



International Council of Voluntary Agencies  
Conseil International des Agences Bénévoles  
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# talk back

The Newsletter of ICVA

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## SPECIAL ISSUE:

### THE INDEPENDENT EVALUATION OF UNHCR'S EMERGENCY PREPAREDNESS AND RESPONSE TO THE KOSOVO REFUGEE CRISIS

**T**his special edition of Talk Back on the independent evaluation of UNHCR's emergency preparedness and response during the Kosovo refugee crisis has been produced with the aim of provoking debate, discussion, consideration, and follow-up on the wide range of topics raised.

A decision was taken by UNHCR last year to make its evaluations public — a welcome step in terms of transparency and accountability. The much-awaited Kosovo evaluation was made public on 11 February (available on the UNHCR website <[www.unhcr.ch](http://www.unhcr.ch)>).

The evaluation team was given the task of reviewing "UNHCR's efforts to prepare for potential outflows from Kosovo in the year

leading up to the crisis as well as the response mounted by UNHCR following the onset of the exodus at the end of March 1999." The evaluation covered the refugee crisis up until the end of June 1999, by which time refugees were returning to Kosovo.

The terms of reference presented to the independent evaluation team covered a wide range of issues: policy, management, and operational. The review was to focus on UNHCR's "activities and performance," but the team was also mandated to "consider the role and impact of other actors involved in the crisis" in terms of how they impacted upon UNHCR's operations.

The task assigned to the team was indeed a daunting one: not only for the scope of the evaluation, but also given the highly politicised nature of the crisis and the range of actors involved, which impacted upon UNHCR's ability to respond to the crisis and upon basic humanitarian principles. Never before has so much money or so many resources been poured into an emergency with such speed.

The particularity of the Kosovo crisis does not detract from the need to discuss the numerous issues that emerged. Many are not new, but have only been magnified and made more explicit by the Kosovo crisis.

*(see over)*

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The team has covered an impressive range of issues in its evaluation and come up with several concrete recommendations for UNHCR. In considering the role of other actors involved in the crisis, several issues and questions are raised that call for further examination. Such an analysis was, admittedly, beyond the mandate of the team and credit must be given for the way in which the team has tried to keep to this mandate given the complexity of the situation. This reason, however, must not be used as an escape clause by the other actors involved for not examining their roles in the course of the crisis.

Numerous evaluations have been undertaken on the Kosovo crisis. The openness with which

*While the team's mandate focussed on the role of UNHCR, this must not be used as an escape clause by the other actors involved for not examining their roles in the course of the crisis.*

UNHCR has shared the results of the evaluation is an example that ICVA hopes other organisations, agencies, and governments, which have undertaken similar evaluations, will follow. Sharing the results of the various evalu-

ations can only help to ensure that mistakes made during the Kosovo crisis are not repeated and that lessons are learned by all.

Given the public nature of UNHCR's evaluation, advantage should be taken of the issues raised by the independent team. The evaluation should be seen as a first step in a process of reflection that must be undertaken by the plethora of actors involved in the crisis: UNHCR, governments, their militaries, NATO, the media, and NGOs. Perhaps there is a need for an all-encompassing evaluation that examines the roles of all actors involved and provides recommendations or for all the evaluations to be pulled together.

The first opportunity for UNHCR, its member states, and NGOs to discuss the issues raised in the evaluation will be during the UNHCR Standing Committee of the Executive Com-

mittee meeting on 2 March 2000. ICVA will base its remarks at the Standing Committee on the points raised in this issue of Talk Back.

This initial offering by ICVA neither assumes nor intends to be fully comprehensive in its coverage of the issues raised by the evaluation

team. Instead, three comments are offered on the following topics raised in the evaluation that ICVA found to be of particular relevance for the future of humanitarian aid and humanitarian principles and which ICVA felt called for further reflection: coordination in an intensely bilateral

environment; refugee protection; and relations with the military.

However, ICVA recognises that there is a real need for self-critique and analysis within the NGO community. It is up to NGOs to take advantage of the issues raised by the evaluation and ensure that they are further addressed and debated. NGOs must not miss the opportunity to learn some valuable lessons from the Kosovo crisis.

There are several other issues that are raised in the evaluation requiring further discussion and analysis, including the actions of the media and the insinuation in the evaluation that UNHCR's assistance to the internally displaced in Kosovo blurred its "traditional refugee-specific mandate" (para 95). The latter point is particularly relevant given the recent suggestions of US Ambassador to the UN Richard Holbrooke that UNHCR take IDPs under its mandate.

One of the terms of reference that the team, unfortunately, seems to have left unfulfilled was to propose a "follow-up process to ensure...the implementation" of the recommendations. Despite the lack of such a process being included in the evaluation, ICVA hopes that UNHCR, NGOs, governments, and other players, take the time to seriously reflect upon the recommendations and find ways to implement those that will strengthen refugee protection and humanitarian assistance and principles in the future. ICVA is committed to such a process.

*ICVA Secretariat, Geneva*

## COORDINATION IN KOSOVO: A FAILURE OF MULTILATERALISM

The entire concept of multilateralism has been weakened as a result of the response to the Kosovo crisis. The range and number of actors involved in the international response — NGOs, the UN, journalists, politicians, donor governments, states, militaries, NATO — were incomparable to those seen in any previous emergency.

Amidst the resulting welter, in which the players were, on occasion, practically tripping over each other, was UNHCR trying to coordinate the humanitarian response — a tall, and perhaps unrealistic, order given the power, agendas, and sheer numbers of those involved.

While in the end, lives were saved, the response was not well coordinated and humanitarian principles were sacrificed in the process. Although there were several shortcomings on the part of UNHCR, especially in terms of managing its response, responsibility for the failures during the Kosovo response cannot be attributed to UNHCR alone. The bilateral efforts of the other actors involved in the crisis cannot be overlooked. States played an undeniable role in contributing to the conditions that rendered UNHCR unable to fulfil its mandate. The contributions of other actors, and especially of states, to the lack of coordination and the ensuing free-for-all should not be swept under the carpet while UNHCR is used as a scapegoat.

The recommendations put forth on coordination in the evaluation are directed at UNHCR and donors, but open up much room for interpretation and are by no means “quick fix” solutions that will ensure coordination in future emergencies. There is little said on how to reduce bilateral efforts in the future or how UNHCR can minimise the effects of such efforts on its work. Additionally, the recommendations referring to NGOs are generally geared towards donors and UNHCR’s Executive Committee on ways in which they should deal with NGOs, but do not suggest including NGOs in the debate.

The bilateral actions of donors and the work of many NGOs during the crisis are inextricably linked. The fact that donors went bilateral and

were funding NGOs, often their national ones, contributed to the lack of coordination among NGOs. At the same time, the entire concept of “an NGO” was greatly blurred and called into question during the response because of the work of some actors, including NGOs themselves. NGOs must take responsibility for their contributions to the failures in multilateralism and coordination and the resulting waste and shortfalls. In the end, NGOs must ask themselves if they upheld humanitarian principles and if not, why they allowed them to be compromised.

### *Coordination*

The evaluation notes that there are “various interpretations of coordination,” but bases its analysis of UNHCR’s coordination on how UNHCR perceived its role: as “overall humanitarian coordinator in the Kosovo response” (para 368). UNHCR defines the purpose of coordination as “setting standards, identifying and filling gaps in the assistance programmes, preventing overlap of activities and promoting the most cost-effective interventions” (para 373). The evaluation notes that, “As well as planning, mechanisms to facilitate the coordination role must be created and include the establishment of a single coordinating authority and coordination mechanisms such as meetings and information dissemination” (para 373).

UNHCR’s coordination failures are explained by several internal factors, including weaknesses in staff deployment and management failures. However, the shortcomings in UNHCR’s coordination must also be attributed to the many external actors who had “an optional regard for its coordinating authority” (para 322). “Variable support from host governments and other humanitarian and military actors, publicly critical donors, many of whom prioritised national visibility over coordination, NGOs who failed to participate in any coordination mechanisms at all — all served to severely undermine UNHCR’s ability to coordinate” (para 432).

The argument is made that as lead agency in the emergency response (a designation that UNHCR

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assumed during the crisis given its lead agency role for the former Yugoslavia and that was accepted by the other UN agencies), UNHCR had the mandate to coordinate UN agencies. The evaluation makes the case that the lead agency role lacks clear definition and does not necessarily extend to actors outside the UN system.

