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Influencing state behavior for refugee protection: UNHCR and the design of the refugee protection regime

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Introduction

UNHCR is the guardian of the international refugee protection regime. In fulfilling this role, UNHCR is also the single most important actor in its constant development.¹ This paper seeks to examine the way UNHCR designs and adapts the international refugee protection regime, and the extent to which this can be usefully informed by theories about how to influence state behavior, so as to ensure respect for the standards the regime promotes, in other words, international refugee protection standards.

The paper is based on the assumption that throughout its history UNHCR has gained vast experience in what influences state behavior towards respect for and implementation of international refugee protection standards, and what, conversely, does not succeed in this goal. UNHCR, it must be said at the outset, sets its protection priorities taking at least intuitively into account how states will react to its advice, recommendations and standard setting processes.² As any legal officer involved in the drafting of Executive Committee conclusions, for instance, will testify, an important feature of UNHCR's regime design is whether UNHCR's recommendations or standard setting efforts stand a chance of being adopted and being implemented in practice.³

The question this paper raises is whether UNHCR's involvement in designing the international refugee protection regime is adequately informed by regime design and compliance theories. Put simply, the question is whether UNHCR works in this area not only on the basis of intuition and empirical claims as to what influences the states it works with, but also on the basis of critically analysing its vast experience, taking note of the findings and feeding them into the ways it works with states to ensure respect for refugee protection. I am not an expert in international relations theory⁴ or regime theory, yet I am increasingly intrigued by academic discussions in this area, especially as they relate to international human rights regime design.⁵ For the purposes of this paper, it is a given that the standards promoted by UNHCR enjoy the highest legal and moral authority. Hence, the paper is not about the standards themselves. Nor does this paper seek to delve into international regime theories or provide a comprehensive description of how UNHCR goes about designing the refugee protection regime. It aims to stimulate discussion as to whether

¹ It is the role of the guardian of a regime to ensure its continued relevance – hence, constant development, expansion and promotion of the regime is integral to fulfilling any role of regime ‘guardian’. See also Gil Loescher, ‘UNHCR at Fifty: Refugee Protection and World Politics’, in *Problems of Protection* (N. Steiner et al., editors), page 3, at page 16 (stating that UNHCR is the guardian of international refugee norms) and page 6 (stating that UNHCR has become “a purposive actor in its own right with independent interests and capabilities”, despite the fact that “it has only partial control over circumstances key to its performance”).

² This, incidentally, is an important feature (one of many) which sets UNHCR apart from, say, NGOs active in refugee protection advocacy. To succeed in its role as guardian, UNHCR has a vital interest in designing regime features that have a high probability of being adopted and abided with.

³ The same is true for protection officers trying to influence the drafting of national or regional refugee legislation.

⁴ “International relations theory attempts to provide a conceptual model upon which international relations can be analysed. Each theory is reductive and essentialist to different degrees, relying on different sets of assumptions respectively. ...[i]nternational relations theories act as a pair of coloured sunglasses, allowing the wearer to see only the salient events relevant to the theory. An adherent of realism may completely disregard an event that a constructivist might pounce upon as crucial, and vice versa.”Wikipedia, http://en.wikipedia.org/wiki/International_relations_theory.

⁵ Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and Human Rights Law’, in *Duke Law Journal*, vol. 54 no. 3 (December 2004), pages 621-686.

we think sufficiently strategically and systemically about how we operate in the area of influencing state behavior, and whether we need to adopt additional or different strategies.

In this paper I have drawn heavily on an article by Ryan Goodman and Derek Jinks, entitled “How to Influence States: Socialization and Human Rights Law”.⁶ I have on purpose avoided a critical analysis of the propositions and models developed in this article, not because I agree with the authors in everything, but because my main aim is to use it as a theoretical prism for much of UNHCR’s protection work. One of the challenges I confronted in doing so, however, was that the Goodman and Jinks article focuses on the international human rights regime. Between this and the international refugee protection regime there are a number of differences that make direct application of some of the models developed by Goodman and Jinks less evident. For instance, the authors point out that, in contrast to other international law regimes, human rights regimes do not address coordination problems and states have no clear, direct (or self-evident, I would add) interest in securing human rights protection in other states.⁷

While one may disagree with this position or find it too sweeping, it is nevertheless useful to recall that the refugee protection regime is clearly and unequivocally premised on the need for cooperation and coordination by states, if only in recognition of the need to ‘share the burden’ and to avoid secondary movements. As so eloquently stated in one of the earlier ‘notes on international protection’, “international protection of refugees has been accepted as a common trust. One essential aspect of such a trust is that responsibility for ensuring it is either widely shared by many or it may well be borne by no-one.”⁸ Nevertheless, the two regimes share many important characteristics, which make the insight gained from the analysis of the international human rights regime valuable for our purposes.

Compliance: just a question of political will?

Prior to proceeding with a presentation of the different regime design theories, I deem it useful to provide a brief description of the insights gained from academic work in international law and international relations in the last several decades examining ‘compliance’.⁹ Compliance may be generally understood as a state of conformity between an actor’s behavior and a specified rule, irrespective of what causes or triggers this compliance.¹⁰ In academic writing it is distinguished from ‘implementation’, to the effect that implementation is understood as the process of putting international commitments into practice (such as the passage of legislation at the national level). Hence, “implementation is typically a critical step toward compliance, but compliance can occur without implementation”¹¹. For instance, a country may be complying with article 33 of the Refugee Convention (non-refoulement principle) even if it has not passed legislation in

⁶ Ibid.

⁷ Ibid. page 629.

⁸ 2001 Note on International Protection, para. 112, available at <http://www.unhcr.org/excom/EXCOM/3bb1c6cc4.pdf>.

⁹ See generally Kal Raustiala and Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’, in *Handbook of International Relations* (Walter Carlsnaes et al. eds., 2002) at page 538 seq., in particular page 539-540.

¹⁰ Ibid. page 539.

¹¹ Ibid.

implementation of that Convention, as long as it does not return refugees to countries where they face persecution.

