From humanitarian assistance to *"intervention on humanitarian grounds"* ?*

by Maurice Torrelli

Affirmation of the *"devoir d'ingérence"*

While States ever more ardently defend their sovereignty, which does little to improve international cooperation, and as the application of humanitarian law in armed conflicts declines, men of good will throughout the world are doing their utmost to reverse these trends. The century now drawing to a close has witnessed a plethora of private initiatives taken in an effort to temper reasons of State by more humane considerations. Many non-governmental organizations, some symbolically styling themselves "without borders", have taken over where governments can no longer cope, organizing relief, combating drought, preserving the environment or improving sanitary conditions. These voluntary organizations whose vocation is to serve mankind are without question pursuing humanitarian aims as defined in the first Red Cross principle, which is "to prevent and alleviate human suffering wherever it may be found", and whose "purpose is to protect life and health and to ensure respect for the human being". Emergency medical assistance organizations, stating that they wish to remain independent of the powers that be, demanding freedom of action to help all victims and encouraged by the example set by Henry Dunant and the ICRC, do not hesitate to claim that their activities fall within the terms of an as yet unwritten body of law entitling them to bring assistance to needy civilian communities, even against the will of the government. Indeed, they believe that receiving proper care is one of the basic human rights of the individual, wheresoever and whosoever he may be. Such basic rights know no national boundary. While

* United Nations translate the French "droit d'ingérence humanitaire" by "right to intervene on humanitarian grounds". See also note 1, page 215.

awaiting recognition of their activities, the duty to intervene is created by moral considerations.

In 1987, the publication of the proceedings of an international conference organized by Dean Mario Bettati and Dr. Bernard Kouchner with a deliberately provocative title — "The duty to intervene" — was well received by the French authorities. Already, in 1981, in Mexico, the President of the Republic had referred to the offence of failing to assist a people in danger and regretted that that offence had no legal existence. On 5 October 1987, he stated: "As suffering can be experienced by any individual, it is universal. The right of victims to be succoured when they call for help, and to be succoured by volunteers who see themselves as professionally neutral in fulfilling what has come to be known as 'the duty of humanitarian intervention' in situations of extreme emergency, will certainly be included one day in the Universal Declaration of Human Rights. For no State can be considered sole proprietor of the suffering it causes or harbours".

This approach, supported by the Foreign Minister, Mr. Roland Dumas, was to send French diplomats at the United Nations into action. France "believes that the law of humanity takes precedence over the law of nations and should always serve as a basis for the latter; and that the duty to provide humanitarian assistance, ever more an integral part of today's universal conscience, should be embodied in international legislation in the form of a 'right to intervene on humanitarian grounds'".[1] Humanitarian issues have become a central theme of French activity within the UN. It was on the initiative of France that, on 8 December 1988, the General Assembly adopted resolution 43/131 entitled "Humanitarian assistance to victims of natural disasters and similar emergency situations". On 14 December 1990, resolution 45/100 proposed consideration of relief corridors to facilitate access to victims. That spate of activity was to gain particular prominence when, on 5 April 1991, the Security Council stepped in with resolution 688 to provide protection for Kurds in Iraq, this being a measure "without historical precedent as it provided for and permitted a right of intervention in the internal affairs of a State".[2] The Security Council followed this up on 23 January 1992 with resolution 733 on the situation in Somalia.

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[1] Roland Dumas, "La France et le droit d''ingérence humanitaire'", *Relations internationales et stratégiques*, No. 3, 1991, p. 57.

[2] *Ibid.*, p. 60.

Ignorance of the right to humanitarian assistance

Assistance, interference, intervention — the confusion is total, for interference or intervention in the internal affairs of a State, even for humanitarian reasons, is still condemned in theory by international law. What is new here is a surprising ignorance of legal realities. The discussion has taken a political turn, while the right to humanitarian assistance during periods of armed conflict has been recognized since 1949 by the Geneva Conventions, to which 170 States are now party.[3] When not accused of acting as an accessory to murder by its silence,[4] the ICRC is depicted as "an association like any other, whereas in fact it has a specific role, precisely relating to the right to assistance".[5] To raise the discussion above political considerations, the first thing to do is to recall that a right to assistance already exists, before wondering what might happen if a right of intervention were recognized.

I. ASSISTANCE — A RIGHT RECOGNIZED IN THE NAME OF HUMANITY

The variety of terms used in humanitarian law, such as "relief", "relief operation" or "assistance operation", should not obscure the fact that humanitarian assistance, all specific definition apart, is basically the provision from without of health services, food or equipment to help victims of a conflict, whether international or internal. There are many provisions which acknowledge this principle and its terms and conditions, which may vary with the situation. This article is no place for an analysis of the details, which have been studied on several occasions in the *International Review of the Red Cross*.[6] Here it will

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[3] Mario Bettati: "This principle, while not appearing in the 1949 Geneva Conventions, is not conceptually alien to them". "Un droit d'ingérence?", *RGDIP* 1991, p. 645.

