Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps

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Contradictory images of humanitarian assistance in armed conflict paint a confusing picture. There are now a great many public and private humanitarian organizations operating all over the world. The work that they do is seen to help save lives and alleviate the suffering of those not taking part in an armed conflict, who are deprived of the basic necessities of life as a result of the hostilities. The organizations responsible for enforcing international humanitarian law (IHL) and international human rights law (IHRL) and, in certain circumstances, those responsible for dealing with threats to international peace and security are also seen to take serious action when parties to a conflict obstruct efforts to provide humanitarian assistance.

However, it is also evident that a relatively large proportion of relief supplies ends up in the hands of combatants, that parties to a conflict sometimes reject the offer of such aid for victims of the hostilities for no apparent reason and that humanitarian aid is sometimes even used by the belligerents as a weapon of war. In some cases, the international community attempts to compensate for the lack of protection against serious violations of international law by sending relief supplies for the victims and thereby often prolong their suffering.

The issues raised by this situation warrant an examination of the law regulating humanitarian assistance in armed conflict, the progress made to date and the gaps in regulation that need to be filled.

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This article is structured around three main areas: (i) humanitarian assistance as a right of the civilian population that is guaranteed under both IHL and IHRL; (ii) implementation and enforcement mechanisms to ensure compliance with obligations stemming from this right; and (iii) the regulation of the implementation of humanitarian assistance: offer and provision of aid, with or without the consent of the parties to a conflict, and the conditions in which humanitarian assistance is afforded protection under international law.

The right to humanitarian assistance

This section is based on a joint analysis of IHL and IHRL, which is necessary for several reasons.

First, the right of the civilian population to humanitarian assistance can be derived from the principle of inviolability[1], which is at the basis of both IHL and IHRL. Second, there are gaps in the regulation of humanitarian assistance set forth in conventional IHL that can only be filled by IHRL (for example, the duty of a State to ensure that its own population is adequately supplied in emergency situations and in non-international armed conflict, the duty to cooperate with humanitarian organizations and the duty to protect convoys, cannot be deduced literally from IHL). Third, as observed by the International Court of Justice (ICJ), limitations on the right to life[2] and, specifically, on the right to humanitarian assistance in conflict situations are determined by IHL. Fourth, the development of IHRL will reinforce and advance the establishment of the majority of norms concerning humanitarian assistance in armed conflict as part of customary law.[3] Fifth, the fact that IHL is binding on non-State parties engaged in internal conflicts indirectly implies that they, too, are bound to comply with IHRL, at

1 See Jean Pictet, *Développement et principes du droit international humanitaire*, Pedone, Paris, 1983, p. 78. Pictet determines that there are three common principles to humanitarian law and human rights law: inviolability, non-discrimination and security. The first one, according to Pictet, means that "l'individu a droit au respect de sa vie, de son intégrité physique et morale et des attributs inséparables de la personnalité."

2 "The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war (...) the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict." ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, para. 25.

3 See Manuel Pérez González, "Las relaciones entre el derecho internacional de los derechos humanos y el derecho internacional humanitario", in *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Centro Internacional Bancaja para la Paz y el Desarrollo (CIBPD), Valencia, 1997, p. 361.

least concerning non-derogable rights. Sixth, the link between these two bodies of law will allow the mechanisms established by both to be used to guarantee respect for the right of victims to humanitarian assistance and to ensure that States fulfil the duties associated with this right. Lastly, the recognition of the hard core of obligations relating to humanitarian assistance as obligations *erga omnes* deriving from *jus cogens* norms can be deduced from an analysis of these two areas of law.

Humanitarian assistance and the right to life

There is no doubt that States have an obligation to respect and above all to ensure respect for the right to life of all the individuals within its territory and subject to its jurisdiction.[4] This not only implies that States must abstain from directly violating this right, but also, and this is the interesting point, that they must take all necessary steps to ensure that this right is not abused.

"Taking all necessary steps" could be construed as a duty to prevent and prepare for human disasters, but there is absolutely no question that it establishes the duty of States to take positive action to eradicate or alleviate the effects of any emergency situations.

The duty to guarantee the right to life puts the State in the position of guarantor, so that in the event of wilful omission, the State could be considered directly responsible for any resulting loss of life.

This duty to take positive action implies that States have a duty to ensure that the population affected by a crisis is adequately supplied with goods and services essential for its survival and, if they are unable to do so or their efforts fail, to allow third parties to provide the required relief supplies. The two aspects of this obligation, the duty to provide humanitarian aid and the duty to allow others to provide it, are very closely linked, as the latter presupposes the existence of the former.

4 In addition to express references in conventions, this obligation flows from the positive, as well as the negative, obligations imposed on States in international conventions. Article 2 of the 1966 International Covenant on Civil and Political Rights makes express reference to such obligations; the comments of the Human Rights Committee on the right to life, laid down in Article 6 of the Covenant, clearly indicate that such an obligation exists in relation to the right to life (Human Rights Committee, *General Comment No. 6*, 30 July 1982). The obligation is also established in the following instruments, among others: Preamble to the 1948 Universal Declaration of Human Rights; 1989 Convention on the Rights of the Child (Article 6); 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14); 1981 African Charter on Human and People's Rights (Article 1); 1969 American Convention on Human Rights - "Pact of San José" (Articles 1 and 2); 1966 International Covenant on Economic, Social and Cultural Rights (Article 2).

All this has direct consequences of a practical nature. The link between humanitarian assistance and the right to life means that the duties of the parties to a conflict in this respect bestow the right to receive humanitarian assistance offered by third parties on all the victims of all conflicts.

Although the right to life, which is at the root of the right to humanitarian assistance, cannot be derogated from, it is not an absolute right and can be limited in times of armed conflict. And, as pointed out above, it is the law of armed conflict that establishes the substance of this right and the limitations to it.

In spite of the fact that the right to humanitarian assistance, arising from the right to life, is individual, there are two factors that affect its treatment as such. First, a crisis that deprives an individual of the basic necessities of life affects a group of people, all of whom must be helped. Second, violations of this right are usually committed on a collective scale: the right to humanitarian assistance is generally denied to a group of people or to an entire population and not to a particular individual.[5]

Humanitarian assistance and international humanitarian law

The enshrinement of the right to humanitarian assistance in IHL is grounded in two of the principles on which this entire body of law is based: the duty to distinguish between the civilian population and combatants and the duty to ensure respect, protection and humane treatment for people not or no longer participating in the hostilities. The broad concept of protection established under this principle[6] clearly encompasses assistance for people in need and, as such, is established in conventions and protocols.

With regard to international conflicts, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War establishes explicitly that States have the duty to provide humanitarian aid to the civilian population under their control (non-nationals, whether free or detained, and the population of occupied territories) of the adverse party[7] and, if unable to do so, are bound to accept the offer of third parties to provide the

5 Depriving civilians belonging to a particular group of supplies essential for survival may be considered an act of genocide or a crime against humanity (extermination).

6 See Resolution XXVIII of the 20th International Conference of the Red Cross and Red Crescent (Vienna, 1965).

7 Articles 55 and 81.

required aid.[8] However, the duty of States to provide humanitarian assistance and to allow others to do so for their own nationals is not expressly laid down in this instrument.[9] The right of the nationals of neutral States to humanitarian aid is not provided for in it either, although it was later included in its First Additional Protocol.[10]

The Fourth Geneva Convention only establishes the duties of States and the rights of victims in relation to humanitarian assistance in international armed conflicts or in situations of occupation. In the case of internal conflicts, however, the existence of these duties and rights can be clearly deduced from Article 3 common to the four Geneva Conventions, in particular from the prohibition of violence to life and person.[11]

This prohibition can be violated by act or omission. If by omission, it must be voluntary and a prior positive obligation must exist, in this case the obligation of the authorities of a State and other parties under IHRL to ensure that the needs of the civilian population are adequately met.

