Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention

Saul Takahashi *

Abstract

Nearly all human rights conventions adopt the treaty body model to monitor states parties' implementation of their treaty obligations. This monitoring mechanism provides for a quasi judicial committee, far detached from sites of many of the human rights violations it reviews. On the other hand, there is no such treaty body for the 1951 Convention relating to the Status of Refugees. Rather, there is the UNHCR; a large operational agency with offices all over the world, including in sites of refugee emergencies.

Effective monitoring of human rights conventions would seem to require a number of factors, including independence and transparency. Legitimate monitoring would have to be strong, and would have to be seen to be strong. Criticism raised in recent years of UNHCR's monitoring methods are largely based on frustration with these points. This paper will examine these issues, and also examine whether recourse to the treaty bodies really provides an adequate remedy for refugee rights. The argument of this paper is that while the UNHCR's monitoring of the Refugee Convention is problematic in many respects, the monitoring of refugee issues by the treaty bodies is in many ways incomplete and inconsistent, and that the treaty body model does not provide refugee advocates with a comprehensive solution.

1 Introduction

The international community has adopted a large number of binding instruments for the protection of human rights, the most prominent and arguably the most important of these are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both of these were adopted in 1966, and, together with the Universal Declaration on Human Rights (UDHR), make up what is often referred to as the International Bill of Rights. However, there are also a number of other important human rights conventions, such as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (Convention against Torture), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of Discrimination against Women (CEDAW).

Most of these conventions establish monitoring treaty bodies; quasi judicial committees of experts in the relevant field charged with monitoring implementation of the convention, and guiding States parties in fulfilling their obligations. The treaty bodies, which meet regularly in Geneva and New York, review information provided by States parties and by other sources, engage in a discussion with State representatives, and adopt recommendations on how States parties could better implement the provisions of that convention. Treaty bodies also adopt general interpretations

* Legal Officer, Holocaust Victim Assets Programme, International Organisation for Migration (IOM). The opinions expressed in this paper are those of the author alone, and do not necessarily reflect the views of IOM. The author would like to express his gratitude to Mr David Petrasek for his critical comments on an earlier draft of this paper.

Netherlands Quarterly of Human Rights, Vol. 20/1, 53-74, 2002.

('General Comments') of particular provisions of the Conventions, in order to clarify the extent of obligations states parties may have. The activities of the treaty bodies, and the conclusions and recommendations they adopt, have become a crucial part of the international human rights regime.

The Convention relating to the Status of Refugees (Refugee Convention) was adopted in 1951, before the human rights conventions noted above. The language and orientation of the Convention differs somewhat from texts seen in human rights law, referring mainly to treatment States parties should afford to refugees, as opposed to inherent rights persons own. However, the Refugee Convention specifically cites the UDHR in its preamble,[1] making a connection between the protection of refugees and human rights, and the mainstream understanding solidified over recent years is that human rights standards should be utilised in interpreting the elusive concept of 'persecution',[2] one of the key elements in the refugee definition.[3] The increasing attention of influential human rights organisations[4] to refugee issues has arguably also contributed to the Refugee Convention being commonly characterised as part of human rights law.

The Refugee Convention differs greatly from the more traditional human rights conventions, however, in its method of monitoring. No monitoring treaty body exists for the Refugee Convention; rather, Article 35 of the Convention, obligates States parties to co-operate with the Office of the United Nations High Commissioner for Refugees (UNHCR), in the fulfillment of its duties as the agency 'supervising the application' of the Convention.[5] The UNHCR is a gigantic operational agency with offices in many countries of the world, and thousands of staff employed to ensure the well being of refugees. UNHCR was established in 1950, when its Statute was adopted by the General Assembly, and is governed by the Executive Committee, an intergovernmental body made up of 56 States. The Executive Committee meets once

---

1 The first and second paragraphs of the preamble read: 'Considering that the Charter of the United Nations and the [UDHR] (...) have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination; Considering that the United Nations has, on various occasions, mainfested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms...'

2 'The dominant view (...) is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.' Hathaway, J., *The Law of Refugee Status*, Butterworths, Toronto, 1991, p. 108. Hathaway puts forward an elaborate system of explaining how specific human rights standards, in particular those in the International Bill of Rights, can be used to decide whether a person qualifies for refugee status.

3 Article 1(2) of the Refugee Convention defines a refugee who 'owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

4 Amnesty International, for example, conducted a world-wide campaign on the rights of refugees, in 1997, issuing the publication *Refugees; Human Rights Have No Borders*. In addition, Human Rights Watch and the Lawyers Committee for Human Rights have also published a large number of reports and statements on refugee protection issues.

5 Article 35, see below.

a year in Geneva, [6] and besides debating the UNHCR budget and other organisational matters, adopts Conclusions on current issues of refugee protection. These Conclusions, while not legally binding on States, have been described as '[representing] the views of the international community' and as therefore having 'persuasive authority'.[7]

We are faced therefore with two differing approaches to human rights monitoring. On the one hand, the treaty body model provides for a quasi judicial committee, far detached from sites of many of the human rights violations it reviews. These committees issue authoritative interpretations of the conventions, and sit in judgement of States' performance. On the other hand, the UNHCR model provides for a large operational agency with offices all over the world, including in sites of refugee emergencies. Thousands of staff work for UNHCR, assisting refugees. Which model is more effective in general is an open question; one which far exceeds the scope of this paper. However, what is pertinent in the current context is the fact that in recent years, there has been increased criticism of UNHCR by outside observers (including refugee advocates and non-governmental organisations – NGOs), and increased recourse by refugee advocates to the human rights treaty bodies. Most prominently, the Committee against Torture (CAT), which monitors the Convention against Torture, has been most heavily involved in refugee matters. To a lesser degree, the Human Rights Committee (HRC), which monitors the ICCPR, has also examined refugee matters in recent years. In some ways, advocates seem to have decided that the UNHCR model of monitoring State compliance is ineffective, and have given up on the UNHCR.

Effective monitoring would seem to require a number of factors, not all of which can be explored here. Certainly, the ability to raise difficult questions in clear and certain terms, and to make strong rebukes of States who fail to properly implement their human rights obligations, would seem to be a necessary part of any effective monitoring. It is also submitted that the monitoring process, including the recommendations of the monitoring body, should be open to the public. Not only might public exposure be more effective in encouraging States to improve their performance; the principles of good governance would seem to demand transparency, in particular with procedures involved in the protection of human rights. Legitimate monitoring, to put it simply, would have to be strong, and would have to be seen to be strong. Any effective monitoring body would have to be able to take strong stances towards delinquent governments, when necessary. In order to ensure this ability, it is obvious that any monitoring body would have to exercise independence from States; and indeed, to ensure the legitimacy of the monitoring process, to be seen by all to be independent.

---

6 There is also the Executive Committee Standing Committee, which meets three times a year and prepares draft Conclusions for the plenary Executive Committee.

7 Amnesty International, *op.cit.* (note 4), p. 132. Goodwin-Gill notes that Executive Committee Conclusions 'do not have force of law and do not, of themselves, create binding obligations. They may contribute, however, to the formulation of *opinio juris* – the sense of legal obligations with which States may or may not approach the problems of refugees'. Goodwin-Gill, G., *The Refugee in International Law, second edition*, Clarendon Press, Oxford, 1996, p. 128. It should be noted that though Conclusions concerning budgetary and organisational matters are binding on the UNHCR, Conclusions regarding protection policy are only recommendations to the organisation.

