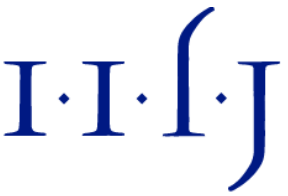

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## MANAGING THE 'REPUBLIC OF NGOS': ACCOUNTABILITY AND LEGITIMATION PROBLEMS FACING THE U.N. CLUSTER SYSTEM

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# Managing the 'Republic of NGOs': Accountability and Legitimation Problems Facing the U.N. Cluster System

By J. Benton Heath*

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*This Article identifies and critically assesses the crucial but troubled system for the coordination of international humanitarian assistance (the U.N. "Cluster Approach"). Regardless of whether the Cluster Approach actually "helps" in disaster response, it exercises substantial power over affected populations by assigning competences and leadership roles. The built-in mechanisms for controlling this power are unworkable, as they ultimately fail to resolve the tension between humanitarian organizations' autonomy and the need for coordination. This Article identifies the emergence of an alternative model of accountability, based on mutual monitoring and "peer review." Drawing on theories of "network" governance and "experimentalism," this Article teases out the institutional and normative implications of such a model. In particular, the Article argues, a turn toward peer review would demand dramatic improvements in the inclusion of affected populations in the cluster system. This investigation may carry broader lessons for transnational networks and the study of accountability in global governance.*

## I. Introduction

The demand for greater "coordination" marks all contemporary discussions of humanitarian aid.[1] Three years after the devastating earthquake in Haiti, coordination failures take the blame for the interminable pace of the recovery effort.[2] But there is no shortage of coordination mechanisms in Haiti or any other disaster-ravaged nation. Often chief among these is the United Nations system for coordinating humanitarian operations, generally known as the

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[1] Recently the problem has arguably become even more pressing, as the proliferation of unskilled or inexperienced NGOs gives rise to fears of botched responses, inappropriate aid, and wavering confidence in the international relief system. *See* DAVID FISHER, INT'L FED. RED CROSS & RED CRESCENT SOC. [IFRC], INTERNATIONAL DISASTER RESPONSE LAW: A DESK STUDY 29–31 (2007).

[2] *E.g.*, Deborah Sontag, *Rebuilding Lags in Haiti after Billions in Post-Quake Aid*, N.Y. TIMES, Dec. 24, 2012, at A1; *see also* Neil MacFarquhar, *U.N. Is Faulted as Lacking Coordination of Aid and Security in Haiti*, N.Y. TIMES, March 3, 2010, at A11; David Bressan, *Post-Disaster Recovery: Lessons from the 2010 Haiti Earthquake*, SCIENTIFIC AMERICAN HISTORY OF GEOLOGY BLOG, Jan. 12, 2012, http://blogs.scientificamerican.com/history-of-geology/2012/01/12/post-disaster-recovery-lessons-from-the-2010-haiti-earthquake/.

"Cluster Approach."[3] Though no more than a loose network connecting autonomous organizations, the Cluster Approach may be understood as an institution in its own right, one that exercises substantial power in disaster-affected States.[4] Despite its flaws, a coordination apparatus like the cluster system is the connective tissue that brings together various humanitarian actors, forming what some Haitians have derisively called the "Republic of NGOs."[5]

This Article critically assesses the power, accountability, and legitimation of a coordination network such as the Cluster Approach. In so doing, it brackets the question of whether this system actually improves "coordination," or how such improvement would be measured.[6] I observe that the cluster system alters the realities of disaster response by assigning competences and leadership roles, setting policies, and channeling funding.[7] Embedded within arguments regarding the "accountability" of this power are deeper questions concerning the legitimation of an institution such as the Cluster Approach. By identifying and interpreting emerging trends in this discourse, this Article draws out the normative choices that face the U.N. humanitarian architecture.

I argue that changes in the structure and self-justification of the Cluster Approach place increasing stress on the inclusion of voices from vulnerable and disaster-affected communities.

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[3] *See generally* Cluster Approach, http://oneresponse.info/coordination/clusterapproach/Pages/Cluster%20Approach.aspx.

[4] On the importance of studying networks as actors in their own right, see generally MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS (1998). The accountability of such networks emerges as a central concern in Anne-Marie Slaughter, *Accountability of Global Governance Networks*, 8 IND. J. GLOB. LGL. STUD. 347 (2001).

[5] Madeline Kristoff & Liz Paranelli, *Haiti: A Republic of NGOs?*, UNITED STATES INSTITUTE FOR PEACE, April 26, 2010, http://www.usip.org/files/resources/PB%2023%20Haiti%20a%20Republic%20of%20NGOs.pdf; Marjorie Valbrun, *Amid a Slow Recovery, Haitians Question the Work of Aid Groups*, CENTER FOR PUBLIC INTEGRITY, Jan. 10, 2012, http://www.publicintegrity.org/2012/01/10/7838/after-quake-praise-becomes-resentment-haiti.

[6] Five years after the implementation of the system, an external evaluation found that "it is hard to pin down exactly how the cluster approach was or is intended to work." JULIA STEETS ET AL., CLUSTER APPROACH EVALUATION 2: SYNTHESIS REPORT 24 (2010).

[7] Should one require a definition of "power," I refer to the broad understanding of power as "the transformative capacity of human agency." ANTHONY GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD 111 (1976).

Voice is not a new concern for humanitarian actors.[8] But institutional developments within the cluster system, designed to ensure its accountability and legitimacy, raise the problem of inclusion to a place of primacy, without necessarily solving it. As humanitarian actors turn away from the failed formal accountability structure, and begin to unlock the potential of the cluster system for decentralized learning and experimentation, the fate of that system will be increasingly bound to the question of how well it secures the effective participation of local populations and grassroots organizations.

Despite a renewed interest in "disaster response law,"[9] the institutions through which disaster response is operationalized remain under-studied in the legal literature.[10] This deficit is at least partly attributable to the orthodox view of public international law in this area, which remains focused on rules of conduct and responsibility, rather than institutional structure.[11] But

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[8] *E.g.*, Georg Frerks & Dorothea Hilhorst, *Evaluation of Humanitarian Assistance in Emergency Situations*, New Issues in Refugee Research Working Paper No. 56 (February 2002) (detailing persisting challenges associated with participatory approaches to aid delivery); Amanda M. Klassing, P. Scott Moses & Margaret Satterthwaite, *Measuring the Way Forward in Haiti: Grounding Disaster Relief in the Legal Framework of Human Rights*, 13 HEALTH & HUM. RTS. J. 1 (2011).

[9] These have included recent conferences under the auspices of the "Four Societies" of international law, the Canadian Council on International Law, and the Hague Academy, as well as ongoing codification efforts by the International Federation of Red Cross and Red Crescent Societies and the International Law Commission.

[10] *See* Nadia Khoury, *Hague Academy Examines the International Law of Catastrophe*, INT'L FED. RED CROSS & RED CRESCENT SOC., Feb. 27, 2012, https://www.ifrc.org/en/what-we-do/idrl/latest-news/disaster-law-newsletter-february-2012/hague-academy-of-international-law-seminar-on-the-legal-challenges-of-catastrophes/ (quoting Professor Samantha Besson, who points to the need for further analysis of institutions in disaster response). *But see* Giovanni de Siervo, *Actors, Activities and Coordination in Emergencies*, in INTERNATIONAL DISASTER RESPONSE LAW 485 (Andrea de Guttry ed. 2012). Other recent works have begun to tackle areas of disaster response that require some sensitivity to an institutional or a "governance" perspective. *See, e.g.*, David Fisher, *Legal Implementation of Human Rights Obligations to Prevent Displacement Due to Natural Disasters*, 41 STUD. TRANSNAT'L LGL. POL'Y 551 (2010) (addressing what might be categorized as compliance issues); Jim Chen, *Modern Disaster Theory: Evaluating Disaster Law as a Portfolio of Legal Rules*, 25 EMORY INT'L L. REV. 1121 (2011) (applying a risk-management theory to the assessment of disaster rules).

[11] Moreover, the leading treatises on international institutional law spend little time addressing operational activities or emergency situations. It has recently suggested that emergency powers of international organizations should become a sub-field of study in the field of Global Administrative Law, though few works have followed in that vein. Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORGS. L. REV. 319, 334–38 (2009); *see also* Joost Pauwelyn & Ayalet Berman, *Emergency Action by the WTO Director-General: Global Administrative Law and the WTO's Initial Response to the 2008–09 Financial Crisis*, 6 INT'L ORGS. L. REV. 499 (2009); Ulrich Garms, *Promoting Human Rights in the Administration of Justice in Southern Sudan: Mandate and Accountability Dilemmas in the Field Work of a DPKO Human Rights Officer*, 6 INT'L ORGS. L. REV. 581 (2009).

the intensive study of institutional design, and in particular the normative assessment of institutional structure, is a fundamental task in the history of public law.[12] This Article is a small contribution to the effort to reclaim the study of institutions for legal scholars.

Though coordination is a persistent historical problem of humanitarianism,[13] the United Nations has emerged as a central player in the coordination of disaster-relief activities, largely in the past two decades.[14] In 2005, following the highly complex response to the Indian Ocean tsunami and the crisis in Darfur, a comprehensive review of the humanitarian system recommended the designation of "lead agencies" in areas where coordination was weak.[15] The next year, the Inter-Agency Standing Committee finalized guidelines for such an approach, designating nine "cluster leads" in substantive areas where "there are clearly identified gaps in capacity."[16] The so-called "Cluster Approach" now claims to be the central method for coordinating humanitarian activity in countries experiencing overwhelming disasters. This system is the focus of the present Article, though any future arrangement will have to confront problems similar to those described here, unless the realities of humanitarian institutions are dramatically altered.

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[12] For one comprehensive effort to take a "public-law" approach to international institutions, see generally THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS (Armin von Bogdandy, Rudiger Wolfrum, Joachen von Bernstorff, Philipp Dann & Matthias Goldmann eds. 2010).

[13] It may be among the oldest and most intractable problems of modern humanitarianism. *See* Convention and Statute Establishing an International Relief Union, art. 2(2), July 12, 1927, 1932 L.N.T.S. 249 (no longer in force) (stating that the Union's purpose will be "to co-ordinate … the efforts made by relief organizations); Twenty-First Conference of the Red Cross, Istanbul, Turk., Sept. 1969, *Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations*, Res. XXVI, ¶ 3 (committing to "secure prompt action and effective allocation of resources and to avoid duplication of effort").

[14] The contemporary era began following the Kurdish refugee crisis caused by the first Gulf War. *See* Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46/182, Annex, ¶¶ 34, 36, U.N. Doc. A/RES/46/182 (Dec. 19, 1991); Tom J. Farer & Felice Gaer, *The UN and Human Rights: At the End of the Beginning*, *in* UNITED NATIONS, DIVIDED WORLD 240, 255–57 (2d ed., Adam Roberts & Benedict Kingsbury eds. 1993).

[15] COSTANZA ADINOLFI ET AL., U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS [OCHA], HUMANITARIAN RESPONSE REVIEW 51 (2005).

[16] Inter-Agency Standing Committee [IASC], *Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response*, 2 (Nov. 24, 2006) [hereinafter IASC, *Cluster Approach*]. By "substantive areas," I refer to operational sectors, such as food, shelter, camp management, and refugee protection.

This Article does four things. Following an introduction to the humanitarian system (Section II), it identifies a form of power defined as "institutional choice," and argues that the mere fact of assigning competences and tasks to one organization rather than another has practical consequences at all levels of action (Section III). Second, it relates the discourse of "accountability" in the Cluster Approach to the difficulties in controlling and correcting the effects institutional choice. In the process, the Article sketches an approach to institutions that melds normative and conceptual inquiry with a detailed, practical focus on the actual design and workings of institutions (Section IV). Third, it applies this method to critique the vertical, hierarchical accountability structure that was designed for the Cluster Approach, demonstrating that the system's operation in practice has forced a confrontation with its normative shortcomings (Section V).

Fourth, this Article accepts the invitation, posed by some recent reports from practitioners and consultants, to reimagine the system for humanitarian coordination in terms of a "horizontal" accountability structure (Section VI). Several observers of humanitarian practice have suggested that processes to encourage mutual monitoring, continuous "peer review," and experimentation might remedy the deficit in effective oversight and control. Drawing on insights from recent literature on "network governance" and "democratic experimentalism,"[17] this Article teases out the institutional and normative implications of such an approach. Though this approach is promising, it will be argued that a horizontal structure represents a high-risk strategy for humanitarian coordination, one which hitches the institution's legitimacy ever more tightly to its ability to include and respond to the voices of affected populations.

[17] For overviews of these concepts, see generally Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011); Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227.

## II. The Rise of the United Nations as a Humanitarian Coordinator

The Cluster Approach—the United Nations system for coordinating humanitarian activities—generates a framework loaded with the potential for the exercise of power, the expansion of organizational competences, and the generation of winners and losers. The reality is often more muted, as the power of the cluster system depends on its acceptance by relevant actors.[18] Moreover, the relative importance of the U.N. framework will likely increase in inverse proportion to the involvement of the state government, which retains the "primary responsibility" for coordinating relief on its territory.[19] This section will explain the evolution of the Cluster Approach in order to tease out the various ways in which this structure exercises emergency power. The following section then turns to a more in-depth analysis of the ways in which the structure facilitates or blocks the exercise of power by participating institutions.

The framework for the coordination of humanitarian affairs is managed by the Office for the Coordination of Humanitarian Affairs (OCHA), an office of the U.N. Secretariat. OCHA, first established by the General Assembly in 1991 and reorganized seven years later by the Secretary-General,[20] oversees United Nations humanitarian operations, as well as the coordination of humanitarian policy and advocacy.[21] Policy setting and best practices are developed by an Inter-Agency Standing Committee (IASC), which includes all the United

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[18] *See, e.g.*, Miriam Stumpenhorst, Rolf Stumpenhorst & Oliver Razum, *The UN OCHA Cluster Approach: Gaps Between Theory and Practice*, 19 PUB. HEALTH 587 (2011).

[19] On the primary role of the host state, see Eduardo Valenica-Ospina, U.N. International Law Commission [ILC], *Third Report on the Protection of Persons in the Event of Disasters*, ¶¶ 79–89, U.N. Doc. A/CN.4/629 (March 31, 2010) (surveying treaty provisions to this effect); J. Benton Heath, Note, *Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission*, 43 N.Y.U. J. INT'L L. & POL. 419 (2011) (arguing for a rule that balances the State's human rights obligations to provide aid with its primary role).

[20] In a 1991 resolution, the General Assembly directed the formation of a "strengthened Office of the United Nations Disaster Relief Coordinator." Strengthening the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46/182, Annex, ¶¶ 34, 36, U.N. Doc. A/RES/46/182 (Dec. 19, 1991). This became known as the Department of Humanitarian Affairs, and was reorganized into OCHA in 1998, a process that included an expansion of the office's mandate to capture broader coordination functions. OCHA, History of OCHA, http://www.unocha.org/about-us/who-we-are/history (last visited Jan. 26, 2012).

[21] *E.g.*, Valerie Amos, OCHA, *OCHA Organizational Diagram*, http://ochanet.unocha.org/p/Documents/UNOCHA%20Organigramme%202011.pdf (last visited Jan. 25, 2012).

