

# Rights and accountability

by Leanne MacMillan and Lars Olsson

Refugees languish in ‘no-mans land’ while countries close their borders, fearing de-stabilisation if too many are let in; men, women and children seeking asylum are detained, sometimes for months on end; refugees are caught in camps placed dangerously near the border of the very country they fled, subject to attack and infiltration of their camps by armed groups; refugee protection and assistance workers are killed working in dangerous settings despite the UN calling on governments to ensure their protection; refugees have been evacuated with an uncertain legal status under humanitarian rather than resettlement programmes; would-be refugees have been protected in ‘safe’ havens only to find them anything but safe; refugees are forcibly mass repatriated by countries no longer willing to provide protection; refugees face a whole host of obstacles on the path to finding safety including visa requirements, carrier sanctions, rejection at frontiers and interception by boats trawling the seas.

These distressingly common examples of the plight of refugees and those who seek to assist them represent the challenges faced by UNHCR and NGOs and also point to the failures of the international community as it grapples with the current challenges of refugee protection and assistance. There is an urgent need to create a system of accountability to expose the failure of states in their responsibilities to provide refugees with the protection they are due under agreed international standards. This article makes the case for the creation of an independent, impartial and effective body to secure reports from states to monitor their implementation of the 1951 UN Refugee Convention, to advise on questions of interpretation of the Convention and to receive individual complaints from refugees whose rights are being violated. The need for closer scrutiny of how states act needs the support of all those in the NGO sector whose work to protect

and assist refugees will be greatly enhanced through a more transparent system of accountability.

## 50 years of the UN Refugee Convention

This year, many are assessing how the Convention bears up in a world where the rights of refugees are much in dispute and where those forcibly displaced are the subject of popular debate. UNHCR has initiated a round of Global Consultations [see page 9] seeking to reach international consensus on the continued relevance of the UN Refugee Convention and on a number of contested issues relating to refugee protection. At this time when states are also being asked to re-affirm their commitment to the Convention, there are two key needs: first, to monitor how current standards are interpreted and implemented and to hold those who breach current provisions accountable for any violations; and, second, to find ways in which to develop standards to address new refugee protection concerns given the changing nature of forced displacement. This article will mainly focus on the first of these needs.

Most would not dispute that the Convention is an important and vital tool, along with other international human rights instruments, in establishing the minimum standards

of rights of refugees. However, the increasing tendency of many critics is to dispute the relevancy of the Convention in a world which, they argue, has changed dramatically in terms of the nature and character of the forced mass displacement of millions. Only the reasons why people continue to flee and need protection remain similar to those the Convention originally sought to address: genocide, conflict, oppression and a host of other human rights violations.

Clearly, the pressing challenge today is to stem the tide in the demise of refugee rights as states seek to change their

responsibilities to even the most basic of rights, such as the right to seek and enjoy asylum and the requirements of the fundamental principle of *non-refoulement*. Any casual reading of the press will show that refugees are more often seen as a threat to host societies and as having too many rights. Governments have engaged in making these arguments themselves while at the same time, and quite remarkably so, maintaining that they are committed to their Convention and other human rights responsibilities to refugees. In the meantime, those working with refugees in dozens of countries around the world provide protection and assistance in an environment where rights are balanced with political considerations which the NGO and IGO sector have little, if any, ability to influence. Reference need only be made to the crises of the past few years in Afghanistan, Guinea, Chechnya, East Timor, Kosovo, the former Yugoslavia and the Great Lakes region to see how refugees’ rights reel in the face of geopolitical factors and varying commitment to those forcibly displaced.

## The failure of protection

When speaking of failure, the tendency is to look for a ‘guilty party’. In the realm of refugee protection, it is not possible simply to find one actor responsible for the flaws in the system; all those with roles and responsibilities for protecting refugees have failed. What is vital now is to learn from the sharp lessons of the past decade which have made it clear that new approaches are needed in the progressive interpretation of the Convention and the solutions which flow from it.