The concept of ‘compliance’ with a rule is also linked to the concept of ‘effectiveness’. A rule may be considered as ‘effective’ if it “induces changes in behavior that further the rule’s goals”.¹² For instance, the principle of non-refoulement is ‘effective’ in a given state, if, following its adoption, that state ceases to intercept or return refugees where they face persecution. However, “while high levels of compliance can indicate high levels of effectiveness, they can also indicate low, readily met and ineffective standards”.¹³ In the EU context, for example, high levels of compliance with the asylum procedures directive do not render effective the right to seek and enjoy asylum for all asylum seekers reaching the EU territory. Conversely, “regimes with significant non-compliance may still be ‘effective’ if they induce changes in behavior”,¹⁴ such as in the case of the principles of best interests of the child.

There are a number of schools of thought that have developed around the concept of ‘compliance’ over the last several decades, each one contributing different theoretical models as to what leads to state compliance.¹⁵ With the risk of over-simplifying and, as consequence, misrepresenting some of the concepts underlining these theories, I present four of these schools. The first one to appear historically emphasised the likelihood of compliance, which it tied to states’ willingness to establish regimes when it was in their long-term interest to cooperate; this approach was subsequently termed as ‘rationalist’. The ‘constructivist’ school of thought, on the other hand, emphasises that “compliance is secured at least in part by the perception of a rule as legitimate by those to whom it is addressed”.¹⁶

Hence, it is the quality of a rule itself which causes a ‘compliance pull’, rather than a rational, strategic interaction. A third school of thought offers a ‘managerial’ theory (or the ‘no-fault theory of compliance’),¹⁷ to the effect that states have a propensity to comply with their international commitments; where this is not the case, this is inadvertent and results, for instance, from state incapacity or serious resource constraints or from interpretatively contestable treaty provisions, meaning that commitment itself is ambiguous. Finally, a fourth school of thought advances the criticism that “much of the evidence about high compliance with international law is merely indicative of the ‘shallowness’ of many international agreements”,¹⁸ and that as regimes deepen, they require correspondingly harsher punishments to deter non-compliance and sustain cooperation.

What ideas can UNHCR lawyers and protection strategists draw from these theories? The first is that, while most of the propositions presented above will strike many readers as obvious, it is

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid. pages 540-545. The authors refer to academic work by international law and international relations scholars that have left their mark in the development of compliance theories, such as Louis Henkin, Richard Falk, Oscar Schachter and Abram and Antonia Chayes.

¹⁶ Ibid. page 541, citing Thomas Franck, ‘Legitimacy in the International System’, in *American Journal of International Law*, vol.82 (4) page 705 seq.

¹⁷ Ibid. page 542-543, citing Chayes and Chayes, ‘On Compliance’, in *International Organisation*, vol. 47(2) page 175 seq.

¹⁸ Ibid. page 543, citing Downs, Rocke and Barsoom, ‘Is the Good News about Compliance Good News about Cooperation’, in *International Organisation*, vol. 50(3) page 379 seq.

important to acknowledge that their results are not incidental or accidental, but can actually be explained in terms of cause and effect, and consequently can be predicted and designed. The second is that, to paraphrase Slaughter and Raustiala, while we, UNHCR lawyers, are often creative and insightful in analysing and conceptualising what we experience in our work, we do not always test our theories. Often we conclude that if only there were the political will, compliance would be achieved. Political scientists, on the contrary, are more focused on working out models and insist on specifying precise causal relationships. I will now turn to regime design theories and try to show what we can gain from applying some of these models.

Regime design theories: ensuring respect through design?

In this paper I use the term ‘regime’ to refer to the formal and informal aspects of a regulatory environment.¹⁹ This includes all implicit or explicit norms, rules and decision-making procedures built on and around international refugee law. As far as standards are concerned, they are found in the 1951 Convention on the Status of Refugees (Refugee Convention) and the 1967 Protocol,²⁰ regional instruments on refugee protection, the Travaux Préparatoires,²¹ Executive Committee (ExCom) conclusions,²² General Assembly resolutions on refugee issues and international and regional human rights treaties and instruments. They are further, and importantly, included in ‘notes’ on international protection to the ExCom,²³ the Handbook on Refugee Status Determination Procedures,²⁴ guidelines²⁵ and positions such as those resulting from the Global Consultations,²⁶ the Agenda for Protection,²⁷ and legal advice provided to governments in the process of the drafting of national refugee legislation.

In addition to ‘hard’ and ‘soft’ standards, the decision-making procedures, or the processes through which standards emerge, are equally important features of the refugee protection regime. Governments ‘gather around’ UNHCR to ‘advise on refugee protection’ at the annual session of UNHCR’s Executive Committee (ExCom) and its subsidiary Standing Committee. The Executive Committee had initially twenty-five members; at present it has seventy-two.²⁸ Occasionally, a High Commissioner may decide to create additional fora, such as the Convention Plus initiative²⁹ and the High Commissioner’s Forum,³⁰ or, more recently, the High

¹⁹ Goodman and Jinks, *supra* note 5, at note 1, page 623, citing Stephen D. Krasner, ‘*Structural Causes and Regime Consequences: Regimes as Intervening Variables*’, in *International Regimes* (Stephen D. Krasner, ed., 1983).

²⁰ For the text of these documents see <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>.

²¹ For the Travaux see <http://www.unhcr.org/doclist/protect/3c07a8642.html>.

²² On ExCom see generally <http://www.unhcr.org/excom.html>. For the text of the Conclusions see <http://www.unhcr.org/doclist/excom/3bb1cd174.html>.

²³ For the Notes see <http://www.unhcr.org/doclist/excom/3b54444912.html>.

²⁴ For the Handbook see <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>.

²⁵ See <http://www.unhcr.org/doclist/publ/3bc17bbc4.html>.

²⁶ See <http://www.unhcr.org/protect/3b7cea1b4.html>.

²⁷ See <http://www.unhcr.org/protect/PROTECTION/3e637b194.pdf>.

