Protection of the civilian population and the prohibition of starvation as a method of warfare

DRAFT TEXTS ON INTERNATIONAL HUMANITARIAN ASSISTANCE

by Peter Macalister-Smith

Armed conflict is often accompanied or followed by the outbreak of famine. The legal foundations of global humanitarian policy for dealing with famine are reviewed in this article, with special attention to conflict situations and their aftermath. The existing law is examined first, and then recent proposals in the form of drafts and expert studies which seek to develop legal instruments or policy relating to international humanitarian assistance are considered.

1. Introduction

The international humanitarian law of armed conflict, in treaty form, consisting of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, is widely recognized to be both a special and an important branch of public international law. The humanitarian law of armed conflict sets human values in the forefront and legally enshrines the principle that respect is owed to the human person in all circumstances. Yet the dangers to which civilians are exposed during armed conflict and in its wake have not been eliminated. It is well known that great suffering is frequently inflicted on the civilian population, and the international humanitarian response is often inadequate.

The remarks below concentrate on the law as it stands in the Geneva Conventions and in their Additional Protocols. Of course, ratifications and accessions alone do not guarantee that humanitarian prin-

ciples are in fact upheld or that people in need are always cared for. Implementation of the law is an important and related factor, but further consideration of this subject has been excluded from the present inquiry. Simply because the humanitarian law of armed conflict has been so widely accepted, it seems appropriate to review the contents of the existing law, having regard to the objective of attaining better standards of protection through the formulation of improved international humanitarian policy.

2. Protection of the civilian population

In armed conflict, every belligerent seeks to win, and military force is applied for this purpose. The law, however, seeks to introduce humanitarian considerations and it may do this best wherever military requirements can give way. As is often said, the law of armed conflict must achieve a compromise between military requirements and humanitarian considerations. If this is true, and the legal humanitarian sphere is to be extended, then it is necessary to find and define new areas where military requirements can give way without the loss of overriding military advantage.

Against a background of changing circumstances, accompanied by shifting nuances of advantage and disadvantage, it may still be possible to find such areas and to agree on ways and means of defining them. Such a process underlies the development of humanitarian law from its early days, in the 19th century, dealing first of all with the care of the wounded and sick members of armed forces, then going on to cover protection of and care for prisoners of war, and again expanding to give increasing attention to protection of and assistance for civilians.

Behind these developments is the basic principle that belligerents cannot legally employ every possible means to injure and defeat the enemy. Concerning the situation of the civilian population, a distinction was made between combatants and the victims of armed conflict or those not taking part in hostilities, including civilians. It need hardly be added that the distinction between combatants and civilians has often been disregarded or abused in practice. As a legal principle it was codified only in Article 48 of Additional Protocol I of 1977, which lays down the basic rule as follows:

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times

distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

Additional Protocol I thus represented a great advance in this area of law. However, even a provision such as that just quoted cannot fully guarantee protection for the civilian population. One problem is that in modern warfare virtually the whole of enemy territory, including almost all the economic infrastructure, has come to be regarded as a legitimate military target. Massive aerial bombardments may take place in the interior of a country and far removed from the attacking ground forces. This recognized means of long-range warfare, as witnessed during the Gulf conflict, can disable opposing forces, weaken them or even bring about their defeat without the greater hazards of occupation by land. As a consequence, however, the distinction between military and non-military objectives is obscured. Furthermore, during attacks on legitimate military targets, inflicting a certain degree of incidental damage on the civilian population is not in breach of the law, unless the damage is excessive in relation to the "concrete and direct military advantage anticipated": this rule was included in Additional Protocol I (Art. 57 (2) (a) (iii)). However, indiscriminate attacks are clearly prohibited (Art. 51 (4)).

While the recent conflict has demonstrated that weapons of ever greater accuracy can be developed, it has proved illusory to suppose that as a result the civilian population will be spared. Because military objectives can include almost any type of object under given circumstances—and they are defined widely in Additional Protocol I itself (Art. 52 (2))—this concept was balanced there by defining more closely the notions of *civilians* (Art. 50 (1)), *civilian population* (Art. 50 (2)) and *civilian objects* (Art. 52 (1)). Civilians are defined as persons who are not members of armed forces; in cases of doubt a person shall be considered to be a civilian (Art. 50). Civilian objects are defined as "all objects which are not military objectives..." (Art. 52 (1)).