Other criteria for effective monitoring may be identified, including consistency and clarity. However, the criticism which has been raised of UNHCR's current monitoring methods are largely based on frustration with the above points. Critics point out that UNHCR can not exercise the requisite independence, and can not take a strong stance towards States which violate the rights of refugees. This paper will examine these issues, and also examine whether recourse to the treaty bodies really provides an adequate remedy for refugee rights. The argument of this paper is that while UNHCR's monitoring of the Refugee Convention is problematic in many respects, the monitoring of refugee issues by the treaty bodies is in many incomplete and inconsistent, and that the treaty body model does not provide refugee advocates with a comprehensive solution.

2 Monitoring of the Refugee Convention; the Framework

Article 35 of the Refugee Convention, titled 'Co-operation of the National Authorities with the United Nations', obliges States parties in Article 35(1) to 'undertake to co-operate with the [UNHCR] in the exercise of its functions, and (...) in particular facilitate its duty of supervising the application of the provisions of [the] Convention'.[8] Article 35(2) goes on to state that States parties must 'undertake to provide [UNHCR] (...) with information and statistical data concerning: (a) the condition of refugees, (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees'. UNHCR's supervisory responsibility is also mentioned in the organisation's Statute, as the first of its activities to 'provide for the protection of refugees'. Article 8(a) states that UNHCR shall: '[promote] the conclusion and ratification of international conventions for the protection of refugees, [supervise] their application and [propose] amendments thereto'.

The true meaning of UNHCR's supervisory duties has never been truly explored. To this author's knowledge, no UNHCR position (internal or external) exists regarding Article 35 and the organisation's supervisory responsibility, and there is no conceptual framework for exactly what it entails. It is also unclear what exactly the reporting obligation outlined in Article 35(2) implies in this regard; the article states that the purpose of the reporting obligation is 'to enable the [UNHCR] to make reports to competent organs of the [UN]'.[9] In any case, there is no periodic, regular reporting requirement for States parties as such; only an obligation to 'undertake to provide'[10] with information 'in the appropriate form'.[11] Article 35 is also silent on the question of

---

8 There is an identical provision in the 1967 Protocol relating to the Status of Refugees. Article 8 of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa does not include a reporting obligation, stating merely that 'Member States shall co-operate' with the UNHCR. However, the preamble of the OAU Convention recognises the 1951 Refugee Convention as the 'basic and universal instrument relating to the status of refugees'.

9 Article 40(2).

10 Article 35(2).

11 *Idem*.

UNHCR's competence with regards to issuing authoritative interpretations of the provisions of the Convention. UNHCR does occasionally make public positions on current issues of refugee protection.[12] However, though these opinions would naturally carry a considerable amount of authority, as an organisation, UNHCR arguably does not have the competence to issue opinions which are binding as such on States parties.

Conclusions of the UNHCR Executive Committee have also touched on Article 35. In 1989, the Executive Committee cited Article 35 in a Conclusion titled 'Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees'. In this Conclusion, the Executive Committee stated that '[b]earing in mind that, pursuant to Article 35 of the 1951 Convention, States Parties are required to facilitate UNHCR's supervisory duty in relation to the Convention, including through the provision of information and statistical date concerning implementation', it '[r]equested the High Commissioner to prepare a more detailed report on implementation of the 1951 Convention and the 1967 Protocol (...) and called on States parties to facilitate this task, including through the timely provision to the High Commissioner, when requested, of detailed information on implementation of the Convention and/or Protocol in their respective countries'.[13] Subsequent to this Conclusion, UNHCR distributed a questionnaire to States, requesting them for information as stipulated in the Conclusion. Despite similar language in Executive Committee Conclusions in 1990, 1991 and 1992, the response to this initiative was lackluster at best, with only a small number of States submitting completed questionnaires.[14]

The Executive Committee stated again in 1995 that it '[r]eaffirms the competence of the High Commissioner in supervising the application of international instruments for the protection of refugees' and '[r]eminds States Party to the [Refugee Convention] of the undertaking in Article 35 of the Convention, reiterated in Conclusion 57 of the fortieth session of the Executive Committee in 1989, to provide the High Commissioner with detailed information on the implementation of the Convention and urges those states parties who have not yet complied with this undertaking to do so'.[15] There was similar language in an Executive Committee Conclusion the following year. In addition, resolutions of the Commission on Human Rights in 1996 and 1997[16] cited both of these Executive Committee Conclusions and '[encouraged] States parties to the [Refugee Convention] to provide information to the [UNHCR], in accordance with Article 35 of the Convention'.[17] Despite these resolutions, UNHCR understandably did not take any initiative similar to that of 1989, and nothing seems to have come of this issue.

---

12 See *e.g.* UNHCR Regional Bureau for Europe, *An Overview of Protection Issues in Western Europe; Legislative Trends and Positions Taken by UNHCR*, Geneva, September 1995.

13 Conclusion 57 (XL) at pream. para. 5, para. d.

14 Though the documentation on this issue is unclear, a total of 25 States parties seem to have responded.

15 Conclusion 77 (XLVI) 1995, General Conclusion on International Protection at para. e.

16 Human Rights and Mass Exoduses, 1996/51 and 1997/75 respectively.

17 *Ibidem*, paras. 15 and 16 respectively.

The Note on International Protection submitted to the Standing Committee of the Executive Committee in June 2000[18] outlines the activities undertaken by UNHCR, to assist governments in ensuring that refugees receive international protection. The document is essentially a list of the main categories of activities of UNHCR in the field of protection, and mentions Article 35 only once, under the section titled 'Promoting national legislation and asylum procedures'.[19] The Note states that 'UNHCR's involvement in [the above area] stems from its international protection function, and especially from its supervisory responsibility'.[20] There is also a section outlining the types of intervention UNHCR undertakes with national authorities, though this does not mention Article 35 as a basis for the organisation's interventions.[21]

2.1 UNHCR's ability to fulfill a monitoring role

In recent years, there has been staunch criticism from many circles regarding UNHCR's inability to take a strong stance towards governments on issues of the rights of refugees; and, hence, its inability to perform an effective monitoring role. Amnesty International, for example, states that 'UNHCR, at least as it currently operates, would not be able to monitor States parties' compliance with the Refugee Convention effectively'.[22] The organisation laments UNHCR's inability to perform a monitoring function, and states that 'the time has come to establish a different body'[23] to play this role.

Two institutional factors which are often raised by critics are UNHCR's lack of independence (both political and financial), and its organisational emphasis on humanitarian aid.

2.1.1 Independence of UNHCR

UNHCR is not even nominally independent. The organisation is governed by governments, in the form of its Executive Committee. The Executive Committee, comprised of 56 governments, meets once a year and decides on budgetary and organisational matters of the organisation. The Executive Committee also adopts Conclusions on UNHCR policy and the state of international protection. A number of member States of the Executive Committee are not even party to the Refugee

---

18 E/50/SC/CRP.16. The *Note on International Protection* is submitted annually by UNHCR to the Executive Committee, and generally examines the protection challenges faced by the organisation in the preceding year. In light of the 50th anniversary of UNHCR, the Note prepared for the year 2000 is of a more general character, outlining the activities taken by UNHCR to ensure protection, as above.

