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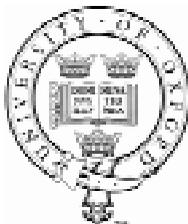
UNHCR and International Refugee Protection

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Introduction

Confusion about UNHCR's Role

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The theme of international refugee protection featured prominently at the Refugee Studies Programme's 1998 Summer School. The opening and closing addresses were given by two leading authorities on international refugee law: Dennis McNamara, Director of International Protection at UNHCR, and Guy Goodwin-Gill, Professor of International Refugee Law at the University of Oxford. Coincidentally, as Summer School participants debated UNHCR's role in refugee protection, a scandal broke in the *Financial Times* involving allegations that the agency had been misusing funds.

The *Financial Times'* articles and letters on UNHCR's alleged misuse of funds should be placed in the larger context of the agency's unprecedented and extraordinary institutional expansion of recent years. During the 1980s UNHCR's annual budget remained relatively stable at around half a billion dollars, despite the dramatic increase in the number of refugees in the world and asylum seekers in Western Europe. It was only in the early 1990s with the agency's large-scale involvement in countries from which refugee flows originate that there was a significant increase in the budget. By the mid-1990s the annual budget had reached well over one billion dollars and the agency's personnel had tripled from 2,000 to 6,000 employees. Key funding states (EU members, US and Japan) were clearly pleased with the new focus on countries of origin and hopeful that refugee flows would be contained. Yet UNHCR's shift of focus from assisting asylum seekers to intervening in troubled countries deserves attention.

Despite the assertion in a *Financial Times* editorial of 30 July claiming that UNHCR is supposed to deal with 'the victims of the world's conflicts', the agency's task was originally intended to be much more specific. Indeed, it is precisely the agency's involvement in vaguely defined humanitarian activities that has diluted its role as the main international actor responsible for promoting asylum. UNHCR's statutory mandate is not outdated; on the contrary, it is depressingly all too relevant to the work it was supposed to be doing. The problem is that the agency has recently been engaged in activities outside the original mandate that have proven to be complex and problematic when combined with the promotion of asylum.

There is fear that UNHCR's tendency to assume the role of a general humanitarian emergency organisation diverts attention from the less glamorous

issue of asylum. One considerable operational problem is that the agency now responds in an *ad hoc* and sometimes opportunistic manner because it is no longer guided by clear principles. The senior leadership sincerely believes that it can contribute effectively to humanitarian crises by being pragmatic rather than basing its actions on traditional principles. The problem is, nevertheless, one of mandates and division of labour. Since 1921, High Commissioners for Refugees promoted acceptable conditions of asylum and were accordingly supposed to stay clear of the delicate and politicised work associated with humanitarian interventions.

While flexibility in institutional responses is admirable, a form of principled pragmatism would suggest that it is inherently impossible for one organisation to effectively attempt to 'solve' problems in troubled countries and promote asylum at the same time. A certain amount of separation in institutional responsibilities is healthy and allows for competing interests to be heard. If there is a genuine commitment to a more comprehensive and coherent approach to humanitarian crises, then the difficult task of intervening in civil wars and condemning human rights violations should be left to more appropriate international bodies with clear political mandates.

The key question is essentially the following: do we want to preserve the one UN agency committed to promoting asylum world-wide? Perhaps xenophobia and hostility toward asylum seekers has reached such a point that we would rather see UNHCR transformed into a humanitarian emergency aid organisation that no longer specifically focuses on the promotion of asylum. While any non-governmental organisation such as OXFAM or Médecins Sans Frontières can deliver relief aid, promoting asylum in our age of tight immigration controls requires an international body with moral authority and a clear commitment and focus.

UNHCR's dramatic expansion since it has re-oriented its activities partly reflects the reluctance of funding governments to have their own asylum policies scrutinised at a time when they are engaged in restrictive asylum practices. In this context, financial scandals may be used by certain key governments to justify their decreasing contributions to UNHCR. After all, they are the ones that encouraged and rewarded UNHCR's expansion in non-traditional activities for self-interested reasons that may have little to do with human rights protection. It should be kept in mind that during recent years when the UN refugee agency was losing focus of its role as the international actor promoting asylum, refugee status claims in most Western states have been dramatically cut due to immigration control measures. If our communities still value the old tradition of offering refuge to endangered foreigners, then we should acknowledge that the preservation of the institution of asylum is at stake.

It will be difficult for UNHCR to accept a modest and limited role for itself because of its unclear institutional focus and unprecedented recent expansion. One can only hope that the doubling and tripling of budgets during the early 1990s has not led to many cases of misused funds and that the leadership of this valuable UN agency will use the controversy over financial scandals to consider carefully the direction of the agency as a whole.

