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Beyond the Red Cross: the protection of independent humanitarian organizations and their staff in international humanitarian law

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Abstract

Members of independent humanitarian organizations have less protection, legally speaking, than most of them probably think. Two key features of their work – their neutrality and independence – as well as practical steps they take to implement these principles, actually place them outside much of the protection afforded to either civilians or authorized medical staff. This article examines the international legal protection currently available to independent humanitarian organizations, and considers whether there is scope for improvement of both the content of this framework and respect for the same.

It has become commonplace to note that attacks on humanitarian workers are increasing.[1] Recent attempts to improve respect for the normative framework assumed to protect such workers include the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (UN Convention) and

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the development of a new, culturally neutral emblem, the Red Crystal, both in December 2005. But the nature of independent humanitarian non-governmental organizations, which nowadays carry out a large part of the world's humanitarian action, excludes them from much international legal protection. Their independence from warring parties means they cannot use the Red Cross, Crescent or Crystal, and if they seek to stay independent from the UN they will be excluded from the provisions of the UN Convention. Their neutrality, another key attribute, and steps taken to support their neutral image – such as only sending nationals of neutral states into conflict areas – makes it unlikely that their kidnap, ill-treatment or murder will be treated as a war crime.

This article examines the international legal protection currently available to independent humanitarian organizations, and considers whether there is scope for improvement in both the content of this framework and respect for the same.

The Red Cross and Red Crescent

The Red Cross[2] and Red Crescent constitute the most famous symbols of humanitarian work, and they carry with them a certain protection. However, the protection they represent is unlikely to be available to independent humanitarian organizations, at least as long as they seek to maintain that independence.

Use of the Red Cross in time of conflict is regulated by the Geneva Conventions, and mainly concerns medical work. Wounded and sick combatants and civilians are entitled to medical treatment under the Conventions, and, as a corollary to this, the Conventions (and their Protocols) provide for the protection of medical services, units and personnel involved in treating them. The symbol of this protection is the Red Cross emblem. Use of the emblem is controlled by the states parties to the Conventions, and is in the first place assigned to the medical services of the armed forces.[3] Other medical services, units and personnel assigned to a party to the conflict (such as national Red Cross societies), can make use of the Red Cross with the consent of the military authorities,[4] as can civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases if authorized by the state concerned.[5] Under Additional Protocol I, this protection

1 According to a recent study, the absolute number of reported major acts of violence (killings, kidnappings and armed attacks resulting in serious injury) against aid workers has risen sharply since 1997. The annual number of incidents reported between 2002 and 2005 was nearly double those between 1997 and 2001 (a 92 per cent increase). A total of 408 separate acts of major violence were perpetrated against aid workers between 1997 and 2005, involving 947 victims and including 434 fatalities. See Abby Stoddard, Adele Harmer and Katherine Haver, "Providing aid in insecure environments: trends in policy and operations", HPG Report 23, Humanitarian Policy Group and Center on International Cooperation, September 2006.

2 Throughout this article the term "Red Cross" is used to designate that group of emblems which includes the Red Crescent and the Red Crystal.

3 Geneva Convention I (GCI), Article 38.

4 GCI, Articles 26, 42, 44.

5 Geneva Convention IV (GCIV), Article 18.

can be extended to medical personnel and units made available to one of the parties to a conflict by impartial international humanitarian organizations, as long as they are under that party's control.[6] Only states parties to the Conventions can authorize use of the Red Cross, and they have a corresponding duty to ensure that it is not misused,[7] hence the need for states to control the activities of organizations displaying the Red Cross emblem. Independent medical organizations, which are by definition not under the control of a state, are therefore excluded from this protection.

The other use of the Red Cross emblem is to designate the activities of the International Red Cross Movement (the ICRC – International Committee of the Red Cross – and the International Federation of Red Cross and Red Crescent Societies). Under Article 44 of Geneva Convention I,

> The international Red Cross organizations and their duly authorized personnel shall be permitted to make use, at all times, of the emblem of the Red Cross on a white ground.

This particular privilege is not restricted to the medical activities of the ICRC and the International Federation, which are entitled to the protection of the Red Cross for all of their humanitarian work. The Red Cross Movement has independence as one of its fundamental principles, but other independent humanitarian organizations are not permitted to used the Red Cross emblem and do not benefit from the associated protection. So where does this leave them?

