

Humanitarian protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees

by

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Humanitarian protection — the effort to protect the fundamental well-being of individuals caught up in certain conflicts or “man-made” emergencies — has moved from the periphery of world affairs to centre stage over the past few decades. This is both good and bad. It is good in the sense that the welfare of persons in dire straits because of war and forced displacement is receiving more attention from various actors. It is bad in the sense that many millions of persons each year continue to wind up in dire straits from these and similar emergencies.

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Many actors can be involved in humanitarian protection. Two organizations above all symbolize long-standing efforts to provide humanitarian protection on an international basis: the International Committee of the Red Cross (ICRC) and the Office of the United Nations High Commissioner for Refugees (UNHCR). The two exhibit several fundamental differences. As is well known, the former focused historically on victims of war, and the latter on refugees. Also, the ICRC is private at its core. It is legally incorporated as a private body under the laws of Switzerland, where it is headquartered. Its top policy-making body, the Assembly, which is all-Swiss and maintained by co-optation, formally answers to no other entity.¹ UNHCR is clearly public, being part of the extended UN system. It was created by the UN General Assembly, from which it takes instructions and to which it reports, and its head is approved by that same General Assembly upon nomination by the UN Secretary-General. A small portion of its budget is derived from the UN regular or administrative budget, but like the ICRC it operates mostly on the basis of voluntary contributions from (western) States.²

Regardless of differences concerning focal points and public/private character, the ICRC and UNHCR share many similarities in their efforts to provide humanitarian protection. It is the purpose of this brief essay to highlight these similarities, as well as to note important differences.

1 The ICRC is recognized in international public law and has signed a headquarters agreement with Switzerland as if it were a public international organization. Nevertheless, the ICRC was formed as a voluntary private medical aid society. It has never taken formal instructions from, or officially reported to, any public authority. In truth the ICRC is *sui generis* with both public and private characteristics. The private aspects are fundamental.

2 Both the ICRC and UNHCR depend for their operations on the voluntary contributions of the wealthy liberal democracies. These governments contribute more than 85% of the ICRC's total operating expenses, and more than 95% of UNHCR's. The public/private distinction does not matter very much in this regard.

The meaning of humanitarian protection

Both the ICRC and UNHCR share a working understanding of humanitarian protection, although neither has explained it as well as analytical observers might wish. This common understanding of humanitarian protection, reflected in operations more than in pronouncements, consists of three basic parts.

First, each agency is to be an advocate for, and sometimes manager of, persons of concern within its mandate. The central purpose of humanitarian protection is to safeguard the worth and welfare of certain persons in distress. This core role requires the agency to be, realistically speaking, political in the broad sense of lobbying primarily States to provide, *de jure* and *de facto*, minimal standards of dignity for mandated persons.

Both agencies lobby States to become parties to the relevant parts of international law (international humanitarian law and refugee law) and live up to their commitments. Both make diplomatic and legal representations to States and would-be States (e.g. non-State parties in the form of rebel armies, private militias, etc.) in order to obtain minimal human decency for persons within their mandates. Both seek to educate, or raise the political awareness of, both policy-makers and various publics for the benefit of persons falling within their mandates. Where necessary, they organize and manage the provision of goods and services to ensure minimal standards of human dignity and welfare.

To do what they are supposed to do, the ICRC and UNHCR *must* be political in the sense of participating in the political process that determines who gets things of value.³ In fact, each agency lobbies for public policies designed to benefit certain individuals in distress. Each tries to elevate certain humane public policies, while opposing competing policies that are deemed less humane. The semantics of neutrality cannot obscure this fact.

³ Politics in this sense is the process that determines the allocation of things of value. Or in other terms, politics refers to who gets what, when, and how.

This effort to advance certain public policies rather than others cannot be, public relations aside, a non-political and value-free stance.⁴ Humanitarian advocacy and management is an endorsement of policies reflecting the philosophy of social liberalism: each individual matters, and he or she is worthy of equal attention to basic, minimal standards of human decency or dignity. Thus you have both agencies employing the semantics of independent, neutral, and impartial action for the benefit of individuals. Nationality, ethnicity, class, gender, race, and other superficial characteristics are not supposed to matter, certainly not in a negative or exclusionary sense.⁵

The ICRC and UNHCR without doubt engage in the political process to affect things of value. They primarily try to affect public policies determining individual freedom from: abuse, hunger, the elements, poor physical and mental health, lack of basic education, etc. This is the central meaning of “humanitarian politics.”⁶ Operatives for the ICRC and UNHCR, except perhaps for a few traditionalists, understand very well that their agency is highly political in the sense explained above.⁷ To be humanitarian is to be political in this fundamental sense: to engage in the political process to advance social

⁴ While the 1950 UNGA resolution creating UNHCR requires it to be a strictly non-political body, that resolution also explicitly requires it to propose, promote, and try to obtain measures for the protection of persons of concern, while supervising refugee norms. A fair reading of that instrument leads to the conclusion that the agency is authorized to lobby for persons of concern, but must try to avoid strategic and partisan affairs. It makes no sense to say that the agency should propose, promote, try to obtain, and supervise, but not participate in the political process that controls protection. That would be an impossibility. The same type of interpretation applies to the ICRC and its semantics about being neutral, humanitarian, and non-political. The ICRC is an advocate for victims of certain conflicts. If you advocate a certain public policy by public authorities, *ipso*

facto you participate in the political process.

