



KEYNOTE PAPER

# **Conceptualising protection as safety:** A normative proposal

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## Abstract

The Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR) stipulates, *inter alia*, that UNHCR ‘shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall under the present Statute...’ The expression ‘international protection’ also features prominently in official documents of UNHCR, and in state practice. Often referred in its short form as simply ‘protection’, it has also been used in relations to persons displaced within their countries because of conflict or those fleeing droughts, famine, or floods. What is meant by international protection? What are its conceptual content and boundaries? The Statute of UNHCR, the 1951 Convention relating to the Status of Refugees, several resolutions of the General Assembly of the United Nations on refugees and displaced persons, the official documents of UNHCR and of states parties to the 1951 Convention are silent on these central questions.

While the issues of refugee rights, legal and institutional problems of protection, including protection of people at risk in conflict situations, and how the policies and practices of states and UNHCR affect refugees and other persons of concern have received attention in the literature, there has been no attempt to conceptualise international protection and ground it in the experiences of refugees and other persons of concern to UNHCR and the international community. The objective of this paper is twofold: firstly, to explain the concept of international protection of refugees and other displaced persons that currently informs – if somewhat implicitly – the work with refugees and displaced persons, tracing its historical evolution to two central formative phases, the inter-war period and the years after the end of World War II; and secondly, to propose a normative framework on the proper conceptual approach to the international protection of refugees. It is argued that a conceptualisation of the idea of international protection of refugees that provides a framework distinguishing between the means and the ends of protection is needed; in other words, a concept of international protection that transcends the idea of law and institutions as protection and that defines a vision, a goal, or an overarching objective, which mobilises law, institutions, materials, and politics as inter-related means or vehicles for fulfilling and reaching that vision and overarching objective.

# Introduction

I would like to thank the organisers of this conference for giving me the opportunity to share with participants my perspectives about the protection of people at risk in conflict and crises. What I am going to share with you are some of the ideas from my ongoing research and work for my thesis on the protection of refugees and the accountability of those competent to provide such protection and I am flattered to see them presented, much as I presented them at the RSC Public Seminar Series during the Hilary Term 2008<sup>1</sup> and the Summer School sessions in 2007 and 2008,<sup>2</sup> in the conference concept paper.<sup>3</sup>

The convenors of this conference asked me to talk about ‘protecting populations at risk’ in the context of conflict and crisis. I decided to focus on people I believe are at much greater risk – refugees; persons internally displaced within their countries are no less at risk but I have had the privilege of experiencing life as both a former refugee and a displaced person upon return to home to Uganda.

Also, talking about populations at risk is a bit too broad because, on the basis of my experience, no-one in any country at war with itself or another is safe. The entire population of that country is at risk although the nature and levels of risk may vary, depending on the nature and intensity of the conflict and its epicentre or epicentres. In other words, in conflict situations the whole population of a country may be at risk. The other reason I have decided to focus on refugees alone is the broadness of the term risk. If one checks a Thesaurus, one will find out that there are several meanings to this term and the risks a population caught up in a conflict and crisis are unfathomable

So, I will specifically talk about the protection of those people who have fled, as a result of conflict and other forms of persecution, their homes and countries and are living outside their countries in other countries as refugees, stranded in camps and settlements or living amongst host communities.

There are several ways in which the protection of refugees has been conceptualised and approached and none of these have been influenced by the view points of the refugees themselves or the reason for their flight. My central thesis is that for most people who flee any risk to their lives, whether from conflict or targeted persecution, safety from harm is the primary reason for leaving their homes and often their countries and their loved ones.

Yet this simple, obvious, and tautological premise is often discounted or ignored in conceptualisation of protection by the different actors and in the mainstream literature on the conceptualisation of what constitutes the protection of refugees and displaced

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<sup>1</sup> See, Lomo, Z.A., “The Concept of the International Protection of Refugees: Origins and Ideas”, paper in partial fulfilment of the requirement for the Certificate of Postgraduate Study in Legal Studies and registration for the PhD Degree, University of Cambridge, 15 June 2007. On 23 January 2008, I presented a slightly edited version of this paper at the RSC Public Seminar Series titled as, “Conceptualising the international protection of refugees as safety: a normative proposal”

<sup>2</sup> I presented excerpts from my first-year paper during the 15 minutes given to each tutor to talk about his or her current research on forced migration, a problematic concept itself, to participants at the Summer School.

<sup>3</sup> See, e.g., conference concept paper questions and themes.

persons.<sup>4</sup> Simply stated, you cannot protect refugees and people displaced within their countries without taking account of their own conceptions of protection.

My perspectives on what constitutes protection of refugees are largely influenced by my own experiences of 11 years as a former refugee and my research and work experiences on refugee protection, first as a legal research assistant for Dr. Barbara Harrell-Bond and Dr. Guglielmo Verdirame's research project in Kenya and Uganda. Also, working for the Refugee Law Project of the Faculty of Law, Makerere University allowed me to interact with different actors both at the policy and implementation level and what I saw and heard led me to begin to question what really constituted protection of refugees. Researching and writing for my doctoral project, however, gave me a rare opportunity to engage with the literature, both primary and secondary, on what constitutes the international protection of refugees, its evolution, and systematisation over the last eighty-eight years.

