

Attributing Wrongful Conduct of Implementing Partners to UNHCR

International Responsibility and Human Rights Violations in Refugee Camps

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Abstract

Refugee camps are often managed by a wide set of actors other than the Host State. The United Nations High Commissioner for Refugees (UNHCR), tasked under international law to provide “international protection” to refugees and to seek “permanent solutions for the problem of refugees”, often sub-contracts the daily management of camps to non-governmental organizations (NGO). In 2013, UNHCR collaborated with 733 NGOs worldwide. Together with UNHCR, these “implementing partners” often perform public powers normally exercised by the Host State. But when human rights violations occur following the conduct of a UNHCR implementing partner, which actor(s) are responsible under international law? This article focuses on UNHCR’s international responsibility for the conduct of NGO implementing partners. By exploring UNHCR’s standard sub-contracting agreements through the lens of the International Law Commission’s (ILC) Articles on the Responsibility of International Organizations (ARIO), it answers questions such as: Which human rights requirements does UNHCR place on implementing partners? Under what circumstances may UNHCR be held responsible under the ARIO for the acts of its implementing partners? It finds that an application of the ARIO would make UNHCR internationally responsible for the wrongful conduct of implementing partners, even when sub-contracting agreements include clauses absolving UNHCR from any liability.

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Keywords

UNHCR – implementing partners – non-governmental organizations – international responsibility – refugee camps – sub-contracting – attribution

Introduction

The refugee camp may be considered an anomalous establishment, being situated on the territory of a Host State but in practice often managed by a wide range of actors other than State authorities. Under international law, the United Nations High Commissioner for Refugees (UNHCR) is specifically tasked to provide “international protection” to refugees and to seek “permanent solutions for the problem of refugees”.¹ In fulfilling its mandate in general, and administering refugee camps in particular, UNHCR relies to a large extent on partnerships with a wide spectrum of actors.² While UNHCR’s relation to the Host State in the context of international responsibility has been dealt with elsewhere,³ this article focuses on the Organization’s so-called “implementing partnerships”, where UNHCR, through a formal project agreement, sub-contracts certain tasks to a non-governmental organization (NGO).⁴ In 2013, UNHCR collaborated with 733 NGOs worldwide, and many of these are an intricate part of the power structure of refugee camps. Together with UNHCR they varyingly perform all or some of the public powers normally exercised by the Host State. Typically, UNHCR negotiates conditions with government authorities, approves the campsite, and functions as a supervisor or performance evaluator. The NGO sub-contractors are hired to manage the camp and

1 See Statute of the United Nations High Commissioner for Refugees (UNHCR Statute), adopted by the UN General Assembly in GA Res 428, 14 December 1950, para. 1.

2 These actors include governments and their agencies, United Nations sister agencies, international organizations and non-governmental organizations. This article deals primarily with UNHCR’s non-governmental implementing partners, and does not as such address situations where State agencies are UNHCR implementing partners. See UNHCR, ‘NGO Partnerships in Refugee Protection, Questions & Answers’ UNHCR/DERNGO/Q&AA5/ENG 3, September 2007; T. Börzel and T. Risse, ‘Public-Private Partnerships: Effective and Legitimate Tools of Transitional Governance’, in E. Grande and L.W. Pauly (eds.), *Complex Sovereignty, Reconstituting Political Authority in the Twenty-First Century* 195 (2005), at 201.

3 M. Janmyr, *Protecting Civilians in Refugee Camps: Unwilling and Unable States, UNHCR and International Responsibility* (2014).

4 For a thorough elaboration of non-governmental organizations in international law, see A-K. Lindblom, *Non-Governmental Organizations in International Law* (2005).

provide for the necessary food, health facilities, water/sanitation, schools, security and other essential services.⁵ In other words, these NGOs are charged by UNHCR with carrying out UNHCR functions. They may also delegate to yet another set of actors, such as to the refugees themselves.⁶

While NGOs may have an important role to play when it comes to refugee protection, it is often pointed out that they are seldom accountable to the people on whose behalf they claim to speak.⁷ The increasing delegation of authority often brings about a number of human rights concerns — indeed, the behavior of UNHCR personnel and implementing partners hit the headlines in the early 2000s when a widely-publicized scandal unfolded in Guinea, Liberia and Sierra Leone.⁸ A report by UNHCR and Save the Children concluded that there was compelling evidence of a “chronic and entrenched pattern” of abuse in refugee camps in the three West African countries, involving mostly locally employed workers for international NGOs. During the same time period, InterAid, a UNHCR implementing partner in Uganda, was reported to have directed police to use excessive force against refugees on numerous occasions. As specifically asserted by Verdirame and Harrell-Bond, the “inhuman treatment accorded to refugees waiting for their asylum cases to be heard or to receive services at the offices of UNHCR or their implementing partners has been so widely reported that it can be described as normative.”⁹ On other occasions, abuse has not been perpetrated by UNHCR implementing partners, but these have omitted to take steps to prevent human rights violations from occurring. In Roma camps for internally displaced persons in Mitrovica,

5 O.E. Olsen and K.S. Scharffscher, ‘Rape in Refugee Camps as Organisational Failures’, 8 *International Journal of Human Rights* 377 (2004), at 387. See also UN Secretary-General, Investigation into sexual exploitation of refugees by aid workers in West Africa: Note by the Secretary-General, A/57/465, 11 October 2002, at 12.

6 Agier, for instance, describes how in the Zambian Maheba camp, UNHCR had delegated its powers to the national section of the Lutheran World Foundation, which in turn deployed agents who were Zambian nationals and refugees. See M. Agier, *Managing the Undesirables: Refugee Camps and Humanitarian Government* (2011), at 82. See also UN Secretary-General, *supra* note 5, at 4.

7 Lindblom, *supra* note 4, at 525.

8 See generally UNHCR and Save the Children, ‘Note for Implementing an Operational Partners on Sexual Violence and Exploitation: The Experiences of Refugee Children in Guinea, Liberia and Sierra Leone: Based on Initial Findings and Recommendations from Assessment Mission 22 Oct.–30 Nov. 2001’, 27 February 2002. See also UN Secretary-General, *supra* note 5. The lack of oversight of UNHCR and NGOs with regard to serious human rights issues has also been explored in Human Rights Watch, ‘Trapped by Inequality: Bhutanese Refugee Women in Nepal’, Vol. 15, No. 8(C), September, 2003.

9 G. Verdirame and B. Harrell-Bond, *Rights in Exile: Janus-faced Humanitarianism* (2005), at 137–138.

Kosovo, set up by UNHCR when Kosovo was under UN administration, the Norwegian Church Aid (NCA) ostensibly did little to prevent exposure to serious and lethal health risks due to detrimental conditions in the camp that it managed.¹⁰ Several studies by the World Health Organization (WHO) and others have found that the communities were affected by extremely high levels of lead contamination, especially children who were found to have lead blood levels which amounted to a medical emergency.¹¹

In view of these realities, and in terms of achieving justice for victims of human rights violations in refugee camps, it is important that we address the allocation of responsibility for human rights violations taking place in these spaces. While international law has increasingly recognized that both States and international organizations are subjects of international law and can thus be held responsible under the law of international responsibility, the same is not entirely true when it comes to NGOs. Here, the traditional view stresses that NGOs are not subjects of international law, and cannot therefore in a strict sense have international obligations and thus engage with the international laws of responsibility.¹² This article aims to address this very problematic issue area by focusing on UNHCR's international responsibility for the conduct of its NGO implementing partners. Through an exploration of UNHCR's standard agreements with its implementing partners as well as the International Law Commission's (ILC) Articles on the Responsibility of International Organizations (ARIO),¹³ adopted in the summer of 2011, this article aims to answer questions such as: which human rights requirements, if any, does

10 See specifically Complaint, '129 Roma in Kosovo v. Norwegian Church Aid', 22 June 2011, at 10ff, http://www.responsiblebusiness.no/files/2013/12/roma_klage.pdf (last accessed 26 October 2014). See also Council of Europe, Report of the Council of Europe Commissioner for Human Rights: Special Mission to Kosovo, 23–27 March 2009, CommDH(200) 23, 2 July 2009, at 23ff; M.J. Brown et al., 'Lead Poisoning Among Internally Displaced Roma, Ashkali and Egyptian Children in the United Nations-Administered Province of Kosovo', 20 *European Journal of Public Health* 288 (2010); 'UN Closes Controversial Lead-Contaminated IDP Site in Kosovo', IRIN News, 8 October 2010; Human Rights Watch, Poisoned by Lead: A Health and Human Rights Crisis in Mitrovica's Roma Camps, 1-56432-498-2, June 2009.

