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Débat humanitaire : droit, politiques, action

International Review of the Red Cross

Humanitarian Debate: Law, Policy, Action

Revue fondée en 1869
et publiée par le
Comité international
de la Croix-Rouge
Genève

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Mission de la Revue internationale de la Croix-Rouge

La *Revue internationale de la Croix-Rouge* est un périodique publié par le Comité international de la Croix-Rouge (CICR) qui entend favoriser la réflexion sur la politique, l'action et le droit international humanitaires et, en même temps, renforcer le dialogue entre le CICR et les autres institutions ou personnes intéressées par l'humanitaire.

● La *Revue* est au service de l'analyse, de la réflexion et du dialogue sur l'humanitaire en temps de conflit armé et d'autres situations de violence collective. Elle porte une attention particulière à l'action humanitaire elle-même, mais elle entend également contribuer à la connaissance de son histoire, à l'analyse des causes et des caractéristiques des conflits – pour mieux saisir les problèmes humanitaires qui en découlent – et à la prévention de violations du droit international humanitaire. La *Revue* entend stimuler un débat d'idées.

● La *Revue* sert de publication spécialisée sur le droit international humanitaire, rédigée à la fois pour un public académique et pour un public général. Elle cherche à promouvoir la connaissance, l'examen critique et le développement de ce droit. Elle stimule le débat entre, notamment, le droit international humanitaire, le droit des droits de l'homme et le droit des réfugiés.

● La *Revue* est un vecteur de l'information, de la réflexion et du dialogue relatifs aux questions intéressant le Mouvement international de la Croix-Rouge et du Croissant-Rouge et, en particulier, à la doctrine et aux activités du Comité international de la Croix-Rouge. Ainsi la *Revue* entend-elle contribuer à promouvoir la cohésion au sein du Mouvement.

La *Revue* s'adresse à plusieurs publics à la fois, notamment aux gouvernements, aux organisations internationales gouvernementales et non gouvernementales, aux Sociétés nationales de la Croix-Rouge et du Croissant-Rouge, aux milieux académiques, aux médias et à toute personne spécifiquement intéressée par les questions humanitaires.

Mission of the International Review of the Red Cross

The *International Review of the Red Cross* is a periodical published by the International Committee of the Red Cross (ICRC). Its aim is to promote reflection on humanitarian policy and action and on international humanitarian law, while at the same time strengthening the dialogue between the ICRC and other organizations and individuals concerned with humanitarian issues.

● The *Review* is a forum for thought, analysis and dialogue on humanitarian issues in armed conflict and other situations of collective violence. While focusing particular attention on humanitarian action per se, it also strives to spread knowledge of the history of such activity, to analyse the causes and characteristics of conflicts – so as to give a clearer insight into the humanitarian problems they generate – and to contribute to the prevention of violations of international humanitarian law. The Review wishes to encourage the exchange of ideas.

● The *Review* is a specialized journal on international humanitarian law, intended for both an academic and a more general readership. It endeavours to promote knowledge, critical analysis and development of the law. Its also fosters the debate on such matters as the relationship between international humanitarian law, human rights law and refugee law.

● The *Review* is a vector for information, reflection and dialogue on questions pertaining to the International Red Cross and Red Crescent Movement and, in particular, on the policy and activities of the International Committee of the Red Cross. The *Review* thus seeks to promote cohesion within the Movement.

The *Review* is intended for a wide readership, including governments, international governmental and non-governmental organizations, National Red Cross and Red Crescent Societies, academics, the media and all those interested by humanitarian issues.

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Editorial

Il y a 50 ans, le 28 juillet 1951, une conférence spécialement convoquée par les Nations Unies adoptait la Convention relative au statut des réfugiés. Quelques mois auparavant, le Haut Commissariat pour les réfugiés avait été créé par l'Assemblée générale des Nations Unies. Le 50e anniversaire de ce dispositif qui a pour vocation la protection internationale des réfugiés mérite que la Revue internationale de la Croix-Rouge *lui consacre un numéro.*

Il convient d'abord de rappeler qu'en trois ans, de 1948 à 1951, la communauté internationale jeta et consolida les bases juridiques qui redéfinissaient la place de la personne humaine dans l'ordre juridique international :

- *La* Déclaration universelle des droits de l'homme, *adoptée en 1948, érigea en principe fondamental du droit international que «la reconnaissance de la dignité inhérente à tous les membres de la famille humaine et de leurs droits égaux et inaliénables constitue le fondement de la liberté, de la justice et de la paix dans le monde»* [1].
- *En 1949, les États approuvèrent les quatre* Conventions de Genève pour la protection des victimes de la guerre, *reconnaissant ainsi que même – ou plutôt, surtout – en temps de conflit armé, la personne humaine a droit au respect de son intégrité et de sa dignité et à la protection contre la violence.*
- *Enfin, la* Convention de 1951 relative au statut des réfugiés *entend sauvegarder la dignité de ceux qui doivent fuir leur pays d'origine pour des raisons étroitement liées à la violence.*

Ce fut donc une période extrêmement fructueuse, voire révolutionnaire, pour le développement du droit international. Il faut cependant souligner que le droit a progressé dans ces trois domaines d'une manière étonnamment indépendante, sans liens apparents.

La Revue *a ouvert ses pages à un débat sur les questions liées à la Convention de 1951. Le réfugié est en effet devenu une figure emblématique de notre époque, et le 50e anniversaire de cette Convention, qui entend protéger les réfugiés sur le plan international, nous le rappelle. En outre, il est urgent de mettre plus encore en évidence les liens qui existent entre la protection internationale des réfugiés et le sort des victimes de la guerre qui, elles, sont protégées principalement par les Conventions de Genève de 1949.*

La rédaction de la Revue *a invité plusieurs auteurs à se pencher sur un certain nombre de questions d'actualité relatives au droit des réfugiés et à choisir parmi ces questions celles qui ont un rapport avec les conflits armés ou des situations similaires. En d'autres termes, ce sont les points de rencontre entre la protection internationale des réfugiés, d'une part, et l'action et le droit international humanitaire, d'autre part, qui intéresseront ici le lecteur.*

La rédaction de la Revue *remercie le Haut Commissaire pour les réfugiés et le président du Comité international de la Croix-Rouge, qui ont accepté de préfacer ce numéro. Elle remercie tout particulièrement les auteurs des articles qui y sont publiés, qu'ils appartiennent à l'une ou l'autre des deux institutions ou au monde académique.*

LA REVUE

1 Préambule, 1er considérant. Voir également le dossier « 1949-1998 : Droits de l'homme et droit international humanitaire », *RICR*, n° 831, septembre 1998.

A note from the Editor

Fifty years ago, on 28 July 1951, a conference specially convened by the United Nations adopted the Convention relating to the Status of Refugees. The Office of the United Nations High Commissioner for Refugees had been created by the General Assembly several months before. In tribute to the 50th anniversary of that organization for the international protection of refugees, this issue of the International Review of the Red Cross *is devoted to it.*

It is noteworthy first of all that within three years, from 1948 to 1951, the international community established and consolidated the legal bases redefining the position of the human being in the international legal order:

- *the* Universal Declaration of Human Rights, *adopted in 1948, laid down the fundamental principle of international law that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world";*[1]
- *in 1949, States approved the four* Geneva Conventions *for the protection of war victims, thereby formally recognizing that even — or above all — in times of armed conflict human beings are entitled to respect for their well-being and dignity and to protection against violence;*
- *lastly, the* 1951 Convention relating to the Status of Refugees *is intended to safeguard the dignity of those who have to flee their country for reasons closely associated with violence.*

In the development of international law it was thus an extremely productive and even revolutionary period. It must be stressed, however, that the progress made by the law in those three domains has been surprisingly independent, without apparent links.

The Review *has opened its pages to a debate on questions relating to the 1951 Convention, for refugees have become sadly symptomatic of our day and age, and the 50th anniversary of the Convention designed to protect them internationally is a reminder of that fact. There is furthermore an urgent need to heighten awareness of the links that do exist between international protection of refugees and the fate of war victims, who are protected primarily by the Geneva Conventions of 1949.*

The Editor of the Review *has invited several authors to consider a number of current refugee law issues and to select those which are concerned in some way with armed conflicts or similar situations. In other words, of interest to the reader here will be the points at which international refugee protection and international humanitarian law and action overlap.*

The Editor thanks the United Nations High Commissioner for Refugees and the President of the International Committee of the Red Cross for kindly consenting to provide forewords for this issue of the Review. *Special thanks go to the authors of the articles published in it, whether they belong to either of the two institutions or to the academic world.*

THE REVIEW

1 Preamble, first paragraph. See also "1949-1998: Human rights and international humanitarian law", *IRRC*, No. 831, September 1998.

Foreword by the President of the International Committee of the Red Cross

It is rare in the field of humanitarian action for anniversaries to be celebrated. Yet some achievements in history cannot fail to be remembered and serve as inspiration. The adoption of the 1951 Convention relating to the Status of Refugees, which remains the fundamental instrument for refugee protection, is one such achievement. On the occasion of its 50th anniversary, I would like to reiterate the ICRC's strong support for the 1951 Convention and the principles set out therein. I would also like to take the opportunity to commend the vital role played by UNHCR in providing help for refugees in so many places around the world.

The Office of the United Nations High Commissioner for Refugees and the International Committee of the Red Cross have long shared a close relationship based on a determination to uphold standards of protection and operational principles. The connection between the two institutions is firmly anchored in historical, legal and operational aspirations.

From early on in its own existence, the ICRC was confronted with the pain and sense of loss experienced by persons who had fled their homes, their land and their country. Within the framework of a conference on refugees held in 1921 under the auspices of the International Committee and the League of Red Cross Societies, ICRC President Gustave Ador proposed that a Commissioner for the Russian refugees be appointed. A few months later, on 23 August 1921, the League of Nations designated Dr Fridtjof Nansen as the "High Commissioner on behalf of the League in connection with the problems of Russian refugees in Europe".

The Second World War gave the most dramatic confirmation of the immense suffering endured by refugees. In a message addressed to governments in May 1950, the ICRC presented an overview of what it had done in aid of refugees despite the legal vacuum of that time: its activities ranged from establishing travel documents to issuing capture and tracing certificates. This report opens with a stark reminder: "Of all victims of the recent war, none, since the

Armistice, have endured greater hardships than the refugees, and none have been more hardly dealt with. Up to the present they had, like civilians in general, the protection of no international Convention..."[1] The ICRC was calling both for the development of legal norms and for the formation of a body able to act on behalf of persons in need.

This brings me to a second and far from minor link between the ICRC and UNHCR: international law. Refugee law was drawn up in the aftermath of the Second World War, while international humanitarian law made one of its significant steps forward in 1949 with the adoption of the four Geneva Conventions. Like international humanitarian law, refugee law contains universal and complementary rules designed to protect the dignity of the individual. Thus in the event of armed conflict, both refugees and persons displaced within their own countries are protected as civilians. In addition, several of the protective principles set out in the 1951 Convention, such as *non-refoulement*, are also contained in the 1949 Conventions.

Today, however, both the ICRC and UNHCR are increasingly drawing attention to the poor level of respect for and implementation of the law. For the two organizations mandated by the community of States to provide protection, this growing discrepancy is alarming. On the anniversary of the 1951 Refugee Convention I therefore wish to remind all concerned that poor implementation of existing law does not bode well for the scope and the effectiveness of current and future developments of international legal instruments. States have a primary responsibility to address this issue.

Reference to historical and legal linkages between the two organizations should not, however, obscure an important fact: the ICRC and UNHCR are first and foremost operational entities working to provide concrete assistance and protection for countless persons affected in and around conflict zones. Both UNHCR and the ICRC face a number of similar operational challenges in this regard.

1 "The International Committee of the Red Cross and the refugee problem", *Revue internationale de la Croix-Rouge*, [English] Supplement, Vol. III, 1950, p. 114.

To begin with, they are both dealing with a complex and changing international environment, where wars are fought mainly for motives such as identity, ethnicity or access to resources. An environment in which arms are easily available and chains of command are often blurred.

As a result both organizations have to address serious dilemmas, such as how to operate in contexts where policies of "ethnic cleansing" are being brutally implemented or where genocide is taking its ruthless toll. What can and should humanitarian agencies do where civilians have become the very target of hostilities and where displacement is no longer a simple side-effect of fighting but a favoured instrument of war?

Closely connected is their shared concern for the safety of humanitarian personnel. Recent years have brought cruel reminders of the dangers involved in certain operational contexts: UNHCR lost four of its colleagues in West Timor and the Republic of Guinea in 2000, and the ICRC seven of its colleagues in the Democratic Republic of Congo and southern Sudan in 2001.

A further dominant feature of the contemporary humanitarian environment is the high number of agencies. This has led to an ever-growing requirement for coordination by the various organizations. To my mind, competition is positive in so far as responses to the needs of men, women and children affected by conflict are enhanced thereby. Otherwise competition is negative. Despite the progress already accomplished, there is room for improvement.

Effective coordination and cooperation are greatly facilitated by the willingness of humanitarian organizations to define their objectives in a given field on the basis of their core competencies, their actual activities and their experience as opposed to mere aspirations. While this will no doubt help to clarify divisions of labour, it must be recognized that in today's complex situations there will always be grey areas where ad hoc coordination is required, in particular at field level. A firm resolve to make the best possible use of existing complementarities in the interest of the victims should be at the heart of these efforts. This is the spirit in which both the High Commissioner Ruud

Lubbers and I approached the most recent annual high-level UNHCR/ICRC meeting last June.

Donor countries — and rightly so — expect humanitarian organizations to coordinate their activities as efficiently as possible in order to avoid both costly duplication thereof and situations in which persons in need are left without protection and assistance. They can contribute to successful coordination by taking into account, in their messages to humanitarian organizations, their respective specific mandates, activities and experience.

As a closing remark, I would like to point out that humanitarian action today is a complex undertaking in the broadest sense. It requires a combination of players to address the many needs that arise from conflict. Concrete cooperation is thus a fundamental prerequisite. Organizations with a strong and well-defined identity are well placed to work together in a predictable manner. UNHCR and the ICRC are two such organizations.

JAKOB KELLENBERGER
President of the International Committee of the Red Cross

Foreword by the High Commissioner for Refugees

I am pleased to join the President of the International Committee of the Red Cross in introducing this special edition of the *Review* focusing on the 50th anniversaries of the 1951 Convention relating to the Status of Refugees and of the Office of the High Commissioner for Refugees. This tribute has special significance for us at UNHCR, as we see the ICRC and the International Movement of the Red Cross and Red Crescent as among our closest partners on the humanitarian frontlines.

ICRC and UNHCR have both been entrusted unique responsibilities. Each is the guardian of international instruments that are inspired by some of humankind's noblest ideals and are necessitated by its worst tendencies. The 1951 Refugee Convention and the four 1949 Geneva Conventions for the Protection of War Victims, along with their respective protocols, have the same basic purpose — protecting the safety and dignity of individual human beings. Seen from today's perspective, the consensus among States that produced these remarkable treaties was something of a miracle.

Despite their common objectives, international humanitarian law and refugee law are distinct and have different historical roots. The Red Cross and Red Crescent Movement and the first elements of humanitarian law emerged in the mid-19th century with the purpose of preventing and alleviating the suffering caused by war. While asylum is an ancient custom in many cultures, modern refugee law began under the League of Nations and was consolidated when UNHCR and the 1951 Convention were created to resolve refugee problems in Europe in the wake of the Second World War. Refugee law is part of the human rights tradition and, thus, is very much a product of the 20th century.

Like the 1949 Geneva Conventions, the 1951 Convention has proven its value and resilience over the past half century. The protections established by the Convention and extended by its 1967 Protocol have saved the lives and preserved the futures of millions of refugees on every continent. These instruments give coherence to the international refugee protection framework because they are clear on

basic principles, focused on rights and grounded in universal values. Important regional instruments, such as the 1969 OAU Refugee Convention, have enriched the body of refugee law enormously, but the Convention and Protocol remain the hub on which the international protection regime turns.

Fifty years on, the international community's commitment to refugee protection is facing unprecedented pressures. Globalization has brought increased human mobility, and people searching for protection often travel alongside those seeking better economic prospects. Concerned by the expense and difficulty of sorting out who needs protection, governments have sought to narrowly construe their refugee protection obligations and have created a formidable array of obstacles to ensure that migrants, including asylum-seekers, never reach their territory. As a consequence, many asylum-seekers are compelled to use criminal trafficking and smuggling networks — becoming victims yet again.

The challenges to protection are no less daunting in countries of first asylum that host the great majority of the world's refugees — often in the least developed regions of the world. Massive and protracted displacement caused by seemingly insoluble conflicts places tremendous strains on social stability, security and the environment. Refugees continue to flee persecution in countries at peace, but armed conflict is undeniably the greatest cause of refugee flows today. The nature of conflict has also changed, with the proliferation of internal ethnically or religiously based struggles in which displacement has become an objective, rather than merely a consequence of war. The patterns of displacement have also become increasingly complex. Refugees, internally displaced persons and returnees often live intermingled with the war-affected local people. Frequently, all have similar needs for protection and assistance, and the needs of one group typically cannot be addressed in isolation from the others.

The result is that the traditional paradigm — with ICRC working in the conflict zone and UNHCR across the border tending to the refugees — no longer describes reality. ICRC and UNHCR colleagues increasingly work directly alongside each other in humanitarian operations around the world. We also share a broad range of

common concerns, such as the denial of access to humanitarian aid, "ethnic cleansing" and other forcible displacement of civilian populations, the abduction and recruitment of children into armed forces, the separation of children from their families and family reunification, the use of rape and other sexual and gender-based violence as a weapon of war and the militarization of refugee camps and settlements.

This new environment imposes upon ICRC and UNHCR a profound obligation to maximize the impact of our limited resources through cooperation and complementary action. Our two organizations are constantly rising to this challenge in the field, effecting a division of labour based at times upon the clear distinctions in our international mandates or, where our responsibilities are concurrent, upon our respective organizational capacities and comparative advantages. I very much appreciate ICRC's presence in the Global Consultations that UNHCR has launched to revitalize the international refugee protection regime. ICRC's active participation has allowed us to focus upon our respective roles and responsibilities, as well as those of host States, in such crucial areas as the maintaining of the civilian character of asylum and the separation of armed elements from refugees.

Working together in inhospitable and dangerous places, ICRC and UNHCR colleagues also encounter an increasing risk to their lives. Over the past few years, we have seen dear friends and colleagues brutally murdered in remote locations such as Mugina, Novye Atagi, Atambua, Macenta, Kimpese and Bunia. It is too easy to say that these committed humanitarians gave their lives to lessen the suffering of others. The lives of our colleagues were not given willingly, rather they were cruelly and unfairly taken, leaving their families and loved ones devastated and wounded in ways that never heal. I would like to dedicate this volume to their memory and, in doing so, call for a redoubling of our collective efforts to enhance security and respect for the lives of all humanitarian workers. We cannot protect refugees and the victims of war if we lose our own lives in the effort.

RUUD LUBBERS
United Nations High Commissioner for Refugees

International refugee protection 50 years on: The protection challenges of the past, present and future

by
ERIKA FELLER

Headlines repeatedly proclaim: "Experts meet in Dublin to discuss child asylum seekers"; "More refugees flee to the Gambia from Senegal's Casamance province"; "73 illegal immigrants detained in Austria at weekend"; "UNHCR to repatriate more Tanzanian refugees in Kenya"; "Afghanistan: Taliban impose Islamic law on aid workers"; "East Timorese refugees in West Timor to vote on repatriation"; "Residents, army fear rebel assault on Burundi capital"; "1,600 Sudanese refugees enter Uganda"; "Scotland: asylum hate 'shames city'"; "Immigrants are seeking asylum in outdated law". These are just some of the press headlines featuring refugee issues in May/June 2001.

To begin to appreciate the scale of humanitarian need underlying the work of international refugee protection, it is enough to look at refugee statistics showing that UNHCR has responsibility for some 22 million persons in 160 countries, of which the majority are women, children and the elderly. While there is little cause for celebration of the 50th anniversary of UNHCR and the 1951 Convention relating to the Status of Refugees, it provides an opportunity to reflect seriously on the point now reached in refugee protection and where it could or should go from here.

ERIKA FELLER is Director of the Department of International Protection, Office of the United Nations High Commissioner for Refugees (UNHCR).

This article first outlines the refugee protection regime and its key components, then it portrays past developments in the refugee field, looks into the question as to whether the 1951 Convention is outdated and takes stock of current protection challenges. Finally, it illustrates the current dialogue on how these challenges could be met.

Refugee protection regime

The refugee protection regime, within which the United Nations High Commissioner for Refugees discharges his mandated functions, has its origins in general principles of human rights. At the same time, it is firmly founded on treaty and customary law obligations, particularly those flowing from the 1951 Convention and its 1967 Protocol, and also draws on principles and standards articulated in other international instruments or through court processes in a variety of jurisdictions. Finally, this regime is guided by so-called "soft law" pronouncements and directives of authoritative international and regional bodies, including the conclusions of UNHCR's Executive Committee.

The 1951 Convention has a legal, political and ethical significance that goes well beyond its specific terms: legal in that it provides the basic standards on which principled action can be based; political in that it provides a truly universal framework within which States can cooperate and share the responsibility resulting from forced displacement; and ethical in that it is a unique declaration by the 141 States Parties of their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged people.

The 1951 Convention is a landmark in the setting of standards for the treatment of refugees. It incorporates, either directly or as an inevitable interpretation, the fundamental concepts of the refugee protection regime, which are as relevant in the contemporary context as they were in 1951. These include the following:

- that refugees should not be returned to persecution or the threat of persecution (the principle of *non-refoulement*);

- that protection must be extended to all refugees without discrimination;
- that the problem of refugees is social and humanitarian in nature and, therefore, should not become a cause of tension between States;
- that since the grant of asylum may place unduly heavy burdens on certain countries, a satisfactory solution of the problem of refugees can be achieved only through international cooperation;
- that persons escaping persecution cannot be expected always to leave their country and enter another country in a regular manner and, accordingly, should not be penalized for having entered into or being illegally in the country where they seek asylum;
- that given the very serious consequences that the expulsion of refugees may have, this should only be resorted to in exceptional circumstances to protect national security or public order; and
- that cooperation by States with the High Commissioner for Refugees is essential if the effective coordination of measures taken to deal with the problem of refugees is to be ensured.

In addition, refugee protection also embraces the safeguarding of basic human rights placed in particular jeopardy in refugee situations —the right to life, liberty and security of person, the right to be free from torture and other cruel or degrading treatment, the right not be discriminated against, and the right of access to the basics necessary for survival (food, shelter, medical assistance), as well as, at a later point, for self-sufficiency (a livelihood, education, health care).

These fundamental concepts remain intrinsically sound as the framework for refugee protection fifty years after the adoption, on 28 July 1951, of the Convention relating to the Status of Refugees, although it is true that contemporary realities on the ground demand some adjustment. There are gaps in protection which need to be bridged through complementary mechanisms and some necessary evolution of the principles, as outlined in the next chapters. How innovative one really needs to be, however, and to what end, are both the subject of heated debate.

Past developments in the refugee field

Refugees have been around for as long as history, but an awareness of the responsibility of the international community to provide protection and find solutions for them dates only from the time of the League of Nations and the appointment of Dr Fridtjof Nansen as the first High Commissioner for Russian refugees in 1921. For the League of Nations, refugees were defined by categories specifically in relation to their country of origin. Dr Nansen's mandate was subsequently extended to other groups of refugees, to include Armenians (1924), as well as Assyrian, Assyro-Chaldean and Turkish refugees (1928). First, the League of Nations and later the United Nations established and dismantled several international institutions devoted to refugees in Europe. The International Refugee Organization (IRO) was the last to precede UNHCR. The IRO was created in mid-1947 to deal with the problem of refugees in Europe in the aftermath of the Second World War and was to complete its work by mid-1950. It was soon apparent, however, that the comprehensive nature of the task it had been assigned — to address every aspect of the refugee problem (from registration and determination of status, to repatriation, resettlement, and "legal and political protection") — precluded its winding up.

In December 1949, the General Assembly therefore decided to replace the IRO with UNHCR, which was established, for an initial period of three years, as a subsidiary organ of the General Assembly under Article 22 of the United Nations Charter. On 14 December 1950, the General Assembly adopted the UNHCR Statute. The organization's tasks were to provide international protection for refugees and to seek permanent solutions to their problems by assisting governments in facilitating their voluntary repatriation or their assimilation within new national communities. On 1 January 1951, UNHCR began its work with a staff of 33 and a budget of US$ 300,000.

The 1950s: development of the international refugee protection regime

When UNHCR was established, the problem was essentially concerned with the remaining million individuals who had fled Nazism and later Communism in Europe. UNHCR's work was mainly of a legal nature to ensure entry and ease integration in accordance with the 1951 Convention. That Convention was the first (and indeed remains) the only binding refugee protection instrument of a universal character. It was actually an instrument of rather limited intent, addressing in particular the question of refugee status, not solutions or causes. While it traced its origins broadly to human rights principles, it was more about States' responsibilities than individuals' rights. A principal contribution it did, however, make, was to put in place a global definition of refugee. In 1967, the main caveat attached to the universal character of this definition — a geographical and time limitation — was lifted by the coming into effect of a protocol (at present the only one) to the 1951 Convention.

The 1960s and 1970s: expansion of the international refugee protection regime

If the 1951 Convention was the baseline, to some extent it also contained the basics only. This became clear as UNHCR's protection activities began to extend well beyond Europe into countries, particularly on the African continent, experiencing the painful process of decolonization. The persecution-based approach confined to the five reasons outlined in the 1951 Convention was perceived to limit its applicability. The large numbers of refugees and the generalized conflicts which precipitated their displacement ensured a growing mismatch. From the late 1950s, the General Assembly felt it necessary on occasion to extend UNHCR's mandate to protect and assist groups of refugees falling outside the definition and geographic ambit of the 1951 Convention, while UNHCR began the process which was to lead effectively to the Convention's 1967 Protocol.

Simultaneously, developments in Africa promoted the conclusion of a regional instrument, which in effect updated the 1951 Convention definition by expanding it to include a broader category

of persons. The result was the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa. While incorporating the existing 1951 Convention's refugee definition, the OAU Convention added a paragraph specifying that "[t]he term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality". In other words the notion of refugee was broadened beyond victims of persecution to include the increasingly prevalent "new" category of victims of generalized conflict and violence. The OAU Convention was also a significant advance on the 1951 Convention in its recognition of the security implications of refugee flows, in its more specific focus on solutions — particularly on voluntary repatriation — and through its promotion of a burden-sharing approach to refugee assistance and protection.

The 1970s proved to be important in terms of fostering the concepts of international solidarity and burden-sharing in the difficult search for solutions. One of the more important milestones in this regard was the International Conference on Refugees and Displaced Persons in South-East Asia, held in 1979 in Geneva. It came at a time when the world was observing with grave concern the plight of Vietnamese fleeing their country in flimsy boats, confronting the perils of the sea and pirates, only to be pushed back as they reached the shores of neighbouring countries. A three-way agreement emerged from the Conference: South-East Asian countries promised to provide temporary asylum; Viet Nam undertook to promote orderly departures in place of illegal exits; and third countries outside the region agreed to accelerate the rate of resettlement. Important burden-sharing schemes were subsequently put in place to ensure the continuing rescue at sea of the Vietnamese "boat people". This Comprehensive Plan of Action (CPA) for Indo-Chinese refugees was the first attempt to involve all concerned parties (countries of asylum, of origin and of resettlement), as well as the donor community in a coordinated, solutions-oriented set of arrangements for sharing responsibilities as regards a refugee population.

The 1980s, 1990s and the 21st century: restrictions on the international refugee protection regime

During the 1980s and 1990s, substantial changes came about in the environment in which international refugee protection had to be realized. These changes not only placed basic concepts in question, they also impacted on both political will and readiness of local host communities to continue to offer asylum on the generous terms of the past. The numbers of refugees grew exponentially, no longer as a product of struggles for independence but due to the steep rise in internal inter-ethnic conflicts in now independent States. The conflicts were fuelled by superpower rivalry and aggravated by socio-economic problems in developing countries. Solutions to refugee problems became even more elusive – whether in Afghanistan, with 2.5 million Afghan refugees remaining in exile today, in the Horn of Africa or southern Africa. Human rights abuses and breaches of humanitarian law were no longer by-products of war, but often a conscious objective of military strategy, so that even low levels of conflict generated a disproportionately high degree of suffering among civilians and massive displacement. To give some examples from the post-Cold War period when these characteristics became even more pronounced, 2.5 million people were displaced or fled to Iran from northern Iraq in 1991; in the former Yugoslavia, the number of refugees, internally displaced and others assisted by UNHCR exceeded four million; and the 1994 crisis in the Great Lakes region of Africa forced more than three million people to flee their countries.

With the prospects of lasting political solutions to refugee-producing conflicts ever more distant, UNHCR had little option but to embark on prolonged aid programmes for millions of refugees in overcrowded camps. And the refugee population steadily rose from a few million in the mid-1970s to some 10 million by the late 1980s. In 1995, the number of persons needing assistance rocketed to around 25 million. Asylum countries became ever more worried about receiving large numbers of refugees for whom there was no possibility of early repatriation. Large-scale refugee flows were increasingly perceived as a threat to political, economic and social stability. Even in traditionally hospitable asylum countries, there was hostility, violence,

physical attack and rape of refugees. Providing effective protection has become exceedingly difficult where the exodus results from conflict which remains unresolved, where warring parties lack authority or legitimacy, and where there is no sense of accountability as regards compliance with basic human rights or humanitarian norms of behaviour. In some situations such as in the Great Lakes region and the Horn of Africa, the conflicts have spilled across frontiers and affected areas where refugees, returnees and displaced persons have been living, seriously threatening their safety and that of the local population. Governments have resorted to closing borders or pushing refugees back to danger, even death, as a result of their concerns for national security and the safety of the local population. Guinea' s closure of its borders in December 1998/January 1999 to the Sierra Leonean refugees, many of whom were women and children who had had limbs amputated by rebel forces, was a graphically horrible example. The civilian character of refugee camps and settlements continued to be compromised, not least by the unwillingness of some governments to site refugee camps away from borders or the lack of commitment of others to address the issue of armed elements resolutely.

When it comes to such situations, the "voluntariness" of returns has become a key issue as refugees return to countries emerging from many years of war, where peace is fragile, the infrastructure weak, the human rights situation not yet stabilized, and the basic necessities of life are in uncertain supply. In such situations, the factor precipitating return is often not durable change at home but inhospitable, even hostile, conditions in the host country, making return the lesser evil. In some cases, rapid outflows have been followed by equally sudden and large-scale returns of people to their country, from which they have been compelled to flee again after only a short period.

In the developed world where there are sophisticated asylum systems and a long tradition of active political support for refugee protection, the changes were no less significant. There has been, particularly in recent years, a major reshaping of asylum policies, provoked

by a shared concern in the industrialized countries about the overburdening of the structures they have in place to handle claims, about rising costs associated with running their systems and about problems stemming from difficulties in applying refugee concepts to mixed groups of arrivals, and by a substantial misuse of asylum systems.

Trafficking and human smuggling have been a compounding feature. Increasingly, being smuggled to sanctuary has become an important option for asylum-seekers, but one which carries a price tag. An asylum-seeker who has resorted to a trafficker has seriously compromised his or her claim in the eyes of many States, and has consequently had to face a sort of double criminality: not only has he or she flouted national borders, but also has consorted with criminal trafficking gangs to do so, to the point where the claim in question has become tainted and measures which restrict fundamental privileges have been seen as more than justified.

There has been a slow but steady growth in processes, laws and concepts whose compatibility with the prevailing protection framework is ever more tenuous. Some States have reverted to an overly restrictive application of the 1951 Convention and its 1967 Protocol, coupled with the erection of a formidable range of obstacles to prevent legal and physical access to territory (i.e. interdiction and interception). This has been accompanied by an inappropriate use of otherwise useful asylum-related notions such as "safe country", "internal flight alternative" or "manifestly unfounded claims" and the emergence of a bewildering myriad of alternative protection regimes of more limited duration and guaranteeing lesser rights when compared to those of the 1951 Convention. Increased detention, reduced welfare benefits and severe curtailment of self-sufficiency possibilities, coupled with restricted family reunification rights, have all been manifestations of this trend.

There has furthermore been the tendency in some States to move away from an objective and law-based system altogether. Instead of a process which is protected by the rule of law and overseen by an independent judiciary, some national asylum systems are resting increasingly on ad hoc and subjective procedures built around the

exercise of executive discretion. Such discretionary forms of protection provide lesser safeguards to people of concern. In response, there has been even more resort — by failed asylum-seekers, by lawyers seeking protection solutions, and by judges considering protection needs — to human rights instruments as an alternative source of protection. While the 1984 Convention against Torture and the 1950 European Human Rights Convention do provide an absolute prohibition on removal, the rights of people allowed to remain are usually inferior to those of recognized refugees.

Overall, the climate for the admission, processing and treatment of asylum-seekers is less benevolent today. Refugee issues are often heavily politicized, even sensationalized, for a variety of domestic or political purposes, some quite self-serving. Attitudes, too, are inflamed by opportunistic or ill-informed media. It is a sad fact also that, in many cases, racist and xenophobic attacks against refugees are being politically instigated, and refugees are being made the scapegoat for other inadequacies and exploited for party-political ends.

To confront these manifold challenges, there is an urgent need to revitalize the legal principles and ethical values that underpin asylum and refugee protection.

1951 Convention outdated?

Some have felt compelled to argue that the complexities of modern population movements have rendered the 1951 Convention outdated, unworkable or irrelevant, or even an unacceptably complicating factor in today' s migration environment. In particular, the 1951 Convention has been criticized as being over-rigid in the face of important migration challenges.

There are, however, many more voices to the contrary, including that of UNHCR itself. The 1951 Convention cannot be held accountable for what it has not achieved in relation to problems for which it was never intended as a response. Its terms impact, it is true, on immigration-related issues including the sovereign right to regulate entry across borders, but only with a view to introducing the compelling exception for a clear category of individuals in need of protection. The 1951 Convention was never drafted to be an

instrument for permanent migration settlement, much less for migration control. It is unacceptable, in UNHCR's view, that proper implementation of a refugee protection instrument should lose its priority in the face of migration challenges which have no formal or direct relationship to its intended purposes.

This being said, I recognize that the 1951 Convention is being challenged in a number of important ways today, which put to the test its resilience and the scope of its application. Any listing of such challenges would have to include the following:

- The changed displacement environment in which the 1951 Convention must operate, which certainly demands some flexibility in its application. There is the need to put an end to debate around such issues as to whether the victims of violence and persecution by non-State agents (e.g. police, military, militia, paramilitary groups, separatist rebels or bandits) are entitled to protection as refugees in another State? Whether the notion of "persecution" and the ground of "membership of a particular social group" in the 1951 Convention can be reasonably extended to protect women from gender-related violence, not least rape, in the context of conflict but also, perhaps, harmful traditional practices or even domestic violence? If only part of the State of origin is affected by conflict, then how far are the victims of violence and persecution required to seek protection inside the State before a claim for refugee protection will be entertained in an asylum State? In addition, what bearing have other Conventions such as the Convention on the Rights of the Child on the status determination and treatment of refugee children?
- The growth of irregular migration and smuggling of people for profit has led to a crowding of the space in which the 1951 Convention has to operate.
- The discrepancies between, variously, Convention refugees, the broader class of persons in need of international protection to whom UNHCR's competence has been extended, and persons for whom States have explicitly accepted responsibilities under the 1951 Convention; at this point some rationalization of

responsibilities is required to introduce greater certainty of a protection outcome for those in need.

- The related issue of the growing number of subsidiary forms of protection which States, not least in Europe, develop often as less onerous alternatives to the 1951 Convention-based protections. Again, these limit the room allowed to the 1951 Convention to operate as it could or should.
- Currently, aside from subsidiary protection at the national level, there are also complementary protections starting to appear at the international level, including in particular those in place through the human rights instruments. Many States which now offer complementary forms of protection currently have several different, parallel proceedings for determining protection needs. When determining those needs, there is the challenge of how to tailor proceedings which are less expensive and require fewer resources from appellate or participating governmental bodies.
- Efforts to develop regionally specific legal frameworks for handling refugee and asylum demands, which carry with them the real, if unintended, threat of a degree of redundancy for the Convention in some parts of the world, and the concomitant problem that its international applicability is put into question.
- While accepting that new or refined notions, such as the internal flight alternative or the safe third country notion, as well as the safe country of origin notion, have a place in the developing repertoire of responses to complex displacement situations, there is a need to establish how best to prevent their misuse and to apply them in protection-sensitive procedures.
- The creation of actual conditions to allow return in safety and dignity remains fundamentally a political process going well beyond the capabilities of UNHCR. The question here is how to enhance the preparedness of the international community to commit itself to a substantive and prolonged engagement in the reinforcement of local efforts. Otherwise, there is no sustainable solution with adequate guarantees of protection.
- Self-sufficiency is just one tool to increase available asylum space. Provided that the absorption of refugees into the host community

does not economically, socially or politically destabilize the country, the challenge is how to enhance the preparedness of host countries to allow local integration.

- A further challenge is how best to realize the full potential of resettlement as a tool of international protection, as a durable solution, and also as a means of burden- and responsibility-sharing.
- While there is a general understanding that more equitable burden- and responsibility-sharing would quantitatively improve the political climate and the asylum possibilities for refugees, in practice, the challenge is how best to spread the share of responsibilities so as to ease the asylum burden on any one State unable to shoulder it entirely; how to put in place burden-sharing and not burden-shifting mechanisms; and how to trigger timely responsibility-sharing in any one situation.
- Finally, and significant amongst those challenges on this list, there is the "integrationist" approach taken to the Convention' s application over the fifty years of its existence, which has given birth to systems to implement the Convention which are not well enough attuned to mass arrivals or even to large numbers of individual asylum-seekers. Applying the Convention in mass arrival situations poses problems in many parts of the world. The challenge here is how to realize solutions for individuals, as well as for refugee groups, which are both lasting and protection-based.
- In short, while the Convention remains, and has to remain, the foundation of refugee protection, it is being chipped away from all sides at the moment. How to reinforce it, reinvigorate it and ensure its "full and inclusive application" for the decades to come is a common concern. All stakeholders in the regime do, though, need to try. The 1951 Convention is the one truly universal instrument setting out the baseline principles on which the international protection of refugees has to be built. As indicated above, it has a legal, political and ethical significance that goes well beyond its specific terms. If this instrument is lost, the likelihood of it being replaced by anything approaching its value is remote.

Revitalizing refugee protection

In the face of these challenges, UNHCR has invested quite some effort recently in strengthening the application of the Convention through targeted strategies to address, variously:

- the deteriorating quality of asylum;
- the current gaps in the protection framework; and
- the inconsistencies between regional approaches and international standards.

These strategies go hand in hand with a dynamic interpretation of the 1951 Convention. There are already well-established international law rules for interpreting treaties, which have been codified quite comprehensively in the 1969 Vienna Convention on the Law of Treaties. This latter Convention can be said to place a premium on the principle of effectiveness by requiring interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The preamble to a treaty is one source for determining its purposes. The Preamble to the 1951 Convention states its aim *inter alia* as being to ensure that human beings shall enjoy fundamental rights and freedoms without discrimination, as well as to assure refugees the widest possible exercise of these fundamental rights and freedoms. The Convention is thus quite a specific rights protection instrument. This being so, it is of fundamental importance that its provisions be interpreted in such a way as to make its safeguards practical and effective, which in turn requires, consistent with the 1995 judgment in the European Court of Human Rights case of *Loizidou* v. *Turkey*, that it be treated as a living instrument and understood in the light of present-day conditions, not solely in accordance with such intentions as the authors may have expressly set out at the time of drafting.

This means that the 1951 Convention should not be seen as a static instrument but should be interpreted in more "evolutionary" terms, taking into consideration the changes that have occurred in the period since its conclusion. That this interpretation is in the spirit of the intentions of the 1951 Convention drafters fifty years ago was also accepted by the UK House of Lords in the Aden case of December 2000, according to which "the signatory States intended

that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world".

When dealing with the various protection challenges in today' s context, it is of paramount importance that there be a common understanding of principles and objectives. The following are just some issues to be kept in mind by all stakeholders involved:

- *Mass influx/maintaining civilian character of asylum*
  There is nothing inherent in the provisions of the 1951 Convention and 1967 Protocol to preclude these instruments from being applied in mass influx situations. Host States have the primary responsibility for ensuring security in refugee camps and refugee-populated areas, including the identification and separation of armed elements.
- *Interface between refugee protection and migration control*
  While fully supporting the efforts of States in combating the criminal and organized smuggling of persons across international borders, there is a need to strike a balance between the repression of criminal smuggling and the protection of humanitarian interests and values.
- *Barriers to entry*
  Measures such as interdiction, interception, visas, immigration officers in countries of departure and carriers' liability restrict access to asylum. If such measures are taken, they should be implemented in a manner consistent with international human rights and refugee protection principles. If States apply carrier sanctions, for instance, they should exempt carriers from penalties in the case of asylum-seekers.
- *Illegal entry*
  Similarly, and in accordance with Article 31 of the 1951 Convention, States should not penalize refugees for illegal entry or unnecessarily restrict the freedom of movement of such persons.
- *Detention of asylum-seekers*
  Detention of asylum-seekers and refugees should take place only after full consideration of all possible alternatives. It should be resorted to only in cases of necessity, and therefore should not be automatic or unduly prolonged.

- *Access to asylum procedures/written decision*
  As a rule, all asylum-seekers, without distinction, must be given access to refugee status determination procedures. The examination of applications for refugee status should at first instance allow for a personal interview, if possible before the decision-makers of the competent body, and should be based on a thorough assessment of the circumstances of each case. All applicants should receive a written decision automatically, whether on admissibility or the claim itself. If the claim is rejected or declared inadmissible, the decision should be a reasoned one.
- *Single procedure*
  A single procedure to assess the claims of all those seeking refugee status or other complementary protection may in many cases represent the clearest, swiftest means of identifying those in need of international protection. The single procedure approach must, though, avoid any tendency to redefine protection down to the most basic of obligations — that of *non-refoulement* alone. At the same time, the status of refugee must be one which continues to be conferred in keeping with the provisions of the 1951 Convention and carrying with it all rights and responsibilities deriving from this status.
- *Guidance to asylum-seekers/access to interpreters and UNHCR/NGOs*
  At all stages of the asylum procedure, including the admissibility stage, asylum-seekers should receive guidance and advice on the procedure in a language and in terms they are able to understand and have access to legal counsel in need. They should also have access to qualified and impartial interpreters and the right to contact UNHCR and recognized non-governmental organizations (NGOs).
- *Confidentiality*
  The asylum procedure should at all stages respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request. No information on the asylum application should be shared with the country of origin.

- *Groups with special protection needs*
  There should be special procedures for refugee women and children:
  - Where female asylum-seekers are accompanied by male relatives they should be informed in private and in terms they understand of their right to make an independent individual asylum application at any stage, and be afforded the opportunity to seek legal advice before making such an application. Female asylum-seekers should preferably be given the opportunity to be interviewed by skilled female interviewers and interpreters and should in any case be interviewed in a gender-sensitive environment.
  - For unaccompanied or separated children, the best interests of the child are paramount. They should never be refused entry or returned at the point of entry, or subjected to detailed interviews by immigration authorities at the point of entry. As soon as a separated child is identified, a suitably qualified guardian or adviser should be appointed to assist them at all stages. Interviews should be carried out by specially trained personnel and separated children should never be detained for immigration reasons.

Other groups such as torture victims or the elderly could benefit from the establishment of common understandings and greater sensitivity towards their special protection needs.

- *Review of negative decision*
  All applicants shall have the right to an independent appeal against or review of a negative decision, including a negative admissibility decision, although this may be more simplified in the case of admissibility decisions made under accelerated procedures. The letter of rejection should contain information on the asylum-seeker's right to appeal, provisions of the appeal procedure and any applicable time limits.
- *Return of asylum-seekers to third countries*
  An asylum-seeker should only be returned to a third State if responsibility for assessing the particular asylum application in substance is assumed by the third country, and if the asylum-seeker will

be protected from *refoulement* and will be able to seek and, if recognized, enjoy asylum in accordance with accepted international standards. Any mechanisms under which responsibility for assessing the asylum claim is transferred should be clearly defined in law.

- *Right to remain until decision has been taken*
  An asylum-seeker should in principle have the right to remain on the territory of the asylum country and should not be removed, excluded or deported until a final decision has been made on the case or on the responsibility for assessing the case.
- *Family reunification*
  From the recognition of a need for international protection of the beneficiaries stems a "package" of rights and benefits, including the reunification of scattered families, that enables beneficiaries to live in dignity and to support themselves and their families.
- *Durable solutions*
  Neither the Statute of UNHCR nor any other international instrument relating to refugees indicates that durable solutions have an inherent hierarchy. The use of the various durable solutions – voluntary repatriation, local integration, resettlement – over the past decades shows that views about which solution is preferable or in some cases realistic can vary greatly, depending on the most appropriate durable solution for a refugee population or for groups and individuals within it.
- *Voluntary repatriation*
  To ensure the sustainability of returns, it is important that conditions in the country of origin allow for a voluntary return in safety (i.e. availability of physical, legal and material safety) and dignity.
- *Local integration*
  Refugees can offer host societies potentially strong benefits. In order to become part of the community, refugees should be able to exercise the rights as set out in the 1951 Convention, including the option for their naturalization. To facilitate their integration, public, private and community sectors should work alongside refugees as facilitators to create an environment in which people can be empowered.

- *Resettlement*
  Resettlement serves as a protection tool, as an instrument of responsibility-sharing and as a durable solution in specific circumstances. Resettlement policies and criteria are to be applied in a consistent and transparent fashion throughout every region of the world, always being careful to strike a balance in resettlement planning between meeting needs and addressing quota-related issues.
- *Burden- and responsibility-sharing*
  In the search for permanent solutions for refugees, UNHCR is dependent on States offering asylum to refugees in a spirit of burden- and responsibility-sharing. This reformulation of "burden"-sharing to responsibility-sharing arises from the fact that refugees are not only a problem but also part of the solution, and also from the recognition that often countries of refuge are the least equipped financially and logistically to assist refugees in situations of mass influx, as well as those of a protracted nature.

These are just some of the principles on which it is useful to establish common understandings. As one highly respected refugee lawyer and academic aptly observed, "A great, indeed damaging disservice is done to the protection of refugees by pretending rules exist where there are none, or by imagining that the persistent objector can be overcome by persistent rhetoric alone."[1] The next section of this paper outlines the process of Global Consultations on International Protection which is, among other purposes, intended to enhance common understandings.

Process of ensuring continued refugee protection

Mindful of all the various developments outlined above, UNHCR decided in 2000 to take the opportunity of the forthcoming 50th anniversary of the 1951 Convention to initiate a process of open,

1 G. S. Goodwin-Gill, "The international protection of refugees: What future?", *International Journal for Refugee Law*, Vol. 12, No. 1, 2000, p. 6.

frank and constructive dialogue with governments, NGOs, refugee experts and refugees themselves. These Global Consultations were endorsed by the United Nations General Assembly and UNHCR' s Executive Committee (ExCom) and welcomed by the United Nations Secretary-General. The purpose of this process, on the one hand, is to seek to promote the full and effective implementation of the 1951 Convention and, on the other, to develop complementary new approaches, tools and standards to ensure the availability of international protection where the 1951 Convention needs to be buttressed. The challenge for UNHCR is now how best to revitalize the existing protection regime, how to restore its credibility while ensuring its flexibility to absorb new protection notions in order to provide protection for refugees in mass influx situations, in the context of individual asylum systems and in the search for protection-based solutions.

To best match topics, participants and outcomes, the Global Consultations process has been designed along three tracks: the first track involves the Ministerial Meeting of States Parties; the second track comprises a series of Expert Roundtables; the third track will focus on policy formulation within the Executive Committee framework.

First track: Ministerial Meetings of State Parties

The Ministerial Meeting of States Parties to be held on 12 December 2001 will hopefully achieve one of the central purposes of the Global Consultations, namely to reconsolidate support around the foundations of refugee protection and to reconfirm the collective commitment of States Parties to implement the 1951 Convention and its 1967 Protocol fully and effectively, in accordance with the object, purposes and intent of those instruments. In addition, it is hoped by all involved that new accessions or the withdrawal of reservations to the 1951 Convention and 1967 Protocol will accompany the meeting. This meeting should also provide the opportunity for States to reflect more broadly on the governance system for international refugee protection of which the 1951 Convention is a part and within which it remains central. This will be the first ever meeting of the States Parties to the 1951 Convention and its 1967 Protocol and will be hosted jointly by the Government of Switzerland and UNHCR.

Second track: Expert Roundtables

The second track, the legal one, deals with certain open interpretative questions regarding the 1951 Convention and 1967 Protocol. The idea here is to examine how and in what directions the law has developed over recent years so as to allow decision-makers to be better informed about how the 1951 Convention is being understood and applied globally today. This examination is being made through a series of discussions in Expert Roundtables, with participants drawn from governments of States Parties, NGOs, academia, the judiciary, and the legal profession. Following informal consultations with a wide range of States, NGOs and other interested parties, UNHCR identified issues for consideration by experts and on which background papers have been commissioned from scholars. Issues for discussion comprise: interpretation of the cessation (Article 1C) and exclusion (Article 1F) clauses; principle of *non-refoulement* (Article 33); supervisory responsibility (Article 35); membership of a particular social group (Article 1A(2); gender-related persecution (Article 1A(2); internal protection/relocation/flight alternative; illegal entry (Article 31); family unity (Final Act of the 1951 UN Conference). The background papers and reports of the Roundtables will be published by UNHCR as a contribution to the 50th anniversary of the Convention. Furthermore, they enable UNHCR to refine its own guidelines on related questions, including in the area of refugee status determination.

Third track: policy formulation within the Executive Committee framework

The third track of the Consultations is structured around a number of protection policy matters, including issues not adequately covered by the 1951 Convention. Through a protection-driven set of discussions within the Executive Committee framework during 2001 and 2002, the following objectives should be achieved: first, to foster a common understanding of the protection challenges and enhance cooperation to address them; second, to identify and promote practical responses to protection problems; and third, to lead to the development of new approaches, tools, and standards to strengthen protection.

The third track is not only about new standard setting, it is also about improving the overall capacity to manage refugee or asylum situations within a proper framework using the existing instruments (e.g. 1951 Convention, 1967 Protocol, OAU Convention). Practical guidance and agreement on what additional tools are required (e.g. Executive Committee conclusions; cooperative arrangements) are only two of the possible outcomes.

The third-track discussions centre on four broad themes as agreed at an organizational meeting in December 2000:[2] protection of refugees in mass influx situations; protection of refugees in the context of individual asylum systems, including the problems inherent in the migration/asylum interface; search for protection-based solutions; and protection of refugee women and refugee children. Responsibility- or burden-sharing, as well as aspects of protection of refugee women and refugee children, are crosscutting themes which are being considered throughout the discussions on the various topics as well as having their own specialized focus. To ensure that the Consultations have a truly global reach, UNHCR is organizing a number of regional meetings in order to broaden participation on issues on the agenda of particular interest to one or other of the regions.

Agenda for protection

The Global Consultations process will help to shape the Agenda for Protection for the coming years. It will be a sort of road map informed by the discussions and conclusions stemming from the various meetings, setting out shared strategic goals, while identifying some key actions needed to attain those goals. A provisional agenda will be submitted to the Ministerial Meeting of States Parties in December 2001 and will provide an opportunity for States to exchange views on how best to build upon the Convention system so as to ensure that aspects of the global refugee situation which are not adequately addressed by the 1951 Convention also benefit from an effective response.

2 See the revised Work Programme for "Third Track" Issues in the Context of the Executive Committee Framework (Working Document), EC/GC/01/1/Rev.2, 9 May 2001.

But today's and tomorrow's refugee problems cannot be addressed in isolation. There is a need for a strengthened partnership between all stakeholders and a clearer understanding of their roles. While it is correct to say that it is a State's sovereign duty to protect the interests of its own population and its borders from abuse, a State also has humanitarian responsibilities towards refugees and other victims of forced displacement. It is important that States commit themselves to establishing asylum systems which responsibly identify who is a refugee, who is otherwise in need of protection, and who is not deserving of protection and should be rejected and returned home in a safe and dignified manner.

Other important stakeholders in achieving durable solutions for refugees are international and national NGOs. They have a potentially important role to play in providing international protection and assistance. Indeed, refugees need the support of NGOs, given the fact that States and UNHCR alone are incapable of protecting and assisting the millions of refugees throughout the world today.

Another important protection partner is the judiciary. Creative judicial interventions by national courts restore the real meaning to the notion of "protection" for refugees by ensuring that all administrative action meets the basic principles of fairness and due process and that refugees and asylum-seekers are treated in a fair, dignified and humane way throughout their time of refuge. Refugees themselves have very often been a neglected group. To make any process dealing with the protection of refugees credible, they themselves need to be involved in the process, including in fora such as the Executive Committee framework.

Outlook for the future

Refugee protection has undergone considerable change over the last fifty years, since the basic global framework came into existence with the conclusion of the 1951 Convention. There is certainly an irony in the fact that protection is both the most promoted in rhetoric and the most disliked in practice of the functions entrusted to UNHCR. Against this backdrop, the Global Consultations process provides a forum to:

- mark the 50th anniversary of the 1951 Convention;
- reaffirm, in a declaration to be adopted at the 12 December 2001 Ministerial Meeting of States Parties, the collective commitment to the 1951 Convention and 1967 Protocol and the values they embody;
- encourage States Parties to withdraw any reservations that they may have made at the time of their accession and encourage States that are not yet Parties to the 1951 Convention/1967 Protocol to accede to these treaties;
- take stock of developments in refugee law and develop guidance on current open interpretative questions of the 1951 Convention;
- foster a common understanding of the protection challenges and enhance cooperation to address them;
- identify and promote practical responses to current protection gaps;
- develop new approaches, tools and standards to strengthen protection;
- enable governments to present their view of how to improve the international governance of the refugee problem and the directions to be pursued for refugee protection in the future.

Clearly, this process is not an exercise without dangers. Some refugee advocates fear that if UNHCR puts the 1951 Convention in any way up for discussion, the organization may end up provoking a consensus around a protection regime of much more limited rights. While acknowledging the dangers, UNHCR does not see things quite this way. Refugee protection is confronted by a number of major challenges which could well overtake existing protection principles unless action is taken to secure an enduring place for them. UNHCR has to contend with a worrying level of disillusionment about aspects of the 1951 Convention; with a deteriorating quality of asylum worldwide; with hundreds of thousands of refugees without access to timely or safe solutions; with less reliable partners for our traditional protection activities; with more concerted efforts now than in the past to regionalize responsibilities and give them a particular understanding not always consistent with international approaches; and in general with a protection system with gaps and strains now

starting to materialize. It is vital to maintain and revitalize a depoliticized and law-based framework for dealing with all refugee situations.

Refugee protection is at a crossroads with some clear pointers as to the desirable road to go down. With a degree of courage, a good dose of imagination, a measure of goodwill and commitment to positive change, coupled with an unwavering focus on better protection for refugees as the goal to be reached, the chances for a revitalized and enduring refugee protection system being in place for the next fifty years are pretty good.

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Résumé

La protection internationale des réfugiés depuis 50 ans — Les enjeux de la protection dans le passé, aujourd' hui et dans l' avenir

par ERIKA FELLER

Directeur pour la protection à l'Office du Haut Commissaire des Nations Unies pour les réfugiés, l'auteur brosse un large tableau des activités dévolues au HCR, que résume la notion de « protection » des réfugiés. Après avoir brièvement rappelé l'histoire de la protection internationale des réfugiés, elle examine la question de savoir si la Convention de 1951 relative au statut des réfugiés est toujours à la hauteur pour résoudre les problèmes liés aux migrations de masse qui caractérisent notre époque. Même si la Convention de 1951 n'est pas idéale, elle reste le seul traité international reconnu par la quasi-totalité des États pour légitimer le régime de protection des réfugiés. Afin de renforcer cette protection, le HCR a récemment engagé une vaste consultation des États, des organisations non gouvernementales et des réfugiés eux-mêmes pour mieux définir les problèmes et y trouver des solutions dans le contexte actuel. L'auteur est convaincu que cette consultation renforcera la détermination de la communauté internationale à mieux protéger les réfugiés.

The ICRC's policy on refugees and internally displaced civilians

by
FRANÇOISE KRILL

Since its foundation in 1863 the International Red Cross and Red Crescent Movement, and in particular the International Committee of the Red Cross, has been concerned with the plight of refugees and internally displaced civilians.

Without listing the Movement's various operations and especially those of the ICRC to assist *refugees* in the past century until the fall of the Berlin Wall, mention should be made of several situations that are memorable in terms of the scale of the exodus and in which the ICRC was able to play a significant role.