Thus, in the sections that follow, I will endeavour to briefly review the current conceptualisations of protection (section 2), some of the positive aspects of these conceptualisations (section 3), the problems these conceptualisations pose for protecting refugees and conflict displaced persons (section 4), how to protect refugees and displaced persons (section 5), the challenges of protecting people at risk (6) and my conclusion (section 7).

## Current conceptualisations of protection

I believe before one can talk about protecting populations or people at risk, and protection of refugees in particular, it is imperative to talk about what constitutes protection and to take a quick look at how it has been conceptualised in relation to protection of refugees. The current attempts to conceptualise protection as a broad humanitarian concept to cover all categories of people threatened by various risks, including risk from the consequences of war, famine, floods and earthquakes, started around the early 1990s, and has in my view ominous undertones, but owes its origins to the systematisation of the concept of the international protection of refugees which I spent the whole of my first year in Cambridge researching.<sup>5</sup> In fact, the concept of the international protection of refugees serves both as the premise and justification today for addressing any problem related to displacement or movement of human beings. The work of advocates for persons displaced within their countries due to war, commonly referred to as internally displaced persons (IDPs), economic migrants,<sup>6</sup> and victims of human trafficking, for example, draw inspiration from the refugee protection template, its inherent flaws notwithstanding.<sup>7</sup>

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<sup>4</sup> See, note 1, at 38

<sup>5</sup> See, *supra* note 1.

<sup>6</sup> See, e.g., Foster, M., *International Refugee Law and Socio-economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007)

<sup>7</sup> See, e.g., Roberta Cohen and Francis Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution Press, 1998)

It is not surprising that some of them argued that persons displaced within their countries lack a distinct legal status as refugees and hence the exercise that was sanctioned by the United Nations of harvesting legal principles contained in existing treaties in order to develop a legal regime akin to that of refugees.<sup>8</sup> Yet, throughout the history of refugee protection, whether under the auspices of the League of Nations or of the United Nations, different actors defined and conceptualised protection from different viewpoints, experiences, and interests<sup>9</sup>

### **States and the concept of protection of refugees**

States and governments, for example, conceptualise the international protection of refugees in the light of their national interests, with national security a top priority. From this perspective, they see international protection of refugees as a system of mobilising resources for protecting those interests.<sup>10</sup> States have also conceptualised protection as a device to assert competing interests in the murky arena of international politics.<sup>11</sup>

### **UNHCR and concept of protection of refugees**

UNHCR has never had a coherent conceptualisation of international protection of refugees. During the Cold War and the early 1980s, UNHCR defined international protection – at least in the context of Europe – in terms of asylum, legal protection, civil rights, and access to refugee status determination procedures. This conceptualisation of protection meant that much of the focus of its work was on promoting the principle of non-refoulement as the foundation of protection.<sup>12</sup>

Beginning from the early 1990s, however, UNHCR's conceptualisation of protection shifted from its juridical focus to solutions. This shift in focus was articulated in 1993 in the following language:

Protection of refugees has in the past focused on their fundamental right to asylum. Asylum, however, can be seen as single point on a spectrum of the human rights that relate to movement. Those rights begin with the right to remain safely at home...The concept of protection, therefore needs to be broadened to include notions of prevention and solutions.<sup>13</sup>

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<sup>8</sup> That dream was partly realised when the Protocol on the Protection and Assistance to Internally Displaced Person was pushed through the International Conference on the Great Lakes Region's final act, the Pact on Security, Stability and Development in the Great Lakes Region of 14 and 15 December 2006; see Article 12 of the Pact.

<sup>9</sup> See, *supra* note 1, at 5 – 32.

<sup>10</sup> *Id.*, at 22.

<sup>11</sup> *Id.* Also see, e.g., Loescher, G., *UNHCR and World Politics: A Perilous Path* (Oxford University Press, 2001) and Skran, C., *Refugees in Inter-War Europe: The Emergence of A Regime* (Clarendon Press, 1995)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, also see, UNHCR, *The State of the World's Refugees* (1993),

By February 2007, an activity centred conception of protection was articulated:

Protection embraces everything we do – whether it’s the delivery of tents, the delivery of food, or whether it’s putting in place primary education initiatives for young people, it delivers a protection outcome. It improves the environment that people live in. It contributes to their human dignity. It contributes to the realisation of their rights and their physical security<sup>14</sup>

There is a sharp contrast in the way UNHCR conceptualised protection in 1993 and 2007 and this, it is suggested, speaks to the subtexts that drive the work of the UNHCR since the end of the Cold War. In the 1993 conceptualisation we see that the exile premise of protection is abandoned, although the focus of work remains on refugees. But in the 2007 conceptualisation of protection, ‘people’ replace ‘refugees’ and anyone could benefit from the work of UNHCR under this conceptualisation of protection.