Article 18 of Additional Protocol II, applicable in non-international armed conflicts establishes the right to humanitarian assistance, imposing on the parties to conflict the obligation to accept humanitarian aid essential to the survival of the population.[12]

In any event, in view of the fact that common Article 3, as observed by the International Court of Justice, establishes that there is a hard core of fundamental human rights belonging to all people not taking part in the hostilities that cannot be derogated from in international or internal conflicts and

8 Articles 38, 39, and particularly Article 23.

9 These two categories of population (the own nationals of the State concerned and the nationals of neutral States) are only protected, as relief is concerned, by Article 23 of the Fourth Geneva Convention, which referes to the free passage of aid destined for the civilian population in the territory of a third State.

10 Part IV, Section II of this Protocol (entitled "Relief in favour of the civilian population") contains obligations regarding the entry, passage and distribution of aid for the civilian population. The civilian population includes all civilians, independent of their nationality or position in the conflict (see Article 50 Additional Protocol I).

11 See Jean Pictet (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 47; Luigi Condorelli, "Intervention humanitaire et/ou assistance humanitaire? Quelques certitudes et beaucoup d'interrogations", in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, International Committee of the Red Cross/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, p.1007.

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

in time of peace or war,[13] the consideration that common Article 3 contains obligations relating to humanitarian assistance leads to the assertion that they apply to all victims in all conflicts.

It should be noted that the obligations imposed by these instruments are binding on both State and non-State parties. The latter are therefore bound to comply with IHRL, although, as the situation now stands, compliance is limited to the rights enumerated in common Article 3 and Additional Protocol II.

The link between the two bodies of law is clear in this case. Given that the right to humanitarian assistance is instrumental in guaranteeing the right to life, the obligation imposed on non-State parties to guarantee the right to humanitarian assistance effectively binds them to comply with obligations associated with human rights observance. It should therefore be possible, in theory, to use the mechanisms provided for in IHRL to enforce the compliance of non-State parties.

However, the source and content of the obligations binding on non-State parties differ from those of State party obligations even in non-international armed conflicts. The duty of States to provide humanitarian assistance extends to the entire population of the nation, while non-State parties are bound to provide aid only for people under their control. The duty of a State to allow the free passage of humanitarian aid addressed to persons that are not under its control, derives directly from IHRL and, specifically, from the obligation to respect and ensure respect for the right to life of all the people under its jurisdiction, regardless of whether or not they are in State-controlled territory. In the case of non-State parties, however, the sole foundation for these duties lies in the dependence of the population on the humanitarian aid offered to it and in the principles of humanity and inviolability binding on all parties.

This means that depending on whether it is a State or a non-State party, the duty of a party to a conflict to allow the free passage of relief supplies to people in the power of another party has a different source.

Content of the right to humanitarian assistance: entitlements of victims and humanitarian organizations and duties of parties to conflict

The right of persons affected by armed conflict to humanitarian assistance consists of the right to receive from third parties relief supplies that

13 *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 3), para. 22.

comply with the conditions imposed by IHL. It also entitles victims to demand that their right to receive such aid be given effect. Lastly, it should also imply their right to appeal to potential benefactors to come to their aid.

In the case of international conflicts the entitlement to request aid from third parties is established in Article 30 of the Fourth Geneva Convention. In the case of internal conflicts, however, there is no provision referring either directly or indirectly to such an entitlement. This right therefore needs to be expressly enshrined in law or its effectiveness will not be guaranteed in cases in which the international community fails to take spontaneous action, the authorities responsible for the victims do not disclose the situation to the outside world and the media do not have access to the affected area and are unable to sound the alarm.

Humanitarian organizations also have a right to provide humanitarian assistance. This consists of the right to offer victims the relief supplies that they need and the right for the offer of aid not to be unreasonably refused when the needs of the victims are not met in some other way. This right should be regarded as a corollary to the right of victims to humanitarian assistance, without which it lacks a solid justificatory basis.

The duties of States and other parties to conflict in this regard boil down to a duty to permit the entry, passage and distribution of humanitarian aid.

They involve the following: (i) affected States must authorize the entry and passage of humanitarian aid for the civilian population in need; (ii) affected parties to a conflict must not obstruct, directly or indirectly, the entry, passage or distribution of humanitarian aid; (iii) affected parties must make every effort to facilitate the rapid and unimpeded passage of relief consignments and assist humanitarian organizations and personnel in carrying out their work; and (iv) affected parties must guarantee the safety of relief supplies and humanitarian personnel.

Although most of these obligations are expressly established in the Fourth Geneva Convention[14] and are therefore already considered part of customary international law, some of them, particularly the duty to assist humanitarian organizations in carrying out their relief mission and the duty to protect relief consignments and relief personnel, are only established in general terms in Additional Protocol I[15] for international conflicts.

However, recent international practice, observed essentially in the declarations and resolutions of international bodies (Commission on Human

14 See Articles 23, 30, 54, 59, 110, 111 and 142 of the Fourth Geneva Convention.

15 See Articles 70 and 71 of Additional Protocol I.

Rights, United Nations Security Council and General Assembly, European Union, among others[16]) and in reports issued by human rights monitoring bodies[17] and States, shows a general acceptance that these obligations apply to all States and to all types of conflict.

With regard to internal conflicts, the succinct wording of common Article 3 and Article 18 of Additional Protocol II makes it difficult to directly deduce any more than the obligation to authorize and refrain from obstructing the entry and passage of humanitarian aid. However, recent international practice particularly since the end of the Cold War shows that in this case also, as above, the obligation of all parties to a conflict to allow the free passage of humanitarian aid has become part of customary law. The substance of this obligation is basically the same as that established in the Fourth Geneva Convention and Additional Protocol I for international conflicts.

Sieges, embargoes and blockades as factors limiting the right to humanitarian assistance

The interests underlying the recognition of the right to humanitarian assistance are also reflected in other areas: in the rules regulating the conduct of hostilities and the way in which the United Nations Security Council imposes embargoes on States.

With regard to the conduct of hostilities, the Protocols Additional to the Geneva Conventions prohibits the parties to an armed conflict, be it interna-

16 The issue has clearly been addressed in the same way in these texts in relation to all types of conflict. The following conclusions can be drawn from an analysis of relevant resolutions adopted by the United Nations Security Council: (i) no distinction is made between international conflicts and internal conflicts; (ii) the severity of the tone of the language used to ask parties to authorize humanitarian assistance varies ("requested", "invited", "called on", "enjoined", "strongly enjoined", "urged"). While it is true that more peremptory terms are usually employed for particularly serious humanitarian situations and particularly condemnable conduct, even then the language used is often very mild; (iii) these appeals are addressed to both the State and non-State party; (iv) reference is usually made to the duties of the parties to the conflict and the rights of humanitarian organizations and personnel, and not to the right of victims to humanitarian assistance; (v) the appeals usually urge the parties to: refrain from obstructing the passage and distribution of humanitarian aid, guarantee humanitarian organizations access to victims, cooperate in the work of humanitarian organizations and personnel, guarantee the safety of humanitarian personnel and relief consignments; (vi) in addition, they condemn violent acts committed by the parties to conflict directly against humanitarian personnel, premises, means of transport and relief supplies, and sometimes even require those who committed such acts of violence to be punished. These conclusions apply equally to the other international organizations mentioned above. See Abril Stoffels, *op. cit*. (note *), pp. 145 ff., 262 ff. and 417 ff.

