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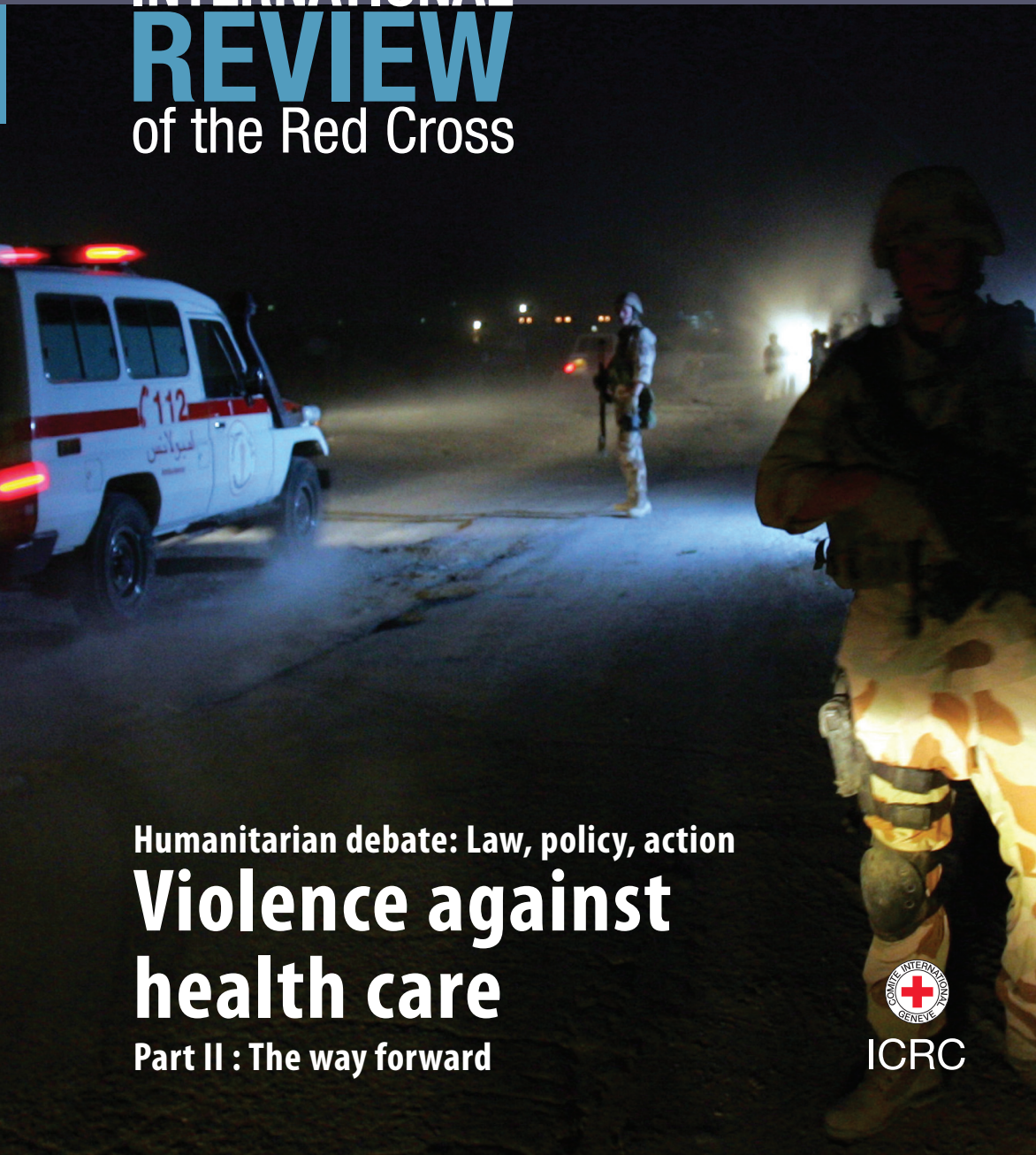

Humanitarian debate: Law, policy, action

Violence against health care

Part II : The way forward

ICRC

INTERNATIONAL
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Established in 1869, the *International Review of the Red Cross* is a periodical published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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INTERNATIONAL REVIEW of the Red Cross

Reflections on the Colombian case law on the protection of medical personnel against punishment

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Abstract
One of the fundamental rules for the protection of health-care personnel in any circumstance, including contexts of armed conflicts, provides for a prohibition on punishing medical professionals who merely act in accordance with medical ethics. However, although the reasons for this prohibition may seem obvious, in contexts of non-international armed conflicts the provision of medical care to wounded and sick members of non-state armed groups can expose medical personnel to accusations of participation in criminal activities. Based on the Colombian domestic legislation and jurisprudence on the matter, this article aims to propose elements of analysis on the apparent contradiction that exists between, on the one hand, the prohibition against punishing medical personnel for merely providing health care to the wounded and sick who need it, and on the other, the prerogative of the state authorities to restore order and security within their territory through the imposition of criminal sanctions on members of non-state armed groups or their aiders and abettors.

Keywords: health care, Colombia, violence against health care, protection of medical personnel against punishment.

The ongoing non-international armed conflict taking place in Colombia is one of the longest in modern history and has changed greatly over time. Its beginning can be dated back to the first half of the twentieth century with a violent polarisation between the liberal and conservative political parties. During the 1960s, new actors emerged within the conflict in the form of guerrilla groups, amongst which the main ones that remain today are the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP) and the *Ejército de Liberación Nacional* (ELN).[1] Other armed actors, such as the *Autodefensas Unidas de Colombia* (AUC), emerged in the 1970s, gained in strength in the 1980s, and were consolidated during the 1990s. Since 1982, there have been attempts at peace and reconciliation, with the introduction of several legal frameworks,[2] including the Law for Justice and Peace of 2005.[3] Later on, other armed groups emerged as part of the *'bandas criminales'*/BACRIM ('criminal bands'), including the so-called *'Urabeños'* and *'Rastrojos'*. The latest developments include the current peace dialogue between the Colombian government and the FARC-EP, which formally started in October 2012.

The scope of the present paper is to analyse how the Colombian authorities have legally addressed the norms related to the protection of the medical mission, specifically in relation to the prohibition on punishing medical personnel[4] for merely carrying out medical activities compatible with medical ethics. Indeed, Article 10 of Additional Protocol II to the Geneva Conventions of 1949 (hereinafter AP II) establishes fundamental obligations for the parties to non-international armed conflicts with respect to the general protection of the medical mission, namely: (i) a prohibition on punishing any person for the mere fact of having carried out medical activities compatible with medical ethics; (ii) a prohibition on compelling persons engaged in medical activities to perform acts that are contrary to, or to refrain from acts required by, the rules designed to protect the wounded and sick; (iii) an obligation to respect the medical personnel's right to reserve information concerning the wounded and sick being attended; and (iv) a prohibition on punishing persons engaged in medical activities for failing to give that information.[5]

1 Other guerrilla groups that emerged during the 1960s and subsequent decades, and that demobilised after participating in negotiations with the government, are the M-19 (1990), *Ejército Popular de Liberación* (EPL, 1991), *Partido Revolucionario de los Trabajadores* (PRT, 1993), and *Quintín Lame* (1991).

2 One of the most relevant laws is Law 418 of 26 December 1997, by which some instruments for seeking coexistence, effective justice, and other provisions are adopted.

3 Law 975 of 25 July 2005, which dictates provisions for the reincorporation into society of members of illegal armed groups who contribute effectively to the achievement of national peace, and for other humanitarian agreements.

4 Throughout the text, we will use 'health-care personnel' and 'medical personnel' interchangeably.

5 Second Additional Protocol to the Geneva Conventions of 12 August 1949 (hereinafter AP II), Art. 10. See also ICRC, *Customary International Humanitarian Law*, Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary Law Study), Rule 26 (applicable in international and non-international armed conflicts).

Although the protection of the medical mission is a clear complement to the right of the wounded and sick to be cared for,[6] in some circumstances health-care personnel may be perceived as being members of the armed group or as its aiders and abettors. Hence, in order to comply with the rules on the protection of medical personnel under international humanitarian law (IHL), a line has to be drawn between membership in the armed group as a health-care professional on the one hand, and mere exercise of the principle of social solidarity on the other. The latter principle requires that any person, doctor or not, carry out humanitarian actions when faced with situations that endanger the life or health of fellow individuals.

The judicial approach to the provision of health services to members of armed groups in Colombia has changed over the years, from an automatic inclusion of the health-care activities of medical personnel in the crime of rebellion, to the introduction of humanitarian arguments for their protection in the judges' reasoning after the adoption of IHL rules in national legislation. However, sentencing of medical personnel in Colombia is still a risk[7] since the threshold above which medical services exceed the principle of social solidarity and become punishable under domestic criminal law[8] remains unclear due to the wide scope of activities that may be carried out by medical personnel in the course of their medical duties, in the context of a non-international armed conflict.

The objective of this article is to present some relevant attempts to delineate the notion of protected medical activities within the Colombian legal system. Indeed, an overly broad interpretation of what constitutes support to a non-state armed group could seriously undermine the treatment and care that health-care personnel can provide to sick and wounded persons belonging to these groups. This paper will first recount the IHL rules prohibiting the punishment of medical practitioners for having carried out activities in conformity with medical ethics, and their implementation in Colombian law. It will then introduce an analysis of the crime of rebellion and its actual application in case law, which is often applied to accuse health-care personnel of being members of non-state armed groups in the country.[9]

6 Arts. 7-8 of AP II; ICRC Customary Law Study, Rule 110 (applicable in international and non-international armed conflicts).

7 See, for example, Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 27227 of 21 May 2009, p. 13.

8 According to the ICRC's commentary on Art. 3 of AP II, states may 'take appropriate measures for maintaining or restoring law and order' only through legitimate means, such as the adoption of legislation; hence, 'imperative needs of State security may not be invoked to justify breaches of the rules of the Protocol'. See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (hereinafter ICRC Commentary), paras. 4500-4501.

9 The present article will focus only on the definition and application of the crime of rebellion, which is considered a political crime, although members of non-state armed groups may also be condemned for the crimes of terrorism, complicity, extortion, kidnapping, drug trafficking, etc.

The protection of medical personnel in IHL and Colombian law

The rules of IHL on the protection of medical personnel

The IHL notion of 'medical duties' (or 'medical activities') under Article 10 of AP II refers to 'the tasks which personnel perform in accordance with their professional obligations when they give care or treatment'.[10] The Commentary to the Additional Protocols further states that this notion should be interpreted very broadly as meaning not only care and treatment, but also activities such as 'issu[ing] death certificates, vaccinat[ing] people, mak[ing] diagnoses, giv[ing] advice, etc.'[11]

The personnel who 'carr[y] out medical duties' include not only doctors but also 'any other persons professionally carrying out medical activities, such as nurses, midwives, pharmacists and medical students who have not yet qualified'.[12] It is important to note that this list of medical personnel is not exhaustive, and that it should also be understood as including persons such as 'paramedical staff including first-aiders, and support staff assigned to medical functions; the administrative staff of health-care facilities; and ambulance personnel'.[13]

As for the prohibition against punishing anyone having carried out medical activities in accordance with medical ethics, '[t]he reference to punishing is meant to cover all forms of sanction, including both penal and administrative measures'.[14] In this regard, it should be noted that the practice of international organisations like the United Nations (UN) reveals that, in situations of armed conflict, under no circumstances should medical personnel be punished for their medical activities if those activities have been carried out in accordance with medical ethics.[15] This prohibition has also been endorsed by the Council of Europe and the World Medical Association.[16]

Additionally, the IHL prohibition on punishing anyone for the mere fact of providing medical services is complemented by the need to respect the confidentiality of information that may be acquired while providing such care.[17] The protected information covers 'any information that doctors may obtain from their patients in the course of the delivery of medical care, and not just details

10 ICRC Commentary, para. 4679.
11 *Ibid.*, para. 4687.
12 *Ibid.*, para. 4686.
13 ICRC, *Health Care in Danger: Making the Case*, August 2011, p. 14, available at: www.icrc.org/eng/assets/files/publications/icrc-002-4072.pdf (all internet references were last accessed in February 2014).
14 ICRC Commentary, para. 4691.
15 GA Res. 44/165, 15 November 1989.
16 Council of Europe, Parliamentary Assembly, Resolution 904 of 30 June 1988, Appendix, para. 1; Regulations of the World Medical Association in Times of Armed Conflict, adopted by the 10th World Medical Assembly, Havana, Cuba, October 1956, Regulation B(3) (edited by the 11th World Medical Assembly, Istanbul, Turkey, October 1957, and amended by the 35th World Medical Assembly, Venice, Italy, October 1983), available at: www1.umn.edu/humanrts/instree/armedconflict.html.
17 Art. 10(3) of AP II states: 'The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.' Art. 10(4) states: 'Subject to national law, no person engaged in medical activities may be penalised in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.'

concerning diagnoses and prescriptions'.[18] The prohibition on obliging medical personnel to divulge information protected by professional confidentiality is not formulated as forcefully as the general prohibition on punishment discussed above, since it is 'subject to [the] national law' of each country. In fact, the inclusion of such a vague disposition was not present within the first drafts of AP II.[19] However, even though 'an obligation to systematically reveal the identity of the wounded and sick would divest the principle of the neutrality of medical activities of all meaning',[20] adding the terms 'subject to national law' was the only way that states would have accepted the article concerned.[21] The consequence of this is that the protection of professional confidentiality is lowered and that many sick or wounded individuals would rather refuse medical treatment than take the risk of being denounced.[22] The inclusion of a reference to national legislation responds, in part, to the understanding that the obligation of respect for professional confidentiality is not absolute when divulgation may allow the prevention of the commission of serious crimes of which the doctor might have knowledge. On this, the commentary to Article 10 of AP II provides that '[i]n ethical terms, the rule against denunciation does not mean that information may never be given; the doctor has a certain measure of freedom of action to follow his own conscience and judgment'.[23]

The reference to national legislation can be further explained by looking at the corresponding norm in international armed conflicts, according to which:

> no person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party *except as required by the law of the latter Party*, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families.[24]

According to the commentary to this article, during an international armed conflict, a doctor

> retains the freedom to denounce a patient on the basis that he may legitimately wish to prevent the patient pursuing activities which he considers to be dangerous for other human beings, just as, in peacetime, he may wish to prevent a criminal from continuing his criminal activities.[25]

18 Hernán Reyes MD, *Medical Neutrality – Confidentiality Subject to National Law: Should Doctors Always Comply?*, November 1996, available at: www.medekspert.az/en/chapter13/resources/med_confid_subject_law-2.pdf.
19 ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, 1972 Report*, Vol. I, para. 2.376, Geneva, October 1973, p. 148, available at: www.loc.gov/rr/frd/Military_Law/pdf/RC-Draft-additional-protocols.pdf.
20 ICRC Commentary, para. 4700.
21 *Ibid.*, para. 4684.
22 *Ibid.*, para. 4700.
23 *Ibid.*, para. 4697.
24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (hereinafter AP I), Art. 16(3) (emphasis added).
25 ICRC Commentary, para. 676.

In this respect, the Inter-American Court of Human Rights addressed the issue of confidentiality in a case against Peru, where the state had condemned a physician for providing medical services to alleged members of the *Sendero Luminoso* (Shining Path), a non-state armed group defined as a terrorist organisation by the state authorities. The Court indicated that:

> the State violated the principle of legality: by . . . penalising a medical activity, which is not only an essential lawful act, but which it is also the physician's obligation to provide; and for imposing on physicians the obligation to report the possible criminal behaviour of their patients, based on information obtained in the exercise of their profession.[26]

This jurisprudential contribution is relevant as it states that, even if the obligation of professional confidentiality contained in Article 10(3) of AP II is subject to national law, this national law must be specific enough as to delimit the exceptions to this obligation in accordance with the human rights principle of legality.[27]

Implementation of the rules of IHL in domestic Colombian law

The Colombian example is of particular interest for the present analysis because of the adoption and implementation of almost all IHL rules into domestic law, and, as will be seen, in some cases even includes further legal rights and obligations, not contemplated in IHL, that are relevant to the humanitarian challenges that the country's protracted non-international armed conflict poses in practice. The great development of IHL at the Colombian domestic level is due, in part, to the regulatory and institutional culture that predominates, in which the state seeks to regulate as many human relationships as possible through legislation and institutionalism. It is also partly due to the experience of the authorities in identifying the varied needs in terms of protection for people affected by the conflict.

IHL treaties ratified by the Colombian state are incorporated into the domestic legal order by virtue of Article 93 of the Constitution, which enables constitutional value to be conferred to international norms.[28] In fact, the Colombian Constitutional Court, when analysing the constitutionality of the incorporation of AP II in domestic legislation, stated that:

> the rules of humanitarian assistance to the wounded, sick, and shipwrecked *obviously* imply the provision of guarantees and immunities to those responsible for carrying out such a task, which is why Protocol II protects health and religious personnel (article 9), and medical activity (article 10) and

26 Inter-American Court of Human Rights, *De La Cruz Flores* v. *Peru*, Judgment, 18 November 2004, para. 102, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_115_ing.pdf.

27 *Ibid.*

28 See Constitutional Court of Colombia, Sentence C-067 of 4 February 2003, para. 3(B). In this decision the Constitutional Court established that the international norms integrated into domestic law by virtue of the constitutional block are 'real principles and rules with a constitutional value'. The Court added that these international treaties benefit from a 'general and permanent prevalence over the internal legislation' (our translations).

> the medical units and transport (articles 11 and 12), which should be respected at all times.[29]

Colombian legislation does not have laws that explicitly implement AP II, but it has various other tools to ensure the protection of the medical mission. For example, Colombian law regulates specifically the use and protection of the Red Cross emblem, which refers to the protection due to 'civilian sanitary personnel, medical, paramedical and relief personnel, as well as any person performing, permanently or temporarily, humanitarian work in situations of armed conflict or natural disasters'.[30] This goes even further than Article 18 of AP II, which 'authorises the civilian population to offer its services on its own initiative, and allows the authorities the possibility of declining such an offer'.[31] Indeed, Colombian law not only allows civilians legally to perform humanitarian acts, but also extends the protection provided to medical personnel to anyone that might undertake this task. The protection of the medical mission is furthermore elevated as a constitutional duty because humanitarian work is explicitly considered to be part of the duty of social solidarity, which involves responding 'with humanitarian actions in situations that endanger the lives or health of human beings'.[32] Even when a doctor provides medical care to a member of an armed group without having been coerced to do so, he must not be considered to be a member of the group or to have collaborated in alleged crimes committed by his patients if his role was limited to providing medical care. It is the duty of the doctor to provide services to anyone who needs them, in accordance with the principle of social solidarity.

In order to guarantee this constitutional principle, the Colombian Criminal Code includes the offence of failing to provide relief or humanitarian assistance to protected persons. It also provides that any person who has a duty to provide relief and assistance to protected persons whose life or health is in great danger and fails to do so without a reasonable justification may be criminally liable.[33]

Moreover, the importance of medical services in times of armed conflict is such that any obstruction or impediment, whether violent or not, to medical, health or relief personnel or the civilian population in carrying out their health and humanitarian work, constitutes a crime under Colombian law[34] and a war crime under the ICC Statute.[35]

As for the legal duty of health-care professionals to care for the wounded and sick without discrimination, it is covered by the Code of Medical Ethics, which states that 'the doctor shall dispense the benefits of medicine to whoever may need

29 Constitutional Court of Colombia, Sentence C-225 of 18 May 1995, para. 32 (our translation, emphasis added).
30 Decree 138 of 1 January 2005 regulating Arts 5, 6, 14 and 18 of Law 875 of 2 January 2004 and other provisions, Art. 16 (our translation).
31 ICRC Commentary, para. 4876.
32 Political Constitution of Colombia of 1991, Art. 95(2).
33 Colombian Criminal Code, Art. 152.
34 *Ibid.*, Art. 135.
35 Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF.183/9, Art. 8(2)(e), (ii).

it, without limitations other than those expressly stated by the law'.[36] Moreover, the rules that provide ways to seek peace and reparation for victims of the armed conflict in Colombia have laid down an obligation that enlarges the duty to attend to the wounded and sick, adjusting it to the national context, in the following terms:

> Hospitals, be they public or private, in the national territory, that provide health services, are required to deliver immediate care to victims of terrorist attacks, combats and massacres, caused by the internal armed conflict, and who may require it, independently of the socio-economic capacity of the claimant of these services and without any prerequisite for admission.[37]

This law is complemented by the Victims and Land Restitution Law of 2011 that provides for legal measures for the attention, assistance and reparation of the victims of the Colombian non-international armed conflict. Amongst other things, it reiterates the above mentioned obligation of private and public hospital institutions to deliver care to all victims without discrimination[38] and grants such victims the right to access humanitarian assistance through a differentiated approach to address their immediate and particular needs.[39] Among the medical programmes that the law establishes to achieve this goal are hospitalisation, medicines and transportation, as well as HIV examinations and psychosocial assistance in case of sexual abuse.[40]

Finally, in relation to professional confidentiality, the Constitutional Court has reiterated that this right is inviolable.[41] However, the Court makes an exception: in extreme situations, when the revelation of such information could prevent the commission of a serious crime, the health-care professional can disclose it without the risk of being sanctioned for violating his or her duty of confidentiality.[42] The Supreme Court adds that professional confidentiality is not a privilege for the professional that has access to the information, but that it is meant to protect the patient's fundamental rights of intimacy, honour and good name.[43] Moreover, in Colombia, the obligation to denounce the commission of crimes by individuals is circumscribed only to crimes with great social impact[44] such as genocide, torture and forced displacement.[45]

36 Law 23 of 18 February 1981 establishing rules on medical ethics, Arts. 6 and 7; Decree 3380 of 30 November 1981 regulating Law 23 of 18 February 1981, Art. 4.
37 Law 782 of 23 December 2002, through which extends the application of Law 418 of 17 December 1997, extended and amended by Law 548 of 23 December 1999 and modifying some of its provisions, Art. 19 (our translation).
38 Law 1148 of 10 June 2011, through which measures for the integral attention, assistance, and reparation of the internal armed conflict are dictated, Art. 53.
39 *Ibid.*, Art. 47.
40 *Ibid.*, Art. 54.
41 Constitutional Court of Colombia, Sentence C-411 of 1993, para. 5.2.2.
42 *Ibid.*
43 Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 14043 of 7 March 2002, para 4.
44 Constitutional Court of Colombia, Sentence C-853 of 2009, para 6.2.
45 Colombian Criminal Code, Art. 441.

The crime of rebellion and health-care activities in Colombian criminal law

As explained in the first part of this article, the standards on the protection of the medical mission have been incorporated into, and adjusted to, the Colombian context, providing a comprehensive framework for the protection of medical personnel. Nevertheless, the protection of medical activities explained above is called into question when exercised in situations or conditions that could be interpreted as exceeding the strictly humanitarian nature of the medical mission's work, constituting acts that, one way or another, benefit the activities of the non-state armed group and hence could legitimately be punishable under domestic criminal law. This situation leads to the question of when medical acts exceed humanitarian activities to become acts that effectively support a non-sate armed group. To answer this question, we will clarify the constitutive elements of the crime of rebellion under the Colombian Criminal Code.

The crime of rebellion in Colombian domestic law and case law

Objective elements of the crime of rebellion

In order to analyse the crime of rebellion, we first have to understand the notion of 'membership of an armed group' during an armed conflict. The concept of 'membership' under the Colombian domestic law on rebellion should be distinguished from the notion of 'membership' that arises under IHL. Indeed, under IHL, the International Committee of the Red Cross (ICRC) *Interpretive Guidance on Direct Participation in Hostilities* provides that those members of an armed group whose specific function is to continuously commit acts that constitute direct participation in hostilities (that is, those who have a continuous fighting function) do not benefit from the rules that protect civilians from attacks. This notion of 'membership of an armed group' is necessarily restrictive since its main objective is the protection from attacks of those civilians who do not directly participate in hostilities.[46]

Different from the above, the concept of 'membership' in an armed group in the framework of Colombian national criminal law is understandably broader since it is generally punished under the crime of rebellion, which encompasses all kinds of acts that are directed at destabilising the state's institutions.[47] The difference between the interpretation of the concept of 'membership' under IHL and under domestic criminal law can be illustrated by the act of providing funding to a non-state armed group. Under IHL, this does not constitute direct participation in hostilities and therefore a person who provides funds to such a group does not lose

46 See Nils Melzer, *Interpretive Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009. For more extensive information on Direct Participation in Hostilities and the civilian's loss of protection against attacks, see in particular p. 33 on the notion of 'membership in an armed group'.

47 Colombian Criminal Code, Art. 467.

his or her protection against attacks. However, under Colombian criminal law, providing funding to an armed group could be considered as an act of collaboration with the group and would therefore be punishable as a crime of rebellion.

Prior to the approval of AP II – approved in Colombia by Law 171 of December 1994 and ratified in August 1995 – the Colombian jurisprudence had established a definition of the expression 'to be part of, or collaborate with, an armed group' and specified that:

> acts of rebellion not only refer to armed confrontations with members of the Security Forces, to the point that this type of crime also finds realisation in the mere belonging of the individual agent to the rebel group and, for this reason, a person may be assigned any activity, such as financing, providing ideologies, planning, recruiting, advertising, deployment of international relations, education, indoctrination, communications, intelligence, infiltrations, supplies, *medical care*, or any other activity that does not relate directly to the use of weapons but that is a suitable instrument for the maintenance, strengthening or functioning of the rebel group.[48]

This configuration of the crime of rebellion provides punishment not only for those who carry out armed activities on behalf of the group, but also for those who perform different roles within the group. However, such a broad interpretation ceased to be valid with regard to the provision of medical care with the ratification of AP II which, as we have seen in the first part of this article, prohibits the punishment of medical personnel for carrying out medical activities strictly in accordance with medical ethics. The rest of the activities listed in the aforementioned judicial decision are still present in the Colombian jurisprudence as constitutive of the crime of rebellion if they are carried out with the intention to participate in the strengthening and stability of the activities of the group and hence to support its ultimate goal of overtaking the state institutions, provided that the collaboration is subject to a functional and predetermined division of labour.[49]

Subjective elements of the crime of rebellion

In Colombia, the crime of rebellion provides for the punishment of 'those who, through the use of arms, intend to overthrow the national government or remove or modify the existing constitutional or legal regime'.[50] Recently, Colombian tribunals have given more weight to the subjective part of the crime of rebellion, adding that more than the performance of any activity by the non-state armed group, the subjective element of the crime (or *mens rea*) has to be very specific in order for this crime to be materialised. As has been raised by the Higher Tribunal of the Northern

48 Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 7504 of 12 August 1993, cited in Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 33558 of 7 July 2010, p. 25 (our translation, emphasis added).

49 Supreme Court of Justice of Colombia, Criminal Cassation Chamber, case No. 33558 of 7 July 2010, p. 22–24.

50 Colombian Criminal Code, Art. 467.

Judicial District of Santander, from the perspective of domestic law, within non-state armed groups each person carries out different and well-defined roles, working jointly with a division of labour towards a common criminal purpose: overthrowing the legally constituted government. This means that, for a crime of rebellion to exist, the person must have been aware of the criminal purpose of the group to overthrow the legally constituted government, and must have had the intention to contribute to it.[51] However, in cases where this special intent to overthrow the government cannot be proved, the person who finances, promotes, arms or trains a non-state armed group could still be charged with conspiracy,[52] training for illicit activities,[53] administration of resources related to terrorism,[54] and so on.

Another element follows from the argument from the Office of the Attorney General in a case analysed by the Second Criminal Circuit Court of Villavicencio, which established that:

> the classification of the crime of rebellion requires that the active subject develops such behaviour in a continuous and permanent fashion . . . [The crime will not be attributed to the individual] if he does not have the knowledge or the desire to participate in the objectives of the group (in this case, the Revolutionary Armed Forces of Colombia – FARC), with a permanent duration . . .[55]

This judgement establishes that the crime of rebellion constitutes a permanent act, meaning that a person responsible for rebellion will be criminally liable for the whole duration of his or her membership of the armed group.[56] Moreover, it suggests that the 'acts must be voluntarily or intentionally linked'[57] to the objective of the armed organisation to overthrow the national government or to change the current constitutional and legal regime. This means that there is also a subjective element in the crime of rebellion: the action must be voluntary and guided by a specific intention in order for a person to be prosecuted for its commission.

In line with the above, in the context of another case, the Supreme Court of Justice of Colombia denied that members of paramilitary armed groups could be liable for the crime of rebellion since they were not seeking to overthrow the national government or to remove or modify the existing constitutional or legal regime, but were rather pursuing individual opportunistic interests. The Court raised the following particularities about the crime of rebellion:

- the legal interest protected is the constitutional regime and the national institutions;

51 Higher Tribunal of the Northern Judicial District of Santander, Criminal Decision Chamber, Ordinary Condemnatory Sentence, second instance, Case No. 54-498-31-04-002-2007-00111-01, 9 July 2009.
52 Colombian Criminal Code, Art. 340.
53 *Ibid.*, Art. 341.
54 *Ibid.*, Art. 345.
55 Second Criminal Circuit Court of Villavicencio, Case No. 50001310400220090002800 of 28 April 2010 (our translation).
56 Supreme Court of Justice of Colombia, Criminal Cassation Court, Case No. 19915 of 10 June 2005, p. 29 (our translation).
57 *Ibid.*

- the objective part of the crime is constituted by the attempt to overthrow the existing government through violent means;
- the subjective element of the crime is that the accused must have had the intent to disturb the existing legitimate government in order to establish another one while knowing the obligation to respect state institutions.[58] This means the accused must have been aware of the illegality of his or her act but performed it anyway.

The Court, as well as other high tribunals in the country, found that what distinguishes the crime of rebellion from other ordinary crimes is its intrinsic political purpose and agenda of institutional change.[59]

In summary, in the context of the Colombian non-international armed conflict, the crime of rebellion should not include the mere provision of medical services to members of the armed group that may require it, so as to enable the respect for the principle of non-discrimination, as explained in the first part of this article. However, if a doctor provides medical services to members of a non-state armed group with a continuous and permanent intention to overthrow the existing government, then he could be held criminally liable for an act of rebellion.

Activities of medical personnel that appear to go beyond what is internationally protected as a legitimate humanitarian service

Despite the clarifications provided by the jurisprudence, there remains the question of the threshold at which the provision of medical services exceeds the obligation of social solidarity and becomes membership of, complicity with, or simply effective support to an armed group. The following part of this article will address situations in which the status of medical personnel has been questioned on the grounds that their work has exceeded the limits of its humanitarian nature, and hence has become an active part of the objective element of the crime of rebellion. These situations will be analysed in the framework of the Colombian jurisprudence – of courts at different levels – based on the premise that the medical activities referred to have been carried out voluntarily and have been confined to the provision of services related to medical or health activities.

Administrative procedures for accessing health-care facilities and specialists

The conduct of administrative procedures by health-care personnel brings up the question of the limits of the medical mission. The Colombian Supreme Court of Justice criminally condemned a medical professional who, in addition to having provided medical and surgical services to members of an armed group party

58 Supreme Court of Justice of Colombia, Criminal Cassation Court, Case No. 26945 of 11 July 2007, p. 24.
59 Constitutional Court of Colombia, Sentence C-009 of 17 January 1995, para. 3.2.2.

to the conflict, 'also managed the patients that were sent to [the hospital in] Bogotá, referring them, whenever necessary, to specialised clinics depending on the pathology they presented'.[60]

In our opinion, though open to interpretation, neither the objective nor the subjective elements of the crime of rebellion are met in this example. The objective part is not met as the activity itself has been classified as being a part of the health-care professional's medical activities, and hence protected by IHL. As for the subjective part, it would have to be proved, as the mere remission to legally constituted clinics and hospitals does not prove in itself the criminal purpose of intentionally aiming to overthrow the legally constituted government. Moreover, even if he or she knows of a patient's membership of a criminal group, the health-care provider does not have the obligation to denounce it, by virtue of professional confidentiality and of the limitations to the duty to denounce previously mentioned.

It should also be noted that, even though an activity may fall into the realm of 'medical activities' protected by IHL, the fact that a person performs this duty permanently in favour of members of an armed group has raised questions within the jurisprudence. In the example given here, the Supreme Court of Justice considered that the medical activities performed by the accused, even though they had no relation with the armed confrontation, strengthened the guerrilla group since healed members of the group would subsequently return to fight against the government armed forces. This, according to the Court, was enough to condemn the accused for the crime of rebellion.[61]

Recurrence of the provision of health-care and subsequent medical controls

The Colombian domestic jurisprudence has often indicated that, if health care is provided to members of an armed group party to the conflict more than once without being reported to the authorities, the medical personnel involved in such activities could be accused of rebellion for failing to report such facts. This jurisprudence has generated an important debate regarding the scope of professional confidentiality. As an example, a doctor was accused of the crime of rebellion by the prosecutor in charge:

> because he was identified as the person who healed and secretly met two members of the FARC on several occasions. He provided them not only with surgery but also prescribed medicines for after care . . . keeping his reserve so as to protect the person he attended, a fact that from the objective point of view indicates the commission of the crime of rebellion.[62]

Contrary to this position, it is the understanding of the authors that the members of the medical personnel may not be prosecuted for rebellion, as long as they are acting

60 Supreme Court of Justice of Colombia, above note 7, p. 3 (our translation).
61 *Ibid.*, p. 12 (our translation).
62 Criminal Circuit Court 49, Case No. 2006-188 of 16 September 2009 (our translation).

in compliance with their legal duty, for the period of time that is necessary for the full recovery of the patient. It is not in their hands to decide the number of times that they should attend to people; this should be strictly justified by the state of health of the patient.

Hence, the objective element of the crime of rebellion would still not be present since the execution of surgery and corresponding follow-up with medicines are part of the medical activities protected by IHL and by national law. The subjective element would not be met because the aim, though repetitive, is always concerned with the healing of the patient and not the overthrow of the government.

Urgent care and compensation

As for urgent care, the Colombian Supreme Court of Justice analysed a case involving a pharmacist who had provided medical assistance to a member of the guerrilla forces days after he had been injured by gunfire. The Court considered that the medical services given did not constitute an emergency as they were 'not provided under the Hippocratic Oath of humanitarian assistance to the wounded of war or combat, but much later, when the rebels required his services . . . be it in his office or in clinics, where he took care of them'.[63] This position shows that 'humanitarian aid' can be considered by some as a response to an emergency where the lack of appropriate public or private services gives no alternative but to attend to the person that needs it.[64]

In other words, some Courts in Colombia have concluded that, in order not to be accused of the crime of rebellion, the doctor must be able to prove that the care provided was needed immediately. On the contrary, we consider that the care given to wounded and sick members of an armed group need not be emergency care but may also be mid- or long-term treatment, in light of the IHL rules referring to the wounded and the sick as protected persons. A definition that might come in handy in the present analysis is the one provided by Additional Protocol I to the Geneva Conventions, applicable in international armed conflicts (but which also applies to non-international armed conflict as stated in the ICRC's Commentary[65]), that defines the wounded and sick as 'persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.'[66]

With respect to compensation for the provision of health services, the Colombian jurisprudence has analysed situations in which medical specialists were accused of rebellion for 'receiving financial compensation' as a retribution for their medical and health services to FARC members.[67] It was considered by the prosecution that the fact that doctors received money for their services eliminated the merely 'humanitarian' character of their actions. In other words, the prosecution

63 Supreme Court of Justice of Colombia, above note 7, p. 12 (our translation).
64 Criminal Circuit Court 49, above note 62.
65 ICRC Commentary, para. 4637.
66 AP I, Art. 8(a); ICRC Customary Law Study, Rule 109, p. 399.
67 Second Criminal Circuit Court of Villavicencio, above note 55.

was equating the humanitarian nature of medical acts with volunteerism. In this regard, it should be noted that, according to the Colombian Code of Medical Ethics, anyone who provides a legitimate service has the right to receive an economic compensation for the care given. Medical personnel, like any other workers, are protected by the constitutional right to dignified conditions of labour,[68] which include payment for the services they provide. According to the Constitutional Court, dignity and justice in relation to work conditions are realised in a remuneration that is proportional to the quantity and quality of the activity provided by any worker, in this case a health-care provider, who offers his or her services in a public of private capacity.[69] In our view, payment does therefore not necessarily negate the humanitarian nature of the service provided.

Conclusion

States in whose territory a non-international armed conflict is occurring have the prerogative to restore their internal order through legal means. This may include criminal sanctions to those who belong to armed groups, imposed under the framework of international legal standards. However, this prerogative should not fail to take into account the provisions of Article 10 of AP II and other rules of customary IHL[70] which prohibit punishing individuals who have committed acts which comply with medical ethics, in light of the duty to assist the wounded and sick.

Although the above mentioned protective measures may seem obvious, in the context of non-international armed conflicts there are still situations in which civilian doctors and other civilian providers of health care are condemned for exercising their medical work, as it is considered that they have exceeded the limits legally permitted in the framework of their humanitarian duties, becoming effective collaborators of a non-state armed group.

It is imperative that the domestic law of states delimit very precisely the constitutive elements of the crimes of which one may be accused in connection to conduct executed in relation to, or in the framework of, an armed conflict – including those committed by health-care personnel. A broad or vague definition or interpretation of the concept of 'membership of an armed group' within domestic law, disregard of IHL obligations of protection in this regard, and lack of knowledge of the national legislation on medical ethics, rights, and obligations could put at risk the effective protection of health-care personnel and the medical mission, which could in turn endanger the access of the wounded and sick to medical assistance.

68 Political Constitution of Colombia of 1991, Arts. 25 and 53.
69 Constitutional Court of Colombia, Sentence T-161 of 1998, para 2.
70 ICRC Customary Law Study, Rule 26 (applicable in international and non-international armed conflicts).

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The Vukovar Hospital case from the perspective of a national investigative judge

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Miroslav Alimpic, a Judge of the Novi Sad High Court, was assigned to the War Crimes Chamber of the Belgrade District Court between 2003 and 2007. During this period, he, among other things, led an extensive investigation into the war crimes committed at Ovčara and in Zvornik.

Abstract
Among the increasingly frequent acts of non-compliance with, and grievous violations of, international humanitarian law around the world, especially in non-international armed conflicts, attacks on objects and persons enjoying special protection, and their abuse, as well as the misuse of the distinctive emblems of the Red Cross and Red Crescent, come as no surprise. Although a repressive approach to the problem – through the prosecution and punishment of perpetrators – cannot completely prevent such occurrences, an effective and appropriate judicial stigmatisation can significantly contribute to making them as rare as possible. In this regard, the court proceedings held before the War Crimes Chamber in Belgrade and the International Criminal Tribunal for the former Yugoslavia in The Hague in connection with the events in and around the Vukovar Hospital and Ovčara farm have provided an appropriate judicial response. This is notwithstanding the fact that, at least for now, not all perpetrators have been prosecuted for their acts (or failure to act) at the time of the commission of these grave crimes.

Keywords: Vukovar Hospital, Ovčara, domestic prosecution, wounded and sick, prisoners of war, War Crimes Chamber, Belgrade District Court, ICTY.

'*Coelo tonantem credidimus Iovem regnare.*'
('It is only when it thunders that we believe in Jupiter's rule.')
Horace (Roman poet)

Even though the recent history of armed conflict around the world unquestionably shows a trend of a significant reduction in the number of inter-state wars, there is a dramatic increase currently in the number of so-called 'civil wars' (or non-international armed conflicts). By the first half of the twentieth century, inter-state conflicts were the prevalent form, while the second half of the twentieth century and the beginning of the twenty-first were characterised by internal conflicts with a greater or lesser degree of other countries' involvement. A disturbing feature of these non-international armed conflicts is that they are typically accompanied by a far greater number of civilian casualties and more extensive material destruction than preceding inter-state wars, leaving the warring parties not only with the long-term consequences of economic underdevelopment and political instability in general, but also with changes in the minds of people at the micro level.

Acts of non-compliance with, and grievous violations of, international humanitarian law (IHL) in non-international armed conflicts are frequent, and attacks on objects and persons enjoying special protection, and their abuse, as well as the misuse of the distinctive emblems of the Red Cross and Red Crescent, come as no surprise. The incident that occurred during the conflict in the former Yugoslavia at the hospital of the city of Vukovar – and at the nearby Ovčara farm – is a striking example of such violations against the sanctity of health care. In this regard, the court proceedings held before the War Crimes Chamber of the Belgrade District Court and the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague in connection with the events in and around the Vukovar Hospital have provided an appropriate judicial response. This is notwithstanding the fact that, at least for now, not all perpetrators have been prosecuted for their acts, or failure to act, at the time these grave crimes were committed, and that a number of legal questions regarding the protection of the wounded and sick in times of conflict remain to be addressed in this case. Although a purely repressive approach to the problem of IHL violations against health care – through the prosecution and punishment of perpetrators – cannot completely prevent such occurrences, effective and appropriate judicial stigmatisation can significantly contribute to reducing their number.[1]

After discussing the facts of the Vukovar Hospital case (also referred to as the Ovčara case), this article provides a few broader reflections – from the perspective of a domestic judge – on the need for effective dissemination of IHL and its judicial enforcement as a means to prevent and deter future IHL violations.

1 Such prosecution can be undertaken by permanent or temporary, national, international or 'hybrid' judicial authorities, and be complemented by specific treaty provisions by which States Parties agree to punish violators via their criminal legislation systems and courts.

The Vukovar Hospital (Ovčara) case before the War Crimes Chamber of the Belgrade District Court

The Vukovar Hospital case is an emblematic one for many reasons. It is a case that illustrates an attack against persons having sought refuge in a hospital facility; it is a case which was dealt with both by an international criminal tribunal (the ICTY in The Hague) and by domestic courts in Serbia; it is a case in which both senior commanders and direct perpetrators were brought to justice; and finally, it is also a case in which a number of questions remain to be addressed, and a number of perpetrators brought to justice still. The following sections summarise the facts of the case and the circumstances of the domestic trial.

The facts of the case

As per the Belgrade District Court's judgment of 12 March 2009,[2] a non-international armed conflict existed on the territory of the Republic of Croatia,[3] opposing on one side, the Yugoslav People's Army (Jugoslavenska Narodna Armija, JNA) – which was the legal army of a state that, at the time, still (formally) existed with its incorporated Territorial Defence and volunteer units – and, on the other, the Croatian armed forces – made up of units of the National Guard (Zbor Narodne Garde, ZNG), militias and volunteer units. The fighting in the Croatian town of Vukovar practically ceased on 18 November 1991.

The hospital in the city of Vukovar had remained operational throughout even the fiercest fighting. Despite the very difficult circumstances, the hospital staff provided medical assistance to the sick and wounded, both civilians and fighters, including several wounded JNA troops. When the Serbian forces captured the city, a large number of civilians (women, children and the elderly) also took shelter in the hospital, in the hope that they would be evacuated. Given that it was not safe, especially for the sick and wounded, to remain in the hospital or even in Vukovar, a decision was taken to evacuate this medical facility. A promise to that effect was made to the Croatian government on 18 November 1991, in Zagreb, according to which the JNA would safely evacuate the hospital in the presence of international observers.

On the day of the evacuation, an order was issued for triage and separation of civilians, the wounded, and medical personnel and their families from those suspected of having committed criminal offences.[4] The able-bodied men of fighting

2 District Court in Belgrade (War Crimes Chamber), *Prosecutor* v. *Miroljub Vujović et al.*, Case No. K.V.4/2006, 12 March 2009.

3 Croatia at that time was still formally part of the former Yugoslavia. The international legal recognition of Croatia as an independent state began only in January 1992. The Court also noted that the former Yugoslavia acceded to and ratified the four Geneva Conventions in 1950 and the First and Second Additional Protocols to the Geneva Conventions in 1978.

4 It was established during the proceedings that, close to the end of the fighting in Vukovar, members of the former JNA military security had operational information that a number of members of the Croatian armed forces would also seek refuge in the Vukovar Hospital and try to disguise themselves as wounded and sick patients, or hospital staff, to avoid capture or possible prosecution. After the JNA entered the

age whom the military security suspected of having taken part in the fighting and possibly in the commission of certain crimes were singled out and, on 20 November 1991, transported in six buses to the Ovčara farm and barracks, southeast of Vukovar.[5] Members of the Vukovar Territorial Defence and volunteer units began to abuse the prisoners immediately upon their arrival, and continued to do so in the hangar where they were put up. The few JNA soldiers who were securing the prisoners were unable, or simply did not dare, to stand up to the aggressive and far more numerous assailants. When, a while later, orders were received for all JNA soldiers to withdraw from the Ovčara farm, the prisoners were left at the mercy of the members of the Territorial Defence and volunteers, who proceeded, during the course of the evening, to take them out in small groups to already dug-out pits, executing at least 200 of them.

As established by the Court, immediately before the fighting stopped, when it was certain that the hospital would be evacuated, the hospital staff, with the approval of their director Dr. Vesna Bosanac, had allowed a number of members of the Croatian armed forces, who at the time happened to be in the hospital, to feign injuries and pretend to be undergoing medical treatment by putting on bandages, plaster casts and the like as well as to disguise themselves as hospital staff.

The Court established these facts on the basis of, among other things, clear testimonies given by several witnesses of the injured party, including those rescued from Ovčara, who, during the trial, gave detailed descriptions of their involvement in the armed conflict, the reasons why they took refuge in the hospital and the way they disguised themselves. The autopsy reports of all 200 victims also indicated that for forty-one victims on whose bodies some kind of a 'medical dressing'[6] was found during autopsy, there was no medical reason for these parts of the body to be covered in such a way. In fifty other autopsied cases, however, they confirmed finding signs of previous injuries. The forensic specialists also concluded that in thirty-one of the autopsied cases, civilian clothes were found besides the hospital pyjamas, in ten cases the victims were wearing only pyjamas, and in one case a part of a hospital staff uniform was found on the victim's body. It must also be noted that some of the witnesses said that the victims included women too, which was also confirmed by autopsy reports. Forensics found that one of the women was at an advanced stage of pregnancy, while another one was well advanced in years, which undoubtedly indicated that they were civilians.

Some defendants and witnesses testified that there were also some foreign nationals among the prisoners brought to Ovčara, which was corroborated by the

hospital, this was confirmed in interviews with the hospital's physicians and upon inspection of the hospital records of its staff and the lists of the wounded and sick.

5 At the same time, the hospital staff as well as the relatives of some of those who were bussed away intervened with Major Šljivančanin from the JNA to have their co-workers/relatives released, claiming they had not taken part in any fighting, which resulted in Major Šljivančanin ordering the release of some twenty of them.

6 The term 'dressing' also included splints, circular plasters, slings and cervical collars.

fact that out of the 200 bodies exhumed from Ovčara, 193 were positively identified, while the Court found that the bodies of a certain number of prisoners who were executed in front of the hangar have never been found at all. For these reasons, the Court allowed for the possibility that a number of foreign mercenaries were also among the prisoners held at Ovčara.

Taking the above elements into account, there can be no doubt that among the victims of the massacre at Ovčara were both members of the Croatian armed forces and civilian patients of the hospital, either genuinely sick or feigning injuries or disease (and having sought refuge in the hospital), as well as possibly foreign mercenaries.

The status of victims – a presumption of POW status

Having considered all aspects of the event, the Court qualified the case as a war crime against 'prisoners of war' (POWs). It is worth mentioning here that although under IHL, the status of 'prisoner of war' does not exist in non-international armed conflict, the conflicting parties may agree to treat such detained persons as POWs, and consequently apply to them provisions related to POWs. On 18 November 1991, the command of the First Military District issued an order to that effect, indicating that the JNA agreed that captured members of the armed forces of Croatia were to be considered POWs to whom the Third Geneva Convention was to be applied. It was clear from the evidence presented that both sides did negotiate and reach agreement on these issues, and that both sides regarded the persons in question as POWs.

There was no doubt that a significant number of the victims of the Ovčara massacre were members of the armed forces of Croatia (Croatian National Guard, police, volunteers and other individuals accompanying these troops but not being part of their formal structure) – an inference that was also based on the List of the General Staff Medical Services of the Republic of Croatia. In the course of the proceedings, the defendants recognised some of the victims as combatants fighting for the opposite side, while it also became evident from the attitude of the civilian authorities that these were actually POWs, as the surrender of 'prisoners' (members of the National Guard and 'Ustashas') was sought. Other evidence presented at the trial also pointed to the same conclusion.[7] This shows that the conflicting parties were engaged in negotiating the terms of surrender and discussed the status of persons about to surrender, which unquestionably indicated that they were treated as POWs. Furthermore, when talking about the victims, the defendants, witnesses

7 As a case in point, the order issued by the command of the First Military District on 18 November 1991 shows that the JNA agreed that members of the armed forces of Croatia were to be considered prisoners of war to whom the Third Geneva Convention was to be applied. In this context, a note from the combat log of the Guards Motorized Brigade of 18 November 1991 is especially interesting and was read out at the trial: 'The Commander of Operational Group South spoke with a HDZ representative (Trustee) in Vukovar on the terms for the surrender of the Ustasha forces in Vukovar. Unconditional surrender agreed and safety guaranteed to the Ustasha forces in accordance with the Geneva Convention.'

and cooperating witnesses all referred to them as POWs, on the basis of which the Court concluded that their appreciation of the situation and their awareness that the victims were members of the other side influenced their perception of the victims as POWs, regardless of the fact that two women and a number of wounded troops were also among the victims.

Possible civilian victims?

The Court also considered whether in addition to the criminal act of 'war crime against POWs', the defendants possibly perpetrated any other related offence taking into account the already mentioned fact that, among the victims, there were clearly also civilians (either 'real' patients of the hospital, or civilians feigning injuries or sickness). Both the Socialist Federal Republic of Yugoslavia (SFRY) Criminal Code and the Federal Republic of Yugoslavia (FRY) Criminal Code contain provisions on war crimes committed against the wounded and sick,[8] as well as war crimes committed against the civilian population.[9]

The Belgrade Appellate Court in particular sought to address this issue, before concluding that it was necessary to apply the principle of *apparent* or *quasi ideal concurrence* in a situation of *alternativity*, since a single act has caused a number of criminal offences that have elements of several different crimes but still constitute a single criminal act that incorporates all other crimes. Thus, even though the acts of the defendants featured some elements of the offences of war crime against the wounded and sick and war crime against the civilian population, the acts of the defendants were still centred on the dominant offence of a war crime against POWs, because it was established that most of the victims had or were entitled to POW status, and that the defendants committed the crimes against them acting in the belief that they were indeed dealing with POWs.

