REFUGEE STUDIES CENTRE

hpg Humanitarian Policy Group

KEYNOTE PAPER

When 'protection' meets 'humanitarian'...

Jean-François Durieux
Director a.i., Division of Operational Services, UNHCR
durieux@unhcr.org

September 2009

International Conference: 'Protecting People in Conflict and Crisis: Responding to the Challenges of a Changing World'

Abstract[1]

If 'humanitarian protection' is a much debated concept, this is due not only to some ambiguity surrounding the term 'protection', but also to the multiple meanings conferred upon the adjective 'humanitarian'. This paper examines a number of contexts within which this phrase has been mainstreamed into legal and/or policy discourse, and the implications of this juxtaposition of 'humanitarian' and 'protection' with regard to (i) the legal obligations of states under international humanitarian law; (ii) the specific functions of protection-mandated agencies, in particular ICRC and UNHCR; and (iii) the response-ability of the larger 'humanitarian community' as "protection .. grow[s] from specialized function to jargon champion"2 .

Among the many questions raised by this paper – which does not purport to suggest many answers...- , three in particular could be tabled for discussion:

- A legal question: Is it possible and/or desirable to give extra-territorial effect (i.e., outside the area of conflict) to at least the customary provisions of IHL, so that no-one may be forcibly returned to a situation of indiscriminate violence, within which a serious risk of IHL violations exists? Put differently: Could a non-refoulement duty be derived from the universal obligation, under Art.1 common to the four Geneva Conventions, to 'respect and ensure respect' for IHL?

- A mandate question (re: UNHCR): Is it possible and/or desirable to transpose the 'entirely non-political' and 'humanitarian and social' character of UNHCR's protection responsibility from its refugee work to its protection work within countries in conflict, in particular for IDPs?

- A question of 'label interpretation': When is it, and when does it cease to be, of benefit to the intended beneficiaries of an NGO's protection activities that agency staff insist on the humanitarian character of their intervention? And conversely, when is it, and when does it cease to be, of benefit to the beneficiary populations that the agency insist on the protection nature of its humanitarian intervention?

[1] The views expressed in this paper are the author's own, and do not necessarily represent the position of the United Nations or UNHCR.

[2] Marc DuBois, *Protection : The New Humanitarian Fig-Leaf* http://www.urd.org/newsletter/IMG/pdf/Protection_Fig-Leaf_DuBois.pdf

The thorough background paper, which the Refugee Studies Centre prepared for this conference, invites us to 'review the state of policy and practice in the broad field of humanitarian protection'. It also observes that since the mid-1990's the 'humanitarian protection sector has taken remarkable strides'.

I must confess that I am intrigued by the phrase 'humanitarian protection'. What I intend to do in this short paper, therefore, is to explore the possible meanings of this juxtaposition of a noun and an adjective, both of which resonate with all of us, though not necessarily in full harmony. I would like to conduct this inquiry across three levels or dimensions of 'protection' – starting with notions of state responsibility and legal obligations, continuing with functions of protection-mandated agencies, and finishing with the dilemmas facing the larger humanitarian community.

International humanitarian law: what's in the name?

Art. 49 of the First Protocol to the Geneva Conventions stipulates that 'the provisions of this section are additional to the rules concerning humanitarian protection contained in the Fourth Convention and in other international agreements'. Interestingly, though, the phrase 'humanitarian protection' *per se* cannot be found anywhere else in the law of armed conflicts. The authoritative Commentary on the Protocol dismisses this apparent contradiction by observing that 'all these [IHL] treaties are concerned with 'humanitarian protection' of individuals'. In other words, IHL recognises humanitarian protection without naming it as such. This is probably hard to dispute. The whole body of IHL is impregnated with the language of protection, and it would be vain to ask whether IHL is truly 'humanitarian': it is so by definition, it is all in the name.

But is it? I would not like to leave the field of international law so quickly; for I suspect that it may provide us with a few extra clues in our semantic quest.

It has become almost ritualistic to recall that the primary responsibility to protect vulnerable populations during crisis lies with states. It is actually an important truth: this responsibility is truly primary in the sense that the extent to which, and the manner in which it is exercised will determine the need for, and content of, any 'protection activity' to be carried out by other actors. The International Committee of the Red Cross (ICRC) sanctioned definition of protection *ad usum* humanitarian and human rights organisations, which is quoted in the background paper, illustrates this perfectly, as it refers to 'all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law'.

The key word in this definition, in my opinion, is not 'protect', but 'respect' – respect for rights, hence compliance with obligations. Where states are concerned, to talk only of an obligation to protect would be misleading and unnecessarily limiting: states, and belligerents in general, are not bound to *protect* civilians against their own actions, but more fundamentally to refrain from harmful acts, i.e., to *respect* the life, physical integrity,

dignity and freedom of all persons under their jurisdiction or control. As every law student will know, human rights also entail obligations to protect, as those rights are capable of being threatened and violated by other entities than states; and to fulfill or realise human rights through positive action. There is no question, however, that states and other parties with the power to harm must, first and foremost, refrain from abuse.