Status and protection of independent humanitarian organizations

Status

Independent humanitarian organizations other than those of the International Red Cross Movement do feature in the Geneva Conventions. Article 3 common to all four Conventions (common Article 3) provides that

> An impartial humanitarian body, *such as* the International Committee of the Red Cross, may offer its services to the parties to the conflict. (emphasis added)

And Article 9 of Conventions I–III and Article 10 of Convention IV (which are largely the same) state that

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross

6 Additional Protocol I (API), Article 9. There are a number of other conditions that also have to be fulfilled; see Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, (eds.), *Commentary on the Additional Protocols of 8 June 1977*, ICRC, Geneva, 1987.

7 Articles 53 and 54 of Geneva Convention I.

> *or any other impartial, humanitarian organisation* may, subject to the consent of the parties to the conflict concerned, undertake for the protection of … [protected persons] and for their relief. (emphasis added)

Convention IV also has more detailed provisions, such as Article 59:

> If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.
>
> Such schemes, which may be undertaken either by States *or by impartial humanitarian organisations* such as the International Committee of the Red Cross, shall consist, in particular, of the provision of foodstuffs, medical supplies, and clothing. (emphasis added)

And Article 61:

> The distribution of the relief consignments referred to in the foregoing articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross *or to any other impartial humanitarian body*. (emphasis added)

The use of the ICRC as an example in all cases (and the comparison with states in the last two) suggests that these impartial humanitarian bodies will be independent, like the ICRC, rather than assigned to a party like the medical services discussed above. It is clear, then, that the Geneva Conventions envisage that the humanitarian assistance they provide for may be carried out by independent organizations.

What might be the content of humanitarian assistance? A wide range of activities are foreseen by the Conventions. While the last two articles cited – 59 and 61 of Convention IV – clearly define the relief to be provided, this is left completely open in common Article 3. And the second citation above – Article 9 in Conventions I–III and Article 10 in Convention IV – makes it clear that the humanitarian activities envisaged include both protection and assistance.[8] That this last reference appears in all four Conventions and not only Convention IV, also shows that such activities may extend to sick, wounded and captured combatants, and need not be restricted to civilian beneficiaries, as is commonly taken to be the case.[9]

A more precise definition proves elusive. Impartiality is a key qualifier, as is evident from the passages quoted here, and as emphasized by the International Court of Justice in the case of *Nicaragua* v. *United States of America*, where it considered the legal definition of ''humanitarian'' assistance:

8 See also Article 15, GCIV.

9 Geneva Convention I applies to wounded and sick combatants on land; Geneva Convention II to wounded, sick and shipwrecked combatants at sea; Geneva Convention III to prisoners of war; and Geneva Convention IV to civilians.

> An essential feature of truly humanitarian aid is that it is given ''without discrimination'' of any kind. In the view of the Court, if the provision of ''humanitarian assistance'' is to escape condemnations as an intervention in the internal affairs of Nicaragua [because humanitarian assistance is by definition not unlawful intervention in another state], not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ''to prevent suffering'', and ''to protect life and health and ensure respect for the human being''; it must also, and above all, be given without discrimination to all in need in Nicaragua …[10]

A more extensive definition was provided by the Institute of International Law, which considered the question in 2003:

> ''Humanitarian assistance'' means all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfilment of the essential needs of the victims of disasters.[11]

Protection

The legal protection afforded to humanitarian workers varies according to a number of factors. The first important distinction is between protection from attack under what is often termed ''Hague'' law, and protection against mistreatment in the hands of the enemy under ''Geneva'' law. Within the second category, protection will vary depending on the nature of the conflict and on

10 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Rep. 1986, para. 243.

11 Institute of International Law, Resolution of the Sixteenth Commission (Humanitarian Assistance), 2 September 2003. The full text of Article 1, defining humanitarian assistance, reads as follows: I. Definitions for the purposes of this Resolution: 1. ''Humanitarian assistance'' means all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfillment of the essential needs of the victims of disasters. a) ''Goods'' includes foodstuffs, drinking water, medical supplies and equipment, means of shelter, clothing, bedding, vehicles, and all other goods indispensable for the survival and the fulfillment of the essential needs of the victims of disasters; this term never includes weapons, ammunition or any other military material. b) ''Services'' means the means of transport, tracing services, medical services,religious, spiritual and psychological assistance, reconstruction, de-mining,decontamination, voluntary return of refugees and internally displaced persons, and all other services indispensable for the survival and the fulfilment of the essential needs of the victims of disasters. 2. ''Disaster'' means calamitous events which endanger life, health, physical integrity, or the right not to be subjected to cruel, inhuman or degrading treatment, or other fundamental human rights, or the essential needs of the population, whether of natural origin (such as earthquakes, volcanic eruptions, windstorms, torrential rains, floods, landslides, droughts, fires, famine, epidemics), or man-made disasters of technological origin (such as chemical disasters or nuclear explosions), or caused by armed conflicts or violence (such as international or internal armed conflicts, internal disturbances or violence, terrorist activities). 3. ''Victims'' means groups of human beings whose fundamental human rights or whose essential needs are endangered. 4. ''Affected State'' means the State or the territorial entity where humanitarian assistance is needed. 5. ''Assisting State or organization'' means the State or intergovernmental organization, or impartial international or national non-governmental organization which organizes, provides or distributes humanitarian assistance.

