University of Wollongong

Research Online

Faculty of Law, Humanities and the Arts -
Papers (Archive)

Faculty of Arts, Social Sciences & Humanities

1-1-2016

The implied human rights obligations of UNHCR

Niamh H. Kinchin

University of Wollongong, nkinchin@uow.edu.au

Follow this and additional works at: <https://ro.uow.edu.au/lhapapers>

Part of the [Arts and Humanities Commons](#), and the [Law Commons](#)

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: research-pubs@uow.edu.au

The implied human rights obligations of UNHCR

Abstract

Amongst the discourse surrounding the potential for non-State actors to hold human rights obligations are complex questions around what those rights entail, where they derive from and in what circumstances they apply. In an attempt to add clarity to that discussion, this article identifies the implied powers of the United Nations High Commissioner for Refugees (UNHCR) as a potential catalyst for the creation of its human rights obligations. As a subsidiary body of the UN, UNHCR is imbued with the capacity to hold human rights obligations through attribution and derivative international legal personality, as well as via its status as an organisation to which the 'general rules of international law' apply. UNHCR has implied powers to administer refugee camps and conduct Refugee Status Determination (RSD). It is argued that when the 'quasi-sovereign' character of camp administration is considered in light of the particular vulnerability of refugees' human rights, their protection cannot be separated from camp administration or from the camp administrator itself, meaning that UNHCR has an obligation to respect, protect and fulfil the human rights of the inhabitants of the camps it administers. It is also argued that the unambiguous obligation for all parties that undertake RSD to respect non-refoulement, which is a human rights principle that is considered the 'cornerstone' of international protection, creates a concurrent obligation to ensure that RSD procedures are 'fair, efficient and effective'. Although the identification of rights obligations of non-State actors inevitably faces challenges from the lack of available remedies for individuals who seek liability for human rights breaches, as long as UNHCR undertakes activities that places it in direct contact with individuals, it is imperative that it retains limited human rights obligations that exist alongside of, and not in substitution for, those of States.

Disciplines

Arts and Humanities | Law

Publication Details

N. Kinchin, 'The implied human rights obligations of UNHCR' (2016) 28 (2) International Journal of Refugee Law

THE IMPLIED HUMAN RIGHTS OBLIGATIONS OF UNHCR

NIAMH KINCHIN*

In an era of expanding global governance and diminishing importance of State sovereignty the ‘human rights conversation’ can no longer be confined to States’ capacity, obligations, and appetite for rights protection. It is hardly controversial to suggest that when non-State actors possess the capacity to affect human rights, the extent to which that actor should be accountable for their protection must be at the forefront of that conversation. Identifying what human rights obligations are applicable, from where those obligations derive and in what circumstances they are relevant however, is more contentious.

The United Nations High Commissioner for Refugees (UNHCR) is an agency that, as discussed in Part I, is capable of holding human rights obligations via its position as a subsidiary organ of the UN through attribution and derivative international legal personality. In addition, the ‘general rules of international law’ outlined in article 38 of the Statute of the International Court of Justice (ICJ) apply to UNHCR to create a legal obligation to respect customary international law, which include human rights. However, which human rights UNHCR is obligated to protect, in what circumstances and the consequences of those obligations is not defined by the sources of its capacity for human rights obligations.

In Part II, it is argued that UNHCR’s implied powers,¹ which are those powers which, though not expressly provided in its constituent instrument, ‘are conferred upon it by *necessary implication* as being *essential* to the performance of its duties’² create obligations for it to respect, protect and fulfil the human rights of refugees in limited circumstances. The administration of refugee camps and the performance of refugee status determination (RSD), both of which are implied powers of UNHCR, contain

¹ Implied powers are: ‘[R]ead into the organization’s statute not in order to modify it or add to the members’ burdens, but in order to give effect to what they agreed by becoming parties to the constitutional treaty.’ K Skubiszewski, ‘Implied Powers of International Organizations’ in Y Dinstein (ed) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff Dordrecht 1989) 856.

² *Reparations for the Injuries Suffered in the Service of the United Nations* (‘*Reparations*’) [1949] ICJ Rep 174, 182 (*emphasis added*).

obligations to protect human rights. When the ‘quasi sovereign’ character of camp administration is considered in light of the particular vulnerability of refugees, it is clear that the protection of their human rights cannot be separated from camp administration or the camp administrator, which is often UNHCR. Further, there is an obligation for all parties who undertake RSD, including UNHCR, to respect *non-refoulement*, which is the obligation to not expel or return a person to a country where their life or freedom would be threatened by persecution or torture and is considered the ‘cornerstone’ of international protection. As a consequence, a concurrent obligation is created to ensure that RSD procedures are fair, efficient and effective.

Finally, in the Conclusion the lack of remedies for human rights violations is considered and potential ways forward suggested.

I. DOES UNHCR HAVE THE CAPACITY TO HOLD HUMAN RIGHTS OBLIGATIONS?

Sometimes the constitutions of International Organizations (IOs) or their subsidiary bodies expressly place a non-State actor within the framework of human rights. For example, the UN General Assembly (UNGA) resolution that established the High Commissioner for Human Rights (UNHCHR) declares that the High Commissioner shall:

Function within the framework of the Charter of the United Nations, the Universal Declaration of Human Rights, other international instruments of human rights and international law...³

‘Functioning within the framework’ of human rights instruments may be interpreted as an obligation to administer that framework or more expansively, to protect human rights because UNHCHR cannot function within a framework it is not bound by. Regardless, it is more common for constitutions of non-State actors to not expressly

* Lecturer, School of Law, Faculty of Law, Humanities and the Arts, University of Wollongong. I wish to acknowledge the helpful comments made by the anonymous reviewers.

³ UNGA Res 141 (1993) GAOR 48th sess, 85th plen mtg Doc/A/Res/48/141 [3(a)].

create obligations relating to human rights. As a consequence, whether, and to what extent, non-State actors retain human rights obligations is yet to find international consensus,⁴ partly because obligations for human rights will differ for each actor. The extent of the human rights obligations of UNHCR, which is not formally bound by human rights instruments, is dependent on an enquiry that raises two questions. First, what are the sources of UNHCR's capacity to hold human rights obligations? Second, if UNHCR is accountable for human rights protection, what is the nature of those rights and to whom are they due?

1.1 Source of UNHCR's Human Rights Obligations I: Position as a Subsidiary Organ of the UN

UNHCR's position as a UN subsidiary organ, which is confirmed by article 1 of its Statute,⁵ means that whilst UNHCR acts in a manner that can be described as somewhat independent, it cannot be separated from the UN as an organization. In particular, UNHCR facilitates the functions of the UNGA by adopting and carrying out its decisions. Further, UNHCR's tasks and functions are dependent on the scope of UNGA's powers,⁶ meaning that it cannot be delegated more powers than UNGA possesses.⁷ As a consequence, UNHCR's acts are not only attributable to the UN; it derives its international legal personality from it. Both attribution and international legal personality create obligations for UNHCR to protect the human rights of refugees in certain circumstances.

⁴ Andrew Clapham describes the 'old objections' to imposing human rights obligations on non-state actors in A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 33–56. See also G Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (OUP 2014) 232–72 on the indeterminacy of the human rights obligations of armed non-state actors.

⁵ UNGA Res 428(V) (1950) GAOR, 5th sess, 325th plen mtg, Doc/A/Res/428(v). UNHCR assumes the function of international protection 'under the auspices of the United Nations' and that it acts 'under the authority of the General Assembly'. Accordingly, UNHCR is a subsidiary organ of the UN because it functions under its 'auspices' and acts under the authority of the UNGA, which itself is an organ of the UN.

⁶ C Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed CUP 2003) 140–41.

⁷ H G Schermers, Blokker, N. M, *International Institutional Law* (5th ed, Martinus Nijhoff 2011) 172–73. The authors also point out that an IO cannot transfer its responsibility to a subsidiary organ.

1.1.1 *The Human Rights Obligations of the UN*

If UNHCR's capacity to hold human rights obligations stem from its position as a UN subsidiary organ, then it follows that the UN must also have the capacity to hold human rights obligations. This proposition rests on four foundations. First, the UN is a subject of international law because it has international legal personality⁸ that is dependent upon its 'purposes and functions as specified or implied in its constituent documents and developed in practice.'⁹ In the *WHO Case* the ICJ stated that 'international organizations are subjects of international law, and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.¹⁰ Article 38 of the ICJ Statute does not define what comprises 'general rules of international law' and whilst its human rights component continues to attract debate,¹¹ it is largely accepted that it incorporates both *jus cogens*, which are peremptory norms from which no derogation is permitted,¹² and laws that derive from custom.¹³ Accordingly, the UN will be bound by human rights obligations that are either customary international law or *jus cogens*.

This argument encounters difficulty from the fact that the *State* is a fundamental component of customary international law, which makes any assertion that obligations are 'incumbent' upon the UN problematic. However, two factors point to an obligation for the UN to respect customary international law. First, the UN, as an organization, is considered a subject of international law whose 'duties depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'.¹⁴ Logically there is no impediment to the extension of its rights

⁸ See G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (CUP 2011) 58-72 for the importance of legal personality to the human rights obligations of the UN.