NGOs, donor governments, NATO, and military contingents had (and have) no compulsion to accept UNHCR's lead agency role or coordinating authority. The evaluation

includes the caveat that NGOs with UNHCR sub-agreements must accept UNHCR's coordination authority. However, under the Framework Agreement for Operational Partnership (FAOP) between UNHCR and NGOs that become its implementing partners, there is a provision that partners (meaning UNHCR and NGOs) will work together in a forum for exchanging information or alternatively work together for operational coordination. Under the FAOP and sub-agreements, there is no stipulation that NGOs that are implementing partners of UNHCR must accept "UNHCR's coordination authority," as suggested by the evaluation.

"In practice," however, notes the evaluation, "the acceptance of an overall coordinating authority is determined not solely through formal or legal authority, but through power relations and considerations of effectiveness" (para 372). Given the bilateral actions that took place during the Kosovo crisis, it would seem that many states, as well as NATO, did not accept, in practice, UNHCR's overall coordinating authority. The acceptance of this authority also varied among NGOs significantly.

### ***Bilateralism***

The challenge of coordination was made even more difficult by the fact that UNHCR was being sidelined by many states. The actions of donors and governments in overstepping UNHCR's mandate and bypassing UNHCR's coordination role led to a self-fulfilling prophecy of sorts during the Kosovo crisis. Governments on their own (and through NATO) stepped in to provide humanitarian assistance even before UNHCR had the

chance to prove whether or not it could handle the task at hand. "Donors maintained that UNHCR was overwhelmed, making recourse to bilateralism necessary" (para 45).

While UNHCR did have many shortcomings in its response to the crisis, the actions of governments and NATO greatly hindered UNHCR's ability to

coordinate. UNHCR decided to deploy an emergency response team on 29 March, which was "well within the 72-hour time frame" that UNHCR has set for itself in mobilising emergency response teams (para 153).

However, the team's arrival in Albania was delayed by NATO denying flight clearance to the team since military use was given priority for airspace. Yet, the same day that UNHCR was denied clearance, the EU Commissioner for Humanitarian Affairs arrived in the region on board "an aircraft put at her disposal by NATO and accompanied by NATO's Deputy SACEUR (Supreme Allied Commander Europe)" (para 49).

The bilateral efforts of many governments and the intrusion of the military into the humanitarian sphere draw into question the dedication of states to the role and mandate of UNHCR and concepts of multilateralism. The stakes in the humanitarian response in Kosovo were extremely high for many governments, especially NATO member countries and the countries neighbouring Kosovo. NATO member states had to ensure that the humanitarian crisis was contained "so as to minimise domestic political criticism of the war" (para 37). In addition, "the refugee crisis was not to be allowed to jeopardise the military operation," which included the deployment of NATO troops to Albania and the former Yugoslav Republic of Macedonia (FYROM) (para 37). The Italians, for their part, pursued a policy of containment through "Operation Rainbow," one of the largest bilateral operations (para 41), in an effort to prevent refugees from flowing into Italy.

Funding, with some exceptions, for "public humanitarian assistance followed a distinctly bilateral...pattern" (para 46). The contrast to the



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emergency in Goma is striking. In Goma, the EU, for example, channelled all of its funds through UNHCR. During the Kosovo crisis, funds for public humanitarian assistance from the top six EU contributors was US\$278.8 million; "of this, UNHCR was allocated only \$9.8 million, or 3.5 percent," (para 47) although half way through the emergency UNHCR did receive funding from the European Community Humanitarian Office.

Was the overtly political nature of the Kosovo crisis the sole driving force behind the bilateral endeavours of governments or were those actions testimony of a more serious, underlying crisis of confidence in UNHCR among certain states? Given the insistence of many governments (especially the Americans and Italians) that NATO forge ahead with plans for "humanitarian" assistance, one must ask where the priorities of those governments lie: in pushing NATO to take on a role for which it was not intended or in supporting the agency created and mandated by governments to protect and assist refugees? It also comes down to a question of whether governments are dedicated to the concept of multilateralism or if they are increasingly moving towards bilateral and regional efforts and exclusively following their own interests.

The need, and outright competition, for countries to be actively engaged in the humanitarian response prompted several states to become operational as they built refugee camps using their military forces. Often, when the camps were ready to be handed over for management (to an NGO or UNHCR), many governments favoured "their 'own' NGOs" (para 415). The result was that "nationality, not capacity, was the selection criterion and some NGOs could not fulfil their allocated tasks, producing sub-standard work" (para 415). Many NGOs (often "briefcase NGOs" that focus merely on logistics) overlooked the differences in the standards of camps or the fact that camps were poorly planned and took over management of the camps from NATO or military contingents, along with funding from governments. As the evaluation notes, this demonstrated a "lack of respect...for established humanitarian standards" (para 430). The question must be asked as to how it can be ensured that actors, including donor governments, NGOs, and even military contingents (should they be deployed) adhere to basic humanitarian standards in the future?

The flow of high-level politicians into the region did not help UNHCR. The delegations, wanting to gain points and support with their constituents, simply added to the workloads of UNHCR whose senior officials had to deal with external relations. In a situation where staff was already overstretched, the arrival of politicians into an emergency response only further complicated matters. While UNHCR, admittedly did not take up an offer from the British for protocol staff, the perceived need for visibility among politicians further weakened UNHCR's ability to attend to its more fundamental roles of protecting and assisting refugees.

Donor governments were not the only ones to act on a bilateral basis. The Government of Albania approached NATO and NATO member states for assistance with the refugees and in building camps without approaching UNHCR and before UNHCR could demonstrate its capacity to deal with the flow of refugees. The Albanian government's blatant disregard for the mandate of UNHCR and the apparent willingness and speed with which NATO member states complied with the Albanian government's requests could indicate and imply a weakening of the acceptance of UNHCR's role and mandate. The FYROM authorities "made arrangements with Albania and Turkey (facilitated by the USA) in order to transfer refugees from the border to these two countries)" (para 471). Decisions were taken without the involvement of UNHCR — decisions that raised serious protection concerns (see section on protection) and disregarded UNHCR's mandate. The office of the High Commissioner for Refugees will be rendered increasingly impotent if faced with governments that side-step the organisation in such manners in the future.

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### *The OSCE*

The Organisation for Security and Cooperation in Europe also took on roles in humanitarian coordination that sidelined UNHCR. The OSCE in Albania, while "monitoring refugees and recording oral histories of violence," was also "promoting coordination of humanitarian assistance" (para 64). During a meeting in The Hague in November 1999 looking at the role of the military in humanitarian aid in the case of Kosovo, one NGO representative pointed out that the OSCE called for NATO's involvement in humanitarian aid even before UNHCR had asked for NATO's support.

The OSCE was also responsible for initiating the Emergency Management Group (EMG) in Tirana, which was chaired by the Government of Albania and involved "the relevant Albanian ministries, donors, inter-governmental organisations, UNHCR, the WFP, and NATO;" NGO representatives started attending the meeting from mid-April onwards (para 389). The EMG served as a "high-level policy making desk" that included "actors usually excluded from the everyday decision-making of an emergency" (para 389). It was not until 12 April that UNHCR took over joint-coordination of the EMG.

The question must be raised as to why the OSCE was pushing for humanitarian coordination? Was it that the OSCE had a lack of faith in UNHCR's ability to coordinate humanitarian assistance? Was it a result of the stronger relationship between OSCE and the Albanian government than between UNHCR and the government? What can UNHCR do to ensure that it is not sidelined by regional organisations in this manner in future emergencies?

### *Coordination and NGOs*

The evaluation aptly described not only the bilaterals, but also many NGOs as acting "according to their own criteria and priorities" (para 376). In some cases, NGOs found that UNHCR's limited field presence resulted in a perception of UNHCR being out of touch with needs. "In many cases the NGOs ignored the advice they received from

UNHCR as they felt it contradicted the reality of the situation on the ground, although many of these differences were a result of disagreement with UNHCR policy positions" (endnote 57, p. 86). Such an effect on its capacity to coordinate, which arose from UNHCR's minimal role in the provision of assistance, sparks the old debate of whether or not a non-operational agency can effectively coordinate.

Many NGOs in FYROM were willing to support UNHCR in its coordination role, as was witnessed by

the letter sent to donors and the FYROM government by 35 NGOs, which were members of the NGO Council (formed in Pristina and then re-formed in Skopje; see also below), the majority of which were not implementing partners of UNHCR. Several NGOs have expressed their frustration at times with the complacency of UNHCR. They found the agency to be unwilling to speak out against the actions of donors and NATO, which hindered its ability to coordinate.