As a result of the First World War and its aftermath, millions of people found themselves outside their own countries and in dire straits. The Movement was able to intervene and undertook major emergency relief operations. When the need for longer-term intergovernmental action on behalf of refugees became evident, the Red Cross took the initiative of alerting the newly formed intergovernmental organization, the League of Nations, to this need. Thus it was that the League of Nations established, in 1921, the office of its High Commissioner for Refugees and appointed Fridtjof Nansen of Norway to the post.

FRANÇOISE KRILL is the Deputy Director of Operations, International Committee of the Red Cross.

In 1946, one year after the end of the Second World War, some 1,675,000 people in Europe, Africa and the Middle East were considered as refugees for whom new homes had to be found. Some 320,000 of them were placed under the ICRC's responsibility (refugees from Germany, Austria and the Sudetenland, and Spanish refugees). When the International Refugee Organization (IRO) was established in 1947, the activities of the ICRC and the League of Red Cross Societies[1] gradually tapered off.[2]

Of the big operations undertaken by the ICRC and the League soon after the Second World War, the one that began in 1948 on behalf of Palestinian refugees is worthy of note. In view of the deteriorating situation, the United Nations General Assembly decided on 14 May 1948 to appoint a United Nations mediator in Palestine, Count Folke Bernadotte, President of the Swedish Red Cross.

At the International Conference of the Red Cross[3] held in Stockholm in 1948, Count Bernadotte appealed for assistance to Palestinian refugees. This led to a resolution urging all governments and all National Societies to do their utmost, through normal governmental and Red Cross channels, to alleviate the suffering of the victims of those hostilities, irrespective of race, creed or political status.

On the basis of this resolution, the United Nations General Assembly established the United Nations Relief for Palestine Refugees (UNRPR) on 19 November 1948 to set up the requisite large-scale relief programme, in cooperation with the ICRC, the League and the American Friends Service Committee (AFSC). Agreements were concluded between the United Nations on the one hand and the ICRC and the League on the other, recognizing the latter institutions' independence from the United Nations and making funds available to them to meet the refugees' basic needs. An estimated

1 Now the International Federation of Red Cross and Red Crescent Societies.

2 F. Schnyder, *The Red Cross and the Refugees*, UNHCR, Geneva, 1963, pp. 5, 6 and 11.

3 Under Article 8 of the Movement's Statutes, "[t]he International Conference is the supreme deliberative body for the Movement. At the International Conference, representatives of the components of the Movement meet with representatives of the States Parties to the Geneva Conventions, the latter in exercise of their responsibilities under those Conventions and in support of the overall work of the Movement...".

395,000 refugees were assigned to the care of the ICRC, 300,000 to the League and 245,000 to AFSC.

On 8 December 1949 the United Nations General Assembly created the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) for the direct implementation of relief and works programmes there. The operation was entrusted to UNRWA on 1 May 1950, when the ICRC-League-AFSC relief programme in the Middle East ended.[4]

Ever since then, the relationship established between the international refugee agencies and the Movement's various components has played a significant part in all activities to assist refugees. Particularly noteworthy in this respect is the vast operation to help the hundreds of thousands of Cambodians who fled impending famine and sought asylum in Thailand and the border regions, which was carried out jointly by the ICRC and UNICEF from 1979 onwards.[5]

This introductory chapter would not be complete without mentioning the indispensable role that was played by the Central Prisoners of War Agency, now the Central Tracing Agency (CTA) of the ICRC. While its primary task was to restore contact between prisoners and their families, since the First World War, it has also tried to bring civilians dispersed by war together again.[6] During the Second World War the Central Prisoners of War Agency established a card-index of information concerning civilians dispersed as a result of hostilities, including thousands of forced labourers and deportees — the future internally displaced persons and refugees. At the request of the Allied authorities, this card-index was handed over in 1945 to the International Tracing Service (SIR) established by them at Arolsen in Germany. The ICRC has been in charge of the SIR since 1955.[7] To this day the Central Tracing Agency of the ICRC continues to play a vital role.[8]

4 *Op. cit.* (note 2), pp. 16 and 17.

5 François Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 1994, pp. 947-948. (Shortly to be published in English entitled *The International Committee of the Red Cross and the Protection of War Victims*.)

6 *Ibid.*, p. 904.

7 *Op. cit.* (note 2), p. 12.

8 In 2000 the ICRC forwarded nearly one million family messages, traced 2,457 missing persons, received 6,092 new tracing requests and reunited 2,481 persons with their families.

It was also in 1945 that the ICRC created the travel document which is still in use today. This document is intended for internally displaced persons, stateless persons or refugees who, for lack of proper identity papers, can neither return to their country of origin or usual residence nor travel to a country of their choice willing to grant them asylum.[9]

The activities of the ICRC on behalf of *internally displaced civilians* are at the heart of its mandate. In other words, in all its work in connection with armed conflicts it has provided protection and assistance to the entire civilian population and has taken account of the particular needs of displaced persons — women, children and elderly people — in accordance with the responsibilities entrusted to it by the States in such situations. Besides the extensive operations deployed by the ICRC in the 1980s and 1990s in Ethiopia, Sudan, Angola and Mozambique, particular mention must be made of the one it conducted in Rwanda in aid of one million civilians displaced by hostilities in 1993[10] and 1.2 million in 1994.[11] The ICRC is currently working to help five million internally displaced persons in some fifty countries.

This brief historical review shows the extent to which the Movement's and especially the ICRC's destiny is linked with that of UNHCR. It is therefore not possible to explain the role of the ICRC without also setting forth the role of UNHCR, though concisely and far from exhaustively.

For that reason a brief account will now be given of the various legal texts governing the division of responsibilities between the Office of the United Nations High Commissioner for Refugees and the Movement, in particular the ICRC. The two organizations' responsibilities towards refugees and displaced persons who are victims of conflicts will then be examined in greater detail, to show that there are concurrent or parallel, primary and finally subsidiary responsibilities on both sides. Irrespective of whether the persons concerned are

9 *Op. cit.* (note 5), p. 657.
10 *ICRC Annual Report 1993*, p. 76.
11 *ICRC Annual Report 1994*, p. 53.

refugees or internally displaced civilians, the role of the Central Tracing Agency of the ICRC is permanent.

Policy of the Movement and of the ICRC in particular

A. Some key developments

Without examining the whole framework of legal protection provided by international humanitarian law,[12] it is useful to recall the legal instruments — be they resolutions or agreements — which determine the Movement's policy and especially that of the ICRC on refugees and internally displaced persons.

1. Resolutions of the Movement

Since the Movement was founded, many resolutions have been adopted in that field,[13] but Resolution XXI on "International Red Cross aid to refugees" adopted by the 24th International Conference of the Red Cross at Manila in 1981 and, above all, the accompanying Statement of Policy unquestionably deserve particular attention. By consolidating prior practice and guiding future action, this resolution gave the Movement a genuine policy in aid of refugees, internally displaced persons and returnees. It is to the credit of the accompanying policy statement that it establishes a clear division of competencies between the Movement and UNHCR on the one hand, and between the various components of the Movement on the other.

In Resolution XXI the Movement made a point of stressing that the primary responsibility for refugee protection and assistance lies with governments. Furthermore, in legal terms UNHCR has a primary role in providing international protection and material assistance. The subsidiary and complementary role of the Red Cross is clearly shown by this resolution. Point 1 of the Statement of Policy emphasizes that:

12 The legal protection afforded by international humanitarian law is the subject of other articles in this issue of the *Review*.

13 Resolutions IX, IV and XXXI, adopted respectively by the 10th, 12th and 17th International Conferences of the Red Cross in 1921 and 1925 (Geneva) and in 1948 in Stockholm.

"The Red Cross should at all times be ready to assist and to protect refugees, displaced persons and returnees, when such victims are considered as protected persons under the Fourth Geneva Convention of 1949, or when they are considered as refugees under Article 73 of the 1977 Protocol I additional to the Geneva Conventions of 1949, or in conformity with the Statutes of the International Red Cross, especially when they cannot, in fact, benefit from any other protection or assistance, as in some cases of internally displaced persons."

The Statement of Policy also recalls the need to coordinate activities within the Movement, as well as with UNHCR and governmental and non-governmental organizations working in favour of refugees.

The role of the Central Tracing Agency of the ICRC is also underscored.

Lastly, the Movement and UNHCR are invited to hold regular consultations on matters of common interest and to coordinate their humanitarian assistance.

Other resolutions were subsequently passed but none of them called into question the policy decided on in 1981.[14] However, mention should also be made of Resolution 1 of the 27th International Conference, held in Geneva in 1999, which broke new ground by adopting a plan of action for the years 2000-2003.[15] The plan provides for measures to be taken by the National Societies, the International Federation and the ICRC, according to their respective mandates and in accordance with international humanitarian law, to aid refugees and asylum-seekers in cooperation with UNHCR, as well as internally displaced persons.

14 Resolution XVII of the 25th International Conference (Geneva, 1986) and Resolution 4 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995). See also Resolutions 9 and 7 of the Council of Delegates (Budapest, 1991 and Birmingham, 1993).

15 Plan of Action for the years 2000-2003, *IRRC*, No. 836, December 1999, pp. 880-895, esp. p. 890.

2. The Seville Agreement

The Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement, which was adopted by the Council of Delegates[16] in Seville in 1997, aims to promote close cooperation among the components of the Movement in their international activities and to obviate differences as to the definition and the organization of their respective international activities and responsibilities.[17]

Generally speaking, the agreement determines the role of each component as lead agency according to the given situation. In natural or technological disasters, for instance, the lead agency role will be performed by the Federation, whereas in situations of armed conflicts, internal strife and their direct results the ICRC will act as lead agency.

The agreement furthermore specifies that "the term 'direct results of a conflict' shall also apply to situations in which victims of a conflict are to be found on the territory of a State which is neither party to a conflict nor affected by internal strife, especially following a large-scale movement of refugees".[18] "In order to maintain among the components a coherent approach that will preserve the Movement's unity and independence, a National Society wishing to conclude a cooperation agreement with a specialized agency of the United Nations, shall keep the Federation and/or the ICRC informed. In particular, it shall keep the Federation and/or the ICRC informed of any negotiations likely to lead to a formal agreement with the UNHCR which should be undertaken in association with the Federation and/or the ICRC".[19]

The following sections of this article will focus on the division of responsibilities between UNHCR and the ICRC.

16 Art. 12 of the Movement's Statutes: "The Council of Delegates... is the body where the representatives of all the components of the Movement meet to discuss matters which concern the Movement as a whole".

17 Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement, of 26 November 1997, *IRRC*, No. 322, March 1998, pp. 159-176.

18 *Ibid.*, Art. 5.1, letter A) d).

19 *Ibid.*, Art. 5.8.

It is necessary to stress the important role played by the National Red Cross and Red Crescent Societies and by the Federation in operations to assist refugees.

B. Responsibilities of the ICRC

According to the above-mentioned Manila resolution, several possible scenarios can arise: concurrent or parallel responsibility of UNHCR and the ICRC, which should be assumed in a spirit of complementarity; subsidiary or even complementary responsibility with regard to refugees; and primary and subsidiary responsibilities with regard to displaced civilian victims of conflicts.

1. Refugees

Two categories of refugees are defined in international refugee law: first, persons who are fleeing *owing to a well-founded fear of being persecuted* and who are outside their country of origin;[20] and, second, persons who are fleeing *on account of an armed conflict or disturbances* and who are likewise outside their country of origin.[21]

Apart from a few special provisions, refugees do not receive particular protection under international humanitarian law,[22] nor is there any specific definition of refugees as persons protected by that law. Refugees are above all civilians who are protected as such by international humanitarian law, notably by the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949. The Fourth Geneva Convention confines itself, however, to laying down the criterion of absence of protection by any government.

20 Art. 1 A (2), Convention relating to the Status of Refugees, of 28 July 1951. The Protocol relating to the Status of Refugees, of 31 January 1967, abolishes the time and geographical limitations.

21 Art. 1, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, of 10 September 1969.

22 Arts 44 and 70, para. 2, of the Fourth Geneva Convention of 1949 and Art. 73 of Additional Protocol I.

1.1. Concurrent or parallel responsibility of the ICRC

The ICRC has been mandated by the States to protect and assist the victims of international and non-international armed conflicts. People may, for instance, find refuge in a neighbouring country already racked by internal conflict or which becomes involved in an international conflict with the country of origin of refugees after their flight. In such circumstances it is normal for the ICRC to take an interest in the plight of those refugees, who are also *civilian victims of conflict*. In both the aforesaid cases they are protected both by refugee law and by international humanitarian law. The two organizations consequently each have a parallel responsibility and the tasks are allocated, in a spirit of complementarity, according to needs and to various criteria that will be discussed below.

For example, the ICRC stepped in to help 25,000 Iranians of Kurdish origin who had sought refuge in Iraq and were interned at the Al Tash camp near Ramadi. At the Iraqi authorities' request, the ICRC also endeavoured to find host countries for other Iranians who had fled to Iraq and were regularly visited by it in camps at Shomeli and Ramadi.[23]

These refugees were protected by the 1951 Convention and therefore came within the mandate of UNHCR. After having found refuge in Iraq, they were trapped by the conflict that broke out between Iran and Iraq and from then on were also victims of that international conflict. As such they were protected by the Fourth Geneva Convention and came within the ICRC's mandate. This gave rise to concurrent responsibilities, but the division of labour was unproblematic since the Iraqi authorities did not want the United Nations to intervene on the refugees' behalf. After consultations with UNHCR, it was thus the ICRC which looked after them. It did, however, experience some difficulty in discharging the mandate it had been given, for whereas the protection of refugees in camps comes within the scope of its traditional activity of visiting civilian prisoners,

23 ICRC *Annual Reports* from 1983 to 1988, pp. 59, 62, 68, 67, 77-78 and 79, respectively.

the search for durable solutions does not. The ICRC was therefore making an exception when it embarked on the resettlement of those refugees in third countries.

The situation of people from Liberia and Sierra Leone who had found refuge in Guinea is similar: from the time that the conflict spread to their country of asylum in 2000, they have been protected both by refugee law, in particular the OAU Convention on refugees, and by international humanitarian law. Since then, UNHCR and the ICRC have had concurrent responsibilities. Insofar as UNHCR has been willing and able to discharge its mandate for refugees, the ICRC has concentrated on providing protection and assistance to displaced civilians within Guinea.

1.2. Subsidiary responsibility of the ICRC

For a refugee to be able to benefit from the ICRC's work, he/she must in principle be a victim of a situation of internal or international conflict. But to belong to the category of persons protected by international humanitarian law is not an absolute requirement, for the ICRC's right of initiative allows it to intervene in situations not covered by the Geneva Conventions or the nature of which is disputed. The ICRC performs this subsidiary role either because it is already on the spot, the needs are immense and it is capable of responding to them until UNHCR takes over; or because it is the only institution able to take action if UNHCR is prevented from doing so (i.e. if the host State is not party to the 1951 Convention and/or rejects United Nations' involvement; or if the UNHCR Executive Committee does not wish to act, as was the case in South Africa on account of the *apartheid* policy).

For instance the ICRC, as was mentioned in the introduction, conducted a joint operation with UNICEF on behalf of Cambodian refugees in areas bordering Thailand, which did not want UNHCR to intervene. So after consulting UNHCR and with the consent of the Thai government, the ICRC stepped in, by virtue of

the right of initiative laid down in its Statutes.[24] Insofar as the refugee camps were the target of armed attacks, the ICRC would also have been able to invoke humanitarian law to intervene.[25]

Some more recent examples can also be given:

- The ICRC temporarily acted in lieu of UNHCR for Rwandan refugees in north and south Kivu in July 1994, and for Tanzanian refugees in Kenya, near Mombasa, in 2001. Since it was already on the spot, it provided initial emergency aid until UNHCR could intervene and with the latter's agreement.
- Following the Panamanian government's refusal to allow the United Nations specialized agency to act directly, the ICRC is supporting the National Society's work in aid of Colombian refugees in the Darien region of Panama.
- Since the ICRC was already on the spot with emergency supplies, UNHCR expressly requested it to attend to the Albanian refugees who had arrived in Kosovo from Macedonia in March 2001. The ICRC provided assistance to 8,000 refugees for one month.

1.3. Complementary and permanent responsibility of the ICRC

In cases where UNHCR is able to discharge its mandate, the ICRC remains available for tasks in which its own specific capabilities can be turned to account. Thus in keeping with a long-established practice, it may at any time offer the services of its Central Tracing Agency, in accordance with Point 9 of the Statement of Policy accompanying the 1981 Manila resolution. Only two of the many examples will be given here.

24 See Art. 5, para. 3, of the Movement's Statutes: "The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution."

25 René Kosirnik, "Droit international humanitaire et protection des camps de réfugiés", in *Studies and Essays on International Humanitarian Law and Red Cross Principles, in Honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva, 1984, pp. 387-393.

In the course of the operation to assist the victims of the genocide in Rwanda, the ICRC published, in collaboration with UNHCR, UNICEF and the Federation, a joint declaration on 27 June 1994 emphasizing the importance of family unity and the necessity of keeping the files of all evacuated children. About 150 other organizations took part in this large-scale programme between 1994 and 1997, which solved the problem of almost all unaccompanied children.[26]

In Syria, following the Arab-Israeli conflict, the ICRC continues to maintain contact between separated family members by forwarding family messages for both Syrian citizens and Palestinian refugees. In cooperation with UNHCR, it has also issued travel documents for refugees accepted by third countries but who lacked the requisite identity documents for the journey there.

It also enables refugees to receive surgical treatment, whether or not they are war casualties, by placing its knowlege and expertise at their disposal. It did so for Cambodian refugees in Thailand and Afghan refugees at Peshawar and Quetta (Pakistan), and continues to do so today at Lokichokio (Kenya) for wounded and sick persons coming from Sudan, among them refugees.

1.4. Particular problem areas

Refugee *repatriation* is another of the ICRC's major concerns. Even though it is generally not involved in repatriation operations, the ICRC considers that the time of and conditions for the return of refugees must be carefully assessed by the States and organizations concerned. With its good knowledge of the refugees' countries of origin it can consider all aspects of the situation and make recommendations for refugees to return safely and in dignity. On several occasions, when refugees were being returned to Cambodia,[27]

26 The ICRC, together with UNHCR, UNICEF and several international NGOs, is currently preparing a document summarizing common principles of action for unaccompanied children entitled "Guiding principles on unaccompanied and separated children".

27 With regard to Cambodia, the ICRC's memorandum of 14 November 1990 is partially reproduced in: Frédéric Maurice/Jean de Courten, "ICRC's activities for refugees and displaced civilians", *IRRC*, No. 280, January/February 1991, pp. 9-22.

Afghanistan, Croatia, Bosnia-Herzegovina or Rwanda, the ICRC warned of the risks of premature repatriation to unstable and often mine-ridden areas or where the infrastructure had been destroyed.[28]

The problems of repatriation are frequently aggravated by the presence of *anti-personnel mines*, which have a devastating effect among the civilian population. Besides being a possible cause of displacement, they also seriously hinder the reconstruction of the countries affected and prevent the return of refugees and displaced persons. The adoption of the Treaty of Ottawa in 1997 and the resultant total prohibition of anti-personnel mines are a tremendous step forward. However, the impressive number of mines that have not yet been cleared and the laying of new mines, despite the total ban, show just how essential the Movement's *mine awareness* programmes still are.

Lastly, the ICRC has also been challenged with regard to *the presence of combatants within refugee camps*, in particular in Africa, be it in Zaire and later the Democratic Republic of Congo, in Tanzania, Zambia or Liberia. The ICRC has always clearly stated that, according to the Hague Convention (V) of 1907,[29] the authorities of neutral States which receive armed elements on their territory are themselves responsible for indentifying and disarming combatants and separating them from civilians. This is a precondition for any visits by the ICRC to ex-combatants who, according to the Third Geneva Convention of 1949, are entitled not to prisoner-of-war status but to equivalent treatment and to repatriation at the close of hostilities.[30]

2. Internally displaced civilians

The definition of *displaced persons* to which the international community usually refers is that of the Special Representative of

28 Jean-Philippe Lavoyer, "Refugees and internally displaced persons: International humanitarian law and the role of the ICRC", *IRRC*, No. 305, March-April 1995, pp. 162-180.

29 The Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, applies formally in the context of international conflicts; it may also be applied by analogy to internal conflicts.

30 *The Civilian Character of Asylum — Separating Armed Elements from Refugees*, ICRC's statement to the UNHCR Global Consultations on International Protection, first meeting, 8-9 March 2001.

the United Nations Secretary-General on internally displaced persons, Francis Deng. It is to be found in the *Guiding Principles on Internal Displacement*.[31]

These Guiding Principles adopted by the United Nations reflect the content of international humanitarian law and human rights law. However, the definition of displaced persons is so broad and covers a group of persons whose needs are so varied — as indeed are the motivations behind their displacement — that it goes beyond the capabilities of a single organization.

It must be borne in mind that the ICRC itself is present and active primarily in situations of conflict and internal violence, and that the States have mandated it to protect and assist the victims of those situations, thus also internally displaced civilians. In accordance with the principle of impartiality, the ICRC gives priority to those whose needs are most urgent. It consequently considers an internally displaced person primarily as a civilian, who as such is protected by international humanitarian law.

Although the ICRC contributed to the drafting of the Guiding Principles and supports their dissemination, it will use them solely when international humanitarian law is not or is only implicitly applicable, or when they afford additional protection.

The ICRC has stressed on several occasions that international humanitarian law, which is binding on both State and non-State protagonists in situations of armed conflict, is eminently suited to solving most of the problems of internal displacement on account of such situations.

31 UN Doc. E/CN.4/1998/53/Add.2. — This document defines displaced persons as follows: "internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border". See also Jean-Philippe Lavoyer, "Guiding Principles on Internal Displacement", *IRRC*, No. 324, September 1998, pp. 467-480.

2.1. Primary responsibility of the ICRC

2.1.1. Position on principle

Whenever civilians are internally displaced or otherwise affected by conflict, the ICRC considers itself duty-bound to do its utmost on their behalf, in keeping with the mandate assigned to it by the various States and obviously insofar as the parties to the conflict, the security conditions and the resources at its disposal allow. While emphasizing once again that the primary responsibility lay with the national authorities, the members of the *Interagency Standing Committee* (IASC) recently drew renewed attention, in Rome in April 2000, to the ICRC's specific mandate for internally displaced persons who are victims of armed conflicts and internal disturbances and tensions.[32]

The ICRC's involvement in a given country affected by conflict extends well beyond the areas in which active hostilities are taking place; it consequently takes care of internally displaced civilians wherever they may be in that country. Moreover, in the famous appeal judgment of the International Criminal Tribunal in The Hague, in the Tadic case, the concept of armed conflict was extended to areas bordering those where armed clashes were taking place.[33]

2.1.2. Reminder of some challenges to be met

In general, the ICRC's assistance programmes seek to strike a balance between targeted operations for displaced populations and those intended for the civilian population as a whole. The ICRC wishes first and foremost to promote the affected communities' self-

32 "It should be noted that the ICRC has a specific mandate to provide protection and assistance to victims, including IDPs, of armed conflicts, internal disturbances and tensions. In general, ICRC's mandate is discharged in close cooperation with National Societies of the Red Cross/Red Crescent supported by their International Federation. The National Societies are mandated to assist the most vulnerable within their own countries, including IDPs, and are often the first and only organisation present at the inception of a disaster." Reproduced in Supplementary Guidance to Humanitarian/Resident Coordinators on their Responsibilities in relation to IDPs, 5 April 2000.

33 Marco Sassoli, "La première décision de la chambre d'appel du tribunal pénal international pour l'ex-Yugoslavie: TADIC (compétence)", *Revue générale de droit international public*, Vol. 100, No. 1, 1996, pp. 101-134.

sufficiency and will therefore enhance the host population's ability to absorb the displaced persons. At the same time everything possible will be done to preserve the displaced persons' coping mechanisms and avoid exacerbating the situation by increasing the disparities between different sections of the population, or to prevent corruption and appropriation by the warring parties of the assistance provided.

Thus by advocating better application of international humanitarian law, the ICRC seeks to preserve conditions enabling the civilian population to stay in their homes, to protect people who are uprooted and to encourage their return as soon as the conditions so permit. In this regard the lack of access by humanitarian organizations to victims seriously impedes the implementation of international humanitarian law and the deployment of humanitarian activities in general. This lack of access is due to:

- deliberate obstruction by the parties to the conflict;
- inadequate security for humanitarian workers;
- forced population relocation as a military strategy.

2.2. Subsidiary responsibility of UNHCR

The competent organs of the United Nations (Secretary-General, General Assembly) may, in a given situation, ask UNHCR to assist displaced persons, as was the case in Bosnia in 1992.

Sometimes such requests are made by States which, to avoid a further increase in the number of asylum-seekers already on their territory, would like displaced persons to be assisted within their country of origin as a preventive measure.

UNHCR may also, if it has cause for concern, take an interest in the situation of returnees in their country of origin, which is interlinked with that of internally displaced persons there. For instance, the ICRC and UNHCR agreed in the field on a division of labour in aid of Afghan refugees repatriated from Iran to volatile areas of Afghanistan.

A recurrent scenario is when refugees and internally displaced persons coexist in the same area. In Guinea Conakry, for example, UNHCR looks after those who took refuge there before the conflict broke out, whereas the ICRC takes care of the civilian

population, and in particular those people who were internally displaced on account of the conflict.

2.3. Comparative advantages

It is useful to recall that in a latent or ongoing conflict, the ICRC has several comparative advantages.

First of all, the ICRC bases its work for internally displaced persons on binding treaties, unlike UNHCR, whose work for them is essentially based on the Guiding Principles on Internal Displacement. These principles are not binding and can be invoked by all United Nations institutions. So substitution by UNHCR can only remain exceptional, as is substitution of UNHCR by the ICRC in the case of refugees. Indeed, it is likewise exceptional for the ICRC to be entrusted, on the basis of a policy statement accompanying the 1981 Manila resolution, with the task of looking after refugees, whereas this role was assigned to UNHCR by governments in binding refugee law treaties.

It is essential that the ICRC be able to carry out its mandate to the greatest possible extent, as otherwise internally displaced civilian populations may well see:

- a UNHCR operation based on "soft law", or invoking international humanitarian law without having expert knowledge of it, just as if the ICRC were to avail itself of refugee law without knowing its intricacies;
- their needs met only in government-controlled territory;
- the government concerned restricting the ICRC's activities on the pretext that UNHCR is already taking care of displaced civilians' needs.

Secondly, the ICRC has an operational advantage, because with its 10,000 or so staff members it provides both protection and assistance at the same time, since the latter is not sub-contracted to NGOs, as is the case for UNHCR.

Moreover, thanks to its experience, *modus operandi* and physical proximity to the victims, the ICRC is best able to meet the specific needs of civilians affected by the conflict, who include internally displaced persons.

Finally, the ICRC can act quickly because it does not require authorization from the Secretary-General or the General Assembly to do so. When the needs have been identified and assessed, it can act immediately, subject to the obvious proviso that the warring parties give their consent.

As an intergovernmental organization UNHCR, for its part, is better placed and closer to government than is possible for the ICRC, given the Committee's independence and the dialogue it maintains with all warring parties so as to play to the full its role as neutral intermediary. For example UNHCR, with its great experience in legislation for the enactment of refugee law, has been able to successfully advise the Colombian government on the country's domestic law on internal displacement.

C. Towards healthy complementarity

In spite of an unequivocal legal framework, namely,

- refugee law for refugees, and a clear mandate for UNHCR; and
- international humanitarian law for civilians internally displaced by conflict, and a clear mandate for the ICRC,

some cases of duplication have occurred in the past and may well do so again in the future, in view of the ever-increasing complexity of the situations in which these two organizations are working. Such cases will have to be limited as much as possible, since they are neither in the victims' interests (risk of adverse effects to the extent of jeopardizing the very persons one wishes to protect), nor in the donors' interests in terms of operating efficiency and cost.

Moreover, we must be realistic: in huge countries where the area of hostilties and the area where peace prevails are far apart and there is no danger of the conflict spilling over, the ICRC will not always be able to act on its own throughout the territory.

As far as the Movement is concerned, its components will meet the needs of displaced persons in countries as large as Russia or Sudan by working within the framework of the Seville Agreement, abiding by their respective mandates and performing their complementary functions. Complementary action between the Movement and the United Nations' specialized agencies must definitely also be envisaged.

Whenever UNHCR is requested to intervene in a situation of armed conflict to aid internally displaced civilians and, likewise, whenever the ICRC wishes to intervene in aid of refugees, the immediate reaction of both institutions is, in principle, to start a dialogue so as to exchange information on the activities that have been, or have yet to be, organized. But this dialogue could be further reinforced.

If no agreement on a division of labour between UNHCR and the ICRC is reached in the field, discussions should continue at the headquarters of the two institutions, starting at the operational level and ending, if necessary, at the highest institutional level during the annual meeting between the High Commissioner for Refugees and and the President of the ICRC.

Conclusion

At a time when the 50th anniversary of the Convention on refugees' rights, adopted on 28 July 1951, is being celebrated, it was more than legitimate to speak of UNHCR in an account of the Movement's policy and especially that of the ICRC on refugees and displaced civilians in areas of armed conflict. The brief historical outline at the beginning of this article also shows how much the plight of refugees and then of internally displaced persons has been one of the core concerns of the International Red Cross and Red Crescent Movement. This review of the past has shown to what extent the ICRC, on the one hand, and the League of Nations, then the United Nations and finally UNHCR on the other, have worked with the same humanitarian desire to alleviate the suffering of millions of uprooted people.

It was also important to recall the ICRC's fervent desire for the establishment of the various intergovernmental refugee aid agencies, of which UNHCR is the most recent, a desire expressed in its appeals to States following the exodus caused first by the two world wars, then that of hundreds of thousands of Palestinians due to the situation in the Middle East. It is therefore not possible to speak of competition between UNHCR and the ICRC.

While occasional divergences between the two institutions in the field may give rise to duplication, in most situations the

responsibilities are divided out harmoniously. In closing, we shall therefore state two essential considerations:

- the interests of refugees and internally displaced persons must be safeguarded; and
- the efficiency of aid must be guaranteed.

With regard to the first consideration, it is of paramount importance to ensure that refugees and displaced persons are not left without the protection or assistance of any organization whatsoever.

With regard to the efficiency of aid, it is essential to avoid duplication and to entrust responsibility to the organization that has the most comparative advantages, taking into account the respective primary and subsidiary mandates, as well as the required experience and know-how or the operational capacity to respond to needs.

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Résumé

La politique du CICR à l'égard des réfugiés et des populations civiles déplacées à l'intérieur de leur propre pays

PAR FRANÇOISE KRILL

Depuis sa fondation en 1863, le Mouvement international de la Croix-Rouge et du Croissant-Rouge — et plus particulièrement le CICR — s'est préoccupé du sort des réfugiés et des populations civiles déplacées à l'intérieur de leur propre pays. La Croix-Rouge est ainsi à l'origine de la création d'une structure qui s'intéresse au sort des réfugiés sur le plan international et au centre de laquelle se trouve aujourd'hui le Haut Commissariat des Nations Unies pour les réfugiés. L'article porte principalement sur le défi relativement nouveau que doit relever la communauté internationale, à savoir le déplacement des personnes à l'intérieur de leur propre pays. En guise de conclusion, l'auteur en appelle à la communauté internationale et aux institutions chargées de la protection des réfugiés et des personnes déplacées pour qu'elles veillent à ce que les intérêts de ces personnes soient sauvegardés en tout temps, à l'intérieur de leur propre pays, et que l'efficacité de l'aide dont elles ont besoin soit toujours garantie.

Flight in times of war

by
WALTER KÄLIN

Armed conflict always has been and still is the most important cause of flight. The 50th anniversary of the Refugee Convention provides an appropriate opportunity for re-examining the relevance of international refugee law for persons fleeing armed conflict and its multiple conceptual and legal relationships with international humanitarian law.

The Convention relating to the Status of Refugees was adopted on 28 July 1951 as an instrument aimed at solving the residual problems of refugees in Europe whose flight was caused by the events of World War II.[1] Today, it is internal rather than international armed conflict that forces human beings all over the world to abandon their homes and flee the dangers of war. For a long time, though, the Refugee Convention found little application to situations of flight caused by armed conflict but was instead mainly used to protect victims fleeing the often very stable totalitarian and authoritarian regimes in Eastern Europe and the south. It was thought that the protection of human beings in times of war should be left to international humanitarian law. However, international humanitarian law limits its protection to refugees who are on the territory of one of the parties to an international conflict. This limitation has resulted in considerable challenges to the refugee protection regime as, traditionally, refugees fleeing the perils of war to third States were not regarded as persons hav-

WALTER KÄLIN is Professor of International and Constitutional Law at the University of Bern (Switzerland). He has written extensively on refugee law and was a consultant to UNHCR on several occasions.

ing "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion", i.e. not as refugees as defined by the Refugee Convention.[2]

Another challenge is that the majority of persons forced to leave their habitual residences as a consequence of armed conflict do not become refugees, as they do not flee across an international border, but remain in their country as internally displaced persons. They are a part of the civilian population, but might have specific protection needs.

How is present international law dealing with these different situations and problems? To answer this question, consideration will first be given to the various situations in which civilian victims of armed conflict have to flee (part 1). The article then focuses on international refugee law and shows how, in the past decade, this branch of international law has become more relevant for the protection of persons fleeing across international borders and seeking asylum abroad (part 2). This is followed by a look at the law relating to the protection of internally displaced persons (part 3). In closing, an answer is given to the question, whether and to what extent present international law has created a comprehensive and coherent protection regime for persons fleeing the perils of armed conflict.

1 According to its Art. 1A, para. 2, the 1951 Convention on the Status of Refugees was originally limited to the protection of persons who fled as a "result of events occurring before 1 January 1951", and States had, according to Art. 1B, para. 1(a), the possibility to declare that this phrase should be understood as "events occurring in Europe before 1 January 1951". The temporal limitation was removed by the 1967 Protocol relating to the Status of Refugees, and only five States still retain the geographical limitation.

2 Art. 1A, para. 2. For a discussion of this notion of refugee see below.

Relevant situations

Refugees under the control of a party to a conflict

In international humanitarian law, provisions on refugees can be found in the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and in Additional Protocol I.[3] This means that humanitarian law is concerned only with a limited category of refugees, i.e. refugees who are under the control of a party to an international armed conflict. Such control exists in three situations: (1) nationals of an enemy State have been admitted as refugees to the territory of that party before the conflict starts or seek refuge on its territory during the war; (2) nationals of a neutral country have been admitted as refugees to the territory of that party before or during the conflict; and (3) after fleeing to an enemy State, nationals of that party come under its control again when it occupies all or part of the enemy State's territory.

Under the Fourth Geneva Convention, nationals of a belligerent State who seek refuge on the territory of an enemy State are protected as aliens on the territory of a party to the conflict (Articles 35 to 46). If such persons no longer enjoy the protection of their home country, it is prohibited to treat them as enemy aliens solely because of their national origin (Article 44). Article 73 of Additional Protocol I extends the prohibition of adverse distinction to all persons who, before the beginning of the hostilities, were regarded as refugees or stateless persons under relevant international or national instruments and designates them as protected persons. The principle of *non-refoulement*, the very cornerstone of refugee protection, is addressed in Article 45, paragraph 4, of the Fourth Convention, stipulating that: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".

3 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. — See Jean-Philippe Lavoyer, "Refugees and internally displaced persons: International humanitarian law and the role of the ICRC", *IRRC*, No. 305, March-April 1995, pp. 162-180.

Refugee nationals of a neutral State who find themselves on the territory of a belligerent State with which no diplomatic relations exist belong to the category of protected persons as defined by the Fourth Convention, and this protection is extended by Protocol I to refugees even if such relations do exist.[4]

Finally, refugees who, during an occupation of enemy territory, fall into the power of their country of origin "shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace".[5]

Apart from the prohibitions of *refoulement*, international humanitarian law does not contain special guarantees for refugees but makes sure that, as protected persons, they are treated like other civilians. In contrast, the Refugee Convention creates, as will be set forth below, specific status rights for refugees. To the extent that enemy nationals or nationals of a neutral State are refugees in the sense of the 1951 Convention, international humanitarian law and refugee law complement each other, as refugees benefit from the guarantees of the Refugee Convention even in times of war. It is true that "in time of war or other grave and exceptional circumstances" a State party to the Refugee Convention may take "measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security", but such measures must be provisional and must be limited to what is really necessary.[6] The provision allows, e.g., the internment of refugees prior to their status determination,[7] but full derogation of the Convention during an armed conflict is prohibited.[8]

4 See Art. 4, para. 2, Fourth Convention, and Art. 73, Additional Protocol I.

5 Art. 70, para. 2, Fourth Convention.

6 Refugee Convention, Art. 9.

7 Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation*, A Commentary, Institute of Jewish Affairs, New York, 1953, p. 95.

8 Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, UNHCR, Geneva, 1963, p. 42.

Of particular relevance for refugees who are nationals of an enemy State is Article 8 of the Refugee Convention stating that "[w]ith regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality". This provision clearly reflects Article 44 of the Fourth Geneva Convention.

Refugees on the territory of a State not party to a conflict

As mentioned above, international humanitarian law does not apply to refugees who are citizens of a belligerent State and flee to a State that is not party to the conflict they seek to escape. International humanitarian law furthermore does not specifically address the plight of those who escape internal armed conflicts by fleeing abroad. It is in these two situations that the Refugee Convention becomes particularly important.

Who is protected by the Refugee Convention and what are its main guarantees? The Convention defines refugees as persons who have left their country of origin and are in need of international protection because they have or will become victims of persecution in that country. The disregard for their most fundamental human rights by the country of origin, the involuntary nature of their departure and the fact that most often they arrive in the country of refuge without its prior permission makes them an especially vulnerable category of aliens. The Refugee Convention responds to their needs by granting them a special status that not only protects them against discrimination and against forcible return to the country of persecution (principle of *non-refoulement*), but also provides them with a series of guarantees necessary to start a meaningful new life and relating, e.g., to personal status, property, access to courts, employment, housing, education, social security, welfare or travel documents. In some of these domains, States must ensure that refugees lawfully in the country of asylum receive treatment at least equal to that which is granted to aliens generally in the same circumstances (e.g. property rights, right of

association, housing);[9] in other domains, such refugees have the right to be treated in the same way as nationals (e.g. with regard to rationing, elementary education, or social security).[10]

This privileged status, however, is not accorded to all persons who have fled abroad, but only to those who are refugees as defined by Article 1A, paragraph 2, of the 1951 Refugee Convention. According to this article,

> "the term "refugee" shall apply to any person who:
>
> ...
>
> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

This definition contains several important elements:[11]

- *Well-founded fear*: It is not necessary for the refugee to have already become a victim of persecution. Fear of future persecution is sufficient if such fear is not just subjective but has an objective basis in the facts of the case.
- *Persecution*: It usually takes the form of human rights abuse or similar harm, but must reach a certain level of seriousness in order to be regarded as relevant.
- *Convention grounds*: What distinguishes refugees from other victims of human rights violations who have left their country is the fact that they are persecuted "for reasons of race, religion, nationality, membership of a particular social group or political opinion". Whereas the grounds of race, religion and political opinion do not

9 Refugee Convention, Arts 13, 15 and 21.

10 Refugee Convention, Arts 20, 22 and 24.

11 For a detailed analysis of this provision see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992 (first edition 1979). See also James Hathaway, *The Law of Refugee Status*, Toronto, 1991, pp. 29-188, and Guy Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, 1996, pp. 40 -79.

usually give rise to any particular problems, there is considerable debate today about the meaning of "social group". In contrast, there is widespread consensus that "nationality" not only denotes citizenship but also ethnicity.

- *Outside the country of nationality or habitual residence*: Flight is not a necessary element of the refugee definition. Someone who has left his country without having been persecuted at that time becomes a refugee *sur place* when relevant circumstances change in a way that would make him a victim of persecution were he then to return to that country.
- *Unable or unwilling to avail himself of State protection*: This last element makes sure that refugee status is granted only if protection by the country of origin is not available to the person concerned or if he, in the light of what has happened or will happen to him, cannot be reasonably expected to ask for such protection.

These rather complex requirements show that not everyone fleeing the dangers of armed conflict will be regarded as a refugee in the sense of the 1951 Refugee Convention. In fact, courts in many countries held for a long time that refugee status could not be granted to those fleeing armed conflict. At the same time, it is obvious that even in times of war some persons might be persecuted for Convention reasons. The 1990s in particular have been marked by an increased use of armed conflict, directed against particular groups of persons, as an instrument of persecution in the sense of the Refugee Convention.

Persons displaced within the territory of their own country

As already mentioned, most of those who have to flee the dangers of international or internal armed conflict remain within their own countries and thus become internally displaced persons. International humanitarian law contains a few provisions that specifically mention the problem of internal displacement.[12] Especially important are those provisions that prohibit the deportation of

12 See Lavoyer, *op. cit.* (note 3), pp. 171 ff.

civilians or stress that forced displacement of the civilian populations is not permissible unless the security of the persons involved or imperative military reasons so demand.[13] Despite the limited number of such legal norms, humanitarian law is of paramount importance for the internally displaced, as they are part of the civilian population protected during international armed conflicts by the Fourth Geneva Convention and significant parts of Protocol I.[14] During internal armed conflicts Article 3 common to the 1949 Geneva Convention, as well as the fundamental guarantees of Article 4 and the more specific provisions of Articles 13-18 of Additional Protocol II,[15] are fully applicable to internally displaced persons.

Whereas such persons are almost fully protected during international armed conflicts, the law on internal armed conflicts is much more limited in addressing their protection needs. This is particularly true if a conflict is covered by common Article 3 only but does not reach the threshold of application of Protocol II, or if a country has not ratified the latter instrument. In such situations international human rights law becomes important, for it also affords protection for internally displaced persons who flee situations of tension, violence and disturbances characterized by widespread human rights violations but not amounting to a non-international armed conflict. It remains applicable in all those situations insofar as the State concerned has not legitimately derogated from relevant human rights conventions or that specific guarantees are non-derogable. Admittedly, like international humanitarian law, human rights law does not contain specific guarantees for internally displaced persons, but they are nonetheless fully entitled to invoke all relevant guarantees.

This is of paramount importance. Even though the factual situation of internally displaced persons is often similar to that of

13 Fourth Convention, Arts 49 and 147; Additional Protocol I, Arts 51, para. 7; 78, para. 1; and 85, para. 4; and Additional Protocol II, Arts 4, para. 3(e) and 17.

14 See in particular Protocol I, Part IV, Arts 48-79.

15 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

refugees, from a legal point of view they are not refugees. Although internally displaced persons have departed from their homes, unlike refugees they have not left the country whose citizens they normally are. As such, they remain entitled to enjoy the full range of human rights as well as those guarantees of international humanitarian law which are applicable in a given situation. This is why, in general, they should not be treated like refugees, who are very often treated in accordance with the lower standards applicable to aliens legally present in the country of refuge.

International refugee law and victims of armed conflict

As mentioned above, a traditional understanding of the relationship between international humanitarian law and refugee law maintains that refugee law was not really made to address the plight of those who had to flee the dangers of war and seek refuge abroad. At the same time, international humanitarian law does not provide any protection for this large category of persons in need of international protection. How has refugee law addressed this potential protection gap? The answers have not been universal and uniform but largely regional.

Broad refugee definitions in Africa and Latin America

Ever since the struggles for independence from colonial powers, the refugee situations in Africa have consisted predominantly of large flows of refugees crossing borders while escaping war, civil war and extensive violence. Because of their sheer numbers, it would have been impossible to distinguish, on the basis of a case-by-case determination, between those fleeing persecution for one of the reasons set forth in the Convention and those escaping the general dangers of war. Taking into account the obvious protection and assistance needs of all those flooding in, such a distinction would also have been highly artificial. The 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa, which was adopted to deal with large numbers of refugees in an adequate manner, found a solution by broadening the definition of a refugee. In addition to refugees with a

well-founded fear of political and similar persecution,[16] Article I designates as a refugee

> "every person who, owing to external aggression, occupation, foreign domination or events seriously disrupting public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of residence in order to seek refuge in another place outside his country of origin or nationality."[17]

This definition facilitates the determination of refugees on a group basis and thus departs from the individualistic approach of the 1951 Refugee Convention. Article II on Asylum and Article V on Voluntary Repatriation make clear that, normally, countries of refuge should grant asylum or temporary residence until voluntary repatriation becomes possible.[18] This concept has enabled a flexible solution to be found for many of the largest refugee crises of the past decades.

On the American continent, the refugee crisis of the 1980s in Central America reinforced the idea that a wider refugee definition was needed and that those refugees should be granted asylum until voluntary repatriation became possible. This is the approach underlying the 1984 Cartagena Declaration on Refugees[19] which enlarged the refugee definition following the model of the OAU Convention.[20] The declaration also reiterated the binding character of the principle of *non-refoulement*.

16 Art. I, para. 1, repeats the refugee definition of Article 1A, para. 2.

17 Art. I, para. 2, 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa.

18 See, e.g. Lawyers Committee For Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, New York, 1995, p. 30.

19 *Cartagena Declaration on Refugees*, adopted at a colloquium entitled "Coloquio sobre la Proteccíon Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios" held at Cartagena, Colombia, from 19-22 November 1984.

20 Art. 3 of the Declaration recommends as definition of a refugee "one which, in addition to containing the elements of the Refugee Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".

Temporary protection in Europe[21]

European countries were not ready to fill the gap between the protection guaranteed to refugees under the Refugee Convention and the larger group of persons who are forced to flee their country owing to the dangers of armed conflict or systematic and widespread human rights violations and who may not fulfil the requirements of that Convention. For a long time such *de facto* refugees, as they were then called, were denied asylum but in many countries received a so-called B-status allowing them to remain as rejected asylum-seekers until their safe return became possible.

When large numbers of asylum-seekers arrived after armed conflicts broke out on the territory of the former Yugoslavia in the early 1990s, it soon became apparent that this approach would not work. This gave rise to the notion of temporary protection. The concept was presented by the UN High Commissioner for Refugees in 1992 as an element of the Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia in order to cope with the problems caused by the flight of hundreds of thousands from armed conflict, genocide, "ethnic cleansing" and other serious and systematic human rights violations. As one author succinctly put it:

> "The idea was to provide protection against *refoulement* and respect for fundamental human rights while awaiting return in safety and dignity following a political solution of the conflict in former Yugoslavia. The other intention was to avoid over-

21 The following is based on Walter Kälin, *Towards a Concept of Temporary Protection*, Study on behalf of UNHCR, Division of International Protection, 12 November 1996. See also Walter Kälin, *Interim Report on Refugee Procedures*, International Law Association, Report of the 67th Conference, Helsinki, 1996, London, 1996, pp. 116-139; *ibid.*, *Interim Report on Temporary Protection*, International Law Association, Report of the 68th Conference, Taipei, 1998, London, 1998, pp. 407-426.

whelming the national refugee status procedures already considered as overburdened".[22]

Some European States responded favourably to the High Commissioner's call and around 700,000 persons from Bosnia and Herzegovina and from Croatia thus found refuge in Western Europe,[23] in most cases without being formally granted refugee status. For the majority of these States, "temporary" meant that protection was limited in time until return became possible, and large numbers of refugees returned or were repatriated after the conflicts in Croatia and Bosnia ended. Temporary protection again became an issue during the 1999 Kosovo crisis, and was widely granted on those same terms by the main countries of refuge.

In both situations, temporary protection was applied on the basis of either a political decision by the governments concerned or relevant domestic legislation. An international instrument on temporary protection of a binding nature did not exist during the relevant period, but Member States of the European Union could base their policies on a 1993 Resolution on certain common guidelines as regards the admission of particularly vulnerable persons from the former Yugoslavia.[24] Later, the EU Commission started to work on a Directive on temporary protection. After lengthy preparations the

22 Donatella Luca, "Questioning temporary protection", *International Journal of Refugee Law*, Vol. 6, 1994, p. 535. On temporary protection, see also Morten Kjaerum, "Temporary protection in Europe in the 1990s", *ibid.*, Vol. 6, 1994, p. 444; Reinhard Marx, "Temporary protection — Refugees from former Yugoslavia: International protection or solution-oriented approach?", European Council on Refugees and Exiles, June 1994; Joanne Thornburn, "Transcending boundaries: Temporary protection and burden-sharing in Europe", *International Journal of Refugee Law*, Vol. 7, 1995, p. 459; Karoline Kerber, "Temporary protection in the European Union: A chronology", *Georgetown Immigration Law Journal*, Vol. 14, (1999, p. 1, pp. 39-50).

23 Report of the Sub-Committee of the Whole on International Protection, UN Doc. A/AC.96/858, 17 October 1995, para. 5.

24 Adopted by the Meeting of the Ministers of the Member States of the European Communities responsible for immigration in the Member States of the European Communities, Copenhagen, 1 and 2 June 1993. Reprinted with comments by Elspeth Guild, *The Developing Immigration and Asylum Policies of the European Union*, Adopted Conventions, Resolutions, Recommen-dations, Decisions and Conclusions, The Hague/London/Boston, 1996, pp. 293-309.

Commission, in March 2000, presented a proposal for such a directive that also addressed issues of burden-sharing in mass-influx situations.[25]

The purpose of the Directive is "to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin ..." (Article 1). According to the proposal, the EU Council, in the event of a mass influx, would take a decision by a qualified majority vote to grant temporary protection to a specific group of persons for one year. Such protection could be extended for a maximum of another year. Asylum procedures would be suspended during that period, unless a person requested an individual determination of his/her refugee status. Beneficiaries would be given a residence permit during the duration of temporary protection, have access to the employment market and to suitable accommodation, medical services and education. They would also have a right to family reunification. Temporary protection would be ended when "the situation in the country of origin is such as to permit the long-term, safe and dignified return, in accordance with Article 33 of the Geneva [Refugee] Convention and the European Convention on Human Rights" (Article 6). If such return was not possible after two years had elapsed, States would start normal asylum procedures.[26]

Broadening the interpretation of Article 1A(2) of the Refugee Convention[27]

Critiques of temporary protection maintain that it excludes genuine refugees from full enjoyment of the guarantees provided by the Refugee Convention. At the same time, it is still a moot

25 Proposal for a Council Directive on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 24 May 2000, Doc. 500PC0303.

26 At the time of writing this article, the Directive had not been adopted but a political consensus had been reached to adopt it soon.

27 For details and references to case law, see Walter Kälin, "Refugees and civil wars: Only a matter of interpretation?", *International Journal of Refugee Law*, Vol. 3, 1991, and "Non-State agents of persecution and the inability of the State to protect", *Georgetown Immigration Law Journal*, No. 3, Vol. 15, 2001, pp. 415-431.

question as to whether and under what conditions persons fleeing armed conflict might qualify as refugees under its Article 1A, paragraph 2. It is not contested that among those coming from a war-torn country, Convention refugees may be found (e.g. persons persecuted for political opinions not related to the conflict). However, under what circumstances could measures taken by the parties to the conflict amount to relevant persecution? It is sometimes held that the existence of war or civil war as such does not constitute persecution. Usually, one of the following three reasons is given:

- Insofar as someone becomes the victim of military and security operations of the government against an external or internal enemy, he or she, even if singled out, is not persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, as the State is only exercising its legitimate right to defend itself against an external attacker or internal insurgent.
- In order to be considered as persecuted, a person must not just experience the plight suffered by everyone in a country. He or she must become an individual target of persecutory measures to be entitled to refugee status, not just an accidental victim of military actions directed against the armed forces of the enemy. Therefore, persons fleeing war and civil war do not meet the requirement of "differential treatment" or of being "singled out for persecution".
- Insofar as the victim fears persecution by non-State actors (insurgents, separatist groups, etc.), some countries, most notably Germany, Switzerland and France, maintain that relevant persecution must be attributable to the State; therefore, refugee status is not granted if the State is unable to protect the victim against persecution by non-State actors.

All three arguments raise complex questions of refugee law that cannot be discussed here in detail. Suffice it to say that less restrictive interpretations of Article 1A, paragraph 2, of the Refugee Convention are not only possible but also warranted. Thus, military or security operations directed against a particular group must be regarded as racially, religiously, politically, etc., motivated if their target is a group of persons *hors de combat* who share certain racial, religious or political characteristics and if the measures taken are

disproportionate, e.g. because they are not justified by compelling reasons or are much harsher in the case of that particular group than they would be in the case of persons not regarded as (potential) enemies by the State. In such situations, victims are considered as being singled out for persecution when they become targets of unjustified military and security operations because they are regarded as untrustworthy elements or allies of the enemy who deserve intimidation and punishment. Finally, with the exception of the countries mentioned above, the large majority of countries recognize today that persecution by non-State agents is relevant if all other necessary requirements are met.

Protection of internally displaced persons: The Guiding Principles on Internal Displacement

Background

Awareness of the plight and growing number of internally displaced persons all over the world started to grow within the international community in the early 1990s. The UN Commission on Human Rights decided in 1992 to study the question of internal displacement, and a mandate was given to Dr Francis Deng, Representative of the Secretary-General on internally displaced persons. As part of his activities, the Representative submitted a comprehensive Compilation and Analysis of Legal Norms[28] pertaining to internally displaced persons to the Commission on Human Rights in 1996. The conclusion reached in this study was that there are only minor gaps in present international humanitarian and human rights law applicable to internally displaced persons. At the same time it made clear how complex and complicated the application of these provisions is in an actual situation of displacement.

The Commission welcomed the Compilation and requested the Representative to develop a normative framework to enhance the protection of internally displaced persons. In response to that request, a group of independent experts prepared the Guiding

28 UN Doc. E/CN.4/1996/52/Add. 2.

Principles on Internal Displacement with a view to restating the relevant law in a short and "user-friendly" form.[29] These Guiding Principles were submitted to the Commission on Human Rights in 1998. Since then, they have been widely distributed.

Content

The Guiding Principles define internally displaced persons as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border". This description of an internally displaced person highlights two elements: (1) the coercive or otherwise involuntary character of that person's movement, and (2) the fact that such movement takes place within national borders. Even though most displacement occurs during armed conflict, the Guiding Principles thus cover other situations too.

The document states in Section I, on *general principles*, that the Guiding Principles "shall be observed by all authorities, groups and persons irrespective of their legal status" (Principle 2). What does this mean? According to a traditional view, human rights provisions, apart from a few exceptions, impose direct obligations on States and State agents only. Conversely, international humanitarian law applicable in situations of non-international armed conflict[30] binds all parties to the conflict, including non-State actors. Individuals are indirectly bound by human rights and humanitarian law insofar as they can be prosecuted for violations amounting to war crimes, genocide or crimes against humanity. Principle 2 reflects this present state of international law, but at the same time provides guidelines for anyone dealing with

29 UN Doc E/CN.4/1998/53/Add. 2. — See Jean-Philippe Lavoyer, "Guiding Principles on Internal Displacement", *IRRC*, No. 324, September 1998, pp. 467-480; Robert K. Goldman, "Codification of international rules on internally displaced persons", *ibid.*, pp. 463-466; Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, Washington D.C., 2000.

30 Article 3 common to the 1949 Geneva Conventions, and 1977 Additional Protocol II.

internally displaced persons, including international agencies and non-governmental organizations.

After setting forth some general principles, the document, in Section II, addresses the issue of *protection from displacement*. Of particular importance is Principle 6 explicitly recognizing a right not to be arbitrarily displaced. This right is deduced from a variety of human rights guarantees, including those of freedom of movement and choice of residence and several provisions contained in humanitarian law instruments addressing the issue of forced displacement of civilians. Paragraph 2 of Principle 6 lists some important categories of prohibited displacement, including displacement occurring as a consequence of armed conflict. By stating that displacement of civilians would be arbitrary in situations of armed conflicts, unless the security of the civilians involved or imperative military reasons so demand, paragraph 2(b) reflects several articles of the Fourth Geneva Convention on the protection of the civilian population and of the 1977 Additional Protocols.[31]

The main body of the Principles (Section III, Principles 10-23) relates to *protection during displacement*. These principles first restate the applicable human right and then try to specify the relevance of these general guarantees for internally displaced persons by setting out their meaning in the context of displacement. Many of these specifications have been derived from international humanitarian law and thus apply to situations of conflict-induced displacement. However, numerous other guarantees such as Principle 12, paragraph 3, on the protection of internally displaced persons from discriminatory arrest and detention as a result of their displacement, Principle 18 on the right to an adequate standard of living, Principle 21 on the protection of property, Principle 23 on the right of education and others also apply to persons who have been displaced by disasters or large-scale development projects.

