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NETWORK paper**Human rights and international legal standards: what do relief workers need to know?**

James Darcy

Abstract

The concept of human rights is increasingly invoked in the context of humanitarian emergencies; yet the moral and legal basis for the claims involved are often little understood. This paper aims to describe the basic moral and legal framework of human rights; to look at issues of responsibility, protection and enforcement in the light of international legal obligations; and to relate this to the work of humanitarian agencies in their attempts to provide assistance and protection to communities affected by conflict and other disasters.

The legal framework involves a sometimes confusing patchwork of provisions from different branches of international law: human rights law, humanitarian law (the Geneva Conventions), and refugee law. The key features of these provisions, and the way they relate to each other, are explored in this paper. More specifically, the particular role and mandate of the

ICRC and of UNHCR are examined in the context of a discussion of humanitarian law and refugee law respectively. From that follows a general discussion of protection and assistance activities, the relationship between them, and the tensions and potential dilemmas that arise in seeking to combine human rights advocacy with relief assistance.

The basic thesis is that humanitarian actions – assistance and protection – are properly seen as part of a spectrum of human rights activity; in other words, it is an argument for the recognition of humanitarian rights in the broader sense, including but not limited to relief. The paper concludes with a number of recommendations, including a call to make an assessment of *protection* needs part of every needs assessment, and to calculate and minimise the potential negative side-effects of relief interventions.

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Introduction

We all use the phrase human rights. It is so familiar that we tend to assume that its meaning is understood and accepted. It is a useful phrase: it carries a certain moral force and acts as a kind of ‘trump card’ in arguments about moral behaviour. But do we really understand the nature of human rights claims, and the basis on which they are founded?

The concept of human rights is increasingly being invoked in the context of humanitarian relief, often in reaction to the frustration of attempts to bring relief assistance to civilian populations caught up in armed conflict. The people concerned, it is said, have a right to assistance. Sometimes it is claimed that external agencies have a right to deliver that assistance. Others stress the right of the people affected to protection from violence by reason of their civilian status. Threats to their security and well-being posed by the warring parties are described in terms of human rights abuse or denial – though the need to negotiate safe access with those same parties for the provision of relief is often felt to be incompatible in practice with public denunciation of abuse.

In whatever forum they are made, the claims described above are forms of human rights advocacy: the assertion of rights on behalf of people whose rights are threatened and who may be unable to assert them for themselves. This paper is written in the belief that for those engaged in humanitarian work, it is essential to be familiar with the relevant human rights standards and the legal provisions which codify them. It is argued below that humanitarian action can and should be rooted in human rights principles. But no agency which professes a commitment to human rights can afford to be ignorant of the relevant standards if it is to engage in more than empty rhetoric.

This argument is partly a reflection of a general concern with defining and achieving minimum standards of humanitarian response; and attempts to define a kind of ‘humanitarian charter’ setting out what, as a minimum, people have a right to expect. The aim is to establish a consistent measure of accountability for the actions of humanitarian agencies. The achievement of that aim will involve recognition of states’ and others’

responsibilities, and agencies working to more clearly defined roles – embracing the work of relief agencies, those engaged in protection activities in the field, and the advocacy work of human rights agencies. Consistent application of human rights standards, it is argued, can provide a framework which unites these activities, helps answer apparent dilemmas – and relates humanitarian action to development initiatives. For those concerned with the protection of conflict-affected populations, there is a potentially confusing patchwork of provisions from different branches of international law: human rights, humanitarian, and refugee.

The purpose of this paper, therefore, is three-fold:

1. To attempt to sketch the basic moral and legal framework of human rights.
2. To look at issues of responsibility, protection and enforcement in the light of international legal obligations.
3. To relate this to the work of humanitarian agencies in their attempts to provide assistance and protection to communities affected by conflict and other disasters.

A wide view is taken of human rights law, so that international humanitarian law (the Geneva Conventions etc.) and refugee law are included under this heading. A related and subsidiary aim of this paper is to examine the role and mandate of two agencies concerned specifically with these areas of law: respectively, the ICRC and UNHCR. A discussion of the connection between protection and assistance activities follows from this.

Some of what follows is a statement of fact; some of it is a matter of interpretation, on which feedback would be welcome. In a paper of this length, of course, it not possible to cover these subjects in depth. The author is currently engaged in producing a manual for Oxfam UK/I which covers the subject in some detail and which provides a guide to relevant human rights and other legal provisions. Many materials already exist on the individual topics under discussion: for a short list of recommended reading, please see the bibliography at the end of the paper.

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Different traditions: human rights and humanitarianism

The modern concept of human rights can be traced back to the American and French revolutions in the late eighteenth century. The ‘rights of man’ were asserted and justified by reference to principles of liberty and equality. Though sometimes distorted, the concept can be traced through subsequent history in the emancipation movement and the abolition of the slave trade through to the developments of this century, including the founding of the United Nations and the formulation of international legal standards based on the principles set out in the Universal Declaration of Human Rights of 1948.

The development of universal human rights in the twentieth century has been spurred by two main factors: the atrocities committed against civilians and non-combatants in the two World Wars, above all in the Holocaust; and the persecution and violent suppression of opponents of totalitarian or colonial regimes. Loss or denial of liberty and democratic expression has been a common feature of both, as has discrimination – a denial of equality – in the form of political,

social and economic marginalisation. The principle of non-discrimination lies at the heart of human rights; that is, the principle that differences of race, sex and other human characteristics, or differences of belief or culture, cannot justify differential treatment. Genocide can be seen as the ultimate form of discrimination, treating human beings as sub-human.

The process of defining and giving international recognition to human rights has involved, to some extent, a pulling back of the curtain of sovereignty. It is a recognition that the previous basis on which international relations rested – absolute respect for national sovereignty and a reluctance to question a state’s behaviour towards individuals within its territory – provided insufficient safeguards. The recognition of individuals as ‘subjects’ of international law, and so of international concern, was a revolutionary step. That said, it can be seen as a recognition that state sovereignty, which remains the corner-stone of international law and relations, has two aspects. It carries with it both rights and duties, and the duties of the state include, as a

minimum, the protection of the human rights of those within its sovereign jurisdiction. Failure to do so may call into question a state's sovereign rights, and so its very legitimacy.

The concept of state (and so government) responsibility remains at the heart of human rights, and will be stressed throughout this paper. But human rights responsibilities go beyond the state, and we shall look at this issue below. The mainstream of the rights tradition has tended to place the greatest value on liberty, and to assume that, left to live their own lives, people will thrive. It is only in later years that more positive claims have been made on the state, a recognition that liberty may be of little value if accompanied by disabling poverty.

The *humanitarian* tradition – if it can be called a single tradition – has been more obviously concerned with basic human needs. It is an older tradition, impossible to date – it is evident even in Homer's *Iliad*, the bloodiest of epics, but is by no means an exclusively 'western' phenomenon. It has a history in Islam, Christianity, Buddhism and other religions. Of particular concern have been situations of armed conflict where a defenceless individual requires urgent assistance and protection from the effects of a conflict in which they are playing no direct part. The Red Cross movement, governed by principles of neutrality and impartiality, is the clearest expression of this tradition, and the development of international humanitarian law which it sponsored has gone some way to establishing humanitarian action on a set of rights. The widely-shared belief in the existence of a humanitarian imperative implies a duty to act in the face of human suffering, without assigning more specific rights and duties. Whatever the basis for relief activities – and certainly the motivation for them is most easily described in terms of compassion and the desire to relieve suffering in fellow human beings – they are today to a great extent delegated to specialised relief agencies, governmental and others. The way in which this function is performed is increasingly

being called into question, as are the ethics of providing relief assistance in complex political emergencies.

One of the purposes of this paper is to suggest that a rights analysis can provide a basis for addressing the ethical questions involved in providing humanitarian assistance, and for clarifying the roles and responsibilities of the agencies concerned. This implies that the two traditions sketched above can be closely related.

