

International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and United Nations Reform
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Introduction

With talk of reform once again in the air, this is a timely moment to look at the institutional dimensions of protection and assistance for refugees and the displaced. This paper raises a number of related questions about the meaning of 'protection', the relation of protection to 'assistance', and the link to solutions. It raises these issues, not within an exclusively refugee or displacement context, but with regard overall to the United Nations humanitarian response system and current reforms. Among others, the issues which call for review include the identification of those requiring 'international protection', of the agency or mechanism most appropriate to provide such protection, and of the means by which protection can be co-ordinated with other humanitarian activities.¹ To that end, the paper recalls some very brief history and the emergence of the concept of 'protection', examines some of the institutional dimensions to debate regarding internally displaced persons (including lines of authority and lines of accountability), considers the recent focus on 'clustering' in UN emergency response discourse, and finally poses a number of questions, challenges and possibilities for future roles in protection and assistance for refugees and the displaced.

Some brief history

For over 80 years, the community of States has considered it appropriate to 'institutionalize' its response to successive crises of displacement. Refugees were immediately perceived not just as people displaced, but as people without protection and, in particular, without the protection of their own State. It was this gap in an idealised system of responsibility and organization that the League of Nations sought to fill. So it called on the first High Commissioner for Refugees to define the status

¹ Although this paper raises questions about the extent of current activity by the Office of the United Nations High Commissioner for Refugees (UNHCR), it is not intended as an assault upon the waywardness of present UNHCR policy and practice; for the latter, from another time and place, see Goodwin-Gill, G. S., 'Refugee Identity and Protection's Fading Prospect', in Nicholson, F. & Twomey, P., *Refugee Rights and Realities*, Cambridge: Cambridge University Press, 1999, 220-49.

of refugees, to organize their repatriation or allocation to potential resettlement countries, and to undertake relief work with the aid of philanthropic societies.²

Protection, or ‘political and legal protection’, was central to the mandates of successive offices and agencies set up both within and outside the League and in the language of the instruments and ‘arrangements’ of the period. None explicitly defined what was meant by legal and political protection, but the notion was reasonably clear from the context. Refugees were defined by reference to groups and categories outside their country of origin, who did not enjoy the protection of their government. The protection which they needed was ‘legal’, in that it related to their status, rights and interests in other countries, and had the practical dimension of access, or lack of access, to services and opportunities. Protection was ‘political’, in that the situation of refugees and solutions to their problems required presentation to governments at the political level and a corresponding exercise of political will, if the requisite measures of assistance and the necessary solutions were to be found.

The operations set up to deal with displacement during and immediately after the second world war were inspired by much the same sense of protection, to which was added an assistance and operations dimension. As its name implies, the United Nations Relief and Rehabilitation Administration, set up in 1943, provided emergency aid to those displaced by the conflict in Europe,³ and eventually assisted with the return or repatriation of more than 6 million. Its immediate successor, the International Refugee Organization, was authorised to engage in similar assistance activities.⁴

² Selected representatives of the High Commissioner’s Office were also authorised to provide refugees with the assistance normally rendered to nationals abroad by consular authorities. This included certifying the identity and position of refugees, their family and civil status, testifying as to the regularity, validity, and conformity with the previous law of their country of origin of documents issued there, certifying the signature of refugees and of translations of documents drawn up in their own language, testifying before the authorities of the country to the good character and conduct of individual refugees, and recommending them to the competent authorities for visas, residence permits, admission to schools, etc.

³ See Preamble and Article 1, Agreement for United Nations Relief and Rehabilitation Administration, 9 November 1943: <http://www.yale.edu/lawweb/avalon/unrra001.htm>.

⁴ See Preamble and Article 2, Constitution of the International Refugee Organization, 15 December 1946: <http://www.yale.edu/lawweb/avalon/decade/decad053.htm>.

For various reasons, the General Assembly decided that the next agency responsible for refugees should be non-operational, initially at least. In finalizing UNHCR's statute, it nevertheless maintained the importance, purpose and range of the protection function and its integral link to solutions.⁵ The nature of protection, as it was understood at the time, is reflected in one representative's comment, to the effect that it 'would be the duty of the High Commissioner to intervene with governments on their behalf in order that they might be afforded minimum rights and privileges essential to their existence and security.'⁶ The major assumption seems to have been that only *legal* obstacles stood in the way of a successful solution.

In addition, the very nature of UNHCR's competence and its focus on the refugee who, by definition, had crossed an international border, served to emphasize the essentially *reactive* nature of the organization. UNHCR was thus seen by many not only as non-operational and 'diplomatic', but as formally constrained by the same prohibition on intervening in 'domestic jurisdiction' as the United Nations at large.⁷

Nevertheless, while UNHCR was initially conceived as neutral, passive and reactive, the rationale for its continued existence combines recognition of the humanitarian necessity for protection with recognition that assistance is commonly essential not only to survival, but also in the transition to solutions. Indeed, the General Assembly rapidly accepted that UNHCR *should* engage in activities beyond the diplomatic, in resettlement, repatriation, and channelling funds for assistance.