31 See in particular Art. 49 of the Fourth Convention, and Art. 17 of Additional Protocol II.

The next section of the Guiding Principles deals with the issue of *humanitarian assistance*. These principles are of special relevance to organizations helping internally displaced persons. Principle 25 stresses that the primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities, and thus underlines the principle of State sovereignty. Assistance by international organizations and agencies can be delivered only with the consent of the State concerned. Such consent, however, cannot be denied for arbitrary reasons. In particular, if the government concerned is unable to provide the required assistance itself, it cannot, without lapsing into arbitrariness, prohibit access for prolonged periods of time to all organizations providing such assistance.

The document ends with the *post-displacement phase*, addressing return, resettlement and reintegration (Section V, Principles 28-30). Here, Principle 28 is important in spelling out the primary duty and responsibility of competent authorities to establish conditions and to provide the means which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence or to resettle voluntarily in another part of the country. While this does not amount to an individual right to return to one's home, Principle 28 clearly outlines the appropriate solutions to problems of displacement. Principle 29, paragraph 2, provides some guidance on property issues, although it has to be admitted that present international law is rather weak in this regard.

Legal character

The Guiding Principles on Internal Displacement are neither a declaration of the rights of internally displaced persons nor do they constitute, as such, a binding instrument. However, they reflect and are consistent with present human rights and humanitarian law. They do not replace the guarantees of these two bodies of law but try to facilitate their application by restating many of those existing legal provisions which respond to the specific needs of internally displaced persons and by spelling them out in a form that facilitates their application in situations of internal displacement. The Guiding Principles address the full range of human rights and humanitarian law

guarantees. They do not only cover civil and political rights but take economic and social rights seriously, too. Moreover, many of the specific Principles are derived from the Fourth Geneva Convention and the two 1977 Additional Protocols. They thus cover the full range of guarantees which are already binding upon States.

The Guiding Principles also clarify aspects of the protection of internally displaced persons where present international law contains certain grey areas or even gaps.

In doing so, the Guiding Principles provide guidance for all those confronted and dealing with situations of displacement. This is achieved by synthesizing the many applicable norms of international human rights and humanitarian law into clear principles, and by highlighting those more concrete aspects of human rights and humanitarian law guarantees that are of special significance for the displaced. So although not a binding legal document like a treaty, the Principles are based on hard law.

This basis is an important reason why the Guiding Principles have gained, in a relatively short period of time, considerable recognition and standing. *Inter alia*, the Commission on Human Rights, the Economic and Social Council (ECOSOC) and the UN General Assembly have adopted resolutions taking note of the Principles and of the Representative's intention to use them in his dialogues with governments, intergovernmental bodies and NGOs. In January 2000, the Security Council, in a Presidential statement, did the same.[32] Regional organizations such as the Organization of African Unity (OAU) and the Organization for Security and Co-operation in Europe (OSCE) have begun to disseminate the Principles. The Inter-American Commission on Human Rights of the Organization of American States (OAS) has called the Guiding Principles "the most comprehensive restatement of norms applicable to the internally displaced" which "will provide authoritative guidance to the Commission on how the law should be interpreted and applied during

32 Promoting peace and security: Humanitarian assistance to refugees in Africa, S/PRST/2000/1, 13 January 2000.

all phases of displacement",[33] and in its missions to different countries assesses conditions on the ground in terms of the Principles.

Finally, international and national non-governmental organizations (NGOs) have been publicizing and widely circulating the Principles and have organized workshops and meetings in a number of countries, together with regional and international organizations, to discuss how best to implement them in the field. Moreover, several governments have accepted the authoritative character of the Guiding Principles by incorporating them into their laws and policies.[34]

Conclusions

To what extent has present international law created a comprehensive and coherent protection regime for persons fleeing the perils of armed conflict?

It is fair to say that in recent years, the international community has taken major steps forward towards such a regime. International humanitarian law addresses the needs of those refugees who, during an international armed conflict, are on the territory of a party to the conflict. It also protects internally displaced persons during international and internal armed conflicts. Such persons are furthermore protected by applicable human rights guarantees. International refugee law provides protection to those who have left their country because they have a well-founded fear of becoming victims of, *inter alia*, acts of violence carried out in the context of an armed conflict that amount to persecution. For those fleeing armed conflict who are not persecuted in this narrow sense, regional solutions have been found, such as the introduction of a wider definition of refugees in Africa and Latin America or of temporary protection in

33 Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia, 1999, Chap. 4, para. 10.

34 See, e.g. Angola, Conselho de Ministros, Decreto No. 1/01, *Normas sobre o reassentamento das populações deslocados*, Diario da República, I Série – No. 1, 5 January 2001; Burundi, *Protocol relatif à la création d'un cadre permanent de concertation pour la protection des personnes déplacées*, 7 February 2001.

Europe. All these different instruments and sets of legal provisions complement and reinforce each other.

Despite these positive developments, problems regarding the protection of persons fleeing war persist. These include a continuing tendency to interpret the 1951 Refugee Convention too narrowly in the case of persons fleeing from areas of conflict; the fact that despite its strong roots in international humanitarian and human rights law, the legal protection of internally displaced persons is in an early formative stage; and a certain lack of coordination between and cooperation by the multiple international entities dealing with the different categories of persons fleeing situations of armed conflict.

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Résumé

Fuir en temps de guerre

PAR WALTER KÄLIN

Dans quelle mesure le droit international en vigueur a-t-il créé un régime de protection cohérent et complet pour les personnes qui fuient les périls d'un conflit armé ? Le droit humanitaire répond aux besoins des réfugiés qui, lors d'un conflit armé international, se trouvent sur le territoire de l'un des belligérants. Il protège en outre les personnes déplacées à l'intérieur de leur propre pays lors d'un conflit armé international ou non international. Ces personnes sont également protégées par les garanties des droits de l'homme applicables. Le droit international des réfugiés assure une protection aux personnes qui ont fui leur pays parce qu'elles craignent avec raison d'être victimes, notamment, d'actes de violence perpétrés dans le contexte d'un conflit armé et assimilables à la persécution fondée sur les raisons énoncées dans la Convention de 1951. Des solutions régionales, telles que l'élargissement de la définition du réfugié en Afrique et en Amérique latine, ou la protection temporaire en Europe, ont été trouvées pour les personnes qui fuient un conflit armé et qui ne sont pas l'objet de persécutions au sens strict du terme.

The cross-fertilization of international humanitarian law and international refugee law

by
STEPHANE JAQUEMET

International refugee lawyers sometimes have a problem of identity. They are used to living in a small cosy house, of which they know each room and cranny and, if any, each hidden place. After all, the 1951 Refugee Convention and its 1967 Protocol, taken together, contain less than 60 articles. Attempts to provide a more ambitious and more comprehensive treaty-law framework have failed, except on one continent, Africa, where the OAU in 1969 adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa. The problem is that this tiny house cannot accommodate refugee protection in its entirety. Whereas the codification process has been put on hold, the refugee problem has inexorably grown in scope, magnitude and complexity. The logical — and rather pragmatic — response has been non-treaty legal expansion, either by using existing buildings around the tiny house or by erecting, sometimes hastily, legal annexes. The latter have taken on diverse forms, including the adoption of national implementing legislation, jurisprudential developments, and the creation of soft law (through United Nations General Assembly Resolutions and the Conclusions of the United Nations High Commissioner's Executive Committee). As to "squatting" in

STEPHANE JAQUEMET is Chief of the Promotion of Refugee Law Section, Office of the UN High Commissioner for Refugees, Geneva. He previously worked for the ICRC as a delegate and legal adviser.

existing buildings, refugee law has made use of two sister branches of law: human rights law and international humanitarian law.

While much has been written about the interface between refugee law and human rights law, a great deal remains to be said about the relationship between humanitarian law and refugee law.

Firstly, international humanitarian law and refugee law come into contact quite naturally when refugees are caught up in an armed conflict. In that case, such people are at the same time refugees and conflict victims. Logically, they should be under the dual protection of refugee law and humanitarian law, which should apply concurrently. Secondly, international humanitarian law and refugee law, instead of applying concurrently, can apply successively, forming a sort of continuum in terms of protection. In other words, a victim of armed conflict may be forced to leave his or her country because he or she does not obtain adequate protection from international humanitarian law, for instance in all conflicts where there are gross violations of human rights and grave breaches of humanitarian law. In such circumstances, those grave breaches constitute a substantial part of the refugee definition and become the determining factor triggering refugee protection. Thirdly, international humanitarian law may have influenced refugee law in that the latter may have "borrowed" from the former concepts, principles or rules, either at the standard-setting level or at the interpretation stage. One of the cardinal principles of international refugee law, the exclusively civilian character of refugee camps and settlements and, more broadly, of asylum, has been shaped and permeated by a founding principle of international humanitarian law, namely, the principle of distinction (the prohibition of attacks against civilian populations and civilian objects). Another example is the exclusion from the protection of the Refugee Convention of persons who have committed a war crime.

This article will be confined to a brief and non-exhaustive discussion of the first two aspects of the relationship between international humanitarian law and refugee law.

Refugees caught up in an armed conflict: the concurrent application of refugee law and international humanitarian law

The refugee in international and non-international armed conflict

The question of whether refugees are protected by international humanitarian law has been discussed on many occasions in the *International Review of the Red Cross*,[1] and there is no need to return here to an issue that is rather technical. Both as civilians and as persons who do not enjoy the protection of their government, refugees are protected by humanitarian law treaties and by customary law, in the context of both international[2] and non-international armed conflict. In addition, refugees in armed conflict continue to be protected by international refugee law. An antithetical or *a contrario* interpretation of Article 9 of the 1951 Convention leads to the conclusion that the Convention "is to be applied not only in normal peace time, but also in time of war...".[3] Article 5 clearly allows for the concurrent application of the Convention and other instruments granting "rights and benefits" to refugees. In other words, protection by international refugee law does not result in the abolition of broader rights granted by other treaties, such as international humanitarian law treaties. What are the implications and the consequences, for both refugees and States parties, of such concurrent application of refugee law and international humanitarian law? Does concurrent application

1 See Françoise Krill, "ICRC's action in aid of refugees", *IRRC*, No. 265, July-August 1988, pp. 328-350; Jean-Philippe Lavoyer, "Refugees and internally displaced persons: International humanitarian law and the role of the ICRC", *IRRC*, No. 305, March-April 1995, pp. 162-180; International Committee of the Red Cross, "Internally displaced persons: The mandate and role of the International Committee of the Red Cross", *IRRC*, No. 838, June 2000, pp. 491-500.

2 With respect to international armed conflicts, there is a small deficiency or gap in the protection offered by the Geneva Conventions. The gap has been largely but not entirely bridged by Article 73 of Protocol I. See Krill, *op. cit.* (note 1), p. 330 f.

3 Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, UNHCR, Geneva, 1997, p. 42.

increase protection for refugees and create additional obligations for States?[4] What value does international humanitarian law have for refugees caught up in armed conflict?

The two chapters of international law have different histories and represent two different challenges to the "sacrosanct" principle of State sovereignty. In its written form, international humanitarian law came into being in the mid-nineteenth century, while refugee law, like human rights law, is a creation of the twentieth century. Unlike international humanitarian law, refugee law was not designed for the special circumstances existing in times of war. During armed conflict, refugee law has certain weaknesses, which can be partly corrected by humanitarian law:

1. Article 9 of the 1951 Convention relating to the Status of Refugees allows a Contracting State to take "provisionally measures" against asylum-seekers or refugees "in time of war or other grave and exceptional circumstances". Though this provision lays down a certain number of safeguards and limitations, it authorizes a Contracting State to derogate from all the provisions of the Convention. Unlike other human rights treaties, the 1951 Convention does not contain a set of core rights which cannot be waived in any circumstances, so there is a risk of refugee rights being suspended in time of war. Fortunately, international humanitarian law contains important complementary safeguards; it also urges States to show the greatest restraint in applying special measures to protected persons.[5]

2. International refugee law is based on the assumption that refugees are, with some exceptions, accorded the same treatment as aliens in general.[6] In times of war, however, aliens are usually the first to see their rights restricted or reduced. Under Article 7 of the 1951 Convention, such limitations or derogations could affect refugees. Also pertinent is Article 44 of the Fourth Geneva Convention, which reads as follows:

4 Nehemiah Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation*, reprinted by UNHCR, Geneva, 1997, p. 67.

5 See in particular Part III of the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

6 Article 7 of the 1951 Convention.

> "In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government."

The interpretation of this rule makes it clear that the status of a refugee as an alien is largely artificial and should not lead to automatic curtailment of his or her rights:

> "People who are in fact the first victims of the Power at war with their country of asylum and who are in certain cases in favour of the latter's cause, obviously cannot be treated as enemies. The purely formal criterion of nationality must therefore be adjusted, for it rests on an essentially legal and technical conception, and the strict application of such a contradiction would be in contradiction to human reality and contrary to justice and morality."[7]

It is interesting to note that Article 44 of the Fourth Geneva Convention expressly served as a precedent for the inclusion of Article 8 in the 1951 Convention, thus establishing a link between humanitarian law and refugee law.

3. It is generally accepted that dissident groups who, in a non-international armed conflict, control part of a territory, including its refugee population, are bound neither by refugee law nor by human rights law. However, there is no serious disagreement over the question of whether international humanitarian law is binding upon dissident or insurgent groups in internal armed conflict. The nearly unanimous answer is "yes", despite the fact that such groups are not party to international treaties. The reasons given for such an obligation for the insurgent side have not always been convincing,[8] but they have not been seriously challenged. The main and most consistent arguments developed in favour of such an interpretation are as follows:

7 Jean S. Pictet (ed.), *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958, p. 264.

8 François Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 1994, p. 380.

- Article 3 common to the four Geneva Conventions (as well as most provisions of their Additional Protocol II of 1977), is clearly addressed to both sides, stating that "*each* Party to the conflict shall be bound to apply..." (emphasis added). By definition, the "other" party to an internal armed conflict is one or more dissident groups.
- Fundamental rules of international humanitarian law[9] are not only codified as treaty law but have become customary law. Thus, they apply in all circumstances, regardless of whether a party to an armed conflict has formally accepted them or not.
- Rules of international humanitarian law govern not only the conduct of States, or those representing a State, but also the conduct of individuals.
- Violation of these rules incurs individual criminal responsibility, not only during international armed conflicts but also during internal armed conflicts. This is quite a new development. Both Article 3 and Protocol II say nothing at first sight about criminal responsibility and the prosecution of war crimes. In the *Tadic* case, however, the Trial Chamber of the International Tribunal for the former Yugoslavia recognized the existence of a customary rule extending individual criminal responsibility to situations of internal armed conflict.[10]
- The Rome Statute of the International Criminal Court has now clarified some of the points that were still unclear in the Statutes of both ad hoc International Tribunals.[11] According to Article 8 of the Rome Statute, the Court shall have jurisdiction over war crimes, including those committed during armed conflicts that are not international in character. In addition, Article 25(1) is uncompromising with respect to individual responsibility:

9 Including Article 3 common to the 1949 Geneva Conventions and several provisions of the 1977 Additional Protocol II.

10 Judgment of Trial Chamber II in the *Dusko Tadic* case, 7 May 1997, para. 613.

11 For the former Yugoslavia and Rwanda, respectively.

> "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."

The binding character of international humanitarian law for dissident groups is crucial for refugee protection. When refugees are caught up in an internal armed conflict and find themselves under the territorial control of a non-governmental entity, they are left with no other protection than that afforded by humanitarian law. As pointed out above, international refugee law is not binding for dissident groups; it is addressed exclusively to States. The obligation of non-governmental armed groups to respect the rights of refugees is therefore based on international humanitarian law and not on refugee law.

International humanitarian law has further advantages over refugee law:

- The four 1949 Geneva Conventions — which, with their 1977 Additional Protocols, constitute the core of international humanitarian law — have been ratified or acceded to by 189 States,[12] compared with 140 States party to the 1951 Refugee Convention and/or its 1967 Protocol.[13]
- The rules on denunciation are different. While a denunciation of the 1949 Geneva Conventions and their Additional Protocols "shall not take effect until peace has been concluded", a denunciation of the 1951 Refugee Convention automatically takes place one year from the date on which it is received by the Secretary-General of the United Nations.
- Finally, the rules of international humanitarian law cannot, by their very nature, be either derogated from or renounced, as they are a compromise between the concepts of "military necessity" and "humanity".
- In situations where humanitarian law and international refugee law apply concurrently, it is not impossible that a norm of humanitarian law might be at variance with a norm of refugee law. Which norm should prevail in such a case? How should inconsistencies or

12 As at 1 May 2001.

13 As at 1 May 2001.

differences between norms belonging to two different treaties be resolved? To answer these questions the human rights/humanitarian nature of both treaties, which calls for a more dynamic approach to interpretation, should be taken into account. Since both international humanitarian law and international refugee law aim to protect human beings and to secure their basic rights, the norm which offers the best protection to the individual concerned should then prevail. The best interest of the protected person should always be the prime consideration.[14]

Prisoners of war released at the end of hostilities who refuse to be repatriated and apply for asylum

One of the most interesting examples of the concurrent application of international humanitarian law and refugee law is the issue of prisoners of war who, at the end of hostilities, refuse to be repatriated and instead apply for asylum in the detaining State. From a refugee law perspective, a former soldier who has been disarmed and detained by the enemy State can be a refugee. The only conditions for being a refugee are the following:

- applicants must meet the conditions set forth in Article 1, A (2) of the 1951 Refugee Convention, in particular, they must have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;
- there must be no serious reasons for considering that they committed a war crime or a crime against humanity during the time they were fighting; and
- they are required to lay down their arms and cease military activity in the country of asylum.

In many cases of international armed conflict, when prisoners of war are released at the end of the hostilities the reaction of the "Power on which the prisoners depend" — in other words, their country of origin — is ambiguous. Released prisoners of war may be

14 See, e.g., Malcolm N. Shaw, *International Law*, 4th ed., Cambridge University Press, 1997, p. 658.

seen as heroes who have suffered for their country, but they may equally be regarded as traitors or cowards who have been captured instead of accepting a courageous death, or even as collaborators with the enemy. (Though a clear violation of the Third Geneva Convention, a long captivity can be used by the Detaining Power to obtain intelligence from its prisoners.) In the latter two cases, a prisoner of war who is repatriated to his/her country of origin might have a "well-founded fear of persecution" based on one of the five grounds spelled out in the 1951 Refugee Convention. In most cases, the claim to a fear of persecution will fall under the heading of "membership of a particular social group", as released prisoners of war can constitute a category of persons who are perceived as disloyal to their country. This interpretation is in line with the authoritative recommendation of the UNHCR *Handbook*, which states:

> "Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook (...) of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies."[15]

In other cases, the claim can be based on "political opinions" (not necessarily expressed, but rightly or wrongly attributed to the applicant by the authorities of his/her country of origin), "race", "nationality" or "religion".

From a refugee law perspective, the repatriation of such individuals who have a credible claim would amount to a violation of the principle of *non-refoulement*.

In international humanitarian law, the treatment of prisoners of war, including their release and repatriation, is governed by the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War. Two provisions of this Convention are central to the issue of release and repatriation of prisoners of war, and

15 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, January 1992, p. 19.

their inter-linkage with the principle of *non-refoulement* is crucial for refugee protection.

Article 109 of the Third Geneva Convention concerns the release and repatriation of sick and injured prisoners of war during hostilities. The article's third paragraph states that "no sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities". This prohibition constitutes an absolute legal guarantee against *refoulement*, the latter being precisely defined as forcible return or return against the will of the person concerned.

Unfortunately, Article 109 of the Third Geneva Convention applies only in rather exceptional situations. The large majority of prisoners of war are not so sick or injured that they are released and repatriated during hostilities. The release and repatriation of able-bodied prisoners of war (including those who are not seriously sick or seriously wounded) will usually take place at the end of hostilities and will not be governed by Article 109, but by Article 118 of the Third Convention. This is a vaguer and more ambiguous provision and does not take the wishes of the prisoners of war into account. Its first paragraph merely states, quite unequivocally, that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities". Taken out of its broader context and interpreted literally, this provision may well be seen as incompatible with the principle of *non-refoulement*:

> "The conjunction 'and' between the words 'released' and 'repatriated' may, therefore, create the impression that any prisoner of war who is released after the cessation of hostilities must also be repatriated irrespective of his will. In fact, when in the course of the Geneva Conference of 1949, a proposal was made to add to Article 118 a paragraph granting prisoners of war the option of not returning to their country if they so desire, it was rejected in a vote, owing to the apprehension that such a provision would serve as an escape clause for a Detaining Power wishing to

retain prisoners on the pretext that they are unwilling to be repatriated."[16]

The apprehension of States was mainly based on the fact "that at the end of the Second World War a number of States had kept prisoners of war in captivity for a very long time for various reasons. Every effort was therefore made to ensure repatriation as soon as possible after the end of the hostilities."[17] The proposal, made by Austria, to include a clause giving prisoners of war the option of not being repatriated to their country of origin was rejected on other grounds:

> "The Soviet delegation opposed the Austrian suggestion because prisoners of war might not be able to express themselves with complete freedom. Furthermore, the proposed provision might give rise to undue pressure on the part of the Detaining Power. The delegate of the United States concurred in such views and the Austrian proposal was rejected 'by a large majority'."[18]

Not long after the adoption of the 1949 Geneva Conventions, and almost coincidental with the adoption of the 1951 Refugee Convention, the issue of whether prisoners of war can be forcibly repatriated to their country of origin became a major concern in the negotiations leading to an armistice during the Korean War. Thousands of Chinese and North Korean POWs, when interviewed by the United Nations Command, said that they would resist forcible repatriation, because if they were returned, "they would be executed or imprisoned or treated brutally in some way".[19] In other words, they expressed a fear of persecution and asked not to be forcibly returned to such persecution or torture.

Although none of the parties to the Korean conflict had ratified the 1949 Geneva Conventions, all of them gave assurances at the beginning of hostilities that they would apply them *de facto*. They

16 Yoram Dinstein, "Refugees and the law of armed conflict", *Israel Yearbook on Human Rights*, Vol. 12, 1982, p. 102.

17 Jean S. Pictet (ed.), *Geneva Convention relative to the Treatment of Prisoners of War: Commentary*, ICRC, Geneva, 1960, p. 543.

18 Christiane Shields-Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, Schulthess Verlag, Zurich, 1977, p. 170.

19 *Ibid.*, p. 158.

accordingly examined the issue of repatriation in the light of Article 118 of the Third Convention, but they disagreed as to the article's meaning. Negotiations were long and arduous, but eventually ended with all parties signing a special Agreement on Prisoners of War which incorporated the principle that the will of a prisoner of war should be respected. This principle meshed with the nearly contemporaneous resolution of the General Assembly of the United Nations, adopted on 3 December 1952, that "force shall not be used against prisoners of war to prevent or effect their return to their homelands and no violence to their persons or affront to their dignity or self-respect shall be permitted in any manner or for any purpose whatsoever...".[20]

Today it is no exaggeration to say that an interpretation that takes into account the will of the prisoner of war is not only in line with the spirit of the Geneva Conventions, but also reconciles international humanitarian law and refugee law by giving precedence to the principle of *non-refoulement*. It may also be said that this interpretation is authoritative.

> "The point of departure here is that every prisoner of war must be afforded free choice whether or not to return to his country. But this right must be exercised in such objective conditions (out of the control of the Detaining Power) that there cannot be any doubt as to the free exercise of that choice. The option of repatriation is bestowed on the prisoner of war personally, and not on the two States concerned (the country of origin or the Detaining Power)."[21]

The Commentary on the 1949 Geneva Conventions published by the ICRC proposes the following interpretation of Article 118 of the Third Convention, an interpretation that fully conforms to refugee law principles and standards:

> "1. Prisoners of war have an inalienable right to be repatriated once active hostilities have ceased. In parallel (...) it is the duty of the Detaining Power to carry out repatriation and to provide the necessary means for it to take place....

20 UNGA A/RES/610(VII).

21 Dinstein, *op. cit.* (note 16), p. 102.

2. No exceptions may be made to this rule unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually."[22]

The ICRC, which in most international armed conflicts has been able to assume invaluable humanitarian and protection functions vis-à-vis prisoners of war and has almost systematically been a substitute for a Protecting Power, has consistently held the view that prisoners of war at risk of being persecuted in their country of origin must not be repatriated. In the context of the 1990-1991 Gulf War, ICRC delegates interviewed all Iraqi POWs who had expressed their unwillingness to be repatriated and determined that they should be treated as asylum-seekers.[23]

Article 118 of the Third Geneva Convention, as interpreted during successive international armed conflicts, has proved to be a good example of the complementary character of international humanitarian law and refugee law: they do not simply overlap, but instead represent a legal and institutional "hand-over". As long as prisoners of war are held in captivity and there is no obligation to release them, they are protected by the Geneva Convention. They have POW status and are under the responsibility of the Detaining Power.[24] But as soon as there is an obligation to release them, those who would be at risk of persecution in their country of origin are entitled to have their

22 *Op. cit.* (note 17), pp. 546-547.

23 Peter Rowe (ed.), *The Gulf War in International and English Law*, Sweet and Maxwell, London, 1993, p. 203.

24 The responsibility of the State detaining POWs is clearly stated in the Third Geneva Convention, Art. 12, para. 1, which reads as follows: "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them". — POWs must at all times be treated humanely and are entitled in all circumstances to respect for their persons and their honour (*ibid.*, Arts 13 and 14).

claim examined and their refugee status determined by the Detaining Power. This State is no longer merely the Detaining Power but must assume a different responsibility/obligation deriving from refugee law and principles that include, but are not limited to, the principle of *non-refoulement*. Institutionally, the ICRC's mandate to monitor compliance with international humanitarian law should end on the day UNHCR takes over, although in practice some overlapping will be necessary in order to avoid a protection gap.

Thus released prisoners of war who refuse to be repatriated for fear of persecution become "classic" asylum-seekers whose case should be examined in the light of all refugee law rules and principles. If the applicants are deemed to have a well-founded fear of persecution based on one of the five grounds specified in the 1951 Refugee Convention, they will then be granted refugee status, unless there are serious reasons for considering that they have committed a crime that excludes their entitlement to such status, in particular a war crime or a crime against humanity at the time they were engaged in hostilities.

The successive application of international humanitarian law and refugee law — or refugee law as a response to non-respect for international humanitarian law

International humanitarian law is based on the premise that despite the existence of armed conflict, persons not (or no longer) taking a direct part in hostilities must be protected and treated humanely. The law creates a "humanitarian or human rights reserve" in which the civilian population can be protected. Respect for international humanitarian law means that protection must be granted where hostilities take place, and that civilians are not forced to cross international frontiers in order to obtain international protection. If international humanitarian law is grossly violated in a country at war and civilians there can no longer be protected from being targeted, those who flee their homeland will become refugees. Refugee status is then based on the inability or unwillingness of parties to a conflict to respect international humanitarian law, which means that there is a

clear correlation between grave breaches of that law (often constituting war crimes or even crimes against humanity) and refugee protection.

In this section, consideration will first be given to the linkage between the refugee definition and non-respect for international humanitarian law in the country of origin, and then to another important aspect of the humanitarian law/refugee law "continuum". In modern conflicts, refugee situations are often created by population transfer policies or forced displacement. In such circumstances, which may include the practice of ethnic cleansing, "population transfers are not merely a feature of the war, but its principal objective".[25] Such forced movements of civilians, which are a clear violation of international humanitarian law, call for international protection under refugee law.

War crimes and refugee status

The key question here is whether the victim or the potential victim of a war crime who has fled his/her country of origin and has sought asylum in another country is a refugee meeting the rather strict definition of Article 1 A. (2) of the 1951 Convention. While consensus exists that such victims deserve international protection, at least temporarily, some argue that they are not *stricto sensu* refugees, but persons fleeing a situation of war or armed conflict and not persecution. In other words, they would meet the extended definition of the 1969 OAU Convention, but not the stricter one embodied in the 1951 Refugee Convention.

Such an approach has often been guided by practical considerations. Armed conflict produces mass displacements, and it is often impractical to determine refugee status during large-scale influxes. In the specific context of non-international armed conflict, States may argue that claimants have been victimized by non-State elements and that to be applicable the 1951 Convention, though silent on the issue, requires persecution by the State and its agents. Finally, it would be

25 Christa Meindersma, *Human Rights Concerns in Situations of Population Transfers and Population Exchanges*, UNHCR, Geneva, February 1997, p. 77.

politically untenable to insist on granting "permanent" asylum to large groups of people affected by conflict when both host governments and their local populations have become increasingly unsympathetic to the plight of refugees.

Under the 1951 Convention, a refugee is someone who is outside his/her country of origin and has a well-founded fear of being persecuted for one or more of five specific reasons. The fact that persecution took place or was likely to take place during peace or war is not relevant and is not part of the definition. In other words, "there is nothing in the refugee definition which would exclude its application to persons caught up in a civil war"[26] or in an international armed conflict.

The crucial question to ask is whether the relevant individuals have "only" fled from areas affected by war (in which case they may not necessarily meet the strict definition of the 1951 Convention), or whether they have, in addition, been exposed to persecution. In the latter case, these individuals would be refugees according to the 1951 Convention, on condition that the persecution is based on one of the five grounds specified therein.

As many scholars have rightly pointed out, the concept of persecution is not defined in the 1951 Refugee Convention and has not been given a uniform interpretation.[27] But there is agreement that some acts, because of their intrinsic unlawfulness and gravity, are always considered to be persecution. This is particularly the case of a "straightforward threat to life or liberty"[28] and of "the violation of non-derogable human rights".[29]

Less serious acts might also constitute persecution, depending on their consequences for the victims.

Under Article 8 of the Rome Statute of the International Criminal Court, war crimes are grave breaches of the Geneva Conventions or serious violations of the laws and customs applicable

26 Pirkko Kourula, *Broadening the Edges: Refugee Protection and International Protection Revisited*, Martinus Nijhoff Publishers, The Hague, 1997, p. 110.

27 See in particular Guy Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Clarendon, Oxford, 1996, p. 66, and Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1, Sijthoff, Leiden, 1972, p. 188.

28 *Ibid.*, p. 69.

29 Kourula, *op. cit.* (note 26), p. 92.

in armed conflicts. A less technical but more enlightening approach is also found in the said Statute, which lists war crimes among "the most serious crimes of concern to the international community as a whole" (Article 5), as well as among "atrocities that deeply shock the conscience of humanity" (Preamble). War crimes are offensive to human dignity and, as such, always constitute persecution. A number of related questions nonetheless still need to be answered before concluding that a person fleeing a war crime situation is a refugee according to the 1951 Convention.

First, as has already been mentioned, the war crime concerned must be attributable to one of the five reasons recognized by Article 1 of the 1951 Convention. Recent armed conflicts have shown that most war crimes are committed because of the victims' ethnic background — what the 1951 Convention would call "race" or "nationality". Mass deportations and practices such as ethnic cleansing fall within this category. Groups of civilians or individual civilians are also targeted because they are (often falsely) accused of siding with the enemy; in other words, they are deemed to hold a certain political opinion. Membership of a particular social group might also play an important role, as parties to a conflict tend to succumb to the influence of group mentality when they resort to criminal behaviour (collective punishment).

Second, in the context of an armed conflict it is important to determine whether an individual has to show that he/she has been individually singled out or specifically targeted. The answer will very much depend on the nature and type of conflict. In a conflict where international humanitarian law is extensively flouted, where war crimes or crimes against humanity are part of a plan or policy and where armed elements are totally undisciplined, it is likely that all civilians belonging to or associated with the "enemy" side will have a well-founded fear of persecution within the meaning of the 1951 Convention. As Goodwin-Gill puts it, where large groups are seriously affected by unlawful practices, it would be wrong, in principle, to limit the concept of persecution to measures immediately identifiable as direct and individual. The "singling out" or "targeting" requirement should be discarded when there is a clear pattern of persecution of

persons similarly situated to the applicant.[30] In this respect, it is important to emphasize that the 1951 Convention does not necessarily require that there be individualized persecution or fear of persecution, but instead places greater stress on the likelihood of persecution. There are instances when persecution is not selective but generalized, targeting the group or even the entire population or "where it is clear that persecutory measures are applied completely at random".[31] In such cases, the likelihood of persecution exists not on an individual basis but on a group basis, and the group in question can sometimes be the whole population.

Third, with regard to agents of persecution, UNHCR has always maintained the view that persecution is normally related to action by the authorities of the country, but can also be related to acts committed by non-State actors if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.[32] Fear of persecution and the unavailability of protection are interrelated concepts. In situations where part of a territory is under the rebels' control, the government is unable to offer protection to that part of its population. When war crimes are committed by the dissident side, in violation of Article 3 common to the Geneva Conventions or of Protocol II, civilians often have no other option than to flee to another country. Persecution means precisely that there are no local remedies against serious abuses. It represents the failure of a State to protect its citizens, either against its own agents or against any other elements. As Walter Kälin puts it, "the unwillingness of refugees to avail themselves of the protection of their country of origin is well founded if this country is unable to provide the minimum of safety and security that serves as the very foundation of the legitimacy of State power".[33]

30 Goodwin-Gill, *op. cit.* (note 27), p. 77.
31 Grahl-Madsen, *op. cit.* (note 27), p. 175.
32 *Handbook, op. cit.* (note 15), p. 12.
33 Walter Kälin, "Non-State agents of persecution and the inability of the State to protect", in International Association of Refugee Law, *The Changing Nature of Persecution*, 4th Conference, October 2000, Berne, Switzerland, published by Institute of Public Law, University of Berne, 2001, p. 59.

Finally, it is important to note that in a war context, and especially in conflicts eliciting a pattern of war crimes/crimes against humanity, victims of persecution often lack what we call an "internal flight alternative" or a "relocation" possibility. It would be both inhumane and illegitimate to require victims or potential victims of "atrocities that deeply shock the conscience of humanity" to move to another location where he/she is likely to witness or experience similar atrocities.

Prohibition of forced movement of civilians

Concerning the prohibition of forced movement of civilians, international humanitarian law is much more explicit than international human rights law. The law on international armed conflicts applies in the event of armed conflict between two or more States, including situations of total or partial occupation of the territory of a State party to the Geneva Conventions. In cases of occupation, the Fourth Geneva Convention prohibits the deportation and transfer of the inhabitants of the occupied territory. Article 49 reads as follows:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
>
> The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated..."

Article 49 clearly, unequivocally and absolutely prohibits all forms of deportation from the occupied territory to the territory of other States, including that of the Occupying Power, or the forcible transfer of populations or individuals within the occupied territory, including practices such as ethnic cleansing. The only putative exception to this principle is found in its paragraph 2. But it is not a true exception, as that paragraph covers situations different from those stipulated in paragraph 1. Paragraph 2 authorizes the Occupying Power to evacuate the civilian population "when overriding military considerations make it imperative".[34] Evacuation for imperative military reasons is not the same act or the same concept as deportation. The ICRC's *Commentary* on the Geneva Conventions gives as an example of the former "the presence of protected persons in an area [which] hampers military operations".[35] Evacuations for political, religious or racial reasons cannot be considered as exceptions covered by paragraph 2, whose wording is both restrictive and clearly limited to military considerations. Of course, evacuation is authorized when it is in the interest of the civilian population. Under Article 58 of Additional Protocol I, parties to a conflict have, in particular, the duty to remove the civilian population under their control from the vicinity of military objectives.

When an evacuation in accordance with Article 49, paragraph 2, of the Fourth Convention is undertaken, the Occupying Power must be guided by two principles. First, evacuation must be undertaken in a dignified manner and, second, it must in principle not involve displacement beyond the border. Under Article 147 of the Convention, unlawful deportation or transfer is a grave breach. The criminal character of deportation by the Occupying Power has been confirmed both in the Statute of the International Tribunal for the former Yugoslavia (Articles 2 (g) and 5 (d)) and in the Rome Statute of the future International Criminal Court (Article 7 (d) and Article 8, para. 2 (a)(vii) and (b) (viii)). When deportation is carried out as part of a widespread or systematic attack on any civilian population, it is not only a war crime but also a crime against humanity (Article 7 of the Rome Statute).

34 *Commentary, op. cit.* (note 7), p. 280.

35 *Ibid.*, p. 280.

With regard to the situation of aliens on the territory of a party to an international armed conflict, there is no provision similar to Article 49 of the Fourth Geneva Convention. This difference can be explained as follows. In an occupied territory the local population, which is otherwise without any international protection, has to be protected. Non-nationals who happen to be on the territory of a party to the conflict are protected by international law. It is generally admitted that a State has the right to deport individual aliens (with the notable exception of persons who have a well-founded fear of persecution). But as the ICRC's *Commentary* phrases it:

> "...practice and theory both make this right a limited one: the mass deportation, at the beginning of the war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted. (...) Moreover, expulsion, if it does take place, must be carried out under humane conditions, the persons concerned being treated with due respect and without brutality. Persons threatened with deportation must be able to present their defence without any difficulty being placed in their way and must be granted a reasonable time limit before the deportation order is carried out, if it is confirmed..."[36]

The prohibition of any mass or individual deportation that is not based on legitimate State security or military considerations can be deduced from Article 45 of the Fourth Convention and from Article 75 of Additional Protocol I. Article 45 applies to protected persons, including refugees, and contains in its fourth paragraph the principle of *non-refoulement*, whereas Article 75 applies without distinction to all persons affected by armed conflict, sets out the principles of humane treatment and respect for the person and honour of all, and prohibits humiliating and degrading treatment.

Protection against forced displacement exists not only during international armed conflicts but also during internal armed conflicts. In terms of refugees, protection during internal conflicts is essential, as most refugee crises are directly or indirectly linked to non-international armed conflicts. Additional Protocol II contains a rather

36 *Ibid.*, p. 266.

remarkable provision, Article 17, which is inspired by Article 49 of the Fourth Convention. Though much shorter than Article 49, Article 17 of Protocol II sets out the same principle (prohibition of forced movement of civilians) and the same restrictively defined exceptions (security of the civilian population and/or imperative military reasons). Paragraph 2 adds that "civilians shall not be compelled to leave their own territory for reasons connected with the conflict". Violation of that provision is a war crime (ICC Statute, Article 8, paragraph 2 (e)(viii)) and can also be a crime against humanity (Article 7, paragraph 1 (d)).

Conclusion

Since the adoption of the 1951 Refugee Convention, refugee law and international humanitarian law have interacted in many ways. Such interaction has been unavoidable for three main reasons. First, throughout the latter half of the twentieth century, armed conflicts have probably been the main cause of refugee flows. Secondly, both refugee law and humanitarian law aim at granting international protection for the "unprotected", often in different situations but sometimes concurrently. Thirdly, both the ICRC, the "guardian" of international humanitarian law and UNHCR, the "guardian" of the 1951 Refugee Convention and its 1967 Protocol, are major humanitarian players, confronted with similar constraints and problems in their respective operations and working on the basis of a similar "code of conduct".

Recent developments have led and will continue to lead to a closer interface between the two branches of international law. At this point in time, three relatively new avenues towards progressive rapprochement can be identified:

- The first is the debate on the protection of more than 20 million people displaced within their own country. One of the most positive outcomes of this debate has been the drafting of the Guiding Principles on Internal Displacement, a text which reflects and is consistent with existing international law, in particular human rights law, international humanitarian law and refugee law (as applied by analogy to displaced persons).

- The second avenue is the consolidation of international criminal law and international criminal jurisdictions through the establishment of the ad hoc Tribunals for Rwanda and the former Yugoslavia and the adoption of the Rome Statute of the International Criminal Court. International criminal justice will have a dual impact. On the one hand, those responsible for persecuting individuals and thus creating refugee situations may be prosecuted for war crimes or crimes against humanity. On the other hand, international courts produce judicial decisions that play a role in the progressive development of the law. Some of these decisions may be relevant for refugee protection. A precedent exists with the judgment of the ICTY Trial Chamber II in the *Kupreskic* case,[37] which gives an interpretation of what is meant by the notion of persecution in international refugee law.
- Finally, the third avenue that could lead to rapprochement is the largely unused domain of State responsibility for wrongful or illegal acts, including grave breaches of international humanitarian law and the creation of refugee flows, a responsibility which can entail the payment of compensation for loss caused.

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37 *Prosecutor v. Kupreskic*, Judgment of 14 January 2000, paras 588 and 589.

Résumé

Les interactions entre le droit international humanitaire et le droit international des réfugiés

par STEPHANE JAQUEMET

Les liens entre le droit international des réfugiés et le droit international des droits de l'homme sont étroits. Il en est de même entre le droit international des réfugiés et le droit international humanitaire. À l'aide de deux exemples, l'auteur met en évidence l'interdépendance de ces deux branches du droit. Il démontre d'abord que la situation juridique de la victime d'un conflit armé et celle du réfugié ne sont pas identiques, même si elles sont étroitement liées, et soulève ainsi la question de l'application cumulative des deux ordres juridiques. Il examine ensuite un deuxième point d'interaction entre ces deux ordres, à savoir le sort juridique des personnes qui ont fui leur pays d'origine à cause de violations graves du droit international humanitaire (crimes de guerre) et établit finalement que droit humanitaire et droit des réfugiés non seulement peuvent s'appliquer simultanément, mais encore s'influencent mutuellement.

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

by
DAVID P. FORSYTHE

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

DAVID P. FORSYTHE is Charles J. Mach Distinguished Professor for Political Science, University of Nebraska, USA. — The author has followed the work of the ICRC closely since the 1970s when he was a consultant to the Committee on the Reappraisal of the Red Cross (which issued the 1975 Tansley Report or "Big Study"). More recently he has been a consultant to UNHCR. This article derives from a report done for UNHCR, "The mandate of the UNHCR: The politics of being non-political". The author would like to thank those who made that report possible, particularly Jeffery Crisp and Stephane Jaquemet, from UNHCR.

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

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

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

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

The meaning of humanitarian protection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Although traditional discourse makes this subject awkward to present, in reality one has traditional-protection and relief-protection. In traditional-protection[12] the ICRC and UNHCR are found observing the actions of public authorities toward persons of concern under the relevant international norms. On the basis of these norms the agencies make diplomatic or legal representation to the authorities to ensure that such persons are not abused or otherwise treated wrongly. In relief-protection, there can be an element of observation or supervision, along with the central effort to provide the goods and services necessary for minimal human dignity in exceptional circumstances. When the ICRC makes prison visits and also provides goods and services to those detained, it can clearly be seen

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

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

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

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

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

13 See various ICRC *Annual Reports*.

14 UNHCR will submit legal papers to national courts in order to try to defend the rights of refugees. The ICRC, while sometimes observing trials, does not participate in war crimes trials, for reasons discussed further on in the text.

Persons of concern

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

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

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

15 For recent in-depth histories of the ICRC, see François Bugnion, *The ICRC and the Protection of Victims of War*, ICRC, Geneva (to be published in 2001), and John Hutchinson, *Champions of Charity*, Westview Press, 1986. More accessible to the general public is the account by Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, HarperCollins, 1998.

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

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

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

16 Useful overviews include Gil Loescher, *The UNHCR and World Politics: A Perilous Path*, Oxford University Press, 2001, and Guy S. Goodwin-Gil, *The Refugee in International Law*, Clarendon Press, 2nd ed., 1998.

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

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

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

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

17 Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement, *IRRC*, No. 322, March 1998, pp. 159-177.

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

Policy choices

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

The question of discretion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The question of relations with donors

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

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

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

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

26 It is possible that there is little general truth in this regard, as compared to "truth" in particular situations. In the spring of 2001 the head of the ICRC delegation for Israel and the Occupied Territories commented publicly that it was a war crime for an occupying power to establish permanent settlements for its own nationals in occupied territories. The resulting furore in Israel and the United States raised interesting questions not about discretion in general, but about the effect of this particular public statement at that particular time in regional and global affairs. The ICRC has an evaluation unit that is beginning to look at many aspects of traditional protection.

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

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

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

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

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

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

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

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

28 *Op. cit.* (note 18).

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

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

The question of pragmatism *v.* legal standards

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

29 See also William Frelick, "Refuge rights: The new frontier of human rights protection", *Buffalo Human Rights Law Review*, No. 4, 1998, pp. 261-274.—The High Commissioner, Mrs Ogata, having ordered a suspension of UNHCR relief operations given the conditions faced, could have resigned rather than follow the directions of Secretary-General Boutros Boutros Ghali to resume operations. It is not at all clear that the High Commissioner is legally bound to follow the directives of the Secretary-General, as the constituent instrument for UNHCR is silent on this matter.

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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Résumé

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

par DAVID P. FORSYTHE

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

Protection of internally displaced persons affected by armed conflict: concept and challenges

by
MARGUERITE CONTAT HICKEL

The 50th anniversary of the 1951 Convention relating to the Status of Refugees provides us with an opportunity to share a few thoughts on the concept of protection of internally displaced persons, the political factors underlying the problem of displacement and its humanitarian implications.

In recent years, we have seen the focus of attention of the international community, States, United Nations agencies and international governmental or non-governmental organizations turn to a new dimension of population displacement — displacement within a country as a result of non-international conflict. The early 1990s and the end of the Cold War brought a proliferation of a new kind of internal conflict, and with them a sharp increase in the number of people displaced within their own countries. The terms "conflict based on identities", "ethnic conflict", or "religious conflict" are now used in an attempt to characterize the nature of these new confrontations. In States of great strategic importance but with a weakened central authority, the political or religious causes of conflicts are in fact often obscured or manipulated to serve infinitely more profitable economic

MARGUERITE CONTAT HICKEL is a diplomatic advisor and member of the International Organizations Division of the ICRC. She has previously had various field assignments for the ICRC.

interests. Control of natural resources has, often with foreign support, become more than ever an objective for parties to conflict.

In such circumstances, the value of a "civilian" — someone who does not participate directly in the conflict — is measured in terms of the potential gain that person represents. Previously the collateral victims of military operations, civilians are now the preferred policy instruments of belligerents: when they are not simply the direct targets of attacks, populations are taken hostage, forcibly recruited, made to do forced labour, or even deported to achieve a demographic, political or ethnic balance. The displacement of millions of people as a result of conflicts, which has become an inescapable fact of the post-Cold War period, was something to which the international community could not remain indifferent. Initially raised by certain NGOs (particularly the Commission of Churches on International Affairs and the Quakers), taken up by the mechanisms and agencies of the United Nations system and further highlighted by think-tank discussions and pressure from donor countries, the problems of internally displaced persons have gradually found a place on the agenda of multilateral diplomacy, finally reaching the United Nations Security Council, where diplomats address political and humanitarian aspects in parallel.

The issue of "internally displaced persons" (or "IDPs") is now recognized as a phenomenon and has become part, as one of the elements of humanitarian affairs, of the field of international politics.

The protection of internally displaced persons

Although all internally displaced persons have the same needs in terms of safety, subsistence and dignity, they nevertheless come under several categories depending on the very different contexts in which they live. The response must therefore be adapted to their needs and take into account the problems specific to each category.

The protection of internally displaced persons will be considered here from the viewpoint of the general protection of civilian populations, the strategy for its implementation, and the complementarity of approaches by the various organizations involved. We shall not go into the rules of law protecting refugees and internally dis-

placed persons or the respective mandates and activities of UNHCR and the ICRC relevant thereto, since these are the subjects of other articles in this issue of the *Review*.

By "internally displaced person" or "IDP", we mean a person who has been obliged to move within the borders of his or her own country because of an armed conflict or internal unrest. Such people are above all civilians who, as such, are protected by international humanitarian law.

The definition of the protection to which we shall be referring is that adopted by the participants — humanitarian organizations, human rights NGOs and United Nations agencies — in one of the four workshops on protection organized in 1999 by the ICRC: "The concept of protection encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies (human rights, humanitarian law, refugee law). Human rights and humanitarian actors shall conduct these activities impartially and not on the basis of race, national or ethnic origin, language, gender..."[1]

According to this definition, any protection action is based on the rule of law. In other words, it may be argued that humanitarian problems, including those that result from displacement in the event of conflict, are the consequences of a violation, deliberate or otherwise, of rules of law and are primarily the responsibility of national authorities that are under an obligation to provide protection and assistance to the population.

In actual practice, the unwillingness or inability of authorities to assume that obligation has prompted the humanitarian organizations to develop assistance activities. Most of them have also realized that they could not limit their role to that of distributing food or medical aid. Learning from their experience, they now also want to back up their emergency operations with action intended to protect assisted persons, and to reach a consensus on the sharing of roles.

1 *Third Workshop on Protection for Human Rights and Humanitarian Organizations: Doing Something about It and Doing It Well*, 18-20 January 1999, Report, ICRC, Geneva, 1999, p. 21.

What does action intended to protect a person entail? According to the participants in the workshops mentioned above, such action or activity, be it the provision of material help or otherwise, must allow the creation of an environment conducive to respect for the human person, whether it is intended to prevent or terminate a violation or reduce the immediate effects thereof, or to restore decent living conditions.[2] The framework of protection includes three types of activity:

- *responsive action*, taken during the emergency phase and intended to bring violations to an end, reduce their effects or prevent further violations (e.g. by giving emergency food aid, the building of a camp, or contacts with an authority intended to stop a population displacement);
- *remedial action*, taken after the emergency phase and intended to restore human dignity or provide appropriate living conditions for people who have been the victims of violations (e.g. a psycho-social programme for women rape victims, the collection and forwarding of tracing requests for people who have become separated, or the construction of shelters enabling displaced persons to return); and finally,
- *environment-building* that promotes a social, cultural and legal environment conducive to respect for the rights of the individual in accordance with the spirit and the letter of the text of relevant laws (e.g. the training of officers in the rules for the conduct of hostilities, support for prevention programmes on the dangers of anti-personnel mines).

These three types of activity can be undertaken simultaneously by an organization, but some agencies prefer to concentrate on a single type of activity. They can also mesh in with modes of action or working methods used by humanitarian organizations in their contacts with authorities,[3] i.e.:

2 *Fourth Workshop on Protection for Human Rights and Humanitarian Organizations: The Challenges of Complementarity*, 16-18 February 2000, Report, ICRC, Geneva, 2000.

3 See also Paul Bonard, *Modes of Action Used by Humanitarian Players: Criteria for Operational Complementarity*, ICRC, Geneva, 1999.

- *persuasion*, intended to convince authorities by dialogue (e.g. by confidential oral or written approaches) to end a violation or to help the victims of a violation;
- *denunciation*, intended to exert pressure on the authority and compel it against its will, to end a violation or help the victims thereof (e.g. by publishing reports on human rights violations, or issuing public appeals);
- *substitution*, whereby the organization seeks to act in lieu of the authority to end a violation or help the victims of that violation (e.g. by delivering food or installing latrines). The aim of another form of substitution — indirect or institutional support — may be to reinforce the capabilities of authorities.

Generally, each organization uses a "preferred mode of action", and modes of action can be combined. Certain human rights organizations are more inclined to publicize their information and even to denounce those responsible for violations, whereas other operational organizations prefer to use the substitution mode and assist displaced persons directly. In general, an organization will base its action on the strategy it feels is most suitable, depending on its mandate or expertise and on the authorities' attitude and capabilities.

For its part, the ICRC believes in an approach based on persuasion and continuing and confidential dialogue with all parties to a conflict, be they State players or armed opposition groups. Deployment of its delegates in the field, particularly in sensitive areas, enables it to keep the situation under constant review, to monitor application of the law, and to make the appropriate representations to political and military authorities in order to end or prevent a violation. An approach of this kind relies on the establishment of a relationship of trust with all the parties; in the opinion of the ICRC it is essential to be able to have access to victims and ensure the safety of humanitarian personnel. Its activities in Colombia are a good illustration of the modes of action that serve as points of reference for it. That being said, if confidential approaches do not work, the ICRC is always able to mobilize the diplomatic community or even, in exceptional cases, to resort to public appeals in order to resolve a situation. Both modes of action, persuasion and substitution, are often used in tandem. And

the ICRC will more often than not back up its diplomatic approaches to the parties with operational activities in the field intended to enable the civilian population to remain in their homes, to protect them during displacement or prevent further displacements, and then to facilitate the local integration or the return of displaced persons.

Specifically, the ICRC can provide material, medical and food aid (shelter, water, evacuation of the wounded, etc.) and give technical support to the authorities (dissemination and training). In the realm of active protection it will, for example when family ties have been disrupted by conflict, register those who have been displaced, try to trace those who have disappeared, arrange for the exchange of Red Cross messages and reunite the members of dispersed families. It will also offer its services to visit people who have been arrested. Special attention is given to persons and groups deemed to be particularly vulnerable (unaccompanied children and women, the elderly, etc.).

In situations of armed conflict and internal disturbances the ICRC will in fact always try to give priority to those with the most urgent needs. Because of their precarious situation, displaced persons are frequently, although not exclusively, among the main beneficiaries of its work. Moreover, the host populations, which are sometimes minority groups or resident populations that have been unable to move away, often have to face a situation that is just as difficult, if not worse. Instead of developing programmes tailored to the needs of the displaced persons, it will then be necessary to adopt an overall approach and define the appropriate operational modes according to the context.[4] Finally, by virtue of its recognized right of initiative and its status as a neutral and independent institution, the ICRC will be able to act as an intermediary between the warring parties themselves

4 As in Angola, where the ICRC is developing assistance programmes (water, food, seed distributions, etc.) for both the resident and the displaced population of the Huambo suburbs, or in Afghanistan, where it is helping the populations *in situ* so as to avert displacements.

or between those parties and the displaced persons so as to facilitate contacts between them, or even to settle a humanitarian problem.[5]

Population displacements very often take organizations by surprise, obliging them to attend to the most urgent matters first and react in a rather unprofessional and disorganized manner. Hence the importance for organizations of exchanging information, constantly analysing a situation, and organizing in a concerted fashion the planning of an operation by preparing intervention plans and setting up contingency stocks of equipment and food on the spot, etc. It goes without saying that the quality of a humanitarian response in terms of protection and assistance depends largely on the aid organizations' state of preparedness for an emergency.

Finally, it would be pointless today to talk of the protection of displaced persons without raising the question of access to victims: too many displaced populations nowadays remain unprotected because they are inaccessible. The reasons for this are rarely logistical (lack of communication channels, configuration of the terrain) or political. More often than not, they are purely a matter of security: the parties to the conflict refuse access, or even deliberately target humanitarian personnel. Without going into detail, we note that the debate on the possible or desirable role of armed or peace-keeping forces in safeguarding humanitarian activities, or even refugee camps, is in progress. The risks inherent in the politicization of humanitarian work and the merging of political, military and humanitarian mandates should, however, be borne in mind, particularly in situations of protracted crisis.[6]

Nevertheless, no action to provide effective and lasting protection can be contemplated unless there is a satisfactory security

5 Such as the return by boat from Monrovia to their home region in south-eastern Liberia, organized at the beginning of 2001, of several hundred displaced persons who had fled the fighting ten years earlier and had been living since then in poverty in the Liberian capital. Or in Sri Lanka where, at the request of the security forces and the *Liberation Tigers of Tamil Eelam* (LTTE), the ICRC is facilitating the passage across the dividing lines for persons and food convoys for the civilian population.

6 Meinrad Studer, "The ICRC and civil-military relations in armed conflict", *IRRC*, No. 842, June 2001, p. 367.

environment, and unless belligerents understand and accept the role of humanitarian organizations.

Coordination with regard to protection

The framework of protection developed by humanitarian NGOs and organizations and described above can be operationally useful to humanitarian players in terms of the complementarity of various activities. With these concepts it should also be possible to make the humanitarian response not only more consistent and predictable, but also more effective for the victims of violations, including internally displaced persons.

Within the United Nations system, too, a study has been carried out with a view to conceptualizing the idea of protection and setting up a coordination mechanism.[7] More recently, the Senior Interagency Network on Internal Displacement was mandated by the Interagency Standing Committee (IASC) to evaluate the quality of humanitarian responses to displaced persons, identify gaps in protection and assistance and make recommendations to the agencies. Four missions and six months later, in April 2001, the creation of a small non-operational coordination office was proposed: the Internal Displacement Unit, in the Office for Coordination of Humanitarian Affairs (OCHA), with the aim of formalizing and strengthening coordination and humanitarian response and the support of the international community for the issue of internally displaced persons.

Lastly, on the normative level, a major survey was undertaken by Francis Deng, Representative of the UN Secretary-General on Internally Displaced Persons, which led, among other things, to the publication in 1998 of the "Guiding Principles on Internal

7 "Protection of internally displaced persons", adopted in 1999 by the IASC and finalized in April 2000: "Plan of action for follow-up to the IASC policy on the protection of IDPs" and "Supplementary guidance to humanitarian/resident coordinators on their responsibilities in relation to internally displaced persons".

Displacement". These Principles, which provide a very broad definition of the concept of displaced person, include elements of international humanitarian law, human rights and refugee law covering all the phases of internal displacement. However, the Principles, which are part of "soft law", are not legally binding. And in a situation of armed conflict, in particular, it seems essential to us to invoke the peremptory rule first, i.e. the rules of international humanitarian law applicable to international and non-international armed conflicts that are binding both on State players and on armed opposition groups.[8] Finally, advocacy of the cause of internally displaced persons is another important part of the role of the Secretary-General's Representative in protection matters.