There is one obvious link between the traditions: both are universal in their application, and based on a recognition that our shared humanity makes certain demands on us. Both, too, can be linked to an analysis of human need, though human rights are more broadly conceived to include all those aspects of an individual's physical, economic, political and social security which it is believed essential to safeguard in any society. But whereas humanitarianism has tended to rely on an impulse of private charity, human rights have always had a public and political aspect. It is this aspect of human rights which has sometimes caused relief workers to view them warily – coupled with the fear that involvement in such issues will jeopardise their relief activities. That said, the provision of relief itself has increasingly been recognised as having, to a greater or lesser extent, a political dimension.

The argument of this paper is that humanitarian actions should themselves be seen as one part of a spectrum of human rights activities: that assistance and protection are closely related activities that can and should be justified in human rights terms. Relief assistance can be described in terms of the fulfilment of certain claims that human rights make on us. This may be a different type of activity to advocacy aimed at preventing the abuse or denial of human rights; but they are clearly related. This will be taken up again below. What we shall look at before then is the nature of the claims that human rights make, what the corresponding duties are, and who is responsible for fulfilling them.

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Moral and legal rights

What is a right? One dictionary definition describes it as a justifiable claim, on legal or moral grounds, to have or obtain something, or to act in a certain way'.¹ It is useful to think of rights as valid claims or entitlements, which may be moral or legal, that one party makes against another. Human rights can be described as claims that we all have simply by virtue of our humanity. But what do those claims consist of, and from whom can we claim them? The history of human rights has been one of defining the claims in question, and of defining the corresponding duties. If there is a single rationale underlying all human rights, it is perhaps the need, on the one hand, to secure individual and group interests against the potential threats and limitations of living in society; and, on the other hand, to ensure that all individuals and groups share the benefits of living in society.

Human rights are fundamentally moral claims. Though much of what follows is concerned with the legal form in which those rights have been codified, the law did not create the rights: it recognises that individuals have such

(moral) rights and involves formal (legal) undertakings by states to ensure that those rights are respected. They remain fairly broad principles, and it is important to realise that they constitute a set of essential minimum safeguards that should not be stretched beyond their core meaning. Nor are they always absolute rights. The limits set on human rights and freedoms are those necessary to ensure that the rights of others are not themselves infringed, or to ensure the security of society and the state.

What sorts of claim do human rights involve? It may help to look at the list [Boxes 2 and 3 on pages 20 and 21 respectively], which sets out a summary of the rights in the two main global human rights conventions. The civil and political rights make roughly three sorts of claim. First, they make 'liberty' claims: to be left alone, not to be interfered with, to be allowed to act as one wishes, individually and in community. So for example, the rights to freedom of speech, freedom of movement and freedom of association. Second, they make claims to recognition of civil, legal and political status from which flow certain

safeguards and rights of political and legal access – hence for example the right to a fair trial. Third, and crucially, are various prohibitions mostly framed as ‘freedoms from’: these include the right of freedom from torture.

The right to life itself probably belongs in this last group. Until recently it was interpreted in negative terms: the right not to be arbitrarily deprived of one’s life. More recently there have been moves in the UN to expand its interpretation to encompass a duty to take positive steps to preserve life – a development of obvious relevance to relief workers. The original interpretation remains of particular relevance for civilians in conflict.

The economic, social and cultural rights include a number of claims that are of a different type: they are claims to social security and a certain standard of living, including claims to adequate food, clothing, housing, health care, and education. The duties accepted by states to achieve fulfilment of these rights are of a more qualified sort (see section 4); but these rights should be of central concern to humanitarian and development workers. This set of rights – sometimes called ‘second generation’ rights – addresses the issue of poverty, as the first generation addressed the issue of threats to liberty. The failure to make progress on the fulfilment of these rights, and indeed the lack of international commitment to their fulfilment, has been one of the chief failings of the human rights movement. It is reflected in the language used: we talk about human rights abuse, even human rights denial; but perhaps we should talk also of human rights neglect. Denial or neglect, accompanied by discrimination, is the cause not only of chronic suffering but potentially also of armed conflict and its humanitarian consequences.

It would be wrong to characterise this second set of rights as welfare claims by passive recipients. They do imply certain welfare entitlements where individuals and communities lack the ability to secure subsistence needs for themselves. But just as importantly, they are about equitable access

and the creation of conditions where people (individually and collectively) can pursue viable livelihoods and satisfy their own needs. It is in this respect that they are most obviously linked to the first generation rights, and why the two sets are rightly said to be indivisible. The concept of justice, in its concern with due process on the one hand and with fair distribution of goods on the other, may be said to link the two strands. So do the related concepts of non-discrimination and consistency of treatment.

If human rights are claims, who are they claims against? In legal terms, they are framed as claims against the state: and (crucially) most states have recognised the validity of those claims by ratifying human rights treaties and so formally accepting their obligation to respect and ensure the rights in question to all within their territory and subject to their jurisdiction.

In moral terms, human rights are claims we all have against everyone else; that is, they are not restricted to the relationship between state and individual. Since humanitarian agencies are likely to base their advocacy as much on moral as on legal grounds, it is important to say that (for example) a rebel movement may with equal justification be accused of human rights abuse as may government forces, even though they are not party to the relevant conventions. It is just the terms in which the argument is made that may differ.

Human rights claims are universal in that, if they are valid at all, they are valid for everyone, since they are based on general assumptions about human needs and capacities. But are those claims – and the corresponding duties – universally recognised and equally respected? The answer is no, though the differences tend to arise less from a fundamental clash of cultural values than from a difference of emphasis. Certainly, for example, in Islamic states, duty has tended to be stressed over rights, human rights being seen in the light of the overriding duty to obey God’s law. In Asia, second generation rights have tended to be prioritised over first

generation. In Africa, talk about rights has tended to focus on the collective ('third generation') rights to self-determination or development as much as on the rights of individuals.

The human rights code drawn up after the Second World War reflected the ideological differences between East and West. The two sets of rights discussed above themselves contain the seeds of ideological difference: the first generation stressing individual liberty and seeming to require adherence to democratic principles; the second implying universal minimum welfare entitlements, and arguably requiring a redistribution of wealth within and between states. If the ideological debate has now shifted to one between North and South, the substance of the debate remains fairly constant: civil and political versus economic and social rights, individual versus

collective interests, liberty versus equality. The differences of emphasis sometimes threaten to break the consensus that the spectrum of human rights is 'indivisible and interdependent'. But for the reasons indicated above, the principle is a vital one, and transcends differences of political ideology. Human rights law fulfils the useful function of providing evidence of consensus about rights among states and between cultures. That consensus generates both moral and political pressure on other states to adopt the same standards. We may be wary of the use by politicians of human rights as an ideological 'battering ram', and recognise legitimate problems of implementation; but in the end a commitment to human rights implies a willingness to pursue advocacy (in whatever form) to champion those rights and to prevent breaches.

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Human rights in law

The first place to look for legal protection of human rights is in national legislation and the law enforcement mechanisms of the state. Most human rights safeguards that exist will be found here: for example, laws against murder reflect the right to life, one of many human rights principles that pre-date the modern human rights movement. The law of *habeas corpus* (freedom from unjustified detention) is another example. Some of the most fundamental rights are protected in state constitutions, of which the most famous and the most common model is the US Constitution and Bill of Rights.

So why concentrate on international law? Not because protection against human rights abuse is best pursued at the international level: it is not. But international human rights law, founded on the principles set out in the Universal Declaration of Human Rights in 1948, formulates legal standards to which state parties to the relevant conventions have committed themselves. These have an external and an internal aspect. In their external aspect, they amount to a set of binding undertakings to other state parties in respect of the

observance and protection of human rights. In their internal aspect, they involve an equivalent undertaking to the holders of the rights, that is, to every individual within the state's jurisdiction. In becoming party to a human rights treaty, a state undertakes to ensure that its national policies and legislation conform to the relevant standards, and to guarantee to individuals effective remedy for abuse. So international law sets standards which are to be implemented through national policies and legislation. It provides a blueprint by which to judge national legislation, as well as a state's behaviour towards all those within its territory.