²⁸ For a list of current members of the ExCom see <http://www.unhcr.org/excom/40111aab4.html>.

²⁹ See <http://www.unhcr.org/protect/406d21802.html>.

³⁰ See <http://www.unhcr.org/protect/406d21802.html>.

Commissioner's Dialogue on Protection Challenges.³¹ Regional initiatives may also be organised, although rather rarely.³²

These fora and initiatives do not play a supervisory role for the Refugee Convention, as do, for instance, the human rights treaty bodies, established under the various international human rights conventions. UNHCR participates in a multitude of other fora directly relevant to refugee protection, in the context both of the United Nations and other inter-governmental and regional organisations. In these fora, however, it does not drive the design of the various regimes and can have only limited impact.³³ We will return later to these elements of the refugee protection regime (membership in bodies and fora, nature of norms and enforcement mechanisms).³⁴

International refugee law aims to ensure that states will guarantee the protection for refugees, including by effecting changes to their practices. International relations theories' explaining what makes states indeed change their practice towards abiding with international human rights standards have been described to generally fall into three categories of social mechanism: coercion, persuasion and acculturation.³⁵ In the following paragraphs I provide a description of each, giving examples as to how they are applied in the case of the international refugee protection regime.

The first category or type of social mechanism suggests that changes come about as a result of 'coercion', namely, 'coercing' states to comply with regime rules, "whereby states and institutions influence the behavior of other states by escalating the benefits of conformity or the costs of nonconformity through 'material' rewards and punishments (emphasis added)".³⁶ For instance, consider the extreme example whereby UNHCR would threaten to withdraw major funding from a country programme, vital to that country's survival, if it continued to turn away refugees at its border.³⁷ It is indeed recognised that UNHCR tends to have more leverage in countries where it makes large financial contributions to refugee programmes. However, since according to the theory about coercion, international normative and institutional developments reflect the interests of powerful states, this type of social mechanism appears not to sit conveniently with international organisations with less relative power such as UNHCR³⁸. UNHCR, like other international organisations, can and does exploit this approach when it

³¹ See <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=4745a7602/>

³² For instance the CIS Conference (CISCONF), see <http://www.unhcr.org/protect/406d21802.html>, established to deal with refugee problems in the aftermath of the break-up of the Soviet Union. After a decade of deliberations, the CISCONF was wrapped up in October 2005.

³³ Based on the observations made in this paper, however, UNHCR's involvement in fora such as the EU or the IGC may be worth re-evaluating under the prism of effectiveness in influencing state behavior.

³⁴ In the penultimate section.

³⁵ See generally Goodman and Jinks, *supra* note 5, pages 625-656. I hope to have captured adequately the typology as offered and analysed by Goodman and Jinks.

³⁶ *Ibid.* page 633.

³⁷ In the 1920s, when Greece received over one million refugees of Christian orthodox origin, when its local population did not exceed three and a half million, the assistance provided then by then High Commissioner for Refugees, Fritjof Nansen, was crucial to the survival of the country. This, in addition to his remarkable personality, explains at least in part why the High Commissioner was a key and very influential player in the negotiations that led to the terms of the population exchange between Greece and Turkey. See generally Bruce Clark, *Twice a Stranger: How Mass Expulsion Forged Modern Greece and Turkey* (2006).

³⁸ Although coercion can be combined with persuasion, where UNHCR convinces a state that it is in its material interest to comply with protection norms. See also Loescher, *supra* note 1 at page 5.

garners the political support of a powerful state to affect the behavior of the ‘target actor’ (the state whose behavior UNHCR tries to influence). It should be noted, however, that compliance with norms in the case of coercion does not necessarily “involve any change in the target actor’s underlying preferences”.³⁹

According to the second type of social mechanism, ‘persuasion’, “international law influences state behavior through processes of social learning and other forms of information conveyance”.⁴⁰ Persuasion means convincing and changing the mind of the target actor, with the ultimate objective that this actor adopt and ‘internalise’ new norms and rules of appropriate behavior. The “actor assesses the content of a particular message, such as a norm, practice or belief”, and respect for the norm is achieved through acceptance.

How this comes about in practice is also interesting. One way, described as the ‘framing’ technique, involves the ‘framing’ of an issue to resonate with the target audience. For instance, in the early 1990s the issue of the need to offer protection to the internally displaced was ‘framed’ on the basis of the protection that was available to refugees but not to them, hence linking it to a general need to restore equality between the two groups.⁴¹ Another technique “is ‘cuing’ target audiences to think harder about the merits of a counter attitudinal message”, in other words, introducing new information and prompting actors to examine, reflect and defend their positions.⁴²

Given these features, this process seems to work best in highly institutionalised environments, with an important degree of shared attitudes, where dealing with this new information is a matter of routine. Cuing is described as ‘teaching’, in other words essentially “convincing target audiences to discard previously held views by conveying authoritative information discrediting those views”.⁴³

The persuasion technique is very familiar to UNHCR, and certainly much more used at least at the working level than the coercion technique. Much of UNHCR’s work in the area of promotion of refugee law is about convincing government officials to adopt and internalise the fundamental refugee law principles (who is a refugee and the principle of non-refoulement) through ‘framing’, that is, linking those principles to the fundamental values of their audience, such as fundamental religious beliefs, the tradition of offering shelter to refugees in the country, or the history of a country’s own refugees who found asylum in third countries.⁴⁴

The technique of ‘cuing’ is also extensively used, as governments are ‘forced’ to re-examine their fears, false beliefs about their obligations under international law, wrongly held views about numbers of refugees and so forth. In this case UNHCR’s ‘intuition’ has worked well, since, as has been observed, “cuing is particularly important in addressing inadvertent or uniformed

³⁹ Goodman and Jinks, *supra* note 4, page 633.

⁴⁰ *Ibid.* page 635, referring to a rich inter-disciplinary literature on this theory. See notes 33-42 for many references.