For the first time in treaty law, both attacks and reprisals against civilian objects are explicitly prohibited by Additional Protocol I. In case of doubt, the presumption is in favour of civilian objects (Art. 52 (3)). The real difficulty, however, is that the definition of military objectives is neither strict nor comprehensive. Indeed, the definition of objects leaves room for a certain freedom of interpretation, and is couched in terms of "military advantage" to be gained (Art. 52 (2)). These provisions, relating to what is military and what is civilian, thus

operate in combination. In dealing with non-international conflicts, Additional Protocol II contains no detailed rules such as those just mentioned.

3. The prohibition of starvation

The borderline between military objectives and civilian objects is thus somewhat vague under the law as it currently stands. This fact, however, seems to reflect military reality. Objects which, under normal circumstances, are purely civilian objects, even including crops and agricultural land, may legally become military objectives if a party to a conflict uses them for military purposes.

Although it would seem that general and absolute protection is difficult or even impossible to attain, certain civilian objects are accorded special protection by the law, especially by the Additional Protocols. In particular, the important Article 54 of Additional Protocol I protects objects regarded as indispensable to the survival of the civilian population. The basic principle is set out in Article 54 (1) as follows:

"Starvation of civilians as a method of warfare is prohibited".

This very specific prohibition is simple, clear and absolute. A corresponding provision is found in Additional Protocol II with respect to non-international conflicts (Art. 14). However, under these provisions, the starvation of military personnel remains a legitimate method of warfare. This fact can have detrimental consequences for the civilian population and constitutes a notable weakness in the present state of the law.

The remainder of Article 54 of Additional Protocol I develops the basic principle by describing and prohibiting the most usual forms of attack that can lead to starvation of civilians. The full text of Article 54 (2) provides as follows:

"It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive".

This part of the article seeks to supply the detailed examples necessary to cover all eventualities. The objects indicated are accorded legal protection not only to ensure the survival of the civilian population as such, but also to prevent population displacements which expose civilians to especially high risk. The legal and factual protection of the fixed civilian objects and installations mentioned, such as agricultural areas, crops, storehouses and drinking water stations which cannot be moved or removed in time of attack, is of particular importance. Simply because they cannot be moved out of the zone of conflict, the only available protection is to prohibit attacks against them, and such a prohibition is found in Article 54.

Even these provisions are not absolute, however. A final clause in the same article allows for derogation from the prohibitions contained in Article 54 (2) in defence of national territory against invasion, "where required by imperative military necessity" (Art. 54 (5)). In other words, the provisions quoted with regard to civilian objects do not apply to the actions of a State on its own territory when defending itself against invasion. Furthermore, the article makes it clear that some foodstuffs and supplies may be used solely for the members of armed forces or in direct support of military action; in this case, the prohibition of attacks is weakened or becomes inapplicable. However, a fair reading of the whole article seems to indicate that at least the absolute prohibition of starvation of civilians as a method of warfare remains unrestricted, as expressed in the first paragraph.

Regarding non-international conflicts, it is important to note that the basic prohibition of starvation of civilians "as a method of combat" is also included in Additional Protocol II (Art. 14). Nevertheless, several of the supplementary rules found in Additional Protocol I are not included in the shorter instrument. While the provisions contained in Additional Protocol II are in essence comparable with those quoted above, and also include protection of objects indispensable to the survival of the civilian population, they are certainly reduced and simplified. However, the ICRC *Commentary on the Additional Protocols* rightly describes the relevant provisions in Additional Protocol II as a specific application of the general obligation of the Parties to the 1949 Geneva Conventions to guarantee humane treatment in all circumstances to persons taking no active part in hostilities (Geneva Conventions (GC), Common Art. 3)[1]. The basic underlying rules

[1] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Eds. Y. Sandoz, C. Swinarski and B. Zimmermann, ICRC, Martinus Nijhoff Publishers, Geneva, 1987, paras. 4790-4813, pp. 1455-1460.

expressed in the older conventions still apply, notwithstanding the difficulty of specifying the obligations in greater detail in the more recent law.

The ICRC *Commentary* also points out that Additional Protocol I did not change the law of naval blockade (Art. 49 (3))[2]. Blockade is a controversial matter, and its legal aspects will not be examined here in any detail. Nevertheless, the question cannot be ignored, because international law permits the imposition of a blockade on an enemy. Various aspects may be involved: a blockade may be a collective measure, or a sanction employed in a confrontation between States of unequal strength. It is admissible under Article 42 of the United Nations Charter. It may be an aspect of economic warfare. In armed conflict a blockade is a form of siege, intended to interrupt transportation and facilitate the defeat of the enemy by cutting off supplies. In whatever form it appears, a blockade usually has consequences that are not restricted to government or military objectives but also affect the civilian population. In fact, civilians are often the principal victims of such a measure, since they may have the lowest priority in the distribution of food supplies. In practice, during hostilities the places under blockade or siege are often regarded as a single military objective; thus, despite the prohibition of indiscriminate attacks, civilians can easily become the victims of starvation, even when passage is provided for medical consignments or relief (cf. GC IV, Art. 23; AP I, Art. 70; AP II, Art. 18 (2))[3].