### **Human rights, humanitarian organisations and the concept of protection**

Humanitarian agencies have also grappled with the concept of protection and in 1996 the ICRC initiated a series of workshops where a number of humanitarian and human rights organisations discussed ‘how best to protect civilian victims of conflict given the many different aspects and approaches to modern day humanitarian endeavour.’ At the end of four workshops in four years, the participants finalised a definition of protection in the following terms:

“...all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law i.e., human rights law, international humanitarian law and refugee law. Human rights and humanitarian organisations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender).”<sup>15</sup>

A protection activity is then defined as ‘any activity which prevents and puts a stop to a specific pattern of abuse and /or alleviates its immediate effects; restores people’s dignity and ensures adequate living conditions through reparation, restitution, and rehabilitation’; and ‘fosters an environment conducive to respect for the right of individuals in accordance with the relevant bodies of law.’<sup>16</sup> Groups of activities were identified and ‘constitute a protection framework’ diagrammatically represented by the image of an egg, namely ‘The “egg” Protection Framework.’<sup>17</sup>

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<sup>14</sup> See, UNHCR, ‘Q &A: Protection: The heart and soul of the UN Refugee Agency’, (News stories, 9 February 2007), at <http://www.unhcr.org/print/45cc85604.htm>

<sup>15</sup> See, Caverzasio, S.G (ed.), *Strengthening PROTECTION in war: a search for professional standards: summary of discussions among human rights and humanitarian organisations* (ICRC, 2001), 19.

<sup>16</sup> Id., at 20

<sup>17</sup> Id., at 21

## **Scholars and the concept of protection**

For international lawyers, the international protection of refugees is conceptualised as laws or legal rules and institutions. Social and political scientists, on the other hand systematised protection as a regime or system created to solve the refugee problem. Sometimes international lawyers also refer to protection in the light of regimes and systems.

The early legal writers in English on the international protection of refugees during the time of the League of Nations, such as Holborn,<sup>18</sup> Simpson,<sup>19</sup> and Jennings,<sup>20</sup> conceptualise international protection of refugees in the light of the anomalous position of the refugee in international law and the failure of states at the time to provide answers to the dilemmas relating to the status of political refugees. Indeed, most legal scholars premise their explanations of the idea of the international protection of refugees on the anomalous position of the refugee in international law.<sup>21</sup>

The most recent legal writers, Grahl-Madsen, Hathaway, and Goodwin-Gill, have followed much the same template, albeit with some variations in style and context.<sup>22</sup>

## **Some positive aspects of the current conceptualisations of protection**

The way protection is conceptualised and understood, it is suggested, influences in practice how the different actors, be they state and governmental actors, inter-governmental international organisations, private international organisations and individuals, respond, receive and treat refugees. While each of the conceptualisations of protection above has its fundamental flaws, there are some positive aspects that have yielded better outcomes for refugees and displaced persons.

### **Services delivered, lives saved**

Protection, whether conceptualised as asylum, refugee status determination, activities, law, and provisions of tents, food, and health services and so on, has delivered some services that have saved millions of lives, if keeping people's body and soul together is a better indicator. Indeed, humanitarian actors often prefer to measure their performance in terms of lives saved and not the quality of the lives saved.

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<sup>18</sup> Holborn, L., *The International Refugee Organisation*

<sup>19</sup> Simpson, J.H., *The Refugee Problem: Report of a Survey* (1939)

<sup>20</sup> Jennings, R.Y., "Some International Law Aspects of the Refugee Question", 20 *BYBIL* (1939) 98

<sup>21</sup> See, *supra* note 1, at 27

<sup>22</sup> *Id.*, at 30,31

# Problems with current conceptualisations of protection

While great work in the area of protection of refugees and other persons at risk has been achieved by use of the current concepts of protection, there are some key problematic areas worthy highlighting.

## **Views of refugees and displaced persons at risk not included**

One of the key characteristics of all the conceptualisations of protection by the different actors, in the context of refugees, is the marked lack of attention for the perspectives of the people for whom protection is purportedly defined and conceptualised. In other words, the view point of those for whom protection is conceptualised and implemented is ignored.<sup>23</sup> In addition, while in the case of refugee protection questions of refugee rights, problems of protection, legal and institutional issues, policies and practices of states and UNHCR have received considerable attention in the main literature, there has been no attempt to conceptualise the international protection of refugees by grounding it in the experiences of refugees.<sup>24</sup> This has had far-reaching negative consequences on the way refugees have been treated. Increasingly, the power and authority to make decisions on everyday functions of life is taken away and vested in the hands of bureaucrats, many of whom, while well-meaning, are without the slightest idea of the risks and challenges that these people go through.

