be UNHCR's core *raison d'être*. Even with changing understandings of protection, the need to ensure the safety and security of refugees is perhaps its most important component—and arguably, also the reason for the emergence of the principle of *non-refoulement* in the first place.

In its training materials, UNHCR emphasises the importance of human rights as a basis for peace and security.⁷⁶ Maintaining peace, security and order in camps is the main way through which refugees' safety is ensured in their time of camp-based exile. Although States are officially and formally responsible for ensuring security in refugee camps, they often fall short in this regard. To compensate, UNHCR has adopted a wide range of initiatives towards this end.

The Peace Education Programs (PEPs) are a prominent example. A central aim of this initiative is to reduce violence and structural factors that inhibit inequality among refugees. Though the PEPs, UNHCR encourages refugees to take responsibility for maintaining peace in the camps through increased self-governance. Sagy, who conducted research in Buduburam refugee settlement in Ghana, observes that UNHCR encourages refugees 'to convert their identities and behaviours, and to use individualism-based forms of alternative dispute resolution mechanisms as part of an internalization of harmony ideology'.⁷⁷ To bring about cultural change, refugees' behaviours, skills, concepts and values are targeted.

⁶⁹ These are informal legal systems established in refugee camps by refugees themselves, usually based on customary legal norms and traditions, which operate independently from the legal system of the host country.

⁷⁰ UNHCR, *Protection Gaps Framework for Analysis: Enhancing Protection of Refugees*, 2nd Edition. UNHCR, Geneva, 2008c, Refer to Annex.

⁷¹ UNHCR, *op. cit.*, 2008a, p. 28.

⁷² UNHCR, *Code of Conduct and Explanatory Notes*, UNHCR, Geneva, 2004, p. 4.

⁷³ Dufour, Charlotte, Véronique de Geoffroy, *et al.*, *op. cit.*, p. 129.

⁷⁴ Kent, Randolph, «The Future of Humanitarianism, Dimensions of Continuity and the Dynamics of Change», Keynote speech presented at the February 2009 World Conference on Humanitarian Studies, Groningen, 2009.

⁷⁵ Appadurai, Arjun, «Tactical Humanism», *Polis / R.C.S.P / C.S.P.R.*, 9, 2002, Numéro Spécial.

⁷⁶ UNHCR, *Training Module on Human Rights and Refugee Protection*, October 1995. UNHCR, Geneva., 1995.

⁷⁷ Sagy, Tehila, «Treating Peace as Knowledge: UNHCR's Peace Education as a Controlling Process». *Journal of Refugee Studies*, 21, 3, pp. 360-379., 2008, p. 360.

One part of the cultural change that is envisioned by the program involves refugees' adoption of UNHCR's vision of rights, which is promoted through peace education programs, rights workshops and other activities. By instilling refugees with violent backgrounds with human rights norms, UNHCR believes that vulnerability and exploitation can be reduced in the camps. Together with the allocation of increased responsibility for peace to the refugee population itself, this is thought to contribute to the maintenance of order and security. In this way, rights education can be understood as a form of bio-governance, aiming at improving peace and order in the refugee camps.

This aim, however, conflates means and ends. Order as a short-term goal may stand in direct opposition to efforts that challenge structural inequality and challenge existing power relations in the camps.⁷⁸ Moreover, rights awareness is not necessarily conducive for achieving order or an absence of violence. There are several reasons for this.

First, the particular version of rights to which UNHCR adheres, as mentioned earlier, has a strong western orientation. Its individualistic conceptualisation and interpretation of human rights may differ from the norms that refugees consider important, whether for cultural, religious or other reasons. This vision of rights is not necessarily compatible with prevailing community mechanisms for the maintenance of order or social harmony. The consequences of introducing and enforcing international norms that diverge sharply from those of local societies can be grave and counter-intuitive, and may even lead to instability by undermining local solutions. This is evident from a case that was pointed out to me by a staff member of CARE, one of UNHCR's implementing partners in Kenya, while I was conducting field research into access to justice for camp-based refugees in Dadaab refugee camp in March and April 2006.