⁹ *Reparations* [1949] ICJ Rep 174, 180.

¹⁰ *Interpretation of the Agreement of March 1951 between the WHO and Egypt* ('*WHO Case*') [1980] ICJ Rep 73, 89 – 90. Clapham (n 2) 9 states that 'it is plain that international organizations have human rights obligations' by citing *The WHO Case*.

¹¹ A N Pronto, 'Human-Rightism' and the Development of General International Law' (2007) 20 LJIL 753.

¹² The Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.

¹³ See M T Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in M T Kamminga and M Scheinin (eds) *Final Report on the Impact of International Human Rights Law on General International Law* (OUP 2009).

¹⁴ *Reparations* (n 7) 180.

and duties to customary international law where they relate to its functions and purposes as *specified or implied in its constituent documents and developed in practice*. Second, although the UN does not officially contribute to the formation of customary international law¹⁵ its actions can be viewed as evidence of *opinio juris* and State practice. UNGA resolutions and other non-binding statements from IOs may be evidence of *opinio juris* where they receive endorsement from States.¹⁶ *Opinio juris* is the first element of customary international law and according to the ‘human rights method’ of identification, the primary element.¹⁷ In addition, treaties, rules and the decisions of the judicial organs of IOs are generally considered to be capable of contributing to State practice.¹⁸ Contribution to customary international law may not necessarily bind an organization, but it gives weight to the proposition that IOs are bound by customary international law as principles of general international law. As Verdirame argues, it would be ‘extremely disruptive for the international system to tolerate the presence of actors that are endowed with legal personality, and thus with the legal capacity to operate upon the international plane, but are exempt from a body of universally or almost universally accepted rules.’¹⁹

The second foundation for the UN’s capacity to hold human rights obligations are circumstances where it is involved in peacekeeping duties and/or the temporary administration of a territory,²⁰ which are operations that are undertaken as part of the UN Security Council’s (UNSC) responsibilities for international peace and security.²¹

¹⁵ M Janmyr *Protecting Civilians in Refugee Camps* (Martinus Nijhoff 2014) 236; Giacca (n 2) 237.

¹⁶ The ICJ has stated that ‘*opinio juris* may... be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain UNGA resolutions (*Military and Paramilitary Activities in and against Nicaragua* (*‘Nicaragua Case’*) [1986] ICJ Rep 14, 188) and that resolutions ‘can, in certain circumstances, provide evidence important for establishing the existence of... the emergence of an *opinio juris*’ (*Legality of the Threat or Use of Nuclear Weapons* (*Advisory Opinion*) [1996] ICJ Rep 226, 70.

¹⁷ J Wouters and C Ryngaert, ‘Impact on the Process of the Formation of Customary International Law’ in M T Kamminga and M Scheinin (eds) *Final Report on the Impact of International Human Rights Law on General International Law* (OUP 2009) 111-31.

¹⁸ J Klabbers and A Wallendahl, *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 207.

¹⁹ Verdirame (n 6) 71.

²⁰ The International Law Association (ILA) recommends that the human rights and humanitarian law applicable to the activities of IOs include basic human rights obligations in the temporary administration of territory and peace keeping and enforcement activities. International Law Association Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices (*RRP’s*) New Delhi Conference 2002, 12.

²¹ See United Nations Peacekeeping, ‘Mandates and the legal basis for peacekeeping’ <http://www.un.org/en/peacekeeping/operations/pkmandates.shtml> for discussion on the legal mandate of the UN to undertake peacekeeping operations.

It has been argued that when the UN temporarily administers a territory, such as in East Timor from 1999–2002 and in Kosovo from 1999 (albeit in a limited capacity since 2008), it acts as a ‘quasi-sovereign’ because it has complete responsibility for the administration of that territory, including civil and security matters.²² The breakdown of a State’s governance and national security leaves a human rights ‘vacuum’ so that the more the UN emulates a State, the more fully human rights obligations apply to it.²³ Augmenting this argument is the assertion that the UN has the same human rights obligations as the State in which it operates, regardless of whether they arise from customary international law or treaties.²⁴ When the UN takes on quasi-sovereign status, the human rights obligations of the administered State remain in force throughout the administration and ‘may be said to be binding by reasoning of established principles of the law of state succession.’²⁵ For example, although the United Nations Interim Administration Mission in Kosovo (UNMIK) had effective control/administration of Kosovo since 1999, it is arguable that the human rights obligations of the Federal Republic of Yugoslavia remained in force whilst that State still existed because, as the Human Rights Committee (HRC) has stated, ‘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.’²⁶ Similarly, the UN has agreed to ‘respect all local laws and regulations’ as part of its peace-keeping operations,²⁷ meaning that it is arguable that where the local State is a signatory to, and therefore bound by a human rights instrument, UN peace keeping personnel are similarly bound.²⁸

²² F Megret and F Hoffman, ‘The UN as a Human Rights Violator?: Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25 HumRtsQ 316. A Slaughter and J Crisp, ‘A Surrogate State? The role of UNHCR in Protected Refugee Situations’ (Research paper No. 168, UNHCR, January 2009) 8.

²³ Ibid 314, 323.

²⁴ I Bantekas and L Oette, *International Human Rights Law and Practice* (CUP 2013) 678.

²⁵ P M Dupont, ‘Detention of Individuals During Peacekeeping Operations: Lessons Learned from Kosovo’ in R Arnold & G A Knoops (eds), *Practice and Policies of Modern Peace Support Operations Under International Law* (Martinus Nijhoff 2006) 249, 256.

²⁶ UN Human Rights Comm, *General Comment No. 26: Continuity of obligations* 4, U.N. Doc. CCPR/CI211Rev.1/Add.81Rev.1 (8 Dec 1997).

²⁷ The Secretary General, Draft Model Status of Forces Agreement/or Peace-keeping Operations, 37, UN Doc. A/45/594 (9 Oct 1990) [art 6].

²⁸ T Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Appropriated for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’ (2010) 51 HarvIntLLJ 113, 138.

The third human rights foundation is the obligations that arise from the UN Charter. In the *Administrative Tribunal Case*²⁹ the ICJ found that the UN had an implied power to establish an administrative tribunal under article 7(2) of its Charter. The Court claimed that power to establish the tribunal was essential to ‘give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity’ and that ‘capacity to do this arises by necessary intendment out of the Charter’.³⁰ By linking the need for a tribunal to the Charter, the Court created an obligation for the UN to create the tribunal, not just an authority to do so. The preamble of the UN Charter states that one of its purposes is to ‘reaffirm faith in fundamental human rights’. Article 1(3) of the Charter states that the purpose of the UN is to ‘promote and encourage respect for human rights’ and article 55(c) states that the UN shall promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’ If the creation of an administrative tribunal can be conceptualized as an obligation that is based upon the purpose of the Charter, it could be argued that an obligation to protect human rights arises as a necessary intendment out of the Charter because a failure to protect human rights is incongruous with an objective to promote them.³¹ It is acknowledged that whilst the UN has authority to take action to create a tribunal as a subsidiary organ under article 7(2), no similar authority exists to take direct action regarding human rights protection. However, it is difficult to conceive how a body that is tasked to promote human rights, and declares that its own personnel is to act in accordance with the Universal Declaration of Human Rights (UDHR),³² has no need to protect those human rights itself.³³

The fourth foundation of the UN’s human rights obligations is a simple one. The UN is an international organization that is made up of member states, which means that it

²⁹ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion) (‘Administrative Tribunal Case’)* [1954] ICJ Rep, 47.

³⁰ *Administrative Tribunal Case* *ibid*, 47, 57. Cf ‘*The WHO Case*’ (n 8) where the court expressed concern that finding that agencies of the UN had wide implied powers would break down the division of powers between UN and its agencies, undermining the court’s concept of the UN as a system.

³¹ Megret and Hoffman (n 20) 317 suggest that the UN ‘is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order, without any added judicial finesse’.

³² Clapham (n 2) 127 points out that the UN’s Code of Conduct for Peacekeepers and the Handbook for Military Observers and Civilian Police state that personnel are to act in accordance with the UDHR.

³³ See J Paust, ‘The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity’ (2010) 51 *HarvIntLJ* 301.

is bound ‘transitively’ by human rights as a result and to the extent that its members are bound.³⁴ States do not relinquish their human rights obligations when an IO takes action on their behalf.³⁵ In *M & Co v Federal Republic of Germany* the European Commission of Human Rights found that the transfer of State powers to an IO is valid only when the protection of fundamental human rights by that IO is equivalent to the standards that States would ordinarily be bound under the European Convention on Human Rights (ECHR).³⁶ This ‘doctrine of equivalent protection’ may, in time, have relevance for the UN.