## **Lack of clarity between means and ends of protection**

Because there is no coherent conceptualisation of what constitutes protection and given that the perspectives of those who were supposed to benefit from protection are not considered valuable to the conceptualisation of protection, there is apparently some confusion about the overarching objective, as well as the origins of the concept of international protection. While many of the current conceptions of protection and the policies premised on them purport to have clear goals and visions, in order to realise protection, these do not come near enough to, for example, a refugee's overarching objective of fleeing his country.

I believe a proper conceptualisation of protection must contain a framework distinguishing between the means and the ends of protection. In other words, a conceptualisation of international protection of refugees and displaced persons must transcend the idea of law and institutions as protection and must define a vision, a goal, or an overarching objective, which mobilises law, institutions, materials, and politics as inter-related means or vehicles for fulfilling and reaching that vision and overarching objective.<sup>25</sup> I have been trying to uncover ways of how this can be realised over the last three years of research, since October 2006.

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<sup>23</sup> See, *supra* note 1, at 38

<sup>24</sup> *Id.*, at 2

<sup>25</sup> *Id.* at 3.

## Care and maintenance

The different ways protection has been conceptualised and understood and the assumptions held about what is acceptable and what is unacceptable, who has authority to provide what and to whom, when and how, have largely informed what in practice are the preferred means of realising the protection of refugees: encampment and rural settlements. It is suggested that protection in practice is conceptualised as care and maintenance, whereby refugees and displaced persons are treated as passive recipients of assistance, humanitarian or otherwise.<sup>26</sup>

There are inherent risks to refugees within this care and maintenance model, despite its claimed advantages or benefits to refugees and displaced persons. I will limit myself to only four. In the first place, refugees in camps and settlements are not free to leave as and when they deem necessary. They have to seek permission from authorities, and depending on the mood of the officer, it sometimes takes an unnecessarily long time to get a movement permit. This affects a refugee's ability to regain independence and take control of his or her life. It was not surprising that refugees I interviewed during my fieldwork in Kenya, Tanzania, and Uganda said that if there is one thing that they would ask UNHCR to give them it would be the freedom to choose where to live and to receive assistance there; or if they have to live in the camps, the freedom to decide when to leave as and when they deemed it necessary, without having to line up for permission. In the second place, there are no fair mechanisms for lodging complaints or receiving feedback, let alone appealing negative decisions; to get the attention of officials of the different actors in the camps or settlement is a huge challenge. In the third place, refugee labour is exploited very cheaply, almost without pay. In the fourth place, although participation by refugees in some of the planning processes of certain programmes is allowed, refugees feel it only serves symbolic purposes.<sup>27</sup> And crucially, important decisions about when to decide to return home are arbitrarily made between top-level actors without input from refugees. A person who made a conscious choice when it was necessary to flee from risks is now being asked to leave, whether he considers it the right time to do so or not, and nobody cares about his or her perspectives about the most appropriate time to return home or to his or her country.

A further serious problem with the care and maintenance approach to protection is that, through encampment of refugees, it engenders and perpetuates so-called 'protracted refugee situations', namely, situations where refugees are considered not able to attain some durable solution after a five-year period of being a refugee. In addition, it destroys the human agency in refugees and it was not surprising that many refugees refer to UNHCR as their 'father' and 'mother', disturbing imagery of dependence and helplessness.

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<sup>26</sup> Id. at 41.

<sup>27</sup> As per interviews with refugees in Mtabila, Nyarugusu camps in Tanzania and in Kakuma refugee camp in Kenya from November to December 2008.

## **Activity and resource-centredness**

Protection is defined largely on the basis of the activities of those who provide it. The conceptualisation of protection by the ICRC-initiated workshops in the 1990s and UNHCR's conception of February 2007 are excellent examples. There is nothing inherently wrong with focusing on activities; after all at some point a certain level of material support is necessary in order to ensure protection for refugees and displaced persons. The problem arises when these activities become the end in themselves and not the means to an end and the human being for whom these activities were identified in the first place takes a secondary place. Premising the conceptualisation of protection on activities inevitably leads to it being tied to resources. The danger with this in practice is that often the letter and spirit of the human rights and humanitarian instruments upon which the activities were allegedly to be carried out is ignored or violated at will.

Financial and material resource limitations have often been cited as the justification for setting the minimalistic standards of living for refugees and displaced persons in camps and settlements.

## **Flawed re-invention of the wheel**

As some actors expand their horizons to include in their remits situations that were hitherto non-issues, although they have been with us since time immemorial - IDPs, climate, persons of concern, and so on - there has been a propensity to conceptualise protection to allow them to be seized of these 'new' and 'unprecedented' situations. Depending on the issue, appeal has often been made to either the annals of history or the 'newness' and 'uniqueness' of the situation to provide the much needed justification.

The problem is that, while some of these efforts appear to have provided solutions to the plight of these 'new' unprecedented categories of people at risk, in reality they have often exacerbated the situation for other categories of persons at risk, such as refugees. There is nothing wrong with looking to the withering past to adapt to the budding future; but if one is going to say that the reason persons displaced within their countries are not protected is because they lack the same legal status as refugees, and therefore we should go through the same historical process as we did for refugees and create a similar legal framework to define their status and rights, then there is some serious reason for concern.