⁴¹ *Ibid.* note 41 and accompanying text, offer references to literature that emphasises the role of ‘norm entrepreneurs’, namely, individuals who can alert people to the existence of a shared complaint and can suggest a collective solution. They create coalitions, make compliance of new norms appear more beneficial, mobilise popular opinion and political support and so on.

⁴² *Ibid.* page 637, notes 43-51 and accompanying text.

⁴³ *Ibid.* page 638.

⁴⁴ See also Loescher, *supra* note 1 at page 5 (noting that for most of its history UNHCR has acted as a ‘teacher’ of refugee norms).

nonobservance of community standards”,⁴⁵ which is the case of many of UNHCR’s interlocutors at the working level (immigration officials, police and coast guard officials and others). It is not clear, however, whether any ‘cuing’ can take place in the context of ExCom, as the forum is too big and too diverse for actual ‘persuasion’ to take place.

The third type is described as ‘acculturation’, that is, the general process of adopting the behavioral patterns of the surrounding culture.⁴⁶ The dominant feature here is behavioral change through pressures to assimilate – real or imagined ones. In this sense the social environment of the actor, in our case a state, acquires significance; consequently, behavioral change may be induced by changing the actor’s social environment. The theory draws heavily upon principles of social psychology, describing the internal pressures that lead to behavioral change through, on the one hand the social-psychological costs of non-conformity and on the other the social-psychological benefits of conforming to group norms and expectations. Actors, once they internalise some role or identity, are impelled to act in ways consistent with the attributes and purposes of that role (‘orthodoxy’).

In addition, social pressures will also propel acculturation, through either social-psychological pressures such as ‘shaming’ or ‘shunning’, or through social-psychological benefits, such as ‘back-patting’.⁴⁷ Respect for the norm in this case is achieved through conformity, and surely resonates with UNHCR staff.⁴⁸ For instance, the invitation extended to states of Central Europe to join the exclusive EU ‘club’ was utilised for over a decade by UNHCR as a strategic tool, as it cajoled these states into incorporating the EU asylum aquis in their national legislations.⁴⁹ Shame mobilisation was also recognised by UNHCR in the last fifteen years or so to be an important method of inconveniencing states when their behavior did not conform to expected standards. Our experience has been, nevertheless, that social pressure will not always bring about the desired change, and this may require some further analysis as to when and what type of pressure will work best.⁵⁰

In the case of acculturation it is interesting to note the following: The first is that, obviously, behavioral change does not necessarily mean internalisation of a norm, standard or belief, in other words, a genuine ‘change of mind’. In this sense it differs from persuasion. “Acculturation depends less on the properties of the rule than on the properties of the relationship of the actor to the community”.⁵¹ The result may be disconcerting for us, since it may appear as a half-hearted

⁴⁵ Goodman and Jinks, *supra* note 5 at note 51, citing among others Abram Chayes and Antonia Chayes, *New Sovereignty: Compliance with International Regulatory Agreements* page 17-28 (1995).

⁴⁶ *Ibid.* pages 638.

⁴⁷ *Ibid.* page 641.

⁴⁸ See also Loescher, *supra* note 1 at page 5 (stating that “UNHCR’s tactics have mainly involved persuasion and socialisation in order to hold states accountable to their previously stated policies and principles”).

⁴⁹ This specific example, whereby UNHCR operated as a ‘gatekeeper’ in determining “which governments were worthy of membership in international society”, see also Loescher, *supra* note 1 at page 5, also shows that acculturation and coercion techniques can be usefully combined.

⁵⁰ Goodman and Jinks, *ibid* page 642, drawing on social impact theories, suggest that the “likelihood of conformity turns on strength, immediacy and size of the group”. Hence, conformity increases with the importance the group has for the target actor, with the exposure of the actor to the group, and with the size with the group (whereby optimisation is arrived at between three and eight members).

⁵¹ *Ibid.* page 643.

or fake commitment to the fundamental refugee protection principles, ready to be violated when no one is looking.⁵²

Nevertheless, as will be mentioned also below,⁵³ social forces can be used to promote rule-of-law values in many ways other than complete internalisation and change-of-minds. The second relates to the social sanctions and rewards discussed above and how these differ from ‘coercion’. Indeed, social sanctions and rewards, if they can be translated into material costs by the target actor, become tools of coercion. If, for instance, a negative assessment by UNHCR results in the withdrawal of development aid by a major donor, then compliance can be said to have been secured through coercion. Generally, however, the kinds of social pressures taken into account here (shaming, back-patting etc.) are difficult to calculate. But the interesting point is that they may induce significant behavioral changes.

As regards acculturation, the question is also raised in academic literature whether states can be acculturated, concluding that they can.⁵⁴ States can ‘identify’ with a reference group, and they also respond to cognitive frameworks and social pressures. It is noted that states not only are highly “legitimated actors” in world society, but also that they look like each other in terms of their structural organisations, educational curricula, militarisation and so on (‘isomorphism’), to such a degree in fact, that this likeness cannot be explained without reference to acculturation processes.

Turning to international human rights, acculturation, rather than coercion or persuasion, seems to explain why so many states have acceded to international and regional human rights treaties and have adopted very similar constitutional provisions protecting individual rights, despite the wide disparities in cultures, stage of development, type of government or technical capacities.⁵⁵

Recalling the reference groups mentioned above,⁵⁶ accession to norms is found also to have a ‘contagious’ effect within regions, a potentially powerful message for UNHCR. Additionally, the process of acculturation seems to result not only in the diffusion of similar norms, but also in the diffusion of similar institutions across states. This is important from a human rights perspective at the national level, as it raises interesting possibilities for the role national courts and national human rights institutions can play in promoting human rights⁵⁷ (and by extension refugee rights).

⁵² This is also described as ‘decoupling’, which occurs when behavior within the state is not in conformity with commitments made towards other states.

⁵³ See note 69 below and accompanying text.

⁵⁴ Goodman and Jinks *supra* note 5 at page 646. The authors base their analysis on theories of organisational sociology.