At the same time, there were NGOs that approached the military for help out of desperation. Several saw that UNHCR was unable to do the job and thus approached NATO. Instead of turning to UNHCR and to states and calling for the host government to adhere to its obligations under international law, they compromised humanitarian principles in order to gain access to the beneficiaries.

The failures in coordination can also be attributed to the number, and even quality, of the NGOs that responded to the refugee exodus. The preference displayed for national NGOs by many donor governments leads to the issue raised in the evaluation concerning the experience and accountability of NGOs. Many so-called "briefcase NGOs," concentrating on logistics, appeared during the Kosovo crisis and many of them were funded by donor governments in their rush to pour money into the emergency response. At the same time, many states were deeply critical of the role of NGOs and their apparent lack of accountability. There is a definite need for NGOs to seriously examine their involve-

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The evaluation concludes that ensuring that numbers and experience of “independently funded NGOs” correspond to need is a “shared responsibility of host governments and the NGOs,” (p. xvii). The conclusion in the chapter on Assistance and Coordination reads that “in a bilateral context, UNHCR alone cannot ‘screen’ the actors to ensure that numbers and experience correspond to need. This issue is a shared responsibility and should be addressed at EXCOM” (para 436).

The evaluation suggests that UNHCR’s Executive Committee “should address ways in which all NGOs can be made accountable and brought into the coordination framework” by referring to professional standards developed by NGOs, including the Humanitarian Code of Conduct, the Sphere Project, and the Ombudsman Project (p. xvii). Any such attempts must actively involve NGOs. It must also be kept in mind that contrary to what is implied in the evaluation by the statement, “The NGOs have developed mechanisms to enhance effectiveness and regularise standards” (para 434), not all NGOs agree with these mechanisms or donor-imposed enforcement of them.

To assume that these standards are sufficient measures of an NGO’s capacity or competency is to oversimplify the matter. The issue of NGO accountability and capacity raises broader questions that cannot simply be answered by determining whether an NGO is able to implement certain standards or not. There are increasingly more and more organisations appearing that call themselves NGOs. The question of who these NGOs are, what their motives are, and how accountable they are to the beneficiaries are all questions that need to be addressed and discussed — by NGOs, UN agencies, and governments. At the same time, it must be kept in mind that basic humanitarian standards were often ignored or violated in the construction of camps by military contingents and NATO. There is little mention in the evaluation as to how to ensure that such a situation does not arise again.

### *Coordinating the Willing*

The report rightly concludes that “UNHCR can only coordinate those willing to be coordinated” (p. xvi). The recommendation presented, however,

is that donors should “support coordination through publicly supporting UNHCR and by tying NGO funding to a coordination contract with UNHCR” (para 433) — an interesting means of forcing NGOs to become willing participants in coordination. Recommending that funding be tied to coordination contracts has far-reaching implications that can be broadly interpreted. Moreover, the recommendation seems not to take into account that UNHCR is not always the lead agency in an emergency.

The evaluation refers to two types of coordination: the authoritative model, arising from contractual or funding obligations; and the consensual model, resulting from “credible leadership”. By arguing that donors support a contractual obligation for NGOs with UNHCR, the evaluation team seems to be arguing for an authoritative model of coordination (“the stick approach”), instead of a consensual one based on credible leadership (“the carrot approach”). Such a recommendation seems to throw into question UNHCR’s ability for credible leadership.

The team’s suggestions on how UNHCR can improve its coordination role are focussed upon internal staffing changes that would provide for better trained and more senior staff. The evaluation notes that the lead agency responsibilities demand additional resources and, as a result, “staff should not be expected to undertake the role as an ‘add-on’ to existing work” (para 423).

The draft Report on the PARinAC Review, which was discussed at the 1999 Pre-EXCOM consultations between UNHCR and NGOs, but is not referred to in the evaluation, makes some concrete suggestions as to how coordination between UNHCR and NGOs can be improved. One of the suggestions is to train a number of NGO coordinators through a joint effort of NGOs, UNHCR, and OCHA, who can then be brought in on short notice to emergency situations. Another suggestion in that report is for UNHCR and NGOs to mandate and authorise an entity to have a strong coordinating role for NGOs activities in refugee or IDP situations.

The NGO Council that was formed in Kosovo and then re-formed in Skopje during the crisis is an example of such an entity. It provided a coordinating mechanism for several NGOs to focus on

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issues relating to policy, and not merely operational issues. Yet, a weakness of the Council was that many NGOs were not interested in participating in coordination mechanisms. The Council, which is again functioning in Kosovo, has been attempting to encourage the involvement of more NGOs. An alternative recommendation to the one made in the evaluation for donors would be to support such NGO-driven coordination initiatives instead of tying NGO funding to forced coordination with UNHCR.

### **The IASC**

A crucial aspect of coordination that has not been addressed in the report is the role of the UN Inter-Agency Standing Committee (IASC), which is designed to ensure inter-agency coordination within the UN system. The IASC includes eight UN agencies, IOM, the World Bank, ICRC, IFRC, SCHR, InterAction, and ICVA. One place where UNHCR definitely had a mandate and role to coordinate was in the IASC. Surprisingly, the evaluation makes scant mention of the IASC, let alone its role or potential role in inter-agency coordination. References made to the IASC in the evaluation are merely in passing.

There is no analysis of why the IASC processes, formal and/or informal, were not used as a means for effectively coordinating the emergency response among member agencies. The response to the crisis was discussed by various agencies during formal meetings of the body, but these interventions generally took the form of information sharing instead of substantial discussions on inter-agency coordination.

Reference is made in the evaluation to the extensive information sharing that took place at UNHCR Headquarters "through meetings and telephone conferences," but with whom these meetings and teleconferences took place is not made explicit (para 377). In fact, teleconferences, to which UNICEF, WFP, WHO, and IOM were initially invited, were initiated by UNHCR with the help of OCHA as a means of coordinating. After the first few meetings, ICRC and IFRC were invited. As of 20 April, NATO's Supreme Headquarters Al-

lied Powers Europe and liaison officers from NATO who were at UNHCR Headquarters began attending. The three NGO consortia participating in the IASC were not invited to the teleconferences; one official explained that there was the perception in UNHCR that coordination was taking place in the field amongst NGOs and between NGOs and UNHCR. The meetings were limited to one hour and were at first held three times a week. They were later reduced to twice a week and then once a week. While the teleconferences were largely information sharing sessions, they sometimes involved basic plan-

ning for donor alert updates. Agencies also used the teleconferences, on occasion, to take UNHCR to task on some issues or to discuss matters of coordinating assistance. A conscious effort was made to ensure that the number of participants did not get too large.

The fact that the IASC was overlooked in this inter-agency coordinate process calls into question the effectiveness, and even role, of the body. The creation of a separate "structure" by UNHCR and OCHA to facilitate coordination may be indicative of some inherent weaknesses in the IASC, such as its size and membership. The result is a vicious cycle: UNHCR found the IASC to have weaknesses; it was not used for inter-agency coordination (which is the function for which it was designed); and, as a result, it may have been further weakened as a result of the Kosovo crisis.

### **Conclusions and Recommendations**

The response to the Kosovo crisis was unlike any seen before. UNHCR tried to coordinate the humanitarian response in the midst of a plethora of actors that were following and acting upon their own agendas. The situation turned out to be one beyond UNHCR's control as states and NATO took it upon themselves to engage in the humanitarian response.

When UNHCR realised that the bilateral actions of states and NATO were clearly hampering its abilities to execute its mandate, UNHCR should have forcefully made this point to its member states.

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The old adage of “not biting the hand that feeds” may have come into play in UNHCR’s decision not to be so forthright with states, but the result was that UNHCR could not effectively coordinate the humanitarian response. UNHCR must not be afraid to assert and defend its responsibility to protect and assist refugees. UNHCR should have a threshold beyond which it renders it impossible to carry out its mandate effectively. When this threshold is passed, it should be prepared to take the case to its Executive Committee and/or to speak out publicly. Interestingly, several EXCOM members chose to work on a bilateral basis during the Kosovo crisis. Ultimately, if necessary, the agency should be prepared to suspend its operations in such a situation.

While there are several recommendations presented in the evaluation on ways that UNHCR can improve its coordination capacity through internal changes to staffing, staff deployment, and management, the recommendations on how to ensure coordination with other actors are not so strong.