The problem of internal displacement: a humanitarian challenge or an escape for the international community?

The attention given by the international community to the problem of internal displacement has certainly helped to make people aware of the plight of those millions of uprooted civilians and to describe the phenomenon that some have rightly called an "exodus within borders".[9]

While welcoming this interest, we must at the same time analyse its operational and political consequences:

- In terms of definition, first of all: humanitarian organizations, States and donors use the same acronym, "IDPs", or term, "internally displaced persons", to denote categories of persons confronted with different situations. But who are they talking about?: Persons recently displaced as the result of a conflict? Persons displaced, regrouped or resettled by force? Displaced persons who have been resettled or have become more or less integrated into the suburbs

8 See on this subject Jean-Philippe Lavoyer, "Guiding Principles on Internal Displacement: a few comments on the contribution of international humanitarian law", *IRRC*, No. 324, September 1998, pp. 467-480.

9 David A. Korn, *Exodus within Borders. An Introduction to the Crisis of Internal Displacement*, The Brookings Institution, Washington DC, 1998.

of a city? Economic migrants ? Or persons displaced as the result of a natural disaster? The use of a simplistic catch-all term ("IDPs") — not to mention its dehumanizing nature — is bound to give rise to unreliable estimates and exaggerated figures, and to a humanitarian response that is inappropriate, poorly coordinated, or even dangerous as far as protection is concerned. Semantic confusion engenders operational confusion.

- Next, in terms of the target group: in focusing on people internally displaced as a result of conflict there is an obvious risk that protection will be limited to that specific category of person, to the detriment of the rest of the population. It is essential to repeat here that an internal conflict affects whole sections of the population. Those that have been unable to flee or host communities often suffer a fate very similar to that of the displaced persons themselves. Unless segmentation of assistance by target group is part of an overall approach, it is often the source of tensions between host populations and stigmatized displaced populations. In a country ravaged by years of conflict and displacements and lapsing slowly into extreme poverty, the consequences of such tensions must not be underestimated. Over time, the clear distinctions between the categories will become blurred, but without giving way to the harmonious integration of the people from outside. In such situations, should not attention also be given to the far more serious problem of the tens of thousands of long-term displaced persons and that of "urban migrants"?
- In terms of coordination and norms: the special interest taken by the international community in internally displaced persons has been expressed by the establishment, under pressure from donor countries, of a system containing guiding principles, coordination mechanisms and an implementation strategy. It is of course too early to say whether the new Internal Displacement Unit created within OCHA will enable the humanitarian responses by UN agencies in aid of displaced persons to be better coordinated, or whether this structure will simply perpetuate the coordination difficulties already observed. It would be regrettable, however, if these developments in the realm of UN coordination were to endorse, or

even reinforce, the "discriminatory" nature of the approach because of the specific mechanisms set up to respond to the needs of a single category. It is also to be feared that the increasingly frequent recourse to principles that are specifically designed to deal with internally displaced persons and are not binding on States and non-State players will ultimately narrow the scope of the protection granted by international humanitarian law to the entire civilian population.

- Finally, in terms of humanitarian and political factors: the question that may rightly be asked is "Why all this sudden interest?". The introduction to this article described the political context. It remains to be said that as interest in the problem of internally displaced persons grows, the right of asylum is simultaneously being weakened and the obstacles and means used by governments to control migratory flows and contain potential refugees in their countries of origin are being reinforced. "Preventive measures" and "repatriation" are the order of the day, intended to prevent frontiers from being crossed by drawing the humanitarian organizations into the very heart of conflict situations, and to send refugees back from whence they came in conditions that are less and less compatible with the principles of protection. We and others are entitled to ask whether what lies ahead is the end of "refugee" status. The debate is developing against the backdrop of a decline in the amount of public development aid — which fell from 63 to 53 billion US dollars between 1992 and 1998[10] — and a growing proportion of aid given for humanitarian assistance. The consequences of this trend can also be seen in the case of long-term internally displaced persons or those who have settled around cities. The modest response of States is all too evident: they are more inclined to finance visible operational activities that are packaged, sectoral and destined for certain groups of beneficiaries than to commit them-

10 *Global Humanitarian Assistance 2000*, an independent report commissioned by the IASC, from Development Initiatives, May 2000.

selves in a responsible and sustained fashion to strengthening the governmental structures and the economic development of the populations affected. This is paradoxical when we know that those donor countries are constantly calling for a coordinated or even an integrated approach for all humanitarian players.

The problem of internally displaced persons is in fact part of a larger set of problems, that of humanitarian action that some people wish to see as an instrument for other purposes or as a substitute for political commitment. Their expectations are illusory: we are in fact far from being convinced that humanitarian action alone can act as a regulator of disturbances on the planet and serve the State-devised strategy of stemming migratory flows. At a time of lasting crises and the marginalization of poorer States or those deemed to be of little strategic interest, it is in our opinion of paramount importance that politics resumes its place courageously, that humanitarian action finds its own space again, and that both are mobilized to respond together and effectively to the real challenge of the future — the requirement for universal respect for the human person.

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Résumé

Protection des personnes déplacées en raison d'un conflit armé : un concept et des enjeux

PAR MARGUERITE CONTAT HICKEL

Cet article propose quelques réflexions sur la notion de protection des personnes déplacées à l'intérieur de leur pays dans une situation de conflit armé. Après avoir rappelé le contexte qui a amené la communauté internationale à s'intéresser aux personnes déplacées, l'auteur porte son attention sur le concept de protection et les modes d'action auxquels peuvent se référer les organisations humanitaires, dont le CICR, dans leur activité de protection. Analysant les enjeux liés à cette problématique, en particulier le lien entre la consolidation de la notion de personnes déplacées et la mise en péril du statut de réfugié, elle relève le rôle assigné aux organisations humanitaires par les États. Toutefois, ce n'est pas « l'humanitaire » qui pourra prévenir les déplacements massifs de population ou résoudre les problèmes qu'ils posent, mais bien « le politique » : les États doivent s'employer avec une détermination accrue à créer un ordre politique juste qui contribue à prévenir le phénomène des personnes déplacées dans leur propre pays.

Refugee law and international humanitarian law: parallels, lessons and looking ahead

A non-governmental organization's view

by
RACHEL BRETT and **EVE LESTER**

There is a conceptual parallel between international refugee law and international humanitarian law. Both originated in the need to address the protection of persons in the hands of a State of which they are not nationals. By contrast, international human rights law was developed to protect persons against abuses by their own State. International humanitarian law and human rights law have grown closer over the years. International humanitarian law has extended its reach into non-international armed conflicts, and human rights law has been recognized as applying to all individuals within the territory or jurisdiction of a State, even if only temporarily, including during times of armed conflict (though some restrictions can be applied to non-nationals and also during times of armed conflict or similar emergency). Similar developments are beginning to happen in relation to refugee law, but a radical rethinking is needed.

RACHEL BRETT, LL.M., is Associate Representative (Human Rights and Refugees) at the Quaker United Nations Office, Geneva, and a fellow of the Human Rights Centre of the University of Essex, United Kingdom. — EVE LESTER is an international refugee lawyer. She has worked for several non-governmental organizations and is currently NGO Liaison Officer for UNHCR's Global Consultations on International Protection.

The changing nature of refugee situations

Geo-political dynamics since the end of the Cold War have thrown new light on root causes of refugee movements and other forced displacement, and on the responses and solutions. Although the issues of large-scale refugee movements and the links to armed conflict and internal strife were acknowledged in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees, at the time these were perceived as being regional problems. Now refugee movements and other forced displacement are increasingly recognized as taking place more generally in the context of armed conflict or mass expulsion.

The compilation and analysis of legal standards relevant to internally displaced persons, drawing on international human rights law, international humanitarian law and refugee law (by analogy, since by definition it only applies directly to those outside the borders of their own country), and the 1998 Guiding Principles on Internal Displacement, were a breakthrough in recognizing the importance and value of seeing the relationship between these three branches of international law and drawing on the strengths of each. The same has yet to be achieved for refugees, although an interesting example of an early linkage was UN General Assembly resolution 33/165 in 1978. This gave quasi-refugee status to those who had to leave South Africa because of their refusal to enforce the *apartheid* system by serving in the South African military or police forces. (The resolution is known as the CO/Apartheid Resolution and is phrased in general terms but this was its *raison d'être*.) In 1989, the Convention on the Rights of the Child became the first human rights treaty to explicitly include international humanitarian law and refugee law. However, the further tendency within the human rights movement to segregate children from mainstream human rights has meant that the Convention has not yet been as effective a springboard as it might have been.

In the past, "custodians" of different areas of international law have been more concerned to guard their distinctiveness and specificity than to develop the relationships between them. The challenge to legal thinking and its application in the area of refugee protection is as much one to the non-governmental organizations

(NGOs) as to others, since amongst NGOs, too, the tendency has been for each to work within their own "stream" of law. The time has come to accept the logic of the now well-recognized fact that all three branches are designed to enhance the protection of the human person. This implies that rather than starting with the law and deciding whether it is applicable, the starting point should be the factual situation and seeing which legal framework, or combination of frameworks, provides the greatest protection for the individual or group concerned.

It is ironic that although the whole rationale of international refugee law, as set out in the 1951 Convention relating to the Status of Refugees, is the protection of human rights, it is only recently that the human rights of refugees have started to receive serious attention. In part this may be because at the time of the creation of the Office of the High Commissioner for Refugees this issue was seen as a temporary problem which would soon be solved, and because human rights law itself was in its infancy, and so the High Commissioner's mandate was perceived as being "humanitarian". In practical terms, the Cold War dynamic that characterized many years of responses under the 1951 Convention meant that refugee protection was not often explicitly recognized as "needing" international human rights law to back it up.

At the ends of the spectrum, the distinction between the subjects of international humanitarian law and of refugee law is clear-cut: the individual asylum-seeker from classic political persecution is clearly different from the captured combatant in an international armed conflict. What, however, of the mass outflow from East Timor to West Timor following the referendum on independence, or the one from Rwanda into (then) Zaire and Tanzania which included persons who were undoubtedly combatants, some who were not and many whose status was unclear? What of the foreigners in Thailand, some of whom claim to be refugees but whom the government (not a party to the 1951 Refugee Convention or the 1967 Protocol) categorizes as illegal migrants? Features common to all these situations are their "group" nature, and their relationship to situations of internal armed conflict or internal tension or strife.

At the same time, the protracted nature of some of the situations of displacement which persist without being resolved in one of the "traditional" refugee ways — return, resettlement in a third country or local integration — has highlighted the need to rethink or develop the body of law applicable. Over recent years, NGOs have started to recognize the need to apply international human rights law to refugees and asylum-seekers, and to make use of the regional and international human rights bodies and mechanisms which apply these standards.[1] The question which now arises is whether international humanitarian law applies (beyond the specific articles in the 1949 Fourth Geneva Convention and the 1977 Additional Protocol I which provide for the treatment of refugees as protected persons in situations of armed conflict[2]) and is, in some circumstances, more beneficial or appropriate to refugees and displaced groups. In particular, the designation of obligations owed to particular groups which is characteristic of international humanitarian law may be helpful in these situations, particularly if supplemented by the more individualistic, rights-based approach of international human rights law in relation to specific individuals.

Some examples:

Example 1 — Separation of armed elements

In discussing militarization of refugee camps and separation of armed elements, at the March 2001 meeting of the UNHCR Global Consultations on International Protection, UNHCR and those concerned with refugees focused on the separation of armed elements in order to preserve the safety and civilian character of the refugees and the camps. This is understandable, but it leaves unresolved what is to happen to those "separated out" and could be taken as

1 See for example the decisions of the UN Committee against Torture with regard to returning individuals to situations where they are likely to be tortured and the reports of the Working Group on Arbitrary Detention concerning detention of asylum-seekers.

2 (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 44, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, Article 73.

implying, if not actually stating, that (a) they are not entitled to make an asylum claim and (b) they should be returned. The NGO statement recognized the "complex weave" of the various streams of international law which may apply in mass influx situations.[3] It noted that these "*may* permit a strictly circumscribed 'separation' of some individuals, but only in very particular circumstances"[4] and that there is a need for clarification of:

- the legal basis for lawful "separation" activities;
- the rights of the various categories of separated persons;
- the procedural safeguards attaching to a separation exercise;
- the entities responsible for carrying out and monitoring such activities; and
- the conditions for termination of separation (tied to the particular purpose determined for the activity).

Amongst the particular NGO concerns was the danger of the tainting or stigmatizing of those separated, with consequent greater risk for these individuals.[5] The ICRC pointed out that international humanitarian law provides for such persons to be disarmed and interned, and that this is the duty of a neutral State (i.e. the host State to which refugees have fled as a result of armed conflict) with regard to members of the armed forces of parties to a conflict.[6] Thus neutral host States are obliged to separate combatants and other armed elements from refugees, to disarm and intern them, and to provide them with the food, clothing and relief required by humane standards. Furthermore, the ICRC has a role in visiting such internees and

3 UNHCR Global Consultations on International Protection, 8-9 March 2001, Geneva. Statement by the Lawyers Committee for Human Rights on behalf of NGOs, Agenda Item 2(ii): Civilian character of asylum, including separation of armed elements and screening in mass influx situations, as well as status and treatment of ex-combatants.

4 *Ibid.* Emphasis added.

5 *Ibid.*

6 The Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, of 1907, governs relations in the event of international armed conflict. Its provisions are deemed to have attained the status of customary law, and it is considered by the ICRC to apply by analogy to situations of internal armed conflict.

performing on their behalf its traditional protective activities for persons deprived of their liberty for reasons related to an armed conflict.[7]

The ICRC also cautioned against assuming that every former combatant should be excluded from the protection of the 1951 Refugee Convention — rather, each individual case should be considered on its own merits, and Article 1 F. of the Convention should be interpreted restrictively.[8] Simply having borne arms is not in itself justification for exclusion from refugee status, though continuing to participate in military activities may be justification for *non*-inclusion (and is also explicitly prohibited under the OAU Refugee Convention).

This clarification of the application of international humanitarian law and its relationship to refugee law in this type of situation is extremely helpful. However, in practice the host State may need assistance in carrying out such separation and disarmament.[9] Since this is an obligation under international humanitarian law, the ICRC and the other States party to the Geneva Conventions bear a responsibility for ensuring that such assistance is forthcoming.

Example 2 — Detention and internment

The issue of detention features in refugee law, humanitarian law, and human rights law. The applicability of international human rights law to refugee protection in the context of detention has

7 UNHCR Global Consultations on International Protection, 8-9 March 2001, Geneva. Statement by the ICRC on "The civilian character of asylum: Separating armed elements from refugees".

8 This approach is reflected in the Summary Conclusions from the UNHCR Expert Roundtable on Exclusion and Cessation, Lisbon, 3-4 May 2001. See paras (4) and (14).‹http://www.unhcr.ch/issues/asylum/globalconsult/main.htm›.

9 This was acknowledged in the UNHCR Regional Symposium on Maintaining the Civilian and Humanitarian Character of Asylum/Refugee Status, Camps and other Locations, Pretoria, South Africa, 26-27 February 2001, which was held as part of the UNHCR's Global Consultations on International Protection. See e.g. Key Conclusions and Recommendations, para. 2(c).

acquired increasing clarity over recent years.[10] Notwithstanding this, the scope and content of the protections accorded to refugees and the limitations thereto under Article 31 of the 1951 Convention deserve further clarification.[11] Article 31 of the 1951 Convention prohibits the imposition of penalties, on account of their illegal entry or presence, on refugees coming directly from a territory where their life or freedom was threatened. Article 31, paragraph 2, in particular, prohibits restrictions on freedom of movement other than those which are necessary. The principal practice which raises questions of violations of Article 31 of the 1951 Convention is administrative detention of asylum-seekers, which in many cases has punitive qualities despite, and sometimes because of, its administrative character.

In broad terms, international human rights protection clearly applies to refugees and asylum-seekers in situations where international humanitarian law would not apply, including Article 9 of the 1966 International Covenant on Civil and Political Rights which prohibits arbitrary and unlawful detention.

UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers of 10 February 1999 specify that the concept of detention, from an international refugee protection perspective, includes detention in closed refugee camps. The guidelines provide that:

> "For the purpose of these guidelines, UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is

10 See e.g. A. *v. Australia*, Communication No. 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993. See also: "The scope and content of the principle of *non-refoulement*", Opinion of Sir Elihu Lauterpacht CBE QC, and Daniel Bethlehem, Barrister, of 20 June 2001. Paper prepared for a forthcoming UNHCR Expert Roundtable on Articles 33 and 35 of the 1951 Convention, which draws heavily on international human rights law in clarifying the scope and content of international refugee law, in particular the principle of *non-refoulement*. See ‹http://www.unhcr.ch/issues/asylum/globalconsult/nr_opinion.pdf›.

11 As part of UNHCR's Global Consultations on International Protection an Expert Roundtable is to be held in Geneva in November 2001 to examine the scope of Article 31 of the 1951 Convention.

substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory." [12]

In addition, these Guidelines espouse the broad principles which govern applicable human rights standards in the imposition of detention, i.e. detention may only be resorted to, *if necessary*:

- to verify identity;
- to determine the *elements* on which the claim for refugee status or asylum is based (emphasis added);
- in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents *in order to mislead* the authorities of the State in which they intend to claim asylum (emphasis added);
- to protect national security and public order.[13]

It is clear from this that detention must be justified in the individual case, but international refugee law must draw heavily on international human rights law in order to determine whether this is the case. Such an approach is certainly not reflected in much State practice, even where specific findings of violations have been made.

Although the prohibition on arbitrary detention is not stated as a non-derogable right under Article 4 of the International Covenant on Civil and Political Rights, the permissible circumstances for derogation are limited. Since derogation is permitted only in time of public emergency threatening the life of the nation, it is likely that, in the context of asylum, measures of derogation are permitted which are contrary to the State's other obligations under international law.[14]

The (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War contains in its Part III,

12 UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers, Geneva, 10 February 1999, Guideline 1. See ‹http://www.unhcr.ch/issues/asylum/guidasyl.htm›.

13 *Ibid.*

14 The Human Rights Committee is preparing a new General Comment on Derogations which considers, *inter alia*, the implications of the requirement that States Parties, when derogating from their obligations under the International Covenant on Civil and Political Rights, must not do so in a way that is incompatible with their other obligations under international law, and the role of the Committee in supervising this. — On this question see also Louise Doswald-Beck and Sylvain Vité, "International humanitarian law and human rights law", *IRRC*, No. 293, March-April 1993, pp. 94-119.

Section IV, regulations for the treatment of internees, the international humanitarian law equivalent of administrative detainees. Article 79 stipulates that the parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78. These articles limit measures of control to "assigned residence or internment". Moreover, they impose further requirements: they limit the said measures to situations where the security of the Detaining Power make them *absolutely* necessary; stipulate that decisions to place persons in assigned residence or internment must be reviewed "as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose"; provide for a periodic review to be carried out at least twice yearly; specify that the period of internment or imprisonment imposed, in the event of the commission of an offence, must be *proportionate* to the offence committed; and require that decisions to place in assigned residence or internment must be made according to a regular procedure and in accordance with the provisions of the Convention. The procedure must include the *right* of appeal for the parties concerned, with appeals to be decided with the *least possible delay.* In the event of the decision being upheld, it shall be subject to *periodic review*, if possible every six months, by a competent body.[15]

The particularly valuable aspects of these provisions include their relevance for group situations as well as for individual ones, and their suitability for application to long-term detention or internment.

Example 3 — Ambiguous status and armed groups

Example 1 related to situations in which the State is neutral, but what if the State or its armed forces are not neutral? Again, international humanitarian law might provide as useful a framework as any in seeking to address the situation of the East Timorese forcibly expelled from East Timor into West Timor after the ballot in which the East Timorese people voted overwhelmingly in favour of independence. They were held in camps with extremely restricted access. The

15 See also Additional Protocol I, Article 11.

presence of UNHCR was cut short on account of the killing of three of its staff and because the capacity to ascertain whether or not those in the camps wished to return to East Timor was limited. According to Human Rights Watch, "[t]housands of East Timorese are effectively being held hostage by the very same militias that drove them from their homes in the first place".[16] It seems likely that some were actually being held hostage, while others were being intimidated by threats or by the abduction of family members as hostages.

International humanitarian law not only prohibits hostage-taking (in both international and non-international armed conflicts), but also applies directly to *all* parties to an armed conflict, not only to government armed forces or where the actions can be attributed to the government through a chain of command or control or a failure to act to prevent them. An added complexity was the question of whether the East Timorese in West Timor should be seen as refugees, as internally displaced persons or as internees, given the disputed status of East Timor. International humanitarian law provides certain standards for the minimum humane treatment of persons whose liberty has been restricted in both international and non-international armed conflicts.[17] These standards are worth considering in relation to the situation of ambiguous camps. Furthermore, applying this framework might enable the ICRC to visit such persons.

Monitoring and supervising implementation of the law

An interesting point is that both international humanitarian law and refugee law have a body mandated to provide protection and assistance. This system has both strengths and weaknesses. Clearly, the practical protection and assistance provided by UNHCR and the ICRC are essential. Nevertheless, UNHCR could benefit from the experience of the ICRC by, for example, developing:

16 Human Rights Watch Press Release, 15 December 1999.

17 For non-international armed conflict, see Art. 3 common to the 1949 Geneva Conventions and Art. 5 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

- policies on when it should "go public" on violations of the rights of refugees, and on when it should withdraw or decide against involvement in specific situations;
- its advisory services' capacity in relation to governments' laws, policies and practices, including model legislation or principles for such legislation;
- a best practices manual or compilation, including examples of the kinds of national institutions which should be developed for the protection of refugees and asylum-seekers.

However, UNHCR is increasingly finding itself in situations closer to those of the ICRC and facing difficult decisions as to how far it raise the subject of violations of the rights of refugees with governments without endangering its own staff or being thrown out of the country. UNHCR also has the problem that the behaviour of some of its major donors is not above reproach, and they do not like being criticized either. This is why the lack of an independent treaty-monitoring body with fact-finding powers and complaints mechanisms is problematic. Although international humanitarian law does provide in Article 90 of 1977 Additional Protocol 1 for an International Fact-Finding Commission, this is a voluntary provision which has yet to prove its worth and is applicable only to international armed conflicts (despite the willingness expressed by the Commission to act with regard to non-international conflicts as well). Discussions about possibly developing a monitoring mechanism with regard to the 1951 Refugee Convention and its 1967 Protocol, as well as more broadly, are taking place as part of the UNHCR Global Consultations on Refugee Protection.[18] However, the reactions by States to criticism from the human rights monitoring mechanisms suggest that they will not be enthusiastic about establishing an effective procedure for monitoring their compliance with refugee and asylum standards. The better

18 See e.g. Walter Kälin, "Supervising the 1951 Convention on the Status of Refugees: Article 35 and beyond", prepared for the Cambridge Expert Roundtable (9-10 July 2001).

option may yet be to increase the use of existing mechanisms to seek to enhance the implementation of all the different aspects of international law applicable to refugees or those in refugee-like situations.

Conclusion

It is clear that in some situations international humanitarian law provides protections that are either stronger than or complementary to those of international refugee law. In contemporary international legal thinking (which often stands at odds with international political thinking), it is becoming increasingly clear that no international legal framework can or should be seen in isolation. Although the development in human rights law may not by itself be determinative of the interpretation[19] of elements of the 1951 Refugee Convention, the law on human rights that has emerged as an essential part of the international legal order must be taken into account for purposes of interpretation. In the same way, it is useful to draw on the protections afforded to internees under international humanitarian law, and to extrapolate from these with regard to detention under international refugee law. In addition, where circumstances of refugee flight are conducive to the direct application of international humanitarian law, it may bring considerable clarity to practices and principles which directly affect refugees and asylum-seekers. This is likely to be particularly so in situations of mass influx and expulsion. It is important to recall here, as with human rights law, that there is no reason why refugee law and international humanitarian law should not run in parallel.

The fundamental point raised here is that although the linkage and relative strengths (and weaknesses) of human rights law in relation to both refugees and situations of armed conflict are being increasingly recognized and applied, the same is not yet the case with international humanitarian law and refugee law. Rather than beginning with the law and presuming which situations it does or does not apply to, the better approach is to examine the situation and then consider which law provides the best protection, or whether a

19 See Lauterpacht and Bethlehem, *op. cit.* (note 10).

combination (or application by analogy) is a better option. In the same way, if some persons fall outside the scope of the law — e.g. those deemed not to be eligible for refugee status for one reason or another — the question of what happens to them and whether they are protected by international humanitarian law, as well as human rights law, should not be forgotten. Such consideration should apply not only to the standards, but also to the body mandated to act in relation to those standards: in some circumstances, the ICRC may be better placed than UNHCR to provide protection.

Finally, both refugee law and international humanitarian law share the strengths and weaknesses of having a field-based protection and assistance agency. The experience of the ICRC could be used to improve UNHCR's practice in some respects, but both streams of law would benefit from enhanced treaty monitoring and implementation procedures. The question of developing these procedures in relation to refugee law is under discussion as part of the UNHCR Global Consultations on Refugee Protection.

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Résumé

Droit des réfugiés et droit international humanitaire : parallèles, leçons et perspectives d'avenir. L'opinion d'une organisation non gouvernementale

par RACHEL BRETT et EVE LESTER

Un parallèle conceptuel existe entre le droit international des réfugiés et le droit international humanitaire. Tous deux ont pour origine la nécessité d'assurer une protection aux individus se trouvant sur le territoire d'un État dont ils ne sont pas des ressortissants. Tous deux sont en outre dotés d'une institution qui a pour mandat d'assurer protection et assistance aux personnes relevant de leur champ d'application. De plus en plus, des réfugiés et d'autres groupes sont déplacés en raison de conflits internes ou de troubles civils. Pourtant, la relation qui existe entre les deux domaines du droit international et la capacité du droit international humanitaire de compléter, renforcer et favoriser le développement ou l'interprétation du droit des réfugiés n'ont pas évolué de manière à répondre aux situations sur le terrain. Le moment est venu d'engager un réexamen approfondi.

On the history of the international protection of refugees

by
GILBERT JAEGER

Whereas the history of protection of refugees dates back at least a few centuries, not to mention refugee situations in Antiquity, the history of international protection starts with the League of Nations. No one would be surprised to learn that the International Committee of the Red Cross was the initiator of the international protection system set up by the League of Nations.

The League of Nations period

World War I (1914-1918), its preliminaries (the Balkan Wars, 1912-1913) and its aftermath in the Near East (the wars in the Caucasus, 1918-1921, and the Greco-Turkish War, 1919-1922) caused considerable upheavals in the States involved and especially in the Russian Empire. Large numbers of refugees (estimates vary between 1 and 2 million) left Russian — later Soviet — territories for various countries of Europe or Asia Minor, Central and East Asia between 1918 and 1922 and also thereafter.

GILBERT JAEGER is a former Director of Protection, UN High Commissioner for Refugees, Geneva.

Emergency relief was provided mainly by charitable organizations. However, these organizations could not extend their succour beyond material assistance. Furthermore,

> "[r]esources were becoming exhausted, and there was no central co-ordinating body. In these circumstances the Joint Committee of the International Committee of the Red Cross and the League of Red Cross Societies called a conference of the principal organizations concerned on 16 February 1921, at which it was decided to invite the Council to appoint a High Commissioner to define the status of refugees, to secure their repatriation or their employment outside Russia, and to co-ordinate measures for their assistance. The proposal was received by the Council on 21 February 1921, and States Members were sounded on the feasibility of international co-operation and the forms it should take. On 27 June the Council considered the replies received, they adopted the original proposal in principle, and instructed the Secretariat to make some preliminary investigation. The appointment of a High Commissioner was left to the discretion of the President of the Council. Dr. Fridtjof Nansen accepted the commission on 1 September 1921."[1]

Well before World War I tragic events in the Ottoman Empire had affected various ethno-religious communities — the Armenians, who are the victims most frequently mentioned, as well as Assyrians (Nestorians), Chaldeans (Uniate Nestorians) and Jacobite Syrians. Turks, Kurds and other Muslim groups also suffered.

As for the Greeks who survived the massacres and the Balkan and Greco-Turkish Wars, they joined with their Bulgarian or Turkish counterparts in the "facultative mutual" exchange of populations that took place under the Treaty of Constantinople (1913), the Turco-Bulgarian Treaty (1913), the Greek-Turkish Agreement (May 1914) and the Treaty of Neuilly (1919), and finally in the compulsory exchange of Greek and Turkish populations provided for by the Treaty of Lausanne (1923).

1 Sir John Hope Simpson, *The Refugee Problem*, Oxford University Press, London, 1939, p. 199.

In order to protect and assist the refugees from the Ottoman Empire and the Turkish Republic, the mandate of the High Commissioner of the League of Nations was extended to Armenians in 1924 and to "other categories of refugees" (Assyrians, Assyro-Chaldeans, Syrians, Kurds and a small group of Turks) in 1928.

During the League of Nations period (1921-1946) several institutions were created to perform some or all of the tasks of the High Commissioner for Refugees: the Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees coming from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946) and the Intergovernmental Committee on Refugees (1938-1947).

The task of international protection

These institutions afforded international protection to refugees on the basis of international legal instruments generally[2] concluded within the framework of the League of Nations. The first Arrangements of 5 July 1922, 31 May 1924 and 12 May 1926 provided a definition of Russian and Armenian refugees and dealt mainly with "identity certificates" for refugees.

The governments which adopted the Arrangement relating to the Legal Status of Russian and Armenian Refugees, of 30 June 1928, "[h]aving agreed that it is necessary to define more clearly the legal status of Russian and Armenian refugees", recommended the appointment of representatives of the High Commissioner for Refugees "in the greatest possible number of countries". They also made a number of recommendations to governments of countries of residence (the term "asylum" was not used) regarding personal status, divorce, exemption from reciprocity, from the *cautio judicatum solvi* and from restrictive labour regulations, expulsion, taxation and travel visas.[3]

By adhering to the Convention relating to the International Status of Refugees, of 28 October 1933, States Parties for the first time undertook real obligations on behalf of Russian,

2 A notable exception is the "Evian Resolution". See below.

3 League of Nations, *Treaty Series*, Vol. LXXXIX, No. 2005.

Armenian and assimilated refugees.[4] It dealt with administrative measures (the issuance of "Nansen certificates"), *refoulement*, legal questions, labour conditions, industrial accidents, welfare and relief, education, fiscal regime and exemption from reciprocity, and provided for the "creation of committees for refugees".

The Convention of 1933 is a milestone in the protection of refugees and served as a model for the 1951 Convention. Its Article 3 reads:

> "Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order.
>
> It undertakes in any case not to refuse entry to refugees at the frontier of their countries of origin.
>
> It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorizations and visas permitting them to proceed to another country."

The Convention of 1933 was ratified by nine States, including France and the United Kingdom, the most important powers of that time. The UK did not, however, accept the second paragraph of Article 3. Nevertheless, it was by virtue of this Convention that the principle of *non-refoulement* acquired the status of international treaty law.

Mention should be made of two treaties concluded to provide protection for refugees coming from Germany: the Provisional Arrangement concerning the Status of Refugees coming

4 League of Nations, *Treaty Series*, Vol. CLIX, No. 3663. Assimilated refugees were Assyrians, Assyro-Chaldeans, Syrians, Kurds and a small number of Turks.

from Germany, signed in Geneva on 4 July 1936,[5] and the Convention concerning the Status of Refugees coming from Germany, signed in Geneva on 10 February 1938.[6] An Additional Protocol to these treaties, opened for signature in Geneva on 14 September 1939, extended them to include refugees from Austria.[7]

As refugees from Germany were not entitled to Nansen certificates, these treaties provided for a separate identity certificate. The Convention of 1938 was likewise modelled on the Convention of 1933.

Neither the Provisional Arrangement of 1936 nor the Convention of 1938 mention the expression *refoulement*, and their provisions on asylum are weaker than those of the 1933 Convention. It was even laid down that, in extreme cases, refugees could "be sent back across the frontier of the Reich".

A further international legal instrument of that period is the resolution which the Intergovernmental Committee on Refugees (IGCR) adopted in Evian on 14 July 1938 to define its functions.[8] The Evian meeting was called by President Franklin Roosevelt outside the formal framework of the League of Nations "for the primary purpose of facilitating involuntary emigration from Germany (including Austria)" of

> "(1) persons who have not already left their country of origin (Germany, including Austria), but who must emigrate on account of their political opinions, religious beliefs or racial origin, and (2) persons as defined in (1) who have already left their country of origin and who have not yet established themselves permanently elsewhere..."

5 League of Nations, *Treaty Series*, Vol. CLXXI, No. 3952.

6 League of Nations, *Treaty Series*, Vol. CXCII, No. 4461, p. 59.

7 League of Nations, *Treaty Series*, Vol. CSCVIII, No. 4634, p. 141.

8 League of Nations, *Official Journal*, XIXth Year, Nos 8-9, August-September 1938, pp. 676 and 677; C. 244 M. 143.1938 XII, annex. — See Tommie Sjöberg, *The Powers and the Persecuted: The Refugee Problem and the Intergovernmental Committee on Refugees (IGCR), 1938-1947*, Lund University Press, Lund, 1991.

For the first time protection was extended to would-be refugees inside the country of potential departure.

In February 1939 the Member States of the IGCR appointed as Director the newly appointed High Commissioner for Refugees, whose headquarters were likewise in London. The IGCR ended its activities on 30 June 1947, six months after the Office of the High Commissioner closed. During that time the IGCR also protected the "Nansen refugees".

The period 1946-1951

The next important phase in international protection was that of the International Refugee Organization (IRO). Established on 15 December 1946 by Resolution 62 (I) of the UN General Assembly, it initially worked as the Preparatory Commission for the IRO from 14 July 1947 to 20 August 1948 and then as full IRO from August 1948 until its termination on 28 February 1952.

The IRO became known as a resettlement agency, for its principal activity was the resettlement of 1,049 refugees and displaced persons, mainly from Central Europe, in the United States, Australia, Western Europe, Israel, Canada and Latin America. However, according to its Constitution, the IRO was "entrusted with the legal and political protection of persons who are its concern". The agreements concluded by the IRO with governments contain a general clause confirming its competence to provide protection and often specify certain aspects of the status of IRO refugees. Contrary to previous or subsequent international agencies, the IRO in some respects assumed the role of a supranational agency.

The IRO was originally meant to complete its operational activities on 30 June 1950. As soon became evident, it was unlikely — to say the least — that the problem of refugees would be solved by that date. With new refugees from Central and Eastern Europe arriving in increasing numbers in the West, the Commission on Human Rights adopted a resolution as early as 1946 in which it expressed the wish:

> "[t]hat early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of

nationality, as regards their legal and social protection and their documentation."[9]

Taking note of that resolution, the Economic and Social Council:

"*Requests* the Secretary-General, in consultation with interested commissions and specialized agencies:

(a) to undertake a study of the existing situation in regard to the protection of stateless persons by the issuance of necessary documents and other measures, and to make recommendations to an early session of the Council on the interim measures which might be taken by the United Nations to further this object;

(b) to undertake a study of national legislation and international agreements and conventions relevant to statelessness, and to submit recommendations to the Council as to the desirability of concluding a further convention on this subject."[10]

This is the origin of *A Study of Statelessness*, a key document in the modern history of international protection of refugees.[11] Part One of the Study, entitled "Improvement of the Status of Stateless Persons", deals with refugees who are mostly *de facto* stateless persons, although some are *de jure* stateless. It provides a full history of institutions of internal protection and of international legal instruments, from the days of the League of Nations until and including the IRO.

The Study examines in detail the various aspects of the "status of stateless persons" (read "refugees"): international travel, right of entry and sojourn, personal status, family rights, rights of property, exercise of trades or professions, education, relief, social security, right to appear before the courts as plaintiff or defendant, exemption from reciprocity, expulsion and reconduction, taxation and military service, taking into account the provisions of the two existing Conventions of 1933 and 1938. It then discusses the "form to be given to the status"

9 *Official Records of the Economic and Social Council*, Third Year, sixth session, Suppl. No. 1, 1946, pp. 13-14.

10 Resolution 116 (VI) D, of 1 and 2 March 1948.

11 UN Doc. E/1112, of 1 February 1949, and E/1112/Add.1, of 19 May 1949.

and concludes in favour of a general convention, a *lex generalis* which would coexist with previous conventions which should represent the *lex specialis*.

The main elements of the 1951 Convention relating to the Status of Refugees can already be found in the Study, which also shows very clearly the derivation of the 1951 Convention from the pre-war conventions.

On the "nature and function of protection" the Study expresses the belief that:

> "The conferment of a status is not sufficient in itself to regularize the standing of stateless persons and to bring them into the orbit of the law; they must also be linked to an independent organ which would to some extent make up for the absence of national protection and render them certain services which the authorities of a country of origin render to their nationals resident abroad.
>
> Such an organ is undoubtedly needed. The status of stateless persons, however carefully determined, cannot become a reality unless there is an organ of international protection.
>
> Such an organ would need to work in close collaboration with the Governments of the reception countries.
>
> It should comprise a central office with subsidiary branches in the countries concerned."

There is nothing new in this. The authors of the Study merely recommended the system that existed under the League of Nations and its High Commissioners. This applies also to the main functions of the central office:

> "(a) To collaborate in the application of the agreements in force;
> (b) To facilitate joint and simultaneous action by Governments on behalf of stateless persons;
> (c) To take a census of stateless persons, determine their requirements, collect all necessary date and information relating to them;

(d) To promote the conclusions of such new agreements as may be required; and to secure further accessions to the agreements already concluded;
(e) To conclude with Governments the arrangements necessary to enable stateless persons to obtain such documents as will allow them to perform various acts of civil and administrative life;
(f) To facilitate the admission of stateless persons into countries willing to receive them temporarily or to allow them to settle there permanently;
(g) To facilitate the assimilation and naturalization of stateless persons;
(h) To co-ordinate the work of private voluntary associations on behalf of stateless persons."

The Study of Statelessness also elaborates on "the organ responsible for protection" and discusses the merits of the type of international organ required: a service within the United Nations Secretariat, a High Commissioner's Office, continuance of the IRO in another form, or a new specialized agency. It finally recommends that the Economic and Social Council "recognize the necessity of providing at an appropriate time permanent international machinery for ensuring the protection of stateless persons".

Having considered the Study, the Economic and Social Council appointed on 8 August 1949 an ad hoc Committee on Refugees and Stateless Persons to

"*Consider* the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention...".[12]

The Council's intention was that the final draft of the convention be approved by the UN General Assembly.

12 ECOSOC Res. 248 (IX), Study of Statelessness, B, of 8 August 1949.

Eventually, after the submission and revision of large sections of the future convention and a further resolution of the Economic and Social Council, the UN General Assembly decided on 14 December 1950 "to convene in Geneva a conference of plenipotentiaries to complete the drafting of and to sign (...) the Convention relating to the Status of Refugees..."[13] The new convention was adopted soon after on 28 July 1951.

As for the aforesaid "permanent international machinery", the UN General Assembly decided on 3 December 1949 "to establish, as of 1 January 1951, a High Commissioner's Office for Refugees",[14] and on 14 December 1950 adopted the Statute of the Office of the United Nations High Commissioner for Refugees.[15]

Thus since 1 January 1951, the international protection of refugees has been in the hands of the High Commissioner of the United Nations on the basis of its Statute. A steadily growing number of States have meanwhile ratified and implemented the *Magna Carta* for refugees, the 1951 Convention relating to the Status of Refugees.

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13 UNGA Res. 429 (V), Draft Convention relating to the Status of Refugees, of 14 December 1950.

14 UNGA Res. 319 (IV), Refugees and stateless persons, of 3 December 1949.

15 UNGA Res. 428 (V), Statute of the Office of the United Nations High Commissioner for Refugees, of 14 December 1950.

Résumé

À propos de l'histoire de la protection internationale des réfugiés

PAR GILBERT JAEGER

L'histoire de la protection internationale des réfugiés commence à l'époque de la Société des Nations, en réponse aux flux de réfugiés pendant et après la Première Guerre mondiale, notamment en Russie et dans les Balkans. Suite à une proposition émise lors d'une conférence convoquée par le CICR et la Fédération internationale, la Société des Nations nomma, en septembre 1921, un haut commissaire pour les réfugiés en la personne de Fridtjof Nansen. L'auteur retrace l'histoire des mesures internationales prises en faveur des réfugiés au cours de l'entre-deux-guerres, puis pendant la période qui suivit immédiatement la Seconde Guerre mondiale. C'est pendant cette dernière période, marquée par des mouvements de réfugiés de grande ampleur, qu'un droit moderne des réfugiés vit le jour – notamment avec l'adoption en 1951 de la Convention relative au statut des réfugiés – et que le Haut Commissariat des Nations Unies pour les réfugiés fut créé.

Le CICR et l'assistance aux réfugiés arabes palestiniens (1948-1950)

par
CATHERINE REY-SCHYRR

Lors du conflit de Palestine (1948-1949)[1], le CICR a conduit une importante action en faveur des blessés et malades, des prisonniers de guerre et des populations civiles victimes du conflit[2]. Dans ce cadre, il fut aussi l'une des premières organisations internationales à fournir une aide concrète aux réfugiés arabes palestiniens : tout d'abord, dès juillet 1948, par l'intermédiaire de la délégation qu'il avait ouverte quelques mois auparavant en Palestine pour y conduire ses tâches traditionnelles de protection et d'assistance. Puis, dans un second temps, en créant le Commissariat pour l'aide aux réfugiés de Palestine ; le CICR agit alors comme organe de distribution — aux côtés de la Ligue des Sociétés de la Croix-Rouge[3] (ci-après la Ligue) et de l'*American Friends Service Committee* (AFSC, aussi connu sous le nom de *Quakers*) — dans le cadre de l'Aide des Nations Unies aux réfugiés de Palestine (*United Nations Relief for Palestine Refugees,* UNRPR).

CATHERINE REY-SCHYRR, licenciée en sciences politiques, est chargée de recherches historiques au CICR. En cette qualité, elle collabore à la rédaction de l'histoire du CICR pour la période 1945-1955.

L'exode des Palestiniens arabes

Durant les trois premiers mois de 1948, quelque 30 000 Arabes, appartenant aux familles aisées de Jérusalem, Haïfa et Jaffa, ou provenant de villages particulièrement touchés par les combats, quittent la Palestine pour les pays arabes[4]. Mais l'exode proprement dit — précipité par la terreur qui s'empare des populations arabes à la suite du massacre de Deïr Yassin[5] — débute en avril-mai, parallèlement à l'effondrement de la résistance arabe, notamment dans l'ouest et dans l'est de la Galilée, avec la chute de Tibériade et de Safed, ainsi que le long de la bande côtière, qui voit les villes de Haïfa, de Jaffa et d'Acre tomber aux mains des forces juives. En date du 15 mai 1948, le nombre de personnes ayant quitté le territoire occupé par Israël est estimé à 250 000[6].

L'exode se poursuit après le déclenchement général des hostilités et jusqu'à l'instauration, le 18 juillet, de la deuxième trêve imposée par les Nations Unies[7], période marquée par la progression des forces israéliennes en Galilée centrale, dans le secteur de Nazareth, de même qu'au centre de la Palestine, avec la prise des villes de Lydda et de Ramleh.

1 Il s'agit de la guerre civile judéo-arabe qui fait suite à l'adoption par l'Assemblée générale des Nations Unies, le 29 novembre 1947, du plan de partage de la Palestine en deux États indépendants, l'un juif et l'autre arabe, puis, dès le 15 mai 1948, du conflit israélo-arabe qui éclate au lendemain de la proclamation de l'État d'Israël avec l'entrée en guerre consécutive de l'Égypte, de l'Irak, du Liban, de la Syrie et de la Transjordanie. Les hostilités prennent fin début 1949 et des conventions d'armistice sont successivement conclues entre Israël et les différents États arabes de février à juillet 1949.

2 Voir à ce sujet les *Rapports d'activité* du CICR pour les périodes suivantes: 1er juillet 1947-31 décembre 1948, pp. 110-126 ; 1949, pp. 79-94 ; 1950, pp. 74-81 ; et 1951, pp. 66-67. Voir également le *Rapport résumé sur l'activité du CICR* (1er juillet 1947-31 décembre 1951), pp. 51-60.

3 Appelée aujourd'hui Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge.

4 Rony E. Gabbay, *A Political Study of the Arab-Jewish Conflict, The Arab Refugee Problem*, Éditions Droz, Genève, 1959, 611 pages, p. 66.

5 Village arabe situé sur une colline à quelques kilomètres à l'ouest de Jérusalem. Le 9 avril 1948, les troupes de l'Irgoun et du Lehi (ou Stern, du nom de son fondateur), deux groupes extrémistes juifs, s'emparent de ce village et y massacrent plus de 200 habitants, parmi lesquels des femmes, des vieillards et des enfants. Bien que condamné par l'Agence juive, ce massacre, et la vague de terreur qui s'ensuit, joueront un rôle décisif dans l'exode des Palestiniens arabes.

6 *Op. cit.* (note 4), p. 86.

7 La première trêve a eu lieu du 11 juin au 8 juillet 1948.

C'est à cette époque que la Ligue des États arabes et le médiateur des Nations Unies pour la Palestine, le comte Folke Bernadotte[8], attirent l'attention de la communauté internationale sur le sort tragique des réfugiés. Dès la mi-août, le comte Bernadotte lance des appels à l'aide au Fonds international de secours à l'enfance de l'Organisation des Nations Unies (UNICEF), à plus d'une cinquantaine de gouvernements ainsi qu'à de nombreuses organisations de secours. Il plaide notamment leur cause devant les représentants des gouvernements et des Sociétés nationales réunis fin août à Stockholm, à l'occasion de la XVIIe Conférence internationale de la Croix-Rouge, qu'il préside en sa qualité de président de la Croix-Rouge suédoise. La Conférence internationale adopte une résolution XLIII, intitulée *Action de secours pour le Moyen-Orient,* qui « invite tous les Gouvernements et toutes les Sociétés nationales à faire tout ce qui est en leur pouvoir, par les voies normales gouvernementales et de la Croix-Rouge, pour alléger les souffrances des victimes des hostilités, sans considération de race, foi ou statut politique » [9].

Le 11 septembre 1948 est établi le *United Nations Disaster Relief Project* (DRP), qui a pour but de coordonner les activités des diverses organisations déjà sur le terrain et de distribuer les secours reçus en réponse aux appels du médiateur[10]. Début octobre 1948, le directeur du DRP estime le nombre des réfugiés à 500 000[11].

La bataille du Néguev, déclenchée en octobre, provoque de nouveaux déplacements de populations. Devant l'urgence de la situation, notamment à l'approche de l'hiver, le successeur du comte

8 Également président de la Croix-Rouge suédoise et président de la Commission permanente de la Conférence internationale de la Croix-Rouge, le comte Bernadotte avait été désigné comme médiateur des Nations Unies pour la Palestine le 20 mai 1948. Il sera assassiné par le groupe extrémiste juif Lehi le 17 septembre 1948.

9 *XVIIe Conférence internationale de la Croix-Rouge tenue à Stockholm du 20 au 30 août 1948, Compte rendu*, Croix-Rouge suédoise, Stockholm, 1948, 116 pages, p. 101, également reproduit dans *RICR*, n° 359, novembre 1948, p. 768.

10 *Op. cit.* (note 4), p. 119. Quelque 3 800 tonnes de secours seront remises pour distribution aux gouvernements arabes et aux comités locaux de réfugiés dans le cadre du DRP.

11 *Rapport général d'activité du Commissariat pour l'aide aux réfugiés en Palestine* (période du 1er janvier au 31 mai 1949), ci-après *Rapport Commissariat CICR I*, p.1 – ACICR, B G 59/I/GC/E.

Bernadotte, le médiateur par intérim Ralph Bunche, saisit l'Assemblée générale des Nations Unies de la question des réfugiés lors de sa session d'automne 1948, qui se tient à Paris.

L'action de la délégation du CICR

Dans le même temps, le CICR reçoit des rapports alarmants de sa délégation sur le sort des réfugiés. Ainsi, à Ramallah, localité de 4 000 habitants avant la guerre et qui abrite alors 60 000 réfugiés

> « Les premiers réfugiés, arrivés de Jaffa il y a deux ou trois mois, ont trouvé à se loger relativement bien dans les écoles et les couvents ; ceux qui vinrent ensuite durent se contenter des corridors de ces maisons ; les derniers, enfin, les plus nombreux, se sont installés en plein air, contre les murs, sous des arbres, aux bords des routes. Quelques-uns ont des matelas, une ou deux couvertures ; la plupart n'ont rien emporté avec eux, ou quasi-rien (...).
> « Peu d'hommes jeunes, des femmes, des masses d'enfants, des vieillards (...).
> « Les conditions d'hygiène des camps — on peut à peine parler de camps — sont déplorables. Là où il y a des W.-C., ils sont bouchés et là où il n'y en a pas, tout se passe n'importe où. On imagine aisément les odeurs et les mouches. L'on tremble en songeant aux épidémies (...) des milliers de gens sont en danger et constituent un danger pour d'autres gens. Ils ont besoin d'être nourris, vêtus, logés. Qu'on leur [sic] aide. Qu'on nous aide à les aider ! (...) »[12]

Plus au sud, dans les secteurs dépendant de la délégation de Gaza, la situation est aussi grave :

> « Le problème des réfugiés nous a causé beaucoup de soucis (...) car journellement nous avons constaté des arrivées de réfugiés

12 Rapport du 07.08.1948 de Juliane Bauverd, infirmière du CICR – ACICR, B G 59/I/GC, boîte 832.

du secteur de Ramallah. Déjà vers le milieu du mois, Hébron annonçait un chiffre de 50 000 et Bethléem à peu près 20 000. En ce moment un recensement (fait par les autorités locales) est en cours et si mes prévisions sont justes, nous arriverons à la fin du mois d'octobre à un chiffre de près de 250 000. J'ai visité la plupart des camps et j'ai constaté que la misère augmente de jour en jour. Pas d'habits, pas de couvertures, peu ou rien à manger. L'état de santé est très mauvais, la mortalité atteint des degrés inimaginables (...) Nous essayons tous d'aider, de soulager et surtout de guérir, mais, hélas nos moyens sont si limités! Le soir en passant en revue les faits de la journée je dois me dire, « Qu'as-tu pu faire », « Qu'as-tu fait », « As-tu aidé ». Et le plus souvent la réponse est très décevante : elle est courte et brève car c'est un triste et simple « non », ou « rien », ou peu »[13].

Et encore :

« La misère de ces camps est indescriptible : les plaies aux pieds parlent des nombreux kilomètres parcourus nu-pieds, les infections spontanées et autres crient la sous-alimentation, la gale, le manque d'hygiène ; les avitaminoses sont nombreuses. Il arrive parfois que nous allions voir des malades à domicile, mais, peut-on parler de domicile quand il s'agit de 2 à 3 mètres carrés par famille dans une baraque sans fenêtre et souvent sans toit, sans lits, sans couvertures, sans mobilier d'aucune sorte ; là les habitants sont couchés sur le sol. Les boîtes de conserve vides servent comme casseroles, tasses ou cuvettes de toilette. (...) La nourriture manque partout et l'aide médicale que nous apportons semble si peu de chose. Il faudrait pouvoir disposer de tonnes de nourriture. (...)

« Nous voudrions voir arriver des secours tant vestimentaires qu'alimentaires et cela en grandes quantités. Il faudrait pouvoir ouvrir des cantines sinon pour les adultes du moins pour les

13 Rapport mensuel septembre 1948 du Dr R. Pflimlin pour le Secteur Sud (Gaza) – ACICR, B G 59/I/GC, boîte 836.

enfants, car à quoi sert-il de panser des blessures de famine si on ne peut en supprimer la cause. » [14]

Le CICR répercute la teneur de ces rapports dans les appels de secours en faveur des victimes du conflit qu'il adresse — tout d'abord seul, puis, à la suite de la XVIIe Conférence internationale de la Croix-Rouge, conjointement avec la Ligue — aux Sociétés nationales de la Croix-Rouge, du Croissant-Rouge et du Lion-et-Soleil-Rouge.

Sur le terrain, les infirmières du CICR affectées dans les principaux centres de rassemblement de réfugiés y ouvrent des policliniques, effectuent des vaccinations et interviennent pour que des mesures d'assainissement soient prises dans les camps. Avec l'appui de comités locaux dont ils ont suscité la formation dans la plupart des régions sous contrôle arabe de l'ancienne Palestine mandataire (ci-après Palestine arabe) et qui regroupent des représentants des diverses tendances, les délégués procèdent à des distributions au fur et à mesure de l'arrivée des secours[15]. Ils assurent également le soutien aux services de santé et aux nombreuses institutions religieuses possédant des établissements hospitaliers.

De juillet 1948 à fin mars 1949, la délégation du CICR distribue au total 628 tonnes de secours — soit 109 tonnes de médicaments, 430 tonnes de vivres, des vêtements, des tentes et des couvertures — résultant de ses appels et de ceux lancés conjointement avec la Ligue et dont la plus grande partie bénéficie aux réfugiés. L'acheminement d'importantes quantités de secours a toutefois été retardé en raison de l'engorgement du port de Beyrouth — où s'accumulent également les secours de l'ONU — et de difficultés de transport[16].

14 Rapport du 01.09 au 25.10.1948 de Madeleine Weber, infirmière à Gaza – ACICR, B G 59/I/GC, boîte 836.

15 Rapport du Dr P. Fasel sur l'activité de la délégation de Ramallah du 26.07 au 18.08.1948. Note du 07.09 et rapport du 30.10.1948 de J. Courvoisier – ACICR, B G 59/I/GC, boîte 832.

16 Rapport général d'activité de la délégation CICR pour la Palestine, janvier 1948-juillet 1949, signé J. de Reynier et daté du 06.07.1949. Notes de M. Horneffer en vue d'un projet de publication sur le CICR et l'aide aux réfugiés de Palestine – ACICR, B G 59/I/GC, boîte 830, et B G 59/I/GC/E, boîte 853.

L'action du Commissariat pour les réfugiés de Palestine

Le cadre d'action et la création du Commissariat

Le 30 octobre 1948, parallèlement aux débats de l'Assemblée générale, le secrétaire général de l'ONU, Trygve Lie, dépêche deux de ses représentants, dont le directeur du DRP, auprès du CICR et de la Ligue à Genève. Un projet de résolution est en effet en discussion qui propose à l'Assemblée générale, d'une part, de voter un important crédit pour l'aide aux réfugiés de Palestine ; d'autre part, de nommer un directeur pour coordonner cette aide, lequel ferait à son tour appel à deux ou trois organisations bénévoles pour distribuer les secours sur le territoire de l'ancienne Palestine mandataire et dans les pays arabes limitrophes. Les représentants de l'ONU viennent s'enquérir si les deux institutions de la Croix-Rouge seraient en principe prêtes à agir comme organes de distribution, dans les limites de leurs statuts et dans le respect de leur indépendance. Ils leur remettent un projet de texte susceptible de servir de base, le cas échéant, à un accord entre le CICR, la Ligue et les Nations Unies[17].

Conscient de l'extrême gravité de la situation des réfugiés, le CICR est d'avis d'examiner favorablement la proposition des Nations Unies, à condition que la sauvegarde de son indépendance soit garantie. Il entend en effet préserver la fonction spécifique d'intermédiaire neutre qu'il exerce en faveur des victimes du conflit au Proche-Orient. Vu le rôle politique joué par les Nations Unies dans le cadre du règlement du conflit, le CICR ne veut surtout pas apparaître comme un agent de l'ONU aux yeux des parties intéressées et exclut tout contrôle de ses activités par cette organisation sur le terrain[18].

Le 10 novembre, le CICR et la Ligue adressent conjointement un contre-projet au secrétaire général de l'ONU, dans lequel les deux institutions soulignent la nécessité de protéger l'indépendance de la Croix-Rouge et émettent diverses propositions à cet effet[19].

17 Procès-verbal d'entretien du 30.10.1948 entre les représentants des Nations Unies, du CICR et de la Ligue, établi le 01.11.1948 par le CICR – ACICR, B G 59/I/GC/E, boîte 850.

18 Procès-verbaux des séances du 02.11 et du 05.11.1948 du Bureau – ACICR, A PV.

19 Procès-verbaux de la séance du 11.11.1948 du Bureau et de la séance plénière du CICR du 18.11.1948 – ACICR, A PV. Lettre du 10.11.1948 du CICR et de la Ligue au secrétaire général de l'ONU – ACICR, B G 59/I/GC/E, boîte 850.