To summarize at this point, two important legal prohibitions have been considered: the prohibition of starvation of civilians as a method of warfare, and the prohibition of attacks on civilian objects which are indispensable for the survival of the civilian population. When these protective measures have failed, relief actions are necessary. The provision of humanitarian assistance to the needy, the victims and the survivors is also an important method of giving susbstance to the principle of protection of the civilian population. Albeit belated and often inadequate, assistance is thus the active counterpart of protection. The concepts of protection and humanitarian assistance are closely related and complementary, as is often demonstrated in the working experience of an institution such as the International Committee of the Red Cross.

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[2] *Ibid.*, paras. 1895-1896, p. 606.

[3] GC: Geneva Convention; AP: Additional Protocol.

4. Humanitarian assistance: the legal foundations

Recent conflicts have again shown how seriously the civilian population can be affected, directly or indirectly, and how sudden and urgent the need for assistance can be. The subject of humanitarian assistance to civilians under the international humanitarian law of armed conflict should therefore be examined in greater detail. Only a brief review of this wide subject can be undertaken here, concentrating first on the established legal foundations.

The terms employed by the Geneva Conventions and Additional Protocols are usually "relief" or "relief actions". Nevertheless, wherever these expressions are not explicitly required by the context, the terms "humanitarian assistance" or "humanitarian assistance operations" will be preferred here. The word "relief" has possible negative overtones, whereas the more correct and neutral description "humanitarian assistance" is already in widespread use and its further application should become a standardized feature of the international vocabulary.

The earlier law, the Fourth Geneva Convention of 1949, contains two different approaches to humanitarian assistance in favour of the civilian population. One general article stipulates the free passage of certain consignments (GC IV, Part II, Art. 23). A group of more specific articles covers relief in occupied territory (GC IV, Part III, Arts. 59-62). The article dealing with consignments is limited and restrictive; and Occupying Powers are made responsible for "ensuring the food and medical supplies" of the civilian population in occupied territory (GC IV, Art. 55). The Fourth Geneva Convention does not create a clear obligation to undertake assistance operations although Article 59 is worded in a more imperative way than the other provisions.

The deficiencies in the Geneva Conventions' provisions relating to humanitarian assistance are to some extent remedied by Additional Protocol I of 1977 (Art. 70). However, it must be recalled that the Additional Protocols have not been ratified as widely as the Geneva Conventions. Thus for some States the old law still applies, while for other States the more recent instruments supply the applicable legal rules. Moreover, the Protocols cannot be said to provide all the solutions to contemporary problems of humanitarian assistance. Where the law is weak, or cannot strictly be applied at all, even emphasis rightly placed on better implementation or positive interpretation may well be incapable of bringing about substantial improvements in practice.

Article 70 of Additional Protocol I provides that relief actions for the civilian population "shall be undertaken". This form of wording, it has been commented, could imply a duty for the Parties to the Protocols that are in a position to do so to undertake or to contribute to such actions in favour of a stricken country. It also indicates the existence of a duty to accept offers of humanitarian assistance which meet the requirements mentioned. Two requirements mentioned in Article 70 are that the civilian population must be inadequately supplied, and that relief actions must be humanitarian and impartial and conducted without any adverse distinction. The most important qualification, however, is that relief actions are "subject to the agreement of the Parties concerned" (Art. 70 (1)). Such agreement, if granted, as it should be, may nevertheless have conditions attached.

With regard to non-international conflicts, Common Article 3 of the Geneva Conventions provides that an impartial humanitarian body may offer its services to the Parties. The International Committee of the Red Cross is mentioned as an example of such a body. Additional Protocol II of 1977 added that relief actions for the civilian population "shall be undertaken subject to the consent of the High Contracting Party concerned" (Art. 18). As is well known, this formulation has given rise to controversy and to difficulties of access in situations where assistance can be most urgently needed. Moreover, in some cases the applicability of Common Article 3 or of Protocol II may simply be denied by the Party concerned. In other cases, notwithstanding a need for humanitarian assistance, the degree of violence in a given situation may be insufficient to enable the international humanitarian law of armed conflict to be invoked. Such cases again exemplify weaknesses in the existing law.