States must reflect upon the consequences of their bilateral actions, and the effects that they had on the coordination of humanitarian assistance. NGOs must undertake a similar reflection process that addresses not only issues of coordination, but also addresses the number of briefcase NGOs that are appearing in humanitarian situations and how to ensure that they adhere to humanitarian principles. At the same time, the IASC should be examined and measures taken to improve its role as a coordination mechanism.

There are several issues arising from the evaluation that should be addressed by all actors in their reflections, including the following:

- What measures can be taken to ensure that basic humanitarian standards are upheld by all actors involved in emergency response?
- What steps can UNHCR take in order to get other actors to accept its lead agency role? What steps can it take in order to establish credible leadership in order to be more effective in its coordination role?
- What concrete measures can UNHCR take to ensure that it is not side-stepped or sidelined by governments and regional organisations in

the future in order to carry out its mandate effectively?

- How could the IASC have been used as an effective means of coordination? Why was it not used to its full potential? How can the IASC process be improved to ensure better coordination in future humanitarian responses?
- How can UNHCR work more closely with NGOs to ensure a coordinated response to humanitarian needs? How can the recommendations of the draft Report of the PARinAC Review to jointly train NGO coordinators and establish coordination mechanisms be translated into reality?
- Donors should find means to support NGO-driven or joint UNHCR-NGO-driven coordination mechanisms instead of forcing coordination through tied-funding. Ways of strengthening such initiatives should be examined, not only by NGOs and UNHCR, but also by donors.
- What were the underlying causes of the bilateral actions of governments? Are fundamental problems with UNHCR what prompted governments to go bilateral or was the unique politicisation of the Kosovo crisis the reason?
- Where do the priorities of governments lie? Is it in supporting UNHCR and its mandate? Is it in pushing NATO towards taking on a “humanitarian role”? Can humanitarian principles be upheld if the latter is the case?
- NGOs must assess whether or not humanitarian principles were upheld. If they were not upheld, why were they allowed to be compromised?
- Do NGOs, who have an established reputation and credible status, have a responsibility to deal with the “briefcase NGOs” that are solely concentrating on logistics and thereby minimising humanitarian action?

This list of questions and issues is not exhaustive, but will hopefully spark some debate and discussion among the various actors to avoid a repeat of the problems associated with the response to Kosovo crisis. ♦

*Manisha Thomas, ICVA*

## ASCRIBING RESPONSIBILITIES FOR ENSURING REFUGEE PROTECTION<sup>1</sup>

Close consideration of chapters 1, 3 and 6 is needed to understand the view in the report on the quality of protection afforded those refugees who fled Kosovo province. This comment is an effort to discern the report's interpretation of international refugee law that serves as the basis for its core recommendations on protection standards.

Essentially, the framework of analysis suggested for assessing protection proceeds on the basis that the constellation of events that surfaced in the Kosovo crisis provided the foundation for the neighbouring country of FYROM to close its border.<sup>2</sup> Further support for this view is advanced on the basis of an interpretation of the drafting history of the UN Refugee Convention, its articles relating to the principle of *non-refoulement* and provisional measures. Refugees' rights are juxtaposed with state interests. In the Kosovo crisis, it is argued, the balance is on the side of state interests, with the rationale that the international community should have had "alternative protection strategies" available to guarantee that a neighbouring country would not have to shoulder a disproportionate burden of refugees and also risk its national security.

It is without doubt that some readers will strenuously disagree with this construction of the capacity for refugee law to ever admit to an exception to the principle of *non-refoulement* and first asylum in situations in mass influx pending more durable solutions, and would support this view on the basis of recent articulations of refugee standards found in EXCOM Conclusions 22 and 85. While not within the purview of international refugee law analysis, it would also seem that in response to the Kosovo crisis there was comparatively high international support (including humanitarian, military, and diplomatic initiatives), and an intersection of regional, economic, and strategic interests that support the conclusion that a threat to national security would be a re-

mote outcome. However, the argument has been advanced and it is important to understand its context in international law before deciding its salience.

As a departure point in evaluating the quality of protection afforded those refugees who fled from Kosovo the report places emphasis on the developments at the border at Blace in early April and their "resolution". The report describes in considerable detail the events and actors involved in "unblocking" this border and from this analysis the more striking conclusions of the report are drawn about the rights of refugees, duties of states and the distinct role of UNHCR.

From a protection standpoint, the fact that refugees lived in the muddy field at Blace for days with little access to humanitarian assistance, while a host of actors negotiated a way out of a near disaster, essentially forced the future course of UNHCR's protection approach. Many observers would agree the events at Blace precipitated the urgent creation of new policy approaches (the Humanitarian Evacuation Programme (HEP) and the Humanitarian Transfer Programme (HTP)) and influential

roles being assumed by other actors (including key governments, the military, and NATO) who occupied the negotiating space usually left to UNHCR. What the report fails to emphasise, however, is that the "resolution" of the events at Blace belie a remarkable failure by some actors to promote respect for the fundamental principle of *non-refoulement* and the right to seek asylum.

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It was the evaluation team's mandate to "consider the role and impact of other actors involved in the crisis, to the extent and insofar as they affected UNHCR's operations." Given this, it is somewhat surprising that the "impact" of the conduct of certain governments and other actors was not given more consideration in the chapter on protection.

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By not so doing, an important opportunity was missed to firmly link the behaviour of other actors to the position of UNHCR and its ability to deliver on its protection mandate. It is from this departure point that the report findings on protection are commented on and hope to serve as a basis for further reflection.<sup>4</sup>

### 1. The right to seek asylum

The report states: "the potential tragedy at the Blace border crossing dramatically juxtaposed the rights of refugees against the interest of state. Resolving such conflicts is the fundamental challenge of a viable protection policy and should motivate burden-sharing initiatives. This is not easy..." (p. xii) Later on in the report it is concluded that there were "transitory admissions problems in FRY Macedonia, but ...protection needs were eventually met." (p.6) The report ultimately concluded that UNHCR should have been prepared with "alternative protection strategies". In reply UNHCR rightly points out that this would mean it should expect that states will not comply with their existing treaty obligations, i.e. as an international institution it must, as a departure point, assume non-compliance with the most fundamental of Convention obligations. (p.141)

In addition to the above, a line of argument advanced in the report rests on an understanding of international refugee law that is deeply controversial and which has not been the subject of great study. The argument advanced is twofold. First, UNHCR should have anticipated that FYROM would close its borders due to its national security concerns and it should have been prepared with protection alternatives from the outset. In the absence of these alternatives, it is argued that FYROM had no reasonable guarantees that it would not be left to shoulder a disproportionate share of the responsibility for a great number of refugees. In addition, it is contended that the size and nature of the influx would contribute to the destabilisation of a country neighbouring a state where there was a civil conflict. Second, it is argued that there is a basis in international refugee law for a country to exempt itself from the principle of *non-refoulement* in situations of mass influx.

The reader is asked to find support for the correctness of this action by FYROM on the basis of factors put forward by the evaluation team: namely, the percentage of the population that Kosovo Albanians would represent in the country; the composition of the host government and the tenuous

nature of its stability in the face of an influx from Kosovo; and statements in the media and from politicians for a couple of years prior to the exodus from Kosovo province that it would close its borders in the event that there was a large flight from the province. Thus, FYROM is referred to variously as "a reluctant host state that feared destabilisation" with a bundle of concerns that should have been anticipated by UNHCR and met with the early implementation of "alternative protection strategies".

ferred to variously as "a reluctant host state that feared destabilisation" with a bundle of concerns that should have been anticipated by UNHCR and met with the early implementation of "alternative protection strategies".

### *The tenuous nature of "First Asylum" or "Unconditional Asylum" in Situations of Mass Influx?*

It is noted in the report that UNHCR vigorously insisted on a "standard position" that focussed primarily on gaining first asylum. "In UNHCR's perspective, there were legitimate fears that a compromise on the first asylum principle would undermine the principle more generally in a global context characterised by increasingly restrictive asylum principles". (p. 91) "UNHCR, however, is institutionally committed to universal standards of refugee protection and to that extent disinclined to support differential treatment of refugees. The result was that UNHCR and the donors were out of step on some key issues"(p. ix) and that: "As a result of the intense international interest in the Kosovo refugee crisis, many factors affecting UNHCR's performance were not under its own control" (p. vii). It is also noted that "It was equally obvious, however, that the protection issue had political implications that were beyond the power of UNHCR to sort out. The Macedonian government wanted international assistance and assurances that at least some refugees would be transferred elsewhere".(p. 36)

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From this assessment the report concludes, *inter alia*, that the most important difference in perspective amongst key actors was that of the first asylum issue in FYROM. The result was that UNHCR's vigorous defence of "unconditional" first asylum (which they were, according to the

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*To accept that the actions of FYROM were legitimate is to accept that it would have been destabilised....*

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report, correct to insist on given the norms enunciated by the Executive Committee based on international refugee law) meant that the governments of the USA

and the UK (apparently due to their concerns over the destabilisation of Macedonia and in maintaining access for NATO) initiated the "burden-sharing" schemes.