⁵ Recognition of gender, adolescence, or elderly status, among other distinctions, may of course require special protections.

⁶ See further David P. Forsythe, *Humanitarian Politics: The International Committee of the Red Cross*, Johns Hopkins, 1977, and Larry Minear/Thomas G. Weiss, *Humanitarian Politics*, Foreign Policy Association, 1995.

⁷ Traditional lawyers tend to say that what is legal cannot be political: if one works for the protection of legal rights, one is not engaging in politics. This traditional way of viewing things is misleading about much social reality. Law emerges from a political process, and much law is a form of codified public policy. Decisions about implementing legal rights entail much choice about competing policies, and about calculations of power.

liberalism. Both agencies advocate for, and otherwise work for, the basic well-being of all persons, on an equal basis, who fall within their mandate.

Secondly, the humanitarian protection of the ICRC and UNHCR seeks to be genuinely non-political in a second, different sense.⁸ The agencies are not motivated to affect interests and values other than the social well-being of persons falling within their mandates. They are not motivated to advance the strategic and/or partisan goals of public authorities. They do not intend to privilege or favour one State or alliance over another in international power struggles. Nor do they intend to privilege or favour one partisan faction or another within a State. Where they cannot help but have an effect on such strategic or partisan interests, the agencies try to minimize or perhaps balance that impact. In any event, they prioritize human welfare for persons of concern. They do not endorse even political liberalism (free and fair elections with protection of civil and political rights), much less other forms of rule, or other distributions of power, on an international or national basis.⁹

⁸ Clear analysis is not helped by the fact that the words “politics” and “political” are widely used in varying, and mostly undifferentiated, ways. As Neil MacFarlane has indicated, “politics” for many writers “is a residual category, a grab bag of assorted factors that may affect humanitarian action but should not”. *Politics and Humanitarian Action*, Occasional Paper No. 41, Watson Institute of Brown University, 2000, p. 7. — It should be clear in my essay that first I use politics (with a small “p” if you wish) to refer to a broad process of competing values and public policies, and then secondly (with a capital “P” if you wish) to refer to strategic and partisan struggles for power and advantage often having little to do directly with humanitarian values. While “politics” refers to competing policies, “Politics” refers to who exercises

power. The two processes are of course related, but their analytical separation helps in understanding humanitarian protection.

⁹ Political liberals sometimes violate international humanitarian law and refugee law. The ICRC and UNHCR, to be true to their philosophy of social liberalism, must be relatively independent of all ruling elites so as to work for the equal worth of certain individuals in distress. The agencies’ customary and usual allies are the political liberals, because both share the theory of individual value. This fact is reflected in funding patterns. But the political liberals often manifest national interests that cause them to downgrade the importance of certain individuals — particularly “enemies”, “outsiders”, and “members of the ‘other’”.

To engage in humanitarian protection is to be “other-oriented” for the benefit of persons of concern. National authorities (and those that seek to replace them) tend to be primarily “self-oriented” in the sense of pursuing egoistic interests that supposedly benefit the nation, or maybe only the ruling group.¹⁰ States (and non-State parties) strongly tend to prioritize strategic and partisan goals, doing only those things that fit in with perceived egoistic interest and preferred power structures. By contrast, humanitarian protectors have social liberal goals, as explained above.

It is quite clear that humanitarian protectors like the ICRC and UNHCR, who are oriented to the welfare of persons of concern, often inadvertently have an impact on the strategic or partisan goals of public authorities. The two types of politics sometimes intersect. When in the early 1990s the ICRC acted inside Bosnia and Herzegovina so as to move civilians out of harm’s way, it contributed to the ethnic cleansing then pursued by certain warring parties. It may have been on firm legal ground: Article 49 of the Fourth Geneva Convention of 1949 allows civilian evacuation if the security situation so requires. Nevertheless, by moving persons away from their tormentors, as desired by the civilians themselves, the ICRC could not help but contribute to ethnic cleansing. When during the mid-1990s UNHCR sought to curtail the operations of various Hutu militia intermingled with genuine civilians in flight from Rwanda, it had an impact on the Hutu-Tutsi militarized conflict. Both agencies acted for persons of concern, even if aware of some impact on the strategic and partisan goals of protagonists in the relevant conflict.