The relevant provisions of the Geneva Conventions and Additional Protocols emphasize the humanitarian and impartial nature of relief actions, and of relief societies. The relief societies or agents of humanitarian assistance encountered in the field are very diverse in character, covering a wide spectrum of humanitarian action. For example, relief operations may involve military personnel and military services, national civil defence organizations, National Red Cross or Red Crescent Societies, other authorized relief societies, the International Committee of the Red Cross, the League of Red Cross and Red Crescent Societies, intergovernmental organizations such as agencies of the United Nations, as well as national and international non-governmental organizations or voluntary agencies, either based in the country concerned or coming from abroad, not to mention the spontaneous efforts of private persons.

This list of agents of national or international assistance serves to illustrate the great variety of contemporary humanitarian responses, not all of which are taken into account fully in the Geneva Conventions and Additional Protocols, and not all to an equal extent. In some cases, admittedly, operational organizations are not constituted for exclusively humanitarian purposes, or their activities may not reflect exclusively humanitarian principles. In addition, competition in humanitarian matters is a fact that may aggravate the problems of assistance in situations where difficulties and obstacles to effective action already abound.

5. Humanitarian assistance: at the frontiers of international law

In the light of the above considerations, it is clear that those parts of the international law of armed conflict which deal with humanitarian assistance for civilians are relatively weak in contemporary circumstances. Moreover, as with other parts of the law, application of the relevant provisions will involve interpretation of the legal texts, usually under difficult field conditions. The national or local authority concerned will always seek to apply its own interpretation, which may be narrow and restrictive. If the Parties so intend, they can even adhere to the letter of the law in order to evade compliance with its spirit.

In comparison with the periods when the existing legal instruments were adopted, in 1949 and 1977, circumstances today are both more acute and more complex. There are now many more private or non-governmental organizations involved in humanitarian activities. Non-governmental organizations work in all types of situations, and their actions form an essential part of the global humanitarian system. Resources provided by governments are sometimes channelled through such organizations in considerable quantity. At times, governments providing humanitarian assistance may even find it expedient to remain in the background, as quasi-anonymous "donors", leaving all operations conducted inside an affected region to their intermediaries. In other situations, States are willing to adopt a much more prominent role, and may even consider undertaking collective measures for humanitarian purposes.

It would thus be hard to deny that three related factors — consent to humanitarian assistance, access to victims, and control over both the operations and the agencies involved — are of central importance in law and in practice. Although authorities can exercise legal or factual discretion to apply controls to humanitarian operations, or even to withhold consent to them, the range of provisions relating to such operations and already embodied in international humanitarian law indicates a clear general development. The overall purport in the Geneva Conventions and their Additional Protocols is that, if at all possible, humanitarian organizations should be given access to areas of need and to victims of conflict who require assistance. But there is a wide gulf between "should" and "must". Although the law may not necessarily seek compulsion, further attention and progressive development could clearly be usefully concentrated on these important areas.

When they have no other means of survival, people will flee *en masse* to places where they hope to obtain the necessities of life. The destructiveness of war and the weaknesses of existing law have contributed to the recent phenomenon of humanitarian agencies establishing relief centres just outside an affected country. A neighbouring State may well provide a more suitable location for humanitarian assistance operations, including treatment of the sick and wounded, reception of displaced persons, and distribution of food and medicines. Such "external" assistance is significant, since it provides greater opportunities for the conduct of humanitarian operations, though in some cases it may result in new problems, including the unwanted influx of additional refugees. The necessity for this type of response appears to be a direct result of the inadequacies in the present legal context of humanitarian action.

The subject of humanitarian assistance can hardly be adequately discussed without raising the important aspect of coordination of operations, an aspect which is relevant in both war and peace. However, from the strictly legal point of view there is not much to add: the law has not yet been developed in this area, although there is general agreement that coordination can improve the effectiveness of humanitarian action. In practice, a variety of approaches is found among the agencies and at the different levels involved. Defining and achieving appropriate coordination mechanisms has not proved easy. In principle, every person and organization seems to be in favour of coordination, but in practice problems arise in determining who shall coordinate and who shall be coordinated. So far, the main responses in this area are of a political, institutional or administrative nature rather than of a legal character.