⁵⁵ For a very interesting analysis and rich references to academic research, including empirical studies on constitutions see *ibid.* pages 649-650. Without themselves taking a stance on them, Goodman and Jinks suggest a number of ways whereby acculturation of states may work as a micro-process, including the direct acculturation of government representatives or policy-makers, of members of special interest groups who may in turn persuade domestic audiences or political leaders, or even of domestic audiences directly who then coerce or persuade their political leaders towards compliance. UNHCR is familiar with all these techniques (*viz* work in the context of ExCom and other fora, and public awareness activities).

⁵⁶ See note 50.

⁵⁷ It is suggested that some of the most effective regimes are those where links between international institutions and domestic actors are created, such as in the case of the European Court of Justice. See Rauptiala and Slaughter, *supra* note 9 at page 547.

The three types of social mechanisms presented here, through which state behavior is influenced towards respect for international norms, can provide very useful insights to refugee regime design. We need to recognise, however, that the ‘logics’ behind them vary substantially, and that as a consequence their regime design principles also vary and are potentially at odds with each other. As is further discussed below, the choices we make among different design elements are *strategic* choices, which cannot afford to be made accidentally or on the basis of intuition or empirical claims. In the next paragraphs, following the models advanced by Goodman and Jinks, we will examine how they can be applied in terms of three regime elements: membership, precision of obligations and enforcement methods.

Membership in refugee protection fora: restrictive or inclusive?

The first regime element examined here is that of ‘membership’, namely, whether it will be restrictive or inclusive. In UNHCR’s case, for instance, the Executive Committee (ExCom) is formally restrictive, since the ExCom rules of election provide that states apply to become members and are elected if, among other criteria, they have a “demonstrated interest in, and devotion to, the solution of refugee problems”.⁵⁸ In practice, however, the ExCom membership rule applies quite inclusively, in the sense that newcomers are allowed to join and conditions on maintaining membership status are negligible.⁵⁹ Some of the states members of ExCom can hardly qualify as fulfilling this criterion.⁶⁰ In addition, it appears that no ExCom member has ever been expelled from this forum.

The interesting issue for UNHCR is whether and how restrictive, rather than inclusive, membership may influence state behavior towards better respect for refugee law and principles. Employing the mechanism of coercion, we would probably reach the following results: First, we would find that whether a state participates in ExCom or not does not necessarily affect the ability of a stronger state to exert influence on it,⁶¹ since under the coercion approach what matters is the material interests of states, which are largely dictated by the influence of more powerful states (or institutions). Second, after a close examination of how ExCom functions in practice, we would probably conclude that the benefits of restrictive or conditional membership are few.

Restrictive membership yields the most results when it has an information-forcing effect, thereby making it easier to ‘find’ the information necessary to ‘coerce’ states into changing their behavior, and where it ‘deepens cooperation’ to such an extent, that in the end only states that do

⁵⁸ The other two criteria are widest possible geographical representation and membership in the United Nations. <http://www.unhcr.org/excom/418b5ecc4.html>.

⁵⁹ Goodman and Jinks, *supra* note 5, at page 656-660. As the authors note, organisations may employ other techniques to limit membership in cases of the participation in human rights fora of governments with offensive human rights records, e.g., rejecting credentials required for participation, limiting voting or speaking rights or denying access to meetings. See *ibid.* notes 146-151 and accompanying text (the case of South Africa in earlier times is mentioned frequently in respect of some of these measures).

⁶⁰ See the list of members of ExCom at <http://www.unhcr.org/excom/40111aab4.html>.

⁶¹ Goodman and Jinks, *supra* note 5, at page 661-662, citing John J. Mearsheimer, ‘The False Promise of International Institutions’, in *International Security* (Winter 1994-1995), page 5 at page 7.

not need to ‘defect’ very often (and will not need to face the consequences of defection very often) join the regime.⁶²

Without going into too many details, we should recall that ExCom is not a treaty monitoring mechanism, in the sense that human rights treaty bodies are, nor a peer review mechanism, as is the case with the ILO and UNESCO procedures.⁶³ The information made available about the protection of refugees in specific countries during ExCom is very limited. In addition, at least in today’s world it is difficult to see which states would be willing to participate in a forum on refugee protection with restrictive membership, with a high entry bar.⁶⁴ But this is a matter of speculation, and it might be interesting to try to test it.

In the hypothetical case that UNHCR were to initiate the creation of an exclusive committee for monitoring the protection of refugees, where only states with a demonstrated record of protecting refugees would be invited to participate, then the specific design of this mechanism would also need to be done carefully, to ensure, for instance, that information otherwise difficult to get would be a prerequisite for admission (e.g., number of separated children asylum seekers in detention).

Analysing the advantages and disadvantages of restrictive and inclusive membership from a persuasion perspective would also yield interesting results. Generally, the social mechanism of persuasion favors an inclusive membership because it sees it as a structural opportunity for collective deliberation and dialogue.⁶⁵ It also allows states with a strong protection agenda to coordinate their efforts at persuasive diplomacy. The deliberations during ExCom leading up to the adoption of its Conclusions have much flavor of a persuasion approach. Restrictive membership, on the other hand, is seen as punitive, and therefore not conducive to persuasion.

At the same time, in a case of restrictive membership it might be that forces inside an excluded country would be galvanised to shape the local political agenda. It might be interesting, for instance, to test reactions especially within liberal societies by excluding their states from, say, an exclusive group of ‘governments advocates for refugees’, on the basis that their governments do not respect their commitments to refugee protection.

Another possible advantage of restrictive membership under a persuasion model would be that negotiations towards membership would allow raising issues that might otherwise not have received adequate attention thus far; this may have been the case with central European countries during their EU member candidacy status and the negotiations with the EU on the adoption of the EU asylum aquis, mentioned also above. The High Commissioner’s Dialogue on Protection might usefully employ some of these ideas.

The mechanism of acculturation also generally speaks in favor of inclusive membership, since it sees therein possibilities for social pressures and for “promoting standardised, socially

⁶² Ibid. notes 160-169 and accompanying text.