One of the reasons that the ICRC desires to be accepted as a “neutral humanitarian intermediary” on both sides of armed conflict is so that it might try to have a similar impact on the military and other objectives of each of the warring parties. If one party gains legitimacy or improved public image from accepting ICRC visits to detainees, the other can also. The agencies’ hope is that the humanitarian good they do outweighs whatever advantage they provide to public authorities as a by-product of their social liberalism.

¹⁰ MacFarlane, *op.cit.* (note 8), p. 8.

Thirdly, both agencies consider relief, or assistance, to be part of humanitarian protection. Why they have not been able to clearly and consistently explain this linkage is an interesting question.¹¹ The fact that they both continue at times to speak of protection and assistance as if they were two different things raises questions about clear thinking. When the ICRC and UNHCR provide humanitarian assistance, they are trying to protect persons of concern from hunger and malnutrition, poor physical and mental health, and the other affronts to human dignity that come from such things as lack of shelter or lack of basic education. Just as the 1948 Universal Declaration of Human Rights contains social and economic rights, so do international humanitarian law and refugee law call for the provision of socio-economic goods and services necessary for minimal standards of decency and welfare. The goods and services making up relief are but part of humanitarian protection, not something different from it.

Although traditional discourse makes this subject awkward to present, in reality one has traditional-protection and relief-protection. In traditional-protection¹² the ICRC and UNHCR are found observing the actions of public authorities toward persons of concern under the relevant international norms. On the basis of these norms the agencies make diplomatic or legal representation to the authorities to ensure that such persons are not abused or otherwise treated wrongly. In relief-protection, there can be an element of observation or supervision, along with the central effort to provide the goods and services necessary for minimal human dignity in exceptional circumstances. When the ICRC makes prison visits and also provides goods and services to those detained, it can clearly be seen

¹¹ See, for example, the ICRC report on its Internet site, presenting protection and assistance as “two sides of the same coin”. What that “coin” is the ICRC does not indicate. But then not only are health activities distinguished from relief; also relief is separated from protection. “Health and Relief: General Introduction”, extract from “ICRC Special Report: Assistance”, 1 March 2000.

¹² It is less awkward in discourse to say that the two agencies seek to alleviate human suffering for persons of concern especially in emergency situations, and that this humanitarian help has two dimensions — relief and protection. The major problem with these semantics is that they tend to suggest that relief is not a core part of protection.

that assistance is part of protection. In that situation there is obviously no logical or humanitarian sense in trying to separate relief from protection. They are part of the same process of safeguarding the minimal human dignity of the detainee. The detainee is to be neither tortured nor starved.

Over time a semantic custom has arisen, to which the humanitarian agencies themselves have intermittently contributed, of discussing relief as something apart from protection. For example, the ICRC presents budgetary figures for “protection”, and then a separate set of figures for both “relief” and “health expenditures”¹³ as if relief, including medical relief, were not part of protection. This is both misleading and confusing. It is true that routine “detention visits” may incur certain costs that can be differentiated from providing food, clothing, shelter, and health care to non-detainees. That kind of distinction makes sense. But separating “relief” from “protection” does not make sense. Protecting a person from death by starvation is just as important as protecting a person from death by summary execution. Protecting a person from hypothermia is just as important as protecting a person from torture. Some threats to human dignity call for diplomatic or legal representation, and some threats to human dignity call for the provision of socio-economic goods and services.

To sum up so far, both the ICRC and UNHCR are doing the same thing in general when they engage in humanitarian protection.¹⁴ They struggle to prioritize social liberalism for persons of concern, which means they seek to promote public policies respecting the equal worth and dignity of those persons. In so doing, they try to minimize their own impact on strategic and partisan affairs. And they both recognize, at least in the field, if not always through statements and publications at headquarters, that relief is very much an important part of protection.

¹³ See various ICRC *Annual Reports*.

¹⁴ UNHCR will submit legal papers to national courts in order to try to defend the rights of refugees. The ICRC, while sometimes

observing trials, does not participate in war crimes trials, for reasons discussed further on in the text.

Persons of concern

While historically the ICRC tried to protect victims of war and UNHCR to protect refugees, each of these genuine focal points for action has become complex rather than simple. Moreover, the two agencies also show a common history in the sense that their mandates have expanded over time.

As for the ICRC, to make a long and very interesting history short,¹⁵ one can simplify by saying that it was created in 1863 to supplement State action in protecting wounded combatants in international war who were *hors de combat*. Since then the ICRC has claimed a general right of initiative: to offer its services to parties in certain conflicts where victims might benefit from humanitarian protection from an adversary. This flexible and open-ended mandate, self-devised but widely accepted in international relations, has led to specific concerns. Over time the ICRC expanded its activities to focus not just on sick and wounded combatants but also on military and civilian detainees, and other civilians, in both international and internal war. After World War I, and more systematically some decades later, the ICRC undertook to protect political or security detainees in situations akin to war, namely in times of national unrest (sometimes also called internal disturbances and tensions). It also sought to trace persons missing as a result of armed conflict. Thus it progressively sought to protect victims of war and certain victims of politics, usually first through its own initiatives “on the ground” or “in the field” and then with the endorsement of the international community.