whether either of the first two Additional Protocols applies (for example if the relevant parties have ratified them, or if other conditions of applicability are met). There is also a difference in the protection under customary and conventional law, with associated practical implications. Another layer of protection is afforded when the prohibited act is designated a war crime and, along with genocide and crimes against humanity, forms part of international criminal law. In these cases universal jurisdiction applies, meaning that any state can put the perpetrator on trial.[12] This is a significant addition to the protection of humanitarian workers, as most of the states in which humanitarian workers operate and are vulnerable to attack, kidnap, murder or other mistreatment do not have well-functioning judicial systems, and the right of other states to prosecute these may be key to avoiding impunity.

As civilians, humanitarian workers of course benefit from the rules mandating the targeting of military objectives and excluding civilians and civilian objects from their scope. The personnel and installations of independent humanitarian organizations benefit from the general protection of civilians and civilian objects from attack, which applies in both international and non-international conflict and forms part of customary international law. Importantly, violation of this protection constitutes a war crime, bringing it within the ambit of international criminal law. That this protection covers humanitarian workers is spelt out in the Statute of the International Criminal Court, which explicitly prohibits

> Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[13]

Naturally the attack must be linked to the armed conflict in some way, and the perpetrators must belong to one of the warring parties, in order to bring the attack within the ambit of international law. But as far as the conduct of hostilities is concerned, independent humanitarian workers are legally protected.

The situation is more complex with regard to the treatment of persons in the hands of a party to the conflict, or ''Geneva law''. Despite the fact that independent humanitarian organizations are referred to in the Geneva Conventions, humanitarian workers were not accorded any specific protection until Additional Protocol I. Under the Geneva Conventions themselves, as with the ''Hague law'' provision discussed above, it is not the status of humanitarian worker that gives protection; protection is only offered insofar as they fit into some other, larger category, namely civilians.[14] But the Geneva Conventions, more

12 Subject to the state's own laws on the matter.

13 Article 8(2)(b)(iii). See also, with regard to non-international armed conflict, the Statute of the Special Court for Sierra Leone, Article 4(b).

14 Another category – staff of civilian hospitals – may be relevant in recognized civilian hospitals, see GCIV Article 20, but this group is usually covered by the provisions relating to the use of the red cross emblem and so not independent; see discussion under the heading ''The Red Cross and Red Crescent'', above.

specifically Geneva Convention IV, do not protect all civilians equally. The bulk of that Convention, pertaining to international armed conflicts, applies only to

> Persons … who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State, who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.[15]

This rather confusing definition of persons protected by the Convention can be summarized as ''enemy nationals''. The logic of the Convention is that only nationals of the enemy states, or those whose state has no diplomatic representation on the territory, need supplementary international protection. Others can be protected through the usual interstate channels.

A similar understanding of those most at risk in a conflict area leads many international humanitarian organizations not to send those staff who are nationals of one of the belligerent parties in the field. Not only are these people potentially more at risk, but their presence in the field mission may undermine the neutral image of the organization they work for. It is easier to appear neutral when your staffs come from outside the conflict areas. But the nationals of neutral states sent out as humanitarian workers are then only protected in the exceptional cases where their state of nationality has no diplomatic representation in the country of the mission. The majority of these people will not be covered by Geneva Convention IV. Ironically, then, if humanitarian organizations did send staff to the field with the same nationality as the parties to the conflict, they might find that they were better protected.

This nationality-based definition of persons protected by the bulk of Geneva Convention IV has been expanded somewhat by subsequent jurisprudence and may now include persons whose allegiance lies with a party to the conflict.[16]

15 Article 4 of GCIV. Part II of the Convention applies more widely, to the whole of the population of the countries in conflict, but there are no provisions in this section which could protect humanitarian workers, other than general provisions about respect and protection of vulnerable groups – wounded and sick, infirm, children and pregnant women – or of staff of recognized civilian hospitals, which are likely not to apply. Violation of these provisions would also not constitute a war crime.

16 See ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, para.166: ''While previously wars were primarily between well-established states, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new states are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.'' This reasoning has been confirmed by subsequent jurisprudence of the ICTY; see *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement (Appeals Chamber), 24 March 2000, paras. 150–151; *The*

However, humanitarian organizations by definition do not associate themselves with either side. It is their neutrality with regard to the conflict that enables them to do their work. Again, this concern for neutrality places them outside the framework of the protection offered to civilians under the Geneva Conventions, at least in international armed conflict.