In his opening statement to the Summer School, McNamara lays out fundamental policy dilemmas that UNHCR will have to confront in the twenty-first century. Most of these issues became prominent during the post-Cold War period when UNHCR was expected to ensure reasonable standards of refugee protection in a context characterised by increased internal conflicts and difficulties with the state-centred institution of asylum. Researchers concerned about the future of refugee protection and the role of UNHCR should pay particular attention to the list of protection problems noted by McNamara and some of the possible directions he suggests for moving forward. Goodwin-Gill's closing statement follows on this theme with suggestions on how to make the 'culture of protection' relevant again. He offers his reflections on the possibility of adopting a principled and pragmatic approach to refugee protection. The various arguments presented in this working paper will hopefully contribute to the international community's attempt to learn from recent protection failures.

Opening Address

DENNIS McNAMARA

It is a pleasure to be back at the Refugee Studies Programme, for the first time under the leadership of Dr. David Turton, and I want to thank the organisers of the Summer School for inviting me. I congratulate you for putting together such a comprehensive course, and for bringing together such an impressive array of people from diverse backgrounds. I see participants from Africa, Asia, Europe, including Central and Eastern Europe, the Middle East, North America, and even Latin America. Some of my own colleagues are here too, as well as representatives from governments, international organisations, and NGOs. I am sure the different perspectives and experiences which together you represent will contribute greatly to the range and quality of your discussions during the coming weeks.

I would like to share with you today some of the major refugee protection dilemmas as we see them in UNHCR, and would be extremely interested in your perspectives on these issues. Many of these challenges have been presented most acutely by the recent refugee crises in the former Yugoslavia and the Great Lakes region of Central Africa. In many respects these situations are atypical, yet they have also brought into sharp focus some of the most fundamental dilemmas facing the international refugee protection regime. These are complex areas which raise thorny questions; to which we do not have many of the answers. Some, I believe, cannot be fully or adequately answered, given the current international environment. But we believe there is need for further conceptual and doctrinal, as well as operational and political, progress if we are to respond to the present challenges. Raising these questions will, hopefully, enable us to find the right answers.

I want to focus today on three of these crucial challenges or dilemmas: firstly, how to strike the right balance between the protection rights and needs of refugees, and legitimate state interests - without doing unnecessary harm to either; secondly, how to ensure refugee protection in conflict or semi-conflict situations and lawless environments; and thirdly, how to solve the host of problems associated with repatriation and return of refugees to collapsed or deeply damaged states. I will spend more time on the first, as this goes to the heart of the problem.

Refugee Protection and State Interests

The international system of refugee protection - carefully built up over the past four decades - is a fragile edifice, as is justice generally, a little like Peter Pan's fairies,

which can quickly disappear if we don't constantly clap our hands in support. Yet harsh national interests often stifle this. One of the main challenges for UNHCR lies in finding the proper balance between international responsibilities towards refugees and legitimate state interests. History has shown that the two are not inherently incompatible and can co-exist: the refugee treaties themselves allow for this. In addition to setting out an expansive regime of refugee rights, the international and regional refugee instruments also provide a predictable framework for dealing with this sensitive and highly politicised area, and provide safeguards for states which allow for the exclusion and even the expulsion of non-deserving cases. Refugee protection takes place in a highly politically-charged atmosphere.

Refugee law has a central role in this environment, in which concerns about illegal migration and criminal aliens are pervasive. Unfortunately, the rapid evolution of the refugee problem, in its various dimensions, has not been paralleled by a similar development of refugee law. Some states have actively resisted this development; others have given clear precedence to perceived political or national interests, unhindered by adherence to legal constraints. Historically, refugees have made very positive contributions to receiving countries, but they can also cause enormous strains, especially if they arrive in large numbers, and particularly when receiving countries also face related domestic, political and economic problems.

The gap between the institutional responsibilities entrusted to UNHCR by the international community and the often limited obligations formally accepted by states (or accepted on a discretionary basis) is a recurring issue for UNHCR. While many states grant asylum to millions of refugees, there also continue to be situations where refugees face problems in relation to admission, access to procedures, expulsion, physical security, detention, and humane treatment. Despite UNHCR's supervisory role under Article 35 of the 1951 Convention Relating to the Status of Refugees, our views on the interpretation of the Convention are often sidelined by the same states which gave UNHCR that role. In some cases, UNHCR's views are openly resisted. In part due to this, significant numbers of people who need international protection are outside the *effective* scope of the principal international instruments, including those fleeing conflict or internal upheaval. Many governments consider the regime of rights which the Refugee Convention prescribes as too expansive or too expensive to apply to large numbers of refugees.