Le 19 novembre 1948, l'Assemblée générale vote un crédit de 29 500 000 dollars — non compris les dépenses administratives — pour assister 500 000 réfugiés pendant une période de neuf mois allant du 1er décembre 1948 au 31 août 1949. Elle invite les États membres et non membres à fournir, aussitôt que possible, des contributions volontaires en nature ou en espèces. Elle demande au secrétaire général de prendre toutes les mesures nécessaires pour porter secours aux réfugiés de Palestine et pour créer l'organisation administrative à cet effet, en faisant appel aux services compétents des différents gouvernements, aux institutions spécialisées de l'ONU, à l'UNICEF et à d'autres organisations bénévoles. En ce qui concerne ces dernières, le CICR et la Ligue des Sociétés de la Croix-Rouge sont nommément cités, et le principe d'impartialité qui régit leur action est expressément reconnu. Le secrétaire général est également chargé de désigner un directeur de l'UNRPR, auquel il pourra déléguer toutes responsabilités pour la préparation et l'exécution de l'ensemble du programme d'assistance[20].

Le secrétaire général fait finalement appel à trois organisations pour assurer la distribution des secours — le CICR, la Ligue et l'AFSC — avec lesquelles sont conclus des accords analogues *mutatis mutandis.*

Aux termes de l'accord signé le 17 décembre 1948 entre le CICR et M. Stanton Griffis (alors ambassadeur des États-Unis au Caire), désigné comme directeur de l'UNRPR, les Nations Unies jouent le rôle d'un donateur ordinaire à qui le CICR est tenu d'envoyer régulièrement rapports et comptes. Elles reconnaissent le caractère complètement indépendant et autonome du CICR, qui organisera toute distribution sous sa propre et entière responsabilité et ne sera en aucune manière placé dans une position de subordination à l'égard de l'ONU. Il est en outre entendu que le CICR doit continuer d'agir comme intermédiaire neutre entre les parties en Palestine, spécialement en faveur des prisonniers de guerre. Cela présuppose qu'il maintienne, aux yeux de chacun et en toutes circonstances, présentes et

20 A/RES/212(III).

futures, sa position totalement apolitique[21]. Le CICR obtient donc les garanties escomptées.

Les zones d'activité dévolues aux trois organisations se répartissent comme suit : le CICR est responsable pour Israël et la Palestine arabe — à l'exception de la région de Gaza, qui relève de l'AFSC. La Ligue opère dans les pays avoisinants : Irak, Liban, Syrie et Transjordanie.

Le travail consiste à installer des camps pour les sans-abri, à distribuer des vivres à la totalité des réfugiés ainsi que des couvertures et des vêtements aux plus démunis. Un service médical doit être mis sur pied, non seulement pour traiter les malades, mais surtout pour prendre des mesures préventives contre les épidémies. Il est également prévu que les trois organisations distribuent les secours fournis par l'UNICEF destinés plus spécialement aux enfants, aux femmes enceintes et allaitantes, cela dès le 1er février 1949. Un programme scolaire, financé par l'UNESCO, viendra encore se greffer sur ces activités par la suite.

Pour exécuter ce mandat, le CICR crée, fin novembre 1948, le Commissariat pour l'aide aux réfugiés de Palestine (ci-après le Commissariat). Il nomme à sa tête un diplomate suisse, Alfred Escher, alors premier conseiller de la Légation de Suisse à Londres. En créant un organisme complètement distinct de sa délégation, le CICR

21 Le point 3 de cet accord se lit comme suit : « *The United Nations will, in this connection, agree to recognise the International Committee of the Red Cross as an independent and autonomous organization which undertakes to effect, under its sole responsibility, the distribution of relief supplies received from the United Nations Organizations, as donors, in the territory assigned. It is agreed and approved by the United Nations Organization that the distribution of such relief supplies effected in the field by the International Committee of the Red Cross, in complete independence, will not in any way place it in a subordinate position with respect to the United Nations. It is understood that the International Committee of the Red Cross must continue to act, between the parties in Palestine, as a neutral intermediary, especially for prisoners of war. This requires that it maintains in the eyes of each and in all circumstances, present and future, its position outside of all political contingencies.* » *Agreement between the Director of the United Nations Relief for Palestine Refugees and the President of the International Committee of the Red Cross*, CP 441 b – ACICR, B G 59/I/GC/E, boîte 850.

entend marquer, vis-à-vis des parties au conflit, l'indépendance dans laquelle cette dernière poursuit ses activités traditionnelles[22].

L'organisation du Commissariat et la logistique

Dès la première quinzaine de décembre, le commissaire du CICR effectue une mission d'une dizaine de jours en Palestine arabe, en Israël et dans les pays arabes environnants, afin de jeter les bases pratiques de l'action. Il est notamment accompagné, à titre d'expert médical, par le Dr A. Vannotti, professeur à la faculté de médecine de l'Université de Lausanne (nommé membre du CICR en mai 1949), ainsi que par un spécialiste des questions relatives aux camps[23].

De retour à Beyrouth le 29 décembre, en compagnie de quatorze délégués et de deux infirmières, le commissaire du CICR se trouve immédiatement face à un dilemme : « Ou bien créer un appareil bien organisé et laisser attendre le travail jusqu'à ce que cet appareil puisse assurer un fonctionnement satisfaisant, ou bien commencer le travail sans délai et créer l'organisation nécessaire dans la suite et au fur et à mesure du possible. (...) Le fait qu'il y avait des vies humaines en jeu ne nous laissa pas le choix : nous avons lancé nos délégués dans le terrain le 2 et 3 janvier, les premiers transports de farine UNRPR sont partis de Beyrouth le 6 et les premières distributions dans la zone arabe ont commencé à partir du 10 janvier. » [24]

Le Commissariat établit deux sièges principaux : l'un à Beyrouth, première porte d'entrée des secours d'outre-mer — où se trouvent également les quartiers généraux de l'UNRPR, de l'UNICEF, de la Ligue et de l'AFSC — l'autre à Haïfa, seconde porte d'entrée pour ces mêmes secours. Le siège de Beyrouth commande les six postes régionaux créés en Palestine arabe, soit les secteurs de

22 Procès-verbal de la séance du 25.11.1948 du Bureau – ACICR, A PV. Note du 24.11.1948, non signée, traitant de l'activité du CICR dans le problème de l'aide aux réfugiés en Palestine – ACICR, B G 59/I/GC/E, boîte 850.

23 Pour plus d'informations à ce sujet voir : Rapport de M. Escher sur sa mission en Palestine, annexe au procès-verbal du Bureau du 16.12.1948 – ACICR, A PV. Rapport médical du professeur A. Vannotti sur l'aide aux réfugiés en Palestine, du 09.12.1948, et rapport du Major Lüscher sur l'organisation des camps, du 20.12.1948 – ACICR, B G 59/I/GC/E, boîte 860.

24 *Rapport Commissariat CICR I*, pp. 4-5.

Jéricho et vallée du Jourdain, rive droite ; Ramallah ; Naplouse, avec le sous-secteur de Jénine et Tulkarem ; Jérusalem, vieille ville et banlieue ; Bethléem ; Hébron. Celui de Haïfa couvre le territoire d'Israël. Chaque poste régional est dirigé par un chef de région, entouré de quelques délégués et collaborateurs expatriés ainsi que d'un nombreux personnel recruté localement. Celui-ci est composé en grande partie de réfugiés, qui trouvent ainsi la possibilité de travailler et de recevoir un salaire. Le personnel expatrié est suisse, à l'exception d'une équipe médicale de la Croix-Rouge danoise, et d'une équipe de l'AFSC qui distribue des secours aux réfugiés d'Acre au nom du Commissariat.

De 24 personnes au 1er janvier 1949, les effectifs du personnel expatrié passent à 94 — soit 45 délégués ou autres collaborateurs, 15 médecins, 29 infirmières et 5 employés de laboratoire — en décembre 1949, pour redescendre à 89 au 30 avril 1950, date de la fin de l'action. Ceux du personnel local s'élèvent à 2 637 à la fin de 1949 et à 3 395 — dont 650 appartenant au personnel médical — au terme de l'action[25].

Le gros des secours doit être livré par l'UNRPR à Beyrouth. Pour les transporter de Beyrouth vers les principaux points d'entreposage en Palestine arabe, le Commissariat fait appel à des compagnies de camionnage. Ce choix se révèle être le bon, mais les difficultés, dues à la distance — plus de 500 kilomètres à parcourir à travers les montagnes du Liban, puis par Damas et Amman — aux conditions climatiques rigoureuses en hiver, aux nombreux contrôles douaniers et à la situation économico-politique ne manquent pas. Par ailleurs, le Commissariat doit se charger lui-même des transports de Jérusalem vers Bethléem et Hébron ; il n'existe en effet dans ce secteur qu'une piste militaire étroite et dangereuse que les camionneurs étrangers se refusent à emprunter. Le Commissariat assure également lui-même la répartition proprement dite des secours à partir des principaux centres

25 Les statistiques sont tirées des tableaux pertinents figurant dans les quatre rapports généraux successifs établis par le Commissariat pour l'aide aux réfugiés en Palestine, couvrant les périodes suivantes : 1er janvier au 31 mai 1949, 1er juin au 30 septembre 1949, 1er octobre au 31 décembre 1949 et 1er janvier au 30 avril 1950, ci-après *Rapports Commissariat CICR I, II, III et IV* – ACICR, B G 59/I/GC/E. En l'occurrence, *Rapports Commissariat CICR II*, p. 7, III, pp. 7 et 8, et IV, p. 7.

d'entreposage vers les différents points de distribution, au moyen de camions loués sur place ou appartenant à son propre parc de véhicules ; celui-ci en compte une centaine fin décembre 1949.

Quant à Israël, ce pays ne peut, de Beyrouth, être atteint par la route. Le Commissariat obtient des autorités concernées l'ouverture d'une voie maritime Beyrouth-Haïfa. Trois voiliers, battant pavillon de la Croix-Rouge, sont ainsi utilisés pour les transports à destination d'Israël. Sur territoire israélien, la répartition des marchandises entre les divers points de distribution se fait, comme en zone arabe, par camions, ceux-ci étant mis à disposition du Commissariat par les autorités israéliennes.

À l'issue de l'action, fin avril 1950, les voiliers affrétés par le Commissariat avaient effectué entre Beyrouth et Haïfa des navettes équivalant à la traversée du Pacifique, de Yokohama à San Francisco et retour. Quant aux camions, ils avaient, à la même date, parcouru quelque dix millions de kilomètres, soit 250 fois le tour de la terre[26].

Le dénombrement des réfugiés

En décembre 1948, le directeur du DRP estime le nombre total des réfugiés à 760 000, dont 300 000 dans les régions qui vont relever du CICR. Or, fin mai 1949, le Commissariat en assiste près de 477 000, dont 40% d'enfants. À la suite d'adaptations successives, la base retenue par l'UNRPR pour ses allocations de secours au CICR passera à 395 000 rations (sur 940 000 au total pour les trois organisations, soit 42%). Elle restera toutefois toujours en-deçà du nombre de réfugiés effectivement inscrits sur les listes du Commissariat, soit 458 000 en décembre 1949 et 416 000 en avril 1950.

Dès février 1949, le directeur de l'UNRPR met en garde les trois organisations contre le gonflement abusif des listes de réfugiés — établies soit par les municipalités soit par des comités locaux de secours — gonflement provoqué par l'arrivée massive de secours en

26 *Le Comité international de la Croix-Rouge et l'aide aux réfugiés de Palestine*, projet de publication établi par M. F. Horneffer (publication non éditée) – ACICR, B G 59/I/GC/E, boîte 853.

provenance de l'étranger. Dans un mémorandum qu'il leur adresse le 2 février, il définit le réfugié comme « une personne ayant quitté son domicile en raison des faits et des conséquences de la guerre », et, condition complémentaire, « actuellement indigente ». Il y a lieu d'éliminer : (1) les Bédouins nomades ordinaires ; (2) les réfugiés pourvus de moyens d'existence ; (3) les pauvres des villages, et (4) les résidents ayant perdu leurs possibilités de travail, ces deux dernières catégories incombant aux municipalités et non pas aux œuvres de secours pour réfugiés.

Le Commissariat est toutefois conscient qu'il lui sera extrêmement difficile d'appliquer ces critères et de se livrer à un contrôle rigoureux, parce que la réalité est autre : les Bédouins, souvent chassés de régions bien définies, ont perdu champs, pâturages et bétail. Le nombre de réfugiés aisés diminue au fur et à mesure que le temps passe. Les indigents dont le nombre s'est multiplié à la suite de l'effondrement économique, constituent une charge écrasante pour les municipalités qui ne peuvent y faire face. Bon nombre de villages sont partiellement détruits, ou demeurent vides parce que situés dans le *no man's land*. À la suite de l'armistice entre Israël et la Jordanie du 3 avril 1949 et des modifications du tracé de la ligne de démarcation qui en découlent, beaucoup sont coupés de leurs champs, laissant la population sans moyens de subsistance. À côté des réfugiés, se forme ainsi une nouvelle classe de victimes de la guerre : les « sinistrés ». S'y ajoutent les « destitués », soit les milliers de personnes qui habitent la Palestine arabe, mais qui travaillaient dans des lieux devenus israéliens et qui ont, de ce fait, perdu leur emploi. Le Commissariat s'efforce de recenser les réfugiés et d'éliminer les abus manifestes, mais la tâche est malaisée. Elle va aussi à l'encontre de la coalition d'intérêts économico-politiques suscitée par l'apport massif de secours, et par le fait que les réfugiés deviennent une clientèle que se disputent les groupes et les partis politiques[27].

Dans les faits, la distinction opérée entre les réfugiés proprement dits et les autres victimes de la guerre ne sera jamais acceptée par les autorités locales palestiniennes et jordaniennes ; les entraves

27 *Ibid.*

mises au travail de recensement du Commissariat iront en se multipliant et retarderont d'autant l'établissement du nombre des ayants droit selon les critères de l'ONU. De plus, sous la pression des circonstances, le Commissariat ne supprimera pas complètement les secours aux sinistrés, destitués et autres indigents. Il continuera de leur distribuer des demi-rations alimentaires ou une aide intermittente. En avril 1950, le nombre de personnes ainsi secourues s'élève à 30 000, qui s'ajoutent aux 416 000 réfugiés effectivement recensés dans les régions relevant du CICR[28].

La prolongation de l'action

Les trois organisations opératrices se rendent rapidement compte que la situation politique et économique au Moyen-Orient n'évolue pas suffisamment pour déboucher sur une solution rapide du problème des réfugiés palestiniens. Elles attirent l'attention des autorités compétentes des Nations Unies sur ce point et sur la nécessité d'examiner, à temps, le sort des réfugiés en prévision de l'hiver 1949-1950. Dès mai 1949, elles se déclarent prêtes à prolonger leurs activités au-delà du 30 août 1949, date originellement prévue pour la fin de l'action, mais à condition que les prestations — rations alimentaires, aide médicale, fourniture de tentes et de vêtements — ne tombent pas au-dessous d'un niveau considéré comme minimum et que des efforts soient entrepris en vue de l'établissement des réfugiés dans des foyers définitifs. L'Assemblée générale des Nations Unies ne siégeant pas avant la fin de septembre et ne pouvant pas, de ce fait, prendre une nouvelle décision en temps utile, l'UNRPR tend en effet à épargner le plus possible ses fonds pour prolonger l'action[29].

28 *Rapports Commissariat CICR I*, pp. 22 ss., et IV, pp. 22 ss. *RICR*, n° 372, décembre 1949, pp. 977 ss. *RICR*, n° 379, juillet 1950, pp. 488 ss. Voir aussi le rapport du président sur sa mission au Proche-Orient, 03.04.1950, annexé au procès-verbal de la séance de travail du Comité du 30.03.1950 – ACICR, A PV.

29 Procès-verbaux de la séance du 05.05.1949 du Conseil de la Présidence et des séances de travail du Comité du 28.04, du 14.06, du 30.06 et du 14.07.1949 – ACICR, A PV. Câbles du 06.05 et du 11.07.1949 du CICR et de la Ligue au secrétaire général de l'ONU. Lettre du 16.06.1949 du directeur de l'UNRPR au CICR et lettre du 22.06.1949 du président du CICR au directeur de l'UNRPR – ACICR, B G 59/I/GC/E, boîte 851. *Rapport Commissariat CICR II*, p. 97.

Ayant reçu, le 5 octobre 1949, à la suite de démarches réitérées, une réponse satisfaisante du secrétaire général de l'ONU, le CICR décide, à l'instar de la Ligue et de l'AFSC, de poursuivre ses activités durant tout l'hiver 1949-1950[30].

Sur ces entrefaites, la Mission économique d'étude pour le Moyen-Orient (*United Nations Economic Survey Mission for the Middle East*, ou mission Clapp, du nom de son président) — créée le 23 août 1949 par la Commission de conciliation pour la Palestine pour examiner les conditions économiques et les conséquences des hostilités au Moyen-Orient — dépose son rapport. Celui-ci relève que les secours n'apportent, à terme, aucune solution à la question des réfugiés. Comme le retour de ces derniers dans leurs foyers ou leur réinstallation ailleurs posent problème, il recommande de diminuer progressivement les secours et de créer des travaux d'utilité publique pour permettre aux réfugiés de gagner leur vie et de se recréer une existence indépendante. Il propose, à cet effet, la mise sur pied d'une nouvelle agence des Nations Unies — appelée à travailler en étroite coopération avec les gouvernements des États du Moyen-Orient — ainsi que la prolongation, durant le premier trimestre 1950, de l'action de secours des trois organisations opératrices sous l'égide de l'UNRPR mais avec des crédits limités.

L'importance de la question provoque le déplacement à Lake Success du président du CICR Paul Ruegger et du commissaire pour les réfugiés Alfred Escher[31]. Le 25 novembre, le président du CICR intervient en ces termes devant la Commission politique spéciale de l'Assemblée générale des Nations-Unies:

> «(...) Il ne m'appartient naturellement pas, il n'appartient pas à la Croix-Rouge internationale, d'émettre une opinion au sujet des diverses propositions faites sur le «réétablissement» des réfugiés. (...) En revanche, il y a une partie du rapport qui vous est

30 Télégramme du 05.10.1949 du secrétaire général de l'ONU au président du CICR – ACICR, B G 59/I/GC/E, boîte 852. Procès-verbal de la séance de travail du Comité du 06.10.1949 – ACICR, A PV. *Rapport Commissariat CICR III*, p.1 et pp. 87 ss.

31 Procès-verbaux de la séance de travail du Comité du 17.11.1949 et de la séance du 25.11.1949 du Conseil de la Présidence – ACICR, A PV.

soumis, sur laquelle le Comité international de la Croix-Rouge a le droit et même le devoir de se prononcer, et de se prononcer sans délai. Il s'agit de la partie de cet exposé qui traite de l'action de secours à continuer sur place pendant le premier trimestre de 1950 par les organisations qui y travaillent déjà. Le rapport propose des crédits qui, au milieu de difficultés accrues, seraient limités selon un système qui réduirait d'un tiers le volume des secours distribués, ou, plus précisément, qui priverait une personne sur trois des rations qui lui sont allouées jusqu'ici, et cela en plein hiver, au moment où l'envoi de tentes est insuffisant.

Pour ce qui est de plusieurs vastes régions dans lesquelles opère le Comité international de la Croix-Rouge, je suis sûr de ne pas exagérer en affirmant ici que la réduction subite et considérable du nombre des personnes secourues jusqu'ici pourrait donner le signal de troubles nouveaux. Alors qu'un des buts primordiaux et déclarés de l'action généreuse entreprise par les Nations Unies est le maintien de la paix, nous risquerions à la onzième heure — juste avant la mise en œuvre graduelle du plan de réétablissement des Nations Unies, de provoquer une recrudescence de désordres qu'il s'agit d'éviter (...).

Au printemps de cette année encore, il y avait des tumultes à Jérusalem même, une partie de la population, indigente, n'ayant cessé de réclamer des rations alimentaires que les agents du Comité international de la Croix-Rouge réservaient strictement aux «réfugiés», c'est-à-dire aux personnes venues du dehors. Le Comité international a fait, en effet, tout ce qui était en son pouvoir pour agir dans l'esprit de la décision de l'Assemblée de ne pas donner les rations alimentaires de l'ONU à des «non-réfugiés» (...).» Paul Ruegger souligne que, pour venir en aide à la population indigente de Jérusalem, le CICR a pris l'initiative d'une action de secours complémentaire en

faveur des non-réfugiés, financée essentiellement par ses fonds propres. » [32]

En conclusion et en vue de la négociation relative à la prolongation des accords existant entre l'ONU, d'une part, et les trois organisations opératrices, de l'autre, le président du CICR « demande instamment à la Commission, à l'Assemblée, de ne pas lier ses organes chargés de négocier, par des instructions qui limiteraient d'emblée le nombre des rations alimentaires que l'ONU alloue aux réfugiés de Palestine (...). » [33]

Une formule suffisamment souple est finalement trouvée qui, tout en soulignant la nécessité de réduire le nombre des réfugiés inscrits, ne risque pas de mettre le Commissariat du CICR et les autres organisations dans une situation difficile. La résolution 302 (IV), adoptée le 8 décembre 1949 par l'Assemblée générale des Nations Unies, qui établit l'Office de secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient (UNRWA, *United Nations Relief and Works Agency for Palestine Refugees in the Near East*), stipule, sous le point 11 :

> « L'Assemblée générale prolonge l'existence de l'Aide des Nations Unies aux réfugiés de Palestine, créée en vertu de la résolution 212 (III) de l'Assemblée générale, jusqu'au 1er avril 1950 ou jusqu'à la date à laquelle aura lieu le transfert mentionné au paragraphe 12 si cette date est plus tardive, et prie le Secrétaire général de poursuivre, en liaison avec les organismes d'exécution, ses efforts pour réduire progressivement le nombre des rations délivrées, en s'inspirant des constatations et des recommandations de la Mission économique d'étude. »[34]

32 De fin mars 1949 à fin avril 1950, près de 14 000 personnes ont bénéficié de cette action, sous la forme de distributions bimensuelles de vivres. Le CICR avait également ouvert un centre de distribution quotidienne de lait et un dispensaire. Voir *L'œuvre de secours du Comité international de la Croix-Rouge en faveur de la population indigente de Jérusalem*, CICR, Genève, 1950, 15 pages.

33 Texte du discours prononcé le 25.11.1949 à Lake Success par Paul Ruegger, président du CICR, devant la Commission politique spéciale de l'Assemblée des Nations Unies – ACICR, B G 59/I/GC/E, boîte 852. *RICR*, n° 372, décembre 1949, pp. 989-995.

34 *Rapport Commissariat CICR III*, p. 90.

En définitive, à la demande du secrétaire général de l'ONU, les trois organisations opératrices acceptent une ultime prolongation de leur action jusqu'au 30 avril 1950[35].

En mars 1950, le président du CICR effectue une mission au Moyen-Orient pour s'assurer que la cessation des activités du Commissariat et leur reprise par l'UNRWA se fera dans les meilleures conditions possible.

Le déroulement et le bilan de l'action

Dès le début de l'action, le Commissariat s'efforce de faire en sorte que les distributions de vivres s'améliorent en quantité et en qualité. De 1 200 calories en moyenne par jour et par personne durant les premiers mois, la ration alimentaire passe à 1 350 fin 1949. Elle n'atteindra toutefois jamais la ration théorique de 1 500 calories établie par l'UNRPR et l'UNICEF, en raison notamment des retards de livraison et de la différence existant entre, d'une part, le nombre de rations allouées au Commissariat et, de l'autre, celui des personnes effectivement secourues par ce dernier. Au terme de l'action, l'état alimentaire des réfugiés est néanmoins considéré comme satisfaisant[36].

Au total, le Commissariat a distribué plus de 76 000 tonnes de vivres — farine, légumineuses, huile, sucre, fruits secs, conserves de poisson et viande, huile de foie de morue, lait en poudre, margarine, riz, pommes de terre et oignons — pour une valeur de près de 43 millions de francs suisses. À cet effet, il a ouvert 215 centres de distribution de vivres et 172 centres de distribution de lait, où 20 millions de litres de lait ont été préparés avec la poudre fournie par l'UNICEF. Un dixième de ces secours a bénéficié aux réfugiés, arabes et juifs, en Israël[37].

Au début, un seul camp existe dans les régions relevant du CICR, à Jéricho. De nouveaux camps sont créés par le Commissariat,

35 Procès-verbal de la séance du 09.02.1950 du Conseil de la Présidence – ACICR, A PV.

36 Compte rendu de A. Vannotti, annexe au procès-verbal de la séance plénière du CICR du 19.01.1950 – ACICR, A PV.

37 *Rapport Commissariat CICR II*, p. 2 et IV, p. 6, *RICR*, n° 372, décembre 1949, p. 982, et *RICR*, n° 379, juillet 1950, p. 491. *Rapport d'activité résumé du CICR du 1er juillet 1947-31 décembre 1951*, p. 116.

au fur et à mesure de l'arrivée des tentes. Leur nombre s'élève à 20 (pour 56 400 réfugiés) fin septembre 1949, à 26 (67 700 réfugiés) fin décembre 1949 et à 36 (76 150) au 30 avril 1950. Ce n'est en effet qu'en décembre 1949 et en janvier 1950 que des dons importants de l'Organisation internationale pour les réfugiés (OIR) et du *Superior Council for Relief to Palestine Refugees* au Caire permettent de procurer aux réfugiés les tentes, les habits et les chaussures qui manquent encore[38].

Le service médical du Commissariat s'organise dès janvier 1949, sur la base des recommandations du professeur Vannotti. Ses activités se développent également en fonction des moyens financiers. Le premier souci est d'améliorer les policliniques déjà mises sur pied par les infirmières du CICR et d'en créer de nouvelles. Elles sont installées dans les agglomérations et dans les camps où se trouvent le plus grand nombre de réfugiés, et complétées par des dispensaires mobiles qui se rendent dans les villages éloignés ou les petits camps. Elles servent notamment au dépistage des maladies graves et surtout contagieuses, et orientent l'évacuation des malades sur les hôpitaux.

Comme ceux-ci sont insuffisants, le service médical du Commissariat crée de nouveaux établissements, ou remet en état des hôpitaux déjà existants, dont il prend en main la direction. Il en subventionne d'autres contre la mise à disposition de lits pour les réfugiés. Une pharmacie centrale, des dépôts locaux de médicaments et des laboratoires sont égalememt mis sur pied, ainsi que des centres de puériculture et des crèches. Dans ces derniers, des consultations spéciales sont organisées pour les nourrissons et les enfants en bas âge, en même temps que les mères se familiarisent avec les notions élémentaires de puériculture et d'hygiène.

Fin avril 1950, le nombre de policliniques s'élève à 36, dont 24 fixes et 12 ambulantes, qui desservent 37 points de consultation. S'y ajoutent 14 centres de puériculture et 4 crèches. Six hôpitaux, 2 cliniques infantiles, 2 maternités centrales et plusieurs maternités de camp sont entièrement à la charge du CICR et dirigés par lui, totalisant 700 lits. L'établissement le plus important est l'hôpital

38 *Rapport Commissariat CICR IV*, p. 1.
RICR, n° 382, octobre 1950, pp. 727 ss.

Augusta-Victoria, à Jérusalem, qui compte 340 lits, 2 salles d'opération, des installations de radiologie, 1 laboratoire central équipé pour les analyses cliniques, bactério-parasitologiques et sérologiques, ainsi que des possibilités d'isolement pour les malades contagieux. Les autres établissements dirigés par le service médical du Commissariat se situent à Béthanie, Hébron, Qualkylia, Tulkarem et Naplouse[39].

Au total, plus de 1 300 000 consultations ont été dispensées alors que près de 6 000 adultes et enfants ont été traités dans les hôpitaux du CICR.

À côté de la médecine curative, de grands efforts sont consentis dans le domaine de la prévention. Vivant dans des conditions d'hygiène déplorables et dans un état de moindre résistance, les réfugiés présentent en effet un terrain propice à l'éclosion d'épidémies. Un service d'hygiène est créé en mars 1949. Ses tâches sont les suivantes : service de voirie et de nettoyage des camps ; construction et entretien des latrines ; installation d'amenées d'eau, surveillance des sources et désinfection de l'eau ; diffusion des mesures élémentaires d'hygiène au sein de la population. Dans le cadre de campagnes contre la malaria et le typhus exanthématique, d'importants moyens sont mobilisés pour lutter contre les insectes vecteurs et procéder à la désinfection des camps et des localités ainsi que des réfugiés. Des programmes de vaccinations sont mis sur pied, permettant à 320 000 personnes d'être vaccinées contre la variole, 225 000 contre la typhoïde et la paratyphoïde, 36 000 contre le typhus exanthématique, 63 000 contre la tuberculose et 21 000 contre la diphtérie. Une attention particulière est également apportée aux affections oculaires, particulièrement fréquentes dans ces régions. Grâce à ces mesures et alors que les plus grandes craintes étaient de mise, aucune épidémie n'est à déplorer[40].

Enfin, dans le domaine éducatif, le Commissariat, grâce à

39 Rapport général d'activité du service médical du Commissariat du Comité international de la Croix-Rouge pour l'aide aux réfugiés en Palestine, établi en novembre 1950 par le Dr R. Sansonnens – ACICR, B G 59/I/GC/E, boîte 855.

40 *Ibid.* Des données sur l'action médicale du Commissariat du CICR en Palestine figurent également dans les documents suivants : *Rapport Commissariat CICR IV*, pp. 6, 7, 63 et 67. *Rapport d'activité CICR 1947-1951*, pp. 57 ss., *RICR*, n° 372, décembre 1949, pp. 982 ss., *RICR*, n° 374, février 1950, pp. 86 ss., et *RICR*, n° 379, juillet 1950, pp. 492 ss.

l'aide de l'UNESCO, commence par soutenir et développer, dès l'automne 1949, les écoles déjà mises en place, notamment à Jéricho, par l'*Arab Development Society* et par l'Alliance universelle des Unions chrétiennes de jeunes gens (*YMCA*), puis par en ouvrir de nouvelles. Fin avril 1950 28 écoles fonctionnent, réparties dans 24 camps des régions de Jéricho, Ramallah, Naplouse, Bethléem et Hébron, ainsi qu'à Naplouse même et dans la vieille ville de Jérusalem. Elles regroupent quelque 9 700 enfants, confiés à 162 instituteurs[41].

À la même époque se développent, grâce à d'importants lots de tissu mis à disposition par l'UNRPR, des centres de couture, où des femmes réfugiées confectionnent des vêtements. En quatre mois, ces ateliers fournissent plus de 82 000 pièces de vêtements, rétribuent quelque 200 femmes, alors que plus de 300 apprenties sont en formation[42].

Enfin, vers la fin de sa mission, le Commissariat peut se consacrer à l'organisation d'ateliers artisanaux, pour initier, dans chaque région, des jeunes gens aux métiers de menuisier, cordonnier, tailleur de pierres et ferblantier. Outre la valeur formatrice que représentent ces ateliers, il s'efforce d'en faire de petites entreprises qui contribuent utilement à l'installation des camps et qui, avec le temps, pourront subvenir à leur entretien. Fin avril 1950 15 ateliers d'apprentissage fonctionnent, placés sous la direction d'une vingtaine d'artisans réfugiés et comptant 270 élèves[43].

Au total, du 1er janvier 1949 au 30 avril 1950, le Commissariat a distribué plus de 78 000 tonnes de secours — dont 76 000 tonnes de vivres, 232 tonnes de médicaments et de matériel sanitaire, des tentes et du combustible, 504 000 couvertures et sacs de couchage, 180 000 pièces de vêtements et du matériel scolaire — pour une valeur totale de 54 545 000 francs suisses[44]. Outre l'UNRPR, l'UNICEF, l'OMS, l'UNESCO et l'OIR, des organisations et donateurs privés — *Church World Service, Council of British Societies for Relief*

41 *Rapport Commissariat CICR IV*, pp. 80 ss. et p. 90 en particulier.

42 *Rapport Commissariat CICR IV*, pp. 104-106.

43 *Ibid.*, pp. 116 ss., et *RICR*, n° 382, octobre 1950, pp. 730 ss.

44 *Rapport d'activité CICR 1947-1951*, p. 116.

Abroad, Jewish Society for Human Service (Londres), *Lutheran World Federation*, Mission belge «Palestine», *Superior Council for Relief to Palestine Refugees* (Cairo), YMCA, S.M. le roi Abdallah de Jordanie — ainsi que le gouvernement turc et les Sociétés nationales de la Croix-Rouge des pays suivants y ont contribué: Afrique du Sud, Belgique, Canada, Danemark, États-Unis, Finlande, Inde, Liechtenstein, Royaume-Uni et Suède[45].

L'UNRWA entre en action le 1er mai 1950, sous la direction d'un Canadien, le major général Howard Kennedy. En l'absence d'une solution au problème des réfugiés palestiniens, le mandat de l'UNWRA a été constamment renouvelé depuis lors. Mi-juin 2001, selon les chiffres publiés par l'UNRWA, le nombre de réfugiés palestiniens inscrits et secourus par cette organisation en Jordanie, au Liban, en Syrie, ainsi qu'en Cisjordanie et dans la bande de Gaza s'élevait à 3,8 millions[46].

Conclusion

Malgré les obstacles rencontrés, l'action du Commissariat du CICR pour l'aide aux réfugiés de Palestine a débouché sur des résultats positifs. À son terme, alors que les plus grandes craintes étaient de mise, aucune épidémie n'est à déplorer. L'état nutritionnel et la santé des réfugiés sont considérés comme satisfaisants. Le CICR est à même de remettre à l'UNRWA des hôpitaux, des dispensaires et d'autres installations de grande qualité.

En comparaison, et particulièrement sur le plan quantitatif, l'action conduite antérieurement par la délégation du CICR en faveur des réfugiés paraît minime. Elle a toutefois facilité le démarrage de celle du Commissariat grâce aux contacts déjà établis, à l'organisation déjà mise en place pour ses propres distributions de secours et à

45 Pour une vue d'ensemble de l'action de l'UNRPR, les lecteurs peuvent se référer à l'ouvrage de Gabbay, cité en note 4. Pour l'action de la Ligue des Sociétés de la Croix-Rouge, voir notamment le *Rapport sur l'action de secours en faveur des réfugiés palestiniens, exécutée par le Commissariat pour le Proche-Orient de la Ligue des Sociétés de la Croix-Rouge en liaison avec le Secours des Nations Unies pour les réfugiés palestiniens*, 1949-1950, Ligue des Sociétés de la Croix-Rouge, Genève, 1950, 110 pages et 18 annexes.

46 Site web officiel de l'UNRWA, mise à jour du 13.06.2001.

l'expérience acquise par ses délégués et infirmières — dont plusieurs passeront sous les ordres du Commissariat.

Grâce à sa coopération avec l'ONU, le CICR a réussi à conduire une action de secours d'envergure — cela sans perdre son identité et en préservant son indépendance.

●

Abstract

The ICRC and assistance to Palestinian refugees (1948-1950)

by CATHERINE REY-SCHYRR

During the 1948-1949 conflict in Palestine, the ICRC conducted a major operation for the wounded and the sick, the prisoners of war and civilian victims of the conflict. It was also one of the first international organizations to provide Palestinian refugees with concrete help: to begin with, starting in July 1948, through the delegation it had opened several months earlier in Palestine to carry out its traditional protection and assistance work there; later, by setting up the ICRC Commissariat for Relief to Palestine Refugees, which, alongside other organizations, acted as a distribution agency within the framework of the United Nations Relief for Palestine Refugees. In 1950, this activity was taken over by UNWRA.

Personnes déplacées en Colombie et personnes d'origine colombienne cherchant refuge dans les pays voisins

Un aperçu des activités du Haut Commissariat des Nations Unies pour les réfugiés (HCR) et du Comité international de la Croix-Rouge (CICR)

par
FRÉDÉRIQUE PRUNERA

Comme le souligne en 1996 l'historien David Bushnell, « de tous les pays d'Amérique latine, la Colombie est le moins étudié et peut-être le moins compris »[1]. Cinq ans plus tard, ce constat est toujours d'actualité. La Colombie n'est que trop souvent perçue à travers le seul prisme de la drogue, de la violence et de la corruption. La nature, les origines et les conséquences du conflit qui ravage le pays retiennent peu l'attention. La Colombie, qui comptait presque deux millions de personnes déplacées à la fin de l'année 2000, occupe pourtant aujourd'hui le troisième rang

FRÉDÉRIQUE PRUNERA est diplômée de l'Institut d'études politiques de Rennes (France). Après avoir fait un stage au CICR, elle a occupé un poste au Bureau du HCR en Colombie. — La *Revue* a invité l'auteur à décrire l'action humanitaire que le HCR et le CICR mènent respectivement en Colombie. Son texte est une présentation personnelle et n'engage pas les deux institutions.

mondial des pays ayant la plus forte population déplacée[2]. Que sait-on vraiment des Colombiens qui fuient la violence liée au conflit ? Qu'en est-il de l'effort humanitaire en faveur des populations déplacées ?

En situant ces questions dans leur contexte politique, cette contribution vise à mettre en relief l'action humanitaire que le CICR et notamment le HCR mènent en faveur des déplacés en Colombie et des personnes d'origine colombienne cherchant refuge dans les pays voisins[3].

Contexte

Origines politiques du conflit

Le conflit qui nourrit depuis cinquante ans le quotidien des Colombiens trouve racine dans les années 1946-1957, période connue sous le nom de *La Violencia*. L'assassinat de Jorge Eliécer Gaitan, libéral populiste, en 1948, et la création du Front national *(Frente Nacional)* ont marqué le début d'une lutte sanglante pour le pouvoir entre conservateurs et libéraux. Ces deux partis ont décidé de s'alterner à la présidence, instaurant de fait un système politique exclusif. La crise de légitimité et de représentativité des institutions qui s'est ensuivie a provoqué une forte vague contestataire. Cette époque a vu en effet apparaître des groupes d'opposition revendiquant leur attachement à des idéologies communistes et marxistes. Les Forces armées révolutionnaires de Colombie (*Fuerzas Armadas Revolucionarias de Colombia* — FARC) naissent en 1964, et l'Armée de libération nationale (*Ejercito de Liberación Nacional* — ELN), guérilla procubaine, fait son apparition l'année suivante. Les deux mouvements disent lutter pour une société plus équitable.

Ce n'est qu'à la fin des années 80 qu'apparaissent de nouveaux groupes armés structurés, les groupes d'autodéfense. Les

1 David Buschnell, *Colombia una nación a pesar de si misma, de los tiempos precolombinos a nuestros días*, Bogotá, 5e éd., 2000, p. 15.

2 US Committee for Refugees, *World Refugee Survey*, Washington D.C., 2000. Voir ‹www.refugee.org›.

3 La situation des réfugiés d'origine non colombienne installés en Colombie (239 en 2000), assistés et protégés par le HCR, ne sera pas traitée dans cette étude.

Groupes unis d'autodéfense de Colombie (*Autodefensas Unidas de Colombia* — AUC) chapeautent d'autres groupes dont le plus important, les Groupes paysans d'autodéfense de Córdoba et Urabá (*Autodefensas Campesinas de Córdoba y Urabá* — ACCU). Ces groupes protègent les intérêts des grands propriétaires terriens. Les années 90 voient leur emprise s'étendre sur le pays, alors que les guérillas, en particulier les FARC, accroissent leur influence. Tous emploient la violence pour parvenir à leurs fins : contrôler le territoire et ses ressources économiques. Les guérillas et les groupes d'autodéfense s'affrontent sur le terrain, et les forces armées régulières combattent les deux groupes d'opposition. La population civile, qui est accusée de sympathiser avec l'adversaire ou, tout simplement, qui est prise entre deux feux, est la première victime de ce conflit[4].

Les déplacements internes en Colombie résultent certes de la violence liée au conflit, mais ils constituent également une stratégie de guerre délibérée, que poursuivent les groupes armés pour s'assurer le contrôle du territoire. Le déplacement forcé de la population civile est une violation des principes fondamentaux protégeant la dignité et le bien-être de la personne humaine. La crise économique, les inégalités sociales, la corruption, la petite criminalité et le trafic de drogue accompagnent ce phénomène qui tend à s'étendre au-delà des frontières colombiennes.

Action de l'État

Le conflit qui sévit en Colombie est reconnu par le gouvernement colombien comme un conflit armé non international, auquel s'applique de ce fait l'article 3 commun aux quatre Conventions de Genève de 1949 et au Protocole additionnel II de 1977. C'est avant tout en tant que civils victimes d'un conflit armé que les personnes déplacées à l'intérieur de leur pays sont protégées par ces

4 Pour une information détaillée sur les violations du droit international humanitaire et des droits de l'homme en Colombie, voir le Rapport à la Commission des droits de l'homme des Nations Unies, 57e session, 2001, Doc. ONU E/CN 4/2001/15.

instruments du droit international, tous ratifiés par la Colombie. En revanche, elles ne bénéficient pas — si elles ne franchissent pas une frontière internationale — d'une protection similaire à celle que garantit aux réfugiés la Convention de 1951 relative au statut des réfugiés, également ratifiée par la Colombie. Les *Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays*, élaborés sous la responsabilité de Francis Deng et inspirés des règles pertinentes du droit international humanitaire et des droits de l'homme[5], concrétisent cependant un cadre de référence normatif applicable à la protection des déplacés à l'intérieur de leur pays. Rappelons que c'est à l'État qu'incombe au premier chef la responsabilité de porter assistance et protection aux personnes déplacées.

Le gouvernement colombien a formellement reconnu cette responsabilité[6] et s'est dit prêt à suivre les recommandations que Francis Deng a formulées à la suite de sa première mission officielle en Colombie (juin 1994), en sa qualité de représentant spécial du secrétaire général des Nations Unies[7]. Cette volonté s'est traduite notamment sur les plans juridique et institutionnel.

Sur le plan juridique, la Loi 387 du 20 juillet 1997 constitue une première tentative d'intégration dans la législation nationale des normes relatives à la protection des personnes déplacées énoncées dans le Protocole additionnel II de 1977. La loi définit les responsabilités de l'État et prévoit l'adoption de mesures destinées à assurer assistance et protection aux déplacés, à stabiliser leur situation socioéconomique et à prévenir les déplacements forcés.

Sur le plan institutionnel, la *Red de Solidaridad Social*[8] (Réseau de solidarité sociale, ci-après la *Red*), qui relève directement de la présidence de la République, a été chargée de coordonner les activités de l'État en faveur des personnes déplacées par la violence.

5 Doc. ONU E/CN 4/1998/53/Add.2.

6 Documents du *Consejo Nacional para la Política Económica y Social* (CONPES) de 1995 et 1997.

7 Voir son rapport Doc. ONU E/CN 4/1995/50/Add.1. Une seconde mission officielle a eu lieu en mai 1999. Voir Doc. ONU E/CN 4/2000/83/Add.1.

8 *La Red de Solidaridad Social* a remplacé en 1999 la *Consejería Presidencial para el Desplazamiento*.

Les moyens ne sont cependant pas à la hauteur des ambitions affichées. Le gouvernement n'a pas la capacité financière et structurelle nécessaire pour apporter, seul, une réponse efficace au problème du déplacement interne forcé.

Les organisations nationales et internationales

À la demande du gouvernement colombien, des organisations humanitaires s'efforcent de fournir assistance et protection aux populations déplacées sur le territoire national et à celles qui cherchent refuge dans les pays voisins. De nombreuses organisations internationales sont présentes : le Mouvement international de la Croix-Rouge et du Croissant-Rouge, à travers le Comité international de la Croix-Rouge et les Sociétés nationales participantes[9], qui collaborent étroitement avec la Croix-Rouge colombienne ; la plupart des institutions des Nations Unies[10], notamment le HCR, que l'Assemblée générale a chargé de coordonner l'action en faveur des déplacés ; des organisations internationales[11], ainsi que quelques grandes ONG internationales[12]. Enfin, ECHO (Office humanitaire de la Communauté européenne) soutient de nombreux projets dans le pays.

Il ne faut pas négliger le poids des organisations de la société civile colombienne[13], c'est-à-dire, les universités, les ONG

9 Les Sociétés nationales participantes (SNP) qui collaborent avec le CICR à travers des délégations de projet sont les Croix-Rouge d'Allemagne, du Canada, de Norvège et de Suède. Les Sociétés nationales française, espagnole et néerlandaise sont également présentes en Colombie.

10 Haut Commissariat aux droits de l'homme (HCDH), HCR, Programme alimentaire mondial (PAM), UNICEF, Fonds des Nations Unies pour la population (FNUAP), Programme des Nations Unies pour le développement (PNUD), Programme des Nations Unies pour le contrôle international des drogues (PNUCID), Organisation pour l'alimentation et l'agriculture (FAO) et Bureau pour la coordination des affaires humanitaires (OCHA).

11 Organisation panaméricaine de la santé (OPS), Organisation internationale pour les migrations (OIM).

12 Parmi lesquelles, MSF, Médecins du monde, Oxfam, *Save the Children, Christian Aid, Norwegian Refugee Council*, Brigades de Paix internationale, *Project Counselling Services*, CISP, etc. Le réseau DIAL *(Diálogo Inter-Agencial)* regroupe plusieurs de ces ONG.

13 Codhes, Cinep, Minga, *Comisión Colombiana de Juristas*, Andas, Opción Legal, Justicia y Paz, Cedavida, *Pastoral Social, Universidad Javeriana*, etc. À noter que le *Grupo de Apoyo a los Desplazados* (GAD – Groupe d'appui aux déplacés) compte treize ONG.

nationales et locales, parfois regroupées en réseaux, les organisations de personnes déplacées et l'Église catholique, particulièrement active dans le pays. Toutes sont des partenaires essentiels pour les organisations internationales et le gouvernement colombien.

Tout en mettant en évidence l'effort que ces organisations déploient en faveur des personnes déplacées par le conflit, cette étude se penche plus particulièrement sur le travail réalisé par le HCR et le CICR.

Action en faveur des personnes déplacées à l'intérieur de la Colombie

Les estimations relatives au nombre des personnes déplacées sur le territoire colombien varient d'une organisation à l'autre, selon les critères de définition adoptés, la durée établie du déplacement ou encore l'importance qui veut être donnée à l'action menée. C'est ainsi qu'on peut estimer à 200 000 environ le nombre des personnes déplacées dans le pays en 2000. Depuis 1985, le conflit aurait poussé près de 1 800 000 personnes à fuir leur foyer.

Les statistiques sont moins diverses en ce qui concerne les caractéristiques de cette population. Ainsi, les enfants représenteraient environ 55 % de la population déplacée. Les femmes, qui constituent 55 et 60 % de la population, seraient à la tête de près de 44 % des familles déplacées. Les communautés indigènes et afro-colombiennes sont particulièrement touchées. Enfin, 60 à 70 % des déplacés seraient réinstallés en zone urbaine.

Il faut noter que toutes les catégories professionnelles et sociales sont concernées et que tous les départements sont touchés, même si ceux de Antioquia, Bolívar, Cesar, Norte Santander, Magdalena Medio et Urabá le sont tout particulièrement.

Mandats

Le CICR apporte assistance et protection aux personnes déplacées en Colombie, en tant que victimes civiles d'un conflit. Il maintient une présence permanente dans le pays depuis 1981. L'accord de siège qu'il a conclu cette année avec le gouvernement colombien lui permet de mener ses activités de façon indépendante, neutre et

impartiale. Le mémorandum d'accord qui a été signé en 1996 avec le gouvernement colombien confère à l'institution une grande liberté d'action dans le cadre de son mandat. Le CICR dispose aujourd'hui de seize sous-délégations et bureaux couvrant l'ensemble du territoire national[14].

Le Statut de l'Office du Haut Commissaire pour les réfugiés ne fait pas explicitement référence aux personnes déplacées, mais son article 9 donne à l'organisation la possibilité d'entreprendre toute activité qui serait prescrite par l'Assemblée générale des Nations Unies. C'est sur cette base que le secrétaire général a pu demander au HCR d'intervenir en faveur des populations déplacées en Colombie[15]. Le HCR a établi un bureau de liaison en 1998, le gouvernement colombien ayant souhaité que l'organisation transmette son savoir-faire aux institutions nationales et locales œuvrant en faveur des personnes déplacées. En 1999, le HCR et le gouvernement colombien ont signé un mémorandum d'intentions sur un programme de coopération technique d'une durée de trois ans[16]. Le HCR dispose aujourd'hui d'un bureau à Bogotá et de trois bureaux régionaux, dans le Magdalena Medio, l'Urabá et le sud de la Colombie (Putumayo).

Programmes d'activités et modalités d'action

Conformément à leur mandat, le CICR et le HCR sont actifs à des degrés différents avant (prévention), pendant (action d'urgence) et après (réadaptation) le déplacement. En Colombie, ces trois étapes ne se succèdent pas; elles sont simultanées. Ce choix semble d'autant plus légitime que le conflit se prolonge et que les déplacements se caractérisent par leur fréquence. Cependant, si les deux organisations ont mis en place des approches analogues, en revanche leurs modalités d'action et l'ampleur de leurs engagements diffèrent sensiblement.

14 Comité international de la Croix-Rouge, « Personnes déplacées à l'intérieur de leur pays. Mandat et rôle du CICR », *RICR*, juin 2000, vol. 82, n° 838, pp. 479-490.

15 HCR, *Les réfugiés dans le monde, cinquante ans d'action humanitaire*, Autrement, Paris.

16 En 1996, le bureau régional du HCR à Caracas avait signé avec le gouvernement colombien un premier mémorandum d'intentions couvrant les activités qui relèvent du mandat traditionnel de l'organisation. Sa validité a été réaffirmée dans celui de 1999.

Alors que le CICR intervient de manière directe en faveur des déplacés et privilégie toujours l'action d'urgence, le HCR agit essentiellement par l'intermédiaire de partenaires d'exécution qui réalisent son programme de coopération technique (ou de renforcement des capacités). Ce programme, qui a cinq composantes — renforcement du cadre institutionnel et juridique, prévention, réponse d'urgence, solutions, communication et diffusion[17] —, vise d'une part à promouvoir une réponse efficace et intégrée de l'État et de la société civile au problème du déplacement interne forcé, et d'autre part à favoriser le renforcement mutuel des activités humanitaires en faveur des déplacés et des initiatives politiques prises dans le cadre des négociations de paix.

Prévention

Le CICR s'emploie à prévenir les violations du droit international humanitaire en maintenant un dialogue bilatéral avec les forces armées colombiennes et les groupes d'opposition, et en leur rappelant chaque fois que nécessaire leurs obligations à l'égard de la population civile. Du côté des forces de l'opposition, les relations sont suivies avec les FARC, l'ELN, l'EPL (*Ejercito Popular de Liberación* – Armée populaire de libération), les AUC, les ACCU et d'autres groupes armés moins importants. Le CICR propose également ses services en tant qu'intermédiaire neutre entre les parties au conflit ou entre les victimes et les autorités, afin de résoudre des problématiques humanitaires spécifiques.

La promotion et la diffusion du droit international humanitaire auprès des autorités, des forces armées et de la police nationale sont des instruments privilégiés de prévention et de protection de la population civile. Des réunions sont organisées, à tous les échelons de commandement, avec les divers groupes armés dans l'espoir de voir intégrer les règles du droit international humanitaire dans les codes de conduite respectifs. Les activités de promotion et de diffusion du

17 Voir HCR, *Operational Plan for UNHCR Response to Forced Displacement in Colombia*, Genève, 1999.

CICR s'adressent enfin aux milieux universitaires, aux médias professionnels et à l'opinion publique, notamment à travers des campagnes de sensibilisation[18]. La présence permanente de délégués du CICR sur le terrain est essentielle à ce travail de prévention et de protection.

Trois des cinq composantes du programme du HCR s'inscrivent dans le cadre d'une stratégie plus globale de prévention : le renforcement du cadre institutionnel et juridique, la prévention et la diffusion.

Soucieux de renforcer les mécanismes nationaux de protection des personnes déplacées, le HCR apporte depuis 1999 un soutien technique et financier à la *Red de Solidaridad Social*. Une *Unidad Técnica Conjunta* (unité technique commune), créée par la *Red* et le HCR, a pour mission d'élaborer la stratégie nationale en faveur des déplacés et d'encourager son application locale et coordonnée. On retiendra que l'un des experts de cette unité travaille sur la réglementation de la Loi 387 et que le CICR fournit une contribution non négligeable à cette initiative.

Le HCR et le CICR apportent leur appui et partagent leurs compétences dans deux autres domaines clés : l'enregistrement de personnes déplacées et la délivrance de documents d'identité. Le soutien apporté tant à la mise en place d'un nouveau système unique d'enregistrement par la *Red*, qu'au programme national de délivrance de documents d'identité aux déplacés, en coordination avec la *Registraduría* (bureau de l'enregistrement), vise à faciliter l'accès de ces personnes aux services sociaux de l'État. La formation des fonctionnaires concernés, la vaste campagne de sensibilisation à l'importance des documents d'identité qui a été menée dans les zones à forte concentration de déplacés, et la création d'une unité mobile sont partie intégrante de ce programme[19]. La *Defensoría* (médiateur national)

18 À titre d'exemple, la campagne de 1999 avait pour slogan *Juegue limpio*, celle de 2000 encourageait la protection du personnel médical et sanitaire.

19 À noter que seulement 17 % des personnes déplacées disposeraient de documents d'identité. Pour plus d'informations sur le sujet voir The Brookings Institute, *The Brookings-Cuny Project on Internal Displacement, Internal Displacement in the Americas: Some distinctive features*, Occasional Paper, May 2000. Voir ‹www.idpproject.org›.

bénéficie elle aussi de l'appui du HCR dans la conduite de ses activités de promotion des droits des déplacés et de protection des communautés à haut risque.

Le CICR, quant à lui, favorise la création de centres d'appui aux personnes déplacées (*Unidad de atención y orientación* — Unité d'assistance et d'orientation). Il soutient ces centres, qui font partie de la *Red*.

À l'échelon local, le HCR et le CICR s'attachent à renforcer la capacité d'action des unités décentralisées de l'administration gouvernementale, des ONG et des communautés de déplacés. Ils organisent à leur intention des séminaires de formation mettant l'accent sur la création de mécanismes de coopération au niveau local. Mentionnons tout particulièrement l'appui dont bénéficient les *comités locaux d'assistance à la population déplacée par la violence*. En application de la Loi 387, ces comités ont pour mandat, à l'échelon municipal, de protéger les droits et de répondre aux besoins des déplacés.

L'action que le HCR mène conjointement avec la *Red* et la *Defensoría* pour établir un système d'alerte rapide, et avec le CODHES, pour renforcer le système national d'information sur les déplacés (SISDES), vise explicitement à atténuer l'impact des déplacements sur les civils. La mise en place de mécanismes communautaires de protection suit cette même logique préventive.

Par ailleurs, les cours de sensibilisation donnés aux forces armées et à la police nationale ont pour objectif de diffuser les *Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays* ainsi que la Loi 387. Celles-ci sont ainsi amenées à prendre conscience de leur rôle en matière de prévention des déplacements et de protection des déplacés.

Action d'urgence

L'incapacité de l'État à répondre aux besoins essentiels des déplacés en situation d'urgence légitime l'effort que les organisations humanitaires déploient au cours de cette phase.

L'action du CICR est centrée essentiellement sur l'action d'urgence, qui lie étroitement activités d'assistance et de protection. Il s'agit non seulement d'assurer la distribution immédiate de moyens

matériels de survie (nourriture, couvertures, ustensiles de cuisine, etc.), mais aussi de prendre contact avec le groupe armé concerné, afin de faciliter l'accès aux personnes menacées, d'évaluer les besoins ou encore de négocier l'accès aux soins médicaux. Par ailleurs, le CICR sollicite l'intervention de la *Red* durant les trois mois d'aide d'urgence. Depuis juin 2000, il appuie, par le biais d'un consultant technique, plusieurs unités d'assistance et d'orientation de la *Red*.

Pendant la phase de l'urgence, le CICR collabore étroitement avec la Croix-Rouge colombienne. À travers des délégations de projets, il coopère en outre avec les Sociétés nationales participantes, qui assurent le fonctionnement de quatre unités médicales mobiles[20]. Ces unités incluent des programmes éducatifs, de prévention (vaccination) et de salubrité de l'environnement. En 2000, elles ont permis la réalisation de 3 000 interventions en faveur des populations vivant dans les zones reculées. Enfin, l'institution coordonne certaines activités avec les autres Sociétés nationales de la Croix-Rouge présentes en Colombie.

Au cours de cette phase, le HCR reconnaît expressément la prééminence du CICR et de la Croix-Rouge colombienne, de l'Église catholique et des ONG nationales. En renforçant la capacité d'intervention des institutions nationales et locales face aux situations d'urgence (préparation aux situations d'urgence), le HCR fait cependant une contribution importante par voie indirecte. Dans cet esprit, les comités municipaux sont encouragés à établir des plans d'intervention d'urgence et des mécanismes de coordination pour une distribution efficace des secours.