⁵ UNGA res. 428(V), 14 Dec. 1950, Annex, paras. 1, 8.

⁶ UN GAOR, Third Committee, 5th Sess., 1950, p.363 (Mrs Roosevelt, USA). Another representative suggested that the High Commissioner, 'would have to exercise as it were both diplomatic and consular functions, functions of an administrative and legal character which would go beyond the scope of the Convention': *ibid.*, p.365 (Mr Perez Perozo, Venezuela).

⁷ See United Nations Charter, Article 2(7). Paragraph 8 of UHHCR's Statute talks of promoting protection and solutions through agreements with governments, initiating and facilitating international co-operation with and between States, and co-ordinating the complementary work of other international institutions and non-governmental organizations. Elsewhere the High Commissioner is instructed to focus on groups and categories of refugees, in work that is to be humanitarian, social and non-political.

UNHCR in the 1990s: ‘Depoliticization’ of the refugee and the challenge of relevance

For forty years or so, the organizational model set up for refugees by the United Nations in 1951 served the purposes of a relatively static world order, in which the Cold War ensured relatively few changes, and none that threatened the status quo. With the end of the Cold War, however, and with the increasing globalization of the world economy, so a new dynamic took over. The notion of a ‘common public order’ began to emerge, even if it was not necessarily consistent with a ‘common interest’, and the victims of civil conflict, of genocide and human rights violations, of natural and man-made disasters within their own countries, the internally displaced, began to claim a place on the international agenda.

When refugees no longer had political significance for the west, and when asylum became scarce resource, what was the UNHCR to do? How could it prove its relevance in the brave new world? The break-up of former Yugoslavia seemed at first to offer an opportunity for new roles, but as that and other tragedies of displacement continued to unfold, so it became clear that inadequately thought out notions of ‘preventive protection’, of ‘being there’, and of ‘humanitarian action’ were no substitute for principled operations.⁸

The 1990s were nevertheless a time also for talk of reform. Sovereignty and intervention, even democracy and democratization, were in the air, and the UN, if not UNHCR, seemed on the verge of reconstruction. . In 1997, the Secretary-General presented his programme for reform, ‘Renewing the United Nations’.⁹ made a number of proposals intended to promote ‘greater unity of purpose, coherence of efforts, and agility in responsiveness’. It singled out four core activities – *Peace and Security*, *Economic and Social Affairs*, *Development Co-operation*, and *Humanitarian Affairs* – and one issue, *Human Rights*, which was ‘designated as cutting across’ each of the above four substantive fields.¹⁰ Moreover, the United Nations, ‘must further strengthen its capacity for launching *coherent and coordinated humanitarian actions*, under

⁸ See above, note 1.

⁹ See ‘Renewing the United Nations: A Programme for Reform’, Report of the Secretary-General: UN doc. A/51/950, 14 July 1997.

¹⁰ Ibid., paras. 62-79.

the *guiding principles of humanity, neutrality and impartiality*... and... work *in partnership* with governments, other intergovernmental organizations and non-governmental organizations'. It 'must develop an effective emergency response capacity, and... establish an effective mechanism of coordination and cooperation... by clarifying the allocation of responsibilities among the entities concerned.'¹¹

Another ten years or so of experience confirms some progress, but also continuing problems in co-ordination and service delivery. The focus now is on the remaining gaps and challenges, on identifying the best way forward to strengthen emergency humanitarian assistance, and on countering the tendency for agency mandates to enjoy primacy, over, above and before the effectiveness of the common system. From a system-wide perspective, UNHCR is just one of the players, and its future as much a matter for review, as that of any other agency.

Nevertheless, UNHCR is possessed of one singular and distinctive characteristic – its General Assembly mandate responsibility to provide international protection. As we shall see, one especially problematic area in the arena of emergency humanitarian assistance is indeed that of protection; and it may be protection that is ultimately the saving of UNHCR, at least for the time being.

Protection in the context of humanitarian assistance: A further sense

UNHCR was conceived in a human rights context. As a subsidiary organ of the United Nations General Assembly, it is bound by article 1 of the UN Charter to pursue the purposes and principles of the organization; and by article 55, to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.

Its own Statute identifies some of the ways by which protection may be pursued, while a special role – supervising the application of their provisions – is confirmed by States party to the 1951 Convention and 1967 Protocol relating to the Status of Refugees.¹² The original idea behind the protection responsibility was to have an international agency to replace what the refugee had lost through flight and the

¹¹ Ibid., paras. 182, 183.