1.1.2 The Subsidiary Human Rights Obligations of UNHCR

UNHCR’s human rights obligations do not exist separately from the UN.³⁷ This proposition finds support in the jurisprudence of the European Court of Human Rights (ECtHR), which has declared that internationally wrongful acts that are committed by one of the UN’s subsidiary organs are attributable to the UN.³⁸ As discussed above, when the UN or one of its subsidiary organs temporarily administers a territory it does so as a *de jure* administrator, which means it is given a formal mandate in the form of a UNSC resolution and/or as part of a treaty, to administer the territory.³⁹ In *Behrami* the ECtHR found that the actions⁴⁰ of the NATO Kosovo Force (KFOR) and UNMIK were attributable to NATO and the UN as their subsidiary organs because the UN and NATO had ‘effective control’ of the territory.⁴¹ The significance of the *Behrami* decision for the human rights obligations of UNHCR is not in relation to issues of territorial administration however, it is in the court’s finding that ‘UNMIK was a

³⁴ Megret and Hoffman (n 20) 318. See also Bantekas and Oette (n 21).

³⁵ The International Law Commissions (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No 10 (A/56/10), chp.IV.E.1, art 5.

³⁶ *M & Co v Federal Republic of Germany* App No 13258/87 (Commission Decision, 9 Feb 1990). See also *Bosphorous Hava Yollari Turizm v Ireland* App no 45036/98 (ECtHR 30 June 2005) 155. European Convention on Human Rights formally known as Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 213 UNTS 222.

³⁷ The nature of UNHCR’s human rights obligations are not identical to that of the UN. Instead, UNHCR’s human rights obligations are [dictated by its objectives and functions](#).

³⁸ *Behrami and Behrami v France and Seramati v France, Germany and Norway* App No 71412/01 and App No, 78166/01 (ECtHR, 2 May 2007) (*Behrami*).

³⁹ Verdirame (n 6) 230.

⁴⁰ A failure to detonate mines and false imprisonment.

⁴¹ *Behrami* (n 34) 128-143. ‘Effective control’ is the exercise of public functions (legislative, executive or judicial) in a way that amounts to territorial control. *ibid* 233-35.

subsidiary organ of the UN institutionally directly and fully answerable to the UNSC’ and ‘that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, “attributable” to the UN in the same sense.’⁴² In other words, if the conduct of a subsidiary organ, such as UNHCR, can be attributable to the UN, and the UN is bound by an international obligation, then that body is capable of violating that international obligation *qua* its position as a subsidiary organ. The UN Legal Counsel has supported this interpretation of the court’s finding by stating:

As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.⁴³

Whilst the *Behrami* decision relied upon the Draft Articles on the Responsibility of International Organizations (DARIO)⁴⁴ (since updated to the Articles on the Responsibility of International Organizations (ARIO)) to inform its usage of the term ‘attribution’, ARIO does not assist in defining what constitutes an international obligation. ARIO does not create international obligations; it refers to obligations that are attributable to the IO, which are created by other instruments and rules of international law.⁴⁵ Whilst ‘when and which’ human rights obligations bind the UN as international obligations remains open, where UN’s international obligations can be identified as having a human rights character, UNHCR inherits those same obligations through attribution.

The second way that UNHCR ‘inherits’ human rights obligations via its status as a UN subsidiary organ is through international legal personality. UNHCR derives international legal personality, which is compatible with its objectives and functions,

⁴² *ibid* 142-43.

⁴³ Unpublished letter of 3 February 2004 by the UN Legal Counsel to the Director of the Codification Division, quoted in *ILC Report* (2004) UN Doc A/59/10, 112. Verdirame (n 6) 199-200.

⁴⁴ The Draft Articles on the Responsibility of International Organizations (DARIO), Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10 UN Doc A/66/10 (3 June 2011), create responsibility for an IO committing a ‘wrongful act’, which is defined as an act or omission that is attributable to an IO under international law and constitutes a breach of an international obligation for that organizations (art 4).

⁴⁵ See Articles on the Responsibility of International Organizations (ARIO) Sixtysixth sess, agenda item 81A/RES/66/100, art 4.

from the UN.⁴⁶ Although the ICJ was referring to the UN when it declared that ‘the rights and duties of ... the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice’,⁴⁷ the court established that non-State actors may possess some international legal personality but only to the extent of the ‘function they are to fulfil in that legal order’,⁴⁸ or to the extent that States as the subjects of international law confer on them. The purpose and functions that can be implied from constituent documents and subsequent practice will depend on the particular organization, but they must be conferred by reasonable implication ‘as capacities required to enable the organizations to discharge their functions effectively.’⁴⁹ The ICJ has confirmed this approach in subsequent cases.⁵⁰

Although it has been argued that UNHCR has international legal personality simply by virtue of being an IO,⁵¹ even a more narrow approach (i.e. that UNHCR has only that degree of international legal personality that is conferred on it by the UN⁵²) establishes its capacity to hold human rights obligations. As human rights obligations are a component of the UN’s international legal personality, those obligations will flow from the UN to UNHCR, albeit in a way that is dictated by the objectives and functions of UNHCR, which, as discussed in Part II, relate to the protection of refugees.

1.2 Source of UNHCR’s Human Rights Obligations II: General Rules of International Law

⁴⁶ Verdirame (n 6) 62.

⁴⁷ *Reparations* (n 7) 180.

⁴⁸ *ibid.*

⁴⁹ Amerasinghe (n 4) 102.

⁵⁰ See eg., *Certain Expenses of the United Nations (Article 17, Article 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 167; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Mazilu Case)* (Advisory Opinion) [1989] ICJ Rep 177, 195–97.

⁵¹ Janmyr (n 13) 229–30.

⁵² G Gilbert, ‘Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order’ (1998) 10 *IJRL* 350, 358. An alternative view is that there is no implication that UNHCR’s legal personality must necessarily be *narrower* than that of the UN. F Green, ‘Fragmentation in Two Dimensions: The ICJ’s Flawed Approach to Non-State Actors and International Legal Personality’ (2008) *Melbourne Journal of International Law* 47, 72.

If 'international organizations are ... bound by any obligations incumbent upon them under *general rules of international law*...' ⁵³ UNHCR will be bound by virtue of being an IO, rather than through its status as a subsidiary organ of the UN.

The definition of an IO is evolving beyond its traditional understanding as an organization formed by a multi-lateral treaty. ⁵⁴ The International Law Commission (ILC) has described IOs as bodies that are established by treaty or other instruments that are governed by international law, and which possess their own legal personality. ⁵⁵ This definition includes organizations that have been created by 'instruments, such as resolutions adopted by the UNGA or by a conference of States.' ⁵⁶ Amerasinghe defines an IO as a body that possesses five identifying characteristics; that it should be established by some kind of international agreement by States, that it possess a constitution, that it will possess organs that are separate from its members, that it is established under international law and finally, that it will have an exclusive or predominant membership of State or governments. ⁵⁷ Amerasinghe further argues that international personality, along with treaty-making capacity, are not intrinsic to the definition of an IO. ⁵⁸

Although not created by treaty, ⁵⁹ UNHCR was established according to international law by a UNGA resolution. UNHCR's constitution is its mandate, which includes both its Statute and UNGA resolutions. Although UNHCR does not have members that are separate from the UN's members, those members are exclusively States. Regardless of whether legal personality is required by an IO, UNHCR derives legal personality from the UN that is compatible with its objectives and functions. ⁶⁰ As discussed above, general international law contains customary international law and the rules of customary international law that create human rights obligations for UNHCR are the subject of Part II.

⁵³ The *WHO Case* (n 8) 89–90 (*emphasis added*).

⁵⁴ J Klabbers, 'Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation' (2013) 14 *Melb JInt'lL* 149–170.

⁵⁵ ILC 'Report of the International Law Commission, Fifty-fifth Session' (5 May–6 July and 7 July–8 August 2003) GAOR 58th Session Supp 10, 38.

⁵⁶ *ibid* 38–39.

⁵⁷ Amerasinghe (n 4) 10.

⁵⁸ *ibid* 10–11.

⁵⁹ N D White states that IOs are usually, *but not exclusively*, created by a multilateral treaty. Nigel D White, *The Law of International Organizations* (2nd ed, MUP 2005) 1.

⁶⁰ According to Klabbers, the identification of an IO by reference to traditional formal criteria is unhelpful because law is largely unable to make such distinctions. Klabbers (n 50) 152.

II UNHCR'S IMPLIED POWERS AS A SOURCE OF ITS HUMAN RIGHTS OBLIGATIONS

As an IO understood in the broad sense outlined above, UNHCR has the capacity for implied powers.⁶¹ As an organization with the capacity for human rights obligations, it is argued that two of these powers, the administration of refugee camps and RSD, carry obligations to adhere to certain human rights standards.

2.1 The Administration of Refugee Camps and RSD as Implied Powers of UNHCR

Implied powers of an institution are additional (but not 'new'⁶²) powers to those that are expressed in a body's constituent instrument. In *Reparations*, the ICJ defined implied powers in the following way:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by *necessary implication* as being *essential* to the performance of its duties.⁶³

Keeping to one side controversies around the breadth of this definition and whether it should be confined to those powers that are necessarily implied by the powers expressly granted in an IO's constitution,⁶⁴ if UNHCR has powers that are necessarily implied as being essential to the performance of its duties, then it is essential that it have the ability to define and adopt measures to 'achieve the object and purpose of supervising the international framework governing refugee protection'.⁶⁵ Considering that 'sovereign States have the primary responsibility for respecting and ensuring the

⁶¹ J Klabbers, *An Introduction to International Institutional Law* (CUP 2002) 152 argues that implied powers apply to most if not all international organizations.