11 Council of Europe, *supra* note 10, at 25.

12 Rather, the legal status of NGOs consists of the rights and capacities which are expressly conferred to them, and can as such not be inferred from a more general recognition of their status. For a more general discussion on the responsibility of NGOs, see e.g. Lindblom, 'The Responsibility of Other Entities: Non-Governmental Organisations' and C. Tomuschat, 'The Responsibility of Other Entities: Private Individuals', both in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010).

13 ILC, Articles on the Responsibility of International Organisations, A/CN.4/L.778, 30 May 2011 (ARIO).

UNHCR place on its implementing partners? When human rights violations occur following the conduct of a UNHCR implementing partner, who shall be held liable under international law? Under what circumstances may UNHCR be held responsible under the ARIO for the acts of its implementing partners? In addressing these queries, this article builds upon earlier work on the international responsibility of UNHCR,¹⁴ but does not address other potential avenues of accountability for the actions of NGOs outside that of the rules of international responsibility. Any independent liability of the NGO thus falls outside the scope of this article but may indeed be triggered in the domestic legal arena or by recourse to non-legal avenues such as various humanitarian accountability projects.¹⁵

This article begins with an overview of the nature and scope of UNHCR's implementing partnerships, before explaining the general procedure of UNHCR's delegation of functions. It thereafter explores UNHCR's standard Tripartite Sub-Project Agreement, which is typically the most important legal instrument setting out the obligations of the implementing NGO in any given situation. The article's third section analyzes the Agreement in light of the ILC's Articles on the Responsibility of International Organizations, paying particular attention to the question of whether or not these NGOs can be considered to be UNHCR "agents", and whether they do, in fact, perform UNHCR "functions". Concluding that UNHCR may indeed be held responsible under the ARIO for the conduct of its implementing partners, even when an Agreement includes clauses aimed at absolving UNHCR from any responsibility whatsoever, in its final section, this article sets out a few recommendations aimed at clarifying the relations between UNHCR and its implementing partners.

1 Perspectives on Implementing Partnerships

UNHCR has been working with NGOs ever since it first began assisting displaced persons in Europe following the end of World War II, when it cooperated with about 100 national and international "voluntary societies". From a UNHCR point of view, there are a number of benefits to sub-contracting NGOs to perform specific tasks in refugee camps. NGOs are perceived as vital to the successful conduct of UNHCR's programs, and as the Organization has pointed

14 Janmyr, *supra* note 3.

15 See e.g. the Humanitarian Accountability Project, <http://www.hapinternational.org/> (last accessed 26 October 2014).

out, “[t]here is virtually no area of UNHCR’s work which does not involve collaboration with NGOs.”¹⁶ Indeed, direct implementation by UNHCR should only, according to UNHCR, occur in exceptional circumstances, such as when “there is no viable implementing partner.”¹⁷ NGOs are further seen as “efficient and flexible”, and their “relatively less bureaucratic structures enable them to act with speed and adapt rapidly to changing situations in the field.”¹⁸ Given the sub-contracting NGOs’ extensive presence in the field, it has also been argued that NGOs are often in a better position to discover and analyze protection-related problems.¹⁹ In Albania, for instance, UNHCR “removed” armed elements from a refugee camp following their discovery by local NGOs.²⁰ The activities of NGOs in insecure areas may furthermore not be restricted to the same extent as those of UNHCR, which, being part of the UN, is subject to rigid security constraints. UNHCR’s implementing partners may as such have a unique access to refugee camps in insecure areas that may otherwise be inaccessible to UNHCR staff.²¹ In Uganda, for instance, UNHCR personnel were in the early 2000s reluctant to visit refugee camps in the volatile north and UNHCR thus attracted criticism for its expectation that NGOs carry out services in these camps on a daily basis. As Martin has argued, “[i]f NGOs were to follow UNHCR’s lead on security, there would simply be no services.”²²

UNHCR’s motivation for the use of implementing partners is also often argued in cost-efficiency terms. The success of the SURGE (Supporting UNHCR Resources on the Ground with Experts on mission) Capacity Project, for

16 UNHCR, Report on UNHCR’s Relations with Non-Governmental Organizations (PARinAC), EC/47/SC/CRP.52, 15 August 1997, at para. 3. See also UNHCR, *supra* note 2, at 6; UNHCR Executive Committee, Annual Theme: Strengthening Partnership to Ensure Protection, also in Relation to Security, A/AC.96/923, 14 September 1999), at para. 7.

17 UNHCR, *Handbook for Emergencies* (2007), at 116, para. 2; UNHCR, Enhancing UNHCR’s Capacity to Monitor the Protection, Rights and Well-Being of Refugees: Synthesis of Findings and Recommendations, EFAU/2004/06, 1 June 2004, at ch. 6, para. 3.

18 UNHCR Executive Committee, *supra* note 16, at para. 23.

19 UNHCR, Report on the Meeting with Non-Governmental Organizations prior to the Fifty-second Session of the Executive Committee of UNHCR (24–26 Sept. 2001), October 2001, at 3.

20 Statement by Representative of the International Rescue Committee, in UNHCR, *supra* note 19, at 4.

21 UNHCR’s implementing partners have however increasingly voiced their concerns regarding staff security in projects initiated by UNHCR. See R. Martin, A More Proactive UN Role in the Security of NGO Staff?, *Humanitarian Exchange Magazine* 45 (2001).

22 *Ibid.*

instance, stems from the fact that it enables UNHCR to hire protection staff “at a fraction of the cost of a UN staff member”.²³ In the SURGE project the International Rescue Committee (IRC) recruits, trains and deploys protection officers to UNHCR field offices when there are increased protection needs and limited UNHCR staff.²⁴ NGO staff are seconded to UNHCR to perform various protection activities such as monitoring refugee returns and child protection, but areas of intervention for SURGE Protection Officers also include the physical security of refugees, arrest and detention, and border monitoring.²⁵ Thus, NGO staff often “do not hesitate to go deep in the field’ at less costly salary scales compared to UNHCR regular staff [...]”.²⁶

The numbers of UNHCR implementing and operational partners have steadily risen over the years.²⁷ In the mid-1960s, UNHCR’s partners numbered less than 20, of which half were large international NGOs.²⁸ In response to major refugee emergencies in the Horn of Africa, Asia and Central America during the 1980s, this number rose significantly; for instance, in the late 1980s, there were over 100 international NGOs working in the Afghan refugee camps in Pakistan.²⁹ During the 1990s, the High Commissioner called for a redoubling of UNHCR’s partnerships, and subsequently launched the Partnership in Action (PARinAC) initiative in 1994.³⁰ By 2004, UNHCR had

23 See European Commission, Evaluation of the partnership between ECHO and UNHCR and of UNHCR activities funded by ECHO, ECHO/ADM/BUD/2004/01212, October 2005, at 6; 36.

24 See UNHCR, SURGE, <http://www.unhcr.org/pages/4a16a15b6.html> (last accessed 7 July 2014); UNHCR, The Protection Surge Capacity Project, Answers to Frequently Asked Questions for SURGE Roster Applicants and Members, <http://www.unhcr.org/42c943cf2.html> (last accessed 7 July 2014). Similarly, the Danish Refugee Council, the Norwegian Refugee Council, and Save the Children have developed emergency response and standby agreements with UNHCR to facilitate the rapid deployment in for instance refugee protection, child protection and field security. See UNHCR, *supra* note 2, at 17.