As already indicated, the need for humanitarian action in favour of civilians arises not only during conflict, but also in peacetime. In the immediate aftermath of a conflict, in the period of transition to peace, and in the phase of reconstruction there is a compelling need to start or to continue humanitarian assistance operations, and yet there is also the weakest legal foundation for such actions. The needs, the practice and the law are most at variance in this zone. The needs of the victims are at their greatest; the practice of assistance is at its most difficult in view of the disruption of normal relations; and the law that has been considered above, if it is applicable at all, has only a minimum to offer in terms of concrete measures that could contribute to the central aspects of assistance operations. Often most serious, extending across the boundary between war and peace, are the problems of humanitarian assistance for refugees and displaced persons, especially in cases of massive exodus. Moreover, humanitarian assistance is urgently required in various other types of disasters in peacetime, unconnected with armed conflict.

6. Draft texts and expert studies

The pursuit of the above considerations has led discussion to the point where existing legal texts are left behind and possible future developments come into view. It is therefore appropriate to examine briefly some of the different proposals and studies made in recent years with the aim of developing legal instruments or policy relating to humanitarian assistance in general. In the Annex to this article, the principal texts referred to below are listed chronologically, with an indication of the original source for further reference.

One of the first matters raised in this context, and examined within the United Nations, related to the legal status of special relief units. The questions of status, jurisdiction and legal liability which may arise whenever personnel or units undertake humanitarian assistance activities outside their own country, or are made available by international organizations, were raised in the United Nations General Assembly in 1965. Proposals relating to the legal status of relief units covered three situations in which such units might operate: first, as a unit entirely within the United Nations system; second, as a national unit placed at the disposal of the country in need, with the United Nations as a party to the arrangements; and third, as a national unit operating independently under a bilateral agreement. It was suggested that a long-term objective might be to regulate this matter by an international agree-

ment or agreements[4]. The preparation of guidelines for such agreements was given consideration within the United Nations. However, despite general consensus on the need to facilitate humanitarian assistance operations, the differing views of potential donor and recipient States as well as widely varying field conditions have hindered the further development or use of such guideline agreements.

The International Law Association (ILA), a non-governmental organization composed of legal scholars from all over the world, proposed a model agreement on the status of relief units. The ILA started to study legal problems of disaster relief operations in the early 1970s and concentrated on formulating a draft model agreement intended to regulate some of the problematic aspects of international humanitarian action, based on agreements which had actually been used in assistance operations. The final version of the ILA's model agreement was presented in 1980. It emphasized technical matters which can be of importance during a humanitarian assistance operation. Within the context of the model agreement, such an operation was seen exclusively as one which has been requested or accepted by the receiving State.

The next proposal is best referred to as "Measures to expedite international relief", the title used by its promoters. In the resolution which established the Office of the United Nations Disaster Relief Co-ordinator (UNDRO) in 1971, the United Nations General Assembly invited potential recipient governments to consider appropriate legislative or other measures to facilitate the receipt of assistance[5]. The resolution referred to some issues which could contribute to more effective relief operations, emphasizing the problems of overflight and landing rights, and necessary privileges and immunities for relief units. A study of this matter, started jointly by UNDRO and the League of Red Cross and Red Crescent Societies, concentrated on identifying obstacles to the delivery of emergency relief supplies to consignees within disaster-stricken countries. A small step towards overcoming such obstacles was taken in 1976, when the Customs Co-operation Council adopted an instrument on customs procedures relating to urgent consignments. In 1977 a final report was produced, containing recommendations which concentrated on facilitating the functioning of relief personnel and the delivery of relief consignments. In the same year, the United Nations Economic and Social Council, the International

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[4] See United Nations Doc. E/4994, Annex III, 13 May 1971.

[5] See United Nations General Assembly Resolution 2816 (XXVI), para. 8 (e).

Conference of the Red Cross and the United Nations General Assembly all reaffirmed the measures to expedite international relief. Although the expected measures granting the necessary facilities and immunities and taking other relevant action did not materialize, more recent studies have reverted to the original proposals.

The work was carried forward in a study published in 1982 by the United Nations Institute for Training and Research (UNITAR) entitled *Model Rules for Disaster Relief Operations.* The stated purpose of the model rules was "to contribute to closing the lacunae in international humanitarian law regarding assistance to victims of disasters" and "to overcome some of the legal restrictions and bureaucratic impediments which are often major obstacles to the success of a relief operation". Seventeen model rules for bilateral agreements were formulated. The scope of application of the proposed rules extended to natural and man-made disasters. However, no definition of the term "disaster" was considered necessary by the authors of the study, because the proposed rules were designed to be brought into effect only on the basis of an agreement between the parties in particular circumstances.