Ever since its inception, UNHCR, under its protection mandate, has sought to monitor the implementation of the Convention and to hold governments accountable. It has provided advice on interpretation of the Convention and has, when possible, publicly exposed and admonished governments violating the rights of refugees. It has also intervened on behalf of individual refugees in order to ensure that their claim to

*refugees are more often seen as a threat*

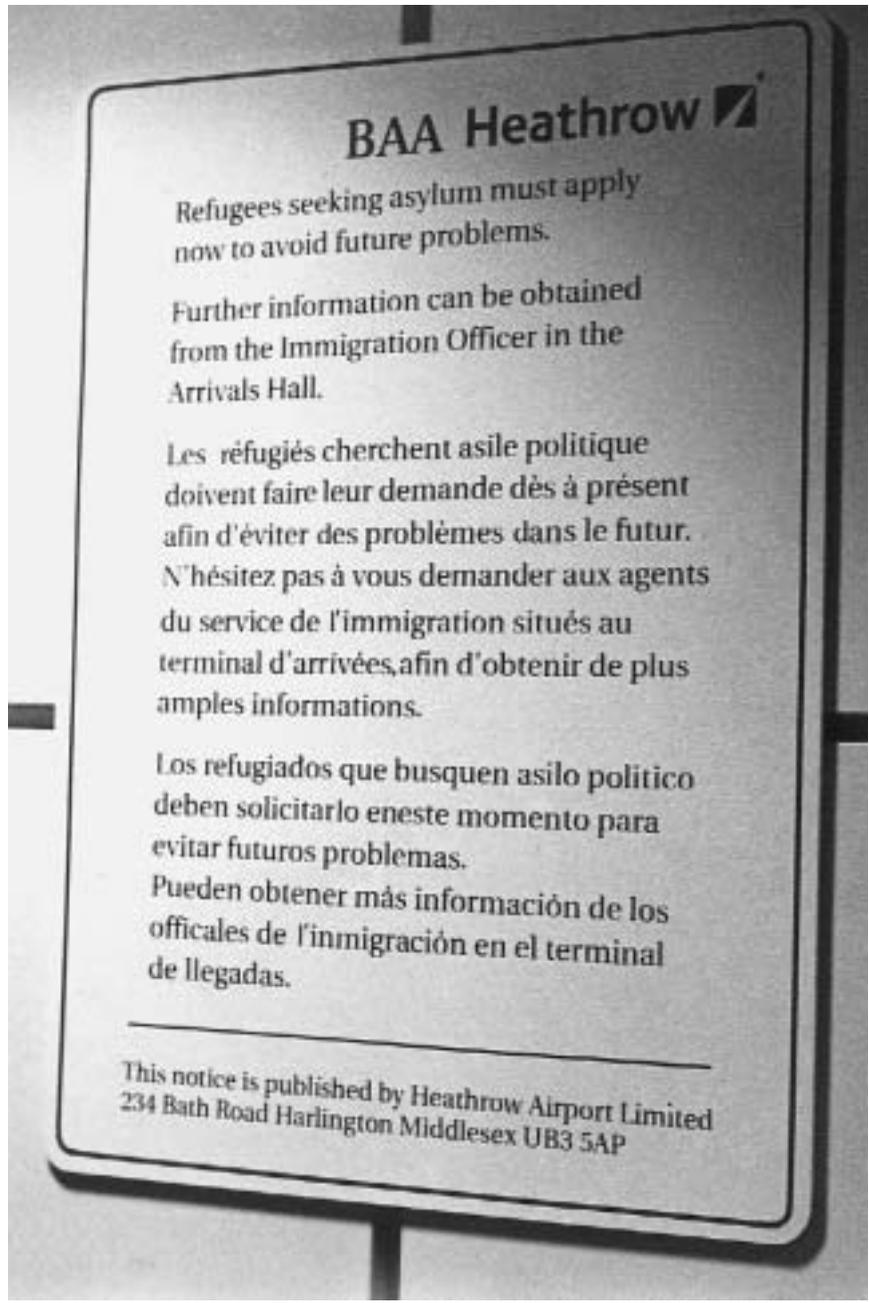
asylum was properly determined and in some instances has been the sole authority responsible for asylum adjudication in countries where there has been no other authority. It is not any failing of UNHCR which is at issue at present; it is rather the failing of the international community to abide by the very standards they agreed to uphold and the limited ability of UNHCR to ensure that governments heed their advice.

**Recommendations**

Some refugee experts have concluded that the absence of a treaty body with competence for examining the legality of state conduct and to bring states to account for the implementation of their Convention obligations has contributed to the inadequate protection of the rights of refugees.<sup>1</sup> When considering the most appropriate manner in which to ensure compliance with the Convention and the development of standards in the realm of refugee rights, it is frequently argued that the nature of refugee protection and assistance is unique in the area of international human rights standard setting, monitoring and enforcement. It is argued that refugee protection and assistance necessarily involve the close cooperation of host governments, governments in countries of origin, donor governments, intergovernmental organisations and, in particular, a host of international, regional and national NGOs. The nature of refugee protection and assistance is of course characterised by phases ranging from immediate emergency phases to longer-term post-return assistance. However, at each stage there are rights and standards to guide all actors in their protection and assistance work, which have been variously adhered to for a number of reasons. The need is to recognise that improvements can be made, however modest, through enhancing cooperation by all parties at each stage, including cooperation in monitoring the implementation of international standards.