In early 2006, Firdouza,⁷⁹ a fifteen-year-old Somali girl, was raped in Ifo camp where she lived with her grandmother. Rather than resolving the issue within her community, Firdouza took the perpetrator to a Kenyan court. He was convicted and jailed. As the Kenyan court proceedings were public, the Somali community quickly learned what had happened. Consequently, it was also common knowledge that she—who had been cir-

cumcised according to Somali custom— was now 'open'. Having had sexual relations without being married (consensual or not), her reputation was ruined. After returning to the camp, Firdouza was raped again and again, by so many men that she could no longer identify most of the perpetrators. At the time of my visit, she was two months pregnant. Unable to think of another way to protect her from further rapes, Firdouza's grandmother chained her to the pole that held up the centre of their *tukul* (hut), and would not budge from her side.

Firdouza's case is complicated. Under Kenyan law, rape is a crime. Traditional legal systems such as *Maslaxad*, a system of Somali courts established in the Dadaab camps by refugees themselves which is used to resolve the majority of conflicts within the community according to Somali custom, do not have jurisdiction over criminal cases. The adjudication over this case through *Maslaxad* would therefore have been illegal under Kenyan law, and the extra-judicial resolution of criminal cases (including those involving elements of sexual or gender-based violence) at community-level is actively discouraged by UNHCR. Freedom from (sexual) violence is a human right, and on the surface, taking a rapist to court and securing his conviction would appear to be a desirable outcome. The particularities and cultural context of the community within which Firdouza lived, however, changed an apparently positive solution to one that turned out to be extremely hazardous to her well-being and safety. Had her case been resolved through *Maslaxad*, Firdouza's first rapist would most likely have been forced to marry her and pay bride wealth to her family. This solution would have had a dual function. First, it would have restored her and her family's honour by framing the first rape as part of a marital relationship, thereby neutralising the act. Second, her husband would have taken on responsibility for her protection, preventing the subsequent rapes from taking place. By taking her rapist to a Kenyan court rather than resolving it within the Somali community, Firdouza challenged the patriarchal society in which she lived and went against prevailing social norms within the Somali community in the camp. Her challenge was strongly resisted within the community, putting her in danger. The camp-based agencies subsequently failed to protect her, and it was not until the involvement of the Refugee Consortium of Kenya,

⁷⁸ *Ibid.*

⁷⁹ Her name has been changed.

a Nairobi-based NGO that provides legal aid to refugees, that Firdouza was taken out of the camp and brought to a safe haven in Nairobi.

What emerges from this example is that individualistic rights-based approaches may undermine collective group-based mechanisms for dispute resolution and conflict management. By delegitimizing these mechanisms in the interest of equality and rights, the cultural ordering mechanisms of society are removed. Human rights strategies that serve to erode social safety nets without offering viable alternatives can have harmful and unforeseen effects. Rather than securing the protection of refugees through an emphasis on rights, they may prove detrimental to the safety and welfare of already vulnerable individuals. Ironically, Kenya was the first country where the Peace Education Program was piloted from 1998-2001. The evaluation report, which was published by UNHCR,⁸⁰ was overwhelmingly positive and failed to highlight any potential adverse consequences of peace/rights education.

Rights-focuses may also lead to disorder in other ways. Across the world, many established orders have been challenged and fought in the name of rights. In many countries, refugees have organized to protest actions and policies they felt as unfair or contrary to their rights. Some have involved violence. Over the course of several years, refugees in Woomera detention centre in Australia repeatedly protested Australia's detention policy and threats of deportation. Their actions included hunger strikes (during which they swallowed detergent and sewed together the lips of both adults and children), threats of suicide by hanging, the digging of faux graves, and full-out riots using self-made weapons. These demonstrations, which resulted in injuries among both refugees and law enforcement officials, continued until the centre was finally closed in 2003.⁸¹

Other protests may start peacefully, but meet violent ends. From September until December 2005, a large group of Suda-

nese refugees staged a three-month non-violent sit-in on a public square near UNHCR's office in Cairo to protest, inter alia, the conditions of their reception in Egypt and the procedures as implemented by UNHCR. Their demands included, *inter alia*, that UNHCR, which carries out Refugee Status Determination (the procedure through which it is determined whether an individual is recognized as a refugee) in Egypt, re-examine the cases of those whose claim for refugee status had been rejected on account of what refugees considered unfair and faulty procedures. No action was undertaken by the Egyptian authorities until the last day of the protest, when the police intervened and forcibly dispersed the group. In the course of their removal from the square, at least 29 refugees were killed and hundreds were detained.⁸²