[4] In this connection, Bernard Kouchner in Biafra went so far as to bear witness "against the Red Cross — with the support of Sartre — because it closed its eyes to the food embargo used as a means of warfare. I did not wish to repeat the error of the last war when the Red Cross kept silent about the extermination camps". *Le monde aujourd'hui*, 9-10 March 1986, p. XII.

[5] Jean-Christophe Rufin, "La maladie infantile du droit d'ingérence", *Le Débat*, Gallimard, No. 67, November-December 1991, p. 25.

[6] See especially Jean-Luc Blondel, "Assistance to protected persons"; Boško Jakovljević, "The right to humanitarian assistance"; Michael A. Meyer, "Humanitarian action: a delicate balancing act"; Peter Macalister-Smith, "Non-governmental

suffice to recall the general lines. The right to offer assistance is broadly recognized but the exercise of that right is subject to permission from the State. Indeed, the right to humanitarian assistance has to be reconciled with the preservation of sovereignty.

A. A general right of initiative

The ICRC — and any other impartial humanitarian body in international or non-international armed conflicts — enjoys an acknowledged right of initiative, that is to say, the right to propose its services. Hence, according to Articles 9, 9, 9 and 10 respectively of the four Geneva Conventions, "the provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief". Article 3 common to all four Conventions further states that "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". Even though the ICRC does enjoy a privileged position[7] and appears as a model for all other bodies that might wish to offer their services, it does not have a monopoly in this respect.

These general provisions apart, there are other articles that recognize the right of initiative, but they often specify by whom it may be exercised. For example, Article 27 of the First Convention refers to "a recognized Society of a neutral country", and Article 64 of Protocol I concerns "civilian defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations". In

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organizations and coordination of humanitarian assistance", *IRRC*, No. 260, September-October 1987. Frédéric Maurice and Jean de Courten, "ICRC activities for refugees and displaced civilians", *IRRC*, No. 280, January-February 1991. Peter Macalister-Smith, "Protection of the civilian population and the prohibition of starvation as a method of warfare", *IRRC*, No. 284, September-October 1991.

[7] For example, Article 81, para. 1, of Protocol I reads "The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions ..."; paras. 2 and 3 state that the parties shall grant the "facilities necessary" to Red Cross organizations or "facilitate in every possible way" assistance by other Red Cross organizations; under para. 4, "the High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations".

other cases, the texts merely envisage the possibility or necessity of external aid, without going into details. This is the case, for example, with Articles 23, 59-62 and 108-111 of the Fourth Convention, as supplemented by Article 69 of Protocol I, with respect to meeting the needs of the population of an occupied territory. Article 70, para. 1, of Protocol I also states: "If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions". In such cases, the offer of external assistance may be made by public or private bodies, States, international organizations, the ICRC, National Red Cross or Red Crescent Societies and NGOs.

As this right of initiative has been legally accepted by States, it cannot be denounced as undue interference when exercised. By recognizing this right, States have simply expressed their sovereignty. Indeed, this view is supported by many provisions, such as Article 27 of the First Convention, Article 64 of Protocol I and Article 70 of the same Protocol. In its decision concerning *military and paramilitary activities in and against Nicaragua*, the International Court of Justice confirmed that assistance limited to the underlying purposes of the Red Cross and given without discrimination was not to be condemned as an intervention in the internal affairs of a State. The resolution adopted on 13 September 1989 by the Institute of International Law at its session in Santiago de Compostela stresses in Article 5 that "an offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that State".[8]

B. The obstacle of consent

Consent — the expression of sovereignty — is hence a basic principle in the exercise of the right to humanitarian assistance in armed conflicts.

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[8] *Yearbook of the Institute of International Law*, Vol. 63-III, 1990, pp. 338-345.

(a) Limited powers

However, this is no arbitrary power. The expression of this consent is subject to the principle of good faith. It is conditioned by respect for the rights that the State has conferred on its nationals, the victims of the conflict, by virtue of Articles 7, 7, 7 and 8 respectively of the four Conventions and the provisions of Article 18, para. 2, of Protocol II. Under Articles 54 of Protocol I and 14 of Protocol II, starvation is prohibited as a method of warfare. Consent also depends on the nature of and the circumstances attending the humanitarian assistance. A case in point is Article 23 of the Fourth Convention, which requires all States party to the Convention to allow the free passage of all medical and hospital stores, objects necessary for religious worship and essentials for children, expectant mothers and maternity cases. Similarly, Article 59 of the same Convention, referring to the situation of an occupied territory, requires the occupying power to accept relief supplies if the population is inadequately supplied. The provisions of Article 59 are compulsory. Article 70, para. 2, of Protocol I provides that "the parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party". Finally, in non-international armed conflicts, the State no longer has the exclusive power of consent.