⁶³ Walter Kälin, ‘UNHCR’s supervisory responsibility’, in Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law* (2003) page 613 at page 634-651 (reviewing various treaty monitoring mechanisms under international law of potential relevance to the monitoring of the Refugee Convention).

⁶⁴ Goodman and Jinks, *supra* note 5, note 174 and accompanying text.

⁶⁵ Ibid. pages 665-667.

legitimated models of appropriate state behavior”⁶⁶ and norms identified with being a ‘modern state’. The scholars analysing this mechanism observe that acculturation operates primarily through international organisations, whereas coercion and persuasion can operate independently of them.⁶⁷

Hence, from the point of view of an international organisation, employing different acculturation ‘techniques’ is inherent in their work towards promoting global respect for its standards. Restrictive membership, on the other hand, would encourage “parochial or idiosyncratic modes of resistance” and even “aberrant official policies and forms of government”.⁶⁸ Acculturation also foresees what will happen in the case of defections, in other words in the case of non-observance of the norms a state has committed itself to. In this case this is conceived of as a particular form of defection, which scholars describe as ‘decoupling’. Scholars further argue, however, that ‘decoupling’ is not an impediment to the diffusion of global norms⁶⁹ but may in fact assist in the diffusion of norms.

The theory about acculturation does not discount restrictive membership altogether. It sees, for instance, inclusion in a restrictive membership as a form of ‘back-patting’ and as a way of significantly increasing identification within the group. Yet at least as far as human rights regimes are concerned, the disadvantages, which include the adoption of standards too high for outsiders to ever hope to adopt, and the increasing disparity among insiders and outsiders, are very serious from an acculturation perspective. The mechanism of acculturation speaks generally in favor of an inclusive human rights regime, where deviant states gradually and increasingly ‘imitate’ and ‘identify’ with the group in which they are included.⁷⁰

In the case of the international refugee protection regime, however, we observe a distortion in the last two decades. The mechanism of acculturation, especially in the context of migration control regimes, and in particular the imitation elements of it, to a large extent explains the current state of refugee protection in the world and may strongly indicate the need for different acculturation methods and mechanisms beyond the confines of ExCom and fora with a strong focus on migration control, but a nominal only interest in refugee protection. Moreover, a restrictive regime might encourage the establishment of ‘qualifying criteria’ which would include a basic commitment to refugee protection, but also the establishment of national institutional arrangements, which foster subsequently the diffusion of global norms through local structures.⁷¹

⁶⁶ Ibid. note 187 and accompanying text, citing the work of Martha Finnemore.

⁶⁷ Ibid. page 668.

⁶⁸ Ibid. page 669. The authors explain in some detail how acculturation “predicts the institutionalisation of deviance within subcultures that can form among outsiders who have been denied access to the dominant group”, and by consequence how states with fewer connections to international bodies, such as Burma and North Korea, may be more “prone to adopt aberrant official policies and forms of governance”.

⁶⁹ Ibid. page 670.

⁷⁰ Ibid. notes 200-203 and accompanying text, page 671.

⁷¹ Ibid. notes 208-210 (noting that this has been found to be inadvertently the case for domestic natural science associations and environmental institutes which diffuse the global models of environmentalism).

Refugee protection norms: precise or ambiguous?

The second issue to be examined under the prism of the three social mechanisms, coercion, persuasion and acculturation, is that of the extent of the precision of obligations in a regime. Here the debate is not whether international legal obligations must be very precise (as is frequently argued), but whether the level of precision of these norms may influence the behavior of states, and how. As is the case with many international legal regimes, the international refugee protection regime might also be ‘accused’ of lack of precision, especially if compared with some national asylum regimes. Goodman and Jinks argue that the issue of precision must be evaluated along two dimensions: first, the effects of the legislative process (the drafting) and second, the effects on compliance (ex ante and ex post effects respectively).⁷²

Coercion generally favors precise law for a number of reasons. For instance, it reduces possible disputes over whether a state has respected its obligations, hence reduces the possible reputational, and thereby material, costs of non-compliance. Also, acceding to a regime with high precision signals a willingness and capacity to respect these obligations.⁷³ The disadvantage is seen during the legislative process (ex ante effects): Negotiations are longer and agreement may be very difficult to obtain, or once obtained, may reveal an agreed text which is very ‘ineffective’ in furthering its goals. Again, the protracted negotiations in the EU on the asylum procedures directive come to mind as a pertinent example, and on the basis of this and other similar legislative efforts many refugee and UNHCR lawyers argue that re-negotiating the Refugee Convention is perilous, as it would almost certainly lead to weakened, ‘ineffective’ standards.

The persuasion mechanism reaches more or less the same results as far as compliance is concerned (ex post), although for very different reasons. But it also sees the legislative process (ex ante) as beneficial. The legislative process itself provides ample opportunity for persuasive encounters, whereby states and other actors initiating the process try to persuade other actors that the norm they are advancing is legitimate.

Precise rules help clarify points of agreement and disagreement, which facilitates targeted debates about the content of the norm and provides a framework for movement towards further agreement on more controversial matters. In addition, it allows for ‘framing’ issues more clearly: In UNHCR’s context, for instance, the issue of non-admission at the border is ‘framed’ as ‘refoulement’. To summarise, from a persuasion perspective adopting ambiguous norms (if the adoption of precise rules is difficult to achieve), and deferring their precision to an interpretative authority or a supervisory body can be very successful. In this manner states that would otherwise not accede or face weaknesses in enforcing the norms are constantly involved in interpretation and justification exercises, gradually ‘internalising’ them.⁷⁴

Whereas under coercion and persuasion it is generally deemed that precision promotes compliance, even though it makes initial agreement more difficult, Goodman and Jinks argue that under an acculturation perspective the results are potentially reversed.⁷⁵ They argue that, given the remarkable levels of homogeneity across all states (such as education policies, bureaucracies,

⁷² Ibid. pages 675-686. For a parallel discussion on the issues of the use of ‘hard’ law as opposed to ‘soft’ law, see Raustiala and Slaughter, *supra* note 9 at page 551 seq.