These examples both occurred in situations where States, and not UNHCR, were in charge of overseeing refugees. They show that rights awareness among refugees and mobilization to secure human rights or other entitlements do not necessarily lead to order, and can be de-stabilizing. UNHCR, particularly in situations where governments fail to offer it adequate policing or security capabilities, may be unable to effectively prevent refugee protests from spiralling out of control. Sagy warns that: '[h]uman rights are part of a democratic regime that is not built on harmony as much as on participation in the state and protection of human rights (by the state). This means that in the absence of a state, rights consciousness could translate into... disorder.'⁸³ On the other hand, order is sometimes secured by suppressing human rights,⁸⁴ as is evident from a recent example involving freedom of the press in Kakuma refugee camp, Kenya.

Most western countries are no longer confronted with active press censorship. If and when it does happen, there are typically courts to which complaints can be directed. In fact, a stable and critical press is generally considered to be fundamental to a functioning democracy. Yet Zachary Lomo declares: 'In the refu-

⁸⁰ Obura, Anna, *Peace Education Programme in Dadaab and Kakuma, Kenya: Evaluation Summary*. Geneva, UNHCR, 2002.

⁸¹ «Boys' Lips Were Sewn Together in Refugee Protest», *The Guardian*, 22 January 2002; «Notorious Australian Refugee Camp Shut», *The Guardian*, 27 April 2003.

⁸² Azzam, Fateh, «A Tragedy of Failures and False Expectations: Report of the Events Surrounding the Three-month Sit-in and Forced Removal of

Sudanese Refugees in Cairo, September-December 2005» *Forced Migration and Refugee Studies Program*. American University in Cairo, Cairo, 2006, p. 41.

⁸³ Sagy, Tehila, *op. cit.*

⁸⁴ *Ibid.*

gee camps I visited in Tanzania and Kenya, refugees interviewed strongly felt that their rights and freedoms were not fully upheld by UNHCR. Refugees organizing themselves into associations or free press often face hostility far greater from UNHCR staff than sometimes government organs'.⁸⁵ This may seem incomprehensible and at odds with the UN's human rights mission. Yet when considering the pragmatic realities of refugee camp governance, it becomes much less so.

Wishing to increase refugee participation in decisions and policy that affect them, and bemoaning the lack of human rights monitoring in camps, refugee reporters in Kakuma refugee camp came together to establish the Kakuma News Reflector (KANERE). KANERE is a refugee community-run newspaper which, for lack of funding, is currently only published online. Through this forum, refugees report from the ground on a monthly to bi-monthly basis, on matters ranging from opinion pieces on arts or intermarriage within refugee communities to human rights violations and peace and security in the camps. Their vision is very much in line with an environment of growing rights awareness, and KANERE's mission statement reads: 'In exercising a refugee free press, we speak in terms of human rights and the rule of law in order to create a more open society in refugee camps and to develop a platform for fair public debate on refugee affairs.'⁸⁶

But camps are not democracies or open societies. Despite UNHCR's attempts to encourage a semblance of democracy by holding elections for posts in refugee administrations and emphasizing participation in policy documents, camp governance is really more of a dictatorship. Unlike strong, repressive dictatorships however, strong and reliable security and policing apparatuses are often lacking. This makes camps vulnerable to (political) unrest. In this context, a free press by and for refugees is likely to be perceived as threatening to the maintenance of order and stability in the camp. Such concerns explain UNHCR's hostility to press initiatives established by refugees, including KANERE. From the moment of its founding, KANERE and its report-

ers have been confronted with pressure from UNHCR to cease their activities. To increase its legitimacy, KANERE tried to gain official status under Kenyan law by registering with the Government of Kenya as a community-based organization. Their registration form was signed by the District Officer, Mr. Wanyoni, on 23 January 2009. Only a few days later, he retracted his signature and confiscated the form, saying that 'UNHCR had raised objections'.⁸⁷