19 *Ibidem*, para. 20.

20 *Idem*.

21 *Ibidem*, para. 13. This is not to say that UNHCR has never cited Article 35 in its interventions; see *e.g.* written intervention to the European Court of Human Rights in *T.I.* vs *United Kingdom*, application 43844/98, 4 February 2000.

22 'Refugee Protection Under Attack', in: *Amnesty International Report 1999*, London, p. 46.

23 *Ibidem*, p. 48.

Convention; an obviously problematic state of affairs.[24] While the process of drafting Executive Committee Conclusions has not yet reached the level of politicisation obvious in other United Nations (UN) fora , most prominently the UN Commission on Human Rights, delegations engage in drafting as representatives of their governments, and must put forward their State's political interests.

The fact that UNHCR is directly accountable to governments may not in itself show that the organisation is incapable of exercising independence in its day to day work. However, the picture becomes more murky when the organisation's precarious funding situation is taken into account. Less than 3% of UNHCR's funding comes from the UN core budget,[25] and that only for administrative costs; the organisation receives all funding for operations through voluntary contributions (much of which is earmarked) by States.[26] This forces UNHCR to be sensitive to the priorities of a small group of donor countries; an issue recognised openly by UNHCR.[27]

The attendant problems were revealed starkly in the case of the former Yugoslavia, where UNHCR accepted and even promoted 'temporary protection', a secondary status enabling European States to escape from their obligations under the Refugee Convention by affording refugees fewer rights than stipulated for.[28] Within the former Yugoslavia, and in particular Bosnia, UNHCR implemented programmes which arguably had the effect (if not the intent) of preventing people from fleeing the country and becoming refugees.[29] The funding statistics provide a clear picture of where the

---

24 India, Lebanon, Pakistan, Thailand, and Bangladesh, all current members of the Executive Committee, are not parties to the Refugee Convention. Amnesty International notes that 'not all member States of Executive Committee are even party to the Refugee Convention, despite its crucial role in setting UNHCR policy and international standards on refugee protection. The process of drafting Executive Committee Conclusions is far from open and transparent, and is certainly not independent of the political considerations of member States'. *Ibidem*, p. 46.

25 'During the 1990s, an average of less than 3% of [UNHCR's] total annual revenue came from the UN regular budget.' UNHCR, *State of the World's Refugees 2000; Fifty Years of Humanitarian Action*, Oxford University Press, Oxford, p. 167.

26 'In 1999, only 20% of contributions were not earmarked.' *Idem.*

27 In an interview in the UNHCR publication *Refugees* magazine, High Commissioner Ruud Lubbers notes that UNHCR is 'voluntarily funded by a relatively small coalition of the willing. The fact that a number of governments decide case by case, on a voluntary basis, when and what they will support, makes UNHCR much too vulnerable.' Volume 1, Number 122, Geneva, 2001, p. 16.

28 Regarding UNHCR's endorsement, even promotion of temporary protection, Barutciski notes: 'Not only was UNHCR aware that a genuine commitment to burden sharing was unlikely to emerge from its proposition since States never accepted any such obligation, it consistently emphasised that temporary protection was most appropriate if combined with containment in the immediate affected region.' Barutciski, M., 'The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992-94)', *International Journal of Refugee Law*, Volume 8, Number 1/2, 1996, p. 76.

29 Cunliffe and Pugh note that the priorities of wealthy European countries continued to take precedence over the rights of refugees with regards to the return of Bosnians. 'Peace building (...) reinforced ethnic divisions and implicated UNHCR in a programme that afforded protection to asylum states from the continued presence of Bosnian exiles by giving them little option but to become displaced persons in the region.' 'UNHCR as a Leader in Humanitarian

priorities of donor countries lie; in 1993, UNHCR allocated more funds to the protection of refugees in Europe than for the protection of three times as many refugees in Africa, Asia, and the Middle East combined [30] UNHCR notes that in 1999, it received almost four times as much funding per 'person of concern' to the organisation for the former Yugoslavia as it did for West Africa.[31]

2.1.2 UNHCR's emphasis on humanitarian assistance

It has also been pointed out that UNHCR's increasing emphasis on the provision of humanitarian aid has made the organisation incapable of maintaining a strong stance towards governments. UNHCR's priorities currently lie in retaining presence in countries of asylum, and running large scale, expensive aid operations. Speaking out and criticising an asylum country's refugee policies, often seems to take a back seat to these aid operations, which are less controversial for all and which, being far more high profile, also attract large amounts of funding. For example, Goodwin-Gill notes that '[a]n examination of [UNHCR statements to the Executive Committee] in the years 1991 to 1997 reveals a distinct, formal disinclination to characterise UNHCR in terms of its statutory duty to provide international protection, and a preference instead of locating its role in a field to be called "humanitarian action"'.[32] Indeed, the 2000 edition of the biannual State of the World's Refugees report, UNHCR's primary promotional publication, is titled Fifty Years of Humanitarian Action. While never clearly defined, UNHCR has listed a number of activities which the term would clearly include, such as 'the provision of relief assistance such as food, water, shelter materials and medical care'.[33]

Assistance, a Triumph of Politics over Law?', in: Nicholson, F. and Twomey, P. ed., *Refugee Rights and Realities; Evolving International Concepts and Regimes*, Cambridge University Press, Cambridge, 1999, p. 196.

30 Report of the UNHCR, A/49/12, cited in: Hathaway, J. and Neve, A., 'Making International Refugee Law Relevant Again; a Proposal for Collectivised and Solution Oriented Protection', *Harvard Human Rights Law Journal*, Volume 10, 1997, p. 141.

31 'The international community spent some US$ 120 per person of concern to UNHCR in the former Yugoslavia during 1999, which was more than three times the amount spent in West Africa (about US$35 per person).' UNHCR, *op.cit.* (note 25), p. 167.

32 Goodwin-Gill, *op.cit.* (note 6), p. 224. A stark, albeit anecdotal reminder of how UNHCR staff conceptualise their organisation's role as that of provider of humanitarian assistance was provided by the Assistant High Commissioner, during the debate at the Standing Committee of the Executive Committee in June 2000, regarding on the review of UNHCR's performance in the Kosovo crisis. In a reference to referring to large scale floods which had featured highly in the international media, the Assistant High Commissioner stated that it was 'striking' how they were debating events which happened more than a year ago, when what should really be discussed was the international community's response to the 'current situation in Southern Africa'. Needless to say, persons fleeing natural disasters as such do not qualify for international protection as refugees, and therefore do not qualify for UNHCR's assistance.