That, of course, is the theory. In practice, abusive behaviour not only goes unpunished but is in many cases actually perpetrated by the state through its agents (police, army etc.). In other words, the very body which undertakes to protect human rights, and is charged with that responsibility, may be unable to provide protection or may itself be the source of the threat. That threat may be overt or covert; and it may be posed by (for example) measures which are grossly

discriminatory against one section of the population. We shall look below at issues of international protection in the context of refugees and asylum. But most who suffer human rights abuse must look for protection *in situ*. The responsibility of the state and of other parties in respect of human rights, and the issues of protection and enforcement, are examined in the next section.

Human rights are only one part of international law, though an increasingly significant part. International law concerns itself with inter-state relations. Primarily through the mechanism of treaties to which states put their name, it imposes duties on those states in respect of all the other parties to the same treaty. Strictly speaking, therefore, a state party to a human rights treaty owes its obligation in international law not to the individuals whose rights are to be protected but to the other state parties. This is reflected in the fact that individuals have very restricted access to international mechanisms in seeking a remedy for abuse.

Certain principles of law become established by consistent state practice over time as rules of ‘customary’ international law, binding on all states regardless of whether they explicitly endorse them. The content of customary law is less certain than treaty law, but it includes general humanitarian principles of which (for example) the Geneva Conventions are an elaboration.

International law is peculiar in being essentially consensual, and is very different in a number of other ways from national law. First, there is no single law-making body, though in respect of human rights at least the UN has tended to play that role. Second, there is no single court which has universal jurisdiction to rule authoritatively on any issue of international law: the International Court of Justice, for example, has jurisdiction only if the states in dispute have agreed that it should have. Third, there is no universal enforcement mechanism: the business of judgment and enforcement has tended to be left to states and to be dictated by political factors. The inconsistency of states in

performing this function is illustrated by the resolutions of the UN Security Council, whose policing role in imposing sanctions or authorising the use of force against errant states has become much more prominent in the years since the ending of the Cold War.

The fundamentally political nature of international law and of its methods of judgment and enforcement is one of its inherent characteristics. It is essentially about protecting the interests of sovereign states, and in that respect its concern with human rights is anomalous. That said, human rights are increasingly used as the yardstick to judge state behaviour. It is essential to the consistent application of human rights standards that those bodies which are not driven by state-political agendas should keep states to the commitments they have made.

Ultimately, however, the realisation of human rights depends on their being known, valued and insisted on by those who hold them. Education is one aspect of this. So too are channels of free expression and forms of representative and responsive government. The role of independent investigative journalists and others concerned with human rights monitoring may be crucial in this respect.

There is not space here to run through all the relevant human rights treaties, but some must be mentioned. The UN Charter [see Box 1 on page 19] – to which almost all states are party – contains important general undertakings in respect of human rights but did not spell out those rights. The 1948 Universal Declaration of Human Rights filled that gap, and remains a blue-print for international human rights, but it was not itself a legally binding instrument. It was not until the twin International Covenants of 1966 – one covering Civil and Political Rights, the other Economic, Social and Cultural rights – that legal form was given to the declaration of intent.

Various other instruments, before and since, have given legal protection against specific abuses. The Genocide Convention (1948) [see Box 4 on page 22] remains sadly relevant

today, though states have failed to live up to their individual and collective responsibility to ‘prevent and punish’ genocide, surely the ultimate abuse of human rights. Other conventions elaborate on the general prohibitions against torture (1984) and slavery (various). Racial discrimination and discrimination against women are the subject of treaties signed in 1966 and 1978 respectively. More recently, the Convention on the Rights of the Child (1989), which elaborates on the general provision for the protection of children, has proved its value in a number of different contexts. [see forthcoming Network Paper 21 by Iain Levine *Humanitarian Principles: the South Sudan experience*].

Of the other relevant treaties, it is important to mention the regional human rights conventions and mechanisms in Europe, Latin America and Africa. (There is no equivalent in Asia.) The provisions of these treaties are broadly in line with those in the global human rights treaties.

Both the global and regional conventions have corresponding review mechanisms, though only in two cases – the European and Inter-American human rights courts – do these include effective judicial mechanisms. The nature and workings of the UN and regional human rights bodies are beyond the scope of this paper. They provide a more or less effective mechanism for scrutinising states’ performance against their international legal obligations. The sanctions against failure are largely politically determined. For the most part, it is unrealistic to expect urgent protection issues to be dealt with effectively through these bodies. But their work, informed by reports from human rights and other organisations, is an important part of the standard setting function of their respective parent organisations. The appointment of a UN High Commissioner for Human Rights has raised hopes (as yet unfulfilled) that human rights protection will come higher on member states’ agendas.

Some final remarks before going on. First, not all states are signatories of the global

treaties mentioned above, and it is clearly important to be aware of whether human rights case law is based on explicit legal undertakings or simply on moral obligation. In making a case on legal grounds, we have the advantage of quoting states’ own words back to them.

Second, in certain circumstances, states are permitted to ‘derogate from’ (suspend or limit) the application of legal human rights guarantees. Derogation is only permissible in time of public emergency which threatens the life of the nation. Any such measures must be officially proclaimed, be non-discriminatory, and be limited to the extent ‘strictly required by the exigencies of the situation’. Crucially, certain rights can never be derogated from: the right to life, to freedom of thought, to recognition as a person before the law; freedom from torture etc., from slavery, from imprisonment for debt, and from prosecution under retroactive criminal laws.

Third, subject to derogation, human rights laws continue to apply during armed conflict. We shall look below at how these standards are supplemented by the provisions of international humanitarian law (the Geneva Conventions and Protocols), which is a separate but related strand of law. Human rights standards apply to refugees and internally displaced as well; though in the case of refugees, specific provision is made by international refugee law. This, again, is a separate but related branch of law, and is discussed below.

Finally, a word on how the content of human rights law relates to humanitarian relief. We have said that the human rights tradition has not placed concern with meeting immediate basic needs at its centre. Outside humanitarian law, the rights foundation for relief assistance is founded mainly on the right to life on the one hand and the principles set out in the Economic Covenant on the other. The latter states the principle that everyone has a right to adequate food, shelter and clothing; to freedom from hunger; and to the highest attainable standard of physical and mental health. The obligations it sets to achieve these

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Responsibility for protection and enforcement

In legal terms, responsibility for protecting human rights lies with the state first and foremost. This remains true even where the state’s agents are themselves the abusing parties, or are unable to provide the necessary protection against threats to human rights posed by third parties. Specific responsibilities are vested in the state’s agents – administration, legislature, courts, police, army, civil servants – all of whose activities have a bearing on the protection and fulfilment of human rights. To some extent this is a question of maintaining ‘law and order’, with the qualification that the law must govern the activities of the state’s own agents, and must itself satisfy the requirements of justice.

Beyond national boundaries, failure to comply with human rights obligations amounts to a breach by the offending state of its undertakings to other states. Moreover, the UN Charter (articles 55 & 56, see Box 1 on page 19) requires of its member states that they take joint and separate action to ensure observance of human rights. The international community therefore has a legal commitment to the protection of human rights where they

are not otherwise protected by the state. The difficulties of providing international protection in such circumstances are notorious – witness the ‘safe areas’ initiative in former Yugoslavia – and most such efforts take the form of external pressure aimed at ensuring that the state itself fulfils its obligations. Increasingly the use or threat of sanctions or the suspension of trade concessions are used in an attempt to apply leverage on the offending state. Making aid transfers conditional on human rights performance falls in the same category.

The problems with such approaches are well known: while humanitarian assistance is generally exempted, economic penalties tend to hit the poorest hardest and may have little impact on government policy; they tend to focus exclusively on civil and political rights performance to the exclusion of economic and social rights; and they tend to be part of an ideological package that insists on economic and other reforms which go beyond (or may contradict) the dictates of human rights. Such measures have a mixed record of success in forcing reform, and have notoriously failed

as a method of dislodging dictators. They are, in any case, applied *ad hoc* and inconsistently by the industrialised states. The pursuit of national (strategic) interest remains the driving force of international relations, but is an insecure foundation for the enforcement of human rights.