The ICRC lobbied for statements in meetings of the International Conference of the Red Cross and in international humanitarian law that would confirm and perhaps expand its field experience. It also lobbied to create other international law, such as treaties banning anti-personnel landmines or establishing a permanent

¹⁵ For recent in-depth histories of the ICRC, see François Bugnion, *The ICRC and the Protection of Victims of War*, ICRC, Geneva (to be published in 2001), and John Hutchinson, *Champions of Charity*, Westview Press, 1986.

More accessible to the general public is the account by Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, HarperCollins, 1998.

international criminal court. These latter legal instruments might not be part of international humanitarian law traditionally understood. But landmines and international criminal justice, among other issues such as the traffic in light weapons, affected victims of war, and so the ICRC lobbied (and was lobbied by others) in the international legislative process.

Likewise, UNHCR's early focus on persons who had a "well-founded fear of persecution" and who had fled across an international boundary came to be supplemented by concern for others.¹⁶ The agency eventually focused its protective efforts not just on Convention or legal refugees but also on others in a "refugee-like" situation, such as those fleeing across an international boundary to escape war or other public disorder (rather than individualized persecution), and certain of those involuntarily displaced within national jurisdiction. Taking action similar to the codification efforts of the ICRC, UNHCR lobbied the General Assembly to approve responses to the needs it saw in the field, either by drafting new legal instruments or passing Assembly resolutions. UNHCR also helped produce generalized statements of policy formally adopted by its Executive Committee, the latter being composed of States meeting at the UN which are interested in refugee affairs.

Like the ICRC, UNHCR came to operate under not just treaties, but also more flexible "international regimes" that contained non-binding instruments and various customs. Like the ICRC, UNHCR found it difficult to confine its humanitarian protection to a well-established but clearly limited group of persons, when similar persons presented pressing humanitarian needs. Both agencies generalized their language, talking of "persons affected by conflict" or "persons of concern" so that various definitional distinctions could be blurred in the interests of providing expanded humanitarian protection.

¹⁶ Useful overviews include Gil Loescher, *The UNHCR and World Politics: A Perilous Path*, Oxford University Press, 2001, and Guy

S. Goodwin-Gil, *The Refugee in International Law*, Clarendon Press, 2nd ed., 1998.

Like the ICRC, UNHCR found that a reputation for effectiveness led to increased tasks. If the ICRC proved reliable for monitoring the condition of prisoners of war, why not that of civilian detainees and political prisoners? And if UNHCR proved reliable for providing relief-protection for legal refugees, why not for war refugees or internally displaced persons?

It was not always easy, for either agency, to clearly curtail or limit its group of intended beneficiaries. The ICRC represented the International Red Cross and Red Crescent Movement in situations of conflict, while the International Federation of Red Cross and Red Crescent Societies coordinated international action in natural emergencies. The two “heads” of the Movement wound up negotiating the 1997 Seville Agreement, which, among other things, tried to define when the direct effects of a conflict were over, and thus when the Federation might replace the ICRC in dealing with certain persons.¹⁷ So the protection of certain persons, like civilians displaced by armed conflict, might be under the aegis of the ICRC for a time, but then under the umbrella of the Federation when the acute phase of the conflict was over. Views differ as to how well this agreement has structured the ICRC’s “hand-over” of civilians affected by armed conflict to the Federation.

In similar fashion, if UNHCR supervised the return of certain refugees to dwelling places in their original country in order to protect them from abuse and deprivation, at what point did it regard that task as essentially finished? At what point did another agency, such as perhaps the UN Development Programme, consider these same persons to fall within its jurisdiction? That is to say, at what point does UNHCR returnee protection in an emergency become a matter of UNDP (or World Bank) socio-economic development?

Both the ICRC and UNHCR try to limit their protective efforts to only certain persons in certain situations. This is not easy to

¹⁷ Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent

Movement, *IRRC*, No. 322, March 1998, pp. 159-177.

do with precision, and had gradually led to a wider range of beneficiaries. Hence both of these agencies may wind up concerned about the same group of persons, such as war refugees and those internally displaced by armed conflict. Moreover, both are aware that forced displacement and various forms of conflict often entail violations of internationally recognized human rights, which gives further breadth to some of their efforts at prevention and education.