17 *Ibid.*, pp. 272 and 425 ff.

tional or internal, from using starvation as a method of warfare[18] and, by extension, from imposing embargoes, blockades or sieges that endanger the lives of the civilian population by depriving it of resources essential for survival.[19]

When such strategies are used, certain conditions must therefore be met. In the case of blockades and other such military techniques, it is necessary to establish exemptions for goods that are vital to the survival of the population. In the case of sieges, essential supplies must be allowed in or people in the besieged area must be allowed to leave. As both options are possible and lawful, the choice of one or the other may lead to a clash of military interests between the warring parties, making it difficult to ensure that the option most beneficial to the victims is taken.

The recent siege of Monrovia must therefore be considered unlawful in that it directly affected the civilian population. Civilians in the besieged area did not receive adequate supplies and services to ensure survival and were given no minimum guarantee of safety enabling them to leave.

Although there are no specific provisions limiting the power of the UN Security Council to adopt measures — both in cases where IHL is applicable and in others where it is not — that could lead to a situation in which the inadequacy of supplies for the general population of a country endangers people's lives, in imposing sanctions the Security Council makes exceptions on the grounds of humanitarian necessity, permitting the entry of essential supplies.[20] Such a practice can only be attributed to the existence of a duty to fulfil obligations relating to humanitarian assistance, a duty based on the requirement that the Security Council must comply with IHL and IHRL. This assumption has hitherto not been questioned.

Responses to violations of the right to humanitarian assistance

Given that the right to humanitarian assistance is directly derived from the fundamental norms of both IHRL (those concerning the right to

18 Article 54 of Additional Protocol I, which is considered part of customary law, as demonstrated by the fact that under Article 8.2.b (xxv) of the Rome Statute such act is recognized as an international crime and can be prosecuted and punished by the International Criminal Court.

19 Articles 17 and 23 of the Fourth Geneva Convention.

20 An examination of the measures adopted by the United Nations Security Council reveals that a distinction is made between different types of relief supplies: those directly excluded from measures adopted by the Council (medical supplies); those subject to a notification procedure to inform the organization responsible for implementing the measures adopted (foodstuffs); and those subject to a non-objection procedure (other supplies to meet humanitarian needs). See Abril Stoffels, *op. cit.* (note *), pp. 188 ff.

life) and IHL (those concerning the principle of inviolability[21] and, as the International Court of Justice has observed on several occasions,[22] that these two concepts undoubtedly form the hard core of obligations *erga omnes*, it can be concluded that the right to humanitarian assistance generates obligations *erga omnes* for all parties to a conflict.

Obligations *erga omnes* are characterized by certain conditions. Any State of the international community may concern itself with the enforcement of such obligations without its actions being construed as interference in the domestic affairs of the State in question. The international community as a whole (and not just the States directly involved) has the legal right to adopt the necessary measures to galvanize the offending State into complying with its obligations.

It is submitted that the latter is not an effective way of enforcing these obligations, as serious violations of the right to humanitarian assistance could go without redress if the international community fails to take effective and timely action, even when a particular State or group of States is willing to do so.

Legal mechanisms, as one of the types of mechanism available to States for the peaceful resolution of international disputes, in this case humanitarian assistance issues, seem to be *a priori* inadequate for this purpose.

The fact that such mechanisms, particularly the jurisdictional mechanisms currently in force, entail a long-drawn-out process and cannot be used to deal with the behaviour of non-State parties severely limits their utility.

Political mechanisms are particularly effective for settling disputes of this kind, because they are more flexible and can be used to deal with the conduct of non-State parties. It is important to remember that the majority of recent wars have been internal conflicts, which are generally characterized by more serious and more widespread violations of the right to humanitarian assistance.

In institutionalized cooperation, there are a number of international organizations, as mentioned above, that play a key role not so much as a direct or indirect agent in the peaceful resolution of disputes, but in pressuring States and other parties to conflict into fulfilling their obligations in

21 See Pictet, *op. cit.* (note 1).

22 ICJ, *Barcelona Traction Case*, Merits, Judgment, 5 February 1970, *ICJ Reports 1970*, para. 33; ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, *ICJ Reports* 1986, para. 218; ICJ, *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 3), para. 79.

this regard. However, the reluctance of such organizations to use the mechanisms available to them to deal with conflicts or disputes that are not of any special concern to them undermines their effectiveness.

There now follows a more in-depth examination of the effectiveness of the implementation mechanisms provided for under IHRL and IHL and the role of the UN Security Council in this area.

Implementation mechanisms provided for under international human rights law

The very nature of violations of the right to humanitarian assistance limits the effectiveness of IHRL mechanisms in ensuring enforcement: (i) humanitarian assistance is an individual right that is generally abused on a collective scale, and the mechanisms tasked with guaranteeing individual protection are unable to provide redress against such violations;[23] (ii) the right to humanitarian assistance is linked to emergency situations, and measures can be effective only if implemented immediately; (iii) measures aimed at promoting respect for the right to humanitarian assistance progressively are not, in principle, very effective, because violations are committed in a specific and exceptional context; and (iv) violations are committed not only by States but also by non-State parties for whose conduct the State is not responsible.

None of the conventional mechanisms provided for under the International Covenant on Civil and Political Rights or within the framework of the Council of Europe, for example, are capable of effectively enforcing the right to humanitarian assistance.

The purpose of the periodic reporting procedure set up by the Covenant is to monitor the progressive implementation of the protections that it establishes. However, reports are submitted, and therefore analysed, at five-year intervals, and many States engaged in conflict fail to comply with this reporting obligation.[24]

The inter-State complaints procedure involves a long-drawn-out process and has yet to be invoked.

23 The right to humanitarian assistance is here analysed as a right derived essentially from the right to life and as an individual right. It could also be analysed from the point of view of collective or group rights.

24 The following countries are more than five years behind in submitting reports: Somalia, Central African Republic, Democratic Republic of the Congo, Rwanda, Côte d'Ivoire, and Afghanistan. Human Rights Committee, *Annual Report of the Human Rights Committee*, 30 October 2002, UN Doc. A/57/40, Vol. I, pp. 19-20.

The individual communications procedure establishes the exhaustion of domestic remedies as a requirement of admissibility and also involves a lengthy process, with no provision for the adoption of interim measures. The decisions and views issued by the Human Rights Committee refer only to individual cases, and the role it plays is reactive rather than preventive. Taking a case to the European Court of Human Rights is likewise a lengthy process, no direct provision is made for interim measures[25] and the role of the court is reactive rather than preventive.

None of the above mechanisms has yet been used to enforce the right to humanitarian assistance.

Extra-conventional monitoring mechanisms within the United Nations system, particularly the one established by Resolution 1235 (XLII) of the United Nations Economic and Social Council (ECOSOC), must be assessed in a different light.

The fact that these mechanisms are "extra-conventional" and are therefore outside the treaty framework means that they can be applied to a greater number of States. Most of them do not require the exhaustion of domestic remedies, they can be applied to all parties to a conflict and are both reactive and preventive.

The monitoring procedure focuses on the analysis of "situations" in which human rights are violated, taking into account the recurrence of violations over time rather than the number of individuals affected. This allows for the analysis of individual human rights violations committed on a collective scale (which is one of the characteristics of such violations, as mentioned above). Its effectiveness in this area is demonstrated by the fact that it is commonly used to analyse violations of this kind.[26]

Fact-finding mechanisms can be set up to gather information, and the resulting reports are used by the Commission on Human Rights and other international organizations to pressure States into compliance with their obligations in this respect. It is an entirely public procedure from start to finish, and resolutions can be adopted at any time to induce the offending party to comply.