(b) Shared powers

Article 3 common to the four Conventions constituted a veritable legal revolution because it meant that each State agreed, in the humiliating situation in which its authority was flouted, that its relations with the sector of the population rebelling against it would thenceforth be governed by international humanitarian law. The exact scope of that provision with respect to assistance is all too often unknown. This is particularly unfortunate since in such a situation, the most frequent form of armed conflict since 1949, it is the rebels who are in greatest need of assistance, especially medical.

It should be remembered that, according to common Article 3, "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". Here there are two possibilities. First, an impartial humanitarian body may want to take action on the part of the territory under the control of the legal government, in which case the government must give its

consent. Otherwise, the humanitarian body may want to work on the part of the territory controlled by the rebels, in which case the agreement of the latter will suffice, without it being necessary also to obtain the agreement of the legal government; provided, of course, that it is possible to reach the rebel territory without passing through government-controlled areas. As Mr. Yves Sandoz[9] wrote, the system envisaged by Article 3 "in practical terms authorizes the ICRC (or any other impartial humanitarian body) to enter a territory without the agreement of the government that still represents the entire State internationally". Undoubtedly, implementing this provision would be a problem if a government were to refuse to admit to a state of armed conflict, yet the ICRC "could not forswear its action in a large area of the territory of a State over which the government has lost control simply because that government denied the obvious".

But is that legal situation not called into question by Article 18 of Protocol II, according to which the State has a monopoly of consent? As the Protocol is only additional to the main treaty — the 1949 Conventions — the provisions of the latter take precedence according to the Vienna Convention on the Law of Treaties, and especially as the purpose of the Protocols is to improve the lot of victims and not to cast any doubt on the Conventions. The ICRC did not hesitate to state that this drastic wording must be rejected and to express the hope that it would in no case give rise to restrictive interpretations that would limit activities intended to help innocent victims. At its 10th session, the Medico-Legal Commission of Monaco unanimously adopted a resolution stating that "in non-international armed conflicts, under Article 3 common to the four Geneva Conventions, a non-governmental medical organization is entitled to perform its activities in territory controlled by any governmental or non-governmental party provided that it has obtained the prior consent of the party concerned."[10]

(c) Conditional agreement

In fact, the State is entitled to make its consent conditional on certain requirements.

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[9] "The right of initiative of the International Committee of the Red Cross", *German Yearbook of International Law*, Vol. 22, 1979, p. 365.

[10] See Maurice Torrelli, "La protection du médecin volontaire", *Annales de droit international médical*, No. 33, 1986, Palais de Monaco, resolution III, p. 79.

Generally speaking, relief work has to be humanitarian, impartial and non-discriminatory. Its purpose is exclusively to help victims; relief supplies are to be distributed according to need, giving priority to the most urgent cases of distress. Relief work must also be performed in compliance with the country's internal laws and without hindering military operations.

That means that the State has a supervisory power, the extent of which may vary from one situation to another. This applies not only to the State on whose territory the action is being undertaken but also to the State which gives right of passage. Such supervision may be exercised by a neutral State, by the ICRC or by some other humanitarian and impartial body (Art. 61 of the Fourth Convention, by a Protecting Power, Art. 70, para. 3b, of Protocol I, Art. 23 of the Fourth Convention, etc).

In general, it may be said that the condition that the distribution of relief be supervised, whether imposed by law or demanded by the party authorizing the aid, definitely "seems clearly linked to the obligation to accept such activities and could be considered as a corollary thereof."[11]

Despite the recognition of this right to assistance, sovereignty still all too often takes precedence over humanity. The State may always be tempted to refuse to acknowledge the existence of an armed conflict, or the urgent need for outside aid, and it may claim interference. However, it cannot evade its responsibilities *vis-à-vis* the community of States party to the Geneva Conventions. Here again, humanitarian law is a precursor to new trends in international law. Long before the notion of an international community came into being, Article 1 common to the Geneva Conventions had already created its basis in law by requiring that States undertake "to ensure respect for" the Conventions "in all circumstances", not merely by bringing diplomatic pressure to bear on governments in conflict situations which had failed to fulfil their commitments, but also by economic or other measures permitted by international law and not involving the use of armed force, which would be in breach of the United Nations

[11] 26th International Conference of the Red Cross and Red Crescent, *Implementation of international humanitarian law: Protection of the civilian population and persons* hors de combat, ICRC document C.1/4.2/1, Geneva, 1991, p. 9.