Nations operational agencies, such as the High Commissioner for Refugees and the World Health Organization, and which extends "standing invitations" to a range of non-governmental organizations, the Red Cross, and the International Organization for Migration.[22] Country-level efforts are overseen by an in-country Humanitarian Coordinator, who is named by the head of OCHA and remains directly accountable to him or her.[23] The head of OCHA is an appointee of the U.N. secretary-general.[24]

The Cluster Approach developed in 2005 following complicated responses to the Indian Ocean tsunami and the crisis in Darfur.[25] This new method of disaster management was meant to solve several problems endemic to existing institutions.[26] In particular, reviewers complained of "the absence of clear operational accountability and leadership in key sectors."[27] The reforms introduced in 2005 responded to these complaints by introducing clearly defined leadership responsibilities to areas where responsibility had previously been murky.[28] The key innovation was the assignment of a "lead agency" for each sector, which "is responsible for mapping needs, planning, monitoring, coordination and reporting. It acts as the first port of call and provider of last resort."[29]

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[22] *See* GA Res. 46/182, *supra* note 20, Annex, ¶ 38 (establishing IASC). Current members of the IASC, which is crucial for setting policy on humanitarian coordination, are the Food and Agriculture Organization (FAO), OCHA, the Development Programme (UNDP), the Population Fund (UNFPA), the Human Settlements Programme (UNHABITAT), UNHCR, the Children's Fund (UNICEF), the World Food Programme (WFP), and WHO. IASC, *About the ISAC*, http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-about-default.
[23] *See generally* Inter-Agency Standing Committee [IASC], *Terms of Reference for the Humanitarian Coordinator*, Document Endorsed by IASC Working Group (May 4, 2009) [hereinafter IASC, *HC Terms of Reference*].
[24] GA Res. 46/182, *supra* note 20, Annex, ¶ 34.
[25] Jan Egeland, *Towards a Stronger Humanitarian Response System*, 24 FORCED MIGRATION REV., IDP SUPP. 4, 4 (2005).
[26] *See* ADINOLFI, *supra* note 15, at 46–52.
[27] Egeland, *supra* note 25, at 4.
[28] ADINOLFI, *supra* note 15, at 51.
[29] Egeland, *supra* note 25, at 4.

The Cluster Approach works at two levels: country-level and global.[30] At the global level, the clusters are standing bodies, where lead agencies coordinate standard-setting, dissemination of best practices, and capacity-building among responders.[31] Country-level clusters are assembled as needed when disaster strikes, and lead agencies are tasked with ensuring "adequate coordination mechanisms … adequate preparedness, as well as adequate strategic planning …."[32] Country clusters are often subdivided by geographic scale, establishing national-level clusters in the capital and sub-national clusters at the provincial or local level.[33] The "lead agency" of a local cluster is determined by the United Nations official overseeing operations (the "Humanitarian Coordinator"), and it is not necessarily identical to lead agencies at the global level.[34] However, the guidance document explaining the approach does express a preference that the global cluster lead be named a lead agency at the national level.[35]

Clusters are to be activated in all "major emergencies," the existence of which is judged by the scale of the needs, and by the complexity of the response.[36] In principle, the Humanitarian Coordinator establishes the clusters and selects cluster leads at the earliest possible opportunity—urged to be within forty-eight hours.[37] Lead agencies should be chosen based upon

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[30] IASC, *Cluster Approach*, *supra* note 16, at 2.
[31] *Id.* at 2–4.
[32] *Id.* at 10.
[33] IASC, HANDBOOK FOR RCS AND HCS ON EMERGENCY PREPAREDNESS AND RESPONSE 35 (2010).
[34] IASC, *Cluster Approach*, *supra* note 16, at 11–13.
[35] *Id* at 5; *see also* IASC, *Operational Guidance on Designating Sector/Cluster Leads in Major New Emergencies*, at 2 (May 2007) (stressing flexibility in selecting lead agencies) [hereinafter IASC, *Designating Cluster Leads*].
[36] IASC, *Designating Cluster Leads*, *supra* note 35, at 1 ("For IASC operational purposes, a 'major new emergency' is defined as any situation where humanitarian needs are of a sufficiently large scale and complexity that significant external assistance and resources are required, and where a multi-sectoral response is needed with the engagement of a wide range of international humanitarian actors.").
[37] IASC provides for a six-step standard operating procedure for designating cluster leads: (1) consultations with local government, U.N. agencies, NGOs, and other IOs to determine capacities, leaders, cross-cutting issues, and needed OCHA support; (2) proposal is drafted by the humanitarian coordinator and forwarded to New York; (3) the head of OCHA reviews the proposal with the members of IASC; (4) the OCHA head ensures that IASC agrees at the global level; (5) OCHA informs the in-country coordinator of its decision; (6) the coordinator informs local government and country-level partners. IASC, *Designating Cluster Leads*, *supra* note 35, at 4. This process is designed to take forty-eight hours; it is not clear how often practice meets this expectation.

"existing operations and capacities" and after consultations among the agencies operating at country level (see Table 1).[38] A practice has developed of appointing NGOs to co-chair clusters alongside a U.N. agency, in order to reduce U.N. dominance of the cluster system, prevent conflicts of interest, and generally legitimate the system in the eyes of NGOs.[39] IASC policy requires that membership within the clusters at country level be held open to groups with "real operational capacities" in the relevant sectors.[40]

Although the Cluster Approach does not create any new legal relationships between lead agencies and other humanitarian actors, it imposes on lead agencies the duty to ensure a range of conditions.[41] In particular, cluster leads are responsible for ensuring inclusion of "key partners," establishment of "appropriate coordination mechanisms," and interaction with national actors, including state officials.[42] Moreover, clusters "should ensure adherence to norms, policies and standards agreed at the global level."[43] Cluster lead organizations also retain the ultimate responsibility for ensuring that so-called "cross-cutting issues," such as gender, are properly taken into account,[44] a problem that has plagued many responses.[45] Finally, IASC documents state that the cluster lead is intended to take a representative role, acting as a voice for the

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[38] IASC, *Designating Cluster Leads*, *supra* note 35, at 2.
[39] *E.g.*, DOMITILLE KAUFFMANN & SUSANNA KRÜGER, IASC CLUSTER APPROACH EVALUATION, 2ND PHASE, COUNTRY STUDY: MYANMAR 30 (2010). In some countries, this has failed due to unexpected resistance from NGOs. In Haiti, "[n]either NGOs nor the government (with some exceptions) wanted to cofacilitate clusters. Reasons … included Haiti's still shaky political landscape, fear of exposure to public scrutiny and critique, and the NGOs' worry of decreasing their scope for advocacy vis-à-vis the United Nations." ANDREA BINDER & FRANÇOIS GRÜNEWALD, IASC CLUSTER APPROACH EVALUATION, 2ND PHASE: COUNTRY STUDY—HAITI 30 (2010).
[40] IASC, *Designating Cluster Leads*, *supra* note 35, at 3.
[41] *See generally* IASC, *Generic Terms of Reference for Sector/Cluster Leads at the Country Level* [hereinafter IASC, *Cluster Lead TOR*].
[42] IASC, *Cluster Approach*, *supra* note 16, at 7.
[43] *Id.* at 6.
[44] *Id.* at 7 (noting this as a "particular responsibility" of lead agencies); IASC, *Designating Cluster Leads*, *supra* note 35, at 1.
[45] STEETS, *supra* note 6, at 56–58.

## TABLE 1: Global and Country-Level Cluster Lead Agencies

| Cluster and Cross-Cutting Issues | Global Cluster Lead | Cluster Lead: Haiti after 2010 quake | Cluster Lead: Burma after Cyclone Nargis |
|---|---|---|---|
| *'Response areas'* | | | |
| Agriculture | FAO | FAO | FAO |
| Camp Coordination/ Camp Management | UNHCR (conflict) & IOM (non-conflict) | IOM | *N/A* |
| Early Recovery | UNDP | UNDP | Resident Coordinator |
| Education | UNICEF & Save the Children | UNICEF | UNICEF & Save the Children |
| Emergency Shelter | UNHCR & IFRC | IFRC | UNHABITAT |
| (Food Delivery) | *N/A* | WFP | WFP |
| Health | WHO | WHO & Pan-Am. Health Organization | WHO & Merlin |
| Nutrition | UNICEF | UNICEF | UNICEF |
| Protection | UNHCR | Office of the High Commissioner for Human Rights, UNICEF (*child*) and UNFPA (gender-based violence) | UNICEF & Save the Children (*referred to as protection of children and women*) |
| Water and Sanitation | UNICEF | UNICEF | UNICEF |
| *'Service Clusters'* | | | |
| Telecommunications | OCHA, WFP & UNICEF | WHO & PAHO | WFP |
| Logistics | WFP | WFP | *N/A* |
| *'Cross-cutting issues'* | | | |
| Age | HelpAge Int'l | *N/A* | *N/A* |
| Environment | UNEP | *N/A* | |
| Gender | Co-chairs of IASC Sub-Working Group on Gender, in 2012: UNICEF, UNHCR, Relief Int'l & Int'l Medical Corps | *N/A* (*but note the role of gender-based violence in the protection clusters*) | *N/A* (*but note the role of gender-based violence in the protection clusters*) |
| HIV/AIDS | UNAIDS | *N/A* (*see health*) | *N/A* (*see health*) |

**Sources:** JULIA STEETS ET AL., CLUSTER APPROACH EVALUATION 2: SYNTHESIS REPORT (2010); ROBERT TURNER ET AL., INTER-AGENCY REAL TIME EVALUATION OF THE RESPONSE TO CYCLONE NARGIS (2008); IASC, *Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response* (Nov. 24, 2006); IASC, Sub-Working Group on Gender in Humanitarian Action, http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-subsidi-tf_gender-default; OneResponse, Haiti, http://oneresponse.info/Coordination/ClusterApproach/Pages/Haiti.aspx.

interests of organizations operating within its sector in meetings with higher-level U.N. officials and other cluster leads.[46]

Cluster activities largely take place through regular meetings of participants.[47] The goals of such meetings include information-sharing, feedback, coordination on strategy and activities, and the preparation of joint funding appeals.[48] A recent evaluation notes, "As such, clusters act as platforms for achieving coordination, as well as elements that go beyond mere coordination, such as peer review, learning, or the organization of a common response."[49] Similar meetings took place under older coordination arrangements, but the Cluster Approach is intended to improve on these models by identifying clear leadership, by connecting the in-country meetings to a global framework, and by designating cluster leads as "providers of last resort."[50]

The latter concept—provider of last resort—remains notoriously unclear and under-used, and it constitutes a barrier to the full implementation of the Cluster Approach. Where "critical gaps" appear in the response, the cluster lead is required to either convince a partner to address the problem, provide the service itself, or work with the U.N. representative and donors to obtain further funding and resources.[51] Reviewers have noted that this concept has generally failed to ensure that such gaps are addressed,[52] but in recent responses the concept appears to have been

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[46] IASC, *Cluster Lead TOR*, *supra* note 41. Lead agencies also serve as members of the U.N. "Humanitarian Country Team," which also includes the U.N. humanitarian coordinator and national authorities if possible. IASC, HANDBOOK, *supra* note 33, at 35–36.
[47] STEETS, *supra* note 6, at 24.
[48] *Id.* at 24–25.
[49] *Id.* at 25.
[50] *Id.*
[51] IASC, *Cluster Approach*, *supra* note 16, at 10; IASC, *Operational Guidance on the Concept of 'Provider of Last Resort'* (June 20, 2008) [hereinafter IASC, *Guidance on Last Resort*] (affirming the responsibility of cluster leads to fill critical gaps or, where resources fail, work with the national government, the U.N., and donors to ensure an effective response).
[52] STEETS, *supra* note 6, at 56 ("only 26% of survey respondents indicated that they had experienced situations in which a cluster lead agency had acted as provider of last resort"); International Council of Voluntary Agencies [ICVA], *The Roll-Out of the Cluster Approach in the Democratic Republic of Congo* (March 2006) (providers "were not stepping forward quickly enough").

employed more readily.[53] To the extent the concept of "provider of last resort" is operationalized, the choice of cluster leads becomes all the more significant.

The framework for accountability established by the Cluster Approach is examined in a later section.[54] But it must be noted at the outset that ruptures in the accountability chain will not necessarily or even generally lead to a system-wide breakdown. In response to a deficit in central leadership, actors tend to feel less accountable to the Humanitarian Coordinator.[55] But the agencies within the cluster system remain active, and, importantly, retain their status as cluster leads.[56] In this environment, it is possible that certain clusters will be able to maintain influence despite the breakdown in authority at higher levels. When this happens, we may think of the cluster system less as consolidating authority within the central actors of the OCHA system, but rather as bestowing additional leadership capacities on the cluster leads themselves, potentially without the accompanying accountability structures.

## III. The Power of Humanitarian Coordination: Operational and Institutional Aspects

It should be clear that the cluster system does not attempt to wholly unify humanitarian policy, either globally or at the country level. Despite the title of the system's website, the aim of the Cluster Approach is not "one response," but something like "complimentary responses."[57]

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[53] *E.g.*, IASC, *Response to the Humanitarian Crisis in Haiti*, at 12 (2010) (noting that IOM acted as the manager of last resort in at least one IDP camp); RAJ RANA & JEREMY CONDOR, EVALUATION OF THE INTERNATIONAL ORGANIZATION FOR MIGRATION'S ONGOING ACTIVITIES TO SUPPORT THE FLASH APPEAL FOR THE HAITI EARTHQUAKE AND CHOLERA OUTBREAK 15 (stating that IOM's work with water and sanitation in the camps has "reinforced IOM's credibility as the CCCM Cluster lead, [and] committed the organization to its role as the provider of last resort. This is a commitment rarely implemented by other Cluster leads, and has to be strongly applauded."). In September of 2010, IOM was "acting as a Camp Management Agency … in 120 camps around Port-au-Prince and [elsewhere]." Camp Management Operations Unit [CMO], IOM & Camp Coordination Camp Management Cluster, *CMO Weekly Report, 117–17 September: CMO in Action*, http://cmohaiti.wordpress.com/.

[54] *See infra* Section V.

[55] *See, e.g.*, KAUFFMANN & KRÜGER, MYANMAR, *supra* note 39, at 38–39 (noting that actors did not feel accountable to the HC).

[56] *Cf. id.* at 39 (noting the rise of informal accountability structures within clusters).

[57] *See* United Nations, OneResponse, http://oneresponse.info. In a sign of just how much symbols matter in this profession, the Second Phase of cluster evaluations reports that some agencies are frustrated with the "one response" branding, and it suggests a name change. STEETS ET AL., *supra* note 6, at 65.

But, in navigating the tension between collaboration and diversity, the U.N. framework creates some important opportunities for the exercise of power. For example, the clusters and the IASC itself adopt standards, best practices, and operational guidelines that may affect the accepted range of practices in future emergencies.[58] Or the system might be examined as a force that legitimates the "mission creep" of some organizations into areas not expressly covered by their mandates.[59] This investigation cannot possibly cover all aspects of the U.N. framework, and there is much left to explore.

This section focuses on the potential problems associated with the system's emphasis on leadership and on appointing "lead agencies." This mechanism resembles a form of *institutional choice*, which inevitably affects the way that a given problem will be addressed.[60] First, the relative influence of leaders over policy and funding risks pathologically harmonizing policy rather than allowing for experimentation and competition. Second, by selecting a "lead agency" to manage the response in each sector, the Cluster Approach exercises a form of institutional choice that magnifies the power of a particular agency and brings its unique practices and principles to bear on an affected population. Each aspect pulls in a different direction, thus emphasizing the problem of ensuring an appropriate balance between shared policy and

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[58] As with most forms of international standard-setting, the proliferation of best practices may serve to legitimate certain methods while freezing out organizations that take alternative approaches. *See* Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process*, THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOR OF IAN BROWNLIE 323, 338–42 (Guy S. Goodwin-Gil & Stefan Talmon eds., 1999).