¹² See Article 35 of the 1951 Convention; Article II, 1967 Protocol.

fracturing of the assumed normal relationship between citizen and State. Today, taking account of developments at international legal and institutional levels, protection comprises both a legal framework and a solutions framework. Among others, the legal framework encompasses the refugee treaties, such as the 1951 Convention and the 1967 Protocol and their regional counterparts, but also relevant international human rights law; the solutions framework, in turn, covers refuge and asylum, voluntary repatriation, and assistance.¹³

To ‘provide international protection’ thus means, first, to insist on the fulfilment of international obligations; secondly, it has a practical aspect – it means being there and using all available mechanisms to ensure that protection goals are achieved (municipal law, governmental and non-governmental institutions, the impact of information, regional and international supervisory mechanisms; protest); thirdly, it means maintaining the humanitarian and non-political character of the work; and fourthly, it has a prohibitive dimension, drawn directly from the body of human rights law, which requires disengagement from and non-engagement in activities incompatible with international protection standards (no forced return of refugees, or support for policies and practices that violate human rights, such as forced labour, indefinite detention, assistance in unlawful situations, or protection of those properly excluded from refugee status. Protection is thus soundly based in law; it may be wider than rights, but it begins with rights and rights permeate the whole. Moreover, while the responsibility to seek solutions recalls the *objective* of the international refugee regime, this does not mean that the one goal is automatically subsumed within the other. That is, protection *is* an end in itself, so far as it serves to ensure the fundamental human rights of the individual. Neither the objective of solutions nor the imperatives of assistance, therefore, can displace UNHCR’s autonomous protection responsibility.

Time and again the UN General Assembly – to which the High Commissioner reports and is presently if imperfectly accountable – has stressed both the

¹³ See UNGA res. 60/129, ‘Office of the United Nations High Commissioner for Refugees’, 16 December 2005, para. 9, in which the General Assembly, ‘*Emphasizes* that international protection of refugees is a dynamic and action-oriented function that is at the core of the mandate of the Office of the High Commissioner and that it includes, in cooperation with States and other partners, the promotion and facilitation of, *inter alia*, the admission, reception and treatment of refugees in accordance with internationally agreed standards and the ensuring of durable, protection-oriented solutions, bearing in mind the particular needs of vulnerable groups and paying special attention to those with specific needs, and notes in this context that the delivery of international protection is a staff-intensive service that requires adequate staff with the appropriate expertise, especially at the field level...’

fundamental nature of the international protection function, and the fundamental rights of those of concern to UNHCR.¹⁴ UNHCR is thus an agency with very specific responsibilities in the human rights field – to provide international protection, not merely by respecting the rights of refugees in a passive sense, but also actively taking the fact of their being refugees as necessary and sufficient reasons for action and intervention.

Internally displaced persons: The institutional dilemma

For the last decade, if not more, I have argued that, as a matter of general policy, international responsibility for the internally displaced should not be handed to UNHCR.¹⁵ Essentially, the objections resolve themselves into issues of legal standing and conflict of interest, in a context nonetheless which poses a serious challenge to the community of nations. In the case of refugees, the fact of having crossed a frontier brings their situation clearly onto the international plane, triggering a raft of rules, practices, expectations, institutional mechanisms, and legal tools. On the other hand and as a matter of international law, primary responsibility for the protection of and assistance to internally displaced persons rests with the territorial State, in virtue of its sovereignty and the principle of non-intervention. In practice, of course, internal displacement is commonly the result of conflict, where the authority of the central government is in dispute, or its capacity or willingness to provide protection and assistance are in doubt. At this point, the governing premises of sovereignty and non-intervention stand potentially in opposition to other governing principles of international organization, including the commitment to human rights and to international co-operation in the resolution of humanitarian problems. Clearly, those who are internally displaced gain little from being advised to look to their own government for protection and assistance, while other States and constituencies increasingly feel that the situation of the displaced *is* a matter of concern to them, and that in appropriate cases, something ought to be done.¹⁶

¹⁴ See, for example, UNGA res. 60/129, above note, paras. 13, 18.

¹⁵ See, for example, Goodwin-Gill, G. S., 'UNHCR and Internal Displacement: Stepping into a Legal and Political Minefield', in U. S. Committee for Refugees, *World Refugee Survey 2000*, Washington, D.C., (2000), 26-31.

¹⁶ This increasing 'internationalization' of issues, of course, has been helped on its way by the Security Council's practice under Chapter VII in relation to threats to international peace and security.