**1. Monitoring through periodic reporting**

There are important, indeed necessary, criteria for effective monitoring of states' obligations under international instruments. The monitoring body must be independent and impartial (free to operate without political pressure from governments); it must be efficient (able to act in a timely manner and not be



administratively cumbersome, given that people's rights are at stake); and it must be open to public scrutiny, with a meaningful opportunity for NGOs and IGOs to provide input as this is the very essence of what motivates many governments to adhere to standards. Governments do not want to risk opprobrium and embarrassment.

It has been widely acknowledged that UNHCR operates in an increasingly politicised environment, subject to the political will of those very states responsible for its funding and the political considerations of those states in which it operates. The Office of the High Commissioner for Refugees is generally

responsible, according to both its Statute and the Refugee Convention, for ensuring compliance with international conventions for the protection of refugees.<sup>2</sup> Other international treaties include a reporting requirement whereby states issue reports on a periodic basis and are subject to scrutiny on the basis of these reports. Under the UN Refugee Convention, states have never consistently and publicly reported on their implementation of the Convention (as required under Article 35 of the Convention). UNHCR, through its protection work, variously monitors the compliance of states but these protection reports are not made public, for reasons including beliefs about the

primary role of diplomacy, preference for more private forms of influencing states, and concerns about the potential jeopardising of access by UNHCR and NGOs to the country in question if violations of Convention obligations were made public. However, in the majority of cases, other international human rights monitoring bodies' work and influence have not been lessened through the issuing of public reports. Indeed, rights have been reaffirmed and strengthened and further violations stopped. It may be concluded that the failure of UNHCR, NGOs and the international community as a whole to establish public reporting is ultimately a failure towards refugees.<sup>3</sup>

Many major human rights treaties establish an independent body to monitor application through a system of periodic

public reporting and, in some cases, through state and individual complaints mechanisms. This provides an opportunity for states to submit reports on implementation to the monitoring body which in turn reviews the reports, often in light of information supplied by NGOs. These monitoring functions, which play a key role in the protection of human rights, are performed in public, with states called to account in an open process.

Remarkably, these tools available under the international human rights framework are increasingly being used in an effort to improve or, some would argue, prevent a further deterioration in the quality of protection afforded to refugees, to assert the rights of refugees and to hold states accountable for

violations of human rights treaties as well as refugee protection standards. The integrity of the refugee protection framework is now more forcefully upheld in other human rights fora.

For some years now Amnesty International has promoted the use of other international and regional fora where refugees' rights can be asserted. In addition to the Executive Committee of the High Commissioner for Refugees (EXCOM), international human rights mechanisms have evolved to play an important role in the monitoring of states' refugee policies. For example, the UN Human Rights Committee, in its examination of country reports, has expressed concern regarding restrictive interpretations of the definition of persecution for refugees where account was not taken of persecution by non-state actors. The Committee also has found that an asylum seeker was arbitrarily detained in contravention of the International Covenant on Civil and Political Rights as there was no "real and not merely formal" review of the detention. The UN Committee against Torture has also reviewed an increasing number of individual communications brought forward by asylum seekers and refugees fearing return to countries where they would be at risk of torture. Most recently, the Committee on the Elimination of Racial Discrimination has also called on states to adhere to its commitments under the UN Refugee Convention.

## 2. Interpretation of the UN Refugee Convention

Governments interpret the UN Refugee Convention variously. There are a number of ways to ensure consistent interpretation but these are cumbersome, time-consuming, uncertain and, most importantly, cause undue grief for refugees who fall victim to the interpretative lapses of decision makers. It will always be the case that there are principled and legitimate differences of interpretation and these differences can only be corrected through larger processes of revision of the treaty from which the confusion flows. However, it simply cannot be the case that governments continue to willfully ignore the interpretative guidance offered by EXCOM and UNHCR and to be gained from leading jurisprudence from other countries.