While in UNHCR's view the victims of many conflicts today fall classically within the ambit of the 1951 Refugee Convention - as for example in the former Yugoslavia and Rwanda, where war was used as an instrument of persecution to eliminate or displace entire groups of people because of their ethnicity - this interpretation has not always been shared by states. UNHCR has become particularly concerned about restrictive interpretations of the refugee definition in

Article 1A of the 1951 Convention. Some states contend that if warring parties terrorise a whole community - even as part of ethnic, religious, racial, social or nationality-based violence - none of the victims is a refugee unless he or she has been singled out for special treatment. Others - despite UNHCR's formal objection - argue that the Convention does not cover those persecuted by 'non-governmental actors' - in other words, at least one side in civil war. These two interpretations alone could disqualify from international protection many of the civilians who have fled the conflicts in Algeria, Bosnia, Kosovo and Sierra Leone. In our view the spirit and object of the Convention is seriously undermined when people with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership of a social group are not afforded international protection just because the persecutor is not 'officially' sanctioned, or the persecution is not individually targeted.

Regional instruments such as the OAU Convention and Cartagena Declaration have built positively on the 1951 Convention to cover mass victims of conflict, but the response of many states has relied on *ad hoc* arrangements such as temporary protection, and the grant of humanitarian, rather than refugee, status. These complementary mechanisms can add a positive flexibility to the protection system, provided refugee rights are ensured and are not arbitrarily withheld or withdrawn. Temporary protection has provided, in many ways, a positive response to the rapid, mass movements of civilians provoked by recent conflicts. It covers everyone who needs protection without implying a permanent stay, and by eliminating the need for time-consuming, individual refugee status determination procedures. It has been a form of *prima facie* recognition which is certainly not excluded by the Convention. In general, it has offered an essential balance between protection and legitimate state or regional concerns.

While temporary protection is virtually identical to protection under the Convention and beneficiaries are given the eventual right to convert to full refugee status in many countries, others have been as expansive in their definition of temporary as they are restrictive in their interpretation of protection. In these cases, large numbers of people, including genuine refugees, are left to languish in a kind of legal limbo, traumatised and separated from their families, while conflicts drag on for months or years. Appropriate standards of treatment under temporary protection; its interlinkage with the asylum procedure and international obligations stemming from the 1951 Convention; and, perhaps most crucially, its duration, remain key elements to its success. The challenge is to ensure a uniform approach on these issues. The need for the development of agreed guiding principles on temporary protection is an urgent one.

There have been other recent efforts to exclude some categories, or nationalities, from the scope of the Convention. The EU Protocol to the Maastricht

Treaty adopted at the Amsterdam Summit in May 1997, encourages all EU states not to receive asylum applications from nationals of other EU states. It was adopted despite UNHCR's view that it violated some of the basic provisions of the 1951 Convention. Restrictive language has also been written into US immigration legislation in 1996 and 1997, limiting to some extent that country's ability to implement its treaty obligations towards refugees. These restrictive trends in such influential regions are inevitably watched closely, and copied, by countries in other regions of the world.

Narrowing the legal basis for protection opens up gaps in the system. The use of complementary protection mechanisms established under human rights mechanisms have become increasingly essential to bridge some of these gaps. While the Convention defines a refugee, it leaves the actual status determinations to governments, which have developed diverse practices and case law. Article 35 of the Convention, along with the UNHCR Statute, assign UNHCR the task of supervising its provisions. However, the Convention says nothing about procedure. The strengths of the European human rights protection system, for example, lie in the fact that interpretation of the human rights provisions of the Convention are left less to politics than to jurisprudence. For example, under the European Convention of Human Rights and its related enforcement mechanisms, an asylum-seeker may resist expulsion using a very broad interpretation of Article 3 of the European Convention: the short and absolute declaration that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.' This provision allows for jurisprudence to redress persecution on important grounds not mentioned in the Convention, such as gender.

UNHCR fully understands that the size of the current exoduses from civil conflicts and failed states raises concern among countries which might be pressed to host those displaced. We sympathise with their efforts to help refugees without endangering their political economies, cultural heritage, or in some cases even their national security. We also appreciate the desire of states to streamline their asylum procedures, to reject promptly those who do not need protection and to discourage abuse of the system by people who want to move to another country for purely economic reasons. But the legitimate need - and right - of governments to control their borders and immigration and to deal with terrorism should not lead to administrative and executive actions which, like broad drift nets, also sweep up genuine refugees in their wake. Too often, efforts to stop large flows of illegal migrants also deny asylum-seekers access to protection mechanisms. Again, it's a question of balance. States have a sovereign right to protect their borders; but they also have a responsibility to deal fairly with the related problems of asylum and immigration.