8 See Art. 143 of the FRY Criminal Code: 'Whoever, in violation of the rules of international law at the time of war or armed conflict, orders murders, tortures, inhuman treatment of the wounded, sick, the [*sic*] shipwrecked persons or medical personnel, including therein biological experiments, causing of great sufferings or serious injury to the [*sic*] bodily integrity or health; or whoever orders unlawful and arbitrary destruction or large-scale appropriation of material and stocks of medical facilities or units which is not justified by military needs, or whoever commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.'

9 See Art. 142 of the FRY Criminal Code: 'Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of [the] enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on [a] large scale of a [*sic*] property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.'

Outstanding questions regarding the protection of the wounded and sick

During the entire proceedings, the Court heard evidence from a number of witnesses and victims who had knowledge of what was happening in the hospital just before the cessation of the fighting in Vukovar. When trying to establish the facts, the Court did not deal with any other developments in and around the hospital, nor did it attempt to establish whether some other serious violations of IHL had also been committed elsewhere.

However, some indisputable facts related to the Vukovar Hospital, its personnel and patients were established by both the Belgrade District Court and the ICTY. There is no doubt, for instance, that the hospital in Vukovar was a civilian medical facility that operated long before the onset of the armed conflict and employed civilian staff – physicians, nurses and paramedics. After the outbreak of the armed conflict, the hospital, in addition to regular medical services to civilian patients, started to increasingly provide medical assistance to wounded members of the Croatian armed forces and even took care of a small number of JNA soldiers, injured in combat or indiscriminate shelling of the city, including the hospital itself.

For reasons of the safety of both patients and staff, most of the hospital's activities were moved to a shelter in the basement, where the wounded were placed and operated on. As fighting intensified, most medical interventions were related to war surgery. Due to the shelter's limited capacity, the wounded were moved after operations to a makeshift hospital ward set up in the Borovo Commerce building. Meanwhile, the hospital building was badly damaged by numerous missiles, as was confirmed by a host of witnesses and was clearly visible in the photographs and video footage from that time. The hospital was also hit by a 250 kg aircraft bomb, which passed clean through all five floors and landed in the basement, fortunately without exploding.

When establishing the responsibility for the Ovčara crimes, the Belgrade District Court did not specifically address possible violations of IHL with regard to persons and objects enjoying special protection, such as medical personnel and medical units,[10] but the data collected in these criminal proceedings still provide a sufficient basis for a more detailed study of this aspect of the event. Such data would certainly give rise to a number of questions, including (i) whether the hospital was purely a military target; (ii) whether it was the object of indiscriminate attacks;[11] (iii) whether there were criminal elements in the actions taken against the hospital's medical personnel by JNA officers and soldiers; (iv) whether there was any other

10 Under IHL, the wounded and sick must be found, collected and evacuated and must also be given medical care and assistance as soon as possible. For a full analysis of the protection of the wounded and sick under IHL and international human rights law, see the article by Alexander Breitegger in Part I of this issue of the *Review*.

11 See in particular Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary Law Study), Rule 13: 'Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.'

weapon in the hospital other than those seized from the wounded and the light firearms carried by the military medical personnel; (v) whether any members of a military unit of the Croatian armed forces who were not wounded and were not part of any hospital security detail were also hiding in the hospital; and (vi) whether JNA aircraft were shot at from this medical facility,[12] as well as a number of issues regarding the implementation of triage in the given circumstances, but also the already mentioned attempts by the hospital staff to change the status of some of the fighters to *hors de combat* (wounded) in a situation where they faced imminent capture.[13] These remain outstanding questions to be explored.

Circumstances of the domestic trial and history of the proceedings

Following the 1991–1995 conflicts in the former Yugoslavia, some of the countries in the region decided that, according to their needs and capacities, they would initiate trials for the crimes committed in the course of the conflicts; such trials were to take place in several large, regular courts, where they would be dealt with by special judicial panels. The Republic of Serbia, however, adopted a different, 'centralised' solution, involving a specially trained police unit from the Ministry of the Interior (Department for War Crimes), a Parliament-elected Prosecutor for War Crimes, and a War Crimes Chamber (popularly known as the 'Special Court'), which was established within the Belgrade District Court and was made up of investigating judges and presiding judges of the judicial panels. These judicial bodies, created by a law passed in June 2003, were to prosecute war crimes committed in Serbia, Bosnia and Croatia in the course of the 1992–1995 conflict.

The Belgrade prosecution and the War Crimes Chamber began work in the autumn of 2003, in the specific circumstances of growing social awareness of the necessity of conducting war-crimes trials more than ten years after the first armed conflict, when part of the public started to seriously talk about facing the truth and the need for reconciliation. This was also the point at which the ICTY had been operational for ten years and the time of the assassination of Serbia's prime minister and the subsequent imposition of a six-week state of emergency in the Republic of Serbia. One part of the Serbian public was still showing a lack of appreciation for, and disapproval of, the possibility that some obvious serious violations of IHL,

12 This possibility was brought up during the trial at the ICTY by the defence of the 'Vukovar Three' case (see following section), which alleged that members of police units attached to the Croat armed forces were in the hospital shooting at JNA aircraft from its roof, which reportedly stripped the hospital of its status as a civilian object enjoying special protection and, in this way, made it a legitimate military target.

13 The Belgrade District Court did not address in any specific detail, for instance, the issue of possible perfidy in relation to the fact that members of the Croatian forces disguised themselves by taking off their uniforms and putting on civilian clothes or those of the hospital staff and by 'feigning injuries', as the defence put it, because the Court did not deem this to be its task. Perfidy is defined in Art. 37 of Additional Protocol I to the Geneva Conventions as 'acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence'. See also ICRC Customary Law Study, Rule 65: 'Killing, injuring or capturing an adversary by resort to perfidy is prohibited'; this includes 'simulation of being disabled by injuries or sickness because an enemy who is thus disabled is considered *hors de combat* and may not be attacked but must be collected and cared for.'

which were committed in the former Yugoslavia, should be tried in Serbian courts. At that time, the investigating and presiding judges of the new Court were often berated by the representatives of certain political parties and referred to in distinctly negative terms in parliamentary debates.

At the same time, many international observers and representatives of non-governmental organisations who followed the work of the newly established judicial bodies in Serbia were full of praise for the expertise and way of working that the Court had shown in the first months of its operation. It was the Ovčara case that was singled out and referred to in a positive context in the 2005 Progress Report from the European Union, which evaluated the readiness of Serbia and Montenegro to join the European Union: 'domestic courts have continued to be cooperative and are doing good work in trying some low-profile cases (notably the Ovčara case)'.[14] The document, nevertheless, also expressed some reservations, pointing out that 'the overall political climate is such that there is no guarantee that any high-profile war crimes trials could be conducted in a fair and transparent manner'.[15] The subsequent continuation of the trial and conviction in this case, as well as the opening of other criminal proceedings before the War Crimes Chamber in Belgrade, have shown that such a cautious approach to the prosecution of serious violations of IHL in Serbia was not justified after all.

In these circumstances, just before the adoption of the law creating these judicial bodies in the summer of 2003, and after the police collected information in the pre-trial investigation and the documents were submitted by the ICTY, the District Court in Novi Sad began an investigation against four people suspected of war crimes against prisoners of war[16] at Ovčara, near the city of Vukovar. The initial results of the investigation resulted in the gradual increase of the number of defendants charged with ordering and executing these crimes.

In the autumn of 2003, the Ovčara case was the first case taken over from the District Court in Novi Sad by the prosecution and the War Crimes Chamber of the Belgrade District Court. On 4 December 2003, having completed the first part of the investigation, the Serbian Prosecutor of War Crimes charged a total of eight persons with a criminal act of war crime against prisoners of war at Ovčara.[17] When in May 2004 the Prosecutor completed the second part of the investigation, he indicted twelve more persons for the same offence. Another three indictments followed at a later date after extraditions from Montenegro, Norway and Great Britain.

In the course of the trial, the Court, in addition to bringing all the defendants to the witness stand, examined more than a hundred witnesses who had knowledge not only of the crime in question but also of the broader circumstances surrounding the event. Extensive forensic evidence was presented in a number

14 European Commission, *Serbia and Montenegro – 2005 Progress Report*, SEC (2005) 1428, Brussels, 9 November 2005, p. 23, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1428_final_progress_report_cs_en.pdf.

15 *Ibid.*

16 The reference to 'prisoners of war' in this context of *non*-international armed conflict is explained below.

17 For an explanation of the legal qualification of the acts, see below.

of different areas, with forensic experts explaining their findings and opinions before the Court. In addition to this, numerous documents were read at the trial in support of the evidence, together with photographs, sketches and videos, all of which were entered into the court records and added to the body of evidence in these criminal proceedings. For the first time ever, a video link with Zagreb was established, allowing some witnesses to provide their testimonies by means of video conferencing. Besides numerous media representatives, the trial in Belgrade was also followed by representatives of the Organization for Security and Cooperation in Europe (OSCE) mission, several embassies, the Republic of Croatia government and a number of non-governmental organisations from the region, as well as by the relatives and friends of the Croatian victims.

On 12 December 2005, a First Instance verdict was passed,[18] but on 14 December 2006 it was overturned by the Serbian Supreme Court, which ordered a new trial before the Court of First Instance. During the retrial, all the defendants were re-examined and all the evidence presented again as in the previous trial, while some additional expertise was done and new evidence brought by order of the Appellate Court in order to further clarify some contentious points. A new verdict was pronounced on 12 March 2009.[19]

Acting on the appeals of the prosecution and the defence, the Appellate Court in Belgrade (given the provisions of the Law on the Organisation of Courts of 2008, which envisages that this court rules in second-instance appeals) only partially reversed, in June 2010, the First Instance verdict by reducing the sentence of one defendant from twenty to fifteen years in prison and increasing the sentence of another from nine to eleven years.[20] The rest of the First Instance verdict was confirmed, thus legally terminating the criminal proceedings in this case.

By noting, however, that war-crimes offences never expire, the court did not rule out the possibility of a new trial against some newly discovered perpetrators of this crime.[21] When announcing the verdict, the presiding judge even made a point of noting that not all of the culprits of the execution at the Ovčara farm were in the dock at this particular time. Subsequent events proved his point when another

18 District Court in Belgrade (War Crimes Chamber), *Prosecutor* v. *Miroljub Vujović et al.*, Case No. K. V. 1/2003, Judgment, 12 December 2005. Fourteen people were sentenced to prison – eight defendants to maximum prison terms of twenty years, four to prison terms of fifteen years, and three to prison sentences of twelve, nine and five years respectively. Two defendants were acquitted by the same verdict, while a defendant who was tried separately because of his illness received an eight-year prison sentence.

19 District Court in Belgrade (War Crimes Chamber), *Prosecutor* v. *Miroljub Vujović et al.*, Case No. K. V. 4/2006, Judgment, 12 March 2009. Thirteen defendants were found guilty and sentenced to prison terms. Seven of them received maximum prison terms of twenty years, one defendant was sentenced to fifteen years in prison, one to thirteen, one female defendant to nine years, one defendant to six years and two defendants to five years in prison each. At the same time, five defendants were acquitted of all charges by the same verdict.

20 Appellate Court in Belgrade, Case No. KZ1 PO2-1/2010, 23, Second Instance Verdict, June 2010.

21 Particularly interesting in this respect was the following sentence from the Court's verdict: 'These crimes, however, are never rendered obsolete, and if not now, it is expected that the future will provide the answers.' This holds particularly true in the light of the fact that the *Mrkšić et al.* trial has now been completed before the ICTY in The Hague (see below section), and there is now a real possibility that the defendants in this case may be interrogated by the judicial authorities of the Republic of Serbia in some other criminal proceedings, whether directly or through international legal assistance.

suspect in the Ovčara massacre was later identified, located in Serbia and arrested as evidence indicated that he was a direct perpetrator of the crime. Criminal proceedings against him are ongoing before the Court in Belgrade, making him the twenty-fourth suspect against whom criminal proceedings have been initiated in Serbia for the same offence.

The Vukovar Hospital case before the ICTY

The events at Ovčara were the subject of review not only by the War Crimes Chamber in Belgrade, but also by the ICTY Prosecutor's Office, which already in November 1995 had filed an initial indictment (which later underwent several changes) against the so-called 'Vukovar Three' – senior JNA officers Colonel Mile Mrkšić,[22] Major Veselin Šljivančanin[23] and Captain Miroslav Radić[24] – for planning, instigating, ordering or otherwise aiding and abetting the crimes of persecution on political, racial or religious grounds, extermination, murder, torture, inhumane acts, and cruel treatment.

The ICTY trial proceedings began in October 2005 and lasted until September 2007, when, according to the Trial Chamber judgment, Mile Mrkšić was sentenced to twenty years and Veselin Šljivančanin to five years in prison, and Miroslav Radić was acquitted of all charges.[25] Although the ICTY did not characterise the conflict in Croatia, it did similarly consider the victims at Ovčara as benefiting from POW status.[26]

The Trial Chamber found Mile Mrkšić responsible for aiding and abetting the criminal offences of murder, torture and cruel treatment. The ICTY found that Mrkšić, despite knowing how extremely hostile members of the Territorial Defence and paramilitary forces were, still ordered the withdrawal of the JNA military guard keeping watch over the prisoners of war at Ovčara, and in this way virtually handed them over to the Territorial Defence forces despite being fully aware that in doing so, he was exposing them to a high risk of serious violence and death. According to the Trial Chamber, Mrkšić's failure to act in any other way – although he had the

22 Colonel Mrkšić was alleged to have ordered or permitted JNA soldiers under his command to 'deliver custody of detainees taken from the Vukovar hospital to other Serb forces', who allegedly committed the crimes mentioned in the indictment. See ICTY, *Prosecutor* v. *Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Judgment, 27 September 2007, para. 2.

23 Major Šljivančanin was charged with having 'personally directed the removal and selection of about 400 non-Serbs from Vukovar Hospital on 20 November 1991, knowing or having reason to know they would be murdered', and to have 'ordered or permitted JNA soldiers under his command to deliver custody of these detainees to other Serb forces knowing or having reason to know that they would be murdered, and to have been present at Ovčara farm on 20 November 1991', when the criminal acts were committed. See ICTY, *Prosecutor* v. *Mrkšić et al.*, above note 17, para. 4.

24 Captain Radić was alleged to have, among other things, personally participated 'in the removal and selection of about 400 non-Serbs from Vukovar Hospital on 20 November 1991, knowing or having reason to know they would be murdered'. See ICTY, *Prosecutor* v. *Mrkšić et al.*, above note 17, para. 3.

25 ICTY, *Prosecutor* v. *Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Judgment, 27 September 2007.

26 For a detailed analysis and discussion on this point, see Giulia Pinzauti, 'Protecting Prisoners of War: The Mrkšić et al. Appeal Judgment', in *Journal of International Criminal Justice*, Vol. 8, No. 1, 2010, pp. 199–219.

means to do so by possibly giving the order to reinforce the military guards at Ovčara or to improve in any way the measures for securing the POWs – made it possible for the direct perpetrators, members of the Territorial Defence of Vukovar and paramilitary forces to take revenge on the prisoners of war.

Regarding Šljivančanin's accountability, the Trial Chamber found that the allegations in the indictment had not been proved and that there was no evidence to suggest that the defendant ordered any forces to commit any of the offences specified in the indictment. However, the Trial Chamber found that Šljivančanin knew about the abuse of prisoners at Ovčara, that he was aware that the number of military officers providing security to these prisoners was insufficient and that they often failed to discharge their duties in an appropriate way, and, finally, that he did not take any of the measures available to him to try to prevent the abuse of the prisoners despite being aware of the grave crimes being committed against them. For these reasons, the Trial Chamber found Šljivančanin responsible for aiding and abetting the crimes of torture and cruel treatment, but found no evidence of his responsibility for other crimes. However, the Chamber also found that the military police security detail guarding the prisoners was withdrawn in the evening on the orders of Colonel Mrkšić, as a result of which, in the Trial Chamber's opinion, Major Šljivančanin ceased to be responsible for the safety of the prisoners of war since he no longer had command authority over the military police providing the security.

In the case of Miroslav Radić, the Trial Chamber found that on 19 November and in the early morning of 20 November 1991, the defendant was at the hospital, since, in the beginning, the soldiers under his command were in charge of securing the hospital, but that he was not in any way involved in the triage of prisoners in the hospital and that there was no evidence that he was at Ovčara in the first place. For these reasons, he was acquitted of all charges.

In considering the appeals filed by both the ICTY prosecution and the defence, the Appeals Chamber issued, in May 2009, an appellate judgment[27] which confirmed the twenty-year prison sentence for Mrkšić and, with regard to Radić, upheld his acquittal. The Appeals Chamber took a different stance on Šljivančanin, finding that his aiding and abetting of the crime of torture as a violation of the laws or customs of war was proved in court, but that the first sentence did not adequately reflect the gravity of the crimes he had committed. Besides this, the Appeals Chamber convicted Šljivančanin for aiding and abetting the crime of murder as a violation of the laws or customs of war and his sentence was substantially lengthened from the original five to seventeen years in prison.

Acting on the request of Šljivančanin's defence for review of the Appeals Chamber's ruling, the ICTY agreed to allow the presentation of new evidence that was not known at the time of the previous judgment and granted a review hearing regarding the defendant's responsibility for the events at Ovčara. This resulted in the Appeals Chamber quashing the previous sentence and, in December 2010, imposing a final sentence of ten years' imprisonment.

27 ICTY, *Prosecutor* v. *Mrkšić et al.*, Case No. IT-95-13/1-A, Appeal Judgment, 5 May 2009.

The ICTY thus brought to a close the marathon process of determining the accountability of the accused officers of the former Yugoslav People's Army for the execution of persons taken from Vukovar Hospital on 20 November 1991. Although the subject of the trial was a specific event, the ICTY also had to determine, in the course of the proceedings, the broader context in which events took place by presenting numerous exhibits and pieces of evidence, examining a large number of witnesses and experts, and probing extensive written, audio, photo and video documentation, because only in such a comprehensive manner could it get the full picture of the circumstances preceding and directly contributing to the occurrence of the crime in question.

Modalities of domestic prosecution of war crimes and the challenges of judicial cooperation

In addition to raising questions about the status of persons at the Vukovar Hospital and their protection under IHL, the Ovčara case highlights some of the challenges involved in domestic prosecution of war crimes, in particular as regards judicial cooperation. Criminal proceedings had been initiated in Serbia, where most of the defendants were apprehended, while some others were still on the run and were out of reach of the Serbian authorities, and some witnesses and victims resided mainly in the territory of the Republic of Croatia. It was therefore necessary for the Serbian` courts to gather valid court-worthy statements and testimonies that could, to a significant degree, clarify the still numerous contentious issues.

In a situation where there was no significant cooperation in the prosecution of war crimes between Serbia and Croatia and where there was still some mistrust between them, it was reasonable to expect that witnesses and victims from Croatia did not want to testify before courts in Serbia. As an illustration of this, the Croatian side at one point even rejected a suggestion that witnesses from Croatia be transported under Croatian police escort to the nearest border crossing on the territory of Serbia (Backa Palanka); there, an investigating judge from Belgrade would meet and interview them in the local court building, where full security measures would be taken to protect them.

On the other hand, the classic form of international legal aid, in which the injured party and witnesses would be interviewed independently by a Croatian investigating judge, would certainly not have yielded the best results because of the complexity of the event in question: at that point in time, the investigative file was already over 1,000 pages long and preparing a set of questions in advance would not have been sufficient in many cases, since the choice of the next question all too often depends on the answer given previously.

Bearing all this in mind and appreciating the obvious need to strengthen mutual confidence, the investigating judge of the War Crimes Chamber in Belgrade asked to join the deputy prosecutor in charge and attend the hearings of witnesses and victims in Zagreb, so that he could also interrogate them. The first arrival of the investigating authorities from Belgrade and the subsequent establishment of a fair

and professional collaboration with their colleagues from Zagreb made it possible for both sides to reach the critical threshold of mutual trust, which in turn convinced the witnesses that the judicial authorities of the two countries were really cooperating and made them fully accept the fact that their testimonies would contribute to establishing the truth.

This method of interrogating witnesses during the investigation, together with the substantial assistance of some non-governmental organisations, played a crucial part in convincing some of the witnesses from Croatia to come to Belgrade and testify in person at the trial. In the same way, forensics professionals from Zagreb offered their expert opinions directly before the Belgrade District Court; moreover, direct evidence at the trial was also given by witnesses who were interrogated by video link. Besides this, the organised arrival of the families of the victims and their presence at the trial in Belgrade was a further confirmation of the fact that the prosecution of such crimes and the transparent approach to the proceedings contributed to meeting more than just the basic requirement of serving justice. One cannot ignore the contribution that such trials make to reconciliation, dealing with the past and strengthening of or restoring mutual trust. It was precisely for this reason that it was so important to have this kind of case tried in Belgrade, Serbia.

Cooperation between the War Crimes Chamber in Belgrade and the ICTY

Through sustained and institutionalised cooperation with the Prosecution and the War Crimes Chamber in Belgrade, the ICTY was able to use the evidence and findings obtained by the Belgrade District Court. Of particular significance was the help, support and encouragement of the ICTY and, above all, of the Prosecutor's Office, which allowed access to some of the evidence in the criminal proceedings conducted in The Hague against the 'Vukovar Three' – JNA officers Mile Mrkšić, Veselin Šljivančanin and Miroslav Radić. The three were also interviewed in the ICTY Detention Unit in The Hague by an investigating judge from Belgrade in the presence of the deputy war crimes prosecutor in charge.

Although there are some who believe that in the judicial resolution of this crime – in circumstances where the ICTY took over the prosecution of former JNA officers while the Belgrade District Court tried the direct perpetrators of the crime – there was not enough cooperation between the two courts, it appears that such assessments are not fully justified. As this was the first case in which direct communication was established between the judges and prosecutors of these judicial institutions, it is true that a certain amount of mutual distrust was present at the beginning, especially during the first phase of the investigation, conducted in Belgrade. In addition, not all procedural questions related to the use of available evidence and the status of individual participants have been fully resolved. However, at the later stage of the proceedings, cooperation on this case – and in other investigations and trials that the War Crimes Chamber in Belgrade subsequently dealt with – was far more substantial and of significantly better quality, so the results were more concrete and better overall.

The very fact that the subject matter of the trial was practically the same event, albeit with different defendants, unavoidably resulted in the overlapping of some evidence, so that some of the same witnesses and victims were examined and parts of the same body of evidence were used in both the Hague and Belgrade trials. In such circumstances, both courts were in a position to establish and verify all the facts that were essential for a fair and just verdict with much greater certainty.

The chosen solution that the ICTY would try former senior JNA officers for the crime at Ovčara, while the Belgrade Chamber for War Crimes would focus on the direct perpetrators of the same crime, turned out to be the best option in the given circumstances. Regardless of the fact that an exit strategy for the ICTY had long been decided, leaving the Tribunal to simply complete ongoing proceedings and not initiate any new investigations, one cannot state with certainty that there will be no new trials for the Ovčara crime. Bearing in mind the statute of limitations for war crimes and the principle of universal jurisdiction over serious violations of IHL, as well as the extensive documentation that is available to the courts (and allowing for the possibility that the charge sheets in both trials did not necessarily cover all the perpetrators and those responsible for this crime), it is still possible that new criminal proceedings in this case be launched before the War Crimes Chamber in Serbia. One also cannot rule out the possibility that criminal proceedings will be initiated before a court of another state in the region or the world, especially if a suspect in this crime is caught on its territory and the state in question decides to conduct such a trial.

Beyond the Ovčara case: reflections on preventing and prosecuting violations of international humanitarian law

Possibilities of prosecution

Although one cannot really speak about full codification of the law applicable to international armed conflict, there is even less to be said about treaty law of non-international armed conflicts, and the impression is that this area is somewhat unjustly neglected. It is precisely these circumstances that, among other things, necessarily point to the direction in which IHL should continue to develop. What is of exceptional importance in this field is surely the work of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as well as the establishment and operation of the permanent International Criminal Court, the East Timor hybrid tribunal (the Special Panels of the Dili District Court), the hybrid courts for Kosovo, the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone.

Though the crimes dealt with by these tribunals generally never become obsolete under statutes of limitations, almost all of these institutions are of limited duration because of the time limitation of their work, or because of lack of political will or insufficient funding for their continued operation. Only the permanent International Criminal Court is not in this category, but it would be unrealistic

to expect that it will be able to hold trials for all of the numerous grave violations of IHL around the globe.

In view of this, it is very important not to disregard the national courts of states involved in armed conflict or of countries on whose territories such conflicts take place, provided that they have the capacity and opportunity to try these gravest offences, both by directly applying the rules of IHL and by implementing these laws in their existing national legal systems. After all, it is almost impossible to imagine that any dramatic shift in the judicial resolution of a number of grave violations of IHL could ever be expected to take place without these national courts. For example, in Croatia and Bosnia and Herzegovina alone, criminal charges for war crimes related to the armed conflicts of 1991–1995 have been filed against thousands of people, which is a huge number of war crimes-related events and suspects even if one takes into account the fact that in many such cases there was no real basis for such legal qualifications.

Furthermore, there is also a possibility that, for political reasons, some states found it in their interest to portray some events as occurrences of war crimes for which they filed charges against suspects in pre-trial proceedings, although there was no clear basis for doing so (this is best evidenced by the ratio of the number of reported war crimes and the number of aborted prosecutions and acquittals), leaving a huge number of people suspected of these crimes. This is even more curious considering that trials for serious violations of IHL are very demanding, with complex procedures for presenting evidence and proving guilt that certainly require a substantial level of expertise in the field of investigation, prosecution and trial of these offences. In order to successfully conduct such trials under respective national legislations, it is also necessary to overcome the narrow nationalistic approaches to this issue and to create an appropriate political climate by means of raising awareness and promoting universally accepted human values.

It goes without saying that, had at least some of the violations of international criminal law been prosecuted at the time of the armed conflict, this would have contributed significantly to allowing the societies and states involved to make a clear stand on such criminal offences and would have helped to deter potential offenders.

However, it is much more realistic and commonplace in practice to see such trials take place following a certain time-lapse after the crimes in question are committed and hostilities cease. A society's recognition of the necessity of such trials, coupled with the general public being allowed access to the evidence and facts from them, can make a major contribution to the successful conduct of these trials.

As all this is not sufficient in itself, it is also essential to make appropriate normative interventions in the existing positive legislation, coupled with the enactment of the necessary regulations and the harmonisation of national legislation with international instruments in order to create an appropriate legal framework and place the right tools in the hands of those who are to implement in practice the prosecution and trials of the perpetrators of the gravest crimes. Given the specificities of these offences, particularly in terms of gathering and recording evidence and the interpretation and application of IHL, additional specialisation

and education of all those involved in the process is desirable, especially when it comes to the police officers, prosecutors and judges who are to participate in the proceedings.

International judicial cooperation

Special attention should also be paid to international cooperation in the broad sense of the term, not only with other states, but also with international tribunals and other international organisations and institutions which could be in possession of evidence pertinent to a particular trial or have access to defendants, witnesses or experts who are unavailable to the country conducting the trial. In many cases, the perpetrators of crimes are citizens of one state while the victims and witnesses are citizens of another. There is often a need to conduct some investigation on the territory of another state. Sometimes, especially in complex procedures with multiple defendants and victims, there is a need to locate witnesses, serve summons, possibly implement protective measures, and examine a number of witnesses and victims in the territory of one or more states.

No country is willing to give up part of its sovereignty and allow the investigating authorities of another country to independently conduct certain investigations on its territory. On the other hand, the classical mechanism of providing international legal aid is too slow and inefficient: it typically takes months for the requesting state to, for example, submit an ordinary note to the requested state; if the requested state is expected to respond to the requesting one, the whole process becomes a nightmare for those seeking such information.

Nevertheless, much of the problem can be solved by bilateral or multilateral agreements between the parties, which may agree on faster and more efficient ways of communication. A good basis for achieving more advanced cooperation is the European Convention on Mutual Assistance in Criminal Matters and especially its Second Additional Protocol, which, among other things, prescribes the correct ways of conducting hearings by video conference and the formation of joint investigation teams by two or more states.

When it comes to trials for violations of IHL, the current practice in Serbia shows that the means available to government agencies have not been used to their full extent. The biggest advances have been made in the field of bilateral agreements between states, primarily in the field of cooperation between prosecutors in the region, where interrogations via video link of participants in hearing proceedings are no longer a rarity.

The least used cooperation mechanism has been joint investigation teams; the first of these was set up in early 2007, in Belgrade, under an agreement between the Belgrade District Court and the Tuzla Cantonal Prosecutor's Office, in order to facilitate a very complex and extensive investigation of one of the worst war crimes in the former SFRY. The leader of the team was an investigating judge of the War Crimes Chamber in Belgrade, while members of the team comprised one prosecutor from Serbia and one from Bosnia and Herzegovina, plus two police officers from each of the two countries. As the experience gained in the work of this team was very

positive and the results exceptionally good, it is unclear why this kind of cooperation has not been more extensively pursued in other legal proceedings.

On the importance of disseminating IHL

In the case of the former Yugoslavia, it should be noted that the country had ratified all the major international instruments in the field of IHL and, for the most part, incorporated these regulations into domestic legislation, particularly in the criminal justice system. The country was also fulfilling its obligations in terms of IHL dissemination. A good example in this regard is the *Instructions on the Application of the International Law of War in the Armed Forces of the SFRY* (hereinafter the Instructions), published in the official military gazette of June 1988, in which the then federal secretary for national defence, General Veljko Kadijević, acting on the orders of the presidency of Yugoslavia, gives more detailed instructions on the conduct of members of the SFRY armed forces.[28] Containing some fifteen detailed forms and documents, the Instructions were printed in book form and distributed to all units and institutions of the former Yugoslav People's Army. This order issued by the federal presidency clearly illustrates the way it treated accountability in war:

> All unit commanders and each individual member of the Armed Forces is responsible for the application of the rules of the international law of war. An authorised officer shall initiate proceedings for the imposition of statutory sanctions against any person found to be in violation of the rules of the international law of war.[29]

The presidency also ordered that all members of the armed forces undergo mandatory training in order to get acquainted with the rules of IHL.

For the purposes of this paper, several key points from the Instructions can be singled out as particularly relevant. At its very beginning, this manual points out that the armed forces of the SFRY are made up of the JNA and Territorial Defence, and provides a list of all international agreements and other documents that the SFRY has ratified and recognised. Although the manual essentially and above all refers to international armed conflicts, it also makes references to the application of Additional Protocol II to the Geneva Conventions and the basic rules of humanity in the case of non-international armed conflicts.

If a violation of IHL was established, a Yugoslav army officer was required to order an investigation into the relevant facts and circumstances and the gathering of the necessary evidence. The manual also stipulates that during a bombing campaign against defended positions, all necessary measures must be taken to protect hospitals and collection points for the wounded and sick, and prohibits any

28 See *Propisi o primeni pravila Medjunarodnog ratnog prava u Oružanim snagama SFRJ* (*Instructions on the Application of the International Law of War in the Armed Forces of the SFRJ)*, PrU-2, Savezni Sekretarijat za Narodnu Odbranu (Pravna Uprava), Belgrade, 1988.

29 In the same sense, see *ibid*., Rules 20 ff, on individual responsibility and violations of IHL.

form of attack on, among other things, military medical units and facilities as well as on civilian institutions and health service units.

The issue of the wounded and sick is also covered in detail, while the capture of prisoners is described as follows: 'When they fall into the hands of the enemy, the wounded and sick become prisoners of war to whom, in addition to special provisions governing the protection of the wounded and sick, the provisions of Item 200 of this Instruction shall also apply' (Item 200 lists which categories of individuals have the status of prisoners of war).

Any attempt to relate this approach to the key provisions of IHL (through ratifying conventions and agreements, and the highly detailed Instructions being made available to all members of the armed forces) with the proportions, magnitude and 'ingenuity' of the crimes committed in the former SFRY in 1991–1995 brings forward the chilling question of how many more such crimes would have been committed and how much worse they would have been if the state had not followed and accepted the rules of contemporary IHL. Putting aside possible banal and ironic comments that the Geneva Conventions and their accompanying Protocols, as well as the aforementioned Instructions, may have served to collect dust in military libraries rather than being seriously studied in the field, one would have to conclude that the answer to this question is indeed very complex and requires extensive research in a direction that goes beyond the scope of this particular paper.

Conclusion

It is quite certain that a more detailed study of these events, coupled with proper access to the whole issue, could provide answers to most of the questions posed in this paper. It could also point to some other facts and throw further light on the roles and actions of the participants in these events, which for now are still not fully understood.

Unfortunately, attacks on hospitals, medical personnel and medical transports are no longer a rarity in armed conflicts, even in situations where they are clearly marked, although many institutions and organisations, primarily the International Committee of the Red Cross, have repeatedly appealed to the humanity of the participants of armed conflicts, reminding them of their obligation to respect IHL. In addition to medical staff, the wounded and sick in hospitals and transport vehicles are also directly affected by such attacks, as well as the soldiers and civilians to whom the medical teams cannot provide timely assistance. Field investigations have demonstrated the tragic and inhuman character of such attacks and confirmed that a great many lives have been lost because of violence against those trying to help the wounded and sick. This is certainly an affront to the fundamental ideas of humanity and a serious challenge to the wider international community, which simply must find an effective way to prevent this from happening.

Any attempt to relativise the level of accountability for such grave crimes through the practice of prosecuting and punishing only direct perpetrators

significantly undermines the authority of IHL and shows that there is still ample room for the implementation of the developed forms of some principles belonging to this branch of law, which are incorporated not only into domestic legislation but also in the minds of the people. This pertains to the already accepted direction of further judicial development, where more attention would be focused on so-called 'crimes of omission' – that is, crimes of inaction committed by military commanders and politicians. Only once those responsible for failing to act to prevent a crime end up in the dock themselves can we speak of proper accountability for the lack of respect for or application of IHL.

Further promotion of IHL by careful monitoring of the current trends of violations of this branch of law may surely contribute to making this world a better place than it is now, and this goal really deserves the maximum involvement of all relevant actors. It is precisely the activities of the international community in this area, as well as the use of the powerful instruments available to it – in the form of mechanisms of criminal legal prosecution and punishment in both national and international courts, as well as through the courts of state signatories of international treaties – that can make a significant contribution to reducing the number of violations of IHL.

Although opponents of this approach to strengthening the authority of IHL by intensifying criminal prosecution of perpetrators of such crimes might accuse the international community of sabre-rattling, it is undeniable that the certainty of prosecution, either in an international or national court, acts as a general deterrent aimed at dissuading potential perpetrators from getting involved in the commission of these grave criminal offences.

The already mentioned Roman poet Horace was certainly not aware of the timeless character of his verse, which, in lieu of a conclusion, we hereby quote again: '*Coelo tonantem credidimus Iovem regnare.*'

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The relevance of the Fundamental Principles to operations: learning from Lebanon

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Abstract

Many aid agencies and commentators suggest that humanitarian principles are of little value to the humanitarian crises of today. However, through profiling the experience of the Lebanese Red Cross, this article highlights the enduring value and impact of the application of the International Red Cross and Red Crescent Fundamental Principles as effective operational tools for acceptance, access and safety. Having suffered a series of security incidents during the civil war and subsequent disturbances and tensions, this National Society deliberately sought to increase its acceptance amongst different groups. One of the approaches used was the systematic

* This paper draws heavily on a case study developed for the British Red Cross's Principles in Action project and for the International Committee of the Red Cross's (ICRC's) Safer Access Practical Resource Pack, which was co-authored by Sorcha O'Callaghan and Leslie Leach: see 'Principles in action in Lebanon', British Red Cross, ICRC and Lebanese Red Cross, 2012, available at: www.redcross.org.uk/About-us/Who-we-are/The-international-Movement/Fundamental-principles/~/media/BritishRedCross/Documents/Who%20we%20are/Principles%20in%20action%20in%20Lebanon.pdf (last visited March 2014); and 'Safer access in action case study: Lebanon', ICRC, British Red Cross and Lebanese Red Cross, 2013, available at: www.icrcproject.org/interactive/safer-access-in-action.html. The authors are grateful to the Lebanese Red Cross Secretary-General Georges Kettaneh and his team for their support. We would also like to thank Jane Backhurst, Samuel Carpenter and Dominique Loye for their very helpful comments on this paper.

operational application of the Fundamental Principles. Today, the Lebanese Red Cross is the only public service and Lebanese humanitarian actor with access throughout the country. This article seeks to address the relative absence of attention to how humanitarian organisations apply humanitarian principles in practice – and their responsibility and accountability to do so – by describing the systematic approach of the Lebanese Red Cross.

Keywords: Fundamental Principles, humanitarian principles, Lebanon, Lebanese Red Cross, perception, access, acceptance, security, safer access.

Following two days of open hostilities between the Lebanese Armed Forces and opposition forces early in the civil war which raged in Lebanon between 1975 and 1990, a convoy of Lebanese Red Cross ambulances took advantage of a short ceasefire to evacuate the wounded to hospital. Two Lebanese Red Cross ambulances transporting wounded and dead Lebanese Armed Forces soldiers were stopped at a military checkpoint manned by members of an opposing group. The Red Cross volunteers managed to persuade the group not to detain the wounded soldiers, but were less successful in stopping them from interrogating them. As the ceasefire came to a close and the fighting re-ignited, the Red Cross workers urged those at the checkpoint to let them through, highlighting the neutral medical mission of the Lebanese Red Cross. The volunteers also argued that should their interrogators find themselves in a similar position, they would not want the Red Cross to hand them over to their opponents. Negotiations continued until a call from a senior commander settled the matter at the request of a well-connected senior Lebanese Red Cross official in Beirut, and the ambulances were able to pass through and deliver the soldiers to hospital for treatment.

This article highlights some of the many strategies employed by the Lebanese Red Cross to provide humanitarian services and gain and maintain acceptance, safety and access over the past thirty years. Having suffered a series of security incidents during the civil war, the Lebanese Red Cross deliberately sought to increase its trust and acceptance amongst different groups by applying the International Red Cross and Red Crescent Fundamental Principles (hereinafter the Fundamental Principles). Although not without numerous challenges – to which the example above attests – the decision has paid off. Later in the civil war, the emergency medical services of the Lebanese Red Cross were able to work across as many as fifty different checkpoints. During the Israeli occupation of southern Lebanon, the Lebanese Red Cross provided services across the different territories. The Lebanese Red Cross also provided services for both sides during the 2006 armed conflict between Israel and Hezbollah. At the time of writing, the Lebanese Red Cross is providing emergency medical transport and humanitarian assistance for wounded Syrian nationals who are fleeing across the Lebanon border, adjusting and intensifying their acceptance strategies and security measures, to enable safe passage through various sensitive confessional areas within Lebanon.

Drawing on the experience of the Lebanese Red Cross, this paper argues that the Fundamental Principles are more than just normative aspirations. It shows that when applied systematically, they can be tools to support the management of operations. It examines the numerous accounts of external attacks on, and limitations of, humanitarian action in accordance with the principles and suggests that there is a relative absence of attention to the responsibilities of humanitarian organisations in applying them. The article highlights how the Lebanese Red Cross and its volunteers have systematically applied the Fundamental Principles in their daily work – a key factor in ensuring that the Principles are genuinely meaningful and useful, and not simply an empty rhetorical commitment. The article shows that considerable and consistent effort is required to build organisational commitment in order to ensure the rigorous application of the Fundamental Principles, but that this, along with specific acceptance and security management measures, has been effective in improving acceptance and access for the National Society. The action of the Lebanese Red Cross highlights the interdependence of all the Fundamental Principles in helping to get aid safely to those who need it most.

The article is structured in four parts. The first part begins with a brief overview of the Lebanese context and the methodology of the original case study from which this article draws. The second part examines some of the debates regarding humanitarian principles, including the degree to which they are understood as operationally relevant. The third highlights the interplay between the application of the Fundamental Principles and other actions and measures contained in the Safer Access Framework. It describes the impact of the strategies and approaches employed by the Lebanese Red Cross to apply the Fundamental Principles and the Safer Access actions and measures to increase its acceptance, security and access. The fourth part analyses the importance and implications of perceptions, access and security for the National Society. The paper concludes by highlighting some lessons that can be drawn and some questions raised by the Lebanon case study.

Lebanon and the emergency medical services of the Lebanese Red Cross

Lebanon gained independence in 1943 as a parliamentary democracy based on religious denominational or confessional lines, with government traditionally composed of a Maronite Christian president, a Sunni Muslim prime minister and a Shia Muslim speaker of the Chamber of Deputies or National Assembly.[1] Confessional divisions underpinned a civil war that spanned from 1975 to 1990 – a conflict which continues to act as a backdrop to the ongoing tensions and the fragility of relations between Lebanon's different communities today.

1 Alfred B. Prados, 'Lebanon', CRS Report for Congress RL33509, Congressional Research Service, 2007, p. 4, available at: www.fas.org/sgp/crs/mideast/RL33509.pdf (All internet references were accessed in March 2014, unless otherwise stated).

Lebanon's political stability is also closely intertwined with that of the region: Syria occupied parts of the country for almost thirty years, which in turn played a role in the later occupation of southern Lebanon by Israel for almost two decades. Today, the interconnections between Syrian and Lebanese societies and politics leave Lebanon vulnerable to spillover from the current conflict in Syria. At the time of writing, the number of confrontations between pro- and anti-Syrian factions within Lebanon is rising, particularly since the influx of Syrian refugees into northern Lebanon and Tripoli.[2]

Established in 1945, the confessional system of government in Lebanon affects the Lebanese Red Cross in a number of ways, including a governance structure which largely mirrors that of the Lebanese government. The work of the Lebanese Red Cross is largely health-related and includes the provision of emergency services, medical-social assistance, blood services, educational services and youth support. The Lebanese Red Cross's emergency medical services department, which was the focus of this study, carries out 200,000 medical missions every year, providing emergency support and ambulance care for medical emergencies as well as first aid at major public and sporting events. The Lebanese Red Cross currently operates the only national emergency hotline. With forty-five ambulance stations across the country, supported by an estimated 2,700 first-aid volunteers and 270 ambulances, the service aims to respond to 80% of emergency calls within nine minutes. The Lebanese Red Cross faces significant challenges – not least in providing a national twenty-four-hour emergency service run almost entirely by volunteers and on a low budget – but the professionalism of the highly motivated volunteers results in the provision of reliable and relevant humanitarian emergency services for communities across Lebanon.

Methodology and the relevance of the Fundamental Principles to the study's findings

This article draws on findings from an internal learning review of the operations of the Lebanese Red Cross by representatives of the British Red Cross and the International Committee of the Red Cross (ICRC) in February 2012. The review sought to examine the process and actions undertaken by the Lebanese Red Cross's emergency medical services to manage the acceptance, access and security of its operations and personnel, and the relevance of the Fundamental Principles to this process. The Lebanese Red Cross was chosen in order to draw learning from a National Society known within the International Red Cross and Red Crescent Movement (hereinafter the Movement) for its successful application of the Fundamental Principles.

Conducted over a month, the case study draws on a review of documents and a joint ICRC/British Red Cross eight-day research mission to

2 Rebecca A. Hopkins, 'Lebanon and the uprising in Syria: issue for Congress', CRS Report for Congress, Congressional Research Service, 2012, pp. 7–11, available at: www.fas.org/sgp/crs/mideast/R42339.pdf.

Lebanon (Beirut, Tyre, Rmaich, Tripoli and Qobeyat). Semi-structured interviews and focus group sessions were held with a range of stakeholders from within and outside the National Society, including several Movement partners, external government and media representatives and family members of the first-aid responders. Guided by a set of questions, the approach was open and iterative in order to understand the rationale, nature and outcomes of the process and the implications for the identity, actions and behaviours of the Lebanese Red Cross and its volunteers, as well as how external actors perceived these. The findings were then analysed to identify the relevance of both the Fundamental Principles and the Safer Access Framework[3] to the Lebanese Red Cross's emergency services operations. Analysis was undertaken in relation to all seven Principles to establish whether and in what ways they were relevant to the emergency medical services of the Lebanese Red Cross.

The research team used the framework below to analyse their findings. This framework, which draws from both National Society and ICRC practice and is an important concept underpinning the Safer Access Framework, depicts how neutral, impartial, independent humanitarian action can enhance acceptance, access and security. This approach recognises that to provide assistance and protection, humanitarian agencies and their personnel and activities must be accepted by both state and non-state armed groups and by communities – specific actions must be taken to reduce risks and increase acceptance and security so as to improve access and thereby support increased assistance and protection for those in need. Effective, relevant and community-based humanitarian services, provided in accordance with the Fundamental Principles and other relevant Movement policies, form its basis. The perception of an organisation – including its public identity and reputation, and how its actions are understood – is critical. In order to provide an effective response, it is important that at all times stakeholders perceive an organisation to be a neutral, independent, impartial provider of relevant humanitarian services. Trust and respect that have previously been established through interactions by carefully trained volunteers and staff with communities and armed actors need to be increasingly fostered and will contribute to greater acceptance of the organisation. This, together with a context-specific operational security risk management approach, should result in enhanced security for staff and volunteers, which, combined with additional measures, will enable them to gain increased access to those in need.

The success of the Lebanese Red Cross in improving its acceptance, security and access raises an important question of causation. To what degree can this be attributed to the application of the Fundamental Principles alone, or to other organisational strategies and processes, such as the various actions and measures contained in the Safer Access Framework? Is the work of the emergency medical services accepted amongst different communities because of the reliability, quality

3 The Safer Access Framework is a tool and approach used by National Red Cross and Red Crescent Societies to increase their acceptance, security and access to vulnerable people and communities. See www.icrc.org/saferaccess.

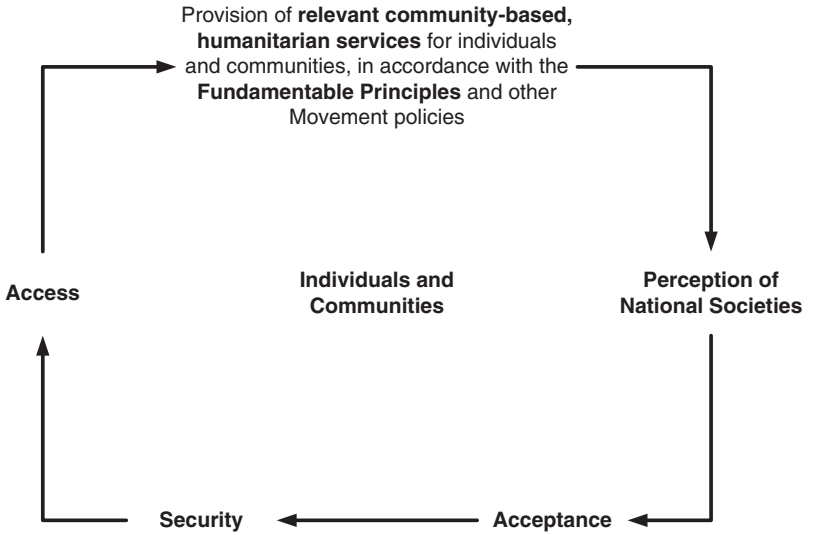

Figure 1. A principled approach to Safer Access.[4]

and effectiveness of the service or because it is delivered in accordance with the Principles, or both? In what way is this influenced by the National Society's investment in the training of volunteers – not only in medical standards, but also in the application of the Fundamental Principles?

While it would be helpful to be able to isolate neatly the effect of the application of the Fundamental Principles, they are standards that guide strategic and operational decisions and influence organisational processes, communications and actions, and are often combined with other acceptance measures. In Lebanon, it was clear to the interviewers that the Principles helped embed shared values, behaviour and identity within the National Society. This was evident from interviews with volunteers and staff as they spoke about themselves, their decision-making, their work and its humanitarian impact in terms of the Principles, ranging from their influence on communication and response strategies to how they recruit volunteers and manage security protocols.

The Fundamental Principles and the work of the International Red Cross and Red Crescent Movement

Today, although the International Red Cross and Red Crescent Movement often treats the Fundamental Principles as revealed wisdom, they are, in reality, the

4 This model has since been adapted slightly in the Safer Access guide. The modified diagram ('the Safer Access Cycle') and explanation can be found at: http://www.icrc.org/eng/assets/files/2013/safer-access-a-guide-for-all-national-societies.pdf, pp. 39–45.

distillation of practical operational experience over a very long period of time and not a priori or normative in origin.[5]

The work of the Movement is underpinned by seven Fundamental Principles – humanity, impartiality, neutrality, independence, voluntary service, unity and universality – which inspire and influence its conduct and activities. Based on, but not codified in, international humanitarian law (IHL), they were agreed in 1965 as a framework for the action and organisation of the Movement.

Fundamental Principles of the International Red Cross and Red Crescent Movement[6]

Humanity: The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.

Impartiality: It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

Neutrality: In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

Independence: The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

Voluntary service: It is a voluntary relief movement not prompted in any manner by desire for gain.

Unity: There can be only one Red Cross or one Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

Universality: The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.

5 Larry Minear and Peter Walker, 'One for all and all for one: support and assistance models for an effective IFRC', Feinstein International Famine Center, Tufts University, Boston, August 2004, p. 32, fn. 25.

6 International Federation of the Red Cross, 'The seven Fundamental Principles', available at: www.ifrc.org/en/who-we-are/vision-and-mission/the-seven-fundamental-principles/.

According to Jean Pictet, the celebrated ICRC lawyer and commentator on the Fundamental Principles, there is a clear hierarchy of Principles. Humanity and impartiality 'stand above all contingencies' as 'substantive' Principles; moral goods in and of themselves. Neutrality and independence are 'substantive' Principles of utility, which help to achieve humanity and impartiality. These two tiers of Principles thus reflect both their moral intent and practical orientation. Voluntary action, unity and universality are seen as less far-reaching than other Principles and describe the ideals of a Red Cross/Red Crescent institutional organisation.[7] Although the work of the Movement is underpinned by all seven of the Fundamental Principles, those of humanity, impartiality, neutrality and independence are particularly significant in the context of collective violence.