33 UNHCR, *The State of the World's Refugees 1997 - 1998; A Humanitarian Agenda*, Oxford University Press, Oxford, 1997, p. 7. 'Advocacy activities, intended to persuade a government that it is wrong to act in a manner that is contrary to international refugee or human rights law' is also

The more dramatic examples of UNHCR giving priority to humanitarian assistance over protection activities have been well documented. In particular, Barutciski has examined in detail the process of UNHCR's involvement in the Bosnian crisis, noting how the organisation gave priority to the distribution of humanitarian aid not to refugees, but to displaced persons within Bosnia.[34] Similar problems continued in the former Yugoslavia; the evaluation commissioned by UNHCR of its performance during the Kosovo refugee crisis[35] admits that the organisation's preparedness towards the refugee crisis was hampered by its preoccupation with organising assistance for the internally displaced in the province.[36]

2.1.3 UNHCR's presence and effective monitoring

Though this author is not personally aware of one comprehensive response to these criticisms, it is possible to gauge UNHCR's attitudes through a number of statements, both formal and informal. One of the oft repeated points of UNHCR's response is that the presence of UNHCR on the ground, for which the provision of humanitarian assistance is often a prerequisite, enables the organisation to monitor the situation and to provide effective protection. Morris, a high ranking UNHCR official, covers both of these points in a personal opinion published in the International Journal of Refugee Law. He argues that refugee protection takes place in specific contexts, and that UNHCR often has to search for the best (or least worst) possible solutions in difficult, even extreme circumstances.[37] At the same time, he seems to admit that refugee protection has at times taken a back seat to 'relief specific operational considerations',[38] and states 'the very operationality of protection in [difficult] circumstances may inhibit

---

noted as part of 'humanitarian action', though somewhat far down the list. Ibidem, p. 8.

34 Barutciski, *op.cit* (note 28).

35 *The Kosovo Refugee Crisis; an Independent Evaluation of UNHCR's Emergency Preparedness and Response*, EPAU/2000/001, February 2000.

36 'The primary and compelling focus on internal victims of the Kosovo conflict, it seemed, had shifted institutional preoccupation away from the possibility (...) that a large scale outflow of refugees might result, to assistance for the IDPs. Had UNHCR been more focused on its traditional refugee specific mandate, it might have been more ready to prepare for worst case refugee scenarios simply because refugees were its primary concern. Instead, as the agency's constituencies and interests multiplied, institutional attention became divided and diffused.' *Ibidem*, at p. 95. Criticism of UNHCR on this issue is by no means isolated to the former Yugoslavia, but is based on UNHCR's activities in other regions as well. See, just to name a few, *e.g.* Human Rights Watch, *Unwanted and Unprotected; Burmese Refugees in Thailand*, New York, September 1998; Medicins Sans Frontieres, *Better off in Burma? The Plight of the Burmese Rohingyas*, Amsterdam, November 1997; and Amnesty International, *Rwanda; Human Rights Overlooked in Mass Repatriation*, London, January 1997.

37 Nicholas Morris, 'Protection Dilemmas and UNHCR's Response; a Personal View from Within UNHCR', *International Journal for Refugee Law*, Volume 9, Number 3, 1997, p. 492.

38 *Ibidem*, p. 493.

at least public denunciation of gross abuses, lest the operation itself and the security of humanitarian personnel (...) be put at risk'.[39]

It is true that UNHCR's operational presence gives UNHCR the necessary presence to engage in day to day monitoring of refugee situations, and can be an important means to ensure stronger protection for refugees. Indeed, UNHCR officials often state that a State reporting type framework is not needed for the Refugee Convention, since States always provide information to UNHCR anyway. In other words, UNHCR is already monitoring the Convention, and, as stated in the Note, through intervening with the authorities when necessary. Though this may or may not be as effective as the treaty body / monitoring committee model, one may argue that the question is merely one of methodology.

However, there is one fundamental problem with the UNHCR method of monitoring, and that is that the procedure is not public. As Norris notes in the above article, UNHCR makes no secret of the fact that in dealing with governments, it may favour quiet diplomacy over public criticism. It also makes no secret of the fact that reports on the situation of protection in particular countries, compiled by UNHCR officers around the world, are for internal consumption only. Noting that the strategy that the presence on its own of international agencies brings about improvements has failed consistently, Frelick notes that '[t]he equation 'presence equals protection' does say the right thing, but it doesn't say enough. International presence alone will not bring protection. The presence must be conscious, forceful, courageous. It must be an engaged presence that is not afraid to resist injustice and cruelty'.[40] Just being present is not enough, nor is making quiet, diplomatic demarches; what is needed is a strong, public stance.

UNHCR does at times make strong statements criticising governments for failing to protect refugees. For example, on 14 July 2000, the High Commissioner 'denounced the continuing violence' in refugee camps in East Timor. She stated that she was 'appalled and dismayed' at the situation, and that she could not 'remain silent while Indonesian authorities wantonly disregard the safety of humanitarian workers and refugees'.[41] However, for each situation which UNHCR engages in public denouncement, there are easily dozens of situations where UNHCR chooses to remain silent; at least publicly. Indeed, the lack of public scrutiny for UNHCR's actions may itself be problematic. Amnesty International points to an instance where UNHCR provided advice regarding important Iraqi asylum seekers to European governments, in a confidential intergovernmental forum. UNHCR submitted to European governments that the situation in northern Iraq had stabilised, and that asylum seekers

---

39 *Ibidem* p. 494. In A Humanitarian Agenda, UNHCR states that differing positions on this point between the organisation and human rights organisations such as Amnesty International and Human Rights Watch may be 'difficult to reconcile'. UNHCR, *op.cit.* (note 33) p. 268.

40 Bill Frelick, 'Assistance Without Protection; Feed the Hungry, Clothe the Naked, and Watch Them Die', in: US Committee for Refugees, *World Refugee Survey 1997*, Washington DC, 1998, p. 33.

41 'UNHCR deplores continuing violence in West Timor camps', UNHCR press release, Geneva, 14 July 2000.

may, in certain cases, be returned to that area of Iraq. This advice seemed to directly contradict statements given publicly by the organisation, just a month previously.[42]

It is submitted that this approach is untenable as a legitimate method of monitoring human rights. The principles of good governance would seem to demand that monitoring of a convention so fundamental to the protection of human rights should include a public procedure, whereby States are held accountable before all. Whatever benefits UNHCR's model of monitoring may provide, it does not provide for such a public procedure.

3 MONITORING PROCEDURES IN HUMAN RIGHTS CONVENTIONS

Most international human rights conventions establish a treaty body, a mechanism to supervise their application.[43] Generally, this has assumed the shape of a monitoring committee of experts, who monitor States parties' implementation of the provisions of the convention. The ICCPR states that members of the HRC 'shall be persons of high moral character and recognised competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience'.[44] These experts are elected by States parties, but serve on the treaty body in their independent capacity, and exercise independence from their governments in reviewing State compliance; indeed, the ICCPR requires new members to make 'a solemn declaration in open committee that he will perform his functions impartially and conscientiously'.[45]

The procedures for monitoring stipulated in the human rights conventions are generally similar. States parties are obliged to submit periodic reports[46] to the relevant treaty body regarding the convention's implementation. These reports (which are made available on the internet after submission) are examined by the treaty body in public session, which enters into a dialogue with government representatives regarding the fulfillment of their obligations. The committee then adopts concluding observations,

---

42 See Amnesty International, *op.cit.* (note 22) p. 47.

43 The ICESCR is the only international human rights convention which does not establish a treaty body to monitor its provisions. Rather, Article 16 of that Covenant states that the reports of States parties shall be examined by the UN Economic and Social Council (ECOSOC). ECOSOC established a 'Sessional Working Group' to undertake this function; however, the monitoring was cursory and politicised, and ECOSOC decided in 1985 to establish the Committee on Economic, Social and Cultural Rights along the lines of the other treaty bodies. For discussion, see Alston, P., 'The Committee on Economic, Social, and Cultural Rights', in: Alston, P. (ed.), *The United Nations and Human Rights; a Critical Appraisal*, Clarendon Press, Oxford, 1992, p. 473.