25 UNHCR, SURGE, *ibid.*

26 European Commission, *supra* note 23.

27 Institutions who do not receive funding from UNHCR but who play a major role in refugee operations are known as “operational partners”. They are not dealt with in this article. See UNHCR, *Partnerships in Protection*, <http://www.unhcr.org/pages/49c3646c2co.html> (last accessed 7 July 2014).

28 UNHCR, *supra* note 2.

29 *Ibid.* at 9.

30 The PARinAC Global NGO and UNHCR Conference included 182 NGO representatives from 83 countries, as well as observers from intergovernmental bodies, the United Nations system, agencies and members of Executive Committee. The conference, which took place in Oslo, Norway, from 6–9 June 1994, adopted by consensus the Oslo Declaration and Plan of Action, which endorses the regional proposals from all the consultations.

formal project agreements with over 500 NGOs, of which 80 percent were local or national organizations.³¹ In 2007, this number had been significantly augmented to include project agreements with 649 NGOs, of which 75 percent were local or national NGOs.³² In 2013, UNHCR collaborated with 733 NGOs worldwide, of which 567 were national and local NGOs and 166 were international.³³

For a long period, UNHCR channeled approximately half of its raised funds through its implementing partners, but in 2009, approximately 35 percent of UNHCR's expenditures were spent through all partners.³⁴ In 2013, UNHCR funding channeled through NGOs and other partners reached a record high, exceeding USD 1.15 billion, a 23 percent increase compared to 2012.³⁵ The use of implementing partners is as such not only an integrated part of almost all UNHCR activities, but administering and managing partnership agreements remains a major administrative and operational task for many UNHCR representations.³⁶ In fact, in the late 1990s and early 2000s, the number of sub-agreements concluded each year between UNHCR and its implementing partners and government partners ranged between 1,300 and 1,400.³⁷ In Uganda in 2008 alone, UNHCR administered 58 sub-agreements, a situation which attracted criticism from the UN Office of Internal Oversight, precisely for being "difficult to manage".³⁸

The Plan of Action includes 134 recommendations that were intended to serve as guidelines for present and future response to humanitarian challenges. However, a 2010 investigation by the UN Office for Internal Oversight criticized UNHCR for the fact that the PARinAC had not been reviewed since 2000. See UNHCR, *supra* note 2, at 4; UNHCR, Partnership in Action (PARinAC): Oslo Declaration and Plan of Action, 9 June 1994; UN Office of Internal Oversight (OIOS), Audit Report: UNHCR's Relationship with Implementing Partners (Audit Report, Implementing Partners), AR2007/160/03, 25 March 2010, at 9; UNHCR, 'Report on PARinAC and Plan of Action 2000', February 2000.

31 UNHCR, Enhancing UNHCR's Capacity, *supra* note 17, at ch. 2, para. 17; R. Zetter, 'International Perspectives on Refugee Assistance', in A. Ager (ed.), *Refugees: Perspectives on the Experience of Forced Migration* 46 (1999); UNHCR, *supra* note 2, at 4.

32 UNHCR, *supra* note 2, at 7; 13.

33 UNHCR, Global Report 2013 – Working in partnership, <http://www.unhcr.org/539809d916.html> (last accessed 10 July 2014), at 84.

34 F. Groot, Evaluation of UNHCR Training Activities for Implementing Partners and Government Counterparts, EPAU/2000/02, September 2000, at 13; UN OIOS, *supra* note 30, at 8.

35 UNHCR, *supra* note 33, at 84.

36 UN OIOS, *supra* note 30, at 2.

37 Groot, *supra* note 34, at 16.

38 UN OIOS, Audit Report, UNHCR Operations in Uganda, AR2008/112/02, 28 May 2009, at 15.

2 Delegating Functions to Implementing Partners

A *UNHCR's Competence to Delegate Functions*

To be able to delegate its powers, UNHCR must possess either the express or implied competence to do so.³⁹ UNHCR possesses a competence to delegate certain functions to its non-governmental implementing partners deriving from its mandate as expressed in the UNHCR Statute.⁴⁰ In stark contrast to UNHCR's predecessor, the International Refugee Organization (IRO), UNHCR was at the outset intended to be essentially non-operational.⁴¹ The idea of sub-contracting certain functions to other actors is as such an important aspect of UNHCR's intended operation. Articles 10 and 12 of the Statute specifically establish the basis for these implementing partnerships. According to Article 10 of the Statute, the High Commissioner "[...] shall administer any funds, public or private, which he receives for assistance to refugees, and shall distribute them among the private and, as appropriate, public agencies which he deems best qualified to administer such assistance". As such, the Statute has expressly opened for international assistance to be channeled through international and national NGOs to the refugees under UNHCR's mandate.⁴²

Article 12 of UNHCR's Statute also authorizes the High Commissioner to invite the "cooperation" of the "specialized agencies". The term "cooperation" which is referenced to in Article 12, seems to be understood, at least by UNHCR's Executive Committee, to correspond with the notion of "partnership":

Partnership is at the foundation of the way international protection is envisaged in the 1951 Convention and the 1967 Protocol, and in UNHCR's Mandate. Key provisions of both acknowledge that the effective performance of UNHCR's functions depends on its cooperation with states,

39 See D. Sarooshi, *The United Nations And The Development Of Collective Security, The Delegation By The UN Security Council of its Chapter VII Powers* (1999); UNHCR, *Partnership: An Operations Management Handbook for UNHCR's Partners* (2009), at 30; 89.

40 See Articles 10 and 12 of the UNHCR Statute, *supra* note 1.

41 L.W. Holborn, *Refugees: A Problem of Our Time: The work of the United Nations High Commissioner for Refugees 1951–1972* (1975), Vol. 1 at 88–9. See also UNHCR, *supra* note 39, at 9.

42 This interpretation is also supported by Väyrynen, who argues that "[...] originally, the High Commissioner was primarily supposed to be a foundation that would collect and redistribute funds to organizations, mostly private ones, working with the refugees in the field". See R. Väyrynen, 'Funding Dilemmas in Refugee Assistance: Political Interests and Institutional Reforms in UNHCR', 35 *International Migration Review* 134 (2001), at 150.

intergovernmental organizations, private organizations and other entities.⁴³

This would essentially mean that any agreement that UNHCR enters into with the view of forging a partnership that contributes to UNHCR's discharge of its functions, could be seen as a *cooperation* agreement.⁴⁴ Partnership agreements in their very essence arguably constitute a form of cooperation as envisaged in the UNHCR Statute.

B *General Process of Delegation*

In order to ascertain UNHCR's responsibility for the conduct of its implementing partners, it is important to understand the process of delegation and contractual relationship between UNHCR and the NGO. UNHCR has explicitly referred to the relationship with its implementing partners as one of delegation, explaining how "[t]he delegation of the implementation of an assistance project is embodied in an implementing agreement [...]"⁴⁵ However, in the view of UNHCR, the first instance of "delegation" generally occurs when UNHCR headquarters in Geneva through a "Letter of Instruction" (LOI) delegates the project implementation authority to a UNHCR Representative in a Field Office.⁴⁶ In certain situations an "Emergency Letter of Instruction" (ELOI) may be issued instead of the usual LOI, with the purpose of giving the UNHCR Representative in a country where an emergency situation is evolving the immediate authority to enter into agreements with implementing partners. The responsibilities for UNHCR's implementing partners are defined in the appropriate implementing agreement, which provide the legal basis for the delegation of project implementation.

UNHCR's provision of international protection and material assistance in a Host State is generally organized in terms of "projects", meaning a designated part of a protection or assistance program.⁴⁷ A project generally consists of a

43 UNHCR Executive Committee, *supra* note 16, paras. 7;12. See also UNHCR Executive Committee Conclusion no. 87 (1999) sub. (g) in which the Executive Committee reaffirms Conclusion no. 85 (1985) sub. (d) and "calls on all interested parties to turn concentrated attention towards revitalizing old partnerships and building new ones in support of the international refugee protection system [...]"

44 See M. Zieck, *UNHCR's Worldwide Presence in the Field: A Legal Analysis of UNHCR's Cooperation Agreements* (2006), at 71–2.