Attention to the operational relevance of the Fundamental Principles

Many organisations have since adopted elements of the Principles of the Movement. Humanity, impartiality and independence are referred to in the Code of Conduct for the International Red Cross Red Crescent Movement and NGOs in Disaster Relief, which has been adopted by 522 organisations at the time of writing.[8] Within and outside the Movement, the Principles are often perceived first and foremost as an expression of values and ideals. Their relevance as an operational, decision-making and guide-to-conduct tool is often underestimated or under-analysed. Surprisingly, the Movement has provided limited public accounts of the benefits of adherence to its Fundamental Principles and how they are achieved in practice, except for the newly produced Safer Access guide for National Societies.[9] Where accounts do exist, they tend to be by NGOs or humanitarian specialists; a recent description of the neutral action by the ICRC in Afghanistan is an important exception.[10]

The limited attention within the humanitarian community to the operational importance and relevance of applying the Principles can, to a degree, be explained by a lack of in-depth knowledge and training on how they can be used. Many claim that the Principles are often applied very loosely in accordance with various organisational interests, or are disputed or misunderstood.[11] A recent 'State of the System' report, for example, highlighted the limited understanding amongst humanitarian staff of humanitarian principles and IHL, whilst reviews of humanitarian action in response to the so-called 'IDP crisis' in Pakistan in 2009 highlighted the challenges faced by the United Nations (UN) and NGOs in ensuring

7 Jean Pictet, 'Commentary on the Fundamental Principles of the Red Cross', in *International Review of the Red Cross*, No. 210, May–June 1979, pp. 130–149.

8 See International Federation of Red Cross and Red Crescent Societies (IFRC), Signatories of the Code of Conduct, available at: https://www.ifrc.org/Global/Publications/disasters/code-of-conduct/Code%20of%20Conduct%20UPDATED_APRIL%202014.pdf (last visited April 2014).

9 ICRC, *Safer Access: a Guide for All National Societies*, Geneva, October 2013, pp. 54–61, available at: www.icrc.org/eng/assets/files/2013/safer-access-a-guide-for-all-national-societies.pdf.

10 Fiona Terry, 'The International Committee of the Red Cross in Afghanistan: reasserting the neutrality of humanitarian action', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, pp. 173–188.

11 Hugo Slim, 'Relief agencies and moral standing in war: principles of humanity, neutrality, impartiality and solidarity', in *Development in Practice*, Vol. 7, No. 4, November 1997, pp. 342–352.

principled humanitarian action in a highly politicised context where doing so would risk access due to efforts by the Pakistan government to downplay the crisis and Western governments' interest in using the crisis as an opportunity for more comprehensive stabilisation agendas.[12] Such shortcomings are not, however, the preserve of non-Movement actors. Fiona Terry has noted the inconsistent application of the Fundamental Principles by different components of the Movement, for instance,[13] whilst Pictet himself has recognised that the Principles are ideals to aspire to and argued that no Red Cross or Red Crescent Society has put this 'doctrine into effect at all times and in its totality'.[14]

This lack of appreciation of the practical relevance of the Principles is further compounded by what Collinson and Elhawary describe as 'a preoccupation with the role that external actors play in challenging humanitarian action'.[15] For example, national and donor governments can manipulate aid for their own political or military purposes;[16] stabilisation operations blur the lines between military and humanitarian actors;[17] counter-terrorism legislation criminalises humanitarian support to areas controlled by proscribed groups, thus undermining impartial humanitarian action;[18] the list goes on. Whilst not underplaying the important impact of these issues on humanitarian action, this sweeping externalisation of challenges means that there is also limited reflection on the responsibilities of humanitarian actors themselves to ensure that they are indeed focused and delivering on humanitarian objectives and applying humanitarian principles systematically. It also means that limited attention is applied to examining when and whether increased adherence to humanitarian principles can influence access and operational space in specific contexts. A parallel and related challenge to humanitarian principles emanates most often from *within* the aid sector. Faced with the limitations of humanitarian action in contexts such as Rwanda and Bosnia, where relief was critiqued as doing more harm than good by fuelling and failing to address the underlying causes of conflict, many question the ethical basis of neutrality in particular and call for a more politicised form of humanitarian action, as Oxfam for example did in relation to Somalia and Kosovo.[19]

12 Paul Harvey *et al.*, 'The state of the humanitarian system: assessing performance and progress', Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), Overseas Development Institute, London, 2010; Humanitarian Policy Group, 'A clash of principles? Humanitarian action and the search for stability in Pakistan', HPG Policy Brief No. 36, Overseas Development Institute, London, September 2009.
13 F. Terry, above note 10.
14 J. Pictet, above note 7, p. 14.
15 Sarah Collinson and Samir Elhawary, 'Humanitarian Space: A Review of Trends and Issues', HPG Report No. 32, Overseas Development Institute, London, April 2012, p.1.
16 Antonio Donini (ed.), *The Golden Fleece: Manipulation and Independence in Humanitarian Action*, Kumarian Press, Sterling, VA, 2012, pp. 2–40.
17 Ajay Madiwale and Kudrat, Virk , 'Civil–military relations in natural disasters: a case study of the 2010 Pakistan floods', in *International Review of the Red Cross*, Vol. 93, No. 884, December 2011, pp. 1085–1105.
18 Sara Pantuliano *et al.*, 'Counter-terrorism and humanitarian action: tensions, impact and ways forward', HPG Policy Brief No. 43, Overseas Development Institute, London, October 2011.
19 Tony Vaux, *The Selfish Altruist*, Earthscan, London, 2001, p. 202.

One of the implications is that these viewpoints create the perception that humanitarian principles are from a more politically straightforward 'golden age' of humanitarianism and are no longer relevant to the complexities and problems faced today. However, as Smillie[20] describes, this underplays a more complex and politicised history of humanitarianism replete, for example, with precedents of political inaction in the face of mass suffering (the 1915 Armenian genocide, the 1935 Italian invasion of Abyssinia, the short-lived secession of Biafra in 1967) and of military action on the grounds of humanitarianism (the 1824 Russian, British and French Anti-Ottoman intervention in the Greek war of independence, the 1860–1861 French expedition in Syria, the 1877 Russian anti-Ottoman intervention in Bulgaria). This limited engagement, understanding and application of humanitarian principles also narrows the purpose of humanitarian action to material relief rather than the broader purpose of 'protect[ing] life and health' and 'ensur[ing] respect for the human being' found in the Fundamental Principle of humanity, for example, thus again reducing its relevance.[21]

Importantly, these narratives also ignore the contingent aspect of humanitarian action and the significance of respect for the application of humanitarian principles in humanitarian negotiations precisely *because* of the enduring challenges of providing humanitarian assistance in complex environments. Although this is often forgotten, there is no automatic right of access for humanitarian agencies under IHL; rather, this access is a process of negotiation between parties to the conflict and humanitarian agencies. It could almost be described as a negative right – that humanitarian agencies cannot be obstructed if certain conditions are met. Under the Geneva Conventions, warring parties have the primary responsibility to ensure the humane treatment of those not participating in hostilities,[22] but impartial humanitarian agencies can offer their services.[23] Customary humanitarian law establishes that parties to both international and non-international conflicts must allow and facilitate the rapid and unimpeded passage of humanitarian relief which is impartial in character and conducted without any adverse distinction, subject to their right

20 Ian Smillie, 'The emperor's old clothes: the self-created siege of humanitarian action', in A. Donini (ed.), above note 16.

21 A. Donini, above note 16, p. 345.

22 Arts. 12 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (hereinafter GC I) and of Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 (hereinafter GC II); Art. 13 of Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (hereinafter GC III) and Art. 27 of Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (hereinafter GC IV); Common Art. 3 to the Geneva Conventions; Art. 75(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (hereinafter AP I); Art. 4(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (hereinafter AP II). See also ICRC, *Customary International Humanitarian Law,*Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary Law Study), Rule 87.

23 Art. 9 of GC I, GC II and GC III; Art. 10 of GC IV; Common Art. 3 to the Geneva Conventions.

of control.[24] This assumes a responsibility on the part of humanitarian agencies to demonstrate that they are indeed impartial and neutral in character so that they can come to the negotiating table to offer their services, and that access cannot be denied where the needs of those not participating in conflict are not met. However, by emphasising the limitations posed by external threats to principled action and focusing less on the accountabilities of humanitarian agencies themselves, there is arguably less incentive for humanitarian agencies to move beyond what are often rhetorical assertions of being principled and to explore in context-specific and nuanced ways how their actions and principles can be used to negotiate and navigate complex operating environments.

National Societies and the Fundamental Principles

Despite the importance of the Fundamental Principles to Red Cross and Red Crescent National Societies, their experience in applying the Fundamental Principles is largely absent from the humanitarian literature, which is partially explicable by the lack of research on the challenges and dilemmas faced by national organisations involved in humanitarian service delivery during conflict. This is despite the fact that with the onset of conflict, a National Society may have to shift quickly from its usual disaster response mechanisms to those required for operating securely in conflict, such as negotiating access with various local and national actors and adapting its methods of providing assistance and protection.

The ICRC, together with National Societies, has developed a guide, centred on the Safer Access Framework, to support National Societies in increasing their acceptance, security and access. When applying the guide, National Societies first reflect on their operational experiences within their context (past, present and anticipated) and isolate the root causes of the barriers, gaps and challenges to their acceptance, security and access to people and communities in need in sensitive and insecure contexts including armed conflict, internal disturbances and tensions.[25] They then define and take specific interlinked actions and measures – many of them associated with the application of the Fundamental Principles – which have been proven to address these challenges. The Framework is underpinned by the Safer Access cycle outlined above (perceptions, acceptance, security and access) and infused by the application of the Fundamental Principles.

24 ICRC Customary Law Study, above note 22, Rules 55 and 56. These specific rules are applicable in both international and non-international armed conflicts.

25 The term 'armed conflict' indicates a situation in which recourse is made to armed force between two or more states or to protracted armed violence between government authorities and organised armed groups or between such groups within a state. Whether or not a situation is classified as an armed conflict is important because, if it is, IHL applies and provides the normative framework against which the behaviour of the parties to the conflict is assessed. The term 'internal disturbances and tensions' refers to serious situations that fall short of the classification of armed conflict and to which IHL does not therefore apply. These situations may be of political, religious, racial, social, economic or other origin and include serious acts of violence affecting a large number of people. The relevant normative framework applicable to them is comprised of domestic law and international human rights law.

Elements of the Safer Access Framework[26]

The following elements are essential considerations for all National Societies in their efforts to gain and maintain safer access to people and communities affected by sensitive and insecure contexts including armed conflict, internal disturbances and tensions in order to provide protection and assistance.

Context and risk assessment and analysis: National Societies should have a clear understanding of the environments in which they operate and of the associated risks so that they can prevent and manage those risks in order to operate safely and effectively.

National Societies' legal and policy basis for action: Sound statutory and legal instruments and an equally sound policy base are very important in terms of facilitating access to restricted areas during armed conflict, internal disturbances and tensions.

Acceptance of the organisation: Providing relevant humanitarian services for the most vulnerable in accordance with the Fundamental Principles and other Movement policies helps National Societies to gain acceptance, which in turn contributes to security and hence helps to improve access to those in need.

Acceptance of the individual: To facilitate acceptance, National Society volunteers and staff should be representative of the community that they serve and should be recruited and deployed on the basis of their ability to represent their National Society and to adhere to the Fundamental Principles of the Movement.

Identification: National Societies should take initiatives to strengthen their image and that of the Movement, for example linking the public's image of the Red Cross or Red Crescent to the emblem, supporting their governments in fulfilling their responsibility to prevent and address misuse of the emblem, and developing and enforcing internal guidelines on the use of the emblem.

External communications: A well-developed communications strategy, systems, procedures and implementation plan, coordinated with other components of the Movement and supported with the necessary tools and resources, reinforces the positive image and position of the National Societies and the Movement at the same time as fulfilling operational communication needs. This, in turn, can have a positive impact on access.

Internal communications: The effectiveness of a response and the safety of National Society staff and volunteers are highly dependent on the unobstructed flow and analysis of information between the field and headquarters as well as between the National Society, the ICRC and other Movement components. Appropriate systems, procedures and equipment are therefore required.

26 Safer Access guide, above note 3.

Security and risk management: A security/risk management system can increase the safety of National Society staff and volunteers and their access to affected people and communities. To that end, the system should include well-defined security guidelines and protective measures that are based on ongoing context and risk assessment, coordinated with other Movement components and fully incorporated into response procedures, training and response operations.

Application of the Principles by the Lebanese Red Cross

Lebanon's history of armed conflict, internal disturbances and tensions, along with the overall sensitive operational context due to the need to navigate various confessional interests, has compelled the Lebanese Red Cross to develop and sustain approaches that help to build trust in and acceptance of the emergency medical services and the staff and volunteers who run it. In the late 1980s the organisation suffered a series of security incidents, which impacted its staff, volunteers and assets. For example, one incident resulted in a fleet of newly donated vehicles, clearly marked with the red cross emblem, being commandeered by armed actors.

Working closely with the ICRC, the Lebanese Red Cross undertook concerted action to improve its operational approach, including efforts to build its acceptance, access and security. The Fundamental Principles were central to this work. The Fundamental Principles are not codified and there is no specific guidance on their application, but in a National Society drawn from a deeply divided nation, the Principles' secular standards provided an objective language, a guide to conduct and a decision-making framework that underpinned this strategy. Today, the Fundamental Principles influence a range of Lebanese Red Cross organisational priorities, such as the importance attributed to the ability of the emergency medical services to respond to needs throughout Lebanon; the selection, profile and make-up of its volunteers; and the increased level of coordination and association with the authorities and other key stakeholders. They also connect and anchor the leadership and volunteers' operational approach and their ability to explain and justify their actions internally and to external actors.

The Lebanese Red Cross recognises that deliberate and systematic action is required to apply the Fundamental Principles. The Fundamental Principles are used to guide the communications and operational decision-making of emergency medical services staff and volunteers. It is clear from staff and volunteers that the Fundamental Principles are living instruments. Lebanese Red Cross staff and volunteers at every level – from first-aid volunteers to the director of operations – were able to supply specific practical examples of how they had used the Fundamental Principles personally or of how they had observed them being applied within the emergency medical services department.

The interplay between the Fundamental Principles

In a context of sectarian divisions, neutral, impartial and independent humanitarian action is paramount to engendering trust and acceptance amongst different Lebanese communities. Strict neutrality is demanded from and imposed on all staff and volunteers by the Lebanese Red Cross leadership. During the recruitment process, prospective volunteers must sign a neutrality oath, and formal and informal checks with communities are often undertaken by the Lebanese Red Cross to make sure that the applicants are not actively affiliated to any political group. The neutral composition of the workforce of the Lebanese Red Cross is reinforced by a history of volunteering with the Red Cross as an alternative to being conscripted by militia forces during the civil war. This view of the Lebanese Red Cross as a kind of sanctuary is still evident today in the face of confessional divisions within society and some continuing conscription; parents of volunteers drew particular attention to this aspect of volunteering, which they perceive as positive. The Lebanese Red Cross's neutrality is a considerable draw for some young people who are uncomfortable with the system of confessionalism and limited meritocracy that persists in Lebanon today.

The Lebanese Red Cross's neutrality is complemented by its impartial and universal approach of working with those in need irrespective of their political, religious or other affiliations. Knowing that the emergency medical service is available to all confessional groups throughout Lebanon, without discrimination, reinforces the confidence of the population that their service is delivered impartially. There are a number of other ambulance service providers in Lebanon, including the Ministry of Health, military actors, charitable organisations, confessional groups and the Lebanese Armed Forces, but the Lebanese Red Cross is the only one which can operate universally throughout Lebanon and which enjoys a high degree of confidence and acceptance among Lebanon's eighteen confessional groupings. In interviews, volunteers provided numerous examples of how they act impartially. One such example occurred during violent clashes in 2007 between the Lebanese Armed Forces and an armed Palestinian group in the Nahr el-Bared refugee camp.[27] Volunteers spoke proudly of providing both sides with medical services, according to need. This was true even of volunteers who had siblings, spouses and friends actively engaged in the fighting as members of the Armed Forces. One stated, 'The person is a person; we don't care who it is.'

Although the Lebanese Red Cross operates as an auxiliary to the government, its independence is valued and guarded fiercely both by the leadership of the National Society and by the public authorities themselves, which have at times faced challenges in providing humanitarian assistance in some communities. The Lebanese Red Cross's role in running the national ambulance service means that

27 International Crisis Group, 'Lebanon's Palestinian dilemma: the struggle over Nahr al-Bared', Middle East Report No. 117, 1 March 2012, available at: http://www.crisisgroup.org/en/regions/middle-east-north-africa/egypt-syria-lebanon/lebanon/117-lebanons-palestinian-dilemma-the-struggle-over-nahr-al-bared.aspx.

daily liaison with the authorities is often required, for instance to ensure coordinated planning for receiving and transporting sensitive cases from across the border or for public events. Representatives of the Lebanese Armed Forces, the Civil Defence and the Ministry of Health all reported the importance of having an independent, neutral humanitarian actor that could provide services for people residing in all areas and communities. Given this high level of coordination with the authorities, it is important for the Lebanese Red Cross to also retain autonomy over operational decision-making and to maintain an organisational distance from all stakeholders, in both reality and perception. Examples of independent action include challenging a government request to open a station in a particular location; safeguarding perceptions of neutrality by refusing to be on stand-by for the Civil Defence during demonstrations, preferring rather to be on call for everyone through the national hotline; and transferring patients to treatment locations where it was believed that they would feel safe instead of following advice from the authorities to deliver them to an alternative location. Of course, to manage these sensitive situations, an open and trustful relationship and dialogue must accompany these actions.

It is clear that it is not just humanity, neutrality, impartiality and independence that are important for acceptance of the Lebanese Red Cross, but also the other three Principles of voluntary service, unity and universality (covering the needs of the entire country, thus reinforcing the Principle of impartiality). These are also of great significance, highlighting the mutually reinforcing interplay between all of the Fundamental Principles.

Most notable is the Lebanese Red Cross's application of the Principle of voluntary service. The commitment of the volunteers providing emergency medical services to the work and approach of the Lebanese Red Cross is particularly noteworthy and inspiring. Each volunteer provides twelve hours of service one day a week and thirty-six hours one weekend a month, ensuring that the entirely voluntary national ambulance service operates effectively. A strong team spirit contributes to a sense of collective enterprise, and this is developed not only through commitment to the work itself but also through the humanitarian ethos developed through the understanding and application of the Fundamental Principles. Team spirit and unity of action is developed further by the need for each station to improvise in order to maintain services due to budget shortfalls. In interviews, volunteers recounted recycling non-essential items, using substitutes where possible (for example, old ties as slings) and even paying out of their own pockets to ensure that the service continues. Many of the thirty-five paid members of staff started their work with the Lebanese Red Cross as volunteers. All of them, including the then director of the emergency medical services, continue to volunteer at the ambulance stations in their spare time.

Training, mentoring and leadership in ensuring adherence to the Fundamental Principles

The experience of the Lebanese Red Cross demonstrates the importance of building an understanding and application of the Principles on the ground and of the role

of the leadership in engendering a culture where the Fundamental Principles are respected and used to guide strategic and operational decision-making as well as everyday conduct. Lebanese Red Cross volunteers' adherence to the Fundamental Principles is reinforced by consistent mentoring and training, although informal approaches and codes of behaviour are more important in a National Society where funding is limited. No political or religious discussions are allowed at ambulance stations (at some, the news is turned off to discourage reactions), and joint celebrations of religious festivals are organised between stations to promote a sense of unity, understanding and tolerance. The importance of understanding and of applying the Fundamental Principles is reinforced through example and mentoring by the experienced leadership and peers. They remind volunteers of the danger of one 'rotten apple' or one action or word ruining the National Society's reputation and set an example for more junior volunteers through their commitment to the systematic application of the Fundamental Principles. There is a strong hierarchical structure at the stations, where orders are expected to be followed fully. Contraventions are punished by shame and sanctions, with behaviour warnings publicly displayed at ambulance stations.

The perception of the neutrality of staff and volunteers and a sense of unity and camaraderie are reinforced at times by the use of nicknames The acceptance by external stakeholders of the Lebanese Red Cross's cadre of 2,700 volunteers is enhanced through the use of 'neutral' names and enhances their ability to be deployed everywhere in Lebanon, regardless of their personal affiliation or background. Historically, the personal acceptance of individuals has been challenged by different actors, usually on the basis of religion or due to the profile of an individual volunteer. An important aspect of gaining acceptance has been ensuring representation from the eighteen different confessional groups among staff and volunteers, while another focus has been on ensuring that both women and men are represented in teams that operate in socially conservative areas, whose residents may not be comfortable with male health workers providing humanitarian assistance to female victims.

Perceptions, acceptance and security

> In today's volatile operating environments, acceptance of humanitarian action by local authorities and communities needs to be approached as a process rather than as an event, requiring presence, time, and sustained engagement with all relevant parties, including non-state actors as well as influential political, military, or religious leaders.[28]

The Lebanese Red Cross's approach to acceptance centres on the provision of relevant and effective humanitarian services in accordance with the Fundamental Principles. This is accompanied by a concerted strategy to take the necessary actions and

28 Jan Egeland, Adele Harmer and Abby Stoddard, 'To stay and deliver: good practice for humanitarians in complex security environments', Policy and Studies Series, OCHA, Policy Development and Studies Branch, 2011, p. 3.

measures required to establish understanding, trust, respect and acceptance for the work and approach of the National Society amongst different groups.

Relevant and effective humanitarian action

> Be clear of what your capacity is and do not promise more … keep some capacity in reserve … put stones in your pocket or you will fly.[29]

The Lebanese Red Cross's wide access is dependent on the quality, reliability and effectiveness of its much-needed emergency services work. However, its 24/7 ambulance services also provide the necessary infrastructure, capacity and responsiveness to mobilise other humanitarian services quickly in an emergency. In interveiws, the leadership indicated the importance of the Lebanese Red Cross following through on its stated commitments so that confidence and trust in its work is earned and maintained. The leaders stated that the history of armed conflict, internal disturbances and tensions in Lebanon is such that the Lebanese Red Cross has proved itself to everyone over time, indicating, for example, how the 2006 armed conflict with Israel was important in developing further the Lebanese Red Cross's acceptance by Hezbollah to ensure access to those in need.

Repeated attention was drawn to the need for consistency in messages and adherence to strict communication lines, together with having the skills, strength and experience to take a principled stand in challenging circumstances, and at times to have the courage to say 'no'. As a senior manager stated: 'each decision is crucial; it can have serious implications. There is so much pressure on leaders. Many conversations are tough. In a stressful situation, you must know that you are strong.'

Building networks and relationships of trust

The security incidents in the 1980s triggered efforts by the Lebanese Red Cross leadership to widen its network of contacts, deepen its relations with stakeholders and communicate information about its work. Contacts developed at that time have been maintained and fostered, with the result that the leadership has established trustful relationships with many of the key people in government, with the Lebanese Armed Forces and within the various confessional groups today, highlighting the importance of investing in relationships and developing trust over time.

A significant amount of time is devoted to communicating the work and approach of the Lebanese Red Cross and cultivating and maintaining relationships. Senior representatives are appointed on the basis of their ability to undertake these roles. The Lebanese Red Cross's relationships are very strong at the central level and are replicated in all districts across Lebanon and Lebanese Red Cross ambulance stations, where the station heads emphasise how much of their time and attention is devoted to maintaining a strong network of local contacts. Relationships are built with political, military and community leaders during peacetime or before new

29 Quote from a senior official of the Lebanese Red Cross.

operations and then drawn upon during armed conflicts, internal disturbances and tensions to secure safe passage. As one station head mentioned: 'Even if you do not have any business, you need to regularly make contact … [You must] ensure they understand the mission of the Red Cross, convince them on the value of how we work and then later, during an operation, it is easier to make contact to secure safe passage.' The depth and breadth of positive relationships are such that other Red Cross partners in Lebanon spoke of the credibility that they attained from being associated with the Lebanese Red Cross.

The Lebanese Red Cross's effective and principled humanitarian action, combined with relevant, reliable and quality service delivery and its investment in building relationships of trust and respect, has resulted in a very positive reputation across Lebanon. A 2007 poll found extraordinarily high levels of awareness of the Lebanese Red Cross (almost 100% recognition) and its work, with correspondingly high positive perceptions. While the National Society conducts sessions on the Movement, IHL and the Fundamental Principles with civil society groups, universities and different community groups, its positive reputation is largely generated by its sustained work on the ground, which is spread through word of mouth and profiled in the media. As one government official explained: 'They are protected by their activities … From 1975 until now, they have gained their reputation through demonstration.'

These positive perceptions mean that today, the Lebanese Red Cross is the only public service and Lebanese humanitarian actor that enjoys national reach in Lebanon. According to the leadership, this is due to its conscious and systematic efforts to use the Fundamental Principles as a foundation for gaining access to all affected populations.

Challenges to acceptance and security

Acceptance is the cornerstone of the organisation's security strategy, although some protective and deterrence measures, such as the use of ballistic vests and driving in convoys and/or relays, are also employed.[30] This elaborate and well-honed system has been built up over many years and there is heavy reliance on the knowledge, experience and authority of the veteran leadership and its network of contacts to ensure the safety of the work and volunteers. There are limited formal security management structures, and systems and procedures are not fully integrated into the volunteers' work. Although the volunteers receive some security training, there

30 Acceptance, deterrence and protection approaches to security are said to form a 'security triangle'. Often used in combination, they constitute a range of security options for agencies that extend from 'soft' to 'hard'. Acceptance is an approach to security that attempts to negate a threat by building relationships with local communities and relevant stakeholders in the operational area and by obtaining their consent for the organisation's presence and its work. Protection is an approach to security that emphasises the use of protective procedures and devices to reduce vulnerability to existing threats. Deterrence is an approach that attempts to deter a threat by posing a counter-threat, in its most extreme form through the use of armed protection. See Humanitarian Policy Group (HPN), 'Operational security management in violent environments', Good Practice Review No. 8, HPN, Overseas Development Institute, London, December 2010.

is a high degree of risk tolerance and the leadership readily admits that one of the challenges is to hold back over-enthusiastic volunteers from entering high-risk environments. Operational reviews are mandatory after each response and although there is significant peer support and kinship between the volunteers, more formal psychological support is not available, despite the significant trauma that volunteers can witness and even experience first-hand. This lack of formal integration of security management adds to the high degree of stress on the leaders as responsibility for security rests solely on their shoulders.

Challenges to the Lebanese Red Cross's acceptance in international armed conflict include a number of serious security incidents during the 2006 armed conflict, which underscore the limitations of over-reliance on acceptance strategies alone for security and the need for a greater investment in more formal and diverse security measures. These limitations were brought home all too clearly to the Lebanese Red Cross in an incident near Qana in south Lebanon during the 2006 armed conflict with Israel. Civilians were being transferred by two clearly marked, well-lit and security-cleared Red Cross ambulances with Red Cross flags on the sides and flashing blue strobe lights on the roofs. Despite these markings, a missile struck the first ambulance and a further attack struck the second ambulance a few minutes later. Nine Red Cross volunteers and patients were injured. The incident severely damaged the affected volunteers' trust in the power and protection of the Fundamental Principles, the protective emblem and the ability of the Movement to secure safe access. For many, it highlighted how the Lebanese Red Cross can, over time, attain high levels of access and security in non-international armed conflicts, internal disturbances and tensions through extensive and deep contacts with all stakeholders which build high levels of trust. However, in an international armed conflict, where direct contact by the Lebanese Red Cross with the authorities of the opposing side is most often not possible, relationships of trust are more difficult or even impossible to establish.

This example highlights that despite employing various operational strategies and applying the Fundamental Principles fully, unpredictable operational factors can affect safety and access drastically. It shows that while the Principles can serve as a framework for action and decision-making, they must be accompanied by other operational measures (not least rigorous security measures) – and even then, they have their limitations in certain contexts. It also shows that although they can serve as tools for access and security, their value is contingent not only on the manner in which they are applied, but also on the decisions and actions of armed actors.

Conclusion

The experience of the Lebanese Red Cross highlights that the Fundamental Principles are more than an abstract code or ideological commitment. Applied systematically, they can have important operational benefits and can help improve the effective delivery of humanitarian services.

The Fundamental Principles provide operational tools to guide communication, decision-making and the conduct of activities and serve as a basis for acceptance by different interlocutors for the National Society. When combined with strategies, actions and measures focused on building trustful relationships and acceptance and on increasing the security of its personnel, and through the delivery of reliable high-quality services over time, their impact is compounded. Limitations exist in contexts where the National Society does not have direct contact with the authorities of one or more groups or parties to the conflict and it must be understood that the dynamics of the context can thwart the protective aspect offered by systematic application of the Fundamental Principles.

Having built up its experience over the past twenty-five years, there are a number of lessons to be drawn from the Lebanese Red Cross for other National Societies and humanitarian agencies in other contexts. These include:

- A deliberate, structured strategy for gaining and maintaining access safely and for applying the Fundamental Principles is required. Time and experience are essential; acceptance cannot be achieved overnight and is stronger when systematic actions and measures are taken during peacetime.
- For National Societies, the human resource base should be representative of the people whom it serves. Its members must adhere to the Fundamental Principles at all times, inside and outside work, and must be perceived to think and to act neutrally and impartially.
- Applying *all* Fundamental Principles, not just humanity, neutrality, impartiality and independence, is important for the acceptance of a National Society. The 'other' three Principles – voluntary service, unity and universality – are distinctive to the Movement and their application also contributes toward the acceptance and operational access of a National Society.
- Organisations are judged by what they do and how they perform their actions on the ground rather than by words, making it important for promises to be kept and effective delivery to be ensured. Trust and credibility can be established by the consistent provision of effective, relevant community-based services during peacetime, as well as during armed conflict, internal disturbances and tensions. Impartiality must be demonstrated through actions.
- Challenges should be resolved by early and swift action and should be seen as an opportunity to reinforce the organisation's principles and its acceptance. Strong, experienced leadership, consistency and good internal communication are all required.
- A large number of contacts at all levels and strong relationships of trust and respect with key stakeholders are essential. Systematic demonstration and communication of the organisation's work, objectives and principles must take place.

The experience in Lebanon confirms the findings of studies that have highlighted the limitations of over-reliance on acceptance-based strategies alone, highlighting for example the security challenges posed in highly political or criminal

environments or in contexts where targeting of aid organisations or their staff is deliberate.[31]

Despite the significance of the Fundamental Principles to the Movement and their enduring effectiveness as operational tools, there has been little recent articulation of their operational value and limitations in the crises of today. This is particularly surprising given the present level of external debate regarding humanitarian principles and their relevance.

Current debates tend to focus on their relevance to international humanitarian organisations in armed conflict, but the Lebanon case study has highlighted the importance of humanitarian principles for national actors and of applying them at all times – even in peaceful environments, as well as during times of armed conflict, internal disturbances or tensions. The work of National Societies in peacetime or in periods of armed conflict, internal disturbances and tensions suggests that their experience might be of interest both to other national actors and to multi-mandate organisations. These are issues that have yet to be explored fully.

Questions are sometimes raised as to whether a National Society can ever implement fully the Fundamental Principles, due to suggestions that National Societies' auxiliary role to their governments may at times be incompatible with their independence. The autonomy of action exhibited by the Lebanese Red Cross and the value that the authorities place on it suggest otherwise. The Lebanon case study was chosen due to the potential for capturing good practice that might be relevant elsewhere, but in order to understand the value of the Principles it will be important to reflect on less positive examples – including where the authorities are less willing to allow independent action. These questions – as well as the positive lessons learned from Lebanon – suggest that there is much to be gained from the Movement, in particular National Societies, by increasing its engagement in debates regarding humanitarian principles, and using its experience – both positive and negative – to understand better the role of humanitarian principles in helping to meet the needs of those in crisis.

31 See, for example, J. Egeland, A. Harmer and A. Stoddard, above note 28, p. 19.

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Attacks on medical missions: overview of a polymorphous reality: the case of Médecins Sans Frontières*

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Abstract

The aim of this article is to carry out a preliminary analysis of issues relating to the types of violence that are directed against humanitarian medical missions.

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Starting from the observation that violence can cause some degree of disruption for a medical organisation such as Médecins Sans Frontières, despite its wide experience which has brought it much wisdom and generated numerous and sporadic responses to such events, the article offers a more subtle analysis of terms and of situations of violence so as to contribute to the establishment of a research project and, in a second phase, to an awareness-raising campaign focusing on these complex phenomena.

Keywords: violence, attacks, medical care, criminality, war, medicine.

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> *If we are killed, the NGOs will withdraw and there will be no-one left to pay for the protection racket or salaries. They want us alive and scared. So you should be scared and happy because that means you can work.*[1]

The aim of this article is to examine the sources and the limits of analysis of phenomena of violence aimed at humanitarian medical missions. Often presented in an anecdotal manner, as in the above quotation taken from an historical example dating from 1992, the issue of violence against patients and against doctors and health-care personnel working for Médecins Sans Frontières (MSF)[2] has not always been the focus of coherent reflection within the organisation. The issue of attacks against medical activities is doubtless not a new one, but since the initiative taken by the International Committee of the Red Cross (ICRC) titled 'Health care in danger',[3] it has aroused the interest of a community of practitioners and humanitarian workers. This reflection nevertheless needs to be further developed and supported by an analysis of the complexity of such occurrences.

Since its inception in 1971, MSF has been confronted with various forms of violence against its patients, its personnel and its medical facilities and vehicles, as well as against national health systems in general. Nevertheless, these forms of violence, often heterogeneous, have rarely been approached as a matter for deliberation and comprehensive analysis by the organisation. The action taken in those cases has been sporadic and reactive, often spurred by operational urgency and the media climate of the time.

The aim of this article, therefore, is to draw attention to the importance of the matter for MSF by outlining the general framework in which the problem of violence against medical activities arises. It will examine the semantic choices made in relation to such violence, consider the pertinence of the criterion of intentionality in investigations focusing on such attacks and, finally, seek to establish to what extent such instances of violence and the way they are dealt with by the organisation call humanitarian principles into question.

1 Extract from a discussion between Joni, an MSF volunteer, and James Orbinski in Somalia around 1992. Quoted in James Orbinski, *Le cauchemar humanitaire*, Music & Entertainment Books, Marne-la-Vallée, 2010, p. 99.

2 MSF is termed 'the organisation', 'the movement', or 'MSF' throughout this article.

3 ICRC, *Health care in danger: Making the case*, ICRC, Geneva, 2011.

Subsequently we shall endeavour to classify the different types of attack on medical activities which are directed against MSF in the field. This will point up three ambiguous dimensions of MSF's relationship to violence and insecurity, dimensions which are potential subjects of research: the trivialisation of violence, its internalization and, more insidious, tolerance of such incidents. The article takes up those three points and attempts to bring out their complexity. While remaining at a distance from the anecdotic, it seeks to establish in concrete terms the nature of such violence so as to give it a 'visibility'[4] which may enable us to understand its motivations and its intrinsic dynamics.

Talking about of the trivialisation of violent incidents might lead to recognition of their almost implicit character in the conduct of humanitarian medical activities. Despite extensive risk assessment[5] and personnel management practices, an organisation like MSF nevertheless lacks the cross-sectional and longitudinal data and the meta-analyses that should underpin a global perception of phenomena of violence within the movement[6] or in the situations in which it works. However, such data does exist and is often processed in the framework of operations and of human resources, but with variabilities which may cause uncertainty as to the origins and nature of violence. While violence can never be entirely eliminated, and while insecurity and risk are both inflationary trends, humanitarian workers have perhaps tended to consider them as a constituent part of their way of operating.[7]

In the worst case, therefore, a real climate of tolerance might develop among teams vis-à-vis situations which are nevertheless unacceptable. As humanitarian activities always take place in a balance of power, some degree of ambivalence or even ambiguity may appear. Undoubtedly, from an historical standpoint, such tolerance appears to be on the decrease. It remains, however, deeply entrenched in the culture of the organisation.

More recently there has been a debate throughout the MSF movement focusing on the issue of violence directed against medical activities. In the absence of reliable data and definitions, tension relating to security matters might also be a symptom of what British sociologists call 'moral panic', that is, a moral crisis within the organisation created by a general feeling of anxiety in the face of acts of violence. This feeling is not generally associated with any rational demonstration of an increase in insecurity.[8] The organisation thus seems to be subject to two

4 Conversation with Jérôme Oberreit, Secretary General of MSF International, 16 May 2013.

5 Used mainly in psychiatry and criminology, the techniques of 'risk assessment' have moved away from their initial usage. See Kevin A. Douglas, David N. Cox and Christopher D. Webster, 'Violence risk assessment: Science and practice', in *Legal and Criminological Psychology*, Vol. 4, 1999, pp. 149–184.

6 The MSF movement comprises five operational sections and 23 associations.

7 See, for example, the memoirs of John Norris, *The Disaster Gypsies: Humanitarian Workers in the World's Deadliest Conflicts*, Praeger Security International, Westport, CT, 2007, pp. 7–8.

8 The concept of 'moral panic' has its origins in the work of Jock Young and Stanley Cohen. It often refers to the impact of the media and other forms of expression of opinion on the development of new social perceptions of danger in response to concern about social changes. The concept is now an integral part of the development of approaches to risk and risk assessment. See Stanley Cohen, *Folk Devils and Moral Panics*, Blackwell, Oxford, 1972; Kenneth Thompson, *Moral Panics*, Routledge, London, 1998. For more recent use, see Sheldon Ungar, 'Moral Panic Versus the Risk Society: The Implications of the Changing Sites of Social Anxiety', in *The British Journal of Sociology*, Vol. 52, No. 2, 2001, pp. 271–291.

contradictory currents, that is, teams that accept or even tolerate violent incidents on a daily basis, and an institutional dynamic which appears increasingly unwilling to accept the taking of risks.[9] It must be admitted, however, that currently there are security issues in medical circles, and in very different contexts; this situation may create the possibility of a new perception of problems which have, nevertheless, existed for a long time.[10] In both cases it would appear justified to focus on this violence as a subject of research.[11]

The theoretical and historical implications of the issue

Discussion of the problem of violent acts against humanitarian medical organisations often takes the form of questions regarding the notion of neutrality of medical activities. While it is not automatically synonymous with a reasoned approach to violence, medical neutrality has been claimed by certain organisations from the origins of the modern humanitarian movement.[12] Without reverting to the numerous attacks perpetrated against doctors and patients during the war of 1870,[13] soon after adoption of the first Geneva Convention, the issue of medical neutrality in conflict situations described as 'insurrectionary or revolutionary' was considered important enough in the 1950s[14] et 1960s to justify the holding of conferences on the subject and the publication of articles in the *Revue internationale de la Croix-Rouge*.[15] The problem is therefore not a new one. Partisan use of medical

9 In this regard, see Michel Tondellier, 'L'action organisée face à la prise de risque: l'héroïsme au travail et son institutionnalisation', Proceedings of the symposium 'Acteur, risque et prise de risque', 25 and 26 November 2004, Centre lillois d'études sociologiques et économiques, UMR 8019 Centre national de la recherche scientifique.

10 The Chinese press, for example, reported 17,000 incidents in 2011: *Wall Street Journal*, 22 October 2012; see Therese Hesketh, Dan Wu, Linan Mao and Nan Ma, 'Violence against Doctors in China', in *BMJ* 2012;345/e.5730. Violence in hospitals is also at the centre of investigations in France and in the United Kingdom. See Ministère du Travail, de l'Emploi et de la Santé (French Ministry of Work, Employment and Health), *Bilan national des remontées des signalements d'actes de violence en milieu hospitalier*, 2011.

11 A series of semi-structured interviews was carried out in order to substantiate this article. Four members of MSF took part in interviews held to record the issues relating to incidents they had experienced while working for the organisation in the field. The reports were recorded and written up *in extenso*. The questions and all the replies are available on request.

12 Frank T. Carlton, 'Humanitarianism, Past and Present', in *International Journal of Ethics*, Vol. 17, No. 1, 1906, pp. 48–55; John F. Hutchinson, 'Rethinking the Origins of the Red Cross', in *Bulletin of the History of Medicine*, Vol. 63, No. 4, 1989, pp. 557–578; Bertrand Taithe, 'The Red Cross Flag in the Franco-Prussian War: Civilians, Humanitarians and War in the "Modern" Age', in Roger Cooter, Steve Sturdy and Mark Harrison (eds), *War, Medicine and Modernity*, Sutton Publishing, Stroud, 1998, pp. 22–47; John Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Westview Press, Oxford, 1996.

13 Charles Duncker, *Les violations de la convention de Genève par les français en 1870–1871*, Berlin, 1871; J. M. Félix Christot, *Le Massacre de l'ambulance de Saône et Loire le 21 janvier 1871; rapport lu au comité médical de secours aux blessés le 7 juillet 1871*, Vingtrinier, Lyon, 1871; Charles Aimé Dauban, *La Guerre comme la font les prussiens*, Plon, Paris, 1871; Bertrand Taithe, *Defeated Flesh: Welfare, Warfare and the Making of Modern France*, Manchester University Press, Manchester, 1999, pp. 169–173.

14 John H. Herz, 'Idealist Internationalism and the Security Dilemma', in *World Politics*, Vol. 2, No. 2, 1950, pp. 157–180.

15 Jean des Cilleuls and Raymond de la Pradelle, 'Medical Neutrality in Subversive Wars', in *International Review of the Red Cross*, Vol. 13, No. 10, 1960, pp. 195–204.

resources,[16] the theft or exclusive appropriation of health services, and violent acts perpetrated against medical personnel with the aim of depriving the adversary of medical treatment are unfortunately all features of warfare examples of which may be found throughout the twentieth century. More recently, ongoing events in Syria are forceful reminders that health systems can be the object of targeted attacks.[17] Medical activities may thus be perverted to serve logistic and belligerent purposes. The issue of access or denial of access to medical care can deprive entire populations of vital assistance.[18] Hence attacks on medical facilities allow the parties to the conflict to assert their power in an effective and symbolic manner.[19]

Violence in war must nevertheless be analysed in its own context. While there is no golden age for humanitarian action in the face of conflict, it should be noted that responsibility for such violence against medical facilities has been claimed only in the context of efforts to rid a country entirely of a foreign presence, and that since the 1870s attacks on health facilities and personnel have always given rise to international controversy.[20]

Nevertheless, beyond their specific contexts, such attacks are heterogeneous. A distinction must therefore be drawn between several elements, and the porous nature of possible analytical categories must be recognized.[21] However, certain common points may be stressed in order to distinguish, perhaps artificially, the causal connections which often overlap:

- The brutal nature of the social relations in which attacks on medical missions generally occur;[22]

16 Laurence Brown, 'The Great Betrayal? European Socialists and Humanitarian Relief during the Spanish Civil War', in *Labour History Review*, Vol. 67, No. 1, 2002, pp. 83–99.

17 Médecins Sans Frontières, 'Syria: All Parties To The Conflict Must Respect Medical Facilities', 26 January 2013, available at: http://www.doctorswithoutborders.org/press/release.cfm?id=6582&cat=press-release (last visited 13 June 2013); Olivier Falhun, 'En Syrie, l'humanitaire confronté à ses limites', CRASH, 12 March 2012, available at: http://www.msf-crash.org/sur-le-vif/2012/03/12/4902/en-syrie-lhumanitaire-confronte-a-ses-limites (last visited 13 June 2013).

18 'A deeply worrisome pattern is emerging, where people and their scarce resources are deliberately targeted by all the armed groups involved in inter-communal violence. Hospitals, health clinics, and water sources are all targets, suggesting a tactic of depriving people of life's basic essentials, precisely when they need them most'. See Médecins Sans Frontières, 'Even Running Away Is Not Enough: Attacks in Jonglei, South Sudan, Perpetuate Extreme Violence', 24 January 2012, available at: http://www.doctorswithoutborders.org/press/release.cfm?id=5740ost (last visited 13 June 2013).

19 'Biopolitics designates the assumption of control by the power of the processes that affect life, from birth to death (disease, age, disability, environmental effects, etc.) and that, while absolutely random on the scale of the individual, have, as a collective phenomenon, decisive economic and political effects' [ICRC translation]. See Marie Cuillerai and Marc Abélès, 'Mondialisation: du géo-culturel au bio-politique', in *Anthropologie et Sociétés*, Vol. 26, No. 1, 2002, p. 22.

20 In this regard, international law governing the use of armed force (*jus ad bellum*) and international humanitarian law governing the use of force (*jus in bello*) coincide. See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, Cambridge University Press, Cambridge, 2002; Samuel Moyn, *The Last Utopia: Human Rights in History*, Harvard University Press, Belknap, 2010; David. G. Chandler, 'The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda', in *Human Rights Quarterly*, Vol. 23, No. 3, 2001, pp. 678–700.

21 An argument to this effect is put forward by Larissa Fast, 'Characteristics, context and risk: NGO insecurity in conflict zones', in *Disasters*, Vol. 31, No. 2, 2007, pp. 130–154.

22 The concept of brutalisation is a reference to the work of George Mosse, *De la Grande Guerre au totalitarisme, la brutalisation des sociétés européennes*, Hachette, Paris, 1999.

- The chronic insecurity of patients and personnel resulting from the fact that hospitals, and health facilities in general, are perceived first and foremost as possible targets for predation, with essentially criminal objectives;
- The strategic or tactical importance of medical facilities in the wider context of urban or psychological warfare or insurgency;
- The perception of health care as being a private asset or resource (of the enemy) rather than being for the common good.

While attacks on medical facilities may be a sign of an escalation in hostilities (for they are aimed at premises usually devoted to preserving vital interests common to the entire population), they usually occur in a context marked by other types of violations of international humanitarian law, such as attacks on civilians – in particular counterinsurgency operations which make the distinction between civilians and combatants (an essential precept of international law) illusory[23] – or acts of torture perpetrated on the civilian population by government forces, a phenomenon which, sadly, may be observed in many situations.[24]

The sequence of such events is also a matter for investigation. In particular, the stage at which these eruptions of violence occur – the moment in time when such acts against medical facilities are most frequent or appear advantageous for those who carry them out – remains a subject for analysis.

Semantic choices

Several studies have demonstrated the importance of the terminology used by humanitarian organisations in their responses to difficult situations.[25] As well as more general discussions on principles, debate centred on the very terms of such discussions takes on an autonomous dimension. For example, MSF very often refers to the notion of 'medical sanctuaries', but without taking into account the metaphysical dimension that this idea may embody. The term 'sanctuary' might also give rise to confusion in that it suggests that medical services belong in an extraterritorial sphere, that is, outside national sovereignty which is itself often at issue in conflicts. By being considered as a refuge, or a safe haven, protected from any national or international interference, a sanctuary may appear to be a non-indigenous structure, in contradiction with the idea of common good which is essential to its safety.[26] The fact that the existence of any 'medical sanctuary' is a myth, albeit an advantageous and necessary one, is not often the subject of internal discussion within MSF and it is perhaps illusory to imagine that such a notion can

23 Gilles Andréani and Pierre Hassner (eds), *Justifier la guerre? De l'humanitaire au contre-terrorisme*, Presses de la Fondation nationale des sciences politiques, Paris, 2005.

24 Médecins Sans Frontières, 'Libya: Detainees Tortured and Denied Medical Care, MSF Suspends Work in Detention Centers in Misrata', 26 January 2012, available at: http://www.doctorswithoutborders.org/press/release.cfm?id=5744 (last visited 13 June 2013).

25 With regard to the terminology used by humanitarian agencies, see Caroline Abu Sa'Da, *Dans l'œil des autres: Perception de l'action humanitaire et de MSF*, Editions Antipodes, Lausanne, 2011, pp. 43–50.

26 Sarah Kenyon Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Aid*, Cornell University Press, Ithaca, 2005.

have any meaning or indeed, a priori, any useful purpose.[27] Several other examples could be cited, but suffice it to note here the critical importance of terminology in all approaches and responses to violence.

Pertinence of the parameter of intentionality

While it is often difficult to analyse the causes of attacks on medical activities, their consequences are essentially difficulties in the delivery of care or in accessibility by patients to health services. Lack of security resulting from unpredictable acts of violence also has secondary effects. Fiona Terry, referring to her long experience with MSF and in humanitarian activities in general, points out:

> The most widespread consequence of violence against health-care is its absence or inaccessibility when needed most. Violence causes health structures to close and staff to flee, leaving no one to treat patients. Resupplying health centres with drugs, materials and equipment is a major problem in insecure contexts such as Somalia today. People in the south and central regions are deprived of health-care because resupply trucks cannot get through.[28]

Trying to distinguish between criminal violence and tactical violence, whether on a battleground or more sporadically in street fighting, or even during strategic combat in which deprivation of medical care is a war objective, is thus hardly pertinent from the viewpoint of the primary victims. In many cases such distinctions emerge only after the event, from historical or legal analysis.

In fact, light can be shed on the issue of intentional deprivation of medical care by means of political analysis which is often carried out after the event. Neglecting to perform such analysis sometimes leads to deferring the issue of responsibility to a later date and focusing attention on the medical consequences. Analysis of a situation from the angle of deprivation of medical care ignores the various forms of violence to concentrate only on their effects. This approach may be necessary during local negotiations, but it might seem to set such practices apart from the political responsibilities with which they must be linked, and to amalgamate events that are highly diverse. From the opposite viewpoint, an approach focusing on an analysis of intentionality might be distorted by a biased or ill-informed perception of highly complex situations. In either case, a non-governmental medical organisation (NGO) is hardly qualified to carry out a comprehensive analysis of the situations of insecurity in which it attempts to

27 In fact, the term 'sanctuary' implies the capacity of society to remove individuals from a situation of danger and to produce a situation in violation of the usual rules; in the North American context the concept of sanctuary refers to local and exceptional campaigns run by churches or other religions relying on 'pastoral power' in aid of a few refugees. As this concept has no implications for the majority of other refugees, it is not a universally recognized principle, but merely a locally negotiated balance of power. See Randy Lippert, 'Sanctuary Practices, Rationalities, and Sovereignties', in *Alternatives: Global, Local, Political*, Vol. 29, No. 5, 2004, pp. 535–555.

28 Interview with Fiona Terry, Geneva, 14 May 2013.

operate, often because of its fragmentary view of the causal links and the motivations underlying such phenomena.