The Office of the United Nations Disaster Relief Co-ordinator continued to consider possible legal measures which could help to improve the provision of disaster relief. A report presented to UNDRO in 1983 concentrated on technical impediments to the delivery of relief supplies and included a proposed draft convention for expediting emergency assistance. The draft convention was then considered by a group of experts who made further recommendations with a view to enabling the proposals to gain wider acceptance. Again, however, no further developments took place. Not all organizations involved or potentially involved were in favour of such an approach. A draft convention to facilitate assistance was also presented during the same period within the Organization of American States, but it encountered resistance among the members and was shelved.

The International Atomic Energy Agency (IAEA) attempted to formulate an instrument designed to facilitate emergency assistance in the event of radiation accidents. Guidelines for mutual arrangements were adopted in 1983. Conventions on assistance in the event of a radiological emergency and on early notification of a nuclear accident were introduced in 1986 under the auspices of the IAEA following the Chernobyl disaster. The relatively rapid response of the IAEA member States in this special case is of interest, and the legal obligations contained in these very specific conventions deserve to be closely scrutinized. However, it remains uncertain to what extent the 1986 convention on assistance in a radiological emergency can offer a

model for a general field where humanitarian operations are needed in different circumstances, and are conducted with regularity by a great variety of organizations and other agents.

Promotion of a new international humanitarian order, emphasizing that humanitarian issues remain relatively neglected in international relations, was a more recent proposal brought before the United Nations General Assembly. The expressed objective of the proposal was a comprehensive approach to humanitarian problems, and the closing of the existing gaps in basic humanitarian instruments and mechanisms for humanitarian action. One suggestion in the original proposal relevant to the present subject was a universal declaration of humanitarian principles, which would support the development of humanitarian law beyond the area of armed conflict. The work is currently being pursued by the *Independent Bureau for Humanitarian Issues*, and the topic remains on the agenda of the United Nations General Assembly.[6]

Other proposals and initiatives, in published reports or studies with particular objectives, have discussed the subject of relief operations and even advocated the adoption of various types of instruments relating to humanitarian assistance. Separate proposals relate to minimum humanitarian standards, concentrating on a wider range of civil and political rights but without ignoring the aspect of humanitarian actions. This is not the place to discuss these proposals in detail. Nor is it possible to mention all the relevant internal resolutions and other texts of many of the organizations involved, such as the 1969 Red Cross Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, or the Principles and Rules for Red Cross Disaster Relief. Such texts are obviously closely related to the present subject.

Experience with all the various existing texts, and examination of new proposals and studies make it clear that extending the legal foundations for humanitarian assistance in the situations of greatest need constitutes a major challenge. If this task is to be made an objective of contemporary international humanitarian policy, it would be reasonable to suggest that lessons should first be drawn from the results of previous work tending in the same direction.

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[6] See United Nations General Assembly resolution 45/101 of 14 December 1990.

7. Conclusions

While it may be true to assert that the present international regulation of humanitarian efforts could be improved, the exact nature of the legal responses that should follow is not yet apparent. Various attempts have been made to regulate international humanitarian assistance activities in general, and internal regulations already direct the activities of particular organizations and could supply guidance for wider solutions. Yet there is still no international normative instrument which deals comprehensively with humanitarian action, which has gained general acceptance, and which can be applied globally. Such an instrument could in theory take the form of a convention, a declaration, a series of bilateral agreements based on a common pattern, or simply a set of working guidelines accepted by the prinicipal agents involved. It may even be appropriate to think not only or primarily in terms of global responses, but to concentrate on developing more effective regional solutions applicable in the geographical areas of greatest need.

Whatever approach may prove the most suitable, the problem of legal measures relating to international humanitarian assistance is likely to arise at several different levels. One important level is that of technical arrangements to expedite assistance: the concern here is to facilitate the efficient delivery of relief consignments, the movement and functioning of relief personnel, and the provision of adequate communications. Another level of legal interest relates to more fundamental aspects, to the underlying principles of humanitarian assistance: here it seems necessary to consider the framework for initiation and control of assistance operations, and adherence to recognized humanitarian standards during such operations. A related and more ambitious objective might cover a range of humanitarian issues broader than international assistance alone; the results could be reflected in a comprehensive charter or universal declaration of general humanitarian principles. Such a charter or declaration could remedy the lack of guidance in the United Nations Charter with regard to humanitarian matters. The chosen instrument or instruments would also have to clearly approach the questions of a right or duty to provide and a right or duty to receive humanitarian assistance.