45 UNHCR, *supra* note 39, at 30.

46 *Ibid.*, at 89, paras. 1.3; 1.4; 2.1; 2.5.

47 *Ibid.*, at 89–91, paras. 1.1; 3.1; 4.1.

number of sub-projects, which are each implemented by a given partner. Thus, the legally binding “sub-project agreements”, generally either a “tripartite agreement” between UNHCR, the refugee-hosting government and an implementing partner, or a very similar “bipartite agreement” between either UNHCR and the implementing partner or UNHCR and the host government, are the most common form of agreements. A so-called “headquarters agreement” may also be drawn up in a situation where there is only one implementing partner for a project, as may an interim “Letter of Mutual Intent to Conclude an Agreement” in order to begin a sub-project immediately in situations of exceptional urgency during which formal sub-agreements may be delayed.⁴⁸ In the below, I will explore the most common form of sub-project agreement, the “Tripartite Sub-Project Agreement”.

C *The Tripartite Sub-Project Agreement*

The most important instrument setting out the concrete obligations of UNHCR and its implementing partners appears to be the “Tripartite Sub-Project Agreement”. This Agreement concerns UNHCR, the implementing partner (“the Agency”) and the Host State (“the Government”) and generally sets out the nature of activities, as well as administrative and financial procedures related to the implementation of sub-projects. The relation between UNHCR and the Host State when it comes to managing refugee camps has been thoroughly addressed elsewhere, but it is important to note also here that UNHCR’s relation with the Host State is generally governed by specific “cooperation agreements” which set out the legal questions concerning the establishment of a representative presence in the territory of a State, as well as the more substantive issues of UNHCR’s relations with States.⁴⁹

The Tripartite Sub-Project Agreement is arguably to be considered an *international* contract. While an agreement that is concluded between parties who have no international legal personality, i.e. NGOs, will not normally be governed by international law, it is arguable that agreements of which *one* party is a non-state entity can be governed by international law.⁵⁰ When determining whether an agreement, one party of which is a non-state actor, is subject to international law, due regard must be made to the intentions of the States or international organizations. If an intention that the agreement be governed

48 However, as UNHCR points out, “[t]his letter is *not* an implementing instrument, but a temporary arrangement pending the preparation of a detailed budget and a formal Sub-Project Agreement”. Emphasis in original. *Ibid.*, at 91, para. 3.7.

49 Janmyr, *supra* note 3, at 263ff.

50 See discussion in Lindblom, *supra* note 4, at 492–4.

by international law is expressed in the actual agreement, these agreements should, at least in principle, be governed by international law. The idea that the intention of the parties determines which law is to govern an agreement is further supported by the principle of party autonomy which allows the parties to choose any set of rules to serve as the basis for solving disputes.⁵¹ As we will see below, the clearly international character of the Agreement supports the notion that it is of an international nature, as would the inherent linkage between UNHCR's partnerships and its mandate as laid out in the UNHCR Statute.

The Tripartite Sub-Project Agreement includes a preamble and a number of articles, as well as three annexes, which, as emphasized in the Preamble, should be considered an essential part of the Agreement.⁵² The Preamble furthermore restates that the nature of UNHCR's participation in the sub-project is humanitarian and non-political.⁵³ The Agreement establishes conditions such as financial and accountability requirements, and also UNHCR rules and procedures. It employs legal *lingua* such as the terms "obligations", "liability" and "arbitration". According to the Agreement, all parties also agree that they "shall" carry out a number of activities. Although there is no explicit reference as to which legal system is to govern the Agreement, a number of articles make specific reference to both national and international law. Article 6.14, for instance, concerns the implementing agency's compliance with the laws and regulations of its country of residence or operation. Moreover, as for the settlement of disputes, the Agreement refers to the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules⁵⁴ and also states that the place of arbitration shall be Geneva and that:

If the Parties cannot agree on the selection of a single arbitrator, then they may appoint each one Arbitrator who shall choose the third Arbitrator. In the event of disagreement as to the nomination of the third arbitrator, the latter shall be appointed by the Chairman of the Court of Arbitration of the International Chamber of Commerce.⁵⁵

51 C. Greenwood, 'The Libyan Oil Arbitrations', 53 *BYIL* 27 (1983), at 79; K. Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration* (2001), at 93, 113.

52 For a discussion of the possibility that subjects of international law other than States can enter into treaties, see Janmyr, *supra* note 3, at 35–6.

53 The standard format Tripartite Sub-Project Agreement is annexed to UNHCR, *supra* note 40. See Appendix C1.

54 Articles 8.05 and 8.06 of the format Tripartite Sub-Project Agreement. *Ibid.*

55 *Ibid.* Art. 8.06.

These factors suggest that the Agreement is legally binding under international law. Furthermore, Article 3 deals with the duration of the agreement, while Article 8.07.1 concerns the termination of the Agreement and stipulates that “[i]f the Agency refuses or fails to prosecute any work, or separable part thereof, or violates any term, condition or requirement of this Agreement, UNHCR, in consultation with the Government, may terminate this Agreement in writing with immediate effect”. The Agreement also includes a clause on *force majeure*.⁵⁶ The following sections will explore the extent to which the Agreement lays down human rights requirements and other obligations on the implementing partner.

1 Human Rights Requirements and Other Obligations

Article 6 of the Tripartite Sub-Project Agreement provides that the implementing partner has a strict obligation to respect the laws of the country in which it is operating, and under Article 4 it shall further

[...] refrain from any conduct that that would adversely reflect on UNHCR and the United Nations and shall not engage in any activity which is incompatible with the aims and objectives of the United Nations or the mandate of UNHCR to ensure the protection of refugees and other persons of concern to UNHCR.⁵⁷

The aims and objectives of the United Nations are nevertheless not entirely clear-cut, and it is a matter of controversy whether the “purposes” of the UN as contained in Article 1 of the UN Charter are meant to be legally binding, or if, as Wolfrum notes, the wording is “more appropriate for political objectives rather than for legally binding obligations.”⁵⁸ While Article 55 of the Charter specifically binds the UN as a whole to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”, it is less clear exactly which human rights are encompassed within the obligation. The UN’s perspective of the indivisibility of human rights might nevertheless suggest that *all* rights are to be encompassed.⁵⁹

⁵⁶ *Ibid.* Art. 8.04.

⁵⁷ *Ibid.*, Art. 4.04.1.

⁵⁸ R. Wolfrum, ‘Chapter I. Purposes and Principles’, in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (2002), at 40.

⁵⁹ Vienna Declaration and Programme of Action, World Conference on Human Rights (1993), <http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> (last accessed 28 October 2014).

The reference to the mandate of UNHCR is, however, of the same generality, not the least because UNHCR does not have a straightforward statement of its responsibilities.⁶⁰ In addition to the non-exhaustive lists of functions provided in the UNHCR Statute, the Organization is also bound by a number of implied duties, which are likely to be incredibly difficult for UNHCR's implementing partners to keep track of.⁶¹ It is thus questionable whether the existence of a reference to the aims and purposes of the UN Charter, and to the mandate of UNHCR, is sufficient to demonstrate the meaningful existence of any human rights obligations, or, as in the above idea of Wolfrum, whether this Article is more to be considered a general statement of goals. While additional references to more explicit human rights norms and instruments may not be necessary as a means of creating human rights obligations in the first place, such additional articles would be beneficial for the sake of clarity.

Appendix 2 contains the "Standards of Conduct Ensuring Protection from Sexual Exploitation and Abuse", under which the implementing partner shall prevent, oppose and combat all exploitation and abuse of refugees and other persons of concern to UNHCR.⁶² These standards were adopted in the wake of concern raised over the previously mentioned widely-publicized sexual exploitation by NGOs of refugees in West African refugee camps during 2002, and are as such the most detailed human rights norms provided in the Agreement. While the Standards are not intended to be an exhaustive list, they *inter alia* stipulate that "sexual exploitation and abuse by personnel working on Projects/sub-Projects funded by UNHCR, constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal", and also prohibit sexual activity with children and the exchange of money, employment, goods or services for sex. Importantly, the implementing partner is under an explicit obligation to inform its staff of these principles.