Historically, UNHCR's involvement with the internally displaced was practical and non-controversial, involving the provision of assistance simultaneously to both returning refugees and their internally displaced 'neighbours', very much in a general, development-oriented approach. Faced with ever more frequent calls to get involved in the problems of internal displacement, UNHCR began to explore the conditions for engagement. In 1993, taking UN General Assembly resolution 47/105 as its lead,¹⁷ it identified these as (1) a *specific request* from the Secretary-General or other competent UN organ; and (2) the *consent* of the State concerned. This generally cautious approach was endorsed by General Assembly,¹⁸ and by the UNHCR Executive Committee, which also stressed that UNHCR should *only* become involved in situations that call for its special expertise, and that it should pay due regard to the complementary mandates of other organizations and the availability of resources.¹⁹ The idea of providing protection at the same time was certainly mooted, but a proposal that UNHCR be accorded a general competence in this regard on behalf of IDPs in 'refugee-like and potential refugee-generating situations' was not taken up, either by UNHCR or other States. UNHCR's 1994 note on the protection aspects of its IDP activities was in fact more of an attempt to refine the criteria for engagement, than to set out how it might or ought to protect IDPs. Indeed, on this issue, UNHCR was distinctly sanguine, recognizing in essence *that IDP protection had little if anything to do with 'legal norms and remedies'*.²⁰

Neither UNHCR nor any other UN agency has any legal authority to 'protect' persons within their own country. No treaty or rule of customary international law establishes legal standing, even if the standards according to which internally

¹⁷ UNGA res. 47/105, 'Office of the United Nations High Commissioner for Refugees', 16 December 1992, para. 14.

¹⁸ UNGA res. 48/116, 'Office of the United Nations High Commissioner for Refugees', 20 December 1993, para. 12, in which the General Assembly reaffirms, 'its support for the High Commissioner's efforts, on the basis of specific requests from the Secretary-General or the competent principal organs of the United Nations and with the consent of the concerned State, and taking into account the complementarities of the mandates and expertise of other relevant organizations, to provide humanitarian assistance and protection to persons displaced within their own country in specific situations calling for the Office's particular expertise, especially where such efforts could contribute to the prevention or solution of refugee problems...'

¹⁹ See UNHCR Executive Committee Conclusion No. 75 (XLV), 1994, 'Internally Displaced Persons', *Report of the 45th Session*: UN doc. A/AC.96/839, para. 20.

²⁰ UNHCR, 'Protection Aspects of UNHCR Activities on behalf of Internally Displaced Persons', UN doc. EC/1994/SCP/CRP.2, 4 May 1994.

displaced persons ought to be treated have been substantially clarified by the *Guiding Principles on Internal Displacement*.²¹ After considerable hesitation among many States,²² the General Assembly has ‘recognized’ those principles as ‘an important international framework for the protection of internally displaced persons’;²³ however, the competence of the UN and UNHCR to ‘oppose’ those principles to States will still depend on consent or acquiescence.

Recent developments

The argument against the choice of UNHCR as the agency responsible for the protection of IDPs appears now to have been rejected in regard to conflict-generated displacement; at the least, it has been overtaken by events, and may even be on the point of redundancy, if broader reforms in the UN humanitarian response system begin to bite.

In September 2005, the Principals of the UN Inter-Agency Standing Committee²⁴ assigned responsibility for the protection of conflict-generated IDPs to a ‘cluster’ to be chaired by UNHCR (with UNHCR also to chair clusters on emergency shelter,

²¹ See ‘Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted to the United Nations Commission on Human Rights, pursuant to Commission resolution 1997/39, Addendum’: UN doc. E/CN.4/1998/53/Add.2; Kälin, W., ‘Introduction to the “Guiding Principles on Internal Displacement” submitted by Francis Deng, Special Representative of the Secretary-General, to the UN Commission on Human Rights’, 10 *IJRL* 557 (1998); Kälin, W., *Guiding Principles on Internal Displacement: Annotations*, Washington: American Society of International Law and The Brookings Institution, 2000; Phuong, C., *The International Protection of Internally Displaced Persons*, Cambridge: Cambridge University Press, 2005.

²² See Goodwin-Gill, G. S., ‘Note on paragraph 20 of General Assembly resolution 55/74’, 13 *IJRL* 255-8 (2001).

²³ UNGA res. 60/124, ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’, 15 December 2005, para. 6. Although earlier reservations regarding the *Guiding Principles* did not recur, Cuba challenged the notion of a ‘culture of protection’, which States are called on to promote in para. 3; see UN GAOR, 60th sess., 63rd plenary meeting, 15 December 2005: UN doc. A/60/PV.63, p. 6. The *Guiding Principles* are also ‘recalled’ in UNGA resolution 60/128, ‘Assistance to refugees, returnees and displaced persons in Africa’, 16 December 2005, para. 26.

