

NEW ISSUES IN REFUGEE RESEARCH

Working Paper No. 33

UNHCR's mandate: the politics of being non-political

David Forsythe

Charles J. Mach Distinguished Professor of Political Science
University of Nebraska-Lincoln
United States

e-mail: dforsythe@unlnotes.unl.edu

March 2001

These working papers provide a means for UNHCR staff, consultants, interns and associates to publish the preliminary results of their research on refugee-related issues. The papers do not represent the official views of UNHCR. They are also available online at <<http://www.unhcr.org>>

ISSN 1020-7473

Summary

The mandate of UNHCR indicates that it is to be a strictly non-political organization. Yet the rest of that mandate requires the agency to provide protection to refugees.¹ Subsequent resolutions of the UN General Assembly have enlarged and specified the agency's tasks, for example authorizing it to protect certain other persons of concern, such as at least some internally displaced persons, and to address the root causes of forced displacement, which in general are violations of human rights. In what sense can UNHCR provide effective protection to persons of concern to it, on a broad scale including relief operations in the midst of conflict, while being strictly non-political?

If we make a realistic analysis rather than a legalistic one or one for public relations, we have to admit that the overall mandate requires UNHCR to be a political agency in the sense of trying to influence public authorities to protect refugees and those in a refugee like situation. This is mostly an advocacy or lobbying function, sometimes entailing follow-on management as in coordinating the delivery of relief. It is well recognized - at least among political scientists - that trying to advance a preferred public policy is a political act. To avoid this reality would be to abandon the *raison d'être* of the agency.

For reasons of acceptability, however, the agency might like to refer to this type of politics as humanitarian advocacy and management. These semantics, as well as reference to legal rights, would allow the agency to maintain the fiction that it is totally non-political, or humanitarian, or neutral. But analytically or realistically speaking, this is indeed a fiction. One meaning of politics is to try to exert influence in the policy process, viz., the process of making or applying public policy. This is precisely what UNHCR does in its protection activities. When it speaks of trying to create a humanitarian space for itself and persons of concern to it, it is in reality talking about creating, through persuasion and negotiation, a zone of humanitarian policy. This humanitarian policy necessarily entails value judgments and preferences. The process and content are both political, in a very widespread usage of that term. The process is about a struggle for influence, and the content is about elevating one public policy over another.

In a second sense the agency might be said realistically or truthfully to be non-political, and hence humanitarian and neutral. UNHCR is not to be motivated by attempts to affect partisan positions *per se*, and this avoidance of classic politics takes three specific forms. UNHCR can be said to be non-political in that: it does not pronounce directly and explicitly on "who governs," meaning who should govern in general; it does not pronounce on public policies beyond its mandate, and thus on the general nature of governance unrelated to refugee concerns; and it does not engage in military coercion in an effort to compel policy change.

¹ I am grateful to several persons who read and commented on earlier versions of this study. Some of these persons work for UNHCR and do not wish to have their contributions explicitly recognized. Beyond these persons, who were uniformly generous with their time and expertise, I would like to thank Bill Frelick and Tom Weiss for their observations and suggestions. I alone am responsible for the final version.

As a humanitarian protection agency with a limited mandate, UNHCR does not comment in general on who should rule nationally or internationally. Thus it indicates no preference regarding contenders for power, or on the general nature of peace agreements, or who is responsible for breaking the peace. Nor does its mandate authorize it to act on other matters not linked to protection of persons of concern. It goes without saying that the agency does not do military coercion.

A great difficulty arises when UNHCR protection, motivated by concern for certain individuals in dire straits, impacts “who governs,” or contradicts the general nature of governance, or is linked to military coercion. There is the related issue of whether UNHCR itself engages in a type of coercion by closing down refugee camps or reducing goods and services in an effort to compel refugees to move. The agency will need careful consideration of its policies in order to maintain an image of being non-political in this second sense of being non-partisan on issues beyond its mandate.

In other words, UNHCR must, according to its mandate, try to exert influence in behalf of persons of concern, but it should try to minimize its impact on partisan struggles apart from refugee (and refugee-like) affairs. The fundamental problem is that the two domains can overlap. To protect persons of concern in Bosnia, the agency had to challenge policies by public authorities. This challenge sometimes affected the authorities’ power position, type of governance they pursued, and coercive policies adopted. A central goal of the agency should be to minimize the area of overlap where possible. If not possible, the agency’s mandate requires it to stand firm, at least in principle, in behalf of humanitarian protection.

In sum, UNHCR is mandated to engage in the struggle for influence in behalf of persons of concern. Thus the international community has agreed that it should lobby, try to advance certain policies, be an advocate for certain persons. But it is supposed to minimize its involvement in controversies over who governs, the overall nature of governance, and its link to coercion. Thus it is to be an advocate for persons of concern, but non-partisan otherwise.

UNHCR needs to carefully calculate its policies in order to maximize influence to protect persons of concern, while minimizing undesirable effects as seen by state and non-state actors. It is in this sense that the agency has to be very political so as to appear as non-political as possible.

Introduction

The Office of the United Nations High Commissioner for Refugees, like other protection agencies such as the International Committee of the Red Cross, has repeatedly claimed to be non-political and thus humanitarian. Both agencies assert a distinction between the humanitarian and the political. A number of private experts on this subject do the same.² For many, to be non-political and humanitarian means to be neutral in struggles for power. This is said to be absolutely fundamental to the nature and manner of their protection efforts. Owing perhaps to the ambiguity of the words political and non-political in both English and French, neither agency has satisfactorily explained the concept of humanitarian protection, despite repeated attempts to do so. When asked, the President of the ICRC said in 1998 that the most misunderstood thing about that agency was its neutrality.³

Some responsibility rests with the ICRC for this state of affairs, given its 140 year history and persistent claims to non-political status. When an ICRC author concludes her essay by writing that the international community needs to preserve means of assistance and protection “genuinely free of political considerations and influence,”⁴ it is not an entirely helpful statement because readers do not agree on what the word “political” means.⁵ It may be true, however, that since both the ICRC and UNHCR are operating agencies that deal with public authorities, they cannot be fully candid in their statements. The present study, independent in nature, explores the ways in which UNHCR (with comparisons to the ICRC) is both political and non-political. Thus it analyses the meaning of humanitarian protection as practiced by these two agencies in contemporary international relations.

This study gives no separate attention to the concept of impartiality. Impartiality refers to giving equal attention to persons of concern based on personal need related to health and welfare. Being humanitarian (or non-political, or neutral) on the other hand, and for present purposes, refers to a protective agency’s relationship with other primary actors, usually governments, but sometimes intergovernmental organizations and non-state parties. The ideas of impartiality and neutrality can overlap. The issue of donors earmarking funds given to UNHCR affects mostly impartiality but not usually neutrality. Because of donors, UNHCR may distribute more goods and services to Kosovar refugees than African refugees with comparable personal needs. The principle of impartiality is thereby violated, but the principle of neutrality is not.

² Gil Loescher, *Beyond Charity*, New York: Oxford University Press, 1993, pp. 10, 181, and passim.

³ Massimo Lorenzi, *Le CICR, le coeur et la raison: Entretiens avec Cornelio Sommaruga*, Lausanne: Favre, 1998, p. 21.

⁴ Beatrice Megevand Roggo, “After the Kosovo conflict, a genuine humanitarian space: A utopian concept or an essential requirement?,” *International Review of the Red Cross*, no. 837. (March 2000), p. 45. There is no definition of “political” given in the article.

⁵ Compare Denise Plattner, “ICRC neutrality and neutrality in humanitarian assistance,” *Ibid.*, no. 811, pp. 161-179, which does not add much clarity to the subject. See also Daniel Warner, “The politics of the political/humanitarian divide,” *ibid.*, no. 833, pp. 109-118.

It is important to make clear at the outset that this study sees relief as part of protection for two basic reasons: (1) Relief provides protection from death, malnutrition, disease, hypothermia, depression, and similar socio-economic ills. Relief thus provides protection from the violation of certain socio-economic rights, as codified in various parts of international law. Relief therefore protects against certain major socio-economic impediments that block the achievement of minimal human dignity for persons of concern.⁶ (2) Relief workers, by their very presence in the field, tend to deter further harm to those who have been involuntarily displaced or otherwise victimized. As international observers, they provide some element of protection for persons of concern against further intentional persecution, discrimination, or other harm by their adversaries.

Hence it is useful to distinguish between traditional protection (through diplomatic and legal representations) and relief protection (through socio-economic goods and services, containing also an element of traditional protection). In its 1999 Global Report UNHCR at first recognized that relief was part of protection. It stated, “the daily practice of providing protection” includes, among other tasks, “identifying vulnerable groups and prioritizing assistance to ensure their physical security, access to food and safe accommodation, and primary education.”⁷

This wording corresponds to the accurate view of some writers who manifest much practical experience. For example, Pirkko Kourula writes of “the right of refugees to international protection, including humanitarian assistance...”⁸ But later in that very same section of the 1999 Global Report, the agency reverts to old habits and confusions (just like the ICRC) and refers to “protection and assistance” as if assistance were not part of protection.⁹

An important question arises as to whether UNHCR curtails its traditional-protection because it now engages in considerable relief protection. This curtailment could occur in two ways. The necessity and size of relief protection might not leave adequate time and resources for traditional protection. Or, because a given authority might be an actor that

⁶ See further Amartya Sen, *Development as Freedom*, Oxford: Oxford University Press, 1999, for an extended discussion of protection of rights through the removal of material conditions that impede the exercise of those rights. One should be careful not to equate the discourse on refugee rights (or rights under humanitarian law) with only “negative rights” entailed in civil rights that block undesired or inappropriate action by public authorities against individuals. To be sure, refugees have certain civil rights such as proper processing of claims to asylum. But individuals in dire straits also have “positive rights” or “socio-economic rights” that need protecting, and this protection comes through relief. On the difference between negative and positive rights, and the subjectivity of that distinction, see David P. Forsythe, *Human Rights in International Relations*, Cambridge: Cambridge University Press, 2000, p. 29. For the best theoretical argument in support of the importance of “subsistence rights” to human dignity, see Henry Shue, *Basic Rights*, Princeton: Princeton University Press, 1996, 2nd ed.

⁷ “Providing Protection and Assistance,” downloaded from UNHCR homepage.

⁸ “Broadening the Edges: Refugee Definition and International Protection Revisited”, The Hague: Nijhoff, 1997, p. 342.

⁹ The ICRC spokespersons sometimes say that relief is part of protection. But in its annual reports, the ICRC presents budgetary figures for “protection.” It then presents separate figures for relief, and for health expenditures.

both causes persons to flee but still has control over other uprooted persons in need, UNHCR might curtail its traditional protection activities vis-a-vis that actor regarding the outflow of persons because of needing its cooperation for relief protection activities in its zone of control.