44 Article 28(2). Most of the other conventions follow this general formula with minor word changes, though ICERD stipulates that members of CERD should be 'of high moral standing and acknowledged impartiality'. Article 8(1).

45 Article 38.

46 States parties to ICCPR undertake to submit their initial report within a year of entry into force of the Covenant, and every five years thereafter. The periodic reporting requirement for the Convention against Torture is every four years, with States parties to ICERD being obligated to submit reports every two years.

recommending measures to the State party on how it could better implement the provisions of the convention. Besides implementing the treaty body's recommendations, States are expected to give wide circulation to their views amongst the general public.[47]

As an indicative example, the ICCPR states that the Human Rights Committee, the monitoring body established under that convention, 'shall study the reports submitted by [states parties]. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties'.[48] In fact, the early stages of the existence of the Human Rights Committee was fraught with conflict between differing views within the Committee regarding the appropriate role of the Committee and how it should exercise its monitoring functions.[49] Some members argued that the Committee had not been empowered to evaluate the performance of States parties in the fulfillment of their obligations, but merely to examine their reports, and, after a voluntary dialogue with the States parties, forward them on to the UN General Assembly. It was not in the mandate of the HRC to state views as to whether a State was in violation of its obligations. The opposing view was that the objective and purpose of the Covenant was to promote respect for civil and political rights, and that this objective could only be served if the Committee pointed out situations in States parties where there was room for improvement. The 'Consensus Statement'[50] which was eventually adopted arguably does not clarify the main issues, but in practice it has been the latter school of thought which has prevailed. Though in theory the objective of the monitoring procedure is a 'constructive dialogue' with States,[51] it is fair to say that the HRC, as well as other treaty bodies, have taken a strong stance in pointing out problematic situations during the review of State reports, and making recommendations for improvement.[52]

---

47 For example, *the Consolidated Guidelines for State Reports under the ICCPR* note that 'the [HRC] expects the State party to disseminate [the HRC's] conclusions, in all appropriate languages, with a view to public information and discussion', CCPR/C/66/GUI/Rev.2, 26 February 2001, at para. G.4.

48 Article 40(4). There are detailed provisions regarding State complaint procedures to the Committee, but here too the Committee's role seems to be envisioned as one of mediation, rather than one handing down a decision on the case.

49 See Opsahl, T. 'The Human Rights Committee', in Alston, *op.cit.* (note 43) p. 369, also McGoldrick, D., *The Human Rights Committee*, Clarendon Press, Oxford, 1994 for general discussion.

50 A/36/40 at 101.

51 For example, the new Consolidated Guidelines for State Reports under the ICCPR state that the HRC 'intends its consideration of a report to take the form of a constructive discussion with the delegation, the aim of which is to improve the situation pertaining to Covenant rights in the State', CCPR/C/66/GUI/Rev.2, 26 February 2001, at para. G1.

52 CERD, which was operational before HRC, initially concluded its examination of State reports by stating merely whether particular reports were 'satisfactory' or 'unsatisfactory', with no further information or comment given. CERD changed its working methods in 1972, and adopted the HRC model elaborated here, which other treaty bodies have since used. See Partsch, K.J., 'The Committee on the Elimination of Racial Discrimination', in: Alston, *op.cit.* (note 43), p. 357.

In engaging in these dialogues and formulating their conclusions, the treaty bodies take great heed of information they receive from sources besides the State party; in particular human rights NGOs. Human rights NGOs flock in large numbers to sessions of the treaty bodies, to present their concerns regarding the State party being reviewed. Since it is usually the case that the State party's own report glosses over (or ignores entirely) shortcomings in the fulfillment of that State's international obligations, the treaty bodies rely heavily on information provided by NGOs to gain a more accurate picture of the human rights situation in that country. Whether the role of NGOs is formally recognised largely depends on the treaty body; for example, the Convention on the Rights of the Child states that the Committee on the Rights of the Child 'may invite (...) competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention'.[53] Indeed, the Committee holds pre sessional working groups, where NGOs are invited to comment on particular State reports.[54] The Economic Social and Cultural Rights Committee allows submission of NGO material as formal documents, and allows NGO representative to appear as experts in the general discussions held during each session.[55] Most of the other treaty bodies do not provide for a formal role for NGOs; however, it is widely recognised that the system would not function effectively without their participation.

One more important function of the treaty bodies is to adopt General Comments; general interpretations of particular articles (or aspects) of the convention. Since the treaty bodies are charged with assessing State compliance with their conventions' provisions, it follows that they would have the capacity to provide general interpretations of these provisions, and inform States of what the obligations in question entail. General Comments provide general guidance to all States parties, and are not directed at any one State party.[56] General Comments are also adopted regarding procedural matters; for example, General Comment 2 of the HRC provides rudimentary guidelines for States in compiling reports.[57] As of April 2001, the HRC has adopted 28 General Comments. Finally, a number of treaty bodies[58] are empowered to

---

53 Article 45(b).

54 Governments are excluded from these sessions. Gerison Lansdown, 'The Reporting Process Under the Convention on the Rights of the Child', in: Alston, P. and Crawford, J. (ed.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, Cambridge, 2000, p. 119.

55 Alston, P., 'The Economic, Social and Cultural Rights Committee' in Alston, *op.cit.* (note 43), p. 501.

56 This is not to say that the adoption of a particular General Comment can not be spurred by the situation in, or the actions of, a particular State party. In particular, General Comment 26, 'Continuity of Obligations', was obviously in response to North Korea's announcement that it intended to denounce the ICCPR.

57 This General Comment has since been superseded by a more detailed set of guidelines, in CCPR/C/66/GUI, 26 February 2001.

58 Currently, HRC, CAT, CERD and the Committee on the Elimination of Discrimination against Women, are empowered to review communications from individuals. States must recognise the competence of these respective committees to do so, by undertaking optional procedures. Both the ICCPR and CEDAW have optional protocols which provide for the individual

receive and assess communications from individuals, alleging a violation of their rights by a State party. The treaty body adopts views on the merits of the communication, and requests the State concerned to abide by its conclusions.

Unlike UNHCR, treaty bodies do not have large numbers of staff working for them in the countries concerned, monitoring the situation and providing the treaty body with reports on the situation. Rather, treaty bodies sit in New York and Geneva, generally far detached from the situations of torture and persecution they examine. They are quasi judicial bodies, sitting in judgement of a State's performance, and issuing general interpretations of treaty provisions. Treaty bodies do not require the massive amount of funds which UNHCR does to sustain its field operations, though resource constraints remain a serious issue.[59] They are serviced by the UN Secretariat and, unlike UNHCR, do not rely on voluntary contributions to operate.[60]

3.1 Recourse to International Human Rights Procedures

On the face of it, the treaty bodies seem to have the necessary institutional factors for effective monitoring. They are independent, and often make strong statements towards States which do not fulfill their obligations. Their procedures, as well, are entirely public, and there are many opportunities for advocates to play a role in ensuring that treaty bodies get the necessary information. Though resource constraints are grave, treaty bodies do not rely on voluntary contributions, and there is therefore not the scope for the exertion of political pressure on the part of States that exists with the funding situation of UNHCR.