Policy choices

As the ICRC and UNHCR practise humanitarian protection, they often face difficult policy choices. Often they make similar decisions, but not always. As they try to protect persons of concern, they normally have at their disposal only two sources of influence: a reputation for humane, efficient, non-partisan action; and the international norms that States have agreed should guide that action. An independent report on UNHCR's role in Kosovo in 1999 commented that the agency was "armed chiefly with the power of international refugee law and creative diplomacy...".¹⁸ A classic memoir by an ICRC delegate spoke of his being a "warrior without weapons".¹⁹

The question of discretion

The ICRC is well known for its policy of discretion, whereby it usually does not comment with any specificity in public as to what its delegates have seen in the field. Notwithstanding the fact that the ICRC used to publish the reports on its visits to prisoners of war during World War I, this writer is of the opinion that a certain penchant for secrecy and privacy historically permeated the dominant culture of Switzerland. In this view a cultural disposition toward discretion has affected certain Swiss institutions such as private banks, but also the ICRC. Relevant is the 1975 Tansley Report, which found that the penchant of the ICRC for secrecy was dysfunctional: it was so secretive that it cut itself off from supporting elements in international

¹⁸ *Independent Report on Kosovo*, UNHCR Refworld, Summary, Section 2, 1999, available on <www.unhcr.ch>.

¹⁹ Marcel Junod, *Warrior Without Weapons*, Macmillan, 1951.

relations. Most members of National Red Cross Societies, for example, even in Europe, had little idea of what the ICRC was or what it did. If the Tansley view was correct, then the discretion of the ICRC was, at least in its origins and evolution, more the product of culture than of careful analysis.

Be that as it may, the ICRC now has a carefully considered policy on discretion. It argues that since it carries out protective operations in the midst of conflict, including political and armed conflict inside States, discretion is the price it pays for access to victims. This policy, generally validated by extensive ICRC action across time, has been accepted by international criminal courts, which do not compel officials of the ICRC to testify in criminal cases, since such testimony might undermine its ability to operate in controversial situations. If the officials of parties to conflict knew that ICRC personnel might testify on war crimes, crimes against humanity, and genocide, they could prove reluctant to grant the ICRC access to victims.

For some time the ICRC has had a “doctrine” or official policy about “going public”. For example, if there are repeated and serious violations especially of well-established international humanitarian law, and if discreet efforts have not proven ameliorative, the ICRC may issue a public condemnation if it feels that such publicity would benefit victims. For example, if one party in an international armed conflict releases an incomplete or distorted report on ICRC detention visits, the ICRC may release the entire report. While the ICRC has spoken out more often in recent years, it can be shown that some things remain the same.²⁰ The ICRC is still reluctant to go into very many specifics when it goes public. And its officials tend to believe that going public does not often result in improved protection for victims.

The ICRC has not always handled well the related problem that silence can be interpreted as complicity in abuse of victims. It is now known that the ICRC did not protest publicly against the

²⁰ Simone Delorenzi, *ICRC Policy Since the End of the Cold War*, ICRC, 1999, pp. 60-62.

Holocaust, certainly in the fall of 1942, even after ICRC efforts to gain systematic and meaningful access to German concentration camps had come to naught. Swiss Federal authorities pressured the ICRC not to do anything that would interfere with the Swiss policy of accommodating Nazi rule in Europe.²¹ While various arguments have been offered in defence of this ICRC policy of silence during World War II — e.g. ongoing work with prisoners of war, lack of international legal guidelines pertaining to civilian detainees — numerous members of the ICRC's top body in 1942 recognized that silence would damage the agency's reputation over time. So even if the judgment is made that publicity is not likely to help victims in the short term, there remains the matter of protecting the reputation of the protectors. This is — or should be — less a matter of sentimental pride in the organization than of concern for preserving humanitarian protection in the long term, based on a certain reputation for integrity.

As for UNHCR, at first glance one might think it had adopted the ICRC's policy regarding discretion. Many UNHCR publications manage to refer to problems, situations, and even States without indicating who exactly is responsible for persecution and other forms of forced displacement. UNHCR too must often be operational on the territory of States, frequently in the midst of conflict. Certain human rights NGOs, which are very keen on the shaming power of negative publicity, think UNHCR should speak out more about the human rights violations that lead to forced displacement.²²

Yet on balance UNHCR is less discreet than the ICRC. When UNHCR files legal papers on behalf of someone it considers a refugee, it is clearly being very specific in a public way about its view that persecution has been committed. When high UNHCR officials testify in open session of the UN Security Council that, for example, the forced displacement of Kosovars was caused in 1999 primarily by Yugoslav policy and not by NATO bombardment, there can be no doubt that the UN refugee agency does not hesitate to go public in a

²¹ Jean-Claude Favez, *The Red Cross and the Holocaust*, Cambridge University Press, 1999.

²² Human Rights Watch, *Uncertain Refuge*, April 1997.

specific way. Likewise, the agency did not hesitate to publicly castigate Indonesian authorities in West Timor for lack of security arrangements that led to the deaths of three UNHCR staff in 2000.