Oddly situated under the heading "Financial and Programme Arrangements" in an Annex to the main agreement, we find an express obligation for UNHCR's implementing partners to abide by UNHCR's soft law material:

60 V. Türk, 'Freedom from Fear: Refugees, the Broader Displacement Context and the Underlying International Protection Regime', in V. Chetail (ed.), *Globalization, Migration and Human Rights: International Law under Review Vol. II* 475 (2007), at 479–80.

61 UNHCR's institutional practice illuminates the extent of implied terms and is imperative for any interpretation of UNHCR's Statute. The basis for UNHCR's practice is often found in its informal normative framework, i.e. its policy statements, internal guidelines, and operational codes. See generally Janmyr, *supra* note 3, at 248ff. See also J. Klabbers, *An Introduction to International Institutional Law* (2009), at 53ff.

62 See also Art. 4.

In the implementation of UNHCR Sub-Projects, the Governments and Agencies are required to respect the relevant Guidelines related to the protection of, and assistance to, refugees. Particularly relevant in this regard are the Global Strategic Priorities (see UNHCR's website at www.unhcr.org). The same website on the Refworld, Partnership Guides and Who We Help pages provides a range of information related to UNHCR's principles and policies: Age, Gender, and Diversity Mainstreaming (AGD), refugee women/gender equality; refugee children & adolescents, older refugees, persons of concerns with disabilities, livelihood, environment and HIV/AIDS etc.⁶³

The responsibilities placed on UNHCR's implementing partners thus seem to include a very general obligation to respect UNHCR's principles and policies. UNHCR guidelines and handbooks are arguably one of the most influential means for UNHCR to contribute to the development of international law, and may moreover be used to reaffirm or further elaborate previously accepted general or vague norms found in binding or non-binding texts.⁶⁴ However, a wide-ranging reference to an obligation on the part of the implementing partners to respect UNHCR's policies and procedures appears limited when it comes to constituting any meaningful human rights requirements, and particularly so in light of studies suggesting that both UNHCR and implementing partner staff in the field have been unaware of UNHCR's protection guidelines and policies.⁶⁵ Despite the fact that there has been a proliferation of guidelines and a considerable increase in attention to, for example, gender-based violence in the last decade, as one recent study pinpointed, "[t]he excellent guidelines and materials produced are often left unread by those working most closely with the refugee communities and are seldom used to inform and shape programmatic responses."⁶⁶ In situations where these relatively easily

63 Art. 13 of the Financial and Programme Arrangements, Annex A to the format Tripartite Sub-Project Agreement. Annexed to UNHCR, *supra* note 39.

64 J. Kirton and M.J. Trebilcock, 'Introduction: Hard Choices and Soft Law in Sustainable Global Governance', in J. Kirton and M.J. Trebilcock (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance* 3 (2004), at 5; C. Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution', 17 *International Journal of Refugee Law* 67 (2005), at 82.

65 Olsen and Scharffscher, *supra* note 5, at 393; UNHCR, A Survey of Compliance with UNHCR's Policies on Refugee Women, Children and the Environment, EPAS/99/01, 1 March 1999, at 11; 14; UN OIOS, *supra* note 30, at 6; Groot, *supra* note 34, at 1.

66 D. Buscher, 'Refugee Women: Twenty Years On', 29 *Refugee Survey Quarterly* 4 (2010), at 19.

accessible and comprehensible guidelines are disregarded in practice, it is indeed questionable to what extent the broader references as made in Article 6 of the Agreement relating to UN aims and objectives and UNHCR's mandate — both under constant evolution and interpretation — actually translate into meaningful protection. In addition, Annex A provides no further evidence of an obligation to respect more generally applicable instruments of international law, such as the UN Charter or the core human rights conventions.

While it employs legal terminology in many other aspects, the Agreement thus avoids explicit human rights language. By comparison, the non-binding “Framework Agreement for Operational Partnership”,⁶⁷ not applicable to UNHCR's implementing partners under the Tripartite Sub-Project Agreement, reiterates UNHCR's responsibility for “providing international protection, under the auspices of the United Nations, to refugees” and for “[...] seeking permanent solutions for the problems of refugees by assisting Governments and, subject to the approval of the Governments concerned, private Organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities”. It also stresses that “UNHCR is bound by its Mandate and is required to provide protection to refugees, and as a part of its protection activities to coordinate and monitor the assistance provided.”⁶⁸ This Framework Agreement moreover includes a provision concerning non-binding code of conducts, stating that “the Partners will be guided by the principles set down in the Code of Conduct of the International Red Cross and Red Crescent Movement and Non-Governmental Organizations”.⁶⁹ The differences between these two agreements in the field of human rights appear manifest.

2 Responsibility and Accountability Issues

Several clauses of UNHCR's Tripartite Sub-Project Agreement aim at absolving UNHCR from responsibility for the conduct of its implementing partners

67 UNHCR's operational partnerships with NGOs may be formalized through the “Framework Agreement for Operational Partnership”. See UNHCR, Framework Agreement for Operational Partnership (UNHCR and NGO), 2003, paras. 9; 11. See also UNHCR, *supra* note 39, at 28–9, para. 2.5.

68 UNHCR, Framework Agreement, *ibid.* para. 4.

69 This Code was prepared in the mid-1990s by the International Federation of Red Cross and Red Crescent Societies and the ICRC in cooperation with a number of non-governmental organizations. By 2011, it had 492 NGO signatories. See International Federation of Red Cross, Red Crescent Societies and ICRC, The Code of Conduct of the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief; Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, July 2011. See also UNHCR, Framework Agreement, *ibid.*, para. 6.

when these perform services for UNHCR. Article 4, a key provision, specifically states that:

UNHCR does not accept any liability for claims arising out of the activities performed under this Agreement, or any claims for death, bodily injury, disability, damage to property or other hazards that may be suffered by Agency or Government Personnel as a result of their work pertaining to the Sub-Project.⁷⁰

Importantly, under the Agreement, it is the implementing partner and the Host State that are responsible for dealing with all claims brought against either of them by implementing partner or Host State.⁷¹ UNHCR is not liable to indemnify any third party in respect of any claim, debt, damage or demand arising out of the implementation of the Sub-Project — to the contrary, the Agreement stipulates that it is the implementing partner and the Host State who are responsible for dealing with all claims arising out of the acts or omissions of the personnel of the implementing partner or the Host State, *even* when these claims are made against UNHCR and its officials or persons performing services for UNHCR. Article 6, concerning assignment and subcontracting, equally provides that the implementing partner shall be “[...] fully responsible for all work and services performed by operational partners, subcontractors and suppliers, and for all acts and omissions committed by them or their employees”. Article 6.13 also stipulates that the agency shall be fully responsible for all services performed by agency personnel, and that such personnel shall not be considered “in any respect” UNHCR staff members or as having any other contractual link with the Office. It is clear that by including these clauses in the implementing agreements with implementing partners, UNHCR seeks to avoid responsibility for the conduct of these. Below, this responsibility will be analyzed in light of the rules of international responsibility.

3 Applying the Law of International Responsibility

A *Generally on the System of International Responsibility*

The law of international responsibility plays a fundamental role in the modern system of international law.⁷² It is understood as the body of principles which

⁷⁰ UNHCR, Framework Agreement, *ibid.*, Art. 4.03.1.

⁷¹ *Ibid.*, Art. 4.03.2.