Challenging principles

It is partly to transcend these analytical limits that recalling the fundamental concepts of humanitarianism might be a possible solution. In fact, attacks on medical missions are attacks on the principles of humanitarian action as set out in the MSF Charter and constitute a grave violation of international humanitarian law.[29] While the neutrality of MSF is called into question by the very existence of its operational and medical choices, which remain a political decision on the part of the organisation, this principle is at the heart of reflection regarding attacks on medical activities.[30] The interpretation of neutrality as a condition for negotiations or as a fundamental principle is often placed in an historical perspective. In this connection, Fiona Terry remarks:

> When the founder of the Red Cross Movement, Henri Dunant, proposed that medical personnel and volunteers agree to be neutral in time of war, it was with the quite clear objective of avoiding attacks on them. Medical staff and their assistants were not allowed to take part in fighting and their status had to be clearly indicated by a distinctive sign. But, like all good ideas, the neutrality of humanitarian workers in times of war has given rise to many dilemmas, both practical and philosophical.[31][ICRC translation]

Moreover, as pointed out by Hugo Slim, neutrality and impartiality are the main points of tension in both law and practice.[32] Article 23 of the Fourth Geneva Convention states clearly that aid may be suspended if there is any evidence that thanks to that aid 'a definite advantage may accrue to the military efforts or economy of the enemy.'[33] In this legal perspective, therefore, aid is not intended to help or develop the capacity of the parties to the conflict. It may be difficult to claim that medical assistance is entirely impartial if it is seen not as a common asset but as a private resource or an advantage for one of the parties to the conflict.

29 Certain public statements made by MSF concerning security incidents explicitly mention the attack on the fundamental principles of medical humanitarian aid. For example: 'The attack on our team in Kismayo has been an attack on the very idea of humanitarianism and our ability to alleviate the suffering in Somalia', available at: http://www.msf.org/article/attack-our-team-kismayo-has-been-attack-very-idea-humanitarianism-and-our-ability-alleviate (last visited 13 June 2013).

30 For two historical examples at critical moments, see Max Huber, 'Croix-Rouge et neutralité', in *Revue internationale de la Croix-Rouge*, Vol. 18, No. 209, 1936, pp. 353–363; Carola Weil, 'The Protection-Neutrality Dilemma in Humanitarian Emergencies: Why the Need for Military Intervention?', in *International Migration Review*, Vol. 35, No. 1, 2001, pp. 79–116.

31 Interview with Fiona Terry, Geneva, 14 May 2013; Jean Pictet, *The Fundamental Principles of the Red Cross*, Henry Dunant Institute, Geneva, 1979.

32 Hugo Slim and Miriam Bradley, 'Principled Humanitarian Action and Ethical Tensions in Multi-Mandate Organizations in Armed Conflict, Observations from a Rapid Literature Review', in *World Vision*, March 2013, p. 13.

33 *Ibid.* See also Barbara Ann Rieffer-Flanagan, 'Is Neutral Humanitarianism Dead? Red Cross Neutrality Walking the Tightrope of Neutral Humanitarianism', in *Human Rights Quarterly*, Vol. 31, No. 4, 2009, pp. 888–915.

While neutrality is an historical concept, the history of its application is rife with tension and temptation. Indeed, humanitarian medical staff have often been active in favour of one or other party to the conflict. From the Vietnam War to the conflicts in Afghanistan against the Soviet invaders,[34] humanitarian involvement in the Cold War did not always abide by the principles of neutrality and impartiality. Instead, humanitarian personnel acted in accordance with other, more partisan considerations, often focusing on identifying victims of oppressive regimes, which led them to concentrate their efforts on a particular cause and group. In the operational history of MSF, such choices clearly demonstrate that there is a degree of ambivalence regarding principles when it comes to practice.[35]

Certain dynamics of war – which could be termed totalizing, for they consist in the gradual invasion of all public and private places in pursuance of the political and military aims of the conflict – sometimes appear inconceivable for an organisation such as MSF. Yet here we have to analyse such phenomena in contrast to what is termed the 'total' warfare of the past, during which the nature of medical neutrality and the protection of medical facilities were more or less established, although recent historiography reveals many breaches of the generally accepted rules.[36] On the other hand, civil wars offer numerous examples of violence against the wounded and medical personnel.

In French history, the insurrectionary régime of the Paris Commune in April 1871 was not legally competent to sign the Geneva Convention, so could claim adherence to it only implicitly:

> The *International Aid Society for Nursing of the War Wounded* having protested to the Versailles government about the atrocious violations of the Geneva Convention committed daily by the monarchy's troops, Thiers gave this heinous reply:
> 'As the Commune has not adhered to the Geneva Convention, the Versailles government is under no obligation to comply with it.'
>
> The Commune has done better to date than to adhere to the Geneva Convention.
>
> It has scrupulously respected all the laws of humanity in the face of the most barbarous acts, the most bloodthirsty challenges to civilization and to modern law: our wounded finished off on the battlefield, our hospitals shelled, our ambulances riddled with bullets, our doctors and nurses even having their throats cut in the performance of their duties.[37] [ICRC translation]

34 Scott Flipse, 'The Latest Casualty of War: Catholic Relief Services, Humanitarianism and the War in Vietnam, 1967–1968', in *Peace and Change*, Vol. 27, No. 2, 2002, pp. 245–70; Christopher Kauffman, 'Politics, Programs and Protests: Catholic Relief Services in Vietnam, 1954–1975', in *Catholic Historical Review*, Vol. 91, No. 2, 2005, pp. 223–250.

35 Fabrice Weissman (ed.), *In the Shadow of Just Wars: Violence, Politics and Humanitarian Action*, Hurst & Co, Paris & New York, 2004; Claire Magone, Michaël Neuman and Fabrice Weissmann (eds), *Agir à tout Prix? Négociations humanitaires: l'expérience de Médecins Sans Frontières*, La Découverte, Paris, 2011.

36 Annette Becker, *Oubliés de la grande guerre: humanitaire et culture de guerre, 1914–1918. Populations occupées, déportés civils, prisonniers de guerre*, Editions Noêsis, Paris, 1998.

37 Journal Officiel de la Commune de Paris, 12 May 1871.

Only to recognize it officially on 16 May according to a narrow interpretation:

> The only aim and effect of the Geneva Convention is to guarantee the neutrality of the buildings and the personnel of military ambulances. The Commune's adherence is limited to recognition of this neutrality.[38][ICRC translation]

In practice, the facilities of the Aid Society were harassed by the Commune and its leaders were forced to flee after 15 April 1871.[39] While the first victim of the retaking of Paris by the Versailles government was a Dr Pasquier, killed by communards while wearing a Red Cross armband, violence against the Commune did not spare medical facilities. After the Commune de Paris insurgency, wounded persons identified by doctors as communards were executed by French army forces.[40] Be it the Commune de Paris, the Spanish Civil War or the wars in Indochina, all civil conflicts are, sadly, replete with examples of atrocities committed against medical services. We should, however, approach these distinctions between 'conventional' (or international) wars and 'civil' wars with caution, because in practice medical services were not spared to any greater extent during 'conventional' wars. Since the Peninsular War fought by Napoléon I, conflicts described as 'conventional' have often had a counter-insurrectional element which could easily be mistaken for what is usually called 'civil war'.[41] The primary aim of conflicts fought for national independence, such as the war in Algeria,[42] was to support the population. However, they led to the use for political ends of doctors and medical treatment; a trend which prompted the holding of three congresses between 1959 and 1968 on the neutrality of medical care.[43]

Since the end of the Cold War, the proliferation of local conflicts has led to a perception of so-called 'new' wars, according to the studies of Mary Kaldor.[44] These conflicts, described as 'asymmetrical'[45] and taking place in what are

38 Journal Officiel de la Commune de Paris, 15 May 1871 (Paschal Grousset's declaration being postdated).

39 Eugène Delessert, *Épisodes pendant la Commune*, Charles Noblat, Paris, 1872, pp. 60–64; B. Taithe, above note 13, p. 146; Bertrand Taithe, *Citizenship and Wars, France in Turmoil, 1870–1871*, Routledge, 2001, p. 137.

40 For example, the hospital of the rue d'Allemagne, Dr Dolbeau's patients at the Beaujon hospital and the execution of Drs Faneau and Moilin are all well documented: see *ibid*., p. 148.

41 Helen Yanacopulos and Joseph Hanlon (eds), *Civil War, Civil Peace*, Open University, Oxford, James Currey, 2006.

42 Axelle Brodiez, 'Le Secours populaire français dans la guerre d'Algérie: Mobilisation communiste et tournant identitaire d'une organisation de masse', in *Vingtième siècle. Revue d'histoire*, No. 90, 2006, pp. 47–59; Raphaëlle Branche, 'Entre droit humanitaire et intérêts politiques: les missions algériennes du CICR', dans *Revue historique*, Vol. 301, No. 1(609), 1999, pp. 101–125; Maurice Faivre, *La Croix-Rouge pendant la guerre d'Algérie: un éclairage nouveau sur les victimes et les internés*, Lavauzelle, Panazol, 2007.

43 'Third Congress of the Neutrality of Medicine', in *International Review of the Red Cross,* Vol. 13, No. 87, No. 594, June 1968, pp. 418–424.

44 Mary Kaldor, *New and Old Wars*, Polity, Oxford, 1998–2006.

45 For analysis of the term 'asymmetrical warfare' see Robin Geiß, 'Asymmetric conflict structures', in *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 759 : 'Neither the term "asymmetric warfare" nor the sometimes synonymously employed terms "fourth-generation warfare" or "non-linear war" have thus far been concordantly defined. … Analysis shows, however, that there is a noticeable tendency in contemporary conflicts towards an increasing inequality between belligerents in terms of weaponry.'

considered to be middle-income countries,[46] seem to give rise to particularly extreme forms of violence against health systems, as these can become important stakes in the dynamics of war. Doctors and hospitals may sometimes be regarded as a dyad to be destroyed, as they represent the possible preservation of the enemy's human resources. For example, one doctor[47] working for MSF in Syria reported that he had been advised to describe himself as a journalist rather than as a health professional. In some 'civil' wars,[48] suspicion regarding health services and insurgents may be connected with a long tradition of distrust towards the medical domain, which would indicate that this phenomenon is far from new. The hiding of weapons in hospitals and firing emanating from health-care establishments have on occasion justified the massacre of medical personnel and sometimes of their patients.[49] In all these historical cases, medical 'sanctuary' certainly seems to be tainted by partiality and class or political solidarity.

To a certain extent hospitals, like all the other services of a sovereign State, remain associated with the previous political régime. Medical care given to insurgents that appears to amount to aid, even when dispensed impartially, becomes a justification for violence against health personnel. In a situation of total war, whether ideological or societal, there is little room left for political ideals relating to the common good.[50] This is sadly not a recent phenomenon, and the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field hardly broached the issue of the total politicisation of everyday activities such as health care. In certain contemporary conflicts, the population has been fearful about the setting-up of medical centres because they might attract aerial bombing.[51] Shelling of medical facilities bearing the logos of international organisations or the Red Cross emblem is also not a new phenomenon, for it has been denounced by the French authorities since the siege of Paris in January 1871. In response to that infringement of the law, the French authorities also violated the Geneva principles, using enemy prisoners as human shields by placing them in hospitals to better

46 Income groups: economies are classified by gross national income (GNI) per capita for the year 2011, calculated according to the World Bank Atlas method. The groups are: low income, $1,025 or less; lower middle income, $1,026–$4,035; upper middle income, $4,036–$12,475; and high-income, $12,476 or more. Available at: http://data.worldbank.org/about/country-classifications (last visited 13 June 2013). See Mark R. Duffield, *Global governance and the new wars: the merging of development and security*, Zed Books, London, 2001; Edward Newman, 'The "New Wars" Debate: A Historical Perspective is Needed', in *Security Dialogue*, Vol. 35, No. 2, 2004, pp. 173–189.

47 Discussion with MSF physician, March 2013.

48 Christopher Cramer, *Civil War is Not a Stupid Thing: Accounting for Violence in Developing Countries*, Hurst, 2006, p. 33.

49 Laurence Brown, '"Pour Aider Nos Frères d'Espagne": Humanitarian Aid, French Women, and Popular Mobilization during the Front Populaire', in *French Politics, Culture and Society*, Vol. 25, No. 1, 2007, pp. 30–48.

50 This politicisation reappears quite markedly during the Second World War: Paul Benkimoun, A. Bergogne and C. Coumau, 'Les médecins et Vichy: Résistants, collaborateurs . . .', in *Impact médecin hebdo*, No. 380, 1997, pp. 6–19.

51 Interview with MSF chief of emergency operations, March 2013.

protect such premises.[52] Such practices were observed in 1877–78 and in many later conflicts.[53]

In fact, a war hospital is a structure sheltering a concentrated mass of exceptionally static and vulnerable wounded combatants who are tempting prey in the effort to destroy the enemy. It is therefore a favoured target in a context of total war. In such cases the vulnerability of a wounded soldier may no longer evoke the urgency of medical care but rather an opportunity for attack. Thus the principle of humanity is completely disregarded, or perverted solely for exploitation in the dynamics of war.

In other cases, as we shall see later, the purpose of the belligerents may be to use medical services to consolidate their control over a given community.[54] Furthermore, the possession of medical facilities is a matter associated with the principle of sovereignty,[55] and an affirmation of power as well as a source of political legitimacy. Their loss or destruction thus becomes a vital issue in protracted conflicts involving local and international alliances. Presenting itself as the essential role of protector and provider of health care creates and consolidates a power in place. This political use of health economics has in the past been exploited by humanitarian organisations themselves in order to gain access to patients. Negotiations with various warlords in Afghanistan, for example, are a good historical demonstration of this.[56]

That being the case, what can be done to counter such practices, apart from invoking the principle of universality to promote acceptance of the fact that health facilities benefit everyone, and that ensuring their security is based on well-understood mutual interest? What difference is there between health care in time of war and such activity in peacetime? As doctors have a dual role in wartime – that of treating victims and, in the case of military medical officers and others in a similar category, sometimes that of accompanying the fighting forces – it is evident that some ambiguity may arise.[57] Sometimes in the past humanitarian aid has even been seen as a form of support for the war effort: the early Quaker pacifists saw it as a way of internationalizing conflicts, and even of mobilizing women and children.[58] In fact, it cannot be denied that humanitarian assistance in time of war does allow mobilization of an international environment and thus contributes to accounts of

52 Charles Laurent, 'Histoire de deux prisonniers allemands à Paris', in *Annales Politiques et Littéraires*, 1911, pp. 304–306, 338–339, 358–359, 378 and 404–406.

53 *Report and Record of the Operations of the Stafford House Committee for the Relief of Sick and Wounded Turkish Soldiers: Russo Turkish War, 1877-1878,* pp. 119–120.

54 Xavier Crombé, 'Afghanistan retour négocié?', in C. Magone, M. Neuman and F. Weissmann, above note 35, pp. 65–91.

55 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge, 2005.

56 Archives MSF France, Afghanistan Ghazni, 1986–1989; see also the archives of MSF France, Thailand 1989, on the situation of latent violence in Site II of the Cambodian camps.

57 John T. Greenwood and F. Clifton Berry Jr, *Medics at War: Military Medicine from Colonial Times to the 21st Century*, Naval Institute Press, Annapolis, MD, 2005.

58 B. Taithe, above note 12, pp. 22–47.

the causes of conflicts.[59] Is it not the case that NGO reports and victims' stories are often referred to by the press and by States party to the conflict as sometimes being used for political ends?[60] Indeed, being in control of medical care might also be a means of controlling the narrative of the war:[61] Biafra is a significant example of this.[62] It therefore represents a resource and a symbolic asset whose usefulness in generating political propaganda remains immense.[63]

To conclude this first part, it must be said that the debate concerning attacks on MSF's medical activities often comes down to calling into question, by the teams, of the pertinence, the advantage gained by the populations concerned and the added medical and operational value should MSF decide to remain in a context in which it has come under attack. In such cases the continuity of operations sometimes prevails over contingencies connected with violent phenomena. Invocation of the concept of neutrality has rarely prevented attacks on medical activities; medical missions have often been exploited for political purposes. In approaching this subject it is essential not only to be prudent in the choice of terms used, but also to place the events concerned in context.

An attempt to draw up a typology of attacks on medical missions and attitudes to such attacks

It should be noted that in the history of the organisation, these acts of violence have been recurrent (spasmodic or chronic, often a combination of both) and have several categories of effects on access to and delivery of medical care:

- A general restriction on access to care, either because the infrastructure has become inoperative or for lack of competent health personnel, for example when they have been directly or indirectly targeted by attacks.
- Withdrawal from certain medical zones, or even certain types of medical care, as a result of direct and indirect attacks against health personnel and patients.
- The impossibility of providing primary health care, in particular under the Expanded Programme on Immunization, due mainly to obstruction of medical

59 Heather Jones, 'International or Transnational? Humanitarian Action During the First World War', in *European Review of History*, Vol. 16, No. 5, 2009, pp. 697–713.

60 Luc Boltanski, *La souffrance à distance: morale humanitaire, médias et politique*, Métailié, Paris, 1993; Rony Brauman, *Dangerous Liaisons: Bearing Witness and Political Propaganda. Biafra and Cambodia – the Founding Myths of Médecins Sans Frontières*, Centre de réflexion sur l'action et les savoirs humanitaires, Paris, 2006.

61 Jonathan Benthall, *Disasters, Relief and the Media*, Tauris, London, 1993.

62 Henryka Schabowska, *Africa Reports on the Nigerian Crisis: News, Attitudes and Background Information. A Study of Press Performance, Government Attitude to Biafra and Ethnopolitical Integration*, Scandinavian Institute of African Studies, Uppsala, 1978; Donald Rothchild, 'Unofficial Mediation and the Nigeria-Biafra war', in *Nationalism and Ethnic Politics*, No. 3, 1997, pp. 37–65; Enda Staunton, 'The Case of Biafra: Ireland and the Nigerian Civil War', in *Historical Studies*, Vol. 31, No. 124, 1999, pp. 513–534; Daniel Bach, 'Le Général de Gaulle et la guerre civile au Nigeria', in *Canadian Journal of African Studies/Revue Canadienne des Etudes Africaines*, Vol. 14, No. 2, 1980, pp. 259–272; John J. Stremlau, *The International Politics of the Nigerian Civil War*, Princeton University Press, Princeton, NJ, 1977.

63 J. Benthall, above note 61.

activities, looting of medical supplies or the inability of medical personnel to travel because of poor security conditions.
- Constriction of the humanitarian organisations' working space when violent incidents result, in some serious cases, to a diminution in the aid dispensed and in the geographical area covered.
- Triage of patients according to non-medical criteria (for example gender, age or ethnicity).[64]
- Selection[65] of certain staff members on the basis of gender, religion or culture, which violates the principles governing MSF's working practices and the principles set out in its charter.

A whole range of problems arise as a corollary of the consequences set out above. They create tensions (functional, ethical, or even identity-related), not only within MSF but also among international organisations in general, especially in the event of very serious incidents[66] likely to call individual and institutional responsibilities into question.

Threats, pressure, violence: visible and invisible forms

In terms of security analysis, the most acute forms of violence are also the most visible, in particular the killing of health personnel and patients,[67] sometimes even inside health centres or ambulances. Such events may have a range of effects which are sometimes difficult to grasp. Thus the migration of qualified medical personnel from public services to the private sector (a phenomenon noted in particular in Central America, where violence perpetrated by organized crime rings[68] against health professionals is well documented[69]) not only results in staff shortages in those structures but also makes the delivery of health care more complex. Indeed, doctors working in Mexico State, Mexico, report that they have to avoid certain territories in the hands of cartels in order to be able to function.[70] In situations of latent war, tactical acts of violence may combine cynicism and terror. For example, a senior

64 MSF France Archives, Afghanistan 1996, 1997 and 1998, in particular on the conflicts with the Taliban over access to health care for women.

65 Pierre Micheletti discusses 'affectabilité' in 'Les humanitaires français à l'épreuve de la Syrie', *Le Monde*, 28 February 2012, available at: http://www.lemonde.fr/idees/article/2012/02/28/les-humanitaires-francais-a-l-epreuve-de-la-syrie_1649002_3232.html (last visited 13 June 2013).

66 For example, see: Médecins Sans Frontières, 'Afghanistan – L'humanitaire "assassiné"', 5 July 2004, available at: http://www.msf.fr/actualite/articles/afghanistan-humanitaire-assassine (last visited 13 June 2013).

67 A patient executed in a Honduran Red Cross ambulance: 'Acribillan a un hombre dentro de ambulancia en Honduras', in *La Prensa*, 20 March 2013, available at: http://www.laprensa.hn/csp/mediapool/sites/LaPrensa/Sucesos/Policiales/story.csp?cid=365888&sid=951&fid=98 (last visited 29 August 2013).

68 A health centre was closed in Tegucigalpa because of constant threats and extortion on the part of the Maras: 'Mareros le sacan carrera a personal de centro de salud', in *La Tribuna*, 8 December 2012, available at: http://www.latribuna.hn/2012/12/08/mareros-le-sacan-carrera-a-personal-de-centro-de-salud/ (last visited 13 June 2013).

69 For example in Ciudad Juarez and Tamaulipas State: 'Médicos huyen por violencia', in *El Universal*, 5 October 2010, available at: http://www.eluniversal.com.mx/primera/35648.html (last visited 13 June 2013).

70 Private communication, MSF adviser, Mexico, 2013.

member of MSF working in Iraq describes the feeling of helplessness among teams faced with particularly violent attacks directly targeting medical vehicles and hospitals:

> One *modus operandi* is regularly used in Iraq, and consists of multiple attacks: a first explosion – sometimes relatively small – claims a few victims so as to attract a group of emergency personnel, security forces and bystanders to the site of the blast. Then there is a second explosion, often more violent, which results in many more casualties because of all the people who have rushed to the spot to bring aid to the victims of the first one. Sometimes this is followed by a third explosion, targeting the hospital where the wounded have been taken. A similar type of scenario was played out three times in 2011 in Kirkuk, interrupting *de facto* the aid chain, and more generally the operation of the reference hospital, which led to the evacuation or 'bunkerisation' of the teams and thus the suspension of medical care in the wards where MSF was working. This diffuse but constant threat materialized on 21 December 2011, when the vehicle transporting the victims of an initial, targeted attack, was itself booby-trapped and exploded in the compound of the Jumhouri Hospital, wounding an Iraqi doctor.[71]

Several senior MSF officials explain that in situations of extreme violence, operational possibilities (not including public statements) for responding to such events are finally quite limited. In comparable if not similar circumstances, MSF has either temporarily or permanently reduced the number of expatriate, regional or national teams present, or suspended its activities, or else opted for temporary or permanent suspension of medical programmes of whatever description. In many cases, definitive withdrawal from the country is a possibility contemplated only when the degree of risk is weighed against the medical impact that MSF can have on the spot. However, threatening the authorities with temporary or permanent withdrawal would appear to be an effective means of restoring security only where there is a political economy of health whereby the sovereign authority has the means to put an end to violence and needs the continued presence of medical aid.

These two conditions, however, are rather uncertain and the indicisiveness of the Taliban régime in the 1990s about the acceptability of the presence of female medical staff is a clear indication that health policies are often the subject of internal debates which find an echo within MSF.[72] In such a tense context, complex military and political situations sometimes generate conflicting attitudes vis-à-vis the setting-up of autonomous medical aid and the compromises that the organisation might be willing to accept. Finally, a 'vocational crisis'[73] also seems to be emerging.[74] As the practice of medicine exposes practitioners to significant

71 Discussion with François Delfosse, Head of MSF mission, Geneva, 12 April 2013.
72 Archives MSF France Afghanistan 1996, 1997, 1998.
73 Private communication, teaching staff, University of Mexico Faculty of Medicine, Mexico City, 6 April 2011.
74 There are no doctors in the country's 74 municipalities, which have a population of some 500,000. A large number of complaints have been addressed to the Health Secretary about the lack of treatment available:

risks in certain contexts, health professionals sometimes prefer to emigrate in order to exercise their profession in more serene conditions. In many areas, analysis of violent events tends to demonstrate the extraordinary complexity of both their motivations and in their consequences, and many difficulties arise when steps are taken to prevent and interpret them, especially when the daily threat of violence blurs all sense of normality for the teams.

The nature of activities and specific forms of violence

The nature of medical activities carried out may also be a catalyst for tension, or even for specific forms of violence. This is particularly the case for war surgery,[75] in that it brings together in a single space different types of belligerents, and that this medical activity may be seen as ostensibly sustaining the military forces of the enemy or of the adverse community. For example, when there was fighting between two communities in the Democratic Republic of the Congo in 2003, in the town of Bunia in Ituri district, MSF had to set up ambulance services to transport the wounded belonging to one ethnic group which no longer had access to medical centres run by the other group:

> We negotiated with both sides, in fact, with both the Hema and the Lendu, in the attempt to treat the wounded and sick. At one point MSF was suspected by both sides of no longer being impartial, and one expatriate was kidnapped and held for several days. As a result the organisation hardly left the town of Bunia for almost two years. We no longer responded to outbreaks of disease in the district, for example.[76][ICRC translation]

Even before medical attention is dispensed, the priority accorded in hospital emergency departments to patients in line with their medical condition also gives rise to many disputes: 'The common denominator in the simultaneous management of a large number of victims – whether sick or wounded – is medical triage. When aid activities are initially unable to cope with the scale of an event, the first thing to do is to sort the victims into categories so as to treat them in order of medical priority. Triage allows the emergence of the singular from the collective and the individual from the crowd. It thus moves away from political considerations to focus on ethical ones.'[77][ICRC translation] As it creates both symbolically and

'No hay médicos en 74 municipios del país', in *La Prensa*, 2 April 2011, available at: http://archivo.laprensa.hn/content/view/full/488396 (last visited on 13 June 2013).

75 'Médecins Sans Frontières expresses its serious concern for the security of its surgical centre in Aden, following the irruption into the hospital of a group of armed men during the night of 18 to 19 June. These men tried to carry away a patient who was receiving treatment in the emergency room' [ICRC translation]. See Médecins Sans Frontières, 'Yémen: MSF appelle au respect de la neutralité des hôpitaux', 21 June 2012, available at: http://www.msf.fr/actualite/articles/yemen-msf-appelle-au-respect-neutralite-hopitaux (last visited 13 June 2013).

76 Interview with Laurent Ligozat, Deputy Director of Operations, MSF Switzerland, Geneva, 13 May 2013.

77 Pierre Valette, *Du tri à l'Autre: Éthique et médecine d'urgence,* Thesis presented and defended at the Université Paris-Est Marne-la-Vallée, 1 December 2011, p. 181.

in reality a form of competition among the victims, medical triage becomes a social and political issue and the source of a number of incidents reported in the field. In many cases patients and their families or associates try to relegate medical imperatives to second place so as to obtain immediate assistance for a particular individual or group. This direct interference in the provision of medical care reflects the fact that medical services prior to the arrival of humanitarian aid are not always seen as neutral or impartial, or may simply be dispensed according to personal interest.

Recently vaccination campaigns have also been the scene of repeated attacks against health workers, perpetrated in particular by population groups that reject[78] such campaigns, seeing them as a form of health imperialism.[79]

This often violent opposition to medical activities calls for an analysis of the circumstances, and also for examination of the underlying historical, political and social context of such occurrences. A population always has its own particular perception of and customs relating to medical treatment, arising from its interaction with health systems or with professionals who may be perceived as in the pay of a dominant power, or simply motivated by commercial or even corrupt interests. Medical care is rarely seen as neutral, and a hospital is not an insular structure whose work is guided by metaphysical principles.

The type of activities carried out, the history of the medical profession in a given country and the triage policies which *de facto* create a hierarchy among victims are all factors that tend to exacerbate pre-existing social and political tensions in countries receiving medical aid. Opting for the 'vertical' type of treatment in which resources are used exclusively for a health campaign focusing implicitly or explicitly on a single disease, for example polio or tuberculosis, at the expense of a more 'horizontal' approach, or concentrating on the eradication of one disease while others remain untreated, often appears to be seen by the population as the preferred policy of authoritarian attitudes to health care.[80] These campaigns launched to eradicate major endemic diseases call to mind other, earlier, campaigns, some of which might have appeared experimental while nevertheless justified

78 'While security concerns persist in Nigeria – amplified by the August bombing of UN headquarters in Abuja – a quarter of the children not vaccinated in the July 2011 immunization campaign were due to refusals – with greater than 80% of refusals in the northern States of Kano, Sokoto and Jigawa', in Heidi J. Larson and Pauline Paterson, 'Eradicating polio: persisting challenges beyond endemic countries', in *Expert Review of Vaccines*, 2011, pp. 1635–1636.

79 'The body and the population resist systematic biomedical practices; they resist in an organic manner in the sense that illness allows a definition of the self and the non-self, of the self and the other, of the pathological and the normal. But bodies and populations also resist in accordance with social contexts and particular policies', in Julie Laplante and Julie Bruneau, 'Aperçu d'une anthropologie du vaccin: regards sur l'éthique d'une pratique humanitaire', in *História, Ciências, Saúde - Manguinhos*. Vol. 10, Suppl. 2, 2003, pp. 519–536, available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0104-59702003000500005&lng=en&nrm=iso> (last visited 13 June 2013).

80 Maryinez Lyons, *The Colonial Disease: A History of Sleeping Sickness in Northern Zaire, 1900–1940*, Cambridge University Press, Cambridge, 1992; Poonam Bala (ed.), *Biomedicine as a contested site: some revelations in imperial contexts*, Lexington Books, Lanham, MD, 2009; Lea Berrang-Ford, Martin Odiit, Faustin Maiso, David Waltner-Toews and John McDermott, 'Sleeping sickness in Uganda: revisiting current and historical distributions', in *African Health Sciences*, Vol. 6, No. 4, 2006, pp. 223–231.

by ethical considerations.[81] Even today, tensions and misunderstandings relating to that pioneering period persist. Such tensions resurface when specific campaigns overlook the real or perceived needs of the populations concerned.[82] Finding effective levers of power capable of allaying such tensions and organizing a secure space for medical activity often depends on a targeted operational approach which incorporates all these dimensions. Also, serious studies must therefore be initiated to examine the practices which have allowed medical aid to be dispensed in an effective manner.

From tolerated violence to internalised violence?

There is perhaps no clear boundary between tolerance and internalisation of violent phenomena. These two mechanisms often echo feelings of personal insecurity, but may arise from, and be justified by, a substantiated analysis of local micro-politics.[83] Humanitarian activities take place in difficult contexts, and medical teams do not have the authority to solve the prevailing social and political problems.[84] In practice, the teams often experience some difficulty in grasping the overall trends that give rise to attacks, in particular because the issue of intentionality underlying them is extremely difficult to define and understand. The result is a sort of permissiveness in the face of the daily harassment or pressure sometimes experienced by teams on the ground. Only the most brutal attacks on MSF medical missions are reported or denounced. These include attacks on health facilities aimed at identifying opponents of the governing régime,[85] the theft of confidential medical records,[86] and the killing or abduction of patients or personnel.[87] Presented on each occasion as a special case, such problems have served locally as decisive elements in negotiations on the management of resources and relations with local political figures.

81 Benjamin N. Azikiwe, 'Ethics of Colonial Imperialism', in *The Journal of Negro History*, Vol. 16, No. 3, 1931, pp. 287–308.

82 David Arnold (ed.), *Imperial Medicine and Indigenous Societies*, Manchester University Press, Manchester, 1988; Laëtitia Atlani-Duault and Jean-Pierre Dozon, 'Colonisation, développement, aide humanitaire. Pour une anthropologie de l'aide internationale', in *Ethnologie française*, Vol. 41, No. 3, 2011, pp. 393–404.

83 A field in which MSF teams have often shown great sensitivity, which has sometimes influenced international opinion. Archives MSF France, *Comité Solidarité étranger* (Afghanistan, 1985–1987).

84 For views on the difficulty experienced by medical teams in analysing violent phenomena, see Françoise Duroch, 'Le viol, arme de guerre: l'humanitaire en désarroi', in *Les Temps Modernes*, No. 627, 2004, pp. 138–147.

85 Médecins Sans Frontières, 'MSF Calls for End to Bahrain Military Crackdown on Patients', 7 April 2011, available at: http://www.doctorswithoutborders.org/press/release.cfm?id=5170&cat=press-release (last visited 13 June 2013).

86 'MSF is gravely concerned for the safety of our staff and patients following a serious incident occurring in an MSF medical facility in Dinsor (Bay region, Somalia) on December 27. After taking control of Dinsor, representatives of military forces entered the MSF medical facility, pressured the Somali medical staff employed by MSF, and confiscated all inpatient confidential medical files', in Médecins Sans Frontières, 'After a Week of Intense Fighting in Somalia, MSF Extremely Concerned about the Security of Medical Staff and Safety of Patients', 28 December 2006, available at: http://www.doctorswithoutborders.org/press/release.cfm?id=1916&cat=press-release (last visited 13 June 2013).

87 For example in Somalia, where two MSF colleagues were killed in Mogadishu in December 2011.

Some forms of internalisation[88] have been observed when it comes to certain types of violence[89] experienced repeatedly by MSF teams and patients, who are sometimes forced to endure harassment, threats and blackmail on a daily basis. As a result, a significant number of incidents are reported only in a fragmentary manner.[90] This trivialisation of violence might seem to create the risk of a tacit, or even permissive, culture of an organisation that feeds on individual responses and depends, in practice, on its members' capacity for negotiation. For humanitarian actors and for militants, internalizing acts of violence would amount to making such occurrences a matter that goes unmentioned, an everyday normality that is exhausting and potentially traumatic. As a result, an organisation could become incapable of assessing the real dangers. In fact, this type of internalisation might be seen as giving carte blanche for repetition of such events. Moreover, the tacit acceptance by MSF teams of 'rules' that have to be observed – regarding the recruitment of staff or the conduct of projects, or even for operational choices – and that are constantly being changed by certain elements involved in the conflict, may eventually become a form of submission. The definition of 'red lines' that must not be crossed to avoid passing from accommodation to compromise has been dealt with elsewhere,[91] but still remains a topical issue for the organisation.

Criminalisation of medical activities?

Finally, the question of the criminalisation of medical activities must also be examined. This matter has arisen in the Gaza Strip and also in Somalia, following new legislation put in place in connection with the 'war on terror' and adopted by a group of countries. The issue considered was to what extent providing medical assistance to individuals or groups considered to be terrorists amounted to 'material support for terrorism', as defined by the USA Patriot Act, adopted following 11 September 2001:[92]

> . . . [I]n two criminal cases concerning individual doctors ideologically affiliated with Al-Qaeda, rather than humanitarian organisations, the doctors were

88 The National Report on the increase in reports of acts of violence in the hospital setting records a similar trend and notes that a policy encouraging reporting of such incidents may result in their increase, while tolerance with regard to violent episodes depends largely on the persons who fall victim to them. 'The establishments do not all report the events that occur in the same manner, for a subjective analysis of the event partly remains, and the threshold of tolerance to agression is very different from one set of personnel to another, from one structure to another, from one establishment to another'. [ICRC translation] See French Ministry of Work, Employment and Health, above note 10, p. 6.

89 'It should be remembered finally that the problem of violence within health facilities requires prudence and prior definitions because violence is protean and subjective. Everyone who encounters this notion gives his or her own definition, a fact that must imperatively be taken into account before any attempt at analysis is made, so as to define a common language from which everyone can draw the elements of communication and information that he or she is seeking.' [ICRC translation] See French Ministry of Work, Employment and Health, above note 10, p. 4.

90 Private communication, senior field staff member, MSF Yemen, March 2013.

91 C. Magone, M. Neuman and F. Weissmann, above note 35.

92 The title of the PATRIOT Act is 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism'.

> convicted of supporting terrorism by providing medical treatment to members of a proscribed group (the cases are US v. Shah and US v. Farhane). The humanitarian exception was interpreted narrowly in these cases as including the provision of medicine only, and not the provision of medical treatment, which draws upon medical expertise. However, a significant factor in each case was the stated commitment of the defendants to the goals of Al-Qaeda, and the judgments suggest that a different conclusion could be reached in the case of independent humanitarian organisations not acting under the 'direction or control of a designated foreign terrorist organisation.'[93]

In several cases, the manipulation of medical aid for political ends has also led medical organisations such as MSF to withdraw completely from certain contexts. In 1994, for example, MSF withdrew from Rwandan refugee camps so as to cease contributing to the exploitation of humanitarian aid by genocidal factions:

> Although the impact of MSF's medical services was marginal compared with that of organisations distributing food . . . our participation in the aid system implicated us in all its outcomes . . . . Everything from our presence in the camps to the resources we lost from theft made us direct accomplices in whatever harmful acts ensued.[94]

There had already been a precedent to this situation in Ethiopia in the 1980s, as reported by Rony Brauman, the then President of MSF France:

> The routine of humanitarian activity was beginning to mask participation in the mass violence that was now the primary cause of mortality in the country. Just imagine: I got up, I checked my medical equipment, I went to the dispensary to carry out consultations, I took part in a meeting with the regional coordinating committee, I submitted a request to my headquarters for medical supplies, I paid a visit to the hospital. This daily activity, motivated by the conviction that I was participating in a rescue operation, can be completely turned on its head, seen on the contrary as part of a strategy of oppression, reversed against the intentions pursued, with no break in its routine. . . . We gradually found ourselves in an 'Eichmann-like' process of suspension of critical thinking, in a way delegating our responsibility to higher authorities . . . while carrying out routine tasks ennobled by the underlying intention to bring aid.[95][ICRC translation]

Reverting to the issue of the internalisation of everyday violence and the lack of a critical framework that can result, R. Brauman clearly demonstrates how

93 Sara Pantuliano, Kate Mackintosh and Samir Elhawary with Victoria Metcalfe, 'Counter-Terrorism and Humanitarian Action, Tensions, Impact and Ways Forward', in *HPN Policy Brief* No. 43, October 2011, pp. 4–5.

94 Fiona Terry, *Condemned to Repeat? The Paradox of Humanitarian Action*, Cornell University Press, Ithaca and London, 2002, p. 3.

95 Rony Brauman, 'La routine du travail humanitaire en venait à dissimuler la participation à des violences de masse', in *Philosophie Magazine*, available at: http://www.philomag.com/les-idees/dossiers/rony-brauman-la-routine-du-travail-humanitaire-en-venait-a-dissimuler-la (last visited 13 June 2013).

internalized violence can become a pernicious dimension of humanitarian work as a whole, undermining the very principles of philanthropy. Forms of mass violence such as the everyday harassment or extreme risks to which MSF medical personnel and patients are exposed by war are interlinked challenges, both individual and institutional, at the heart of current issues.

Conclusion: the MSF 'Medical care under fire' campaign

We have seen how, whatever the form taken by an attack on medical activities, the primary consequence remains the temporary or permanent blocking of access to health care for all or part of the population. In this context, should we see as an indirect threat to medical missions the creation of 'administrative' health wastelands when the authorities deliberately refuse to supply the necessary financial and human resources for certain zones or certain categories of the population?

It appears that the issue of intentionality is finally one of the most sensitive and difficult to grasp and that the pertinence of this factor as an element in analysing field conditions is questionable, despite the fact that its political and historical significance remains indisputable.

In response to all these issues, in 2013 MSF decided to launch a project throughout the MSF movement with the objective of setting up a research programme to document the consequences in medical and humanitarian terms of attacks on patients, health personnel, and health facilities and vehicles. It is intended that the project will focus on improving patients' access to health care and on ensuring the safety of personnel in the exercise, in the broad sense, of their activities. Another aim of the project is to try to determine the consequences in epidemiological terms of the interruption in medical care following an attack. In order to distinguish the real risk from the perceived risk, even if only to dismiss the idea of 'moral panic', it is intended that the project will expand the collection of current and historical data on the basis of shared definitions and methodologies. As suggested by a senior MSF executive, this project could also lead to better understanding of violent phenomena hitherto overlooked, in particular those to which national teams are subjected.[96]

MSF is currently troubled about the absence of data, both narrative and statistical, concerning attacks on medical missions, which seems to highlight a prevailing deficiency and also represents a real challenge for the organisation to produce a coherent analysis of the risks it incurs. Some would like to see these issues of violence analysed more systematically by MSF in order to identify a global trend and a better understanding of the nature of the problem. In practical terms, that may involve use of a database common to all the different sections of MSF – this is still in an experimental phase – coupled with a study of the issues and risks that may be involved in the use of statistical tools, which are time-consuming for the teams and whose pertinence is often called into question.

96 Discussion with Laurent Ligozat, Deputy Director of Operations, MSF Switzerland, Geneva, 13 May 2013.

Nevertheless, above and beyond the introduction of common and shared procedures allowing the best possible use to be made of the cross-sectional data of the MSF movement and, potentially, ensuring a common understanding of these problems, there remains the basic challenge of conducting a critical study on phenomena of insecurity[97] in the context of humanitarian operations.

Starting from the premise that security incidents result from a combination of elements that may or may not allow the occurrence of such events, the responsibility of humanitarian organisations in relation to the drawing up of operational policies, the quality of the aid delivered and the selection and recruitment of personnel cannot be dismissed out of hand in the process of research. It is therefore not sufficient to be content with assuming the posture of victims or merely denunciators while medical humanitarian aid remains a stakeholder in the conflicts in which it becomes involved and, furthermore, such involvement has to be managed in the most lucid manner possible. There must be detailed analysis of the chain of events leading to the occurrence of these security incidents, and in particular closer assessment of the part played by individuals, groups and random/arbitrary factors. Such investigations should enable the organisation to devise compelling messages that can be brought before the decision-makers: the human cost of operations first of all, the 'knock-on effect' (the immediate, middle-term and long-term effect on health systems), and the implications for patients. Establishment of a data-collection methodology common to the different sections of the MSF movement, and current and retrospective analysis of these violent events will make it possible to track the incidence of such phenomena over time, a process which appears difficult at present.

97 Elsa Rambaud, 'L'organisation sociale de la critique à Médecins sans frontières', in *Revue française de science politique*, Vol. 59, No. 4, 2009, pp. 723–756.

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OPINION NOTE

A way forward in protecting health services in conflict: moving beyond the humanitarian paradigm

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Attacks on health workers, clinics, hospitals, ambulances and patients during periods of armed conflict or civil disturbance pose enormous challenges to humanitarian response and constitute affronts to the imperatives of human rights and civilian protection. Violence inflicted on humanitarian aid workers is gaining the global attention it warrants. While the number of attacks on aid workers has decreased in recent years, in a handful of places, notably Sudan, Afghanistan, and Somalia, they have become more spectacular and frightening, with aid agencies targeted for kidnapping and subjected to use of explosives because of their

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perceived affiliation with Western governments.[1] The assaults have galvanised the humanitarian aid community to track attacks[2] and to engage in intensive and sophisticated discussion of means to increase operational security. After worldwide consultation, in 2011 the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA) issued a report that summarised the fruits of experience and stimulated consideration of security strategies for aid providers.[3] By contrast, however, until very recently the far larger number of incidents of violence inflicted on and interference with indigenous health services and on international and local development agencies by state and armed groups has received comparatively little attention.

In the past two years, the landscape of attention has begun to shift.[4] Notable milestones include a report by the International Committee of the Red Cross (ICRC)[5] and the launch of its Health Care in Danger campaign; a resolution at the 31st International Conference of the Red Cross and Red Crescent Movement urging action by states and the entire Red Cross and Red Crescent Movement;[6] a policy resolution by the World Health Assembly requiring leadership by the World Health Organization (WHO) in the collection and dissemination of data on attacks on health services;[7] inclusion of attacks on schools and hospitals in the UN Security Council's accountability mechanisms for protecting children in armed conflict;[8] recognition of the problem by the UN Secretary-General in his 2012 report on the protection of civilians in armed conflict;[9] and a new coalition devoted to the protection of health in conflicts. Assaults against health have been included in official investigations of human rights violations and war crimes. For example, an independent commission investigating atrocities in Syria identified the bombing

1 Abby Stoddard, Adele Harmer, and Victoria DiDomenico, *Providing Aid in Insecure Environments: 2009 Update*, Humanitarian Policy Group, 2009, available at: www.humanitarianoutcomes.org/resources/ProvidingAidinInsecureEnvironments20091.pdf. All internet references were last visited in August 2012, unless otherwise stated.

2 Humanitarian Outcomes, *Aid Worker Security Database*, 2012, available at: https://://aidworkersecurity.org/.

3 Jan Egeland, Adele Harmer, and Abby Stoddard, *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, UN Office for the Coordination of Humanitarian Affairs, 2011, available at: http://ochanet.unocha.org/p/Documents/Stay_and_Deliver.pdf; see also Abby Stoddard and Adele Harmer, *Supporting Security for Humanitarian Action: A Review of Critical Issues for the Humanitarian Community*, Humanitarian Outcome, March 2010, available at: http://reliefweb.int/sites/reliefweb.int/files/resources/9B8094812827584485257719005804D4-HO-SupportingSecurityforHumanitarianActionMarch2010.pdf.

4 Leonard S. Rubenstein, *Protection of Health in Armed and Civil Conflict: Opportunities for Breakthroughs*, Center for Strategic and International Studies, 2011, available at: http://csis.org/files/publication/120125_Rubenstein_ProtectionOfHealth_Web.pdf.

5 ICRC, *Health Care in Danger: A Sixteen-Country Study*, 2011, available at: www.icrc.org/eng/assets/files/reports/4073-002-16-country-study.pdf.

6 31st International Conference of the Red Cross and Red Crescent Movement, Resolution 5, 'Health Care in Danger: Respecting and Protecting Health Care', 2011, available at: www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-5-2011.htm.

7 WHA Res. 65.20, 26 May 2012.

8 UNSC Res. 1998, 12 July 2011.

9 *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2012/376, 22 May 2012, paras. 13, 14, 33, 34, 74.

of hospitals and attacks on medical personnel as among 'the most alarming features of the conflict'.[10]

It is often assumed that responding to the vulnerabilities of indigenous health service providers and development agencies simply requires extending the humanitarian aid protection paradigm to them. Common ground certainly exists, particularly insisting on the respect for health services by all parties under international law and adapting humanitarian agency security strategies to local needs. Yet in certain key respects, circumstances and governing principles differ between humanitarian missions on the one hand and indigenous health services and development programs on the other. Unless these differences are recognised, global approaches to the protection of local health service providers and development actors may be ineffective or paradoxically exacerbate threats to them. Most fundamentally, to assure the safety of these health providers, we need to expand our vision beyond the humanitarian aid paradigm and, in appropriate circumstances, expand the use of the tools of reporting, protection and accountability that derive from human rights movements.

The humanitarian security paradigm and local health services providers

The dominant health security paradigm in complex environments is understandably rooted in the work of humanitarian aid agencies, as well as local Red Cross and Red Crescent societies, which have become a fixture in response to war and disaster. That paradigm focuses on adherence to humanitarian principles, securing and maintaining access, and developing sophisticated ongoing security analysis and programming.[11] Strategies for increasing the security of humanitarian aid organisations include rigorous risk assessment, articulation of acceptable levels of risk, proactive methods to gain acceptance and rootedness in communities, negotiation with combatants for access, devolved management, protective measures, deterrence through armed security, and demonstrated strict adherence to humanitarian principles of impartiality and neutrality.[12] Additionally, analysts have focused on extrinsic factors, particularly the need for humanitarian space, especially in circumstances where Western militaries are operating, and the relaxation of restrictions on aid group interaction with organisations deemed by governments to be engaged in terrorism.[13]

In designing security strategies, the OCHA report emphasises, the aid groups' goal is to stay in the region in need in order to provide services. Because the access of aid organisations to affected populations is frequently dependent on the permission of governments or armed groups that control territory, such

10 *Report of the Independent National Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/22/59, 5 February 2013, para. 138.
11 J. Egeland, A. Harmer, and A. Stoddard, above note 3.
12 *Ibid.* Also see A. Stoddard and A. Harmer, above note 3.
13 J. Egeland, A. Harmer, and A. Stoddard, above note 3.

organisations often face constraints in employing potential security measures that involve public protest or criticism. Although there is ongoing debate about whether and how aid groups take steps to reveal or protest human rights violations they see or experience, there is little doubt that in many situations, a direct trade-off exists between speaking out and maintaining access. Further, public attention to denial of or interference with an agency's humanitarian work can stimulate retaliation or further violence against it. Thus, with some exceptions, aid agency security strategies do not generally invoke public mechanisms such as naming and shaming through the media or UN civilian protection or human rights mechanisms. Even sharing of security data raises concerns for aid organisations.

The situation for indigenous health providers such as local clinics, hospitals, nurses, doctors, and ambulance services, however, often differs from that of humanitarian aid organisations. For the purpose of this discussion, these are local groups or individuals, not national or local staff of aid organisations or members of Red Cross or Red Crescent Societies that identify with and affirm the humanitarian mission and values, including neutrality.[14] First, the assumption that local health providers should adhere to the humanitarian principle of neutrality is misplaced, and indeed it is often impossible to follow. All health services and personnel should adhere to the principle of impartiality, which means providing services 'on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions'.[15] The principle of impartiality is reflected not only in the Geneva Conventions and Additional Protocols but also in international medical ethics codes. The World Medical Association's Declaration of Geneva, the modern version of the Hippocratic Oath, for example, provides that: 'I will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between my duty and my patient.'[16]

Unlike humanitarian aid providers, however, local doctors, nurses and other health workers need not and often cannot be neutral – that is, they cannot refrain from 'tak[ing] sides in hostilities or engag[ing] in controversies of a political, racial, religious or ideological nature'.[17] Neutrality, particularly exemplified by the work of the ICRC and often Red Cross or Red Crescent Societies, is increasingly embraced – and indeed, seen as essential to security – by other humanitarian providers, especially where armed groups view their fight as against all groups allied

14 Abby Stoddard, Adele Harmer, and Katherine Haver, *Safety and Security of National Humanitarian Workers*, 2011, Annex to J. Egeland, A. Harmer, and A. Stoddard, above note 3, pp. 14–15, available at: http://ochanet.unocha.org/p/Documents/Safety%20and%20Security%20for%20National%20Humanitarian%20Workers,%20PDSB,%202011,%20English.pdf.

15 OCHA, *Humanitarian Principles*, 2010, available at: http://ochanet.unocha.org/p/Documents/OOM_HumPrinciple_English.pdf.

16 World Medical Association, *Declaration of Geneva*, as amended, 2006, available at: www.wma.net/en/30publications/10policies/g1/. See also World Medical Association, *Regulations in Times of Armed Conflict*, as amended, 2006, paras. 4, 11, available at: www.wma.net/en/30publications/10policies/a20/.

17 OCHA, *Humanitarian Principles*, above note 15. Other humanitarian principles, including humanity and operational independence, also apply to local health programmes.

in some way with what they perceive as Western interests. Indeed, critics of the humanitarian community have argued that breaches of the principle of neutrality by UN and aid agencies contribute to their vulnerability.[18] Insistence on the neutrality of indigenous health providers, however, is both unnecessary from ethical and legal standpoints and counterproductively may serve to increase their vulnerability to attack by imposing a standard that is impossible to meet.