The threat of public denunciation, or denial of diplomatic privileges, is probably a greater deterrent than is generally recognised. A critical report from one of the UN human rights bodies is at least a severe embarrassment to the government concerned, and may have political repercussions at the domestic as well as the international level (opposition parties seize such opportunities). States will go to great lengths to forestall such criticism. Alas, the UN's mechanisms tend to be slow, and its monitoring functions limited in capacity. The monitoring and advocacy activities of NGOs are often crucial in alerting the international community to abuses committed behind the veil of national sovereignty.

The UN Security Council may order the imposition of sanctions, and ultimately even armed intervention, under Chapter VII of the Charter; but in keeping with the primary purpose of the UN, the rationale for such measures is the removal of a threat to world peace and security. It is much debated whether armed intervention for the purposes of providing humanitarian relief or protecting human rights can be legitimate under the Charter, given the provisions of Article 2 [see Box 1 on page 19]. There is a general presumption against violation of state sovereignty, though few would disagree that exceptions exist: intervention to prevent genocide, for example, is not only legitimate but is in effect required of the international community under the Genocide Convention [see Box 4 on page 22]. Action to prevent other gross abuses of human rights or crimes against humanity can be argued to fall in the same category.

The recent examples of international intervention in Iraqi Kurdistan, Somalia and The Former Yugoslavia do not provide a

convincing basis for a precedent of humanitarian intervention by force. In particular, the mandate and practice of the UN-sanctioned intervention forces in the last two cases call into question the description of such interventions as essentially 'humanitarian' in character. The delivery of relief in such circumstances, while essential, is only part of the humanitarian picture. The protection given to the civilian population from the effects of conflict, indeed the cessation of conflict itself, are issues which the focus on relief have tended to mask.

In the absence of a global enforcement mechanism, the combination of such disparate mechanisms and measures as those outlined above may be the only form of protection which the international community can provide. Current proposals for a standing international criminal court, along the lines of the recent special tribunals for Rwanda and former Yugoslavia, would if adopted go some way to remedying the situation: but without the political will to enforce its judgments it would suffer the same weaknesses as have (to date) hampered those tribunals, and could have little deterrent effect.

The protection activities of humanitarian and human rights agencies consist in identifying threats to human rights and then seeking to ensure that the responsible authorities fulfil their obligation to protect against those threats. This depends both on clearly locating responsibility for the protection of human rights – which as we have seen may lie at various levels – and for identifying the competent parties. If the party with primary responsibility is unable or unwilling to provide the necessary protection, or is itself the abusing power, then the responsibility of other parties may need to be invoked. Ultimately this may involve the international community. The genocide in Rwanda in 1994, orchestrated by a government against a section of its own people, was a catastrophic failure of protection as well as being a crime against humanity. The international community must accept its responsibility for the failure to prevent it happening, as the Joint Evaluation of Emergency Assistance to Rwanda (JEEAR)

pointed out. It is one thing to plead inability to respond; it is quite another to deny responsibility.

Governments here stand as representative of the state, and bear the relevant responsibilities. But the bodies which in practice are the protecting (and potentially abusing) powers include ministries, local government, courts, law enforcement agencies, armed forces, and the individuals who staff them. Decisions are made by individuals, and it is with individuals that negotiation takes place. Of course, an individual may fear no sanction for an abuse of human rights, or for failure to prevent such abuse. But one of the assumptions on which advocacy is pursued is that the individual recognises and understands the duties that go with his or her office. If the advocates themselves lack that understanding, the chances of success are reduced. Knowledge of the basic provisions of human rights, humanitarian law and refugee law, is an essential part of that understanding.

What about abuse by non-government agents? Though humanitarian law imposes duties on such parties, human rights law does not. The moral case against abuse remains unchanged, of course. But more than that, international human rights law sets standards for which universal respect should be promoted, and the observance of which has a bearing on claims to legitimacy. The desire for legitimacy (or at least respectability) will often be the primary motivation behind compliance with

human rights standards. This has a bearing on the conduct of rebel movements aspiring to a share in government, for example, as well as on the conduct of governments and their agents.

Where state structures are themselves breaking down, and in the case of ‘weak’ states lacking any effective centre of sovereign authority, the issue of human rights observance is particularly relevant and particularly intractable. It is certainly not always true that desire for respectability is a motivating factor, especially where the chain of command is weakened to the point of virtual anarchy. Recent attempts in South Sudan (described in the forthcoming Network Paper 21 by Iain Levine, *Humanitarian Principles: the South Sudan experience*) to secure respect by all parties for the provisions of international humanitarian law and the Convention on the Rights of the Child provide a potentially important precedent. The adoption of ‘joint operating principles’ by INGOs operating in Liberia – which include as a central concern the promotion of respect for humanitarian and human rights principles – is an example of a similar initiative. It remains to be seen whether initiatives of this sort will be an effective force for the protection of civilians. The ICRC has long experience in such circumstances, with results that are hard to assess. We shall discuss in the next section how such efforts relate to the realities of armed conflict.

BOX 1

United Nations Charter: selected provisions

From the Preamble:

“We the peoples of the United Nations determined ... to save succeeding generations from the scourge of war ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom ... have resolved to combine our efforts to accomplish these aims.”

Article 1

“The Purposes of the United Nations are:

1. To maintain international peace and security;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonising the actions of nations in the attainment of these common ends.”

Article 2

“The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with following Principles:

1. The Organisation is based on the principle of the sovereign equality of its members;
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations;
7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

Article 55 (under Chapter IX: International Economic and Social Cooperation)

“... the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

Article 56

“All Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.”

BOX 2

Rights & freedoms in the Covenant on Civil and Political Rights 1966 (in abbreviated form)

Rights: (to live or be treated in a certain way; recognition of status)

- to life (Article 6)
- to liberty and security of person (9)
- to humane treatment as a prisoner (10)
- to a fair trial etc. (14)
- to privacy etc. (17)
- to protection as a child (24)
- to be given a vote and take part in public affairs (25)
- to equal treatment, protection and recognition before the law including presumption of innocence and right of appeal (14, 16 & 26)

Freedoms of... or to... (active freedoms - rights of non-interference)

- of movement / choice of residence (12)
- of thought, conscience and religion (18)
- of opinion and of expression (19)
- of peaceful assembly (21)
- of association (22)
- to marry freely and found a family (23)
- (of individuals belonging to minorities) to practice own culture, religion and language, in community with other members of their group (27)

Freedoms from... (rights not to be treated in a certain way - protection from...)

- from torture or cruel, inhuman or degrading treatment or punishment (7)
- from slavery, servitude and forced labour (8)
- from imprisonment for debt etc. (11)
- from arbitrary expulsion (as an alien) (13)
- from prosecution under retroactive criminal law (15)

Prohibition of propaganda for war, or advocacy of national, racial or religious hatred that constitute incitement to discrimination, hostility or violence (20)

Notes:

1. These rights are to be ensured to all individuals within the State's territory and subject to its jurisdiction, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (2)
2. Derogation from these rights is only permissible in time of public emergency which threatens the life of the nation. Any such measures must be officially proclaimed, be non-discriminatory, and be limited 'to the extent strictly required by the exigencies of the situation'. Certain rights can never be derogated from: the right to life, to freedom of thought, and to recognition as a person before the law; and freedom from torture etc., from slavery, from imprisonment for debt, and from prosecution under retroactive criminal laws.

BOX 3

International Covenant on Economic, Social and Cultural Rights 1966 - summary of rights

Article 2(1) *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

Rights recognised (summary):

- to work (Article 6)
- to fair pay and conditions (7)
- to join trade unions and strike (8)
- to social security (9)
- to protection of the family, particularly mothers and children (10)
- to an adequate standard of living including adequate food, clothing and housing etc. (11)
- to the highest attainable standard of physical and mental health (12)
- to education (13)
- to participate in cultural life and enjoy the benefits of scientific progress (15)
- (of ‘peoples’) to enjoy and utilise fully and freely their natural wealth and resources (25)

Notes

1. Note that Art. 2(3) allows an exception to the overriding principle of non-discrimination in Art. 2(2), in that developing countries are given discretion as to the extent to which the *economic* rights recognised under the Covenant should be guaranteed to *non-nationals*, having due regard to human rights and their national economy.
2. N.B. Art. 11(2) “The State Parties ... recognising the fundamental right of everyone to be free from hunger [shall take the measures needed] to ensure an equitable distribution of world food supplies in relation to need.”
3. There is no provision in the Economic Covenant for derogation from the rights and duties that it recognises.
4. There is no right to own property in the Covenants, as there had been in the Universal declaration of Human Rights. Nor is there recognition in the Covenants, or elsewhere, of a ‘right to land’.