[59] *See* ERNST B. HAAS, WHEN KNOWLEDGE IS POWER: THREE MODES OF CHANGE IN INTERNATIONAL ORGANIZATIONS 60 (1991) (noting the ability of IOs to draw jurisdictional boundaries in complex operations).

[60] The concept of "institutional choice" is developed most fully in other contexts. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY (1994). Gregory Shaffer and Joel Trachtman have recently discussed institutional choice in their analysis of WTO law, noting that the design of legal structures and the interpretation of rules may direct decisions to different "social decision-making processes," or institutions, and thereby ultimately affect social welfare. Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT'L L. 103, 105 (2011). This Article is sympathetic to this definition insofar as it identifies a type of power, but in turning to the accountability and legitimation of this power in subsequent sections, this paper veers away from the type of analysis that Shaffer and Trachtman undertake.

"legitimate difference."[61] This problematic will set the stage for investigating questions of accountability and legitimacy.

### *A. Trampling Diversity? Harmonization of Policy in the Clusters*

Because the Cluster Approach is intended to coordinate policies among various actors working in the same sector, its very nature gives rise to fears that alternative views will be abandoned, marginalized, or co-opted. In addition, the system might magnify the influence of certain parties. The inclusion of development actors, peacekeeping forces, military personnel, or governments in cluster meetings may be important from the perspective of increased coordination. But, to the extent these actors influence policies, this practice threatens humanitarian principles of neutrality and independence.[62] This part addresses these concerns through a handful of examples drawn from the life of the cluster system.

To understand the delicate balancing act between harmonization and difference, one must appreciate the wide diversity among humanitarian actors. Over the decades, aid agencies have developed divergent policies toward peacemaking, human rights, intervention, civil-military relations, long-term economic development, and anything else that might fall under the heading of "politics." For now it suffices to note that many believe diversity in relief policy to be advantageous, and thus the pressure to coalesce around a single strategic plan raises some concerns.[63]

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[61] On this concept, see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 247–50 (2004); *see also* Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 L. & CONTEMP. PROBS. 263 (2005).

[62] *See, e.g.*, Steering Committee for Humanitarian Response [SCHR], *Position Paper on Humanitarian-Military Relations*, at 11 (January 2010) ("Military presence in cluster meetings (in particular protection) may inhibit the free exchange of information amongst humanitarian organisations, and give rise to the perception of a common strategy and objectives between humanitarians and the military."); STEETS, ET AL., *supra* note 6, at 64.

[63] The Global Humanitarian Platform, a group of U.N. and non-U.N. humanitarian organizations, issued a statement on partnership and coherence in 2007 that emphasizes principles of equality among organizations, transparency, results-based action, responsibility, and complementarity. On the latter, the statement notes, "The diversity of the humanitarian community is an asset if we build on our comparative advantages and complement each other's

Standardization in the cluster system may work through a number of different dynamics. Understanding the cluster approach as a "network" of like-minded actors working for a common purpose raises the possibility that participants will be socialized through repeated interaction into taking a common position.[64] In his study of transgovernmental networks, Kal Raustiala identifies an alternative rational-choice account, whereby network arrangements increase the benefits of and incentives for policy convergence.[65] Both of these dynamics may be reflected in the cluster system.

But the presence of powerful donors creates additional, and much more overt, incentives to standardize policy. For example, an MSF review of cluster operations noted that, in Uganda, the European Community Humanitarian Office (ECHO) "required 'partners' to fit their proposals into existing cluster strategies before granting funding."[66] There is evidence that donors continue to view participation in clusters as an important aspect in funding decisions.[67] In addition, the cluster system may be changing donors' funding habits, as donors begin to delegate allocation decisions to humanitarian coordinators and cluster leaders.[68] Though OCHA has warned against this practice in some cases,[69] the use of pooled funds continues.[70] This form

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contributions." Global Humanitarian Platform [GHP], *Principles of Partnership* (July 12, 2007) [hereinafter *Principles of Partnership*].

[64] SLAUGHTER, *supra* note 61, at 198–200. *See generally* Jeffrey T. Checkel, *International Organizations and Socialization in Europe: Introduction and Framework*, 59 INT'L ORG. 801 (2005).

[65] Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 62–68 (2002). This understanding draws on Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CA. L. REV. 479 (1998).

[66] Katharine Derderian et al., *UN Humanitarian Reforms: A View from the Field*, HUMANITARIAN EXCHANGE MAG. June 2007, http://www.odihpn.org/humanitarian-exchange-magazine/issue-39/un-humanitarian-reforms-a-view-from-the-field.

[67] *See, e.g.*, U.K. DEPT. FOR INT'L DEV. [DFID], MULTILATERAL AID REVIEW 10 (March 2011), *available at* http://www.dfid.gov.uk/Documents/publications1/mar/multilateral_aid_review.pdf (stating that organizations are to be evaluated in part on their "partnership behavior" and coordination functions).

[68] Oxfam International, *Missing Pieces? Assessing the Impact of Humanitarian Reform in Pakistan*, at 8 (October 2009) (arguing that this arrangement is inappropriate and premature, adding "additional layers of time and bureaucracy to the disbursement" of funds).

[69] *Id.*

of giving greatly empowers cluster leaders to enforce policies developed within the cluster system,[71] and increases the risk that they might become responsive to powerful donors.

One problem of standardization centers on the adoption of certain performance measures. In Chad, the Water and Sanitation (WASH) cluster employed Sphere standards for the provision of services.[72] The Sphere Project provides a set of indicators, which purport to be based on international human rights standards, providing for minimum quantities of clean drinking water and other services.[73] Because the indicators as set at the global level tended to strain natural resources and exacerbate local conflicts, some NGOs pressed for these to be adapted and changed to fit the Chadian context, a modification resisted by the WASH cluster lead.[74] This experience may be especially problematic, not only because Sphere is used to hold NGOs accountable to their donors and thus may work substantial influence over the response,[75] but also because it shows the failure of the cluster system to develop responsive, context-sensitive metrics for performance evaluation.

Criticism that the clusters politicize aid might have been most common in the early years of the system. The MSF review notes several examples where cluster funds were used primarily to further the political goals of the peace-building efforts, including in Côte d'Ivoire, where the overwhelming majority of CERF funds were used in and around a town that suffered from anti-

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[70] Most notably, NGOs that partner with U.N. agencies or IOM gain access to the Central Emergency Response Fund (CERF) of the United Nations, which they could not access on their own. CERF, *Central Emergency Response Fund Facts*, at 2, http://ochanet.unocha.org/p/Documents/FactSheet_AH.pdf.

[71] *See* Derderian, *supra* note 66 ("Despite some checks and balances (such as the Pooled Fund Board, on which NGOs and donors have a presence), UN cluster leads wield significant power in inviting participants to meetings, submitting proposals and disbursing … funding.").

[72] FRANÇOIS GRÜNEWALD & BONAVENTURE SOKPOH, IASC CLUSTER APPROACH EVALUATION, SECOND PHASE COUNTRY STUDY: CHAD 31 (2010).

[73] *See generally* SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN HUMANITARIAN RESPONSE (3d ed., 2011) [hereinafter SPHERE HANDBOOK]. For problems in the development and application of Sphere indicators, see Margaret L. Satterthwaite, *Indicators in Crisis: Rights-Based Humanitarian Indicators in Post-Earthquake Haiti*, 43 N.Y.U. J. INT'L L. & POL. 865 (2011).

[74] GRÜNEWALD & SOKPOH, *supra* note 72, at 31.

[75] *See* Satterthwaite, *supra* note 73, at 963 ("once codified … the debates underlying what it means to provide quality assistance … tend to retreat from view").

U.N. riots.[76] Other aid groups have noted the risk that information shared in clusters will be appropriated and used by the military, thus risking the neutrality of humanitarian actors, and potentially frustrating access.[77]

In many cases, the fear that policies will become overly rigid is more theoretical than real. In the response to the 2008 hurricanes and tropical storms in Haiti, for example, the response experienced the opposite problem, as few common plans or strategies were implemented.[78] But where the system exerts substantial influence either directly or via pressure from donors, its ability to trample legitimate diversity will become a cause for concern.

*B. Problematizing Diversity: Variance among Leaders*

The diversity of participating actors in the Cluster Approach can also become a problem through the leadership functions of the system. In setting global leaders and country-level "lead agencies," the cluster system engages in a process of institutional choice that works a real effect on institutional structures, budgets, and, most importantly, affected populations. Humanitarian organizations take a range of divergent approaches to neutrality, independence, or the entire idea of principled action.[79] Organizational cultures, funding structures, and competence add additional dimensions to the diversity among actors.[80]

As a facilitator and coordinator of cluster meetings, a lead agency may wield considerable power to exclude or include certain actors. This dynamic is currently playing out in Haiti, where a group of human rights advocates, acting on behalf of women and girls residing in

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[76] Derderian, *supra* note 66.
[77] SCHR, *supra* note 62, at 11.
[78] BINDER & GRÜNEWALD, *supra* note 39, at 30.
[79] *See generally* Nicholas Leader, *The Politics of Principle: The Principles of Humanitarian Action in Practice*, Humanitarian Policy Group Report No. 2 (March 2000); Kate Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law*, Humanitarian Policy Group Report No. 5 (March 2000).
[80] For a snapshot of the relative skills of different agencies working in Haiti, see Vince Beiser, *Organizing Armageddon: What We Learned from the Haiti Earthquake*, WIRED, May 2010, http://www.wired.com/magazine/2010/04/ff_haiti/all/1.

twenty-two different camps for displaced persons, have argued that the gender-based violence sub-cluster "refuses to include Haitian grassroots women's groups to meaningful participate in the planning and implementation of activities designed to address sexual violence."[81] This same coalition has succeeded in obtaining "precautionary measures" against Haiti from the Inter-American Commission for Human Rights, which called on the country in 2010 to ensure, *inter alia*, that grassroots organizations participate effectively in coordination arrangements.[82]

The choice of a cluster lead takes on an operational dimension through the lead agency's role as a "provider of last resort."[83] Where a single agency is designated to fill any operational gaps, its institutional practices and principles will be that much more likely to inform conditions on the ground. This can be particularly important where the difference between "status-based" and "needs-based" treatment is concerned,[84] as some organizations, particularly UNHCR, are committed by their mandate to a status-based approach.[85] While few disasters have seen cluster leads asserting this role,[86] it is possible that the 2010 Haiti earthquake and other examples will herald an increasing assertion of the provider-of-last-resort concept.[87]

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[81] MADRE et. al, *Gender-Based Violence Against Haitian Women & Girls in Internal Displacement Camps: Submission to the United Nations Universal Periodic Review, Republic of Haiti*, ¶ 20, 12th Sess., Working Group on the Universal Periodic Review, Hum. Rts. Council, Oct. 3–14, 2011, *available at* http://ijdh.org/wordpress/wp-content/uploads/2011/03/UPR-GBV-Final-4-4-2011.pdf.

[82] Women & Girls Residing in 22 Camps for Internally Displaced Persons in Port-au-Prince, Haiti, PM 340/10 (Dec. 22, 2010), http://www.oas.org/en/iachr/decisions/precautionary.asp. Note that, in this dispute, the victims' advocates advance the novel argument that the sub-cluster constitutes an "agent" of the state under the Articles on State Responsibility, *Articles on the Responsibility of States for Internationally Wrongful Acts*, art. 5, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83 (Jan. 28, 2002), and that the country is thus responsible for its failures. The Commission granted precautionary measures, but did not appear to directly address this point, which, if affirmed, could significantly alter the dynamics of the response.

[83] For an elaboration of this concept, see *supra* text accompanying notes 50–53.

[84] On this, see GRÜNEWALD & SOKPOH, *supra* note 72, at 31; STEETS ET AL., *supra* note 6, at 51.

[85] *See* Statute of the U.N. High Commissioner for Refugees, G.A. Res. 428 (V), Annex, ¶ 2 (Dec. 14, 1950).

[86] *E.g.*, KAUFFMANN & KRÜGER, *supra* note 39, at 14 (noting that lead agencies "acted as 'advisor of last resort,' not as 'provider of last resort' as no financial resources were available"); SUSANNA KRÜGER & JULIA STEETS, IASC CLUSTER APPROACH EVALUATION, SECOND PHASE COUNTRY STUDY: THE OCCUPIED PALESTINIAN TERRITORIES 22 (2010) (noting the same tendency).

[87] *See supra* note 53. In addition, an agency's status as cluster lead in a particular field may generate greater donations for that purpose, thus increasing the agency's on-the-ground involvement without having to invoke the concept.

The consequences of institutional choice may be expressed through the example of camp coordination and camp management (CCCM).[88] Over time, camps of displaced persons can resemble "sophisticated polities," requiring a range of municipal-like services governing infrastructure, governance arrangements, markets, and police.[89] Agencies involved in CCCM are responsible for, among other functions, coordinating and monitoring service delivery, maintaining infrastructure, and "establishing governance and community participation/mobilisation mechanisms."[90] Camp coordinators are responsible for macro-level strategy, for monitoring the management of camps, and, crucially, for developing camp closure and "exit strategies."[91] This latter power involves the important tension between maintaining lives and livelihoods in the camp, and the general policy of returning or resettling displaced persons as soon as possible.

The International Organization for Migration (IOM), a treaty-based international organization that is formally independent from the United Nations, is a frequent cluster leader in this field.[92] A relative newcomer to camp coordination and management, IOM has at times been the target of other relief agencies and human rights groups,[93] and its lack of a clear mandate for

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[88] On the general concept of CCCM, see generally NORWEGIAN REFUGEE COUNCIL & CAMP MANAGEMENT PROJECT, THE CAMP MANAGEMENT TOOLKIT (2008) [hereinafter CM TOOLKIT].

[89] *Cf.* Ralph Wilde, Qis Custodiet Ipsos Custodes?*: Why and How UNHCR 'Development' Refugee Camps Should Be Subject to International Human Rights Law*, 1 YALE HUM. RTS. & DEV. J. 107, 108 (1998) (describing this phenomenon in the case of longer-term "development camps"); *see also* Mark Pallis, *The Operation of UNHCR Accountability Mechanisms*, 37 N.Y.U. J. INT'L L. & POL. 869 (2005) (elaborating on Wilde's account); Satterthwaite, *supra* note 73, at 874 (noting that humanitarians may "govern the putatively ungoverned—those whose governments have failed, become predatory, or can no longer be counted on to provide protection").

[90] CM TOOLKIT, *supra* note 88, at 28.

[91] *Id.* at 30–31.

[92] The organization is a "global cluster lead" for CCCM in non-conflict situations. IASC, *Cluster Approach*, *supra* note 16, at 2. It has served as a CCCM lead in at least four disasters, and has led other clusters as well. IOM and the Cluster Approach, IOM Doc. 05/EPC-CLUSTER/0807, *available at* http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/mepmm/op_support/epc_clusters_070808.pdf.