In situations of international and non-international armed conflict, parties assume unequivocal and fairly detailed obligations, and there is no doubt that IHL is binding – much of it is actually customary law or *jus cogens*. It is, on the other hand, modest in its ambitions, born as it was of a practical accommodation. It is the job of IHL to ensure respect for the human person and her development ... to the fullest extent compatible with public order and, in war time, with military exigencies[3]. Thus, with regard to the protection of civilians, IHL delineates the strict minimum 'core' of the obligation to respect and to protect basic rights – under circumstances in which further 'fulfilment' is too ambitious a goal. In their legal form, humanitarian standards are bound to be 'minimum'. Significantly, though, they are also context-specific and find application within the strict confines of clearly exceptional situations. Humanitarian law does not undermine human rights law – rather, it affirms it in the same way as the proverbial exception corroborates the rule.

It is interesting to note that in common parlance, as well as in other branches of law and policy, 'humanitarian' often denotes a sense of obligation somewhat below the genuinely legal – something definitely less binding than IHL. Humanitarian, in the sense of compassionate, responses tend to fall in the domain of state discretion rather than obligation. In matters of asylum and refugee protection, for example, 'humanitarian' programmes and statuses are designed for a category of persons, who a few decades ago were known as *de facto* refugees. The phrase says it all: the protection they receive is also *de facto,* not *de jure*: it is given outside the binding legal framework of refugee law.

As these 'humanitarian' refugees often flee situations of armed conflict, the adjective could actually be used in a more robust way, more in line with the binding nature of IHL. There is in IHL an obligation to put civilians out of harm's way, e.g. in safe or hospital zones. One of the most intriguing questions in the search for convergence of IHL and refugee law concerns a corollary obligation on any state party to IHL to refrain from sending persons back to indiscriminate violence. Could a duty of non-refoulement be derived from the universal obligation, under Art.1 common to the four Geneva Conventions, to 'respect and ensure respect' for IHL? 'Humanitarian protection' would then assume an identical and equally binding meaning under two branches of international law, and a serious protection gap would be closed.

[3] 'Le respect de la personne humaine et son épanouissement seront assurés dans toute la mesure compatible avec l'ordre public et, en temps de guerre, avec les exigences militaires'. J. Pictet, *Le Droit humanitaire et la protection des victimes de la guerre,* 1973, p.31

Protection-mandated entities: a common understanding?

According to David P.Forsythe[4], 'ICRC and UNHCR share a common understanding of humanitarian protection', which he defines as 'the effort to protect the fundamental well-being of individuals caught up in certain conflicts or 'man-made' emergencies'. This common understanding, he adds, is 'reflected in operations more than in pronouncements', as neither agency has explained it 'as well as analytical observers might wish'. I am not sure why analytical observers of our organisations – many of whom must be in the room today – would wish us to explain our understanding of a concept which – in UNHCR at least – we hardly ever use. But I am willing to take on the challenge.

I cannot speak for ICRC, but to reiterate, with even greater conviction, the observation made previously about the indisputably humanitarian nature of IHL where IHL stipulates that 'The Parties to the conflict shall grant to the ICRC all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and [...] Protocol[s] in order to ensure protection and assistance to the victims of conflicts', one is bound to conclude that the protection activities of ICRC are by definition humanitarian. This is, I suppose, why we all try to emulate our ICRC colleagues, at times to their chagrin, as when the principles of the Red Cross become the gospel of humanitarians of all kinds – including, supreme heresy, the UN kind.

As a member of the UN family, UNHCR is generally listed as both a protection and a humanitarian agency. In our Statute, the two notions do indeed appear, albeit not in the same phrase. Pursuant to Article 1, UNHCR is vested with the 'function of providing international protection under the .auspices of the UN to refugees who fall within the scope of the present Statute'. Article 2 establishes that 'The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and relate, as a rule, to groups and categories of refugees'.

It is worth remembering that the 'entirely non-political' phrase was introduced into the Statute by Yugoslavia, the only socialist state participating in the creation of UNHCR and in the drafting of the 1951 Refugee Convention. Within a Cold War logic, it was probably more important for Yugoslavia than for, say, the United States or the UK, to reaffirm the legal fiction underpinning the refugee regime, i.e., that the granting of asylum is not a hostile act and does not 'accuse' the state of origin. Likewise, such activities in support of asylum, as UNHCR would perform under its protection mandate, should be regarded as neither hostile nor accusatory – in a word, as 'humanitarian'. Its bias in favour of refugees notwithstanding, this qualification has allowed UNHCR to operate in refugee-hosting countries that are also 'producing' refugees towards their neighbours and at the same time in those neighbouring countries, too. This is possibly the clearest illustration of 'humanitarian protection' *à la* UNHCR, in the world of refugees.