⁶² Skubiszewski (n 1) 856.

⁶³ *Reparations* (n 7) 182 (*emphasis added*).

⁶⁴ Judge Hackworth (dissenting opinion) *Reparations* (n 7) 198. It is noted the definition of implied powers in the majority decision of *Reparations* is widely accepted.

⁶⁵ V Türk, 'UNHCR's Supervisory Responsibility' (2001) 14(1) *Revue Quebecoise de Droit International* 135, 146.

fundamental rights of everyone within their territory and subject to their jurisdiction’,⁶⁶ the powers of UNHCR that can be necessarily implied are those that are essential to either the facilitation by UNHCR of protection by States, or the direct protection of refugees where States will not or cannot, provide protection. Examples of the latter, which are the focus of this article, are the powers to administer refugee camps and carry out RSD.

UNHCR’s Statute enables UNHCR to undertake ‘additional activities’, which are to be determined by the UNGA.⁶⁷ Accordingly, UNHCR’s statute expressly allows for implied powers, the only stipulation being that their nature is to be ‘determined’ by the UNGA. In practice it has primarily been UNHCR that has identified the additional activities that it needs to fulfil its mandate responsibility for international protection. UNHCR’s 1994 Note on International Protection (‘Protection Note’) states that these functions include ‘securing admission, asylum, and respect for basic human rights, including the principle of *non-refoulement*’, durable solutions and the promotion of legislation to ‘ensure that refugees are identified and accorded an appropriate status and standard of treatment in their countries of asylum’, amongst other things.⁶⁸ UNHCR’s 2000 Protection Note separates its international protection functions into four ‘principal protection challenges’, which are (a) ensuring the availability and quality of asylum; (b) revitalizing the refugee protection system; (c) promoting durable solutions from a protection perspective and engaging in in-country protection activities; and (d) fostering partnerships in support of the international refugee protection system. The note outlines operational activities to strengthen asylum, which includes ‘receiving asylum-seekers and refugees’, ‘intervening with authorities’, ‘ensuring physical safety’, ‘protecting women, children and the elderly’, ‘promoting national legislation and asylum procedures’, ‘participating in national refugee status determination procedures’, ‘undertaking determination of refugee status’ (ie. RSD), ‘providing advice and developing jurisprudence’ and ‘staff development’.⁶⁹ More recently, UNHCR defined some its ‘standard functions’ as

⁶⁶ UNHCR, ‘Note on International Protection’ UN Doc A/AC.96/830 (7 September 1994) [13]. A State’s human rights obligations within jurisdiction arise via the obligation to perform human rights treaties in good faith (*pacta sunt servanda*) Vienna Convention (n 10) art 26.

⁶⁷ UNHCR Statute (n 3) art 9.

⁶⁸ 1994 Note (n 62) [12].

⁶⁹ ‘Report on the eighteenth meeting of the Standing Committee’ UN Doc A/AC.96/930 (7 July 2000) [10-30].

including ‘relief distribution, emergency preparedness, special humanitarian activities, broader development work, as well as registration, determination of status and issuance of documentation for persons falling under the mandate.’⁷⁰

Although, unlike RSD, the administration of refugee camps is not identified as a separate protection activity, activities associated with camp administration are referred to in relation to other operational activities. For example, the 2000 Protection Note refers to the importance of ensuring physical safety of refugees within camps⁷¹ and taking measures to protect women, children and the elderly within camps, giving the example of establishing women’s centres in a number of camps.⁷² Further, the UNGA endorses UNHCR’s interpretation of its operational duties when it expressly refers to those activities as belonging to UNHCR.⁷³

The administration of refugee camps and RSD are implied powers of UNHCR because they are activities that are essential to its international protection function *when States cannot or will not comply with their protection obligations* under international refugee law. Where a State refuses to take on formal protection responsibilities, or cannot do so due to poverty or internal conflict, there is a gap between the rights conferred by the Convention Relating to the Status of Refugees (‘Refugee Convention’)⁷⁴ and the duty to protect those rights, which causes a ‘protection vacuum’.⁷⁵ In certain situations UNHCR must possess the ability to provide that protection itself, the authority to do so being necessarily implied from its international protection function.

Two issues regarding this argument are acknowledged. First, UNHCR’s power to undertake these activities is contingent on permission being granted by States to operate within their territory. Accordingly, whilst UNHCR may have an implied

⁷⁰ UNHCR, ‘Note on the Mandate of the High Commissioner for Refugees and his Office’ October 2013, 5.

⁷¹ *ibid* 5.

⁷² *ibid* 6.

⁷³ Eg., In a 2011 resolution the UNGA encouraged ‘the High Commissioner to continue efforts, in consultation with States and other relevant actors, to ensure the civilian and humanitarian character of camps.’ UNGA Res 64/129 (28 January 2010) GAOR, 41st sess, 65th mtg, Agenda item 41, UN Doc A/RES/64/129 [17].

⁷⁴ 189 UNTS 150, art 1A(2). Supported by the Protocol Relating to the Status of Refugees, 606 UNTS 267 art II.

⁷⁵ J C Field, ‘Bridging the Gap between Refugee Rights and Reality: a Proposal for Developing International Duties in the Refugee Context’ 22 (2010) IJRL 512, 513.

power to undertake these activities, it may not be able to do so if it has not been issued an invitation to operate within the State's territory. Second, an implied power to undertake protection activities is a power and not an obligation. Whilst Verdirame argues that obligations can equally be implied into a constituent instrument (advocating for the alternative 'implied terms')⁷⁶ it is important that UNHCR's ability to undertake protection activities is perceived as a power to ensure that it is not burdened with new protection obligations that it was never intended to have. This, however, does not mean that UNHCR's implied powers cannot contain obligations to exercise the power in accordance with broadly-accepted aspirations, such as human rights protection. Once UNHCR has committed to undertaking these activities, they become part of its relationship with refugees and are the catalyst for the identification of its human rights obligations.

2.2 Protecting Human Rights in Refugee Camps

An obligation for UNHCR to adhere to human rights standards is inherent to its administration of refugee camps.

Although protection of refugees remains the responsibility of States, in some circumstances such as where there has been a mass influx of refugees and a subsequent protracted refugee situation, States have often taken on a limited role in camp administration. The reasons for this are varied but include a reluctance to expend national resources on a growing number of displaced people, the changing nature of conflict from external to internal aggression, a growing sense by developing countries that they are being burdened by a disproportionate number of refugees⁷⁷ and a general shift in an international mindset, which dates from the 1980s, from accommodation of refugees to control of their intake.⁷⁸ More often, it is a matter of lack of resources. The large Dadaab camps in Kenya (Dagahaley, Hagadera, Ifo, Ifo 2 and Kambioos), which were established following the breakdown of governance in

⁷⁶ Verdirame (n 6) 62.

⁷⁷ Slaughter and Crisp (n 22) 2-3.

⁷⁸ C Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution' (2005) 17(1) *IJRL* 67, 82-85.

Somalia in 1991, are an example of camps where the State, Kenya, was both unable and unwilling to undertake complete administration of the camps and according to Wilde, only allowed them to be established if UNHCR accepted full practical responsibility.⁷⁹

In conjunction with its NGO implementing partners,⁸⁰ UNHCR is responsible for the *de facto* administration of refugee camps. *De facto* administration means that the administering authority does not have a formal mandate in the form of a UNSC resolution and/or as part of a treaty to administer the territory.⁸¹ This does not mean, however, that UNHCR is operating within the territory of a State without its permission. Camp administration is formalised by an agreement between UNHCR and the host State,⁸² which outlines the broad expectations of both parties, including the role of UNHCR in assisting governments in the protection of refugees and the State in providing the facilities and resources for UNHCR to carry out its work, as well as to ensure immunities and protection for UNHCR staff.⁸³

Refugees' human rights are common with and additional to those held by the general population.⁸⁴ As the primary instrument for international protection, article 7 of the Refugee Convention provides that, except where the Refugee Convention contains more favourable provisions, all refugees should be accorded the same treatment that normally applies to 'aliens'. Although States have traditionally been considered to bestow human rights on individuals through the ratification of a treaty, a State's

⁷⁹ R Wilde, 'Quis Custodiet Ipsos Custodes? Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law' (1998) 1 YaleHumRts&DevLJ 107, 110.

⁸⁰ An implementing partner is an 'operational partner that signs an implementing agreement and receives funding from UNHCR'. UNHCR, 'Partnership: An Operational Management Handbook for UNHCR's Partners' (February 2003) s1.6.

⁸¹ Verdirame (n 6) 230.

⁸² Memorandum of Understandings (MOU) or UNHCR's Model Cooperation Agreement with Governments ('Model Agreement').

⁸³ See eg., Memorandum of Understanding between the Government of the Kingdom of Saudi Arabia and the United Nations High Commissioner for Refugees, 22 June 1993.