As for the former or first possible reason for an alleged decline in traditional protection, according to the 1999 UNHCR Global Report there was a backlog of cases pertaining to the determination of refugee status “which arise unavoidably from time to time owing to unforeseen developments around the world.”¹⁰ This euphemistic wording no doubt means that the backlog of cases pertaining to traditional protection was caused by emergencies involving large scale forced displacement, which necessitated relief protection. (Such a primary cause would not rule out some mismanagement of traditional protection.) This primacy to relief protection is unfortunate but often unavoidable, as the report states. One has to keep refugees alive and healthy, otherwise there will be no point in seeking durable solutions through traditional protection.

For this reason, criticisms of UNHCR, as in the London Financial Times,¹¹ for devoting too much effort to relief are not persuasive. Relief is a necessary and fundamental part of protection that must, in the nature of things, sometimes precede traditional protection through diplomatic and legal representation. (It might be the case, however, that UNHCR personnel managing relief protection have not always been well trained in traditional protection matters, and therefore do not maximize the interjection of traditional protection standards into relief protection decisions. Some close observers of the agency see an internal tug of war between lawyers in the protection division and managers of relief operations, with the latter gaining much influence in the 1990s, and with some subsequent erosion of traditional protection concerns.)

As for the latter or second reason, a reasonable observer might be led to conclude that in a few cases the agency did “pull its punches” or not press as energetically as it could regarding traditional protection in order to try to secure the cooperation of public authorities for a desired relief protection operation. Some observers thought UNHCR was not very forceful in dealing with Russian policies in Chechnya in an effort to mount a relief operation there. Other observers thought the agency should have been more critical of policies by the junta in Myanmar, where UNHCR was also trying to get some relief programs started. It appears to be the case that in several situations the title of a UNHCR protection officer was changed in order not to give possible offense to a public authority whose cooperation was needed on relief matters.

It seems quite clear that in Bosnia during 1992-1995, the agency became a major instrument for the generalized Western policy of “containment” of refugee and humanitarian problems, to such an extent that the agency was forced into a position that

¹⁰ “Providing Protection and Assistance,” downloaded from UNHCR homepage.

¹¹ Jimmy Burns and Francis Williams, “United Nations High Commissioner for Refugees: Special Report,” *Financial Times (London)*, 29 July 1998, p. 7, and subsequent stories in the same paper.

actually undermined the right to seek asylum. Western states did not want increased numbers of Bosnian citizens on their doorstep. Thus they instituted stiffer visa requirements, forbade UNPROFOR to escort Bosnians abroad, and compelled UNHCR to deliver considerable assistance to those in need who remained within Bosnia. To provide such assistance, the agency had to negotiate access to persons of concern from the very authorities that were causing the forced displacement. Thus in this situation relief protection undercut traditional protection.¹² Provision of UNHCR relief inside Bosnia, along with western state policies, encouraged those in dire straits not to seek asylum abroad.

There seems to be no scientific truth about correct policy for protection agencies in these situations where relief is also an issue, because an evaluation depends on judgments about what is reasonable in context. Had UNHCR publicly and vigorously criticized Russian policies that contributed to persons fleeing out of Groszny and/or Chechnya, would the agency have stood much chance of getting Russian cooperation for a relief operation for those displaced persons in need who stayed in the area of military operations? If you want cooperation for doing good, how much can you vigorously protest the bad that is occurring? We will return to this dilemma in several of the following sections.

Background: “non-political” as neutral humanitarianism

It is useful to lead into our subject with reflections on state neutrality, and philosophical neutrality. Both considerations tell us something important about supposedly non-political and therefore humanitarian protection by UNHCR (and ICRC).

State neutrality

It is clear enough that neutral states are not to participate in armed conflict by other parties. The more complex point that deserves attention is the following: certainly for states that are proximate to a conflict and possess the capability to intervene, a profession of neutrality still impacts the power relations of the parties. When the western democracies proclaimed neutrality with regard to the Spanish civil war in the 1930s, they indirectly contributed to the outcome as determined by the strongest participating power. They did essentially nothing to oppose victory by the fascists, and thus so contributed indirectly to that victory.

When states such as Switzerland, Sweden, and Portugal declared neutrality during the Second World War, they bore indirect responsibility for the tides of fortune in that war. They did nothing to oppose Nazi control over much of Europe between 1939 and 1943, and so contributed to that general state of affairs. On the other hand, it may have been that during the Falklands/Malvinas war between Argentina and the United Kingdom, a distant and weak state like Burma remained absolutely or totally neutral. But for other states

¹² For a sharp analysis see Bill Frelick, “Refugee Rights: The New Frontier of Human Rights Protection,” *Buffalo Human Rights Law Review*, 4 (1998), 261-274.

with the capacity to intervene, non-involvement indirectly contributed to British victory. There is rarely such a thing as absolute neutrality. In a shrinking world, even professions of neutrality often affect the outcome of power struggles.

Likewise, when UNHCR sought to rid its refugee camps in the Great Lakes region of Africa of armed militias in the name of neutral or non-political or humanitarian protection, to the extent that it succeeded it had a negative impact on the militias. Its policy undertaken in the name of humanitarian neutrality (it asked the UN Security Council to "neutralize" the camps) was not free from impact on the armed struggle for control of territory and government. The side of the militias was disadvantaged. The intention may have been neutral care of refugees, but the by-product was impact on power struggles. We should not expect absolute neutrality from essentially humanitarian protection agencies, anymore than from states. It is often an impossible standard to meet.

When the ICRC engages in detention visits with the consent of governmental authorities, some positive value usually accrues to those authorities. They are increasingly viewed by at least some observers as more responsible and humane for having cooperated with the ICRC. Their legitimacy may thus be enhanced. They can respond to criticisms from other actors by saying they are cooperating with the ICRC. This impact on "who governs" and governance is simply inherent in the situation. The ICRC hopes that the humanitarian good it does for detainees compensates for any political gain derived by detaining authorities. But it privately acknowledges that its detention visits do carry "political baggage." Again, there is rarely any absolutely neutral or non-political involvement, even by "humanitarian" rather than "political" actors.

When actors profess to be engaged in neutral or humanitarian, and therefore non-political, protection, there is almost always some impact on power struggles.

Philosophical neutrality

A widespread view is that neutrality reflects moral bankruptcy. Rather than take a stand for morality and justice, neutrals supposedly sit on the fence. Cornelius Sommaruga, then President of the ICRC, furthered this view when he said in 1999: "The goal of humanitarianism is not to correct wrongs or impose increased justice."¹³ Sadako Ogata, recent head of UNHCR, said something similar in a 1995 public speech when she stated, "Humanitarian action must remain broadly non-judgmental..."¹⁴ But these views of neutrality do not show a profound understanding of neutral protection as practiced by UNHCR (or really by the ICRC either).¹⁵

¹³ *International Herald Tribune*, 25 October 1999, 7.

¹⁴ "Human Rights, Humanitarian Law and Refugee Protection," presentation at the Graduate Institute of International Studies, Geneva, 16-17 March 1995, p. 5 of prepared remarks.

¹⁵ It is relevant to note that Sweden's view of neutrality during the American phase of the war in Indochina, 1954-1975, did not prevent it from commenting extensively on matters of international law and wise policy. This was in contrast to Switzerland's view of neutrality during that time on that issue, which was much more discreet. So there are varying conceptions of state neutrality, just as there are varying conceptions of neutrality by humanitarian organizations.

Professions of non-political and thus humanitarian protection by UNHCR, ICRC, and similar agencies are not really based on philosophical neutrality or lack of commitment to certain values. In reality, UNHCR and ICRC are committed to a type of social liberalism focused on the worth and well being of the human person. This is one general reason why the ICRC in its 140-year history has had such difficulty dealing with actors endorsing communal ideologies such as fascism and communism. The regimes representing these ideologies elevated the fate of racial or class *groups* over the worth and well being of particular *individuals*. The ICRC wanted to engage in neutral and impartial protection of individuals in dire straits, and the fascist and communist regimes sought to advantage certain races or classes. It was a clash of philosophy, and the morality derived therefrom, as much as a clash over specific policies of detention and persecution and extra-judicial killing.

An ICRC official was on the right track, although he was not fully explicit about the fact that the political neutrality of his agency was based on social liberalism, when he wrote:

Although they were party to the 1949 Geneva Conventions, the Soviet Union and its allies never really accepted the ICRC's mandate, and even less the fundamental principles of humanity, neutrality and impartiality which it upheld. In the essentially Manichean philosophy of Marxism-Leninism, there is no room for neutrality, and there is no question of placing the victims on an equal footing. [The equality of persons is a fundamental tenet of liberalism.] Between Communism and Capitalism, between "progressive forces" and "reactionaries," the relationship can only be one of opposition, leaving no room for any neutral intermediary....In those circumstances it was hardly surprising that the ICRC was unable to act as a neutral intermediary either in the Indochina war, or in the Korean war, or in the Viet Nam war....¹⁶

Implicit in this passage by the ICRC official are the primacy of personal welfare and the equality of the victims. It is not only the very idea of neutrality between capitalism and communism that rigid Marxists reject. They also reject the idea that humanitarian protection should benefit individuals equally, regardless of class and ideology. To use neutrality in strategic power struggles to protect the welfare of the person is to act on social liberalism.¹⁷

The Soviet Union and its allies did not become part of the global refugee regime either, since it too encompassed a neutral and humanitarian protection based on social

¹⁶ Francois Bugnion, "From the end of the Second World War to the dawn of the third millennium: the activities of the International Committee of the Red Cross during the Cold War," *International Review of the Red Cross*, Nos. 305 and 306, (Spring, 1995), p. 214.

¹⁷ Some evidence from ICRC history would seem to indicate it was not the notion of political neutrality per se that communists rejected, but the notion that capitalist victims should be treated equally with communist victims. In the armed conflict between communist China and communist Vietnam of 1979-80, the ICRC was able to serve as neutral intermediary for visits to prisoners of war. All detainees represented a communist state, and thus in the view of those states could be treated equally - as long as the ICRC remained neutral about the policies of the two states beyond its mandate, which it did.

liberalism. As UNHCR has stated about its protection work: “UNHCR’s efforts to find durable solutions to the plight of refugees stem from the needs and rights *of the individual.*”¹⁸ This individual focus and priority was not philosophically or ideologically compatible with communism’s advantaging a particular class.

Political communalism, which privileges a certain group, still lives, complicating the work of social liberals like UNHCR (and ICRC) who focus on individual welfare. In so far as contemporary international relations constitutes a system whose most important actor is the nation-state, collective national and state interests compete with the personal focus of humanitarian protectors like UNHCR and ICRC. This pervasive dialectic is a persistent tension in all forms of contemporary humanitarian protection.

Thus even after the end of the age of ideologies, or the end of the modern war of religion if such the Cold War was, humanitarian protection still encounters a tough opposition in the group orientation that operates under the labels of national interest or reasons of state. It may be that behind the facade of fascism and communism there was always a more basic nationalism: German, Italian, Japanese, Russian, Chinese, Vietnamese, Romanian, Cuban or whatever. While of historical interest, this fact, if such it be, does nothing to lessen the tension between humanitarian protection and nation-state interests in today’s world. The former is concerned with the human person, and the latter, at best, combines personal concern with national interest.