Practical measures designed to expedite humanitarian activities, including the appropriate institutional arrangements, remain an important area for further development. Such measures should be based on relevant fundamental principles, with legal and purely institutional responses regarded as complementary. However, the humanitarian field

is very wide, and assistance is required in many different situations. From a global perspective, the greatest needs for humanitarian assistance exist within the context of poverty and underdevelopment. Assistance for refugees and displaced persons should also be taken into account; here again, there is a close relationship with development issues and human rights. The need for humanitarian assistance is in many cases a symptom of other underlying problems, including political and security aspects, either within States or between States. In such a wide field of action, two main approaches therefore appear feasible: either the overall scope of any draft text should be carefully defined and restricted, which would be a difficult supplementary task in itself; or the proposed instrument must be globally conceived and left open to interpretation according to need. Neither of these results may be easy to achieve while incorporating provisions of reasonable practical effectiveness.

The problems of initiation, acceptance and control of humanitarian assistance operations must be faced by those who draft any proposed new instrument or conceive any new institutional arrangements. States able to provide assistance do not necessarily believe that they are under a legal duty to do so, and States needing assistance do not always agree that they must accept such operations. In addition, special problems arise in the context of humanitarian assistance provided to a *de facto* regime, or to persons in need in an area of territory temporarily outside effective governmental control. In general, a receiving State must consent to receive assistance, and an assisting State or organization must be willing to provide it. These are still the two main conditions for humanitarian operations, and the approach to them will largely determine the character of any draft text or new arrangements.

Several special difficulties and recurring problems also have to be faced. One example is the question of transit through third countries: detailed regulation of this matter has often seemed best left to specific agreements concluded between the parties concerned, but this can have the disadvantage of creating partial or fragmentary rules on the subject. The same applies to privileges, immunities and facilities, which are controversial matters likewise sometimes regarded as best governed by specific agreements. The old and recurring problems of coordination and leadership of humanitarian assistance operations remain unresolved in legal and institutional terms, even if a political consensus on the nature of major international operations shows signs of emerging in the aftermath of recent events.

A further consideration is the difficulty of providing satisfactory definitions of even the most common terms employed in the humanitarian sphere, including a definition of the concept "humanitarian" itself, which in practice may be stretched beyond all recognition. The best approach seems to be to avoid any attempt to formulate definitions that prove too difficult. In any case, no definition can by itself eliminate the political component present in so many humanitarian matters.

If humanitarian assistance is provided only with the consent of all the Parties concerned, then no explicit definition of the scope of any proposed instrument or arrangements would be necessary. It is thus reasonable to consider whether any proposed text or the corresponding institutional arrangements should deal preferentially with what might be called mainstream cases, where humanitarian assistance is required and is in fact provided with the willing consent of all concerned. This avenue could lead quite logically to the consolidation and perhaps even "codification" of accepted current practices of a largely technical nature.

On the other hand, a new legal text or revised institutional arrangements could attempt to deal systematically with the more controversial matters and with really difficult cases, such as those arising during and on the periphery of internal conflicts. Such an approach should respond more closely to the specially pressing needs now regularly arising, and might ultimately bring about more far-reaching "progressive development" of the law.

It is not easy to say which of the two approaches may be the more appropriate at present, and indeed they should not be regarded as mutually exclusive; in fact a combined approach may be more realistic. However, the choices involved illustrate a dilemma in establishing priorities. In both cases it will be much more difficult to achieve adoption of a new instrument in a binding legal form rather than in a non-binding form. All these considerations, together with the general factor of reciprocity of obligations, which may require attention, appear particularly relevant to any new efforts to deal with the numerous situations in which the application of humanitarian principles is desirable.

Many suggestions and even some concrete attempts have been made to improve the applicable law. Is this a sign that there is a gradual movement in the direction of further codification or progressive development? Or does the lack of success of past initiatives demonstrate that little progress is possible at the moment? Despite the great needs, all the elements of realism have clearly not yet been

found. Quite simply, the much closer alignment of interests that is a condition for genuine progress has not yet taken place. A promising indication, however, is the appearance on high-level agendas of reforms concerning humanitarian issues. It might be timely, therefore, to analyse even more closely how the separate interests of the victims, of assistance agencies and institutions, and of the States and their authorities sometimes diverge so greatly that, as all too frequently seen, they impede urgently needed humanitarian actions in favour of the civilian population.