BOX 4

Extracts from 1948 Convention on the Prevention and Punishment of the Crime of Genocide

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible, rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact ... the necessary legislation to give effect to the provisions of the present Covenant...

Article VI

Persons charged with genocide [etc.] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

Genocide [etc.] shall not be considered as political crimes for the purposes of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any other acts enumerated in Article III.

6

Human rights in armed conflict

If it is possible to generalise about the causes of armed conflict, they might be described in terms of competing economic, political, social, or religious/cultural claims and ambitions, or a combination of these. They may or may not be linked to factors such as a shrinking resource base relative to population size. Where these claims are not arbitrated by existing political or legal mechanisms, or by any other means, armed conflict may be the result. Non-violent solutions demand compromise, and it is characteristic of armed conflict that the claims and ambitions that drive it tend not to be amenable to compromise. Wars tend to cease either when the conflict is settled decisively by military defeat or victory; or when they reach an equilibrium or stalemate which allows a political settlement (involving compromise) to be reached.

This is no doubt a simplistic sketch of the dynamics of armed conflict. The point is to highlight some of the features which relate to the application of international legal standards which continue to apply during the course of

the conflict. In the majority of internal conflicts – and the majority of conflicts now are intra- as opposed to inter-state – the parties to the conflict and the populations from which they draw their support will have to go on living in fairly close proximity within the same national boundaries when the fighting stops. A process of ‘ethnic cleansing’ may involve the separation of different elements of the population, but the reluctance of third-party states to host long-term refugees means that this process is increasingly confined within state borders.

The competing claims that underlie a conflict may be left unresolved by the typical steps in a peace process: peace talks, cease fire, demobilisation, territorial agreements, interim power-sharing arrangements, elections, amnesty, legal reform. At any rate, the conduct of hostilities leaves a legacy; and the worse the atrocities committed by the warring parties, the more bitter that legacy is, the more unstable the subsequent peace, and the harder it is to unite the various factions in pursuit of common national goals. This is particularly so if the peace process itself provides for an

amnesty for the perpetrators: impunity is not a firm foundation for longer-term reconciliation, though reconciliation in the short-term has tended to require compromise on the demands of justice.

Civilians are no longer incidental victims of war. They are often targeted for the political support they are perceived to provide to one side or the other. One notorious counter-insurgency strategy of the 1980s was described as ‘draining the sea from the fish’ – civilians constituting the ‘sea’ which hid guerrilla ‘fish’.

Civilians are rarely neutral bystanders in war, and their allegiance is likely to be courted or demanded by all sides. The term ‘civil war’ might seem to imply that the erosion of the distinction between civilian and military is justified; that where a society is ‘at war with itself’, the distinction is meaningless. But this is a false argument. The vast majority of the population, while it may owe strong ethnic or other allegiance (often through fear of ‘the other’), is not party to the conflict in that it plays no direct part in it. Civilians have played an indirect part in hostilities throughout recorded history, but have not on that account been considered legitimate targets of war.

The way in which war is conducted, and in particular the treatment of civilians and non-combatants, is the subject of international humanitarian law (IHL). The four Geneva Conventions of 1949 and the two Additional Protocols of 1977, based on the principle of non-combatant immunity, set out in some detail standards of treatment for those not taking an active part in hostilities – including sick and wounded combatants and prisoners of war, as well as civilians. These treaties constitute the modern law, but the history of IHL dates back most famously to 1859 and the humanitarian initiative of an individual, Henri Dunant, who persuaded Napoleon III – the victor in the battle of Solferino – to allow the wounded of all nationalities on the battle field to be given assistance under the protection of an official proclamation. By this, a humanitarian gesture was turned into a protected right. The subsequent founding of the Red Cross movement and the development

of IHL built on this foundation. Today almost all states have ratified the 1949 Geneva Conventions; rather fewer have ratified the Protocols. The development of this ‘Geneva’ law was paralleled by the development of laws (‘Hague’ law) restricting the types of weapons that might legitimately be used, a process that continues today in, for example, agreements to control the use of anti-personnel mines and other inhumane weapons. Relief workers will not need to be reminded of the humanitarian implications of this, and many humanitarian agencies have been involved in advocacy aimed at influencing this process.

The 1949 Conventions and First Protocol apply to international armed conflict only; that is conflict between states. Since most conflicts today are internal, this limits their application. But the Conventions contain one article common to all four, known as common Article 3 [see Box 5 on page 25]. This lays down some minimum standards for the treatment of non-combatants during internal armed conflict. It constitutes a basic set of protection standards, reflecting general principles of humanitarian law, which impose duties on all parties to the conflict, government or other. If relief workers are familiar with only one part of humanitarian law, it should be this part, since it has universal application.

Whether a particular situation amounts to ‘armed conflict’ may be disputed. The Second Protocol, which is designed to build on common Article 3, applies specifically to internal armed conflicts, but these are defined to include only those conflicts in which dissident forces exercise effective control over territory such as to allow them to carry out ‘sustained and concerted’ military operations. Internal disturbance and other ‘lower’ levels of conflict are explicitly excluded, and states have notoriously sought to characterise conflicts in such a way that they fall outside the provisions of the Second Protocol. The provisions of the Second Protocol are highly significant in respect of the protection of civilians. They include a prohibition of attack against civilian populations as such; prohibition of starvation as a method of combat, or destruction of objects like crops,

livestock and water sources which are indispensable to the survival of the ‘civilian population’; and prohibition of forced relocation on grounds other than the security of the civilians concerned or ‘imperative military reasons’. They also allow for the provision of relief to civilian populations.

The International Committee of the Red Cross (ICRC) has from the outset been the sponsor and guardian of IHL. Its unique status and mandate is reflected in the Geneva Conventions themselves; and it is alone among non-governmental organisations in having an

explicit mandate in international law. In many ways it enjoys the status and privileges of an inter-governmental organisation. In practice, the preservation of its status depends on strict adherence to principles of neutrality, impartiality and independence. Because states and others recognise this, the ICRC is often able to act as a neutral intermediary between factions, and to perform a protection and assistance role in respect of war victims that others may be unable to access.

Neutrality involves not taking sides in a dispute; and specifically, not espousing the

BOX 5

Article 3, common to the four Geneva Conventions of 1949

In the case of armed conflict, not of an international character, occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion, or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

cause of one side or another in an armed conflict. In theory, consistent application of human rights standards to the actions of all sides to a conflict is not inconsistent with neutrality. In practice, of course, it is likely to prejudice the ability of a humanitarian agency to deliver relief. For the ICRC, the principle of neutrality is rooted in pragmatism. As it is stated in the Fundamental Principles of the Red Cross Movement: ‘In order to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature’ (emphasis added).

The practice of operational neutrality makes demands that few organisations aspire to meeting. For example, the ICRC will wherever possible work on all sides of a conflict, establishing separate delegations to negotiate with the warring factions while insisting that this implies no formal recognition of the parties concerned. The practice depends on a policy of ‘discretion’; and it is here that the practice of the ICRC diverges most obviously from that of many other humanitarian actors. While it can and does make representations on human rights abuses to the controlling authorities, it rarely

makes public condemnations. It is sometimes said that a commitment to justice demands such condemnation. Whether or not that is so, the ICRC believes that its humanitarian mandate precludes such a role. That mandate, however, has protection as a central element. It is the means that ICRC adopts to pursue that aim that distinguish its work from that of agencies specialising in public advocacy on human rights. There is no fundamental clash of agendas here.

Whether or not other agencies follow the strictures of operational neutrality, the principle of impartiality is one that is fundamental to humanitarianism – and mirrors the general human rights principle of non-discrimination. It involves a commitment to providing relief from suffering on the basis of need alone, giving priority to those in greater need, without any distinction on grounds of race, political belief etc.. It is doubtful whether agencies apply this principle consistently in practice, but a commitment to it is an essential safeguard to the whole concept of humanitarianism. Practical issues such as that of restricted access to the people affected should not be allowed to obscure this basic principle.