The central point here merits restating. Humanitarian protection is based on social liberalism, which gives primacy to the needs and welfare of the individual, and nation-states tend to operate in international relations according to the tenets of realism, which gives priority to national interests.¹⁹

There is a profound philosophical and moral difference between UNHCR, with its mandate to focus on protection of certain humans in distress, and even states espousing political liberalism. For the latter have national interests to protect, even as they endorse the value of the human person, whereas UNHCR (or ICRC) does not have similar group interests. The humanitarian protectors may (and I think should) be concerned about their image of neutrality and effectiveness. But they do not have national interests and values like territories, cultures, societies, and governments to defend. They seek to advance the human interests of persons in dire straits, not national interests. Even states reflecting political liberalism at home tend to be realists in their foreign policies, especially when their existence and vital interests (as they see them) are threatened. Thus even liberal democracies often act on realist principles in international relations, elevating national interests over the human interest when the two clash.²⁰

¹⁸ UNHCR Refworld, UNHCR Information, UNHCR’s mandate, para. 1. Emphasis added.

¹⁹ There is no one definition of realism. See Jack Donnelly, *Realism and International Relations*, Cambridge: Cambridge University Press, 2000. In the present study realism is used as shorthand for prioritizing national interests (which are subjectively constructed).

²⁰ On this difference see Robert Johansen, *The National Interest and the Human Interest*, Princeton: Princeton University Press, 1980.

Even at the risk of repetition, it is important to emphasize that UNHCR (and ICRC) neutrality is based on social liberalism. We should not confuse “non-political” with “value-free.” It is thus not surprising that humanitarian protection agencies have persistent conflict with states, especially illiberal ones, but even those that manifest political liberalism. States have a broader and more collective agenda. In their foreign policies states, even liberal democracies, dilute their liberalism in the name of national interest - if they aspire to political liberalism in the first place. Humanitarian protectors, if true to their mandates, do not. UNHCR (no less than the ICRC) tries to project social liberalism into an international relations dominated by realist notions driven by conceptions of national interest and security.

The central question then becomes whether the humanitarian protectors can find an acceptable and workable blend of social liberalism and realism, of the human interest and the national interest. The codified mandate of UNHCR (and of the ICRC) is supposed to reflect this combination. International humanitarian law is supposed to reflect a blend of military necessity and humane concern. International refugee law is supposed to reflect a similar blend of reasons of state and humane needs of refugees (and those in a refugee-like situation).

Humanitarian neutrality translates into policy preferences. It is completely naive to think that UNHCR can become involved in a situation where an illiberal government is pursuing such illiberal policies as genocide or ethnic cleansing without encountering profound conflict. UNHCR is mandated to act on the basis of social liberalism.

One way to view this advocacy is to say that UNHCR should try to get states to define their national interests in ways compatible with individual interests- to define their national interests in ways compatible with refugee needs. Thus a general view of UNHCR is that it should work to liberalize realism.

It is naïve, however, to think that in the fall of 1942 a public statement by the ICRC could have caused the Nazis to abandon their policy of persecution of Jews and others. As became clear, especially from 1942 to the fall of Berlin and suicide of Hitler, the Nazi regime was fanatically committed to crimes against humanity including genocide. This rabidly illiberal communalism was not very susceptible to appeals to social liberalism.²¹ (But it can be argued that the ICRC should have gone public to protect its own reputation, and hence its protective work in the future, as analyzed below.)

²¹ The standard starting point on the ICRC and the holocaust is Jean-Claude Favez, *The Red Cross and the Holocaust*, Cambridge: Cambridge University Press, 1999. There is a more detailed edition in French. It should be noted that law and the principle of reciprocity caused the ICRC and Protecting Powers to be able to carve out a zone of humanitarian policy with the Nazis regarding visits to prisoners of war. Thus the ICRC (and Protecting Powers) served as neutral intermediary regarding allied and Nazi prisoners of war. By analogy, the Nazis agreed to some humanitarian protection for detained foreign civilians. But absent both legal obligation and the workings of reciprocity, the Nazis were impervious to acceptance of social liberalism, as seen in policies not only toward despised German groups but also toward Soviet (and Polish) prisoners of war. The point is not that humanitarian protectors cannot ever reach agreement with illiberal or communal regimes, but that it is an uphill struggle to do so, especially when the principle of reciprocity cannot be brought into play.

Humanitarian protectors may strive for *relative* neutrality in power struggles, and therefore strive to be non-political in that sense, but their protection is based on social liberalism. Humanitarian protection is not value free. It urges a type of public policy that benefits individuals regardless of nationality or other social distinctions.

Protection as lobbying to influence public policy

Against the background of state neutrality (point: the difficulty of achieving absolute neutrality) and philosophical neutrality (point: humanitarian protection agencies are not philosophically neutral but rather committed to social liberalism), we can better address the sense in which UNHCR is both a political and a non-political actor.

In its Statute, approved by the UN General Assembly on 14 December 1950, UNHCR is provided with an outline of protection activities in Article 8. This article uses such language as “proposing,” “promoting,” and “endeavouring to obtain.” All of this language suggests an UNHCR active in the transnational policy process, with the basic authority to try to persuade or influence governments for the benefit of persons of concern. Article 8 also authorizes UNHCR to “supervise” refugee conventions. This role is confirmed by Article 35 of the Refugee Convention of July 28, 1951. One can hardly supervise conventions without making judgments or observations about state behavior under refugee law. Thus in reality a type of political behavior is authorized for UNHCR. The statement that UNHCR is to be a strictly non-political agency (Article 2 in its Statute) cannot logically forbid what Article 8, *inter alia*, explicitly permits.

UNHCR almost articulated this reality. In basic information about itself, it said the following: “while safeguarding the strictly humanitarian and non-partisan nature of its mandate, UNHCR may have to play a more active role in the political arena, encouraging States and non-state actors to acknowledge their responsibility for the causes and consequences of forced population movements and the protection of displaced people.”²² UNHCR would have made an important contribution to clearer understanding of its protection role had it said: “while being focused solely on the welfare of persons of concern, UNHCR will have to play a more active role in the policy arena, encouraging other actors to....”

Likewise, UNHCR was almost candid when it said: “UNHCR must...place humanitarian problems squarely against their broader political background, without in any way compromising the humanitarian and non-partisan essence of its mandate.”²³ Full candor would have led to this statement: “UNHCR must place the problems of persons of concern squarely in their political context, without in any way compromising its mandate that requires it to focus only on humanitarian needs.”

²² UNHCR Refworld, UNHCR Information, “UNHCR Strategy towards 2000,” para. 15.

²³ UNHCR Refworld, UNHCR Information, *ibid.*, para. 37.

It seems a bit strange, and certainly reflects the agency's cautious - perhaps legalistic - history, that a keen observer and practitioner should find it necessary in 1995 to argue that the agency "should declare that UNHCR exists to uphold the rights of refugees, including the right to a just solution, and to extend assistance to them. And, to that end, it acts, consistently with the Rule of Law, in accordance with the principles of humanity, neutrality and impartiality...."²⁴ Why should this point have to be argued in 1995? One wonders what the agency thought it was doing between 1950 and 1995? One expert in humanitarian matters found the agency historically legalistic and overly cautious.²⁵

Given its statute and the sensitivity surrounding the phrases "political" and "non-political," the agency mostly prefers to speak of UNHCR humanitarian or social advocacy under particularly statutory Article 8. It also prefers to camouflage its lobbying role by referring to defense of refugee rights. Its protection is said to be based on legal rights. Thus you have the statement, "The objective of protection is to secure for involuntarily displaced populations those fundamental rights and freedoms which a State should afford its citizens."²⁶ There is the pretense that if protection is a matter of protecting legal rights, it is therefore strictly non-political. What is legal cannot be political, by definition.²⁷

This caution seems excessive, because fifty years of practice shows that states do not object in principle, or in the abstract, to the right of UNHCR to put forward its views about proper policy for persons of concern. In fact, it is increasingly recognized that not only human rights groups but also aid agencies routinely engage in advocacy. According to one analyst, "Nowadays advocacy is viewed by aid practitioners as a logical extension of their bread-and-butter activities...key issues within the humanitarian community today concern not whether organizations should engage the authorities but rather on what issues, in what fora...and with what relative commitment of agency...resources."²⁸ The idea that the agency should be non-judgmental when it comes to refugee protection seems quaint at best.

The agency is somewhat different from pure advocacy groups like Human Rights Watch or Amnesty International in that it is part of an inter-governmental organization whose mandate requires it to help states with refugee problems. Thus UNHCR exists both to facilitate state policies towards persons of concern, and at the same time to persuade them to adopt appropriate policies under international law. It may be ironic that at times states provide support to the agency so that it can then lobby states to change their policies- and

²⁴ G. J. L. Coles, "UNHCR and the Political Dimension of Protection", UNHCR. Belley, August, 1995, p. 46.

²⁵ Frederick C. Cuny, "Refugees, Displaced Persons, and the United Nations System," in Charles William Maynes and Richard S. Williamson, eds., U.S. Foreign Policy and the United Nations System, New York: Norton, for the American Assembly, 1996, 196.

²⁶ UNHCR Refworld, UNHCR Information, Note on International Protection, ExCom, 47th Sess., 1 July 1996, Conclusions, para. 32.

²⁷ For an attempt to deal with UNHCR protection in terms of legal rights, see especially Guy S. Goodwin-Gill, *The Refugee in International Law*, Oxford: Clarendon press, 1998, 2nd ed. This legal work, useful in many other ways, does not give a realistic understanding of the protection process.

²⁸ See further Larry Minear, "Partnerships in the protection of refugees and other people at risk," *New Issues in Refugee Research*, Working Paper No. 13, Geneva: UNHCR, July, 1999, pp. 8-9.

so that it can criticize states for having inappropriate policies. But this is no different from states providing support to the ICRC which may then oppose certain state policies - and at least indirectly or in general, or certainly in private, criticize them.

UNHCR advocacy frequently takes the form of diplomatic representation. This can occur via discussions with the High Commissioner or her representatives, as is well known. It also takes the form of consulting with national legislators when they draft statutes on refugee matters.

It also takes the form of issuing UNHCR publications, such as the High Commissioner's Annual Report or UNHCR Handbook on proper interpretation of controlling standards. States are not legally obligated to follow the Handbook guidelines, for example, but states do not contest the publication of the Handbook. The Handbook is, legal form aside, a type of policy advocacy, and thus in that sense a political work. When the US or Canadian courts, inter alia, follow the Handbook guidelines regarding granting of asylum in response to gender-based persecution, it can be said that the agency has been influential in advancing its preferred public policy.