It is therefore perhaps the most effective type of human rights implementation mechanism that can be used to enforce the right of victims of armed conflict to humanitarian assistance.

25 See, however, Article 39 of the Rules of Procedure of the European Court for Human Rights, which has been used only in cases of the death penalty and torture (linked in general to extradition or expulsion procedures).

26 See Abril Stoffels, *op. cit.* (note *), pp. 268 ff. and 423 ff.

However, other factors that influence how the Commission on Human Rights acts can impair its effectiveness: the consent of the State under investigation is required before special fact-finding bodies can gather information *in situ*; whether these mechanisms are used to their full potential and whether effective measures are taken to deal with detected violations depends on the political will of the members of the Commission; and the recommendations and resolutions of the Commission are not binding on States.[27]

It would perhaps be useful to create a thematic procedure to carry out a global, but at the same time specific, analysis of violations of the right to humanitarian assistance and to adopt measures providing protection in certain particularly serious situations.

An examination of action taken by the Commission on Human Rights with regard to recent conflicts also reveals a number of general features that can be added to those enumerated above, showing how international organizations deal with these matters: (i) repeated express reference is made to IHL as a branch of law that is directly applicable in the analysis of human rights abuse; (ii) although the Commission takes action against the conduct of both States and non-State parties, there appears to be a certain reticence on its part to call on non-State parties directly and explicitly to respect human rights; in such cases its exhortations are grounded in IHL, requiring the parties to cooperate in ensuring respect for these rights; and (iii) it focuses on the rights of humanitarian organizations and personnel rather than on the rights of those who are in need of relief supplies, to the extent that the right of victims to humanitarian assistance is mentioned only in passing.

The functions of the United Nations Office of the High Commissioner for Human Rights (OHCHR) include promoting and protecting human rights, and it therefore has a very useful role to play in ensuring respect for the right to humanitarian assistance. Under its broad mandate, the OHCRH could (with the necessary means and support) make an important contribution to asserting and enforcing this right.

The recently created post of Special Rapporteur on the right to food[28] could have an important role to play in this domain, but the activities assigned to it are centered on seeking, receiving and responding to informa-

27 See, among others, José A. Pastor Ridruejo, "La protección de los derechos humanos en las Naciones Unidas", in *Cursos de Derecho Internacional Vitoria-Gastéiz, Universidad del País Vasco*, Vitoria, 1988, pp. 39 ff.

28 United Nations Commission on Human Rights, *The right to food,* 17 April 2000, UN Doc. E/CN.4/RES/2000/10.

tion, establishing cooperation with governments and identifying emerging issues related to the right to food. In short, they are activities that may have an important effect in the medium and long term, but not to respond directly to an actual emergency situation.[29]

Implementation mechanisms provided for under international humanitarian law

The first conclusion that can be drawn from an analysis of implementation mechanisms established under IHL is that individuals are largely dependent on the political will of States to use the means at their disposal to ensure implementation and enforcement.

Not only do individuals have no standing in international mechanisms concerned with any kind of armed conflict, but IHL provides for even fewer mechanisms in internal conflicts (for example, no provision is made for recourse to a Protecting Power) and those that do exist are less effective, particularly when it is necessary to compel non-State parties to comply with IHL.

It is also evident that the conflict situation itself, particularly in internal conflicts, hinders the implementation of mechanisms established under domestic legislation and diminishes the effectiveness of recourse to the courts. These mechanisms, too, are largely ineffectual when the offender is a non-State party or a member thereof. A weak administrative infrastructure, the absence, in many cases, of a clear chain of command, inadequate training of both the officers and rank and file of the militia and the type of military strategies employed not only hinder efforts to implement IHL, but also make it difficult to monitor the situation. In such cases, government authorities are practically powerless to compel rebel forces to fulfil their obligations.

However, the commitment of States to respect and ensure respect for IHL applies: (i) in international law applicable in both international and internal conflicts; (ii) in conventional and customary law; (iii) to States that are directly affected and to other States; (iv) in relation to grave breaches and other violations. With regard to the latter, the commitment applies in all areas regulated by this body of law and therefore to all violations associated with humanitarian assistance; and (v) in relation to violations

29 See (idem) 7 February 2001, UN Doc. E/CN.4/2001/53, and especially paras. 72-106 of Report by the Special Rapporteur on the right to food, Mr Jean Ziegler, submitted in accordance with Resolution 2001/25, 10 January 2002, UN Doc. E/CN.4/2002/58.

committed by the State providing humanitarian assistance, by the State of transit, by the State receiving aid, by the parties to conflict and even by the humanitarian organizations.

States therefore have not only the legal right, but also the legal obligation, to take action in the face of such violations. This means that they should use all the means at their disposal to deal with violations committed by any party anywhere in the world, and not just those committed in neighbouring nations or by particular States or parties to a conflict.

It can therefore be considered unlawful for a State to maintain a passive attitude when it is in a position to take action, because the failure to respond allows the rights of victims protected under IHL to be abused. In view of the commitment of States to respect and ensure respect for IHL, it is, at best, inappropriate for them to focus on repressing or condemning violations of the right to humanitarian assistance in order to avoid greater involvement in the conflict. Such a course of action is particularly wrong when other more serious violations, which are sometimes the root cause of the emergency situation affecting the civilian population, are ignored. When this occurs, humanitarian assistance no longer fulfils the purpose for which it was intended.

Recourse to a Protecting Power, a specific mechanism established under IHL, can in theory serve as an effective means of guaranteeing the right to humanitarian assistance. The mission of a Protecting Power is to cooperate with the parties in IHL implementation and to monitor compliance. This provides an opportunity to determine the existence and extent of humanitarian needs and ensure that the relief supplies reach their intended destination and the control measures authorized by the States are adequate. The Protecting Power can play a mediating role between and among the parties to a conflict, humanitarian organizations and the civilian population. It can also use its good offices, cooperate in ensuring the safe passage and distribution of humanitarian aid and appeal to international solidarity.

In short, the existence of a neutral third party that assists the parties to a conflict in implementing IHL, has direct access to the authorities and the victims under their control, helps in relief efforts, acts as a mandatory of the international community to ensure that the parties to conflict fulfil their obligations, has rights of initiative, visitation, mediation and assistance and tenders its good offices, among other things, would seem to be a useful and effective means of ensuring respect for the right to humanitarian assistance.

However, the results so far have been disappointing. Very little use has been made of this mechanism, and when it has been used the results have not been encouraging.[30]

Instead, the functions of the Protecting Power are most often performed by the International Committee of the Red Cross[31] as a *de facto* substitute for it. In this role, it has provided mediation between parties to a conflict, offered its good offices, ensured the protection of civilians, monitored the safe passage and distribution of humanitarian aid and provided humanitarian assistance directly.

It should be noted that since this mechanism is not expressly applicable in non-international conflicts, the rights of victims of IHL violations committed in such conflicts have less protection. The ICRC has undoubtedly managed to improve this situation to some extent by offering to perform the functions of a Protecting Power, as established in IHL in relation to international conflicts, for the parties to internal conflicts, which often, although not always, accept the offer.[32]

The humanitarian International Fact-Finding Commission is another of the mechanisms established by IHL that can be used to ensure respect for the norms it contains.