²⁴ The Inter-Agency Standing Committee, set up under UNGA resolution 46/182, ‘Strengthening of the coordination of humanitarian emergency assistance of the United Nations’, 19 December 1991, Annex, para. 38, includes the United Nations, the ICRC, the Red Cross and Red Crescent Movement, the International Organization for Migration, and NGOs as appropriate. The ‘Principals’ include, as Chair, Jan Egeland, the Emergency Relief Coordinator, the executive heads of seven UN agencies (UNDP, UNHCR, FAO, WHO, WFP, UNFPA, and UNICEF) as ‘full members’, and nine ‘standing invitees’. For further information, see <http://www.humanitarianinfo.org/iasc>.

and on camp co-ordination and camp management). The ‘cluster’ approach comes out of the Secretary-General’s 2005 report on strengthening the co-ordination of the UN’s emergency humanitarian assistance.²⁵ This identified ‘significant capacity gaps’ in, among others, shelter and camp management and protection. It recognized that the protection of civilians is primarily the responsibility of States, but also that ‘the humanitarian system must work to fill protection gaps...’,²⁶ and that ‘Partnerships within the system may be necessary to overcome those gaps in assistance – such as protection and camp management in situations involving internally displaced persons – that do not enjoy leadership from any one agency’.²⁷ It went on to recommend that humanitarian response capacity be strengthened by broadening the capacity base, making more efficient use of available resources, strengthening financial mechanisms, and preserving the ‘humanitarian space’ in integrated missions.²⁸

A ‘humanitarian response review’ commissioned by the UN Emergency Relief Coordinator was published two months later, in August 2005.²⁹ It looked at complex (man-made) emergencies and natural disasters, at preparedness and response capacities, and at protection in relation to the latter. It found ‘a conspicuous lack of recognition of a generally accepted definition of the meaning and requirements of protection’,³⁰ despite or perhaps because of the very definition in OCHA’s ‘Glossary of Humanitarian Terms’; this describes protection as,

‘A concept that encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of human rights, refugee and international humanitarian law. Protection involves creating an environment

²⁵ ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’, Report of the Secretary-General: UN doc. A/60/87-E/2005/78, 23 June 2005.

²⁶ Ibid., para. 28.

²⁷ Ibid., para. 37; see also paras. 53-8.

²⁸ Ibid., paras. 78-82.

²⁹ See OCHA, *Humanitarian Response Review*, An independent report commissioned by the United Nations Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs, Office for the Coordination of Humanitarian Affairs, New York, Geneva, August 2005. The report was prepared by Costanza Adinolfi, David S. Bassiouni, Halvor Fossum Lauritzsen, and Howard Roy Williams.

³⁰ Ibid., section 4.2, pp. 30-1.

conducive to respect for human beings, preventing and/or alleviating the immediate effects of a specific pattern of abuse and restoring dignified conditions of life through reparation, restitution and rehabilitation.³¹

The *Review* took a somewhat broader approach, and saw protection as covering, ‘a wide range of activities, including physical presence, bilateral negotiations, multilateral diplomacy, training, education, data collection, dissemination, and advocacy and gaining access to victims...’ The concept generally was only vaguely understood, however, and capacity to respond here was severely lacking, notwithstanding the fact that protection was ‘a cross-cutting issue in all response sectors’, requiring special and urgent attention.³²

Although a number of co-ordination elements were in place, the *Review* noted the feeling that the time for a more inclusive mechanism had arrived. The ‘lead agency’ approach applied by UNHCR in the 1990s had not gained much support,³³ but might do so now if there were ‘appropriate and transparent terms of reference, including strong obligations for consultation and accountability (including financial accountability) towards partner organizations.’³⁴ The *Review* recommended the system-wide adoption of a ‘lead organization concept’, which would ‘also facilitate clustering at different levels where this model has a potential to increase efficiency in the use of resources’.

The *Review* found that the major weaknesses in recent situations of internal displacement to have been due to the absence of accountability and leadership. The impact of the ERC and of the ERC’s field-level counterparts, the Humanitarian Coordinators, was ‘in practice minimized by the lack of operational accountability

³¹ Ibid. See further, OCHA, ‘Glossary of Humanitarian Terms In relation to the Protection of Civilians in Armed Conflict’, New York: United Nations, 2003.

³² Above note 29, p. 31.

³³ On which see, among others, Michael Pugh & S. Alex Cunliffe, ‘The Lead Agency Concept in Humanitarian Assistance: The Case of the UNHCR’, *Security Dialogue*, 1997, vol. 28(1), 17-30; Sue Lautze, Bruce Jones & Mark Duffield, ‘Strategic Humanitarian Co-ordination in the Great Lakes Region, 1996-1997: An Independent Assessment’, Policy, Information and Advocacy Division, Office for the Co-ordination of Humanitarian Affairs, United Nations, New York, March 1998.