UNHCR's discouragement of this initiative, which was a manifestation of refugees' human rights of freedom of expression and press, highlights the tension between order and rights. In situations where rights are perceived to be counter-productive to other policy goals, such as the maintenance of security and order, 'UNHCR's pursuit of the «least bad options» for refugees may leave the agency with little realistic choice but to turn a blind eye to breaches of the very norms it is charged with overseeing'.⁸⁸ In view of the «humanitarian imperative» and importance of security for the provision of assistance and safety of refugees, it is not hard to understand that rights do not always have the upper hand when confronted with competing considerations. From a human rights perspective, however, it is more difficult to justify.

Taken together, UNHCR's reticence in accepting any form of accountability for rights violations that take place under its watch, the hollow version of participation, and continued priority of other humanitarian and governance concern over refugee rights might lead one to wonder whether UNHCR's rights-based approach is not simply a continuation of its previous policies, disguised up in rights-talk. It is easy, as Slim argues, to present philanthropy 'dressed up as rights'.⁸⁹

5. Rights and durable solutions

Where the previous sections of this paper have focused on problems associated with the lack of accountability for refugee

⁸⁵ Lomo, Zachary, «Essay on Refugee Human Rights in Camps», *Kakuma News Reflector*, 1, 2009, pp. 4-5, <http://kakuma.wordpress.com/2009/05/12/essay-on-refugee-human-rights-in-camps/>, accessed 23 June 2009.

⁸⁶ Kakuma News Reflector, <http://kakuma.wordpress.com/about/>, accessed 28 July 2009.

⁸⁷ Pambazuka News (Pan-African Voices for Freedom and Justice), 2 May 2009, «Report on KANERE's Progress and Challenges», <http://>

www.pambazuka.org/en/category/comment/53789, accessed 28 July 2009.

⁸⁸ Hathaway, James C., *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge and New York, 2005, p. 996.

⁸⁹ Slim, Hugo, *op. cit.*, p. 4.

rights and potential conflicts between a rights-focus and UNHCR's protection mandate inside refugee camps, this section considers refugees' futures. Muggah warns that because the consequences of integrating the HRBA into humanitarian work are still largely unknown, there are potential risks associated with its application that may only become apparent in the future.⁹⁰ These «future risks», it is becoming apparent, may involve the increasing elusiveness of long-term solutions for refugees.

UNHCR understands there to be three «durable solutions» for refugee crises: voluntary repatriation to the country of origin, local integration in the country of asylum, and resettlement to a third country. These solutions are an important part of the refugee protection regime because they offer long-lasting solutions and remove refugees from the difficult period of limbo that accompanies temporary asylum. Next to protection, the facilitation of durable solutions is therefore a key component of UNHCR's mandate.

In the camps that become their homes for many years, refugees are subject to international interventions and exposed to transnational legal norms and people from different regions and countries to an extent that most probably would not have been had they not lived in the camp. As a by-product of the cosmopolitan nature of camps and result of assistance interventions (or even as an explicit aim of such interventions, as in the case of the Peace Education Programmes), prolonged encampment can and should be expected to lead to changes to identity, 'traditions' and 'culture'. As Agier writes, 'camps create identity, both ethnic and non-ethnic, even more so than they reproduce, maintain, or reinforce ethnicity.'⁹¹ And this is, perhaps, part of the agenda of humanitarian agencies. Oomen writes that sometimes, 'it seems as though the twin concepts of humanitarianism and human rights have quietly replaced the tainted notion of development'.⁹² Under the guise of humanitarianism, international organizations and donors are able to intervene in areas for which they might not otherwise obtain consent.⁹³ In this way, rights-based action and education in camps may be tied

to donor hopes that refugees will become agents of change in their countries of origin and the surrounding regions, thus spreading hegemonic notions of rights and western values.

For these and other reasons, refugee identities are likely to deviate from those of the inhabitants of surrounding communities and others in their countries and regions of origin. Most citizens of refugees' host countries and countries of origins have never received human rights education. Refugees' adoption of transnational norms on democracy, women's rights or equality during encampment may make countries of origin hesitant to accept their return, especially when these norms deviate sharply from local and national cultures and norm systems. Foreseeably, prolonged exposure to rights-based humanitarianism may therefore impact refugees' access to durable solutions such as voluntary repatriation or local integration.