[93] *E.g.*, Tim Morris, *IOM: Trespassing on Others' Humanitarian Space?*, FORCED MIGRATION REV., Jan. 2005, at 43; Editorial, *IOM, Darfur, and the Meaning of Undermining (MOU)*, TALK BACK (Int'l Council Voluntary Agencies, Geneva, Switz.), Oct. 4, 2004, http://www.icva.ch/doc00001253.html#iom.

protection or humanitarian action has been cause for some concern.[94] This critique should not be overstated, as the agency has formally adopted certain principled guidelines,[95] and IOM has been praised for many of its humanitarian activities.[96] But it is widely acknowledged that IOM operates with a much more "pragmatic" or "technical" orientation, placing less emphasis on broadly phrased principles or theoretical discussion.[97] The organization has been noted for its view "that the organization cannot tell governments what they should do or how to do it."[98]

In Haiti following the 2010 earthquake, where IOM acts as a cluster lead, the organization has weathered criticism for failing to stop government-led closures of displaced-person camps.[99] The organization's alleged cooperation in some eviction proceedings raises the criticism that the organization is legitimating these evictions.[100] In 2011, newly elected Haitian President Michel Martelly enlisted IOM in his program (the "16–6 Plan") to close six camps

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[94] *See, e.g.*, Melanie Teff & Emilie Parry, *Haiti: Still Trapped in Emergency Phase*, REFUGEES INTERNATIONAL, Oct. 6, 2010, http://www.refugeesinternational.org/policy/field-report/haiti-still-trapped-emergency-phase.

[95] IOM was an early adopter of the Guiding Principles on Internal Displacement, which purport to set out the relevant international legal obligations with respect to internally displaced persons. *Internally Displaced Persons: IOM Policy and Activities*, ¶ 10, IOM Doc. MC/INF/258 (Nov. 18, 2002).

[96] *E.g.*, RANA & CONDOR, *supra* note 53.

[97] *See, e.g.*, Elizabeth Farris and Sara Ferro-Ribeiro, *Protecting People in Cities: The Disturbing Case of Haiti*, DISASTERS (forthcoming 2012) (emphasizing the differences between UNHCR and IOM in approaches to the protection of displaced persons).

[98] BJÖRN BENGTSON ET AL., SWEDISH INSTITUTE FOR PUBLIC ADMINISTRATION, STUDY OF THE INTERNATIONAL ORGANIZATION FOR MIGRATION AND ITS HUMANITARIAN ASSISTANCE 13 (2008).

[99] Ellie Happel, *Returning to Zero: Forced Evictions in Haiti's Displaced Persons Camps*, CANADA HAITI ACTION NETWORK, March 1, 2012, http://canadahaitiaction.ca/content/returning-zero-forced-evictions-haitis-displaced-persons-camps.

[100] *Id.* (arguing that IOM "merely assists the relocation of camp residents to equally poor conditions" and that IOM "reinforces the power disparity between landowners and the displaced" by failing to include residents in negotiations with the government regarding the closure of camps); Mark Snyder, *IOM's Direct Participation in Forced Evictions Raises Many Questions*, CANADA HAITI ACTION NETWORK, April 5, 2012, http://www.canadahaitiaction.ca/content/ioms-direct-participation-forced-evictions-raises-many-questions.

A number of sources focus on the relocation of more than a thousand displaced persons from a camp thought to be dangerous into a "barren, windswept" valley known as Corail Cesselesse. Deborah Sontag, *Years after Quake, Safe Housing Is Dream for Multitudes*, N.Y. TIMES, Aug. 16, 2012, at A1 (noting that "some disaster experts consider [the move] to have been a mistake, imposed on a group without options"); *Displaced Haitians: 'We Can't Continue in This Situation Anymore*, DEMOCRACY NOW!, July 12, 2010, http://www.democracynow.org/2010/7/12/displaced_haitians_we_cant_continue_in (noting that the camp population was originally told that this would be a temporary situation). In another notorious case, after attempting to relocate the residents of one camp, IOM employees allegedly deposited a number of displaced persons at the Delmas police station. Justin Podur, *The Eviction of Barbancourt 17*, ZNET, October 5, 2011, http://www.zcommunications.org/the-eviction-of-barbancourt-17-by-justin-podur.

within his first 100 days in office.[101] The program has since been criticized as an unsustainable effort, which has not provided displaced residents with sufficient resources to find livable housing elsewhere.[102] A coalition of human rights advocates has sought preliminary measures from the Inter-American Commission of Human Rights, requesting a moratorium on evictions until a more sustainable plan is developed.[103]

It is not clear which other agencies would have done differently if placed in the position of IOM. Many of the problems experienced by IDP camps in Haiti are likely the result of the complexity of the response, the enormity of the problem, and the longstanding problems with corruption and land-rights issues in the country, which certainly predate the earthquake. But the unique normative outlook of IOM—and its relative newness in large-scale humanitarian operations—makes it reasonable to suppose that the dynamics of institutional choice constitute at least one cause of the realities facing displaced persons in Haiti today. This hypothesis gives rise to the question of how the power of institutional choice might be monitored and checked.

## IV. Accountability, Legitimacy and Institutional Design

In confronting the power of humanitarian actors and institutions, the profession has increasingly engaged in a wide-ranging and often confused discourse of "accountability."[104] Without firm conceptual underpinnings, any attempt to address the power of humanitarian

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[101] Nelson A. King, *Launch of Ambitious Housing Plan for Haiti*, CARIBBEAN LIFE, October 12, 2011, http://www.caribbeanlifenews.com/stories/2011/10/2011_10_10_nk_martelly.html.

[102] Kevin Edmonds, *Unsustainable Solutions to Haiti's Housing Crisis*, NORTH AMERICAN CONGRESS ON LATIN AMERICA, July 20, 2012, http://nacla.org/blog/2012/7/20/unsustainable-solutions-haiti%E2%80%99s-housing-crisis (arguing that the 16-6 initiative has succeeded in clearing some major camps, but only at the cost of creating a more diffuse housing problem); *Haiti's Housing Crisis: Human Rights Investigation Finds Forty-One Percent of Families Relocated under Haitian Government's Housing Program Live in Worse Conditions than Before Earthquake*, UNDER TENTS, July 27, 2012, http://undertentshaiti.com/?p=227.

[103] Institute for Justice and Democracy in Haiti, *Letter to IACHR on Forced Evictions in Haiti and Request for New Precautionary Measures*, Feb. 27, 2012, http://ijdh.org/archives/25449.

[104] *See generally* NGO ACCOUNTABILITY: POLITICS, PRINCIPLES AND INNOVATIONS (Lisa Jordan & Peter van Tuijl eds., 2006); Michael Barnett, *Humanitarianism Transformed*, 3 PERSP. ON POL. 723 (2005); Jem Benedell, *Debating NGO Accountability*, U.N.-NGLS Development Dossier, U.N. Doc. UNCTAD/NGLS/2006/1 (August 2006); *Humanitarian Accountability*, 52 HUMANITARIAN EXCH. MAG. 1 (October 2011).

agencies risks being swept away in the conflicting terminology of practitioners and observers, which often conceals as much as it clarifies. Without losing sight of the real-world problems identified in the prior sections, this interlude provides these concepts with some theoretical backing. With a stronger understanding of accountability as a persistent institutional problem,[105] we can see how shifting approaches to accountability carry broader lessons regarding the legitimation of humanitarian enterprises, and solve old normative challenges even as they create new ones.

### *A. A Broad Approach to the Accountability of Networks*

In an effort to best mirror the wide-ranging uses in humanitarian practice, this investigation takes a broad approach to the concept of accountability. Following Grant and Keohane, I understand accountability to mean "that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met."[106] This definition, as employed by its authors, takes an inclusive approach to what constitutes a "sanction," as well as to what constitutes a "right … to judge," including a range of market and reputational mechanisms within this definition.[107] And Grant and Keohane's view might yet be too restrictive unless the authors' reference to "a set of standards" is understood

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[105] For an effective approach that understands accountability as a "question," rather than a "clear and unequivocal goal," see Janice Gross Stein, *Humanitarian Organizations: Accountable—Why, to Whom, for What, and How?*, *in* HUMANITARIANISM: POWER, POLITICS, ETHICS 124, 125 (Michael Barnett & Thomas G. Weiss eds., 2008).

[106] Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29 (2005).

[107] *Id.* at. 35–37. An inclusive approach is also adopted by other writers. *See, e.g.*, CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 306–07 (3d ed. 2009) (allowing that network forms may allow for a form of accountability, though noting this is harder to secure); Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND DIFFERENCES 115 (Michael Dowdle ed., 2006); Aaron Bloom, Note, *The Power of the Borrower: IMF Responsiveness to Emerging Market Economies*, 43 N.Y.U. J. INT'L L. & POL. 767 (2011) (assessing the IMF in terms of market-type accountability).

broadly, to allow for situations where no clear standards are held intersubjectively, or when those standards are in flux.[108]

This broad definition has been criticized as pitching too big a tent, threatening to lose the essential features that make accountability unique among various institutional control mechanisms.[109] But the broad definition is helpful for the present purposes, as it enables an assessment of the competing visions of accountability facing the Cluster Approach. Recent reform proposals have emphasized "horizontal" accountability and "peer review" as forms of accountability.[110] It is less important to second-guess the labeling of these approaches than it is to determine their viability as alternative institutional models. This is particularly true where, as I suggest below, a discourse over accountability mechanisms can be interpreted as a competition among alternative models for legitimating a particular system of governance.

What we mean by the "accountability" of the cluster system is itself difficult to grasp. As noted above, the *raison d'etre* of the Cluster Approach is improving leadership and accountability across all sectors of the response.[111] The primary sites for accountability seem to be the constituent NGOs and U.N. agencies in the system, not the system itself. But, as we have seen, merely by constituting such a system, the Cluster Approach itself becomes an institution endowed with some power, and we should rightly ask how the system may be forced to incorporate disregarded voices or to correct for any errors or misjudgments it committed when

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[108] *See* Steve Charnovitz, *Accountability of Nongovernmental Organizations (NGOs) in Global Governance*, Geo. Wash. U. Sch. L. Pub. L. & Lgl. Theory Working Paper No. 145 (April 19, 2005), at 7–8 (criticizing Grant & Keohane to the extent that their definition relies on "jointly-agreed standards").

[109] These "essential" features are common to, *inter alia*, rights to sue, employee-supervisor relationships, and impeachment, but do not extend to peer interactions or market dynamics. In an unpublished paper, Richard Stewart makes a forceful version of this critique.

[110] *See infra* Section VI.

[111] IASC, *Cluster Approach*, *supra* note 16, at 4 ("In the past, however, it was usually the case that only a limited number of sectors had clearly designated lead agencies accountable to the Humanitarian Coordinator. The cluster approach aims to rectify this by ensuring that within the international humanitarian response, there is a clear system of leadership and accountability for *all* the key sectors or areas of humanitarian activity.").

constructing a particular response. In some respects, the framing question is similar to the problem of accountability for government oversight bodies: who watches the watchers?[112]

This question is, of course, complicated by the fact the watcher in this case is neither an individual nor a well-defined organization, but a loosely bound network of institutions, governments and victims' groups interacting at and across various levels. It is thus a frame for action, as well as a potential actor in its own right.[113] Though all institutions, from private firms to government departments, may be considered as "networks" of branches, offices, and ultimately individuals,[114] the looseness of the bonds between cluster members create a creature that is substantially different from more traditional institutions. The problem is to address the accountability of such a system in a way that incorporates, but does not devolve into, the more general discourse on NGO and IO accountability.

The dual understanding of networks as actors and frameworks for action provides a useful approach. On this view, the manner in which the system itself is held accountable is dependent upon a latticework of relations within the organization itself.[115] This view is not unknown in our contemporary judicial treatment of the firm.[116] Following this approach, the

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[112] *See Who Guards the Guardians?: An Audit of Conservationists*, ECONOMIST, Sept. 18, 2003, http://www.economist.com/node/2077493; *cf.* Jonathan B. Wiener & Alberto Aleemanno, *Comparing Regulatory Bodies Across the Atlantic: The Office of Information and Regulatory Affairs in the U.S. and the Impact Assessment Board in the E.U.*, *in* COMPARATIVE ADMINISTRATIVE LAW 309, 312 (Susan Rose-Ackerman & Peter Lindseth eds., 2010) ("Just as regulators need oversight, so too [oversight bodies] warrant oversight").

[113] *See generally* Miles Kahler, *Networked Politics: Agency, Power, and Governance*, *in* NETWORKED POLITICS 1 (Miles Kahler ed., 2009) (addressing networks through both views); KECK & SIKKINK, *supra* note 4, 8–10 (conceptualizing the network as a type of actor); Michel Callon & Bruno Latour, *Unscrewing the Big Leviathan: How Actors Macro-Structure Reality and How Sociologists Help Them Do So*, *in* ADVANCES IN SOCIAL THEORY AND METHODOLOGY 277 (K. Knorr & A. Cicourel eds., 1981).

[114] *See* Edward L. Rubin, *Public Choice, Phenomenology and the Meaning of the Administrative State: Keep the Bathwater, But Throw Out that Baby*, 87 CORNELL L. REV. 309 (2002).

[115] For a theoretical approach that accommodates this view, see Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859 (2011); *see also* HARLOW & RAWLINGS, *supra* note 107, at 305. For a similarly oriented critique of U.S. administrative law in the courts, see M. Elizabeth Magill & Adrian Vermeule, *Allocating Power within Agencies*, 120 YALE L.J. 1032 (2011).

[116] See, for example, the cases associated with In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del Ch. 1996).

trick is to ensure that this internal set of relationships can be made to work for whichever actors "external" to the network are deemed to be important account-holders. Changing or improving accountability may consist of providing new access points to external actors, but, equally, it may require rearranging or scrambling the internal relationships to increase or decrease sensitivity to certain power centers.

### *B. Accountability as the Self-Justification of Institutions*

The design of accountability mechanisms is interesting on its own account, as a study in the manner in which institutions are influenced and controlled. But the close tie between accountability and legitimacy in contemporary politics renders this subject particularly pressing for those interested in the legitimation of international law and global institutions.[117] Grant and Keohane describe the legitimacy as setting the background against which the accountability relationship operates: conceptions of legitimacy define the nature of the power-wielder, identify the appropriate account-holder, and provide the substantive norms that fuel the operation of accountability mechanisms.[118] This view suggests that changes in the accountability discourse reflect more than technical adjustments, indicating deeper shifts in the underlying approaches to legitimacy in international institutions.[119] Here I propose an approach that brings the implications of such changes to the surface.