³⁴ Above note 29, Ch. III, section 2.2, p. 47.

among UN agencies for addressing IDP needs...³⁵ What was needed was ‘a more explicit model where sector operational accountability will be clearly identified at the level of a designated organization, following standards to be agreed upon. Responsibilities to be covered... are (a) planning and strategy development, (b) standard-setting, (c) implementation and monitoring, (d) advocacy.’³⁶ It recommended that the ERC consult with the IASC Principals and major stakeholders to agree on designating operational accountability for the various sectors and cross-cutting areas to respond to the protection and care of internally displaced persons.³⁷

In resolution 60/124, adopted without a vote on 15 December 2005, the General Assembly took note of the Secretary-General’s Report, referred to above, and reaffirmed ‘the principles of neutrality, humanity, impartiality and independence for the provision of humanitarian assistance.’ In paragraph 2, it called upon all governments and parties in complex humanitarian emergencies to ensure the safe and unhindered access of humanitarian personnel to affected civilian populations, including refugees and displaced persons. It also clearly recognized the authority of the ERC, whom it encouraged to strengthen coordination, and called on relevant UN and other organizations to work with OCHA ‘to enhance the coordination, effectiveness and efficiency of humanitarian assistance’.³⁸

Some two months’ earlier, the UNHCR Executive Committee had also taken account of both the *Review* and the work of the Inter-Agency Standing Committee. It encouraged UNHCR, ‘to continue to explore the feasibility of taking on coordination responsibilities for clusters related’ to the internally displaced and ‘in support of United Nations humanitarian coordinators’, and looked forward to working out, together with UNHCR, how it might respond to these new commitments without

³⁵ Ibid., p. 50.

³⁶ Ibid.

³⁷ Ibid. See also Annex VIII, p. 95, ‘Lead Agency and Clustering Chart’, suggesting general responsibilities of a collaborative rather than directive character.

³⁸ UNGA res. 60/124, ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’, 15 December 2005, para. 8. The General Assembly specifically emphasized the need for a strengthened role for the senior United Nations resident official responsible for coordination, and for strengthened support to UN resident/humanitarian coordinators and to UN country teams; *ibid.*, paras. 9-11.

prejudice to its ‘core mandate’.³⁹ The General Assembly subsequently adopted much the same language in resolution 60/128 on ‘assistance to refugees, returnees and displaced persons in Africa’.⁴⁰

UNHCR as ‘cluster chair’ or ‘lead’

An internal UNHCR perspective on these developments can be found in the recently published 2006 edition of *The State of the World’s Refugees*.⁴¹ Here, the background is summarised with due regard also to many of the concerns, expressed both inside and outside the organization, about the extension of UNHCR’s responsibilities. In this report, UNHCR recognizes that its ‘enlarged protection role will require it to ensure that joint steps are taken by all agencies in the field to enhance the security of the displaced’, but that it will now have to ‘navigate in a collaborative system that often resists involvement with the security and human rights’ of IDPs. UNHCR rightly emphasizes the logic of entrusting protection work to the agency with long experience with refugees – the externally displaced – and a comprehensive mandate. It appears sensitive to the inherent limitations of its role (in particular areas, such as designing protection strategies and managing camps), and to the need not to diminish the roles of other agencies (a point emphasized in the General Assembly resolutions cited above). Whether UNHCR has learned from its mistakes of the 1990s remains to be seen, particularly in matters of consultation and accountability,⁴² as does its readiness to recognize the primary responsibility and authority of the Emergency Relief Coordinator, now endorsed by the General Assembly in Resolution 60/124.

³⁹ UNHCR Executive Committee, General Conclusion on International Protection, No. 102 (LVI) – 2005, para. (x): ‘Report of the Fifty-sixth Session of the Executive Committee of the High Commissioner’s Programme’, UN doc. A/AC.96/1021, 7 October 2005, para. 20.

⁴⁰ UNGA resolution 60/128, ‘Assistance to refugees, returnees and displaced persons in Africa’, 16 December 2005, paras. 16 and 26.

⁴¹ UNHCR, *The State of the World’s Refugees 2006*, Oxford: Oxford University Press, 2006, Ch. 7.

⁴² *Humanitarian Response Review*, 2005, above note 29, p. 47.

The cluster approach is intended to introduce ‘predictability and accountability into sector responses that have often been ineffective’.⁴³ As an essentially collaborative mechanism, it appears to be premised on assessment, action, and accountability, in a working environment where assessment is a consultative matter and action involves getting competent agencies and organizations, including NGOs, to engage at the practical level.⁴⁴ The latest appeal for improving humanitarian response capacity (March 2006), which includes UNHCR’s request for funding for, among others, two headquarters posts to support the global protection cluster, suggests how the approach is likely to operate in the early stages. It notes that UN agencies and NGOs participating in the cluster have identified nine ‘critical protection gaps, and, based on these identified gaps, have agreed on a broad framework for responsibility sharing, in order to ensure a more predictable protection response in the field’.⁴⁵

Nevertheless, it should be recalled that the Humanitarian Coordinator,

‘retains overall responsibility for ensuring the effectiveness of humanitarian response and remains accountable to the ERC. Meanwhile, cluster leads at the field level – in addition to their normal agency responsibilities – are accountable to the Humanitarian Coordinators for ensuring effective and timely assessment and response in their respective clusters, and for acting as providers of last resort.’⁴⁶

⁴³ *Cluster 2006 – Appeal for Improving Humanitarian Response Capacity*, 3 March 2006, Executive Summary.