Scant reference is made in the chapter on protection of the principle of non-refoulement. Turning away refugees seeking a haven from grave human rights violations is a serious violation of international refugee law by a state. As such, the effect of this on the ability of the very agency charged with the responsibility to ensure that treaty obligations are respected, is likely one of the most important aspects in evaluating UNHCR's ability to seek protection outcomes. It was due to the closure of a border that new policies were urgently developed for evacuating or transferring refugees. Making such policy departures in the climate of an emergency is a fairly risky approach in refugee protection and the effect on refugees' rights are addressed later in these comments.

### *Basis in law*

The report challenges, on legal grounds, the position taken by UNHCR on first asylum and its reliance on EXCOM Conclusion 85 as basic norms of international protection. However, the report does not elaborate what these legal challenges are that provide an exception based on a threat to national security interests. It is suggested that further examination is needed of whether first asylum should be considered as an absolute and unconditional legal obligation under the 1951 Refugee Convention (p. 97). In a footnote, reference (li. at p. 106) is made to Arts. 9 and

33(2) of the UN Refugee Convention and the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons that the reader is to rely on for this position. The objections of the Department of International Protection are alluded to, however, the report does not elaborate on the foundation for making this claim of a national interest sufficient enough to be exempted from treaty obligations.

To accept that the actions of FYROM were legitimate is to accept that it would have been destabilised — and the analysis to support this conclusion is lacking and likely beyond the scope of the evaluation. However, since this view is relied on in drawing further conclusions about the adequacy of the position on protection that UNHCR took, it is an important basis upon which to understand the viewpoint of the report. If, indeed, it is the contention of the report that there exists an exception to what it states UNHCR rightly relied on as basic norms of international refugee protection, then there should have been an articulation of the national security interests that overwhelmed the rights of refugees to seek asylum. If UNHCR failed to meet the political challenges of this particular refugee emergency then emphasis must be placed on what those political challenges were and why other actors steered the direction of the protection response in this crisis. If UNHCR failed to equivocate in promoting basic norms of international protection so be it — that is what states have asked them to uphold.

The efforts made in this report to make the case that FYROM's stated fears of destabilisation were real (thus its "reluctance" as a host) and that there exists in international refugee law an exception to first asylum in situations of mass influx cannot be left uncontested. While the prudence of opening this debate is questionable, to say the least, it might inform the debate on alternative protection strategies.

Most would agree that burden-sharing initiatives need further examination and most would look to UNHCR and governments for leadership on this issue. The report states that there was at Blace a juxtaposition of rights of refugees and interests of states that require the development of alternative solutions. However, the report fails to make a convincing argument that the particular interest of a

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borderline state's stability overwhelmed the rights of refugees seeking a haven (at least for a time while other durable solutions were sought). An effort is made to marshal evidence that the inflow raised fundamental issues of national security for the government of FYROM and that it had a sound basis for determining that it risked destabilisation (see, pp 9-10 FYROM — a reluctant host). While it was right for

FYROM to insist that the international community share responsibility for the refugees at its borders, it needs to be underlined that some would question the tactic of holding refugees as a bargaining chip at its borders as a positive development to encourage adequate burden-sharing arrangements.

### **2. New Approaches — Humanitarian Evacuation Programme (HEP) & Humanitarian Transfer Programme (HTP)**

#### *Humanitarian Evacuation Programme*

In the early weeks of the influx to FYROM, it was the tenuous nature of the openness of the border that required UNHCR to invoke policies such as the HEP and HTP in order to unblock a border where refugees were being prevented from getting protection. Over the course of several weeks, some 90,000 refugees were evacuated to other countries and accorded various legal rights. Clearly, the HEP was an important (albeit forced) innovation in the face of closed borders. However, the report indicates that the HEP and HTP were a unique response, unlikely to be repeated again.

The evaluation deems that in the main, UNHCR delivered as reasonably as could be expected, at least in the context of the HEP, in structuring a policy and a programme that could be used to evacuate large numbers of refugees in a brief period of time. However, it is clear that those governments who were in the main responsible for delivering the programme at the camp level did affect the success of the programme, and as did other actors such as the IOM, and their roles are not fully accounted for in this report. The fact

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*....some would question the tactic of holding refugees as a bargaining chip at borders as a positive development to encourage adequate burden-sharing arrangements.*

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that participating governments and the role of the IOM were not fully examined mean that an important opportunity to test out the value of HEP-like policies has been missed.

The fact that some governments participating in the HEP limited the pool of refugees that they would evacuate (for example, surprising decisions by some governments not to

accept refugees who had kin in their country even though on resettlement criteria this is a sound practice) did have an effect on UNHCR's ability to implement the HEP in a manner that met protection interests. The fact that many of the governments participating in the HEP would only afford some form of temporary protected status, while other governments agreed that those evacuated would have access to the Convention refugee status determination procedures, and that some governments were not clear on the legal rights of those admitted under the HEP, is not elaborated in the report. Clearly, this had an effect on the ability of UNHCR and other agencies to structure evacuations and for refugees to make informed decisions. Most importantly, this had the effect of denying the rights of some of those refugees who were evacuated to a host country where they were not afforded their full rights as Convention refugees.

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*The fact that many governments participating in the HEP would only afford some form of temporary protected status...had the effect of denying the rights of some of those refugees evacuated to a host country...*

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From a practical perspective, there were large problems between the agencies implementing this programme in ensuring that the HEP was conducted in a manner that heightened the prospects for protecting those most in need and not the subject of abuse. However, the concerns expressed by UNHCR and in the report about



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the abuse by some refugees of the HEP programme need to be balanced against the reasonable choices of the refugees in choosing their country for evacuation. The goal of the HEP was two-fold: first, to quickly remove large numbers of refugees from a country that was a reluctant host,

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*The report offers the beginnings of a critical assessment of the HEP in terms of protection standards, policy, and implementation and it is hoped that this issue will be further examined by NGOs, governments, and UNHCR.*

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and, second, to identify the most vulnerable refugees and get them to a place where their needs could be met. This initial tension between the two main goals of the HEP did not account for the reasonable choices that the refugees should have had the opportunity to make, let alone their legal status as refugees. It is not unreasonable for refugees to have a choice in where they will get

protection after the country of first asylum, and to be adequately informed of the rights that they will have in the country of destination. It must be recalled that at the time of evacuation, refugees did not know the duration of their exile and it is not unreasonable that they would want to have a say in where they might be sent.

The voice of the refugee is missing in this evaluation of the HEP. A number of refugees interviewed by Amnesty International in the camps at FYROM indicated their confusion about the evacuation programme given a lack of information and the different approaches taken by governments. In addition, it is not acknowledged that many of the refugees wanted to stay close to home, as it was their consistent intention to return home as soon as possible. The fact that it is often stated that the return to Kosovo was unstoppable and the scale and speed of the return were unprecedented is further evidence that refugees in both Albania and FYROM were anxious to return home quickly.

The debates within UNHCR as to the appropriateness of programmes like the HEP are meaningful debates and it would be important for

UNHCR to examine the response of governments and refugees to the HEP (and lack thereof to the HTP) as important indicators of the prospects for international solidarity and responsibility sharing. The differentiated treatment of those refugees evacuated as opposed to those who sought asylum otherwise still presents considerable problems in host countries and this issue bears further scrutiny as it may well be the case that the protestations of UNHCR in the initial phases of the HEP were well placed as they were pushed by a number of governments to quickly off-load refugees from FYROM's territory. The report offers the beginnings of a critical assessment of the HEP in terms of protection standards, policy, and implementation and it is hoped that this issue will be further examined by NGOs, governments, and UNHCR.