Sometimes the wheel is re-invented without appeal to history. It is packaged as a new and original idea and quickly becomes a rallying concept for action. The 'responsibility to protect' mantra is a good example. The concept of the responsibility of 'civilised' nations, or invariably, the 'international community', through vehicles such as the League of Nations and the United Nations, to protect refugees or people at risk is not new.

Let us take the League of Nations as a starting point: one could argue that the concept of the responsibility to protect was born when Mr. Gustav Ador, President of the ICRC penned that seminal letter on 20 February 1921 asking the League to assume political responsibility for Russian refugees.<sup>28</sup> How the League fared in this regard, is subject to

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<sup>28</sup> See, *Official Journal, March/April, (1921) 227.*

conflicting interpretations of history but at least one enduring legacy is the international system that it helped found, nurture and develop to provide protection for refugees and later displaced persons, a system we have borrowed heavily from to reconstruct and re-invent the current systems.<sup>29</sup>

Indeed, just after the Second World War and the creation of the United Nations, the concept of ‘the responsibility to protect’ featured in resolution 319 (IV) of 1949 on the protection of refugees and stateless persons. In one of its preambular paragraphs, the General Assembly recognised ‘the responsibility of the United Nations for the international protection of refugees.’ Some sixty years later, it was pulled out from the archives, dusted off and given a new impetus by the United Nations 2005 World Summit. During this summit, some serious soul-searching appeared to have taken place in the face of the horrendous events in the previous decade: a genocide in Rwanda, yet another unfolding tragedy in Darfur, and many other ‘forgotten’ tragedies such as in northern Uganda, Somalia, Colombia, and, until recently, Sri-Lanka.

Will responsibility to protect strengthen the alternative option of internal flight?

### **Organisational culture and competing interests**

Implicit in the conceptualisations of protection by the different actors, especially international organisations are assumptions about what is right or wrong, acceptable or unacceptable, what is and what ought to be, namely the ethos, values, and cultures of the organisation. There is nothing wrong with people holding certain assumptions. The problem arises when those assumptions become the orthodoxy by which other assumptions are rejected out of hand, including assumptions held by those who have had life experiences of what it means to be a refugee and are at the receiving end of protection. Also, within the different conceptualisations of protection are subtexts which point towards self-perpetuation.<sup>30</sup> Again, there is nothing inherently wrong with that. But self-perpetuation becomes part of a problem if it begins to subvert clearly recognised principles on refugee protection. Sometimes the desire for self-perpetuation is born out of the organisation’s structure as defined by its constituent instrument. If it is periodically re-defined or reviewed, as had been the case of UNHCR until 2003, and the organisation has to respond on ad hoc basis to every tragedy, the propensity to take advantage of every situation outside the organisation’s original mandate in order to score points and demonstrates its relevance is great. As a consequence, no careful thought is given to reflection on the most effective way to achieve long term goals.<sup>31</sup> One has just to look at the changes in refugee protection since the beginning of the 1990s to realise what is at stake.<sup>32</sup>

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<sup>29</sup> See, *supra* note 1, at 6; on this aspect also see, Skran, C., *Refugees in Inter-War Europe: The Emergency of a Regime* (1995) 9

<sup>30</sup> On this aspect, see, e.g., Wigley, B., “The State of UNHCR’s organisational culture”, (EPAU/2005/08), May 2005

<sup>31</sup> See, e.g., Kuyama, S., Ouedraogo, L-D., and Wynes, M.D., ‘Review of Management and Administration in the Office of the United Nations High Commissioner for Refugees’ (Joint Inspection Unit, 2004), para. 5

<sup>32</sup> On this aspect, see, e.g., Goodwin-Gill, G., ‘Refugee identity and protection’s fading prospect’, in F. Nicholson and P. Twomey, eds, *supra* note 2, at 220.

## **Meticulous legalism and bureaucratisation**

Crucially, protection is often systematised by international lawyers as a set of legal rules, an exercise in filling gaps in international law, and developing institutions to implement that law.<sup>33</sup> This conceptualisation of protection, from the perspective of refugee protection, was born out of the dilemma created by people who had fled their countries of origin, many of whom had been stripped of their citizenship and whose legal status was now unclear. No-one can deny the importance of law in protection, and indeed the role of law in organising social order and harmony. But law is a means to an end which operates within a specific economic, political, cultural, and dare I say, religious contexts; it is not an end in itself. The problem arises when law is used to perpetuate irresponsibility and cause irreparable harm to those it was meant to protect from risk.

In some cases when the law suits the interests of the actors, they tend to stick to its letter and ignore its spirit. But when the law suits the interests of the refugee, its import is deliberately distorted by policy considerations. Crucially, the bureaucratic rules of the actors often supersede legal rules and norms. If the law is to serve a truly protective function, its interpretation must not ignore the overarching objective of why people at risk flee in search of safety.