We begin with the insight that the very rules and practices of institutions constitute *arguments* for an institution's legitimacy.[120] By opening itself to certain forms of criticism, submitting its decisions to external review, or even closing itself off from influence in the name

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[117] *See* Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REGULATION & GOVERNANCE 137, 149–50 (2008) (noting that accountability and legitimacy discussions are often intertwined, though they remain distinct concepts).
[118] Grant & Keohane, *supra* note 106, at 30–31.
[119] See, in particular, *id.* at 34–35.
[120] *See generally* DAVID BEETHAM, THE LEGITIMATION OF POWER 37 (1991).

of autonomy or independence, an institution implies a theory of its own legitimacy and opens this theory to critique. These arguments may be imposed on an institution by its masters, or self-generated in an effort to secure a more stable basis for action.[121] By recognizing that institutional arrangements suggest deeper legitimation strategies, we can interpret these arrangements in light of political and moral theory, arriving at a reconstruction of the normative assumptions that drive the institution.[122]

Legitimation strategies do not prescribe a particular set of institutional arrangements, but they create and constrain possibilities. For example, as Richard Stewart has shown, the early models for the self-justification of the U.S. administrative state viewed "discretion" as the most pressing problem, and designed institutions that would tightly constrain the exercise of such discretion by administrative officials.[123] The ultimate inability of these models to constrain discretion spurred the development of an alternative strategy (what Stewart calls the "interest-representation" model), which "solved" the problem of discretion by reconceptualizing institutions; discretion persisted, but it was rendered less problematic by a series of self- and court-imposed controls designed to subject discretion to miniature versions of the democratic process within agencies.[124] Though it provided a solution to the problem of discretion, this approach is not necessarily superior, as it creates a new constellation of potentially insoluble

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[121] Julia Black describes the manner in which institutions often generate their own self-justificatory discourse. *See generally* Black, *supra* note 117.

[122] In addition to Beetham's work, I have found helpful contributions by JÜRGEN HABERMAS, *Legitimation Problems in the Modern State*, *in* COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (1976) (Thomas McCarthy trans., 1979); ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 243-268 (1976); RODNEY BARKER, LEGITIMATING IDENTITIES: THE SELF-PRESENTATION OF RULERS AND SUBJECTS (2004); IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY (2007); Robert Howse, *The Legitimacy of the World Trade Organization*, *in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 355 (Veijo Heiskanen & Jean-Marc Coicaud eds., 2001). This approach is developed more fully in a yet-to-be-published paper by the author.

[123] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

[124] *Id.* at 1676–88.

problems in place of the old issues.[125] It may be suggested that this continuous cycle of problem-solution combinations better represents the nature of legitimation in modern governance than the teleological approach suggested by many authorities.[126]

Through analysis of the Cluster Approach's accountability mechanisms, we will glimpse a similar dynamic at work. The supervisory accountability structure built into the Cluster Approach represented a theoretically coherent attempt to ground the system's operation in the consent of members and the well-worn processes of the United Nations. These constitute a set of arguments that the system's power, in the form of institutional choice, is both well-founded and properly controlled.

But, for reasons that will be discussed, this structure was set up to fail. In its place, we see traces of a new apparatus based on "horizontal" accountability, which would co-opt many of the difficulties that faced the earlier structure, treating them as strengths. But this solution creates new problems. Inclusion of the affected population, which once stood as just one among many critiques facing humanitarianism, would emerge as the key variable upon which legitimation of the system would depend.

## V. Supervisory Accountability in the U.N. Humanitarian Architecture

Institutional innovation and development in the humanitarian arena takes place in a tightly constrained normative landscape. Accountability strategies must navigate the preexisting normative demands on the institution, which often greatly constrain the types of mechanisms that may be imposed. This section maps the constraints of autonomy and coordination on humanitarian institution-building, before proceeding to outline the formal accountability

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[125] *Id*.

[126] On the latter, see generally THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); JUTTA BRUNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006).

structure of the Cluster Approach. As will be shown, the formal system was likely to fail not only because of logistical and practical constraints, but because it is fundamentally unable to cope with the values of coordination and autonomy that shape action in this field.

*A. Autonomy and Coordination as Constraints on Accountability*

The U.N. Cluster Approach depends for its survival on the participation of a broad range of actors that possess no defined legal obligation to work with the United Nations. Therefore, the mechanism must be made to appear sufficiently attractive and justifiable (or legitimate) to secure the participation of the major humanitarian actors whom it purports to coordinate. This does not mean that the participants themselves necessarily need to be convinced. Donors and political actors, if convinced of the value of a centralized U.N. mechanism for humanitarian coordination, may be able to force reluctant NGOs to participate. At the same time, however, the Red Cross and other humanitarian NGOs wield significant normative influence that might be used to undermine any effort at coordinating relief activities.[127] So, while the pathways for influence might be diffuse, the system must justify itself in order to work.

It will not be sufficient to justify the general enterprise of humanitarianism, or even "humanitarian coordination." The United Nations' stated purpose "to achieve international co-operation in solving international problems of a … humanitarian character"[128] provides legal grounding for the organization's role in this context, but it does not legitimate any particular institutional arrangement.[129] In the end, the institutional structure of the Cluster Approach must

[127] The receptivity of participating NGOs is thus a central concern of the cluster system, and features prominently in the ongoing review process. The operations of IASC represent a clear effort to bring the major stakeholders on board in designing this structure.
[128] U.N. Charter, arts. 1(3), 55–56.
[129] On the supplemental legitimating power of the U.N. as a symbol of international cooperation, see FRANCK, *supra* note 126, at 102–03.

itself compose a normative argument as to why agencies ought to participate, in light of the relevant values at stake.[130]

Any effort to impose accountability upon or within the cluster system will confront the problem of navigating between autonomy and effective coordination.[131] This tension is particularly pronounced within the cluster system, where both concepts are closely tied to deeply held values and principles. On the one hand, effective coordination has emerged as the watchword of emergency response, and the organization will face pressures to orchestrate the increasingly varied and numerous foreign and domestic actors engaged in major disasters.[132] But the system will also face significant pressure to preserve the autonomy of humanitarian actors, which continue to operate under competing sets of principles and to compete for donors. In order to be perceived as normatively justifiable, any central effort to coordinate relief activities must hold at least the possibility for resolving the tension between these two impulses.

Though calls for coordination have become increasingly prevalent as the number of humanitarian actors has multiplied,[133] this should not imply that actors are coalescing around a single "correct" approach to disaster response.[134] By emphasizing the need for diversity and experimentation in approaches, humanitarian agencies have been relatively successful in

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[130] I take this to be the normative version of the law-and-economics scholar's claim that "the pursuit of any substantive goal is necessarily mediated through different institutional processes that will affect outcomes, so that institutional analysis is required and such analysis must be comparative." Gregory Shaffer, *Comparative Institutional Analysis and a New Legal Realism*, WIS. L. REV. (forthcoming 2013), at 1 (reviewing the work of Neil Komesar).

[131] Judge Katzmann has helpfully defined this opposition in terms of organization theory. *See* Robert A. Katzmann, Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513, 521–22 (1980).

[132] FISHER, *supra* note 1, at 150 ("Coordination is probably the most discussed issue in international disaster response. Yet, failures in this area remain a constant complaint both among international actors and between international actors and their domestic counterparts in affected states.").

[133] Coordination now figures prominently in almost every evaluation and review of humanitarian responses. *E.g.* ALNAP, EVALUATING HUMANITARIAN ACTION USING THE OECD-DAC CRITERIA 36–37 (2006); OECD DEVELOPMENT ASSISTANCE COMMITTEE, GUIDANCE FOR EVALUATING HUMANITARIAN ASSISTANCE IN COMPLEX EMERGENCIES 23 (1999).

[134] *See supra* text accompanying notes 79–80 (explaining the divergence in principle and practice among organizations), and sources cited therein.

delegitimizing any effort to wholly integrate emergency response efforts under one hierarchical structure.[135] In his review of "international disaster response law," David Fisher suggests that the failure of the International Relief Union in the early 1940s taught the international community to avoid "command and control" coordination mechanisms.[136] Fisher argues that the resulting independence of the Red Cross and other humanitarian NGOs may be viewed as a "salutary effect" of the move away from centralization.[137]

Humanitarian organizations value diversity for different reasons. Aid actors have long been skeptical of the United Nations' emphasis on peacekeeping and peace-building, which is not always compatible with the fundamental humanitarian principle of neutrality with respect to antagonistic parties.[138] Indeed, the cluster system in its early years suffered the criticism that the clusters were a U.N.-centric mechanism,[139] raising concerns about the system's long-term legitimacy and sustainability. The preferences of powerful donors such as states are also not neutral, as history indicates that they seek the ability to channel their money to multiple possible sources.[140] Thus the cluster system must accommodate normative arguments for autonomy. Otherwise, actors might seek to undermine the legitimacy of the coordination process by

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[135] *See, e.g.*, Angelo Gnaediger, Keynote Address: The Value of Diversity, ICVA Conference, Feb. 1, 2006, Geneva, Switzerland ("In the face of this enormous variety of humanitarian calls, the diversity of actors greatly enhances the flexibility and the appropriateness of the response.").

[136] FISHER, *supra* note 1, at 151. On the background of the IRU, a treaty-based organization created under the auspices of the League of Nations, see Peter MacAlister-Smith, *Reflections on the Convention Establishing an International Relief Union of July 12, 1927*, 54 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 363 (1986) (tracing the establishment and collapse of the organization).

[137] FISHER, *supra* note 1, at 151.

[138] *See* Nicolas de Torrenté, *Humanitarianism Sacrificed: Integration's False Promise*, 18 ETHICS & INT'L AFF. 3, 6 (2004) (arguing that "the hierarchy of priorities inherent in the coherence agenda often results in humanitarian interests being sacrificed or sidelined in the name of a 'greater good'"); FIONA TERRY, CONDEMNED TO REPEAT? THE PARADOX OF HUMANITARIAN ACTION 24 (2002). Addressing this principled critique has been a central focus of recent cluster reforms, and it has been a major driver in the push to invite independent NGOs to co-chair operational clusters. NGOS AND HUMANITARIAN REFORM PROJECT [NHRP], THE PARTICIPATION OF NGOS IN CLUSTER CO-LEADERSHIP AT COUNTRY LEVEL: A REVIEW OF EXPERIENCE 3 (February 2010).

[139] ABBY STODDARD ET AL., OCHA, CLUSTER APPROACH EVALUATION 19 (2008).

[140] *See supra* note 136 and sources cited therein.

pointing to operational defects that harm affected populations, or by emphasizing the value of diversity and experimentation.[141]

### *B. Outlines of a Formal Supervisory Structure*

On paper, the Cluster Approach solves monitoring problems through an elegant, two-tiered structure of hierarchical supervision.[142] The in-country Humanitarian Coordinator, a U.N. official, appoints the cluster "lead agencies" and holds them responsible for ensuring effective coordination within their sectors.[143] Though the cluster system does not alter the formal legal relationship between the U.N. and the relevant agency, the Humanitarian Coordinator could "fire" a cluster lead by replacing it, or embarrass the agency by releasing information about its activities. The Humanitarian Coordinator is, in turn, formally supervised by the head of the Office for the Coordination of Humanitarian Affairs (OCHA) in New York, who may hire and fire the in-country official.[144]

The substance guiding this relationship is outlined in Section II.[145] Lead agencies are responsible to the Humanitarian Coordinator largely for a number of general procedural and substantive considerations: inclusion of humanitarian actors, establishment of coordination mechanisms, coordination with local authorities, community participation, consideration of "cross-cutting issues," needs assessment, emergency preparedness, "planning and strategy development," application of humanitarian and human rights standards, monitoring and reporting, advocacy, resource-mobilization, training and capacity-building, and provision of

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[141] *E.g.*, ICVA, *supra* note 52.
[142] The outlines of this structure are explained in IASC, *Cluster Approach*, *supra* note 16. On "supervisory accountability," see generally Grant & Keohane, *supra* note 106, at 36.
[143] On the role of the Humanitarian Coordinator, see IASC, *Terms of Reference for the Humanitarian Coordinator*, Document Endorsed by IASC Working Group (May 4, 2009) [hereinafter IASC, *HC TOR*].
[144] The head of OCHA is also often referred to as the "Emergency Relief Coordinator." G.A. Res. 46/182, *supra* note 20, Annex, ¶ 34.
[145] *See supra* text accompanying notes 41–50 (describing the responsibilities of cluster leads).

services as a "last resort."[146] The substantive norms governing cooperation, cross-cutting issues, and the like are expected to be developed through repeated interactions within clusters at the global and local levels.[147] By producing or endorsing handbooks, toolkits, and guidelines, the Inter-Agency Standing Committee can exercise some control over the normative standards that inform cooperation.[148] The Humanitarian Coordinator's responsibilities are phrased in similar procedural terms: articulating a "Common Humanitarian Action Plan," ensuring the coordination of clusters and the proper functioning of lead agencies, and establishing a mechanism for inter-cluster coordination.[149]

This vertical structure replicates the legal basis for the cluster system itself. The authority of IASC to create something like the Cluster Approach can be traced largely to a single resolution of the General Assembly in 1991.[150] That resolution sketched a hierarchical system that remains the backbone of the accountability structure created for the Cluster Approach fifteen years later.[151] As noted above, the system as it exists today was created in response to earlier failures in Indonesia and elsewhere.[152] The central innovation of the cluster system was the creation of "lead agencies," which now occupy the ground-level tier of the accountability structure.

The possibility of greater institutionalization of humanitarian activities may have been threatening to disaster-prone states, whose emergency authority might be threatened by a

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[146] *See* IASC, *Cluster Lead TOR*, *supra* note 41.
[147] *E.g.*, IASC, *Cluster Approach*, *supra* note 16, at 6 (noting that clusters should implement standards set at the global level).
[148] *E.g.*, IASC & OCHA, CIVIL-MILITARY GUIDELINES & REFERENCE FOR COMPLEX EMERGENCIES (2008). These documents will often be formulated quite capaciously in order to obtain agreement, and it is not clear that they are regularly used. The minimal survey data compiled by the IASC shows mixed results, if it can be relied upon at all. *See, e.g.*, IASC, *Survey on the Civil-Military Guidelines and References for Complex Emergencies* (July 1, 2010).
[149] IASC, *HC TOR*, *supra* note 143, at 2. The terms of reference, like other documents, set up certain broad substantive considerations: "age, gender, diversity, human rights, HIV/AIDS, and the environment." *Id.*
[150] GA Res. 46/182, *supra* note 20, Annex.
[151] *Id.* ¶¶ 33–39.
[152] *See supra* text accompanying notes 14–16.

strengthened humanitarian response structure.[153] This fear is observed in the practice of the cluster system, where States have occasionally resisted the implementation of the approach, sometimes successfully.[154] Endeavoring to make the system directly responsive to a subordinate of the Secretary-General, who is himself appointed by the General Assembly,[155] suggests a desire to maintain some measure of state control over the system, rendering it more palatable to States. In addition, the hierarchical mechanism grounds the system in the internal law of the United Nations, as it is built on the General Assembly's powers to establish organs and offices.[156] And the mere fact that the hierarchical structure mapped earlier forms of humanitarian organization within the U.N. may have been attractive: if the cluster innovation is to be seen as a technical improvement, rather than a transfer of leadership power from the host states to international and non-governmental organizations, it appears natural to subject the system to familiar procedures, which are responsive to a familiar set of interests.

### *C. The Breakdown of the Formal Structure*

The weakness of the formal structure is among the most widely recognized failings of the Cluster Approach.[157] The oversight mechanism is of course vulnerable to a range of logistical problems: OCHA, which exercises the top level of supervisory, cannot realistically be expected

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[153] Humanitarian institutions often function as an auxiliary to, functional substitute for, or challenge to state government in times of crisis. *See generally* Paul Harvey, *Towards Good Humanitarian Government: The Role of the Affected State in Disaster Response*, Humanitarian Policy Group Rep. No. 29 (September 2009).
[154] Samir Elhawary & Gerardo Castillo, *The Role of the Affected State: A Case Study on the Peruvian Earthquake Response*, Humanitarian Policy Group Working Paper, at 12 (April 2008) (citing political opposition as a main reason why the Cluster Approach was not activated in the 2007 Peruvian earthquake).
[155] U.N. Charter, art. 97.
[156] *See id.*, art. 22.
[157] *See* NGOs & Humanitarian Reform Project [NHRP], *Synthesis Report: Review of the Engagement of NGOs with the Humanitarian Reform Process*, at 3 (2009) ("The UN has continued to appoint unqualified HCs who do not adequately understand humanitarian action; who underestimate the importance of NGOs; who do not understand the critical importance of partnership."); PAUL HARVEY ET AL., ACTIVE LEARNING NETWORK FOR ACCOUNTABILITY AND PERFORMANCE IN HUMANITARIAN ACTION [ALNAP], THE STATE OF THE HUMANITARIAN SYSTEM (2010) (noting a lack of leadership).