⁷² Crawford *et al.*, *supra* note 12.

determine when and how States and international organizations may be liable to another for breach of an international obligation. As such, the rules of international responsibility do not set forth any particular obligations but rather determine when an obligation has been breached and the legal consequences of that violation. The rules are as such “secondary” that address basic issues of responsibility and remedies available for breach of “primary” or substantive rules of international law. They establish the conditions for an act to qualify as internationally wrongful; the circumstances under which actions of officials and other actors may be attributed to the State or the international organization; general defenses to liability; and the consequences of liability. Due to the historical primacy of States in the international legal system, the law of State responsibility is the most evolved structure of international responsibility.⁷³

However, following a ten-year process, the International Law Commission adopted its Articles on the Responsibility of International Organizations (ARIO) in the summer of 2011.⁷⁴ The ILC’s efforts to develop the ARIO have been the subject of much critical commentary by states, international organizations and scholars alike. The main criticisms have concerned the general lack of practice to support the contents of the ARIO rules and the ARIO’s resemblance to the ILC’s Articles on State Responsibility.⁷⁵ In contrast to the latter, which referred to existing rules and largely codified customary international law, the ARIO were drafted without extensive practice to draw from. This is largely due to the fact that because international organizations enjoy generous grants of immunity both as institutions and for their individual agents, there are few cases where principles of responsibility have been invoked before any national or international courts.⁷⁶ As a result, while the ARIO codify some

73 ILC, Report of the ILC, 53rd Session, Yearbook of the International Law Commission II, part 2, 2001, at 26–143.

74 See ILC, Report of the International Law Commission on the Work of its Sixty-third Session (26 April–3 June and 4 July–12 August 2011), A/66/10, 2011, at para. 87; GA Res. 66/100, 9 December 2011; GA Res. 66/98, 9 December 2011.

75 See generally K. Boon, ‘New Directions in Responsibility: Assessing the International Law Commission’s Draft Articles on the Responsibility of International Organizations’, 37 *Yale Journal of International Law Online* (2011); J. Aspremont and C. Ahlborn, ‘The International Law Commission Embarks on the Second Reading of Draft Articles on the Responsibility of International Organizations’, *EJIL Talk*, 16 May 2011; J. Alvarez, ‘Misadventures in Subjecthood’, *EJIL Talk*, 29 September 2010.

76 See A. Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals’, 7 *Chinese Journal of International Law* 285 (2008). See also *Mendaro v. World Bank*, 717 F.2d 610, D.C. Cir., 1983. For an elaboration of how recent cases and academic commentary demonstrate a “nibbling away” at the edges of UN immunity,

principles of responsibility that are considered customary international law, the Articles also propose a number of more novel principles, and as the ILC recognizes in its Commentary: “[t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter.”⁷⁷ While no international judicial fora currently exists where international organizations can be held responsible under the ARIIO, the ARIIO have nevertheless been identified as a “critical new development”, the effects of which have already been seen in practice.⁷⁸ Indeed, early drafts of ARIIO were invoked by the European Court of Human Rights (ECTHR) in the controversial *Behrami* case.⁷⁹

B *Applying the ARIIO to UNHCR*

International responsibility is generally triggered following the decision that a breach of international law has occurred.⁸⁰ Under the ARIIO, for example, an organization is responsible for an internationally wrongful act when conduct consisting of an action or omission is attributable to the organization and which *constitutes a breach of an international obligation*.⁸¹ As will be explained below, the international obligations of UNHCR may derive from treaty or customary international law, and it is these obligations that determine what a breach of international law is under the law of international responsibility. As explained by the arbitral tribunal in the *Rainbow Warrior* case: “[t]he general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation [...] so that any violation of a State of any obligation, of whatever origin gives rise to State responsibility.”⁸² This, then, seems to imply that a State, or, as in this case, an international organization, which is in breach of *any* obligation to which it is bound under

see R. Freedman, ‘UN Immunity or Impunity? A Human Rights Based Challenge’, 25 *EJIL* 239 (2014).

77 ILC Commentary, in ILC, *supra* note 78, para. 5.

78 Boon, *supra* note 75, at 1.

79 Decision on Admissibility, *Behrami and Behrami v. France*, Application no. 71412/01 and *Saramati v. France, Germany, and Norway*, Application no. 78166/01, ECTHR (GC), 2 May 2007. Also the decision of the House of Lords in *Al-Jedda* contained references to the ARIIO. See Decision, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, House of Lords, 12 December 2007, para. 5 of the opinion of Lord Bingham of Cornhill.

80 J. Crawford and J. Watkins, ‘International Responsibility’, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), at 284.

81 ARIIO, *supra* note 13, Art. 4.

82 Decision, *Rainbow Warrior (New Zealand v. France)*, 20 RIAA 215, 1990, at 251 (para. 75).

international law, can be held responsible under the general principles of international responsibility.

In addition to the provisions found in the specific legal conventions pertaining to human rights and refugees, the most basic norms of international humanitarian and international human rights law are today considered part of international customary law.⁸³ While most human rights treaties contain no provision for the accession of international organizations,⁸⁴ there has been an increasing recognition that international customary law binds not only states, but also, by virtue of their legal personality, international organizations.⁸⁵ In the *Reparation for Injuries* case, the ICJ found that the “rights and duties [of the organization] will depend upon its purposes and functions as specified or implied in its constituent documents and functions in practice”.⁸⁶ The ICJ’s most explicit reference to the obligations of international organizations can be found in its advisory opinion in the *Interpretation of Agreement* case, in which it explains that: “[i]nternational organizations are subjects of international law, and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”⁸⁷ This means that UNHCR is clearly bound by customary international (human rights) law.

UNHCR’s subordination to the UN Charter entails that Charter provisions requiring the UN to respect human rights, including Articles 1(3), 55, and 56, also bind UNHCR. UNHCR’s mandate, found in the UNHCR Statute,⁸⁸ provides it with broader human rights obligations than the obligation to respect customary human rights law.⁸⁹ The Statute evidences that UNHCR has been

83 A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 85–7.

84 For an exception, see the International Convention of the Rights of Persons with Disabilities and its Optional Protocol, UN GAOR, 61st Sess., Item 67(b), UN Doc. A/61/611 (6 December 2006), Arts. 42–3.

85 See Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, 1949, at 174. See also D. Akande, ‘International Organizations’, in M.D. Evans (ed.), *International Law* (2010); G. Verdirame, *The UN and Human Rights, Who Guards the Guardians?* (2011), at 71; W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (2010), at 87.

86 For a discussion of the tension between attributed and implied powers, see Klabbbers, *supra* note 61, at 53ff.

87 Emphasis added. Advisory Opinion, *Interpretation of Agreement of March 1951 between the WHO and Egypt*, ICJ, 20 December 1980, 47, at 57.

88 UNHCR Statute, *supra* note 1.

89 Although UNHCR is not a party to the Statute, there is today general acceptance that an international organization is bound by obligations arising under its constituent instrument. Instruments such as the UNHCR Statute are generally considered to be of a dual

granted a unique, almost supranational, role by the international community; it is specifically mandated to provide “international protection” to refugees and to seek “permanent solutions for the problem of refugees”.⁹⁰ An integral link seems to exist between UNHCR’s international protection mandate and human rights, and the Preamble to the 1951 Refugee Convention aptly summarizes the grand objective of international protection: “to assure refugees the widest possible exercise of ... fundamental rights and freedoms” which all “human beings [should] enjoy ... without discrimination”. UNHCR’s Statute arguably also binds the Agency to provide international protection not only in a passive sense, but also actively by for instance intervening vis-à-vis governments. As former High Commissioner Schnyder explained in 1965: “... international protection may be defined as the power, conferred by the international community to an international body, to take all necessary measures to replace the national protection of which refugees are deprived, because of their very condition.”⁹¹ As such, international protection seems to a large extent based on the notion of *surrogacy* in which UNHCR steps in to provide the protection which a refugee’s own State cannot or will not provide.⁹²

C *Attribution of Conduct by NGO Implementing Partners to UNHCR*

Under the ARIO, an international organization is responsible for an internationally wrongful act when conduct consisting of an action or omission is attributable to the organization and which constitutes a breach of an international obligation.⁹³ Article 6(1) of the ARIO specifically provides that: “[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.” As detailed in the above, UNHCR seeks to avoid liability for the conduct of its implementing partners by including certain clauses in its agreements with implementing partners. But do these agreements hold water when analyzed through the lens of the ILC’s work on the

nature; on the one hand they are international treaties or contracts between States, governed by the law of treaties, while, on the other hand, they are of a constitutional character and are as such best governed by institutional law. See C. Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’, ACIL Research Paper No. 4, 2011; C. Chinkin, *Third Parties in International Law* (1993), at 94–96.