The purpose of the Commission is to investigate violations of IHL and offer its good offices to bring them to an end. It can therefore play a useful role in the area of humanitarian assistance. Although the use of this mechanism has certain advantages, such as immediate activation when a violation is committed without any need for an *ad hoc* agreement, it also has certain

30 For example, the Suez Canal crisis, the Goa conflict and the conflicts between France and Tunisia and between India and Pakistan.

31 See, among others, François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, International Committee of the Red Cross, Geneva, pp. 985-1061; Christian Dominicé: "La aplicación de las leyes humanitarias" in *Las dimensiones internacionales de los derechos humanos*, Vol. II, Serbal/UNESCO, Barcelona, 1984, pp. 586-608; Michel Veuthey, "De la guerre d'Octobre 1973 au conflit du Golfe 1991: les appels du CICR pour la protection de la population civile", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflicts*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp. 527-543; Michel Veuthey, "Implementation and enforcement of humanitarian law and human rights in non-international armed conflicts: The role of the ICRC", *The American University Law Review*, Vol. 33, No. 1, Autumn 1983.

32 The statutory basis for offering humanitarian assistance is established in the provisions of Article 5 of the Statutes of the International Red Cross and Red Crescent Movement, among others. Article 4.2 of the Statutes of the International Committee of the Red Cross also makes specific reference to this capacity: "The ICRC may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary".

shortcomings that warrant criticism and impair its effectiveness: only the State has the right to request an inquiry; only grave breaches or other serious violations of IHL come within its competence; its functions are confined to fact-finding and good offices; its conclusions, observations and recommendations are not, in principle, made public; and no provision is made for implementation in internal conflicts.

In any event, although there is clearly room for improvement, the creation of a permanent body of this kind within the framework of IHL must be regarded positively. The International Fact-Finding Commission could replace or complement similar ad hoc bodies created to deal with certain conflicts, such as those created by the Commission on Human Rights and the United Nations Security Council, and by specific agreements.[33]

This section ends with a brief reference to mechanisms used to prosecute and punish individuals who violate IHL, which act as a deterrent against such violations.

Although the two most recent predecessors of the International Criminal Court (the ICTY to prosecute persons who committed violations of IHL in the former Yugoslavia and the ICTR to prosecute those who committed acts of genocide and other serious violations of IHL in Rwanda) make no specific provision for violations relating to humanitarian assistance, the broad categories of crimes established in their Statutes allow for the prosecution and punishment of violations of this kind. Attacks on humanitarian personnel and the use of starvation as a method of warfare, for example, are clearly included as punishable crimes under these Statutes.

In addition to the generic categories of crimes established in previous statutes, the Rome Statute of the International Criminal Court expressly includes a series of acts that are closely linked to humanitarian assistance. Curiously, these acts are established as punishable crimes in all three of the categories defined in the Rome Statute, namely genocide, crimes against humanity and war crimes.[34] It is regrettable, however, that the use of starva-

33 Impartial commission of experts set up to examine and analyse information on violations of international humanitarian law in Rwanda by United Nations Security Council Resolution 935 of 1 July 1994, UN Doc. S/RES/935 (1994); Commission of experts set up to investigate violations of international humanitarian law in the former Yugoslavia by United Nations Security Council Resolution 780 of 6 October 1992, UN Doc. S/RES/780 (1992); Commission set up to monitor human rights abuse in East Timor since 1 January 1999, which completed its work on 14 December of the same year (UN Doc. E/CN.4/RES/1999/S-4). On this type of mechanism, see Christian Tomuschat, "Current issues of responsibility under international law", in *Cursos Euromediterráneos Bancaja de Derecho Internacional*, CIBPD, Valencia, Vol. IV, 2000.

34 Articles 6.c, 7.1.b, 8.2.b (iii), 8.2.b (xxv) and 8.2.e (iii) respectively.

tion as a method of warfare is not expressly established as a punishable crime in non-international armed conflicts. Nevertheless, it seems clear that the competence of the Court to hear such cases will be recognized once the customary law status of the prohibition of such conduct is accepted and a link established with the right to life, the right to human dignity, the right not to be subjected to cruel, inhuman or degrading treatment and other such rights.

United Nations Security Council

As a result of the recent concern of the United Nations Security Council (UNSC) for the right to humanitarian assistance, the Council has become very important as a means of enforcement.

By becoming involved in this issue, it not only confirms the customary law status of the norms concerning humanitarian assistance, but also establishes a direct link between violations of these norms and international peace and security. It goes so far as to assert that depriving victims of humanitarian aid is a threat to world peace and security,[35] an assertion that gives it the power to adopt whatever measures it considers necessary to put an end to such situations.

UNSC action can be classified into different levels, although more than one level of action can be taken in the same conflict: [36] (i) appeal to the parties in a more or less peremptory tone to fulfil their obligations;[37] (ii) grant powers to peacekeeping operations to facilitate the provision of humanitarian aid by humanitarian organizations. This interposition between the parties serves to create a humanitarian space that facilities the provision of humanitarian assistance; (iii) protect and escort humanitarian relief supplies, personnel, convoys and premises; the use of force is permitted in self-defence against attacks by parties to the conflict, uncontrolled elements of the fighting forces, bandits, thieves or starving people; and (iv) impose humanitarian assistance; States and peacekeeping forces are authorized to use force to implement the right to humanitarian assistance.

35 Although this link was noted as far back as Resolution 307 (1971) on the India-Pakistan conflict, Resolution 361 (1974) on the Cyprus conflict, and Resolutions 512, 513, 518 and 520 (all adopted in 1982) on the Lebanon conflict, it was the humanitarian crisis in Iraqi Kurdistan and subsequent crises in Somalia and Yugoslavia that led to it being conclusively and definitively established.

36 See Abril Stoffels, *op. cit*. (note *), pp. 219 ff.

37 A recent example of such an appeal is to be found in Resolution 1497 of 1 August 2003, which "calls on all Liberian parties and Member States (...) to ensure the safe and unimpeded access of international humanitarian personnel to populations in need in Liberia".

It should be noted that the fourth level relates to States and peacekeeping forces imposing humanitarian assistance against the will of the parties to the conflict, if necessary, while the third level could relate to the protection of relief supplies provided with prior consent in a particularly unstable conflict rather than to the imposition of humanitarian assistance. At the fourth level, competences necessarily derive from Chapter VII of the Charter of the United Nations, while at the third level they may also derive from Chapter VI.

Implementation of humanitarian assistance I: offer, entry, passage and distribution

The above analysis of the legal basis for humanitarian assistance and the way in which international law protects the victims of related violations leads to an examination of the legal aspects of implementation. The first part looks at who should seek authorization for the offer, entry, passage and distribution of humanitarian assistance, how and to whom the application should be made and the resulting consequences, while the second part examines the requirements with which humanitarian assistance must comply for the parties to be bound to accept it.

Offer of humanitarian assistance

The link between humanitarian assistance and the right to life and the consideration of the ensuing obligations as *erga omnes*, giving all members of the international community a legitimate interest in this issue, confer a right of initiative on the latter. Consequently, the offer of humanitarian assistance to those in need by any member of the international community, without the prior consent of the State in question, does not constitute an internationally wrongful act.

States, international organizations and public humanitarian organizations therefore have the legal right to offer humanitarian assistance to victims in a humanitarian emergency, without this being considered unlawful or even inappropriate.