7

Human rights, refugees and internal displacement

Human rights and displacement

The commonest context for relief activities is that of human displacement, usually with communities fleeing the effects of armed conflict. In this section we shall look at the human rights aspects of displacement and ask how these relate to traditional humanitarian concerns. First, some definitions.

'Displaced'

People are said to be 'displaced' when they have been in some sense forced to leave their home. This will not include all migrants but should probably include 'distress' migrants fleeing the effects of natural disaster.² They are internally displaced if they remain within the borders of their own country.

'Refugees'

A 'refugee' is someone who is externally displaced, that is someone who has fled across a national boundary. But the formal definition of a refugee is more specific than that, and defines the reasons for displacement: the most

common definition, in the 1951 Convention on the Status of Refugees, refers to someone who is externally displaced through a 'well-founded fear of persecution'. Other definitions (e.g. found in the OAU African Convention) broaden the definition to embrace those fleeing 'events seriously disturbing public order', for example armed conflict. What the legal definitions have in common is the further condition that the person concerned must be unable to secure protection from the threat in question in the country of origin. It is this non-availability of effective national protection, and the need for international protection, which is the main characteristic of a refugee. No such definition exists for those displaced internally, who are presumed to enjoy national protection.

The relevant rights are found in refugee law and in general human rights law. The core human right here is freedom of movement. As defined in international law [Rights & Freedoms in the Covenant on Civil and Political Rights 1966 (Article 12), see Box 2 on page 20] this comprises three elements:

- (i) freedom of movement within a country in which one is lawfully resident
- (ii) freedom to leave any country
- (iii) the right to return to one's own country

The first two apply to nationals and non-nationals alike; the third only to nationals of the country in question. They are subject to legal restrictions, but these must not be arbitrary or discriminatory. In particular, they are subject to suspension during a state of emergency under the derogation powers described earlier. In the absence of such exceptional measures, which are valid only if they meet strict conditions, the rights described above may be assumed to apply.

What is the significance of these rights in the context of displacement? First, they outlaw forced displacement of people other than on exceptional grounds (humanitarian law imposes similar restrictions) but give people freedom to move to safer areas if threatened. Second, they allow people to leave a country to seek safety beyond its borders – though there is not a corresponding right to enter any country, even in search of asylum (see below). Third, the right to return implies a right for refugees to repatriate when they wish to.

Internally displaced people

There is no specific provision or mechanism for the protection of internally displaced people (IDPs). In theory, they are protected under general human rights provisions, including those mentioned above, to the extent they have not been legitimately derogated from; and where relevant, by the provisions of international humanitarian law. In theory, too, they continue to enjoy the protection of those rights by their own government. In practice, of course, they may get no such protection. Yet the extension of international protection to people within their own borders, even given the willingness to provide it, runs up against sovereignty and is fraught with difficulty. Such populations, perceived as partisan, are often treated by belligerents as legitimate targets of war. The experiment with ‘safe areas’ in The Former Yugoslavia had mixed results, to say the least: in practice they

were anything but safe, the UN intervention force evidently lacking the necessary protection mandate or the political resolve to fulfil such a mandate.

The role of the ICRC in bringing relief to such populations, and in attempting to secure their protection, is an important and well-established one. UNHCR has in several recent cases extended its assistance (if not its protection) activities to cover internally displaced populations. But IDPs may suffer greater problems than refugees with few of the equivalent protections. The issue of IDP protection has been the subject of much debate in recent years, and the appointment by the UN Secretary General of a Representative (Mr Francis Deng) to examine and report on the situation of IDPs – estimated to be some 25 million people worldwide – has highlighted the issue without so far resulting in any new agreement on institutional mandates. It is debated whether existing legal provisions are sufficient, and responsibilities adequately defined; but in any case, the political and practical obstacles to the consistent application of the relevant standards are formidable. Establishing respect for the humanitarian law principle of non-combatant immunity (see next section) is perhaps the key issue here.

Refugees, refugee law and UNHCR

There is no universal ‘right of asylum’ – that is, there is no legal obligation on states to grant protection to refugees, despite the wording of the Universal Declaration on Human Rights (UDHR). States have in practice tended to accept at least a moral obligation to give asylum to those who meet the definition of ‘refugee’ in the 1951 Refugee Convention. However, what constitutes asylum is not defined in that or any other text, though at a minimum it must include at least temporary protection against the threat from which the refugee fled. However, the 1951 Convention contains a vital safeguard in the principle of *non-refoulement*, ie. having crossed a national boundary, a refugee shall not be expelled or returned to the frontiers of territories ‘where his life or freedom would be threatened on

account of his race, religion, nationality, membership of a particular social group or political opinion' (art.33). Since the assessment of refugee status involves determining the existence of just such threats, it follows that an asylum seeker cannot be expelled before such determination has been made.

Once admitted as a refugee, whether as a result of individual status determination or on the basis of 'group' determination, the 1951 Convention and regional agreements in Africa and Latin America lay down certain rights relating to status and entitlements, based broadly on the principle that refugees should be treated as far as possible in the same way as citizens of the host state.

An increasing trend in recent years when dealing with mass exodus of refugees, for example with the Vietnamese refugees and those from The Former Yugoslavia, has been the granting of 'temporary protected status' on the basis of group determination rather than full refugee status. This lesser form of protection is now explicitly premised on the idea that refugees will be sent home as soon as it possible to do so, subject to the 'non-refoulement' requirement. While the use of this device has been welcomed by UNHCR as allowing speed and flexibility of response, it carries with it dangers and limitations in respect of refugee protection. It also rules out any longer-term solution other than repatriation. It has the advantage of reconciling the divergent interests of a state faced with mass immigration and of refugees requiring protection in the short-term. What it fails to do is to make any distinction as to the longer-term protection needs of a diverse group of individuals.

The practice of temporary protection at least has the merit of recognising the immediate protection needs of asylum seekers, and the humanitarian imperative of assisting them. There is another trend that is of more concern. The concern with the 'right to remain', and the focus on root causes of refugee movement, is laudable in itself – it would be hard to disagree with the importance of addressing the

human rights issues that underlie refugee movement, and ensuring that effective national protection is available. But it is accompanied by an increasing tendency to stop asylum-seekers ever getting near the borders of potential countries of asylum. The measures that industrialised states have increasingly adopted to restrict the flow of asylum seekers constitute an attempt to 'bottle up' the problem in the South. Those states in the South that, willingly or not, do bear the burden of large refugee flows receive little assistance in carrying out what the law and international opinion requires of them. It is not surprising that their patience is in many cases wearing thin. Certainly it would be unjust to make them the sole target of criticism for the apparent erosion of international protection.

Two other elements of the 1951 Convention on which greater stress has recently been placed are the *exception* and *cessation* clauses. These relate to the questions of what disqualifies a person from claiming refugee status; and when does a refugee *cease* to be a refugee.

Roughly, a person is disqualified if they are guilty of war crimes, crimes against humanity, or serious non-political crimes. In addition, someone who may reasonably be considered to constitute a threat to national security in the host country, or who has been convicted of a particularly serious crime and constitutes a danger to the community, cannot claim the protection of the non-refoulement provision.

Under the 'ceased circumstances' clause of the 1951 Convention, a person ceases to be a refugee when s/he 'can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality'. This clause is increasingly being looked to by host and donor states; and it highlights the question of protection guarantees in the country of origin.

Relief NGOs tend to be more familiar with the role of UNHCR in coordinating relief

assistance to refugees than they are with the agency's primary role and mandate: that of refugee protection. Under its Statute, the agency's mandate contains two main elements: providing *international protection* on the one hand, and *seeking permanent solutions* to the 'problem of refugees' on the other. Its role in coordinating welfare assistance efforts is very much subsidiary in the Statute, yet has developed to the point where it often seems to obscure its fundamental (and unique) protection function. That function is increasingly under threat. Since the assistance role is largely carried out through 'contractor' NGOs, with UNHCR acting as a conduit for donor funds, it is an issue in which NGOs are inextricably caught up. In the rest of this section we shall be concerned with the two primary mandated functions, and the apparent shift in UNHCR's interpretation of its own mandate.