90 UNHCR Statute, *supra* note 1, para. 1.

91 F. Schnyder, *Les Aspects Juridiques Actuels du Problème des Réfugiés* (1965), at 423, cited in A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (2009), at 255.

92 See further G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007), at 10.

93 ARIO, *supra* note 13, Art. 4.

responsibility of international organizations? Under what circumstances should the acts and omissions of UNHCR's implementing partners be attributed to UNHCR? The key questions appear to be whether or not these actors are to be considered UNHCR "agents", and whether or not they are performing UNHCR "functions". It is precisely these issues that I will discuss below, before exploring the related issue of contractual clauses seeking to avoid responsibility.

1 UNHCR "Agents" and Relation to UNHCR "Functions"

The ILC defines the term "agent" as "an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts".⁹⁴ It is arguable that this is precisely what UNHCR's implementing partners do — through specific sub-contracting agreements, they are charged by UNHCR to perform specific functions. Even though it is often referred to as a "partnership", the relationship between UNHCR and the NGO implementing partners is essentially an "unequal, contractor and service-provider relationship".⁹⁵ Importantly, in drafting the definition of "agent", the ILC relied on statements made by the International Court of Justice (ICJ) that advocated that the term must be understood "in the most liberal sense" and that the essence of the matter lies not in the agent's administrative position, "but in the nature of their mission".⁹⁶

This broad understanding of the term "agent" in the ARIO has been criticized by several international organizations. While UNHCR does not appear to have submitted any comments regarding the ARIO to the ILC, international organizations such as the International Labour Organization (ILO), International Monetary Fund (IMF) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) voiced concern that the wide inclusiveness of the key terms of Articles 2 and 6 may entail that conduct too easily can be attributed to international organizations.⁹⁷ These organizations

94 ARIO, *supra* note 13, Art. 2(d).

95 M. Kamiya, 'A Study of Formal Relationships between Civil Society and Multilateral Bodies: Accreditation and Other Consultative Modalities', Conference Paper: 'Building Bridges III: Engaging Civil Society from Muslim States and Communities with the Multilateral Sphere', Dhaka, 27–28 October 2007, at 5.

96 Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, 11 April 1949, at 51–2; 177; Advisory Opinion, *Applicability of Article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ, 15 December 1989.

97 See ILC, Responsibility of International Organizations: Comments and observations received from Governments, A/CN.4/568/Add.1, 12 May 2006, at sect. E; ILC, Responsibility

suggested that it would be appropriate to add some qualifications to the definition of the term “agent”. The IMF, for instance, considered that only acts of officials performed in their official capacity could be attributable to IMF.⁹⁸ In any manner, it is arguable that the mere existence of some sort of agreement between UNHCR and an implementing partner should suffice for the establishment of the agency link, primarily because such agreements generally confer power upon an entity to act “on behalf” of UNHCR.⁹⁹

The other decisive factor under the ARIO appears to be whether or not the implementing partner has been charged by UNHCR with carrying out, or helping to carry out, one of UNHCR’s *functions*. Article 6(2) of the ARIO specifies that the “rules of the organization” shall apply in the determination of the functions of its organs and agents.¹⁰⁰ The expression “rules of the organisation” in the ARIO means “the constituent instruments, decisions, resolutions and other acts of the organisation adopted in accordance with those instruments and established practice of the organisation”.¹⁰¹ Through these rules, UNHCR establishes which functions are entrusted to each organ and agent. The ILC Commentary particularly notes that the rules of the organization may include instruments such as agreements concluded by the organization with third parties.¹⁰² In fact, given that the implementing agreements concluded by UNHCR and its implementing partners allocate functions to UNHCR agents in accordance with the constituent instruments of the organization (the UNHCR

of International Organizations: Comments and observations received from Governments, A/CN.4/556, 12 May 2005, sect. II.E.

98 IMF specifies in its comment to the ILC, that “An act of another person external to IMF would not be attributable to the organization under general principles of international law, even where they were helping to carry out the functions of IMF unless IMF exercised effective control over that act or an appropriate organ of IMF ratified or expressly assumed responsibility for that act.” See ILC (2005), *Ibid.*, sect. II.E.

99 See discussion in Verdirame, *supra* note 85, at 99ff.

100 The rules of the organization are nevertheless not the only criterion for establishing the functions of UNHCR. The Commission refers to the possibility that “in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization”. See ILC Commentary, ILC, Report of the International Law Commission on the Work of its Sixty-third Session (26 April-3 June and 4 July-12 August 2011), A/66/10, 2011, commentary to Art. 6.

101 ARIO, *supra* note 13, Art. 2(b), and para. 15 of the ILC Commentary, in ILC, Report on the Sixty-third Session, *ibid.* See also Ahlborn, *supra* note 89, and the critical comments by governments, international organizations and the United Nations: A/CN.4/636 (2011), at 15 (Portugal); A/CN.4/637/Add.1 (2011), at 17; 39; A/CN.4/637/Add.1 (2011), at 4–6.

102 ILC Commentary, in ILC, *supra* note 100, commentary to Art. 2.

Statute), it is arguable that these constitute one of the clearest forms of UNHCR's rules of the organization. Thus not only does the mere showing of a contractual link between UNHCR and the implementing NGO suffice to qualify the NGO as a UNHCR "agent", the very fact that UNHCR denotes these NGOs as "implementing partners" indicates that these are, in fact, *implementing* UNHCR functions.

Accordingly, under Article 6, once it has been established that the NGO is a UNHCR "agent", there is no requirement to prove that UNHCR effectively controls each and every instance of conduct. Rather, attribution of conduct on the basis of this link encompasses *all* conduct of the agent in official capacity when this conduct amounts to an internationally wrongful act, even if this conduct happens to be in excess of authority or contravention of instructions. Importantly, when UNHCR delegates certain of its functions to an implementing NGO, the conduct of the sub-contractor, when this amounts to an internationally wrongful act, will be attributable to UNHCR irrespective of whether or not UNHCR's mandate explicitly permits it to delegate these functions. As the ILC specifies, "[i]t may be held that, when practice develops in a way that is not consistent with the constituent instrument, the organization should not necessarily be exempt from responsibility in the case of conduct that stretches beyond the organization's competence."¹⁰³

2 Specifically on Contractual Clauses Seeking to Avoid Responsibility

In practice, many agreements concluded by UNHCR and its NGO implementing partners include clauses stipulating that the NGO will not be considered an agent or member of staff of the organization. As I explained in the above, UNHCR's model "Tripartite Sub-Project Agreement", for instance, specifically stipulates that the implementing Agency shall be fully responsible for all services performed by Agency personnel, and that such personnel "*shall not be considered in any respect*" UNHCR staff members or as having any other contractual link with the Office. UNHCR is not alone in its attempts to avoid liability for the conduct of those to whom it sub-contracts. During the ARIO drafting process, UNESCO expressed the opinion that attribution should be precluded when the relations between an international organization and a private contractor are governed by a contract that includes a clause excluding the possibility that the contractor "be considered as an agent or member of the staff of UNESCO". It specifically argued that:

¹⁰³ ILC, Second Report on Responsibility of International Organisations (prepared by G. Gaja, Special Rapporteur), A/CN.4/541, 2 April 2004, para. 24.

UNESCO contractors may perform very different types of operational activities (including technical assistance) under fee contracts and consultant contracts. Although the same types of activity could be carried out by UNESCO officials, in the case of contractors UNESCO is of the view that acts performed by the latter may not be considered as acts of the organization, since the rules of the organization clearly exclude this possibility. Furthermore, the contracts in question only impose on contractors an obligation of result (for instance, the execution of a project in the field), while the organization has no direction or control over their actions nor may it exercise disciplinary powers on them.¹⁰⁴

According to UNESCO, the reason lies in the inclusion into such contracts of clauses according to which “[n]either the contractor, nor anyone whom the contractor employs to carry out the work is to be considered as an agent or member of the staff of UNESCO [...]”.¹⁰⁵ Thus, in the view of UNESCO, despite sub-contracting functions to private actors, acts committed by these private actors would not be attributable to the Organization simply because the rules of the organization, i.e. the contract as such, would exclude the UNESCO from responsibility for wrongful acts of private actors acting on its account.