Personnel involved in civilian relief feature explicitly for the first time in Additional Protocol I, applicable in international armed conflict, where they are accorded protection in their own right. Article 71 of that Protocol states:

> (1) Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.
> (2) Such personnel shall be respected and protected.

In addition, Article 75 of Protocol I introduces fundamental guarantees of humane treatment for all persons in the power of a party to the conflict, which can cover humanitarian workers. However, violations of these provisions will not constitute war crimes.

Non-international conflicts are regulated by common Article 3 and Additional Protocols, and, rather surprisingly, this means that the protection of humanitarian workers in internal wars exceeds that in international conflict. Common Article 3 protects from mistreatment a general category of ''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''. There is no nationality requirement. As ''persons taking no active part in the hostilities'', therefore, all humanitarian workers are protected. Since a 1995 decision of the International Criminal Tribunal for the former Yugoslavia, it is generally accepted that serious violations of this provision constitute war crimes to which international criminal liability attaches.[17]

This unexpected inequality in the levels of protection available to humanitarian workers in different conflicts may, in theory at least, be evened out by customary international law. Although the text of common Article 3 makes it clear that it applies in non-international conflict, the principle contained in the article has been held to apply in all conflicts by virtue of customary international law,[18] and so to give rise to individual criminal responsibility in any situation of

Prosecutor v. Delalic, Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para.183, and The Prosecutor v. Tihomir Blaskic, *Case No. IT-95-14-A, Judgement (Appeals Chamber), 29 July 2004, paras. 172–183.*

17 ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995 (''Tadic Jurisdiction Decision''), para. 134.

18 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986 (''Nicaragua Judgment''), para. 218: ''Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applies in the armed

armed conflict.[19] According to custom, then, the murder, kidnap or other mistreatment of humanitarian workers in any armed conflict can violate the principles contained in common Article 3, and serious breaches will constitute war crimes (as long as the other relevant criteria are met, namely that that there is a sufficient nexus between the mistreatment and the conflict, of which more below). This was also the finding of the 2005 ICRC study on customary international law.[20]

The value of customary principles is, however, debatable in practice. National courts, especially in states with a dualist system, are traditionally reluctant to apply customary international law, especially in criminal cases where the principle of legality mandates that the law be clearly defined.[21] They are also likely to be influenced by the Statute of the International Criminal Court (ICC), which, while affirming the existence of individual criminal responsibility for violations of common Article 3 itself (that is, in non-international armed conflict), limits war crimes in international armed conflict to violations of Hague law and grave breaches of the Geneva Conventions, which can only be committed against protected persons fulfilling the nationality requirement discussed above. Violations of the general customary principle underlying common Article 3 cannot, therefore, be prosecuted at the ICC. The resulting position, which may be followed in domestic jurisdictions, is rather odd, in that a larger category of people are protected by the ICC Statute in non-international conflicts than in international warfare. As far as humanitarian workers are concerned, this means that they are excluded from ICC protection against mistreatment in international wars (unless their state of nationality is involved on the opposing side), but may be covered by the provisions of common Article 3 where the conflict is non-international.

May be covered only, because while common Article 3 does not require that victims be enemy nationals – being designed for internal armed conflict – there must be a nexus between the crime and the armed conflict in order to bring the act within the scope of international law.[22] This will be the case where the perpetrator and victim are on different sides of the conflict, but also arguably in other, less obvious, situations – where the perpetrator identifies themselves with one side and perceives the victim to be on the other, without either being officially

conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" ..."

19 See Nicaragua Judgment, above note 18, as basis for the decision referred to in n. 17, Tadic Jurisdiction Decision, para. 102.

20 See "Rule 31: Humanitarian relief personnel must be respected and protected", in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Cambridge, 2005. The ICRC finding is based on an extensive survey of state practice, and the rule is seen as a corollary of the prohibition of starvation and the rule that the wounded and sick must be collected and cared for.

21 For a wide-ranging survey of the application of customary international law by national courts, see *Non-State Actors and International Law*, Vol. 4, No. 1 (2004).