## **Protecting refugees and displaced persons at risk**

How we conceptualise protection, it is suggested, determines how we implement it in practice. Some of the current problems affecting refugees and displaced persons, some of the risks they face, are a result of what the different actors consider to constitute protection. As suggested above, protection of refugees transcends law, institutions, and material assistance. In the first place, protection, it is suggested, must have an overarching objective, a vision, an end that we aspire to for refugees and displaced persons at risk. That overarching objective is the safety of the refugee. So, it should simply be conceptualised as safety.

In the second place, if safety is the overarching objective and vision of protection, we should revisit our existing mindsets and assumptions of what we believe constitutes the protection of refugees and displaced persons. In the third place, our task to ensure the safety of refugees and displaced persons at risk is to engage, right from the outset, the communities hosting them; after all, we are often late-comers on the scene. And lastly, sticking to principles, norms, processes, and rules that are no longer contested but enhance the safety of those at risk in situations of conflict and crisis is critical to realising a safe environment in which refugees and displaced persons can live in freedom, security, and well-being.

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<sup>33</sup> See, *supra* note 1, at 36

## **Conceptualising protection as safety**

By the end of my first year research at Cambridge, and given my experiences as a former refugee, I was convinced that for the last eighty-eight years, since the idea of international protection of refugees was born, the view-point of refugees and the reason they fled their countries of origin or habitual residence were totally ignored. Instead, the refugee was actually conceptualised as a problem of international proportions. Yet it occurred to me that a refugee's main reason for flight is to seek safety, not just in the sense of the absence of physical harm, but also including the intrinsic functions of life, from persecution – harm or risk. And I remember some thirty years ago that while fleeing from Uganda in April 1979 to Zaire and later Sudan, the overarching objective was to find a safe place where we could temporarily settle and monitor from safety developments in Uganda before deciding whether and when to return.

Or, after returning home in 1990, I had to flee my home town of Koboko for the safety of the capital Kampala because of a looming threat from yet another rebel group and fighting in the area and the likelihood of being forcibly recruited into rebel ranks. I believe this is still the same reason today why hundreds of thousands, millions, of people have fled from their homes. Thus the need for safety in all its ramifications, it is submitted, is the primary reason a person flees his home and sometimes his country. Although this appears obvious, this tautological premise is often discounted or ignored throughout the current development of the concept of the international protection of refugees, and now of displaced persons at risk. Ironically, the idea of 'safety' was introduced in 1993, alongside that of 'dignity' by UNHCR and later by states to justify the forcible return of refugees to their countries of origin.<sup>34</sup>

## **Changing mindsets**

It is not possible to provide protection to refugees and displaced persons when we continue to see them through the prism of 'problem', 'victims' and 'vulnerable persons' who must depend solely on our expertise. Without a radical change in our attitudes – whether we work for governments, private organisations or international organisations – towards refugees and displaced persons, as rights-holders, with capacity, and capability to take care of their own lives, the protracted nature of the situation and conditions of most refugees will continue to deteriorate. It is useless to talk about reforms and streamlining of international organisations and the shrinking of humanitarian space if we do not change our attitudes and give refugees the human space they rights deserve in order to live, like us, in dignity.

We must tap into the creative genius of refugees and displaced persons. There are those in the humanitarian industry who believe that refugees and displaced persons are backward, primitive and ignorant and therefore cannot take care of themselves. This is true of any human community but many refugees would dispute such claims; one refugee I interviewed in Dar es Salaam in October 2008 explained why refugees would like to leave the camps:

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<sup>34</sup> See, *supra* note 1, at 38.

Take a bird and keep it in a cage; you will have to feed it, give it water, treat it, and protect it from predators. Yet before its captivity, it fed itself. It freely roamed the skies and lacked nothing. If refugees are free, they can do anything.<sup>35</sup>

### **Involvement of hosts**

The host communities, whether to refugees as legally defined or displaced persons within their countries, are key to any efforts at providing protection. Yet in practice they come into mind only as an afterthought, especially when they have resisted attempts by the government to give their land for camps or settlements. Involving host communities in a meaningful and mutually beneficial way necessitates a radical shift from encampment to allowing refugees and displaced persons to settle amongst their hosts. It means putting an end to establishing parallel social services such as schools, health centres, and water points. Unfortunately, some states and international organisations resist, while others reject this approach out of hand.

### **Stick to principles, norms, process, and rules**

All actors - states, international organisations and non-governmental organisations, including religious organisations - should stick to already known and uncontested principles relating to the protection of people at risk such as refugees and displaced persons. These are contained in several conventions and Holy Scripture of certain religions. The 1951 Refugee Convention and the 1969 AU Convention Governing Specific Aspects of Refugee Problems in Africa, for example, have defined a category of people at risk and set the thresholds below which states and any other entity vested with authority cannot treat them. The standards set in these instruments also bind non-state actors such as individuals, international organisations and non-governmental organisations.