Charter.[12] So, to avoid feeling threatened by the prospect of humanitarian intervention, all States have to do is meet their commitments.

II. INTERFERENCE — A DUTY CONTESTED IN THE NAME OF SOVEREIGNTY

"The duty not to interfere stops where the risk of failure to assist begins", said the President of the French Republic on 30 May 1989 on opening the CSCE meeting on human rights. So intervention is justified in the name of humanity. That means that NGOs, in particular,[13] but also third-party States, should be able to intervene if an emergency situation and the basic needs of a given community so require, even against the will of the State. Even if States cannot accept this principle, can they not try to improve the conditions of humanitarian assistance?

A. *"Ingérence"* in the name of humanity

We are currently witnessing considerable legislative activity in the sphere of human rights and this, in turn, is having its effect on humanitarian law. The *"droit d'ingérence"* should be based on affirmation of the right to life that transcends national borders. In its resolution 43/131, the UN General Assembly acknowledged that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity". In its resolutions 688 and 733, the Security Council drew its own inferences from this recognition of the humanitarian dimension by the UN.

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[12] This interpretation is confirmed by the 1989 resolution of the Institute of International Law, as quoted. It should also be remembered that Article 89 of Protocol I provides that in the event of serious violations of humanitarian law, States undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with its Charter.

[13] Resolution 43/131 stresses the importance of their role: "Aware that alongside the action of Governments and intergovernmental organizations, the speed and efficiency of this assistance often depends on the help and aid of local and non-governmental organizations working with strictly humanitarian motives".

(a) The legislative activity of the General Assembly

At the heart of the tension between humanity and sovereignty, human rights tend to appear in the following guises.

1. The basis of a new humanitarian order

The resolution adopted by the Institute of International Law at Santiago de Compostela declares that "human rights, having been given international protection, are no longer matters essentially within the domestic jurisdiction of States" and that the "international" obligation to respect human rights is *erga omnes*, conferring on all States a "legal interest" in observing them. In Article 5, it points out that an offer of relief supplies does not constitute interference and goes on to state: "However, such offers of assistance shall not, particularly by virtue of the means used to implement them, take a form suggestive of a threat of armed intervention or any other measure of intimidation; assistance shall be granted and distributed without discrimination. States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance".

Thus, States no longer refer to General Assembly resolution 36/103 of 9 December 1981 on "the inadmissibility of intervention and interference in the internal affairs of States", which stresses "the duty of a State to refrain from the exploitation and the deformation of human rights issues as a means of interference in the internal affairs of States, of exerting pressure on other States or creating distrust and disorder within and among States or groups of States". Interference, and intervention even more, when they take the form of armed coercion, are always condemned under international law. The prohibition in resolution 2625 of 24 October 1970 was not deemed sufficient to reassure States in an area as sensitive as that of non-international armed conflicts. Hence, Article 3 of Protocol II reaffirms the principles of the inviolability of national sovereignty and non-intervention in matters falling essentially within the purview of a State, for any reason whatsoever; this is mainly because certain private organizations had allegedly committed abuses under cover of humanitarian activities. The prohibition is general and "is therefore addressed not only to States, but also to other bodies, international or non-governmental organizations, which might use the Protocol as a pretext for

interfering in the affairs of the State in whose territory the armed conflict is taking place".[14]

2. *The principle of subsidiarity*

The merit of the General Assembly resolutions lies in the fact that they stress the importance of the assistance that the NGOs can provide along with States or international organizations in emergency situations. These resolutions, like those of the Institute of International Law, considerably broaden the field of application as this right may be exercised not only in times of armed conflict,[15] internal disturbances and tensions, but also in the event of natural disaster or to cope with the consequences of a massive violation of human rights. However, this broadening of application does entail a risk: a State which is unwilling to accept this approach might tend to reject the entire package, including humanitarian law, in a situation of armed conflict.

Hence the basic objective being sought is to ensure free access to the victims of emergencies. This brings us up against the problem of consent and an attempt has to be made to persuade States to accept this principle. But the outcome is a legally confused situation. State consent is always required. Resolution 43/131 "reaffirms also the sovereignty of affected States and their primary role in the initiation, organization, co-ordination and implementation of humanitarian assistance within their respective territories". But, should the State refuse, then the principle of subsidiarity comes into play. "It is only as 'second best' that international assistance is resorted to, as a substitute for activities that should have been undertaken by the State with jurisdiction over the territory in question".[16] The fact that victims are abandoned "without humanitarian assistance constitutes a threat to human life and an offence to human dignity" (eighth preambular paragraph of the resolution). Emergencies call for rapid action and the document expresses the desire "that the international community should respond

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[14] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, eds.) ICRC, Martinus Nijhoff Publishers, Geneva, 1987 — Protocol II, Article 3, para. 4503. It is thus difficult to agree with Mario Bettati that the principle of non-intervention "refers only to States and intergovernmental organizations" (*op. cit*, *RGDIP* 1991, p. 651).