States also do not object to UNHCR's submitting legal papers regarding refugee determination and other legal matters in various court proceedings. Much law is a type of codified policy. Much law, including much international law, is public policy in legal form.²⁹ And involvement in judicial proceedings is a type of legal lobbying. Much mythology aside, court decisions are frequently a type of legal policy making. So when UNHCR submits an amicus curiae or friend of the court brief, this too is a type of politics - a continuation of politics by judicial means. Courts are not legally bound to follow UNHCR lines of reasoning, but again there is no doubt that the agency has the right to try to influence public policy by judicial lobbying as well as diplomatic lobbying.

So there is much settled practice concerning UNHCR protection process in principle. It bears emphasizing that this attempted protection is intermediate or facilitative, with final or ultimate protection resting with the state. It may be circular but true to say that UNHCR can only be fully effective when states recognize their international obligations and act accordingly. The agency has issued a reasonably clear statement on this:³⁰

The objective of protection is to secure for involuntarily displaced populations those fundamental rights and freedoms which a state should afford its citizens. [As per above, note the reference to rights in order to bypass its political, viz. lobbying role.] Attaining this objective entails actively mobilizing [which means being influential in lobbying for] the appropriate solution for the refugee. As the High Commissioner has stated, however, UNHCR can give meaning to its mandate of international protection and solutions only to the extent that States themselves are willing to meet

²⁹ See, for example, Vera Gowlland-Debbas, "The Right to life and genocide: the Court and an international public policy," in L. Boisson de Chazournes and P. Sands, eds., *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge: Cambridge University Press, 1999.

³⁰ UNHCR Refworld, note on protection, op. cit. para. 32.

their responsibilities. [UNHCR proposes and the state disposes.] These responsibilities include enduring and maintaining conditions which do not compel people to flee, granting asylum, creating conditions conducive to voluntary repatriation, taking steps to meet essential humanitarian needs and co-operating with countries on whom the acute needs weigh most heavily.

This should not obscure the size of the challenge facing the agency. For example, it can fully protect those forcefully displaced in Kosovo when the government in Belgrade agrees to stop discrimination and persecution of Albanian Kosovars. In the meantime, the agency relies on appropriate policies from states like Albania and Macedonia (and portions of Yugoslavia like Montenegro), and on appropriate support from all other states.

All of this shows a rough symmetry with the history of the ICRC. The ICRC, too, engages in humanitarian politics through advocacy of ideas, publication of various sorts, and release of certain statements pertaining to the norms of its complicated and flexible mandate.³¹ The ICRC, for example, clearly lobbies states to become parties to the 1977 Protocols to the Geneva Conventions of 12 August 1949. It clearly lobbies states and others engaged in power struggles to take seriously the norms they have accepted in principle.

There is also a rough symmetry with the World Bank. The Articles of Agreement of the Bank indicate that it is to be an economic and non-political agency. This language has not prevented the Bank, particularly recently, from addressing subjects such as good governance. The Bank even engages in political conditionality, albeit inconsistently, sometimes attaching to its loans various conditions or "strings" intended to promote more liberal democratic governance. In reality, the Bank was always a political actor in the sense of advocating, as backed with money, certain public policies oriented toward the goal of economic growth.

More recently, the Bank has enlarged the scope of this political activity, saying that it should address a wide variety of governance issues that are crucial to achieving sustained human development, e.g., transparency of decision making, reduction of corruption, end to repression and cronyism. Like UNHCR, the Bank says that it is non-political, but that it must address a broad range of subject matter that crucially affects matters which are its proper concern. The Bank does not claim neutrality per se, but the parallels with UNHCR are striking. Just as the Bank found that promoting economic growth could not be separated from certain social and governance issues, so UNHCR found that protecting

³¹ See further David P. Forsythe, *Humanitarian Politics: The International Committee of the Red Cross*, Baltimore: Johns Hopkins University Press, 1977. In addition to that part of its mandate provided by the international law of armed conflict, the ICRC constructs its mandate from its own self-devised statutes and from various rules associated with the International Red Cross and Red Crescent Movement. The ICRC reserves to itself the right to offer its services as a neutral and humanitarian intermediary in any situation in which such an intermediary might be able to provide protection to those who might be victimized by an adversary. Its mandate is broad, flexible, and open ended. In practice it focuses on victims of war, whether in international or internal armed conflicts, victims of internal violence, and victims of internal troubles and tensions.

persons of concern could not be separated from certain social and governance issues, e.g., ethnic hostility, extent of discrimination and persecution. Both international actors now reach more deeply into national societies, taking policy positions that touch on a broad range of issues formerly considered to be both “political” and domestic. The crux of the matter is that everything is related to everything else. What is international cannot be separated very easily from what is domestic. What is a matter of economic growth or humanitarian protection cannot be separated very easily from what is a matter of the nature of national governance.³²

If we return to a focus on humanitarian protectors, the crux of the issue is not really whether in actuality UNHCR, like the ICRC, should - indeed, must - engage in these types of political actions, even if we choose to call them forms of social or humanitarian advocacy, or defense of legal rights. The real question is how should UNHCR handle the conflicts over policy that inevitably arise. After all, the 1950 Statute anticipates all of this by saying in its preamble that “when difficulties arise...”

One final point merits attention here. Regardless of the motivation of UNHCR, and regardless of the (correct) theory of its being an advocate for persons of concern, if the agency is perceived as being hostile, its personnel as well as its policies will be at risk. In Iraq during the 1990s, the agency was no doubt motivated to respond to the needs of refugees and those in a refugee-like situation, but from the view of the Hussein ruling group, UNHCR was part of the UN system then in the process of applying devastating economic sanctions. Thus some in the ruling elite viewed the agency as part of a political coalition hostile to it. Likewise in Bosnia earlier during the 1990s, the field representatives of UNHCR and the UN military contingents both wore the same blue colors. When those UN military contingents were authorized to use military coercion against Serb partisans, UNHCR personnel felt the backlash, regardless of their motivation and correct understanding of their mandate.

The only general solution to this problem is long term socialization (informal or political education) into the notion that advocacy for refugees is not a hostile action. This is similar to the Red Cross notion, codified in international law, that a demarche in behalf of protected persons is not to be construed as a hostile act.

Even so, intractable problems may well remain. The Bosnian government during the first half of the 1990s obstructed UNHCR relief to its own people. That government viewed UNHCR relief as a mechanism by which the western states avoided their responsibility to respond to Serb aggression. Thus regardless of agency motivation and understanding of its mandate, its actions were regarded as inherently hostile to vital Bosnian national interests.³³

³² For an analysis of how the Bank has taken up certain human rights and governance issues despite the wording of its Articles of Agreement that it is to be an economic and non-political actor, see David P. Forsythe, “Human Rights, Development, and the United Nations,” *Human Rights Quarterly*, May, 1997.

³³ I am indebted to Nicholas Morris for insights into this and other matters covered in this study.

Struggle for influence, without weapons

When there is conflict between UNHCR and states over what policies to pursue regarding persons of concern, most of the traditional weapons of influence rest with states. They can refer to the traditional idea of state sovereignty, or legal right to have the last or ultimate say as to what should be done. They have, all too frequently, nationalistic public opinion for support. They have means of coercion so as to physically control movement of persons across borders. They have, usually, an administrative and judicial apparatus to legally manage movement of persons in keeping with their desires. And so forth.

UNHCR has nothing more, usually, than the capability to engage in persuasion based on the norms of its mandate, and its reputation for action faithful to its mandate. As an independent report of its operations in Kosovo stated, UNHCR is “armed chiefly with the power of international refugee law and creative diplomacy...”³⁴ In the same sense, an ICRC official of the past wrote about his being a Warrior Without Weapons.³⁵ More than 90 per cent of UNHCR's budget is not guaranteed, but is dependent on the largesse of certain states through their voluntary contributions. The ICRC depends on essentially the same states for about 85 per cent of its total budget.

In a short study such as this, one cannot cover all the contentious issues that might arise in UNHCR advocacy for persons of concern. What follows is simply an illustrative sample.

The issue of discretion

Given the imbalance of resources in the struggle for influence, and given the fact that many humanitarian agencies run controversial or delicate programs inside countries while depending on states for material and diplomatic support, some of these agencies rely greatly on discretion rather than on consistent and explicit public criticism. This is particularly true of the ICRC, but was also true of agencies such as UNICEF in the humanitarian crises in the horn of Africa during the 1980s. UNICEF, like the ICRC, found it difficult to be a “whistle blower” about violations of humane standards while remaining acceptable to the government for in-country operations. On the other hand some agencies, like Medecins Sans Frontiers, believe that one should and can do both: operate inside countries and speak out on the root causes of forced displacement and other threats to the dignity of persons. UNHCR needs to carefully consider where it fits along this spectrum of policy choice.

The ICRC is the humanitarian agency most known for discretion. The ICRC has come up with a detailed set of rules for when it will “go public” in relation to both detention visits and relief operations. But even when it goes public, which in a general way it has done

³⁴ Independent Report on Kosovo, UNHCR Refworld, Summary, Section 2.

³⁵ Marcel Junod, *Warrior Without Weapons*, New York: Macmillan, 1951. The title is well chosen, for it accurately captures the essence of struggling to advance a public policy that benefits individuals. Junod obviously recognized that he participated in a political process.

more frequently after the cold war,³⁶ the ICRC does not castigate an actor in the explicit style of many private human rights non-governmental organizations such as Human Rights Watch. It is relevant for UNHCR that many within the ICRC have concluded that “going public” does not often improve the situation for persons of concern. An observer of UNHCR believes the same to be true regarding agency public states in behalf of persons of concern.³⁷ Public appeals for humanitarian action are often ignored by states.

There is a continuing discussion about whether ICRC discretion is really required by the nature of things in the 21st century, or whether it is the product mostly of Swiss tradition. There is a serious argument that a penchant for secrecy and discretion runs throughout Swiss history and contemporary society, and that the ICRC as well as Swiss banks are reflective of this trait.³⁸ A supporting piece of evidence is that the ICRC pursued discretion to a dysfunctional extent in an earlier period, staying so quiet (and aloof) that few knew and understood the agency. Thus the ICRC lacked adequate support. Discretion for the ICRC of the past seemed less a carefully considered policy than a reflexive orientation. In the 21st century, International Relations is not what it once was. States share the stage with all sorts of outspoken parties, especially private ones. State claims to sovereignty and domestic jurisdiction were not what they once were.

“Red Cross” discretion is certainly not required by all notions of humanitarian advocacy. It may be judged useful by some, but it is not required by the nature of things. Amnesty International and Human Rights Watch, among others, name names specifically. They are no less “neutral,” no less “humanitarian” for doing so. Their motivations remain non-partisan regarding struggles for power. Not always trying to operate inside states, and not being so dependent on state funding, and not having been given particular mandates by states through international law, they choose to be publicly explicit in their concerns - in an effort to mobilize public opinion and so embarrass or shame public authorities into changing their policies. But even ICRC officials say that discretion is not required as part of its neutrality. Discretion is only an optional tactic that, it says, proves useful in helping victims of power struggles. Discretion is thus an instrumental rather than constitutive matter.