Refugee advocates have in recent years increasingly turned to monitoring procedures under the human rights conventions, in particular CAT and the HRC. The Convention against Torture has a provision dealing specifically with the subject of *refoulement*; Article 3(1) states: 'No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The ICCPR does not have an article which mentions explicitly *refoulement* or refugee protection. However, the HRC has interpreted Article 7 (prohibiting torture) to contain an inherent element of *non refoulement*. In its General Comment on the article, the Committee states that: 'States parties must not expose individuals to the danger of torture or cruel, inhuman or

---

communication procedure, and under the Convention against Torture and ICERD, States parties must make a special declaration, under Articles 21 and 14 respectively.

59 Though the Vienna Declaration and Plan of Action, adopted at the World Conference on Human Rights in 1993, makes repeated calls for an increase in resources for the UN human rights programme (see Plan of Action paras. 9 – 12), Evatt notes that 'it is not at all clear that any additional resources have been made available to the treaty bodies as a whole since 1993.' Evatt, E. 'Ensuring Effective Supervisory Procedures; the Need for Resources', Alston and Crawford, *op.cit.* (note 54), p. 473.

60 Though CAT and CERD were initially funded solely by States parties to the respective conventions, in accordance with provisions of the Conventions, both Conventions were eventually amended to allow funding from the General Budget.

degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*'.[61]

Both of these conventions provide for an optional individual communications procedure, under which States can opt to allow the monitoring committee to review cases of individuals in that country who allege a violation of their rights. In particular, refugee advocates have made increasing use of the individual complaints procedure under CAT. The vast majority of individual communications submitted to (and reviewed by) CAT concern asylum seekers who have had their refugee claims rejected in their country of asylum, and who face refoulement. For example, of the 17 cases reviewed by CAT and reported on to the General Assembly in 2000, only 1 did not concern an asylum seeker alleging a violation of Article 3.[62]

Besides providing for relief in the individual case, the review of individual communications can lead to general criticism regarding particular aspects of a State's asylum policies. For example, in the case *A* vs *Australia*,[63] the HRC reviewed a communication from a Cambodian refugee who had been detained in Australia for approximately four years. Under Australian legislation, detention was mandatory for undocumented arrivals, with there being in effect no scope for judicial review of the lawfulness of the detention: 'the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was [undocumented]. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release.'[64] The HRC found that this practice violated Article 9 of the ICCPR, and reiterated its concerns in the subsequent review of Australia's State report in 2000.[65]

Besides reviewing individual communications, the treaty bodies also increasingly take into account refugee concerns when reviewing States parties' reports. Since UNHCR's method of monitoring only rarely involves commenting in public, review by the treaty bodies of State reports can be the only way that a State is subjected to public criticism by an international body regarding its refugee policies. Many NGOs therefore have included refugee related concerns in the information they submit to the committee, in the hope that these concerns will be raised by the committees, and included in their final views. In 1997, Amnesty International and the International Service for Human Rights published a manual for refugee advocates on how to utilise international human rights procedures. This manual includes a section on lobbying treaty bodies and

---

61 General Comment 20 at para 9.

62 A/55/44.

63 CCPR/C/59/D/560/1993, 30 April 1997.

64 *Ibidem*, at para. 9.5.

65 CCPR/CO/69/AUS, 28 July 2000, at para. 19. One day later, the Australian Foreign Ministry issued a media release stating that the treaty bodies must 'ensure adequate recognition of the primary role of democratically elected governments and the subordinate role' of NGOs. Stating that further co-operation with the treaty bodies would be 'dependent on the extent to which effective reform occurs', the Ministry states that Australia would in the future 'reject unwarranted requests from [treaty bodies] to delay removal of unsuccessful asylum seekers from Australia'. 'Improving the Effectiveness of United Nations Committees', 29 August 2000.

encourages NGOs to submit information on refugee concerns to the committees, stating that 'comments by the official body authorised to interpret the treaty carry a significant amount of weight and are generally taken very seriously by governments. They are useful tools for both national and international NGOs which are lobbying to change particular laws, policies or practices'.[66]

In reviewing State reports, the Committee against Torture regularly examines refugee policies, to ensure compliance with Article 3. For example, in the course of its meetings in November 1999 and May 2000, the Committee noted refugee or expulsion related issues in Malta, Austria, Uzbekistan, Poland, Hong Kong, El Salvador, and Slovenia.[67]

The HRC has not been as active as CAT on refugee issues, perhaps largely because there is no specific provision for refugee protection or prohibition of refoulement in the Covenant. However, the above mentioned General Comment has enabled the Committee to comment on refugee policies of States parties, insofar as they may lead to a person being forcibly returned to face torture. In examining the report of Austria in 1998, the HRC stated that it was 'concerned about certain features of Austria's law and procedure concerning asylum seekers and immigrants. These concerns relate to (...) apparently insufficient legal guarantees to prevent deportation in cases where there is a risk of treatment that would violate Article 7...'[68] The Committee stated about the State report of Tanzania: 'Despite the problems concerning the volumes of refugees entering and remaining in the country, the Committee urges that no refugee be returned to another State unless it is certain that, once there, he or she shall not be executed or subjected to torture or other form of inhuman treatment (Arts. 6, 7, and 13)'.[69]

The other issue which the HRC has dealt with fairly frequently is the detention of asylum seekers, which in many cases may amount to arbitrary detention. In examining the report of Belgium in October 1998, the HRC '[noted] ... that the period of five months' detention, which may be extended to eight months, to which asylum seekers may be subjected, may amount to arbitrary detention in violation of Article 9 of the Covenant, unless the detention is subject to judicial review...'[70] In examining the State report of the United States of America in 1995, the Committee stated its concern that 'excludable aliens are dealt with by lower standards of due process than other aliens and, in particular, that those who cannot be deported or extradited may be held in detention indefinitely. The situation of a number of asylum seekers and refugees is also a matter of concern'.[71]

---

66 *The UN and Refugees' Human Rights, a Manual on How UN Human Rights Mechanisms Can Protect the Rights of Refugees*, Geneva, 1997, p. 33. Treaty bodies may also consult with UNHCR, though this is reportedly not a regular practice.

67 A/55/44 at paras. 41 to 212.

68 CCPR/C/79/Add. 103, 19 November 1998, at para. 11.

69 CCPR/C/79/Add. 97, 18 August 1998, at para. 17.

70 CCPR/C/79/Add. 99, 19 November 1998, at para. 18.

71 A/50/40 at 55.

The HRC has on several occasions examined refugee policies in a more general way in its review of State reports, without a clear linkage to Articles 7 or 9 of the Covenant. In examining the State report of France in 1997, the HRC stated in its concluding observations that it was 'particularly concerned by the restrictive definition of the concept of 'persecution' of refugees used by the French authorities as it does not take into account possible persecution by non-State actors',[72] and also that it was 'concerned that the [UNHCR] has no right on its own of access to the various places where persons applying for asylum or waiting deportation are kept'.[73] In examining the report of India, the Committee '[recommended] that, in the process of repatriation of asylum seekers or refugees, due attention be paid to the provisions of the Covenant and other applicable international norms'.[74] However, such general criticisms remain unusual.