Protection, Legal Standards and Armed Conflicts

While refugee protection is predicated on a functioning rule of law, too often UNHCR finds itself trying to work in areas in which minimum standards of law are non-existent. In recent years, we've seen the systematic pursuit and murder of civilian groups, often as they were lured by the promise of humanitarian assistance; and the mass round-up, relocation and expulsion of hundreds of thousands of refugees. We have been denied access to refugees in need; and UNHCR and other humanitarian agency personnel have been physically attacked while doing their jobs. Since 1994, more than 40 UNHCR personnel were deliberately killed, died or went missing in the course of their work in the Great Lakes region alone. Refugee protection in such contexts faces fundamental challenges.

The militarisation of refugee camps in the Great Lakes region and the experiment with so-called civilian 'safe areas' in combat zones such as Bosnia have embroiled UNHCR and other UN agencies in a key debate over the extent to which we can - and should - attempt to provide physical security in conflict areas. Formally UNHCR cannot - and should not - function where essential minimum standards of law and protection are not in place. Refugee camps on sensitive borders linked to armed groups which may have perpetrated war crimes should not be supported. But what if the majority of people sheltered in those camps are apparently innocent and needy women and children who depend completely on international support? When UNHCR repeatedly called on states to separate Rwandan war criminals and fighters from innocent civilians, there were no volunteers.

This has raised the question as to whether we should place some restrictions on the temporary protection system in mass influx situations and conduct screening exercises to exclude non-civilians, war criminals and human rights violators. UNHCR and relief agencies are often under enormous pressure to assist refugees quickly in mass influx situations; and the life-saving imperative inevitably takes precedence over more objective and difficult criteria, such as whether the refugee camps are completely civilian in character.

But *how* do we exclude the undeserving in mass influx situations? Highly complex logistical, material and security implications arise, as do procedural problems of proof and credibility. UNHCR recently concluded that despite these difficulties, screening the residual Rwandan caseload to identify genuine refugees and the perpetrators of atrocities was essential, so that the two might be clearly separated. In the Great Lakes and now in West Africa, we are grappling with difficult questions such as how to conduct screening of perpetrators who remain armed and well-organised, and where the country of refuge lacks either the will or capacity to separate the armed elements. Given the increasing - and alarming - phenomenon of child soldiers, and the known involvement of children in the genocides in Rwanda (as in Cambodia), how do we properly approach the issue of

exclusion of minors? And how do we reconcile protection against *refoulement*, found in international human rights instruments such as the Convention against Torture, with cases that involve possible expulsion of perpetrators of crimes against humanity?

In some situations, such as the former Yugoslavia, UNHCR finds itself wrestling with the question of whether protecting people can even conflict with protecting their human rights. If, for example, we assist in the relocation of returnees who may be persecuted in their original home areas because they are members of ethnic minorities (as we helped move minority civilians safely away from areas other parties were trying to 'cleanse' ethnically during the conflict), are we complicit in a human rights violation or are we performing a humanitarian protection function? If both exist simultaneously, should we weigh the seriousness of the danger to civilians against the threat to human rights principles? And if so, what would tip the scale?

A related dilemma which has been raised in the increasingly lawless environments where many refugees find themselves, is how to bridge the yawning gap between the law and the guidelines - and the rhetoric - of the protection of refugee women and children, and the sad fact that large numbers of women and children continue to face the threat of rape, sexual violence, forced recruitment, and other serious violations of their basic human rights on a daily basis.

Linked to this, is the heated debate which has surrounded the issue of gender-based claims of refugee status. While it is increasingly recognised that women are victims of violence and persecution around the world, the debate centres on whether it is legally correct and desirable to protect women against gender-based persecution by granting refugee status under the 1951 Convention. The major areas of contention lie in the interpretation of the terms 'persecution' and 'grounds for persecution' in the refugee definition. Jurisprudence is limited; but experience so far has been that there is greater scope in the 'particular social group' category than in those of race, religion, nationality or political opinion to accommodate gender-related claims. But a woman's social grouping is often defined by her experience of persecution; and to many decision-makers, this leads to an unacceptably circular argument in which persons may fear persecution because of membership in a social group which, itself, is defined by a common fear of persecution. The challenge is to take this forward to ensure that the legitimate protection needs of women are met, while remaining sensitive to the arguments found in national jurisprudence regarding legal difficulties, and the differing views and sensibilities of states in their area.