Muggah predicted as much in his critique of the community-based development approaches in Nepal:

'A more fundamental concern relates to the promulgation of liberal and progressive rights by UNHCR and its implementing partners as 'goods' or 'ends' in and of themselves. While it is impossible for UNHCR to refute the desirability of secondary and tertiary education, access to all facets of curative care, the empowerment and progress of women and the development of democratic decision making, these 'ends' have long-term implications for the repatriation of refugees to their country of origin. In the case of Bhutanese refugees, the more democratically inclined, the less likely the Bhutanese government will allow them a safe and voluntary repatriation.'⁹⁴

Muggah's fear has not been unfounded. By 2009, more than seventeen years after the original exodus, Bhutan had still not permitted a single refugee to return from the Nepalese camps. Although there is no conclusive evidence that refugees' democratic inclination has anything to do with this, it is not an unthinkable scenario.

Obstacles to return do not necessarily stem from governments, but may be posed by conservative societies and communities, or arise in the minds of refugees themselves who

⁹⁰ Muggah, Robert, «Distinguishing Means and Ends: The Counterintuitive Effects of UNHCR's Community Development Approach in Nepal», *Journal of Refugee Studies* 18, 2, 2005, pp. 151-164.

⁹¹ Agier, Michel, «Between War and City: Towards an Urban Anthropology of Refugee Camps», *Ethnography* 3, 3, pp. 317-341., 2002, p. 333.

⁹² Oomen, Barbara, «Donor-Driven Justice and its Discontents: The Case of Rwanda», *Development and Change* 36, 5, pp. 887-910., 2005, p. 892.

⁹³ *Ibid.*

⁹⁴ Muggah, Robert, *op. cit.*, p. 162.

worry about being rejected on account of new cultural differences. Southern Sudan, for example, has readily accepted thousands of returnees from camps in surrounding countries, some of whom had been in exile for almost two decades. The different normative environment in Kakuma refugee camp, however, has allowed girls some freedoms that were previously unknown to them. Girls' education was heavily emphasized, as a result of which many girls were able to go to school. Walking along the camp, you could see girls riding bicycles and wearing trousers. In conversations with refugees about return, the fear that new practices such as these would lead to discrimination in Sudan was commonly expressed.

Where fears do not hamper actual return, the new identities returnees take home with them may result in intimidation and difficulty reintegrating into their former societies. Muggah feared that '[e]ven if repatriation was a possibility, refugees with a strong desire to promote gender equality would find integration into Bhutan's traditionally patriarchal society difficult. The wider Bhutanese population, let alone its government, shares few common values in this regard.'⁹⁵

Resettlement to a third country is the third durable solution available for refugees. Because of the limited number of places, it is also the least accessible. By far the largest number of refugees in the world is resettled to the United States, Canada, Australia and a handful of other (mostly western European) countries. At first, this may seem like a perfect match. Refugees who are acquainted with transnational human rights norms and have developed human rights consciousnesses are subsequently resettled to the western countries from which most of these concepts originate. Nevertheless, the relationship is not always so simple, as is aptly illustrated by the problems experienced by a Congolese family that was resettled to the Netherlands in 2006, with whom I came into contact in the course of my work with a refugee-assisting organization in The Hague in 2007.

The family, consisting of Mr. B, his wife, and their six children, was experiencing considerable problems integrating into Dutch society. The problem, in the view of the agencies and municipality that were cooperating to assist them, was largely a question of mentality—one importantly centred on the mat-

ter of «rights» and 'duties'. For example, Mr. B understood that his children had a right to education. Through the municipality in which the family lived, the Dutch government disbursed funding to enable them to purchase school supplies and take the bus. Mr. B, however, had failed to link this notion of a right to education to his obligation to ensure that his children did, in fact, attend school—nor to ensure that the funding he was given was spent for this purpose. The issue became one of conflict when it was noted that Mr. B had purchased (what were considered non-essential) consumer goods such as a printer, and then failed to send his children to school because he lacked money for the school bus.