Fruit d'un effort conjoint du HCR, du CICR, d'ECHO, de la *Red de Solidaridad Social* et de l'Église catholique, le *Manuel sur les normes applicables pour l'assistance humanitaire* a été publié en 2000. C'est un outil au service des délégués de la *Red* et de tous les acteurs concernés, qui vise à améliorer la distribution de l'aide humanitaire et à

20 Les SNP fournissent des moyens techniques et financiers pour le fonctionnement de ces unités mobiles.

en garantir l'accès à tous les ayants droit, dans des conditions de sécurité et en tenant compte des besoins spécifiques.

L'urgence passée, il est rare que les déplacés qui ne sont pas retournés chez eux disposent des moyens de subsistance indispensables à leur réadaptation. En effet, s'il est crucial de couvrir les besoins d'urgence à court terme, la réadaptation des déplacés est aujourd'hui une préoccupation majeure, qui requiert tout autant d'attention.

Solutions

Le retour des personnes déplacées dans leur lieu d'origine et dans des conditions de sécurité est évidemment la meilleure des solutions, mais ce retour n'est pas toujours possible. Le CICR et le HCR œuvrent donc à la stabilisation socioéconomique de ces personnes, contribuant ainsi à leur intégration. Par ailleurs, le CICR déploie son activité traditionnelle de protection.

Bien que le CICR privilégie l'action d'urgence, il s'efforce, tout comme le HCR, de rétablir des conditions de vie garantissant dignité et sécurité aux personnes déplacées. En l'an 2000, il a mis en place, par l'intermédiaire d'ONG locales, d'organisations de déplacés ou de l'Église, des projets à impact rapide (PIR) de micro-infrastructure. Des activités génératrices de recettes sont par ailleurs encouragées dans les domaines de la pêche et de l'agriculture.

Le HCR encourage le développement de micro-projets dans des domaines aussi divers que l'infrastructure, l'eau et l'assainissement, l'éducation, la santé, le soutien psychosocial, des projets productifs de revenus et l'environnement. Ces projets permettent aux déplacés de recouvrer un minimum de dignité. Le HCR veille à ce que les besoins spécifiques des enfants, des femmes et des populations indigènes soient pris en compte. Ainsi, plusieurs projets locaux visent directement à renforcer les organisations de femmes déplacées ou à faire connaître leurs droits aux populations indigènes.

À noter que, suivant les circonstances, les communautés d'accueil bénéficient d'un soutien de la part des deux organisations.

Quel espace de coopération ?

Si l'arrivée du HCR en Colombie a pu susciter quelques appréhensions du côté du CICR, dont le souci premier est de ne pas mettre en péril son image de neutralité et d'indépendance, les deux institutions ont su depuis maintenir des relations cordiales, fondées notamment sur la volonté commune d'éviter les chevauchements d'activités.

L'espace de coopération entre le CICR et le HCR se traduit aujourd'hui par un partage de l'analyse sur des sujets d'intérêt commun, dans le cadre de réunions informelles ou de forums inter-institutions de réflexion. Le *Manuel sur les normes applicables pour l'assistance humanitaire* est un des résultats de ce type de collaboration.

En revanche, le CICR et le HCR ne mènent pas d'opérations communes. On comprendra que les mandats et, pour le CICR, les principes de neutralité et d'indépendance, limitent le champ de cette coopération.

Action en faveur des Colombiens cherchant refuge dans les pays voisins

Dans le cadre d'une réflexion sur la situation des réfugiés dans le monde, engagée à l'occasion du 50e anniversaire de la Convention de 1951, il semble difficile de traiter du contexte colombien sans aborder ses conséquences régionales puisqu'il force des populations à se déplacer au-delà des frontières nationales pour chercher refuge dans les pays voisins : l'Équateur, le Panama et le Venezuela. Les déplacés d'aujourd'hui seront-il les réfugiés de demain ?

En 2000, mille à deux mille Colombiens étaient réfugiés dans les pays voisins. La crainte d'afflux massifs, liés à la mise en œuvre du Plan Colombie, ne s'est pas vérifiée jusqu'à présent. La réalité du terrain impose une analyse plus mesurée du phénomène. Tout d'abord, le nombre des Colombiens qui franchissent la frontière n'est pas aujourd'hui significatif. Les mouvements sont sporadiques et de faible ampleur. Il importe ensuite de relever le caractère atypique de ces mouvements car nombreux sont les Colombiens qui demandent l'asile dans les pays limitrophes mais qui reviennent régulièrement dans leur pays. Ainsi, des Colombiens passent la nuit au Venezuela et travaillent

leur lopin de terre en Colombie le jour. Enfin, les frontières de la Colombie avec ses trois voisins, en particulier le Venezuela, n'ont jamais été hermétiques : il y a toujours eu un mélange de différents types de migrations, qu'il s'agisse de réunions de familles ou d'activités commerciales.

Néanmoins, les personnes qui fuient le conflit et cherchent refuge dans les pays voisins sont en droit d'être assistées et protégées. Ces mouvements et la perspective d'autres flux plus importants inquiètent les États d'accueil, qui invoquent de nombreux arguments pour ne pas considérer ces Colombiens comme des réfugiés et donc pour ne pas les protéger en tant que tels. À titre d'exemple, ce phénomène migratoire a pu être qualifié de *huida interna* (fuite interne) pour refuser le statut de réfugié à ceux qui ont passé la frontière. Un argument plus récurrent est que la présence d'éléments subversifs parmi les réfugiés constitue une menace à l'ordre public

Dans ce contexte, quelle est la marge de manœuvre dont disposent les humanitaires pour protéger les réfugiés en provenance de Colombie ? Quelles sont les activités respectives du HCR et du CICR ?

Mandats respectifs

Nous retrouvons ici le terrain d'intervention classique du HCR, qui fonde son action sur son mandat traditionnel de protection des réfugiés. Le bureau régional du HCR à Caracas assure la coordination des activités qui sont menées dans les zones frontalières en faveur des Colombiens en situation de réfugiés.

Comme pour les déplacés, le CICR s'efforce de porter assistance et protection aux réfugiés, en tant que civils victimes d'un conflit. Il est toutefois important de souligner que son mandat reste subsidiaire[21] lorsque ces personnes sont réfugiées dans un pays qui n'est pas confronté à une situation de conflit. La délégation régionale

21 On précisera toutefois sur ce point qu'une compétence directe est reconnue au CICR lorsque les personnes ayant traversé une frontière sont confrontées à un risque de sécurité important.

de Caracas s'appuie essentiellement sur le réseau des Sociétés nationales de la Croix-Rouge.

Activités respectives dans les trois zones frontalières

La stratégie régionale du HCR vise à rappeler aux gouvernements leurs obligations en matière d'asile et de respect du principe du non-refoulement. Le HCR œuvre au renforcement du cadre de protection dans les trois pays et encourage les autorités et la société civile à se préparer aux situations d'urgence. Le bureau du HCR en Colombie réalise quant à lui des missions régulières de suivi de la situation aux frontières, accompagne les réfugiés qui regagnent leur pays et encourage le développement de systèmes d'information aux frontières, ainsi que le renforcement des liens avec la société civile de chaque côté des frontières.

Comme cela a déjà été indiqué, le CICR intervient essentiellement de manière indirecte en faveur des réfugiés colombiens en renforçant la capacité institutionnelle des Sociétés nationales des pays concernés et en soutenant les activités de l'Agence centrale de recherches. Cependant, le CICR a pu agir directement en faveur des populations réfugiées lorsque le HCR n'était pas en mesure d'exercer son mandat et donc de leur apporter une assistance et une protection suffisantes.

Qu'en est-il aux frontières?

La partie amazonienne de la frontière avec l'Équateur est marquée par la faible présence des autorités colombiennes. Le HCR a favorisé la mise en place d'un mécanisme tripartite (HCR/Colombie/Équateur) et l'élaboration de plans d'intervention d'urgence. Néanmoins, les deux camps de Sucumbios ne sont pas utilisés car les réfugiés préfèrent s'installer chez des proches. Certains ne font que passer par Sucumbios avant de retourner en Colombie par un autre point frontalier. En collaboration avec l'Église, le HCR conduit des programmes de santé, d'approvisionnement en eau, d'assainissement et d'éducation en faveur des réfugiés. Le gouvernement équatorien et les organisations humanitaires actives à la frontière sont d'autant plus

préoccupés par l'arrivée de Colombiens que celle-ci provoque des déplacements internes d'Équatoriens (environ 270 cas).

Le CICR apporte quant à lui un soutien matériel à la Croix-Rouge équatorienne, qui poursuit notamment des projets d'approvisionnement en eau potable et fournit les premiers secours.

La présence importante de groupes armés à la frontière avec le Panama limite l'afflux de réfugiés. Le dernier mouvement important date de janvier 2001 et un retour volontaire des réfugiés a été depuis organisé conjointement par le HCR, l'ONPAR (Bureau national pour l'aide aux réfugiés) et la *Red*. Quelque sept cents réfugiés vivraient encore dans la province du Darién. Au Panama, le HCR veille à garantir l'application, par les autorités, du régime de protection temporaire de trois mois accordé aux Colombiens dans l'attente de leur rapatriement. Des réunions de haut niveau sont organisées dans l'espoir de réduire la violence à la frontière et de faire mieux respecter les droits des réfugiés. Le HCR propose un appui technique et une formation au droit des réfugiés et aux Principes directeurs à l'intention du gouvernement, de la police, de la Commission nationale d'éligibilité et de l'ONPAR.

Le CICR appuie le programme d'assistance médicale de la Société nationale en faveur des réfugiés installés dans la province du Darién. Il a en outre apporté une assistance directe à ces personnes lorsque le HCR n'était pas en mesure d'exercer son mandat dans cette province.

Des déplacements importants, toujours possibles dans le Norte Santander en Colombie, pourraient être provoqués par la fumigation des plantations de coca et font régulièrement craindre des débordements à la frontière avec le Venezuela. Le HCR a récemment ouvert un bureau à San Cristobal afin de s'en rapprocher et d'intensifier les contacts avec les autorités locales. Cependant, son action reste limitée car le gouvernement restreint l'accès aux zones concernées. Les personnes seraient renvoyées en Colombie après quelques jours. À noter qu'une commission technique interministérielle sur les réfugiés est chargée des procédures de détermination du statut de réfugié et que les forces armées reçoivent une formation au droit des réfugiés.

L'action en faveur des Colombiens qui cherchent refuge dans ces trois pays est d'autant plus ardue que les États concernés ont tendance à remettre en question les raisons pour lesquelles ceux-ci franchissent les frontières. Pourtant, ces personnes répondent aux critères de la définition du réfugié énoncés dans la Déclaration de Carthagène, un instrument politique que ces mêmes États ont adopté en 1984 et qui est applicable à la région.

Quel espace de coopération?

Cette question se pose moins dans le cas des réfugiés en provenance de Colombie que dans celui des déplacés, puisqu'ils relèvent du mandat du HCR, dont le savoir-faire est reconnu. Cela dit, la situation politique tendue et l'instabilité aux frontières requièrent une coordination permanente. Il faut aussi valoriser les potentialités de chaque organisation. Les bureaux régionaux du HCR et du CICR maintiennent aujourd'hui des relations régulières.

Conclusion

Sans avoir la prétention de dresser un inventaire exhaustif des activités menées par le HCR et par le CICR en faveur des civils colombiens victimes du conflit, cette analyse de l'action humanitaire en Colombie tente de mettre en évidence, à travers les engagements respectifs, les terrains de rencontre des deux institutions et l'espace de coopération existant. On peut conclure que le mode opératoire qui définit le cadre de coopération actuel — le CICR intervenant en premier lieu et de façon directe dans l'assistance aux personnes déplacées et le HCR menant des activités de renforcement des capacités — permet de répondre aux besoins humanitaires tels qu'ils se présentent aujourd'hui.

L'évolution du conflit, ses conséquences régionales, l'ampleur des besoins restant à couvrir, ainsi que la perspective des changements politiques et institutionnels importants auxquels pourraient donner lieu les élections présidentielles de 2002, soulignent la nécessité d'un échange régulier d'informations et d'une collaboration soutenue entre le CICR et le HCR, dans le but d'améliorer le sort des personnes déplacées en Colombie.

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Abstract

Displaced persons in Colombia and Colombian refugees in neighbouring countries: UNHCR and ICRC action

by FRÉDÉRIQUE PRUNERA

In the course of half a century of political turmoil and civil war in Colombia, a large number of civilians have fled their homes or been forcefully removed to other places. The author gives an overview of UNHCR and ICRC activities for these internally displaced persons. While UNHCR strives mainly to strengthen their ability to cope, the ICRC specializes in direct assistance to displaced persons and pursues its traditional protection work. Action taken for Colombian refugees in neighbouring countries is also discussed.

UNHCR and ICRC in the former Yugoslavia: Bosnia-Herzegovina

by
KIRSTEN YOUNG

The emergency relief operation in the former Yugoslavia was one of the largest, most complex, and riskiest international relief initiatives ever undertaken. UNHCR's programme was perhaps the most difficult of any mounted by the organization since it was established. While UNHCR had operations in all the republics of the former Yugoslavia during its violent dissolution, the organization faced its greatest challenges in Bosnia-Herzegovina. For the first time, UNHCR was operating in a context of .open conflict where it worked as much with war-affected local populations as with displaced ones. While this was more familiar territory for the ICRC, the conflict in Bosnia-Herzegovina likewise presented the International Committee with one of its most complicated programmes ever. This case study will focus on the activities of both organizations during the Bosnian conflict from 1992-1995.

KIRSTEN YOUNG is a Senior Liaison Officer, South-Eastern Europe Operation, at the Office of the United Nations High Commissioner for Refugees, Geneva. She has served as Protection Officer in Bosnia and Herzegovina. She gratefully acknowledges the contribution of Artemis Christodolou to her research for this article. — The *Review* invited the author to write an article on the humanitarian work of UNHCR and the ICRC respectively in the Balkans war (1992-1995) for this issue. The text is her own personal contribution and does not necessarily reflect the opinions of the two organizations.

Among the most complex issues facing the humanitarian operation in Bosnia-Herzegovina were: the sheer scale of the crisis, which produced the largest number of refugees and displaced people in Europe since World War II; the displacement of populations as an objective rather than as a consequence of the war, through a practice euphemistically known as "ethnic cleansing"; flagrant attacks on humanitarian principles, including systematic denial of humanitarian access; the unprecedented level of security risks faced by humanitarian personnel; and the involvement of UN troops with the primary mandate of supporting the humanitarian operation.

UNHCR and ICRC were uneasy bedfellows in the early days of the operation in Bosnia-Herzegovina. UNHCR was stepping on traditional ICRC turf in working in a situation of open conflict with the internally displaced and local war-affected populations. But as the humanitarian needs rapidly increased, UNHCR came to the conclusion that the ICRC did not have adequate capacity to address the enormity of the crisis on its own, and the two organizations developed a collaborative, complementary relationship.

History of the conflict

The break-up of the Socialist Federal Republic of Yugoslavia began in June 1991 when Slovenia proclaimed independence, followed by a similar declaration by Croatia. While Slovenia achieved statehood without bloodshed, skirmishes broke out between Croatia's Serb minority and the majority ethnic Croat population. The ensuing war in Croatia was to last four years.

In April 1992, a second, more bloody conflict broke out in Bosnia-Herzegovina when it, too, declared independence — pitting Bosnia's three main constituent communities, ethnic Serbs, Croats and Muslims, against each other. The war resulted in massive displacement. In less than three months, the number of Bosnian refugees and internally displaced persons reached 2.6 million.

The conflict in Bosnia-Herzegovina ended in November 1995 with the signing of the General Framework Agreement on Peace (the so-called "Dayton Agreement"). In Croatia it ended with the Erdut Agreement which was signed the same month. When the

Dayton and Erdut agreements were signed, more than 3 million people from the region were displaced. Over half of Bosnia-Herzegovina's population of 4.4 million was displaced; an estimated 1.3 million were internally displaced, approximately 500,000 refugees had fled to neighbouring countries, and some 700,000 refugees were in Western Europe.

Cooperation between UNHCR and ICRC

In 1991, the government of the Socialist Federal Republic of Yugoslavia, where UNHCR had maintained a small presence since 1976, formally requested UNHCR to assist with displaced persons within the region. Following a similar request from the UN Secretary-General shortly afterwards, UNHCR agreed to lead UN humanitarian efforts in the region. The ICRC established its first long-term presence in the former Yugoslavia just after the outbreak of war in Croatia in 1991.

In the early days of the conflict, UNHCR and ICRC worked according to the traditional division of labour between the organizations, with the former providing protection and assistance for refugees in countries of asylum, and the latter working with war-affected populations in conflict zones. However, the demarcation lines rapidly became blurred given the magnitude of the needs, especially after the conflict spread to Bosnia-Herzegovina. When the ICRC withdrew temporarily from Sarajevo in May 1992 following the fatal shooting of one of its delegates, UNHCR's role became pivotal, and it stepped in to assume many functions traditionally carried out by the ICRC. The organization began delivering relief supplies by air to Sarajevo and by road to the rest of the country to assist not only refugees and internally displaced people, but also hundreds of thousands of other war-affected civilians.

For UNHCR, the attempt to assist civilians in the midst of armed conflict proved vastly more difficult than assisting refugees in countries of asylum. Gaining access to vulnerable populations was a complex problem, security was a major concern, and to continue to be seen as impartial was difficult if not impossible.

Achievements of UNHCR and ICRC

Humanitarian relief saved lives

The humanitarian operation in the former Yugoslavia received huge funding, allowing UNHCR and ICRC to deliver massive quantities of aid to the region. This unquestionably saved many lives and did much to mitigate human suffering. Without the food, shelter materials and medicines both organizations delivered, a large number of deaths would inevitably have occurred from hunger, cold or disease.

UNHCR's Balkans operation was its largest in the world, costing over one billion US dollars between 1991 and 1995. UNHCR coordinated a massive logistical operation in which some 950,000 tons of humanitarian relief supplies were delivered to various destinations in Bosnia-Herzegovina. Its humanitarian airlift into the besieged city of Sarajevo — the largest and longest in history — delivered over 160,000 tons of assistance, most of it food. The airlift was also used to evacuate more than 1,100 civilians unable to obtain proper medical treatment in Sarajevo's shattered hospital.

The ICRC's programme for the former Yugoslavia was also its largest and represented about half of the ICRC's 1993 budget. By the war's end, the ICRC had visited over 54,000 detainees in 520 places, exchanged 18 million Red Cross messages, reunited over 4,500 families, distributed over 100,000 metric tons of food, and spent over 47 million Swiss francs on medical and surgical assistance.

Humanitarian presence — bearing witness

To some extent, the huge humanitarian assistance programme helped to reduce further population displacement by providing people with food and medical aid which they would otherwise have had to leave to obtain. Some have argued that the humanitarian presence was itself a form of protection and served to mitigate the severity of the worst atrocities and ethnic cleansing. Given the scale of the ethnic cleansing which continued despite the massive international humanitarian (and military) presence, this assertion is somewhat difficult to prove.

Whether or not the humanitarian presence served to mitigate human rights abuses, it did serve an important function of bearing witness to those abuses. Through their reports on the situation on the ground UNHCR and ICRC regularly denounced, each in its own way, forcible displacement and violations of human rights and humanitarian law of which the international community may not otherwise have learned. These reports, while inadequate on their own, provided vital information to the outside world. They were particularly important where other international observers had little or no access. Journalists and the UN military force, UNPROFOR, for example, were denied permission to enter large parts of Bosnian Serb territory for most of the war, and in other besieged enclaves in Bosnian Croat areas such as East Mostar, UNHCR and ICRC were the only international organizations present to bear witness to the atrocities.

It was often on the basis of the reporting of UNHCR and ICRC that States were galvanized to take action at the political level, which sometimes had an effect on the ground. For example, UNHCR reports of appalling conditions in Bosnian Croat-run detention camps in the Mostar region in August 1993, which received heavy coverage in the international media, led to Western political pressure on the Croatian authorities in Zagreb, the main sponsors of the Bosnian Croats. This in turn resulted in the Bosnian Croats agreeing to grant the ICRC full access to the camps (which had until then been denied for almost six months), and to allow UNHCR to resettle the detainees to third countries.

The role of bearing witness by impartial humanitarian organizations was particularly important in such a highly charged, highly politicized environment. Even other international players were not immune from politically influenced representations of the situation, which bore little resemblance to the reality on the ground. A particularly acute example was UNPROFOR's declaration at a press conference in August 1993 that there was "no siege" of Sarajevo — apparently due to fears that to say there was a siege would inevitably lead to NATO air strikes. The UNPROFOR spokesperson said "The Serbs have encircled the city. They are in a position to bring force to bear on the city. You call it a siege. We say they are deployed in a

tactically advantageous position".[1] The spokespersons for UNHCR and ICRC immediately disagreed with this clear misrepresentation of the factual situation, thereby reflecting the organizations' roles as neutral humanitarian players.

Another important aspect of the reporting role of both organizations is the unique body of impartial evidence such reporting provides to institutions seeking to investigate events during the conflict. UNHCR and ICRC both built up a substantial body of written reports documenting violations of international humanitarian and human rights law. Such documents are considered an important independent information base for post-war criminal hearings by the International Criminal Tribunal for the former Yugoslavia (ICTY). The two organizations, however, do not have the same approach to cooperation with ICTY. While UNHCR does share information gathered during its wartime field operations with the Tribunal, the ICRC has taken the position that this would jeopardize its operational ability to gain access to war victims, which is based on confidentiality. The Tribunal has accepted the ICRC's argument. In the author's view, there is however some irony in the fact that the major guardian of international humanitarian law does not share information with one of its few enforcement mechanisms. Moreover, it could be argued that UNHCR faces very similar operational risks as a result of its cooperation with ICTY, which have not prevented it from sharing information with an international criminal jurisdiction.

Challenges faced by UNHCR and ICRC

Post-Cold War conflicts

The relief operation in the former Yugoslavia unfolded in unusually complex international political and military circumstances. It took place against a background of political indecision, where humanitarian action became the only form of political action. Humanitarian action diverted attention from failures in the political

1 Tom Gjelten, *Whose Truth to Tell? Professionalism in War Reporting*, Hamline University, 2000. ‹www.hamline.edu/world/backissues/gjelten4.htm›.

process, as well as possible military intervention. The humanitarian operation was therefore a key issue in the conflict and was subjected to intense international scrutiny and pressure.

Security problems, lack of cooperation from the parties to the conflict and difficulties in gaining access to populations in need of assistance dogged both UNHCR's and ICRC's operations. The war was an unconventional one, waged by militia and irregulars who were not particularly sensitive to outside scrutiny or sanction and who blatantly used civilians and international relief activities as pawns in the conflict. UNHCR had previously avoided or limited its involvement in any situation where humanitarian principles were blatantly disregarded and where the provision of relief was confronted with exceptional practical or political constraints. In the post-Cold War environment, however, there was much greater expectation, fuelled by the media, that international organizations such as UNHCR would assist the victims of conflict, however difficult or dangerous the circumstances.

Events unfolded at a rapid pace, with humanitarian operations tumbling from one critical crisis week to the next, while the complexity and manner in which events went from bad to worse defied the predictions of even the greatest pessimists. Humanitarian workers had to accustom themselves to an environment where daily conditions could dramatically change overnight, making it extremely difficult to predict scenarios or formulate plans. Decisions had to be continually reassessed according to the constantly changing circumstances in the field.

Another feature of the humanitarian operation in Bosnia-Herzegovina — as in many in the post-Cold War environment — was the huge number of international players involved or interested in humanitarian activities. At one point, over 3,000 humanitarian personnel from over 250 organizations carried UNHCR identity cards. Added to this were tens of thousands of personnel from multinational military deployments, regional security organizations, human rights organizations, war crimes investigators, peace negotiators and the media. This posed tremendous challenges for UNHCR and ICRC in terms of cooperation and coordination.

Politicization of the humanitarian operation

The international relief effort in Bosnia-Herzegovina was politicized on two levels: at the international level, as it became the only visible response of the international community to the war; and at the local level, as the parties to the conflict regarded humanitarian players as protagonists in the political process.

On the international level, a combination of concern about the increasing numbers of asylum-seekers caused by the conflict and indecision regarding a political solution incited States to concentrate most of their attention on humanitarian relief efforts. Humanitarianism quickly became the key issue in the conflict. According to one senior UNHCR official at the time, "every time the question of settling the conflict came up, the donors responded by saying that they were going to give more money to the humanitarian effort".

Given the public exposure of the crisis, the international community needed to appear to be doing something. Unable to forge a common foreign political/military policy, States chose to respond to the violence not by stopping it, but by trying to provide relief to the suffering. The humanitarian effort led by UNHCR was thus transformed into a showcase for governments, and the only manifestation of international political will. It became an important component of European efforts to contain the conflict and the population movements that it provoked.

In leading the UN humanitarian effort, UNHCR initially saw its activities as buying time for a political solution. As time passed, that solution failed to materialize, and humanitarian activities remained the centre-piece of UN efforts in Bosnia-Herzegovina. The gap between the deterioration in events and the lack of international political or military responses became acute, and UNHCR was left struggling in the vacuum.

While this vacuum had an impact on the effectiveness of both UNHCR and ICRC, UNHCR was more constrained than the ICRC in its ability to respond. As an independent organization, the ICRC was able to suspend its activities when security considerations made it impossible to operate. UNHCR did not have this free-

dom. When High Commissioner Sadako Ogata decided to suspend UNHCR's operations in February 1993 due to repeated prohibitions placed on access to the Muslim eastern enclaves by the Bosnian Serbs, UN Secretary-General Boutros Boutros-Ghali informed her that she could not do so.

This incident demonstrated the lack of control which UNHCR had over its own operation, which had become part of a much larger political and military process. As the lead humanitarian agency in the region, UNHCR's mission was of fundamental importance both to donor governments, for which the humanitarian effort symbolized political action, and to the UN military force, UNPROFOR, whose presence in the region was intimately connected to that of UNHCR. If UNHCR ceased operations in the former Yugoslavia, then UNPROFOR, whose primary mandate was to support the humanitarian effort, would no longer have had a reason to remain in the region.

At the local level, humanitarian operations were similarly politicized. Siege and starvation were used as weapons. In such a context, the delivery of humanitarian relief was not seen as a neutral humanitarian act. As mass population displacement was the direct objective rather than a consequence of the conflict, the efforts of UNHCR and ICRC to deliver relief which would enable people to remain in their homes were in direct opposition to the aims of the warring factions. Humanitarian assistance became a weapon. This led to the creation of significant obstacles to, and manipulation of, the humanitarian effort.

Fundamental breaches of humanitarian principles

The application of humanitarian principles presupposes the existence of what is sometimes called "humanitarian space", or recognition by the parties to the conflict of the priority of neutral, non-partisan humanitarian action. While basic humanitarian principles have never been universally respected, they were flouted in a particularly shameless way in the former Yugoslavia. As the war spread and intensified, humanitarian space all but disappeared, leaving little room for insistence on principles.

The operations of UNHCR and ICRC were subject to constant obstructionism, in the form of either roadblocks or administrative hurdles and clearances. In many cases, the parties denied clearances for humanitarian convoys to transit through areas under their control to enemy territory unless there was an increase in the percentage of supplies sent to areas under their own control. Lengthy negotiations would ensue — UNHCR and ICRC officials on the ground spent much of the war negotiating humanitarian access. But owing to the collapse of the government and the lack of central authority, it was virtually impossible to negotiate terms for the provision of relief that had meaning beyond the immediate time and place. In March 1993, High Commissioner Sadako Ogata reported to the Security Council that the agency had only been able to deliver less than half of its target of 8,000 metric tons per week in Bosnia-Herzegovina. The ICRC reported similar obstructionism — in December 1993 it was able to deliver only 10% of its regular relief programme.

In such an environment, UNHCR and ICRC were confronted by a range of tricky dilemmas. To what extent should principles be compromised to fulfil the end objective of saving lives? And what were the basic principles which did not allow for compromise?

In previous operations, UNHCR had tended to maintain — if not always apply — the principle that assistance could be delivered only if this could be done safely and freely and on the basis of evaluated need, and that its end use could be effectively monitored. UNHCR would not supply it to combatants, and distributions were carried out according to humanitarian need rather than for political ends. Where these principles were not met, assistance was in general not provided or was suspended. However, in Bosnia-Herzegovina, partly prompted by media and political expectations, UNHCR took the approach that compromise was unavoidable, and continued to assist, no matter how difficult or dangerous the circumstances. While it maintained some principles, such as impartiality in distribution to all sides and non-linkage in negotiations on humanitarian assistance with military or political matters, the organization believed that dogmatic insistence on other principles, such as the right to free and safe passage,

non-inspection of humanitarian convoys, and monitoring, would have brought the operation to a grinding halt.

In order to maintain leverage and access, UNHCR continued to provide aid in Bosnian Serb and Bosnian Croat areas well after it was known that it only benefited the majority populations who least needed it (if at all), and that it was not getting through to the minority populations who needed it the most. While not official policy, some UNHCR staff were also prepared in some instances to engage in trade-offs, providing the warring factions with a portion of the relief so that the rest of the shipment could reach its intended destination. It was also known that aid was diverted to the black market, as well as for military purposes, leading to criticism that the humanitarian operation was fuelling the war. In other instances, to be allowed to evacuate minority civilians from an area controlled by one ethnic group, UNHCR agreed to do the same in other areas where the majority and minority were reversed. UNHCR also made extensive use of military escorts provided by UNPROFOR, and in some situations was prepared to challenge the combatants and push its way through roadblocks.

Conversely, the ICRC was more tenacious in insisting on its traditional interpretation of humanitarian principles. For instance, it more regularly threatened to withhold assistance when the safety of its delegates was at stake. Its withdrawal from Sarajevo in May 1992, when a delegate was killed, was the most high-profile example of this approach. The ICRC also refrained from the use of military escorts. Rather than working out local deals and ad hoc solutions like UNHCR, the ICRC attempted – with only moderate success — to work on the basis of formal agreements, negotiated at the highest level.

Nonetheless, the ICRC's traditional approach was sorely tested in Bosnia-Herzegovina, as it was simply not possible to operate according to regular procedures. Many in UNHCR felt that the ICRC operation suffered from an unrealistic insistence on the institution's operational principles, which rendered it less effective than it could otherwise have been. And while the institution would be loathe to admit it, the ICRC was also forced to compromise simply to remain

operational. In the besieged cities of Sarajevo and East Mostar, for example, as well as in enclaves held by Bosnian government forces, alternative sources of food were simply too limited to give the authorities much choice other than to use humanitarian aid for political or military purposes. Moreover, nearly every able-bodied male had been mobilized in Bosnia-Herzegovina, rendering the traditional distinction between combatants and civilians largely meaningless. The provision of fuel for humanitarian purposes gave rise to even greater challenges to the neutrality of assistance. The fact that UNHCR supervised the delivery of fuel supplies in former Yugoslavia to ensure that they were used for humanitarian purposes was in many senses irrelevant, as they simply enabled other fuel supplies to be used by the military.

Both organizations were therefore forced to compromise. UNHCR reasoned that by providing majority populations with assistance disproportionate to their actual needs, it would gain access to otherwise inaccessible populations. The idea was also that if enough assistance was brought in by whatever means possible, some would trickle down to those who really needed it. The organization believed it naïve to insist that humanitarian assistance — alone in all the elements involved in a conflict — could be entirely free from calculations of ends and means.

Threats to safety of humanitarian personnel

Humanitarian personnel in Bosnia-Herzegovina were exposed to new and unacceptable levels of risk which far exceeded those encountered in the past. They were constantly exposed to indiscriminate shelling, sniping and landmines. UNHCR and ICRC staff were threatened and intimidated, their vehicles regularly hijacked and stolen, and they were often the target of deliberate attack. Bullet-proof vests and armoured vehicles were used to an extent never seen before in any major humanitarian operation.

Humanitarian staff assumed personal risks on a daily basis which went far beyond the risks which the military forces supporting them were willing to assume. Over 50 personnel involved in the UNHCR-led operation lost their lives and hundreds more were

injured. Based on casualty rates for UNHCR humanitarian personnel and UN soldiers from 1991-1993, the probability of being a war casualty was eleven times higher for a UNHCR staff member. While UNHCR had often operated in dangerous environments, it had never before operated in the midst of a conflict characterized by such extreme levels of lawlessness and violence.

UNHCR was ill-prepared to deal with the threats to staff security in terms of training, equipment, or communications. Most crucially, there were no guidelines or standards relating to risk levels. Thresholds of "acceptable" threats rose as the organization became increasingly committed to the rapidly expanding operation. Time after time the vaguely defined limits of acceptable risk were extended, and unacceptable levels were quickly passed. In a climate of heroism and risk-taking, most UNHCR staff became resigned to the dangers of working in Bosnia-Herzegovina.

In contrast, the ICRC was much better prepared with a professional approach and working methods developed for conflict zones. As with all its operations, ICRC staff received pre-assignment training in handling threats such as shelling, sniping and landmines, whereas UNHCR staff did not receive any pre-deployment security training. The ICRC was also much more willing to suspend whenever its staff were in danger. For example, it suspended cross-line activities in any exposed areas of Sarajevo after ICRC vehicles suffered direct hits on numerous occasions in no man's land in the summer of 1995. Nonetheless, and despite the ICRC's professionalism, the security threats to its staff in Bosnia-Herzegovina proved to be one of the most trying experiences in the organization's history.

Protection

In spite of the obstacles constraining their relief activities, UNHCR and ICRC assistance efforts in the former Yugoslavia were more successful than their protection activities. An internal evaluation of UNHCR's operations conducted in 1994 found that, while some protection activities were successful in specific situations in Bosnia-Herzegovina, "...on a broader level...the impact was generally very modest". The same has been said about the activities of the ICRC:

while its accomplishments on the relief side were significant, "the scales tip sharply to the wrong side" in the case of protection.[2]

UNHCR's protection activities in Bosnia-Herzegovina were predicated on the idea that the Office could play a preventive role in addressing some of the more immediate causes for displacement at the regional level. The concept of "preventive protection" became one of the key policy bases for UNHCR's activities in Bosnia-Herzegovina. The conceptual starting point of the policy was the right of all citizens to remain in their homes. By establishing an international humanitarian presence in the region, and by providing war-affected populations with material assistance, UNHCR hoped that it could create a situation in which the need to flee was diminished, thereby enabling people to remain in their area of origin. In short, the aim was to limit the scale of the refugee problem.

The notion of preventive protection emerged in the context of discussions regarding the role of UNHCR and other international organizations in addressing the root causes of refugee movements. In the specific circumstances of the former Yugoslavia, the reliance on a preventive approach was reinforced by a number of considerations, including the inability of many people in Bosnia-Herzegovina to leave the country, the determination of some war-affected populations to remain in their homes, the operational difficulties involved in providing shelter to large numbers of refugees and displaced people in the region, and the unwillingness of many Western European countries to admit large numbers of people fleeing from the conflict. Ideally, European States wanted to keep asylum-seekers from the former Yugoslavia as close as possible to their areas of origin.

2 Cited in Thomas G. Weiss and Amir Pasic, "Dealing with displacement and suffering from Yugoslavia's wars: Conceptual and operational issues", in Francis M. Deng and Roberta Cohen (ed.), *Forsaken People: Case Studies on the Internally Displaced*, The Brookings Institution, Washington DC, 1998, p. 17.

In the field, preventive protection meant monitoring the treatment of minority groups and mediating and intervening on their behalf with the warring parties, monitoring the imminent movement of populations and exposing the practice of forced relocation, and maintaining contact with local communities as a confidence-building measure, especially in areas where security was fragile. The delivery of material assistance was also an important part of UNHCR's protection strategy, as the aid provided a concrete rationale for its presence in the area. UNHCR protection officers often gained access to areas where ethnic cleansing was being carried out on the pretext of making an aid delivery.

The notion of preventive protection was controversial. For UNHCR staff in the field, as the war raged on it quickly became clear that the idea underlying the concept of preventive protection was increasingly unrealistic, and that the organization was able to do very little in terms of stopping the process of ethnic cleansing. The distribution of relief did not in itself constitute protection, and the kind of preventive protection activities available to the agency's staff could have only a limited impact in an environment where the expulsion of civilians was one of the most important objectives of the war.

There was vigorous debate within the organization about the approach, with opponents regarding it as a betrayal of fundamental protection principles such as the right to seek asylum and international burden-sharing. For them, by launching a massive operation in Bosnia-Herzegovina and neighbouring countries of first asylum, UNHCR gave tacit support to the European argument that there was no need for onward movement of refugees. In the view of its harshest critics, preventive protection simply "let Europe off the hook". According to this view, UNHCR's approach legitimized the restrictive asylum practices which have multiplied in the region during recent years, and endorsed the view that there are acceptable alternatives to flight, even in situations where the affected population has a demonstrably well-founded fear of persecution in their own country.

Other UNHCR staff have categorically rejected such criticisms, pointing out that from the outset the organization repeatedly called on European States to share the burden of the refugee

exodus. They also argue that the analysis upon which such criticisms are based fails to comprehend the intransigence of European policy at the time. UNHCR's repeated calls for burden-sharing went largely unheeded. Governments did not hesitate to push people back at the height of the fighting. Nonetheless, probably one in ten people displaced by the conflict managed to find their way to Western Europe anyway, and were granted protection under temporary protection schemes or other arrangements.

On balance, there is merit to the argument that UNHCR went to extremes in its efforts to provide relief to populations in a bid to prevent them from leaving, and that the organization insisted more frequently and strongly on the right to provide assistance *in situ* than on admission to safety. UNHCR stuck to its overriding objective of prevention of displacement even after this objective had revealed itself as largely illusory, perhaps obscuring the need to adopt a more forceful approach towards European governments in encouraging burden-sharing.

However, UNHCR also recognized that political insistence on the right to stay should not in practice prevent people in danger from seeking safety. In many areas, remaining minorities wanted only one thing — to leave, and to be helped to leave. This created a serious dilemma for UNHCR and ICRC. While the organizations wanted to avoid becoming part of the conflict objective of ethnic relocations, they also recognized that assisting people to leave was often the only way to save lives. As High Commissioner Sadako Ogata put it, "if you take these people you are an accomplice to ethnic cleansing. If you don't, you are an accomplice to murder".[3]

At first, both UNHCR and ICRC agreed that they did not wish to prejudge the outcome of the war with an organized policy of evacuation, and preferred to insist on the right to freedom of movement and the right to seek access to safety. Both soon realized, however, that a more active evacuation policy was necessary if lives were to be saved, and evacuation criteria were developed. The main

3 *Chicago Tribune*, February 1993.

criterion for UNHCR's involvement in assisting departures was the presence of life-threatening situations.

In practice, field staff agonized over what constituted a life-threatening situation and faced innumerable obstacles in actually carrying out evacuations. For example, all of the estimated 50,000 Muslims living in Croat-controlled West Mostar lived under the daily threat of attack, rape, forced eviction or forced expulsion across frontlines to the Muslim-controlled eastern part of the city. At the height of the ethnic cleansing in West Mostar, hundreds of Muslims visited the UNHCR office on a daily basis, begging to be transferred across the frontlines to safety in the Muslim part of the city or to a third country. Apart from the fact that UNHCR lacked the logistical capacity to transfer 50,000 people, neither the predominantly Muslim Bosnian government nor the Croats who controlled the western part of the city wanted to see these people — political pawns in the conflict — moved *en masse* by UNHCR. This left UNHCR staff to try to pick among equally deserving cases to determine who was in the most acute situation for evacuation, guaranteeing that ad hoc and desperate decisions were often made.

With the benefit of hindsight, some observers have suggested that UNHCR could have done more to assist people to safety. They believe that UNHCR gave a much higher priority to the right to remain than it gave to the right to leave, given the organization's sensitivity to participating in the process of ethnic cleansing, as well as its identification with the political objectives of key donor States. Many UNHCR staff have been left with a sense of guilt that they did not do more to evacuate more people. To illustrate how easy it is to have misgivings about the impact of UNHCR's restrictive evacuation policy, I will give just one example of many from my own experience of working as a protection officer in the Mostar region in 1993. UNHCR had been asked by the residents of a Muslim village called Tomislavici in Croat-controlled western Herzegovina to help them to leave during the height of the ethnic cleansing campaign directed against Muslims in the area. For us, their situation was no different to that of any Muslim in Croat-controlled areas in the region at the time, and we put their request in the queue of the thousands of other

evacuation requests we had received. Days later, Croatian paramilitaries took nine villagers, including old men, women and children, into the hills above the village and massacred them.

But while it is easy to suggest that more people should have been assisted to safety, there were enormous practical and political obstacles to evacuations. UNHCR was only able to work on the basis of consensus, and evacuations accross the frontlines were not accepted by the warring factions, and so often were simply not safe. The large-scale evacuation convoys of several thousand desperate civilians from Srebrenica conducted by UNHCR early in 1993 were the target of shelling and sniping which killed over 50 and wounded many others, thus illustrating the dangers involved. Even small-scale attempts to evacuate civilians degenerated into endless haggling over exchanges of evacuees for other evacuees, money, prisoners, dead bodies, food or any other conceivable barter item, before the warring parties would permit the evacuees to leave. It was also the case that evacuations inevitably led to increased persecution and ethnic cleansing in the hope that those remaining would depart or be taken away. And finally, there was also the question as to where to take the evacuees. Croatia, the only place of safety in the region, imposed a visa policy for all Bosnians who were not of Croatian ethnic origin. Croatia regularly denied UNHCR requests for visas for Bosnian Muslims or Serbs whom the organization was seeking to evacuate from Bosnia-Herzegovina. Even where visas were issued, Croatian border guards often refused to recognize them and grant entry. Many UNHCR staff have argued that the cautious approach to evacuation was thus fully justified.

The ICRC's policy was to evacuate detainees, the wounded, and persons under death threat. The ICRC was perhaps less affected by accusations of complicity, as its evacuations focused more on individuals than on groups or communities — it did not conduct the kind of mass evacuations carried out by UNHCR from places such as Srebrenica. As a result of its policy to evacuate the most vulnerable members of minorities whose lives were directly threatened, by the end of the war the ICRC had, however, transferred almost 5,000 individuals, mostly from the Banja Luka area to Croatia, where

UNHCR took charge of them and tried to resettle them. And through a joint transfer/resettlement programme for detainees run by the two organizations, more than 16,000 ex-detainees and their family members were resettled from Bosnia in third countries.

Safe areas

In 1993, the Security Council declared six government-held enclaves — Bihac, Gorazde, Sarajevo, Srebrenica, Tuzla and Zepa — to be safe areas, with the purpose of safeguarding civilians from attack and ensuring that they received humanitarian assistance in order to survive. The Security Council placed the safe areas under the protection of UNPROFOR and NATO.

In reality, the safe areas were under constant siege and bombardment by the Bosnian Serbs, and were some of the least safe places in the world. UNHCR and ICRC, who had both advocated at one stage or another the creation of some form of safety zone, faced difficult dilemmas in terms of their roles in assisting the populations of the safe areas. As the UNHCR Special Envoy to the former Yugoslavia wrote at the time, "surrounded by enemy forces, without basic shelter, medical assistance or infrastructure, isolated and living under sporadic shelling or sniper fire, these areas are becoming more and more like detention centres, administered by the UN and assisted by UNHCR". Another report, from a UNHCR staff member based in Srebrenica just one month after the establishment of the safe area in May 1993, gave a graphic firsthand account of the situation: "Srebrenica... provides a vivid example of the unfortunate gap between the reality in these areas and the concept as presented by State proponents of the safe area concept... In the case of Srebrenica, there is nothing which resembles normal life... The enclave must now be recognised for what it is, namely a closed refugee camp of 50,000 persons, without adequate facilities for more than about 15,000".

In July 1995, two of the safe areas, Srebrenica and Zepa, were finally seized by Bosnian Serb forces, and the population of both enclaves expelled. Some 7,000 people from Srebrenica, virtually all men and boys, were killed in the largest massacre in Europe since the Second World War.

One of UNHCR's key concerns regarding the strategy of establishing safe areas was the potential threat to the principle of asylum and the right to freedom of movement. The freedom of people to leave the safe areas was constrained both by the Serb siege and by the Bosnian government's reluctance to allow the depletion of the population in areas remaining under its control. At a time when governments were expressing a reluctance to host large numbers of asylum-seekers, the establishment of safe areas contributed to a deterioration of protection standards.

Accepting military escorts

The main mandate of the UN force in Bosnia-Herzegovina, UNPROFOR, which was to provide support to the humanitarian operation, presented UNHCR with significant practical and philosophical dilemmas.

The use of military escorts for humanitarian convoys was an innovation for UNHCR, which initially approached the cooperation with gun-wielding UNPROFOR escorts with the same apprehension normally expressed by the ICRC. However, this attitude was overtaken by events as the war spread and intensified, and it became increasingly clear that a military escort allowed for the delivery of assistance where it was otherwise simply not possible. At the same time, UNHCR compromised its distinct humanitarian image as it increasingly became identified with UNPROFOR and, by extension, with the political process. This identification limited UNHCR's independence and made it more and more difficult to separate humanitarian concerns from political and military negotiations. It also provoked much criticism from observers who considered that the impartiality of humanitarian action was being undermined.

The system nevertheless enabled UNHCR to deliver large quantities of emergency supplies and to cross active frontlines even during some of the worst fighting. Perhaps the most frequently acknowledged service rendered to the humanitarian operation by UNPROFOR was the sense of security provided to drivers of aid trucks. When convoys came under attack, drivers were usually able to seek shelter in the armoured personnel carriers that accompanied the

convoy. In addition, UNHCR's airlift into Sarajevo was run by military aircraft, as was UNHCR's humanitarian airdrop operation. More than 80% of the emergency supplies distributed to civilians in Bosnia and Herzegovina during the war were delivered by UNHCR.

Despite this success, cooperation with UNPROFOR was not easy for UNHCR. As the humanitarian operation was UNPROFOR's main *raison d'être*, humanitarian concerns regularly became mixed up with political and military negotiations, often with disturbing results. A humanitarian convoy to break the siege of East Mostar, for example, was negotiated by UNPROFOR in August 1993, the price of access being an exchange of dead soldiers between the parties and some other political and military concessions. While UNHCR objected to this conditionality, it nonetheless participated in the convoy — with a truck of reeking soldiers' corpses leading the way — in order to obtain access to an enclave where the humanitarian needs were critical.

Some UNHCR staff have also argued that UNPROFOR's contribution to the humanitarian operation was, in fact, minimal. According to this view, providing security to UNHCR convoys was never the main priority of UNPROFOR, so in practice UNHCR had to cope with all the bureaucratic inconveniences of the military without receiving any real protection. In many areas of the country, UNHCR staff on the ground found that the armed forces were generally much more cautious in areas of active conflict than humanitarian personnel. This was probably mainly due to the fact that troop-contributing governments, afraid of the political fallout of military deaths, ensured that priority was given to self-defence. "Force protection" absorbed most of the military contingent's time and resources. Most of the casualties amongst humanitarian relief workers occurred in convoys escorted by UNPROFOR.

The ICRC maintained its traditional refusal to be associated with military participants. It operated without escorts throughout the war and has also been critical of UNHCR's relationship with the military. According to its then Director General, "operating under the same blue emblem as the UN blue helmets, using the same white cars with the blue flag and protected by white armoured vehicles with the

blue emblem, [UNHCR was] not necessarily perceived as being politically independent and neutral. (...) This perception of dependence and partiality jeopardized humanitarian work in general and the safety of all humanitarian field workers."[4]

The role of the media

Over 5,000 journalists were accredited to the former Yugoslavia during the war in Bosnia-Herzegovina. The war provided the media with highly marketable themes, including massive bloodshed, sexual violence, dramatic rescues and the innocent victims of easily identifiable villains. Television in particular was keen to show relief convoys that were blocked or harassed, as well as how normal people were coping and getting on with their lives in a war situation. The situation was of particular interest to the European and North American public, as to many it recalled memories of the Second World War with victims who looked and lived like them, and served as an unsettling reminder that conflict and suffering were not as far away as they had imagined. It was therefore inevitable that the humanitarian operations of UNHCR and ICRC would be very much in the public eye.

UNHCR did much to cultivate a close working relationship with the media in the former Yugoslavia. In addition to feeding the press with information, UNHCR helped journalists to cross frontlines in an effort to bring them to areas which were otherwise difficult to access, and where UNHCR wanted the suffering of the civilian population to be exposed. The organization also regularly denounced forced population displacement and breaches of human rights and humanitarian law in press statements. In a departure from previous institutional practice, all staff at every level were encouraged to speak to the media — owing to the breakdown in control by the local

4 Peter Fuchs, "Humanitarian action in armed conflicts: Basic principles", address to a Seminar on International Humanitarian Assistance in Conflict Situations, Swedish Red Cross Folk College, Gripsholm, Sweden, 10-11 May 1995. Peter Fuchs was Director General of the ICRC *from 1992 to 1996*.

government, the usual institutional sensitivity to its concerns was less of a constraint, thus allowing staff an unusual freedom.

Unlike the humanitarian dimensions of the war in Croatia, which had been broadly ignored, the humanitarian dimensions of the conflict in Bosnia-Herzegovina were widely known, in large part owing to UNHCR's high media profile. In the spring of 1992, for example, US Secretary of State Baker referred to Bosnia as the "humanitarian nightmare".

At least some in the ICRC were critical of the emphasis UNHCR placed on media relations, seeing UNHCR's programme as being driven purely by publicity concerns and too readily playing down humanitarian principles. In an early meeting in 1992 to discuss the division of labour between the two organizations in Geneva, a senior ICRC official characterized a planned UNHCR convoy into Sarajevo as a "humanitarian circus" and wished UNHCR luck in putting on "a good show".

UNHCR's high media profile did prove to be a double-edged sword for the organization, with two contradictory effects: a gain in profile and leverage, and a loss of independence. In highlighting the extent of the humanitarian needs, UNHCR attracted the greater part of the burden of responsibility for the cause it had so successfully promoted, and built up expectations which it had to meet. Its operation was thus moved into the public domain, and this affected operational decisions in an unexpected way. The most apparently minor operational decisions of UNHCR were scrutinized by the international press and Western political leaders. UNHCR pushed the Western public and governments to react. When they did, the pressure was turned around on to UNHCR, which became the instrument for their action.

When, for example, a European Cabinet Minister visited Mostar in 1993, UNHCR took him to visit a psychiatric hospital on the frontline, in the hope that he could assist in negotiations to evacuate the patients to another facility away from the frontline. Despite his interventions, the evacuation continued to be obstructed for several weeks after the visit. From the safety of his capital the Minister, who had taken the problem to heart, proceeded to put heavy pressure on

UNHCR to move forward with the evacuation, even though the absence of cooperation from the parties meant that it was beyond UNHCR's power to achieve.

Public denunciations levelled by UNHCR officials against those responsible for committing atrocities also strained relations with the parties to the conflict and often resulted in threats and restrictions on the ability of UNHCR staff to operate. For instance, while UNHCR's public exposure of Croatian detention camps in the summer of 1993 in the Mostar region led to the opening of the camps to the ICRC and the resettlement of inmates, the UNHCR staff member who broke the story had to be evacuated from the area after receiving death threats. And while the use of the media helped gain access to victims, in some cases UNHCR was forced to devote a disproportionate amount of resources to a small number of individuals who had captured the media's attention. An injured baby named Irma in the Sarajevo hospital, for example, received massive media exposure in the British press which led to inordinate pressure on UNHCR to evacuate her, despite the practical obstacles caused by the refusal of the Bosnian Serbs to allow medical evacuations.

While eschewing UNHCR's high-profile approach to the media, even the ICRC, which is not traditionally given to regular public denunciation, was more outspoken than usual about the total lack of respect in the former Yugoslavia for international humanitarian law and the red cross emblem.

Conclusion

The experience of UNHCR and ICRC in the war in Bosnia clearly illustrated the limits of humanitarian action, and how, all too often during the 1990s, humanitarian organizations were left to deal with problems which were essentially political in nature. For UNHCR, it also demonstrated some of the dangers of moving its operations from countries of asylum to countries of origin and into zones of active conflict. These dangers include the possibility that emergency relief efforts may be used as a substitute for decisive international action to prevent or halt refugee-producing conflicts, as well as the potential threat posed to the right of asylum by the international

community's growing efforts to assist war-affected populations within their own country.

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Résumé

HCR et CICR en ex-Yougoslavie : Bosnie-Herzégovine

PAR KIRSTEN YOUNG

L'action menée par le HCR pendant les différentes étapes du conflit des Balkans, en Bosnie-Herzégovine notamment, compte parmi les plus importantes et les plus difficiles de son histoire. En Bosnie-Herzégovine, le HCR et le CICR travaillèrent côte à côte, et cela dans un contexte qui relevait avant tout des compétences du CICR, puisqu'il s'agissait du sort des populations civiles au cours d'un conflit armé – celui des personnes déplacées en l'occurrence. L'auteur examine les activités au cours desquelles les deux institutions collaborèrent harmonieusement, mais également celles où il y eut divergence de vue dans l'approche des problèmes à résoudre. Finalement, les deux institutions ressentirent la même déception en constatant l'incapacité de « la politique » à trouver une solution pacifique aux conflits et devant l'obligation qui leur fut faite d'affronter seules la souffrance des victimes.

La Croix-Rouge albanaise face à la crise du Kosovo

par
PANDORA KETRI

Les vents qui soufflaient, début mars 1999, au-delà de la frontière au nord-est de l'Albanie annonçaient un printemps turbulent. Et le printemps de cette année-là fut effectivement particulier et très dur pour l'Albanie. Il le fut également pour la Croix-Rouge albanaise (CRA). Les centaines de milliers d'arrivants parlaient albanais tout comme la population locale, mais ils venaient avec le statut de réfugiés. C'étaient les réfugiés du Kosovo.

En Albanie, le terme « réfugié », dont l'acception véritable était inconnue d'une grande partie de la population locale, avait été assez fréquemment utilisé au cours de la dernière décennie pour désigner, dans le langage courant, tous ceux qui, durant les années 90, étaient partis à l'étranger et notamment vers les pays d'Europe occidentale. Il s'agissait en réalité d'émigrés qui quittaient le pays dans l'espoir d'une vie meilleure. Des dizaines de milliers de familles albanaises, qui avaient une tradition très forte de vie en commun, avaient ainsi profondément ressenti le déchirement provoqué par le départ, loin du pays, des parents, des enfants et des proches. C'est dans les pays d'accueil qu'on voyait le mieux l'expression d'affliction sur les visages de ceux qui avaient quitté l'Albanie. La plaie ouverte par ce drame était encore très vive dans la mémoire des gens, et c'est pour cette raison que leur réaction fut très positive et forte quand ils devinrent les témoins d'un drame plus terrible encore, celui vécu par les Kosovars.

PANDORA KETRI est secrétaire générale de la Croix-Rouge albanaise.

Ils comprirent tout de suite l'expression sur le visage des centaines de milliers de personnes qui fuyaient le Kosovo, de mars à mai 1999. Ils y virent ce mélange de terreur et de douleur si difficile à décrire.

Cela faisait longtemps qu'on sentait la situation empirer de l'autre côté de la frontière, et le franchissement de cette frontière s'annonçait lourd de conséquences sur le plan humanitaire. Les événements de la première moitié de l'année 1998 – quand 25 000 Kosovars en provenance essentiellement des zones frontalières étaient arrivés en Albanie – avaient été un avertissement qui incitait à se préparer.

La Croix-Rouge albanaise était-elle prête à faire face à la nouvelle situation ?

Neuf ans s'étaient écoulés depuis que la Croix-Rouge albanaise avait été réactivée. Auparavant, de 1967 à 1989, elle avait été interdite et empêchée d'exercer ses activités. Lors de la première Assemblée générale tenue après la réorganisation, la préparation aux catastrophes fut déclarée priorité en matière de développement. Le pays traversait alors des moments extrêmement difficiles dus au changement de régime, et il aspirait à quitter l'état de pauvreté absolue dans lequel il se trouvait pour s'acheminer vers l'économie de marché.

Au début, il était inconcevable, voire incroyable, que des résultats tangibles puissent être obtenus sur le plan de la préparation aux catastrophes, alors que la Société nationale était en pleine réorganisation. Certes, elle avait le soutien d'un grand nombre de Sociétés de la Croix-Rouge et du Croissant-Rouge, mais le temps restait un facteur de poids. Certains progrès furent toutefois enregistrés, apportant la preuve que les choses bougeaient.

La politique de la Société nationale en matière de préparation et d'intervention en cas de catastrophe fut approuvée, et on procéda à toute une série d'entraînements. Un stock de secours d'urgence à court terme suffisant pour couvrir les besoins de 5 000 personnes fut constitué dans l'entrepôt central et renouvelé périodiquement.