3.2 Shortcomings of Treaty Bodies

There can be no doubt that these treaty bodies have played an important role in strengthening the protection of refugees in many instances, as well as the development of the connection between human rights and refugee law.[75] In addition, it should not be overlooked that a significant number of cases of individuals who otherwise may have been subjected to refoulement have been able to find protection from that fate, thanks to the individual communications procedure. However, advocates should be aware of the many shortcomings of the treaty body system, in particular with regard to refugee issues.

One issue particularly relevant to refugees is that there is a lack of consistency on the part of treaty bodies in taking up refugee matters. While CAT generally examines refugee issues in the context of Article 3, it is not always the case that it comments on a State's performance under this article, even if there is abundant evidence in the public domain that there are problems. For example, in November 1998, the Committee made no mention of refugee issues in its Conclusions on the United Kingdom, despite long standing and serious criticism by numerous organisations (including the UNHCR) of many aspects of the country's asylum procedure.[76] Indeed, the British Government had just a few months previous to the CAT meeting issued a white paper on asylum policies, outlining a number of extremely restrictive proposals for legislative reform, including a loss of welfare benefits for asylum seekers who applied for judicial review of their

---

72 CCPR/C/79/Add. 80, 4 August 1997, at para. 21.

73 *Ibidem*, at para. 22.

74 CCPR/C/79/Add.81, 4 August 1997, at para 30.

75 See *e.g.* Gorlick, B., 'The Convention and the Committee against Torture; a Complimentary Protection Regime for Refugees', in: *International Journal of Refugee Law*, Volume 11, Number 3, 1999, p. 479.

76 See *e.g.* Justice, *Providing Protection; Towards Fair and Effective Asylum Procedures*, London, 1997; Amnesty International United Kingdom, *Slamming the Door; the Demolition of the Right to Asylum in the UK*, London, 1996; UNHCR, *Certain Comments by the UNHCR on the Asylum and Immigration Bill 1995*, London, 1995.

claim.[77] This white paper had been subjected to strong criticism from numerous quarters and was widely discussed in the press,[78] and it is surprising that CAT would not have examined it as part of their review of the situation in the United Kingdom.

Likewise, in its Conclusions on Hungary a few days later, CAT merely '[noted] with satisfaction (...) the new legislation on asylum'.[79] The examination of the State report was barely a month after Amnesty International had published a report noting 'serious lapses' in the asylum procedure of that country, stating that the organisation had 'documented reports of status determination interviews lasting less than one hour, conducted with interpreters who the claimant stated they could not understand and having been asked to sign forms they did not understand. Amnesty International has received reports that many Kosovo Albanians with valid travel documents are being deported to FRY without an examination of the risk they might face on return'.[80] In examining the report of the United States of America in May 2000, the Committee failed to mention refugee issues, despite serious and sustained criticism of the procedures from many quarters.[81]

The same can be said with regards to the HRC. Firstly, while that Committee has interpreted Article 7 to include non refoulement in cases of possible torture, it is unclear why this interpretation is not extended to other rights guaranteed in the Covenant. This would mean that, under the ICCPR, persons at risk of torture if returned to their country are to be treated differently than persons at risk of, say, arbitrary detention.

Even regarding this aspect of Article 7, though, the examination of the HRC has been inconsistent. For example, the Committee made no mention of refugee protection problems in Germany, in its Concluding Observations on that country in November 1996. Indeed, it commended the German authorities having 'provided temporary residence to a very large number of refugees from Bosnia and Herzegovina',[82] despite the many problems with temporary protection, noted above.[83]

The Committee made no mention of refugee protection issues in Japan in its Concluding Observations on Japan's report in 1998,[84] despite sustained criticism of that country's asylum policies by a number of organisations. A statement by Amnesty International addressed to the HRC noted that 'asylum seekers are not given sufficiently detailed reasons for their rejection, and this makes it almost impossible for them to

---

77 *Fairer, Faster, and Firmer; a Modern Approach to Immigration and Asylum*, July 1998.

78 See *e.g.* Amnesty International United Kingdom, *Amnesty International's Response to the White Paper on Asylum and Immigration*, London, 1998.

79 A/54/44 at para 80.

80 *A Human Rights Crisis in Kosovo Province; the Protection of Kosovo's Displaced and Refugees*, EUR 70/073/1998, London, October 1998, p. 21 (internet version).

81 A/55/44 at paras 175 to 180. For problems with US asylum policy, see *e.g.* Amnesty International, *Lost in the Labyrinth; Detention of Asylum Seekers*, London, September 1999.

82 CCPR/C/79/Add. 73, 8 November 1996, at para 10.

83 See Barutciski, *op.cit.* (note 28).

84 CCPR/C/79/Add. 102, 19 November 1998.

lodge an effective appeal (...) There continues to be no independent or judicial intervention in the decision making process', and that undocumented asylum seekers who enter Japan 'are generally detained in violation of international standards'.[85] The US State Department had also expressed its concern earlier in the year regarding asylum procedures in Japan. It noted the case of a Chinese democracy activist who had been refused refugee status, and was released after 18 months of detention only after he had agreed to resettle in a third country.[86] Though the HRC's Concluding Observations on Belgium in 1998 contained a reference to the subject of detention of asylum seekers, it said nothing regarding the serious problems refugees face in that country obtaining protection from refoulement; despite reports by the US Committee on Refugees that the Belgian authorities '[deem] as many as two thirds of all asylum cases as inadmissible to the asylum procedure, denying them a full merits hearing'.[87]

In fact, the lack of consistency is not confined to refugee matters. Observers have noted a problematic lack of coherence and depth in the examinations of the treaty bodies. Looking at the review of a number of State reports, Bank notes a series of problems with the examinations of both the HRC and CAT, ranging from a lack of awareness of important issues and the recommendations of other relevant international human rights bodies, to a failing on the part of members to note that government delegates were giving incorrect answers. [88] In their examination of the report of France, CAT concluded that 'legislation, judicial practice and preventive machinery in France could usefully serve as a model to other countries in efforts to combat torture'; despite abundant evidence that persons arrested by the French police run the risk of ill treatment.[89] Bank concludes that 'the quality of discussions of the CAT and HRC was characterised by a lack of cohesion and insufficient preparation on the part of individual committee members'.[90] Indeed, questions have been raised regarding the independence and competence of some of the members of the treaty bodies; though they are to perform their functions independently from their government, it should be noted that members are elected by the States parties in an openly political process. [91] As with other

---

85 Amnesty International News Service, *Japan; Japan's Human Rights Record Must be Challenged*, London, 26 October 1998, p. 2.

86 US State Department, *Report on Human Rights Practices for 1997; Japan*, Washington DC, 1998, p. 6 (internet version).

87 US Committee for Refugees, *World Refugee Survey 1999*, Washington DC, 2000, p. 177.

88 Bank, R., 'International Efforts to Combat Torture and Inhuman Treatment; Have New Mechanisms Improved Protection?', *European Journal of International Law*, Volume 8, Number 4, 1997, p. 613.

89 *Idem*.

90 *Idem*. Bank has more recently argued that the problems with CAT have been 'remedied to a certain extent in recent years', mainly because it makes 'considerably greater use of NGO information'. 'Country Oriented Procedures under the Convention against Torture; Towards a New Dynamism', in: Alston and Crawford, *op.cit.* (note 54) pp.150, 151.