They similarly had a right to housing. Again, however, Mr. B's interpretation of this right differed from that of the municipal authorities. Mr. B complained that the house was not to his liking, and he asked the municipality to allocate his family a different house. The municipality responded by informing Mr. B that he had a right to housing, but not a right to choose any house he wanted. He was further informed that if he wished to live in a different house, he would have to arrange this for himself, and that it was his own responsibility to ensure that he would be able to pay for it.

The problem, in this case, arose from Mr. B's failure to comprehend that rights were not limitless. He also failed to comprehend that duties were attached to those rights to which he was entitled, and that in his failure to comply with these duties, he might be sanctioned. At the point of my intervention in this case, Mr. B's conflict with the municipality had escalated to such an extent that he had returned the keys of his house, had packed up his belongings and his family and had taken a train to Brussels to seek the assistance of UNHCR.

As Muggah warns, even decisions taken by programme staff that may appear straightforward, such as the promotion of democratization through participation or of women's issues through sensitisation campaigns, can have practical implications for long-term durable solutions.⁹⁶ Instead of facilitating integration, overly legalistic conceptualisations of rights and those lacking an equal focus on responsibilities and duties⁹⁷ can serve to create unrealistic expectations, thereby encouraging a counter-productive claims

⁹⁵ *Ibid.*, p. 162.

⁹⁶ *Ibid.*, p. 161.

⁹⁷ See Glendon's description of the American rights culture in Glendon, Mary Ann, *op. cit.*

culture that may serve as an impediment to integration even in strongly rights-oriented resettlement countries.

Conclusion

In this article, I have presented a critical reflection of UNHCR's human rights-based approach to refugee protection. By pointing out the repercussions and potential pitfalls of this approach, practitioners and academics are encouraged to reconsider its suitability as a basis for the provision of humanitarian aid and refugee assistance.

The first salient critique is in the HRBA as presently implemented, rights are not followed by remedies. Although UNHCR's actions have far-reaching impacts on the rights and lives of refugees, the growing length of existence of camps and adoption of the human rights-based approach have not been followed by the adoption of equally important accountability mechanisms. Rather than reaffirming faith in human rights, as the UN Charter refugees' inability to seek and find redress for violations of their rights renders human rights claims (and the underlying rights) meaningless in practice, potentially undermining the credibility of the human rights regime as a whole.

The call for accountability is becoming stronger, as refugees engage in protests and report on human rights violations in camps through independent press initiatives. Just as collective mobilization by NGOs and social movements has stimulated state respect for human rights norms,⁹⁸ the mobilization of refugee groups in forms of protest may, in time, raise enough

awareness to lead to new ways of assigning responsibility for the rights of refugees, and of increasing the accountability of humanitarian organizations.

But there are also other concerns arising from the rights-based approach. Ultimately, the vision of rights that is administered in refugee camps is determined by UNHCR and its key donors, and is decidedly western in orientation. Refugees have no say in which rights are applied in the regime that governs their lives in camps, and the values that are prioritized may not rhyme with community concerns or local values. As shown, an uncritical and culturally insensitive emphasis on rights in camps may prove counter-productive to UNHCR's mandate of providing protection to refugees. By delegitimizing local conflict management solutions, insecurity for vulnerable individuals may not be reduced, but increased. Additionally, in some situations rights education can increase the elusiveness of durable solutions.

This begs the question of whether a human rights-based approach is the appropriate framework for humanitarian aid at all. Perhaps there is a better alternative. It may be time to step away from the emphasis on western hegemonic visions of morality and assumptions of universality that currently underpin the aid regime, and move towards a form of «tactical humanism». By reaching agreement on norms and values through dialogue instead of engaging in the top-down transplant of a selective set of international human rights norms, tactical humanism advocates an approach that allows for participation in a way that the current rights-based approach does not. The result may be a set of norms, including human rights norms that work far better on the ground.

⁹⁸ Risse, Thomas and Kathryn Sikkink, «*The Socialization of International Human Rights Norms into Domestic Practices: Introduction*» In Risse, Thomas, Stephen Ropp and Kathryn Sikkink, *The Power of Human Rights:*

International Norms and Domestic Change. Cambridge University Press, Cambridge, 1999, pp. 1-38.

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