22 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement (Appeals Chamber), 1 June 2001 ("Akayesu Appeals Judgement"), para. 438.

a member of the warring parties, for example.[23] While it is not immediately apparent how this could apply when the victim is a humanitarian worker acting in a neutral and impartial manner, a humanitarian worker could arguably fall into this category if s/he was nonetheless perceived as assisting the other side, perhaps by collecting or passing on information. More generally, one thinks of organizations that entered Iraq with the US-led forces, perhaps, or those that co-operated with the occupying power in Afghanistan after 2001, laying themselves open to assimilation with the Coalition. In fact members of any humanitarian organization who travel with armed escorts risk being identified with the armed group escorting them, which may paradoxically increase their vulnerability to attack at the same time as it increases their legal protection.

When the real target of attack or mistreatment of humanitarian workers is the population they seek to assist, international criminal law can provide further, indirect protection. The prohibition of deliberate starvation of a civilian population, listed as a war crime in the ICC Statute, includes ''wilfully impeding relief supplies as provided for under the Geneva Conventions''.[24] Attacks on or ill-treatment of humanitarian workers which are intended to prevent the provision of humanitarian assistance could, therefore, fall within the scope of this article.

Similarly, the crime of extermination as a crime against humanity is explicitly defined in the ICC Statute to include ''the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population''.[25] Again, where attacks on humanitarian workers are intended to impede humanitarian activity, and if this in turn is intended to destroy part of the population the humanitarian operation was seeking to assist, such acts could constitute a crime against humanity. Crimes against humanity can be committed outside the context of an armed conflict, but must be part of a widespread or systematic pattern of similar attacks against a civilian population, so that attacks on (or just refusing access to) a humanitarian organization are unlikely to constitute such a crime alone, unless the assistance is critical to the survival of the population. The ICC Statute specifies that this pattern will be ''pursuant to or in furtherance of a State or organizational policy to commit such attack'',[26] suggesting that this protection would be most

23 Despite the wording of common Article 3, which is clearly addressed to ''each party to the conflict'', it seems that there is no requirement that the perpetrator be under the control of one of the warring parties, at least according to the jurisprudence of the two ad hoc criminal tribunals. See the leading case of Akayesu Appeals Judgement, para. 445.

24 Article 8.2.b (xxv) of the Rome Statute, defining war crimes in international armed conflict, reads: ''Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.'' This is also prohibited by Article 54(1) of Additional Protocol I and Article 14 of Additional Protocol II, although not designated there as a war crime. The ICRC customary law study confirms this as part of customary international law applicable in all conflicts, see Henckaerts, above note 20, Rule 53.

25 Article 7.2.b of the Rome Statute.

26 Article 7.1 and 7.2.a of the Rome Statute.

appropriate in ''stable'' yet extremely repressive regimes; North Korea might be an example.

The prohibition of genocide, which is often characterized as the supreme crime against humanity, can be read in a similar light. Genocide includes the deliberate infliction of conditions of life on a group which are calculated physically to destroy it in whole or in part.[27] This prohibition applies whether or not there is an armed conflict under way, and could clearly include protection of a humanitarian organization where attacks on the organization (or, again, simple refusal of access) were intended physically to destroy the intended beneficiaries, who in the case of genocide would have to constitute ''a national, ethnical, racial or religious group''.[28]

Improving protection

There are a couple of reasons why humanitarian workers consider that they might need better protection. One is the less than watertight state of the protection currently offered, as set out above. Another is the increasing number of attacks on humanitarian workers. And a third is that humanitarian workers are, by their very nature, likely to be in the area of conflict. International humanitarian law has a number of provisions that aim to keep civilians away from the fighting; humanitarian workers, especially perhaps those providing medical care, are likely deliberately to seek to operate in the fighting zone, and so it could be said that they require more specific protection than that afforded the civilian population in general. At the same time, many in the humanitarian community are wary of appearing to ask for ''more'' protection than the civilian population affected. In the words of one aid worker, ''Why should we get more protection than other civilians just because we decide to go to dangerous areas while they have no choice?''

There have been various attempts to obtain this specific protection. In 1996 the UN General Assembly adopted the Convention on the Safety of UN and Associated Personnel (which entered into force on 15 January 1999). This provides protection for personnel of humanitarian organizations, but only as ''associated personnel'', when they are deployed ''under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the IAEA, to carry out activities in support of the fulfilment of the mandate of a United Nations

27 Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (the substance of which is reproduced in Article 6 of the Rome Statute) reads: 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.

28 Ibid.

operation'',[29] and operate under United Nations control.[30] This excludes the activities of truly independent organizations, which see operating outside UN control as crucial to maintaining their independence from political agendas.[31]

A new Optional Protocol to the Convention, extending the range of situations in which the Convention applies, was adopted on 8 December 2005. The original Convention applies only to UN operations to maintain or restore international peace and security and those declared by either the Security Council or the General Assembly, for the purposes of the application of the Convention, to constitute an exceptional safety risk. The Optional Protocol extends this to UN operations to deliver humanitarian, political or development assistance in peace building and to emergency humanitarian assistance operations. Despite the apparent focus on humanitarian assistance in the Optional Protocol, the original definition of qualifying organizations is not modified, so independent humanitarian organizations are excluded.