[15] These resolutions, while not referring to situations of armed conflict, concern "humanitarian assistance to victims of natural disasters and similar emergency situations", which seems implicitly to include man-made disaster situations, in other words, armed conflicts.

[16] Mario Bettati, *Trimestre du Monde*, 1992, p. 3.

speedily and effectively to appeals for emergency humanitarian assistance made in particular through the Secretary-General" of the United Nations (fifth paragraph of the preamble). The United Nations then states that it is convinced that "rapid relief will avoid a tragic increase" in the number of victims (ditto, tenth para.). From this stems the principle of free access to victims, and this precisely is the "revolutionary" part of the text.[17] Still, it is true that resolution 43/131 goes no further than to state the principle that the "prime" role is that of the State on the territory of which the disaster occurred. From this it may be deduced that the "secondary" role, that of the humanitarian organizations, is automatically performed if the "prime" role is not fulfilled. This interpretation may be inferred from the overall logic of resolution 43/131 which, in its entirety, is based on the interests of the victims. Subsequent practice confirms this interpretation.[18]

The idea underlying the reasoning of Dean Bettati when he submitted and defended those resolutions was drawn directly from Article 17 of the Montego Bay Convention which, with respect to the right of inoffensive passage through territorial waters, allows for stopping and dropping anchor "in cases of unavoidable circumstances or in order to assist persons, ships or aircraft in danger or distress". The idea is attractive but it has yet to be set down in a legal text. The logical interpretation of resolution 43/131, the details of which are set forth in resolution 45/100, must remain in the sphere of *lege ferenda* until such time as legal opinion has been confirmed by practice.

3. Principles of conduct — the true significance of neutrality

While the ICRC appears as the epitome of impartial humanitarian organizations, we have to begin by remembering that it has to abide by the principles of the Movement. Those principles have an undoubted internal value since, according to the Preamble to the Statutes of the International Red Cross and Red Crescent Movement, the Movement is guided in its mission by its Fundamental Principles. All States party to the Conventions have accepted those principles by adopting the Statutes.

The International Court of Justice, in its decision in the *Nicaragua* case, subsequently confirmed the scope thereof by making the principles of humanity and impartiality proclaimed by the Red Cross the essential conditions for all humanitarian action. That being so, it is

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[17] *Ibid.*

[18] Mario Bettati, *op. cit.*, *RGDIP* 1991, p. 656.

most regrettable that it did not deem it advisable to include the principle of neutrality which is, to say the least, as important as that of impartiality. It is true that neutrality may be misunderstood, but it is nevertheless the prime condition for humanitarian action.

"Life is not neutral, commit yourself!" That exhortation from everyday life can only sharpen the frustration of those who, in their humanitarian work, have to respect the principle of neutrality. "This principle may be incongruous in the context of modern humanitarianism, which tends to make greater calls on commitment. It also stands out from all the other fundamental principles of the Red Cross, all of which are active, positive principles. Taken alone, neutrality is a negative principle embodying the concept of abstention. For some, it is synonymous with indifference, for others, it is no longer relevant in a world that encourages the individual to participate actively through personal commitment. Brought down to the level of armed conflict or internal disturbance, misunderstood neutrality is grist for the mill of its detractors who, after the fashion of Loysel, proclaimed something like 'he who can prevent yet does nothing is guilty'".[19]

That is the problem that NGOs have to grapple with when they claim both to provide relief and to denounce violations of human rights.[20] "Neutrality is certainly an essential condition for humanitarian action. But it is no longer possible, as it was in the past, to defend over-conservative principles which can have dire consequences in certain circumstances. The second generation of humanitarian action, that of the 'French doctors' and the many medical and health-care NGOs which came into being at the end of the 60s, has refused the paralysing effects of neutrality and its passive consequences. It is no longer possible, other than at the cost of major distortion, for neutrality to serve as the justification for inaction, abstentionism and wait-and-see attitudes in humanitarian matters".[21]

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[19] Jacques Meurant, "Principes fondamentaux de la Croix Rouge et humanitarisme moderne", in *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet*, ICRC, Martinus Nijhoff Publishers, 1984, p. 893.

[20] This would apply specifically to the volunteer doctor who had taken the oath as modified by *Médecins du Monde:* "As a doctor, faithful to the laws of honour and probity set forth in the Hippocratic Oath, I undertake, to the best of my ability, to care for those in the world who are suffering in body or mind. I refuse to accept that science or medical knowledge include oppression or torture, that human dignity be impaired or horror concealed. I undertake to bear witness. I make these promises, solemnly, freely and upon my honour."