In its lower level day-to-day operations, however, it seems that UNHCR lacks a consistent policy on discretion. Some officials in some regions are apparently more inclined to speak out in a specific way, and others elsewhere less so. There seems to be no “doctrine” or general policy statement — published or internal — on when its officials should try to mobilize public pressure. While UNHCR does provide information to the treaty-monitoring bodies of the UN system which, in their concern to scrutinize the human rights record of States, find themselves interested in questions such as persecution, it does not appear to put much effort into feeding specific information into the United Nations Human Rights Commission.

So in the matter of discretion, it is clear that the ICRC has the more carefully considered and consistent policy. Whether it is the more correct policy is a more complicated question. This writer believes that ICRC reluctance to disengage from an abusive situation, with a public statement indicating why, allows Machiavellian parties to manipulate the ICRC.²³ They can grant the ICRC routine and not very important access to some victims (e.g. convicted security prisoners in regular penal confinement) while withholding access to more “delicate” situations (e.g. prisoners undergoing interrogation).²⁴ The tendency of the ICRC to stay and do the good it can, while maintaining discretion, is an orientation that may give rise to problems. The UNHCR tendency to engage in more public criticism may be more in keeping with the changing nature of international relations, in which claim to State sovereignty and its related claim to domestic jurisdiction is considered less and less absolute by more and more

23 The ICRC does this on occasion, as when it suspended prison visits in Fujimori's Peru, with an accompanying public statement.

24 The ICRC may elect to stay and work in an unsatisfactory situation, but publish more candid statements about that situation. It may also be guided by the wishes of victims not to be abandoned.

actors. Some observers of UNHCR, however, do not believe that public criticism often improves the fate of persons of concern.²⁵

Scientific truth is quite elusive regarding the wisdom of discretion in humanitarian protection.²⁶

The question of relations with donors

Both the ICRC and UNHCR, as noted above, rely on voluntary contributions from less than a dozen States in the west for their operational capacity. Does he who pays the piper call the tune? One expert on refugee affairs states boldly: "UNHCR's dependence on voluntary contributions forces it to adopt policies that reflect the interests and priorities of the major donor countries".²⁷ Is this interpretation correct, and, if so, does it pertain to the ICRC as well?

It is obviously true that neither agency could function were it to lose the support of major donor States such as, *inter alia*, the United States, the European Union and Switzerland. In recent years the High Commissioner for Refugees has almost always been selected from one of the major donor States, as are other high officials of UNHCR. The last two High Commissioners came from Japan and the Netherlands, and there was always a US national high in the hierarchy. Moreover, if, for example, the British government offers to fund a UNHCR policy planning and evaluation unit, it will be created.

As for the ICRC, while it is no longer true to say that it seemed to be the humanitarian arm of the Swiss foreign ministry, it remains true that relations between the ICRC and Berne are special. The agency's current president and his direct predecessor were career

²⁵ Yves Beigbeder, *Le Haut Commissariat des Nations Unies pour les réfugiés*, Presses universitaires de France, 1999, p. 71.

²⁶ It is possible that there is little general truth in this regard, as compared to "truth" in particular situations. In the spring of 2001 the head of the ICRC delegation for Israel and the Occupied Territories commented publicly that it was a war crime for an occupying power to establish permanent settlements for its own nationals in occupied territories. The resul-

ting furore in Israel and the United States raised interesting questions not about discretion in general, but about the effect of this particular public statement at that particular time in regional and global affairs. The ICRC has an evaluation unit that is beginning to look at many aspects of traditional protection.

²⁷ Gil Loescher, *Beyond Charity*, Oxford University Press, 1993, p. 137.

officials in the Swiss foreign ministry, and Berne contributes more funds to the regular or administrative budget of the ICRC than any other State. The ICRC is, without doubt, increasingly independent of the Swiss federal authorities, clearly so by comparison to fifty years ago. Yet it would be naïve to think that a social and “telephone” network of the elite, which includes the top figures from the ICRC and the Swiss Confederation, does not exist in Switzerland. When Cornelio Sommaruga retired as President of the ICRC, he was fêted by Berne as if he were a foreign dignitary. No other humanitarian agency gets such treatment. When it comes to certain subjects like the wisdom of calling a diplomatic conference to develop international humanitarian law, there is the closest of coordination between the two.

In general, when it is a matter of traditional protection, both agencies have compiled a strong record of independence during recent decades. For one thing they are closely watched by civic society organizations (or NGOs or relief organizations or human rights lobbies). Were the agencies to tilt in a strategic or partisan direction, they would be vigorously criticized with a resulting loss of reputation for humanitarian work. Secondly, they have little reason to alter their traditional-protection activities for fear of loss of funding. Traditional-protection work is not where the greatest expenses lie. Moreover, there is actually a disconnect between traditional-protection and relief-protection. Donors are not likely to “pull the plug” on relief-protection because of disagreement on traditional-protection. In other words, in any given situation the donor governments have their own reasons to support relief-protection — e.g. domestic opinion or strategic calculation. Donor governments are unlikely to hold back on relief funds desired by their own foreign ministries or parliaments because of unhappiness with traditional-protection work in the same or other contexts. Thirdly, both UNHCR and the ICRC are aware of the importance of their reputation for making impartial or neutral decisions.