Guardians of the neutrality of independent humanitarian action see this as a good thing. Association with the United Nations, a fundamentally political body, cannot but harm the neutral image of humanitarian organizations and, as a result, their ability to act, particularly where the United Nations is playing a prominent political or even military role. In the negotiations over the original treaty, the ICRC indicated that it did not wish to be protected under the Convention ''because application of the Convention to the ICRC would necessarily imply a fairly close association between it and the United Nations''.[32] The final formulation, relying on a very close contractual link with the UN, reportedly satisfied this ICRC concern, as they were then excluded.[33] By making protection dependent on this link with the UN, the Convention may even serve to replace the important distinction of humanitarian from political actors with a new one: on the side of the ''international community'', or not.

In 1998, partly inspired by the adoption of the Convention, the General Assembly adopted two separate resolutions, one on protection of United Nations personnel[34] and the other on the safety and security of humanitarian personnel.[35] This began a regular series of annual resolutions calling for better respect for existing law and requiring the Secretary-General to report on progress or the lack thereof.[36] From 1999 on, a single resolution has covered humanitarian personnel

29 Article 1(b)(iii)
30 Article 1(c).
31 There are a number of other limits on applicability of the Convention, apart from that it is not universally ratified (79 at end-2005), such as that it does not apply to anyone once UN forces are engaged in combat. For a more thorough consideration of this treaty see Antoine Bouvier, ''''Convention on the Safety of United Nations and Associated Personnel'': presentation and analysis'', *International Review of the Red Cross*, No. 309 (November–December 1995), pp. 638–66.
32 Ibid., p. 655.
33 Ibid., p. 656.
34 A/RES/52/126.
35 A/RES/52/167
36 A/RES/52/167; A/RES/53/87; A/RES/54/192; A/RES/55/175; A/RES/56/217; A/RES/57/155; A/RES/58/122; A/RES/59/211; A/RES/60/123; A/RES/61/133. The resulting reports of the Secretary-General can be found at A/53/501; A/55/494; A/56/384; A/56/469; A/57/300; A/59/332; A/60/223 and A/61/463.

and UN personnel. Reports and statements by the UN Secretary-General[37] and the president of the Security Council[38] have also been issued on this theme, and in 2003 a Security Council resolution exhorted states and warring parties to ensure the safety of humanitarian personnel and UN and associated personnel.[39] The inclusion of humanitarian personnel as a group separate from the UN and associated personnel can be read as recognition of independent humanitarian action, and may leave the door open to finding a solution to appropriate legal protection, not based on political control.

Within the humanitarian community there have been moves to claim a special status, albeit less formally, based on the particular identity of independent humanitarian action. Médecins sans Frontières (MSF) has talked about the "symbol of humanitarianism", which would be attributed to organizations based purely on the neutral humanitarian character of their work:

> [T]he safety of international aid workers, and their room to manoeuvre, is tied closely to the credibility of the humanitarian symbol under which they operate. That symbol says, "We refuse to take sides in this war. Our only goal is to provide aid to its victims."[40]

What might that symbol be? Clearly it is nothing as tangible as an emblem like the Red Cross, whose use is regulated by international law. Is it the label "humanitarian" itself? Many in the humanitarian field have decried the use of this word to describe relief efforts carried out by the military, especially when they are parties to the conflict, even though this may be perfectly acceptable under international law. Can the term be claimed and protected by independent organizations?

Definitions of humanitarian assistance, discussed above, do not exclude that it be given by a state, through its military arm or otherwise. In fact the whole thrust of the discussion of humanitarian assistance by the International Court of Justice in the Nicaragua case was to examine whether the intervention of the United States in Nicaragua had been truly humanitarian in nature, clearly presupposing that it could be so.[41] Still, there is a feeling in the non-governmental sector that if relief is provided by a state, especially one with military or strategic interests in an area, it cannot be truly humanitarian, and that the term should be reserved for independent, explicitly neutral (non-governmental) organizations. A too-wide application of the term, it is felt, undermines the respect (and protection) usually accorded humanitarian work.

37 See A/55/637, etc.
38 E.g. S/PRST/2000/4.
39 S/RES/1502 (2003).
40 Fabrice Weissman, "Military humanitarianism: a deadly confusion", MSF Activity Report 2003/4.
41 Of course, as the judgment in that case found, is it also possible that it is not. One clear recent example was the request by the US-led Coalition in Afghanistan that recipients of aid provide intelligence: see MSF, "Coalition forces endanger humanitarian action in Afghanistan", available at http://www.msf.org/msfinternational/invoke.cfm?component=article&objectid=409F102D-A77A-4C94-89E0A47D7213B4D5&method=full_html (last visited 25 January 2007).