[21] Mario Bettati, "Assistance humanitaire et droit international", in *Les droits de l'homme et la nouvelle architecture de l'Europe*, a publication of the Institute of Peace and Development Law, Nice, 1991, p. 169.

Yet neutrality is the very basis of humanitarian law, the element that prevents the taking of sides over the cause of the conflict. Although it is the reason for the discretion exercised by the ICRC, it in no way means that the institution is indifferent to the fate of the victims. It is well known that when the ICRC is faced by flagrant violations of humanitarian law and there is no hope of remedying the situation, it will make a public appeal to all the States party to the Conventions. But this can be done only in extreme cases, for it does not suffice to carry out humanitarian missions to become acceptable to States. They are always quick in denouncing interference in their internal affairs, especially in situations of armed conflict. So trust has to be earned and maintained. It is not enough to declare one's neutrality: that neutrality has to be proved through one's behaviour. That being so, the ICRC has to obtain the agreement of the two parties to an internal conflict even though impartiality requires that it treat both camps "equally", or even that it give priority to the rebels if their need is greater. It knows that in such cases its neutrality is likely to be contested by the State and that the immediate consequence might be that it will be prevented from pursuing its mission.

Hence it is fortunate that the condition of neutrality reappears in resolution 43/131, which recalls that "the principles of humanity, neutrality and impartiality must be given utmost consideration by all those involved in providing humanitarian assistance". All parties might at some time have to provide humanitarian assistance, not just the ICRC but also the public services of a State and, of course, NGOs. Respect for that principle is all the more necessary when action taken by the Security Council politicizes the discussion even further.

(b) Security Council action

The unanimity of the five permanent members, made possible by a favourable world situation, at last permitted the Security Council to fulfil its role as a sort of international board of directors. Another innovation was the fact that resolution 688 (1991) made humanitarian concerns part of United Nations law. This "trend for humanitarian considerations to spread beyond the confines of armed conflicts"[22] will inevitably raise many problems.

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[22] Pierre-Marie Dupuy, "Après la guerre du Golfe", *RGDIP*, Vol. 95/1991/3, p. 269.

1. Confirmation of the right of interference in internal affairs

Resolution 688/1991 "demands that Iraq ... immediately end this repression" and that "Iraq cooperate with the Secretary-General to these ends". Recalling Article 2(7) of the Charter, the Council "condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region". Indeed, one tends at times to forget that Article 2(7), which confirms the areas reserved for domestic jurisdiction, cannot prejudice the application of enforcement measures under Chapter VII" when the Council feels that peace is threatened.

Under the legal system established by the Charter, the appreciation of situations and the decisions that the Security Council may have to take are beyond reproach even though they may be open to criticism in political terms. As Dean René-Jean Dupuy writes in this respect, "interference is in no way new. It is perfectly legal".[23] Still, is it a good thing to place *jus ad bellum* and *jus in bello* on the same footing or even to merge them?

2. Humanity à la carte

In reality Security Council action remains a random matter. It can at any moment be paralysed by the veto, and depends on whether the members of the Council deem it appropriate. Such a selective approach cannot help but be discriminatory.[24] Obviously action cannot be taken against just any State; it will depend on the power that State wields. It may therefore be claimed that "humanitarian law has so far been a universal law; while the right of intervention is a law of inequality".[25]

3. The humanitarian diplomacy of States

These measures taken by the Security Council show the ambiguity that can result when humanitarian work is taken over from private bodies by States. In parallel with the assistance being provided by the United Nations, the United States, acting on the basis of resolu-

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[23] *Trimestre du Monde*, 1992, p. 12.

[24] Discrimination between peoples: on 25 April 1991 the Algerian Foreign Minister asked for humanitarian intervention on behalf of the Palestinian people; also discrimination between Iraqi Shiites and Kurds.

[25] Jean-Christophe Rufin, *op. cit.*, p. 27.

tion 688 and with the authorization of the Security Council, responded to pressure applied by Turkey, France and Britain by launching operation "Provide Comfort", which although armed is fundamentally humanitarian in nature. It is true that military means may be used for humanitarian purposes when, for example, a State needs to evacuate its nationals. In Yugoslavia, the presence of a French minister and a warship *(La Rance)* might have induced the Yugoslav government to make certain concessions. Humanitarian ships had previously gone to Lebanon on a similar mission. However, as necessary as the presence of a warship may be, its significance is always ambivalent. "States have realized the benefits they could derive from charitable and emergency diplomacy. It costs little, it has maximum media impact and rallies a consensus, which makes it an ideal activity for governments at a loss for a political solution. The Kurdish relief operation was above all an opportunity to legitimize State intervention for humanitarian purposes. I for one doubt the wisdom of this. When armies go into action — whatever that action may be — I fear that there are reasons behind that action which are anything but humanitarian".[26] According to Rony Brauman, President of *Médecins sans frontières*, it is essential to resist the temptation on the part of States to implement humanitarian activities themselves. This should be left entirely up to NGOs; otherwise such activities will become just another tool in the diplomatic bag.