Repatriation - Standards and Responsibilities

In the absence of more tangible international support and burden-sharing, the inhospitable climate for refugees has placed enormous pressure on displaced people to return home, often well before the conditions that forced them to leave in the first place have significantly changed. The legal framework for the principle of voluntary repatriation, and the political support for it, are being severely tested. Asylum fatigue among major host countries and the unsustainable nature of some large scale refugee situations, as well as fragile security, the presence of landmines, threats to governmental authority from disputing factions or warlords, and the destruction of economic, social and legal infrastructures, are straining the principles governing repatriation.

There are a host of dilemmas raised by the current emphasis on repatriation as *the* solution to refugee situations. Repatriation has always been the most preferable solution - but only when refugees return home voluntarily and safely. Few will freely volunteer to go back to the very dangers or persecution they fled. Some may do so because the conditions of refuge become intolerable and because no viable alternatives exist - where international protection mechanisms are dysfunctional, for example, even though the situation in the country of origin may be far from ideal, return may still be the 'least worst' option. A classic example was the return of Rwandans from then Eastern Zaire (this was more of a life-saving evacuation than a repatriation, and constitutes an extreme example of the dilemma). In other situations, refugees may not want to return home even when it is safe to do so for fear of ongoing discrimination on return, or for economic or other reasons. How do we, then, accurately assess the 'voluntary' nature of repatriation in such environments?

The lingering after-effects of conflict - destroyed homes and confiscated property, political chaos, ruined civil structures and economies - can make it difficult and even dangerous for refugees to return. A minimum respect for human rights and the rule of law must be in place before UNHCR can assist refugees to return. But what are the basic conditions for return? It is clear that to return refugees to their country of origin against their will is inconsistent with international refugee and human rights law. The cessation clauses provide a well-established mechanism which can be used to facilitate the return of those who were refugees and who no longer require international protection. While established principles governing the repatriation of refugees are unambiguous, and voluntary repatriation is the basic principle for UNHCR's involvement, we have to acknowledge that it is sometimes impossible to ensure that those principles are observed.

In the face of these pressures, UNHCR has been examining the relationship between safety and voluntariness as safeguards for return. Voluntariness is a basic guarantee of safe and viable return, rather than just a question of freedom of choice.

In practice, the voluntariness of many refugees' choice is usually only relative, especially when large numbers of refugees are involved, with the will of individuals often being represented by leaders or politically manipulated. Determining what constitutes 'safe' return is extremely complex, and the definition of minimum standards for return remains one of the major protection challenges we face today. Insisting on full respect for international human rights standards might be a problem if this simply does not - and may not - exist in many situations to which refugees are returning, from Afghanistan and Cambodia to Bosnia, Myanmar and Rwanda. Most difficult questions arise in countries where laws or practices are oppressive, but are of general or widespread application, such as the practice of forced labour or deprivation of nationality or even suspicion of genocide. Are these situations in which minimum standards for return are not met? Should these practices support a claim to refugee status, or is something more - a specific act of discrimination, singling out the individual or group - required? We have said that, at a minimum, basic benchmarks for return should include: the absence of persecution in the country of return; acceptance of return by the authorities; security, including guarantees or amnesties from punishment for having left; non-discrimination against returnees; access to and monitoring of all returnees by UNHCR; and acceptable reception arrangements, including the provision of basic economic and social necessities to sustain the return.

There is also the related issue of UNHCR's post-return responsibilities. Donor pressure for post return human rights monitoring is not necessarily matched by commitment on the part of host governments, which generally are more interested in development assistance from the international community - the Human Rights Field Operation in Rwanda has just been asked to leave, for example. How is UNHCR to conduct its mandated protection monitoring of returnees in such an environment, especially when donors are unwilling to fund the essential reintegration assistance which permits this monitoring?

What should our benchmarks or bottom lines be in these difficult circumstances? Are there situations when we should say no to returns? Or should we persevere and try and make the best of very imperfect situations? These are very difficult questions, and there is little consensus, even within refugee organisations, on these matters.

Conclusion

This has been just a short review of some of the dilemmas we grapple with in the refugee protection area today. They raise fundamental questions. How should humanitarian and human rights organisations, such as UNHCR, strike the necessary balance between the protection needs of refugees and legitimate concerns

of states? Are the concepts, institutions and approaches established over the past five decades able to endure and adapt in the face of the new dimensions to the refugee problem? How do we make the international protection system more current, more responsive and more effective?