We have said that it is the search for protection not available in the country of origin which characterises a refugee. UNHCR's role in securing international protection has much to do with securing recognition of refugee status and the rights that follow from that (legal status under the 1951 Refugee Convention. So while 'protection' includes the more obvious meaning of protection from attack or persecution, it has a broader meaning; and it extends to the protection of refugees' vital interests, those interests that human rights are designed to protect. A refugee or any other non-national has the same human rights claims on the host state as a national (and equivalent duties).³

The protection role of UNHCR relates most crucially to the principle of non-refoulement. It is here that the protection of refugees is perhaps under greatest threat. The apparent acquiescence in involuntary repatriation of Rwandan and Burundian refugees – whether or not this amounted to refoulement – marks a retreat (under duress) from an important working principle. But protection in the country of asylum has itself been neglected. Recent events in eastern Zaire and Tanzania have illustrated how the focus on relief assistance to the exclusion of protection – in

this case, against the threat posed to refugees within camps by those military and political elements that orchestrated the genocide in Rwanda – represents a seriously inadequate response. It has even been suggested that, given its apparent inability in that situation to fulfil its mandate of providing international protection, UNHCR ought to have withdrawn, leaving others to fulfil their primary function of providing relief assistance.⁴ UNHCR itself recognises this problem and is taking steps to strengthen its protection capacity in humanitarian emergencies. Whether the political actors with corresponding responsibility for protection are committed to fulfilling that responsibility remains doubtful.

Where the imperatives of providing relief assistance obscure the protection issues – and this is by no means an issue for UNHCR alone – then any humanitarian agency with a commitment to human rights is bound to look beyond the immediate task of providing relief. Though the humanitarian imperative may dictate a particular agency's course of action, it should never be party to a denial of the protection issues – the solution to which will generally lie with political actors. Where relief is delivered in the context of on-going armed conflict, there will be a close link between protection issues and the factors perpetuating the conflict. The relationship between protection and assistance is explored further in the next section.

This relates to the second core element of UNHCR's mandate: the search for solutions. It is striking that the Executive Committee 'statements' have tended to reposition it as a general humanitarian actor. So too have its more public pronouncements. This, for example, from UNHCR's State of the World's Refugees 1995 (p.43):

“UNHCR has been obliged to develop new areas of competence and to undertake a number of non-traditional activities. These include, for example, providing protection and assistance to besieged and war-affected populations; monitoring the protection needs of returnees and internally displaced people in their own country; establishing community

based rehabilitation programmes in returnee areas; and providing accurate information on migration opportunities to prospective asylum seekers. As a result... UNHCR has been transformed from a refugee organisation into a more broadly-based humanitarian agency."

This shift is described as a 'new paradigm': away from a refugee-centric approach which was 'reactive and exile-oriented', towards a more holistic approach which is 'proactive and homeland-oriented'. This has been accompanied by a new focus on the right to remain as well as the right to return, and on the responsibilities of countries of origin with regard to refugee flows from their borders. The prevention of refugee flows in the first place is at the centre of this approach, which clearly has the potential for conflict with the right to leave a country and to seek asylum.

It is apparent from this that, in the agency's own view, its mandate has developed to embrace root causes as well as solutions, internally displaced as well as refugees, development as well as relief. While these are all important areas of concern, the loss of focus on the core activity of protection that seems to have accompanied this diversification is very worrying. UNHCR, in embracing an agenda that mirrors donors' concern with keeping people within their own countries, is in danger of losing sight of its *raison d'être*. The institution of asylum can only be weakened as a result.

A final word on the search for permanent or durable solutions. We might ask "solutions to whose problem?" There is not one 'refugee problem' in a given context, but a number of interlocking problems: the refugees' own problems, the host government's problem, the country of origin's problem, the donors' problem, and so on. The type of solution that

is pursued may depend on the weighting given to these various concerns, but there are certain minimum protection requirements that any solution must fulfil. For while repatriation at the earliest possible opportunity may be the answer to everybody's problem, equally it may not. It has to be recognised that there are potentially conflicting interests here, and that a coincidence of interests among state parties may yet run counter to the interests of the refugees themselves. The principle of non-refoulement and the practice of voluntary repatriation set a bottom line of protection, and must be defended. Equally, a more imaginative and far-sighted approach to the problem of refugees could lead to the pursuit of more genuinely durable solutions. Premature repatriation, on the other hand, holds the potential for creating further instability and displacement in its wake.

UNHCR's own statute requires that its work be of 'an entirely non-political character'; yet clearly the contexts in which it is operating are highly politically charged, and the motivation of the state actors concerned is essentially political rather than humanitarian. By losing sight of the primacy of its function of protecting refugees, UNHCR runs the risk that the interests of refugees are simply not weighed in the balance of competing interests; that fundamental protection principles are eroded; and that alternative solutions are not explored. It is its function to ensure that they are. One may sympathise with the dilemmas which UNHCR staff face in seeking to do their job and keep their various constituencies happy – pressure from donors and host states has recently become intense – but the best response is surely one that keeps UNHCR to its (limited) mandate and supports it in its efforts to fulfil that mandate. Concentrating exclusively on the delivery of relief is not the way to achieve this.

8

Protection and assistance

Earlier sections have sought to sketch out the key aspects of the legal framework which applies to conflict-affected, displaced and other populations in humanitarian crisis; and to describe how different agencies' mandates apply to the enforcement of the legal and moral principles involved. In recent years there has been a growing awareness of the need to reconcile the apparently disparate demands of human rights monitoring and advocacy on the one hand, and operational relief programmes on the other. This section explores the relationship between protection and assistance activities, and the degree to which they complement or conflict with each other.

What constitutes a humanitarian crisis? Opinions will vary, but as a working definition let us say that a humanitarian crisis is any situation involving an exceptional and widespread threat to life, health or subsistence that exceeds the coping capacity of individuals and the community. This suggests a number of possible forms of intervention:

- (i) action to prevent, remove or mitigate the factors which caused the crisis (e.g.

- flooding, armed conflict);
- (ii) relief action to reduce the immediate threat by providing for those needs that the affected communities cannot meet by themselves;
- (iii) action to enhance coping capacities, to hasten people's recovery and return to self-sufficiency.

These, of course, are not mutually exclusive categories. The point is to suggest ways in which protection and assistance activities are connected, and how both relate to human rights claims. Earlier, we took protection activities to be those aimed at ensuring that the appropriate authorities fulfil their responsibilities in preventing denial or abuse of people's human rights. This is partly a matter of securing recognition of protected status. There is clearly a large degree of overlap with assistance activities, for example in advocacy aimed at lifting a siege on a beleaguered civilian population.

We saw earlier that in the context of conflict, IHL has gone a long way to defining humanitarian rights, which supplement the core human rights. These are concerned for

the most part with category (i) above, in that they are designed to shield non-combatants from the worst effects of conflict. They are in that sense mostly ‘protection’ rights. Relief assistance is also protected in IHL, if not actually established as an absolute right. But the rights regime taken as whole, as we have seen, is designed more to protect against threats to security (physical, economic, social, political) than to meet people’s immediate needs where they cannot do so themselves.

Most people, left in peace and freedom, will cope within the support structures of family and community – though chronic poverty may leave them perpetually vulnerable to disaster. But in a situation where people’s freedom of action, and range of options, is severely curtailed, that assumption can no longer be made. It is here, perhaps, that the connection between protection and assistance needs is closest. The need to remove the factors constraining people’s freedom of action may be the paramount humanitarian concern in any given situation. The removal of those factors is a protection issue, since they constitute a threat to human rights.

It is important to locate responsibility for protection where it belongs. Neither UNHCR nor ICRC can physically protect people, nor provide other forms of protection; their task is to ensure that those responsible and able to provide protection do so. During armed conflict, it is likely that beyond people’s own efforts to help and shield each other, only the warring parties themselves can provide effective protection. This, we have seen, involves recognising civilian status and the immunities that are attached to it. The provisions of humanitarian law set out in some detail the duties of the combatants in this respect; and all have at least a moral commitment to the observance of human rights.