### *HTP: Forcible or less than voluntary relocation?*

The distinction between the position of NATO and of UNHCR is a remarkable example of the difficult position in which UNHCR found itself in upholding standards of voluntariness or consent in these movements. It is noted in the report that, in early May, NATO determined that "with the inflow of refugees over the FRY-FYROM border exceeding the outflow to other countries it is the intention to transfer large numbers ... to SE Albania...to take advantage of the present spare capacity in existing camps..." (p. 95) It is suggested in the report that if in fact these transfers had taken place that delays and blockages at the Blace border post "were to a certain extent unnecessary and could have been avoided". (p. 95)

The implications of this conclusion are indeed important to scrutinise as they seem to suggest that voluntariness be dropped and that refugees be forcibly relocated. The report correctly notes that the HTP raised difficult doctrinal questions and ethical choices for UNHCR to either insist on voluntariness in refugee movements (and thus risk not getting asylum for those refugees who were at the Blace border) or to accept lower asylum standards (i.e. forcible relocation) in order to get more asylum (in empty camps in south-east Albania). It is also noted that some weeks later the position of UNHCR changed from insistence on voluntariness to one of implicit con-

sent: "Preferably all persons evacuated to Albania should agree to go. At the very least, they should not object and, should they do so, this should be respected." (p.96) This shifting of the onus to the refugees to make objections is a curious one in the light of the fundamental nature

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*....it is not established in the report that there was a direct correlation between the number of refugees on the territory, at least while other solutions were sought, and the imminent destabilisation of FYROM.*

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of voluntariness in refugee standards promoted by UNHCR itself.

The discussion on forcible relocation does not include reference to rights arising from both general human rights and refugee law and duties of states even in situations of an influx. This may be because the only conceivable basis for the conclusion that refugees

should have been forcibly transferred to southeast Albania is based on strategic considerations and not concepts of law. Again, the apparent motivation for this policy was the overwhelming concerns of a reluctant host country which was right to expect that UNHCR, key governmental and military actors with concerns in the region, and indeed the refugees themselves, would fail it in reaching other protection solutions. Yet, it is not established in the report that there was a direct correlation between the number of refugees on the territory, at least while other solutions were sought, and the imminent destabilisation of the country.

### ***3. Silence on protection standards at the time of return***

The silence in the evaluation of the role of UNHCR and other actors at the time of return is a considerable gap in the evaluation. In this regard, it would have been important to link the messages that UNHCR was giving in the refugee camps that it was too early to return and the apparent influence of host countries, NATO announcements that certain 'sectors' in Kosovo were 'secure,' and refugees themselves in encouraging early return. It would seem likely that, while it would be a rare

case that UNHCR would prevent refugees from returning spontaneously if that was their will, there is an examination to be done of those factors which encouraged such a rapid return home at a time when international actors were not yet ready to provide the necessary assistance. Perhaps such an evaluation would assist in future determinations of how to heighten protection at the time of return and post-return.

### ***Conclusions<sup>5</sup>***

The success of UNHCR in responding to protection concerns in the Kosovo refugee crisis can only be fairly measured by evaluating the role of other actors including key governments, such as the USA and the UK, the military, and NATO. It is recognised in the report that these other actors had a crucial effect on UNHCR's ability to carry out its protection mandate. Despite this recognition, the report seems to structure its main critique of protection on the basis of an understanding that "a reluctant host state that feared destabilisation" had a legitimate basis to claim that it would be destabilised and that there was support in international law for the actions it took. From this departure point, an effort is made to explain how current protection norms and solutions in situations of mass influx either did not apply or could only be expected to fail. Therefore, it is argued that an overwhelming state interest, combined with a lack of guarantees of burden-sharing or alternative protection strategies by the international community, exempted it from its international obligations to admit refugees at the border at least on the basis of first asylum pending a durable solution.

According to the report, the Kosovo crisis should be understood as a situation where there was a conflict between refugee rights and interests of a state. In summary, the main conclusions of the report based on this analysis seem to be that UNHCR should not have "dogmatically" insisted on respect for first asylum; it should have dropped its insistence on reception in the region of origin as the preferred solution earlier on in the crisis; it should have acted on the early advice of NATO (in May) that refugees presenting themselves at the border at Blace be transferred to empty camps in southeast Albania (thus, the report speculates, avoiding the near disaster at the border at Blace in the

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early April); it should have promoted more vigorously the HTP and not insisted on the standards of "voluntariness" or "lack of objection" for refugees to these transfers; and finally, UNHCR should, in light of all of the above, take steps to

*....the protection of refugees is a shared responsibility, and it is well acknowledged that UNHCR operates in an environment where core standards of refugee protection are not readily embraced.*

develop "alternative international protection strategies"<sup>6</sup> in order to find practical solutions to forced mass displacements in a world characterised by governments unwilling to abide by their international protection obligations (which are understood as respect for the principle of *non-refoulement*, international solidarity, and international

burden-sharing).

Did UNHCR lose its core protection focus in the face of closed borders, "reluctant" host states, a new role being taken by the military, and international burden-sharing that ultimately took the form of evacuations and not other solutions such as resettlement and voluntary repatriation? The critique of refugee protection advanced in the evaluation does make some useful suggestions for UNHCR. However, the seeming unwillingness in the report to firmly state how other governments and actors made it untenable for UNHCR to deliver on refugee protection standards is noteworthy. After all, the protection of refugees is a shared responsibility, and it is well acknowledged that UNHCR operates in an environment where core standards of refugee protection are not readily embraced.

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### NOTES

1. These comments were submitted to *Talk Back* by Leanne MacMillan, Refugee Program Coordinator at Amnesty International, in her personal capacity. They do not represent the views of the organisation and are necessarily summary. The

organisation will prepare a fuller assessment of the evaluation in the coming weeks.

2. FYROM ceded as a party to the 1951 UN Refugee Convention in 1994.

3. Language is important. References to "pileups" at borders and "no-man's land" belie what really happened. "Pileups" might more accurately be described as thousands of refugees fleeing for their lives, surviving in the mud at Blace, and being separated from their families in the melee, with uncertain access to humanitarian assistance and protection. The characterisation of events at the border at Blace as taking place in a so-called "no-man's land" denies the fact that international legal obligations were engaged. If they were not engaged then why was access to them by international actors so contested and controlled? These refugees were under the control of a host government and international refugee law norms applied.

4. For a full discussion of legal protection concerns and relevant international standards see Amnesty International's reports: FYROM: The protection of Kosovo Albanian refugees, May 1999, AI Index: EUR 65/03/99; FYROM: Humanitarian Evacuation and the international response to refugees from Kosovo, June 1999, AI Index: EUR 65/05/99.

5. These summary points are made on the basis of conclusions drawn from the report findings in chapters 1, 3, and 6. They are not the manner in which the authors expressed their analytical framework, however, this is an attempt to distil the arguments advanced in the report and may therefore suffer from a lack of nuance.

6. It would have been helpful to know what "alternative protection strategies" are contemplated by the evaluation team given that this issue is so central to the critique of protection. The reader is left to wonder if the report is suggesting such measures as safe havens, humanitarian zones, safe corridors, etc. given that it also concludes that HEP-like programmes are unlikely to be used again. ♦

*Leanne MacMillan, Amnesty International  
(in her personal capacity)*

## THE ENTANGLEMENT OF HUMANITARIANS AND THE MILITARY

**I**n the Kosovo crisis, UNHCR and other humanitarian organisations deeply entangled themselves with NATO. The evaluation concludes that UNHCR had no other option than to accept NATO as a partner on the terms defined by that partner. It qualifies NATO's partnership as "a mixed blessing." The goal of the relationship prevailed, i.e. the saving of lives.

Being a warring party and trying to be an impartial humanitarian actor at the same time, are diametrically opposed. This merger of roles has fundamental implications for the definition of humanitarian aid and its principles. The moral and ethical questions involved in having a relationship with an organisation that claims to be able to combine both functions require both a thorough analysis and judgement: in view of the implications for the future, more thorough than the evaluation has produced.

### **Weak Conclusion**

In taking the NATO-UNHCR relationship as a reality and in concluding that it has turned out not to be as bad as it could have been, the evaluation fails to speak out against NATO's so-called humanitarian role and UNHCR's acceptance of it. As a result, the evaluation does not provide a genuine opinion as to whether or not UNHCR could and/or should have stayed away from NATO.

Rather, the evaluation suggests that "contemporary norms validate operational cooperation between UNHCR and a military force that is a beligerent party only under two conditions:

- ♦ when the military is engaged in a UN enforcement action under the UN Charter and authorised by the UN, or
- ♦ there is no alternative way to avoid substantial suffering and loss of life" (p. xiii)

The evaluation presents a highly ambiguous conclusion. It concludes that UNHCR shot itself in the foot as it did not invest in a relationship with

NATO in an earlier phase (p. xiii) In autumn 1998, NATO was developing detailed plans for a humanitarian role in the Balkans. But, the evaluation admits that if UNHCR had entered into a relationship with NATO, it remains an "open question" as to whether it would have led to concrete results.