The important common feature of most of the relevant draft texts so far produced is the fact that they concentrate on what may be called a humanitarian kernel, set within the whole complex of problems relating more generally to human rights and human dignity, not only in war but also in peace. Most of the drafts deal primarily with the central aspects of humanitarian assistance, in essence suggesting that it may be possible to obtain assistance, and to transport it to the area of need and distribute it to the suffering and needy, on the basis of fundamental humanitarian principles. Despite the evident difficulties in achieving further progress this minimum humanitarian position may at least have some chance of being strengthened and developed, complementary to the existing instruments and approaches. Indeed, as a final thought, if humanitarian matters become a subject of greater international concern, this could in turn have obvious beneficial repercussions in other areas of policy.

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Annex

INTERNATIONAL HUMANITARIAN ASSISTANCE

Selected instruments, draft texts, proposals and expert studies (since 1976)

1. Annex concerning urgent consignments (Annex F.5 to the *International Convention on the simplification and harmonization of Customs procedures*, Kyoto, 18 May 1973), approved in Brussels on 18 June 1976; relevant provisions reproduced in United Nations Doc. A/32/64 (1977), Annex II.
2. *ASEAN Declaration for Mutual Assistance on Natural Disasters,* 26 June 1976 (Declaration of the foreign ministers of Indonesia, Malaysia, Philippines, Singapore and Thailand: Association of South-East Asian Nations).
3. "Measures to expedite international relief": XXIIIrd *International Conference of the Red Cross*, Resolution VI; *Office of the United Nations Disaster Relief Co-ordinator*, Report of the Secretary-General, United Nations Doc. A/32/64, Annex II, pp. 1-7, 12 May 1977; *United Nations Economic and Social Council* resolution 2102 (LXIII), 3 August 1977; *United Nations General Assembly* resolution 32/56, 8 December 1977.
4. Resolution 102 (1978) on "Powers and responsibilities of local and regional authorities regarding civil protection and mutual aid in the event of disasters occurring in frontier regions", with appendix of two model agreements, *Conference of Local and Regional Authorities of Europe*, 22 June 1978.
5. "Draft model agreement relating to humanitarian relief actions", *International Law Association,* Report of the Fifty-Ninth Conference, Belgrade, 17-23 August 1980 (ILA: 1982), pp. 512-527.
6. "New international humanitarian order" — Jordan: request for the inclusion of an additional item in the agenda of the thirty-sixth session. *United Nations* Doc. A/36/245, 30 October 1981.
7. M. El. Baradei *et al.*, "Model rules for disaster relief operations", *United Nations Institute for Training and Research,* Policy and Efficacy Studies No. 8 (UNITAR: 1982), UN Sales No. E.82.XV.PE/8.
8. "Draft Convention on expediting the delivery of emergency assistance", *United Nations General Assembly and Economic and Social Council, Office of the United Nations Disaster Relief Co-ordinator,* Report of the Secretary-General, United Nations Doc. A/39/267/Add.2 — E/1984/96/Add.2, pp. 5-18, 18 June 1984.

9. "Draft Inter-American Convention to facilitate assistance in cases of disaster", Recommendations and Reports of the *Inter-American Juridical Committee, Organization of American States,* Official Documents (OAS, Secretariat for Legal Affairs: 1985), Vol. XVI (1984), pp. 34-38.
10. Resolution of the *International Academy of Human Rights*, Copenhagen Symposium on the "Right to Humanitarian Assistance in the Perspective of the Chernobyl Accident", 31 August 1986.
11. "Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency," Vienna, 26 September 1986, *International Atomic Energy Agency*, Doc. GC (SPL. I)/Resolutions (1986).
12. Resolution on the "Recognition of the duty to provide humanitarian assistance and the right to this assistance", *Conference on Humanitarian Law and Morals*, Paris, 26-28 January 1987.
13. "Draft International Guidelines for Humanitarian Assistance Operations", *Humanitäres Völkerrecht, Informationsschriften,* German Red Cross, Bonn, Vol. 3, 1990, pp. 143-146.
14. "Draft Declaration of Minimum Humanitarian Standards", adopted in Turku/Åbo on 2 December 1990, *American Journal of International Law*, Vol. 85, 1991, pp. 375-381.
15. "Humanitarian assistance to victims of natural disasters and similar emergency situations", *United Nations General Assembly* resolution 45/100, 14 December 1990. See also the Report of the Secretary-General, Doc. A/45/587 (1990).