There is, in practice, a propensity to only regard States as the bad guys and yet many actors in international organisations also breach, even more frequently, many of the principles and standards already accepted as being the norms guiding the treatment of refugees.

## **Challenges to providing safety to refugees and displaced people at risk**

There are at least three fundamental challenges we must surmount if providing safety to refugees and displaced persons is going to be realised in ways that restore their capacities and capabilities to take charge of their own lives. The first challenge relates to agreeing on a conceptualisation of protection that places the refugee and the displaced person at its centre. That appears obvious but in practice, as shown above, it is far from being the norm. The second challenge in my view concerns how to make more effective the means of realising the safety of refugees and displaced persons. Politics, in particular in the light

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<sup>35</sup> Interview on 3 November 2008

of the structural continuities and discontinuities of international politics and relations, is a third challenge. Far from being a means of social organisation that allows us to harness our creative genius for the common good of humanity, Machiavellian political organising has subverted the way we deal with and treat each other, whether as politicians, scientists, priests, professors and so on.

For the purposes of this paper and conference, I will limit myself to addressing a few of the challenges, especially the need to make the means of realising protection more effective and efficient and those challenges arising out of the situations of conflict and the internal dynamics of each crisis.

### **Finding alternatives to encampment**

Camps and settlements are the means preferred by all actors, whether governmental or not, for providing protection to refugees and displaced persons. Study after study has shown that these enclosed settings do more harm than good to refugees and displaced persons. Dukic and Thierry, for example, have studied the situation of the Saharawi refugees who have lived for more than three decades in refugee camps in Algeria and concluded that, ‘The high level of chronic malnutrition indicates that the long stay in the desert has affected a whole generation of Saharawis; and the prevalence of malnutrition, childhood illnesses, hearing deficiencies (sic) will inevitably have a long-term impact on their development and the general health of their society.’<sup>36</sup>

And yet there is an alternative to encampment; an alternative that the law permits, one that truly gives a refugee the opportunity to live in dignity and to take charge of his or her life just as she had lived in her home before being uprooted by conflict. That alternative is the right to freedom of movement and choice of residence; it is allowing refugees and displaced persons to settle freely amongst host communities in various parts of the host country. It will involve some costs, risks, and challenges as well, but the benefits far outweigh the perceived disadvantages. Now the real challenge in this regard is whether all those concerned, in government, in international organisations, in voluntary agencies and in academia, have the moral courage to take onboard this alternative.

### **Honest interpretation of the relevant legal instruments**

There is a sufficient body of laws – the Charter of the United Nations and the various international and regional human rights conventions including the Geneva Conventions on war that can be deployed to enhance the safety of refugees and displaced persons. But

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<sup>36</sup> Dukic, N & Thierry, A., ‘Saharawi refugees: life after the camps’, 2 *FMR* (1998) 18, 19. On the negative impact of camps and settlements on refugees, see, e.g., Van Damme, W., Do Refugees Belong in Camps? Experiences from Goma and Guinea, 346 *Lancet* (1995); Harrell-Bond, B., Are refugee camps good for children? New Issues in Refugee Research, Working Paper No. 29, 2000; G. Verdirame, ‘Human Rights and Refugees’, 12 (1) *JRS* (1999) 54; on whether settlements are really the best means to achieve durable solutions, see, e.g., See, The Refugee Policy Group (RPG), ‘Older Refugee Settlements in Africa: Final Report’, November 1985, p. 73; available at Forced Migration online; and on the advantages of camps and settlements, see, e.g., Crisp, J., and Jacobsen, K., ‘Refugee camps reconsidered’, 3 *FMR* (December 1998) 27, 28; and Jamal, A., ‘Camps and freedoms: long-term refugee situations in Africa’, 16 *FMR* (2003) 4

as anyone with legal training will acknowledge, the interpretation of legal texts is replete with problems, the interpretive tools of the Vienna Convention on the law of treaties notwithstanding. While difficulties in interpretation are inevitable, the deliberate manipulation of some specific ones, such as the 1951 Refugee Convention in order to deny people refugee status or to blame it for the current problems of massive displacement of peoples due to war, floods, droughts, and poverty because these categories are not beneficiaries, not only undermines its effectiveness but also obfuscates the proper course of action for some of these people.

The challenge in this respect seems to me to be in how we objectively and honestly look at the problems and seek the right and most appropriate legal remedies and do not take an attitude that the end justifies the means regardless of the consequences.

### **Better processes and mechanisms of accountability**

When those vested with authority and the power to make decisions that affect people's everyday lives, such as the lives of refugees and displaced persons, cannot be challenged, then the prospects for better and enhanced safety for them recedes and efforts to address the root causes of the risks will bear no fruit.