⁷³ Ibid. pages 677-678.

⁷⁴ Ibid. notes 230-241 and accompanying text.

⁷⁵ Ibid. page 681.

development agendas etc.), some measure of precision is achievable, especially in areas related to globally shared norms, and that this level of precision is probably higher than one would automatically assume. But the most important aspect is that of compliance and conformity, which, in their view, stands a much better chance in the case of ambiguous norms.

This is the case because the content of the rule itself is not as important as the actor's relationship to the forum that has espoused the norm. Hence, social pressures towards conformity with a norm, even if ambiguous, can have more effects than in the case of very precise norms, which may spur disagreements and undermine institutionalisation. Where actors value the judgment of the group, they are likely to conform – and unlikely to sustain, over the long term, idiosyncratic interpretations. Furthermore, under the acculturation approach, reaching broad consensus has powerful effects for the institutionalisation of a regime.⁷⁶ The ExCom Conclusions, which are traditionally adopted by consensus, serve, then, this purpose quite well, even if they are ambiguous; while ExCom itself manages to retain its culture and status through the years, despite the 'attacks' on the refugee protection regime otherwise.

Enforcement mechanisms for refugee protection?

Turning to enforcement mechanisms, ranging from 'soft' to 'hard' ones, we should recall that it is they that have the most direct effects on the observance of substantive rules. Goodman and Jinks use the publication of best practices, monitoring and reporting, criticising bad actors, and binding decisions and material sanctions under the perspectives of coercion, persuasion and acculturation, to gauge what the effects of these four methods may be on state behavior. They also persuasively argue that “one might mistakenly suppose that exploiting a range of tactics – without having to delve into finer details of mechanisms and behavioral logics – is a pragmatically sound approach”,⁷⁷ and go on to point out that tactics may have to be prioritised not only because of frequently limited resources, but also because there may be incompatibilities among these tactics, based on the features of the different social mechanisms (coercion, persuasion and acculturation).

The coercion mechanism militates for the use of traditional tools of power (military and economic) and would suggest, in the case of refugee principle violations, the establishment of 'agreements with teeth' and arrangements that link them to financial and military interests.⁷⁸ 'Softer' approaches, such as monitoring and reporting, are of limited value, unless they are integrated into coercive mechanisms.⁷⁹ Official criticism, e.g., by UNHCR, might be of some usefulness, but only if tied to a real commitment to employ power – otherwise, it loses its credibility and is of no use.

⁷⁶ Ibid. table 3: Precision of obligations, page 686.

⁷⁷ Ibid. page 689.

⁷⁸ See Raustiala and Slaughter, *supra* note 9 at page 549, describing the enforcement mechanism of the World Trade Organisation (and observing, remarkably, that “contrary to many intuitions about democracy and law, democracies were comparatively *less* likely to comply with GATT rulings – readers interested should research the cited scholarship, as the observation is repeated here out of context).

⁷⁹ Goodman and Jinks, *supra* note 5 at page 692.

The persuasion approach sees in ‘managerialism’ its prospects of acceptance of norms being fully realised.⁸⁰ This is achieved through the seemingly endless debates and discussions about norms and the gradual internalisation and sincere acceptance of the content of those norms, so that, in the end, external surveillance should be rendered meaningless. Monitoring and reporting, such as in the course of human rights treaty body procedures,⁸¹ is highly valued, because it facilitates the exchange of ideas and ‘cues’ states to think harder about their human rights practices and adopt systemic changes. Criticism may complement efforts at persuasion, for instance, by rendering the issues under discussion more salient or by mobilising social actors to persuade their governments to change their behaviour, but may also poison the communicative atmosphere required for persuasion deliberations.⁸² This is often a dilemma facing many UNHCR offices: for instance, in the course of protracted debates about draft national asylum legislation, where UNHCR tries to effect modifications, issuing publicly critical remarks may have a positive effect in multiple ways (mobilising the advocacy network, drawing the attention of higher-level officials and parliamentarians etc.) but may also undermine the cordial atmosphere of cooperation between UNHCR and the government.

Commitment to refugee protection principles, from an acculturation point of view, also provides us with useful insights. For instance, the publication of best practices is highly valued, because it contributes to the process of standardisation and offers opportunities for ‘mimicking’. Monitoring and reporting, especially by third parties and organisations, are also considered important, where they result in social rewards (‘back-patting’) and sanctions. Where, however, acculturation is pursued through ‘mimicking’, reporting and monitoring are not necessarily very useful; on the contrary, and this point is very pertinent to UNHCR, emphasising violations may institutionalise noncompliance.⁸³ Criticism is generally highly valued, as it mobilises shame (social pressure), but again should not fall into the trap of institutionalising non-compliance, while binding decisions and sanctions are generally disfavored.⁸⁴

Putting the pieces together

The various observations made above are constructed on a theoretical level that does not necessarily take into account the practicalities of their use or other variables.⁸⁵ For instance, were a treaty body to be established by UNHCR to monitor and report on the implementation of the Refugee Convention (as has been demanded in the past, and as both the persuasion and the acculturation method, and even to some extent coercion, might call for), it would suffer from the same weaknesses that human rights treaty body monitoring mechanisms face (many overdue reports, backlogs etc.).⁸⁶

⁸⁰ Ibid. pages 693-694.

⁸¹ See Raustiala and Slaughter, *supra* note 9 at page 549.

⁸² Goodman and Jinks, *supra* note 5, notes 293-296 citing scholarship discussing these two variants.

⁸³ Ibid. notes 302-304 and accompanying text.

⁸⁴ Ibid. Table 4: Mechanisms of implementation, at page 699.

⁸⁵ See Goodman and Jinks, ‘International Law and State Socialisation: Conceptual, Empirical and Normative Challenges’, in *Duke Law Journal*, vol. 54 page 983-998 (responding to critical observations by Harold Koh and Jose Alvarez in respective articles).

⁸⁶ See Kälin, *supra* note 63, at page 654 and notes 202 and 203.