### **Legal Analysis**

Chapter 7 of the evaluation that deals with the relations with the military starts with a legal inaccuracy. The evaluation remarks that UNHCR departed from its practice in cooperating with a military force, in this case NATO, since this force was also a party to the conflict. It thereby deviated from the traditional norm, according to the evaluation, that humanitarian organisations be neutral and impartial.

This conclusion is inaccurate. From a legal perspective, multinational or UN forces working under a UN Security Council resolution adopted under Chapter VII, which authorises the use of force, are parties to an armed conflict in the same way that NATO was in Kosovo or the SPLA is in southern Sudan for example.

In contrast to what the evaluation says, the cooperation with UN and NATO forces working under Chapter VII in Bosnia-Herzegovina, therefore, put the humanitarian principles mentioned equally at risk. Although, the evaluation suggests otherwise, the fact that in the case of Kosovo NATO did not have UN authorisation does not make a difference under international law.

Whereas this may seem a polemic argument, it is important as the evaluation states that there are contemporary norms, which validate operational cooperation between UNHCR and a beligerent party under the condition that the military has UN authorisation to use force.

It must, however, be made clear that no such contemporary norms exist. The use of the term "contemporary norms" is a loose one and has no basis in international law. The evaluation seems to suggest that the contemporary norm has emerged

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*Being a warring party and trying to be an impartial humanitarian actor at the same time, are diametrically opposed.*

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because forces working under a peace-enforcement mandate did not jeopardise the principles of neutrality and impartiality, therefore making cooperation possible. However, as pointed out above, working under a peace-enforcement mandate implies that one becomes a party to the conflict, thus jeopardising those principles and making cooperation for a humanitarian agency problematic.

Following the line of thinking of the evaluation, and knowing that NATO did not have this UN Security Council authorisation, it implies that UNHCR can only have cooperated with NATO on the basis of the claim that there was no alternative way to avoid substantial suffering and loss of life.

### *Little Historical Analysis*

The evaluation offers little analysis of the fact that debate on engaging in relations with military forces for humanitarian purposes is not new. Particularly after the events in the first half of the nineties (Northern Iraq and Turkey, Somalia, Bosnia-Herzegovina, and Rwanda), a series of conferences and seminars took place and humanitarian organisations could hardly keep up with the many requests of military forces to participate in their so-called exercises. Different humanitarian organisations have different views on whether military forces have a role to play in the delivery of humanitarian aid and different attitudes on working with the military.

The more principled view, held by a number of humanitarian organisations, is that humanitarian organisations should stay away from the military as much as possible. If the military has a role in humanitarian aid, it should go no further than performing tasks such as air movement control, re-building of infrastructure, and de-mining: jobs that only the military can do and that are in support of humanitarian operations. In addition, many NGOs have made the case that the use of military forces is not the most cost-effective means of providing aid.

On the other side of the spectrum are NGOs that see the military as a useful partner in helping to build camps, in transporting and delivering relief items, and in securing staff and materials. Generally speaking, these are smaller NGOs and, therefore, see the military capacity as a welcome addition to starting up and sustaining their operations.

Generally, the outcome of the debates reached a consensus that holds that military forces can assist humanitarian organisations in their operations when the military recognises that it works in support of the humanitarian organisations. Until Kosovo, UNHCR's practice has not appeared to be an exception to this consensus.

Unfortunately, the evaluation does not provide a clear picture of UNHCR's pre-Kosovo policy of working with the military. Did UNHCR have such a policy? Or, was it a contradictory policy?

The evaluation pays some attention to UNHCR's experience in working with UN and NATO forces in Bosnia-Herzegovina where it heavily engaged with those forces. But, the evaluation also quotes from the protection guidelines that the use of military contingents to provide assistance and security to areas where refugees are accommodated is inherently incompatible with the humanitarian and civilian character of refugee protection (para 498).

### *NATO's Lead Role*

The evaluation provides important insight into the fact that NATO's involvement was a *de facto* lead role since it provides extensive evidence that the relationship and involvement of NATO and national military forces went far beyond a support role. As the evaluation points out, NATO defined the relationship (para 551). At the same time, the evaluation describes NATO as playing a "prominent support role in the humanitarian sector (para 532)." The evaluation should have been clearer on which role NATO really played.

The initiative for the request for NATO's involvement did not come from UNHCR, but from some of NATO's key members (US, UK, Germany, and Italy) and the host-states, FYROM and Albania. NATO imposed itself on UNHCR, knowing that it had the strong support of major member states, who, at the same time, are UNHCR's Executive Committee members, to do so.

In this respect, the evaluation provides interesting details extensively evidencing that NATO's plans to move into the humanitarian field were well down the road long before 3 April when the High Commissioner formally requested NATO's support. It is generally assumed that the High Commissioner waited until 3 April with her request as



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she did not want to work with a military force, which was also a party to the conflict.

Unfortunately, the evaluation misses an essential point by not investigating any further the actual agreement reached between UNHCR and NATO and whether it was respected. After the 3 April 1999 letter and an exchange of letters following a meeting between High Commissioner Ogata and NATO Secretary-General Solana on 14 April 1999, there seemed to be an understanding on paper in terms of a division of labour and coordination arrangements, as well as a recognition of UNHCR's lead role. In a letter from SG Solana to HC Ogata on

21 April 1999, he writes, "NATO fully recognises the leading role of UNHCR, which is not only reflected throughout NATO's operation plan, but is currently being implemented as a working operational reality on the ground in Albania." The necessity to adhere to the terms of the agreement is a matter that UNHCR should have been vigorously pursuing with its member states that are part of NATO and with NATO itself.

The most significant example of UNHCR's subordination to NATO is the fact, brought up by the evaluation, that UNHCR was not involved in NATO's plans to create AFOR, the NATO force formed for Albania and portrayed as a humanitarian military force.

### ***A Merger Jeopardising Humanitarian Principles***

Generally, the evaluation's conclusion is that in working with NATO, UNHCR and other humanitarian organisations jeopardised the principles of neutrality, impartiality, and independence but not to the extent that might have been expected, given the limited period of the merger (para 553). In addition to its conclusion that UNHCR deviated from the traditional principles of neutrality and impartiality, the evaluation finds that UNHCR can seriously damage its lead agency credibility for other humanitarian organisations if the refugee agency decides to work with the military (para. 552).

However, the evaluation also takes the position that the humanitarian community at large — UNHCR, other UN humanitarian agencies, IOM, the Red Cross Movement, and the NGOs — accepted cooperation with NATO as a fact, in view of the humanitarian imperative of providing aid to those in need. In other words, the humanitarian imperative prevailed over the ethical and moral principles of humanitarian aid.

Different humanitarian organisations attach different value to the importance of the issue. Obviously, the more pragmatic the approach, the less concerned the organisation is with the blurring of the distinct identities of military

forces and humanitarian organisations and the compromising of humanitarian principles.

The degree of politicisation of the humanitarian response in the Kosovo crisis has been clearly unprecedented. Although humanitarian intervention or humanitarian war are not new concepts, the broad use of this language by NATO member states during the bombing campaign has seriously contributed to the further corruption of the term 'humanitarian'. For example, many Western military forces nowadays see themselves as humanitarian actors when they are involved in an aid operation. There are fundamental differences in identities. The fact that a military force is an extension of foreign government policy is inherently problematic to the maintenance of neutrality, impartiality, and independence. These points have been largely swept under the carpet.

The evaluation makes a distinction between the blurring of identities and roles between the military and humanitarians in Albania and FYROM. It finds that in FYROM the blurring was less present because of clearer coordination structures, the presence of one force (KFOR) with a unified command, not a plethora of bilateral military contingents operating more or less independently, and a combat force (AFOR) with a humanitarian mandate (para 550). Yet, in practice, the difference was subtle.

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*The fact that a military force is an extension of foreign government policy is inherently problematic to the maintenance of neutrality, impartiality, and independence.*

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In Albania, in performing humanitarian tasks, many of the military carried their arms since there were also internal security problems and petty crime, while in FYROM they did not. In FYROM, NATO's headquarters were closely located to the camps, a point not mentioned in the evaluation. Not only would combat tasks have been easily deployable should the security situation have become more critical in FYROM, but it also brings up the point of civilian camps and military units being situated too closely together.