4. Has "the right to intervene on humanitarian grounds" become sanctioned by custom?

The Security Council seems to confirm the right of access to victims but it does so with some hesitation. It no longer demands; it "insists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations" (resolution 688/1991, para. 3). That access has to be authorized by the Iraqi government in respect for the sovereignty and political independence of Iraq, as stated in the Preamble.

Although the resolution does call on States, the relevant United Nations agencies and humanitarian organizations to contribute to humanitarian relief efforts, it is nonetheless up to the UN Secretary-General to ensure that the assistance operation is carried out. It was he who, on 18 April 1991, concluded an agreement with the Iraqi

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[26] Jean-Christophe Rufin, *op. cit.*, p. 29.

Government. So it appeared that even in such exceptional circumstances the need for consent was confirmed.

One might well wonder whether Security Council operations in Iraq and Somalia can be considered as having set a precedent. The French Foreign Minister seems to think not. After having stated that the Security Council expresses the law,[27] he goes on to write: "The implementation of this relief operation in a situation of extreme humanitarian emergency made it necessary, under resolution 688, to overstep the strict limits of international law with respect to intervention. This was really a *de facto* exercise of the right of intervention in the internal affairs of a State. Forty-five years after the French initiative in San Francisco, this is definite progress. But resolution 688 was adopted for a specific case by a single body, the Security Council, which does not lay down general principles but issues injunctions and launches operations. This makes it different from resolutions adopted by the General Assembly, for they do indeed establish general principles and standards of ethical and political behaviour".[28]

Dean Bettati shares this uncertainty. "As international humanitarian action is pragmatic in approach, it remains subject to diplomatic improvisation. Still, we are encouraged by the increasing frequency with which such operations are accepted and welcomed. International law has not yet codified any binding rules in this respect. Are the embryonic elements of a custom taking shape? It all seems to have the right smell, taste and colour, as a certain advertisement puts it, but is it really custom?".[29] In this context, certain improvements are called for.

B. Improvements in assistance methods

Although the right to humanitarian assistance has long existed in humanitarian law, there is certainly room for improvement in means of implementation to facilitate access to victims, protect relief workers and coordinate their efforts.

(a) Access to victims

Quite apart from any question as to whether the urgency of a situation justifies waiving consent, General Assembly resolutions have the

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[27] *Le Monde*, 12 March 1991.

[28] Roland Dumas, *op cit.*, p. 62.

[29] Mario Bettati, *op. cit.* (note 21 above), pp. 183-184.

great merit of stressing the need for speed in providing relief. Resolution 43/131 invites States in need of assistance to facilitate access to victims. In paragraph 6, it "urges States in proximity to areas of natural disaster and similar emergency situations, particularly in the case of regions that are difficult to reach, to participate closely with the affected countries in international efforts with a view to facilitating, to the extent possible, the transit of humanitarian assistance".[30] Resolution 45/100 calls on States to consider the possibility of establishing "relief corridors" for humanitarian aid, limited in time and space, in accordance with the terms set forth. This initiative needs encouraging for it could help solve many practical difficulties encountered by relief operations.

(b) Protection of relief workers

Although this is no longer the main point at issue, it is one of the major demands made by the medical NGOs that submitted a "charter for the protection of medical missions" to the Council of Europe on 29 February 1984. Here again, humanitarian law offers undoubted guarantees.

For example, Article 71, para. 2, of Protocol I states that personnel participating in relief operations "shall be respected and protected". Similarly, NGOs carrying out medical work[31] may enjoy the general protection conferred by Article 16 of Protocol I and Article 10 of Protocol II to the effect that "under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom". They may even enjoy the protection of the emblem provided that they respect the conditions attaching. Of course, the conditions of that protection need to be more closely defined. At its 10th session, the Medico-Legal Commission of Monaco also stressed "the importance of establishing a procedure whereby:

1. the identity of members of a relief mission can be established;

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[30] This was intended to remind States that, according to the terms of Article 70, para. 5, of Protocol I, "the Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions ...".

[31] Despite, or because of, the imprecision of the text, it may be considered that some of them could fall into the category of "impartial international humanitarian organizations" mentioned in Protocol I, Article 9, para. 2(c).