OCHA to "line manage" the large number of coordinators around the globe.[158] But I suggest here that the deeper reasons for system's failure are normative. The vertical accountability structure reflects a view of humanitarian practice that is incommensurable with the strong commitment to autonomy that is shared, for different reasons, by humanitarian practitioners and donors. The mechanism's inability to resolve the tension between coordination and autonomy opens the way for new institutional solutions, which are the subject of the following section.

So far, this paper has discussed the humanitarian coordinator as if she is a discrete official who is responsive to the head of OCHA in New York, but this is generally not the case. Often, she also serves as the United Nations "Resident Coordinator," who is responsible for overseeing development operations.[159] This position comes with a parallel chain of command, with the Resident Coordinator reporting through a regional team, and ultimately responsive to the U.N. Development Group, which involves a different set of actors.[160] The coordinator may play other roles, with additional supervisors, in the context of peacekeeping missions.[161] Critics argue that these other roles inevitably lead to the subordination of humanitarian concerns to political, security, military, or development motives. Despite several proposals to combat these problems,[162] this dual structure is likely to persist.[163]

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[158] IASC, *Strengthening the HC System: the Unfinished Agenda*, Paper Presented to IASC Working Group, March 2009, at 2 [hereinafter IASC, *HC System*].
[159] G.A. Res. 46/182, *supra* note 20, ¶ 39 ("[T]he resident coordinator should normally coordinate the humanitarian assistance of the United Nations system at the country level.").
[160] IASC, *HC System*, *supra* note 158, 2–3.
[161] *Id.* at 3–4.
[162] For example, a "pool" of potential humanitarian coordinators has been developed, which identifies possible candidates and gives them training in humanitarian affairs. IASC, *HC Pool*, http://oneresponse.info/Coordination/leadership/Pages/HC%20Pool%20Application.aspx ("The IASC HC Pool, established in July 2009, is a roster of high caliber humanitarian professionals from UN agencies, the Red Cross/Red Crescent movement, IOM and NGOs who have been screened by the IASC as potential candidates for humanitarian coordination leadership positions."). This has generated greater calls for transparency in the selection of pool members, for greater NGO input, and for the identification of more "pool" members from outside the U.N. system. This will only have substantial impact, however, to the extent the humanitarian role is separated from the development role and instilled in a separate person, a measure that figures prominently in many reform efforts. *E.g.*, Save the Children U.K., *At a Crossroads: Humanitarianism for the Next Decade* (2010). Another solution is to appoint "deputy" humanitarian coordinators

By splitting her time, or her office, between humanitarian, development, political, and potentially peacekeeping roles, the Humanitarian Coordinator personifies the range of values at the heart of United Nations activities, which humanitarian organizations do not necessarily share. Thus, as one moves up the chain of accountability, the humanitarian mission becomes mixed with other goals that may be seen to undermine humanitarian principles.[164] These other functions are not severable; they are central to the identity of the United Nations as an international problem-solver. The centralized U.N. structure will always be torn between the project of securing peace, fostering a state's economic development, and providing neutral and impartial humanitarian assistance. The HC will never free herself entirely from this conflict, and therefore will often be kept at arm's length by the non-U.N. humanitarian organizations. Coherence with the broader range of United Nations activities thus constitutes both a benefit and a curse for the Cluster Approach—it is at the same time an essential feature of the coordinating mechanism and a grave threat to the autonomy, neutrality, and independence of humanitarian NGOs.[165]

In practical terms, this conflict manifests itself in the observation that humanitarian coordinators often lack the interest, expertise, and information to effectively oversee the operations of clusters.[166] This lack of oversight may undermine the *effectiveness* of the Cluster Approach, but it does not neutralize its power. To the contrary, because the power of the system

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from the aid profession. But, where this is used to make up for a lack of humanitarian knowledge at the top level, this solution is highly dependent on the creation of a strong bond between the deputy and the humanitarian/resident coordinator; if the top-level official is uninterested in humanitarian issues or principles, then the deputy creates an organizational way to marginalize these problems.

[163] *See* Randolph Kent, Humanitarian Futures Programme, *Mapping the Models: The Roles and Rationale of the Humanitarian Coordinator*, at 6–10 (2009) (noting the strengths of the multi-hatting approach).

[164] *See, e.g.*, TERRY, *supra* note 138, at 23–26 (detailing tensions between the demands of peace and the "humanitarian imperative").

[165] On the normative value of independence, see Daniel Thürer, *Dunant's Pyramid: Thoughts on the 'Humanitarian Space'*, 89 INT'L REV. RED CROSS 47, 58 (2007). *See also* de Torrenté, *supra* note 138.

[166] STEETS ET AL., *supra* note 6, at 45; *see also* KAUFFMANN & KRÜGER, *supra* note 39, at 38–39 (noting the weak leadership from OCHA, arising from a gap in staffing).

arises in large measure from its appointment of leaders and distribution of competences,[167] the effects of institutional choice may actually be magnified when the appointed leaders are not subject to the prescribed supervision. The types of policies implemented, and the groups of actors who have access to inner policymaking circles, will be that much more likely to be determined by the individual characteristics of the leader and organization in charge of a particular sector.

Actors critical of the failure of the formal accountability structure are joined by another group of advocates who work from the perspective of grassroots organizing and affected populations. Such groups have long been critical of the Cluster Approach for shutting out local groups and affected persons, arguing, for example, that victims' rights groups had been excluded from U.N. facilities in Haiti during cluster meetings, that these meetings were conducted in languages spoken only by foreign workers, and that the perspective of local organizations was continually squashed.[168]

This is not a new critique: the failures of the 1990s led many to question whether the culture of the "humanitarian international" constituted an obstacle to successful disaster response.[169] And grassroots advocates are likely uninterested in seeing the cluster system succeed in its current form, because the vertical accountability structure points away from the persons most affected by humanitarian action—the victims—toward international U.N. officials and toward New York. Nonetheless, the failure of the formal accountability system creates the

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[167] *See supra* Section III.
[168] *E.g.*, Melinda Miles, *Assumptions and Exclusion: Coordination Failures During the Emergency Phase*, *in* TECTONIC SHIFTS: HAITI SINCE THE EARTHQUAKE 45 (Mark Schuller & Pablo Morales eds., 2012); Maura R. O'Connor, *Does International Aid Keep Haiti Poor?: The U.N. 'Cluster System' Is as Bad as It Sounds*, SLATE, Jan. 7, 2011, http://www.slate.com/articles/news_and_politics/dispatches/features/2011/does_international_aid_keep_haiti_poor/the_un_cluster_system_is_as_bad_as_it_sounds.html; Sontag, *supra* note 2, at A1.
[169] ALEX DE WAAL, FAMINE CRIMES: POLITICS & THE DISASTER RELIEF INDUSTRY IN AFRICA 3–4 (1997).

space for reimagining institutional structure, in which advocates of greater victim participation may be poised to play a crucial role.

## VI. The Promises and Challenges of "Peer Review" in the Cluster System

Looking for new modes of accountability in the Cluster Approach, recent reviews have embraced the opportunities that it creates for "peer review."[170] The most recent evaluation states, "In all case study countries bar one, accountability to the Humanitarian Coordinator is minimal. Instead, clusters have started to make valuable contributions to strengthening peer accountability."[171] The modes that these "peer review" processes take appear to be quite varied, ranging from informal "lessons learned" and reviews of funding proposals, to more structured interactions where standards and recommendations are developed and then forwarded to the next highest level in the structure.

In general, what consultants are calling peer review is really a hodgepodge of procedures, most of which amount to little more than "peer pressure." The role of network-style interactions in encouraging socialization, argumentation, and harmonization of policy is well-known,[172] and many of these theories may explain some successes of the Cluster Approach.[173] But, as beneficial as these dynamics are, it is difficult to imagine that they would substitute for a regularized, dependable oversight structure.[174]

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[170] STEETS ET AL., *supra* note 6, at 69, 87.
[171] *Id.* at 44.
[172] *See generally* SLAUGHTER, *supra* note 61, at 195–212.
[173] Note the discussion *supra* notes 59–65 and accompanying text.
[174] I thank Richard B. Stewart for pressing this point. As Georgios Dimitropoulos points out, however, peer pressure and trust relationships make a positive contribution to regulation under certain conditions. Georgios Dimitropoulos, *Peer Reviews Between Institutions*, Note for the Workshop on Analyzing and Shaping Inter-Institutional Relations in Global Governance, N.Y.U., April 16, 2012 (on file with author); *see also* SLAUGHTER, *supra* note 61, at 198–200 (explaining the benefits of socialization). The important role for law, then, is to ensure that the development of such bonds is not left entirely to individual psychology, charisma, and chance. *See generally* Rebecca M. Bratspies, *Regulatory Trust*, 51 ARIZ. L. REV. 575 (2009).

The real promise of "peer review" lies in its potential to foster a more routinized, decentralized system of peer monitoring, benchmarking, and reflexive revision of goals. This new architecture, it might be hoped, would provide a functional substitute for hierarchical supervision, while adhering more closely to the demands of independence and autonomy arising in the humanitarian profession. Peer review would work by mitigating the effects of harmonization and institutional choice: by subjecting the policies developed within clusters to regular, ongoing review, and by empowering cluster members with information about successful and unsuccessful strategies elsewhere, it is hoped that the problems of weak leadership and bad policy can be corrected through argument and innovation.[175] Whereas, in the formal structure, the U.N. apparatus sought its legitimacy through a hierarchy that could theoretically be responsive to the complaints of states and other interests, in the reimagined system the United Nations emerges as a convener and "orchestrator" of a problem-solving enterprise.[176] This may relax some of the demands directed toward the top of the hierarchy, and shift the focus to direct participation and deliberation at lower levels.

This section first introduces the practical obstacles of "peer review," in order to emphasize the extensive normative transformation that would be required to make such a structure work. Second, I draw on theories of "experimentalism" in regulatory governance to sketch an alternative, not nearly realized in practice, that would effect such a transformation. A final section reflects on the emergence of victim participation as *the* central legitimation problem in this new humanitarian architecture.

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[175] Joshua Cohen & Charles F. Sabel, *A Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763, 779 (2005) (In such a system, "decisionmaking works through mutual reason giving. Deliberation subjects the exercise of collective power to reason's discipline, to what Habermas famously described as 'the force of the better argument,' not the advantage of the better situated.").

[176] *See generally* Kenneth W. Abbott & Duncan Snidal, *International Regulation without International Government: Improving IO Performance through Orchestration*, 5 REV. INT'L ORG. 315, 325–26 (2010); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009).

*A. Peer Review and the Autonomy-Coordination Tension*

The idea that, freed from the tethers of vertical supervision, humanitarians might take it upon themselves to control for the effects of the cluster system may not be very comforting. The development of robust peer review in the clusters has been hampered in part by a noted resistance among cluster participants to "police" each other's activities.[177] Although rare cases show agencies setting targets and holding each other to account in meeting them,[178] the clusters are generally not seen as a forum for mutual monitoring. Michael Dorf and Charles Sabel have noted that mutual-monitoring structures are dependent on the "willingness of all participants to disclose information in view of the investigations of others."[179] One can imagine several reasons, some principled and some self-interested, why humanitarian organizations may be unlikely to develop such an attitude.

The foregoing sections have already noted the importance of independence and autonomy to the humanitarian enterprise. These principles not only instill a desire to be free from the yoke of any powerful State or the United Nations—they also refer to humanitarian institutions'

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[177] STEETS ET AL., *supra* note 6, at 52.

In recent years, humanitarian groups have begun to overcome this problem through a novel peer review process developed outside the clusters. IASC, About the Inter-Agency Standing Committee, http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-about-schr (explaining this practice); Eva Von Oelreich & Yoma Winder, *The SCHR Peer Review Process: Oxfam's Experience*, HUMANITARIAN EXCH. MAG., April 2006, http://www.odihpn.org/humanitarian-exchange-magazine/issue-33/the-schr-peer-review-process-oxfams-experience. The method was first developed by the OECD,[177] and is applied in studies that focus on specific topics, such as sexual abuse or accountability to affected populations. Under this method, agencies work in groups of three, where each agency is reviewed by the other two in its group, guaranteeing a kind of reciprocity. SCHR, *Peer Review on Accountability to Disaster-Affected Populations: An Overview of Lessons Learned*, at 20 (January 2010). The group also hires an outside consultant to facilitate the process and prevent collusive behavior. *Id.* The review results in a set of reports and "lessons learned," which remain private, as well as a synthesis paper for external audiences, which is largely sanitized of any direct reference to a specific failure by any NGO.

This process demonstrates what might be demanded of any kind of "peer review" conducted under the cluster system. But it should be noted that these reviews are time-consuming, and only three have been initiated since the method was created in 2002. IASC, *supra* note 16. Moreover, this is a process controlled entirely by the Steering Committee for Humanitarian Response, a group of major NGOs. It does not include U.N. actors or the IOM. Because of a strong adherence to the principle of independence, it is unlikely that the participating agencies would have agreed to a similar process facilitated by U.N. agencies.

[178] KRÜGER & STEETS, *supra* note 86, at 26 (noting that this took place in the response to a 2009 drought in Gaza).

[179] Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 338 (1998).

independence from each other. In 2007, concerned that the Cluster Approach was being dominated by U.N. concerns for integration, NGOs pressed for a set of *Principles of Partnership*, which were incorporated as a "fourth pillar" to humanitarian reform.[180] While the principles do not foreclose the possibility of critique, their expressed desire to maintain the independence of all partners in the humanitarian system suggests there would be some resistance to the idea of recasting the Cluster Approach as a mode of continued monitoring and reporting.[181]

The principle of independence may also provide ideological backing or justification to actors that wish to circle the wagons for more self-interested reasons.[182] The realities of humanitarian action may provide a rational temptation among aid actors to engage in cartel-like behavior with respect to critical information. Given the desperate situations created by conflicts and environmental disasters, it is safe to assume that humanitarian action is "always insufficient,"[183] and perhaps often harmful.[184] Moreover, because donors expect humanitarian actors to "do good," open and honest reporting of failures is likely to harm an organization's ability to raise funds.[185] We might therefore assume that any agency operating in the field would possess some information about failures by its peers, and that any time Agency A suffers criticism from NGO X, it would be equipped to respond in kind. This could be expected create an overall negative impact on the amount of money going to the humanitarian enterprise. The

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[180] "Equality requires mutual respect between members of the partnership irrespective of size and power. The participants must respect each other's mandates, obligations and independence and recognize each other's constraints and commitments. Mutual respect must not preclude organizations from engaging in constructive dissent." *Principles of Partnership*, *supra* note 63, at 1.