What else could the humanitarian symbol entail? There have been suggestions that the standard operating methods of humanitarian organizations, the way they dress, the cars they drive, mark out their particular nature and are almost an emblem in themselves. In Afghanistan, aid agencies accused the military of blurring the lines between themselves and humanitarian organizations by wearing civilian clothes and driving around in white land cruisers. This superficial similarity was underlined by a structural one, since the military are deployed in the Provincial Reconstruction Teams, whose reconstruction work is similar to that of traditional humanitarian agencies.[42] The white land cruiser, in particular, is seen as a kind of symbol of humanitarian work, and is the car of choice for humanitarian NGOs and UN agencies. In the Democratic Republic of Congo, where the UN, through its peace-keeping operation MONUC, has been directly involved in the conflict,[43] the sharing of this ''symbol'' with the UN is posing problems for the NGOs. Seeing it as not only devalued but downright dangerous, humanitarian NGOs started to paint their cars different colours: yellow, pink, anything as long as it has no military connotations.[44]

Is a new symbol, a legal emblem, needed for independent humanitarian organizations? If humanitarian workers are truly endangered by the warring parties' inability to distinguish them from the enemy – and this is not always clear – then this could help. A number of interesting analogies are thrown up by comparison with war correspondents, who are currently campaigning for their own emblem for many of the reasons humanitarians might.

By the very nature of their work, war correspondents, like humanitarian personnel, are required to go into conflict areas. Journalists accredited to the armed forces have a special status (in a similar way that medical services assigned to a party to the conflict have the protection of the Red Cross). Independent journalists have to rely on the protection afforded to civilians, as do humanitarian workers, although Article 79 of Additional Protocol I goes a small step further, providing for special identity cards to be issued by the government of the state in which the journalist lives or works.[45] The ICRC commentary to Article 79,

42 ''These ''Provincial Reconstruction Teams'' (PRTs) have a broad remit, not only playing a role in reconstruction but also in strengthening local government, negotiating between commanders, disseminating information from central government, and ''assist[ing] in the establishing of national legal codes''. At a time when a war is still being actively pursued, this has blurred the lines between military and assistance actors, and both NGOs and the ICRC have voiced concerns over these proposals.'' Joanna Macrae and Adele Harmer (eds.), Humanitarian action and the ''Global War on Terror'': a review of trends and issues, HPG Report 14, July 2003.

43 In February 2005, sixty militias were killed in Ituri in a UN counter-attack after nine Bangladeshi peacekeepers were ambushed, killed and mutilated.

44 Merlin paints their cars yellow; MSF has painted its cars with a wide pink stripe.

45 Article 79 – Measures of protection for journalists. 1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1. 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention. 3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

although it seems to reflect an earlier time, when civilians were less in the front line of conflicts, highlights aspects of the war correspondent's task which could be said to resemble those of humanitarian workers:

> The circumstances of armed conflict expose journalists exercising their profession in such a situation to dangers which often exceed the level of danger normally encountered by civilians. In some cases the risks are even similar to the dangers encountered by members of the armed forces, although they do not belong to the armed forces. Therefore special rules are required for journalists who are imperilled by their professional duties in the context of armed conflict.[46]

Particularly where humanitarians seek to provide medical assistance to war wounded, the word "journalist" in the above passage could be replaced by "humanitarian worker".

Despite the limited "special protection" offered by Article 79, and in reaction to an increased number of murders and kidnappings of journalists, the Press Emblem Campaign was founded in 2003, and is now proposing an international convention on the protection of journalists.[47] The convention restates the protected status of war correspondents under international humanitarian law, commits states to prosecuting attacks on journalists and to

46 Sandoz et al., above note 6.
47 http://www.pressemblem.ch/ (last visited 25 January 2007).

paying compensation where appropriate, and introduces a ''distinctive international emblem'' which may be worn by journalists who hold a valid press card or equivalent.

But is an inability to distinguish either humanitarian workers or journalists from those fighting the wars really at the root of the problem? It is increasingly clear that in certain contexts humanitarian workers are deliberately targeted – Iraq being the most obvious example. In such contexts humanitarian organizations are considering running a new style of low-profile operation, deliberately failing to distinguish themselves from the local population. The ICRC already operates in unmarked cars in Baghdad. Interestingly, when a press emblem was discussed during the drafting of Additional Protocol I, it was rejected on the grounds that

> By making the wearer of the armlet conspicuous to combatants, such means of identification might make the journalists' mission even more dangerous; similarly it was argued that in this way the journalists would be likely to endanger the surrounding civilian population.[48]

This view is not shared by members of the current campaign, who believe that the majority of attacks on journalists occur through failure to distinguish them from combatants. It is also suggested that wearing of the emblem be discretionary.