2. the professional competence of medical and paramedical personnel can be checked;
3. the mission can be prepared as part of an overall evaluation of the health conditions....

It further:

insists that any use made of the protective emblem must comply strictly with the provisions to that effect contained in the Geneva Conventions and Additional Protocols;

draws the attention of non-governmental medical organizations in particular to the fact that any misuse of the emblem undermines the protection afforded to those making legitimate use of it;

reaffirms that under no circumstances can a medical act performed in accordance with medical ethics give grounds for penal proceedings or punishment;

requests that, if captured, staff of non-governmental medical organizations be repatriated without delay".[32]

But, once again, any improvement in protection has to be sought on the legal basis of the Geneva Conventions and the Protocols additional thereto.

(c) Coordination of operations

Everyone agrees that relief operations need to be better coordinated. This would make it possible to evaluate the needs arising from the emergency situation, in order to avoid duplication of effort and improve the efficiency of all concerned. It should also facilitate supervision of the distribution of relief supplies to ensure that they are not diverted to other purposes. Indeed, in this respect it is difficult to contest shared responsibility between the humanitarian body and the authorities of the beneficiary country:

— as far as the victims are concerned, the humanitarian body must ensure that the supplies reach those for whom they are intended;
— as far as the authorities are concerned, the humanitarian body has to provide guarantees that there has been no illicit trafficking;
— as far as the donors are concerned, the humanitarian body must, by its presence and by its activities on which it has to report, guarantee that the supplies are used for no purpose other than that for which they are intended.

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[32] *Annales de droit international médical*, No. 33, 1986, resolution III, p. 79.

In this respect, the creation by the General Assembly on 19 December 1991 of a post of Coordinator for Humanitarian Emergency Operations was certainly a step forward, even though it was greeted with distrust by the non-aligned States.

The ICRC could hardly oppose any improvement in the coordination of relief operations under United Nations auspices. The fact that it enjoys observer status will certainly facilitate its longstanding practical cooperation with the UN, provided, however, that its special character is not overlooked in any ambiguous and hence uncertain legislation, or in situations in which it works alongside others (States or NGOs) whose activities in the field are not in keeping with the principles of conduct applicable in humanitarian assistance operations.

On this subject, Paul Grossrieder wrote: "In its own specific field, the ICRC conducts operations that presuppose total neutrality and impartiality. When these operations overlap with other initiatives of a political or military nature, the ICRC's role as a neutral intermediary is blurred and then discredited, because any attempt to reconcile humanitarian and military interests is like trying to square the circle.... Since the ICRC needs to be totally independent and neutral in order to act as a neutral intermediary between parties to a conflict, it would be inconsistent for its work to be coordinated by an intergovernmental body."[33] One could also wonder, as did the Medico-Legal Commission of Monaco at its 11th session in May 1991, whether it might not be necessary to "define conditions for the application of the notion of *'intervention on humanitarian grounds'*, while taking care not to confuse situations of armed conflict and those of natural disaster".

Finally, it is up to the President of the ICRC to prevent humanitarian aid assuming political overtones. "I do believe, however, that for its own good and that of the Movement as a whole, the ICRC must preserve the unique nature of its specific mandate, that is, its impartial, independent and neutral role under the Geneva Conventions".[34]

The right to humanitarian assistance as defined by humanitarian law can admittedly not give full satisfaction because of the obvious limitations that still beset it. That is why so many attempts have been made to improve it in practice or to broaden its field of application.[35]

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[33] *ICRC Bulletin*, No. 191, December 1991, p. 1.

[34] Interview with Cornelio Sommaruga, *ICRC Bulletin*, No. 192, January 1992, p. 2.

[35] See Peter Macalister-Smith, "Protection of the civilian population and the prohibition of starvation as a method of warfare — Draft texts on international humanitarian assistance", *IRRC*, No. 284, September-October 1991, pp. 440-459; Michael A. Meyer, "Humanitarian action: a delicate balancing act", *IRRC*, No. 260, September-October 1987, pp. 485-500.

It is to be hoped that until such time as a new general Convention comes along, offering States a chance to reconsider the existing rules, efforts will be made at least to look into the ethics referred to in resolution 45/100 or to draw up a code of conduct reminding both States and NGOs of the principles to be respected. Meanwhile, it should not be forgotten that humanitarian law, "including its provisions on relief action, has proved successful over the years because it reflects a largely acceptable balance between humanitarian interests and the realities of combat or occupation, which [seems] the best that can be agreed".[36] It should further be stressed that respect for the right to humanitarian assistance cannot be dissociated from compliance with the entire body of humanitarian law, which forms its basis.

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[36] Meyer, *op. cit*, p. 500.