[4] D.P.Forsythe, *Humanitarian Protection : The International Committee of the Red Cross and the United Nations High Commissioner for Refugees,* International Review of the Red Cross, Vol.83 No.843, 2001, 675

On the other hand, it is clear that neither the notion nor the quasi-fiction underpinning it can be transposed mechanically from the refugee universe into that of IDP protection. UNHCR may well be the 'natural' coordinator of protection activities within areas of conflict, and these activities may be as 'humanitarian' as the 'humanitarian reform' that engendered the cluster approach. But if you wonder in what substantive way the protection of IDPs is 'humanitarian', or whether it is 'entirely non-political', don't look to UNHCR's Statute for an answer. In the face of these difficult questions, UNHCR is far less well equipped than ICRC, whose own humanitarian mandate was specifically designed for protection in conflict.

The broader humanitarian community: dilemmas and fig-leaves

Where the concept of humanitarian protection has flourished, and where it has fed the fiercest controversies, is not within the relatively well regulated legal and institutional framework of IHL, much less within the refugee regime. Rather it is within the broader and less well charted domain of 'humanitarian action', which according to most commentators has in recent years witnessed a shift from a wants/needs approach to a rights/obligations approach. Marc DuBois describes this shift as '[t]he progressive abandonment of the relief-only paradigm, or rather the progressive expansion of the relief-protection paradigm beyond the towers of the protection-mandated entities'[5]. The new promise of humanitarian protection is thus vested in a community mainly composed of international NGOs, which traditionally perceived themselves as aid providers. As these agencies embrace protection as a necessary and legitimate set of activities, they place it naturally under the humanitarian umbrella that defines them – in other words, as an integral part of humanitarian action.

In short, then, humanitarian protection is protection as understood and practised by those who call themselves humanitarians. There is a double paradox in this formulation: first, as critically noted by DuBois, '[t]he humanitarian obsession with protection reflects the degree to which we define the external environment through *our* activities.' Furthermore, it is illogical that this inclination to 'do protection' should affect the behaviour and the methods of humanitarian actors, but not their self-perception as humanitarian.

Or, perhaps, NGOs involved in protection work know that they are no longer 'strictly' humanitarian, but they uphold the label for marketing purposes, in order for their services to be, if not invited, at least tolerated by one or more of the belligerents. Indeed, in the final analysis, it is not the label affixed by the would-be protector which determines whether an activity is humanitarian, or not : the characterisation is in the eye of the beholder – be that the powerless beneficiary seeking political voice, or the powerful belligerent trying to factor external interveners into his political or military strategies.

[5] See note 1, above.

In most contemporary conflicts, 'humanitarians no longer control the *meaning* of their protection activities as interpreted by those with power, guns and/or blood in or on their hands'[6]. In such situations, to insist on the 'humanitarian' character of those activities would appear to be not only counter-intuitive, but also counter-productive.
We must ask ourselves: When is it, and when does it cease to be, of benefit to the intended beneficiaries of an NGO's protection activities that agency staff insist on the humanitarian character of their intervention? And conversely, when is it, and when does it cease to be, of benefit to the beneficiary populations that the agency insist on the protection nature of its humanitarian intervention?

[6] *Ibid.*

Jean-François Durieux

Jean-François Durieux is a graduate of Facultés Universitaires St-Louis in Brussels, Belgium, and obtained a Law Degree from the Catholic University of Louvain. He practised law as a barrister in Brussels before joining UNHCR in 1979. He served with UNHCR in Sudan; Djibouti; Canada; Mexico/Cuba/Belize; Tanzania and Myanmar. He also spent time at UNHCR Headquarters in Geneva, where he was in charge of, among others, UNHCR's contributions to the asylum harmonization debate in Europe; the development of a UNHCR research policy and service; the Convention Plus initiative; and the promotion and dissemination of refugee law worldwide. He is currently Deputy Director in the Division of Operational Services. From October 2007 to March 2009, Mr Durieux was Departmental Lecturer in International Human Rights and Refugee Law at the University of Oxford (UK). Mr Durieux's research has been mainly policy-oriented and 'operational', addressing the protection challenges faced by UNHCR in the regions in which he worked, and at the global level. Thus, he was the instigator and co-author of the 1994 booklet /*UNHCR's operational experience with internally displaced persons*/, and he contributed to several issues of /*The State of the World's Refugees*/. With Vera Gowland-Debbas of Geneva's Graduate Institute of International Studies, he organised the colloquium that resulted in /The Problem of Refugees in the Light of Current International Law Issues /(Martinus Nijhoff, 1996). Publications include 'Capturing the Central American Refugee Phenomenon: Refugee Law Making in Mexico and Belize' (/*IJRL*/ 4(3), 1992); 'Preserving the Civilian Character of Refugee Camps: Lessons from the Kigoma Refugee Programme in Tanzania' (/Track Two/ 9(3), University of Cape Town, November 2000); and 'Carving Out Humanitarian Space' (with Sivanka Dhanapala) in /*FMR*/ 30 (2008) on Burma's Displaced People. In recent years, his research interest has focused on legal responses to mass influxes of refugees, including a comparison of African and European regimes and a reflection on the legal implications of refugee emergencies and protracted refugee situations.