The challenge is how to ensure effective accountability of all the actors at all times. While there exist processes and mechanisms for challenging the policies and decisions of governments and other state actors, there are no effective such processes and mechanisms for challenging the decisions of international organisations such as UNHCR. Although some of these have internal oversight mechanisms, these are neither fair nor effective.<sup>37</sup> The situation is further compounded by the current state of international law on international organisations which guarantees absolute immunity from any legal processes, purportedly to protect them from interference by states. While there is some valid fear about states interfering, there is nothing to suggest that a refugee challenging a UNHCR decision harmful to his safety, in for example a national court, is interfering in the management of the organisation. One of the greatest challenges in ensuring the accountability of actors in providing protection to refugees and displaced persons, in particular that of international organisations, is our reluctance as beneficiaries of the privileges of power to question the continued relevance of absolute immunity from the jurisdiction of national courts in a century where accountability for violation of human rights is supposedly the norm.

### **Insecurity**

In some conflict contexts, lawlessness rules because governmental authority is diminished or not there at all, where everyone is a law unto himself or herself, with small arms and light weapons found on every corner of the streets and villages. In some contexts, the conflict is raging on, as we have seen in places like Darfur, Afghanistan, Pakistan, Somalia, Colombia, and until recently, northern Uganda. The roads are possibly mined with anti-personnel mines. The risks are high and accessing refugees in a camp can be

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<sup>37</sup> See, e.g., Bouayad-Agha, F., & Hernandez, H.L., 'Administration of Justice at the United Nations', (Geneva, Joint Inspections Unit, 2000) vi, 1

almost impossible. Securing access to those who need protection in such contexts and ensuring the security of those providing it pose daunting challenges.

### **Reconciling the costs, numbers, and resources**

For those whose work is to provide material assistance to refugees and displaced persons as a component of protection, the perennial problem of reconciling meagre resources with competing needs possibly pose the greatest challenge of all. At the emergency stage, that is, when hundreds of thousands of people have fled fighting, mobilising the necessary resources, including food, shelter, and health and trying to make sense and make the numbers and resources add up can really pose a nightmare for those involved.

And crucially, there are situations when a decision has to be taken on whether money should be spent to save the life of a refugee's or displaced person's child or save that money because it could be used to provide material assistance or health services to 10 refugees. The challenge here is which items shall be omitted from the list and how can we, who live in a world that boasts wealthy nations, billionaires, and individuals who earn handsome salaries from their work, mobilise sufficient resources in order that competing needs can be provided for without adverse effects on the lives of refugees and displaced persons.

### **Xenophobia, racism, and discrimination**

The world is still carved along the geographies of race and ethnicity and, in some places, religion. Strangers such as refugees and displaced persons fleeing imminent threats to their lives often have to be confronted by their 'otherness' and not 'belonging here'. Receiving thousands of people in a very short time or continuing to see new people arriving can trigger fear and panic in hosts wary of having to share the limited quantities of jobs, schools, health centres, and even food. In a climate of fear and resentment towards refugees, options for providing them with safety can dwindle and even fade away. Tackling these endemic vices within society is possibly a life-time commitment and addressing the root causes of these can pose real challenges to all those concerned for the safety of refugees and displaced persons.

### **Practising what we preach**

It is easier to see the speck in another person's eye than see the log in our own eyes, said Jesus Christ.<sup>38</sup> States, international organisations, non-governmental organisations, and researchers have critically reviewed each other's work and performance and have many times issued damning reports. But how they fare in their own remits also raises serious questions. While some actor's action is subject to judicial scrutiny, others are immunised from such independent and impartial judicial scrutiny. The challenge lies in how we can practice what we preach.

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<sup>38</sup> Matthew 7: 1 -4, Good News Bible

## **Dealing with ungrateful victims**

To some organisations and governmental organs, having to deal with beneficiaries who refuse to be packaged as passive recipients of assistance, humanitarian or otherwise, and thus obey all the policy guidelines and restrictions imposed 'for their own good' can be a headache. You would, for example, want them to live in designated places where it is much easier to dole out the routine 500g of cereals per person per day or to send them back to their countries when you deem it is time for them to go home because there is no other place like home. But instead they prefer being out and about, at their own choosing, trying to chase after opportunities alongside their host communities. Of course, that is how they have been living all their lives in their countries of origin or in their villages before they were struck with this calamity which forced them out of their homes. Why not now? And it is not the first time that they have had difficulties in their lives but not once had they been asked to use the assistance given them in accordance with the giver's wishes. So why now?

Dealing with human beings and the unpredictable aspects of human nature can create real challenges to how we contribute to providing safety to those people at risk – refugees and displaced persons.

## **Conclusion**

Providing protection to refugees and displaced persons depends on how different actors conceptualise protection. The current conceptualisations of protection are inadequate because they discount the viewpoint of the refugees and displaced persons they purport to protect and lack an overarching objective or vision.

Protection, it has been suggested, should be conceptualised in terms of the primary reasons a person flees his home or country – seeking safety. Safety of the refugee or displaced person should be the overarching objective of protection. The end of protection should be distinct from the means of realising it.

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