It also seems clear that NGOs, as private entities, are permitted by law to offer victims humanitarian assistance, there being no legal provision to the contrary. Furthermore, the legality of such conduct is expressly enshrined in humanitarian law texts in respect of humanitarian organizations providing relief supplies both in international conflicts and internal conflicts[38]. Special

38 Articles 10 and 59 of the Fourth Geneva Convention; Article 70 of Additional Protocol I; Article 18.1 Additional Protocol; Resolutions 43/131 and 45/100 of the United Nations General Assembly; and many of the above-mentioned United Nations Security Council resolutions.

mention should be made of the ICRC, which is recognized in IHL Conventions as an entity with an international mandate in this field.

In view of the fact that States have at least a moral duty to cooperate in resolving humanitarian issues and the repeated appeals of international organizations for international solidarity, it is submitted that such action is not only lawful, but also advisable and indeed necessary for the effective implementation of the rights of victims.

Authorization of the entry, passage and distribution of humanitarian assistance

Once the offer of humanitarian assistance has been made, both parties (offeror and offeree) must agree on the terms and conditions of entry, passage and distribution.

Humanitarian assistance must be authorized by the State of transit and/or destination for it to be considered lawful.

The need for authorization in international conflicts poses no problem, as Article 23 of the Fourth Geneva Convention and Articles 70 and 71 of Additional Protocol I stipulate that it must be granted, a stipulation recalled in Resolutions 43/131 and 45/100 of the United Nations General Assembly.

It should be noted that in the case of occupied territories, authorization must be obtained from the occupying power and not the legitimate authorities (Article 59 of the Fourth Geneva Convention). This is undoubtedly because it is the occupying power that actually controls the population for which the relief supplies are intended and the territory through which they will pass and where they will be distributed.

In internal conflicts the authorization of the State is also required, whether the humanitarian aid is intended for people in areas controlled by the State or by a non-State party.

This requirement is logical in the first of these cases, when humanitarian assistance is intended for the population in State-controlled territory or when it must pass through such territory and is compatible with the provisions that apply in international conflicts. However, when the aid is intended for people in areas controlled by rebel forces and can be transported to its final destination without passing through State-controlled territory, requirements differ from those applicable in international conflicts.

In such cases, although the wording of common Article 3 could lead to a different interpretation,[39] Article 18 of Additional Protocol II[40] would seem to indicate that it is necessary to obtain the authorization of the State in whose territory humanitarian activities and aid distribution are to be carried out. This interpretation is confirmed by the positions adopted by States at the Diplomatic Conference that adopted the two Additional Protocols[41] and, subsequently, by resolutions passed by the United Nations General Assembly on this subject and the practice of donor States and international organizations, which very rarely provide humanitarian assistance in rebel-controlled areas without the prior consent of the State involved and, when they do so, it is generally with the utmost discretion.

However, the humanization process has also influenced this area of law, and the requirement to obtain authorization must be taken in conjunction with the obligation to grant authorization when humanitarian assistance meets the requirements that make it lawful and necessary for the implementation of the rights of victims. In actual fact, the main thrust of recent developments reveals a focus on limiting the right to refuse humanitarian aid rather than on eliminating the authorization requirement.

The requirement to obtain consent implies that humanitarian activities carried out without the authorization of the State in question are not protected under IHL and can be construed as unlawful when implemented by a State or an international organization on the grounds that that they violate the principle of sovereignty and non-interference in the domestic affairs of a State.

However, the fact that "clandestine missions" are not protected as such by international law does not mean that they are completely unprotected. The failure to obtain authorization to provide relief does not convert humanitarian personnel and supplies or their premises and means of transport into military targets. They retain the status of civilians and civilian objects and,

39 The wording of this article, which provides that an "impartial humanitarian body (...) may offer its services to the Parties to the conflict", seems to suggest that the authorization of either one of the parties, the State or the insurgents, confers the protection of IHL on humanitarian aid.

40 "If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival (...) relief actions for the civilian population (...) shall be undertaken subject to the consent of the High Contracting Party concerned."

41 *1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Official Records*, CDDH/II/SR.88, Vol. 12, pp. 366-367; CDDH/II/GT/108, CDDH/II/440, Vol. XIII, p. 441; CDDH/II/440/Add.1, Vol. XIII, p. 445; CDDH/II/SR.94, Vol. XII, pp. 425 ff.; CDDH/II/SR.95, Vol. XII, pp. 435 ff.; CDDH/II/444; Vol. XIII, p. 424.

as such, are entitled to protection. Evidently, this protection does not extend to preventing clandestine humanitarian workers from being deported or sanctioned or relief supplies from being confiscated by the government authorities.

Unlawful refusal to grant authorization: consequences and remedies

The requirement to obtain authorization to provide humanitarian assistance must be taken, as mentioned above, in conjunction with the obligation of the authorities to grant it.

Apart from the mechanisms described above, when one State wishes to take action against another that has refused to authorize humanitarian assistance, it has four options open to it: (i) establish dispensaries, clinics or distribution centres in the territory of a third-party State, avoiding any direct connection with the State that has refused the offer of aid. Such a course of action is lawful and entitled to protection; (ii) put the aid at the disposal of public or private humanitarian organizations, so that it can be forwarded to the victims with the consent of the State in question. Such a course of action is lawful and entitled to protection; and (iii) put the aid at the disposal of humanitarian organizations, which then cross the State's borders without its authorization. The lack of international response, formal or otherwise (except, of course, from the affected State) to putting humanitarian aid at the disposal of NGOs and other international organizations[42] to be delivered clandestinely to the victims of conflicts, when humanitarian needs are particularly acute, is sufficient evidence that there is an international norm that, at least *in statu nascendi*, supports the legality of such a course of action; and (iv) directly undertake a "clandestine" operation in the territory of the State.

The latter cannot be considered a lawful countermeasure, first, because it does not serve the purpose of a countermeasure (that of compelling the defaulting State to fulfil its obligations) and, second, because measures of this kind can be adopted only by the injured State (only States whose offer of aid had been unlawfully refused would be legally entitled to take such action).

This gives rise to a manifest incongruity. On the one hand, in the face of conduct that violates norms considered to be fundamental to the international community, such as those prohibiting serious violations of basic

42 This was common practice in conflicts such as those in Ethiopia, Sudan, Iraq and the former Yugoslavia.

human rights, States are powerless to take countermeasures except when they are directly affected by the violation, for example, when their own nationals are victims.

On the other hand, the same conduct also violates a norm that protects the interest of a State (the right for its offer of aid not to be unreasonably refused), which, as such, is not comparable with the interests protected by the norms referred to in the previous paragraph. The fact that the State is defending its own interest is what confers legality on its response rather than the defence of the fundamental interests of the international community.

Furthermore, if a State has a particular interest in ensuring respect for the rights of certain victims in the power of a State that systematically abuses those rights (refusing all offers of humanitarian aid to cope with the emergency situation), it has only to offer to provide humanitarian assistance, which will naturally be refused, to confer legitimacy upon its response to the violation.

A measure of this kind ("a clandestine mission") could be regarded as what Arangio-Ruiz terms an "interim measure of protection"[43] to be taken when the fundamental interests of the international community are at stake in a humanitarian emergency, provided that it is generally accepted that such measures can be adopted by States unilaterally in situations other than those involving the break-up of a State.

It could also be considered a measure taken in response to a "state of necessity", provided that it is accepted that this involves the defence not only of the national interest, but also of the fundamental interests of the international community, as proposed by Sandoz.[44]

It is submitted that to consider "clandestine" humanitarian assistance as a countermeasure based on a broad conception of the purpose of this form of action, as part of a response to a state of necessity, or as an interim measure to protect the fundamental interests of the international community, constitutes an interpretation that lies in the grey area between *de lege ferenda* and *de lege lata*.