Thus, UNHCR can be found criticizing the United States for its handling of certain claims to refugee status arising from the Caribbean and Central America. The agency can likewise be found criticizing virtually all of the European governments for their

restrictive policies on granting asylum to those claiming persecution in their country of origin. High Commissioner Lubbers did so in no uncertain terms during the early summer of 2001. An independent report on the agency in Kosovo found that UNHCR did not fall under the control of NATO, but rather on occasion took a view on protection matters that was definitely not appreciated in NATO capitals.²⁸ As for the ICRC, for example, although pressured by the US to change its position it can be found standing firm in its support for a permanent international criminal court. It has also been outspoken in its efforts to obtain a legal prohibition of anti-personnel landmines, despite Washington's unhappiness with that ICRC stance.

Particularly with regard to traditional-protection matters, the donor governments recognize that they have an interest in the existence of humanitarian protectors not under government control. Just as the liberal democracies fund public defenders for the indigent who are accused of wrongdoing, even though such public defenders may complicate the life of State prosecutors, so the liberal democracies in general — apart from calculations in certain specific situations — support an independent UNHCR and ICRC in their traditional-protection work.

The picture is somewhat different when it comes to large-scale relief-protection. If the donor governments wish to provide more money for relief-protection in the Balkans than in Africa or Asia, there is little UNHCR or the ICRC can do about it — aside from making public comment about violation of the principle of impartiality.

Worse still for UNHCR, in that western governments dealt with unrest in the Balkans by adopting policies requiring UN agencies to keep those forcibly displaced within the Balkans and therefore distant from western State boundaries where they might lodge a claim for asylum, UNHCR was pushed into a position whereby it undermined the right to seek and enjoy asylum. In other words, since the UN Secretary-General, perhaps at the urging of western governments, ordered UNHCR to continue to operate in Bosnia and

²⁸ *Op. cit.* (note 18).

Herzegovina and bring relief to civilians in need there, the agency, induced to act against its initial judgment, found it difficult to maintain a suspension of relief — Mrs Ogata had suspended UNHCR relief because the warring parties were imposing various non-humanitarian principles on the agency. As a result of other policies established by the donor States, for example forbidding UNPROFOR to transport civilians out of Bosnia, UNHCR became part of a new western policy of containment, namely to keep those uprooted by persecution and war in Bosnia by caring for them where they were, so as to minimize inconvenience to western governments concerned about unwanted migration.²⁹

So with regard to relief-protection it does seem that UNHCR is sometimes compelled by western States to depart from the policies it prefers. This fate seems to have been avoided by the ICRC. Thus while both agencies seem highly independent in traditional-protection, the ICRC seems more independent than UNHCR in relief-protection. This appears to be true despite the fact that western predominance in funding is essentially the same for both agencies.

The question of pragmatism *v.* legal standards

How do UNHCR and the ICRC handle the question of whether they should stand firm and insist on implementation of proper legal principles as they understand them, or do the humanitarian good they can even if that good falls short of international legal standards? To several persons, including this writer, both organizations seem to be internally divided between a legal culture and a pragmatic operations culture. The former stresses the importance of legal norms, while the latter stresses pragmatic field operations. Which prevails most of the time?

²⁹ See also William Frelick, "Refuge rights: The new frontier of human rights protection", *Buffalo Human Rights Law Review*, No. 4, 1998, pp. 261-274.—The High Commissioner, Mrs Ogata, having ordered a suspension of UNHCR relief operations given the conditions faced, could have resigned rather than follow

the directions of Secretary-General Boutros Boutros Ghali to resume operations. It is not at all clear that the High Commissioner is legally bound to follow the directives of the Secretary-General, as the constituent instrument for UNHCR is silent on this matter.

In general, it seems that both agencies, while demanding that States live up to the legal obligations they have accepted, tend to do the good they can, even if this means departing — of course only temporarily, as an exceptional measure — from the humanitarian standards set by international law. Both agencies seem reluctant to abandon victims to their fate, deprived of an international presence. In this sense, both agencies sometimes make an evaluation of power relationships at work; both frequently reach the conclusion that a public insistence on international standards will not be backed by the power of key States, and therefore that it is better for persons of concern if the two agencies provide what protection they can.