⁸⁴ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, International Convention on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See U.N. Human Rights Comm., *General Comment No. 31* [80]; *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add. 13 (26 May 2004), which states 'the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.'

commitment to *pacta sunt servanda*⁸⁵ is enough to allow individuals to benefit from those rights assigned to them,⁸⁶ meaning that refugees, ‘along with aliens, are entitled to claim the protection and benefit of any human rights treaties that the State, on whose territory they are, has adopted; in addition to any protections guaranteed under customary international law.’⁸⁷

Some rights protected by human rights treaties are particular to refugees, including the right to seek and to enjoy in other countries asylum from persecution.⁸⁸ The Refugee Convention confers a number of rights on refugees, which include the right not to be *refouled*,⁸⁹ the right not to be discriminated against in the application of the Refugee Convention,⁹⁰ the right to be treated no less favourably than other aliens regarding housing,⁹¹ property rights,⁹² freedom of internal movement,⁹³ expedition of naturalization⁹⁴ and religious freedom.⁹⁵ Although the Refugee Convention is not as comprehensive in regard to civil and socio-economic rights as the International Covenant on Civil and Political Rights (ICCPR) and International Convention on Economic, Social and Cultural Rights (ICESCR),⁹⁶ James Hathaway argues the inability of States to make reservations to such rights as discrimination, religious freedom and *refoulement* ‘entrenches a universal minimum guarantee of basic liberties for refugees’.⁹⁷ Where refugees reside in States that are not signatories to the Refugee Convention the protection of refugees’ rights is provided by international

⁸⁵ Vienna Convention (n 10) art 26.

⁸⁶ C Lopes and N Quenivet, ‘Individuals as Subjects of International Humanitarian Law and Human Rights Law’ in Roberta Arnold, Noelle Quenivet (eds) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, Leiden 2008) 199, 203. The rights of stateless persons are either provided for by the Convention (where the stateless person is also a refugee) or the Convention relating to the Status of Stateless Persons adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954 Entry into force: 6 June 1960, art 39.

⁸⁷ S Leckie and El Simperingham, *Juridical Status* in Andreas Zimmerman (ed) (OUP 2011) 882, 888.

⁸⁸ Universal Declaration of Human Rights UNGA Res 217A (III) (10 December 1948). GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 art 14.

⁸⁹ Refugee Convention (n 70) art 33.

⁹⁰ *ibid* art 3.

⁹¹ *ibid* art 21.

⁹² *ibid* arts 13, 14.

⁹³ *ibid* art 26.

⁹⁴ *ibid* art 34.

⁹⁵ *ibid* art 4.

⁹⁶ 993 UNTS 3.

⁹⁷ J C Hathaway, *The Rights of Refugees under International Law* (CUP 2005), 94–95.

protection by UNHCR and the binding character of *non-refoulement* as a customary rule of international law.⁹⁸

Although human rights instruments and customary international law are applicable to refugees within and outside of refugee camps,⁹⁹ the refugee camp model has received criticism for enabling the violation of human rights. Verdirame argues that refugee camps are inherently incompatible with international human rights law and are therefore *ultra vires*¹⁰⁰ because their existence infringes the right to ‘freedom of movement’, which is protected by article 26 of the Refugee Convention and article 12 of the ICCPR. Marjoleine Ziek points to the protracted nature of refugee situations, and the related phenomenon of ‘warehousing’ of refugees as creating a situation where ‘many refugees spend one, two, three or more decades in camps without such basic human rights as freedom of movement, protection from violence, and the right to support their families.’¹⁰¹ Verdirame draws upon field research from the Dadaab camps to present examples of breaches of other human rights such as freedom of expression and the right to a fair trial,¹⁰² forced labour¹⁰³ and the right to an adequate standard of living, which is a violation of article 11 of the ICESR.¹⁰⁴ If UNHCR has a capacity to hold human rights obligations and an implied power to administer refugee camps, is UNHCR accountable for the protection of the human rights of the inhabitants of those camps?

Ralph Wilde argues that UNHCR’s human rights obligations within refugee camps are based upon the agreement between UNHCR and the host country to conduct humanitarian and asylum-related activities within the latter’s jurisdiction. Wilde claims that a Model Agreement has the effect of the host country transferring its obligations to protect human rights by delegating its international legal personality to

⁹⁸ UNHCR, ‘Providing for Protection Assisting States with the assumption of responsibility for refugee status determination: A preliminary review’ PDES/2014/01 March 2014, [47].

⁹⁹ See The Secretary General, ‘Secretary-General’s Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse’ UN Doc. ST/ SGB/2003/13 (Oct 9, 2003). See also UNHCR, ‘Minimum Standards and Essential Needs in a Protracted Refugee Situation: A Review of the UNHCR Program in Kakuma, Kenya’ 39-40, UN Doc EPAU/2000/05 (Nov 2000).

¹⁰⁰ Verdirame (n 6) 232.

¹⁰¹ M Ziek, ‘UNHCR’s Parallel Universe: Marking the Contours of a Problem’ (Speech Delivered at the Amsterdam Law School, University of Amsterdam, 23 April 2010) 2.

¹⁰² Verdirame (n 6) 286.

¹⁰³ *ibid* 288.

¹⁰⁴ *ibid* 292.

UNHCR to the extent that it is relevant to UNHCR's purposes and functions.¹⁰⁵ According to Wilde, 'the degree to which international law can apply to UNHCR's governance is inextricably linked to international law's influence on the sovereign entity.'¹⁰⁶ If the State were to conduct the kind of activities that UNHCR undertakes within its jurisdiction, such as administering refugee camps, it would be bound by its human rights obligations in respect of those activities. As UNHCR is undertaking these activities on its behalf, the State confers UNHCR with the relevant international legal personality - being its own human rights obligations.

There are two difficulties with Wilde's argument. First, it relies on the proposition that the State confers its international legal personality to UNHCR through a Model Agreement. Whilst *Reparations* found that member States clothed the UN with the competence required to enable the functions entrusted to it to be effectively discharged,¹⁰⁷ that 'clothing of competence' was a result of a binding treaty in international law (i.e. the UN Charter). It is difficult to see how a Model Agreement might have the same effect. UNHCR has not been entrusted with functions by the host State but has merely been given permission to exercise its functions within its jurisdiction. In addition, there is no clear ICJ authority on the direct transferal of international legal personality from States to the subsidiary organs of the UN. Although this does not mean that such an argument cannot succeed, without that authority it is a more convincing proposition to argue, as earlier in this article, that UNHCR is conferred its international legal personality from the UN as its parent organization.

Second, a State cannot contract out its obligations. Only a State can be held liable for the violation of human rights instruments. Although article 2(1) of the ICCPR states that State parties to the Convention undertake to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...' the Human Rights Commission, confirming Article 5 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts,¹⁰⁸ has

¹⁰⁵ Wilde (n 75) 119.

¹⁰⁶ *ibid.*

¹⁰⁷ *Reparations* (n 7) 180.

¹⁰⁸ Article 5, Draft Articles on Responsibility of States for Internationally Wrongful Acts states;
Conduct of persons or entities exercising elements of governmental authority
 The conduct of a person or entity which is not an organ of the State under article 4 but which is

stated that the article does not imply that a State cannot be held accountable where one of its ‘agents’ commits a violation of its obligations under human rights instruments inside the territory of another State.¹⁰⁹ A State cannot avoid liability for human rights obligations because an agent (ie. an IO) is ‘sub-contracted’ to act for it in an extraterritorial capacity. Indeed, the State could be held responsible if the IO were not to act in compliance with its functions and implied human rights obligations.¹¹⁰

It is well supported by the ICJ that when a State exerts ‘effective control’ over another territory, human rights obligations apply. In *Namibia*, the ICJ held that ‘[t]he fact that South Africa no longer has any title to administer the territory does not release it from its obligations and responsibilities under international law ...’¹¹¹ Further, it is arguable that the human rights obligations of an administered State remain in force whilst that State exists because, as the HRC has stated, ‘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.’¹¹² Although these issues relate to *de jure* rather than *de facto* administration, if both an administering and administered State can retain human rights obligations in certain circumstances, it is difficult to conceive how a State that is subject to a limited *de facto* administration in the form of refugee camp administration can be said to transfer its human rights obligations to that authority via its international legal personality.

UNHCR's accountability for human rights protections in the context of refugee camps should not rely on the host State's human rights obligations except to the point they are *diminished*, practically if not theoretically. In such circumstances, UNHCR's human rights obligations act to fill in the protection vacuum created. Refugee populations are the responsibility of their host nation, but where refugee camps exist

empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

¹⁰⁹ *Burgos/Delia Saldias de Lopez v. Uruguay*, No. 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984) para. 12.3.

¹¹⁰ Draft Articles (n 32) art 5. Where UNHCR subcontracts to NGOs it is questionable whether UNHCR also contracts its human rights obligations in much the same way as suggested by Wilde. 52.

¹¹² UN Human Rights Comm., General Comment No. 26: Continuity of obligations 4, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (8 Dec 1997).

it is UNHCR, which, with the assistance of partner organizations and States, commonly assumes their administration. When a refugee camp is primarily administered by an organization other than the host State, the nature of the activities undertaken puts that organization into the position of ‘micro-sovereignty’¹¹³ or a ‘surrogate state’.¹¹⁴ Whilst some activities may be provided by the host State, such as security/law and order services provided by the Kenyan government for example, and whilst UNHCR may rely on those States to provide those services,¹¹⁵ they do not detract from the fact that UNHCR is the primary administrator.

The camp administration activities undertaken by UNHCR in conjunction with its NGO implementing partners resemble those provided by States. As camp administrator, UNHCR undertakes functions that include registering refugees and providing them with personal documentation, ‘ensuring that they have access to shelter, food, water, health care and education’, and ‘establishing policing and justice mechanisms’,¹¹⁶ including the provision of security personnel and services.¹¹⁷ In addition, UNHCR is responsible for long-term ‘care and maintenance’ programmes within camps. ‘Care and maintenance’ is defined as ‘assistance to refugees in a relatively stable situation, where survival is no longer threatened, but where future of the refugee group has not yet been determined in terms of durable solutions.’¹¹⁸ Slaughter and Crisp describe the care and maintenance model as creating:

a widespread perception that the organization [UNHCR] 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).¹¹⁹

¹¹³ Megret and Hoffman (n 20) 338.

¹¹⁴ Slaughter and Crisp (n 73) 8.

¹¹⁵ Providing for Protection (n 94) 21.

¹¹⁶ *ibid* 2.

¹¹⁷ In 1995 UNHCR and the government of Zaire signed an Aide Memoire in which UNHCR agreed to remunerate Zairian security personnel, provide uniforms and other resources and to provide a liaison group of security advisers for Zairian refugee camps. *Third Report of the Secretary-General on Security in the Rwandese Refugee Camps* S/1995/304 (14 April 1995) [3].

¹¹⁸ UNHCR, ‘Handbook for Planning and Implementing Development Assistance for Refugees (DAR) Programmes’ (2005) Part I, 2.

¹¹⁹ Slaughter and Crisp (n 73) 8.

It is argued that as an organization with direct engagement with individuals and groups who are protected by human rights,¹²⁰ UNHCR must respect, protect and fulfil the human rights of the inhabitants of the camps it administers.¹²¹ UNHCR identifies the importance of a 'rights based approach' in operational camps and settlements¹²² and acknowledges that it 'has a global mandate to ensure that the human rights of its beneficiaries are upheld in accordance with the international obligations of States hosting them.'¹²³ Although an IO's obligations to 'protect and fulfil' human rights may be contested,¹²⁴ it is argued that the particular vulnerability of refugees in camps, the role of UNHCR in the provision of fundamental goods, services and overall governance, and the diminished role of host States, means that UNHCR has a duty to protect and fulfil the human rights of refugees within the camps that it administers to the 'extent that their functions allow them to fulfil such a duty'.¹²⁵ This duty arises from its own human rights obligations and not those of States. UNHCR's role in overseeing the provision of humanitarian aid and taking on the responsibility of 'care and maintenance' *in lieu* of the host State means it is not only accountable for the respect and protection of human rights, it must fulfil them by providing services and developing strategies to build capacities that ensure their human rights are met.¹²⁶

UNHCR's implied power to administer refugee camps cannot be separated from an obligation to respect, protect and fulfil the human rights of the individuals and groups residing within refugee camps. Whilst this obligation may not rely upon binding international instrumentality, it forms part of UNHCR's wider role of international protection.

¹²⁰ A McBeth, *International Economic Actors and Human Rights* (Routledge 2010) 70.

¹²¹ Human rights obligations are often seen through the tripartite lens of respect, protect and fulfil.

¹²² UNHCR, 'Operational Protection in Camps and Settlements' 2006, Division of International Protection Services (Operational Protection) 17-19.

¹²³ UNHCR, 'Policy Paper on Human Rights, Division of International Protection' 7 August 1997.

¹²⁴ See Skogly, who argues that neither the World Bank or the IMF have an obligation to protect human rights because they do not have a 'human rights mandate' and have not acceded to human rights conventions. S Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish 2001) 193.

¹²⁵ Clapham (n 2) 68.

¹²⁶ UNHCR, Operational Protection 2006, 17.

2.3 *Non-refoulement, RSD and Procedural Standards*

Responsibility for RSD lies with States.¹²⁷ However, where States abdicate their protection duties, which primarily occurs when a State lacks the resources and capacity to carry out RSD, or where a host State is not a signatory to the Refugee Convention but hosts a large number of refugees, UNHCR has little choice but to conduct RSD itself. The fact that UNHCR is a *substitute* decision maker with significant resource and capacity restraints¹²⁸ does not justify a weaker application of procedural standards by UNHCR. The need to respect the human rights principle of *non-refoulement* creates an obligation for UNHCR to meet the same procedural standards in RSD as States. It is argued that these standards are, at a minimum, that RSD be fair, efficient and effective.

UNHCR's RSD applies to what are known as 'mandate refugees'. In contrast to RSD conducted by States, a mandate refugee is determined by the definition of a refugee outlined in UNHCR's Statute,¹²⁹ which is similar, but not identical to the Refugee Convention's definition of a refugee. A person who meets the criteria for a refugee in UNHCR's Statute will qualify for protection by UNHCR, regardless of whether he or she is within the territory of a party to the Refugee Convention and 1967 Protocol, or whether he or she has been recognised as a refugee under the Refugee Convention.¹³⁰ UNHCR may also apply broader regional refugee definitions in Africa and Latin America,¹³¹ or as a result of an UNGA resolution in a given situation¹³² or under complementary protection criteria.

¹²⁷ Whilst responsibility for RSD is not stipulated in the Convention or other conventions, it is widely accepted that States could not carry out their obligations without the ability to determine the refugee status of asylum seekers. Providing for Protection (n 94) 19.

¹²⁸ See UNHCR, 'Note on International Protection' 6 June 2014, EC/65/SC/CRP.10 [33-4]. Statement by Volker Türk Assistant High Commissioner for Protection, 66th Session of the Executive Committee of the High Commissioner's Programme, Agenda point 5(a) (8 Oct 2015) 4.

¹²⁹ UNHCR Statute (n 3) art 6(A)(ii).

¹³⁰ UNHCR, 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' Reissued Geneva, December 2011, 6.

¹³¹ Convention Governing the Specific Aspects of Refugees Problems In Africa, signed 10 September 1969 1001 UNTS 45 (entered into force 20 June 1974); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama ('Cartagena Declaration') 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).

¹³² See *Report of the United Nations High Commissioner for Refugees* GA Res 1388 (XIV), UN GAOR, 14th sess, 841st plen mtg, UN Doc A/RES/1388(XIV) (20 November 1959) [2] and *Report of*

In 2014, UNHCR was responsible, or jointly responsible for RSD in 68 countries and received 245,600 new and appeal applications for asylum or refugee status.¹³³ In the same period UNHCR made 99,600 substantive decisions, which included convention status decisions, complementary protection and rejections.¹³⁴

For RSD to be consistent with the principles of international protection, one of its primary objectives must be respect for *non-refoulement*.¹³⁵ *Non-refoulement* is both central to the concept of international protection and a human right. *Non-refoulement* was included in the Refugee Convention by article 33(1), which was based upon previous State practice and international agreements¹³⁶ and created a binding State obligation not to *refoule* refugees unless one of the national security or crime exception circumstances in article 33(2) applies. The application of *non-refoulement* has been given wider application by its inclusion in various instruments of international and human rights law¹³⁷ and is widely accepted to have gained the requisite character of customary international law.¹³⁸ It has also been suggested that *non-refoulement* has evolved beyond customary international law and treaty law to achieve the status of *jus cogens*.¹³⁹

the United Nations High Commissioner for Refugees GA Res 1499 (XV), UN GAOR, 15th sess, 935th plen mtg, UN Doc A/RES/1499 (XV) (5 December 1960) [d]. Whilst references in both resolutions are made to those ‘who do not come within the competence of the United Nations’ is not limited to an identifiable group, subsequent discussion in a *Note on Other Refugee Problems* (UN Doc A/AC.96/122) suggests that ‘naturalised refugees and other camp inmates’ in Austria, Greeks returned from Eastern Europe, Algerian and Congolese refugees in Africa, Chinese refugees in Hong Kong and Tibetan refugees in Nepal were all contemplated as subjects of UNHCR’s good offices. See detailed discussion in Ivor C. Jackson, *The Refugee Concept in Group Situations* (Kluwer Law International, 1999) 95-96.

¹³³ UNHCR, Statistical Yearbook 2014, 14th ed, 51-52.

¹³⁴ *ibid* 55.

¹³⁵ ‘Refugee status determination (RSD) is perhaps the single most important means of securing international protection for those men, women and children who are in need of it. A faulty determination may result in the *refoulement* of refugees and the denial of rights to which they are entitled. Providing for Protection (n 94) 69.

¹³⁶ See the Convention Relating to the International Status of Refugees, 28 October 1933, CLIX LNTS 3663, art 3; the Provisional Arrangement Concerning the Status of Refugees Coming From Germany, 4 July 1936, 171 LNTS 75 and the Convention concerning the Status of Refugees Coming From Germany, 10 February 1938, CXCI LNTS 59, art 5.

¹³⁷ Eg., article 3 of the Convention Against Torture prohibits any State party from expelling, returning (*refouling*) or extraditing a person to another State where there are substantial grounds for believing that that person would be in danger of being subjected to torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment 1465 UNTS 85, art 3.

¹³⁸ G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed OUP 2007) 345–6. Cf Hathaway (n 93) 363.

¹³⁹ UNHCR EXCOM Conclusion No. 25 (XXXIII) (1982) par (b); *Cartagena Declaration*, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc.

States and UNHCR are bound to respect *non-refoulement* as the cornerstone of international protection and as RSD is the practical means, or the ‘entry point’¹⁴⁰ through which a person becomes entitled to protection, it follows that *procedurally* sufficient RSD is a vital defence against the risk of *refoulement*.¹⁴¹ UNHCR acknowledges this when it states that, ‘respect for the principle of *non-refoulement* can therefore be most effectively ensured if claims to refugee status and asylum are determined substantively and expeditiously.’¹⁴² If RSD outcomes are substantively accurate, the risk of *non-refoulement* is significantly diminished.¹⁴³ The likelihood of substantive accuracy of RSD is lessened if procedural standards are not in place to provide a system of checks and balances on the decision-making process.¹⁴⁴ Procedural standards encourage more stringent justification for findings on facts and lessen the likelihood of bias in the decision-making process. Most importantly, they provide an effective remedy in the form of review.

For States, RSD procedural standards are shaped by domestic accountability mechanisms provided for by administrative law, such as regulation and administrative tribunals, as well as domestic and international judicial opinion, UNHCR’s policy guides and handbooks and the Conclusions of the Executive Committee of the High Commissioner’s Programme (‘ExCom’). States are responsible to ensure that their

OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85) section III(5); J Allain, ‘The Jus Cogens Nature of Non-refoulement’ (2001) 13 IJRL 534, 538. Cf. W A. Schabas, ‘Non-Refoulement’, Background Paper for the Technical Workshop on *Human Rights and International Cooperation in Counter-Terrorism*, Liechtenstein, 15-17 November 2006, Office for Democratic Institutions and Human Rights and UN Office of the High Commissioner for Human Rights, Final Report (February 2007), 7.

¹⁴⁰ UNHCR Standing Committee, ‘Note on International Protection’ EC/62/SC/CRP.12 51st meeting, 31 May 2011 [22].

¹⁴¹ Vincent Chetail argues that at least ‘some kind of identification process’ in RSD is needed to ensure the effective implementation of the principle of *non-refoulement*. V Chetail, ‘Are refugee Rights Human Rights?’ in R Rubio-Marin (ed) *Human Rights and Immigration* (OUP 2014) 51-52.

¹⁴² UNHCR, ‘UNHCR Note on the Principle of Non-Refoulement’ November 1997.

¹⁴³ M Pallis, ‘The Operation of UNHCR’s Accountability Mechanisms’ (2005) 37 IL&P 869, 880 argues that when the rule of *non-refoulement* is combined with the ‘guarantee of effective legal protection—a general principle of law—the RSD obligation is created: an obligation to conduct refugee status determination in a manner which provides effective legal protection against the possibility of refoulement or denial of rights due under the refugee convention.’

¹⁴⁴ In view of the nature of the risks involved and the grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the procedure.

UNHCR, ‘Fair and efficient asylum procedures: a non-exhaustive overview of applicable international standards’ 2 September 2005, 1.

RSD procedures are ‘fair and efficient or expeditious’¹⁴⁵ or ‘fair and effective’.¹⁴⁶ In a report on fair and efficient asylum processes, UNHCR stated that:

Fair and efficient procedures are an essential element in the full and inclusive application of the Convention. They enable a State to identify those who should benefit from international protection under the Convention, and those who should not.¹⁴⁷

The ExCom has also acknowledged the link between international protection and the need for ‘fair and efficient’ procedures by emphasising:

[T]he importance of establishing and ensuring access ... to *fair and efficient procedures* for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection.¹⁴⁸

The ExCom has also recognised a link between *non-refoulement* and ‘fair and effective’ procedures. The ExCom:

Strongly deplores the continuing incidence and often tragic humanitarian consequences of *refoulement* in all its forms, including through summary removals, occasionally en masse, and reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to *fair and effective* procedures for determining their status and protection needs.¹⁴⁹

It is argued that by virtue of relevant instruments, case law, UNGA resolutions and UNHCR/ExCom policy, there is a minimum requirement for RSD to be fair, efficient and effective, which is linked to *non-refoulement* in such a way as to be inextricable from it.¹⁵⁰ Each of these elements will be considered in turn.

¹⁴⁵ UNGA Res A/RES/41/124 [8]. UNHCR, ‘Note on International Protection’ UN Doc A/AC.96/1122 (3 July 2013) [22-24].

¹⁴⁶ UNGA Res A/RES/44/137 [4].

¹⁴⁷ UNHCR, ‘Fair and Efficient Asylum Processes’ EC/GC/01/12, 31 May 2001 par 5 (*emphasis added*).

¹⁴⁸ UNHCR EXCOM Conclusion No. 71 (XLIV) ‘General Conclusion of International Protection’ (1993) pars (i) and (l) (*emphasis added*).

¹⁴⁹ UNHCR EXCOM Conclusion No. 85 (XLIX) ‘Conclusion on International Protection’ (1998) par (q). See also UNHCR EXCOM Conclusion No. 8 (XXVIII) - 1977 ‘Determination of Refugee Status’ par (e)(i).

¹⁵⁰ Note that UNHCR has identified the need to provide fair and efficient RSD procedures as stemming from the right to seek and enjoy asylum, as guaranteed under Article 14 of the UDHR, and the

If RSD procedures are not *effective* they are not achieving their purpose. RSD procedures are created to carry out the legal obligation to not *refoule* an individual and it follows that to not be effective in this context is to commit a legal error. If a State commits a legal error by failing to recognise the refugee status of an individual who should be recognised otherwise, it has failed to protect a refugee by exposing them to *refoulement*.¹⁵¹

Erika Feller, UNHCR's then Assistant High Commissioner of Protection, has claimed that the core elements for an effective RSD system include

- (i) a single, specialized first instance body with qualified decision-makers, trained and supported with country of origin information;
- (ii) adequate resources to ensure efficiency, to identify those in need of protection quickly and to curb abuse;
- (iii) an appeal to an authority different from and independent of that making the initial decision; and
- (iv) a single process to deal with both refugee status and complementary forms of protection.¹⁵²

What 'effective' means in the context of refugee-related decisions has been considered by the ECtHR in regards to the requirements for an 'effective remedy', as stipulated by article 13 of the ECHR.¹⁵³ In *Chahal v United Kingdom*, a case where the applicant, who was a Sikh, was facing deportation from the UK to India for national security reasons, the ECtHR found that an effective remedy requires 'independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3...'¹⁵⁴ UNHCR has also stated that an effective remedy is a 'second instance' appeal where law and fact are considered (i.e.

responsibilities derived from the Convention, international and regional human rights instruments, as well as relevant ExCom conclusions.' Fair and Efficient (n 137). Whilst it is agreed that these are relevant, the focus here is on *non-refoulement*.

¹⁵¹ R Marx, 'Non-refoulement, Access to Procedures and Responsibility for Determining Refugee Claims' (1995) 7 IJRL 383, 392 argues that *non-refoulement* requires 'effective protection for refugees presenting their claim at the border'.

¹⁵² UNHCR, 'The Work of the Refugee Protection Division in the International Context', Statement by Erika Feller, Assistant High Commissioner - Protection, UNHCR, at the Immigration and Refugee Board, Refugee Protection Division National Training Seminar (Toronto, Canada, January 28-30, 2008), 28 January 2008, 4-5.

¹⁵³ ECHR 213 UNTS 222 art 13.

¹⁵⁴ App no 70/1995/576/662 (ECtHR, 11 November 1996). The risk referred to was the possibility of the applicant being tortured on returning to India.

judicial review).¹⁵⁵ Considering UNHCR and judicial opinion together, effectiveness in RSD can be perceived as the resources, expertise and availability of first instance decision making and independent review to ensure legally correct determinations.

The term *efficiency* is not given a general meaning in UNHCR or ExCom documentation, but is often used interchangeably or in conjunction with the need for expeditious decision making.¹⁵⁶ Expeditious decision making, or the right to RSD ‘without unreasonable delay’ has been argued to be an element of due process that is sourced from articles 6-11 of the UDHR and articles 13-14 of the ICCPR.¹⁵⁷ Considering Erika Feller has stated that ‘adequate resources to ensure efficiency’ is part of an effective RSD system,¹⁵⁸ *efficiency* within the RSD context can be taken to mean the efficient allocation and use of resources, as well as the expectation that RSD procedures are performed expeditiously.

Fairness is an elusive concept because it is both contextual and multi-faceted. Rather than being understood as encompassing ideals of democracy or good governance, fairness within the context of administrative decision making takes on a narrower ‘procedural-type’ meaning to stand for concepts of procedural fairness, natural justice or due process.¹⁵⁹

The most fundamental element of fairness is an impartial and independent hearing, which is required by article 14(1) of the ICCPR. In *A v Australia*, the Australian government challenged an argument that RSD could be subject to article 14(1) by arguing that proceedings relating to refugee status do not deal with civil rights or obligations and that the decision to allow entry into its territory is a matter for the State concerned. Whilst not making a finding that RSD is always subject to the procedural standards set out in article 14(1), the HRC left the matter open by finding that:

¹⁵⁵ Providing for Protection (n 94) 40; Fair and Efficient (n 137) 4.

¹⁵⁶ UNHCR’s guidebook on its own RSD procedural standards states that RSD should be undertaken in a timely and *efficient* manner. UNHCR, The Procedural Standards for Refugee Status Determination under UNHCR’s Mandate, Unit 1 Introduction, 1.2 (*emphasis added*). See also Fair and Efficient Asylum (n 137) 11; UNGA Res A/RES/41/124 [8].

¹⁵⁷ M Albert, *Prima facie determination of refugee legal status: An Overview and its Legal Foundation* Working Paper Series No. 55, Refugee Studies Centre, Oxford Department of International Development, University of Oxford 2010, 28-29.

¹⁵⁸ Feller (n 145).

¹⁵⁹ See D J Mullan, ‘Natural Justice and Fairness – Substantive as well as Procedural Standards for the Review of Administrative Decision Making?’ (1981-1982) 27 McGillLJ 250, 251.

The issue whether the proceedings ... fall within the scope of article 14, paragraph 1, is a question which should be considered on its merits.¹⁶⁰

UNHCR and ExCom have also identified¹⁶¹ an impartial or independent review as being integral to a fair RSD system.¹⁶² Other elements of procedurally fair RSD that they identified are access to information,¹⁶³ access to an interpreter,¹⁶⁴ an opportunity to adequately present a case¹⁶⁵ and a reasonable time to lodge an appeal.¹⁶⁶

UNHCR, like States, must ensure that its RSD practices are fair, efficient and effective in order to be compliant with its *non-refoulement* obligations. UNHCR is bound to respect *non-refoulement* as customary international law, and because it is a subsidiary organ of the UN. Like States, when UNHCR conducts RSD it is obligated to respect *non-refoulement*, and like States, this requires the adoption of procedural standards that are fair, effective and efficient in accordance with relevant instruments, case law, UNGA resolutions, UNHCR policy¹⁶⁷ and ExCom Conclusions.¹⁶⁸ In UNHCR's own words 'The main elements [of due process applicable to governments]

¹⁶⁰ UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [6.5].

¹⁶¹ Based upon research undertaken for the following thesis; N Kinchin, 'Accountability in the Global Space: Plurality, Complexity and UNHCR' (PhD thesis, University of New South Wales 2014)

¹⁶² Feller (n 145); UNHCR, Position on Important Aspects of Refugee Protection in Greece February 2006, 5; Fair and Efficient Asylum (n 137) 5; ExCom Conclusion No. 30 (XXXIV) – 1983.

¹⁶³ Fair and Efficient Asylum (n 137) 2, 4, 5, 6; UNHCR, Annotated Comments on the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (COM (2002) 326 final of 18 June 2002, presented by the Commission), 27 February 2003, 27; UNHCR EXCOM Conclusion No. 8 (XXVIII) – 1977, (e)(ii)(iv).

¹⁶⁴ Comments *ibid* 9; Fair and Efficient Asylum (n 137) 2; UNHCR ECOM Conclusion No. 8 (XXVIII) – 1977, (e)(iv).

¹⁶⁵ Greece Recommendations (n 155) 4; Fair and Efficient Asylum (n 137) 3; UNHCR EXCOM Conclusion No. 110 (LXI) – 2010, (j).

¹⁶⁶ UNHCR EXCOM Conclusion No. 8 (XXVIII) – 1977, (vi).

¹⁶⁷ The normative opinions of UNHCR contribute to the development of international refugee law in a way that creates an inclusive framework that would be damaged if UNHCR were considered to stand outside of in circumstances where it performs the same duties as States. This is particularly so considering UNHCR's supervisory mandate (UNHCR Statute, par 8(i)) creates an expectation that States should look to UNHCR for guidance and inspiration on the optimum model for carrying out refugee status determination. M Alexander, 'Refugee Status Conducted by UNHCR', (1999) 11 *IJRL* 251, 255

¹⁶⁸ It is argued that UNHCR is obligated to follow the advice and adhere to ExCom Conclusions when they relate to its own functions. Although UNHCR's Statute limits the ExCom to giving advice to UNHCR (see L W Holborn, *Refugees; A Problem of our Time: The Work of the United Nations Commissioner for Refugees 1951 – 1972* (Scarecrow Press 1975) 90) when Conclusions address international refugee law generally and RSD standards in particular, the fact that (a) the UNGA has explicitly requested that the High Commissioner 'abide by directions that the Committee might give him in regard to situations concerning refugees' (GA Res 1673 (XVI). UN GOAR, 16th sess, 1081st plen mtg (18 December 1961) [1]) and (b) UNHCR consistently follows the advice of the ExCom (Lewis (n 74) 80), indicates the significant weight ExCom Conclusions hold for UNHCR. Where the ExCom Conclusions relate to the procedural standards of RSD, they apply to UNHCR because RSD is a function of UNHCR.

must also apply to UNHCR if we are to ensure fair and proper examination of applications'.¹⁶⁹

IV CONCLUSION

States have both the ultimate responsibility for international protection and the ability to prevent UNHCR from achieving its own mandate by refusing access to refugees in its territory. Ideally, UNHCR's role in camp administration and RSD would be decreased through greater State responsibility and burden sharing via increased funding and raised quotas for refugee intake. A State-backed and funded mechanism for review of UNHCR RSD is urgently needed. An independent and impartial review mechanism, whatever its form, will provide asylum seekers with an effective remedy that will enable an independent arbiter to decide whether the procedural standards of 'fairness, efficiency and effectiveness' are being met, and fundamentally, guard against *non-refoulement*.

However, as long as UNHCR engages in camp administration and RSD, it is imperative that it retains *limited* human rights obligations that exist alongside of, and not in substitution for, those of States. The difficulty with this proposition, however, is the lack of remedies available for individuals who seek to hold IO's, including UNHCR, accountable for human rights abuse. If a breach of UNHCR's human rights obligations could be classified as an 'internationally wrongful act', Part III of ARIO, which sets out the content of international responsibility of IOs, limits its scope to States, other IOs or to the 'international community as a whole'.¹⁷⁰ Part IV excludes individuals from invoking responsibility against an IO.¹⁷¹ Although article 33(1) is without prejudice to individuals who wish to challenge responsibility in an alternative forum such as a domestic court,¹⁷² the ability to do so is limited by the doctrine of IO

¹⁶⁹ UNHCR, RLD2 - Determination of Refugee Status, 1 January 1989, 19.

¹⁷⁰ ARIO (n 41) art 33(1).

¹⁷¹ *ibid* arts 43, 49.

¹⁷² *ibid* art 50.

immunities.¹⁷³ The difficulty of seeking redress for human rights abuse does not, however, remove the capacity to hold human rights obligations in the first place.

Although UNHCR's primary role remains international protection facilitated through State collaboration, its direct interaction with vulnerable individuals renders any suggestion that UNHCR has no obligation to protect their human rights as untenable. When UNHCR's implied powers are considered with its capacity to hold human rights obligations, which comes from its position as a subsidiary organ of the UN and from general principles of international law, accountability is created for UNHCR to protect the human rights of refugees in certain circumstances. In particular, UNHCR's implied powers of administering refugee camps creates an obligation to respect, protect and fulfil the human rights of refugees who reside within those camps. Finally, UNHCR's implied power to conduct RSD creates an obligation for it to ensure that its RSD procedures are fair, efficient and effective as a means of acting as a bulwark against *non-refoulement*.

¹⁷³ In the recent case of *Georges et al v United Nations*, heard in the New York District Court, a group of Haitian residents lodged a class action against the UN for liability for the 2010 cholera outbreak that killed thousands and injured many more. Although the UN denied culpability for the outbreak, it is commonly accepted that the cause was inadequate sanitation in a camp used by Nepalese peacekeepers. The court found that as UN refused to expressly waive its immunity, it was immune from suit. Any alleged inadequacy of the UN's failure to offer an alternative mode of settlement, such as settling the private law claim or establishing a Standing Claims Commission, did not undermine the requirement for express waiver.

Georges et al suggests a shy potential for a reinterpretation of section 29(a) of the Convention on the Privileges and Immunities of the United Nations ('Convention on Immunities') (1 UNTS 15. Applies to UNHCR as a subsidiary organ), which states that '[t]he United Nations shall make provisions for appropriate modes of settlement of ... disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.' The court acknowledged that the word shall 'is more than merely aspirational' and that 'it is obligatory and perhaps enforceable.' Although the court found that section 29 could not override the clear and specific grant of immunity in section 2, it may be that a court willing to take a more teleological approach would render an interpretation of section 29 a necessary precondition to the grant of immunity, in accordance with the object and purpose (Vienna Convention (n 10) art 31(1)) of the Convention on Immunities, which was, after all, to ensure independence of the UN from its members (D Sarooshi, 'The Powers of the United Nations Criminal Tribunals' in J. A. Frowein and R Wolfrum (eds) *Max Planck Yearbook of United Nations Law, Volume 2* (Kluwer Law International 1998) 141, 191) and not immunity from the suit of individuals.