La Société nationale réussit à établir ses structures : chaque district du pays comptait un comité local de la Croix-Rouge, dirigé par un conseil du comité local. Ce conseil était composé principalement de volontaires élus, ainsi que d'un secrétaire et d'un administra-

teur, eux aussi volontaires. Seuls neuf comités, qui constituaient le quart des comités locaux de tout le pays, employaient une à deux personnes à temps plein.

Grâce au nombre de volontaires qui augmentait d'année en année et au soutien de nombreuses Sociétés nationales de la Croix-Rouge et du Croissant-Rouge, des activités humanitaires se développèrent dans la plupart des régions. De nombreux comités locaux furent inclus dans des programmes nationaux de développement en matière d'assistance sociale et de santé; ces programmes visaient à recruter et à former des volontaires qui pourraient ensuite offrir leurs services aux personnes vulnérables. Les jeunes représentaient la majorité des volontaires, et cela était considéré comme la force de la Société nationale. Ne disposant que de capacités limitées, la CRA était néanmoins l'association locale la plus développée qui avait bonne réputation et jouissait d'une grande crédibilité dans le pays. Des progrès importants furent réalisés en vue de mettre en place un système de gestion, et l'équipe de gestion financière en particulier avait atteint un très bon niveau de professionnalisme.

Au cours des années 1995-1996, la CRA fut active lors des inondations qui touchèrent plusieurs districts du pays. En plus des secours d'urgence aux sinistrés, elle mena à bien un projet trimestriel d'aide à un millier de familles dans plusieurs districts, projet financé par l'Office humanitaire de la Communauté européenne (ECHO), par l'intermédiaire de la Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge.

Pendant l'année 1997, lors des troubles qui gagnèrent tout le pays suite à l'effondrement des sociétés financières dites «pyramidales», la CRA joua un rôle important dans l'action humanitaire conduite par le CICR pour venir en aide aux établissements de santé et d'assistance sociale, ainsi qu'aux familles les plus touchées par la crise financière.

De même, la CRA fut très active vers le milieu de l'année 1998, lors du premier afflux de réfugiés en provenance du Kosovo. Grâce à une excellente coordination de ses activités avec celles de la Fédération et du CICR, elle put assister les deux tiers environ des 25 000 réfugiés arrivés en Albanie.

Avec le soutien des donateurs, la plupart des comités locaux purent disposer de bureaux. À partir de 1993, un projet de coopération avec la Croix-Rouge de Norvège permit de mettre sur pied, dans les dix districts frontaliers du nord-est, des maisons préfabriquées qui devaient jouer le rôle de centres d'information en cas d'afflux de réfugiés. Elles servaient entre-temps de bureaux de travail ou de salles de rencontre pour les volontaires.

Des liaisons radio furent établies entre Tirana et plusieurs districts, dont ceux de Kukës et de Tropoja.

Les préparatifs avant la crise

Suite à la première arrivée massive de réfugiés en juin 1998 dans le district de Tropoja et en prévision d'un nouvel afflux, toute une série d'activités furent lancées fin 1998 et début 1999 dans les districts de Kukës et de Has, situés le long de la frontière avec le Kosovo. Ces préparatifs furent plus intenses au sein du comité local de Kukës, dont les capacités étaient déjà relativement bonnes. Par contre, celles du district de Has étaient plus faibles, les préparatifs y furent plus modestes. Dans le district de Tropoja, autre district limitrophe du Kosovo, les associations humanitaires avaient suspendu leurs activités depuis presque un an pour des raisons de sécurité, alors que la Croix-Rouge albanaise poursuivait les siennes grâce à la présence de son comité local. Ses activités étaient toutefois très limitées et surtout centrées sur la recherche des réfugiés de 1998. Elle s'occupait aussi d'aider les familles pauvres et de diffuser des messages sur la protection de la santé des femmes enceintes et des enfants.

Les préparatifs avant la crise portèrent sur plusieurs points :

- rendre les comités locaux plus vigilants pour qu'ils suivent attentivement l'évolution de la situation en appréciant toute information en provenance de n'importe quelle source et qu'ils tiennent le siège au courant ;
- organiser des cours de premiers secours pour la préparation des volontaires et des cours de perfectionnement pour les volontaires déjà formés ;
- recruter des jeunes volontaires et les entraîner en vue de les incorporer dans les divers services de la Société nationale ;

- transférer de l'entrepôt central vers Kukës un stock de produits, alimentaires et non alimentaires, ainsi que des produits d'hygiène;
- dresser la liste des commerces capables de fournir des produits alimentaires frais et de l'eau notamment;
- dresser la liste des moyens de transport et des entrepôts existants et étudier la possibilité de signer des contrats de sous-traitance en cas de besoin;
- transférer au préalable sur le compte du comité local de Kukës des fonds qui pourraient être utilisés en cas d'urgence dans les districts de Kukës et de Has;
- affecter au comité de Kukës, dans les tout premiers jours de la crise, trois employés du siège qui prêteraient main-forte aux comités de Kukës et de Has.

En même temps, d'autres comités locaux organisèrent des cours de remise à niveau, sur les plans théorique et pratique, relatifs aux interventions en cas de catastrophe.

Lorsque 460 000 réfugiés — soit 15% de la population locale — arrivèrent du Kosovo en moins de deux mois, la CRA, qui était composée d'une équipe de 45 employés et d'environ 2 500 volontaires, était ainsi prête à les accueillir. Elle disposait en outre à l'entrepôt central de 500 000 tonnes de nourriture, d'environ 15 000 couvertures, et d'une quantité importante d'articles d'hygiène et de vêtements. De plus, depuis un an, une petite délégation de la Fédération et une autre du CICR se trouvaient sur place pour seconder la CRA.

Mesures prises par la Croix-Rouge durant la période d'urgence

Les principaux points de passage de la frontière par lesquels les réfugiés entraient en Albanie étaient le district de Kukës (environ 100 000 habitants et quelque 20 000 familles) et le district de Has (25 000 habitants et environ 5 000 familles). Plus tard, un petit nombre de réfugiés arrivèrent aussi dans le district de Shkodër via le Monténégro, et un autre dans celui de Korçë par la Macédoine. Ce furent les comités locaux de la Croix-Rouge de ces districts qui eurent l'honneur de représenter la Croix-Rouge, car c'est sur eux que pesa le

Très vite les maisons en préfabriqué de la Croix-Rouge près du centre-ville à Kukës et Has, qui étaient les seuls locaux dont la Croix-Rouge disposait initialement, commencèrent à offrir toutes sortes de « services ». Elles accueillaient ceux qui n'avaient pas pu recevoir de la nourriture à leur point de distribution, elles servaient de centres d'information non seulement pour les réfugiés, mais aussi pour beaucoup d'agences et d'associations humanitaires qui arrivaient les unes après les autres et dont beaucoup prenaient à Kukës le premier contact avec l'Albanie. La même maisonnette de 25 m² de surface se transformait le soir en « hôtel » où 10 à 15 personnes passaient la nuit sous une couverture : des secouristes de la Croix-Rouge qui assuraient l'accueil, des employés du siège, des délégués d'autres Sociétés nationales de la Croix-Rouge et même des employés d'autres agences humanitaires qui n'avaient pas trouvé de meilleur endroit pour dormir.

Le nombre des arrivés augmenta rapidement et en quelques jours, quand la crise fut à son comble, il était devenu trois à quatre fois supérieur au nombre des résidents locaux dans les deux villes. Si l'on comptait aussi les réfugiés installés dans les villages, la population des deux districts avait doublé. On trouvait des réfugiés partout : dans les maisons de proches ou de parents habitant en Albanie, dans des familles jusque-là inconnues mais qui leur avaient ouvert les portes de leur maison, dans des centres collectifs de fortune, dans des usines abandonnées, dans des bâtiments publics, des écoles, sous les avant-toits des immeubles, et partout dans la rue, à la belle étoile, sous des chariots renversés, dans des voitures ou des tentes en matière plastique montées à la hâte sur des plates-formes de camions.

Les nouveaux arrivants avaient avant tout besoin de nourriture, d'un abri, de conditions sanitaires minimales et, dans de nombreux cas, d'une assistance médicale. Si pour les vivres, le logement et l'assistance médicale, des solutions furent trouvées, l'hygiène resta un des grands problèmes non résolus jusqu'à la fin de la période d'urgence, à Kukës en particulier.

Très vite, on commença à organiser le déplacement des réfugiés vers les autres districts qui entre-temps s'étaient préparés à les accueillir. Au cours de cette période, la CRA mena pour ainsi dire le

même genre d'activités dans tous les autres districts, principalement dans les centres d'accueil et les centres collectifs nouvellement créés. En général, les circonstances y étaient plus favorables, car le nombre de réfugiés qui arrivaient dans ces districts était nettement moins élevé. Les comités locaux avaient eu plus de temps pour les derniers préparatifs, le briefing des secouristes et le recrutement de nouveaux volontaires.

La situation devint plus difficile dans les comités de Tirana et de Durrës, dans la partie centrale de l'Albanie, où le nombre de réfugiés avait sensiblement augmenté en peu de temps suite à leur transfert depuis Kukës. En effet, d'autres agences qui disposaient de moyens financiers, de vivres et d'autres produits, mais pas d'un réseau opérationnel, demandèrent à la Croix-Rouge de s'en occuper. C'est ainsi qu'à Tirana, quelque 2 000 réfugiés furent déplacés en deux jours d'un centre de sports qui servait de centre d'accueil vers un camp de tentes installé par la protection civile. Après la distribution d'un seul repas, on se retrouva sans structure capable d'assurer la distribution de la nourriture aux réfugiés du camp. Grâce au soutien extrêmement important de la population, le comité local de Tirana et ses volontaires furent en mesure de fournir des vivres et les produits d'hygiène nécessaires et organisèrent la distribution de trois repas par jour pendant toute une semaine. Il continua à offrir ses services et à mettre des volontaires à disposition même après qu'une autre agence se fut chargée de gérer le camp. Pendant trois semaines consécutives, le comité local de Tirana organisa une assistance de 24 heures sur 24 au centre d'accueil où plus de 2 000 personnes passaient la nuit. Je n'oublierai jamais une des premières nuits où des réfugiés arrivèrent à Tirana. Un soir vers 23 heures, le chef de délégation de la Fédération, qui assistait dans les bureaux du HCR à une réunion sur les problèmes d'approvisionnement en eau, me demanda s'il serait possible d'organiser pendant la nuit des secours pour le comité de Tirana, car 800 personnes étaient arrivées ce soir-là de Kukës et avaient été installées dans le centre collectif de Mullet, à 15 kilomètres de Tirana ; elles n'avaient reçu aucune nourriture durant toute la journée. Deux boulangeries et plusieurs commerces travaillèrent toute la nuit afin de préparer et d'emballer des rations de vivres qui purent être distribuées à 7 heures et demie du matin.

Entre-temps, le siège de la Croix-Rouge albanaise avait mis à la disposition des comités locaux des fonds provenant de ses propres réserves, ainsi que des fonds offerts en argent comptant par des représentants de Sociétés nationales de la Croix-Rouge qui s'étaient rendus immédiatement en Albanie. Ces fonds furent utilisés pour acheter au marché local des produits de première nécessité pendant les premiers jours. Cela fut fait en coordination avec d'autres agences, en attendant que la coordination des aides au niveau des districts et du pays se mette en place. Étant donné l'étendue des besoins, l'aide apportée dans un premier temps par la Croix-Rouge et les autres organisations humanitaires se révéla tout à fait insuffisante, mais elle fut heureusement compensée par la générosité des familles albanaises. De même, des compagnies albanaises et étrangères offrirent des vivres, des articles d'hygiène et des fonds. Nombre d'entre elles préféraient le faire par l'intermédiaire de la Croix-Rouge, ce qui motiva grandement les volontaires qui travaillaient sans relâche. Grâce à cet élan de solidarité, il fut possible de faire face à la situation sans grands problèmes sur le plan humanitaire.

Après une répartition sommaire des tâches avec les autres agences humanitaires au cours de la première semaine d'avril, l'action de la Croix-Rouge commença à s'organiser, surtout après la création de la délégation commune Fédération/CICR. Elle se concentra sur les cinq plus grandes préfectures qui comprenaient les quinze districts rassemblant le plus grand nombre de réfugiés. À cette époque, l'assistance, qui en était encore à ses débuts, était offerte partout où elle était nécessaire et en particulier dans les centres collectifs qui se créaient tous les jours.

L'urgence des premiers jours posa de nombreux problèmes — prévus et imprévus — liés aux capacités logistiques, aux ressources humaines et à l'organisation même de l'assistance. Il y eut aussi des difficultés de communication. En effet, les lignes téléphoniques du siège (à l'époque trois en tout) furent constamment occupées dès les premiers jours, car des proches de réfugiés qui vivaient aux quatre coins du monde appelaient la Croix-Rouge dans l'espoir d'avoir des informations sur le sort des leurs, bloquant ainsi toute autre communication. Ce problème fut dans une certaine mesure résolu quand on

doubla le nombre de lignes — mais surtout parce que les nouveaux numéros de téléphone n'étaient pas connus. Le même phénomène se produisit avec le comité local de Kukës, qui n'avait qu'une seule ligne et avec lequel on ne pouvait communiquer que pendant la nuit. Dans beaucoup d'autres districts, le service téléphonique n'était pas direct mais passait par un standard, ce qui compliquait davantage la communication. Les téléphones cellulaires avaient fait leur apparition depuis deux ans en Albanie, mais le territoire couvert était encore trop limité. Par contre, l'emploi de téléphones satellitaires facilita la tâche des délégués.

Malgré tous les préparatifs, les débuts de l'organisation de l'assistance et des services destinés aux premiers réfugiés se révélèrent difficiles. Il n'y avait en effet pas de plan d'action détaillé pour guider tous les acteurs humanitaires. De plus, la situation était très différente de nos expériences antérieures.

Mesures prises par la Croix-Rouge albanaise pour l'assistance à long terme

Devant l'ampleur de la crise provoquée par l'afflux de réfugiés, la CRA devint, dès les premiers jours, un acteur important de la vaste opération humanitaire menée par le Mouvement international de la Croix-Rouge et du Croissant-Rouge — la première du genre depuis l'adoption de l'Accord de Séville. La visite à cette époque des présidents des deux institutions centrales du Mouvement — Cornelio Sommaruga pour le CICR et Astrid Heiberg pour la Fédération – fut non seulement perçue comme une marque de soutien appuyé à notre égard en tant qu'acteurs de la Croix-Rouge, mais aussi comme une garantie du rôle très important qu'allait jouer le Mouvement tout entier dans cette crise.

En très peu de temps, la délégation intégrée du Mouvement fut complétée, et la réponse à l'appel lancé en faveur des victimes de la crise des Balkans très positive.

L'image projetée par la Croix-Rouge en Albanie, l'absence d'un réseau développé d'ONG et d'autres agences humanitaires opérationnelles sur le terrain, ainsi que l'augmentation des besoins, tout cela fit que les attentes à l'égard de la Croix-Rouge étaient grandes et que la CRA se trouvait devant un défi à relever. La situation exigeait

que la CRA assumât un rôle plus important que prévu. Contrairement aux autres crises à travers le monde, un tiers seulement des réfugiés s'installèrent dans les camps construits pour eux. Les autres préféraient rester dans les familles qui les avaient accueillis à leur arrivée. Ce contingent serait l'objet des activités de la Croix-Rouge, comme l'avait aussi demandé le groupe de gestion de l'urgence.

L'expérience avait montré, d'une part, qu'un comité local pouvait assister jusqu'à 400 ou 500 personnes par jour en mettant en place un point de distribution des secours alimentaires et, d'autre part, que les comités les plus développés n'avaient pas eu l'occasion de gérer plus de trois points de distribution simultanément. La situation créée par la crise du Kosovo exigeait un autre rythme de travail que l'on ne pouvait pas suivre avec les ressources humaines disponibles à ce moment-là. Forts du soutien de leurs communautés respectives, les comités locaux assumèrent avec optimisme des responsabilités qui dépassaient celles qu'ils avaient exercées auparavant. À notre avis, la CRA pouvait organiser une assistance en produits alimentaires et non alimentaires pour 150 000 à 200 000 personnes par mois. C'est sur cette base qu'il fut décidé que la Croix-Rouge assisterait les réfugiés accueillis dans les familles, et les familles elles-mêmes, et qu'un accord fut signé entre la Croix-Rouge, le HCR et le PAM.

Plus tard, cependant, des difficultés apparurent du fait que le nombre des réfugiés n'avait pas été précisé dans l'accord et qu'il était presque deux fois supérieur à celui initialement avancé. La situation devint particulièrement délicate vers la fin avril et le début mai, quand on constata que les secours ne répondaient pas aux besoins ni aux termes de l'accord et que nos structures n'étaient pas en mesure de mener à bien qualitativement l'opération d'assistance, en particulier dans les districts les plus touchés, comme Kukës, Tirana et Durrës. Les problèmes furent en partie résolus par la distribution de vivres tout d'abord pour une semaine, puis pour deux semaines, et enfin sur une base mensuelle.

Organisation de l'assistance à long terme

Les réfugiés furent répartis dans les trente-six districts du pays, mais cette répartition était inégale. La plupart furent installés dans les districts proches de la frontière et dans la partie centrale du pays, où les conditions étaient meilleures. La CRA dut s'organiser pour faire face au volume de travail. L'organigramme du siège fut adapté aux besoins des populations réfugiées et à l'organigramme de la délégation intégrée du Mouvement. Six centres régionaux furent créés afin de venir en aide aux comités locaux et de les soutenir dans l'organisation de leur travail. Chaque centre comprenait un coordonnateur de l'opération dans la région et plusieurs services : logistique, administration et agence de recherches. Chaque centre organisait l'assistance des réfugiés sur son propre territoire. La répartition des réfugiés étant différente d'un district à l'autre, les centres régionaux couvraient des territoires comptant entre deux et douze comités locaux. Au poste de coordonnateur de ces centres, on nomma les secrétaires des comités des districts où les centres régionaux avaient été établis et qui avaient une certaine expérience de l'organisation des activités d'assistance. Dans un de ces centres, dans le nord, situés au point d'entrée des réfugiés en Albanie, et notamment à Kukës, une sous-délégation de la Fédération pour les districts de Kukës et de Has fut ouverte. En outre, il y avait au moins un délégué par centre pour aider à organiser l'ensemble du travail.

L'équipe du siège de la CRA contribua à la mise sur pied de ces centres en travaillant avec les délégués à l'élaboration de l'ensemble des activités. Parallèlement à leur propre entraînement, l'équipe existante et les nouveaux recrutés dans ces centres aidaient le comité local de leur district à tirer parti de l'expérience acquise précédemment et à l'adapter à la situation du moment.

Malgré les difficultés rencontrées lors de la création et de la mise en service des centres régionaux, leur organisation montra au fil des jours et des semaines son efficacité et ses valeurs. L'équipe albanaise, qui connaissait bien le terrain, travailla de concert avec les délégués, qui avaient l'expérience de situations semblables. En un seul jour et par point de distribution, les comités locaux purent fournir des secours pour 4 000 à 5 000 personnes, soit dix fois plus que précédemment. D'une manière générale, la collaboration entre les délégués

du CICR, ceux de la Fédération et l'équipe albanaise fut cordiale et fructueuse. Toutefois, dans certains cas, l'absence d'harmonie au travail entre le coordonnateur albanais et le délégué nous amena à apporter des modifications au plan initial pour atteindre le résultat souhaité. Des analyses furent faites par la suite qui montrèrent que cette forme de collaboration était appropriée dans ces circonstances particulières et qu'elle donnait des résultats positifs.

Dans l'organisation du travail, nous rencontrâmes pas mal de difficultés dues parfois à la Croix-Rouge elle-même, parfois à des raisons extérieures. La plupart furent résolues au cours de l'opération. Les principales difficultés survinrent au début, en raison du manque d'expérience et de ressources humaines et matérielles.

La nouvelle structure mise en place était composée de 300 personnes réparties comme suit : l'équipe du siège, l'équipe locale assistant la délégation de la Fédération, et l'équipe chargée des centres régionaux. Six fois plus grande que la structure habituelle, cette structure manquait d'expérience Croix-Rouge et, au début, n'eut pas l'efficacité souhaitée, ce qui, souvent, fut source de problèmes. La formation des membres d'une telle structure demandait du temps, et le temps était précisément la chose la plus coûteuse et la plus difficile à trouver à ce moment-là. Pendant deux à trois semaines, l'équipe et les volontaires durent travailler jusqu'à dix-huit heures par jour et, dans certains cas, on ne put éviter les tensions et les difficultés provoquées par la nécessité de répondre aux demandes et aux besoins des nouveaux arrivants.

Nous avions considéré comme un atout le fait que nous disposions de 2 500 volontaires avant la crise. Mais, quand la crise survint, nous dûmes constater qu'une bonne partie d'entre eux ne pouvaient s'engager que partiellement. En effet, certains travaillaient déjà dans des établissements d'aide aux réfugiés et faisaient déjà des heures supplémentaires, tandis que d'autres étaient étudiants et préparaient leurs examens de fin d'année. L'organisation de l'assistance aux réfugiés hébergés à la campagne fut particulièrement difficile, car notre Société nationale n'avait guère d'expérience en milieu rural et n'avait pas pu y créer ses propres structures ni un réseau de volontaires. Il fut donc nécessaire de recruter de nouveaux volontaires, principalement

dans les villes. Leur disponibilité était grande, mais ils connaissaient peu la Croix-Rouge, ses principes et son mode de fonctionnement. Aussi durent-ils travailler avec des volontaires plus expérimentés.

Une des difficultés rencontrées était le fait que nous devions souvent travailler avec des listes inexactes de bénéficiaires — listes qui avaient été rédigées par d'autres organismes — et cela pouvait mettre en doute la crédibilité de la Croix-Rouge aux yeux de l'opinion publique et des donateurs. En ne cessant de faire part de nos préoccupations à ce sujet aux groupes de gestion de la crise dans les districts, nous dûmes procéder à des vérifications lors de l'établissement des cartes familiales de distribution et de la distribution elle-même, afin de réduire les effets négatifs résultant de l'inexactitude de ces listes.

La préparation des comités locaux sur le plan logistique, en particulier dans la gestion des entrepôts et la rédaction des rapports de ces comités et des centres régionaux, était plus faible que dans les autres domaines. Des progrès furent cependant réalisés grâce à l'aide apportée par les délégués aux employés de la CRA.

Compte tenu de l'excellent niveau professionnel des employés des finances au siège de la CRA et de la conformité de notre système avec celui de la Fédération, nous n'eûmes aucune difficulté d'ordre technique. Il fallut par contre un certain temps aux employés des finances dans les districts pour se former et atteindre le même niveau de compétence qu'au siège. Toutefois, le système bancaire posa quelques problèmes. En effet, les transferts de fonds vers les centres régionaux duraient entre dix et quatorze jours et cela compliquait le travail, particulièrement au début. Souvent, nous fûmes contraints d'acheminer vers les régions d'importantes sommes d'argent que des employés du siège transportaient en voiture, ce qui n'était pas sans risques compte tenu de l'insécurité qui régnait dans le pays. Dans certains cas, des paiements urgents qui devaient être effectués au comptant le furent en privé par des employés ou des volontaires de la Croix-Rouge, mais parfois les prestataires de services acceptaient de se faire payer plusieurs jours plus tard.

La coordination

Si beaucoup de Sociétés nationales de la Croix-Rouge et du Croissant-Rouge réagirent rapidement au moment de la crise, la coordination de l'action humanitaire du Mouvement se révéla très difficile et insuffisante. Au sein même du Mouvement, elle fut difficile à gérer, et ce, pendant toute la durée de la crise. Aux termes de l'Accord de Séville, le fardeau de la coordination pesait surtout sur les épaules de l'institution directrice qui, en Albanie, était la Fédération.

Dans une lettre envoyée au début de la crise par le Secrétariat de la Fédération aux Sociétés nationales de la Croix-Rouge et du Croissant-Rouge, le président de la CRA demanda que toute aide soit envoyée en Albanie via Genève. Bien que cette question ne fasse pas l'objet du présent article, je voudrais néanmoins mentionner certains problèmes qui se sont posés à notre Société à ce sujet et que nous avons dû résoudre.

Dès les premiers jours de la crise, des représentants de dizaines de Sociétés nationales arrivèrent en Albanie pour évaluer la situation et offrir leur aide qui fut, dans certains cas, très rapide et efficace. Cela représentait une charge énorme pour la CRA, qui avait des difficultés à organiser l'accompagnement des représentants de ces Sociétés sur le terrain, en particulier à un moment où la délégation de la Fédération n'était pas encore au complet. Les difficultés étaient de nature logistique et liées au manque de personnel capable d'accompagner nos collègues des autres Sociétés dans les autres districts.

Nous nous trouvâmes particulièrement en difficulté quand des cargaisons de secours, souvent envoyées directement par d'autres Sociétés nationales, arrivèrent au port de Durrës ou à un autre poste frontière sans que nous en soyons avertis. Les formalités de dédouanement de ces cargaisons, au début de la crise surtout, n'avaient pas été remplies au préalable conformément à la législation locale. Un autre problème était le fait que, souvent, les aides envoyées n'étaient pas conformes à notre engagement dans la crise. Au bout de quelques semaines cependant, la coordination s'améliora et devint plus efficace. Des projets délégués à quelques Sociétés de la Croix-Rouge donnèrent de bons résultats.

Autres activités de la Croix-Rouge

En plus des activités décrites ci-dessus et en fonction des capacités des comités locaux, une série d'autres activités en faveur des réfugiés purent être menées à bien. Par ailleurs, beaucoup d'activités destinées aux groupes vulnérables de la population locale se poursuivirent en 1999 comme prévu. Par conséquent, une centaine de volontaires furent engagés pour assister les délégués du CICR dans les activités de l'agence de recherches de l'institution à Kukës et dans les autres districts, où ils recueillaient les messages des réfugiés hébergés dans les camps ou des familles d'accueil. Ces messages étaient ensuite diffusés sur les ondes des radios locales ou étrangères.

Dans les zones septentrionales du pays qui avaient été minées lors des combats, les volontaires commencèrent à sensibiliser aux dangers des mines aussi bien les personnes qui rentraient au Kosovo que les familles qui se trouvaient encore dans les zones frontalières.

Le comité local de Tirana créa un centre d'information qui fonctionnait en permanence et où les réfugiés, surtout ceux qui venaient d'arriver, trouvaient diverses informations sur les services offerts par la Croix-Rouge et pouvaient se faire conseiller sur des problèmes courants.

La plupart des comités locaux entreprirent des activités de caractère sanitaire. Parallèlement à la mise sur pied de deux hôpitaux de campagne à Kukës et à Shkodër et de plusieurs unités sanitaires de diverses associations, ils participèrent aux activités organisées par la CRA visant à prévenir certaines maladies : entretiens avec des groupes de réfugiés, pose d'affiches et distribution de brochures ou de dépliants publiés spécialement durant la crise. Certains comités locaux organisèrent des cours de premiers secours pour les réfugiés intéressés, des visites de réfugiés des camps dans des familles locales et vice versa, des rencontres entre enfants locaux et enfants réfugiés. Les volontaires distribuèrent des kits de matériel scolaire ou de récréation offerts par d'autres associations. Ces activités, et d'autres du même genre, devinrent plus fréquentes après le départ rapide de la plupart des réfugiés à la fin juin et pendant le mois de juillet 1999. Des activités supplémentaires furent organisées : cours d'informatique ou de langues pour les

jeunes et les adultes, cours de couture, camps de vacances pour les enfants au bord de la mer, excursions, etc.

Certains comités locaux apportèrent leur soutien aux Sociétés nationales de la Croix-Rouge et du Croissant-Rouge qui construisaient des camps en les aidant à recruter du personnel local. Des groupes de volontaires assurèrent diverses activités et contribuèrent à la réalisation de programmes psychosociaux.

Les activités planifiées avec les groupes vulnérables de la population locale se poursuivirent même au plus fort de la crise, à savoir le programme «un repas gratuit pour les plus nécessiteux» dans trois comités locaux et des cours de couture dans trois autres. Au cours de la seconde moitié de 1999, alors que le nombre de réfugiés diminuait de mois en mois, la plupart des comités reprirent toutes les activités planifiées tout en menant en parallèle les programmes mis en place à la suite des événements du Kosovo et soutenus par diverses associations, comme le programme d'assistance à la population touchée par la crise et un programme alimentaire réalisé dans huit districts du pays en faveur des personnes âgées qui vivaient seules et avaient vu leur niveau de vie baisser considérablement à cause de la crise.

Conclusion

La crise du Kosovo fut une crise sans précédent tant par son ampleur que par la façon dont elle se déroula. À l'issue de cette période, la CRA procéda à l'examen de son action, mit en évidence ses points forts et ses points faibles et définit les orientations de son travail futur en vue d'accroître ses capacités et ses performances. L'expérience acquise fut très utile, et la CRA en tint compte quand elle présenta sa Stratégie pour les années 2000-2004, qu'elle met actuellement en application avec le soutien de nombreuses Sociétés nationales de la Croix-Rouge et du Croissant-Rouge d'autres pays.

Les marques d'estime et de reconnaissance pour l'action de la Croix-Rouge manifestées par les réfugiés eux-mêmes, par les hautes autorités internationales et par les représentants de Sociétés nationales de la Croix-Rouge et du Croissant-Rouge, ainsi que par le peuple albanais, tout comme les deux décorations prestigieuses que le président albanais a remises à la Fédération et à la Croix-Rouge

albanaise, sont pour notre Société nationale le meilleur encouragement et la meilleure source d'inspiration pour la poursuite dans la voie de son développement.

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Abstract

The Albanian Red Cross and the crisis in Kosovo

by PANDORA KETRI

The Secretary-General of the Albanian Red Cross reports on action taken by her National Society in response to the massive flow of refugees into Albania from neighbouring Kosovo in the spring of 1999. Pandora Ketri shows how a National Society, only a few years after it started to gain strength, met an enormous challenge and coped with huge difficulties. Though the Albanian Red Cross could count on support from other National Societies, the International Federation and the ICRC, the members of this young Society had to bear the brunt of the work. The experience gained through its activities for refugees from Kosovo helped the Albanian Red Cross consolidate its position as a member of the Movement and as a full-fledged relief society.

La Croix-Rouge suisse et l'aide aux réfugiés et aux migrants

par
PHILIPPE BENDER

Participant pleinement de l'histoire de son pays, avec les autorités duquel elle maintient des liens étroits, la Croix-Rouge suisse (CRS) joue, depuis sa fondation en 1866, un rôle actif dans la politique suisse des réfugiés. Dans cet engagement, parfois controversé, elle a trouvé l'une de ses raisons d'être.

C'est à la vérité une longue histoire, qui mêle charité et nécessité et qui débute lors de la guerre franco-allemande de 1870 avec l'internement des 85 000 soldats de l'armée Bourbaki, en février 1871.

Elle se poursuit pendant la Première Guerre mondiale avec l'accueil et le rapatriement, par trains sanitaires, de dizaines de milliers de soldats invalides ou convalescents. Puis, dans les années 20 avec la prise en charge, sur mandat du Conseil fédéral, de quelque «250 Russes qui se trouvaient en Suisse pour cause de santé» et qui, à la suite de la Révolution soviétique, «ont perdu leurs biens et n'ont pu retourner dans leur pays» [1]. Cette assistance aux Russes blancs durera jusque dans les années 80.

PHILIPPE BENDER est responsable du Service de la communication de la Croix-Rouge suisse.

Le Secours aux enfants

Pendant la Seconde Guerre mondiale la Suisse « hébergea, pour un temps plus ou moins long, 295 381 étrangers en quête d'asile (internés militaires, réfugiés civils, émigrants, enfants, frontaliers) » [2].

La CRS porta alors son effort sur l'assistance aux enfants, « victimes innocentes et garants de l'avenir de l'Europe » [3]. Ainsi, le Secours aux enfants va déployer une action remarquable sur le plan national et international. Près de 150 000 enfants, provenant d'une trentaine de pays belligérants, seront reçus en Suisse jusqu'en 1948 et de vastes programmes d'aide directe (aliments, vêtements, gestion de colonies de vacances, soutien médical) seront menés à l'étranger, notamment en France, en Italie, en Yougoslavie et en Grèce. Le Don suisse relayera cette action dans l'immédiate après-guerre, en l'amplifiant.

Plus que jamais, la politique internationale va dicter désormais la politique suisse envers les réfugiés, et, partant, la mission des œuvres d'entraide. Selon l'expression de Jean-Paul Sartre : « La pression de l'histoire nous révélait soudain l'interdépendance des nations. » [4]

Les années 50 et 60 voient l'Europe occidentale panser les plaies de la guerre et inaugurer l'essor des « Trente Glorieuses ». Elle reçoit à bras ouverts les réfugiés politiques de l'Est communiste, d'au-delà du rideau de fer, en les intégrant facilement parce qu'ils bénéficient souvent d'une solide formation professionnelle et partagent les mêmes valeurs culturelles.

Première grande opération de la Croix-Rouge suisse : l'accueil des réfugiés hongrois en 1956, sur mandat du Conseil fédéral. La CRS assure le transport de 11 000 Hongrois d'Autriche en Suisse. Quatre mille d'entre eux seront hébergés dans ses centres et les 7 000 autres trouveront un abri provisoire dans les casernes de l'armée.

1 *Rapport annuel* de la Croix-Rouge suisse, 1920.

2 *La politique pratiquée par la Suisse à l'égard des réfugiés de 1933 à nos jours*, Rapport adressé au Conseil fédéral à l'intention des conseils législatifs par le professeur Carl Ludwig, Berne, 1957, p. 303 et suiv.

3 *Rapport d'activité* de la Croix-Rouge suisse, 1938-1948, p. 8.

4 *Le Temps des réfugiés*, sous la direction d'Urs Gfeller, Éditions de l'Aire, Lausanne, 1987, p. 9.

Après une première aide, les réfugiés seront répartis dans les cantons et soutenus par les œuvres d'entraide regroupées au sein de l'Office central suisse d'aide aux réfugiés (OSAR), la CRS prenant en charge les jeunes, de manière générale.

L'assistance aux Tibétains, en 1959 et en 1963, revêt une forme plus élaborée afin de préserver leur culture, si différente de la nôtre. D'entente avec «l'Association pour la création de foyers tibétains en Suisse», la CRS encadre pendant des décennies un millier de réfugiés et leurs familles. Les réfugiés tchèques, en 1968, puis ceux de l'Ouganda et du Chili, en 1973, posent moins de problèmes et permettent de revenir à des méthodes plus traditionnelles.

Mais le paysage change dès la fin des années 60. L'attention se porte vers le Tiers-Monde, en crise permanente, qui vit la décolonisation dans les affres des guerres civiles, des tensions ethniques, des affrontements idéologiques par États interposés. C'est l'époque de la guerre du Biafra, des opérations humanitaires d'urgence à grande échelle. L'ère des ruptures et des innovations dans l'humanitaire: *Charity Business*, médiatisation, droit d'ingérence, multiplication des organisations non gouvernementales (ONG), naissance du «sans-frontiérisme», etc.

Le tournant des années 80

En participant à l'action en faveur des réfugiés d'Indochine en 1980 — qui impliquait une assistance prolongée à ces réfugiés dans ses centres —, la CRS dut repenser ses méthodes d'action et adopter de nouveaux principes:

> «L'assistance matérielle, l'aide à l'intégration ainsi que le dialogue forment un tout que nous appelons la prise en charge ou l'accueil. (...) Nous ne devons pas oublier que le réfugié est un partenaire autonome. Par sa fuite il a précisément manifesté la volonté d'assumer lui-même la responsabilité de sa destinée.
> Ce qu'il nous demande, c'est notre confiance et notre appui, mais non pas une mise sous tutelle. (...) Une partie considérable

de l'accueil et de la prise en charge consiste en un travail social qualifié… en liaison avec les groupes d'accueil bénévoles… » [5]

L'assistance aux réfugiés devient à ce moment-là une tâche permanente de l'institution, reconnue comme œuvre d'entraide par la Loi sur l'asile de 1979. Une tâche désormais commune au siège de la CRS et aux sections locales, accomplie par des collaborateurs professionnels et bénévoles, dont les sensibilités et les préoccupations sont parfois diverses. Le secteur « Aide aux réfugiés » rattaché jusque-là au Service social devient un service, puis un département doté de ressources accrues. Cette modification structurelle illustre bien la portée du changement.

Réfugiés de guerre et migrants économiques

L'arrivée, dans les années 90, des migrants économiques — qui « tentent le tout pour le tout non seulement pour trouver un asile mais aussi pour avoir une chance de mieux vivre dans les pays industrialisés » [6] — et les carences de la législation portent le débat sur le terrain de la politique. Partisans et adversaires d'une réglementation rigoureuse et d'un traitement expéditif des dossiers d'asile s'y affrontent.

La collaboration loyale avec les autorités sur le plan fédéral et cantonal place parfois la CRS dans une situation difficile. Comment concilier les exigences les plus élevées d'une institution humanitaire avec les obligations liées à son statut d'auxiliaire des pouvoirs publics ?

C'est une Suisse désemparée et une Société nationale ébranlée dans ses certitudes humanitaires qui affrontent la tourmente des années 80 et 90. Une Suisse qui a peine à comprendre la nature d'un phénomène pourtant mondial : « La définition de la Convention de 1951, fondée sur le concept de persécution individuelle, n'est plus à même de refléter toutes les facettes du problème des réfugiés

5 *Le rôle de la CRS dans l'aide aux réfugiés. Situation actuelle et évolution probable. Arguments en faveur d'un approfondissement de notre engagement*, Rapport rédigé par Werner Haug, Croix-Rouge suisse, Berne, 1980, p. 9.

6 Jean-Pierre Hocké, (alors) Haut Commissaire des Nations Unies pour les réfugiés, dans *op. cit.* (note 4), p. 93.

contemporains. (...) La question des réfugiés, auparavant placée sous le signe des droits de l'homme, est désormais posée en termes de rapatriement au Sud et de contrôle des flux au Nord. » [7]

La Suisse voit les demandes d'asile passer de 1 000 par an dans les années 1970 à 10 000 en 1986, à 41 000 en 1991 et à 47 000 en 1999. Dans un premier temps, les autorités se retranchent derrière la conception traditionnelle du droit d'asile, selon laquelle l'octroi de l'asile n'est pas un droit individuel mais relève de la compétence exclusive de l'État. La politique officielle menace ainsi de s'engager dans une impasse. L'examen individuel des requêtes et des recours prend du temps — des mois, des années — de sorte que l'hébergement, aux frais de l'État, des requérants d'asile dans des centres ou dans des logements privés alimente les réactions hostiles de la population :

> « Cette xénophobie exprime la peur des contacts ressentis comme inquiétants avec de nombreux représentants de cultures étrangères, que l'on croit capables de disputer à la population résidente le niveau social qu'elle a atteint. » [8]

Dans ce contexte, il convient également de rappeler que, de 1970 à 2000, le peuple suisse fut invité à se prononcer sur une série d'initiatives visant à limiter le volume de la population étrangère. La première, soumise au peuple pour vote, le 24 juin 1970, recueillera 46% des voix favorables. La dernière en date, celle du 24 septembre 2000, trouvera encore 36% de partisans. Si les milieux hostiles à une politique d'ouverture restent minoritaires, leur influence ne décline pas sensiblement. Ils agissent comme un frein sur le Parlement et l'opinion publique en prônant une application rigide du droit d'asile et du droit de cité[9].

7 *Ibid.*, p. 98.

8 Kurt Sutter, « La Croix-Rouge suisse face aux défis de l'an 2000 », *RICR*, n° 790, juillet-août 1991, p. 394.

9 Statistiques de l'asile à fin juin 2001 pour la Suisse :

35 900 requérants d'asile (durant le premier semestre : 9 223 demandes notifiées)
12 666 dossiers en suspens
8 586 départs durant le premier semestre
32 810 admissions provisoires
26 083 réfugiés reconnus (statutaires)
94 793 personnes relevant du domaine de l'asile

L'aide aux réfugiés et aux migrants en 2001

Cette tâche est accomplie à la fois par le siège de la Croix-Rouge suisse, en l'occurrence le département Migration, et par les associations cantonales en Suisse et à l'étranger.

Le département Migration du Siège central conduit les projets suivants :

- *Les services sanitaires de frontière :* la CRS gère cinq services sur mandat de l'Office fédéral de la santé publique (Altstätten, Bâle, Chiasso, Genève et Kreuzlingen). Depuis 1994, ces derniers ont contrôlé l'état sanitaire de plus de 150 000 personnes et procédé aux vaccinations et examens radiographiques nécessaires (en 1999, 42 446 personnes ont été examinées ; en 2000, 11 800 personnes).
- *Les centres pour requérants d'asile :* au plus fort de la crise en ex-Yougoslavie, les centres — situés dans les cantons de Berne, Fribourg, Uri, Glaris et du Tessin — hébergaient plus de 4 000 requérants d'asile. En 2000, ce nombre a diminué de moitié environ.
- L'*aide au retour* revêt la forme de cours de santé, de sensibilisation aux dangers des mines antipersonnel, de brefs stages de formation professionnelle dans des entreprises (à Lausanne, 93 Kosovars en ont bénéficié). La CRS, par le biais de ses associations cantonales, s'occupe d'un quart environ du total des retours.
- L'*assistance aux auditions des requérants* — décisives pour la constitution des dossiers et leur appréciation par les instances appelées à trancher (en 1999, 5 083 auditions ; en 2000, 1 900) — est assurée exclusivement par la CRS dans trois cantons. Ses délégués examinent les questions de droit et de procédure, et fournissent des avis motivés aux demandeurs. Dans le même ordre d'idées, il faut signaler l'activité du service juridique central, qui conseille le personnel des associations cantonales et élabore des documents de référence.
- *Le Centre de thérapie pour victimes de tortures.* Ouvert en octobre 1995, il constitue sans doute l'une des réalisations les plus originales de la CRS. Sa mission — soigner les réfugiés victimes de la torture ou de traumatismes de guerre, dont on estime le nombre à plus de 10 000 en Suisse, et briser le mur du silence qui entoure cette atteinte à l'intégrité humaine — est assumée par des médecins, des psychiatres, des spécialistes mais aussi des travailleurs sociaux et des

bénévoles. Au fil des ans, le Centre a multiplé ses prestations, en organisant des cours de formation destinés aux œuvres d'entraide, des campagnes d'information, ainsi qu'en éditant plusieurs ouvrages avec le concours de l'Université de Berne et du Fonds national de la recherche scientifique.

- Le *Centre de compétences interculturelles « Intermédio »* a participé à la formation au sein de plusieurs dizaines d'entreprises, services et offices, en Suisse alémanique. Deux publications sur la culture islamique ont rencontré un grand intérêt auprès des milieux spécialisés.
- Dans le même ordre d'idées, les initiatives lancées par le Réseau NIK de compétences interculturelles méritent d'être mises en exergue : cours de gestion des conflits dans des écoles ou auprès de chômeurs ; brochure sur le thème « Mouvement, jeu et sport avec les requérants d'asile », en liaison avec l'École et l'Institut de sport fédéral de Macolin ; réalisation d'une vidéo documentaire *Eux et nous* destinée aux écoles, afin de préparer les élèves à davantage de compréhension envers les réfugiés.

Dans la plupart des régions du pays, l'activité du siège de la CRS est renforcée par celle des associations cantonales, multiples et souvent considérables.

À Fribourg, par exemple, le Conseil d'État a chargé en 1993 la Croix-Rouge cantonale d'assurer l'assistance aux requérants d'asile et leur hébergement. L'exercice de ce mandat implique aujourd'hui 80 personnes, vouées à de multiples tâches allant de la gestion de centres et d'appartements, au stockage de meubles, à l'ouverture de dossiers-santé pour les caisses-maladie ou au maintien de contacts suivis avec les autorités, en particulier lors des départs obligés ou volontaires. L'utilité de la présence de la Croix-Rouge lors des renvois est à souligner

> « La nature humanitaire de la Croix-Rouge constitue un atout pour gérer au mieux cette question d'asile. La police des étrangers applique des méthodes beaucoup plus douces du fait que la Croix-Rouge est impliquée. » [10]

10 Charles Dewarrat, directeur de la Croix-Rouge fribourgeoise, dans *La Liberté*, édition du 30 juin 2001.

En huit ans, la Croix-Rouge fribourgeoise s'est ainsi occupée de près de 10 000 requérants d'asile. Le financement de ce mandat est assuré par le Canton et la Confédération, qui y ont consacré 32 millions de francs en 1999 et 24 millions en 2000. Au 1er janvier 2001, 2 046 requérants étaient pris en charge par la Croix-Rouge fribourgeoise.

À Genève, citons, par exemple, la *Bibliothèque interculturelle — Livres du Monde*, qui permet de découvrir et de partager la richesse des autres cultures, d'approfondir les contacts et la compréhension entre les multiples nationalités présentes dans la ville, et de favoriser l'intégration des étrangers et des migrants. Cette institution collabore avec des écoles primaires, en mettant sur pied des « Mercredis du conte interculturel » et avec des classes des cycles d'orientation. En 2000, elle a prêté à 2 700 lecteurs 10 000 ouvrages prélevés dans un fonds de 14 000 livres, en 146 langues.

Autre activité : *le service d'interprétariat*. Il emploie 60 interprètes-médiateurs culturels, pratiquant une quarantaine de langues, et offre aux migrants la possibilité de s'exprimer dans leur langue maternelle au cours d'entretiens concernant leur statut social, leur formation et leur état de santé (en particulier lors des visites à l'Hôpital universitaire).

Le *Bureau d'aide au départ et à l'immigration* a pour rôle de soutenir et de conseiller les personnes relevant du droit d'asile qui souhaitent quitter légalement la Suisse ou qui, y séjournant sans droit, entendent néanmoins quitter le territoire en respectant les formalités douanières. En 2000, ce Bureau a organisé le retour de 957 Kosovars et l'émigration de nombreux Bosniaques vers les États-Unis ou le Canada. Pour ce faire, il a avancé des fonds à plusieurs entreprises de Sarajevo, Muglai et Kluj, et coopéré avec le Mouvement international de la Croix-Rouge et du Croissant-Rouge, les services étatiques, ainsi qu'avec l'Université populaire albanaise de Genève. En dix ans, il a organisé plus de 2 500 départs, dans la dignité et la sécurité.

Dans quatorze cantons, les associations de la CRS œuvrent à l'*intégration des réfugiés statutaires* (c.-à.-d. ceux qui ont obtenu l'asile). Cette tâche est accomplie par une soixantaine de spécialistes du travail social, qui gèrent environ un millier de dossiers individuels

ou familiaux en s'efforçant de trouver des solutions aux problèmes quotidiens relatifs à la sécurité sociale, au budget, au logement, à l'emploi mais aussi à l'équilibre psychique. Des campagnes d'information sur les réfugiés et les migrants sont lancées, à intervalles réguliers, dans les médias, les écoles et le milieu associatif.

La nouvelle Loi fédérale sur l'asile, adoptée le 26 juin 1998, attribue désormais aux cantons, et non plus à la Confédération, les compétences dans ce domaine. Les cantons sont libres de déléguer ces compétences aux œuvres d'entraide : dans huit d'entre eux, il a déjà été demandé à la CRS de poursuivre son travail.

Activités de la Croix-Rouge suisse sur le plan international

Enfin, il convient de ne pas oublier les opérations menées sur le plan international, en liaison avec le Comité international de la Croix-Rouge, la Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge et avec les Sociétés nationales concernées.

Avant de donner deux exemples actuels, rappelons que dans les années 80 la CRS avait assuré, à la demande du HCR, l'assistance médicale de base dans l'un des plus grands camps d'accueil de réfugiés du monde : celui de Wad Sheriffiee près de Kassala, dans le nord du Soudan. Elle y avait installé une policlinique capable de recevoir 5 000 patients, réalisé des programmes d'alimentation complémentaire pour enfants et adultes, puis veillé à ce que les réfugiés érythréens soient rapatriés dans de bonnes conditions après l'accession de leur État à l'indépendance.

Voici, dans les grandes lignes, deux exemples d'interventions en cours :

Guinée : ce pays accueille aujourd'hui près de 450 000 réfugiés de Sierra Leone et du Liberia, chassés par la guerre civile. La CRS réalise, dans le cadre de la Fédération, un projet d'entraide qui doit durer jusqu'au printemps 2002 (dans le port de Freetown et sur la presqu'île de Lungi), en faveur de 120 000 personnes environ : aide alimentaire, achat d'une ambulance, soins médicaux de base dans une clinique mobile.

Albanie : durant l'été 1999, répondant à un appel conjoint du CICR et de la Fédération, la CRS est intervenue dans le sud de l'Albanie, dans les préfectures de Fier, Berat et Vlorë et Gjirokastër, afin de venir en aide à quelque 8 000 réfugiés du Kosovo et de soutenir les familles d'accueil albanaises. En prêtant assistance à ce dernier groupe, l'opération permet d'accroître le degré d'acceptation des réfugiés parmi la population, déjà confrontée à de considérables difficultés, et de prévenir les tensions entre groupes sociaux. L'aide de la CRS consiste en une distribution régulière de colis de vivres et d'articles d'hygiène.

Le tableau serait incomplet sans les activités d'aide à la reconstruction après les conflits et les programmes (souvent de longue durée) de coopération au développement, réalisés dans une trentaine de pays afin d'éradiquer la misère et les inégalités, causes premières des exclusions, des migrations et des guerres. Chaque année, la CRS leur consacre plus de 30 millions de francs.

Le fondement « idéologique » de l'action de la Croix-Rouge suisse en faveur des réfugiés

L'action de la CRS dans le domaine de l'aide aux réfugiés et aux migrants repose sur des fondements « idéologiques » élaborés par ses instances statutaires. Ainsi, trois documents principaux en définissent le cadre et la stratégie : la Charte, le Rapport du Groupe de réflexion et les Lignes directrices.

La *Charte 1994*, révisée en 2001, déclare expressément que la CRS « soutient les autorités dans leurs activités humanitaires » et que ses prestations dans le domaine de l'aide aux réfugiés et migrants consistent « en services, assistance, formation et soutien », dans le respect des Principes fondamentaux du Mouvement international de la Croix-Rouge et du Croissant-Rouge.

Le *Rapport du Groupe de réflexion 1999* précise le devoir de solidarité de la CRS envers « les victimes des conflits armés, des catastrophes d'origine humaine ou naturelle, de la misère, et du sous-développement chronique, qui sont les groupes cibles de l'action humanitaire ». Plus loin, il relève que « même dans des pays aux traditions démocratiques solides, une partie de la population n'est pas immunisée

contre la tentation de slogans racistes, méprisants et xénophobes», que la «pluralité des cultures et des nationalités» est un fait de société, surtout dans les villes, et que, face à cette situation, la CRS se doit de s'engager dans des projets d'intégration en faveur des migrants, en particulier des requérants d'asile, des réfugiés reconnus et des personnes souhaitant retourner dans leur pays, afin de «préserver ou rétablir la dignité humaine».

Les *Lignes directrices 2000*, relatives aux activités dans le domaine des migrations, proclament que:

> «La CRS s'engage en faveur des migrants afin d'éviter qu'ils ne soient marginalisés et de favoriser leur participation au bon fonctionnement de la société, dans les conditions du moment. Elle soutient plus particulièrement ceux dont la vie est menacée: ils doivent trouver en Suisse protection et assistance. (...) Elle tient à une coexistence pacifique des migrants entre eux et avec la population suisse. [...] Dans le cadre de ses activités à l'étranger, elle s'efforce de lutter contre les causes de l'émigration non volontaire.»

Cette politique d'aide et d'intégration vise notamment «à favoriser chez les migrants, tant au niveau individuel que collectif, l'accès à l'autonomie (...), la responsabilité personnelle et l'égalité des droits et des chances», et dans la population suisse «la tolérance (...) et un climat de compréhension, d'acceptation mutuelle entre autochtones et migrants».

Autre document à citer: le *Concept d'intégration*, rédigé en 1998, dont les analyses continuent de nourrir la réflexion et qui fut à la base des projets mis en œuvre ces dernières années.

Conclusion

L'ampleur des déplacements de population pour faits de guerre ou de migrations économiques oblige les États de l'Europe du Nord en particulier à coordonner progressivement leurs législations et leurs politiques humanitaires. Qu'elle adhère ou non à l'Union européenne ou à l'ONU, la Suisse n'échappera pas à cette évolution. Pour sa part, la Croix-Rouge suisse ne peut qu'intensifier ses relations de partenariat avec les composantes du Mouvement et avec les grandes

institutions internationales. Une telle stratégie s'impose naturellement à la Société nationale de la Croix-Rouge de l'État dépositaire des Conventions de Genève de 1949 et en même temps siège du CICR, de la Fédération et du HCR.

La démocratie directe suisse avive et durcit le débat sur l'asile et sur le statut des migrants. Le fédéralisme — avec la volonté revendiquée par la majorité des communes et des cantons de conserver leurs prérogatives en matière de droit de cité et de droits politiques — le complique encore. L'étranger devient le miroir fidèle de nos institutions et de nos pratiques citoyennes!

L'usage exclusif de la notion de «migrants», sans doute utile à l'analyse sociologique ou démographique, risque peut-être d'occulter la dimension humaine du problème en l'intellectualisant trop. La population perçoit mal une notion qui englobe des catégories de personnes aussi diverses: les simples résidents, les étrangers en séjour, les réfugiés et les requérants d'asile. Le terme «réfugiés», associé à l'idée de groupes ou d'individus «les plus vulnérables» semble plus chargé de compassion et de fraternité, plus capable d'ébranler les consciences, de mobiliser le pouvoir de l'humanité et de promouvoir la justice.

Pourquoi ne pas reprendre la proposition, émise en 1992 par Rony Braumann, d'établir deux catégories de réfugiés? N'ouvrirait-elle pas la voie à une politique plus souple et plus innovatrice? — «Les réfugiés de guerre et les réfugiés politiques. Les premiers seraient justiciables de l'assistance et de la protection prévues dans les Conventions de Genève, c'est-à-dire une sécurité de vie pendant la durée du conflit; les seconds pouvant bénéficier d'un traitement individuel, d'une réinsertion dans un pays d'accueil avec des droits sociaux et politiques.» [11]

Enfin, la Croix-Rouge suisse ne saurait, pour des motifs de «préférence nationale», d'image ou de positionnement sur le «marché humanitaire», diminuer ses activités dans le domaine de l'aide aux

11 Rony Brauman, *Populations en danger*, Médecins sans Frontières, Éditions Hachette, Collection Pluriel, Paris, 1992, p. 15.

réfugiés et aux migrants ainsi que dans celui de la coopération au développement (son corollaire obligé) sans renier sa longue histoire. Au contraire, l'affectation de ressources supplémentaires à ces activités montrerait, de belle manière, que la grandeur d'un petit pays neutre et solidaire peut parfois être estimée en fonction de la part d'humanité qu'il apporte à l'Humanité.

●

Abstract

The Swiss Red Cross and assistance to refugees and migrants

BY PHILIPPE BENDER

Since its foundation in 1866 the Swiss Red Cross has been actively involved in caring for refugees who fled their countries of origin to neutral Switzerland. During the various wars in Europe in the nineteenth and twentieth centuries, and above all the Second World War, the Swiss Red Cross set up shelters for thousands of refugees, with particular emphasis on care for children. With the fall of the Iron Curtain in the heart of Europe and especially the growing influx of migrants from the south, the Swiss Red Cross has had to find different ways of helping with refugee crises. The article discusses the various steps in this ongoing process of adapting its policy to new circumstances.

Globalization and the future of humanitarian action

New priorities for the International Red Cross and Red Crescent Movement?

by Ali Said Ali

We are all aware that we are passing through a phase characterized by rapid changes involving concepts that transcend cultures and utilize mechanisms that some societies may be unable to understand. Since the end of the Cold War, which had troubled international relations for more than fifty years, the parameters of contemporary international relations have evolved within the framework of the concept of globalization.

I do not think that anyone questions the political, economic, social or cultural impact of globalization. The present differences of opinion concern assessment of the extent of the adverse consequences of this impact on human society, and especially on communities in the Third World, many of which are still living in backward conditions.

In this paper, I do not intend to discuss the political, economic, social and cultural impact of globalization. I shall merely attempt to review some of its consequences in order to determine its repercussions on the present humanitarian situation and, at the same time, assess the future of humanitarian action mechanisms, particularly the Red Cross and Red Crescent Movement, which is one of the oldest and most widely known of these mechanisms. It would be difficult to predict this future without a clear diagnosis of the present humanitarian situation in the age of globalization.

Dr Ali Said Ali is Secretary-General of the Libyan Red Crescent Society.