Drawing clear lines between practicalities and principles might at first hand seem to be the appropriate response to these dilemmas. But, as I have tried to show, this is not always easy. UNHCR is very much aware of the dilemmas and challenges the refugee regime faces, but we also know that decisions do not come easily when faced with specific and urgent problems in the field. There may seem to be more questions than answers, but we must not let the system wither from negligence, or from lack of easily available answers. Many of you have vast experience with these and related problems, and I would welcome your views and contributions to the much needed reflective thinking in these areas.

Closing Address

Principles and Protection:

Making it Work in the Modern World

GUY S. GOODWIN-GILL

Lawyers have a saying - they have many sayings - One of them is that 'No law is self-applying'. At the same time they often have illusions... For example, that the role of the judge/decision-maker is 'simply' to apply the law to the facts; and that 'interpretation', let alone constructive interpretation to meet new fact situations, is not the role of the judge or the lawyer, but of the legislator alone. This is the sort of discourse familiar to anyone who has had occasion to reflect on the constitutional relationship between the executive, the legislature and the judiciary. And these are also the sorts of questions which arise periodically, as they are arising now in the United Kingdom, when talk turns to the question of 'entrenching' a Bill of Rights or, in this case, the European Convention on Human Rights.

The fear among many, often but not exclusively the progressive idealists, is that whatever the hopes and aspirations of those who would both protect human rights and promote human and social development, finally they will be frustrated by the rule of the lawyers.

It is trite knowledge that courts are often out of sync with the rest of society; and that while most of us, for example, might favour restrictions on the advertising of tobacco products on social policy grounds, or limits on the amount to be spent at election times in the interests of an equitable contest, we may well be surprised to find them struck down by the courts as unconstitutional or an infringement of human rights. Even in the most regulated and constitutional of societies, then, we find differences of opinion, in particular, about the proper relationship of individual to state, or about the resolution of conflicting rights and interests.

Moving to the international plane, and to the issue of refugee protection, the responsibility of UNHCR, and the international obligations of states, we find what often appear to be similar problems. And yet with subtle and important differences.

In the international relations of states, there is no central legislature, no court with compulsory jurisdiction, no final arbiter of the meaning of words; indeed, to a point states themselves determine both the scope and the content of their obligations.

How then can we expect principles or protection to *work* in the modern world?

Evidently, as refugees know to their cost, it is not enough merely to point to a law, to article 1 or article 33 of the 1951 Convention. States may not care for their

international obligations; or they may have other pressing concerns; or they may simply differ on the meaning of terms. Absent a final authority, those who engage in the provision of international protection have more to do than the average adviser of rights. They work in difficult terrain - a virtual minefield at times. But they also work in a maze where different paths may lead to different solutions, and some even to where we came in. The question then is, what to insist on, what to accept, where to 'compromise', what to reject.

Fortunate, then, are those who can claim a foundation in the basic principles of protection...

The 'Duty' to provide international protection...

I want to illustrate what I mean by protection by way of a quick review of the origins and development, at least to 1990, of the Office of the United Nations High Commissioner for Refugees.

Looking at the drafting background to the Statute of UNHCR, considered together with the way in which its mandate developed over the first forty years, is revealing. It shows that the underlying rationale for UNHCR's competence, for recognition of its entitlement to act, is *need*, deriving from valid reasons for flight involving elements of coercion and compulsion. The refugee in flight from persecution and the refugee in flight from the violence of a man-made disaster are alike the responsibility of UNHCR, who duty it is to provide international protection.

For UNHCR was born in a human rights context. As a subsidiary organ of the United Nations General Assembly it is necessarily bound by article 1 of the UN Charter to pursue the purposes and principles of the organisation; 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'.

As a subject of international law and as a constituent part of the United Nations, UNHCR is bound to respect the rights of individuals within its purview, an injunction of passive resonance. But it is also an actor in the field; the necessities and sufferings of refugees generate that concern which is a (mandatory) reason for action; and in discharging its protection responsibilities, UNHCR must base itself on rules and principles emanating from a variety of sources.

Time and again the General Assembly - the body to which the High Commissioner reports and is accountable - has stressed both the fundamental nature of the international protection function, and the fundamental rights of those of concern to UNHCR. The clear implication is that UNHCR is an operational agency with very specific responsibilities in the human rights field. This means that UNHCR is duty-bound to provide international protection, not merely by respecting

the rights of refugees in a passive sense, but also by actively taking the fact of being refugees as necessary and sufficient reasons for action.

I would argue, moreover, that the human rights basis underlying UNHCR's duty to provide international protection constrains the Office, by its subject-matter, to pursue a particular ideal of individual freedom in the formulation of its policies of protection, and its programmes of assistance and solutions.

... and solutions...