It can therefore be seen that there is tension between the right of the State to decide what and who can enter its territory, the right of victims to receive humanitarian assistance and the interest of the international commu-

43 See Gaetano Arangio-Ruiz, "Fourth Report on State responsibility", UN Doc. A/CN.4/444/Add. 1, 1992, pp. 18 ff.

44 Yves Sandoz, "'Droit' or 'devoir d'ingérence' and the right to assistance: The issues involved", *International Review of the Red Cross*, Vol. 32, No. 111, November-December 1992, p. 234 (the argument revolves around the imposition of aid on the grounds of humanitarian necessity).

nity in enforcing that right. Although the first of these rights has taken precedence over the others to date, a time must come when the rights and interests of victims and the international community prevail over the rights of States, especially now that a humanization process is influencing international law and the recent introduction of axiological values is modulating its content.

It should also be possible to use the same argument to justify the action of third States when they support humanitarian organizations that provide clandestine humanitarian assistance following the unlawful refusal of a State to accept an offer of aid.

But it is one thing to justify clandestine humanitarian assistance in a State that has unlawfully refused an offer of aid, and quite another to justify the forceful imposition of humanitarian assistance on it, using armed force to take supplies into its territory or to protect them. These two circumstances do not necessarily concur in all instances. Humanitarian assistance may be provided clandestinely in areas controlled by non-State parties, with their authorization. In such cases armed force is not necessary except in self-defence. On the other hand, when the relief supplies pass through or are intended for areas controlled by the State, the use of armed force is likely to be unavoidable.

The collective security system established in the Charter of the United Nations must be a closed system with no gaps, although cracks may be caused or justified by the protection of fundamental human rights.

The system must work effectively, otherwise it would not be "fair" (morally acceptable) to condemn (legally reproach) a State for opening up a crack on these grounds as a last resort when the system remains paralysed.

In short, it is submitted that, as the situation now stands, the use of armed force as a last-resort reactive measure in response to the unlawful refusal of a State to accept humanitarian assistance essential to the survival of the population cannot be considered lawful, but who would condemn or take action against such humanitarian intervention when the machinery provided for under international law fails to work effectively and the intervention has no further consequences in international relations? This is a case in which moral and legal considerations clash, leaving no choice but to turn a blind eye to unlawful action that is permitted, and even dictated, by moral principle. This brings to mind the wisdom of Roman law expressed in the adage *summum jus summa injuria* (extreme law is the greatest injury); an overly legalistic approach would lead to the condemnation of a State which, faced with the paralysis of the system, seeks to give effect to one of the structural principles of contemporary international law, namely respect for human rights.

Implementation of humanitarian assistance II: requirements for entitlement to protection

The norms that govern the right of the civilian population to humanitarian assistance in a humanitarian crisis caused by armed conflict reflect the tension and balance between the humanitarian interests and the military interests at the basis of IHL.

While the rights of victims to humanitarian assistance must be as extensive as possible to achieve maximum protection, every effort must be made to ensure that the aid provided does not directly or indirectly favour one of the parties to the conflict. To this end, humanitarian aid must comply with certain requirements, and the parties involved are entitled to ensure that they are in fact met. A party may therefore refuse to authorize humanitarian assistance if it does not meet the established requirements. In such cases, the relief action is no longer protected as such under IHL.

It is understood that humanitarian assistance is acceptable when it is humanitarian, impartial and neutral. Yet even when humanitarian assistance complies with these conditions, as laid down in IHL, it is still often prejudicial to the interests of one of the parties to the conflict.

This is particularly true in today's conflicts, when part of the funding for belligerents (particularly non-State forces) may sometimes at least partially come from humanitarian aid. Sometimes, the object of the war is to eliminate the adverse party (not just the combatants, but all those who do not support the same cause or belong to a different ethnic, religious or cultural group). In such cases, States use humanitarian assistance for political purposes, converting humanitarian activities into political action.

The delivery of relief supplies to the civilian population is often hindered by humanitarian agencies that do not ensure compliance with the established requirements, or by parties to a conflict which take possession of humanitarian assistance from relief operations that are properly planned and conducted by humanitarian agencies and use it for their own benefit. A clear example of such a situation was the conflict in Somalia, where humanitarian aid ended up as the main source of provisions for the warlords and served to prolong and escalate the conflict.

Humanity

The principle of humanity dictates that such aid should consist of goods and services essential to the survival of the population, that it should be provided to the civilian population deprived of the basic necessities of life

as a result of conflict, and that the purpose of the aid should be to alleviate human suffering and protect human life, health and dignity.[45]

This principle is therefore violated when the purpose of the humanitarian aid is to support, directly or indirectly, one of the parties to conflict. It is not violated, however, when the motivation is not exclusively or principally humanitarian, provided that the aid is used properly. For example, if a State offers and provides humanitarian assistance with a view to disposing of surplus agricultural produce, such aid is considered to be humanitarian and therefore protected under IHL, provided that it is delivered to the needy civilian population for the purpose of alleviating human suffering.

Observance of the principle of humanity is reflected in the way in which assistance is provided and particularly in its compliance with other established requirements. Aid that is not neutral or impartial is unlikely to be considered humanitarian. Furthermore, the parties to a conflict are bound to respect the humanitarian nature of relief supplies and must not attempt to change their destination or purpose.

Impartiality

The principle of impartiality requires that humanitarian aid must be provided in a non-discriminatory manner[46] and must be proportionate to the needs of the population.

Non-discrimination implies that no distinction should be made between the beneficiaries of aid for the sole reason of belonging to a particular group, except on the grounds of humanitarian necessity. Aid must therefore be proportionate to the needs of the population in scope and in duration.

Three types of impartiality can be distinguished: overall impartiality; resulting impartiality; and non-discrimination. The first refers to all the humanitarian action taken by a particular entity, the second to the sum of the efforts of all entities, and the third to the absence of discrimination in each particular humanitarian action, i.e. when no distinctions are made other than those based on humanitarian criteria.

In theory, the most desirable is resulting impartiality, which takes into account the impartiality of all humanitarian efforts carried out by all hu-

45 See *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 23), para. 242. See also Resolution VIII of the 20th International Conference of the Red Cross and Red Crescent, Vienna, 1965.

46 *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 23), para. 242.

manitarian organizations, rather than that of a particular action carried out by an individual organization. Resulting impartiality is achieved when the needs of the population under the control of both parties to a conflict are equally covered, regardless of who provides the relief supplies to the population in the power of each party. As the situation now stands, however, this degree of impartiality cannot be considered to be required by law.

The need for humanitarian organizations to comply with the principle of overall impartiality is a controversial issue. In international conflicts there is no requirement at all in this regard,[47] as they are permitted to provide assistance to the population under the control of only one of the parties to the conflict. However, this is not the case in internal conflicts, in the light of the interpretation given by the International Court of Justice in its 1986 judgment and based on the link between the principle of overall impartiality and the principle of humanity.

It is therefore submitted that although desirable not only in observance of the principle of humanity, but also to ensure that the humanitarian mission is effectively respected by parties to conflict, overall impartiality cannot be considered a legal requirement under IHL at the present time.

Furthermore, the enshrinement of this form of impartiality in IHL would provide parties with another weapon to wield in the refusal of aid for the population of the adverse party, thus having the opposite effect to the one intended.

The provisions of IHL do, however, require humanitarian assistance to be provided with no discrimination except on the basis of humanitarian considerations. Once the target population groups (children, the sick and the elderly) and areas have been identified, such aid must be provided for the benefit of all those in need and with access to the centres that distribute supplies and provide assistance.