⁴⁴ The cluster chair may also be a service provider. For constructive criticism of early experience with the cluster approach (but also an appreciation of its potential for coordination and information sharing), see ActionAid, ‘The Evolving UN Cluster Approach in the Aftermath of the Pakistan Earthquake: an NGO perspective’, 24 April 2006. See also the following comment of the Representative of the UN Country Team in Pakistan, to the effect that clusters should be seen ‘as collective decision-making bodies rather than meetings that push parochial interests...’: Report of the Executive Board of the United Nations Children’s Fund on the work of its first regular session 2006’, (16-20 and 23 January 2006), UN doc. E/2006/34 (Part I)/Add.1; E/ICEF/2006/5 (Part I)/Add.1, para. 10.

⁴⁵ *Ibid.*, pp. 22-4, 43-4. The nine gaps are: Rule of Law and Justice; Prevention and Response to Gender-based Violence; Protection of Children; Protection of Others with Specific Protection Needs; Prevention and Response to Physical Safety and Security and Other Human Rights Violations; Mine Action; Land, Housing and Property Rights; Promotion and Facilitation of Solutions; and Logistics and Information Management Support (for the cluster).

⁴⁶ *Cluster 2006 – Appeal for Improving Humanitarian Response Capacity*, 3 March 2006, Executive Summary.

As others have argued elsewhere, including myself, a theoretical but nonetheless real possibility of a conflict of interest for UNHCR remains – responsible under its mandate to the General Assembly for the provision of international protection of refugees; responsible to the ERC as cluster lead for IDPs. Much will depend on the circumstances, however, and perhaps also on possible further changes in roles.

Other future possibilities

When the IASC Principals decided in September 2005 to establish cluster leads in nine areas, they also expressly decided that it was *not* necessary to apply the cluster approach to four sectors where ‘no significant gaps were detected: (a) food, led by WFP; (b) refugees, led by UNHCR; (c) education, led by UNICEF; and (d) agriculture, led by FAO.’⁴⁷ In fact, this begs a number of questions, not the least being whether the primary intention was in fact to preserve established mandates and turf, irrespective of system efficiency. For it is not difficult to envisage a situation of, say, external displacement, in which the essential needs of the refugees could most be met most effectively by agencies other than UNHCR (for example, where there was no or no significant ‘protection’ problem, threat of *refoulement*, or the like). To what extent, then, is an *operational*/UNHCR required for the purposes of (1) ensuring protection and/or (2) ensuring efficient and effective assistance delivery, in the context of a system-wide coordinated response?

Assuming that the protection of refugees will continue to be valued by the international community, and assuming further that the UN’s emergency response system will continue to improve (food, shelter and service delivery, communications, health care, etc.), then it may be reasonable to ask whether and to what extent the provision of ‘assistance’ to refugees should or needs to continue to be a particular operational responsibility for UNHCR.

If there is in place a coordinated and effective United Nations response to a humanitarian emergency involving external displacement, UNHCR’s most effective contribution might resolve into the provision of international protection – for example, ensuring the compliance of States with their international obligations, *and* the compatibility of UN activities with the relevant international legal standards. This in turn might be accomplished by the strategic placement of UNHCR protection

⁴⁷ Ibid.

personnel with cluster agencies, and even with competent governmental or non-governmental agencies.

Is this not the logic of an effective common system? That UNHCR's activities would be more fully integrated into those of the UN at large, even as it retained its independent, mandate-driven protection responsibilities towards the General Assembly? *Integrated*, in the sense that its goals are those of the UN and the community of States; *integrated* again, in recognition of the fact that the realization of those goals requires collaboration and coordination; but still *autonomous*, not in the sense of free-ranging independence, but of accountability to its historic responsibility to provide international protection.⁴⁸

It remains open to the community of States to decide which agency will be primarily responsible for the provision of *relief* in situations of humanitarian emergency. The recent UN reform proposals recognize the necessity of a coherent and co-ordinated response to those in need, to which I would add, *whether or not they also require protection*. While a measure of assistance may sometimes be called for in pursuit of protection objectives, perhaps the far greater proportion of relief operations could be transferred (personnel and resources) to another agency or agencies as part of the radical restructuring necessary to ensure coherent and effective operations..