*Rwandan refugees at Amisi Camp, Zaire*



Part of the mandate of any responsible for ensuring implementation of the Convention could include the ability to determine how the Convention is to be interpreted. This could be by way either of referring questions of interpretation or of considering individual cases of those who can show a dubious interpretation of their right to protection. It is important to underline at this point that at issue are the rights of individuals; errors of interpretation or misapplication of the Convention have consequences for human suffering and may endanger lives.

### 3. Individual complaints to stop a human rights violation

Any system would have to include the opportunity for an individual to have their case heard in order to stop the transgression of their rights as refugees and for a government to be ordered to comply with the findings of the body to whom the case is referred. It is not uncommon in the international human rights system to have such authorities with the power to review individual cases and to invoke some form of redress for the victim. This could include injunctive relief, a reference back to the government with advice on how properly to decide the case, or a disposition that agrees with the interpretation.

This article does not seek to argue that all three elements of an independent, impartial and efficient system would need to be separately established. Nor does it suggest where in the UN system this body would be placed. The criteria of independence, impartiality and efficiency, however, would dictate certain requirements. The current UN Refugee Convention or the Statute of the Office of the High Commissioner as currently configured could accommodate these new roles and responsibilities but it would most likely be the case that a new instrument, such as an optional or additional protocol, would need to be created.

### Conclusions

It is difficult to reconcile the recent and abundant evidence of the failure of state responsibility, the increased incidence of violations of the most fundamental of refugee protection (the principle of *non-refoulement*), the acknowledged tension between the assistance and protection agenda of UNHCR and the challenge by some governments of the authority of

treaty bodies deciding on refugee rights with the view that supervision as it now stands - using diplomacy and institutionalised dialogue - is sufficient. Most would agree that states in all parts of the world continue to flout their obligations under international refugee law. Given the interdependency of the refugee protection regime, it would seem that members of the international community have an interest in ensuring that states are held accountable for implementing their international obligations towards refugees and asylum seekers.

As in other areas where rights are at issue, a system of monitoring and public reporting is required. Refugees, governments, UNHCR and NGOs all have an interest in such a system being established.

In addition, in the past few years there has been an increase in governments, either singly or as part of a group, taking 'parallel approaches' to refugee protection. Confidential strategy papers to regional fora, governments announcing that they were considering withdrawing from their treaty obligations, governments announcing their proposals for selecting refugees offshore rather than recognising refugees who make it to their borders: all are signs of a system in distress and one where UNHCR has limited room to respond given its precarious position as an agency held hostage to the financial ties of powerful governments. UNHCR is a powerful voice when allowed to be so; it is frequently faced, however, with the dilemma of remaining publicly silent in order to secure either the access needed to provide protection or the funds to support its protection initiatives.

It is widely accepted that compliance to international standards is significantly enhanced through systems of accountability and in this regard the role of both human rights and humanitarian assistance NGOs is indisputable. It is equally true that the international instruments and institutions of refugee protection are ultimately only as strong as states allow. All roads lead back to state responsibility and when governments violate basic principles of refugee protection the system itself is weakened. One corrective measure is to hold such states openly accountable.

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## UNHCR is a powerful voice when allowed to be so;

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The international human rights and refugee law framework for the rights of refugees is not perfect but it does provide a foundation in law for core rights to be asserted. A system to monitor the implementation of these rights, to prevent further violations of them and to lead in the development and interpretation of legal standards affecting the rights of refugees would militate against the tendency to find solutions to refugee problems which depend on political

solutions and are subject to negotiation or interpretation at a time of crisis. The challenge to refugee protection advocates is to resolve where and how these important rights can be monitored and decided without being led primarily by political considerations.

All parties involved in refugee protection and assistance must be alert to ensuring that the quality of protection of refugees, whether they be individuals fleeing oppression and violation of their fundamental rights or those forcibly displaced as part of a mass movement, is not left subject to such uncertain and *ad hoc* approaches.

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1 Chaloka Beyani, 'Human Rights and the Protection of Refugees', *Interrights Bulletin*, 1997, Vol 11 No 2.  
2 Statute 8 (B) and the UN Refugee Convention specifically through Article 25.  
3 Beyani *op cit*

## Refuge!

From March to December 1997, Amnesty International ran a refugee rights campaign called 'Refuge! Rights have no Borders', supported by an award-winning website which included an online petition.

The website and full campaign report can be accessed at [www.amnesty.org/ailib/intcam/refugee/index.html](http://www.amnesty.org/ailib/intcam/refugee/index.html)