Local health providers may be affiliated with a government that is under attack, as in Afghanistan, a protest movement, as in Bahrain, or an insurgency or a side in civil war, as in Myanmar and Syria. In many of these contemporary conflicts, moreover, providers from a national, religious or ethnic group in conflict with state forces either do not have the choice of neutrality because of their identities or harbour a political allegiance to one of the parties to the conflict. These affiliations have no bearing on their right to provide health services so long as they do not take part in hostilities – for example, by using health facilities for military purposes. Further, as Frits Kalshoven explains in his review of the history of the idea of medical neutrality, Professor Louis Renault told the conference considering the 1906 Geneva Convention that the term 'neutrality' implies that doctors 'are indifferent with respect to the conflict that sets the fate of their country at stake; they are, in actual fact, enemies, albeit with a special task, and protection and special immunities must be accorded to them precisely to enable them to perform that task'.[19] Renault therefore urged that the Convention forgo the use of the word 'neutrality' in favour of the terms 'respect' and 'protect' in articles concerning the sick and wounded, medical personnel, and medical units.[20] He prevailed, and the word 'neutrality' has not appeared in subsequent Geneva Conventions or Additional Protocols in connection with medical services.

The lack of respect for the provision of impartial care to individuals perceived as enemies is already a major source of intimidation, arrest, and prosecution of health workers,[21] as has been evident in conflicts as diverse as Syria, Kosovo, Chechnya, Bahrain, Iraq, and Myanmar. Inappropriately claiming neutrality can exacerbate health workers' vulnerability, as it may be seen by state armed forces, law enforcement agencies, and armed groups as an effort to mask affiliations and loyalties. In sum, insistence on adherence to the principle of neutrality at a minimum leads to confusion about whether health workers are protected and at worst may serve as justification for attacks on them.

18 Antonio Donini, 'Between a rock and a hard place: integration or independence of humanitarian action', in *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 141–157; Feinstein International Center, Briefing Paper, *Navigating Without a Compass: The Erosion of Humanitarianism in Darfur,* 2011, available at: http://dl.tufts.edu/ProxyServlet/?url=http://://repository01.lib.tufts.edu:8080/fedora/get/tufts:UA197.005.005.00009/bdef:TuftsPDF/getPDF&filename=tufts:UA197.005.005.00009.pdf.

19 Frits Kalshoven, 'International humanitarian law and violation of medical neutrality', in *Reflections on the Law of War: Collected Essays*, Brill Academic Publishers, Leiden, Netherlands and Boston, MA, 2007, p. 1002.

20 *Ibid*.

21 Leonard S. Rubenstein and Melanie D. Bittle, 'Responsibility for protection of medical workers and facilities in armed conflict', in *The Lancet*, Vol. 375, 2010, pp. 329–340.

Second, as noted above, one of the fundamental goals of emergency aid agencies is to obtain and maintain access to affected populations in order to serve them. That goal often drives decisions about security strategies. For example, aid groups often maintain a low profile and engage in careful calculations as to whether access is jeopardised by public criticism of states or armed groups for interfering with access or committing human rights violations. The experience of aid groups expelled from Darfur for allegedly cooperating with human rights investigators is the most dramatic but hardly the only example of the trade-offs between access and human rights reporting. Although every context must be addressed individually, the problem for indigenous health providers is quite different because they largely remain present in the conflict-affected area. Their access may be impeded because of fighting, pervasive insecurity, or security restrictions, but not typically by being thrown out. Moreover, although research is needed on the question, generally it does not appear that local providers' access to people in need of health care is dependent on their silence.

In some circumstances, vocal protest by health providers can be a means of protection by stimulating international action to demand respect for their work.[22] And even when reporting does not bring immediate cessation of attacks, it can be a source of support. People in desperate straits want to know that others care about their fate. I spoke to health workers in Myanmar who have been subjected to attacks by the Myanmar military for years, most of which go unreported by any but local health or human rights organisations. The health workers well know that additional reporting will not bring protection in the near term, but uniformly reinforced its importance in terms of showing that people around the world care about them, affirm their mission, and seek to support them.

Third, indigenous groups often lack the resources, experience, capacity, and support that enable large humanitarian aid organisations to engage in expensive security analysis and activities. Especially in rural areas, health workers and clinics are isolated and operate on shoestring budgets with small staffs. Security coordinators, and even access to security information, may well be beyond the reach of these groups.

International development organisations that support the strengthening of health systems in conflict areas share many characteristics of humanitarian aid agencies (and differences from indigenous providers), such as values that stress community participation, capacity to engage in security strategies, and vulnerability based on their Western identification. They differ from humanitarian aid agencies, however, in a key respect: they are not and cannot claim to be neutral. Though impartial, both may be targeted for advancing health programmes associated with one side of the conflict. In Afghanistan, the goal of constructing a national system of primary care inevitably meant the agencies' allegiance to the government; further, these services were significantly funded by the United States, one of the parties to the conflict.

22 James Orbinski, Chris Beyrer, and Sonal Singh, 'Violations of human rights: health practitioners as witnesses', in *The Lancet*, Vol. 370, pp. 698–704.

Human rights strategies for the protection of indigenous health workers and development agencies

These three differences render models of humanitarian organisation protection only partially applicable to indigenous health workers, including local partners of development agencies. To be sure, many security strategies employed by the humanitarian community, such as rootedness in communities, negotiating with armed groups, and armed deterrence, can in many cases apply to or be adapted by indigenous health providers and facilities and development programmes. Additionally, in some circumstances public protests can put those health providers in greater jeopardy. But the circumstances of many local health providers, including local NGOs engaged in health development activities – lack of neutrality, being in place, and absence of security resources – sometimes suggest the availability of additional strategies derived from the maturing, complementary field of human rights that extend beyond traditional protection interventions used by humanitarian aid providers. The field has developed institutions and tools to deter violence against people who are protected under law through monitoring, reporting, and accountability.

To begin with, human rights and civilian protection do not assume that protection is linked in any way to neutrality; whether a local health provider or development agency is affiliated with one side is irrelevant. On the contrary, one of the central features of the human rights and civilian protection regimes is to assure the rights of dissenters, minorities, and the marginalised, who often take sides. Unlike humanitarian aid security regimes, both human rights and civilian protection are generally premised on public reporting of data, sometimes on specific incidents and sometimes on aggregate trends. Reporting serves multiple functions: establishing the facts about violations and when they are committed systematically, showing their scope; countering misinformation that seeks to re-characterise victims as perpetrators; providing a source of support to the victims; and triggering accountability mechanisms. As in all human rights and civilian protection initiatives, of course, sensitivity and discretion is required to assure that people already in jeopardy are not subjected to new or greater threats because of public reporting. Next, accountability must be invoked. Civilian protection and human rights are premised on stimulation of pressure on perpetrators to stop violations and to deter future violations through public exposure, diplomatic interventions, and imposition of formal penalties. Humanitarian security also benefits from accountability, which is why the UN Secretary-General has called for criminal prosecutions and other forms of accountability for perpetrators of attacks on aid workers as well as health services providers.[23] But whereas humanitarian aid groups (and for access reasons, international development agencies) often need to avoid finger-pointing at specific perpetrators and invocation of international or domestic compliance mechanisms, indigenous groups are often in a position to take public stands against impunity for violence inflicted on them.

23 *Report of the Secretary-General*, above note 9, paras. 74(e), 80(e), 82.

In the human rights field, over the course of sixty years since the Universal Declaration of Human Rights, UN and regional mechanisms[24] for reporting and accountability for violations of human rights have proliferated. Moreover, 'naming and shaming' of perpetrators has extended far beyond reports in media and by human rights organisations, now extending to actions by governments and multilateral organisations. For example, the United States government issues an annual report on the human rights record of states throughout the world and the UN Special Representative of the Secretary-General on Protection of Children in Armed Conflict issues an annual report identifying 'grave violations' and their perpetrators. Assuring the effectiveness of such interventions remains a constant challenge, but there is little doubt that even the most recalcitrant governments and armed groups wish to avoid accusations of major departures from universal human rights values. Moreover, over the last two decades, the original focus of the human rights movement on individual victims and political prisoners has expanded to protections of entire populations from assault. Further, the emergence of international criminal jurisdictions increases the possibility of individual accountability for deliberate attacks on health services as war crimes and crimes against humanity.

The emergence of global civilian protection strategies using human rights approaches is of more recent vintage. In 2005, the World Summit adopted the 'Responsibility to Protect', which mandates that the international community, through the UN, has responsibility to use the authority of the Security Council to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, including taking action where national authorities are manifestly failing to do so.[25] While still controversial, both because of its direct infringement on national sovereignty and the need to develop international consensus case by case, the Responsibility to Protect remains a powerful marker.[26] It has contributed to more robust action by the Security Council to protect civilians through the expansion of peace-keeping mandates to include civilian protection and specific mechanisms such as monitoring and accountability for grave violations against children in armed conflict.

With sufficient political will, galvanised by demands by health workers themselves, these mechanisms can be employed to increase respect for health-care providers in the interest of safeguarding health itself. No new international law is required to bring attacks on health services within the mandate of these

24 There is one mechanism with a specific mandate to address attacks on health-care services, the Special Representative of the Secretary-General for Children in Armed Conflict. Other global mechanisms include the Human Rights Council, treaty-based committees on torture and children, and regional mechanisms such as the Inter-American Commission on Human Rights, the European Court of Human Rights, and the African Commission on Human Rights.

25 *2005 World Summit Outcome*, UN Doc. A/60/L.1, 2005, paras. 139–140, available at: http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf.

26 Paul R. Williams, J. Trevor Ulbrick, and Jonathan Warboys, 'Preventing mass atrocities: the responsibility to protect and the Syrian crisis', American University, Washington College of Law Research Paper No. 2012-45, 1 November 2012, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174768 (last visited 27 February 2013).

mechanisms.[27] But only recently has there been any effort to utilise existing human rights mechanisms to advance protection of health services in armed conflict. In 2011, the Security Council extended the accountability mechanisms available to advance protection of children in armed conflict to attacks on schools and hospitals and associated personnel.[28] The mandate on the WHO to collect data on attacks on health facilities, personnel, and ambulances, and the patients they serve, can provide a new impetus to invoke human rights mechanisms in order to increase respect for health. These two mechanisms should just be the start as protection of health services comes to occupy a deserved place in the human rights and civilian protection regimes. International criminal prosecution for attacks on health workers, patients, and hospitals is available, and it must be initiated where violations warrant it.

Much more needs to be done at the national level, starting with the needed recognition of state obligations to respect and protect medical care offered by non-neutral health providers. The 31st International Conference of the Red Cross and Red Crescent urged states to implement international legal obligations through legislative, regulative, and practical measures.[29] To carry that mandate out, states should incorporate into domestic law the provisions on protection and respect for health contained in international humanitarian law. Additionally, and crucially, states should repeal laws that permit punishment of health workers for affiliation with or providing medical care to members of an organisation deemed an enemy of the state or a terrorist group. Legal reform should also include criminal sanctions for attacks on or interference with health-care services. Military, police, and prosecutors need to be educated about their responsibilities under the law, and courts and human rights bodies should have jurisdiction to hold violators accountable.

We should recognise, too, that just as protection strategies used in the humanitarian community can often be employed to advance the security of local providers and development agencies, so too are human rights tools being invoked to advance the safety of humanitarian organisations. Increasingly, agencies and the UN cluster system responsible for civilian protection employ human rights methods such as public reporting on attacks on health services, as is the case in Afghanistan. These areas of convergence warrant further exploration as we seek to assure respect for health services in situations of conflict.

Conclusion

Local health providers and development agencies can learn a lot from the negotiating and security methods increasingly employed by international aid

27 On this topic, see the article by Katherine H. A. Footer and Leonard S. Rubenstein, 'A human rights approach to health care in conflict', in this issue and the *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN Doc A/68/297, 9 August 2013.

28 UNSC Res. 1998, above note 8.

29 31st International Conference of the Red Cross and Red Crescent Movement, Resolution 5, above note 6.

organisations. We need to move beyond exclusive reliance on the humanitarian paradigm for protection of health services, however, by taking elements from human rights. With their powerful norms and growing reach, civil society groups, professional organisations, and health providers can turn a concern about security into a demand for the protection that is their right. This approach, in turn, can add to the tools available for the security of humanitarian aid agencies.

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INTERNATIONAL REVIEW of the Red Cross

Q&A: 'HEALTH CARE IN DANGER'

In conversation with Pierre Gentile

Head of Project 'Health Care in Danger',
ICRC Directorate of Operations.

In 2011, the International Red Cross and Red Crescent Movement launched the Health Care in Danger project, a global initiative with an ambitious objective: to improve the security of health-care delivery in armed conflicts and other emergencies. Two years later, Pierre Gentile, the ICRC's Head of Project, speaks about the achievements, the challenges and the way forward to make this intention a reality.

What is the Health Care in Danger project about?

The Health Care in Danger project started with a sad realisation: that violence against patients and health-care personnel, facilities, and transport is even more present now than in the past. We are all following it in the news – from a hijacked ambulance in the Middle East to a looted health-care centre in the Central African Republic, this violence is not invisible in the international media.

Yet, even if the International Committee of the Red Cross (ICRC), the Red Cross and Red Crescent National Societies, and many others had often been direct witnesses to these events or had been even tragically affected by them, we had tackled the problem not as a thematic issue but rather as a sum of single, unrelated incidents. The same was true for the international community at large. After doing a study in the field, we realised that there are common patterns of violence, independently of the contexts in which it occurs. We then launched the Health Care in Danger project, starting with raising awareness about the problem and about the humanitarian consequences of this phenomenon, which probably affects millions of people around the world. We are mobilising a wide range of actors such as health-care professionals, national authorities, and ministries of health. With their

help, the project team is working to define good practices and recommendations that can help secure health-care delivery in the field.

Health Care in Danger is an evidence-based project. What does this mean concretely?

In this issue of the *Review*, you will find an article by ICRC Medical Adviser Robin Coupland which provides an overview of what we called the Sixteen-Country Study – the first exercise we did on gathering and analysing violent incidents affecting health care between 2008 and 2010. The study helped us better understand the phenomena and served as a basis for the project. Yet we did not stop here – the methodology evolved, and we have been continuing to collect information from a broader number of countries. For all incidents reported, a data quality check is performed first at the level of the relevant ICRC field delegation. Data is then centralised and entered systematically in Geneva to ensure that the interpretation of the different cases is coherent across the different countries participating in the data collection. In 2013, the ICRC published a new report based on a full year of data collection from across twenty-two countries affected by armed violence. On this basis, we were able to analyse more than 900 incidents.

These data are just the tip of the iceberg in terms of the reality they portray. We have no pretence of giving an exhaustive account of the number of incidents that occur; we can only be aware of a small part of them, and this is therefore not an exact image of the reality on the ground. Nonetheless, we do think the methodology we use enables us to have an understanding of the main trends. We plan to continue regular data gathering and to publish annual reports on it. We hope to see that, over time, the situation in the field evolves positively.

What are the main findings of the Health Care in Danger project so far?

The main trends we have observed can be summarised in the following three findings.

First, the vast majority of the affected health-care workers are local health-care providers (international providers become victims in only 7 per cent of the incidents) – a reality which is very different from the perception that is generally created by media. Even this figure is probably an overestimation. Simply put, we are more aware of incidents affecting international actors than of incidents affecting local health-care providers, especially when these happen in remote areas. So the real percentage of local health-care providers who do become victims of incidents is probably closer to a 95–97 percentile.

This trend is essential to understand, in order for us not to assume that 'health care in danger' and protecting the delivery of health care is only about international organisations lacking access to remote areas; the problem is essentially one of local health-care systems being able to function or be strengthened if need be, in order to confront a higher demand in times of emergencies and crises.

The second finding is the nature of the violence itself. Violence against health care can take different forms and often has tragic consequences, such as health-care providers or patients being killed, wounded, or kidnapped, but the biggest proportion of incidents involve health-care personnel being threatened. The threats recorded in the ICRC study are serious threats to which people have had to react, either by changing their work patterns or sometimes even by leaving their work. Although such threats do not directly affect the physical integrity of the health-care personnel, they can have serious consequences for the entire population in need of health care. From the perspective of the population, if you live in a remote area and the nurse or the doctor does not come any more because he or she was threatened and chose to leave, at the end of the day you do not get the health services you used to get. This is one aspect to take into account. Beyond the number of people directly affected, there are a number of people indirectly affected, such as by a population's health services decreasing or becoming more difficult to access. This usually occurs in situations of armed conflict or emergency, in which the needs tend to increase. This preoccupation is today at the core of the Health Care in Danger project.

The last important finding is linked to the emerging trends of violence against health care. Among others, we have identified a pattern of attacks against health-care workers during vaccination campaigns in several countries. This type of violence affects the capacity to prevent epidemics across large areas. In the same line, we have also recorded several incidents of what we call 'follow-up attacks' – situations in which a first explosion is launched and while first responders struggle to help the victims, a second explosion follows, affecting both the wounded and the health-care personnel. In those cases, there is an apparent intention to target, among others, people who come to rescue the wounded. The result is that emergency health-care delivery becomes even more difficult. First responders face a dilemma: either to act and potentially risk their own lives, or not to intervene and to leave people behind who could have survived. This dilemma was echoed in many of the consultations we had with ambulance services, as it has a very negative impact on their operational procedures and local perception. This is of course extremely worrying, as the wounded have a right to be attended to on time, and emergency services have a right to access people in need of medical assistance.[1]

The Health Care in Danger project convenes experts to work on recommendations that would improve the security of health care. Could you tell us a bit more about these consultations?

At the beginning of the project, we identified a few thematic areas on which we can work to improve the security of health-care delivery. We then organised workshops

1 For a detailed account of the rights of the sick and wounded, see Alexandre Breitegger, 'The legal framework applicable to the protection of the provision of health care in armed conflicts and other emergencies', in this issue.

around each of these thematic areas, inviting a variety of experts to share their experiences and recommend solutions going forward.

For instance, one of the workshops, which took place in Ottawa in 2013, focused on the security of health-care infrastructures. Practically speaking, the discussion revolved around questions such as how to make sure that a medical facility can continue to function for several days when the electricity grid, the Internet, or the water system on which it usually depends are disrupted. Or, how to ensure that a hospital has the capacity to manage its staff, even when the team is under pressure and when some health-care workers might even not be able to reach their workplace. In a situation of risk, there will be lack of resources, more demands, and possibly also pressure from armed men, from the media, or from the families of the patients. As an example, one of the objectives of the consultations with experts on this topic was to understand how to best manage a situation of stress.

Other workshops address, for instance, the question of how ambulance services can be efficient in a situation of risk. We are now working on another, very different topic – what practices armies and security forces can put in place to guarantee that the delivery of health care is respected and protected. This includes issues such as search and arrest operations in hospitals or the management of checkpoints on roads where ambulances and sometimes even private cars transport the wounded and sick. The dilemma of the arms bearers would be the right balance between humanitarian considerations and security constraints. What we want to do is to build on the practices of the military, and that's why, in addition to the workshops, we are conducting bilateral consultations with representatives of different armies.

What is the field of expertise of the different workshop participants?

Depending on the thematic area in question, we are mobilising experts from different fields. As I just mentioned, if we work on military practices, for example, the experts will be members of state armies, both from military medical services and from operational units. If we discuss national legislation, the experts will be mostly legislators or members of international humanitarian law (IHL) committees, but also people working in the field of medical ethics.

For workshops on measures that health-care providers can take on their own, the experts will mostly be coming from the medical field, from various humanitarian organisations or organisations of health-care professionals. This will also depend on whom the recommendation is directed towards; we do involve, as much as possible, those stakeholders who would be directly applying the recommendations. For instance, if health-care professionals are recommending an action to be taken by national authorities, we try to integrate an expert from a health ministry.

What are the recommendations that have surfaced until now?

At this stage, we can say that some recommendations are already clearly formulated, while for others, we can see the direction they might take. For example, a recommendation that came out from the workshop on ambulance services addresses the necessity to pay special attention to ambulance drivers, who are often among the first contact people at checkpoints on the road. Ambulance drivers often have a key role to play when it comes to assessing road security, and they therefore need to be fully integrated in all capacity-building activities targeting ambulance personnel. Another possible measure making first responders more efficient would be to include more systematically psychological support, reinforcing the team's ability to function under pressure. There is a need for a mechanism allowing the team to detect if a staff member needs to take a break when the emotional charge becomes too strong.

During some of the workshops, there was a debate about the use of personal protective equipment (PPE) – such as helmets, bulletproof jackets, and gas masks – by ambulance teams. There are always pros and cons to the use of such equipment, hence the consultation with experts. In this case the recommendation is not about using or not using PPE. Instead, experts came out with criteria that we would recommend to apply in order to better assess the environment and decide if this type of equipment is necessary or not. The situation will vary from one context to another. The recommendation will be thus more about understanding the surrounding environment and its difficulties, as well as about having the right criteria to enable people on the ground to make the best decision.

Another example of a recommendation I would like to bring forward refers to the security of medical infrastructure. During the workshop in Ottawa, we discussed different preparedness measures that could be undertaken by health-care facilities. Many local health-care providers emphasised the need to incorporate in contingency plans measures that can help maintain the supply chain, including uninterrupted provision of water, electricity, drugs, and so forth. When elaborating preparedness measures, health-care professionals need to make sure that the contracts they have with key suppliers incorporate the obligation to continue the service, even in a situation of emergency. In a normal setting, most contracts will have a clause announcing that, in case of emergency, services can be suspended. However, in a crisis situation, the hospital would typically need these services all the more, as the flow of patients is likely to increase. Health-care professionals need to make sure that contracts clarify what is expected in case of an emergency and that suppliers themselves have a contingency plan that will allow them to continue their work during an emergency.

Do you think most of these recommendations will be applicable cross-culturally?

Once we finalise all recommendations, we aim to share them with ICRC's delegations and National Societies working in operational contexts, but also with

all actors that can apply them at a local or international level. We are currently running a communication campaign that has, as one of its objectives, the promotion of recommendations to all relevant stakeholders. It will then be up to each of them to decide how far every single recommendation suits their context, needs, and capacities. So, it is not only about being culturally appropriate; in some cases, a recommendation can simply not be relevant.

There is no single solution to the complex issue of lack of safe access to health care. My team and I are not working to identify the best five recommendations to be applied worldwide; instead, we are trying to identify ten to fifteen measures for each of the seven thematic areas on which we work. That makes a list of around 100 recommendations. Of course, we do not expect that this list will be applied as such in every country. Rather, our goal is that in every context concerned by the problem, there be discussion among the relevant actors on which of these recommendations are relevant and useful for making health-care delivery safer.

Violence against health care cannot be solved with one type of action undertaken by one actor across the globe. Different actors have to take different actions in different contexts, so that the cumulative effect at the end of the day will hopefully have an impact.

The Health Care in Danger project works with several partners. What are their roles and how is the Red Cross and Red Crescent Movement involved?

Indeed, the project is based on the idea that the issue is of concern to many actors. We therefore need to be sure that all concerned actors join forces to improve the situation on the ground. To do so, it is essential that attacks on health care are seen as a priority not only by the ICRC, but also by many other organisations within and beyond the humanitarian sector.

Making sure that the issue of health-care security is a priority for humanitarians and for the international community in general was at the core of the first stage of the project. We focused a lot on sensitising and mobilising different actors. Some of them have even developed their own projects with similar objectives to the Health Care in Danger project.[2] This is the case with *Médecins sans Frontières* (MSF), for example, who launched the Medical Care under Fire project. Others joined efforts within Health Care in Danger. We have developed a strong partnership with several professional organisations such as the World Medical Association, the International Council of Nurses, and the International Military Medical Association. They are part of the expert consultations, but they also play an important role in bringing the recommendations closer to their members.

Last but not least, we have developed a very strong partnership with many National Societies, as the project is primarily a Red Cross and Red Crescent

2 See www.msf-ureph.ch/en/thematique/medical-care-under-fire-0 and www.msf.org/topics/medical-care-under-fire. All internet links were last visited in November 2013.

Movement project. National Societies are at the forefront, not only in terms of taking the risks while evacuating the wounded and sick in emergencies, but also in participating in many of the expert consultations. We have a reference group of some twenty National Societies, who made pledges during the 31st International Red Cross and Red Crescent Conference in 2011 and who are following the project very closely. Many of them have dedicated resources to achieving some of the objectives of the project at national level or to supporting it internationally.

You mentioned MSF's Medical Care under Fire project. Several other NGOs have launched a similar initiative called the Safeguarding Health in Conflict Coalition.[3] How does your team make sure that there is no lack of coordination between all these similar projects and initiatives in the humanitarian world?

Those are separate but parallel and complementary initiatives. As I mentioned, one of the aims of the Health Care in Danger project was to mobilise key actors around the issue, in the hope that they would develop their own projects or at least have the issue included in their own strategies. That is exactly what MSF, for instance, did. MSF has slightly different objectives then us, more oriented towards the security of its own staff and operations, but we all look for the same result in the end – security for the delivery of health care. We also try to include in the consultation process all the different actors that are already working on that. To go back to the example of MSF, it is already part of some of the workshops and we have a very good operational partnership.

In fact, in order to boost the cooperation and the exchange of best practices amongst all the different organisations and individuals that are working actively to find solutions, we extended and remodelled the official Health Care in Danger website and launched the Health Care in Danger Network, an online community of concern where all interested members can share resources, ideas, and information about upcoming events and thus capitalise on their engagement.[4]

What about the ICRC's independence? Can the organisation stay independent while cooperating and even partnering with other organisations and states?

There is no threat to our independence or neutrality when it comes to working with other organisations on this thematic issue in order to find pragmatic and applicable solutions ahead. The project is not about a particular country; it is about an issue

3 See www.safeguardinghealth.org.

4 For the official website, visit: www.healthcareindanger.org. For the Health Care in Danger Network website, visit: www.healthcareindanger.ning.com. To join the Network website, please contact the platform administrator (czanette@icrc.org).

that we unfortunately witness in many countries around the world experiencing armed conflict or other emergencies. There is therefore a need to find a common interest with many organisations in order to create recommendations that will allow secure health-care delivery. In the end, it is all about the very nature of humanitarian action – helping the wounded and sick, based on the urgency of their case and independently of who they are and where they are. In that sense, finding recommendations that are mostly of a preventive nature – measures that various state institutions, armed forces, health-care providers, and other actors can take to reduce the risk to health-care delivery in conflict-affected areas or other emergencies – is not as such an activity that goes against our neutrality or independence.

Would it be accurate to say that the Health Care in Danger project is also a learning experience for the ICRC from a more institutional perspective?

Absolutely, and there are of course many internal challenges. The first one lies in the fact that the project is of a transversal nature. It brings together the different disciplines within the ICRC: protection work, medical assistance, cooperation within the Movement, communication and outreach, legal expertise, and so on. All these different specialists are working together on the project. This is the strength of the project, but it also has a cost in terms of energy and time put into internal coordination, and in creating an understanding around common short- and long-term objectives.

Moreover, precisely because the project is not ICRC-centric, but rather seeks to engage an array of actors around a humanitarian problem, there is an internal challenge when it comes to the decision-making process, especially around the allocation of time and resources, as the partners we are engaging with are not directly participating in those internal processes. So to maintain an understanding of common goals, the project team needs to be able to constantly highlight the bridges and the positive synergies that the project creates between the ICRC and other stakeholders.

You are now halfway through the project. From your point of view, how do you assess the success of the project and of the consultations more specifically?

At this stage, we can say that we have been able to raise awareness and mobilise a large number of stakeholders, ranging from medical associations such as the World Medical Association and the International Council of Nurses to humanitarian organisations such as MSF, a series of states, and also many Red Cross and Red Crescent National Societies. We were therefore able to create a tipping point where the issue is being discussed in many different fora. We hope that this trend will not only continue but will be amplified in 2014. So far, we are satisfied with the way

many of the stakeholders have understood the opportunity the project could give them to address an issue which is a priority for many health-care providers around the world.

We see that today many National Societies start to develop their own activities, be it advocacy in their respective countries, reflecting on measures to be taken in their own operations, or working on some of the recommendations that came out of the expert workshops and putting them into practice. This is extremely important. The project is a Movement project and we need National Societies to have ownership of it.

Another important aspect is the series of expert workshops and the recommendations that come out of them. We still have three consultations to be completed and there is a lot to learn with the experts involved. We already have a publication on the role and responsibilities of health-care personnel and a publication on ambulance services in crises situations with very concrete examples from the field. We will share via different publications the outcome of the workshop on national legislation, military practices, and medical infrastructures. These publications will be the support for the work to be carried out in 2014–2015 in promoting the recommendations. We hope that they will then be implemented by national authorities, ministries of health, health-care providers, NGOs, international organisations, or military and security services, depending on whom the recommendations concern.

The Health Care in Danger project will end in 2015. What are the priorities and the challenges you see for the coming years?

A particular challenge comes from the fact that the project is short-lived. The project was elaborated around the idea of mobilising support from different actors to elaborate practical solutions and then promoting the outcomes of the expert workshops. However, the issue will not disappear when the project is over and we already know that by 2015, it will unfortunately be too early to see a significant change in the field.

We need to think about how to ensure that enough stakeholders have developed their own plans of action and strategies to address the problem, so that once the project ends, a sustainable dynamic is maintained.

While some recommendations can be relatively quickly put in place, it will take a few years for most recommendations to be fully implemented and to bring lasting changes on the ground for the security of health-care providers.

The challenge ahead will therefore be to be able to keep the mobilisation around the issue beyond 2015, both within the Red Cross and Red Crescent Movement and with all the different partners that came together around the project.

Although we were able to mobilise and sensitise many key actors around the issue, even when the expert workshops are well under way and recommendations are being elaborated, we do realise that the real challenges lie ahead of us and concern the implementation of those recommendations

in 2014–2015. This is of course the key issue, because it is only once the recommendations are being applied on the ground that we will hopefully see a difference for the patients. Our energy should therefore be geared towards promoting the implementation of the recommendations by different stakeholders.

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The law regulating cross-border relief operations

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Abstract

In view of the challenges frequently encountered in providing assistance to civilians in opposition-held territories, consideration is sometimes given to cross-border relief operations. Such operations raise numerous legal questions, including whose consent is required; what constitutes arbitrary withholding of consent; what the consequences of withholding of consent are, both for those wishing to provide assistance and for the parties withholding consent; and what alternatives exist for providing assistance in such circumstances.

Keywords: cross-border relief operations, consent of the affected state and the opposition, arbitrary withholding of consent, medical supplies and relief operations, starvation of the civilian population, unauthorised relief operations, state sovereignty, territorial integrity, non-interference, domestic law, assistance in the wrongful act of another state, circumstances precluding wrongfulness, counter-measures, necessity, indirect provision of assistance, binding Security Council decisions.

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Introduction

On a number of occasions in recent years, humanitarian actors have struggled to provide assistance to civilians in opposition-held territories because of a reluctance on the part of the affected state to allow their operations. Recent efforts to assist people affected by conflict in Syria and in the Sudanese states of South Kordofan and Blue Nile have raised the problem once again and highlighted the variety of views and practices among humanitarians.[1]

The present article outlines the principal rules of international law relevant to cross-border operations for civilians in opposition-held areas. It must be noted at the outset that the central legal issue is whether the state in whose territory operations are intended to be implemented (hereinafter referred to as the affected state) consents to them. The modalities for implementing operations – whether 'in-country' or 'cross-border' – do not affect the basic rules, but raise additional legal questions because of the involvement of third states.

Preliminary remarks

A number of preliminary points are warranted before proceeding to an analysis of the law. First, the present article addresses humanitarian relief operations: the provision of supplies and services that are exclusively humanitarian in nature and essential to the survival of the civilian population, such as food, water, medical supplies, clothing and means of shelter. It does not consider the related question of how to enhance the protection of civilians. It therefore does not touch upon concepts such as 'humanitarian intervention' or 'responsibility to protect' inasmuch as, in their current articulation, these concepts focus on preventing and putting an end to genocide, crimes against humanity and war crimes.

Second, the term 'cross-border operations' is neither used in any treaty, nor defined anywhere. It is commonly employed to refer to the provision of assistance from the territory of third states. This can be done in a number of ways, including by so-called 'remote management programming'[2] or by the provision of relief supplies from neighbouring states to actors operating in the affected state.

1 On Syria see, for example, *Humanitarian Exchange Magazine*, No. 59: *The Conflict in Syria*, November 2013, published by the Humanitarian Practice Network at the Overseas Development Institute, available at: www.odihpn.org/humanitarian-exchange-magazine/issue-59. On Blue Nile and South Kordofan see, for example, Irina Mosel and Ashely Jackson, *Talking to the Other Side: Humanitarian Negotiations in Southern Kordofan and Blue Nile, Sudan*, HPG Working Paper, July 2013, available at: www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8591.pdf. All internet references were checked in July 2014.

2 Remote management programming (or limited access programming) is described as 'an adaptation to insecurity, the practice of withdrawing international [staff] (or other at-risk staff) while transferring increased programming responsibilities to local staff or local partner organisations'. See Jan Egeland, Adele Harmer and Abby Stoddard, *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, Office for the Coordination of Humanitarian Affairs (OCHA), Policy Development Studies Branch, 2011, Glossary, xv, available at: https://docs.unocha.org/sites/dms/Documents/Stay_and_Deliver.pdf.

There have been a number of instances in the past when assistance was provided in this way.

While past examples provide valuable insight as to how to implement such operations, from a legal point of view what matters is the reason underlying the decision to operate cross-border. In the majority of past cases, this has been due to a security situation in the affected state that prevented international actors from establishing offices and adequate operations in-country, as was the case for example in Iraq for a number of years after 2003, and for the past decade in Somalia.[3] Such situations must be distinguished from those addressed in the present article, where cross-border operations are being considered either because the affected state does not consent to in-country presence, operations or cross-line activities, or because a combination of restrictions due to ongoing combat operations or other security concerns and onerous administrative requirements make cross-border operations the most efficient way of assisting people in opposition-held areas.

Third, the present article sets out the rules relating to agreement to relief operations in the first instance. It should not be assumed that once such initial consent has been obtained, it will be possible to conduct humanitarian operations in an unimpeded and safe manner. Other rules, only touched upon in the present article, come into play at this subsequent stage, requiring parties to allow and facilitate relief operations that have been authorised. Obviously, these obligations will not arise if operations are carried out without the consent of the affected state.

Fourth, the present article focuses on public international law, while recalling that private humanitarian actors, such as NGOs, must also comply with the domestic law of the states in which they operate. Moreover, the internal legal and policy positions that may be adopted by individual organisations must also be considered.

Finally, at a more factual level, discussions on cross-border operations for civilians in opposition-held areas sometimes appear to proceed on the assumption that the opposition is unified; that it exercises a fairly permanent degree of control over a well-defined territory; and that the civilian population tends to remain in place, either in government- or opposition-held territory. While this is occasionally the case – for example, in the LTTE-held Vanni in Sri Lanka during the 1990s until the end of the conflict in 2009 – the situation on the ground is usually far more fluid and complex.[4] This must be borne in mind when considering the practical feasibility of cross-border operations.

3 *Ibid.*, p. 14.

4 On this see, for example, Pierre Krähenbühl, "There Are No 'Good' or 'Bad' Civilians in Syria – We Must Help all who Need Aid", in *The Guardian*, 3 March 2013, available at: www.theguardian.com/commentisfree/2013/mar/03/red-cross-aid-inside-syria.

Putting the legal analysis on cross-border operations in context

Legal analysis must be put in its proper context. An understanding of the law is necessary to ensure those considering cross-border operations act lawfully. However, it is important to bear a number of other considerations in mind.

First, in the situations under review, arguments based on law will not be used in litigation, where an independent and impartial judicial body makes a determination of the relative merits of the legal arguments of those wishing to provide assistance and of affected states. Instead, they will be the background to guide negotiations with affected states – negotiations which are unlikely to be legal in nature and which will be shaped by political considerations. Accordingly, an argument that might win the day in court might not lead to any progress in the dialogue with the affected state.

Second, the law is not of itself the answer, nor the only element to consider; policy and operational considerations are equally important. The lawfulness of a particular course of action in no way ensures the safety of relief operations or of the people they seek to assist. In practice, the agreement of all affected parties is necessary to ensure the safety of humanitarian operations.

Third, at a policy level, it is important to consider the possible repercussions of unauthorised operations in opposition-held areas on activities in the rest of the affected state, notably those in government-held areas, both by the agencies carrying out the unauthorised operations and by other actors.

Related to this, the issue of consent to relief operations is one of the most delicate and politically sensitive in humanitarian action. The positions adopted in one context are likely to have consequences for the perceptions of humanitarian actors globally, both operationally and at a policy level in discussions within the United Nations and beyond.

It is for these reasons that for most humanitarian actors the decision of whether to carry out relief operations without the consent of the affected state tends to be a *policy* decision *informed* by the law.

Basic rules of international humanitarian law regulating relief operations

The conventional rules of international humanitarian law (IHL) regulating the provision of humanitarian assistance are found in different treaties, depending on the nature of the conflict – international or non-international. Those applicable in international armed conflicts, including occupation, are found principally in Articles 23 and 59 of the Fourth Geneva Convention of 1949 (hereinafter GC IV)[5] and Articles 69 to 71 of the First Additional Protocol of 1977 (hereinafter AP I).[6]

5 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (entered into force 21 October 1950).

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978).

Those applicable in non-international conflicts are Common Article 3(2) to the Geneva Conventions of 1949 (hereinafter GCs) and Article 18 of Additional Protocol II of 1977 (hereinafter AP II).[7] Customary law rules of IHL apply alongside these treaty provisions.

The rules regulating humanitarian assistance are simple and essentially the same in both types of conflict:[8]

- Primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose control they find themselves.
- If this party to the conflict is unable or unwilling to meet these needs, states and humanitarian organisations can offer to carry out relief actions that are humanitarian and impartial in character and conducted without any adverse distinction.
- The consent of affected states is required but may not be arbitrarily withheld.[9]
- Once relief actions have been agreed to, parties to the conflict and other relevant states must allow and facilitate rapid and unimpeded passage of relief consignments, equipment and personnel, even if assistance is destined for the civilian population under the control of the adverse party. Parties may prescribe technical arrangements under which such passage is permitted.[10]

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978).

8 Art. 70(1) of AP I provides that:

> 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. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.

The treaty rules applicable in non-international armed conflicts are essentially the same. Along similar lines, but in a more general manner, common Art. 3(2) of the GCs provides that:

> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

Art. 18(2) of AP II provides that:

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

According to the ICRC Customary Law Study, these treaty rules are essentially mirrored in customary law applicable in both types of conflict. See ICRC, *Customary International Humanitarian Law*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary Law Study), Rule 55.

9 For a discussion of whose consent is required and, in particular, whether it is just that of the affected states or also/only that of the opposition, see below.

10 AP I, Art. 70(3).

The requirement of consent

The general rule

The principal element of complexity in these otherwise simple rules is the requirement of consent. While states and impartial humanitarian organisations may offer their services, consent is required before relief operations may be implemented. This requirement – implicit in Common Article 3(2) of the GCs, which states that an impartial humanitarian organisation may 'offer its services' – was introduced into Article 70 of AP I and Article 18 of AP II in the final stages of the negotiations of the Additional Protocols out of a concern to protect the sovereignty of the state receiving the relief.[11]

Despite the apparently absolute nature of this requirement, it was already understood during the negotiations that parties did not have 'absolute and unlimited freedom to refuse their agreement to relief actions'.[12] A party refusing consent had to do so for 'valid reasons', not for 'arbitrary or capricious ones'.[13]

In relation to non-international armed conflicts, Article 18 of AP II was one of the most hotly debated articles during the Diplomatic Conference that led to the adoption of the Protocols. For states opposed to the idea of regulating non-international conflicts, provision of external assistance was particularly problematic, as relief was often equated with foreign intervention and foreign assistance to rebellion.[14] Nonetheless, similar comments were also made in relation to the consent requirement in Article 18 of AP II.[15]

It is now generally accepted that although the consent of the affected state to relief actions is required, it may not be arbitrarily withheld.[16]

This position is also reflected in subsequent formulations of the rules on humanitarian assistance that expressly note that consent may not be arbitrarily withheld, including the Guiding Principles on Internal Displacement;[17]

11 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949*, (1987), (hereinafter ICRC Commentary to the APs), para. 2805.

12 Germany, CDDH/II/SR.87, pp. 336–337.

13 *Ibid.* Position supported by the US, the Netherlands, the USSR and the UK. No delegations opposed this understanding.

14 Michael Bothe, Karl Josef Partsch and Waldermar Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague/Boston, 1982, p. 694.

15 Belgium and Germany, CDDH/SR.53, pp. 156–157.

16 See, for example, ICRC Customary Law Study, above note 8, Rule 55 and commentary thereto.

17 Guiding Principles on Internal Displacement, UN Doc. E/CN/4/1998/Add.2, 11 February 1998, Principle 25:
1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

the Resolution on Humanitarian Assistance adopted by the Institute of International Law in 2003;[18] Council of Europe Recommendation (2006) 6 on Internally Displaced Persons;[19] and, beyond situations of armed conflict, in the International Law Commission's (ILC) work on the protection of persons in the event of disasters,[20] to mention but a few. United Nations General Assembly Resolution 46/182, on the other hand, only refers to the need for consent of the affected state.[21] It is submitted that it should be read in light of the above-mentioned rules and instruments requiring consent not to be arbitrarily withheld.

Situations in which consent must be granted

There are three situations in which consent must be granted. In these situations, although parties are required to agree to relief operations, they nonetheless remain entitled to adopt measures of control in respect of the relief consignments.

Situations of occupation

The first are situations of occupation where, if it is not in a position to ensure the adequate provision of supplies essential to the survival of the civilian population,

18 Institute of International Law, Bruges Session 2003, Resolution on Humanitarian Assistance, 2 September 2003, Art. VIII:

> Duty of affected States not arbitrarily to reject bona fide offer of humanitarian assistance
> 1. Affected States are under the obligation not arbitrarily and unjustifiably to reject a bona fide offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.

19 Council of Europe recommendation (2006)6 of the Committee of Ministers to Member States on Internally Displaced Persons, 5 April 2006, para. 4:

> 4. Protecting internally displaced persons and their rights as well as providing humanitarian assistance to them is a primary responsibility of the state concerned;
>
> > Such responsibility entails requesting aid from other states or international organisations if the state concerned is not in a position to provide protection and assistance to its internally displaced persons;
> > This responsibility also entails not to arbitrarily refuse offers from other states or international organisations to provide such aid.

20 ILC Report on the work of its 63rd session (26 April–3 June and 4 July–12 August 2011), Protection of Persons in the Event of Disaster, provisionally adopted draft Art. 11 – Consent of the affected State to external assistance, UN Doc. A/66/10, 2011, Chapter XI, paras. 264–289:

> 1. The provision of external assistance requires the consent of the affected State.
> 2. Consent to external assistance shall not be withheld arbitrarily.
> 3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

21 UNGA Res. A/RES/46/182, 19 December 1991, Guiding Principle 3:

> The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.

the Occupying Power is required to accept relief operations that are humanitarian and impartial in character.[22]

Free passage of certain goods pursuant to Article 23 of GC IV

Second, parties to international armed conflicts and other relevant states must allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended for civilians[23] in the territory of another state, even if the latter is its adversary. Pursuant to Article 23 of GC IV, free passage must also be allowed for all consignments of essential foodstuffs, clothing and tonics for civilians considered the most vulnerable: children under fifteen, expectant mothers and maternity cases.[24]

The impact of the first paragraph of Article 23 of GC IV is considerably reduced by the safeguards for the benefit of the blockading party in the second paragraph that aim to ensure the consignments are only used for the identified humanitarian purposes.[25] States are not required to allow free passage if there are serious reasons for fearing that

> a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.[26]

While it is understandable that states may wish to limit the entry of items that could indirectly provide a definite military advantage to the enemy, Article 23 of GC IV lays down an overly broad range of ways in which this advantage could accrue and has rightly been criticised for granting a blockading state too much discretion.[27]

22 AP I, Art. 59.

23 The reference to medical supplies intended for civilians is not to be interpreted *a contrario* as implying that medical supplies intended for wounded and sick combatants should not also be granted free passage. Jean Pictet (ed.), *Commentary – IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, (hereinafter ICRC Commentary to GC IV), p. 180.

24 GC IV, Art. 23. Although not expressly stated, it is understood that this provision was intended to address blockades in international armed conflicts. See *ibid.*, pp. 178 ff.

25 Art. 23 of GC IV, para. 2, provides that:

> The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:
>
> (a) that the consignments may be diverted from their destination,
> (b) that the control may not be effective, or
> (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

26 GC IV, Art. 23, para. 2, point c.

27 ICRC Commentary to GC IV, above note 23, pp. 182 ff. According to the Commentary, 'the Diplomatic Conference of 1949 had to bow to the harsh necessities of war; otherwise they would have had to abandon all idea of a general right of free passage. Some delegations had originally intended to accept the principle

Article 23 of GC IV must now be read in the light of Article 70 of AP I, which sets out an absolute obligation to allow and facilitate the passage of relief goods, with the consequence that parties are no longer entitled to rely on the exceptions in Article 23 of GC IV. Article 68 of AP I and Article 1(3) of AP I specifically note that the provisions of that Protocol with regard to humanitarian relief operations are supplementary to Article 23 and other relevant provisions of GC IV.[28] This statement that the provision is 'supplementary' to GC IV indicates that the rules contained in AP I on this issue develop the rules in the Geneva Conventions by extending the protections in the latter and removing restrictions on those protections. If the drafters of the Protocol had intended to retain the restrictions set out in Article 23 of GC IV, they could have used the term 'without prejudice to' as they did elsewhere in AP I.[29] In view of this, provided the preliminary conditions are met – in other words, that there is a need for medical supplies or the categories of persons referred to in Article 23 of GC IV are in need of essential foodstuffs and clothes, and the party to the conflict in control of the persons in need is unable or unwilling to provide them – offers of medical relief operations must be accepted.

Security Council action

Thirdly, the Security Council may adopt binding decisions requiring parties concerned to consent to humanitarian relief operations or, in the case of states not party to the conflict, to allow their transit through the party's territory. Relevant past Security Council practice is discussed below.

What amounts to arbitrary withholding of consent?

Two conditions must be met before the issue of consent even arises. First, relief must be necessary: civilians must be inadequately provided with essential supplies, and the party in whose control they are must be unable or unwilling to provide the necessary assistance. Second, the actor (state, international organisation, NGO) offering its services must provide the assistance in a principled manner: the relief actions must be exclusively humanitarian and impartial in character and carried out without any adverse distinction.[30] If these conditions are met, consent may not be arbitrarily withheld.

of free passage only in the form of an optional clause. It was only after the insertion of the safeguards set out under (a), (b), and (c) above, that it was possible to make the clause mandatory.'

28 This is in addition to Art. 1(3) of AP I, which indicates more generally that the Protocol is supplementary to the Geneva Conventions.

29 See, for example, AP I, Arts. 53 and 85(5).

30 These two conditions are spelled out in AP I, Art. 70. See, M. Bothe, K. J. Partsch and W. Solf, above note 14, p. 435; ICRC Commentary to the APs, above note 11, para. 4883; and Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, UN Doc. A/65/282, 1 August 2010, para. 81.

Despite its centrality to the rules regulating humanitarian assistance, there is little clarity as to when consent is arbitrarily withheld.[31] There is no definition or guidance on 'arbitrariness' of consent in any treaty, and to date, to the author's knowledge, the issue has not been addressed by any international or national tribunal, human rights mechanism or fact-finding body. It is thus extremely difficult to determine – legally and factually – whether consent to relief operations has been withheld arbitrarily in a particular situation.

According to a leading commentator who participated in the negotiations of the Additional Protocols, an interpretation that does justice to both the requirement that relief actions be undertaken and that of consent is that agreement 'has to be granted as a matter of principle, but that it can be refused for valid and compelling reasons. Such reasons may include imperative considerations of military necessity. But there is no unfettered discretion to refuse agreement, and it may not be declined for arbitrary or capricious reasons'.[32]

But what constitutes a valid and compelling reason for withholding consent, and what constitutes an arbitrary or capricious one? While no generally accepted definition exists, commentators have put forward a number of valid and arbitrary reasons.

Suggested valid reasons include imperative considerations of military necessity – for example, if foreign relief personnel could hamper military operations or can be suspected of un-neutral behaviour in favour of the other party to the conflict[33] – as well as ongoing combat operations.[34]

A number of examples in which consent would be withheld arbitrarily have also been put forward. These include, first and foremost, a withholding of consent that violates the state's other international obligations.[35] An uncontroversial example is withholding consent in situations where the civilian population is facing starvation. Withholding consent in such situations would amount to a violation of the prohibition of starvation of the civilian population as a method of warfare in Article 54(1) of AP I and Article 14 of AP II.[36]

31 See Dapo Akande and Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, OCHA Occasional Policy Papers, No. 8, 2014.

32 M. Bothe, K. J. Partsch and W. Solf, above note 14, p. 434.

33 See *ibid.*, p. 434; and Michael Bothe, 'Relief Actions: The Position of the Recipient State', in Frits Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters – Papers Delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22–24 June 1988*, 1988, p. 95.

34 Walter Kälin, UN Resident Coordinator Induction Programme, New York, 23 February 2013, on file with the author. Art. 71(3) of AP I expressly foresees the possibility of temporarily restricting the freedom of movement of authorised humanitarian relief personnel in case of imperative military necessity, but this provision relates to access *once* consent to carry out relief operations has been granted.

35 See, for example, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para. 82.

36 See, for example, ICRC Commentary to the APs, above note 11, paras. 2808 and 4885. The seriousness of withholding consent in such circumstances is evidenced by the fact that under the Statute of the International Criminal Court, it is a war crime in international armed conflicts to 'intentionally us[e] starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions'. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force

Another example would be withholding consent to medical relief operations on the grounds that medical supplies and equipment could be used to treat wounded enemy combatants. It is a fundamental rule of IHL that the wounded and sick – including enemy combatants – must receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition.[37] No distinction may be made on any grounds other than medical ones. Withholding consent to medical relief operations and supplies as they may assist wounded enemy combatants would violate this rule. Moreover, the same equipment and supplies are also likely to be necessary for the civilian population in opposition-held areas, who would be denied the assistance to which they are entitled by law.