The fact that UNHCR's 'other' responsibility is to seek permanent solutions to the problems of refugees reminds us that protection has an objective; but it should also remind us that the one is not 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.

Nonetheless, the nature of the problem of displacement is such that lasting solutions are required. Evidently, the nature of those solutions means that their attainment will commonly depend on *non-legal* skills and initiatives, but these in turn will require a foundation in principle if they are to meet the international objectives entrusted to UNHCR and to and by the international community. Protection policies must be derived from the principles explicit or implicit in the UNHCR Statute and in the principles of fundamental human rights acknowledged by the international community.

For the objective of solutions cannot displace UNHCR's autonomous responsibility towards refugees whose fundamental human rights are in danger of violation.

But refugee situations are rarely identical. UNHCR must abide by certain fundamental principles in the protection of refugees, but each problem has to be considered on its own facts. The promotion of solutions, touching protection and assistance, requires tailor-made initiatives. Solutions cannot be deduced from general principles alone, but must be forged from the ground up with due account taken of causes and effect, and the particular interests generated by power politics.

UNHCR needs to be pragmatic, and will occasionally need to draw on a variety of standards if responses to different refugee problems are to be realistic and effective. Discretion may be needed in the appreciation of particular circumstances, but UNHCR can only afford to be flexible *so far as it abides by the fundamental principles of protection*, as they are now and as they may develop, and so long as its activities do not undermine the integrity, dignity and basic human rights of refugees, and provided that the individual interests of refugees are not sacrificed to general considerations of expediency.

Operating in the real world of practical politics, refugee advocates will frequently organise their protection and solutions work pragmatically, in the

interests of the welfare and security of refugees. The foundation of UNHCR's organisational context, and the general international law of human rights, provide the limits, however, and reveal the levels of no compromise.

Real problems

A good example of the practical difficulties attaching to the provision of international protection is provided by the recent example of Rwandese refugees in eastern Zaire, as it then was. As we know, the settlements were by no means all 'exclusively civilian', as required by international law if they were to enjoy protection.

The relevant international instruments confirm that the primary responsibility for ensuring civilian character and that 'refugees' do not engage in attacks on their country of origin rests with the state of refuge, while the location of refugee camps also falls within its area of sovereign responsibility.

UNHCR has no police or security personnel, and neither does it have the authority alone to require that refugees be located safely. But its activities are constrained by principle and by its mandate, and it has no lawful authority to be present in military bases being used for armed attacks on other states, let alone to provide relief supplies to combatants.

How then can principles and protection be secured?

In the case of eastern Zaire, the military character of the settlements was known by October 1994; once the initial emergency relief phase was over, some reflection would have confirmed that the separation of military and civilian personnel was just not going to happen. This was certainly clear by December 1994, when the UN Secretariat failed to come up with an effective solution to the problem. By then, the status of the settlements was irretrievably compromised and the risks to the security of those who had fled were correspondingly heightened. At that point, UNHCR's inability to fulfil its *primary* responsibility to provide international protection to refugees in accordance with the international law that binds even itself, let alone to promote its declared objective of promoting return, ought to have prompted a decision to withdraw.

Against this rather peremptory but no means unrealistic scenario, Nicholas Morris, for one, has argued that withdrawal is rarely possible, because of political pressures and because the cessation of humanitarian operations will leave a perception that the innocent are being abandoned. Morris also argues that UNHCR should be judged 'on the basis of whether, given the specific constraints faced and options available..., its actions were justified and principled'. He also makes the point that the expectations often placed on UNHCR by human rights advocates and others, 'are incompatible with the realities that the organisation must confront',

and that ‘the practical achievements for which it should be held accountable can only be the best that was possible in the circumstances’.

While recognising that we all live in the real world, this is where I part company. For it is precisely where hard decisions must be taken that the principles with which we are concerned can point the direction, whether for state or humanitarian organisations. Think for a moment of the *Chahal* case - the United Kingdom constrained, and accepting, not to return to his country of origin an individual at risk of torture, but whom the United Kingdom considered to be associated with terrorism and a security risk. A ‘protection success’, if you like, where principle prevails over self-interest. Think of the daily successes of the refugee representatives throughout the world, of non-governmental organisations, *pro bono* lawyers, UNHCR protection officers, who have contributed to the recognition of individual refugees, to the prevention of *refoulement*, to the development of refugee law and the concept of the refugee. Think also of UNHCR’s rescue of some 250,000 Rwandese from the forests of former Zaire, almost certainly at risk of being killed had they remained.