At first glance it might seem that UNHCR has adopted the model of “the Red Cross” on the issue of discretion. If one reads the speeches of Mrs. Ogata, looks at the major agency publications, and reads the reports of its supporting Executive Committee, it seems that UNHCR refrains as much as possible from indicating directly and frontally by name a

³⁶ For the accurate point that the ICRC has not changed so much regarding “going public” as some observers think, see Simone Delorenzi, “ICRC Policy Since The End Of The Cold War”, Geneva: ICRC, 1999, pp. 60-62. The point will be further developed in David P. Forsythe, *The Humanitarians: The ICRC in the 21st Century*, forthcoming.

³⁷ Yves Beigbeder, *Le Haut Commissariat des Nations Unies pour les réfugiés*, Paris: Presses Universitaires de France, 1999, p. 71.

³⁸ See, for example, Jean Ziegler, *The Swiss, the Gold, and the Dead*, London: Penguin, 1997, especially pp. 27, 176-7, 241-2. See also the *Tansley Report, or Final Report on the Re-Appraisal of the Red Cross*, Geneva: Henry Dunant Institute, 1975, in which an international team of researchers noted that the ICRC was secretive and aloof to a dysfunctional extent.

state or non-state actor that, in the agency's view, is violating the appropriate or relevant standards regarding treatment of persons of concern. UNHCR may express its view in general terms, referring to violations of standards, but without naming the violator(s). The agency may even refer to a territory, such as Sierra Leone, without indicating whether it is the government side or the rebel side that is abusing persons of concern.

A closer look, however, reveals that UNHCR does often challenge governments in a frontal and explicit manner. One can recall that the agency's mandate does provide a supervisory role with regard to the 1951 Convention. When the agency finds that a person is entitled to refugee status under the 1951 Convention, the agency is saying that the person has been persecuted. One does not have to be a rocket scientist or a brain surgeon to understand that the agency is saying thereby that a government has an inappropriate - and illegal - policy. When UNHCR submits legal papers in a judicial proceeding in behalf of a person, it often is openly challenging the correctness of governmental policy. But this is still different from the type of bold and explicit public statement often issued by human rights NGOs like Amnesty International in an effort to generate public pressure.

At times agency officials will engage in quite candid public statements indicating disagreement with policies being pursued by public authorities. UNHCR's special envoy to the Former Yugoslavia did so repeatedly during the early 1990s. In 2000 the agency was quite explicit that in its view the security problems involving refugees from East Timor were the result of inappropriate policies by the Indonesian government. In that same year the agency explicitly called attention to the forced displacement of ethnic Serbs from Kosovo. (Other examples of explicit criticisms are given below in the section on Relations with Donors.)

But it does appear that the agency lacks a coherent policy on this question of publicity/discretion. The extent to which a UNHCR official will engage in attempts at public pressure seems to depend more on personalities than on agency-wide policies. Some agency officials still think direct and public confrontation with public officials to be an unwise policy, preferring to give certain information to NGO partners who then make the public criticism. In reaction to this general caution, Human Rights Watch wanted UNHCR "to take a stronger and more critical role with governments which obstruct" the application of refugee standards.³⁹ It was obvious that HRW did not think the agency had been publicly assertive enough. It certainly appears to be the case that UNHCR does not have a formal policy regarding discretion, based on a careful study about what is necessary and/or desirable.

Relatedly, it does not appear that UNHCR makes policy use of its institutional memory on this matter (or on other policy questions). It does not appear to be the case that the agency has a means for reviewing, for example, its practice of discretion-publicity in the past, and hence what might prove useful in the present or future. The agency does draft

³⁹ Human Rights Watch, "Uncertain Refuge", April, 1997.

the conclusions of its Executive Committee, and these might be said to constitute the policy lessons of refugee protection over time.

By contrast, the ICRC has a process by which a staff member, at the request of the office in charge of “doctrine,” will draw up a policy paper based on the experiences of the past. That draft is then reviewed and eventually approved by one of the higher decision-making bodies of the organization, usually the Comité itself, but sometimes the collective Directorate or other administrative body, and then distributed to various circles for policy guidance. Fifty-nine such policy positions or statements of doctrine had been approved by mid-2000, although not all had been updated, and not all were of exactly the same type or format. There was a need for updating and pruning. As already indicated, the ICRC did have a clear if somewhat general doctrine or general policy regarding discretion publicity.⁴⁰

It appears that UNHCR is rather cautious about seeking the support of the UN Human Rights Commission for its concerns, but more open and active regarding providing information to the UN bodies that monitor human rights treaties. This comparison seems to be explained by the preference of the agency for legally oriented bodies comprised of individual experts, as compared to the Human Rights Commission made up of states. The agency thus does “forum shopping” and believes that the Commission is not the best forum for its concerns.

One might ask whether UNHCR should make more effort to lobby the UN Human Rights Commission or other inter-governmental bodies in quest of specific public pressures on certain public authorities because of their actions toward persons of concern? The UN Human Rights Commission is sometimes quite explicit - if also quite inconsistent - in its criticisms of certain other states. And it is clear that target states do not like to be in that position. Whether they are willing to change offending policies in the short term to avoid such state-generated criticism is another question.

The representatives of Argentina in the 1970s or China at the turn of this century undertook considerable effort to block or defeat such criticism. But since offending policies were seen as important for their continued rule, these target governments - and others - continued with those policies despite criticism by the Commission. Target states fight hard to block criticism, but can live with it if necessary. Commission criticism is, after all, at least in the short term, words on a piece of paper. The same pattern holds for UN General Assembly criticism.

In the long run, persistent and well founded criticism may help delegitimize or discredit a government or situation, as happened to apartheid and white minority rule in the Republic of South Africa. On the other hand, controversial criticism can help delegitimize or discredit the issuing agency, as happened when the UN General Assembly for a time held that Israel was a racist state.

⁴⁰ It was general because the final criterion that had to be present for the ICRC to go public was that such publicity must be in the interests of victims (or persons of concern, in the language of UNHCR). There was no way to quantify or otherwise specify when this criterion was present.

In sum on this point, pooled state criticism of policies essential to governmental rule will probably be ineffective in bringing about desired change for persons of concern in the short term in most situations, but may achieve desired change if well considered and sustained in the long run.⁴¹ It is against this complex evaluation that UNHCR would have to decide whether it should quietly lobby UN bodies to a greater extent in order to try to mobilize specific public pressure.

There is also the point that when faced with egregious harm to persons of concern, protective agencies should insulate themselves against charges of complicity through unwarranted or indefensible silence, even if there is not much hope for change in public policy right away. In other words, humanitarian protection agencies need to guard their reputations in the long term, even if public pressure is likely to be ineffective in the short term. This is less a matter of pure public relations or collective ego, and more a matter of calculations about effective protection over time. One of the few resources that protective agencies possess is a reputation for integrity. This should not be squandered.

The ICRC erred in judgment in October 1942 by remaining silent when faced with sound evidence about German genocide against the Jews and others. The Nazis were engaged in an egregious new policy, and the ICRC found reasons to remain cautiously quiet. Several members of the Comité said at the time, quite accurately, before caving in to the views of the Swiss Federal President, that the ICRC would suffer in the future for remaining silent. Mme. Frick-Cramer said that while she doubted any immediate change in governmental policies from an ICRC appeal, the Comité's silence would run the risk of compromising the very existence of the agency. Mr. Micheli said that the inconveniences of silence would be greater than those of an appeal; silence would reduce its prestige and its future. Mme. Odier said that silence would compromise the ICRC's work after the war.⁴² None of these members, nor any others of the possibly twelve members of the Comité that initially favored some sort of public appeal to belligerent states, continued their arguments after President Etter of the Swiss Federal Council, who was also a member of the Comité, spoke against a public appeal.

In short, key Swiss Federal Authorities believed in accommodation with the Nazis to further Swiss national interests, and a majority of the all-Swiss Comité of the ICRC deferred to that view against their better judgment. The result was a stain on the reputation of the ICRC for strictly humanitarian decisions. The ICRC compromised its neutrality and independence by allowing Swiss national interests as defined by Federal authorities to be decisive or controlling.

Some observers believe UNHCR should have spoken out much more clearly about the problem of humanitarian relief going to the Hutu militias after massive flight from Rwanda in 1994. These critics were not satisfied by the agency's referral of the matter to

⁴¹ See further Forsythe, *Human Rights in International Relations*, op.cit., chapter 3.

⁴² ICRC Archives, p.v. of Committee meetings, Vol. 18 (1942-1947), October 14, 1942.

the UN Security Council, or to its eventual efforts to contract with certain national troops to police the camps.

The modern ICRC often faces the question of whether it should suspend its operations and issue a public statement indicating dissatisfaction with the policy position of public authorities. Apart from the (publicized) withdrawal or suspension of its activities for security reasons, the ICRC does not often fully disengage from a situation in reaction to the policies of its interlocuteurs. It does suspend its activities on rare occasion, frequently with an accompanying public statement, in order to try to negotiate more satisfactory agreements regarding access to persons of concern. At one point it did so vis-a-vis the Fujimori government of Peru regarding the issue of detention visits. Such ICRC suspension, along with the usual press statements, does create, or can create, public pressure on the government. But it seems that both the ICRC and UNHCR are very reluctant to leave victims or persons of concern without humanitarian contact and support.

A problem for the ICRC regarding relief protection is that with so many relief agencies active in a particular situation, its bargaining in behalf of principled relief is undercut by other relief agencies with different policies. When, in Ethiopia in the 1980s, the ICRC felt unable to participate in a particular governmental relief plan because of its strategic implications, other agencies including the Red Cross and Red Crescent Federation replaced the ICRC.

This generalized reluctance to disengage opens protective agencies up to manipulation by their interlocuteurs. Knowing that the ICRC will probably want to stay and do the good it can, a manipulative public authority may deny sensitive access to the ICRC (for example, to persons undergoing interrogation) while allowing routine access (for example, to convicted persons who are then placed in routine confinement). On the other hand, the ICRC makes a sound point when it says that publicized disengagement may not make the situation any better for victims and furthermore may be against their expressed wishes. In this type of context the ICRC may stay the course but issue more specific public statements about its dissatisfaction with existing public policy. It has done this, for example, with regard to Israeli policies in occupied territories, especially concerning interrogation of Palestinian detainees and confiscation of Palestinian property.⁴³

It is not clear that UNHCR has carefully addressed the issue of publicized disengagement as a general policy question, although it certainly had to face the issue in Africa in the 1990s. After massive flight from Rwanda, Hutu armed militias controlled significant parts of areas of UNHCR operations. When the UN Security Council refused to authorize the deployment of military forces to “neutralize” the refugee camps, some other relief agencies disengaged rather than assist militia members and thereby contribute directly to on-going power struggles. UNHCR decided to stay, viewing some civilians of concern as hostages of the militias. The agency felt it could not abandon these persons in need, and who fell within the agency’s modern mandate, even if some of its relief contributed to on-

⁴³ See, for example, ICRC, *Annual Report 1998*, section on Israel, occupied territories, autonomous territories.

going armed struggle.⁴⁴ In short, Medecins Sans Frontiers engaged in publicized disengagement, whereas UNHCR faced that issue and decided to remain operational on the ground (finally arranging for some military deployment by troops from what was then Zaire, although this may have led to as many problems as it was supposed to solve).