A further example of withholding of consent in violation of international law obligations would be selective withholding of consent with the intent or effect of discriminating against a particular group or section of the population; for example, systematically rejecting offers of humanitarian assistance for crisis-affected regions populated by ethnic groups perceived as favouring the opposition.[38]

Withholding of consent that is 'likely to endanger the fundamental human rights' of the affected civilians may also be considered arbitrary.[39] Humanitarian assistance is also often considered from a human rights angle, which requires withholding of consent not to violate particular rights, most notably the right to life, and not to prevent the realisation of economic and social rights, such as the right to an adequate standard of living, the right to food and to be free from hunger, and the right to housing and to health and medical services.[40] Limited guidance exits, however, as to the precise circumstances in which withholding of consent would violate these rights, and as to their application to non-state parties to armed conflicts. One of the most specific indications to date is that provided by the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons:

> A State is deemed to have violated the right to an adequate standard of living, to health and to education, if authorities knew or should have known about the humanitarian needs but failed to take measures to satisfy, at the very least,

1 July 2002) (hereinafter ICC Statute), Art. 8(2)(b)(xxv). Although not specified in the adopted version of the Elements of Crime for this offence, delegations agreed that the crime would cover 'the deprivation not only of food and drink, but also, for example, medicine or in certain circumstances blankets'. See Knut Dörmann, *Elements of Crime under the Rome Statute of the International Criminal Court: Sources and Commentary*, ICRC/Cambridge University Press, 2003, p. 363.

37 Most notably, AP I, Art. 10, and AP II, Art. 7. See also ICRC Customary Law Study, above note 8, Rule 110.

38 Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para. 83.

39 Institute of International Law resolution, above note 18, Art. VIII(1).

40 See, for example, Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, (revised edition), Studies in Transnational Legal Policy, No. 38, American Society of International Law, 2008, p. 117; Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, paras. 68–69; and *Humanitarian Access in Situations of Armed Conflict: Handbook on the Normative Framework*, Version 1.0, 2011, Chapter 4. In relation to assistance in natural disasters, see ILC, Fourth Report on the Protection of Persons in the Event of Disasters, UN Doc. A/CN.4/643, 11 May 2011, paras. 58–60. See also D. Akande and E. C. Gillard, above note 31.

> the most basic standards imposed by these rights. State obligations thus include the responsibility to follow up on these situations of concern and assess relevant needs in good faith, and ensure that humanitarian needs are being met, by the State itself or through available assistance by national or international humanitarian agencies and organizations, to the fullest extent possible under the circumstances and with the least possible delay.[41]

Secondly, it has been suggested that guidance in determining what would constitute an arbitrary withholding of consent may be drawn from the principle of proportionality under human rights law: limitations in terms of time and duration, location and affected goods and services may not go beyond what is absolutely necessary to achieve the legitimate aim of the state withholding consent.[42]

Determining whether consent has been withheld for *valid* reasons frequently requires a difficult balancing of legitimate military considerations with competing humanitarian ones, akin to that required by the proportionality test in IHL.[43] It has been suggested that, applied by analogy,[44] this could provide guidance in determining the validity of a withholding of consent. A refusal in a situation where legitimate military considerations are relatively unimportant but the consequent suffering of the civilian population particularly severe could therefore be considered arbitrary.[45] This is the approach adopted in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*[46] and in the *HPCR Manual on International Law Applicable to Air and Missile Warfare*[47] in relation to naval and aerial blockades, respectively.

Finally, rejecting offers of assistance without providing any reasons or if the reasons are based on errors of fact, such as a denial of humanitarian needs without a proper assessment, could also amount to arbitrary withholding of consent.[48]

41 Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para. 69.

42 W. Kälin, above note 34.

43 M. Bothe, above note 33, p. 95.

44 By analogy only, because in IHL the proportionality test is relevant to determining the lawfulness of a particular attack by balancing expected incidental civilian deaths, injuries or damage to civilian property against the concrete and direct military advantage expected from the attack. AP I, Art. 51(4)(b).

45 M. Bothe, above note 33, p. 95. Of course, there may be instances when the withholding of consent is not based on military considerations.

46 Para. 102(b) of the *San Remo Manual on Armed Conflicts at Sea* prohibits the establishment of a blockade if 'the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade'. Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Grotius, Cambridge, 1995.

47 Rule 157(b) of the *HPCR Manual on Air and Missile Warfare* prohibits the establishment or maintenance of an aerial blockade when the suffering of the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the aerial blockade. *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Bern, 2009.

48 Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para. 82. In relation to humanitarian assistance in natural disasters, the ILC also highlighted the importance of giving reasons when consent to assistance is withheld. It considered this 'fundamental to establishing the good faith of an affected State's decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.' ILC Report, UN Doc. A/66/10, 2011, p. 270.

In view of the above, the following general conclusions can be drawn: the determination of whether consent has been withheld for valid or arbitrary reasons must be made on a case-by-case basis, taking into consideration a number of inter-related elements. These include, first, the needs of the population: what are they in terms of types of supplies, and how acute are they?

Second, who, if anyone, is providing assistance? The starting point of the analysis is the needs of the civilian population, rather than any 'entitlement' of relief organisations or other actors to provide assistance. If the affected state itself or some other actor is providing the necessary assistance in a principled manner, a party is entitled to turn down other offers of relief.

Third, the actor offering the assistance: does it have a record of operating in a principled manner? And can it provide the assistance that is needed?

Fourth, compatibility with other obligations under international law: if withholding of consent amounts to a violation of the concerned party's other international obligations, it would be arbitrary. Examples include the prohibition of starvation of the civilian population as a method of warfare,[49] and the entitlement of the wounded and sick to receive, to the fullest extent possible and with the least possible delay, the medical care required by their condition without discrimination.[50]

Fifth, the location of the proposed relief operations: despite needs, a party may be entitled to withhold consent to offers of assistance on certain grounds; for example, if the location is the theatre of ongoing hostilities. Other grounds would not be acceptable – for example, if consent is withheld because the local population is viewed as being supportive of the enemy.

Sixth, the timeframe: what may constitute valid reasons for withholding consent, such as ongoing hostilities or other reasons of security, could turn into arbitrary ones if their duration is such that the needs of the affected civilian population become severe.

Whose consent is required?[51]

International armed conflicts

In international armed conflicts, Article 70(1) of AP I requires the consent of 'the Parties concerned in such relief actions' in the plural. Most important is that of the state party to the conflict in whose territory the operations are intended to be implemented.

Although treaties do not expressly address this, it is clear that consent is required both for relief actions carried out in-country and for

49 AP I, Art. 54(1), and AP II, Art. 14.

50 AP I, Art. 10, and AP II, Art. 7.

51 For a detailed discussion of this issue, see Ruth Abril Stoeffels, *La Asistencia Humanitaria en los Conflictos Armados: Configuracion juridica, principios rectores y mecanismos de garantia*, Tirant Lo Blanch, Valencia, 2001, Chapter VI.3. See also Emanuela-Chiara Gillard, *Cross-Border Relief Operations: A Legal Perspective*, OCHA Occasional Policy Papers, No. 7, 2014.

cross-border operations. The modalities of the intended operations do not affect the requirement of consent.

Additionally, the consent of states from whose territory a relief action is undertaken, or through whose territory the relief operations must transit, is also required.[52] In situations of occupation, in recognition of the fact that it is exercising effective control over the occupied territory and, consequently, has assumed responsibilities towards the civilian population, it is the Occupying Power that must consent to relief operations.[53]

Non-international armed conflicts

The position in non-international armed conflicts is more complex. A divergence of views exists among commentators as to whether the consent of the state party to the conflict is required for relief operations into territory controlled by the opposition that can be reached without transiting through territory controlled by the state.

Common Article 3(2) to the GCs provides that an 'impartial humanitarian body . . . may offer its services to the Parties to the conflict'. Offers of assistance can thus be made to either side without them being considered an unfriendly act or interference. The provision is silent, however, as to whose consent is required.

Some commentators consider that this expression puts the government and the opposition on an equal footing, and implicitly allows relief operations to be carried out if the party to which an offer was made accepts it, regardless of the position adopted by its opponent. Provided relief operations do not have to transit through territory under the control of the other side, its consent is not required.[54]

Others are of the view that there is no basis for interpreting the silence of Common Article 3(2) to the GCs on the question of whose consent is required in this manner, particularly in view of the significant infringement of the affected state's sovereignty that such an interpretation would entail. They consider that the

52 ICRC Commentary to the APs, paras. 2806–2807. In international armed conflicts, third states through whose territory relief supplies and personnel must pass are covered by Article 70(2) of AP I, which, *once* consent has been granted, requires the parties to the conflict and third states to allow and facilitate the rapid and unimpeded passage of relief supplies, equipment and personnel. In non-international armed conflicts, neither Common Article 3 to the GCs nor Article 18 of AP II expressly addresses the issue, but a state's entitlement to regulate activities carried out in its territory is a fundamental element of state sovereignty and is of particularly relevance, as in situations where unauthorised cross-border relief operations are carried out from their territory, third states risk being accused by the state in whose territory the assistance is delivered of allowing their territory to be used for unlawful activities. See R. A. Stoffels, above note 51, p. 324.

53 GC IV, Art. 59.

54 See, for example, Yves Sandoz, 'Le Droit d'intiative du Comité international de la Croix Rouge', *German Yearbook of International Law*, Vol. 22, 1979, pp. 352, 364–366; implicitly, Dietrich Schindler, 'Humanitarian Assistance, Humanitarian Interference and International Law', in Ronald St. John Macdonald, *Essays in Honour of Wang Tieya*, Martinus Nijhoff, Dordrecht/Boston/London, 1993, pp. 689, 700; Maurice Torrelli, 'From Humanitarian Assistance to "Intervention on Humanitarian Grounds"?', in *International Review of the Red Cross*, No. 288, May–June 1992, p. 234; and, extensively, François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan, Oxford, 2003, pp. 448 ff. See also, most recently, Marco Sassòli, 'When are States and Armed Groups Obliged to Accept Humanitarian Assistance?', *Professionals in Humanitarian Assistance and Protection*, 5 November 2013, available at: http://phap.org/articles/when-are-states-and-armed-groups-obliged-accept-humanitarian-assistance.

provision allows humanitarian actors to offer their services to all sides, so states are precluded from considering such offers an unfriendly act[55] or from criminalising engagement with the opposition. However, by agreeing to allow offers to be made to the opposition, states did not necessarily also agree that assistance could be provided without their consent.

Article 18(2) of AP II is more explicit on this issue, requiring the consent of 'the High Contracting Party concerned'. An early draft of this provision referred to the consent of 'the party or parties concerned', implicitly also referring to the non-state party to the conflict. However, in the negotiations of the Protocol, language that could be interpreted as recognising insurgent parties or as granting rights to their members was removed, including this reference.[56]

Who is 'the High Contracting Party concerned'? It is hard to see how this expression could refer to any state other than the one involved in the non-international armed conflict. This is the view of a number of commentators and also that expressed by some states when forwarding the Additional Protocols to their parliaments for ratification.[57]

Nonetheless, it has been suggested that in certain circumstances the consent of the opposition may suffice. In particular, one expert considers that the state involved in the non-international conflict is 'concerned' by operations for civilians in opposition-held areas, and consequently its consent is required, only if the relief actions must transit through territory under its effective control. If the territory controlled by the opposition is accessible by sea or can be reached from another country directly, the consent of the government is not required.[58]

55 The ICRC Commentaries focus on this aspect of common Article 3(2) of the GCs. See, for example, Jean Pictet (ed.), *Commentary – I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1958, p. 58. The Commentaries to the other three conventions are essentially identical. See also Heike Spieker, 'The Right to Give and Receive Humanitarian Assistance', in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance*, Springer-Verlag, Berlin/Heidelberg, 2011, p. 15.

56 M. Bothe, K. J. Partsch and W. Solf, above note 14, p. 696; and R. A. Stoffels, above note 51, pp. 301–308.

57 See, for example, Knut Dörmann and Hans-Peter Gasser, 'Protection of the Civilian Population', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 236; Frits Kalshoven and Liesbet Zegveld, *Constraints on the Waging of War – An Introduction to Humanitarian Law*, 3rd ed., Cambridge University Press, Cambridge, 2001, p. 139; Denise Plattner, 'Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law', *International Review of the Red Cross*, No. 288, June 1992; H. Spieker, above note 55, p. 16; implicitly, Georges Abi-Saab, 'Non-International Armed Conflicts', in *International Dimensions of Humanitarian Law*, Henry Dunant Institute, 1988, p. 224; and Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para 85. See also ILC, above note 40, para. 65.

The explanatory memoranda prepared by the governments of the Netherlands and Switzerland for transmission of the Additional Protocols to their respective parliaments for ratification expressly note that Article 18(2) of AP II requires the consent of the state in whose territory the conflict is taking place. The Swiss document even specifies that state consent is required even if relief is provided directly from a third country into opposition-held territory: Tweede Kamer, vergaderjaar 1983–1984, 18 277 (R1247), No. 3, p. 52; and Message concernant les Protocoles additionels aux Conventions de Genève du 18 Février 1981, 81.004, Feuille fédérale, 133 année, Vol. 1, p. 973.

58 This view was put forward as a possible alternative to a literal interpretation of Article 18(2) of AP II in recognition of the fact that, as a matter of practice, the consent of the opposition is required if operations are to be carried out in areas under its control. M. Bothe, J. K. Partsch and W. Solf, above note 14, p. 696.

This position is based *inter alia* on an analogy with the rules applicable in occupation, where it is not the consent of the state with legal title to territory that is required but that of the state with effective control over it – that is, the occupier.[59]

This position is questionable for a number of reasons: first, according to this interpretation, in situations where relief operations can reach the opposition-held territory without transiting through government-controlled territory, there would in fact be *no* 'High Contracting Party concerned', a possibility that sits uncomfortably with the clear reference in Article 18(2) of AP II to 'the' High Contracting Party concerned. Second, in such circumstances, as Additional Protocol II does not require the consent of the non-state side, as a matter of this instrument *no* consent would be required. This interpretation is unrealistic and inconsistent with the approach in Common Article 3(2) of the GCs, which even under the broadest interpretation requires the consent of the party to whom the offer of services was made.

Moreover, this interpretation is not borne out by the reality that affected states consider themselves extremely concerned by relief operations in opposition-held parts of their territory, nor by actual practice.[60]

A possible compromise position would be to accept that the affected state's consent is always required, but to argue that where relief actions are intended for

The view has been expressed with increasing conviction, although it has also been admitted that it does not correspond with state practice. See, for example, M. Bothe, above note 33, p. 94; and Michael Bothe, 'Relief Actions', in *Encyclopedia of Public International Law*, Vol. 4, North-Holland, Amsterdam, 2000, pp. 168, 171; as well as exchanges with author. Bugnion reaches the same conclusion but for different reasons: first, if Article 18(2) of AP II were interpreted as only referring to the consent of the state party, this would be the only occasion in AP II where the state and opposition are granted different rights and obligations. Second, it would not make sense for Article 18(2) of API II to contradict the position adopted in Common Article 3(2) of the GCs, which, in Bugnion's view, does not require the consent of the affected state. Third, in view of the frequent difficulties of determining who is the legitimate government in situations of non-international armed conflict, Bugnion does not think the drafters intended to force humanitarian actors to weigh up rival claims. In view of this, while acknowledging that such an interpretation appears contrary to the actual letter of Article 18(2) of AP II, he concludes that each party has the right to grant or withhold consent to relief operations within the territory it effectively controls. He adds that, in view of the risk of protest from the affected state, the International Committee of the Red Cross would resort to such a practice only if the situation of the victims made this imperative. F. Bugnion, above note 54, pp. 451–455.

59 M. Bothe, above note 33, p. 94.

60 For example, during the Nigerian civil war in the late 1960s, a number of humanitarian agencies operated a cross-border air bridge into Biafra from Sao Tome without the consent of the government, whose air force shot down several planes participating in the operations: H. Slim and E. C. Gillard, above note 1, p. 6. Similarly, in 1987 Sri Lanka strongly objected to the airdrop by India of relief supplies for the Tamil population into the besieged city of Jaffna: M. Bothe, above note 33, p. 94. Operation Poomalai was an airdrop of supplies by the Indian air force over Jaffna on 4 June 1987, when the city was under siege by Sri Lankan troops as part of the offensive against the Tamil Tigers. A first attempt by India to deliver assistance by sea was intercepted by Sri Lankan forces; two days later, India carried out the airdrop. In the wake of Operation Poomalai, Sri Lanka accused India of violating its sovereignty and territorial integrity. Pakistan, Bangladesh, Nepal and the Maldives also protested the action. India defended its actions as a 'mercy mission'. Outside the region, the reaction was muted – the United States expressed regret but refused to comment further on the incident. The United Nations Secretary-General issued a statement appealing to both states to act with restraint. Asoka Bandarage, *The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity and Political Economy*, Routledge, London/New York, 2009; and Steven R. Weisman, 'India Airlifts and Tamil Rebels', in *New York Times*, 5 June 1987, available at: www.nytimes.com/1987/06/05/world/india-airlifts-aid-to-tamil-rebels.html.

civilians in opposition-held areas, that state would have a more limited range of grounds for withholding consent.[61] For example, it would have to show that the intended assistance was not in fact humanitarian but of benefit to the opposition's military efforts or, related to this, that the actors providing it were not acting in a principled manner. Grounds based on military necessity would be limited to considerations of military necessity in the opposition-held territory or where military activity outside that territory could affect the safe passage of relief operations to it. Withholding consent out of concerns that the relief operations could legitimise the opposition or cement its control as well as prohibitions on humanitarian actors engaging with the opposition for purely humanitarian purposes would be arbitrary.[62]

An alternative suggestion is that in circumstances where the opposition effectively controls territory and exercises state-like functions to the exclusion of the government, its consent may be both necessary and sufficient. No legal basis has been provided for this suggestion, other than equating the circumstances with those in which, exceptionally, non-state actors have, on occasion, been imputed with responsibilities under human rights law.[63]

Whatever the legal position, as a matter of practice the agreement or acquiescence of the opposition to relief operations for civilians in territory under its control, or transiting through such territory, will be required to implement the operations in a safe and unimpeded way.

Who represents the government whose consent is required?

When should the government authorities involved in a non-international conflict no longer be considered as representing that state and, consequently, no longer be considered the party whose consent to offers of humanitarian assistance is required?

Recognition of the opposition as the 'sole legitimate representative of the people' of the state in question must be distinguished from its recognition as the government of that state.[64] The former type of recognition is an expression

61 See, for example, Michael Meyer, who suggests that 'the established government should not object to humanitarian relief actions fulfilling the required conditions of impartiality and non-discrimination being undertaken in territory not under its control'. Michael Meyer, 'Development of the Law concerning Relief Operations', in Michael Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, BIICL, 1989, p. 221. See also Sandesh Sivakumaran, 'The Provision of Humanitarian Assistance in Non-International Armed Conflicts', in Philip Ambach *et al.* (eds), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society*, forthcoming, 2015.

62 Consultations with legal experts carried out by author; and S. Sivakumaran, above note 61.

63 Consultations with legal experts carried out by author. On the emerging practice of imputing non-state actors with human rights obligations, see, for example, Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors', in *Cornell International Law Journal*, No. 46, 2013, p. 21.

64 See Dapo Akande, 'Self Determination and the Syrian Conflict – Recognition of the Syrian Opposition as the Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?', in *EJILTalk!*, 6 December 2012, available at: www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/; Stefan Talmon, 'Recognition of the Libyan National Transitional Council', in *American Society of International Law Insights*, Vol. 15, No. 16,

of political support and approval for the group, bolstering its position, including internally, by encouraging factions to coalesce under its umbrella. However, it does not have legal consequences. Recognition of an entity as the government usually occurs after an unconstitutional change in regime. Although there is an important political dimension to recognition, states do not have unfettered discretion. Two conditions must be met, with a degree of flexibility. First, the entity in question must exercise effective control over the state's territory. Second, and albeit to a lesser degree in the case of revolutionary change, it must do so with the support or acquiescence of the mass of the population.[65]

As a state cannot have two governments simultaneously, recognition of a group as the government entails 'de-recognition' of the incumbent authorities. The newly recognised government becomes the recognising state's counterpart in diplomatic relations. It will take over the embassy and other state assets in the recognising state's territory and appoint diplomats who will be entitled to diplomatic privileges and immunities, while those of the representatives of the previous government will cease. States can recognise governments expressly or implicitly, in which case recognition can be inferred from the nature of the relations between representatives of the two states.

International organisations also implicitly recognise governments by virtue of whom they accept as representing states. Within the United Nations, the General Assembly Credentials Committee is responsible for checking that credentials are in the appropriate form. In case of competing claims of representation, it effectively makes a recommendation to the General Assembly as to which party is to be considered as representing the government of the state in question.[66]

Although the legal position is straightforward, the challenges of applying it in practice should not be underestimated. Recognition is a sensitive political issue, and situations in which some states recognise one entity as the government and others see that same entity as the opposition are not infrequent.

How can consent be given?

The law does not stipulate how consent to relief operations is to be given. Although some suggest that the requirement of 'consent' in Article 18 of AP II 'implies less formality' than the word 'agreement' in Article 70 of AP I,[67] too much weight should probably not be given to this difference in terminology.

More significantly, it is suggested that consent need not be expressed or public: 'private assurances or an attitude which can in good faith be construed

16 June 2011; and Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', in *Chinese Journal of International Law*, Vol. 12, No. 2, 2013, pp. 219–253. See also, more generally, Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law,* Vol. 1*: Peace*, 9th ed., Longman, London/New York, 1992, paras. 42–54.

65 *Ibid.*, para. 45.

66 *Ibid.*, para. 53.

67 M. Bothe, K. J. Partsch and W. Solf, above note 14, p. 697.

as acquiescence are sufficient'.[68] Such an attitude could include a failure by the authorities to respond to repeated requests for authorisation to operate or their failure to react despite being aware of unauthorised operations. The less overt the relief operations, the less justified it is to infer acquiescence, as the authorities could be merely unaware of them.

Consequences of withholding consent to relief operations

Consequences for those seeking to provide assistance

While the rules regulating relief operations are, for the most part, straightforward, it is more complex to determine the legal consequences of their violation and, in particular, the lawfulness of any unauthorised relief operations.

In addition to IHL, other areas of international law come into play, most notably the rules of public international law safeguarding state sovereignty and territorial integrity and the prohibition on interference in states' internal affairs.

A further element of complexity is the fact that the consequences of carrying out unauthorised relief operations vary with the status of the actor doing so. While all actors – states, international organisations and NGOs – must comply with the relevant rules of IHL if they want their operations and staff to benefit from its protections and safeguards, the rules on sovereignty, territorial integrity and non-interference are not directly binding on private actors. Instead, their actions are subject to the domestic law of the state in which they operate.

What is clear, possibly counter-intuitively, is that arbitrary withholding of consent does not give rise to a general entitlement to carry out unauthorised relief operations. As will be seen, such operations are lawful only in extremely limited circumstances.

Unauthorised operations where consent is validly withheld

As outlined above, a state is entitled to withhold consent to relief operations on valid grounds. Unauthorised relief operations in such circumstances violate a number of rules of international law.

Any actor – state, international organisation, NGO – carrying out unauthorised operations in situations where consent has been withheld for valid reasons is not acting in compliance with the rules of IHL on relief operations. This does not mean that humanitarian staff, supplies and equipment lose their civilian status and consequent protection from attack.[69] However, the duty to facilitate rapid and unimpeded passage of relief supplies and personnel does not arise for unauthorised operations. They may be turned back at the border or, if already in-country, goods and equipment may be confiscated and staff, if not entitled to

68 *Ibid.*
69 R. A. Stoeffels, above note 51, pp. 314–316.

privileges and immunities, may face proceedings before the courts of the state where they carried out the unauthorised operations.

Unauthorised relief operations carried out by a state or by an international organisation are a violation of the affected state's sovereignty and territorial integrity.[70]

The International Court of Justice (ICJ) briefly considered whether relief operations constituted unlawful intervention in the case of *Military and Paramilitary Activities in and against Nicaragua*. It held that:

> There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be considered as unlawful intervention . . .[71]

Caution should be exercised before drawing general conclusions from this statement. It appears in a part of the decision in which the ICJ was contrasting humanitarian assistance with military and paramilitary activities and, in this context, concluded that the former, unlike the latter, did not amount to intervention. In its brief consideration of humanitarian assistance, the ICJ focused on the need for it to be delivered in a principled manner.[72] It did not address the issue of consent, leaving open the question of whether such assistance did not amount to interference only when consent had been arbitrarily withheld or also when it had been withheld for valid reasons.[73]

Moreover, and most importantly, the ICJ was not considering the unauthorised provision of assistance *into* the affected state but, rather, the provision of relief items at the border to actors operating in-country.

Commentators differ in their interpretation of this aspect of the judgment.[74] In any event, even if it were to apply to all situations, the fact that humanitarian assistance does not amount to intervention does not affect the need for relief operations to comply with other rules of international law. Unauthorised assistance provided in situations where consent has been validly withheld would still not comply with IHL and would violate the rules on state sovereignty and territorial integrity.

Private actors, such as NGOs and their staff, are not directly bound by the rules of public international law on sovereignty, territorial integrity and non-interference. Instead, the staff of NGOs do not ordinarily benefit from

70 *Ibid*., p. 314. In response to India's unauthorised airdrop, Sri Lanka complained of violations of its sovereignty and territorial integrity. See the discussion of India's Operation Poomalai in note 60 above.

71 International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America*), Merits, Judgment, 27 June 1986, *ICJ Reports 1986*, para. 242.

72 *Ibid*., paras. 242, 243.

73 Although the ICJ does not specify this either, from the context of the decision it can be assumed that it was addressing situations in which the assistance was provided without the consent of the affected state.

74 See R. A. Stoffels, above note 51, p. 309, and references therein. See also Schindler, who suggests that the ICJ's statement should not be understood as conferring a right on states or humanitarian organisations to cross the borders of another state to provide assistance to people in need. In his view, the Court was only considering the 'right to make humanitarian supplies available to parties to an armed conflict, even to rebels in a civil war, but [did] not imply a right to penetrate into the territory of another State' to deliver the supplies. D. Schindler, above note 54, pp. 698–699.

privileges and immunity, so they could face proceedings in the state where they provided the unauthorised assistance on a number of possible grounds, ranging from illegal entry into the country to the provision of support to the enemy. They may not, however, be punished for providing medical assistance, including to wounded enemy combatants.[75]

Ordinarily, the staff of international organisations are entitled to privileges and immunities either on the basis of multilateral treaties like the 1946 Convention on the Privileges and Immunities of the United Nations,[76] or of bilateral agreements concluded with host states that *inter alia* grant immunity from legal processes before domestic courts.

Unauthorised operations where consent is arbitrarily withheld

While arbitrary withholding of consent to relief operations is a violation of IHL, opinions are divided as to the lawfulness of unauthorised relief operations in such circumstances.

It has been suggested that unauthorised relief operations, where consent is arbitrarily withheld, are permissible.[77] According to this line of reasoning, if consent is arbitrarily withheld, the violation of the affected state's territorial integrity would be justified as an implementation of states' undertaking under Common Article 1 to the GCs and AP I to 'ensure respect' for IHL.[78]

This argument is problematic. First, Common Article 1 is addressed to 'High Contracting Parties' – in other words, to states. Consequently, only states could, arguably, rely on this provision to justify their actions. However, it is suggested that this provision could justify the unauthorised operations of states, international organisations and the ICRC.[79]

Second, and more fundamentally, even only considering operations carried out by states, the undertaking to ensure respect for IHL under Common Article 1 cannot justify a violation of sovereignty and territorial integrity, as it is generally agreed that this provision may not be relied upon as a basis for violating other rules of international law.[80]

An alternative approach based on general public international law and thus pertinent for states and international organisations, but not for private actors, would be to accept that unauthorised operations do not comply with IHL and violate the affected state's sovereignty and territorial integrity, but to argue that their

75 Art. 16 of AP I and Art. 10 of AP II provide that under no circumstances may people be punished for having provided medical assistance. According to the ICRC, the same rule exists under customary law in both international and non-international armed conflicts. See ICRC Customary Law Study, above note 8, Rule 26.

76 See also the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, New York, 21 November 1947 (entered into force 2 December 1948), UNTS Vol. 33, p. 261.

77 M. Bothe, above note 33, p. 96.

78 *Ibid.*, p. 95.

79 *Ibid.*, pp. 95–96.

80 ICRC Commentary to the APs, above note 11, para. 46.

wrongfulness is precluded on accepted grounds.[81] Two possible grounds could be relied upon: counter-measures and necessity.

To be lawful, counter-measures must meet a number of conditions, only some of which warrant highlighting here.[82] First, they may only be brought by a state or international organisation directly affected by a violation – for present purposes, one whose offer of assistance was arbitrarily rejected or, possibly, a state whose nationals were denied assistance. Second, the purpose of the counter-measure must be to induce the wrong-doing state to comply with its obligations. It is questionable whether unauthorised relief operations do this. Rather, they are a performance of the responsibilities not discharged by the recipient state. They aim to remedy the violation of the obligation. Third, counter-measures must be proportionate to the harm suffered by the actor having recourse to them. In this case, the harm suffered by the state or international organisation is minimal. It is the civilian population that suffers. Finally, in no circumstance may counter-measures violate the prohibition on the threat or use of force. In view of these requirements, it appears unlikely that counter-measures could be a basis for precluding the wrongfulness of an unauthorised relief operation.

One possible way of side-stepping some of these conditions – notably the requirements that counter-measures be bought by a state affected by the violation and that they be proportionate to the harm suffered by such a state – would be to argue that IHL lays down *erga omnes* obligations; that is, obligations owed to the international community as a whole.[83] In such circumstances states not directly affected by the violation might be entitled to take counter-measures. However, it is doubtful whether all the rules in the Geneva Conventions and Additional Protocols are *erga omnes* obligations. Even if they were, although there have been some instances of states taking counter-measures in response to violations of *erga omnes* obligations, it is not yet clear that international law provides a right for states to do this. In view of this, ILC Article 54 on State Responsibility leaves open the possibility for any state to take 'lawful measures' rather than counter-measures against the responsible state in order to ensure cessation of the breach and reparation in the interest of the injured state or the beneficiaries of the obligation that has been breached.[84]

The second possible grounds precluding wrongfulness is necessity. Necessity may be invoked by a state or international organisation if the otherwise wrongful act was the only way for it to safeguard an essential interest against a grave

81 Chapter V of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 2001 (hereinafter ILC Articles on State Responsibility), identify six circumstances precluding wrongfulness: consent, self-defence, counter-measures, *force majeure*, distress and necessity.

82 ILC Arts 22 and 49–54 on State Responsibility and Commentaries thereto. ILC Arts 22 and 51–57 on the Responsibility of International Organisations set out largely identical rules. See ILC Report, UN Doc. A/66/10, 2011. On the possibility of invoking counter-measures to justify unauthorised relief operations, see Oliver Courten and Pierre Klein, 'L'Assistance Humanitaire Face à la Souveraineté des Etats', in *Revue Trimestrielle des Droits de l'Homme*, 1992, pp. 343–364; and D. Schindler, above note 54, pp. 698–699.

83 The ICRC Commentaries would seem to suggest this. See, for example, ICRC Commentary to the APs, above note 11, para, 45.

84 See ILC Art. 54 and para. 6 of the Commentary thereto.

and imminent peril and it does not seriously impair an essential interest of the injured state or of the international community.[85]

The essential interest to safeguard can be that of the state or international organisation taking the unauthorised measure, or of the international community.[86] While necessity is most frequently invoked in relation to imminent environmental emergencies, preventing severe suffering of the civilian population can also be considered an 'essential interest' of the international community.

Unauthorised relief operations would impair an essential interest of the injured state – its territorial integrity. However, this need not inevitably be to the serious degree precluded by the rule. The unlawful act justified by necessity must be the only way of preserving the essential interest. If other, lawful ways exist for doing so, necessity cannot be invoked.[87] In the case of relief operations, such alternative methods could be the provision of assistance through actors authorised to operate.

In view of the above, necessity could be invoked to justify a one-off relief operation by a state or international organisation to bring life-saving supplies to a population in a specific location in extreme need, when no alternatives exist. Such a scenario would meet the requirements of grave and imminent danger but not seriously impair the injured state's essential interest.[88]

When are unauthorised operations lawful?

The following conclusions can be drawn on the basis of the analysis above. In situations where consent is validly withheld, unauthorised relief operations are unlawful.

In situations where consent is arbitrarily withheld, the position is unsettled. At best, unauthorised operations by states and international organisations might be justifiable violations of the affected state's sovereignty and territorial integrity in extremely limited circumstances where they could be justified under the legal principle of necessity or, possibly, under the emerging notion of counter-measures in response to violations of *erga omnes* obligations. Unauthorised operations by private parties would expose their staff to the risk of proceedings before the courts of the affected state.

In view of this lack of legal clarity and, possibly even more importantly, of the reality that unauthorised operations are likely to be extremely difficult to implement safely, whether to carry out such operations tends to be principally a policy decision for humanitarian organisations, taken on a context-by-context basis

85 ILC Art. 25 on State Responsibility; see also ILC Art. 25 on the Responsibility of International Organisations. The ILC considers that necessity should not be invoked by international organisations as frequently as by states, so this provision contains an additional condition: only international organisations with a function to protect the essential interest in peril may rely upon it.

86 Commentary to ILC Art. 25 on State Responsibility.

87 *Ibid.*

88 Arguably, necessity could also be invoked in situations where consent to relief operations has been validly withheld. However, if the plight of the civilian population is such as to give rise to a situation of necessity, reasons for withholding consent that might initially have been valid would have probably become arbitrary, as in the example of protracted hostilities given above.

after balancing a number of sometimes competing considerations, including the urgency of providing assistance to civilians; the possibility of actually implementing unauthorised operations and doing so in safety; the likely impact of unauthorised operations in opposition-held areas on their activities in the rest of the affected state and on those of other actors; and the likely impact of carrying out unauthorised operations on their activities in other contexts and on those of other actors.

Consequences for the party arbitrarily withholding consent and persons involved in the decision

The discussion so far has focused on the parties trying to provide humanitarian assistance. What are the legal consequences for the party that arbitrarily withholds consent and for the persons involved in that decision?

Arbitrary withholding of consent to relief operations is a violation of the party's obligations under IHL, and possibly of human rights law, giving rise to state responsibility. This being said, there appear to be no instances in which steps have been taken to enforce such responsibility, for example through dispute settlement mechanisms. A possible reason for this is that no other state considers itself sufficiently injured by the withholding of consent to initiate proceedings in a forum with jurisdiction.

Arbitrary withholding of consent also gives rise, for a state injured thereby, to the possibility of taking counter-measures in accordance with international law. As has just been touched upon, which states would be entitled to do so and the precise form such counter-measures could take is not settled as a matter of law. To the author's best knowledge, this justification has never been invoked.[89]

As will be seen, there have been a small number of instances in which the Security Council has resorted to enforcement actions under Chapter VII of the UN Charter to ensure the delivery of assistance to populations in need.

In terms of individual criminal responsibility, arbitrary withholding of consent to relief operations is not a grave breach of the Geneva Conventions or of AP I. It was not included in the list of war crimes of any of the *ad hoc* tribunals.

Although the ICC Statute includes the war crime of 'intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions', this provision is fairly limited in scope, only covering the extreme situation where civilians are being intentionally deprived of objects indispensable to their survival – and it only applies in international armed conflicts.[90] To date, allegations of this crime have not been included in any investigation.

While a number of possible avenues thus exist for holding responsible parties and persons who have arbitrarily withheld consent to relief operations, there has only been limited recourse to them and, consequently, limited accountability for

89 India justified its airdrop of supplies to the besieged city of Jaffna in Operation Poomalai as a 'mercy mission', rather than as a counter-measure.

90 ICC Statute, Art. 8(2)(b)(xxv).

violations. This should not be taken as implying that the rules on relief operations are not respected: parties initially withholding consent may have eventually granted it following negotiations and/or other diplomatic ways of encouraging them to comply with their obligations.

Alternatives – indirect provision of assistance

In view of the preceding analysis, what course of action is open to states and international humanitarian organisations whose offers of humanitarian assistance have been rejected?

Support to authorised operations

If other actors are operating in the requisite principled manner with the consent of the affected state, the simplest option would be to provide assistance through them, by supplying them with relief items or funding their operations.

From an international legal point of view, such indirect additional support does not raise problems. Difficulties may arise at a policy and operational level. If the affected state has rejected offers of assistance from the actor providing the indirect assistance, or if it believes that the latter has not adopted a neutral position in the conflict, the affected state may consider the operations it had previously authorised, and which are now receiving support, as no longer impartial, neutral and independent, and withdraw its consent to them.

Thus, to state the obvious, indirect assistance should only be pursued if humanitarian agencies operating in-country actually have a need for additional supplies or funding and are willing to accept such assistance from the state or international organisation offering it.

Support to unauthorised operations

More complex is the question of support provided to humanitarian actors carrying out unauthorised operations. Its legality must be assessed under the different areas of law discussed earlier: territorial integrity and non-interference, as well as the rules on assistance in the commission of an internationally wrongful act.

Territorial integrity

If the actors providing indirect support do not enter the territory of the affected state, they do not violate its territorial integrity.

Prohibition of interference

With regard to the principle of non-interference, whatever view is adopted as to the application of the ICJ decision in *Military and Paramilitary Activities* to 'direct' relief operations, it is clear that the Court was addressing 'indirect' assistance by the

provision of relief items from outside the territory of the affected state. The ICJ concluded that such assistance did not amount to interference provided it complied with humanitarian principles:

> An essential feature of truly humanitarian aid is that it is given 'without discrimination' of any kind. In the view of the Court, if the provision of 'humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering' and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.[91]

To counter claims of unlawful interference, it is essential for the actors providing indirect support to satisfy themselves to a high degree of certainty that the operations they assist are exclusively humanitarian and carried out in a principled manner, and that appropriate measures are adopted to avoid diversion of relief supplies and funds. The provision of relief goods rather than funds would make it easier to rebut claims that funds are being provided for or diverted to military or other non-humanitarian activities.

Assistance in the commission of an internationally wrongful act

A state or international organisation that assists the commission of an internationally wrongful act by another state or organisation may itself be in violation of international law. ILC Article 16 on State Responsibility provide that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.

Article 16 is essentially mirrored in ILC Article 14 on the Responsibility of International Organizations.[92]

Whether the provision of relief goods or funds raises this secondary responsibility depends on whether the assisted actor carrying out the relief operations is acting in violation of international law. If states or international

91 *Ibid*., para. 243.

92 ILC Art. 14 on the Responsibility of International Organisations provides that:

> An international organisation which aids or assists a State or another international organisation in the commission of an internationally wrongful act by the State or the latter organisation is internationally responsible for doing so if:
>
> (a) the organisation does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that organisation.

organisations carry out unauthorised relief operations where consent has been validly withheld, this is the case. However, it is unlikely that states and international organisations trying to provide humanitarian assistance in good faith would be providing support in such circumstances.

They are more likely to be doing so in situations where consent has been withheld for arbitrary reasons. As discussed above, it is precisely in such situations that opinions are divided as to the lawfulness of unauthorised operations. The same uncertainty is carried on to the actor providing indirect support. If the unauthorised operations are considered lawful, then assisting them also is; but if they are considered unlawful, then a state or international organisation that provides assistance to such operations would also violate international law.[93]

This being said, this secondary responsibility has rarely been invoked – never in relation to indirect support to relief operations, and rarely even in instances where the underlying violation was much more serious, like the provision of weapons in situations where a substantial risk exists that they will be used to commit violations of IHL.[94]

Moreover, secondary responsibility only arises in relation to assistance to activities that are a violation of international law by states and international organisations. Relief operations carried out by NGOs simply do not fall within the scope of this provision – and in any event, they may violate domestic law but not international law. Accordingly, the provision of support to such operations does not give rise to secondary responsibility.

As indirect support would not violate the territorial integrity of the affected state, nor amount to interference or, if provided to NGOs, assistance in the commission of an internationally wrongful act, such indirect provision of assistance is probably the approach least likely to raise legal concerns, particularly if extreme care is taken to ensure that the supported operations are exclusively humanitarian in nature and carried out in a principled manner.

Finally, any third state whose territory is used for these indirect operations – usually neighbouring states – may also face claims of assisting in the commission of a wrongful act and of allowing its territory to be used for unlawful activities.[95] Obviously, the organisation of unauthorised, but nonetheless principled, relief operations is a far less injurious activity than allowing territory to be used for 'organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State', referred to in the Declaration on Friendly Relations.[96] Nonetheless, the potential liability exists and practice shows that affected states

93 It can safely be assumed that a state or international organisation funding or providing material support to an unauthorised relief operation would meet the knowledge condition in ILC Arts. 16 on State Responsibility and ILC Art. 14 on the Responsibility of International Organisations respectively.

94 Commentary to ILC Art. 16 on State Responsibility, paras. 7–9.

95 In the *Corfu Channel* case, the ICJ underlined 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland* v. *Albania*), Judgment of 9 April 1949, *ICJ Reports 1949*, p. 22.

96 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to GA Res. 2126, XXV, 24 October 1970.

frequently claim that humanitarian activities are in fact a cover for these threats. These possibilities make relevant third states' consent to any form of cross-border operations or indirect support all the more important.

Overriding the requirement of consent – binding Security Council decisions

The requirement of consent under IHL may be circumvented by Security Council 'imposition' of relief operations by a binding decision.

Decisions adopted under Chapter VII of the United Nations Charter are binding on all states and override their rights and duties under other bodies of law, including IHL. Thus, if the Security Council, acting under Chapter VII, demanded that humanitarian relief actions be allowed into the country, the affected state would be required to comply.[97]

While the binding nature of decisions adopted under Chapter VII is uncontroversial, it has been recognised that Council decisions not adopted under this Chapter may also be binding within the meaning of Article 25 of the Charter if they employ a language of obligation.[98]

The Security Council frequently calls upon parties to conflict to grant humanitarian access.[99] However, the majority of these calls are in fact an exhortation to allow relief actions and are, in fact, a recognition that the affected state must agree thereto, rather than a Security Council authorisation thereof.[100]

On a small number of occasions, the Council has adopted binding measures under Chapter VII in relation to relief operations. Careful scrutiny of these precedents reveals that, although addressing impeded relief operations, the Council never actually required the affected state to allow access. Instead, the focus was on creating security conditions conducive to the delivery of assistance – a related but distinct issue that, in the cases in question, eventually led to the use of force.

Resolution 2139 (2014) on Syria marked an important departure from previous practice, with the Security Council for the first time demanding that all parties promptly allow rapid, safe and unhindered humanitarian access, including across conflict lines and across borders.[101]

97 On this issue, see Yoram Dinstein, 'The Right to Humanitarian Assistance', in *Naval War College Review*, Vol. 54, No. 4, 2000, p. 77.

98 See, for example, Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Art. 25 of the Charter?', in *International and Comparative Law Quarterly*, No. 21, 1972, p. 270; and Marko Divac Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', in *European Journal of International Law*, No. 16, 2005, p. 879.

99 See Aide-Memoire for the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict, Addendum, Part I, C, 'Humanitarian Access and Safety and Security of Humanitarian Workers', UN Doc. S/PRST/2010/25, 22 November 2010.

100 See, for example, R. A. Stoeffels, above note 52, p. 289.

101 UNSC Res. S/RES/ 2139, 22 February 2014, op. para. 6.

Bosnia and Herzegovina

In 1992, the Security Council adopted Resolution 752 calling upon parties to ensure that conditions be established for the effective and unhindered delivery of humanitarian assistance to Bosnia and Herzegovina.[102] Two weeks later, in Resolution 757, acting under Chapter VII, the Council demanded that the parties immediately create these conditions, including by establishing a security zone around Sarajevo.[103] In Resolution 770, again acting under Chapter VII, the Council called on all states – not just the parties to the conflict – to take all measures necessary to facilitate the delivery by humanitarian organisations of humanitarian assistance.[104] Finally, as its demands remained unheeded, in Resolution 781 the Security Council imposed a ban on military flights in the airspace of Bosnia and Herzegovina,[105] considering the measure to constitute 'an essential element for the safety of the delivery of humanitarian assistance'.[106]

This example relates to a situation in which the affected state, Bosnia and Herzegovina,[107] consented to the relief, which was being impeded by its opponent.

Somalia

In 1992, following a similar series of resolutions in which its call to parties to facilitate the delivery of humanitarian assistance and to take measures to ensure the safety of humanitarian personnel remained unheeded,[108] the Security Council adopted Resolution 794, in which, acting under Chapter VII, it authorised member states to establish an operation 'to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia'.[109]

This resolution led to the establishment of a US-led multinational force, which operated in Somalia between December 1992 and May 1993, to establish a secure environment for humanitarian operations in the southern half of Somalia.

According to the then Secretary-General, at the time of the adoption of Security Council Resolution 794, Somalia was considered as not having a government. Numerous factions were operating in the country that interfered with and attacked UN and other relief agencies.[110]

102 UNSC Res. S/RES/752, 15 May 1992, op. para. 8.
103 UNSC Res. S/RES/757, 30 May 1992, op. para. 17.
104 UNSC Res. S/RES/770, 13 August 1992, op. para. 2.
105 UNSC Res. S/RES/781, 9 October 1992, op. para. 1.
106 *Ibid.*, op. para. 8.
107 At this time, Bosnia and Herzegovina was already an independent state, admitted to the United Nations on 22 May 1992.
108 UNSC Res. S/RES/733, 23 January 1992; UNSC Res. S/RES/746, 17 March 1992; UNSC Res. S/RES/751, 24 April 1992; UNSC Res. S/RES/767, 27 July 1992; and UNSC Res. S/ RES/775, 28 August 1992. None of the parts of these resolutions relating to relief operations were adopted under Chapter VII.
109 UNSC Res. S/RES/794, 3 December 1992, op. para. 10.
110 Letter dated 29 November 1992 from the Secretary-General addressed to the President of the Security Council, UN Doc S/24868, 30 November 1992.

This is therefore an instance in which a multinational force was authorised to establish a secure environment for relief operations that were being impeded by *de facto* authorities in the absence of a government.

Northern Iraq

In response to Iraq's repression of the civilian population in the Kurdish-populated areas of the country, in April 1991 the Security Council adopted Resolution 668, in which it insisted that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and appealed to all member states and all humanitarian organisations to contribute to humanitarian relief efforts.[111]

Although the Council determined that the repression of the civilian population that led to massive population flows across international borders and to cross-border incursions threatened international peace and security, it did not expressly invoke Chapter VII.

The resolution was nonetheless the basis for a US-led multinational operation. Starting with airdrops, the coalition proceeded to put ground forces into Iraqi territory to protect the displaced persons and build camps. It also established a safe zone in northern Iraq using ground and air forces to allow civilians to return to their homes.[112]

Although Iraq and the UN eventually signed a Memorandum of Understanding on the UN's activities in northern Iraq, the measures adopted pursuant to Resolution 688 were initially without Iraq's consent.[113]

The precedential value of this example is also limited. As in the previous cases, the focus was the establishment of security conditions permitting the provision of humanitarian assistance, rather than the 'imposition' of relief operations themselves. Moreover, the assistance was provided in territory that the multinational force had removed from the affected state's effective control – so arguably, for the purpose of determining whose consent was required for relief operations, it was more akin to a situation of occupation or other forms of foreign administration of territory.

Syria

In October 2013 the Security Council adopted a Presidential Statement on the situation in Syria that addressed humanitarian relief operations in unprecedented detail. It urged all parties to promptly facilitate safe and unhindered humanitarian access to populations in need in all areas under their control and across conflict

111 UNSC Res. S/RES/688, 5 April 1991, op. paras. 3 and 6.

112 Air Force Historical Studies Office, *Operation Provide Comfort and Northern Watch*, fact sheet, 9 September 2012, available at: www.afhso.af.mil/topics/factsheets/factsheet.asp?id=19873; and GlobalSecurity.org, *Operation Provide Comfort*, available at: www.globalsecurity.org/military/ops/provide_comfort.htm.

113 Karin Landgren, 'Safety Zones and International Protection: A Dark Grey Area', in *International Journal of Refugee Law*, Vol. 7, 1995, p. 443; D. Schindler, above note 54, p. 699.

lines and urged the Syrian authorities to take a number of specific steps to facilitate the expansion of humanitarian relief operations, and lift bureaucratic impediments and other obstacles.[114]

In February 2014, in view of the escalating deterioration of the humanitarian situation in Syria, in particular for civilians trapped in besieged areas, and of the limited impact of the October 2013 Presidential Statement, the Council unanimously adopted Resolution 2139. The Council

> '[d]emand[ed] that all parties, in particular the Syrian authorities, promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners, including across conflict lines and across borders, in order to ensure that humanitarian assistance reaches people in need through the most direct routes'.[115]

Although the resolution does not state that it is adopted under Chapter VII of the Charter, it seems clear that certain of its provisions impose binding obligations on the parties to the conflict in Syria and other relevant states. In particular, operative paragraphs 5 and 6 go beyond hortatory language and 'demand' compliance from those to whom they are addressed. A distinction is made in the resolution between those provisions where the Council merely 'urges' particular action and those where it 'demands' action.

The effect of these binding provisions is that the Council *requires* consent to be given. It is not open to Syria, or to other relevant parties, to withhold consent to humanitarian relief operations, within the terms of the resolution. While IHL would allow consent to be withheld for valid reasons, Resolution 2139 does not. It is the first time that the Security Council has demanded that parties to a conflict allow relief operations, laying down an unqualified obligation to allow rapid, safe and unhindered access to UN humanitarian agencies and implementing partners.

Resolution 2139 expressly covers both cross-line and cross-border relief operations. Moreover, the term 'all parties' in operative paragraph 6 is sufficiently broad to also require other relevant states, most notably those from whose territory cross-border relief operations are initiated or through whose territory they must transit and whose consent is also required by IHL, to also allow such operations.

Conclusion

Efforts to provide humanitarian assistance in situations where the state in whose territory the relief operations are to be implemented withholds its consent raise complex legal, operational and policy questions, rarely resolved by cross-border relief operations.

114 Statement by the President of the Security Council, S/PRST/2013/15, 2 October 2013.

115 UNSC Res. S/RES/2139, 22 February 2014, op. para. 6. Also of relevance is op. para. 5, where the Council, having called upon all parties to immediately lift the sieges of populated areas, demanded that all parties allow the delivery of humanitarian assistance (including medical assistance), cease depriving civilians of food and medicine indispensable to their survival, and enable the rapid, safe and unhindered evacuation of all civilians who wished to leave.