Responding to the UNESCO observations, the Special Rapporteur argued that:

In order to establish attribution when an international organization acts through a person or entity that is not an organ [...] the decisive factor appears to be whether or not the person or entity has been charged by an organ of the international organization with carrying out, or helping to carry out, one of the functions of that organization.¹⁰⁶

In his view, the practice of including clauses in contracts between international organizations and private sub-contractors stipulating that the sub-contractor not be considered an agent or member of staff of the organization does not dispose of the question of attribution under international law.¹⁰⁷ Importantly, “this type of clause cannot exclude the possibility that, because of factual circumstances, the conduct of the private contractor would nevertheless

104 Footnotes omitted. ILC, (2006), *supra* note 97, sect. E at 11.

105 ILC, *ibid.*, at 10f.

106 ILC, Seventh Report on Responsibility of International Organisations (prepared by G. Gaja, Special Rapporteur), A/CN.4/610, 27 March 2009.

107 *Ibid.*

be attributed to the organization under international law.”¹⁰⁸ It thus appears that, in the Special Rapporteur’s view, contractual clauses such as those presented above cannot result in any legal effect in the international legal order. While such clauses may be seen as significant in terms of the internal legal order of an international organization, from an international law perspective, they may be seen as irrelevant. As scholars such as Verdirame have noted, seen from the perspective of advancing UN accountability, the solution adopted by the ILC is wholly appropriate.¹⁰⁹

D *Circumstances Precluding Wrongfulness*

Attribution of conduct does not always entail an engagement of responsibility. The international law of responsibility has developed a system of “defenses” for violations of the law, known as circumstances precluding wrongfulness. Accordingly, if a defense is successfully relied upon by UNHCR, the conduct in question is no longer wrongful in character. Articles 20–27 of the ARIIO, containing defences of consent, self-defence, countermeasures, *force majeure*, distress, necessity and compliance with peremptory norms, draw largely on the corresponding articles on State responsibility.¹¹⁰ Perhaps the most frequently invoked defence with regard to international organizations is *force majeure*, which relates to the “occurrence of an irresistible force or an unforeseeable event, beyond the control of the organization”.¹¹¹ This would basically mean that in circumstances where it would be materially impossible for UNHCR to perform a certain obligation, the Organization may be precluded from wrongfulness under these limited conditions. However, it could be argued that the threshold for a successful invocation of *force majeure* with regard to an organization such as UNHCR is higher due to the very nature of UNHCR’s work in emergencies and in the context of other unforeseen events. Indeed, it appears only reasonable that UNHCR is expected to do all in its power to prevent human rights violations in its operations.

Concluding Remarks: Towards New Implementing Partnerships

This article has argued that acts and omissions of UNHCR’s implementing partners may be attributable to UNHCR under ARIIO Article 6 and may as such

¹⁰⁸ *Ibid.*

¹⁰⁹ Verdirame, *supra* note 85, at 101.

¹¹⁰ ILC, *Report of the International Law Commission on the Work of its Sixty-first Session (4 May–5 June and 6 July–7 August)*, A/64/10, 2009, paras. 93–4.

¹¹¹ ARIIO, *supra* note 13, Art. 23. See also ILC, *ibid.*, para. 105.

incur the international responsibility of UNHCR for violations of international human rights law. UNHCR is currently reviewing its framework for implementing with partners, and this offers a unique opportunity for UNHCR to modify its agreements to reflect recent legal developments and to clarify its relationship with these NGOs.¹¹² According to a recent status update regarding the new framework, future agreements will include a requirement that all actors commit to humanitarian principles, non-discrimination of refugees and other persons of concern, respect UNHCR's mandate, and, interestingly, compliance with the UN Security Council's resolutions relating to terrorism and in particular the financing of terrorism.¹¹³ This is indeed one step forward, but the prospect of being internationally responsible for certain conduct of its implementing partners should induce UNHCR to even closer clarify obligations and responsibilities. This article contends that there is an immediate need for UNHCR to ensure that any contract entered into clarifies the real nature of the link existing between the parties and explicitly defines the respective roles and responsibilities of UNHCR and the implementing partner. Future agreements specifically need to clarify both the international human rights standards and internal UNHCR standards by which UNHCR's implementing partners need to abide. Considering the vast amount of UNHCR directives, guidelines and handbooks available, and considering how the implementing agreement is formulated today, it seems difficult for UNHCR's implementing partners to fully comprehend to which rules they are bound.

The impact of the ARIO may also be evident in UNHCR's selection and administration of its implementing partners. UNHCR's new framework for implementing with partners establishes an Implementing Partner Management Service, in addition to a relatively new July 2013 Policy on Selection and Retention of Partners.¹¹⁴ UNHCR has previously acknowledged that its implementing arrangements have "largely evolved as a result of trial and error",¹¹⁵ and its attempts to come to terms with flaws in the implementing arrangements were in 2010 criticized by UN OIOS. In 2010, it issued a report on UNHCR's relationship with its implementing partners, with the objective to "assess the adequacy of UNHCR's policies for the establishment of an effective and efficient partnership with IPs".¹¹⁶ Concluding that the "management and

112 UNHCR, Standing Committee (Side Event) 6th March 2014, <http://www.unhcr.org/532722749.html> (last accessed 10 July 2014).

113 *Ibid.*

114 *Ibid.*

115 UNHCR, Review of UNHCR Implementing Arrangements and Implementing Partner Selection Procedures, 1 November 1997, at 7; Groot, *supra* note 34, at 13.

116 See UN OIOS, *supra* note 30, at 2.

monitoring of relationships with implementing partners need to be improved”, the Report specifically found that, despite the fact that 12 evaluations of partnerships with NGOs had been conducted by UNHCR between 1994 and 2007, there was generally an absence of mechanisms to collect and disseminate information on UNHCR’s relationship with its implementing partners.¹¹⁷

The solution provided by the ARIO highlights the importance of regulating the conduct of UNHCR’s implementing partners more closely and establishing procedural guidelines for the follow-up of cases of misconduct and the repercussions to follow if the implementing partner commits or is alleged to have committed an act amounting to an internationally wrongful act. Implementing agreements should thus also include rights of access for UNHCR oversight bodies and provisions for monitoring of conduct as well as the follow up of identified misconduct. UNHCR’s Inspector General’s Office (IGO) has long lacked authority to investigate UNHCR’s implementing partners suspected of misconduct and UNHCR has not had any mechanism for ensuring that the implementing partners who have not performed are excluded from future agreements.¹¹⁸ Consequently, cases of misconduct by UNHCR’s implementing partners brought to the attention of IGO have often been referred to the implementing partner’s headquarters. As stated by UNHCR at the Pre-ExCOM Consultations with NGOs in 2003, UNHCR “investigates allegations against its staff and accepts that it is the NGO’s responsibility to investigate complaints with respect to their own employees”.¹¹⁹ If we accept that UNHCR is responsible for the conduct of its sub-contractors, it should rather strengthen its supervisory mechanisms accordingly.

117 See UN OIOS, *supra* note 30. See also UNHCR Standing Committee, Implementing Partners, EC/47/SC/CRP.48, 1997, para. 22; EC/47/SC/CRP.52, 1997; UN OIOS, Audit of UNHCR Operations in Georgia: Selection of Implementing Partners, AR2009/121/01, 24 December 2009.

118 UNHCR, *supra* note 2. See also IOM/FOM 054/2005, referenced in UN OIOS, *supra* note 30, para. 44; A. Suhrke and M. Barutciski, ‘The Kosovo Refugee Crisis: An Independent Evaluation of UNHCR’s Emergency Preparedness and Response’, UNHCR Evaluation and Policy Unit Report, EPAU/2000/001, 1 February 2000.

119 UNHCR, Report on Pre-ExCom Consultations with Non-Governmental Organisations (24–26 September 2003), 2003, at 18. But see UNHCR Executive Committee Conclusion No. 98 (2003), para. (f).