Finally in this section, relevant is the point that when the ICRC's usual methods of discrete protection have proven unavailing over time, that agency may discretely contact other states, especially "patrons" or important allies of the offending party, to see if some "humanitarian pressures" can be generated. Here the subject is not discretion versus publicity, but scope of discretionary diplomacy. Such contact is one form of humanitarian politics or humanitarian diplomacy or humanitarian advocacy. Just as the ICRC does not seek absolute neutrality, so it does not practice absolute discretion. It appears that UNHCR sometimes plays the game of humanitarian advocacy the same way. When Macedonia was proving reluctant to open its borders to refugee flight from Kosovo in the spring of 1999, the agency took up the matter with certain other governments such as that of the United States.

The issue of humanitarian intervention and interference by states

Since agencies like UNHCR and ICRC have long sought to distinguish the "humanitarian" from the "political," particularly the ICRC has been stressing that humanitarian protection in conflict situations ought to be done by strictly humanitarian actors like itself. Only they can be neutral and impartial. The ICRC argues that governments, as political actors, can never be fully neutral and humanitarian. They are always selective where they choose to become involved. They always have motivations and concerns other than humanitarian. In the ICRC analysis, political actors can sometimes support humanitarian actors, but in general the ICRC is fearful of governments claiming to undertake humanitarian efforts. It fears corruption of the term humanitarian.⁴⁵

One can understand the concern of the ICRC,⁴⁶ but at the same time it is making an argument not likely to be accepted by many states. It is an argument that looks like

⁴⁴ For a readable and highly critical account of the response of the international community to the 1994 genocide in Rwanda and its aftermath, see Philip Gourevitch, *We Wish To Inform You....*, New York: Farrar, Straus, & Giroux, 1998. While he repeatedly casts scorn on UNHCR, he never deals with the issue of genuine refugees held hostage by the brutal Hutu militias, and whether the agency had a moral and legal obligation to stay sur place in an effort to help those refugees.

⁴⁵ Former President Sommaruga did not like "l'interférence des gouvernements dans l'humanitaire," Lorenzi, op.cit., p. 56. At the time of writing the latest and more nuanced statement of this theme was by Jean-Daniel Tauxe, ICRC Director of Operations, "The ICRC and civil-military cooperation in situations of armed conflict," Montreux, 2 March 2000. ICRC website: www.icrc.org.

⁴⁶ At times governments have indeed corrupted the term humanitarian. The Reagan Administration referred to some of its support for the contras, who were trying to overthrow the Sandinista government of Nicaragua during the 1980s, as "humanitarian" in order to get it approved by Congress. This aid may have been non-lethal, but it was certainly part of power struggles.

defense of turf. In general, the international community is not likely to leave public policy on humanitarian protection to a private party like the ICRC which ultimately answers to no one but its co-opted top council of all Swiss nationals. Moreover, it is clear that even if the international community wanted to channel humanitarian protection through the ICRC, the ICRC is too small and lacks the logistical capacity to respond to massive displacement and violence as in Bosnia, Somalia, the Great Lakes region of Africa, other parts of Africa, and Kosovo. In the early 1990s the ICRC was devoting one-third of its total budget to Somalia, but starvation was still prevalent.

Further, it is clear that at times governments can undertake neutral action. There is the institution of Protecting Powers and international armed conflict. True, this is something of a dying tradition. Nevertheless, states like Switzerland during World War II acted in a reasonably neutral fashion in dealing with Protecting Power concerns arising under the then relevant international law. Whatever one thinks of Swiss foreign policy and claims to neutrality overall during the Second World War, there is little evidence that Bern acted in a biased fashion as a Protecting Power.

State personnel also at times act as neutral mediators in international relations, being accepted by both conflicting parties as unbiased in terms of trying to serve the security and other best interests of each. Norwegian authorities could not have mediated the Oslo accords on the Middle East had they not been accepted as relatively neutral by both Israeli and Palestinian parties. There are also times when UN traditional or first generation peacekeeping has been largely neutral, and seen as neutral, even though the military contingents come from states. UNFICYP and UNTSO, inter alia, fit this mold. At times a western military power has evacuated personnel from a conflict situation but without trying to affect the struggle for power, and thus acted in a reasonably neutral way, e.g., the U.S. in Liberia, early in the conflict in Somalia, etc.

There is much controversy about “humanitarian intervention,” meaning here the use of force by states to stop various gross violations of human rights, including persecution and forced displacement. Unlike some others, I am not so dismissive of the good from this line of action, even if the process entails some bad. If one faces systematic persecution in Kosovo or genocide in Rwanda, appeals to be nice are unlikely to produce much good. Military force is reasonably seen as necessary. I would not dismiss the basically humanitarian character of the NATO intervention in Kosovo, even if coercion was central to that action, even if that action reflected a pro-European bias, and even if other “political objectives” were marginally involved, eg., reputation of the alliance and various western leaders. I see no reason to doubt that the primary motivation and intent was humanitarian—to stop the persecution and forced displacement of large numbers of Albanian Kosovars. I believe the preferred course of action is not to hold such behavior as illegitimate, but to work to generalize it, so that there is firm opposition to the exercise of irresponsible state sovereignty in places like Rwanda as well as Kosovo. States have not been totally even-handed in fashioning policies in the UN Human Rights Commission, but that is not sufficient reason for the Commission to stop its action for protection of human rights when and how it can.

Of course UNHCR (and ICRC) will have to keep a certain distance from such coercive actions. But I do not think it wise to dismiss humanitarian intervention, under whatever legal label,⁴⁷ as “political” and therefore undesirable. Use of military force should always be taken only after careful consideration. It will always entail some bad, especially accidental and otherwise unintended destruction. “Humanitarian war” is a term that harbors obvious contradictions.⁴⁸ But given the nature of some rulers and would be rulers, I find it unwise to say that the use of force can never be primarily humanitarian. Kosovo in particular shows otherwise.

Most damaging to the ICRC argument dismissing the possibility of genuine humanitarian action by states is the reality of what it does day in and day out. As noted earlier, the ICRC (and UNHCR) appeal to the humanitarian values of states (and non-state parties) in order to make their protection efforts effective. As two ICRC authors have written, “This cooperation [from states] is the cornerstone of the ICRC’s work in the field, and without it no humanitarian action worthy of the name is possible.”⁴⁹

This ICRC request for cooperation would be pointless if states never agreed to humanitarian values, never agreed to create a humanitarian space where attention to human welfare would be given great weight. Thus to say that states cannot be humanitarian is to undercut precisely what the ICRC asks for - and sometimes gets - in its protective lobbying. Human rights officers in the US Department of State, or officials in ECHO, or in UNOCHA, will not be persuaded by the argument that claims to humanitarian action by public authorities are inherently tainted and suspect and always inferior to those of the ICRC.

In fact, when the ICRC is unable to reach civilians with humanitarian relief, sometimes it is precisely a state that is able to make that humanitarian delivery because of superior logistics. When the ICRC was unable to reach Bosnian Muslim enclaves, relief was dropped from “western military aircraft.”⁵⁰ Since delivery of this relief is precisely what the ICRC was attempting to do, did the means of delivery and/or extent of delivery ipso facto make the relief non-humanitarian. Not logically. The ICRC arranged relief on the Serb side, and western military powers produced relief on the Muslim side. States acted in a humanitarian if limited way in this example, even if it were preferable for the ICRC to manage relief on both sides, as it seeks to do.

This is not at all to say that the ICRC does not have some advantages over states in presenting itself to parties as independent and disinterested in struggles for power.

⁴⁷ Given the lack of a doctrine of humanitarian intervention in international law, the UN Security Council has used an expanded concept of “threats to international peace and security” to get around that lacuna. The result is increased attention to human security, as well as state security, under Chapter VII of the UN Charter permitting enforcement actions.

⁴⁸ For an excellent overview see Adam Roberts, “Humanitarian Action in War”, London: Institute for Strategic Studies, Paper # 305, December, 1996.

⁴⁹ Christophe Girod and Angelo Gnaedinger, “Politics, military operations and humanitarian action: an uneasy alliance,” 1 September 1998, p. 3, ICRC website, also available in hardcopy.

⁵⁰ *Ibid.*, p. 9.

Probably the best guarantee of humanitarian protection, including relief, is precisely the aegis of the ICRC, if it can manage the size of the problem. But public authorities can also play neutral, humanitarian roles on occasion. The distinctions are not so clear cut as the ICRC would have one believe.

UNHCR is in a different position than the ICRC and thus has not made exactly the same arguments. UNHCR is of course part of an intergovernmental organization, and is obligated to take instructions from the UN Security Council, or General Assembly, or ECOSOC. It seems that the head of UNHCR is also under instructions from the UN Secretary General although this is not at all clear legally speaking.⁵¹ When the General Assembly tells the agency to protect certain internally displaced persons or to take up the root causes of forced displacement, the agency cannot hold itself apart from these governmentally inspired instructions. When the High Commissioner ordered a halt in agency operations in Bosnia because of the terms imposed upon it, and the obstructions, by the fighting parties, the UN Secretary General effectively countermanded her order. Thus, unlike the ICRC, UNHCR cannot distance itself so easily from instructions and pressures emanating ultimately from governments. Being part of an intergovernmental organization, the agency finds it problematic to cast blanket aspersions on the humanitarian intentions of governments.

UNHCR can plead for humanitarian values and space. It can stress its desired independence. It can warn of the dangers to its personnel of being seen as strategically partisan in a conflict. But if the agency is ordered to stay the course, as in Bosnia, it is not free to use suspension or withdrawal as a diplomatic weapon to put pressure on recalcitrant parties, or to protect its reputation. About all that can be said further in general is that the ultimate responsibility rests with those authorizing UNHCR action. If the Secretary-General or General Assembly forces the agency into discrediting positions, as in Bosnia, it is not the agency that bears ultimate responsibility. The agency is simply left with trying to make the best of an impossible job.

All of this has become a real problem when states have used involvement by UNHCR so as to avoid more difficult actions. At times states have compelled the agency to stay the course against its wishes, even when the High Commissioner said in effect the agency could not be reasonably neutral under prevailing conditions. But sometimes states prefer to compromise the position of the agency in order to avoid a type of further involvement that they regard as more disagreeable. As one knowledgeable observer commented, “The international community was more interested in ensuring the continuation of the humanitarian operation [in Bosnia] than in ensuring its effectiveness in protecting and assisting the most vulnerable...the result was that well intentioned humanitarian diplomacy sometimes had the effect of providing inadvertent support to the very authorities who were responsible for causing the civilian suffering in the first place.”⁵²

⁵¹ The High Commissioner is elected by the General Assembly, upon nomination by the Secretary-General. UNHCR statute says nothing about the removal of the High Commissioner, or his or her serving at the pleasure of the Secretary-General.