As a matter of law, it seems safe to conclude that if there are civilians in need and actors capable of providing the assistance in a principled manner, the affected state may not withhold consent to relief operations in a number of specific circumstances. As a minimum these include situations of occupation, situations where the civilian population is facing starvation, and medical relief operations. In all such cases the affected state retains a right of control over the relief operations, including the entitlement to prescribe technical arrangements under which the passage of relief goods is permitted.

Determining whether consent has been withheld arbitrarily and, therefore, unlawfully in other situations is more complex as a matter of law and fact.

Also unsettled is the lawfulness of unauthorised operations. Private actors that carry out unauthorised relief operations expose their staff to the risk of proceedings in the affected state. The wrongfulness of unauthorised operations carried out by states or international organisations may be precluded in exceptional circumstances under the principle of necessity or, possibly, as a counter-measure in response to a violation of an *erga omnes* rule. Even in such circumstances, however, it is unclear how the operations would actually be implemented in practice.

Cross-border relief operations raise possibly even more complex operational questions. Whatever the legal position, operations are unlikely to be implemented in safety unless all parties concerned – the affected state, and opposition groups that control territory where the assistance is to be delivered or through which it must transit – agree or, at least, acquiesce thereto. It is also essential to consider the likely adverse impact of unauthorised operations on existing operations in-country and beyond.

The Security Council may 'impose' relief operations by means of a binding decision, obviating the requirement of consent. As a matter of operational practice, such an imposition has significant potential downsides, by associating what should be an exclusively humanitarian and impartial operation with political decisions. Moreover, past practice would indicate that by the time the Council adopts such a measure, armed force is likely to be necessary to establish security conditions to enable relief operations to be carried out.

At a policy level, guidance on some of the key questions raised by relief operations would be welcome, including whose consent is required; what constitutes arbitrary withholding of consent; and the precise nature of the obligations to allow and facilitate relief operations that have been agreed to – a central legal and practical issue only touched upon in the present article.

In practice, obtaining consent to relief operations and overcoming the ongoing challenges of actually delivering assistance once consent has been granted is fundamentally a matter of negotiation between those wishing to provide assistance and affected states, where the law provides the background, but is only one among many elements that will affect the outcome. Such negotiations are frequently best pursued in a progressive manner to build mutual confidence – actor by actor, specific need by specific need, location by location – rather than in a binary, 'all or nothing' manner.

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From face-to-face to face-to-screen: remote management, effectiveness and accountability of humanitarian action in insecure environments

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Abstract

This article provides a first attempt at analysing the complex set of issues around remote management practices in insecure environments and their increased use. It looks at definitions and reviews existing published and grey literature on remote management and related practices. It tries to situate remote management in the evolving context of post-Cold War strategies of dealing with conflict and crisis. On the basis of interviews with a cross-section of aid workers, senior headquarters managerial and policy staff, donors, and research institutions, it provides an assessment of current remote management practices, with a particular focus on Afghanistan and Somalia, and their implications for the future of humanitarian action.

Keywords: remote management, humanitarian action, Afghanistan, Somalia, effectiveness, accountability, conflict.

In insecure and fraught environments, humanitarian agencies are increasingly resorting to various forms of remote programming and remote management in order to maintain aid delivery when the presence of international staff is no longer possible or allowed. These approaches generally involve the withdrawal of agency international staff, and even senior national staff, from the area of operations and their replacement by a variety of remote control, telemonitoring, distance management and/or sub-contracting arrangements with local partners.

Remote management implies the withdrawal of senior international or national humanitarian managers from the location of the provision of assistance or other humanitarian action as an adaptation to insecurity or denied access. As such, it constitutes a deviation from 'normal' programming practice. It is different from decentralised programming or the capacity-building of local organisations and communities that occurs routinely in development or humanitarian situations. Rather, remote management denotes a less-than-desirable adaptation – in the sense that it is understood that quality and effectiveness may suffer – to what the agency deems an unacceptable level of risk. It is typically a last-resort modality, short of suspending operations.[1] It is usually intended to be temporary, but can also be of considerable duration.

1 Abby Stoddard, Adele Harmer and Jean S. Renouf, *Once Removed: Lessons and Challenges in Remote Management of Humanitarian Operations for Insecure Areas*, Humanitarian Outcomes, New York, 2010.

More broadly, remote management approaches are a response to a number of poorly understood and under-studied developments in the functioning of the humanitarian enterprise, including: the perception that aid work has become more dangerous and access more difficult; the consequent increasingly risk-averse posture of mainstream aid agencies; the collapse of system-wide approaches to negotiating access; the introduction of anti-terrorism legislation that proscribes contact with, or the provision of material support to, certain groups; the emergence of United Nations (UN) integrated missions and other 'joined-up' approaches that incorporate the provision of relief into political or military agendas; and the requirement to satisfy the demands of insurance underwriters, security managers and the risk-avoidance regulations of employers. There also seems to be a correlation between the increase in remote management and the development and generalised availability of a number of distance technologies such as mobile phones and video devices, remote mapping, crowdsourcing, use of 'big data', and the use of drones for data collection.

The paradoxical result of the generalisation of remote management in insecure environments is that, while the humanitarian enterprise has seen exponential growth in the past two decades, there has been a parallel social, intellectual, emotional and geographical withdrawal – a growing remoteness – of international aid workers from the societies and communities in which they work.[2] Bunkerisation of aid workers in protected or gated structures and remote management are the two key exemplars of this loss of proximity.

In most cases, an international or national organisation will withdraw or reduce its international or senior management staff in its area of operations and shift responsibility for aid delivery to more junior national staff, local partner organisations, or contractors. Remote management has the important benefit of allowing some aid activities to continue, but it entails a number of hazards and disadvantages.

These can include lower-quality and less efficient service delivery, difficulties in maintaining policy or strategic direction, the risk of corruption or other abuses, and accountability concerns. Similarly, it may become more difficult to abide by humanitarian principles, to avoid discriminatory practices on the basis of gender or ethnicity and to withstand pressure or manipulation from strongmen and abusive power-holders. While remote management may allow the continuation of some material assistance programmes, the implications for the protection of at-risk individuals and communities are a particular cause for concern.

Moreover, remote management raises serious ethical questions regarding the transfer of security risks from international personnel to national actors and local communities who often become more vulnerable and have fewer security resources, less training and scant alternatives for other gainful employment.

And lastly, remote management fundamentally changes the nature of the humanitarian relationship from a technology of proximity to one of distance.

2 Mark Duffield, 'Challenging Environments: Danger, Resilience and the Aid Industry', in *Security Dialogue*, Vol. 43, No. 5, 2012, pp. 475–492.

The 'face-to-face' approach, which was at the core of decades of NGO voluntarism, is replaced by a virtual or 'face-to-screen' relationship that increases the geographical, social and emotional distance between the international (or capital-based senior national) aid worker and at-risk individuals and communities on the ground.

Defining remote management

The term 'remote management' has been widely used to describe situations in which humanitarian agencies implement programmes with limited or non-existent direct access to populations in need. For some agencies, remote management is simply the decentralisation of management, a practice that might be used in situations where the agency did have access but chose to work through partners on the ground. Several organisations have linked the notion of remote management to the absence of international staff performing some key functions associated with assessments, programme design and/or monitoring. To other agencies, remote management implies a lack of physical presence due to political limitations or security risks. It is notable that organisations also employ diverse definitions of 'access', ranging from occasional short visits to a given area by senior staff with the constant presence of local staff, to working only through local partners without any direct contact between the agency and the affected population.

Remote management was defined by the UN Office for the Coordination of Humanitarian Affairs (OCHA) as 'an adaptation to insecurity, the practice of withdrawing international (or other at-risk staff) while transferring increased programming responsibilities to local staff or local partner organizations.'[3] According to OCHA, remote management should be viewed as a viable strategy when lives are at stake and a humanitarian organisation can bring value to an intervention, even if it has to subcontract all programming steps because of security risks to its staff or other constraints to access.

For the purposes of this article we adopt a similar definition: the withdrawal of senior international or national humanitarian managers from the location of the provision of assistance or other humanitarian action which represents an adaptation to insecurity and a deviation from 'normal' programming practice.

Similar definitions have been adopted by various NGOs.[4] For its part, the ICRC defines remote management as 'an ICRC activity or objective being fulfilled by a third party due to the absence of an ICRC staff in the phases of response (assessment, implementation, monitoring and evaluation).'[5] Interestingly, interviews conducted by the authors with aid agencies, including the ICRC, indicate what

3 Jan Egeland, Adele Harmer and Abby Stoddard, *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, UN Office for the Coordination of Humanitarian Affairs, New York, 2011, p. xv.

4 See for example A. Stoddard *et al.*, above note 1.

5 Communication from ICRC.

seems to be a shift from considering remote management as a measure of 'last resort' to 'one among other' possible modes of operation.

Remote management is specific to situations where access is constrained by insecurity or political barriers and where the physical presence of international or senior national programming staff is replaced either by devolving responsibilities to local staff or subcontractors or by distance technologies (for example, remote monitoring using mobile phones, use of proxies such as traders or market mechanisms to reach people in need, and the like). Remote management is sometimes accompanied by remote assessment of needs; this is done through a variety of techniques, ranging from the use of mobile phones to satellite imagery and mapping and, potentially, humanitarian drones.[6] There is even talk of using drones for the next technological step, which might be remote delivery.

In this context, remote management is not to be confused with decentralisation of decision-making in a stable environment or capacity-building. It is (ideally) a temporary adaptation of programme management, in which agency staff would be physically present to make decisions, provide guidance and monitor quality implementation. In other words, it is usually a reactive rather than a planned approach; it is a departure from normal operating procedures. It ranges from a temporary suspension of normal programme management to a sustained or permanent withdrawal. As will be discussed below, a combination of security, political, insurance and liability factors conspire in some situations in making remote management the default position of the aid community, if not the new normal.

Review of the existing literature[7]

Remote management – or the use of proxies to deliver assistance to groups that are impossible or too dangerous to reach by international agencies – has a long history. Cold War strictures as a rule did not allow aid agencies to work in war zones: anti-colonial liberation movements were thus supported by solidarity groups from outside the theatre; the ICRC routinely worked (and still does) with and through National Red Cross and Red Crescent Societies; from Eritrea to Sudan to Cambodia, internationally provided assistance was delivered via warring parties or their 'humanitarian' wings, local solidarity groups, or religious structures. Before post-Cold War rapid growth and institutionalisation of the humanitarian enterprise, remote management was not a topical issue in humanitarian circles.

6 See Kristin Bergtora Sandvik and Kjersti Lohne, 'The Promise and Perils of "Disaster Drones"', in *Humanitarian Exchange Magazine*, No. 58, July 2013, available at: www.odihpn.org/humanitarian-exchange-magazine/issue-58/the-promise-and-perils-of-disaster-drones. All internet references were accessed in May 2014.

7 We are grateful for the contributions of Heather Stobaugh to this section.

Origins of remote management

Although previous publications had discussed the issues surrounding remote management within other larger issues, such as security,[8] it was not until 2008 that the increasing use of long-term remote management practices began to generate widespread discussion on the need for policies and guidelines about remote management in its own right. Even so, most detailed discussion began only around 2010, as access within both Somalia and Afghanistan became extremely limited. Humanitarian agencies had begun pulling country offices out of Somalia in the mid-1990s after the US intervention debacle, but while senior managers might have been based in remote locations (Nairobi), by and large they were still able to visit programming locations. Debates had started around 2005 in Iraq, in the wake of the US-led intervention and major attacks against aid workers, but had not generally spread to aid agency headquarters and international fora.[9] In Afghanistan, the issue of remote management has grown in prominence in agency discussions in parallel to the shrinking of humanitarian access and the growing perceptions that agencies were aligned with the US-led military intervention.

In recent years there have been several articles and papers discussing various aspects of remote management, though very few agencies have developed clear guidelines on its design and use.[10] Several agencies working in Somalia have begun this process, using their growing base of experience with the issue. Discussions in Afghanistan initially focused more on operational modalities for access and needs assessments in insecure areas rather than on remote management *per se* (partly because the default position of the aid community was that the situation was improving).

Remote management and 'humanitarian space'

There is an ongoing debate on whether humanitarian space is actually shrinking, or whether this is a misperception based on a few exceptional cases.[11] On one hand, humanitarian agencies are now attempting to provide assistance in contexts that

8 See Abby Stoddard, Adele Harmer and Katherine Haver, *Providing Aid in Insecure Environments: Trends in Policy and Operations*, Humanitarian Policy Group (HPG) Report No. 23, Overseas Development Institute, London, 2006.

9 Greg Hansen, 'Operational Modalities in Iraq', Briefing Paper No. 2, NGO Coordinating Committee in Iraq, Baghdad, 2008.

10 See J. Egeland *et al.*, above note 3, pp. 25 ff.

11 See Antonio Donini *et al.*, *Humanitarian Agenda 2015: Final Report: The State of the Humanitarian Enterprise*, Feinstein International Center, Tufts University, Medford, MA, 2008, available at: www.alnap.org/resource/8761; Vicky Tennant, Bernie Doyle and Raouf Mazou, *Safeguarding Humanitarian Space: A Review of Key Challenges for UNHCR*, United Nations High Commissioner for Refugees, Policy Development and Evaluation Service, Geneva, 2010; Sara Pantuliano *et al.*, *Counter-terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*, HPG Policy Brief No. 43, Overseas Development Institute, London, 2011; Bryony Norman, *Monitoring and Accountability Practices for Remotely Managed Projects Implemented in Volatile Operating Environments*, Humanitarian Innovation Fund, Tearfund, London, 2012; Sarah Collinson and Samir Elhawary, *Humanitarian Space: A Review of Trends and Issues*, HPG Report No. 32, Overseas Development Institute, London, 2012.

once would have been too insecure or volatile. This has generated increased incidents of violence against aid workers not necessarily *because* they are aid workers, but simply because they are present in such insecure situations. The move from security planning on 'when to go' to security management strategies on 'how to stay' – which includes adaptations like remote management – reflects this change in perspective on operating in conflict zones.[12] Another view holds that the increasing politicisation of humanitarianism has diminished regard for the humanitarian principles of humanity, neutrality and impartiality, eroding the protection they once provided to humanitarians and making the delivery of assistance more difficult.[13]

Both perspectives in the debate agree, however, that there are situations – such as Iraq, Afghanistan, Darfur and south-central Somalia – in which adherence to humanitarian principles does not ensure safe access for humanitarian agencies. These cases have several common characteristics: conflict is asymmetric and involves numerous non-state actors; there is a lack of a legitimate government; and the context has been polarised by the post-9/11 global security dynamic of international terror and counter-terror or counter-insurgency operations. While attacks on aid workers in other contexts have plateaued, levels of attacks in these particular situations remain so high that they skew the general trend.[14] In Somalia, for example, it appears that attacks on aid workers may be due not to a particular agency's collaboration or connection to Western governments or policies, but rather to a belief that the entire humanitarian endeavour is a Western policy tool and, therefore, a legitimate target for non-state armed groups. In Afghanistan, the key factors explaining attacks against aid workers are the alignment of the UN and aid agencies with the US-led military intervention and state-building agenda, and the perception that aid is supporting a government that is seen as corrupt and illegitimate by insurgent groups and segments of the population.[15] Since 2011, attacks against aid workers seem to have flattened out, partly because road missions of (particularly) international staff have been drastically curtailed, and partly because it appeared that the Taliban (but not necessarily other groups) had adopted a policy of not attacking foreign aid organisations that work directly with communities. However, recent attacks against the ICRC and foreigners in 2013 may indicate a change of policy, which could well be more deleterious for aid workers.

Politicisation

Projecting adherence to the principles of impartiality and neutrality has become especially problematic for UN agencies because of the dual political and

12 J. Egeland *et al.*, above note 3, p 8.
13 A. Donini *et al.*, above note 11, pp. 23–25.
14 J. Egeland *et al.*, above note 3, p. 11.
15 Antonio Donini, *Afghanistan: Humanitarianism Unraveled?*, Feinstein International Center, Tufts University, Medford, MA, 2010; Prisca Benelli, Antonio Donini and Norah Niland, *Afghanistan: Humanitarianism in Uncertain Times*, Feinstein International Center, Tufts University, Medford, MA, 2012; Samuel Hall, *Redefining Humanitarian Assistance in Afghanistan: A Contextual Analysis*, Samuel Hall Consulting, Kabul, 2012.

humanitarian roles required of the UN in such situations.[16] This is exemplified in Afghanistan by the creation of the United Nations Assistance Mission in Afghanistan (UNAMA) – a UN integrated mission – in which humanitarian concerns were subordinated to, and part and parcel of, a political agenda in the context of which it became consistently more difficult to advocate for humanitarian principles and to even contemplate negotiations for access with the Taliban and other insurgent groups.

In addition to similar constraints, south-central Somalia presents relatively unique realities that limit access. These include not only extremely high security risks to staff, but also, since 2009, the risk of legal liability in the event that assistance goes astray and inadvertently assists proscribed groups. Since the US Supreme Court case of *Holder* v. *Humanitarian Law Project*, it has been clear that humanitarian agencies could and would be prosecuted for violation of counter-terrorism laws by providing support (direct or indirect) to listed entities.[17] Working within a conflict area generally requires negotiating with the belligerents for access, especially when they control areas where populations are in need of assistance.[18] In the negotiation process, it is understood that the authority controlling the area may – as an unintended but very significant consequence – gain some benefit, whether material or in the form of legitimacy or political gain. In most contexts, as Bradbury states, this is generally considered 'good field craft' and a pragmatic approach to humanitarian negotiations. In Somalia, however, the fact that such negotiations take place with groups that have been 'listed' or 'proscribed' under various national and international anti-terror mechanisms criminalises this humanitarian engagement and places humanitarian agencies in an untenable position.[19] While technically the same rules on contacts with proscribed groups apply in Afghanistan as well, there is much less angst in the aid community as a whole about violating counter-terrorism legislation in Afghanistan. Perhaps this is due to the current surge of interest in negotiating with the Taliban – a surge in which the US authorities are also partaking. The UN follows a 'don't ask, don't tell' approach, but most observers agree that political contacts are under way. The ICRC and Médecins sans Frontières (MSF) are open about their negotiations with the Taliban relating to access and acceptance, and those NGOs that are still able to work in rural areas routinely negotiate

16 Mark Bradbury, *State-building, Counterterrorism, and Licensing Humanitarianism in Somalia*, Feinstein International Center, Tufts University, Medford, MA, 2010; V. Tennant *et al.*, above note 11; J. Egeland *et al.*, above note 3.

17 US Supreme Court, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2010. For a discussion, see Naz K. Modirzadeh, Dustin A. Lewis and Claude Bruderlein, 'Humanitarian Engagement under Counter-terrorism: A Conflict of Norms and the Emerging Policy Landscape', in *International Review of the Red Cross*, Vol. 93, No. 883, 2011, pp. 623–647.

18 Humanitarian Practice Network, *Good Practice Review: Operational Security Management in Violent Environments*, No. 8 (New Edition), Overseas Development Institute, London, December 2010, p. 60, available at: www.odihpn.org/hpn-resources/good-practice-reviews/operational-security-management-in-violent-environments-revised-edition; M. Bradbury, above note 16; S. Pantuliano *et al.*, above note 11.

19 M. Bradbury, above note 16, p. 17; S. Pantuliano *et al.*, above note 11, pp. 6–7.

via community leaders or village elders with whomever is in charge in a particular area.[20]

There are obvious benefits to remote management and other distance approaches since they allow some humanitarian activities to continue in otherwise prohibitive conditions. Remote management lowers the safety risk for international staff; some capacity-building may take place for national staff and/or local organisations, and re-entry when conditions improve is easier since a presence has been kept on the ground. The cons, however, sometimes overshadow the pros: they can range from increased risk, pressure and expectations for national staff who may not have the required skills for additional responsibilities, to the risk of diversion and fraud, logistical difficulties in moving commodities and project resources, and so on.

Research commissioned by Tearfund found that, although many drawbacks can be minimised through improved programme design and reliance on a growing list of 'best practices', approximately one quarter of the individuals interviewed for that research argued against ever using remote management. They felt that no amount of improvement could overcome critical issues of diminished programme quality and accountability, and the ethical problems of transferring risk to individuals who may not be able to cope with that risk.[21] Other observers have noted that the practice of remote programming puts in place vested interests that make it difficult to exit out of the practice once it is in place.

Experiences with remote management

The following case studies from Afghanistan and Somalia highlight the major findings on the benefits and risks of remote management in volatile contexts.

Afghanistan: ups and downs of remote management (1988–2013)

Remote management has a long history in Afghanistan, dating back to the mid-1980s, if not before, and much in the current debates is not new. During the Soviet occupation, the US and other donors funded an array of 'humanitarian' activities inside Afghanistan in areas controlled by *mujahideen* groups. US citizens were forbidden (by the Reagan administration) to enter Afghanistan; assistance activities were therefore implemented by a number of proxies set up by USAID in Pakistan with Afghan and Pakistani staff, such as the Afghanistan Construction and Logistics Unit (ACLU), that provided services ranging from food aid to small-scale infrastructure projects and transport of non-lethal military equipment (medical

20 See, for example, Joel Alas, 'Five Years After Slayings: Doctors without Borders Returns to Afghanistan', in *Spiegel Online*, 12 October 2009, available at: www.spiegel.de/international/world/five-years-after-slayings-doctors-without-borders-returns-to-afghanistan-a-654702.html; Baba Umar, 'Even the Taliban Respects Us for Our Work in Afghanistan', in *Tehelka.com*, 24 May 2013, available at: www.tehelka.com/even-the-taliban-respects-us-for-our-work-in-afghanistan/.

21 B. Norman, above note 11, p. 2.

supplies, clothes, Tennessee mules used for transport, and so on), as well as monitoring of project activities. Assistance was also provided through US-based NGOs, such as the International Rescue Committee or Save the Children, who also had to rely on Afghan brokers and gatekeepers for the implementation and monitoring of their projects. Non-US NGOs and their international staff could enter Afghanistan, but in practice had to rely on similar proxy arrangements both because of security inside Afghanistan and because the Pakistani authorities controlled access to the border and were very selective as to who could cross it or not. Moreover, the various *mujahideen* groups and parties soon understood the benefits that they could derive by creating their own NGOs and by infiltrating international NGOs (INGOs) and solidarity groups to attract easy money and assistance to areas under their control. Because of the politicised nature of the context – Western support to Afghan 'freedom fighters' – manipulation was rife and monitoring of projects minimal. Many projects existed only on paper; commanders used mafia tactics to intimidate and control NGOs and to deny them access to areas under the control of other groups; and there were large-scale diversions of resources to support the war effort. Of course, there were also effective and successful initiatives set up by reputable NGOs, but the overall climate was one of happy-go-lucky operationalism. In the long run, this contributed to giving NGOs a bad name.

When the UN arrived on the scene after the 1988 Geneva Accords,[22] which were aimed at bringing peace to Afghanistan, the situation of remote management and monitoring improved somewhat. The UN began operating inside Afghanistan on the basis of a 'humanitarian consensus' it negotiated with the Kabul government, the *mujahideen* parties and the neighbouring countries (Pakistan, Iran and the then Soviet Union). This 'consensus' allowed UN staff to enter the country and set up activities both cross-border and cross-line. Initially, the UN agencies had to rely on the same brokers, gatekeepers and proxies put forward by the *mujahideen* groups or the NGOs with 'good contacts' in particular areas. The UN also encouraged the formation of Afghan NGOs, nurturing and financing them, with mixed results. The political economy of the cross-border aid scene was such that it was extremely difficult to shake off the hold of key Afghan strongmen in the *mujahideen* groups and their Pakistani backers, who could control where and how much assistance could be directed.

Nevertheless, over time the UN was able to establish 'dedicated NGOs' able to implement rather large-scale programmes such as mine action and road construction. Access for UN and NGO international staff improved, and there was a gradual shift from remote programming and management to more traditional forms of UN and NGO implementation including with international staff presence or oversight. Offices inside Afghanistan, often staffed by international aid workers, gradually grew, and monitoring improved considerably. During the cross-border

22 Editor's note: Signed on 14 April 1988 between Afghanistan and Pakistan with the United States and the Soviet Union serving as guarantors, the Geneva Accords aimed at regulating bilateral relations between Afghanistan and Pakistan, and at providing a timetable for the withdrawal of Soviet troops from Afghanistan.

period and the subsequent internal conflict period (1992–1996), and even under the Taliban (1996–2001), the half-dozen Afghan mine action NGOs[23] created by the UN – at the time the largest humanitarian mine action programme in the world – were able to work relatively effectively cross-border and cross-line, both in secure and relatively insecure areas. The programme was – until it moved to Kabul in 2002 – essentially managed by remote control from Islamabad, with only a handful of international advisers inside the country at any given time. Its success was predicated, in large part, on the separation of mine clearance and awareness activities from the tasking and monitoring, which was undertaken by a separate dedicated NGO. This experience is mentioned here because it shows that relatively large-scale humanitarian programmes could be implemented by remote management in contested and fraught environments since (a) there was obvious support from the communities and their leaders, (b) the activity was uncontroversial and was not a stake in the conflict, (c) there was transparency about the funding and management structure, (d) the separation between implementation and monitoring and evaluation provided a degree of accountability, and (e) the presence of agency international staff allowed direct monitoring and quality control.

While local strongmen sometimes tried to take advantage of aid agency presence, in the main access and security were not major issues. For example, during the Taliban period, the UN and ICRC, as well as many international and national NGOs, had offices in six to eight regional hubs as well as in Kabul. While the relationship with the Taliban authorities was tense, there were relatively few security risks for humanitarian personnel. The UN, ICRC and NGOs benefited from active support from practically all sectors of the population as these agencies were the only sources of external assistance at the time. Travel by road was generally unproblematic, except in a few areas where there was active conflict.

If we fast-forward to post-9/11 Afghanistan, we can clearly see an expansionist phase of international UN, NGO and donor agencies on the ground – up to about 2006 – during which aid agencies and their donors accepted the conventional wisdom that Afghanistan was in a post-conflict mode. Aid agencies naturally flocked to Kabul, access and acceptance in most of the country was not an issue, and remote management basically dropped from the agenda. Remote management approaches were replaced by normal subcontracting arrangements with local community groups and national NGOs and participation in large-scale national programmes in health or community development (the National Solidarity Programme, NSP), parts of which were implemented by INGOs and NGOs (and other parts by the state itself or private contractors). However, the fact that these arrangements were intended to extend the remit of the government in what was an increasingly contested environment was not lost on the Taliban and other anti-government elements, who came progressively to tar the overall aid effort with the occupier's brush. Nor did the fact that, with a couple of exceptions, the

23 Such as Afghan Technical Consultants (ATC), the Organisation for Mine Clearance and Afghan Rehabilitation (OMAR) and the Mine Clearance Planning Agency (MCPA). These (and other) NGOs worked under the umbrella of the UN mine action programme.

NGO community called for the expansion to the entire country of the presence of the International Security Assistance Force (ISAF), then confined to Kabul, go unnoticed.

This was followed by a retrenchment and 'bunkerisation' phase, which is still ongoing. As attacks against aid workers increased, international staff presence on the ground became more tenuous. Aid agencies faced difficult decisions, especially multi-mandate agencies that were doing both relief work and participating in government state-building projects. They were increasingly seen – and not only by the Taliban – as aligned with the Kabul government and its international military backers. Travel by international staff and even senior national staff to project sites became more difficult if not impossible.[24] A few NGOs with particularly strong or longstanding community support were able to rely on trust and acceptance to maintain activities and even visits to projects, but for most NGOs (not to mention the UN), outside the main cities accessible by air, the universe of access was rapidly shrinking. With visits by international staff and even senior national staff becoming increasingly difficult and dangerous, remote management became the de facto modus operandi in large parts of the country, a situation reminiscent in some ways of the years of the Soviet occupation.

Interviews with aid agency staff in Kabul in 2012 and 2013 showed the extent to which direct relationships between offices in Kabul and projects in rural areas had been replaced by remote management and, sometimes, the cessation of activities.[25] In some cases, projects were able to continue under management of local agency staff when Kabul-based staff had to be withdrawn. In others, agencies recruited new staff from the local community or from other NGOs that had departed the area. There was also experimentation with the contracting of former staff as short-term consultants for the provision of services that would normally have been the responsibility of regular staff, so that they would not appear on the agencies' books. In many cases, monitoring visits became impossible or very challenging even in areas where an NGO had worked for decades. Threats, both political and criminal, increased against staff and their activities, including in areas that were considered to be relatively secure.

The combination of decreased access by international staff and increased threats for national staff had resulted in the fraying of relationships on the ground: programme effectiveness was responding to the law of diminishing returns. Monitoring by international staff was being increasingly replaced by senior national staff and then more junior staff. Travel to visit project locations had to be under the radar, by local transport rather than agency vehicle. Because mobile phones were often checked at Taliban roadblocks, these and any other visible clues of agency affiliation had to be left behind. Local staff were seen to be particularly at risk ('just the fact that you come to visit our project is dangerous for us' was a refrain that was often relayed after field visits); in some areas, even staff working in Kabul could no longer return to their own districts, whether to monitor projects or visit family

24 See P. Benelli *et al.*, above note 15, pp. 28–29.

25 The following paragraphs draw on interviews in person and on Skype conducted by one of the authors.

('I can get to my village, but on the way back I would be stopped and beaten up or worse'). Senior NGO national staff interviewed in Kabul lamented the fact that they could no longer interact with communities where their agency had been working for years and that they were consequently losing credibility and the support of the community. As one experienced respondent noted, 'When there was a problem in the community, I would go down and help sort things out. I used to be seen as a peacemaker because I convinced two groups to stop fighting. Now I can no longer go. My white beard carries no weight.'[26]

Agencies often stress that acceptance is a function of community support. And there are many examples of community elders negotiating with Taliban commanders to allow projects of obvious benefit to communities to continue. The Taliban themselves have issued statements that they are not opposed to activities that benefit the population.[27] However, in practice, such local agreements are hostage to the shifting nature of the conflict, changes in the local Taliban command and control, perceptions of whether the activity supports the government or not, and so on. Agreements require lengthy negotiations, are a function of the personalities involved and often do not last. The patchwork of local power relationships in rural Afghanistan and the fissuring of the Taliban and other insurgent groups increasingly complicate the task of maintaining programmes and their effectiveness.

The ICRC, and to some extent MSF – because of their exclusively humanitarian profile – have been able to negotiate more comprehensive agreements concerning their presence and activities with the leadership of the Taliban and other groups. But even their activities are increasingly managed remotely from hubs in cities where they run health facilities. For example, the ICRC runs a taxi service to bring war wounded to the hospitals that it supports or for the return of mortal remains of combatants to their families.[28] Despite the organisation's blanket agreement, its international staff are unable to venture outside government-held towns. The re-supply of health posts they support, as well as the basic training of the staff, is done through local proxies, short-term consultants or, in areas where it is accepted, by the Afghan Red Crescent.[29] Moreover, in the run-up to the withdrawal of most foreign troops in 2014, both ICRC and MSF are finding that the agreements they have negotiated at the central level with the Taliban and other groups are increasingly tenuous (as demonstrated by the attack against the ICRC office in Jalalabad in May 2013).

The experience of a mainstream US-funded NGO that has been working for the past twenty years supporting agricultural livelihood projects in Helmand and Kandahar provinces is indicative of the changing situation. Until 2011, it was working with some eighty rural communities or groups in these provinces, which are probably the most insecure in the country. It was able to do so because it had

26 Interview with a senior national staff member of an INGO, Kabul 2012.

27 Antonio Donini, *Afghanistan: Humanitarianism Unraveled?*, Feinstein International Center, Tufts University, Medford, MA, 2010; P. Benelli *et al.*, above note 15, p. 29.

28 Fiona Terry, 'The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action', in *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 173–188.

29 Interviews in Kabul, 2012 and 2013.

consistently refused both to participate in US-led stabilisation activities and to work as a subcontractor of the Afghan government. The longstanding relationships with the communities were the best guarantees for access and acceptance. However, by 2011, the situation had changed, and the NGO was forced to retrench and reluctantly resort to a greater use of remote management approaches. In the words of the country director: 'With so much of the development agenda and associated resources now subordinated to counter-insurgency and state-building strategies, some stakeholders come to perceive NGOs as siding with their enemies.'[30] Access and acceptance in Afghanistan have been severely compromised by the escalation and radicalisation of the conflict.[31] This has transformed the image of mainstream organisations from that of 'benign infidels to agents of Western imperialism.'[32] Humanitarian activities are still possible in some areas, but overall the distance between managers and their projects has been rapidly increasing.

Unlike Somalia, there is no famine in Afghanistan, and, while there is a humanitarian crisis, it is diffuse rather than geographically contained. It is a crisis of access to services (in particular health) and chronic food insecurity exacerbated by thirty years of war.[33] Also, unlike Somalia, there has been no major instance of denial of access to food. The World Food Programme (WFP) and the government have been able to move food convoys (in some areas with ISAF armed escorts). Moreover, a lot of food is moved by private traders, who are able to find their own ways of getting through insecure areas and delivering it to target groups identified by NGOs and their local partners. Nevertheless, the continuing insecurity has gravely affected the ability of the aid system to conduct in-depth needs assessments. This situation has resulted in a self-fulfilling prophecy: donors ask for evidence because they are not anxious to be convinced that there is a humanitarian crisis, as this would undermine their post-conflict narrative. Agencies' freedom of movement around the country is increasingly constrained. They are increasingly risk-averse and bunkerised. Therefore, needs are difficult to quantify and remain unmet.[34]

Remote programming, management and monitoring are growth industries in Afghanistan, but the returns on investment are shrinking. In a few areas – the central highlands, parts of the northeast – international staff can still visit and monitor assistance activities by flying in and flying out. In much of the country, this is too dangerous, and national staff are left to face increased responsibility and insecurity (much of which becomes under-reported). NGOs have now learned that the perception of having taken sides can have dangerous consequences. Many, in anticipation of more troubled times ahead in the context of the withdrawal of most foreign troops in 2014, are trying to retain or regain a credibility as impartial and

30 Nigel Pont, 'Southern Afghanistan: Acceptance Still Works', in *Humanitarian Exchange Magazine*, No. 49, February 2011, available at: www.odihpn.org/humanitarian-exchange-magazine/issue-49/southern-afghanistan-acceptance-still-works.
31 A. Donini, above note 27, p. 6; P. Benelli *et al.*, above note 15, pp. 28–29.
32 F. Terry, above note 28, p. 176.
33 ICRC, 'Insufficient Access to Health Care Exacerbates Humanitarian Crisis', press release, 25 July 2012.
34 P. Benelli *et al.*, above note 15, p. 5; interviews with UN and NGO staff in 2012 and 2013.

independent players that was heavily compromised. This is likely to be a difficult task. Rather than being a local problem, the issue of alignment has become a systemic one. So far, there is no breakthrough: attempts by OCHA and the NGOs to agree on an approach for negotiating access and acceptance with the Taliban and other groups have failed due to lack of trust between the UN – whose integrated mission is seen as too partisan in its alignment with ISAF and the government – and the NGOs, but also because of the difficulty of identifying trustworthy interlocutors in the anti-government groups. This situation is likely to continue, if not worsen, in the coming months, and for most NGOs remote management will remain the default mode of operation in large swathes of the country.

Some major INGOs have a policy of not working in areas where they cannot be present and therefore will shut down operations rather than resorting to remote management. One major donor – ECHO – has a policy of not supporting activities that cannot be monitored by international staff. Given prevailing conditions, ECHO has recently showed more flexibility with respect to this requirement; nevertheless, some activities have been suspended. Moreover, most NGOs are anticipating a reduction of available resources in 2014 and beyond, with a corresponding reduction of activities on the ground. Our interviews show that, because of the diminishing returns on effectiveness of remotely managed activities in the most insecure areas, these are likely to be the first to be cut. This, and the fact that there is no common approach between the UN and NGOs (let alone donors) on negotiating access with the Taliban and other insurgent groups, does not bode well for at-risk vulnerable groups in Afghanistan.

The humanitarian response to the 2011–2012 Somalia famine[35]

South-central Somalia presents one of the world's most complex environments for delivering humanitarian assistance in a manner that is consistent with humanitarian principles.[36] As the needs reached famine levels in mid-2011, the humanitarian community working in Somalia was presented with the challenge of rapidly scaling up assistance to a famine-affected population in an area of very constrained access, where operations were largely managed remotely. These challenges were greatly exacerbated by the departure and subsequent banning of the World Food Programme in 2010, and further accentuated in late 2011 when Al-Shabaab banned seventeen organisations from operating in this and other areas under its control. To scale up operations under these circumstances, agencies implicitly and explicitly had to tolerate increased risks, including the risk of misuse and diversion of assistance. These risks had to be considered in light of the more critical risk of failing to deliver assistance to affected populations in a timely manner. Agencies sought to mitigate

35 We are grateful for the insights and contributions of Merry Fitzpatrick, Hannan Sulieman and Genevieve Boutin, who collaborated on an earlier unpublished version of this case study.

36 Laura Hammond and Hannah Vaughan-Lee, *Humanitarian Space in Somalia: A Scarce Commodity*, HPG Working Paper, Overseas Development Institute, London, April 2012.

those risks through the strategies they adopted to distribute assistance and to monitor and verify aid delivery. These strategies are briefly and partially outlined below.[37]

In the years leading up to and including the 2011–2012 famine, organisations were negotiating individually with Al-Shabaab about the question of access, and there was no overall common approach to the delivery of humanitarian assistance. The lack of presence *in situ* challenged the ability of many organisations to assess the situation, to carefully select partners and contractors, and to implement, monitor and evaluate their work sufficiently. In this context, these challenges meant higher costs and significantly more complex, though not necessarily more effective, management structures and partnership strategies, as well as greater likelihood of poor decision-making and of diversion or misuse of aid. Other challenges included the lack of contact with affected communities and local leaders that would secure acceptance and a mutual understanding, and the fact that senior managers who were not present on the ground often had to use unreliable information to assess the situation. This, in turn, means that remote management runs the risk of being self-perpetuating.

Neither the provision of assistance in areas of constrained access nor the remote management of programmes is a particularly new phenomenon in humanitarian response. There are, however, several new aspects of access and remote management in current humanitarian environments, including some that are unique to Somalia.[38] The decision to rely on remote management was largely an *ad hoc* response, and therefore little formal policy or guidance was developed, either within organisations or across the humanitarian system.[39] However, as more agencies came to rely more heavily on remote management, some common practices have emerged.

The increase in the number of agencies relying on remote management is a reflection of increased insecurity targeted at staff of humanitarian agencies, barriers imposed by Al-Shabaab itself, and barriers imposed by donors to prevent aid from falling into the hands of Al-Shabaab. This is complicated by the perception on the part of Al-Shabaab that all non-Islamic humanitarian agencies are part of a 'Western' political agenda. Whether one agrees or not that 'humanitarian space' is shrinking, it is clear that contexts such as Somalia present numerous difficulties for humanitarian operations. According to Bradbury, there were approximately forty INGOs with a physical presence in south-central Somalia in 1995. This number had declined to twenty-six by 1997. By 2012, as the famine was developing, the INGOs present in south-central Somalia had withdrawn almost all their expatriate presence and were working almost exclusively by remote management. Any expatriate

37 Some agencies are understandably reluctant to disclose all their practices. This is therefore an illustrative set of practices, and not an exhaustive one.

38 V. Tennant *et al.*, above note 11, pp. 1–3.

39 Abby Stoddard, Adele Harmer and Victoria DiDomenico, *Providing Aid in Insecure Environments: 2009 Update. Trends in Violence Against Aid Workers and the Operational Response*, HPG Policy Brief No. 34, Overseas Development Institute, London, April 2009; A. Stoddard *et al.*, above note 1.

presence that may have remained at that time had extremely limited, if any, ability to move and perform its function.[40]

Remote management in Somalia in the run-up to the famine

Although Somalia remains a single country in the eyes of much of the international community, in many ways it constitutes three separate programming (and management) contexts for agencies working there. The most extreme challenge for remote management is in south-central Somalia, in areas controlled either by Al-Shabaab or by the Transitional Federal Government (TFG). The modus operandi for gaining access in the late 1990s and early 2000s required negotiation with multiple parties. Despite worsening security conditions from 2006 to 2009, national and international staff continued to have access to Al-Shabaab-controlled areas. But in the second half of 2009, Al-Shabaab banned foreign nationals from most of those areas. As of early 2011, some international agencies had national staff and offices in south-central Somalia, but no international staff. In November 2011, Al-Shabaab completely banned sixteen agencies from operating in areas under its control.

Agencies already had several remote management practices by 2011. The most significant was third-party monitoring visits to get an independent perspective on programmes. Data collection was mostly not tolerated by Al-Shabaab authorities in control of particular regions, and individuals found to be involved in data collection could be accused of spying or other allegations and subsequently punished (e.g., jailed or subjected to a more severe form of punishment). Third-party reporting was regular, but provided limited information on programme results given the monitoring focus on inputs; it could not provide much information on issues such as protection.

As the situation worsened in 2011, a number of agencies further developed risk management procedures. These included partnership reviews; assessment of ability to maintain access and abide by donor regulations; follow-up actions on the available monitoring information; and risk management training for staff. The UN established a Risk Management Unit (RMU), which became a resource for (mainly) UN agencies in conducting risk assessments, recommending risk management solutions and doing some direct monitoring. But of course, the RMU was subject to many of the same constraints of access.

Over the first half of 2011, negotiations with Al-Shabaab were stepped up over the issue of staff movement and access; in many cases, however, permission was denied. Then, as the extent of the crisis was becoming clear, Al-Shabaab announced a different policy in early July, stating that any group, whether 'Muslims or non-Muslims', can give emergency aid as long as they have 'no hidden agenda'.[41] But after the famine was declared and the WFP began to scale up for operations, assuming that it too would be allowed back, WFP Executive Director Josette Sheeran

40 M. Bradbury, above note 16, p. 4.

41 See 'Somalia Islamists Lift Ban on Aid to Drought Victims', in *BBC News Africa*, 6 July 2011, available at: www.bbc.co.uk/news/world-africa-14046267.

issued a press release in Mogadishu announcing that the WFP was 'scaling up to reach an additional 2.2 million people in the previously inaccessible south of the country.'[42] Al-Shabaab swiftly made it clear that the ban remained in effect for agencies like the WFP and noted that while the drought was a problem, the declaration of famine was 'utter nonsense, 100% baseless and sheer propaganda.'[43] Relations continued to sour between Al-Shabaab and humanitarian agencies thereafter.

Remote management during the famine

As relations with Al-Shabaab became increasingly hostile, access became ever more constrained. Access by agency staff was limited by restrictions on movement. National staff of some agencies had occasional access to some areas. With the exception of a handful of agencies, there was little access to the areas hardest hit by the famine (Bay and Bakool regions, Middle and Lower Shebelle). The ICRC had access to these areas, and was able to distribute food to 1.2 million people at the height of the crisis. But even it had to suspend operations later, and was ultimately barred by Al-Shabaab as well.[44] This forced a number of agencies to make several rapid decisions about alternative approaches – again without access to the context.

Measures were devised in response to the challenge of remote management. A number of agencies set up 'call centres' in which staff were assigned contacting partners and field-based facilities by phone using Somalia's well-functioning cell phone networks. Second, upgrading the staff of local partner organisations was facilitated. In some cases, INGOs seconded trained and experienced Somali staff to local partners. In some cases, funding for overheads to cover local partner staff support costs was increased. Through these measures, the timeliness and clarity of reporting improved, and there was less conflicting information both between and within reports. Even so, the very nature of the pressures to resort to remote management techniques also limited assessments or evaluations to measure the true impact of remote management.

A major decision – and one subject to considerable debate at first – was about the use of cash transfers, which, given the absence of all agencies able to deliver food aid except the ICRC, were seen as the only viable alternative. Somalia had the necessary money transfer and market infrastructure, but this was a completely new area of programming for some agencies, which presented considerable risks. Managing this response remotely made it extremely difficult to ensure that the most vulnerable were reached (in other words, minority groups). It also meant investments had to be made in multiple monitoring systems, including

42 Statement by WFP Executive Director Josette Sheeran on Visit to Mogadishu, 21 July 2011, available at: www.wfp.org/news/news-release/statement-wfp-executive-director-josette-sheeran-visit-mogadishu-somalia.

43 'Somali Islamists Maintain Aid Ban and Deny Famine', in *BBC News Africa*, 22 July 2011, available at: www.bbc.co.uk/news/world-africa-14246764.

44 ICRC, 'ICRC Temporarily Suspends Distributions of Food and Seed', press release, 12 January 2012; ICRC, 'ICRC Remains Fully Committed to Helping Somalis', press release, 2 February 2012.

an independent monitoring mechanism covering the work of several NGOs; market monitoring; and third-party verification, in addition to complaints mechanisms. This ultimately resulted in the establishment of the Cash and Voucher Monitoring Group (CVMG), which collected extensive monitoring data, and eventually was able to undertake a substantial evaluation as well.[45]

Another area of scale-up was the immunisation programme when a measles epidemic threatened. Because of constrained access, there had been little awareness-raising and limited work with local authorities. Immunisation campaigns had never been allowed in Al-Shabaab-controlled territory, but immunisation of individuals in hospitals and health facilities was allowed. Remote management compromised the quality of the little immunisation work that was allowed.

All of this was further complicated by the political situation. With the restrictions of the US Office of Foreign Assets Control (OFAC) and other counter-terrorist restrictions prior to the famine, donors questioned whether it was even possible to provide humanitarian assistance in Al-Shabaab-controlled areas. UN Security Council Resolution 1916 – concerned primarily with the arms embargo on Somalia and Eritrea – also affected the humanitarian response. A special 'carve-out' exempted humanitarian assistance from some of the resolution's requirements, but also required that the UN Humanitarian Coordinator report to the Security Council on humanitarian operations and risk management every 120 days. To some degree, this may have appeared to put into question the independence and impartiality of UN agencies, and probably further soured the possibilities of negotiating access with Al-Shabaab. However, the carve-out effectively gave donors more room to provide funding for the humanitarian response. The US government also eased OFAC restrictions with a similar humanitarian carve-out after the famine was declared, to some degree easing constraints on international NGOs, but many remained concerned about possible criminal liabilities.

The ICRC and MSF, given their independence, their closer adherence to humanitarian principles and their ability to negotiate, were able to maintain presence much longer. MSF worked directly, not through operating partners. The ICRC worked with its Red Crescent partner in Somalia. But even these organisations' access became increasingly difficult: the ICRC suspended operations in early 2012, after having operations blocked in several locations, and Al-Shabaab subsequently withdrew its permission to operate.[46] MSF withdrew in 2013, following the killing of several members of its staff.[47] These incidents highlight the kind of 'red lines' that exist for even the most principled of agencies in the Somalian context.

45 Catherine Longley, Mike Brewin and Sophia Dunn, CVMG, *Final Monitoring Report of the Somalia Cash and Voucher Transfer Programme Phase 1: September 2011–March 2012*, Overseas Development Institute, London, 2012; Kerren Hedlund, Nisar Majid, Dan Maxwell and Nigel Nicholson, *Final Evaluation of the Unconditional Cash and Voucher Response to the 2011–12 Crisis in Southern and Central Somalia*, Humanitarian Outcomes, London, 2013.

46 ICRC press releases, above note 44.

47 MSF, 'MSF Forced to Close All Medical Programmes in Somalia', press release, 14 August 2013.

Risks associated with remote management

Remote management carries a number of threats. As noted by Steets *et al*., 'the quality of assessments cannot always be guaranteed in remote operations, and switching into remote mode can reduce the complexity and quality of projects. Remote management should thus be a last resort.'[48] The risks and potential costs of making a bad decision due to poor or inadequate information are potentially enormous – such as the risk of diversion, corruption, poor targeting or a host of other problems. In Somalia during the famine, the most commonly cited risks included:

Information management and the credibility of reports

INGOs and UN staff interviewed all noted that reports from local staff and partners are given less credibility by donors and the international community than those generated by senior staff in international agencies. Although several INGOs had raised red flags early in 2011 about the severity of the crisis, they felt that because their alerts were based on reports from local partners, they were not given the same credibility in coordination meetings as reports that had been generated firsthand by international agencies. As evidence, they point to the increase in CAP appeal only once the Food Security and Nutrition Analysis Unit (FSNAU) reports were available. Some agencies interviewed felt this was part of the reason for the delayed response.

Impartiality and neutrality

All local staff and partners belong to particular ethnic, political or other groups, and those members of the needy population not belonging to the same clan or group may not receive the same level of services. Because the situation in Somalia was so sensitive, agencies that depended on local staff or partners to make key decisions increased the risk of damage to their perception as a neutral, impartial agency, though it has so far been impossible to determine if this was the case during the famine.

Programme quality

Remote management generally means the less experienced and skilled staff must work with little direct support from those with more experience. Where specific guidance is required or senior staff must make decisions, the time required to obtain these from a separate location can delay the implementation of a programme, and certain time-sensitive milestones (e.g., seed distributions) may be missed.

48 Julia Steets, Urban Reichhold and Elias Sagmeister, *Evaluation and Review of Humanitarian Access Strategies in DG-ECHO Funded Interventions*, Global Public Policy Institute, Berlin, 2012.

The technical aspects of the programme, the quality of implementation and the humanitarian principles may suffer.

Partnership and the ethics of risk transfer

The transfer of risk from senior staff (who are largely not Somali) to local Somali staff assumes that the local staff face a lower level of risk, but this is debatable. While they may not present as significant a political target, they face pressures from community leaders and relations that foreigners would not, and they are afforded less protection in the conduct of their work. With increased needs during the famine, there was increased pressure to meet those needs. With remote management it is almost impossible to know exactly what pressures staff are dealing with. Staff and partners do not always want to say how they deal with these difficulties. Without being present, it is difficult to detect if staff find solutions that would be acceptable to the agency and the donors.