[181] *See also* GLYN TAYLOR ET AL., ALNAP, STATE OF THE HUMANITARIAN SYSTEM 2012, at 66 (July 2012) (noting "agency resistance" to peer review processes).

[182] In other words, one come to expect problems in the peer review process regardless of whether she starts from a principled/constructivist orientation or a rationalist one. *Cf.* Tim Büthe, Solomon Major & André de Mello e Souza, *The Politics of Private Foreign Aid: Humanitarian Principles, Economic Development Objectives, and Organizational Interests in NGO Private Aid Allocation*, 66 INT'L ORG. 571 (2012) (arguing that organizational interests do not constitute a major driver of NGO aid allocation, which is better explained by humanitarian principle and constructivist theory).

[183] DAVID RIEFF, A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS 19 (2002) (quoting an ICRC official).

[184] *See* TERRY, *supra* note 138, at 25 (criticizing the zero-sum nature of the "do no harm" approach to aid).

[185] *Id.* at 235–36.

best way to avoid this cycle is to generally avoid singling out peer agencies, and to avoid referencing specific organizations in critical reviews of performance.[186] Though we do see defections, the practice of IASC humanitarian reviews seems generally consistent with this assumption of cartel behavior.[187]

The alignment of principle with self-interest suggests the development of a culture that may be generally unwilling to monitor itself. Alex de Waal put his critique of U.N. humanitarian activities in particularly forceful terms:

> Some [self-evaluations] contain powerful insights or strong recommendations, but there is no mechanism for enforcing 'learning the lessons'. In fact, critical evaluations are used for the opposite purpose: they can be brought out later to defuse new criticisms with the riposte that the critic is not saying anything new. Repetition is a constant difficulty faced by critics of the UN specialized agencies: a critique repeated many times may be valid but is readily ignored because it has become boring. As well as concealed errors the agencies have (rarer) secret successes, but lack of accountability means that successful innovations are only occasionally recognized (and rarely replicated).[188]

NGOs, de Waal argued, suffered similar accountability deficits and learning disabilities.[189]

What is needed is a more robust theory of "peer review" that dissolves the tension between autonomy and coordination at both the practical and the normative levels. If mutual monitoring is to control the effects of institutional choice, and therefore provide a functional substitute for more traditional modes of accountability, it must create realistic possibilities for institutional learning and revision of defective policies. As Larry Minear, a leading researcher in the field of humanitarian policy, put it, "serious learning requires institutional change."[190]

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[186] *Id.*
[187] The three-month review of humanitarian activities in Haiti, for example, refers to problems in various clusters, but judiciously avoids singling out agencies. IASC, *Haiti*, *supra* note 53, at 16–29.
[188] DE WAAL, *supra* note 169, at 72.
[189] *Id.* at 80–81.
[190] Larry Minear, *Learning to Learn*, OCHA Seminar on Lessons Learned on Humanitarian Coordination, April 3–4, 1998, p. 9, quoted in TERRY, *supra*, note 138, at 232.

*B. Experimental Humanitarian Institutions: Sketching an Alternative Model*

The term "experimentalism" implies a range of regulatory techniques that seek alternatives both to command-and-control regulation and to the "minimalism" of de-regulatory approaches.[191] Experimentalist strategies are based on a set of management principles that might be expressed as subsidiarity, inclusion, reflexivity, and peer review.[192] These strategies grant broad discretion to local-level actors to pursue certain goals, with very little steering from the top down.[193] The local units are meant to ensure the broadest possible participation by stakeholders, both inside and outside of the public administration apparatus.[194] All of the norms generated through this process should be subject to periodic revision; this includes the specific practices of local units, as well as the means for measuring performance, decision-making procedures, and the overarching goals.[195]

Some form of "peer review" is necessary to get this process going, but it is not sufficient. The price of broad delegation and discretion to innovate is constant reporting and monitoring.[196] Information is pooled, so that local groupings can learn from each other's experiments and innovations.[197] This process contributes to comparative assessments across jurisdictions or problem areas, and to continued debate within local units as to whether a competing approach is

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[191] For the origins of the concept, see Dorf & Sabel, *supra* note 179. Experimentalism is often considered as part of an array of so-called "new governance" techniques. *See* de Burca, *supra* note 17, at 228 (distinguishing experimentalism from the broader concept of new governance).
[192] This list is my own, but it draws directly from the description in Sabel & Simon, *supra* note 17, at 79.
[193] Dorf & Sabel, *supra* note 191, at 322 ("Above all, an experimentalist regime gives locales substantial latitude in defining problems for themselves.").
[194] Sabel & Simon, *supra* note 17, at 79; de Burca, *supra* note 17, at 228.
[195] JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 151–79 (2002); Michael C. Dorf, *The Domain of Reflexive Law*, 103 COLUM. L. REV. 384, 398–400 (2003); William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, Columbia Pub. L. & Lgl. Theory Working Paper Group, No. 04-79, at 16 (2007) ("The phrase *kaizen*, or continuous improvement, connotes that process be revised in the course of its execution.").
[196] Dorf & Sabel, *supra* note 191, at 288 ("[T]he price communities must and should want to pay … for the right to experiment is to provide individuals in their own and other jurisdictions with information to judge their performance).
[197] Sabel & Simon, *supra* note 17, at 79–80.

superior and should be adopted.[198] The process thus depends on a "blurring of boundaries," where actors simultaneously take on the role of regulator, monitor, and regulated entity.[199] The result is a relatively concentrated form of peer review, where procedures for mutual evaluation among actors are seen as central to the success of the enterprise.[200]

In theory, the experimentalist approach promises to dissolve, or at least dampen, the autonomy-coordination tension. The experimentalist model depends on the fact that the members of the system will be pursuing their own autonomously generated programs and policies, rather than implementing a set of performance standards imposed from the top down. For this reason, experimentalism is attractive in places where top-down regulation is seen to have failed, such as primary education in the U.S., and in arenas where the independence and autonomy of actors is jealously guarded, such as regulatory policy in the European Union.[201] Likewise, an experimentalist humanitarian architecture would *rely* on the independence of NGOs, rather than resisting it.

In addition to the general alignment of values, readers may have already recognized certain design aspects of the cluster system that resemble the four dimensions of experimentalism—subsidiarity, inclusion, peer review, and reflexivity—described above. In terms of subsidiarity, much of the clusters' successes have been seen at sub-national levels, where provincial or municipal clusters are able to adapt to local conditions and demands.[202] Guidance from the global or even national level is often quite sparse or capacious, leaving

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[198] Dorf & Sabel, *supra* note 191.
[199] Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 391 (2004) (noting the interactions among legislation, implementation, enforcement, and adjudication); Jason M. Solomon, *New Governance, Preemptive Self-Regulation and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591 (analyzing "new governance" as a process of blurring lines).
[200] On the related concept of peer accountability, see Grant & Keohane, *supra* note 106, at 37.
[201] *See generally* Joshua Cohen & Charles F. Sabel, *Directly Deliberative Polyarchy*, 3 EUR. L.J. 313 (1997).
[202] Thanks to Paul Christian Namphy for pressing this point.

significant room for innovation, assuming of course that the participating international agencies are also given sufficient flexibility by their headquarters or regional directors. In principle, the Cluster Approach is also designed to be broadly inclusive, directing lead agencies to ensure the inclusion of all "key" humanitarian partners.[203]

Where successful, the Cluster Approach has also triggered peer review and reflexive revision of humanitarian policy. The Kivu regions of the DRC, which rank among the most dangerous, nonetheless provided a success story for reflexive innovation. Provincial clusters developed a systematic practice of issuing recommendations to each other, which are then followed up in an inter-cluster meeting.[204] It was noted that this process was bolstered by the relatively substantial amount of funds directed toward eastern DRC, in comparison to other regions, and the resulting capacity of OCHA to act as a coordinator.[205]

But robust peer review is frustrated by the limited ability of the system to pool and transfer information. While peer review succeeded in the Kivu region of the DRC, the overall national response was largely unable to benefit from these insights, because of a lack of strategic coordination at the country level in Kinshasa.[206] In areas such as DRC, where transportation and communications prove difficult, the capacity of OCHA to move and store information across regions is weakened.[207] The flow of information among policymaking sites becomes crucial from this perspective, as continuous argumentation and monitoring serves to evaluate and revise programs, transmitting lessons from one site to another and generally catalyzing the experimental process. The more OCHA can act as an information-gatherer and pooler, the more

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[203] IASC, *Cluster Lead TOR*, *supra* note 41. Anyone paying attention will note that I am glossing over what is a fraught and controversial issue. The deep-seated problems with inclusion in the Cluster Approach are addressed in Part B.
[204] *See* ANDREA BINDER, VÉRONIQUE DE GEOFFROY & BONAVENTURE SOKPOH, IASC CLUSTER APPROACH EVALUATION, 2ND PHASE: COUNTRY STUDY—DEMOCRATIC REPUBLIC OF CONGO 31–34, 38–39 (2010).
[205] *Id.* at 32. A strong OCHA office in the nearby city of Goma reduced access problems. *Id.* at 39.
[206] *Id.* at 32–33.
[207] *Id.*

effective an experimental structure can be, and the less reporting requirements will interfere with the daily work of disaster response.[208]

In addition to dramatically increasing the informational capacity of OCHA, a successful experimental structure should attempt reforms to the Cluster Approach along at least four lines. Not all of these would require explicit changes in policy—an experimental system, like other forms of late capitalist regulation, is as much an "attitude" as a set of rules.[209] But codifying the following considerations into the next revisions of IASC guidance on the cluster system may allow attitudes to follow policy. Note also that the following directions can be phrased in only general terms; a governance framework that emphasizes context sensitivity and adaptation should not devolve into a prescriptive, off-the-shelf model for institutional design.[210] In short, the system must develop clear procedures for routinized norm-generation, performance monitoring, "rolling rulemaking" across geographic scales, and a rethinking of the United Nations' supervisory role.[211]

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[208] OCHA itself is not an operational agency, in the sense that it does not provide services, and therefore is intuitively well-suited to this background role. Note also that the information-gathering role of OCHA in this context would not necessarily be equivalent to the current burden it carries of supporting the Humanitarian Coordinator's oversight over cluster leads. The role of OCHA would be less focused on informing the HC of what has gone on in recent cluster meetings, and more on making information about groups' various activities more widely available directly to other participants.

[209] *Cf.* IAN AYERS & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992) (defining responsive regulation as an "attitude").

[210] *See* de Burca, *supra* note 17, at 236–38; Christie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 484 (arguing that "new governance methods may simply not be feasible in some contexts"). For a critique of experimentalism along these lines, see William E. Scheuerman, *Democratic Experimentalism or Capitalist Synchronization: Critical Reflections on Directly-Deliberative Polyarchy*, 17 CANADIAN J. L. & JURISPRUDENCE 101 (2004).

[211] *Cf.* Javier Barnes, *Towards a Third Generation of Administrative Procedure*, *in* COMPARATIVE ADMINISTRATIVE LAW, *supra* note 112, at 336, 342 ("The need for procedural rules is in direct proportion to the lack of substantive provisions."); Hari M. Osofsky, *Multidimensional Governance and the BP* Deepwater Horizon *Oil Spill*, 63 FLA. L. REV. 1077 (2011) (emphasizing the need for regulatory responsiveness and inclusion across scales).

1. Active and Clear Rulemaking

If the Cluster Approach is to embrace an experimentalist model as an alternative to vertical hierarchy, the national and local cluster meetings must be used for more than information-sharing.[212] Active rulemaking by local sites is critical to unlocking the diagnostic potential of experimental governance, as the introduction of new rules allows actors to test hypotheses and plans. Moreover, experimental rules, counter-intuitively, should be as precise as possible, in order to facilitate the diagnosis of problem areas and the identification of solutions.[213] This idea originates in the manufacturing sector, where the introduction of new, highly precise standards allows companies to measure performance and to learn under controlled conditions,[214] but the concept has seen some success in service delivery as well.[215] The extremely capacious standards developed by some clusters do not necessarily facilitate error-detection and problem-solving, because it will not be clear whether all actors are faithfully reproducing the same experiment. Nonetheless, even broad standards may be consistent with an experimental approach if they are combined with frequent reporting and monitoring.[216]

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[212] *See* STEETS ET AL., *supra* note 6, at 34 (stating that meetings spend too much time catering to the information needs of agencies that have weak field capacity, and that the discussions are often too abstract and do not disseminate helpful guidance or information); KAUFFMANN & KRÜGER, *supra* note 39, at 35 (noting that many *inter*-cluster meetings fail to move past information sharing); *see also* KRÜGER & STEETS, *supra* note 86, at 24 ("Regular inter-cluster meetings take place in Gaza and Jerusalem, but these are not seen as very useful by most humanitarian actors because they do not systematically focus on inter-cluster gaps or inter-disciplinary issues and do not focus on joint activities or programming.").

[213] Simon, *supra* note 195, at 16 ("[N]orms are always as articulated as possible, but they are not applied consciously in a way that would frustrate their purposes.").

[214] *Id.* at 17.

[215] Sabel & Simon, *supra* note 17, at 91–92 (describing successes in child service provision).

[216] Some areas of governance in Europe have developed an approach known as "comply or explain," in which regulation serves as a "safe harbor," compliance with which excuses the regulated entities' duty to report on their conduct. *E.g.*, U.K. Financial Reporting Council, *What Constitutes an Explanation under 'Comply or Explain'?*, 3–4 (Feb. 2012). This works where the rules are such that compliance can be easily gauged, and thus favors precision in drafting. If a system relies heavily on general standards, then gauging "compliance" will be more difficult, and experimentation may best be facilitated by a simple duty to explain. *But see* SPHERE HANDBOOK, *supra* note 73, at 8–9 (suggesting a principle of comply-or-explain for humanitarian indicators).

The two critical differences between experimental and hierarchical rulemaking lie in type of process and obligation associated with the rule. First, as mentioned above, such rules are generated locally, as the result of a collaborative process among many actors. Second, experimental rules are "indicative or presumptive rather than mandatory."[217] The idea is not to create rules for service provision that are followed rigorously by all cluster participants, even at the local level. Rather, the rules create a point of departure for further experimentation and innovation. "Strength/weakness" analysis should become a first step toward developing new action plans and programs that depart from older, inappropriate standards and practices.[218] Thus, rules for setting up a governance structure for refugee camps can be altered when it becomes clear that the agreed-upon standards would reinforce gender or power disparities. Crucially, however, these innovations should be coupled with a practice of reporting back on the problems identified and the solutions attempted.