91 See *e.g.* Crawford, J., 'The UN Human Rights Treaty System, a System in Crisis?', in: *ibidem*, p. 9. Crawford notes: 'Vote trading between unrelated UN bodies is so common as to be unremarked'.

UN bodies, it is commonplace for states to barter votes in exchange for support in other, unrelated matters. 'Votes for a member of the Committee of the Convention on the Rights of the Child are traded, for example, for votes for a member of the Tribunal on the Law of the Sea.'[92] Indeed, there is no serious scrutiny of the expertise of persons standing for election, and the membership of treaty bodies is 'loaded'[93] with ministers, ambassadors, and other officials (retired and serving); a fact which arguably brings the process into some question.

There are other systemic problems with the current treaty body method of monitoring regime, and it is open to question just how effective a model it provides. Firstly, there are serious problems in ensuring state compliance with the most fundamental point of ensuring that states submit reports. The HRC's report to the GA in 2000 shows that 42 countries have reports that are more than five years overdue. Gambia tops the list with its second report being 15 years overdue, with three countries, Suriname, Kenya, and Mali, having reports 14 years overdue.[94] Most egregious in the eyes of the Committee was the fact that 19 states had not even submitted their initial report (15 of these states being included in the list of 42 states whose reports were more than 5 years overdue).[95] As of 01 December 1998, there were a total of 145 overdue reports to the HRC, and 105 to the CAT. In fact, these two treaty bodies were the more better off; the states parties to the Convention on the Elimination of Racial Discrimination had a whopping 390 overdue reports. As noted by Alston, 'Large scale non reporting makes a mockery of the reporting system as a whole. It leads to a situation in which many States are effectively rewarded for violating their obligations while others are penalised for complying'.[96] Monitoring cannot be said to be effective if states do not even feel obliged to provide information to the monitoring body.

In addition, it should be noted that there remains a sizable backlog in the review of state reports that have been received by the treaty bodies; meaning that even supposing a state does submit its report, it will take years for it to be reviewed by the relevant committee. In his 1996 report, Alston notes that, at the current meeting schedule, if all overdue reports were submitted to the treaty bodies at the end of that year, reviewing the reports would take the HRC almost eight years, CAT almost seven, and CERD over 24.[97] The state of affairs is such that the HRC has resorted to reviewing of two reports from the same State, which had been received on different times.[98] One could even argue (as Alston has) that, the many calls from the treaty bodies to States to fulfill their

---

92 Clapham, A., 'UN Human Rights Reporting Procedures; an NGO Perspective', in: *ibidem*, p. 189.

93 Leckie, S., 'The Committee on Economic, Social and Cultural Rights, Catalyst for Change in a System Needing Reform', in: *ibidem* p. 131.

94 A/55/40 at para. 59.

95 *Ibidem*, at para. 60. Under Article 40, States parties to the ICCPR are required to submit their initial report within one year after the Convention comes into force for them.

96 E/CN.4/1997/74, 27 March 1996 at para. 44.

97 *Ibidem*, at para 48.

98 A/55/40 at para. 58.

reporting obligations notwithstanding, the entire system depends on States not filing reports on time (or at all); hardly the basis for an effective monitoring system. The same is true for the review of individual communications, which, with HRC and CAT, take from three to four years.

The question is largely one of resources; the office of the UN High Commissioner for Human Rights, which acts as secretariat for all the treaty bodies save CERD, is permanently strained for resources. Indeed, some treaty bodies are exploring the possibility of funding some activities through voluntary contributions, adopting a funding model like UNHCR.[99] However, the current structure of treaty bodies is also a factor; committee members generally have other full time occupations, and are paid only a pittance (if at all) for their activities with the treaty body. This prevents treaty bodies from extending their meeting time, which would allow them to review more reports in each session.

Should a treaty body charged with monitoring refugee issues be created with sufficient resources and meeting time, then the matter would be solved. However, given the current state of affairs with regard to the funding of the UN human rights programme, this seems an unrealistic goal; and creating another treaty body which would just compound the same problems is surely not an effective solution. It is submitted that this issue cannot be resolved without examining treaty body reform as a whole.

4 CONCLUSION

While an in depth examination of treaty body reform would be out of the scope of this paper, it is clear that fundamental and far reaching measures need to be taken, in order to ensure the integrity of the system as a whole. Clapham has argued for a 'permanent professional treaty body',[100] which would be staffed by independent professionals. He notes that not only would this rationalise the system, as above; it would also enable advocates to contact the treaty bodies at any time, in cases where a person's rights were in imminent danger of being violated (in the case of refugees for example, where a person was in imminent danger of refoulement). The Refugee Convention could be included in the conventions this 'super treaty body' would review, and it could be ensured that at least one refugee expert sat on the committee.

It is submitted that the establishment of a permanent treaty body along the above lines would be a good solution.[101] However, the main problem with this option is that it is arguably too ambitious to be realised in the foreseeable future. As Evatt points

---

99 Schmidt, M., 'Servicing and Financing Human Rights Supervisory Bodies', in: Alston and Crawford, *op.cit.*(note 54) p. 484-487.

100 Clapham, A., 'UN Human Rights Reporting Procedures; an NGO Perspective', in: *ibidem*, p. 197.

101 Not all commentators support this proposal. For example, Alston has concluded that the option is one 'that may deserve consideration but would also seem to have many potential drawbacks'. *Final Report on Enhancing the Long Term Effectiveness of the United Nations Human Rights Treaty System*, E/CN.4/1997/74, Geneva, 27 March 1996, para. 30.

out,[102] For a super treaty body to function effectively (and including this would include being able to review state reports in a timely manner), it would need a secretariat of considerable size, staffed by human rights experts. It is difficult to see how a new, sizable body such as this could be created, when even the current human rights programme of the UN has difficulty obtaining even meager funds.[103]

In the short to medium term, the reality may be that improvement in the way that UNHCR functions may be the most practical option. The organsiation's emphasis on humanitarian operations is not a legal mandate, but a managerial and cultural direction, which the leadership of the organisation could reverse. The way that UNHCR obtains funding remains a serious restraint on the organsiation's functional independence. However, this issue is to some extent intertwined with UNHCR's emphasis on humanitarian operations, which inevitably require a heavy concentration of resources (and therefore additional funding). Arguably, less emphasis on humanitarian operations would enable UNHCR to operate with considerably less funds, freeing it somewhat from its excessive reliance on voluntary, ear marked funds (though the fundamental issue that UNHCR is not funded on an ongoing basis would remain).

Regarding the lack of public reporting, UNHCR could be instructed by the Executive Committee to make public its annual protection reports, which its field offices compile and currently submit to Headquarters on a confidential basis. This would not provide the same opportunities as the treaty body model for advocates or NGOs to influence the monitoring process, but it would at least be a first step towards ensuring openness and accountability.

The above provide anything but fundamental solutions. However, they may at least be first steps towards badly needed improvement in the situation. In the long run, a treaty body type model, coupled with a fundamentally reformed UNHCR, may be ideal; however, the protection of refugees remains an immediate issue, requiring solutions in the short term as well.

---

102 Evatt, *op.cit.* (note 59), p. 466.

103 Evatt argues that although this solution may not seem feasible in the short term, it should be kept in mind as a long term goal, and outlines a number of changes which could be made in the current procedures towards the eventual consolidation of treaty bodies. *Idem.*