At the same time these models are valuable for an institution like UNHCR which is entrusted with promoting and ensuring respect for the international refugee protection regime. They make us think harder about our strategies. They provide insights as to how this regime needs to continue to develop, in terms of membership in fora, evolution of refugee protection norms and monitoring mechanisms. They also demonstrate that the social mechanisms through which UNHCR may hope to influence state behavior in refugee protection matters must be taken into account; in fact, their various components must be analysed critically before any regime design changes are set in motion, otherwise those changes will not be effective. Combining elements from the different mechanisms of coercion, persuasion and acculturation is possible and even desirable, as long as it is done in a thought-out manner and with strategic vision.⁸⁷

To illustrate then, rather than in any way attempting to suggest the partial or full re-design of the international refugee protection regime, the following are some ideas that can be further explored:

- i) The creation of additional fora building on acculturation and persuasion techniques could be envisaged. Small groupings of countries at sub-regional level, who already host proportionately large numbers of refugees and would see it as a reputational advantage to be invited to participate would be an example. A first step could be to link up with a ‘norm entrepreneur’⁸⁸ in a regional power country, who would convince his or her government to convene together with UNHCR a sub-regional forum and proceed with elaboration of norms relevant to the sub-region. It should be recalled that accession to norms has been found to have a contagious effect.⁸⁹ If many such sub-regional groups were to be created, whereby UNHCR would ensure the diffusion of standardised norms and institutional frameworks, eventually countries or country groupings with restrictive policies would begin to feel the social pressure of being excluded from an emerging culture of protection. Some norm development work could be envisaged at such smaller sub-regional fora, which would help not only the diffusion of norms but eventually also the development of norms at global level, once a ‘tipping point’ in the adoption of norms has been achieved.
- ii) ExCom and its Standing Committee have played a valuable role through the years in both persuading and ‘acculturating’ governments towards adoption of refugee protection norms. In this sense it will retain its value in developing the refugee protection regime in the years to come, although this value will be diminishing, as its members grow in number and their concerns about national security and migration control gain in importance for them. The ExCom Conclusions, being neither binding nor very precise in their wording, have nevertheless been the key vehicle for the development and promotion of the international refugee protection regime, very much along the lines that the mechanisms of persuasion and acculturation would dictate. Whether they will retain their effectiveness in the future, however, both in terms of indeed furthering their goals (being ‘effective’) and of being complied with, is probably an open question. Deliberations among sub-regional groups within

⁸⁷ One example where UNHCR succeeded in effecting a major change in the way powerful governments were interpreting the refugee definition in a restrictive manner was the explicit inclusion of non-state agents as possible agents of persecution in the EU Qualification Directive (which is binding upon EU states). This it managed through a combination of persuasion and acculturation techniques, which it sustained over ten years.

⁸⁸ See above note 41.

⁸⁹ See above text accompanying note 56.

ExCom, reflecting any developments in the context of sub-regional fora, mentioned under the previous point, might induce ExCom to strengthen its protection standards.

- iii) The High Commissioner's Dialogue on Protection might benefit from becoming a somewhat exclusive forum with a small number of participants, balancing out ExCom's 'inclusiveness'. The criteria along which participants are invited to participate, without being too stringent, could serve as a tool of social pressure, as the acculturation model would suggest. Such criteria might include, for instance, a combination of numbers of asylum seekers or refugees in relation to the country's population, eligibility rates, the existence of effective national institutions on refugee protection and in charge of the asylum procedures, and donor contributions, in relation to GDP or per capita income. Being invited to participate would be seen as form of 'back-patting' and might, as discussed earlier, be used by constituencies in excluded liberal countries to press their governments to change state practice. The participation, on equal footing, of other stakeholders would also encourage more 'cuing' and other persuasion techniques.⁹⁰
- iv) Coming to the need of strengthened enforcement mechanisms of the Refugee Convention, one possibility for cases of non-compliance would be to also delegate them to the sub-regional level as well. Social pressures to conform, it should be recalled, are stronger within smaller groups and at sub-regional level. As regards the suggestions made in the course of the Global Consultations process,⁹¹ the suggestion of the creation of a peer review mechanism, with its emphasis on identifying 'best practices', the incorporation of monitoring and reporting elements, and confidentiality, appears to be the most interesting from the point of view of an acculturation model.

Publicising best practices on refugee protection by countries might in any event need to be strengthened, in line with the acculturation model, as it can encourage the diffusion not only of norms, but also of national institutions and procedures. For instance, a good example of a reception centre in, say, one of the islands of the Mediterranean which receives tens of thousands of asylum seekers, might prompt other countries in a similar situation to create similar infrastructure. As regards public criticism, of which UNHCR is often accused of not doing enough especially toward donor states⁹², it should be recalled that, from an acculturation perspective, public criticism can play a powerful role by 'mobilising shame' and the resultant social pressures. At the same time, however, public criticism should not result in alienating states by making them feel that they are not interested in these social pressures any more. Hence, a balanced and careful approach as to when to criticise publicly seems to be in order.

⁹⁰ See Jeff Crisp, '*Beyond the nexus: UNHCR's evolving perspective on refugee protection and international migration*', paper prepared for the workshop 'Challenging sovereignty: What it might take to change global migration regulation', at the University of British Columbia (March 2008) (on file with the author), page 4.

⁹¹ See 'Summary Conclusions: Supervisory Responsibility', in Erika Feller, Volker Türk and Frances Nicholson, *supra* note 63, page 667 at page 670.

⁹² See, for instance, Loescher, *supra* note 1, at page 16.

Conclusion

With this paper I have sought to stimulate reflection and discussion as to what UNHCR could do differently or additionally to influence state behavior towards better protection of refugees. I do not contend that my presentation is comprehensive, and many issues would need to be analysed in further detail. And, while the paper suggests that UNHCR can and perhaps should revisit some of its strategies from the point of view of international relations theory, it does not wish to obscure the fact that it is ultimately the responsibility of states to secure refugee protection; with, or without, UNHCR's protection strategies and involvement.