For UNHCR in the Great Lakes region of Africa, it was better to stay operational in dealing with the massive flight from Rwanda after the spring of 1994, rather than disengage in protest against the fact that Hutu militia too were receiving refugee relief. Although some private relief organizations withdrew, protesting against a clear violation of international refugee law, UNHCR felt it had at least a moral obligation to try to help genuine civilian refugees effectively being held hostage by the Hutu militia. States refused to provide the military forces needed to disarm and separate Hutu militia personnel from genuine war refugees, and so the agency was left to cope with the situation as best it could.³⁰ Given situations like this one, it is not so surprising that one UNHCR official has written, “In extreme cases, principles and standards can seem almost academic in deciding action: the overriding considerations in providing such physical protection as is possible are practical and relative, not absolute”.³¹

Likewise, the ICRC in Bosnia during 1992-1995 knew that it was contributing to ethnic cleansing by moving persons out of harm's way. It knew that legally protected persons under international

³⁰ Authors like Philip Gourevitch, in *We Wish To Inform You...*, Farrar/Straus/Giroux, 1998, who are highly critical of UNHCR, do not discuss at all what the fate of genuine Hutu civilians in need would have been if UNHCR had ceased operations.

³¹ Nicholas Morris, “Protection dilemmas and UNHCR's response: A personal view from within UNHCR”, *International Journal of Refugee Law*, No. 9/3, 1997, p. 494.

humanitarian law were not to be subjected to attacks, and it could have disengaged to protest against the policies of the warring parties. But it decided that moving civilians to safety, which after all was, as noted above, consistent with the Fourth Geneva Convention of 1949, was better than having them stay and be killed. In the final analysis the ICRC chose what it saw as the least worst option in moral terms. It was better to save lives than to disengage and protest against attacks on civilians that were prohibited by international law.

Both agencies urge compliance with the relevant parts of international law, even while feeling sometimes morally compelled to take action that falls short of those standards. A contemporary debate focuses on whether UNHCR has unnecessarily abandoned an emphasis on traditional-protection, either because of emphasizing relief-protection, or for some other reason. In the critics' view, UNHCR has had the ability in certain situations to try to advance traditional-protection as specified in international law, but did not do so. Definitive empirical evidence on this point seems lacking thus far. The ICRC seems to have escaped similar controversy. Indeed, on the subject of those internally displaced by armed conflict, it has made great efforts to remind all parties that such persons, while not covered by extant refugee law, are theoretically protected by international humanitarian law. That is to say, such civilians are protected by the law already on the books. Thus the ICRC has continued to emphasize the relevance of extant legal standards for this category of victims.

Conclusion

This essay has tried to show that the ICRC and UNHCR practise a similar notion of humanitarian protection. That concept of protection is paradoxical in that it is both political and non-political at the same time: political in that the two agencies lobby to advance social liberalism as public policy; non-political in that they eschew strategic and partisan advantage for States as much as the context allows. What is called relief is but another way to protect persons from socio-economic violations of human dignity, beyond traditional-protection consisting of observation and representation under international norms.

This realistic notion of humanitarian protection has been so well suited to international relations that the mandate of both agencies has not only been reconfirmed but also expanded over time. The history of both the ICRC and UNHCR shows international support in principle for what they attempt to do, as well as a widening, if overlapping, focus on persons in dire straits as a result of conflict. Neither agency is an all-purpose human rights protagonist, but both have found it impossible to stick with their original focal point for action. The ICRC deals with much more than the wounded combatant in international armed conflict, and UNHCR deals with much more than individuals fleeing persecution across an international boundary.

Relying on their reputation and the norms of international law, both agencies face hard choices as they deal with more powerful players. The ICRC is more discreet than UNHCR, and marginally more independent from States. Both calculate what power relationships allow, as they take decisions regarding how much to insist on the application of international norms, and how much to do the best they can in context. Both are aware that the best is the enemy of the good, and that given the high incidence of the contexts in which they are expected to operate, they may have to be satisfied with the least worst option. Even long codified norms are rarely matched by practice. Agreements in principle are often undermined by the egoistic pressures of the moment.

Both agencies, and their “other-oriented” humanitarian protection, will certainly be needed for the foreseeable future.



Résumé

Protection humanitaire : le Comité international de la Croix-Rouge et le Haut Commissariat des Nations Unies pour les réfugiés

PAR DAVID P. FORSYTHE

Le CICR et le HCR ont tous deux pour mandat international d'œuvrer en faveur d'une meilleure protection des personnes touchées par une situation de conflit. Quelles sont les similitudes entre ces deux organisations et qu'est-ce qui les différencie ? L'auteur examine d'abord la notion de « protection humanitaire ». Il arrive à la conclusion que les deux institutions ont, dans l'ensemble, adopté le même concept et qu'un lien étroit existe entre la protection et l'assistance. Même si les deux institutions n'exercent pas leurs compétences sur le même cercle de personnes, leurs activités se rejoignent souvent dans la pratique. L'auteur compare ensuite la manière dont les deux institutions abordent certaines questions telles que la discrétion institutionnelle, les relations avec les donateurs et la tension entre l'approche juridique et le pragmatisme. Cette analyse le conduit à constater que le CICR et le HCR défendent une notion semblable de « protection humanitaire ». Toutefois, l'engagement des deux institutions est nécessaire pour affronter les problèmes humanitaires du présent et de l'avenir.