If this logic were to be followed by humanitarian organizations, who would be entitled to wear the emblem? There is no existing equivalent of a ''valid press card'', no professional association of humanitarian workers or general council of humanitarian organizations who can control accreditation. If one were to be established, what would the criteria be for membership? Adherence to the Red Cross Code of Conduct (a set of principles drawn up in 1994 for organizations active in the humanitarian field)?[49] The Code of Conduct is not uncontroversial, particularly around such issues as whether humanitarian agencies should be involved in development work (or ''capacity-building''), which can conflict with the principle of neutrality. And even if the Code could be agreed on, it is hard to imagine its signatories appointing a monitoring body and agreeing to undergo evaluation, as others have pointed out.[50] However, the establishment of an independent body to regulate use of the emblem (and so the work of humanitarian agencies using it) would maintain the independence of humanitarian action.[51] This model is far preferable to one based on the use of the Red Cross by medical

48 Sandoz et al., above note 6, p. 919.

49 Principles of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Response Programmes; see http://www.ifrc.org/publicat/conduct/code.asp (last visited 25 January 2007).

50 See, e.g., Peter Walker, ''Cracking the code: the genesis, use and future of the Code of Conduct'', *Disasters*, Vol. 29 (4) (December 2005), pp. 323–36.

51 The idea of ''certified humanitarianism'' has been floated by others; see, e.g., Antonio Donini, Larry Minear and Peter Walker, ''Between cooptation and irrelevance: humanitarian action after Iraq'', *Journal of Refugee Studies*, Vol. 17 (September 2004), pp. 260–72.

services assigned to the parties to a conflict, which necessarily implies a loss of independence.

The question arises, in relation both to a putative new humanitarian emblem and to the Press Emblem, as to whether states would be willing to sign up to respect an emblem when they have no control over who is entitled to use it. States respect and protect the Red Cross, but, apart from the case of the Red Cross Movement, they authorize its use. And even with regard to the Red Cross Movement, states assigned to it its mandate under the Geneva Conventions and can influence the movement through the International Conferences. Would states be equally happy to respect an emblem assigned entirely by a non-governmental body? Even the protection offered by the Convention on the Safety of UN and Associated Personnel is predicated on UN control. The link between protection and control is strong.

Some in the humanitarian NGO community have already pointed out the possible contradictions between calling for the protection of states while insisting on making one's own determinations about security (and hence where to operate). Military forces in the field have decried the refusal of certain, fiercely independent, humanitarian organizations to be co-ordinated by them, and so, according to the military, put themselves at risk; for the humanitarian organizations, of course, this refusal is an important point of principle to avoid "blurring of the lines".

Even if the implementation of an emblem could be agreed upon, what protection would it represent? Would it be restricted to the general protection from attack afforded civilians and civilian objects, or should some supplementary safeguards be introduced? The major legal gap identified was that mistreatment of humanitarian workers may not be a war crime; perhaps this could be rectified by a convention introducing the new emblem. The example of the draft journalists' convention could be followed, and states could be asked to commit themselves to prosecuting any serious mistreatment of humanitarian workers, whether or not this qualifies as a war crime. Universal jurisdiction could be introduced in all cases (this already applies to war crimes), so that any state party could prosecute the offences, avoiding situations where prosecution is blocked by the unwillingness or inability to prosecute of the territorial state.

Conclusion

Members of independent humanitarian organizations have less protection, legally speaking, than most of them probably think. Two key features of their work – their neutrality and their independence – as well as practical steps they take to implement these principles, actually serve to place them outside much of the protection afforded to either civilians or medical workers assigned to a party to the conflict. The qualities of neutrality and independence are, of course, themselves intended to provide protection. Where these are failing, might a stronger legal protection help? The answer to this is unclear, but if so, the question is whether it is possible to carve out a protection which is compatible with those principles

(without being ICRC). The press emblem campaign is interesting here because it represents an attempt to do just this.

Even if it were possible to agree on the desirability of further legal protection in theory, lack of unity over what qualifies as humanitarian assistance represents another obstacle to its development. And in the current climate, where humanitarianism is instrumentalized to a steadily increasing degree, there is a risk that any new form of internationally recognized legal protection will be skewed in ways which undermine those key humanitarian values.