2. Overcoming the Peer Monitoring Deficit

Second, the clusters should become a forum for performance monitoring. The cluster participants should be empowered to ask whether a camp-closure policy has benefitted the former residents, whether an entitlement to certain daily quantities of water is detrimentally exacerbating conflicts over natural resources, or whether the benefits of housing multiple tribal communities in the same camp are being outweighed by the dissolution of existing communal ties. Specific questions such as these supplement the basic questions regarding the rights and daily needs of disaster victims. The trick is that quantitative and qualitative performance standards are deeply contested among disaster responders and donors, with many agencies and

[217] Sabel & Simon, *supra* note 17, at 80.
[218] *See* ANDREA BINDER & FRANÇOIS GRÜNEWALD, IASC CLUSTER APPROACH EVALUATION, 2ND PHASE: COUNTRY STUDY—HAITI 31 (2010) (noting the usefulness of "strength/weakness" analysis for improving accountability of lead agencies to cluster members, but adding that accountability was generally weak).

observers arguing that performance monitoring leads to rigid response frameworks that provide aid according to indicators rather than according to real need.[219] Only recently have aid agencies been able to agree on general standards for performance monitoring.[220]

An experimentalist framework, particularly one founded on respect for autonomy and independence, would require a much clearer policy statement on the desirability of departing from national and global performance indicators. Section III recalls how pressure from NGOs was unable to relax the rigid application of Sphere indicators in Chad. Strict adherence to quantitative indicators set at the global level is antithetical to an experimental approach. Under this model, clusters should become a forum for reevaluating the content and scope of existing performance indicators in the light of changing circumstances. This can work, as Janice Gross Stein points out, where networks are able to foster open discussion and "veil the face of power and the asymmetries of power" among their members.[221]

3. Reflexivity of Policymaking

Third, information about deviation and innovation should be able to flow up the chain, such that global standards may be modified in light of local innovations.[222] To date, according to most evaluations, the innovations that happen in local clusters tend to stay in local clusters.[223] In some responses, where cluster recommendations were taken up at inter-cluster meetings, innovations did seem to have an effect across sectors. But information is often blocked between

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[219] *See generally* Gross Stein, *Humanitarian Organizations*, *supra* note 17.
[220] *See* Janice Gross Stein, *The Politics and Power of Networks: The Accountability of Humanitarian Organizations*, *in* NETWORKED POLITICS, *supra* note 61, at 151.
[221] Gross Stein, *supra* note 220, at 168.
[222] The bi-directionality of reflexive rulemaking is emphasized by Dorf, *supra* note 195. This understanding embellishes on the concept of "reflexive law" developed by Teubner, but disconnects this concept from the dogmatic tenets of systems theory. *See generally* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC. REV. 239 (1983); Ulrich Beck, *The Reinvention of Politics*, *in* REFLEXIVE MODERNIZATION 1, 24–26 (Ulrich Beck, Anthony Giddens & Scott Lash eds., 1994) (discarding the strict logic of systems theory).
[223] *E.g.*, STEETS ET AL., *supra* note 6, at 52.

the sub-national and the national levels, and the connection between the in-country clusters and the global clusters is close to non-existent.[224] It falls to outside consultants, performing reviews and evaluations, to uncover best practices and novel institutional forms. Experimentalist architecture requires a dramatically strengthened OCHA, which would be in charge of feeding information on shifting norms up and down the chain. In a perfect world of infinite time and resources, this might take the form of a database noting relevant standards, recognized challenges, attempted deviations, and results.[225] In the real world of emergency response, some reflexive revision might be able to take place with more informal but efficient lines of transmission, albeit with a worse signal-to-noise ratio. But as long as peer review stays locked in local clusters, the potential of the system to work fundamental changes in a way that could substitute for top-down accountability is practically precluded.

The vertical movement of information should not only benefit the creation of better global standards, but also further innovation along the horizontal dimension of the cluster system. A crucial aspect of experimentalist practice is that members of local units can take notice of emerging norms in other localities, and urge their adoption.[226] In this cluster system, this may mean that innovations in Kivu should be accessible to clusters operating in other regions of the DRC, but it also means that Haitian clusters should be able to consider programs developing in Pakistan. If information is pooled in a generally accessible way, it becomes

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[224] *Id.* at 32

[225] Simon's description of the Toyota manufacturing floor exemplifies the promises and challenges associated with information pooling: "Elaborate displays visible from all points in the plant summarize what is happening at each station. When a problem that requires suspension of production occurs, its nature and location are communicated immediately to the entire plant. The premise is that, at the outset, we cannot say which people in the plant will have the knowledge and skills necessary to the solution." Simon, *supra* note 195, at 22. For humanitarians, the 'display' would be the IASC/OCHA website, and the 'plant' might refer to a response in a single country. One should not, however, overlook the distributional effects of information technology, as many local NGOs do not have strong capacity in this area. *See* STEETS, *supra* note 6, at 62.

[226] Dorf & Sabel, *supra* note 191, at 323 (describing the process of "benchmarking," to invite comparisons across jurisdictions).

possible for a member of a Chadian cluster to notice previously undiscovered pathologies in the response, because these same problems have already been corrected in Sudan. Again, this aspect of the system is seriously limited by the present resource constraints on OCHA, but the expenses associated with information pooling may be significantly less than those needed to robustly manage the current hierarchical system of supervision.

4. Rethinking Hierarchy

Until now, the "horizontal" aspects of experimentalist architecture have been emphasized. But top-down oversight—and even harsh sanctions—may be crucial to ensuring that the experimental process stays on track.[227] In an experimentalist humanitarian system, the vertical structure would not be eliminated, but it would be reconfigured to focus exclusively on ensuring the continued motion of the problem-solving process. The substantive aspects of the vertical relation would be jettisoned, with top-down interventions being limited to ensuring the appropriate level of disclosure, participation and inclusion.[228]

By retreating from substantive issues, and even some procedural ones, the hierarchical structure of the cluster system might become less threatening to the independence of non-U.N. humanitarian agencies. At the same time, more routinized forms of mutual monitoring within the clusters could leave local actors with more tools to change policy at the ground level, and they need only seek redress at the next highest level of the hierarchy when the experimental process breaks down. In any case, whether or not the actual policy generated in these discussions matches global norms is far less important than ensuring that new policies are explained and subjected to continuous contestation from grassroots organizations and victims'

[227] Sabel & Simon, *supra* note 17.
[228] *Id.*

advocates. This ideal is probably far more attainable in some sectors than others. But, importantly, experimentalism provides a coherent and intelligible theory for shaping the role of supervisory authority in a decentralized system.

### *C. Participation as the Central Problem of a Reimagined System*

In addressing the autonomy-coordination tension, an experimentalist humanitarian system pins its legitimation hopes on the quality and extent of direct participation by affected populations. Victim participation is the key to all of the institutional developments sketched above. Active rulemaking, peer monitoring, and reflexivity are not goods in themselves; they function as workable accountability mechanisms and legitimation strategies only to the extent that they correct for the dangers of institutional choice. They do this by ensuring a level of context-sensitivity and responsiveness that would not necessarily be expected of humanitarian organizations on their own.[229] While the relationship between victims and aid workers is not a new problem, participation re-emerges as the central point of tension within a strategy based on experimentalism.[230]

This should in no way suggest that experimentalist structures *solve* the problem of participation. Indeed, ensuring the voice of affected populations in emergency relief, though stated as a central concern of most aid organizations, remains a perennial problem for humanitarian operations.[231] Clusters have not necessarily made attempts to include and respond

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[229] Recall de Waal's critique that the "genuineness" of the humanitarian's commitment to effective relief delivery becomes pathological by generating an internationalized technocratic culture that becomes desensitized to local realities. DE WAAL, *supra* note 169, at 4–5.

[230] To suggest that participation is key in this context is not to fall into the trap of thinking that NGO (or UN) activity is legitimated solely on the basis of its ability to "represent" the populations it serves. *See* Steve Charnovitz, *Accountability of Non-Governmental Organizations in Global Governance*, *in* NGO ACCOUNTABILITY, *supra* note 104, at 21, 35–36 (debunking the problem of NGO representativeness as a "red herring"). Participation, rather, serves to counter-balance the relatively distanced perspective of the "humanitarian international," in order to bolster or ensure the quality of the ideas being developed and adopted. The *good idea* is the central benefit of a working experimentalist structure.

[231] STEETS ET AL., *supra* note 6, at 59.

to affected populations any easier. Reviews have shown that cluster meetings are often held only in English, and suffer from the jargon-heavy language of international humanitarianism, which is inaccessible not only to local populations but also to most national NGOs.[232] The hope that clusters would be used to press for greater inclusion of local populations, in part because of their decentralized and collaborative nature, largely has not been realized.[233]

If these problems cannot be rectified, then the experimentalist structure fails on its own terms. Experimentalism holds out the promise of involving all those affected by power to share in shaping and controlling it, both by opening initial participation to all affected, and in transparently publicizing the results.[234] In an analogous context, Dorf and Sabel note that the quality of service in public housing and community policing "depends so directly on the contribution of beneficiaries that their active participation essentially makes them co-providers."[235] The authors recommend a tiered structure, with intensive local participation at the lower levels, and opportunities for civilian review at higher levels to address strategic issues.[236] If, instead of involving the local communities in generating innovative solutions, clusters instead facilitate relatively sealed conversations among international relief actors, they risk increasing the divide between de Waal's "humanitarian international" and the populations they purport to serve.[237]

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[232] *Id.* at 62; Miles, *supra* note 168, at 47.
[233] *E.g.*, KAUFFMANN & KRÜGER, *supra* note 39, at 39.
[234] Dorf & Sabel, *supra* note 191, at 288, 313 (learning by monitoring … "distributes authority from the 'rulers' to the 'people.'").
[235] *Id.* at 317.
[236] For an elaboration of experimentalism in community policing, see *id.* at 327–32. Public housing and policing are relevant analogies to humanitarian response not only because housing and safety are central concerns in the provision of aid. At a higher level of abstraction, each form of service provision reflects an enterprise where local conditions and concerns (crime, quality of housing, humanitarian needs) are so bound up with local conditions and the knowledge of beneficiaries that their input becomes vital to developing best practices.
[237] DE WAAL, *supra* note 169, at 65–85.

Nor would ensuring participation necessarily solve the *problem* of participation. In an experimentalist structure, the question of who is a "peer" that should be invited to participate must become a perennial problem, which itself is constantly reassessed and reevaluated in light of new information. Experimental structures must find ways to ensure that the very boundaries of the institution are open to contestation, lest the system re-create the insularity that it purported to avoid. This becomes particularly important as contemporary humanitarian responses may last for several years.[238]

In addition, effective participation may unlock new conflict zones that, under current arrangements, are effectively hidden. This Article's treatment of the humanitarian system has largely placed the affected State in the background. But even a moderately successful experimental system might better represent disregarded and vulnerable voices than the government of a totalitarian or kleptocratic affected state.[239] A system that grants such voices direct access to the levers of humanitarian power might pose a significant threat to authorities, particularly in areas where the power of foreign humanitarian actors rivals that of the state itself.[240] If the Cluster Approach does come to enjoy such success in securing participation, will it come at the price of losing access to troubled areas of the world?

Experimentalism thus represents a fraught normative choice for the Cluster Approach. On the one hand, as accountability to affected populations remains a constant problem under any model of response, and experimentalism holds out the promise of improving participation by devolving decisions to local groups and sensitizing actors to local context. On the other hand,

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[238] *E.g.*, Sontag, *supra* note 2, at A1 (reporting in advance of the three-year anniversary of the Haiti earthquake).
[239] *Cf.* Dorf & Sabel, *supra* note 191, at 314 (arguing that experimentalism should "'(re)politicize political institutions by introducing a novel form of deliberation based on the diversity of practical activity, not the dispassionate homogeneity of those insulated from everyday experience.")
[240] *E.g.*, Janil Lwijis, *NGOs: What Government Are You?*, *in* TECTONIC SHIFTS, *supra* note 168, at 69; Harvey, *supra* note 153.

without participation, the emphasis on "peer review" and information pooling risks further reifying the existing normative, cultural, and linguistic barriers between foreign and local actors.[241] But reviews of the cluster system do not necessarily indicate a trend in either direction, suggesting only that the framework has failed to alter the *status quo* of very little participation.

## VI. Conclusion

We are witnessing another moment of transition in the life of international humanitarian institutions. The high profile of the Haiti earthquake of 2010 has renewed calls for the "accountability" of aid institutions,[242] and the cluster system itself has managed to sneak into mainstream news coverage, generally as the subject of criticism.[243] The relatively high level of public attention provides an opportunity to reflect on the institutional arrangements through which disaster response is conducted, and on the manner in which they exercise power. How we understand the problems associated with such power, and the means for its control, will guide the possibilities for institutional design and innovation.

The foregoing discussion should not be understood as making the strong claim that the rising salience of victims' rights or "grassroots" organizations has or will cause a shift away from State-centered modes of accountability. Rather, this Article finds that a horizontal accountability structure is emerging from the wreckage of a formal system that was continually unable to work, in practice or in theory.[244] This emerging structure is not merely hardware; it is

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[241] JULIA STEETS & FRANÇOIS GRÜNEWALD, IASC CLUSTER APPROACH EVALUATION, SECOND PHASE COUNTRY STUDY: UGANDA 43 (2010). (stating that a top-down introduction of the cluster system "was detrimental to ownership compared to previous approaches and disempowered national and local actors").

[242] Michael Jennings, *International NGOs Must Address their Accountability Deficit*, GUARDIAN (U.K.) POVERTY MATTERS BLOG, Feb. 9, 2012, http://www.guardian.co.uk/global-development/poverty-matters/2012/feb/09/ngos-accountability-deficit-legal-framework.

[243] *See supra* note 168 and sources cited therein.

[244] *See also* NHRP, *Fit for the Future? Strengthening the Leadership Pillar of Humanitarian Reform*, at 15 (Nov. 2010) ("In a system characterized by non-hierarchical relationships between partners, and strong competitive incentives for each of the partners, there should be little surprise that an accountability system based solely on hierarchical, vertical lines does not work.").

embedded with its own normative outlook for the system, which takes a different orientation than the formal structure. In this emerging orientation, victim participation is no longer merely one of many concerns facing the humanitarian enterprise. It is the keystone of the cluster system's legitimation strategy.

And it is a risky one. If, after Haiti, "grassroots" organizations are emboldened to publicly critique the international humanitarian enterprise and assess its responsiveness to local voices, then an accountability strategy that pins its hopes on context-sensitivity and learning opens itself to strong and highly charged normative challenges.

More than simply failing in its mission of inclusion, an experimental and self-correcting process can easily descend into a sealed-off, unresponsive form of peer interaction.[245] Indeed, the pathologies of network-style interactions among an international elite class of experts seem particularly dangerous in the context of humanitarianism. Recently, Concannon and Lindstrom have emphasized the aid effort in Haiti was partially undermined because the UN and other bodies "extensively and inappropriately relied on international NGOs to be the voice of the people."[246] This type of error is troublesome in any case, but it is absolutely fatal to an institution whose strategy for accountability and legitimacy rests on cognitive openness and sensitivity. To the extent that the cluster system shifts toward an experimentalist framework, it will be haunted by images of victims' groups being barred from cloistered compounds, or sidelined by inaccessible jargon.[247]

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[245] For similar critiques, see generally Phillip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 Nw. J. L. & Bus. 1014 (1996–97).
[246] Brian Concannon Jr. & Beatrice Lindstrom, *Cheaper, Better, Long-Lasting: A Rights-Based Approach to Disaster Response in Haiti*, 25 EMORY INT'L L. REV. 1145, 1177 (2011) (internal quotation omitted).
[247] *See* Miles, *supra* note 168.

The renewed emphasis on victim participation expressed here, which is associated with the development of horizontal structures for policy experimentation and peer review, is one view of the future of humanitarian institutions. By focusing on nascent developments in the field, I have attempted to draw out their implications for the transformation of international disaster response. But these developments are by no means foretold. In light of this investigation, experimentalism, in the guise of "horizontal" accountability, remains a promising approach to the reorganization of humanitarian institutions, but it is not without its own normative tensions. Having interrogated these pitfalls, we have not "solved" the problem of humanitarian organizations, but we have a clearer map of the available paths ahead.