Making it work in the modern world

Behind the protection of individual rights and freedoms, ‘making it work’ is also about claims and competing communities. The refugee makes a demand on *us*, seeks a space in *our* community. And communities, self-defining by reference to difference and differentiation as they are, with all their *natural* tendency to exclusiveness, are not always hospitable environments. Governments, representative of national communities, tend by inclination to reflect that exclusiveness, to which may be added a host of other concerns likely to frustrate or impede the protection of refugees: concerns such as ‘national security’, resource limitations and priorities, development plans, ethnic and political enmities, regional alliances, military government. What is required to ‘make it work’ is clearly conditioned by circumstance.

At the height of the conflict in El Salvador, for example, UNHCR’s roving protection officers patrolled the border areas on horse- and muleback, interceding with the Honduran military to prevent *refoulement*, with considerable success. On the Thai-Cambodian border in the late 1970s, a similar presence also did much to facilitate movement to refuge, even if there were large-scale returns that had to be vigorously protested.

In such situations, *access* and *presence* are the necessary but not the sufficient conditions for making it work - that they *are* necessary is clear from the many reports of incidents along the Thai-Burmese border over recent months, to which UNHCR has only now secured access. But *access* and *presence* (and ‘presence’ may apply to *any* protective element, including NGOs), though necessary, are not

sufficient. Former Yugoslavia showed how ‘being there’ is just not enough, absent a foundation in principle and without the backing of law - not that the continuing conflict helped much, either.

Beyond being there

Making it work goes beyond being there. ‘Being there’ - at the frontier or the airport - may prevent *refoulement* today, but not tomorrow, when you have to be somewhere else. Making it work goes beyond the adversarial and the supervisory, to the creation of a culture of protection; to the point at which human rights and the rights of refugees are naturally integrated into both policy-making and front-end, individual responses to individual cases.

To sum up...

Protection is not just a matter of rules and guidelines and handbooks. It is also about ‘culture’; as much an internal, as an external matter. Against the background of principle, whether it be the statutory, constitutional framework provided by the UNHCR Statute or the wealth of human rights and refugee law, a measure of flexibility will always be required in the face of the individual, political and humanitarian nuances of successive crises. It is as necessary to ensure that the ‘dead hand’ of the legalist does not dominate, as it is to maintain consistency and adherence to principle. A culture of protection is thus not just lawyers’ business; on the contrary, while it supposes recognition here of an international legal context and commitment to principle, protection is and ought to be the business of everyone involved.

- It is about co-operation and working together.
- It is about listening, to refugee and host communities.
- It is about learning and information.
- It is about saying *No*, this is *not* acceptable.

External mechanisms to ensure accountability may now be needed, both in fiscal terms, and in relation to the mandate of international protection. Article 35 of the 1951 Convention relating to the Status of Refugees does not go far enough to secure state compliance, while the UNHCR Executive Committee itself is not suited either to the overview of state actions, or to determining UNHCR’s accountability to mandate. An independent mechanism, perhaps founded initially on a regional basis and competent to monitor and evaluate refugee protection from both legal and institutional perspectives, may be just what is needed to strengthen international law and the processes of United Nations reform.

‘To protect’ implies either to provide physical shelter, or to use legal authority to secure the rights and freedom of those at risk. Except within limited

circumstances, the first is generally ruled out. The second option, though, has a long history and a firm legal and institutional base.

The refugee is thus a person known to international law. If not a subject, he or she nevertheless is properly 'of concern'. Not in the sense of UNHCR's extended mandate, but in the sense of being one whose treatment and fate at the hands of the state are a matter of law and obligation, not a matter of discretion. That the refugee is a person of concern to international law, supported by a base of treaties and customary international law, means that the international community thus has *locus standi* (a sufficient legal interest entitling it to intervene, through its mandated agency, UNHCR, on behalf of refugees outside their country). 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 promote protection (municipal law, governmental and non-governmental institutions, the impact of information, regional and international supervisory mechanisms; protest); and thirdly, as if that were not enough, it means maintaining the humanitarian and non-political character of the work.

There is also a fourth, as it were, prohibitive dimension, drawn directly from the body of human rights. It requires disengagement from and non-engagement in activities incompatible with international protection standards (forced return of refugees; support for policies and practices incompatible with human dignity and integrity, such as indefinite detention; provision of assistance in unlawful situations; protection of those properly excluded from refugee status).

It is foolish to imagine that you can ever 'do' protection without being pragmatic, or that the practical application of principles never calls for compromise. There may well be times when it is enough that a person has refuge without formal recognition; but not always. The *art* of protection resides precisely in the ability to be flexible, while remaining close by, and faithful to, the core of fundamental principles, of knowing when not to compromise... and that is a burden, I am happy to say, which falls on all of us.