The warring parties, too, must respect the impartiality of humanitarian efforts undertaken by humanitarian organizations and personnel, but are bound to authorize the provision of humanitarian aid to the population of the adverse party, regardless of whether or not the needs of the population under their own control are adequately met.

47 See Article 27 of the Fourth Geneva Convention, Article 25 of the Second Geneva Convention and Article 8 of Additional Protocol I.

Neutrality

The requirement that humanitarian assistance must be neutral stems from its humanitarian nature and the preferential treatment provided for under IHL.

First and foremost, the principle of neutrality requires that a distinction must be made between combatants and civilians. Only civilians are entitled to receive humanitarian assistance. It is therefore vital that humanitarian organizations and personnel do their utmost to distinguish between the two. However, humanitarian assistance is still protected by law even when combatants manage to mingle with the civilian population and benefit from the aid provided, although the humanitarian organizations and personnel involved have done everything they possibly can to distinguish combatants from civilians and separate them. Despite their efforts, this mingling is unfortunately a dangerous and relatively common occurrence in camps for displaced people and refugees, and it is quite usual for them to contain people engaged in hostile activities both inside and outside the camp, as well as combatants during rest periods, when they are awaiting orders and when there is little military activity.[48]

Humanitarian organizations must prevent the parties to a conflict from directly or indirectly appropriating aid intended for the civilian population, but if they are unable to do so and the warring parties seize part of the aid, the remainder in the hands of those organizations is still entitled to protection. However, if an excessively large proportion of the aid is thus diverted and used to supply troops, the duty of the injured party to allow the free passage of aid should be reconsidered, particularly when the situation is particularly prejudicial to the interests of that party and the diverted aid becomes the basis of a war economy. An example of this was the conflict in Somalia in the early nineties, when 90 per cent of the humanitarian aid was appropriated by the warlords for their own benefit.

The principle of neutrality requires that humanitarians refrain from engaging in hostile activities; these clearly comprise undertaking parallel activities in support of one of the warring parties or providing aid in the knowledge that it is being used to support a particular party. Hostile conduct by humanitarian organizations and personnel would include

48 See *The causes of conflict and the promotion of durable peace and sustainable development in Africa. Report of the Secretary-General*, 16 April 1998, UN Doc. A/52/871.

transporting weapons in their vehicles, storing weapons on their premises, attacking combatants, allowing one of the warring parties to use their logistical facilities and means of communication, spreading propaganda among the civilian population, using or disclosing strategic information, enlisting troops, etc.

The possession by humanitarians of weapons for their personal defence or weapons confiscated from combatants and kept out of their reach, and the use of private security personnel belonging to one of the warring parties for their premises, distribution centres or means of transport are not considered hostile conduct.

It is considered a violation of the principle of "ideological neutrality" for humanitarian organizations and personnel to make public their opinion as to the reasons for a conflict, to support the cause of one of the parties or to exploit humanitarian issues to win support for one of the parties. This occurred, for instance, in the Yugoslav conflict: the general public's initial sympathy for the Bosnians who, according to humanitarian organizations working in the area, had been subjected to large-scale genocide, soon developed into support for the Bosnian cause and their political demands. The same can be said of the support of international public opinion for the Kurdish population in Iraq. However, humanitarian organizations and personnel are not required to remain silent in the face of serious and systematic human rights abuse on a massive scale.

They are legally permitted, and sometimes morally bound, to draw such situations to the attention of those in a position to provide a remedy.

Nevertheless, this is not the function of organizations that provide humanitarian assistance. There are other entities, including NGOs, the media, States and international organizations such as those mentioned above, which are better qualified to carry out this task and should take the initiative in such matters, not least because a public denouncement is likely to destroy the trust of the party concerned.

There are two sides to the coin of effective respect for the civilian population: assistance and protection. The fact that those who provide humanitarian assistance are often obliged, in the face of inaction by others, to provide protection as well generally hampers their own and other humanitarian work.

Finally, humanitarian organizations and personnel must ensure that hostile activities are not carried out on or from their premises and that the humanitarian aid they provide is not used for the benefit of a warring party.

The parties to conflict must respect the humanitarian nature of assistance and refrain from subjecting it to conditions that divest it of its material and ideological neutrality.

Conclusions

This analysis of the legal status, guiding principles and implementation mechanisms of humanitarian assistance shows that the greatest progress has been made in the first of these three areas.

There is now more than sufficient evidence of the existence of the right of victims of armed conflict to humanitarian assistance, derived from the right to life and from both international humanitarian and human rights law. Nevertheless, something should be done in order to guarantee the right to request aid from third parties in internal armed conflicts.

Although there is no doubt about the meaning of the principles of humanity, impartiality and neutrality, many complications arise in applying them to the implementation of humanitarian assistance. In any event, the problem lies not in inadequate legal definitions, but in the context in which humanitarian assistance is implemented and in the interests involved.

The main stumbling block of humanitarian assistance is the lack of effective mechanisms of implementation and enforcement, so that it often remains a mere *desideratum* rather than a real exercisable right.

The absence of specific, effective implementation mechanisms has prompted efforts to establish alternative means of ensuring that humanitarian aid reaches the people it is intended for. These include considering the failure to provide humanitarian assistance as a threat to international peace and security, with all the ensuing consequences, and the unilateral imposition of humanitarian aid on a State when it unlawfully refuses to accept it. Humanitarian assistance then becomes humanitarian intervention, and it is submitted that while such intervention may have a clear moral justification, it has no legal basis in international law as it now stands.

We would like to finish this article with an appropriate quote from the Secretary-General of the United Nations:

> "We enter the new millennium with an international code of human rights that is one of the great accomplishments of the twentieth century. Alas, human rights are flouted wantonly across the globe. Genocide, mass killings, arbitrary and summary executions, torture, disappearances,

enslavement, discrimination, widespread debilitating poverty and the persecution of minorities still have to be stamped out. Institutions and mechanisms have been established at the United Nations to eradicate these blights on our civilization."[49]

Hopefully, the 21st century will see this eradication for the benefit of all peoples.

49 Annual Report of the Secretary-General on the Work of the Organization, 31 August 1999, UN Doc. A/54/1, paras. 257-258.

Résumé

Le régime juridique de l'assistance humanitaire: acquis et lacunes

Ruth Abril Stoffels

Dans cet article, l'auteur analyse le contenu et les limites du droit à l'assistance humanitaire dans les conflits armés internationaux et internes. Son postulat est que l'assistance humanitaire est un droit qui découle directement du droit à la vie et qui, partant, est protégé tant par le droit international des droits de l'homme que par le droit international humanitaire.

Bien que la mise en œuvre de ce droit ne soit pas suffisamment garantie par les mécanismes dont sont dotées les branches du droit international susmentionnées, il convient de mettre en relief le travail considérable mené par le Conseil de sécurité des Nations Unies. Ces dernières années, en effet, cet organe a relié en différentes occasions les violations graves, massives et systématiques de ce droit à l'existence d'une menace pour la paix et la sécurité internationales.

Par ailleurs, il a fallu étudier de quelle façon le refus illicite que les parties en conflit opposent à l'entrée, au transit et à la distribution des secours crée une série de problèmes pratiques et juridiques. Des solutions possibles sont proposées.

Enfin, l'auteur souligne que seule l'assistance qui réunit les critères d'humanité, d'impartialité et de neutralité est protégée par le droit international. Néanmoins, des difficultés surgissent à l'heure non seulement de définir mais aussi de remplir ces critères.