Taxation

Taxation or the risk of having to pay money to a local authority for access became something of a 'public secret' during the crisis. Almost no agency could admit to it because of the implications involved, but practically everyone knew it was happening to some degree. The issuing of an OFAC license that exempted some of the liabilities of agencies was a welcome development after the famine was declared, but the threat of potential prosecution on other grounds persisted. Fraud and the diversion of aid were an equal risk, and determining what was diversion and what was taxation was often difficult. Again, much of the brunt of this was borne by national staff who had to actually operate on the ground in these circumstances.[49] The circumstances forced agencies to operate on their own best judgement and keep quiet – there was little solidarity among agencies in opposing the taxation of aid, and there were justified fears of saying much about it.

Donors and risk

A number of agencies interviewed noted that in the period leading up to the famine, donors were uncertain of the risks and benefits of remote management, with the spectre of its inherent risks towering over possible benefits. In particular, donors were concerned about the lack of specific reporting on results that they partly attributed to the implementation modality. Implementing agencies were required to provide exhaustive justifications and laborious reporting to convince donors to support remotely managed programmes. The restrictions related to interactions with Al-Shabaab only compounded the difficulties, raising the need for intense accountability and higher legal liabilities.

49 K. Hedlund *et al.*, above note 45, pp. 66 ff.

Mitigating the risks of remote management

A number of lessons can be drawn about strategies and approaches put in place by humanitarian organisations to mitigate the risks listed above during the response to the famine in south Somalia in 2011. The purpose of this section is to draw out more general implications for policy and practice from Somalia, Afghanistan and other contexts.

Information management

The FSNAU remains the primary source for information on food security, nutrition and livelihoods in Somalia, and its independence ensures neutral and objective analysis; it is key that this remains uncompromised in such a complex political and humanitarian environment. Unfortunately, in November 2011, Al-Shabaab banned FSNAU from operating in areas under its control, effectively cutting off the most vital and consistent source of information from south-central Somalia. This complicated the ability of all organisations to manage assistance remotely. Diversifying sources of information – about both the situation on the ground and the impact of interventions – was critical to managing risk. The sharing of information between key actors is also of crucial importance. Because of a lack of trust, needs assessments and approaches to negotiating access are not shared in Afghanistan. The same applies to other contexts, for example Syria, where NGOs operating cross-border from Turkey are reluctant to share information and to coordinate for fear that information on where they work will be fed back to Damascus or to militant Islamic groups. Information is shared informally or 'under strict Chatham house rules.' Coordination, then, becomes that much more difficult.

Partnership

Most organisations in south-central Somalia traditionally use local civil society partners for programme implementation. Partnership, however, requires upkeep and interaction. Access restrictions – and the resulting inability to provide training and direct technical oversight, and to carry out the direct interactions that are important for passing on technical advice, brainstorming ideas, sharing information and so on – compromise programme quality. Staff visits by organisations to delivery sites are virtually impossible, and such direct means of oversight and/or monitoring can no longer be assured. As in Afghanistan and elsewhere, remote management also effectively outsources security risks to the local partner.

Monitoring

In addition to the norm, i.e., partner reports, on-site visits and the like, agencies in Somalia introduced additional approaches to ensure implementation quality and the monitoring of progress and the impact of interventions. Third-party monitoring requires triangulation of information reported by partners with different sources at

the community level, such as community elders, social committees, key informants and visual documentation. In addition, monitors investigate the leakage of humanitarian goods in local markets. Partnerships are increasingly scrutinised, whereby background checks are regularly commissioned on major partners and contractors to identify potentials for improper affiliations. As noted, some agencies established call centres that call every social service facility to check on staff availability, supply stocks and whether the facility is actually operating. But it practically goes without saying that organisations are unable to monitor all issues in the south-central Somalia setting. Particularly difficult are human rights and protection issues, such as recruitment of child soldiers and gender-based violence. In Afghanistan, some remote monitoring still provides good reports on assistance activities, but as in Somalia the quality of the reporting on protection and abuse by local non-state actors or criminal elements is much more difficult in the absence of international staff or senior national staff. The sharing of risk management and other information across organisations constitutes an important resource in such environments.

Decision-making

In the management of any programme, decisions must be made daily on the operations, reacting to changing information or circumstances. When managing remotely in south-central Somalia, some levels of decision-making were delegated to the field staff while other levels remained with senior management in remote locations. Decisions that remained with senior staff were often delayed by the additional steps in communication. Negotiations on the ground were necessarily delegated to field staff. Attempts by local authorities to influence targeting resulted in delays of days and sometimes weeks, and organisations by and large felt this could not be compromised and waited for negotiations to conclude. It is important to note that this did impact the security of national staff, who were undertaking access negotiations on behalf of their organisation.

While the humanitarian situation on the ground in Somalia improved in 2012 and 2013, the situation with regard to access and management remains largely the same. This situation has evolved over the time since then, with a much more capable government taking over the reins in Mogadishu, and some areas of south-central Somalia being won back to central government control by the combined forces of the new government and the African Union Mission to Somalia (AMISOM). The evolving military situation on the ground, however, has done little to change the reliance on remote management strategies. The UN has championed the move to put country offices back in Somalia, but the 19 June 2013 bombing at the UN offices in Mogadishu, and the recent terrorist attack in Nairobi, have put those plans somewhat up in the air. Even if country offices are physically located in Mogadishu, the same constraints will continue to exist on field access.

Remote management will no doubt continue to be the modus operandi in south-central Somalia for some time to come and will no doubt continue to be a significant feature of humanitarian response in Afghanistan and elsewhere. Syria is

likely to be an important source of lessons in dealing remotely with an array of militant groups, some of whom are openly threatening international agencies.[50] It is important that the humanitarian community reflects on and incorporates the lessons learned in Somalia in 2011–2012 as well as the broader lessons from Afghanistan and other contexts.

The benefits and risks of remote management and the importance of due diligence

Clearly, under circumstances of extremely limited access, a balance needs to be struck between humanitarian concerns of and for the affected population, and the imperative for humanitarian organisations to mitigate the various risks – security and others – associated with the delivery of this assistance. Thus, assistance is typically carried out subject to the consent or permission of the state. In the case of Somalia, however, the UN Security Council partially claimed that role through UN Security Council Resolution 1916, which could be partially understood as a response to allegations of misuse of humanitarian resources in Somalia due to remote programming.[51] That resolution gave donors a high enough level of assurance that it enabled funding to flow to Somalia, but was problematic from a humanitarian point of view in that it further blurred the lines between the political and humanitarian missions of the UN. It this sense, better self-regulation by the humanitarian system itself is a preferable option.

The fact that remote management is becoming ever more common indicates that agencies often consider the benefits worth the risks. Yet it is the risks, of course, that are controversial and are therefore discussed more often. Staff from agencies interviewed for this article cited numerous benefits, the most common of which were: the reach of aid where it would otherwise have been unavailable (this was especially true during the famine in Somalia); local staff and partners developing a stronger sense of ownership, and often developing new solutions by taking on a larger management role; and agencies that would never otherwise have considered the use of local partners for implementation in their normal organisational strategies becoming aware of and investing in them and building their capacity, both in Afghanistan and Somalia. Other benefits included: more candid feedback from beneficiaries to local partners; expansion of the scope of the work by national staff and partners into areas foreigners could not go; and the development of long-term relationships that may serve as entry points for the international organisation when access improves and increase the likelihood

50 Interviews in Geneva with INGOs working inside Syria raised a host of new issues concerning the difficulties of remote management in the volatile and insecure Syrian context, such as lack of coordination on access negotiation; threats against international staff of NGOs (while national staff are allowed sometimes to operate); and difficulties in finding trustworthy partners on the ground with at least some experience in humanitarian matters.

51 See SC Res. 1916, 19 March 2010, which established *inter alia* a humanitarian exception to the Somalia sanctions regime. See in particular paras. 4 and 5.

that the international agencies will continue to work with those partners long-term in those areas.

All of this raises the question of what constitutes 'due diligence' in humanitarian management decisions in situations of highly restricted access. Fundamentally, due diligence is based on a 'reasonableness' standard – one that asks what a given actor should know in order to act (to prevent or remedy problems) in particular circumstances. Due diligence must also factor in the risk that avoiding decision-making and action may result in no humanitarian assistance reaching affected populations.

At its core, the due diligence principle represents a context-based 'reasonableness' standard. Due diligence asks that an agency adopt an appropriate 'standard of care' based on its obligations or responsibilities in a given context. This standard may be linked to contractual obligations (with specific requirements), but in some cases it may be more general and rely on a broad understanding of the actor's role.

Steps that humanitarians should consider taking to demonstrate adherence to the due-diligence principle include:

- Proactively examine the context within which their activities are taking place, with a view toward highlighting specific challenges,
- Assess potential and actual impacts of a proposed activity – as well as the potential impacts of non-action,
- Determine whether operational and logistical relationships contribute unreasonably to potential misuse, misappropriation and politicisation of humanitarian assistance,
- Determine 'reasonable' levels of loss or taxation before undertaking negotiations with armed groups,
- Put in place additional measures to monitor operations and supply chains based on what is reasonable in the specific context.
- Determine the limits of 'outsourcing' risk and understand the implications for the duty of care of staff, especially when resorting to short-term contracting arrangements that dilute the responsibility of the contracting party,
- Consider the implications of remote management over time, both for the quality of programmes and the safety of staff, especially when a 'temporary' arrangement of last resort tends to become a 'normal' operating modality.

It is important to note that under the due diligence principle, the humanitarian community need only demonstrate that it is making reasonable efforts to avoid contributing to misuse, misappropriation and politicisation, and not that it has a perfect record of delivery. This, in turn, suggests that it would be useful for the humanitarian community to develop a common understanding of due diligence in remote programming, spelling out minimum standards and red lines. This is not likely to be an easy process given the varied practices of agencies and other considerations, but would be valuable in the long-term.

Given the extremely limited access to affected populations during the 2011–2012 famine in Somalia, agencies were forced to make programme decisions

far away from the reality on the ground. Some of the programmes pursued had been in place for some time, but had to be significantly strengthened given the magnitude of the crisis.

The experiences of humanitarian actors in south-central Somalia during the famine underline the conceptual importance of due diligence for better understanding and of framing their choices to accept heightened risk in order to continue to deliver in high-risk environments. Major practices include partnerships, improved information management and third-party monitoring, but all rely on some level of negotiated access. While these practices helped to enable a critical response to the famine, they all carried costs in terms of increased risk, as well as staff time and financial obligations.

An additional complication is the tension between Dunantist and Wilsonian agencies on the issue of access and acceptance, particularly in Afghanistan. For the former, independence and negotiating with whoever controls territory are key. The latter, meanwhile, have to balance their humanitarian activities with their relationship with the government (or even the Provincial Reconstruction Teams),[52] for whom they implement longer-term rehabilitation or state-building projects. Maintaining an independent profile is a difficult challenge for multi-mandate agencies that are seen by non-state actors and segments of the population as aligned with foreign military forces.

Although remote management has enabled some amount of assistance and essential services to reach vulnerable populations in crisis, it is equally important to stress that it is not an optimal mode of operation. Remote management of programmes has the tendency to become a self-filling prophecy. Physical presence is vastly more fruitful – not only for the quality of humanitarian programmes and decision-making elements of humanitarian operations, but also for protection. Experience strongly suggests a relationship between physical presence and contact with populations and authorities, the 'acceptance' of humanitarian organisations, and the degree to which acceptance results in improved protection of local populations.

Traditionally, the ICRC and other agencies involved in protection work would count on the presence of international staff for verification of violations or monitoring of protection activities, especially when the collection of information and analysis on threats and patterns of abuse could prove difficult and dangerous for local staff to carry out. Confronted with increasing situations where access is restricted or not possible, organisations including the ICRC have had to become more agile and creative, in particular by building up networks of trusted intermediaries in order to access reliable information. For example, the work of UNAMA to reduce the incidence of civilian casualties in Afghanistan benefited from prior informal networks including with local civil society actors, government

52 Editor's Note: Provincial Reconstruction Teams (PRTs), currently overseen by ISAF, are joint integrated civilian-military structures, staffed and supported by ISAF contributing countries, and operating at the provincial level in Afghanistan. See ISAF, *Provincial Reconstruction Team (PRT) Handbook*, 4th ed., March 2009, available at: https://publicintelligence.net/isaf-provincial-reconstruction-team-prt-handbook/.

personnel and communities or individuals associated with elements of the armed opposition. UNAMA routinely received reliable information from trusted sources, including mobile phone video footage of incidents involving casualties in remote areas. Context, however, is key: in Afghanistan these networks were often built on years of impartial humanitarian programming and presence by aid agencies. In Somalia – or in Syria – such networks are much weaker or do not exist, and setting them up from scratch will always be problematic.

The extent to which protection activities can continue without the presence of international or senior national staff is of course very context-specific. In some cases, good programming can make up for the absence of experienced on-site staff (e.g. camp layout or the provision of firewood to women can contribute to reduced risks of gender-based violence). However, activities around norm compliance or enhancing respect for the protected status of civilians may be more difficult to undertake. In many cases the outsourcing of risk to local staff, who often have their families on the ground, works against engaging in protection issues or inhibits analyses of patterns of harm detrimental to the safety and well-being of civilians.

The ability to manage crises remotely is important when physical access is simply not possible. The humanitarian community could benefit from a broader and more systematic evaluation of the practice and its effectiveness in a number of different contexts. If the suspension of presence is temporary, remote management may be a good approach in the short term. However, as mentioned above, experience from our two case studies and elsewhere tends to demonstrate that it obeys a law of diminishing returns. Guidelines and manuals may help, but the risk of improved remote management is that the systems put in place to guarantee that assistance gets to people become their own rationale. Rather than engaging directly, agencies might simply decide to reduce security risks by managing crises remotely. Such decisions could become increasingly problematic.

Remote management – necessary as it might sometimes be – is not as good as being physically present; it should continue to be an exception, not the rule. If not, remote management and the recourse to other distance technologies will radically change the way in which agencies look at conflict and crises. Over time, distance fundamentally changes the very nature of the humanitarian relationship.

Looking ahead: remote management and the future of humanitarian action

In the preceding pages we have documented a number of different types of adaptation aimed at allowing humanitarian agencies to continue to work in environments that are perceived to be insecure or where direct access is denied. Remote management is the broader category that comprises different sub-types: remote programming, remote control, remote support, remote monitoring, remote partnership and so on. Linked to remote management are digital mapping and other cyber-technologies that also substitute for the need for a presence on the ground. What these approaches have in common is the increased distance in the chain that

separates programme management and decision-making from purported beneficiaries. In extreme cases, this could take the form of aid or cash drops or the complete virtualisation of aid, for example, through needs assessments conducted by drones or satellite imagery and the use of credit cards or mobile phone cash transfers and other technologies that involve little or no physical contact between aid agencies and vulnerable groups.

Various analysts[53] have noted the parallels between the increased use of distance technologies by mainstream (Western) aid agencies and the use of drones and other technologies that avoid or replace close combat by (Western) armed forces. In both cases, the unacceptability of (military) casualties and the perceived increase in attacks against (civilian) aid workers result in heightened risk-averse postures, bunkerisation and other measures that reduce or even preclude physical contact with local populations. In the fraught urban environments of Kabul, Mogadishu or Baghdad, there is little to distinguish the blast walls and razor wire of the archipelagos of military bases and those of the UN, private security companies, civilian contractors and, increasingly, NGOs. This is not lost on the local population and on anti-government elements: the fact that aid agencies shelter behind much the same concrete fortifications as the military can only reinforce the perception that they are part of a joint enterprise. Even in less insecure environments, foreign aid workers tend to congregate in gated communities, recreation facilities and restaurants where access is regulated and locals are often unwelcome. Large numbers of expatriates live and work in the same place, rarely get outside the wire and even less often get outside the capital city. They move in armoured vehicles between protected islands: for all practical purposes, they live in a virtual Afghanistan, or Somalia, or Darfur.

These adaptations to insecurity go hand-in-hand with the increasing recourse to remote management, and in all likelihood reinforce each other and contribute to making remote management the default option in many situations. More research is required to better understand the triggers that lead to the adoption of remote management and to what extent there is a 'remote management trap' that makes remote management appear as the preferred option.

Anti-terror legislation and insurance and liability concerns, as well as the security training provided to aid workers in insecure environments, compound the distance issue.[54] Rather than focusing on trust, much of the emphasis is on protection from the risks of interacting with local groups. As a result, humanitarians' understanding of the human condition – long based on empathy, conversation, drinking tea and discussing culture and politics, if not living in the community – has become increasingly mediated by technological proxies and the computer screen. As they rely more on remote management and distance

53 For example, M. Duffield, above note 2, p. 276. See also Sarah Collinson, Mark Duffield *et al.*, *Paradoxes of Presence: Risk Management and Aid Culture in Challenging Environments*, HPG, Overseas Development Institute, London, March 2013.

54 M. Duffield, above note 2, p. 278.

technologies, aid workers risk being cut off from the actual reality of the conditions of the people they intend to help.

In sum, remote management is now commonly associated with the decade-long retreat of international aid workers – especially those operating in contested or fragile states – into fortified aid compounds. Such bunkerisation is a visible means of reducing exposure to an aid environment that is now judged uncertain and prone to surprise, if not hostile. It also makes access to the agency by beneficiaries seeking accountability or redress or simply information much more difficult, if not impossible. An extreme example of cutting the locals out of the humanitarian equation was post-earthquake Haiti, where coordination meetings were held in the US military compound at the airport – a manifestation of the physical distance, and in some cases mistrust, between the aid agencies and vulnerable groups.[55]

Remote management aims to mitigate the problems associated with the resulting physical distance from the field. At its most basic, bunkered – or risk-averse – international aid managers now often routinely work well outside of affected areas, through intermediaries able to operate beyond the strict security restrictions governing the movement of international and senior national staff. As we have seen, subcontracting and risk transfer arrangements typically utilise local staff, local NGOs, community organisations and private contractors – and, in some cases, as in Afghanistan, even military actors. This routine use of intermediaries has increased the organisational layers that now separate policies, assessments and programme planning from actual implementation on the ground. Problems of how to independently verify and evaluate the impact of assistance, not to mention protection, activities are now acute.

Aid in fragile states is in the midst of what appears to be a major transformation. The time-tested anthropological-type approaches for understanding local situations are being replaced by the technologies of geospatial remote data collection, the promise of 'big data' and the algorithms to interpret it.[56] In Darfur, satellite imagery has been used by the UN to track population movements and to assess natural resources, in particular the strategic availability of water. There are reports that the UN mission has been using a 'humanitarian drone' in the eastern DRC. OCHA has produced a very optimistic report on humanitarianism in a networked age. This is the latest in a growing literature advocating cyber-humanitarianism, in this case growing out of OCHA's experience in Haiti and more recent emergencies. There seems to be a potentially radical shift towards the use of technologies of distance, and not only in cases of denied access or widespread insecurity. The normalisation of remote management and other distance technologies, rather than their use as a last resort, carries potentially huge risks for the very nature of the humanitarian endeavour.

55 Mark Schuller, 'Haiti's Bitter Harvest: The NGOization of Humanitarian Aid', in A. Donini (ed.), *The Golden Fleece: Manipulation and Independence in Humanitarian Action*, pp. 179–193, Kumarian Press, Sterling, VA, 2012.

56 OCHA, *Humanitarianism in the Network Age*, United Nations, New York, 2013.

These developments raise a host of ethical issues for the future of humanitarian action. Undoubtedly, humanitarians can put distance technologies to positive use. They act as a simplifier and accelerator of tedious, time-consuming processes. They can allow spontaneous communities of vulnerable groups to emerge and articulate their needs, monitor agency activities, and broadcast information on programme ineffectiveness or critical issues, often bypassing the state or even established mainstream agencies (as in Haiti). They can be used to document human rights abuses (Darfur) or civilian casualties (Afghanistan). They can act as a tool for democratising the humanitarian enterprise and its knowledge base. At the same time, it is important to stress that many of the new cyber-technologies were originally developed for military and intelligence-gathering purposes. They are vulnerable to data mining for surveillance or political purposes; the information they carry can be manipulated or shut down at a moment's notice. They may well result in more rather than less political instrumentalisation of humanitarian action and more rather than less mistrust between the aid agencies and the communities they intend to serve.

The message from the proponents of 'big data' to the established humanitarian agencies is that, if they are to remain relevant, they must adapt to the network age and, in particular, open themselves to public–private partnerships. This adaptation is embraced by OCHA and a growing galaxy of non-profit and for-profit entities ranging from Ushahidi[57] to the innovation units of major INGOs.[58] Remote technologies are obviously here to stay. If they are to have a progressive future, however, they need demilitarising and opening to greater democratic control. More importantly, there is a clear risk that cyber-humanitarianism could contribute to deepening the disconnects and power differentials in the aid enterprise – by lengthening and technologising the chain of intermediaries between donors, agency decision-makers, aid workers on the ground and vulnerable groups. The humanitarian relationship already suffers from the lack of reciprocity between the giver and the receiver. Far too often, it is seen or felt as a dominant discourse where power is embedded in the nature of the top-down relationship. These features will be exacerbated by an uncritical use of remote management and other distance technologies.

The strength of traditional humanitarian approaches resided in the proximity and empathy that were at the core of a relationship which, even if it was unequal, stressed the common humanity of those involved. The future of humanitarian action as a compassionate endeavour is likely to hinge on its ability to maintain a critical balance between the promise of technology and the reality of

57 On Ushahidi, see Patrick Meier, 'New Information Technologies and Their Impact on the Humanitarian Sector', in *International Review of the Red Cross*, Vol. 93, No. 884, December 2011, pp. 1239–1263.

58 See, among many others, Save the Children's radio and SMS initiative; CARE International partnering with telecom providers on the 'Digital Early Warning Systems' project (summary available at: www.humanitarianinnovation.org/projects/large-grants/care-international); the 'Random Hacks of Kindness' joint initiative between Microsoft, Google, Yahoo, Hewlett-Packard, NASA and the World Bank (available at: www.rhok.org); see also Gaelle Sundelin, 'Iris-Scanning Technology Streamlines Refugee Registration Process — UNHCR', in *The Jordan Times*, 21 July 2013, available at: http://jordantimes.com/iris-scanning-technology-streamlines-refugee-registration-process----unhcr.

peoples' lives on the ground. Without a modicum of presence, empathy and solidarity, the humanitarian endeavour is at risk of losing its meaning.

Areas for future research

This article represents a first stab at a series of complex and under-studied issues. It raises more questions than answers and, ideally, more in-depth evidence-based research should follow it up. A number of key issues would need to be addressed through thematic and country-based studies in order to get a better and more comprehensive understanding of what works, what does not, and what the implications of remote management are for the future of humanitarian action.

In closing, we offer some of the questions that further research would need to answer:

- Is remote management simply a means of outsourcing risk to partners or local organisations? What is the cost to those organisations?
- Is there scope for an overall common approach in addressing the pros and cons of remote management in insecure environments to be addressed at least in part through joint humanitarian negotiations?
- Does remote management tend over time to become self-perpetuating? In places where it has become entrenched (such as Somalia and Afghanistan), has it in effect become the 'new normal'?
- Are remote sensing, reliance on 'big data' and other remote technologies partly what drive the tendency towards the increasing remoteness of humanitarian management, or is the development of such technology merely a means of coping with a deteriorating security and access situation?
- Is it possible to document the impact of remote management and distance technologies on respect for humanitarian principles and in particular on the protection of at-risk groups?
- Do 'Dunantist' organisations have a different approach to remote management from 'Wilsonian' or multi-mandate agencies? Is one approach more effective than the other in insecure environments?

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INTERNATIONAL REVIEW of the Red Cross

OPINION NOTE

The Occupied Palestinian Territory and international humanitarian law: a response to Peter Maurer

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Editor's note: *This opinion note presents a Palestinian perspective on the relevance and effectiveness of international humanitarian law to Israel and the Occupied Palestinian Territory. It continues the discussion initiated by ICRC's president Peter Maurer, in the previous issue of the* Review*, on the legality and humanitarian consequences of Israeli policies and practices regarding certain key issues related to the occupation, namely the routing of the West Bank Barrier, the building of Israeli settlements in the Occupied Palestinian Territory and the annexation of East Jerusalem. A response piece by Alan Baker, former legal adviser of Israel's Ministry of Foreign Affairs, to Peter Maurer's article was published in the same issue.*

In his article 'Challenges to international humanitarian law: Israel's occupation policy',[1] the president of the International Committee of the Red Cross (ICRC), Mr Peter Maurer, addresses the challenges that the application of international

humanitarian law (IHL) faces in the Middle East in general and in the context of the Israeli–Palestinian conflict in particular. Mr Maurer focuses on three main issues in relation to Israel's military occupation of the Palestinian territory: East Jerusalem, settlements and the Annexation Wall. Furthermore, he touches on the ICRC's confidentiality policy and suggests that the ICRC engage in public dialogue with parties to the conflict, especially when confidential dialogue fails to improve the lives of the affected people.

This response provides a legal perspective with respect to the issues raised by Mr Maurer and explains how Israel, the Occupying Power, has upset the fragile balance established by occupation law/IHL between the Occupying Power's duties and rights, notably by over-emphasising the latter to the detriment of the former. Furthermore, this response attempts to shed light on the impact of the three polices on the daily life of Palestinians. This opinion note also responds to Mr Maurer's point regarding the ICRC's engagement in public dialogue with parties to a conflict in order to improve the lives of those affected.

The ICRC's confidentiality policy

I have always viewed the ICRC's confidentiality policy with concern, especially when serious violations of IHL that may amount to war crimes and crimes against humanity are committed and when the core principles of IHL are manipulated to justify the military occupation of territory. While the wisdom behind the quiet diplomacy of the ICRC is linked to its neutrality, the absence of public positions may sometimes be perceived by perpetrators of crimes as an indication of their acceptance, thereby encouraging further criminal acts. For this reason, it is important that the ICRC raises its voice against all serious violations of IHL, especially when these violations are continuous. Hence, any decision by the ICRC to be more vocal about violations is welcome and much needed.

The value of Mr Maurer's suggestion to engage in more public dialogue with parties to the conflict resides in the fact that it is coming from a neutral and respected humanitarian organisation which expresses its exasperation with ongoing violations of international law. The ICRC would not have decided to engage in public dialogue unless Israeli violations had reached a level at which confidentiality was no longer of assistance. This should add to pressure on Israel to review its policies in order to ensure respect for the rights of Palestinian civilians living under military occupation. Furthermore, it may encourage third-state parties to apply other forms of pressure on Israel to stop its violations of IHL.

1 See Peter Maurer, 'Challenges to international humanitarian law: Israel's occupation policy', in *International Review of the Red Cross*, Vol. 94, No. 888, Winter 2012, available at: www.icrc.org/eng/assets/files/review/2013/irrc-888-maurer.pdf (last visited 8 February 2014).

Occupied or disputed territories?

Israel traditionally rejects the international consensus with respect to the status of the West Bank (including East Jerusalem) and Gaza Strip as an occupied territory to which IHL applies. This position has been frequently expressed by Israeli officials and scholars.[2] However, it is noteworthy that the Israeli Supreme Court considers the West Bank and Gaza (before the disengagement) as territories under belligerent occupation.[3]

Once the Israeli military occupation of the West Bank and Gaza Strip began in 1967, Israel declared, in a military order, that it would apply the Fourth Geneva Convention to the occupied territory.[4] However, this provision was revoked shortly thereafter, following pressure from Israeli politicians who viewed the occupation as an act of liberation.[5] Since then Israel has not accepted the *de jure* applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory. It has declared that it will abide by the humanitarian provisions of the Fourth Convention, but has failed to indicate which of these provisions it would apply.[6]

Israel's argument against the *de jure* applicability of the Convention is mainly premised upon its own interpretation of Common Article 2 of the Geneva Conventions.[7] According to this interpretation, the article applied only when the occupied territory belonged to a High Contracting Party.[8] In Israel's view, both Jordan and Egypt were Occupying Powers in the West Bank and Gaza Strip respectively and did not have sovereign rights over the territory. Furthermore, the territory did not belong to any sovereign to whom it should be returned.[9] In other words, the applicability of the Fourth Geneva Convention depends on the

2 For further information on this, see David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, SUNY series in Israeli Studies, University of New York Albany, 2002, pp. 32–33. See also Ardi Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territories', in *Harvard International Law Journal*, Winter 2003, p. 69.

3 See Israeli High Court of Justice (HCJ) 2056/04, *Beit Sourik Village Council* v. *The Government of Israel et al.*, 48(5) PD, p. 807, 2004; and HCJ 393/82, *Jami'at Ascan et al.* v. *IDF Commander in Judea and Samaria et al.*, 37(4) PD, p. 785, 1983.

4 The Military Order Concerning Security Regulations that is annexed to Proclamation No. 3 of 7 June 1967 states, *inter alia*, that military tribunals would be established by the area commander. Art. 35 of the Order states that 'the military tribunal and its administration shall apply the provisions of the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War in all legal proceedings. And in case of contradiction between the present Order and the Convention, the provisions of the Convention shall prevail.' Military orders are available in Arabic and Hebrew.

5 D. Kretzmer, above note 2, pp. 32–33.

6 See generally Yehuda Blum, 'The missing reversioner: reflections on the status of Judea and Samaria', in *Israel Law Review*, Vol. 3, 1968.

7 See generally Meir Shamgar, 'Legal concepts and problems of the Israeli military government – the initial stage', in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects*, Hebrew University, The Harry Institute for Legislative Research and Comparative Law, Jerusalem, 1982.

8 *Ibid*. See also Adam Roberts, 'Prolonged military occupation: the Israeli-Occupied Territories since 1967', in *American Journal of International Law*, Vol. 84, No. 1, 1990, p. 64.

9 Y. Blum, above note 6.

status quo ante of the occupied territory and inasmuch as no sovereign was ousted from it, the territory does not qualify as occupied.[10]

In an article entitled 'International humanitarian law, ICRC and Israel's status in the Territories',[11] also written in response to the piece by the ICRC president, Alan Baker appears to reject the international consensus with respect to the legal status of the Palestinian territory and more specifically reject the United Nations (UN) as an authoritative body whose resolutions must be respected and adhered to by states. At the same time, he invokes UN General Assembly Resolution 181 (known as the 'Partition Plan') to support his argument with respect to the status of the West Bank and Gaza Strip. In this context, he states that the resolution refers to the area that is located between the west of the River Jordan and the green line as 'Judea and Samaria'. It is true that the resolution uses this term to describe the area, but it should be borne in mind that the same resolution refers to the area located between the River Jordan and the Mediterranean Sea, including the so-called 'Judea and Samaria', as 'Palestine'.[12]

Israel's interpretation of Article 2 of the Fourth Geneva Convention has been the subject of wide criticism, including from eminent Israeli scholars.[13] The international community at large has confirmed on numerous occasions that the West Bank (including East Jerusalem) and Gaza Strip is occupied territory to which IHL applies. This position has been adopted by the UN and other international humanitarian organisations, including the ICRC, as clearly expressed by Mr Maurer in his paper. The UN Security Council first recognised this status in Resolution 242 of 22 November 1967, in which it emphasised the 'inadmissibility of the acquisition of territory by war' and called for the 'withdrawal of Israel armed forces from territories occupied in the recent conflict'.[14] The UN affirmed that the Fourth Geneva Convention applies to the territory in many other subsequent resolutions.[15] In its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice (ICJ) stated the following:

> [T]he Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention is

10 M. Shamgar, above note 7.

11 Alan Baker, 'International humanitarian law, ICRC and Israel's status in the Territories', in *International Review of the Red Cross*, Vol. 94, No. 888, Winter 2012, available at: www.icrc.org/eng/assets/files/review/2013/irrc-888-baker.pdf (last visited 10 February 2014).

12 See the text of GA Res. 181, 29 November 1947.

13 A. Roberts, above note 8; David Kretzmer, 'The law of belligerent occupation in the Supreme Court of Israel', in *International Review of the Red Cross*, Vol. 94, No. 885, Spring 2012, pp. 207–236; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009.

14 SC Res. 242, 22 November 1967.

15 See e.g. SC Res. 452, 20 July 1979; SC Res. 471, 5 June 1980; SC Res. 681, 20 December 1990; and SC Res. 904, 18 March 1994.

> applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.[16]

The ICRC provided a similar argument from the beginning of Israel's military occupation in 1967.[17] Based on this clear pronouncement by the ICJ and the ICRC's position taken earlier, Israel's arguments regarding the *de jure* non-applicability of the Fourth Geneva Convention, interpretation of Common Article 2 of the Geneva Conventions and the *status quo ante* of the occupied territory are untenable. It should be emphasised here that the Gaza Strip is still under Israeli military occupation as it is subject to Israel's effective control, a point that was also stressed by the ICRC president in his piece.[18]

Three main issues

East Jerusalem, settlements and the Annexation Wall are among the main issues in the Palestinian–Israeli conflict. Other issues include the Palestinian refugees' right to return in accordance with UN General Assembly Resolution 194 and international law, sovereign rights over natural resources including water, and Palestinian prisoners in Israeli jails. Each of these issues may be seen as constituting a multiplicity of violations that affect Palestinians' daily lives and as amounting to the protracted denial of their right to self-determination.

East Jerusalem

Shortly after its occupation of the West Bank and Gaza Strip, Israel took concrete steps to annex East Jerusalem. These steps included: the removal of the Mandelbaum Gate, which functioned as a crossing point between East and West Jerusalem; the approval of laws to create a legal framework for annexation; the extension of West Jerusalem Municipality's jurisdiction to East Jerusalem; and the application of Israeli laws to the city and its Palestinian inhabitants.[19] The then Israeli minister of foreign affairs, Abba Eban, informed the UN Secretary-General that the steps taken by Israel did not constitute an act of annexation and that they

16 International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 101.

17 M. Shamgar, above note 7, p. 32.

18 'International jurisprudence, some army manuals, and legal scholarship tend to propose a consistent approach to the notion of effective control based on the ability of the foreign forces to exert authority, in lieu of the territorial sovereign, through their unconsented-to and continued presence in the territory in question': see Tristan Ferraro, 'Determining the beginning and end of occupation under international humanitarian law', in *International Review of the Red Cross*, Vol. 94, No. 885, Spring 2012, p. 141.

19 Usama Halabi, *Israeli Laws and Judicial System as Tools for Accomplishing Political Objectives in Jerusalem – Main Stages in Consolidating Israeli Control over Jerusalem Contrary to International Law*, Civic Coalition for Defending Palestinians' Rights in Jerusalem (CCDPRJ), June 2007, available at: www.civiccoalition-jerusalem.org/system/files/documents/israeli_laws_and_judicial_system_as_tools_for_accomplishing_political_objectives_in_jerusalem_06-2007.pdf (last visited 1 March 2014).

were only administrative in nature.[20] Israel's actions were greeted with international condemnation. The UN Security Council condemned the steps and stated that 'all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status'.[21] In July 1980, an Israeli basic law was enacted that declared 'Jerusalem, complete and united' as 'the capital of Israel'.[22] As such, the annexation of East Jerusalem was given a 'legal' façade. The UN Security Council expressed concern over this step, reiterating 'the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem', and reaffirming its 'determination, in the event of non-compliance by Israel with the present resolution, to examine practical ways and means in accordance with relevant provisions of the Charter of the United Nations to secure the full implementation of the present resolution'.[23]

The unilateral annexation of East Jerusalem constituted a form of land acquisition through means of force, which is prohibited under international law and the UN Charter.[24] Principle 1 of the UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations states, *inter alia*, that 'no territorial acquisition resulting from the threat or use of force shall be recognised as legal'.[25] This principle is recognised as reflecting customary international law. Based on this, Israel's annexation of East Jerusalem is illegal and does not negate its legal status as occupied territory. As unilateral annexation of a territory or part of it cannot change its legal status, it follows that the civilian population of the territory remains protected within the meaning of the Fourth Geneva Convention. Article 47 of the Convention states that annexation of the whole or part of an occupied territory does not deprive protected persons of the protection accorded to them by the Convention.[26]

Annexation is contrary to the underlying principle of occupation law, particularly the fact that the Occupying Power does not acquire any sovereignty over the territory it occupies. Therefore, if the displaced sovereign loses *de facto*

20 Ruth Lapidoth, 'Jerusalem – some jurisprudential aspects', in *Catholic University Law Review*, Vol. 45, 1995–1996, p. 668.

21 See SC Res. 252, 21 May 1968.

22 See Basic Law: Jerusalem, Capital of Israel. An unofficial translation of the Basic Law is available on the website of the Israeli Knesset, at: www.knesset.gov.il/laws/special/eng/basic10_eng.htm (last visited 19 February 2014).

23 See SC Res. 476, 30 June 1980.

24 Art. 2(4) of the UN Charter provides: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

25 GA Res. 2625 (XXV), 24 October 1970.

26 The article states that 'protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory'.

possession of the occupied territory, it nonetheless retains it *de jure*. This principle is uncontested, and a well-recognised jurisprudence establishes that occupation constitutes a temporary situation neither operating nor implying any devolution of sovereignty.

As a result of Israel's policies in East Jerusalem, Palestinians are continuously denied the exercise of their human rights. Movement restrictions that are imposed in East Jerusalem take a heavy toll on their rights, *inter alia*, to family, health, education, worship, and work, as they make it impossible for Palestinians from other parts of the occupied territory to have free access to the city. Palestinians wishing to enter Jerusalem are required to obtain a special permit by the Israeli authorities. To get such a permit, applicants have to undergo a complex process and in most cases the permit is not granted. The usual pretext for permit rejection is 'security'. Due to the fact that Israel annexed East Jerusalem and applied Israeli law, Israel treats the presence of Palestinians from other parts of the West Bank in the city without a permit as 'illegal'. Even in cases where the applicant is in need of urgent medical care that is not available in hospitals in the other cities of the Occupied Palestinian Territory, the permit may not be granted.[27]

Another central right that is violated as a result of the annexation is the right to family life. Palestinians from Jerusalem who wish to marry a Palestinian from another part of the occupied territory cannot live together in the city as long as one spouse does not hold a Jerusalem ID card.[28] If the couple decides to live together in another city, the spouse who holds the Jerusalem ID card may have his/her ID card revoked, which deprives him/her of health services and other social rights and from living in Jerusalem again. According to the Jerusalem Legal Aid Center, 14,232 Jerusalemites had their ID cards revoked by Israeli authorities between 1967 and the end of October 2012.[29] This number includes only those who were directly affected by ID card revocation – in all cases, such revocations also impacted other family members of the directly affected persons. If these were included, the number would be much higher. Furthermore, the number does not include many Palestinians who left the country in and around 1967 and have not been able to return. These restrictions on the right to family life apply to the Palestinian population only.

The enactment of the 2003 Nationality and Entry into Israel Law has imposed further restrictions on Palestinian spouses who wish to live together in East Jerusalem. Israeli authorities claim that this law is temporary, but it has been in force since 2003 and is renewed on an annual basis. The most recent renewal of the Law took place on 19 March 2014. A 2005 amended version of the Law provides that Palestinian men over thirty-five years of age and Palestinian women over twenty-five years of age can submit a family reunification application to the Israeli authorities. This seemingly positive development has added another complication to the already difficult family unification application process. It is common in Palestinian society

27 Al-Haq has documented many such cases. Affidavits are available at Al-Haq's office.
28 Palestinian inhabitants of Jerusalem are given special ID cards, which allow them to live in the city. They are treated as permanent residents.
29 Information gained through private correspondence with the Jerusalem Legal Aid Center.

that people marry at an early age. The majority of men marry in their early twenties and women marry around the same age, if not earlier. The amendment would then mean that Palestinian men wishing to apply for family reunification have to wait at least ten years after their marriage before they become eligible. This increases the number of forcibly separated families and widens the circle of people and families that suffer as a result of the annexation.[30]

Under IHL, the Occupying Power must respect the laws in force in the occupied territory. It is also a fundamental principle of the law of occupation that the Occupying Power is not the sovereign of the territories it occupies, as occupation is meant to be temporary in nature. Article 43 of the regulations annexed to the Hague Convention (IV) of 1907 states:

> [T]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Imposition of the Israeli laws on East Jerusalem violates this provision, which reflects customary international law. Further, under the Fourth Geneva Convention, the Occupying Power is under a legal obligation to respect the rights of protected persons in all circumstances, including 'their honor and their family rights'.[31] According to the ICRC Commentaries on the Fourth Geneva Convention, this provision 'is intended to safeguard the marriage ties and the community of parents and children which constitutes a family, "the natural and fundamental group unit of society"'.[32] It also stresses that 'the family dwelling and home are therefore protected' and that 'they cannot be the object of arbitrary interference'.[33]

Furthermore, Israeli policies in Jerusalem may amount to a form of apartheid. Restrictions on Palestinian family unification have been carried out based on an Israeli law that discriminates against Palestinians. The law prevents Palestinians as a group from exercising their right to freedom of movement and residence and as a consequence prevents them from living together as families and from developing in the city. Under Article 2(c) of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 'any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of

30 For further information on the 2003 Nationality and Entry into Israel Law, see the website of the Legal Center for Arab Minority Rights in Israel (Adalah), at: www.adalah.org.

31 See Art. 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949.

32 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV: *Geneva Convention relative the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1960, p. 202.

33 *Ibid.*

a racial group or groups basic human rights and freedoms, including … the right to freedom of movement and residence', constitute an act of apartheid.[34] As the right to family life and family unification within this context is based primarily on persons' right to move freely and to chose their place of residence within the occupied territory, the 2003 law may be seen as a legislative measure that enforces apartheid.

Settlements Policy

The establishment and expansion of settlements in the Occupied Palestinian Territory is another Israeli policy that aims at land annexation and undermines any possibility for the establishment of an independent Palestinian state on all of the territory that was occupied in 1967. Settlements stand today as an insurmountable obstacle to the conclusion of a genuine peace agreement that is based on justice and international law. New settlements are being built and the existing settlements are being expanded in spite of the 'peace' talks between the two parties. Apparently, peace talks are utilised as a cover by Israel to expand its settlement policy and to create facts on the ground to the detriment of Palestinians' sovereign rights. This was clear from the outset of Israeli occupation, as reflected in statements by Israeli officials. According to Shlomo Gazit, the first coordinator of the Israeli government's 'operations' in the occupied Palestinian territory:

> it was clear that the Israeli settlements in the Territories, and especially in the densely populated areas, had far-reaching political consequences. These settlements are intended to establish new facts to affect the future political solution. It was clear that establishment of the Israeli civilian settlements is a kind of statement of policy, whose weight is not much less than the Knesset's decision in 1967 to annex East Jerusalem: this settlement was established on land from which Israel does not intend to withdraw.[35]

Under IHL, the Occupying Power may 'not deport or transfer parts of its own civilian population into the territory it occupies'.[36] According to the ICRC, deportation or transfer within the meaning of this specific paragraph of Article 49 of the Fourth Geneva Convention differs from the meaning of deportation and transfer used in paragraph 1 of the same article.[37] Paragraph 1 prohibits the transfer and deportation of protected persons from an occupied territory by force – that is, against their will – while paragraph 6 prohibits the deportation or transfer of

34 For further information on Israel's apartheid policy and on whether the Palestinians and Israelis form racial groups for the purpose of apartheid definition under international law, see generally Virginia Tilley (ed.), *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, Pluto Press, London and New York, 2012.

35 Shlomo Gazit, *Trapped Fools: Thirty Years of Israeli Policy in the Territories*, Frank Cass, UK and Portland, OR, 2003, p. 217.

36 See Art. 49, para. 6, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949.

37 J. Pictet (ed.), above note 32, p. 283.

the Occupying Power's own civilians to the occupied territory irrespective of how it is carried out, whether by force or wilfully.[38] Transfer within the meaning of paragraph 6 is prohibited, whether it is carried out forcibly or upon the will of the citizens, because the main goal behind this prohibition is to prevent the colonisation of an occupied territory.[39] In other words, the voluntary movement of the Occupying Power's nationals into an occupied territory is prohibited in order to prevent colonisation taking place.

A recently uncovered document shows that the then legal adviser to the Israeli Ministry of Foreign Affairs in 1967, Theodor Meron, drafted a Memorandum for the Ministry on the matter of 'Settlement in the Administered Territories', in which he expressed the view that settlement in the Occupied Palestinian Territory contravenes explicit provisions of the Fourth Geneva Convention, including Article 49(6).[40]

Settlement in the Occupied Palestinian Territory may be seen as a compound and continuing crime. In the course of occupation, privately owned land is appropriated and damaged. Under Article 147 of the Fourth Geneva Convention, 'extensive destruction and appropriation of property, not justified by military necessity', qualifies as a grave breach of the Convention. If read in conjunction with Article 8(2)(a) of the Rome Statute of the International Criminal Court,[41] grave breaches enumerated in Article 147 of the Convention, including appropriation and destruction of properties, amount to war crimes.[42] In addition, deporting or transferring parts of the Occupying Power's civilian population into the territory it occupies also constitutes a war crime under the Rome Statute.[43]

Settlements themselves have been built on hilltops around the main Palestinian cities and close to villages. A special network of roads has been established to connect these settlements to each other and to Israel. Some of the roads are made for exclusive use by Israeli citizens. The movement of settlers is facilitated at the expense of Palestinians' right to property and to freedom of movement within the occupied territory. Settlements and their associated regime of road networks, as well as the Wall, have divided the West Bank into parts and thus prevented the Palestinian people from exercising the right to self-determination, including the establishment of a Palestinian state on all of the occupied territory. Furthermore, Palestinians' natural resources are exploited for the benefit of settlers.

38 *Ibid*., pp. 278–280 and 283.
39 *Ibid*., pp. 278–280.
40 The English translation of the document is available at: www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf (last visited 12 March 2014).
41 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc A/CONF. 183/9.
42 It should be noted that Israel has not ratified the Rome Statute of the ICC.
43 Under Art. 8(b)(viii) of the Statute, 'the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory', amounts to a war crime.

For example, water allocation for settlers is much higher than that allocated for Palestinians.[44]

In addition to the violations of IHL that emanate from settlement construction, Palestinians and their private property are assaulted and trespassed on by Israeli settlers almost on a daily basis.[45] Settler violence against Palestinians largely goes unpunished. Even in cases where the assaulting settlers are prosecuted, the severity of the punishment is inadequate given the nature of the crime.

The Annexation Wall

Once Israel started the construction of the Wall, it became clear, contrary to Israel's claims, that it was intended to be permanent and that its route was carefully planned to include Israeli settlements and other fertile agricultural land of the occupied West Bank. Upon its completion, the Wall will include 80 per cent of the settlements in the West Bank.[46] It is estimated that 100,000 dunums of fertile agricultural land was appropriated and/or destroyed during phase one of the Wall's construction.[47] The ICJ showed foresight when it concluded in 2004 that 'the construction of the wall and its associated regime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the Wall by Israel, it would be tantamount to *de facto* annexation'.[48] If the Wall was constructed for 'security considerations', as claimed by Mr Baker in his paper,[49] it would have been built along the Green Line.

As outlined by Mr Maurer in his paper, the construction of the Wall 'to the extent it deviates from the Green Line established at the end of the 1948 Arab–Israeli war not only violates IHL but further undermines the living conditions of the affected communities.'[50] The Wall has so far separated Palestinian villages and neighbourhoods from each other and from services provided in nearby cities. For example, eight Palestinian communities close to the village of Barta'a in the north of the West Bank have been separated from services they receive from the city of Jenin.[51] In cases of emergency, access of health personnel and Civil Defence members to this area is gravely hindered because of delays and searches at checkpoints that are part of the Wall system. The situation of these eight

44 See Elisabeth Koek, *Water for One People Only: Discriminatory Access and 'Water-Apartheid' in the OPT*, Al-Haq, 2013.
45 Al-Haq has documented many of these assaults. For some examples see affidavits 9360/2014, 9338/2014, 9355/2014, 9342/2014.
46 ICJ, above note 16, para. 119.
47 Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, UN Doc. A/58/311, 22 August 2003, para. 26. (Editor's note: 100,000 dunums equals 10,000 hectares.)
48 ICJ, above note 16, para. 121.
49 A. Baker, above note 11, p. 1519.
50 P. Maurer, above note 1, p. 1507.
51 Office for the Coordination of Humanitarian Affairs (OCHA), *The Humanitarian Impact of the Barrier*, July 2013, available at: www.ochaopt.org/documents/ocha_opt_barrier_factsheet_july_2013_english.pdf (last visited 1 March 2014).

communities is not unique. Upon the completion of the Wall in western Bethlehem, over 23,000 persons living in nine villages will have restricted access to basic services, including health services and education.[52] In addition, many communities have been separated from their agricultural land, on which they rely for survival. These are just a few examples of how the Wall impacts Palestinians' daily lives and increases their suffering.

In this way, Israeli policies violate the Hague Convention (IV) of 1907 and its annexed regulations, and the Fourth Geneva Convention, in particular the legal obligation to respect the rights of protected persons in all circumstances.

Manipulation of IHL principles by Israel

Israel traditionally justifies its violations of IHL under different pretexts. Explanations provided by Israel are rarely consistent with the provisions of IHL. Examples in this respect are numerous.

Israeli justifications for the construction of the Wall are one example. Israel invoked the state of necessity to justify the construction of the Wall. This justification was rejected by the ICJ. In its Advisory Opinion on the Wall, the Court cited an earlier case[53] to argue that the necessity argument 'can only be accepted on an exceptional basis' and that it 'can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met'.[54] The Court therefore was not convinced that the route of the Wall was planned to protect Israel's security from suicide attacks.[55]

House demolitions are another example of violations that Israel commits and justifies in a manner that is inconsistent with its obligations under the provisions of the Fourth Geneva Convention. Since the start of Israel's occupation in 1967, Israel has demolished thousands of Palestinians' houses. Many of these houses have been demolished because a family member participated in what Israel calls a 'terrorist' attack.[56] This act qualifies as a form of collective punishment as Israel is in fact punishing an entire family for the alleged conduct of one of its members. However, Israel does not recognise such acts as collective punishments prohibited

52 *Ibid.*

53 ICJ, *Case concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25 September 1997, *ICJ Reports 1997*, p. 7, para. 51.

54 *Ibid.*

55 Above note 16, para. 140.

56 The number of houses demolished under this pretext has decreased noticeably over the past few years. However, the policy is still effective in spite of a recommendation to stop it in 2005 by a military committee headed by Major General Udi Shani as it proved to be 'counterproductive'. According to Al-Haq, the most recent house demolition under this pretext took place on 5 February 2014 and targeted the house of Mujahed Sawalmeh's family in the Al-Far'ah refugee camp in Tubas. For further information on this, see Al-Haq affidavit 9335/2014. For further information on the recommendation and subsequent calls opposing it, see Amnon Straschnov, 'