

# *Quis Custodiet Ipsos Custodes?:<sup>†</sup> Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law*

by Ralph Wilde\*

[I]t has become increasingly clear that the principle of responsibility must now be used in a more inclusive manner, applied not only to states but also to all of those other actors which play a significant part in national and international affairs: rebel groups, political leaders and parties, warlords and military factions, religious bodies and commercial enterprises, to give just a few examples.<sup>1</sup>

What about the United Nations High Commissioner for Refugees?

## I. INTRODUCTION: DEVELOPMENT CAMPS

¶1 In the developing world, many refugees are located in medium-term development camps. These camps are invariably under the *de facto* control of the United Nations High Commissioner for Refugees (UNHCR), since host states lack the resources to act in a manner that would bring

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<sup>†</sup> "Who is to keep guard over the guards themselves." JUVENAL, *THE SIXTEEN SATIRES* (Peter Green trans., Penguin Press 1974).

\* Visiting Scholar, Yale Law School. The views in this note remain solely those of the author and should not be construed as representing UNHCR policy. The author would like to express his gratitude to James Hathaway and Jane Alexander for their kind help and encouragement. A shorter version of this thesis was delivered in comments at *Applying International Law to Contemporary Phenomena*, an International Law Student Association (ILSA) panel chaired by the author at the American Society of International Law Annual Conference on April 3, 1998. The uncited descriptions of the camps throughout this Note stem from the author's experiences working in them.

1. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES 1997-98: A HUMANITARIAN AGENDA* 274 (1997) (visited Apr. 16, 1998) <<http://www.unhcr.ch/sowr97/>> [hereinafter UNHCR, HUMANITARIAN AGENDA].

their international legal responsibilities into meaningful effect. Through the example of Dadaab camps of Kenya,<sup>2</sup> this piece argues that when UNHCR governs such camps, it should adopt a *modus operandi* based on international human rights law. Such an approach is possible because UNHCR has the necessary personality in international law to engage with the human rights law that applies to the refugees in the camps.

¶2 This piece concerns the application of international law to "development camps." The term refers to UNHCR-run refugee camps which are located in the developing world, and also have UNHCR status of being in a "development situation." "Development situation" status denotes settled and complex communities of refugees who have no immediate prospect of being assimilated, resettled, or repatriated. In contrast, "emergency situation" status involves camps as short-term havens in response to a crisis. Emergency situation status often evolves into development status. Development camps are sophisticated polities, with marketplaces, schools, hospitals, mosques, churches, running water, and decision-making fora. Demographics within them are not necessarily homogenous, and often coexisting refugee communities manifest profound differences in country of origin, culture, religion, and education.

¶3 The Dadaab camps of Kenya (Dagahaley, Hagadera and Ifo) are typical development camps. They are located in the northeast of Kenya, equidistant to the town of Garrissa and the Liboi border-crossing with Somalia.<sup>3</sup> After the complete breakdown of order in areas of Somalia,<sup>4</sup> refugees fearful for their lives fled to neighboring Kenya and were located in temporary camps organized by UNHCR. As the situation in Somalia remained such that many refugees could not return, and more were arriving, these camps turned into development camps. The general refugee population in Kenya was consolidated, and refugees from the Sudan, Ethiopia, Uganda, and other countries joined the Somalis in Dadaab. UNHCR runs the camps, and is directly responsible for protection issues, including the processing of new arrivals and applications for resettlement and repatriation.<sup>5</sup> Most day-to-day operations are delegated to NGO Implementing Partners (IPs), which run various strategies in the camps to actively promote development, impacting the environmental, economic, and social fields.<sup>6</sup> Environmental initiatives by Gesellschaft für Technische Zusammenarbeit (GTZ) train refugees in conservation skills, not only to

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2. The empirical research for this Article was conducted during a women's rights promotion and monitoring project devised and implemented by the author for UNHCR as part of the Camp Sadako program in the Dadaab camps of Kenya. The project report is contained in RALPH WILDE, PARLIAMENTARY HUMAN RIGHTS GROUP, *BEYOND THE YOKE: THE HUMAN RIGHTS OF WOMEN REFUGEES IN THE DADAAB CAMPS OF KENYA* (1997). Part of this research consists of questionnaire responses, copies of which are contained in Dadaab Questionnaire Responses (unpublished manuscript, on file with the *Yale Human Rights and Development Law Journal*).

3. See Wilde, *supra* note 2, at 4.

4. For background on Somalia, see Ahmednasir M. Abdullahi, *The Refugee Crisis in Africa as a Crisis of the Institution of the State*, 6 INT'L J. REFUGEE L. 562, 570-72 (1994).

5. See Wilde, *supra* note 2, at 4.

6. See *id.*

preserve the environment in the camps, but also to develop expertise that will go with the refugees wherever they end up.<sup>7</sup> CARE operates a children's educational curriculum; the Canadian Baptists run skills training in income-generating tailoring activities for adults.<sup>8</sup> Medical services provided by Médecins sans Frontières (Doctors without Borders), Belgium not only meet the immediate needs of refugees, but also provide a degree of long-term care in immunization and planned parenthood programs. In many ways, the camps constitute a more developed society than the local area, a desert populated by nomads and plagued with bandits.

## II. THE CRISIS IN REFUGEE PROTECTION AND ITS EFFECT ON GOVERNANCE

### A. The Crisis

¶4 The international protection of refugees is in crisis because the applicable legal regime no longer meets the interests of those to whom it applies, yet the political will among states for reform is lacking. Refugee law accords full responsibility to whichever state refugees flee to,<sup>9</sup> irrespective of both the state's ability to offer them any meaningful protection, and the development and security implications of having to attempt this. As most refugee movements occur in the developing world, and developed states increasingly adopt *non-entrée* measures, the legal burden of protecting the vast majority of the world's refugees is shouldered by developing countries who do not have the wherewithal to fulfill this legal obligation.<sup>10</sup> As a result, these refugees invariably live in conditions

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7. These initiatives were precipitated by concerns raised by Kenya about the impact of the camps on their local environment. They include promoting more efficient use of fuel through different cooking methods and the use of wood-saving and solar stoves, tree-planting, and water recycling.

8. These were long-term courses in tailoring for women, who sell their work during the course to raise enough money to buy a sewing machine at the end. Upon completing the course, women are in a position to generate income independently, through selling their work in the markets.

9. For example, the Convention relating to the Status of Refugees, July 28, 1951, 18 U.N.T.S. 137 (visited Apr. 16, 1998) <<http://www.unhcr.ch/refworld/legal/instruments/asylum/1951eng.htm>> (ratified by Kenya on May 16, 1966) [hereinafter 1951 Convention], does not contain provisions that allow for burden-sharing in refugee protection, other than a hortatory reference to the need for "international co-operation" in the preamble. *See id.* at pbml.

10. In explaining the unwillingness of many nations to ratify the Organization of African Unity (OAU) Convention, *infra* note 13, Paul Kuruk cites "governments' reluctance to contractually bind themselves in ways which, given their poor economic status, will be difficult to satisfy or will require better conditions than those available to nationals." Paul Kuruk, *Refugeeism, A Dilemma in International Human Rights: Problems in the Legal Protection of Refugees in West Africa*, 1 TEMPLE INT'L & COMP. L.J. 179, 221 (1987). J. Garvey argues that "refugee flow imposes severe social and economic burdens on receiving states . . . . Potential receiving states see themselves being asked for one-sided sacrifices. . . ." Jack I. Garvey, *The New Asylum Seekers: Addressing Their Origin*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S 181, 188 (David A. Martin ed., 1988). This is indeed why the OAU Convention deliberately leaves out the whole range of rights provided for in the 1951 Convention. For an

of insecurity and deprivation, reliant on whatever protection and assistance is provided by agencies like UNHCR.<sup>11</sup>

¶5 The motifs of the crisis can be seen in the Dadaab camps. From the beginning the influx of refugees was processed by UNHCR, not Kenya. Kenya was willing only to countenance the refugees' continued presence provided that UNHCR accepted full practical responsibility. Even this acquiescence has been threatened, both by security problems as bandits cross the Somali border to attack refugees, and by tensions with Kenyans in the local area, many of whom are ethnically Somali and receive less support than the refugees.<sup>12</sup> It is clear, therefore, that without the support of the international community in the form of UNHCR, countries legally responsible for protecting refugees in development camps would have no means of trying to meet this responsibility.

#### B. UNHCR as *de facto* Sovereign?

¶6 The consequence of this crisis is that development camps are invariably *located* in states, but under the *control* of UNHCR. Kenya has ratified the OAU Convention,<sup>13</sup> the 1951 Convention,<sup>14</sup> and the 1967 Protocol.<sup>15</sup> These instruments acknowledge the rights and duties of the refugees and the host state in international law. They set out a legal framework that delineates the relationship between the two, with

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example of the kinds of demands being made upon host states, see *Conclusions and Recommendations*, in AMNESTY INTERNATIONAL, REFUGEES: HUMAN RIGHTS HAVE NO BORDERS. (1997) (visited Apr. 16, 1998) <<http://www.amnesty.org/ailib/intcam/refugee/recomend.htm>>. See also COLES, PROBLEMS ARISING FROM LARGE NUMBERS OF ASYLUM SEEKERS: A STUDY OF PROTECTION ASPECTS 8-11 (1981) (making recommendations to governments of countries of asylum) [hereinafter COLES, PROBLEMS]. Numerous perspectives on the issue also may be found in *OAU/UNHCR Commemorative Symposium on Refugees and the Problems of Forced Population Displacements in Africa*, INT'L J. REFUGEE L., Summer 1995 [hereinafter OAU/UNHCR Symposium]. Furthermore, some suggested that the increasing democratization of Africa will precipitate greater resistance to asylum seekers on the part of receiving states on the continent. "Growing democratization and press freedom . . . in Africa are leading to increasing pressure from domestic public opinion." Sadako Ogata, Peace, Security and Humanitarian Action, Alistair Buchanan Memorial Lecture at the International Institute for Strategic Studies (April 3, 1997) (visited Apr. 16, 1998) <<http://www.unhcr.ch/refworld/unhcr/hcspeech/3ap1997.htm>> [hereinafter Ogata, Peace]. Kenya itself has itself refouled asylum-seekers. "In July, over 900 Somali refugees were forcibly returned to Somalia by the Kenyan army six days after seeking asylum in Kenya." *Kenya*, in AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1997 (visited Apr. 16, 1998) <<http://www.amnesty.org/ailib/aireport/ar97/AFR32.htm>>.

11. See generally AMNESTY INTERNATIONAL, REFUGEES: HUMAN RIGHTS HAVE NO BORDERS, *supra* note 10 (describing the effects of this crisis on refugees); UNHCR, HUMANITARIAN AGENDA, *supra* note 1 (same). For the particular situation in Africa, see generally Abdullahi, *supra* note 4 (discussing the situation); *OAU/UNHCR Symposium*, *supra* note 10 (same).

12. See Wilde, *supra* note 2, at 13-16 (describing the insecurity in the camps).

13. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 14 U.N.T.S. 691 (visited Apr. 16, 1998) <[http://www.unhcr.ch/refworld/legal/instruments/asylum/ref\\_afre.htm](http://www.unhcr.ch/refworld/legal/instruments/asylum/ref_afre.htm)> [hereinafter OAU Convention] (signed, ratified and deposited by Kenya on Sept. 10, 1969, June 23, 1992 and Feb. 4, 1993 respectively).

14. 1951 Convention, *supra* note 9.

15. Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (visited Apr. 16, 1998) <<http://www.unhcr.ch/refworld/legal/instruments/asylum/proteng.htm>> (ratified by Kenya on Nov. 13, 1981) [hereinafter OAU Protocol].

provisions such as a definition of eligibility for protection<sup>16</sup> and a procedure for processing refugees.<sup>17</sup> This framework begins to have a practical effect upon status determination, when, as a matter of municipal law, the host country grants asylum.<sup>18</sup> As is the case in Dadaab, host countries often choose not to determine status, however, preferring instead to allow refugees to stay without establishing their legal personality in municipal law. UNHCR often adopts its own determination process in order to establish who merits its assistance, and it runs the camps according to its own guidelines. These actions are solely a matter of internal UNHCR organization, and do not engage with municipal law. Therefore, the refugees have been given what might be called temporary refuge or temporary protection,<sup>19</sup> determined and implemented by UNHCR, rather than the host state. Although the presence of the refugees gives rise to rights and duties vis à vis the host state in international law, the situation on the ground is being governed in reality largely outside the conventional application of this legal framework.

¶7 This legal muddle illustrates that the current refugee law regime is ill-equipped to address the challenges raised by the existence of refugees in development camps. It evidences the necessity of a wholesale reconceptualization<sup>20</sup> of refugee burden-sharing in international law. In such a context, when the entire regime within which this operates requires reform, it would appear inappropriate to examine the exercise of UNHCR governance in such camps. The majority of the world's refugees live in development camps, however, and it would be irresponsible to ignore the legal issues raised by their existence, in lieu of a revolution in refugee law. UNHCR itself recognizes that

[e]ven in situations where states are resistant to change at the level of central government, there is often a great deal that can be done to introduce democratic principles and participatory practices at the local level. Humanitarian assistance programs, community development programmes and larger-scale aid projects should

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16. See OAU Convention, *supra* note 13, art. 1; 1951 Convention, *supra* note 9, art.1.

17. See OAU Convention, *supra* note 13 art. 2. See generally UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1992), (visited Apr. 16, 1998) <<http://www.unhcr.ch/refworld/legal/handbook/handeng/hbpart1.htm>> [hereinafter UNHCR, HANDBOOK].

18. It is at this point that the host country formally acknowledges that the individual concerned is a "refugee."

19. See generally Donatella Luca, *Questioning Temporary Protection* 6 INT'L J. REFUGEE L. 535 (1994) (defining the concept of temporary protection and discussing the issues it raises). "The 'temporary' protection systems of many states could more accurately be called 'indefinite' protection regimes. Refugee protection frequently amounts to a system of prolonged 'warehousing' in which refugees are denied the right to integrate in the asylum state yet are unlikely to be restored to meaningful membership in their home community." James Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection* 10 HARV. HUM. RTS. J. 115, 130-31, 158-59.

20. See JAMES HATHAWAY, *RECONCEIVING INTERNATIONAL REFUGEE LAW* (1997) (proposing such reforms).

always be organized in a manner that promotes what the Global Governance Commission describes as "neighborhood values": liberty, justice, equity and mutual respect.<sup>21</sup>

¶8 It is necessary, therefore, to investigate whether and how international human rights law can have a more meaningful impact, despite the deficiencies of the current refugee law regime. Is it possible to acknowledge *de jure*, through the exercise of human rights law-based governance, the *de facto* reality that UNHCR is acting as the sovereign authority over the refugees? Such "human rights law governance" as I shall call it presupposes three components: first, the "governed" who are accorded rights and duties in international human rights law; second, a "governor" which is bound by international law to observe international human rights law in the exercise of its governance; and third, the basis for that "governance," the corpus of international human rights law that applies to the relationship between the governor and the governed. This piece will examine each element in turn.

### III. HUMAN RIGHTS LAW GOVERNANCE

#### A. The Governed: Refugees

¶9 The first requirement of human rights governance is that the individuals governed in the camps are covered by international human rights law. In particular, does international human rights law apply to individuals who claim asylum but who have not had their status determined by the host state, or does their "temporary" status obviate this? Most of the individuals in such camps meet the criteria for refugee status in the relevant international instruments.<sup>22</sup> *Ipsa facto*, irrespective of status determination by the host state, such individuals are refugees and entitled to all the rights concomitant to such status, since determination is declaratory, not constitutive, of refugee status.<sup>23</sup> The host state's acquiescence and UNHCR's involvement is a tacit acknowledgment of this principle. However much the concept of "temporary" protection is used rhetorically to deny that refugees are entitled to any or all refugee law rights,<sup>24</sup> international law requires an unequivocal commitment to them.

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21. UNHCR, HUMANITARIAN AGENDA, *supra* note 1, at 273-74.

22. See OAU Convention, *supra* note 13, art. 1, para.2; 1951 Convention, *supra* note 1, para. A(2).

23. See UNHCR, HANDBOOK, *supra* note 17, para. 28; Hathaway, *supra* note 19, at 158-59.

24. See Hathaway, *supra* note 19, at 167-68 (explaining that states use this term to avoid according refugees the full rights that they are due).

## B. The Governor: UNHCR

### 1. Evolution from the traditional role

¶10 The role that UNHCR now occupies demonstrates the cleavage that exists in refugee protection between traditional international legal norms and practical realities. Even though UNHCR is exercising de facto sovereignty, de jure it is merely an invited guest, assisting in the host state's performance of its obligations<sup>25</sup> in a manner wholly governed by the terms of the invitation.<sup>26</sup> From this standpoint, international human rights law is only applicable to the relationship between refugees and the host state, not refugees and an international organization like UNHCR. The host state has minimal inclination or practical capacity to exercise control over UNHCR's treatment of refugees, and donor states with the potential to scrutinize this treatment manifest policy objectives somewhat different from human rights promotion.<sup>27</sup> Therefore, such treatment is to all intents and purposes outside the scope of human rights law.

¶11 This consequence is part of a more general development in governance around the world. The twin phenomena of globalization and fragmentation are leading to a shift of authority over individuals from states to nongovernmental actors, such as international organizations and multinational corporations, who are not the traditional subjects of public international law.<sup>28</sup> This shift in turn creates a complex and contradictory role for such actors. Thus, UNHCR is not monitoring the host state's treatment of refugees, but adopting the host state's responsibility over them for itself. In such circumstances, one must examine the status of UNHCR in international law, to see whether or not an actor so powerfully involved in the fate of individuals is immune from the very legal framework with which it is in the business of asking states to comply. What must be determined is whether UNHCR has personality and responsibility in public international law, and, if so, whether this

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25. "[T]he ultimate responsibility for the refugees within the mandate of the High Commissioner falls in fact upon the countries of residence . . ." G.A. Res. 832, U.N. GAOR, 9th Sess., Supp. No. 21, at 19, U.N. Doc. A/2890 (1954). The General Assembly Resolution further notes that the disproportionate burden falling on certain countries makes "complementary aid" necessary. *Id.*

26. *Cf.* Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428, U.N. GAOR, 5<sup>th</sup> Sess., Supp. No. 20, at 120, U.N. Doc. A/1775 (1950) (visited Mar. 16, 1998) <[http://www.unhcr.ch/refworld/legal/instruments/volrep/hcrsta\\_e.htm](http://www.unhcr.ch/refworld/legal/instruments/volrep/hcrsta_e.htm)> ("The High Commissioner shall provide for the protection of refugees falling under the competence of his [sic] Office by: Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and reduce the number requiring protection.") [hereinafter *UNHCR Statute*].

27. See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 161 (1990) (highlighting the overriding importance to donor states of issues that affect their own countries).

28. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 137-39 (4th ed. 1997) (discussing states as the subjects of international law).

personality entails being bound by international human rights law.

## 2. Personality in international law

¶12 An organization with international legal personality possesses rights and duties in international law distinct from those it might enjoy in municipal law. The *Reparations for Injuries Suffered in the Service of the United Nations* case<sup>29</sup> established that the existence of this personality depends on the *raison d'être* and the *modus operandi* of the organization in question, and found that the UN met these requirements.<sup>30</sup> Beyond this jurisprudence, UNHCR is an agency of the UN set up through a General Assembly resolution. By stating that UNHCR "shall assume the function of providing international protection, under the auspices of the United Nations, to refugees," Article 1 of the Statute<sup>31</sup> establishes that the organization's protection activities form part of the UN's activities.<sup>32</sup> Furthermore, the nature of the *raison d'être* and *modus operandi* of UNHCR is consistent with that of the UN insofar as they relate to the question of personality. That is to say, the purpose and activities of UNHCR are of the same nature as those purposes and activities of the UN as a whole which give rise to *its* personality.

¶13 This similarity exists because UNHCR has been mandated by states to act in a manner both similar and distinct from the way in which states act. From its inception, the *raison d'être* of UNHCR has been to engage in the kind of activity that states are involved in, "to intervene with governments on their behalf," as Eleanor Roosevelt remarked in the debates that preceded the creation of UNHCR.<sup>33</sup> This purpose reaches its apogee in development camps, where there is no practical difference between the exercise of authority by UNHCR and that which the host state would exercise if it were capable. UNHCR is the gatekeeper in deciding who is entitled to protection, and the government in being entirely responsible for the running of the camps. In addition to this state-like role, UNHCR has been mandated by states to act differently from them, yet in relation to their behavior.<sup>34</sup> First, in being authorized by states to monitor their compliance with international refugee law, UNHCR adopts a role that

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29. *Reparations for Injuries Suffered in the Service of the United Nations Case*, 1949 I.C.J. 174, 16 I.L.R. 318 (Apr. 11) (advisory opinion).

30. *See id.*

31. *UNHCR Statute*, *supra* note 26.

32. Schermers states that UNHCR as an "independent organ" of the UN does not have an independent personality, but *does* fall within the jurisdiction of the UN. HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* § 1695 (1995).

33. *Refugees and Stateless Persons*, U.N. GAOR 3d Comm., 5th Sess., Agenda Item 32, at 363, U.N. Doc. A/C.3/SR.329 (1950).

34. F. Seyersted considers the existence of a will distinct from that of member states as an important factor in personality. *See* SCHERMERS, *supra* note 32, at 978. Pirkko Kourula states that UNHCR's functions in paragraph 8 of the Statute are "considered mandatory and not requiring the consent of the government or the parties concerned, being of a 'supranational' character." PIRKKO KOURULA, *BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED* 209 (1997).

by definition states cannot. Second, in taking over the role of the state in refugee protection, UNHCR performs a function that only it has the mandate to monitor. These aspects of UNHCR's mandate suggest that "by entrusting certain functions" to UNHCR, UN members have "clothed it with the competence required to enable those functions to be effectively discharged,"<sup>35</sup> that is to say becoming part of the personality of the UN. As such, UNHCR is an international legal person.

¶14 The possession of international legal personality entails responsibility in international law. For example, the UN has a certain degree of liability in international law for its peacekeeping operations.<sup>36</sup> The scope of this liability for international organizations depends on two factors. First, it only applies to those circumstances where the organization acts in its international legal capacity. Second, it only applies insofar as it is compatible with the nature of the organization's international legal personality.

### 3. The capacity in which it governs

¶15 International law is only of relevance to UNHCR's governance of development camps when the organization performs this activity in its capacity as an international legal personality. International organizations act in different legal capacities at different times, depending on the particular circumstances.<sup>37</sup> The nature of the agreements between UNHCR and the host state that authorize development camps suggest that UNHCR governs such camps in its international legal capacity. It has already been stated that this legal capacity arises out of UNHCR having been authorized by states to act, in certain circumstances, in a manner akin to a state.<sup>38</sup> In signing an agreement with a host state to run a development camp, UNHCR is acting in such a manner. It acts as the representative of the international community, accepting full responsibility for what is in many cases a regional refugee phenomenon. Rather than performing merely an assistance role akin to an NGO aid provider, UNHCR is authorized to act as a state would in arranging for the entry of NGOs into development camps, and coordinating their activities when there.

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35. *Reparations for Injuries Suffered in the Service of the United Nations Case*, 1949 I.C.J. at 179, 16 I.L.R. 318.

36. For discussions of this liability, see CHITTARANJAN F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 242 (1996) and SHAW, *supra* note 28, at 920 & n.170.

37. It is suggested, for example, that liability in tort over private individuals is in the exclusive realm of municipal law, *see* AMERASINGHE, *supra* note 36, at 226, and that employment matters are in the sole domain of internal laws, *see* AMERASINGHE, *supra* note 36, at 324; Philippe Cahier, *Le Droit Interne des Organisations Internationales*, in *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 563, 585-87, 600-02 (1963).

38. *See supra* note 34-36 and accompanying text.

#### 4. The applicability of international human rights law to its personality

¶16 In international law, only the personality of states gives rise to the full range of rights and duties.<sup>39</sup> International organizations with international legal personality are, in contrast, only subject to international law to the degree that the nature of their personality dictates.<sup>40</sup> It is therefore necessary to evaluate the mandate of UNHCR to see whether it suggests that liability in international law can extend as far as adherence to international human rights law.

¶17 UNHCR is mandated as the international organization for the protection of refugees. Scholars often state that the ultimate jurisprudential basis for international refugee law is international human rights law.<sup>41</sup> What follows from this is that the ultimate mandate for an organization that takes on responsibilities for refugees is a human rights one.<sup>42</sup> Indeed, the current High Commissioner stated in 1994 that "[I]t has become evident that the promotion of human rights is of vital importance to the mandate of my Office . . . . UNHCR today is very much an operational human rights organization . . . ."<sup>43</sup>

¶18 On the face of this mandate, it would be inconceivable that UNHCR, as a creature set up by international law to promote international human rights law, was not bound by international human rights law itself. The implications of UNHCR's human rights mandate are complex, however, and ironically may indeed be at odds with the application of human rights law to its own work. First, UNHCR's personality in international law is predicated on it being a non-political, humanitarian organization. Second, UNHCR's overriding mandate is to promote durable solutions. Do either of these factors mitigate against a legal personality that

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39. See SHAW, *supra* note 28, at 913.

40. See *id.* at 913-14.

41. "[H]uman rights should be recognized as central to the entire refugee issue." G.J.L. COLES, *Refugees and Human Rights*, 91/1 BULL. HUM. RTS. 63 (1992) [hereinafter COLES, *Refugees*]. "It is clear that human rights considerations are central across the spectrum of the refugee problem, from departure, *through refuge* to the realization of a lasting solution . . . . The proper context for approaching refugee issues is their humanitarian and human rights context." Thorvald Stoltenberg, *Statement to the 46<sup>th</sup> Session of the United Nations Commission on Human Rights*, in REFUGEES AND HUMAN RIGHTS 274, 275-76 (1990) (emphasis added).

42. The preamble to the 1951 Convention states: "Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms . . . ." 1951 Convention, *supra* note 9, pmb. Guy Goodwin-Gill states that from this " . . . the potential range of activities [of UNHCR] was as broad as the field of human rights." Guy Goodwin-Gill, *The Language of Protection*, 1 INT'L J. REFUGEE L. 6, 8 (1989). Eleanor Roosevelt states that the activities of UNHCR are "in order that . . . [refugees] might be afforded minimum rights and privileges essential to their existence and security." *Refugees and Stateless Persons*, *supra* note 33.

43. Sadako Ogata, *Statement to the Fiftieth Session of the UN Commission on Human Rights in Geneva (Feb. 9, 1994) (visited Dec. 13, 1997)* <<http://www.unhcr.ch/refworld/unhcr/hcspeech/9fe1994.htm>>.

entails adherence to human rights law?

¶19 Despite officially being confined to work of an "entirely non-political character,"<sup>44</sup> UNHCR does not operate in a political vacuum.<sup>45</sup> The refugee phenomenon impacts national and international spheres; it gives rise to political, security, and humanitarian concerns; it involves private and public actors with different objectives and levels of resources. UNHCR's considerably broad mandate,<sup>46</sup> as the organization charged to "assume the function of providing international protection . . . and of seeking permanent solutions for the problem of refugees,"<sup>47</sup> clearly requires engagement with all of the above issues, necessarily involving decisions of a political nature. UNHCR has indeed not resiled from doing this,<sup>48</sup> and its *modus operandi* has evolved considerably in the process.<sup>49</sup> What has not developed is a coherent conceptual framework to guide the consequences of this constantly evolving role.<sup>50</sup> For development camp governance, human rights law provides such a conceptual framework, since it professionalizes already existing "political" behavior, enabling the organization to control the political effects of its humanitarian activities better. Far from being incompatible with UNHCR's mandate, the application of human rights law is actually a consequence of it.

¶20 It could be argued that if UNHCR were obliged to respect international human rights law, this would undermine its responsibility to realize the long-term durable solutions, such as assimilation, resettlement, or repatriation, that are the ultimate objectives of its mandate.<sup>51</sup> Compliance with human rights law would encourage the development of refugee communities within camps. This would risk institutionalizing exile by further weakening ties with the country of origin and strengthening links with a host country that is unable to sustain the permanent habitation of refugees. Since these consequences are incompatible with its mandate, UNHCR's personality in international law

44. *UNHCR Statute*, *supra* note 26, art. 2.

45. "[H]umanitarian action . . . often has to be performed in an utterly complex political context. Apart from the appalling human suffering, the political dimension of refugee issues is even more prominent . . ." See Ogata, Peace, *supra* note 10.

46. The mandate is broad both in terms of its Statute and the notion of "Good Offices." For further discussion, see P.D. Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 INT'L & COMP. L.Q. 415, 419-21 (1982).

47. See *UNHCR Statute*, *supra* note 26, art. 1.

48. See Claire Palley, *Legal Issues Arising from Conflicts between UN Humanitarian and Political Mandates—a Survey*, in THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 145 (VERA GOWLLAND-DEBBAS ed., 1996) (explaining how UNHCR has taken on political roles).

49. For discussions of this evolution, see COLES, PROBLEMS *supra* note 10, at 15; IAIN GUEST, UNHCR AT 40: REFUGEE PROTECTION AT THE CROSSROADS (1991); Michel Moussalli, *The Evolving Functions of the Office of the High Commissioner for Refugees*, in PROBLEMS AND PROSPECTS OF REFUGEE LAW 81 (Vera Gowlland & Claus Samson eds., 1992); Anne Christine d'Adesky, *UNHCR Facing the Refugee Challenge*, UN MONTHLY CHRON., Sept. 1991, at 40, 43-45. An example of this evolution is UNHCR's involvement with displaced persons.

50. "Conceptual developments have not kept pace with social and political realities. . . . A philosophical basis and set of principles to inform UNHCR's work in this new era must be developed." Arthur Helton *UNHCR and Protection in the 90s*, 6 INT'L J. REFUGEE L. 1 (1994).

51. See *UNHCR Statute*, *supra* note 26, art.8(c), (e).

cannot countenance it being subject to international human rights law.

¶21 Such an interpretation misunderstands the nature of human rights law and the consequences of its practical application. As has been stated already, the phenomenon of settled and sophisticated refugee camps is a reality, regardless of any active promotion by UNHCR or the host state.<sup>52</sup> In fact, both parties passively acquiesce in the development of communities within such camps, by allowing them to exist and by providing basic facilities. The issue at hand, therefore, is whether UNHCR is obliged to engage fully with these communities, with human rights law setting the terms of engagement. Crucially, engagement not only would promote the development of refugee communities for their own sake, but also would ensure that they evolve in such a way that lays the groundwork for a durable solution. This second consequence suggests that the promotion of durable solutions, far from invalidating the application of international human rights law, actually requires it.

¶22 Refugees who have been able to live in a way that respects their human dignity, with all of the social, economic, cultural, educational, and political needs that this entails, are much more likely to thrive in the community where they end up living.<sup>53</sup> For example, some communities in refugee camps perceive themselves as very much "in exile," and are desirous of activities in the camps that can prepare them for the role they will eventually play in their home countries. In Dadaab, these communities range from former Mogadishu government technocrats to rural community leaders. For them a human rights framework might effect human rights education and training, equipping them with the skills necessary for the social reconstruction they will be engaged in upon their return. The activities of the Hutu militia in the Goma camps of the former Zaire<sup>54</sup> illustrate how refugee camps, like any political units, can become breeding grounds for collective activities of a political nature that end up affecting other political units and the security of the region. When the effects of such activities can be so problematic and indeed refugee-generating,<sup>55</sup> UNHCR's mandate requires it to engage with the development of refugee camp communities in a way that focuses them towards activities of a nation-building, conflict-resolution nature.<sup>56</sup> It would appear, therefore, that the application of human rights law is not only compatible with UNHCR's mandate, but is actually an essential component of the obligation to

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52. See *supra* notes 3-8 and accompanying text.

53. This is indeed why the Refugee Convention was drafted to accord refugee rights that would foster self-sufficiency. See Hathaway, *supra* note 19, at 165, 168, nn. 176-78, 243.

54. See, e.g., Ogata, Peace, *supra* note 10 (explaining how UNHCR tried to deal with the situation in the Goma camps).

55. "Vast agglomerations of refugees doomed to an indefinite future of life in bleak and demoralizing camps can generally become fertile sources of violence born out of frustration and despair. The extremism bred in such conditions can endanger the peace and security of entire regions and of the world itself." COLES, PROBLEMS, *supra* note 41, 34; accord Hathaway, *supra* note 19, 133, 175-76; Ben Barber, *Feeding Refugees, or War?*, FOREIGN AFFAIRS, July-Aug. 1997, at 8, 8-14.

56. "Humanitarian action, far from being solely a question of international charity, can support peace and reconciliation." Ogata, Peace, *supra* note 10.

promote durable solutions.

¶23 In justifying that human rights law is applicable to UNHCR, the balance has to be right. UNHCR is not a state, and development camps are not permanent sovereign units that, through the responsible governance of UNHCR, can constitute a permanent solution to the refugees' plight.<sup>57</sup> When a permanent solution is not an immediate possibility, however, governance by a human rights organization with personality in international law and an appropriate mandate can and should be sophisticated enough to ensure that the camp communities develop in an appropriate fashion. This entails the application of international human rights law to UNHCR refugee camp governance.

### C. The Governance: An International Human Rights Law Framework

#### 1. General principles

¶24 In those areas where it has adopted the state's role towards the refugees, the human rights law that would apply to the host state applies to UNHCR. This relationship, although legally akin to the relationship between the refugee and the state, operates differently. In an international legal order based on the post-Westphalian system of state sovereignty, non-state actors are in an inferior legal position. Applying human rights law to them raises challenges inapplicable to state actors. UNHCR is not a *de jure* sovereign authority with jurisdiction over small pockets of international territory. It never has the authority to act without the consent of the host state, since only the state has the legal personality to allow it into its territory. As a result, the degree to which international law can apply to UNHCR governance is inextricably linked to international law's influence on the sovereign entity. From this relationship, one can explore the content and enforcement of the applicable law.

¶25 Although this article previously argues that UNHCR's legal personality includes the application of human rights law, it does not follow that the content of this law in any given situation is necessarily as broad as the entire corpus of international human rights law. Instead, the content is determined by the particular circumstances of UNHCR's exercise of its international legal personality. In the case of development camp governance, it acts by virtue of the personality and jurisdiction of the host state, taking on some of its international legal responsibilities. It follows that the human rights law pertaining to these responsibilities is the law that should apply when UNHCR takes them over. That is to say, UNHCR is bound by that human rights law to which the state is bound. It is important to note, however, that the host state may not have incorporated

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57. "Although UNHCR can provide refugees with a 'legal homeland,' it has no territory on which to grant asylum." MICHAEL REITERER, *THE PROTECTION OF REFUGEES BY THEIR STATE OF ASYLUM* 88(1984).

its international human rights law obligations into its domestic law, nor may it have the will or the wherewithal to promote and protect effectively such rights as have been incorporated. If UNHCR implements human rights law in the camps, therefore, a different level of *de facto* protection would exist for the refugees and nationals of the host state, even if, as a matter of international law, an identical body of law applied. Since UNHCR already governs camps in such a way that refugees within them enjoy a greater level of development than people in the local area, however, it has already acknowledged that inequalities will exist between camps and their localities. This difference is ultimately a matter of selective *enforcement* of human rights law, not selective *application*.

¶26 The law applicable in any given refugee camp situation would be drawn from the well-established corpus of international human rights law which sets out the relationship between the refugee and the state.<sup>58</sup> It would be selected from this corpus according to the legal obligations of the particular state concerned. In all situations, the relevant provisions of customary international human rights law apply.<sup>59</sup> These would then be supplemented by whatever human rights law exists in the treaty obligations of the host state.<sup>60</sup> In the case of Kenya, for example, this amounts to the rights in the 1951 Convention<sup>61</sup> defined by the applicable level of attachment, the more limited rights in the OAU Convention,<sup>62</sup> the duties of the 1951 Convention<sup>63</sup> and the OAU Convention,<sup>64</sup> and the rights and duties of the African Charter.<sup>65</sup> UNHCR's own guidelines and EXCOM Conclusions<sup>66</sup> would be included insofar as the agreement with the host state that forms the basis for UNHCR's presence allows.

58. For an explanation of this corpus of law, see LAWYERS COMMITTEE FOR HUMAN RIGHTS, AFRICAN EXODUS: REFUGEE CRISIS, HUMAN RIGHTS AND THE 1969 OAU CONVENTION, 24-27 (1995); RICHARD B. LILICH, HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW (1984); Subrata Roy Chowdhury, *A Response to the Refugee Problems in the Post Cold War Era*, 7 INT'L J. REFUGEE L. 100, 109; Hathaway, *supra* note 46, at 157-66; Richard B. Lillich, *Duties of States Regarding the Civil Rights of Aliens*, in 161 RECUEIL DES COURS ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 329 (1978); Marion Mushkat, *Human Rights Under Temporary Refuge*, 3 REVUE DE DROIT INTERNATIONAL 169 (1994); Stephen B. Young, *Between Sovereigns: A Reexamination of the Refugee's Status*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, 339 (1982); Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072-81 (1985) (Current Development)

59. Since "the refugee, like every other category of human being, is ultimately a person possessing, as such, basic rights which are independent of 'positive' refugee law for their interpretation." Coles, *Refugees*, *supra* note 41, at 63.

60. See UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (visited Mar. 16, 1998) <<http://www.unhcr.ch/html/intlinst.htm>>.

61. See 1951 Convention, *supra* note †, Articles 3-34.

62. See OAU Convention, *supra* note 13, art. 1(4)-(6).

63. 1951 Convention, *supra* note , art. 2.

64. OAU Convention, *supra* note 13, art. 3.

65. African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58 (1982) (entered into force October 1986) (visited Mar. 15, 1998) <[http://www.unhcr.ch/refworld/legal/instruments/women/afr\\_e.htm](http://www.unhcr.ch/refworld/legal/instruments/women/afr_e.htm)>.

66. See EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAM, CONCLUSIONS [hereinafter EXCOM Conclusions] (visited Mar. 15, 1998) <<http://www.unhcr.ch/refworld/refworld/unhcr/excom/xconc/menu.htm>>.

¶27 The liability of UNHCR to comply with this law is more complex. Regardless of the degree to which the state has handed over its *de facto* responsibilities to UNHCR, the state remains liable under international human rights law. Thus, if human rights law applies to UNHCR, this liability coexists with that of the host state. Indeed, UNHCR is only able to govern according to human rights law insofar as the state will allow it, which can vary from almost total control by UNHCR, to considerable involvement by the host state. In any given human rights situation, who would be called to account? A hierarchy of liability could be conceived. At the top of the hierarchy, the state would be fully and ultimately liable. Below that, UNHCR would be liable insofar as it is given a prerogative by the state to determine the human rights situation. The problem with this approach is that public international law is a horizontal, not a vertical, system. Alternatively, a concurrent liability model might reconcile the need to apply the law in a more meaningful manner with the realities of the international legal system. This model would assume that in those areas where UNHCR has taken on the state's obligations in international human rights law, there is *prima facie* liability concurrent with that of the state. The side upon which the burden lies in any given case would then have to be established. When formulating the test to determine this, specific considerations would have to be borne in mind. They might include the power balance between the two and possible involvement by other parties in the situation and their relationship to UNHCR and the state. It might be possible to deconstruct the elements of the situation, and apportion liability to each separately.

¶28 This enquiry takes international human rights law to new frontiers. If human rights law is to apply to a multiplicity of actors, how will their complex interaction in any given situation be addressed, and how will liability be enforced? Although the application of international human rights law to the relationship between the individual and the state has evolved considerably since its relatively recent establishment, it is still in many ways in its infancy. The expansion of this evolution to cover the relationship between the individual and the non-state actor is in the realm of hypothesis. Questions arising from this have yet to be meaningfully explored in scholarship, let alone reflected in international practice and institutions. There are no human rights judicial review and enforcement mechanisms currently in place that are concerned directly with non-state behavior.

¶29 The power relationship in many development camps is relatively straightforward, however. UNHCR runs the entire operation, with minimal involvement by the host state. In most situations, it is possible to identify the locus of power, and therefore establish with a sufficient degree of certainty the circumstances under which UNHCR has an obligation to comply with international human rights law. This clarity obviously would not be the case in emergency status camps, where control is exercised by a whole host of actors in a competitive and overlapping manner. As far as enforcement is concerned, human rights governance can to a certain extent

be promoted through the (albeit limited) methods of control that currently exist. Donor states can exercise scrutiny by using the current process through which they influence UNHCR.<sup>67</sup> Host states can incorporate obligations vis à vis international human rights law into the agreements they sign with UNHCR. Then, together with NGOs, they can apply the methodology of international human rights law in their monitoring of UNHCR development camp governance.

## 2. How governance would be effected

### *a. Governance Defined*

¶30 Adopting a human rights law framework would entail UNHCR governing development camps according to international human rights law. The full terms of the agreement between the host state and UNHCR constitute the point of departure. Such an inquiry would reveal the extent to which UNHCR has taken on the host state's legal responsibilities, and thus enable the identification of UNHCR activities to which international human rights law applies. In each of these areas, UNHCR would be obliged to act in the same manner that a state would, to ensure that the situation which prevails is one that is in conformity with international human rights law. This would involve applying the law and substituting the "state" for UNHCR where appropriate.

¶31 This application of human rights law amounts to an evaluation of UNHCR's behavior, questioning whether or not the rights of refugees are being respected in those areas in which UNHCR exercises control over them. Whenever UNHCR limited rights, human rights law would provide a test against which for such limitations should be justified. Indeed, the nature of development camps is such that the limitation and derogation provisions of international human rights law would come into their own. These provisions allow for the state—and therefore in this case UNHCR—to take extraordinary measures to safeguard the very existence of the unit within which human rights can be observed.<sup>68</sup> This is of particular concern in development camps, which may be located in areas where the security situation is insecure and where measures that would normally be unnecessary in a stable civil society, such as curfews, are essential to preserve the integrity of the camp. In such circumstances, the balance of rights and duties between the individual and UNHCR shifts much more towards UNHCR. Since it is precisely in these situations that human rights are most at risk, limitation and derogation provisions provide a crucial set of principles against which extraordinary measures can be tested so as to ensure that they do not shift the balance towards UNHCR any more than is

67. At meetings of the Executive Committee, for example.

68. See, e.g., International Covenant on Civil and Political Rights, arts. 4 & 19 (3), 999 U.N.T.S. 171 (1976) (visited July 15, 1998)  
<http://www.tufts.edu/departments/fletcher/multi/texts/BH498.txt>.

necessary. To justify a curfew, for example, UNHCR would have to determine whether the restriction on the freedom of movement was for a legitimate purpose (such as to maintain the safety of a camp from attacks by bandits) and whether it was proportionate to that purpose (i.e. that the extent of the risk from banditry was such that a curfew was necessary). Of course, similar considerations form the basis of current management decisions, since much of human rights law is merely the systematic articulation of the various tests of necessity and proportionality that any responsible decision-maker would consider. The application of human rights law to governance takes these tendencies and puts them on a more transparent, clearly articulated footing, and one that is by its very nature capable of adaption to the particular circumstances of governance.

*b. Particular circumstances in development camps*

¶31 A full examination of the practical application of international human rights law in development camps is beyond the scope of this piece, since it covers the same law as that which applies between refugees and states. There are, however, certain characteristics particular to development camp governance that would affect this application. These include: UNHCR's approach to its role, the fragile nature of refugee camps, the devolved nature of power, the importance of preserving cultural communities, and the problem of disenfranchised refugee women.

*i. UNHCR's Self Image*

¶32 The adoption of a human rights framework would require a leap of faith on the part of UNHCR. The organization would have to think in legal terms like a state responsible for human rights rather than a private actor responsible for refugee rights. Instead of viewing itself as the provider of certain basic services in the camps, it would confront the reality of governing a political unit, and therefore adopt a coherent and coordinated holistic strategy to run through all aspects of camp life. This would require a shift of emphasis away from what James Hathaway sees as the "remedial or palliative" function of the traditional refugee law activities that prevail in emergency situations, like the prevention of *non refoulement*.<sup>69</sup> Instead, UNHCR would have to act in tune with the "interventionist or facilitative"<sup>70</sup> nature of international human rights law. Governance in development camps does not concern refugees solely *qua* refugees, but *qua* human beings, who are entitled to the greatest range of human rights promotion that is possible. A step towards this is evident in the guidelines that UNHCR has already adopted on discrete areas of governance, such as women,<sup>71</sup> children,<sup>72</sup> and sexual violence.<sup>73</sup> Development camps require

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69. James Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113, 177 (1991).

70. *Id.*

71. See Guidelines on the Protection of Refugee Women, EC/SCP/67 (1991); EXCOM

governance that is as multifaceted as the term would suggest, however, involving as broad a range of considerations as any political unit.

*ii. Insecurity*

¶33 UNHCR's approach to the application of international human rights law should be flexible enough to take account of possible changes in the very *raison d'être* of a camp. By its nature, a refugee camp situation is unstable. It can shift from an emergency situation to a development one and back again, as the aforementioned situation in the Goma Camps in Zaire demonstrated.<sup>74</sup> These shifts can be precipitated by a wide range of political, economic, environmental and security factors; they can be derived from events in the host state, the country of origin, or the camp itself. This insecurity precipitates a very different approach to governance than that which prevails in a more stable political unit like a state during peacetime. UNHCR has had to build up expertise in finessing its behavior to the particularities of any given refugee situation to the extent that it categorizes the status of camps (such as "emergency" or "development"), to govern in a manner appropriate to that status, and is able to manage a situation in which the categories blend into each other. The application of international human rights law in development camps has to be similarly finessed. The closest legal analogy to the application of international human rights law in a state context would be a state of emergency. In such circumstances, the aforementioned derogation and limitation tests of international human rights law are applied when certain aspects of civil society are restricted more than usual during an extraordinary situation prevailing in a state.<sup>75</sup> In development camps, human rights law governance will have to draw on this jurisprudence, and marry it with UNHCR's experience of constantly fluctuating camp status into an approach which can reconcile the need to promote the rights of the refugees in the camps with the constant insecurity of the camp itself. This requires the application of international human rights law to concerns that do not normally prevail on a state level. This is an enterprise which UNHCR is well-placed to engage in, however, since for the organization it amounts to the application of a new set of questions to an existing tradition

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conclusions, *supra* note 66, No. 39 (XXXVI) (1985) "Refugee Women and International Protection," 54 (XXXIX) "Refugee Women," 60 (XL) (1989) "Refugee Women," 64 (XLI) "Refugee Women and International Protection," and 73 (XLIV) (1993) "Refugee Protection and Sexual Violence," (visited Mar. 15, 1998) <<http://www.unhcr.ch/refworld/unhcr>, from there select "UNHCR Official Documents," "Executive Committee Documents," and lastly, "Executive Committee Council">.

72. See EXCOM conclusions, *supra* note 66, No. 47 (XXXVIII) (1987) "Refugee Children," and 59 (XL) (1989) "Refugee Children," (visited Mar. 15, 1998) <<http://www.unhcr.ch/refworld/unhcr>, from there select "UNHCR Official Documents," "Executive Committee Documents," and lastly, "Executive Committee Council">.

73. See UNHCR, SEXUAL VIOLENCE AGAINST REFUGEES, GUIDELINES ON PREVENTION AND RESPONSE (1995).

74. See *supra* note 54 and accompanying text.

75. See *supra* note 68 and accompanying text.

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of governance.

*iii. Devolved power*

¶34 Human rights law has to be able to speak to the devolved nature of power in development camp governance. In so doing, its role should be similar to, and different from, that of a bill of rights in a national constitution. It should promote a culture of rights and duties in the camps, therefore meeting the constitutional needs of a sophisticated polity. This promotion, however, should take a particular form. For practical reasons, it could not entail a body of law that is justiciable in a litigative sense, but rather a set of principles that would be the cornerstone of all decisions made by those responsible for governance in the camps. Implementing Partners currently exercise their considerable<sup>76</sup> responsibilities with a high degree of autonomy. A global human rights strategy, coordinated by UNHCR among all these agencies, would require IPs to examine how their activities impacted on the human rights of refugees and what improvements could be made.<sup>77</sup> Human rights law would no longer be the exclusive concern of protection officers. It would be of relevance to all who exercise authority in camp governance. Its adoption should both professionalize the human rights activities and reporting<sup>78</sup> that protection officers<sup>79</sup> engage in, and increase possibilities for partnership with other actors such as the United Nations High Commissioner for Human Rights (UNHCHR),<sup>80</sup> by clearly establishing a legal framework for such activities.

*iv. Preserving Communities*

¶35 The importance of individual communities in development camps requires a particular emphasis on those areas of human rights law which aim to preserve cultural identities.<sup>81</sup> Refugee camps contain not only groups of individuals who have been bundled together in a particular area, but also series of communities that operate on different levels and in different ways, evolving over the passage of time. For the refugees in Dadaab who have seen the breakdown of their societies and, in the case of the Somalis, their entire country, the traditional rituals of community and family life are all they have left to maintain a sense of identity. The importance of engaging in such practices has already been acknowledged in the religious sphere, through the sophisticated array of religious activities in the camps from the mosques and Sha'ria education for Islamist

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76. MSF-B is solely responsible for all of the medical care in the camps. CARE controls one of the key activities of camp governance, food distribution.

77. See *UNHCR Statute*, *supra* note 26, art. 8(i) (UNHCR's mandate includes "co-ordination of the efforts of private organizations concerned with the welfare of refugees.").

78. See *AFRICAN EXODUS*, *supra* note 58, at 170 (describing current problems in human rights monitoring in development camps).

79. "Protection officer" is a term that refers to UNHCR legal personnel.

80. See Helton, *supra* note 50, at 2-3 (advocating such co-operation).

81. See Hathaway, *supra* note 19, at 173-6 (discussing the importance of this emphasis).

Somalis to the churches and festivals of the Ethiopian Christians. Human rights law governance extends this from an *ad hoc* concern with particular cultural practices, to an integrated system that engages with the entirety of religious, cultural and social life in the camps. An example of this would be in education. Article 22 of the 1951 Convention sets out a standard of protection for "Public Education," which applies *inter alia* to "access to studies."<sup>82</sup> Article 3 contains an obligation to apply the provisions of the Convention "without discrimination as to race, religion or country of origin."<sup>83</sup> The combined effect of these two articles on camp governance is that UNHCR is obliged to ensure that its educational programs operate in such a way that they allow all the communities in the camps to participate.

*v. Disenfranchised Women*

¶36 Human rights law should be applied in such a way that governance does not perpetuate the disenfranchisement of those groups, notably women<sup>84</sup> and children,<sup>85</sup> that have been identified by UNHCR as particularly vulnerable in refugee camps. It is axiomatic that the disempowered in society often suffer most acutely when that society breaks down. A camp is by definition a refuge from such suffering, but one constituted by its own particularly fragile form of society, in which authority over individuals is exercised on many different levels. In such circumstances, what might be described as a "chain of protection" exists, that is to say, a complex system of relationships, each entailing rights and duties, which determines the level of protection accorded to any given individual within the chain. Such relationships operate at the individual, family, community, IP, UNHCR, and host state level. If the considerations that flow from the application of human rights law do not impact on all in the chain, any activities by UNHCR are undermined by weak links.<sup>86</sup>

¶37 One example of this problem is in refugee decision-making fora. Typically, UNHCR consults with such bodies on many important decisions in the camps. It does not necessarily engage in a rigorous examination of their representative nature, however, but instead takes their authority at face value. In Dadaab, this meant that consultation amounted to nothing more than a veneer of popular participation, since the forum chosen was dominated by men, thus disenfranchising the women in the camps.<sup>87</sup>

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82. 1951 Convention, *supra* note 9, art. 22.

83. 1951 Convention, *supra* note †, art. 3.

84. See DEVELOPMENT AND DIASPORA: GENDER AND THE REFUGEE EXPERIENCE (Wenona Giles et al. eds., 1996); SUSAN FORBES MARTIN, REFUGEE WOMEN 16-23 (describing the issues faced by refugee women).

85. See Neil Boothby, *Displaced Children: Psychological Theory and Practice from the Field*, 5 J. REFUGEE STUD. 106 (1992); NEIL BOOTHBY ET AL., UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS AND REFUGEE MOVEMENTS (1988) (discussing the issues faced by refugee children).

86. "[Human rights] can be improved if the possibility is found and everybody takes his or her role to play within the situation, either agencies or community members." Dadaab Questionnaire Responses, *supra* note 2.

87. See Wilde, *supra* note 2, at 10-11.

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Furthermore, this undermined the value of decisions taken, since most decisions actually concerned activities that were the exclusive concern of women, such as water supplies.<sup>88</sup> Adherence to the various measures of the Convention on the Elimination of all Forms of Discrimination against Women<sup>89</sup> could reduce the risk of such problems occurring. Article 2 requires that UNHCR "ensure that public authorities and institutions shall act in conformity with this obligation" (not to discriminate) and "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."<sup>90</sup> As regards decision-making in particular, Article 7 obliges UNHCR to

take all appropriate measures to eliminate discrimination against women in the political and public life of the country [sic] and, in particular, shall ensure to women, on equal terms with men, the right:

To vote in all elections and public referenda and to be eligible for selection to all publicly elected bodies;

To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

To participate in non-governmental organizations and associations concerned with the public and political life of the country.<sup>91</sup>

¶38 Obviously, these provisions are phrased literally in terms of the institutions of state, rather than camp, governance. In applying them to camp governance, it is necessary to transpose their spirit to a camp setting.<sup>92</sup> For example, one of the relevant camp processes to which the

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88. One particular decision concerned the location of water taps, used by women to collect water to meet all of their family's needs. A failure to consult women, therefore, not only deprived them of the right to participate, but involved an issue where their input would be vital and the outcome would affect both the family in general and women in particular (who would have additional burdens if the taps were located inappropriately).

89. 19 I.L.M. 33 (1980) (ratified by Kenya on Mar. 9, 1984) (visited July 15, 1998) <http://www.tufts.edu/departments/fletcher/multi/texts/BH769.txt>.

90. *Id.* at art. 2.

91. *Id.* at art. 7.

92. Indeed, the use of "in particular," *id.*, implies that even in the state context, the list of processes in Article 7 is not meant to be exhaustive. Instead, it should be seen as a series of important suggestions, which can be supplemented according to the circumstances.

provisions could apply would be participation in the selection for, and membership in, a decision-making forum. In this case, UNHCR would be obliged to critically appraise the full context within which the forum operates to see whether women were able, on equal terms with men, to be candidates, to vote, and to campaign in elections. This example illustrates that human rights law governance entails an ever-vigilant appraisal of all the camp processes over which UNHCR has authority, not just those it directly controls.

#### IV. CONCLUSION

¶39 It is possible to apply the current norms of public international law in a new but authentic manner that allows the principles of human rights to have a juridical impact upon UNHCR development camp governance. The refugees who are governed in such camps are subjects of international human rights law. UNHCR governs such camps in its capacity as an international legal person, and the nature of this personality is compatible with the application of human rights law to it. What is currently missing is the logical consequence of the relationship between the two, namely the exercise of governance that is rooted in international human rights law. To give effect to this consequence through the adoption of a human rights law framework is to attempt to mitigate some of the unfortunate aspects of the current legal regime from within the parameters of that regime. It is not an ultimate solution to the current crisis in refugee protection. What is fundamentally required is the wholesale revision of the operation of international refugee law, so that it can have a more effective impact on the rights and duties of refugees, states, and organizations. Until a regime is developed that speaks to the nature of the current refugee phenomenon, the role of human rights promotion in refugee camps will be uncertain and insecure.