Globalization and the present humanitarian situation

The world rejoiced when, after many long years, it emerged from the dark tunnel of the Cold War with great hopes that the end of conflict would enable resources to be used for the development of human societies and elimination of the various sources of human suffering. However, all these hopes were dashed when human suffering increased for various reasons, including:

- *Social marginalization* — Many human societies are living in a state of marginalization due to rising rates of unemployment and increases in the incidence of well-known social maladies (drugs, crime, etc.). One of the main expectations concerning globalization was that it would put an end to this suffering and enable States to enjoy a comfortable economic situation that would lead to an improvement in the socio-economic status of individuals. Unfortunately, this optimism was dispelled by the constantly deteriorating socio-economic situation, which has marginalized many human societies and might ultimately give rise to social conflict, with often unforeseeable consequences.
- *The increasing incidence of disasters* — The picture of the world today is even more dismal than it was during the Cold War, the termination of which left the remaining major Powers free to steer the international decision-making mechanisms towards anarchy, international conflicts and internal strife. These have caused intolerable humanitarian suffering, the dangers of which, in most cases, are difficult to predict. There has also been an alarming increase in the incidence of disasters, the majority of which occur in Third World countries afflicted with socio-economic setbacks (for further information on disasters in the world, see the *Disaster Report for the Year 2000* published by the International Federation of Red Cross and Red Crescent Societies in Geneva).

In many human societies globalization seems to have dissipated the optimistic hopes of receiving assistance, as a token of the international community's solidarity, with a view to eliminating the causes of disasters. The best indication of this is the acute shortage of resources available to many humanitarian organizations and, in some cases, the

refusal by major powers to fulfil their constitutional and moral obligations towards such organizations.

Since the dearth of financial resources available to many international organizations has now begun to affect the volume of assistance that they provide for the victims of disasters, questions are being raised about the future of humanitarian action and the priorities of the International Red Cross and Red Crescent Movement in the age of globalization.

The International Red Cross and Red Crescent Movement and the future of humanitarian action in the age of globalization

It would be difficult to predict the future of humanitarian action and the role of the Red Cross and Red Crescent without taking into consideration the complex crises currently facing such action, which can be classified as follows:

- The *crisis of forgotten disasters*, due to the reluctance of donors to provide the funds needed to deal with some major disasters which, since they are no longer a subject capable of arousing public opinion, cause thousands of deaths every day. The best proof of this can be seen today in many Third World countries, especially on the African continent, where the deaths of thousands of AIDS victims constitute the greatest disaster that mankind has ever witnessed, while the parties most able to help remain indifferent.
- The *political crisis* resulting from the fact that victims form part of the political agenda of some parties whose hostile relations have repercussions on those victims. The principal victims of this political conflict are the children, women and civilians affected by the system of economic embargoes imposed on some States. Today, everyone is aware that the adverse effects of this system of economic embargoes have transformed some human societies into a humanitarian tragedy, the consequences of which may be difficult to remedy.
- The *crisis of the Movement's multiple priorities*, resulting from the increasingly extensive concerns of the International Red Cross and Red Crescent Movement and its attempt to undertake tasks which,

in view of the magnitude of the disasters with which some human societies are faced and the dearth of resources which has begun to affect the Movement's programmes, might not constitute an urgent humanitarian priority. It might be helpful if the Movement rapidly recognized the need to identify the requirements of the most vulnerable groups, instead of wasting efforts and resources on the programming of operations that might be implemented by other parties. The Movement might rectify this state of affairs during its statutory meetings in November 2001.

- The *legal crisis*, resulting from the existence of a vacuum in international law with regard to the regulation of humanitarian assistance activities. During the last decade, this vacuum led to differing definitions of some concepts, such as the right to assistance and the right of intervention, thereby not only blurring the parameters of humanitarian assistance programmes but also delaying the timely receipt of assistance by the victims in many locations. Moreover, the linkage of intervention to the right to assistance has been exploited by some parties in order to use unconventional mechanisms, and particularly armed forces, to provide humanitarian assistance. Hence, there is a need to fill this legal vacuum by giving consideration to the establishment of an international legal mechanism regulating humanitarian assistance. It might be appropriate for the Movement to take an initiative to this end, since it is the most able and the most widely experienced in the field of humanitarian action.

Awareness of the complex crises currently facing humanitarian action might help the statutory bodies of the Red Cross and Red Crescent Movement to be more prepared to take measures commensurate with the present circumstances of globalization, particularly since the Standing Commission has begun to discuss the formulation of a strategy for the Movement's components so that it can be presented at the next statutory meetings in November 2001. However, the question being asked at the present time is whether it is possible to diagnose the weaknesses from which our Movement, one of the main humanitarian action mechanisms, is suffering.

By any standards, the present situation of the International Red Cross and Red Crescent Movement differs from that in which it found itself fifty years ago. Everyone realizes that the changes that have taken place in its external environment have not been offset by corresponding changes in its internal environment that could enable it to respond to requirements in accordance with its time-honoured humanitarian procedures. I regard this shortcoming as one of the weaknesses currently affecting the Movement. As a result, it has begun to act in accordance with the circumstances of external changes without being able to determine its course of action within the framework of those circumstances. The best indication of this is the hasty manner in which the Movement addressed the complex question of the emblem, which could have repercussions on its unity and solidarity.

The Movement's priorities

Today, the Movement has undeniably reached a turning point at which it needs to review some of the concepts and mechanisms of its activities. It might be helpful to consider this challenge in the light of the following priorities:

- *The concept of solidarity* needs to be boosted and put into practice by replacing the concept of participation with the *concept of responsible partnership*. This implies abandonment of considerations dictated by donors and other players, and abandonment of the concept of solidarity solely within the framework of the Movement in favour of the concept of solidarity in the interests of the ultimate beneficiaries, namely the most vulnerable groups.
- The *voluntary service aspect* needs to be accentuated so that voluntary endeavours can be used to reduce dependence on reciprocal benefits when providing humanitarian assistance. This would promote a closer mutual relationship between victims and the Movement, a relationship that could add a further dimension to voluntary work by encouraging voluntary endeavours on the part of the target groups themselves. To this end, the Movement might have to review the question of voluntary service and the related mechanisms that are currently in operation.

- There is a need to boost *credibility*, which ensured greater praise and support for the Movement in past decades, in order to enable it to fulfil its obligations towards victims and vulnerable groups by safeguarding the mainstays of this credibility, namely the Movement's identity, fundamental principles, emblem and universality, without diminishing the trust that has always motivated our Movement's sincere endeavours.

Conclusion

There is an increasingly widespread feeling that humanitarian action under the present circumstances of globalization is suffering from shortcomings that have caused the situation of the most vulnerable groups to deteriorate. In many regions they have also led to an increase in the number of victims due to the inability of humanitarian organizations to respond to humanitarian requirements and the reluctance of donors to provide the support needed to enable these organizations to fulfil their obligations towards victims.

These repercussions seem to have had a direct effect on the components of the International Red Cross and Red Crescent Movement, which are complaining in general of difficulties in dealing with these changes and, in particular, of a shortage of the resources needed to discharge their humanitarian tasks.

This challenge implies an urgent need for in-depth discussion and dialogue concerning the priorities of the International Red Cross and Red Crescent Movement and the future of humanitarian action in general in the age of globalization.

Documents on international protection of refugees

Selected international treaties and other legal texts

Convention relating to the Status of Refugees, of 28 July 1951
137 States Parties (1 August 2001)

Protocol relating to the Status of Refugees, of 31 January 1967
136 States Parties (1 August 2001)

United Nations General Assembly Resolution 319 A (IV), of 3 December 1949, establishing a High Commissioner's Office for Refugees as of 1 January 1951

Statute of the Office of the United Nations High Commissioner for Refugees (Annex to General Assembly Resolution 428 (V), of 14 December 1950)

United Nations Declaration on Territorial Asylum (General Assembly Resolution 2312 (XXII), of 14 December 1967)

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, of 10 September 1969
48 States Parties (1 August 2001)

Cartagena Declaration on Refugees, of 19-22 November 1984

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Journal of Refugee Studies, published quarterly by Oxford University Press

Refugee Survey Quarterly, published quarterly by Oxford University Press

Refugees/Réfugiés, magazine published by UNHCR (with Arab, Chinese, English, French, German, Italian, Japanese, Russian and Spanish editions)

Internet Websites

UN High Commissioner for Refugees
www.unhcr.ch

UNHCR RefWorld — a collection of full-text databases representing the most comprehensive and reliable refugee information resource available (also on CD-ROM)
www.unhcr.ch/refworld/welcome.htm

UNHCR/THE REVIEW

Mise en œuvre du droit international humanitaire

Chronique semestrielle de législation et de jurisprudence nationales janvier-juin 2001

A) Législations

Allemagne

Par une loi du 29 novembre 2000 (*Bundesgesetzblatt I*, n° 52 (2000), 1er décembre 2000, p. 1633), la Loi fondamentale allemande a été modifiée afin de permettre la ratification du Statut de Rome de la Cour pénale internationale. Une phrase autorisant l'adoption d'une loi relative à l'extradition de nationaux vers d'autres pays de l'Union européenne ou vers une Cour pénale internationale a été ajoutée après celle qui interdisait toute extradition de ceux-ci (*Grundgesetz*, article 16 par. 2).

Azerbaïdjan

La *loi relative à l'utilisation et à la protection des emblèmes de la croix rouge et du croissant rouge* a été adoptée par le Parlement azéri le 8 mai 2001, et signée par le président de la République le 13 juin 2001. La loi, inspirée de la loi modèle du CICR, fixe les règles relatives aux usages protecteur et indicatif de l'emblème, en temps de paix et en temps de guerre. Quant aux sanctions en cas d'abus de l'emblème, la loi renvoie à la législation nationale en vigueur. Pour rappel, le Code pénal adopté en 1999 incrimine uniquement les abus de l'emblème commis en période de conflit armé.

Danemark

La loi sur la Cour pénale internationale (*Lov om Den Internationale Straffedomstol*, loi n° 342) a été promulguée le 16 mai 2001. Elle attribue aux ministres des Affaires étrangères et de la Justice différentes compétences en relation avec la mise en œuvre du Statut de Rome. Le premier se voit notamment habilité à rendre applicables au Danemark les règles de procédure de la future Cour, les éléments des crimes de l'article 9 du Statut et les amendements éventuels à ce

dernier. Le ministre de la Justice est quant à lui investi d'un certain nombre de compétences en matière d'extradition sur demande de la Cour, d'exécution des jugements de celle-ci sur le territoire danois et de récupération des compensations allouées aux victimes par la Cour. Il peut aussi, de manière générale, adopter d'autres dispositions destinées à mettre en œuvre le Statut. La loi contient en outre le principe *ne bis in idem*. Elle étend également le champ d'application de certaines parties du Code pénal (crimes contre des autorités publiques, parjures et fausses accusations) et de deux chapitres de la loi sur l'extradition.

Honduras

Une loi interdisant la production, l'achat, la vente, l'importation, l'exportation, l'utilisation, le transit, la possession et le transfert de mines terrestres antipersonnel a été adoptée par le Congrès national hondurien le 16 mai 2000 (*Ley para la Prohibición de la Producción, Compra, Venta, Importación, Exportación, Tránsito, Utilización, Posesión y Transferencia de Minas Antipersonales y de Dispositivos Antidetectores o de Partes de Tales Artefactos* — Décret n° 60-2000) et publiée dans *La Gaceta* le 29 juin 2000, date de son entrée en vigueur. Elle érige en délit toute infraction à la loi, sans exclure une éventuelle responsabilité civile et pénale qui pourrait découler d'un tel délit.

Maurice

La loi de mise en œuvre du traité d'Ottawa sur les mines antipersonnel (*Anti-Personnel (Prohibition) Act, 2001*), Act n° 1 de 2001, adopté par l'Assemblée nationale le 27 mars 2001 et publié dans la *Gazette officielle* n° 40 du 28 avril 2001) a reçu l'assentiment du président de la République de Maurice le 10 avril 2001. La loi interdit l'emploi, la mise au point, l'acquisition, le stockage, la conservation ou le transfert de mines antipersonnel pour toute fin autre que la mise au point de techniques de détection des mines, de déminage ou de destruction des mines, et la formation à ces techniques. Elle prévoit les sanctions en cas de violation et attribue au ministre responsable de la Défense le pouvoir de décider de la façon dont les mines concernées seront détruites.

Royaume-Uni

La loi de mise en œuvre du Statut de Rome de la Cour pénale internationale (*International Criminal Court Act 2001*), Chapter 17 — titre long: *An Act to give effect to the Statute of the International Criminal Court; to provide for offences under the law of England and Wales and Northern Ireland corresponding to offences within the jurisdiction of that Court; and for connected purposes*) a été adoptée le 11 mai 2001. Cette loi couvre l'Angleterre, le Pays de Galles et l'Irlande du Nord; une loi séparée concernera l'Écosse. Elle fixe la procédure à suivre en cas de requête de la Cour pour l'arrestation et la remise d'une personne et permet d'autres formes d'assistance, telles que l'interrogatoire ou la détention de personnes, l'entrée et la fouille de propriétés ou la saisie de biens. Des procédures d'extradition sont aussi prévues par cette loi. Aucune immunité diplomatique ou d'État ne pourra être invoquée si l'État concerné a ratifié le Statut de Rome. Par ailleurs, la loi introduit le crime de génocide, les crimes contre l'humanité et les crimes de guerre dans la législation anglaise, galloise et nord-irlandaise. La législation antérieure sur le génocide (*Genocide Act 1969*) est remplacée, et la législation relative aux Conventions de Genève de 1949 légèrement amendée (*Geneva Conventions Act 1957, as amended*). La compétence extraterritoriale pour les crimes couverts par cette loi est limitée à ceux commis par des nationaux, des résidents ou des membres des forces armées britanniques.

Tadjikistan

La *loi sur l'utilisation et la protection du nom et de l'emblème du croissant rouge et de la croix rouge* a été signée par le président de la République du Tadjikistan le 12 mai 2001. Elle est entrée en vigueur le 2 juin 2001, suite à sa publication au journal officiel. La loi, largement fondée sur la loi modèle du CICR, définit les usages protecteur et indicatif de l'emblème en temps de paix et en temps de guerre, en stricte conformité avec le droit international humanitaire. Les sanctions en cas d'abus de l'emblème sont prévues dans le Code pénal.

Trinité-et-Tobago

Le 28 septembre 2000, une loi de mise en œuvre de la Convention d'Ottawa de 1997 sur les mines antipersonnel a été adoptée (*Anti-Personnel Mines Act 2000*), loi n° 48 de 2000, publié dans le supplément juridique de la *Gazette officielle*, vol. 39, n° 193, 5 octobre 2000 — titre long: *An Act to give effect to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction in Trinidad and Tobago*). Elle interdit notamment l'emploi, le développement, la production, l'acquisition, la possession et le transfert de mines antipersonnel ou d'un de leurs composants. Les exceptions concernent la mise au point de techniques de détection des mines, de déminage ou de destruction des mines, la formation à ces techniques, les procédures suivies conformément à la loi elle-même, ainsi que les poursuites et les enquêtes criminelles impliquant une mine comme moyen de preuve. Des dispositions concernent la destruction des mines, que tout possesseur doit déclarer dans un certain délai au ministère chargé de la Sécurité nationale, et une partie est consacrée aux missions d'établissement des faits prévues par le traité d'Ottawa.

Cette loi figure en annexe à un *Dossier d'information sur l'élaboration d'une législation nationale relative à la mise en œuvre de la Convention sur l'interdiction des mines antipersonnel* (mai 2001) préparé par le CICR avec le soutien de la Campagne internationale pour l'interdiction des mines terrestres et le gouvernement de Belgique[1].

Ukraine

Le président de l'Ukraine a signé le nouveau *Code pénal* le 5 avril 2001. Le Code, qui entre en vigueur le 1er septembre 2001, établit la responsabilité pénale pour un nombre de faits qui peuvent être qualifiés de crimes de guerre au sens des Conventions de Genève de

1 Disponible auprès des Services consultatifs en droit international humanitaire du CICR et accessible sur Internet: ‹http://www.icrc.org/fre/services_consultatifs_dih›.

— Also available in English: ICRC, *Information kit on the development of national legislation to implement the Convention on the Prohibition of Anti-personnel Mines*.

1949 et de leur premier Protocole additionnel. Parmi ces faits, on notera notamment les mauvais traitements infligés aux prisonniers de guerre, le transfert de la population civile en vue de son travail forcé, et les abus de l'emblème de la croix rouge et du croissant rouge.

Zimbabwe

Le 16 mars 2001, la République du Zimbabwe a adopté une loi visant l'interdiction des mines antipersonnel, fondée expressément sur le traité d'Ottawa du 18 septembre 1997 (*Anti-Personnel Mines (Prohibition) Act*, publié dans la *Gazette officielle* n° 17, 2 novembre 2000 — titre long : *To enable effect to be given within Zimbabwe to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, signed at Oslo, Norway, on the 18th September, 1997*). Cette loi prévoit des sanctions pour l'emploi ou la possession de mines antipersonnel à des fins autres que la mise au point de techniques de détection des mines, de déminage ou de destruction des mines, et la formation à ces techniques. Elle prévoit aussi la destruction de toute mine qui n'est pas utilisée pour de tels motifs.

B) Jurisprudence

Allemagne

Le 12 décembre 2000, la Cour constitutionnelle fédérale s'est exprimée sur le recours formé par un Serbe de Bosnie contre une décision de la Cour fédérale de justice du 30 avril 1999[2]. L'affaire concernait une condamnation pour crime de génocide et autres crimes conjoints commis sur le territoire de l'ex-Yougoslavie (infractions graves). La demande du recourant, limitée au crime de génocide, n'a en fait pas été acceptée pour décision par la Cour constitutionnelle. Celle-ci a en effet estimé que les questions soulevées ont soit déjà reçu un éclairage suffisant de sa part, soit trouvent facilement réponse dans la Constitution, soit n'ont pas d'espoir de succès. Pour la Cour constitutionnelle fédérale, il ne peut notamment pas être repro-

2 *RICR*, septembre 1999, vol. 81, n° 835, p. 690.

ché aux tribunaux précédents d'avoir fait application d'une norme dont le contenu était trop imprécis au regard des exigences du droit pénal ou dont la définition serait intervenue postérieurement aux faits. Elle répond également par la négative à la question de savoir si la définition du crime de génocide utilisée par les tribunaux allemands s'écarte de la notion telle qu'elle existe en droit international. Par ailleurs, la Cour confirme que rien ne s'oppose à l'application par les tribunaux allemands du principe de la compétence universelle pour le crime de génocide. Le recourant avait également mis en avant le droit fondamental à un procès équitable, mais la Cour rappelle sa jurisprudence sur la constitutionnalité des règles pertinentes des procédures pénales et estime qu'il n'y a pas lieu de penser que les exigences dans ce domaine doivent différer dans le cas d'une procédure ayant un lien avec l'étranger.

Le 21 février 2001, la Cour fédérale de justice a rendu un jugement en appel d'une décision du Tribunal régional supérieur de Düsseldorf du 29 novembre 1999. Le recourant, un Serbe de Bosnie, avait été condamné par ce tribunal à neuf ans d'emprisonnement pour avoir participé en 1992 au crime de génocide et à d'autres crimes conjoints sur le territoire de l'ex-Yougoslavie. La Cour confirme à quelques petites exceptions près l'arrêt précédent. Elle estime notamment justifiée l'application du principe de compétence universelle pour le crime de génocide et pour les infractions graves à la IVe Convention de Genève de 1949. Elle soutient aussi la qualification du conflit comme international, ainsi que l'interprétation large que fait le Tribunal régional supérieur de Düsseldorf de la définition des « personnes protégées » contenue dans cette Convention. Elle laisse donc ouvertes les questions liées à la compétence des tribunaux allemands pour réprimer les violations commises lors de conflits internes, et en fait de même pour ce qui est de la nécessité de démontrer qu'il existe un lien de rattachement avec l'Allemagne pour que des poursuites puissent être engagées. Elle exprime cependant son penchant à penser qu'un tel lien n'est pas nécessaire lorsque la base de compétence des tribunaux allemands repose sur une obligation de poursuivre ancrée dans un traité international par lequel l'Allemagne est liée.

Belgique

La Cour d'assises de l'arrondissement administratif de Bruxelles-capitale a rendu le 7 juin 2001 un jugement, non motivé par écrit, concernant la participation de quatre Rwandais aux événements de 1994. Un professeur d'université, un industriel (ex-ministre) et deux religieuses ont été reconnus coupables de la plupart ou de tous les chefs d'accusation portés contre chacun d'eux, notamment d'avoir ordonné, tenté de commettre, commis ou participé à la commission, par action ou par omission, de toute une série d'homicides intentionnels, réprimés par la loi de 1993 sur les violations graves du droit international humanitaire. Référence est faite notamment à l'article 3 commun aux quatre Conventions de Genève de 1949, aux articles relatifs aux infractions graves à ces Conventions et à leur premier Protocole additionnel, ainsi qu'à certaines dispositions du second Protocole additionnel. Les peines infligées par la même cour le lendemain (8 juin 2001) vont de douze à vingt ans de prison.

Suisse

Le 27 avril 2001, le Tribunal militaire de cassation a statué sur les pourvois en cassation formés par la défense et par l'accusation contre un jugement rendu le 26 mai 2000 par le Tribunal militaire d'appel 1A. Ce dernier avait condamné l'ancien maire d'une commune rwandaise à une peine de quatorze ans de réclusion pour violation des lois de la guerre[3]. Tous les griefs sont rejetés et le jugement maintenu, sauf pour ce qui a trait à la question de l'expulsion du recourant. Le Tribunal militaire d'appel 1A avait en effet également condamné le recourant à la peine accessoire d'expulsion du territoire suisse pour une durée de quinze ans. Le Tribunal militaire de cassation a, quant à lui, estimé que l'instance précédente avait omis d'examiner la question du sursis à l'expulsion et lui renvoie donc la cause pour une nouvelle décision sur cet élément. On notera en particulier que le Tribunal militaire de cassation s'est exprimé sur la nécessité de démontrer que, pour que des actes puissent entrer dans le champ d'application de l'article 3 commun aux Conventions de Genève, d'une part, il

3 *RICR*, vol. 82, n° 839, p. 826.

existe un lien entre la commission des actes et le déroulement d'un conflit armé interne et, d'autre part, que leur auteur exerçait à ce moment-là certaines fonctions particulières en relation avec l'effort de guerre. Alors que, sur ce dernier point, le Tribunal militaire d'appel 1A a affirmé adopter une position divergente par rapport à celle du Tribunal pénal international pour le Rwanda, le Tribunal militaire de cassation estime, quant à lui, que l'instance militaire précédente a en réalité appliqué des critères correspondant à ceux exposés par le tribunal international.

Yougoslavie

La Cour du district de Mitrovica a condamné le 30 août 2000 un Albanais membre de la Sécurité locale de Mitrovica à vingt ans de prison pour violation des règles du droit international applicable en période de conflit armé. Celui-ci a été reconnu coupable de meurtres, de mauvais traitements, d'encouragement au déplacement forcé de populations, de menaces, de pillage et d'avoir infligé de grandes douleurs à des civils. Parallèlement à la charge de crime de guerre contre la population civile, la Cour a également retenu celle de détention illicite d'armes et de matériel explosif.

Le 6 mars 2001, la Cour du district de Gjilan a condamné un Serbe à vingt ans d'emprisonnement pour des actes commis à Kamenica ou dans la région. Les charges retenues sont de trois ordres : tentative de meurtre, possession illégale d'armes et de matériel explosif et crimes de guerre. Commis contre la population civile, ces derniers incluent l'ordre d'attaquer des civils, l'incendie de biens civils, l'enlèvement, les mauvais traitements, la disparition, la torture et le meurtre, la création de panique et de terreur et le déplacement forcé de populations. Ces crimes sont par la suite qualifiés également de crimes contre l'humanité.

C) Commissions nationales

Lesotho

La Commission nationale de droit international humanitaire du Lesotho a été créée en mars 2001, conformément à un Mémorandum d'accord entre différents ministères (Défense, Affaires étrangères, Droit et Affaires constitutionnelles, Intérieur, Santé et Éducation), les forces armées, la police montée, l'Université du Lesotho et la Société nationale de la Croix-Rouge. La Commission est présidée par le secrétaire général du ministère de la Défense. Elle a tenu sa séance inaugurale le 8 juin 2001. Un projet de loi pour ancrer la Commission dans l'ordre légal a été rédigé.

Malawi

La Commission nationale de droit international humanitaire du Malawi a été créée en mars 2001, conformément à un Mémorandum d'accord entre le ministère de la Défense, ceux des Affaires étrangères, de la Justice et de l'Intérieur, le pouvoir judiciaire, la police, la commission des droits de l'homme et la Société nationale de la Croix-Rouge du Malawi. La Commission a aussi la faculté de coopter d'autres organes. Elle examinera la question de l'adoption de mesures visant la répression des crimes de guerre, le respect de l'emblème et la protection des civils en période de conflit armé, conseillera le gouvernement en matière de législation de mise en œuvre du droit international humanitaire et encouragera la diffusion de celui-ci.

Pérou

La Commission nationale d'étude et de mise en œuvre du droit international humanitaire a été créée par la Résolution suprême n° 234-2001 JUS du 1er juin 2001, publiée au Journal officiel péruvien (*El Peruano*) le 2 juin 2001. La Commission est un organe consultatif du pouvoir exécutif, de caractère multisectoriel. Présidée par le ministère de la Justice, elle réunit des représentants des ministères des Affaires étrangères, de la Défense nationale et de l'Intérieur. Le secrétariat de la Commission sera assuré par le Conseil national des droits de l'homme du ministère de la Justice. Le mandat de la Commission

inclut l'élaboration d'études et de recommandations pour la mise en œuvre du droit international humanitaire, la contribution à la supervision du respect du droit international humanitaire et la promotion de la diffusion de ce droit. L'installation officielle de la Commission a eu lieu le 27 juin 2001.

Sénégal

Une Commission nationale chargée de la mise en œuvre du traité d'Ottawa sur l'interdiction des mines antipersonnel a été créée par Arrêté ministériel n° 05463 du 5 août 1999. Elle a pour attributions de préparer les rapports périodiques exigés par la Convention ou sollicités par la Conférence des Parties; de proposer une politique d'ensemble d'assistance et de réintégration sociale des victimes des mines antipersonnel, ainsi que du relèvement économique des zones touchées par ces mines; et d'assurer le suivi de la politique de coopération dans ces domaines entre le Sénégal et ses partenaires au développement. Elle est présidée par le ministère des Affaires étrangères et comprend des représentants de la Présidence de la République, de la Primature, de l'Assemblée nationale et du Sénat, ainsi que des représentants des ministères des Forces armées, de l'Intérieur, de la Justice, de la Santé et de la Famille, de l'Action sociale et de la Solidarité nationale. La Commission est autorisée à faire appel à des représentants des collectivités locales des zones minées ainsi qu'à ceux d'organisations non gouvernementales travaillant dans le domaine de l'action antimines et de la réintégration sociale des victimes des mines.

SERVICES CONSULTATIFS EN DROIT
INTERNATIONAL HUMANITAIRE, CICR

Protection of cultural property in armed conflict

A collection of Basic Rules disseminated during the Kosovo conflict

With a view to halting the destruction of the cultural heritage in Kosovo, UNESCO has prepared a leaflet for the population of Kosovo of both Albanian and Serb ethnic origin, giving the basic rules on protection of the cultural heritage. The text has been compiled in three languages: Albanian, Serb and English.

The seven rules are drawn from the fundamental rules codified by Article 4 of the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, of 14 May 1954, such as the prohibition of theft, pillage and misappropriation of cultural property and of reprisals against cultural property. The text also addresses illicit traffic in cultural property and destruction of cemeteries.

The leaflet has been distributed through the United Nations Interim Administration Mission in Kosovo (UNMIK) and other channels.

It is hoped that this action will raise awareness of the need to protect the cultural heritage, regardless of the ethnic origin of its creators, thus helping to re-establish the fragile civil society in Kosovo and to heal the post-conflict wounds.

UNESCO envisages preparing other language versions of the basic rules, for use in other conflict areas and adapted to the specific conditions of each situation. The text should be distributed by UN peace-keeping contingents employed in the conflict area.

UNESCO

Cultural Property — Basic Rules

1. Do not damage or steal cultural property.
2. If you find a cultural object, do not sell it or barter it; bring it to the local administration.
3. Do not abuse cultural objects belonging to other ethnic groups. Do not destroy them; remember that this may inspire them to do the same to cultural objects dear to you.
4. Do not make your house in a church, a monument or museum.
5. Do not sell cultural objects to black market dealers; your country needs those objects.
6. Remember that cultural objects are not only for you but also for your children and grandchildren and for all humanity.
7. Do not damage the cemeteries of other ethnic groups; remember that this may inspire them to do the same to your own cemeteries.

Cultural property is protected by international treaty.

Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.

1954 Hague Convention, Preamble

Division of Cultural Heritage
UNESCO

United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects

New York, 9-20 July 2001

The first-ever *United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects* was convened in New York from 9-20 July 2001. This Conference gave representatives of the International Red Cross and Red Crescent Movement the opportunity to remind States of the consequences in human terms of uncontrolled arms availability, and to encourage governments to take urgent measures to strengthen the control on transfers of small arms and light weapons. In its statement, the ICRC encouraged conference delegates to support specific language on the humanitarian consequences of such transfers. The ICRC organized, together with the International Federation of Red Cross and Red Crescent Societies and the Norwegian Red Cross, a briefing for delegates on the human costs of widespread arms availability, including firsthand accounts by representatives from the National Societies of Yugoslavia and Mali.

Government delegations did not agree to develop legally binding instruments at the international level to prevent or control illicit transfers of small arms and light weapons. Rather, the *Programme of Action* that was finally adopted encourages governments to undertake a variety of actions to better control small arms and light weapons, primarily at the national level. These include measures related to marking of small arms and light weapons in order to facilitate their tracing, reinforcement of United Nations Security Council arms embargoes, destruction of confiscated, seized or collected small arms and light weapons, stockpile management to prevent theft or loss, and disarmament, demobilization and reintegration of ex-combatants. The document also encourages cooperation among governments in areas such as police and border controls and calls on regional organizations to support these efforts. The important role of civil society in complementing government activities was highlighted.

Notably, the *Programme of Action*, in its preamble, explicitly recognizes the human costs of the illicit trade in small arms and light weapons. States adopted wording proposed by the ICRC which

acknowledges that "the illicit trade in small arms and light weapons in all its aspects (...) undermines respect for international humanitarian law [and] impedes the provision of humanitarian assistance to victims of armed conflict (...)".[1]

The document does little, however, to acknowledge the close links between licit and illicit transfers, and the importance of taking international humanitarian law into account in arms export decisions. There is only implicit acknowledgement of the importance of addressing problems associated with legal exports in order to effectively tackle illicit trade. The document does, however, commit States "to assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with States' existing responsibilities under relevant international law taking into account in particular the risk of diversion of these weapons into the illegal trade".[2] It could be argued that "relevant international law" includes international humanitarian law and States' responsibility to "respect and ensure respect" for this body of law, in accordance with Article 1 common to the 1949 Geneva Conventions on the protection of war victims.

Implementation of the *Programme of Action* will be monitored at biannual UN meetings and at a second global conference to be convened no later than 2006. One of the major challenges for future work will now be to encourage States to implement its recommendations nationally, regionally and globally so that they have a real impact.

Owing to the urgent humanitarian nature of this issue the ICRC, together with a large number of governments and organizations, had hoped for a stronger UN *Programme of Action* which would show commitments by the international community to tackle the problems of unregulated arms transfers. Nevertheless, the various measures on which agreement was reached do constitute modest steps towards

1 *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects*, Preambular para. 5. UN Doc. A/CONF.192/15, 20 July 2001.

2 *Ibid.*, Section II, para. 11.

dealing with the grave humanitarian consequences of unregulated arms availability. The UN process represents progress in putting the issue of arms availability on the global agenda. Yet far more is needed to effectively address the serious humanitarian problems caused by both licit and illicit transfers of small arms. Both governments and civil society — including the Red Cross and Red Crescent Movement — will have to be prepared for years of sustained efforts, at the national, regional and global levels, to build the public awareness and political will needed to achieve this.

LENA ESKELAND and PETER HERBY
ICRC Mines-Arms Unit

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The ICRC on arms availability and the situation of civilians in armed conflict

A study published by the ICRC in 1999 and entitled *Arms Availability and the Situation of Civilians in Armed Conflict*[1] indicated that the unregulated transfer of weapons and ammunition can raise tensions, facilitate violations of international humanitarian law, heighten the number of civilian casualties and prolong the duration of conflicts. It concluded that because the current pattern of transfers of small arms, light weapons and related ammunition falls largely outside international control, it should be a matter of urgent humanitarian concern.

While the primary responsibility for compliance with international humanitarian law rests with users of weapons, States engaged in production and export bear a degree of political, moral and, in some

1 International Committee of the Red Cross, *Arms Availability and the Situation of Civilians in Armed Conflict*, ICRC, Geneva, 1999, 80 pages.

cases, legal responsibility to the international community for the use made of their weapons and ammunition.

Both licit and illicit transfers of arms and ammunition give cause for concern in humanitarian terms, in particular because a large proportion of all illicit transfers begin with weapons which were originally transferred legally. Based on the conclusions of the study, and in the light of States' responsibility to "respect and ensure respect" for international humanitarian law under Article 1 common to the 1949 Geneva Conventions, the ICRC has therefore urged States for several years past to establish standards for responsible exports based, *inter alia*, on the likelihood of violations of humanitarian law by the recipient.

The general conclusions of the study were endorsed by the International Red Cross and Red Crescent Movement in Resolution 12 of the 1999 Council of Delegates. Resolution 12 also encouraged the Movement to promote norms for responsible conduct by States and to raise public awareness of the human costs of the widespread availability of arms and ammunition.

ICRC Mines-Arms Unit

Adhésion de Trinité-et-Tobago aux Protocoles additionnels aux Conventions de Genève du 12 août 1949

Trinité-et-Tobago a adhéré sans faire de déclaration ni de réserve, le 20 juillet 2001, aux Protocoles additionnels aux Conventions de Genève du 12 août 1949 relatifs à la protection des victimes des conflits armés internationaux (Protocole I) et non internationaux (Protocole II), adoptés à Genève le 8 juin 1977. Les Protocoles entreront en vigueur pour Trinité-et-Tobago le 20 janvier 2002.

Par ailleurs, Trinité-et-Tobago a reconnu la compétence de la Commission internationale d'établissement des faits, conformément à l'article 90 du Protocole I.

Trinité-et-Tobago est le 159e État partie au Protocole I et le 151e au Protocole II.

Accession to the Protocols Additional to the Geneva Conventions of 12 August 1949 by Trinidad and Tobago

Trinidad and Tobago acceded on 20 July 2001, without making any declaration or reservation, to the Protocols Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Non-International Armed Conflicts (Protocol II), adopted in Geneva on 8 June 1977. The Protocols will come into force for Trinidad and Tobago on 20 January 2002.

Trinidad and Tobago also made a declaration accepting the competence of the International Fact-Finding Commission, in accordance with Article 90 of Protocol I.

This accession brings to 159 the number of States party to Protocol I and to 151 those party to Protocol II.

Retrait des réserves aux Conventions de Genève de 1949 par le Bélarus

La République du Bélarus a retiré, le 7 août 2001, les réserves formulées lors de la signature des quatre Conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre.

Withdrawal of the reservations to the 1949 Geneva Conventions by Belarus

The Republic of Belarus has withdrawn on 7 August 2001 the reservations made at the signature of the four Geneva Conventions of 12 August 1949 for the Protection of War Victims.

Livres et revues

Books and reviews

Gil Loescher
The UNHCR and World Politics — A Perilous Path
Oxford University Press, Oxford, 2001, 431 pages

"For the past half century, the Office of the United Nations High Commissioner for Refugees (UNHCR) has been at the heart of many of the gravest breakdowns of social and political order and tragic human loss in recent history." This first sentence of a timely book sets the stage and, at the same time, expresses the author's main message: while UNHCR was established fifty years ago to focus on protection and humanitarian relief for refugees in their host countries, events have led the organization to assume a much broader role. UNHCR is now part of an international order which has to ensure respect for human rights and justice, facilitate peaceful resolution of conflicts and guarantee the right of individuals to humanitarian assistance. And, in the author's words, "UNHCR has not just been an agent in world politics but a principal actor" (page 6). An example of this proactive attitude is UNHCR's role in codifying, promoting and monitoring respect for international refugee law by all States.

The author of this book on UNHCR, now celebrating its fiftieth anniversary, is an expert on refugee affairs and has both field experience and academic qualifications. Such a background is, of course, eminently useful for a project of this nature, and his account of the organization, its history and the evolution of its response to current problems reveals excellent insight into the working of the High Commissioner's Office.

After presenting some of the major issues UNHCR has had to face in the fifty years since it came into being, Loescher points out that mass movements of persons have always been part of history: refugees are not a phenomenon of our times. Moreover, in several periods of (European) history, refugees have not been considered as liabilities but as assets for a country's cultural life and its economic

development. It was not until the immense movements of population before, during and after the First World War that they became an object of international concern. Fridtjof Nansen's appointment as High Commissioner for Refugees by the League of Nations in 1921 accordingly signalled that international protection of refugees had become one of the permanent tasks of the organized international community. However, the period preceding the Second World War, marked by the Evian Conference to resolve the problem of Jewish refugees as one of its (negative) highlights, was a dismal failure of international refugee policy. With the foundation of the United Nations, the 1948 Universal Declaration of Human Rights and the adoption of the 1951 Refugee Convention, coupled with the appointment of a High Commissioner for Refugees as part of the United Nations system, postwar efforts to grant refugees not only protection but also a chance to create a new life finally started to take shape.

The central part of the book examines UNHCR's policy and action between 1951 and today, with a chapter on each High Commissioner from van Heuven Goedhart to Sadako Ogata, attributing to each of them specific aspects of UNHCR's development. The author goes into great detail and does not hesitate to give good or bad marks to the various office holders. In doing so he brings to light spectacular changes of UNHCR's attitude toward refugee-causing events, in particular armed conflicts. While UNHCR refused, for instance, any involvement during the Vietnam War and was even reluctant to offer its services in the civil wars which shook the Third World during the sixties (Indonesia, Nigeria, etc.), by the end of the twentieth century it was in the forefront of humanitarian activities, particularly in the Balkans. During High Commissioner Ogata's term in office, UNHCR's agenda was dramatically expanded.

This (over)expansion of UNHCR's activities leads the author to seriously question what he calls "the pitfalls of the UNHCR's new approach to refugees" (page 338). The last chapter of the book, with the title "Toward the Future: The UNHCR in the Twenty-First Century", provides many arguments and helpful insight which should enable readers to form an opinion on the issues and

problems UNHCR must face in the coming years. The following issues and ideas are but a few of those discussed by the author.

One of his main criticisms is concerned with UNHCR's relinquishment of its balanced approach to providing refugees with not only assistance but also protection. In the author's view, the immensity of the task of assisting the civilian population in an emergency such as the Balkans war led to an overstretching of UNHCR's capacities, and its protection activity was bound to suffer first. Finding a new balance between protection and assistance operations should be the first task to be accomplished by UNHCR in the 21st century. Ensuring protection for refugees, *inter alia* by promoting and monitoring respect for the fundamental rules of refugee law by States, in particular the rule of *non-refoulement*, must remain a high priority among the agency's activities.

This is particularly important in view of what Loescher calls "the crisis of refugee protection" at the domestic level or, in other words, "the worldwide asylum crisis" (page 351). Acceptance of refugees is not the highest priority of States at this moment. He does not see how UNHCR can improve the situation as long as the State has the last word on granting refugee status to asylum-seekers. Does this situation call for a body of new international law, and in particular for the revision of the 1951 Refugee Convention? The author is doubtless right to conclude that opening up a revision process could bring more harm than progress and might in the end seriously weaken existing international law. He concludes on this point that "the 1951 Convention, properly applied, remains the essential underpinnning of the refugee protection system" (page 366). A stronger response by the international community to refugee problems must follow other channels.

The author also discusses other topical issues such as coordination among institutions at the international level, the international approach to internally displaced persons, the gap between humanitarian assistance and development, lack of accountability of UNHCR as an institution, and many more. He finally calls for a reversal of the erosion of refugee protection and stresses the need for a more effective, coordinated international response to refugee situations. One of the ways to achieve such a goal should be "a renewed, more effective

UNHCR" (page 374). He rightly points out that respect for the basic rules of international refugee law is essential not only to preserve an open society but also to ensure international security.

Loescher's book has unquestionably been published at the right moment. It should serve as a reminder of past experiences — trials and errors — and achievements of an organization which has no easy task. It should also help to define the right questions and find the right answers in the ongoing process of reconsidering and, if necessary, revising UNHCR's role. For the present reviewer, who is not an expert in refugee matters, Loescher provides fascinating reading on a highly relevant chapter in the history of humankind: the international community's response to the plight of those who have to leave their country "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion..." (Article 1 of the 1951 Refugee Convention).

HANS-PETER GASSER
Editor

Antônio Augusto Cançado Trindade
Tratado de Direito Internacional dos Direitos Humanos
Vol. I (486 pages), vol. II (440 pages), vol. III (à paraître)
Sergio Antônio Fabris Editor, Porto Alegre, 1997-1999

L'auteur de l'ouvrage, actuellement président de la Cour interaméricaine des droits de l'homme et assurément un des plus éminents juristes de sa génération, possède non seulement une large expérience académique (Université de Brasilia et Institut Rio Branco), mais aussi l'expérience d'un diplomate (représentant du Brésil à plusieurs conférences et réunions internationales), d'un praticien (ex-jurisconsulte du ministère des Affaires étrangères) et d'un juge international. L'étendue de son savoir lui permet par conséquent de se lancer dans une entreprise aussi ambitieuse que la rédaction d'un traité des droits de l'homme, et ce, non seulement avec une parfaite maîtrise de la matière et l'assurance d'en connaître les recoins juridiques, mais aussi avec un véritable détachement des intérêts politiques et des partis pris qui si souvent la sous-tendent.

L'auteur donne, en 1987, un cours à l'Académie de droit international de La Haye sur la coexistence et la coordination des mécanismes des droits de l'homme, cours qui constitue le point d'orgue de la première phase de sa réflexion sur le sujet. À partir des conclusions de ce cours, il entreprend son ouvrage, en trois volumes, comme une étude dynamique de l'ensemble des systèmes normatifs existants relatifs à la protection internationale de l'individu. Il s'emploie principalement à montrer comment ces systèmes s'articulent entre eux et interagissent.

Dans le premier volume (chapitres I à X), il examine tout d'abord les origines juridiques de la législation internationale relative aux droits de l'homme, de la Déclaration universelle des droits de l'homme de 1948 à la Conférence de Téhéran de 1968. Il aborde ensuite la phase de consolidation des droits de l'homme en tant que branche du droit international et passe en revue aussi bien les règles de fond que les mécanismes de mise en œuvre. Puis, il examine dans le détail les divers processus et travaux qui ont abouti à la Conférence de

Vienne de 1993. Il analyse en profondeur tous les courants et controverses qui se sont exprimés sur le sujet et accorde une large place à la contribution d'acteurs non internationaux.

L'auteur se livre à une réflexion, novatrice à cet égard, sur les rapports qui existent entre les effets des droits de l'homme et ceux d'autres systèmes de protection internationale de l'individu ; il met l'accent sur leurs confluences, sinon leurs convergences, et sur les ressemblances de plus en plus marquées entre leurs mécanismes respectifs de développement et de fonctionnement. Se fondant sur la pratique et la jurisprudence internationales récentes, cette approche — qu'il appelle «l'approche des trois versants», à savoir, droits de l'homme, droit international humanitaire et droit des réfugiés — met en lumière la tendance qui se dégage progressivement en faveur d'une révision de la systématique actuelle du droit international. Cette systématique a en effet pour résultat que les conséquences des normes appliquées prennent le pas sur les considérations relatives aux origines, au développement historique et aux aspects institutionnels des différentes branches du droit actuel. Cette réflexion mérite à elle seule d'être signalée aux spécialistes du droit international humanitaire, lesquels se voient confrontés aux mêmes problèmes, tant sur le plan théorique que dans la pratique.

Dans la même optique, l'examen de l'évolution des droits économiques, sociaux et culturels — tout comme celui des rapports entre le droit interne et le droit international, abordés dans les deux derniers chapitres du premier volume de l'ouvrage — donne lieu à plusieurs propositions nouvelles susceptibles de répondre aux préoccupations communes du droit international humanitaire et des droits de l'homme.

Le deuxième volume (chapitres XI à XIV) débute par une discussion innovante sur les règles d'interprétation des instruments internationaux qui protègent l'individu. Elle couvre les aspects matériels et formels de l'interprétation, comme l'indérogeabilité, l'intangibilité et la hiérarchie des normes en la matière, d'une part, et l'épuisement des recours internes, la marge d'appréciation, le fardeau de la preuve, la hiérarchie entre les différentes instances et les difficultés d'exécution sur les plans législatif, exécutif et judiciaire, d'autre part.

Cette partie de l'ouvrage propose une nouvelle théorie de l'interprétation qui soit uniforme pour tous les systèmes internationaux de la protection de l'être humain, conçus en tant que *corpus iuris* unique de l'ordre public international. La théorie énonce, entre autres, des postulats herméneutiques qu'on ne saurait ignorer en droit international humanitaire, face aux défis à relever dans ce domaine.

Dans les deux chapitres suivants, l'auteur traite deux questions capitales, peu usuelles dans les ouvrages de droit. Il les aborde en juriste, certes, mais pleinement conscient de leur poids dans le débat politique sur les droits de l'homme. Il s'agit, d'une part, des rapports existant entre les droits de l'homme et le concept de démocratie et, d'autre part, du rôle et de l'importance de cette branche du droit dans le domaine du développement.

Le deuxième volume se termine par des propositions sur la valeur juridique des procédures internationales de supervision *(monitoring)* et de contrôle de la mise en œuvre des droits de l'homme. Ces procédures constituent en effet le corollaire du caractère impératif des droits de l'homme et elles expriment la nécessité d'accorder à leur protection des effets *erga omnes*.

Le troisième volume (chapitres XV à XX, à paraître) traitera de l'évolution des systèmes régionaux des droits de l'homme (interaméricain, européen et africain), de la suite du processus mis en route par la deuxième Conférence mondiale sur les droits de l'homme au niveau universel et, pour terminer, de la signification contemporaine de l'universalité des droits de l'homme et de leurs perspectives d'avenir.

Il convient de donner à l'œuvre l'attention qu'elle mérite. En effet, l'auteur entend y exposer de façon cohérente l'ensemble de la matière relative aux droits de l'homme en tant que système juridique complet dans le cadre du droit actuel des relations internationales. Il réalise ce pari, et son ouvrage devient ainsi non seulement la référence la plus à jour sur le sujet, mais aussi un ouvrage de portée générale, indispensable à tous ceux qui s'intéressent d'une manière ou d'une autre à la protection juridique de l'individu.

Un imposant appareil de références à la doctrine la plus récente ainsi qu'à l'ensemble de la jurisprudence pertinente confirme le caractère magistral de l'ouvrage et en souligne encore davantage la grande utilité.

CHRISTOPHE SWINARSKI
Consultant en droit international humanitaire
Genève

Cherif Bassiouni,
Crimes Against Humanity in International Criminal Law
2nd revised ed., Kluwer Law International,
The Hague/London/Boston, 1999, 610 pages

La deuxième édition révisée de *Crimes Against Humanity in International Criminal Law*, du professeur Bassiouni, est un ouvrage de référence pour toute personne qui s'intéresse aux sources et au développement du droit international pénal dans la période de l'après-guerre, et cela pour trois raisons au moins: la personnalité de son auteur, ses références historiques et ses exposés sur les théories juridiques qui sous-tendent la naissance et l'évolution du droit international pénal.

Tout d'abord, *Crimes Against Humanity in International Criminal Law* a été écrit par l'auteur le plus brillant, le plus actif et le plus influent dans le domaine du droit international pénal depuis la Seconde Guerre mondiale. Et cet ouvrage constitue précisément le sommet de la réflexion d'un scientifique, doublé d'un praticien, entièrement dévoué aux droits de l'homme et au développement du droit international pénal. Le professeur Bassiouni, qui possède une vaste culture juridique et philosophique, explique et démontre les soubassements théoriques du procès de Nuremberg, ainsi que l'évolution du droit international pénal en général et du crime contre l'humanité en particulier, dans le contexte de l'après-guerre. Enfin, cet ouvrage est également une référence en ce qu'il représente typiquement une école que l'on pourrait appeler l'« école jusnaturaliste du droit international pénal », qui exerce une forte influence dans la doctrine contemporaine — principalement dans la doctrine anglo-saxonne et celle des droits de l'homme —, sans pour autant que les autres doctrines soient absentes des analyses faites par l'auteur.

M. Bassiouni montre que les puissances alliées, confrontées à des crimes organisés systématiquement par des États, ont dû — pour éviter l'impunité des criminels nazis et justifier Nuremberg ainsi que l'« invention » du crime contre l'humanité — sortir du cadre classique de la relation entre l'État, son droit positif et l'auteur d'une infraction

pour adopter une approche qui instrumentalise la communauté internationale et le droit international. La répression des crimes les plus graves et les plus odieux de la Seconde Guerre mondiale, y compris du crime contre l'humanité, passait par la transformation de l'adage *nullum crimen sine lege* en *nullum crimen sine jure* (pages 144, 158 et 162). Le carcan de la souveraineté nationale devait également être brisé pour faire admettre l'existence des crimes de droit international et la responsabilité, directement engagée au regard de ce droit, des individus coupables de tels crimes. Nuremberg constituait, de ce point de vue, un précédent (page 164 et suiv.), ou plutôt une révolution. Et très rares sont les auteurs qui, avec 50 ans de recul, peuvent contester et contestent la nécessité historique d'une telle révolution.

Crimes Against Humanity in International Criminal Law décrit ensuite les essais de codification de cette infraction, notamment par la Commission du droit international, pour arriver aux dispositions topiques prévues dans les statuts des tribunaux pénaux internationaux pour l'ex-Yougoslavie et pour le Rwanda et de la Cour pénale internationale. L'ouvrage traite également d'un certain nombre d'infractions proches du crime contre l'humanité, telles qu'incorporées dans diverses conventions (génocide, violations du droit international humanitaire, apartheid, etc.), pour tenter un regroupement de ces différentes infractions sous le label « *crime de jus cogens* ».

Toujours à propos de Nuremberg et des développements postérieurs, l'ouvrage analyse également, de façon détaillée et dans plusieurs chapitres, les éléments constitutifs de l'infraction : la notion de « *crime d'État* », les relations entre les actes individuels et la planification étatique de l'infraction, les différents actes individuels typiques de l'infraction, etc. M. Bassiouni commente également certains aspects périphériques de l'infraction tels que le principe *aut dedere aut judicare*, la non-application du principe de la prescription, la compétence universelle, la responsabilité du supérieur hiérarchique, la responsabilité pénale individuelle des auteurs, l'irrecevabilité de différentes excuses (ordre supérieur, contrainte, représailles, immunité des chefs d'État, etc.).

Enfin, et d'une manière plus générale, l'auteur ne se contente pas — comme le font nombre de juristes pressés et influencés par les modes — de recourir aux citations pour faire admettre ses

analyses et ses conclusions, mais il s'appuie sur une vaste culture pour traiter son sujet *à fond*. Notamment, il part systématiquement des différents courants de la théorie et de la philosophie juridiques pour plaider de manière critique — mais convaincante dans le cas de Nuremberg — contre « *the narrow consensual basis of international law engendered* [*by*] *a rigid positivistic approach* » et faire admettre un retour au droit de la nature (page 104), ou en tout cas à « *a more flexible [approach] that permit*[*s*] *the growth and evolution of this discipline* » (*ibid.*).

Cependant, les développements récents du droit international pénal donnent relativement tort aux jusnaturalistes, puisque les États — et le professeur Bassiouni lui-même — ont montré, notamment avec le Statut de Rome, qu'ils préféraient une codification rigide de l'infraction plutôt qu'une application du droit international pénal sur la seule base du « sentiment de justice ». En quelque sorte, l'approche « jusnaturaliste » si elle permet de justifier la révolution de Nuremberg, n'a pas été considérée comme suffisamment convaincante pour fonder un nouvel ordre pénal mondial.

Pour conclure, l'ouvrage du professeur Bassiouni est incontournable pour quiconque s'intéresse à l'histoire du droit international pénal jusqu'à l'établissement des tribunaux pénaux internationaux pour l'ex-Yougoslavie et pour le Rwanda. Par contre, il faut signaler que l'auteur ne fait nulle part référence aux jurisprudences de ces tribunaux, qui développent, affinent, cristallisent l'infraction de crime contre l'humanité depuis plus de cinq ans. Dans ce sens, si l'ouvrage offre une perspective historique, téléologique et comparative très poussée du crime contre l'humanité et de certains problèmes généraux du droit international pénal, il ne peut pas servir de *manuel* pour ceux qui s'intéressent à cette infraction, telle qu'elle est admise actuellement par lesdits tribunaux et incorporée dans le Statut de la future Cour pénale internationale. L'éclairage de l'infraction donné par le professeur Bassiouni est cependant indispensable, et son ouvrage doit impérativement se trouver dans toute bibliothèque de pénaliste internationaliste digne de ce nom.

MARC HENZELIN
Chargé de cours
Université de Genève

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LA REVUE/THE REVIEW

Divers Miscellaneous

Igor Pavlovich Blishchenko
1930-2000

We were shocked and deeply saddened to learn of the unexpected passing away of Professor Igor Pavlovich Blishchenko, Doctor of Laws, Member of the International Academy of Higher Education and honoured with several official Russian Federation and international awards, including that of "Emeritus Scientist of Russia", for his outstanding contribution to the study of international law.

Professor Blishchenko was renowned as a leading expert in international law and particularly the law of armed conflict, not only in his home country Russia but also on all five continents of the world. He was the author of over four hundred works centred on problems of international humanitarian law, which have been published both in Russia and abroad. Particularly interested in the relationship between international humanitarian law and other branches of international law, he lectured and wrote extensively on subjects such as problems of disarmament and international law, human rights law, international criminal law, terrorism and international law, international law and municipal law, and the pacific settlement of international disputes. His writings in these fields made a significant contribution to the understanding and interpretation of international law, and especially international humanitarian law. His works include: *Armed Conflict and International Law* (1971), *Non-International Armed Conflict and International Law* (1973), *The Red Cross and International Humanitarian Law* (1977), *Conventional Weapons and International Law (1984), International Humanitarian Law* (1986), *The Idea of an International Criminal Court* (1994), *Additional Protocol II on Non-International Armed Conflict and the Problem of Refugees* (1998), and *Precedents in Public and Private International Law* (1999).

Professor Blishchenko devoted more than forty years of his life to fruitful academic activity and research at various Soviet and Russian

law schools (*inter alia* as Professor and Vice-Rector of the School of Diplomacy of the Ministry of Foreign Affairs of the Soviet Union, Professor of the Institute of International Relations of the Ministry of Foreign Affairs of the Soviet Union, and for the last twenty years as Head of the Chair of International Law of the Peoples' Friendship University of Russia in Moscow). He was Visiting Professor of International Law at numerous universities, law schools and research centres in many countries (Switzerland, United Kingdom, France, Germany, Italy, the Netherlands, Poland, USA, Japan, Hungary, Greece, Egypt, Angola, Austria and others).

His academic activities were always closely interlinked with practical work. Professor Blishchenko was an expert consultant of the Parliament of the Soviet Union, the Parliament of the Russian Federation and the Ministry of Foreign Affairs of the USSR and of Russia, as well as member or chairman of various official Soviet and Russian delegations to international conferences and symposiums and to sessions and working groups of many international organizations. He was expert consultant of the United Nations on problems of international humanitarian law, disarmament, and the prohibition of and restrictions on the use of certain conventional weapons. He was chairman of the Soviet delegation to the International Congress of Paris on the prevention of genocide, representative of the Soviet Union to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and a member of the Soviet delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law which, working in four sessions from 1974 to 1977, prepared the two Additional Protocols to the 1949 Geneva Conventions on the protection of war victims.

Professor Blishchenko was among the distinguished members of the authoritative Independent Bureau for Humanitarian Issues, together with Mohamed Bedjaoui, Judge of the International Court of Justice, Pierre Graber, former President of the Swiss Confederation, and many other eminent public figures, which prepared numerous research studies, including one on "The implementation of international humanitarian law".

Igor Blishchenko was a wonderful person, a talented diplomat and a brilliant law professor and scholar, beloved by his colleagues and pupils all over the world.

He died in Moscow on 9 August 2000 at the age of 70. We wish to convey to his wife and his family our sincere condolences (as three of his many pupils all over the world) and those of the entire academic world of law.

Jose Doria
Legal Advisor, Office of the Prosecutor
International Criminal Tribunal for the former Yugoslavia
The Hague
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