⁵² See further Mark Cutts, “The humanitarian operation in Bosnia, 1992-1995: dilemmas of negotiating humanitarian access,” *New Issues in Refugee Research*, Working Paper No. 8, Geneva: UNHCR, May,

In this sense the ICRC can provide more of a guarantee of humanitarian status than UNHCR, because the former generally does not take instructions from governments, whereas sometimes UNHCR must. It is true, as noted above, that in October of 1942 the ICRC did defer to the position of the President of the Swiss Federal Council who was opposed to an ICRC public statement that might offend Nazi Germany, even though a majority of the members of the Comité seemed to be in favor of such a public démarche up to that point. But this event constituted an exception to the general historical and contemporary pattern that the ICRC is reasonably independent from governmental control. And the ICRC has taken a series of steps to try to see that a similar event does not happen again.⁵³

In passing it can be noted that UNHCR, as a coordinating agent whose grass roots relief is carried out by NGOs, has a responsibility to ensure that its sub-contracting partners follow the policies adopted by the agency. This was not always the case in places like Bosnia.

The issue of relations with donors

Since UNHCR is dependent on voluntary contributions from about a dozen states, along with the European Union, question arises as to whether the agency is partial to those states and their intergovernmental organizations (including NATO). Does he who pays the piper call the tune, or in other words, does the agency take its protective decisions so as to minimize irritation on the part of those who pay for more than 95% of its budget? Beyond financial considerations, the OECD states manifest considerable overall power in International Relations. Does UNHCR frequently and quietly defer to that power, rather than vigorously champion the protection of persons of concern?

One authority states boldly: "UNHCR's dependence on voluntary contributions forces it to adopt policies that reflect the interests and priorities of the major donor countries."⁵⁴ This is perhaps overstated, although true enough with regard to certain subjects.

The structure of the leadership of the agency certainly reflects the reality of voluntary contributions and overall power by the wealthy liberal democracies. In much of the past, the High Commissioner has come from key donor states, such as Denmark or Switzerland, with a US national high in the Commissioner's office. Mrs. Ogata's tenure

1999, p. 25. S. Alex Cunliffe and Michael Pugh, "The Politicization of UNHCR in the Former Yugoslavia," *Journal of Refugee Studies*, 10/2 (1997).

⁵³ ICRC Archives, op.cit. In Forsythe, *The Humanitarians*, forthcoming, one will be able to read of several occasions in contemporary times when the Swiss federal government pressured the ICRC to follow a certain course of action. Of course governments lobby the ICRC all the time, as the U.S. government did to try to get the ICRC to change its stance against anti-personnel land mines. So there is a continual political process in which the ICRC and governments lobby each other. If the ICRC caves in to such governmental lobbying against its better judgment, it can be said that governments obtain decisive influence over the agency. Clear evidence of such governmental influence has been rarely found to date.

⁵⁴ Loescher, op.cit., p. 137.

has been marked by Japanese financial support, as well as the placing of Americans and Europeans in key advising positions. A former Dutch prime minister replaced Mrs. Ogata.

With regard to the broad range of protective decisions, the picture is more nuanced. While reasonable people can differ on such a complex subject, the view here is that the agency has manifested a generally appropriate record of unbiased traditional protection over time, within the reality that it could not function were it to lose the support of the wealthy liberal democracies. On a few occasions mainly involving relief protection the agency seems to have tilted toward the western donors.

Turkey closed its border to Iraqi Kurds fleeing persecution in 1991, and the agency remained mostly silent about this violation of international refugee law.⁵⁵ Moreover, there was considerable internal forced displacement within the southeastern (Kurdish) region of Turkey during the 1990s, with consequent socio-economic hardship. UNHCR was largely silent about both traditional protection and relief protection. We have already mentioned the case of Bosnia during 1992-1995 and how the agency contributed to the western policy of containment of refugees within Bosnia (a policy also supported by the Bosnian government). In Bosnia after its war, some thought the agency should have taken a different position from the Western states who were declaring certain areas safe for return of persons of concern. Critical observers thought the Western states were more interested in proving the wisdom of policies aimed at constructing a multi-cultural Bosnia than in the welfare of particular refugees. These critics looked in vain for protests from UNHCR.⁵⁶

If one talks about routine and traditional protective decisions in general, such as determination of refugee status in individual cases, or such as consultation with legislators in the drafting of refugee laws, the agency is not usually criticized for bias or deference to money and power. Two basic or structural factors push in favor of UNHCR attempts at unbiased protection. One is that the agency is watched closely by a variety of NGOs in the donor states. If the agency were to obviously defer to money and power at the expense of persons of concern, the NGOs would certainly publicize that stance in a very harsh manner. The agency does not want this, as it would damage its status, standing, or reputation.

Secondly, there is actually a disconnect between agency traditional protective decisions in donor capitals and donor voluntary contributions for relief protection in unsettled parts of the world. Even if a donor government is unhappy with the agency's position regarding refugee determination cases or pending legislation, it is not likely to cut off or reduce funding in a foreign situation because of that unhappiness. Too many other factors come into play, such as media coverage of the foreign situation, domestic public opinion, strategic calculation in foreign policy, etc. The United States, for example, was not happy with the agency's position regarding a variety of refugee issues arising from the

⁵⁵ See Frelick, *op.cit.*

⁵⁶ On this latter point see Bill Frelick, "Aliens in their own Land," Reprint, from *The World Refugee Survey*, US Committee for Refugees, 1998, pp. 30-39.

Caribbean area, but Washington had its separate reasons for providing voluntary contributions for relief protection in the face of forced displacements in various parts of the world.

Beyond the cases already mentioned (eg., Turkey, Bosnia), if one talks about really salient protective decisions, involving refugee matters of great concern to a donor state, it may be that the agency on occasion, maybe on several occasions, softens its position vis-a-vis a donor government. If this transpires, it is almost certainly not because of financing but because of considerations of humanitarian policy and the power of a donor. Certainly some UNHCR field staff think that its Geneva headquarters should have been tougher and did not back up what the field representatives wanted with sufficient vigor. This is a complex matter to deal with in general and in a supposedly scientific way.

The Geneva headquarters has a broader view than a delegation in a donor capital. It has to prioritize its concerns. Headquarters may decide that it needs a donor government's support on issue A rather than on issue B. Thus if headquarters decides to ask the US to exert some pressure on Macedonia for the benefit of Kosovar refugees, Geneva may feel it is not wise diplomacy at the same time to press Washington to reverse a policy pertaining to, say, Haitian or Cuban asylum seekers. What is wise humanitarian diplomacy from the view of Geneva, based on a realistic estimate of the prospects for doing good, may amount to caving in to superior power from the view of UNHCR representatives in Washington.

The determination of UNHCR to press its view vis-a-vis a donor may also be affected by the subject at issue. If there is a clear violation of the 1951 Convention (as affected by the 1967 Protocol), the agency may be more dogged in its advocacy than if the subject involves persons in distress not covered by international refugee law, eg., internally displaced persons not falling within the agency's existing mandate. Here there is a parallel with the ICRC, for that agency is more likely to vigorously protest a clear violation of international humanitarian law than a violation of someone's view of moral misbehavior in a situation not covered by that law.

A short report such as this can only skim the surface of such a complex subject, but one can note the following. UNHCR submitted legal papers to the US Supreme Court, challenging the US policy of forcefully interdicting asylum seekers outside its territorial waters. The intent of the US policy was to make it more difficult for asylum seekers from Haiti and Cuba, inter alia, to have a full and complete hearing of their claims by US officials. And, since even asylum seekers who lost their claims in US proceedings tended to stay in the country, pending the long appeals process, the interdiction policy was ultimately aimed at reducing the number of illegal as well as legal aliens in the US. The agency publicly and officially challenged the legality of the interdiction policy in an effort to advance the interests of genuine refugees. A number of US officials were, and still are, highly irritated by UNHCR's action. But once the US Supreme Court reviewed the interdiction policy and found it legal, the agency has seen little merit in trying to publicize the continuing different viewpoints, in Geneva and Washington, on this issue. On both sides there has been an agreement to quietly disagree.

Moreover, an independent examination of the role of UNHCR in the Kosovo crisis of 1999 did not conclude that the agency had fallen under the control or political interests of NATO and its constituent states.⁵⁷ Rather, this official but independent and sometimes critical report on Kosovo found considerable UNHCR independence. For example, despite close cooperation between NATO and UNHCR on certain matters, the independent report notes that the agency lobbied hard for an extensive understanding of refugee rights vis-a-vis Macedonia, more so than the US, British, and Macedonian governments thought wise. That is to say, the agency lobbied for an unrestricted right of access to Macedonia for ethnic Albanians fleeing persecution and forced displacement from Kosovo, whereas several governments involved were worried about the political stability of the Macedonian polity.

Here is an example of the agency pursuing a strictly humanitarian, and no doubt properly legal, approach, whereas some governments did not think the agency was being politically understanding and wise. But had the agency shown more political understanding, at least as defined in Washington and London, it would have been vigorously criticized for departing from its humanitarian mandate and tilting toward the strategic interests of the liberal democracies. Eventually, cooperation between UNHCR and concerned governments led to a more generous opening of the Macedonian border, on the understanding that many of the refugees would be sent to third countries with the support of other governments.

In larger perspective, it is true that NATO and other western states greatly but not completely marginalized UNHCR regarding Kosovar refugees after forced displacement became overt and massive in 1999. Those states took over direct control of refugee affairs in many respects, in part to try to legitimize the bombing policy, viz., to make the entire NATO campaign look as humanitarian as possible. In reality there was little that UNHCR could do about this. So whereas in Bosnia the western states, with the help of the UN Secretary-General, projected the agency into the center of the conflict in the name of containment of asylum seekers, in Kosovo the agency was often marginalized by those same western states. In the last analysis the agency could do little about either outcome.

In general, in contemporary times one can find many statements by UNHCR criticizing its main donor governments, whether the statements concern their bias in contributions for Kosovo compared to Africa, or their increasingly restrictive policies in the face of requests for asylum, or the British handling of claims to asylum by Roma of the Czech Republic, or continuing ethnic Albanian persecution of ethnic Serbs in a Kosovo controlled NATO, etc.

There are some observers, however, and some within the agency, who think that the leadership of UNHCR on occasion has been too publicly and candidly aligned with its key donor governments and their intergovernmental organizations. They cite, for

⁵⁷ Kosovo Report, Ref World, op.cit.

example, Mrs. Ogata's testimony on several occasions in the UN Security Council, most notably in 1999 when she stated that displacement in Kosovo stemmed primarily from Serb persecution, not from NATO actions. In that such statements helped legitimize NATO military action in many eyes, some thought the agency should have kept a lower diplomatic profile and made more careful public statements.⁵⁸ By comparison, the agency gives *private* briefings to the Security Council on a frequent basis.

In the last analysis, UNHCR's relationship to its donor governments is similar to that of the ICRC. Each protection agency depends on the largesse of primarily the wealthy liberal democracies. But neither agency simply reflects the ideological, strategic, or other national interests of its key donors. Clear and obvious and decisive influence by key donors over each agency is difficult and mostly impossible to prove in a concrete situation.