Effective protection against imminent threats is almost certain to be found locally, if at all. Protection activities are therefore best aimed at the most local level in the first instance; and that might involve talking to a prison guard, or local commander. Again, this

depends on an awareness of responsibilities. Much of ICRC’s work is concerned with the ‘dissemination’ of IHL. Similar work in respect of human rights is carried out by a variety of agencies. Human rights training, advice centres to inform people of their rights, and so on, are all dissemination activities. But the validity of the currency depends on its being used and recognised by all concerned. This includes all relief agencies.

The provision of relief may itself have protection implications, positive or negative. To take a recent (negative) example from Liberia: valuable dry food rations were distributed to feed malnourished populations. As people left the distribution points, they were attacked for the food that they were carrying. In other instances, people have been deliberately manoeuvred by armed factions in order to attract aid supplies. And the willingness of aid agencies to supply relief to forcibly relocated populations has arguably allowed that practice to occur where it might not otherwise have happened.

The positive potential of relief assistance for the protection of the recipients is debatable. In some cases, the presence of international agencies may have acted as a disincentive to attacks – and the ‘open relief centres’ in Sri Lanka are an example of where protection and assistance have been mutually reinforcing. But it is doubtful whether generalisations may be drawn from this, and there are many counter examples. Kibeho in Rwanda comes to mind as a recent disastrous example (see Cohen, 1996). There, an international force with a specific protection mandate (UNAMIR) was itself apparently impotent to stop a massacre of those it was there to protect.

Finally, protection activities – which tend to involve exposing actual or potential human rights abuse – do not always endear the agency concerned to the authorities. A relief agency that takes a public stand in an attempt to get the responsible authority or others to act, obviously risks losing the consent that it depends on for continued access. Its decision will presumably be based on an interpretation of its own objectives, and an assessment of

how it can best benefit the population concerned. In practice, it tends also to be based on an assessment of whether it is actually able to be effective as a relief agency in the circumstances; and what impact could be achieved by withdrawal and denunciation. The very factors which constitute a threat to human rights may limit the agency's capacity to act effectively.

For most relief agencies this question of effectiveness is likely to be the deciding question. If people have a right to assistance,

then fulfilment of that right may require a decision to stay. Agencies specialising in human rights advocacy may be left to expose the abuse in question, perhaps supplied with information by the relief agency. But if the provision of relief is itself contributing to the ongoing threat to people? People have a right to, and need for, protection. Agencies are rightly taking this issue increasingly seriously. An assessment of relative benefit and risk is hard to make, but that difficulty has too often led agencies to duck the issue.

9

Conclusion and recommendations

The need for relief workers to increase their knowledge and understanding of human rights standards arises from at least two factors: (i) the need to be accountable, and hold others accountable, to existing standards which recognise humanitarian rights; and (ii) the corresponding possibilities for more focused and effective advocacy at all levels on humanitarian issues. It is legitimate to see the provision of humanitarian relief as part of a spectrum of human rights activity. But assistance activities have too often been conducted without an analysis of the protection issues which often make such assistance necessary in the first place.

Protection activities relate to the whole spectrum of rights which guarantee physical, economic, social and political security. Assistance activities are concerned with the fulfilment of physical and economic needs at one end of this spectrum; but as was argued in an earlier section, the fulfilment of these subsistence rights may be dependent on the recognition of social, legal and political status and the rights that go with it – as a civilian, as

a refugee, as a woman, as a worker, as a child, and so on. The two cannot be divorced. Relief agencies should be held accountable for the protection implications of their work, just as they are increasingly being asked to demonstrate the beneficial impact of the relief assistance provided. But that accountability should probably be limited to the obligation to eliminate or mitigate the potential negative protection consequences of their interventions. They are at present answerable to no-one in this respect.

The following recommendations for action follow from the argument of this paper:

1. An assessment of needs should always include an assessment of protection needs –including issues of civil and legal status as well as physical and economic security. How are people’s rights threatened, who is the responsible authority, and what steps can be taken to ensure that protection is given?
2. Following on from this, it is suggested that given the potential negative

implications for people’s protection of providing relief assistance, agencies should work to the following principle: an assessment should always be made of the protection implications of providing relief in a particular form in a given context; and steps taken to minimise the potential negative side-effects for the target population posed by such intervention. This may, ultimately, involve a decision not to intervene.

3. The ability to make a general assessment of protection needs assumes a basic grounding in the relevant legal standards (international and national) as well as familiarity with the relevant structures and responsibilities. The need for appropriate training follows from this. Training should involve materials which relate to situations that relief workers will actually face in the field.
4. People need information about their own rights. New ways need to be explored by which people can be helped to pursue advocacy on their own and others’ behalf. Leaflets, advice centres, formal training, etc. may all be part of this.
5. As well as understanding the basic principles of human rights, and the legal standards which reinforce them, relief workers should understand the specific role and formal mandate of agencies like UNHCR and the ICRC. Though not always described in these terms, their mandates are intrinsically concerned with the protection of human rights. This may imply the need to relate rather differently to these agencies, and in

particular to recognise the significance of their protection role and of their negotiating status. It is suggested that insufficient recognition is given to – and use made of – these existing channels by those relief agencies concerned with human rights advocacy. Their mandates are weakened as a result.

6. Complementing the relevant legal provisions are a number of codes of conduct, declarations, working principles and similar, which seek to regulate the way in which relief is delivered, the conditions attached to the provision of relief, minimum technical standards, and minimum humanitarian standards that ought to be universally applied. Some of these are already quite well established, others are currently being evolved. They deserve to be more widely known and applied by humanitarian agencies. The following should be mentioned:
 - (i) The Red Cross / NGO Code of Conduct
 - (ii) The Turku Declaration on Minimum Standards (1991)
 - (iii) (under development) minimum technical and general standards for relief provision, under the auspices of the Steering Committee for Humanitarian Response and InterAction.
 - (iv) Various context-specific initiatives, of which those in South Sudan and in Liberia have been mentioned above, which seek to apply some form of human rights conditionality to the provision of relief assistance – or to incorporate minimum protection standards – in negotiation with the controlling authorities.

Endnotes

- 1 *pg 9* Shorter Oxford English Dictionary, 3rd Edition
- 2 *pg 27* The distinction is often hard to draw, and is frequently a matter of contention in determining refugee status.
- 3 *pg 30* The only exception relates to economic rights, where ‘developing states’ are given discretion under the Economic Covenant as to the extent to which these are guaranteed to non-nationals.
- 4 *pg 30* Goodwin-Gill in paper entitled ‘Refugee Identity and the Fading Prospect of International Protection’ - see bibliography

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RRN

Background

The Relief and Rehabilitation Network was conceived in 1992 and launched in 1994 as a mechanism for professional information exchange in the expanding field of humanitarian aid. The need for such a mechanism was identified in the course of research undertaken by the Overseas Development Institute (ODI) on the changing role of NGOs in relief and rehabilitation operations, and was developed in consultation with other Networks operated within ODI. Since April 1994, the RRN has produced publications in three different formats, in French and English: Good Practice Reviews, Network Papers and Newsletters. The RRN is now in its second three-year phase (1996-1999), supported by four new donors - DANIDA, ECHO, the Irish Department of Foreign Affairs and ODA. Over the three year phase, the RRN will seek to expand its reach and relevance amongst humanitarian agency personnel and to further promote good practice.

Objective

To improve aid policy and practice as it is applied in complex political emergencies.

Purpose

To contribute to individual and institutional learning by encouraging the exchange and dissemination of information relevant to the professional development of those engaged in the provision of humanitarian assistance.

Activities

To commission, publish and disseminate analysis and reflection on issues of good practice in policy and programming in humanitarian operations, primarily in the form of written publications, in both French and English.

Target audience

Individuals and organisations actively engaged in the provision of humanitarian assistance at national and international, field-based and head office level in the 'North' and 'South'.

The Relief and Rehabilitation Network is supported by:

Ministry of Foreign Affairs
DANIDA

ECHO

Irish Department of Foreign Affairs

ODA