Against this it might be argued that UNHCR's involvement in the delivery of assistance is essential to its being granted the access necessary to provide protection, and that criticism of the tendency to promote assistance over protection is out of order on that account alone. The question of access is indeed fundamental and problematic, but it has multiple dimensions. As the Secretary-General noted in his 2005 Report,

‘this is where humanitarian resolutions have had a role to play. By reaffirming the responsibility of all parties to conflict to ensure the safe and unhindered access of the affected community to humanitarian assistance, and by reminding neighbouring States of

⁴⁸ Although it may have had a peace-building context primarily in mind, see also the Secretary-General's 2005 Report, recognizing some of the problems with 'integrated missions', but noting also the conclusion of a recent study, that 'mission structures must also be sufficiently flexible to enable human rights actors to meet their principled and mandate-based obligations while simultaneously supporting transitional processes': 'Strengthening of the coordination of emergency humanitarian assistance of the United Nations', Report of the Secretary-General: UN doc. A/60/87-E/2005/78, 23 June 2005, para. 72.

their responsibility to facilitate the transit of such assistance, the Economic and Social Council has acted as a valuable advocacy tool on behalf of the humanitarian community. While the Council has been instrumental in raising awareness, it has been unable to “operationalize” such principles in the form of actions on the ground. Access continues to be routinely denied by Governments and armed groups in some crises and the Council has been unable to address critical protection needs... Such issues need to be taken as seriously as material relief and require a less contentious intergovernmental approach.⁴⁹

The protection/assistance argument is somewhat artificial, and there is a tendency to generalize institutional views about policy choices or practical options to the point of abstraction and thereupon to reconstitute them as elements in an imagined dialectic. The confusion of the two remains essentially a confusion of perspective, even if the distinction is indeed relevant in determining institutional roles.⁵⁰ Unless we take care to understand the relation of humanitarian relief to the broader agenda of protection, we may disable ourselves (and indeed, have done so in the past) from taking the necessary action to ensure that rights are effectively protected. And if relief is essential to access, and access to protection, it still does not follow that the one will flow from the other. Assistance can build its own dynamic, which itself leaves no room for protection; this essentially is what happened in Bosnia and Herzegovina – never a traditional refugee or displacement scenario – where service delivery was increasingly determined by and subject to the *politics* of the day, whether local or international.

Being there is just not enough; it may be necessary, but it is not sufficient, and what matters is the quality of the *protection presence*. Unless protection is strengthened,

⁴⁹ Ibid., para. 55; see also paras. 65 (‘reinforcing the normative base’ as an important component of strengthening the humanitarian agenda); and 69; see also UNGA res. 60/124, ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’, 15 December 2005, paras. 2-5.

⁵⁰ The General Assembly’s most recent resolution on assistance to refugees, returnees and displaced persons in Africa makes the obvious point that, ‘assistance and protection are *mutually reinforcing* and that inadequate material assistance and food shortages undermine protection...’: UNGA resolution 60/128, ‘Assistance to refugees, returnees and displaced persons in Africa’, 16 December 2005, para. 11 (emphasis supplied). However, there is no necessary contingency between the two activities, and while UNHCR does have a statutory mandate to provide international protection, there is no *a priori* primary assistance provider.

negative consequences may well result – continuation of hostilities through diversion of aid, for example, or attacks on settlements which are not purely civilian, but used as bases for insurgency, or inattention to the special protection needs of women and children, or promotion of return to conditions of risk and insecurity. This is not an argument for the suspension of relief, but for greater awareness and greater integration into the UN's coordinated emergency response system of those protection principles that are essential if rights and social justice objectives are to be achieved.

As the UN General Assembly has recognized, 'the delivery of international protection is a staff-intensive service that requires adequate staff with the appropriate expertise, especially at the field level...'⁵¹ Perhaps clustering and UNHCR's 'new' involvement with the internally displaced will confirm the viability of detaching the greater part of the assistance function,⁵² while allowing concentration on, and adequate and sufficient investment in, its primary protection role. Strategically placed and trained protection staff would then be in a position to contribute to standard-setting in camp management and the provision of relief; promotion and oversight of solutions; protection of human rights vis-à-vis national authorities, international organizations, non-State actors, and NGOs; advocacy; and, above all, to ensuring the strength and continuing viability of the international regime for protection of refugees, which remains UNHCR's primary mandate.⁵³

⁵¹ UNGA res. 60/129, 'Office of the United Nations High Commissioner for Refugees', 16 December 2005, para. 9.

⁵² Such a move might also assist in dealing with some of the management problems recently identified by the Secretary-General in 'Investing in the United Nations: For a stronger Organization worldwide', Report of the Secretary-General, UN doc. A/60/692, 7 March 2006, paras. 11, 19, 25.

⁵³ Cf. UNHCR Executive Committee, General Conclusion on International Protection, No. 102 (LVI) – 2005, para. (x): 'Report of the Fifty-sixth Session of the Executive Committee of the High Commissioner's Programme', UN doc. A/AC.96/1021, 7 October 2005, para. 20; and to similar effect on the 'core mandate', see UNGA resolution 60/128, 'Assistance to refugees, returnees and displaced persons in Africa', 16 December 2005, para. 26. There is still plenty of scope for strengthening UNHCR's protection and supervisory functions with regard to refugees; see, among others, Kälén, W., 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond', in Erika Feller, Volker Türk, Frances Nicholson, eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge: Cambridge University Press, 2003, 613-66; Summary Conclusions: supervisory responsibility', *ibid.*, 667-71.