In ICRC history from 1863, the only known case of decisive influence by Swiss Federal authorities over a decision by the Comité, the top policy making organ, was in October, 1942 with regard to a possible public appeal to belligerents. Otherwise, while Swiss Federal authorities might have taken a special interest in one or two decisions by the Comité since 1945, decisive influence by Bern has not been proven.⁵⁹ It may be that in the past the ICRC inadvertently tilted toward one or more of the wealthy liberal democracies in a particular conflict situation. It is possible that the ICRC did not protest vigorously enough the civilian damage from US bombing in the Vietnam war. It may be that the ICRC manifested an unbalanced approach in that conflict at that time, focussing too much on attempted protection of US prisoners of war detained by Hanoi, and not enough on protection of Vietnamese civilians in the north adversely affected by the US bombing.

Ironically, although the current and former Presidents of the ICRC had long careers in the Swiss Federal Government, both are fiercely independent from Bern. Mr. Sommaruga was appalled at what had happened in October of 1942 and led the way in the drafting of new ICRC rules making it impossible to serve on the Comité and also hold certain offices in Switzerland. There is also a new headquarters agreement between the ICRC and Bern, formally stating that ICRC property and records are off-limits to Swiss authorities. Thus the ICRC tried to ensure that no repetition of October 1942 would cast doubt on the independence of the ICRC, at least not because of Swiss developments. Mr. Kellenberger believes that a repetition of those events is now impossible. According to him, not only

⁵⁸ The fact that the Milosevic government of Yugoslavia, and the Russian government, criticized the agency for not being neutral in the Kosovo crisis is to be seen mostly as state propaganda, rather than a serious critique. Any time the agency challenges persecution and other violations of human rights leading to forced displacement, it runs the risk of being called biased. This risk is simply inherent in advocacy for persons of concern.

⁵⁹ The ICRC archives are open to researchers only from fifty years after events. Interviews by the present author have elucidated only one or two occasions since 1945 in which Bern may have sought to influence the deliberations of the Comité. On the other hand, it is quite clear that on any number of issues Bern and the ICRC have gone their separate ways.

would the ICRC not yield its independence, but authorities in Bern would not attempt to control the agency as they did in the 1940s.⁶⁰

In general, the wealthy liberal democracies fund the ICRC and UNHCR without always controlling them. At least in reflective moments and away from particular pressures, the wealthy liberal democracies recognize that they have an interest in independent humanitarian protectors. Just as many states fund a “public defenders” office to provide legal help to those defendants charged with violating public order but who cannot afford to pay for that defense, so many states voluntarily fund UNHCR (and ICRC) to help certain persons in dire straits even though the international protectors may sometimes wind up challenging prevailing donor policy.

The issue of power politics

The major donor states aside, does UNHCR take its protective decisions so as to accommodate powerful states rather than on the basis of its mandate, including that part found in international law? A number of observers have charged that the agency has at least been complicit in the declining standards of refugee traditional protection over time. And it is to be recalled that even small and supposedly weak states have more material power than the agency when it comes to financial, police, military, and administrative factors.

UNHCR, like the ICRC, is sometimes faced with a dilemma between pursuing a literal interpretation of its mandate and, on the other hand, doing the best it can for persons of concern in a particular situation where the crucial actor is not going to behave according to international standards. Both Agencies usually try to do the good they can, rather than leave persons of concern in a completely unprotected situation. This is why a 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 it possible are practical and relative, not absolute."⁶¹

In Tanzania in the 1990s, the agency was faced with a situation in which the government decided that the situation in Rwanda was safe enough for refugees from that situation to return. That host government therefore began moving refugees out of Tanzania, regardless of individual wishes. UNHCR could have distanced itself from events, arguing that what was underway was forced return. This stance would have left the refugees completely at the mercy of the situation. Thus the agency chose to do what good it could for the refugees, by providing some assistance to them during return and by trying to supervise their conditions in Rwanda in their status as returnees.

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 protected persons under

⁶⁰ Interviews, 1999 and 2000.

⁶¹ Nicholas Morris, "Protection Dilemmas and UNHCR's Response: A personal View from within UNHCR," *International Journal of Refugee Law*, 9/3 (1997), p. 494.

international humanitarian law were not to be subjected to attacks, and it could have disengaged to protest the policies of the fighting parties. But it decided that moving civilians to safety was better than having them stay and be killed. The right to stay in safety was being violated, and the ICRC was complicit in that violation. But in the last analysis the ICRC chose what it saw as the least worst option. It was better to save lives rather than to disengage in order to protest ethnic cleansing that was prohibited by international law.

So both UNHCR and the ICRC have generally opted to do the good they can for persons of concern, even if this means they do not hold out for full and correct implementation of the international standards at issue. In this way they both act on the basis of the best welfare of persons of concern in context, in relative terms as they see it, while taking into account the power of public authorities. To some this is practical humanitarianism in context. To others it is the abandonment of protective international standards in deference to superior power. Both agencies urge compliance with international standards, even while feeling morally compelled to take action that falls short of those standards.

Beyond UNHCR's protection mandate

UNHCR mandate is in truth much broader in the year 2000 than probably anyone thought it could be or might be in 1950. This is not just because of legal or quasi-legal reasons, such as UN General Assembly resolutions authorizing a broader concern. The living mandate is broader because of a more accurate understanding of what is realistically required for protecting persons of concern. The same is true for the ICRC in its domain of trying to protect victims of war. Both agencies, for example, address the issue of the ample availability of light weapons in conflict areas, because such weapons threaten the welfare of persons of concern. What then, if anything, is off-limits to these humanitarian agencies? What falls within the realm of strategic or partisan politics, a realm theoretically beyond the mandate of humanitarian protection agencies? If there is, which there is, something analytically called humanitarian politics, whose contours and dilemmas have been the subject of this report, what lies beyond the pale as strategic or partisan politics?

In truth, a lot of international relations is beyond UNHCR mandate, but not as much as a half-century ago. As indicated in the introduction to this study, strategic and partisan politics unrelated to refugee concerns remain off-limits to the agency. In many instances there is no controversy about this subject matter. No one representing the agency tries to officially comment on who should be elected Prime Minister of Denmark, or Secretary General of the United Nations. The agency takes no position on the wisdom of the enlargement of NATO or whether Tibet belongs to China. No UNHCR official tried to pass official judgment on who had the legal right to recourse of force in the Falklands/Malvinas war, or in the Persian Gulf War of 1991.

However, when in 1999 the agency officially criticized the Yugoslav (Serb) policy of persecution of ethnic Albanians in Kosovar, it was implicitly criticizing the Milosevic

political faction and government. Thus, in an interpretation of the root causes of refugee displacement, against the background of a UN General Assembly resolution authorizing it to deal with those root causes, the agency could not help but *be perceived* by some states and political factions as taking a position in strategic and partisan politics.

At the end of the 20th century and in the early years of the 21st, UNHCR saw correctly that many aspects of international relations affected persons of concern. Therefore it spoke out on the nature of some peace agreements, the flow of light weapons into conflict situations, the adequacy of development assistance to poor states hosting refugee populations, respect for international humanitarian law, and a variety of other issues, all of which touched on the fate of refugees and those in a refugee-like situation. This public commentary, this taking of broad public policy positions, cast at least indirect criticism on the public authorities responsible for the defects. Such commentary was almost always *perceived* by some state or non-state party as an intrusion into strategic or partisan politics.

Likewise, when the ICRC spoke out on land mines or an international criminal court, some parties regarded that agency as going too far beyond its traditional mandate that was supposed to cover victims of war like prisoners of war and civilians in occupied territory. Land mines dealt with weapons of war, which was supposedly in the Hague tradition rather than the Geneva tradition of the laws of war, and on which the ICRC supposedly had no special role or expertise. International criminal justice was supposedly off-limits to a non-judgmental and neutral humanitarian actor like the ICRC. And yet the ICRC did speak out on these and other subjects that did indeed affect victims of war. This was because of the same logic employed by UNHCR, namely that effectively, which is to say realistically, protecting persons of concern required a broad mandate, even if the resulting humanitarian politics was *perceived* by some to overlap with strategic and partisan politics.

In other words, humanitarian advocacy by either UNHCR or the ICRC could not always be seen as totally distinct from partisan and strategic struggles. These agencies could only defend themselves by reference to their motivation in behalf of the welfare of persons of concern, by a proper and analytical explanation of their mandate, and by careful calculation of policy choice so as to minimize, if possible, any backlash from some inherent overlapping of humanitarian with partisan and strategic politics.

As noted earlier in this study with regard to the World Bank, just as it has proven difficult to separate the pursuit of economic growth from broader social and governance issues, so too has it proven difficult to separate the protection of refugees and others forcibly displaced from broader economic and governance issues. As indicated before, everything, or almost everything, is related directly or indirectly to everything else.

Conclusion

More than a decade ago an experienced UNHCR practitioner and reflective thinker wrote about "the false distinction made between 'humanitarian' and 'political,'" and how UNHCR required "broad...political knowledge and diplomatic experience."⁶² Or as the present author wrote at that time: "To try to pretend that responding to refugee needs is a humanitarian and therefore non-political task is to limit those trying to help refugees to care and maintenance. This results not in 'durable solutions' but in dependency by refugees on their benefactors. The delicate task is to engage in a political process of influencing governments to make the choices necessary for voluntary repatriation plus some resettlement, without being charged with political interference in the domestic affairs of states."⁶³ One can also say that UNHCR must surmount the delicate challenge of being partisan for refugees while practicing non-partisan politics otherwise.

In other words, since UNHCR is no longer essentially a European resettlement agency, but a global agency mandated to focus on the root causes of displacement, it must practice humanitarian politics. It must, in coordination with its NGO partners, lobby other public authorities in behalf of the welfare of those forcibly displaced. At the same time, it should try to minimize its impact on other types of politics having to do with partisan and strategic advantage, and usually having to do with those aspects of who governs, the general nature of governance, and military coercion that remain separate from the welfare of persons of concern.

Recognition of the real or realistic mandate of UNHCR leads to innumerable dilemmas of policy choice for the agency. The same is true in principle for other international protective actors like the ICRC. This short study has tried to highlight the fundamental nature of the process as well as give a representative sample of the dilemmas. It would be helpful for UNHCR to begin to confront the difficulties of its role by explaining clearly what its mandate entails. Such an explicit recognition would promote clear thinking within the organization, as well as - most probably - greater acceptance of that role by other public authorities. It impedes progress to continue to think of refugee protection as a non-political task best conceived and practiced as analogous to giving advice about tax law.

⁶² Gervase Coles, "Approaching the Refugee Problem Today," in Gil Loescher and Laila Monahan, *Refugees and International Relations*, New York: Oxford University Press, 1989, chapter 17.

⁶³ David P. Forsythe, book review of *ibid.*, in *Journal of Church and State*, (1991), p. 434.