Rather than on the basis of coordination arrangements and command structures, the presence, in-

*The fact that FYROM refused to let the refugees proceed and did not allow humanitarian agencies to mount relief activities created the appalling scenes of tens of thousands of refugees without any shelter, stranded in the mud at Blace.*

volvement, and visibility aspects determine the blurring of distinctions between the military and humanitarian organisations. The more executive tasks a

military force undertakes in the delivery of aid while keeping a military identity, the more problematic the relationship with humanitarian agencies becomes.

### *A Job that only NATO could have done?*

In many cases where military forces have become active in humanitarian aid, including the Kosovo refugee crisis, the situation is portrayed as one where the humanitarian needs outweigh the supplies and resources available and where the humanitarian organisations are not up to their tasks.

The evaluation could have made a more thorough analysis of whether this was indeed the case, not only looking at UNHCR's capacity, but also at those of other humanitarian organisations, although, admittedly that falls beyond the scope of this evaluation.

The evaluation illustrates perfectly that the fact that NATO forces in FYROM and national military contingents in Albania started to build camps was a political choice (para 170). FYROM was more than happy to accept the offered NATO package deal: 'you (FYROM) let us in', 'we (NATO) will build the camps', 'fly as many refugees out', and 'assist you in finding long-term

international economic aid.' In the early phases of the crisis, states decided to allow NATO to do contingency planning and put their resources at the disposal of NATO and national military. In other words, the claim that nobody else could do the job, became a self-fulfilling prophecy and was a deliberate decision.

The evaluation simply agrees with the High Commissioner's view that humanitarian organisations were overwhelmed. The logistics, construction, and transport capacities of the military were of dimensions that humanitarian organisations would never possess.

However, it should not be forgotten that in the first days of the emergency the main problem at the border of FYROM, was access. The fact that FYROM refused to let the refugees proceed and did not allow humanitarian agencies to mount relief activities created the appalling scenes of tens of thousands of refugees without any shelter, stranded in the mud at Blace. One of the few humanitarian NGOs that was legally allowed to work at Blace provided other NGOs with T-shirts in order to have as many staff on the ground as possible. Instead of allowing NGOs to start their operations, FYROM opened lengthy procedures for registration and kept their supplies waiting at Skopje airport.

The evaluation remarks that "rapid camp construction averted a humanitarian catastrophe at the Blace border" in FYROM (para 43). After the first site was constructed, however, the selection of sites became a lengthy process involving a number of actors, including the FYROM government, NATO, and UNHCR. While further camp construction could have been done by civilian companies and NGOs, as recognised by the evaluation in paragraph 549, it was mainly NATO forces that were involved in this effort.

In northern Albania, a number of sites were located too closely to the border contravening, UNHCR's guidelines. On the technical side, the performance of the military in creating refugee camps that meet established quality standards as defined by humanitarian organisations on the basis of their experience left a lot to be desired as illustrated by the evaluation. The standards varied and were built "without reference to UNHCR standards in a wide range of sectors" (para 411).

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The camps that militaries generally construct have very different purposes and considerations than refugee camps. As a result, considerations normally taken into account by humanitarian organisations when building camps, such as the location of latrines and the privacy of showers to reduce security risks for women and the inclusion of recreational areas, were often overlooked as militaries rushed in to construct camps (para 414). Some camps fell below standards, while others were known for their luxury facilities and services provided. The result was an uneven distribution of resources and unnecessarily high costs (Italian tents cost US\$1,200; UNHCR tents cost US\$120 (endnote 92, p. 87)).

### *Comparative Advantages — Military Support Activities*

In carrying out humanitarian tasks, the military often points to its comparative advantages over civilian organisations. The evaluation seems to agree with UNHCR that particularly in the areas of air movement control, water and sanitation, transport and heavy logistics, the military can play a useful role.

After the experiences with Rwandan refugees in Goma, eastern Zaire, in 1994, some humanitarian organisations called for the creation of a civilian heavy logistics capacity that could be used by UNHCR and others in times of emergencies, which are not armed conflicts, and would carry out tasks that fall normally beyond the capacity of humanitarian organisations.

UNHCR in this respect had some expectations of the services packages, mentioned in the evaluation (para 133). According to the concept, governments would become responsible for the implementation of assistance activities in certain operational areas, such as air movement control, water and sanitation, transport, and heavy logistics: realistically, capacities that are readily available in military forces.

The evaluation mentions that the High Commissioner had hoped that through NATO, she would be able to access the national military resources of alliance members (para 525). The evaluation adds, however, that several states did offer their services, but on their own and NATO's initiatives and, often, terms.

However, as the evaluation points out the service packages had not been part of any of

UNHCR's contingency plans (para 134) for Kosovo. In fact, information suggests that the concept has not been included in contingency plans for looming emergencies since 1995. In retrospect, therefore, given the little progress UNHCR made on the issue and the high political interests, it seems to have been an unrealistic expectation of the High Commissioner for states to deliver their assistance in a similar manner to the service packages model within the framework of cooperation with NATO.

The evaluation does not pay attention to the supply-driven attitude of the military and the fact that it is only in rather exceptional situations that the military capacity, including the service packages, can be applied.

Since the mid-nineties, there has been increased interest on the part of the military to perform humanitarian tasks and many national contingents have designated parts of their spare capacity for humanitarian use. However, most humanitarian crises take place in zones of armed conflicts where the lack of access for humanitarian organisations is often erratic. In most of these situations, military resources cannot bring relief because of mandate questions, including the use of force, and other political issues. In other words, the needs outweigh the supplies, not necessarily because of their insufficiency, but because the possibilities to deliver them are extremely limited. This aspect is largely overlooked in many seminars and training exercises where the military prepare for their new role.

### *A Role in Protection?*

Perhaps even more important is the fact the military have also difficulties in understanding another crucial aspect of humanitarian action. Humanitarian work concerns not only the technical delivery of services, but also and equally important, the protection of, and the caring for, the mental wellbeing of the beneficiaries. Paradoxically, the military uses the term protection with the connotation of its own protection and perceives it often as a security question.

The evaluation devotes some attention to these crucial matters in the protection chapter (chapter 6). It briefly looks at the extreme merger of roles in northern Albania where the western military

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forces had both a combat role and humanitarian role, explaining that this merger could have provoked attacks on the refugee camps, which were located too close to the border.

The evaluation finds that UNHCR's policy is unclear on the question of a role for the military in refugee protection, as it prevailed in northern Albania in terms of separating the refugees and KLA forces who used the camps as recruitment grounds (paras 495 and 498). In practice, as concluded in the protection chapter, there are essential differences in logistics functions and a protection role. And, as pointed out, even within the protection role of military forces there are critical differences, such as securing a refugee populated area or police-type duties in camps.

A serious related problem is that military forces have extremely little understanding of refugee law and human rights. There is little information available as to whether NATO's response to the crisis was, in any way, informed by refugee law or principles of human rights law. For example, NATO's forces pushed for spare camp capacity to be used in southeast Albania under the humanitarian transfer program (HTP), but the manner in which NATO approached the issue could be considered a form of forced relocation.

### **Conclusions and Recommendations**

In its conclusions and recommendations on relations with the military the evaluation falls significantly short of what might have been expected given its findings. It does not look at the future of the relationship between humanitarian organisations and military forces.

Yet, in ICVA's view, the Kosovo experience and the evaluation teach us extremely important lessons.

UNHCR should clarify its policy on cooperation with the military forces, which take on humanitarian tasks, and define criteria for engaging itself in close relationships. In the case of peace-enforcement and other situations where military forces are warring parties, humanitarian agencies should stay away as much as possible from the military and not accept as a *fait accompli* the same military putting on a humanitarian hat.

UNHCR should define the military tasks in support of humanitarian aid and how they should be

employed. In Kosovo, the military involvement in humanitarian action went clearly beyond a support role. From a coordination perspective, the 'Macedonian model' might have been more suitable for a UN humanitarian agency as the evaluation concludes. However, coordination not only determines whether mandates can be kept separate, but so do, and primarily, presence, the level of involvement, and visibility on the ground, in camps, etc. of the military.

In view of the implications of the involvement of military forces and the principles at stake, UNHCR and NGOs should call on states not only to further develop the service packages, but also to urgently explore alternatives for the involvement of military forces in humanitarian aid, such as civilian units. These civilian units must concentrate on tasks that normally fall beyond the capacity and funds of humanitarian organisations.

UNHCR should clarify its position on the issue of a protection role for military forces, as put forward in the evaluation (para 517). ♦

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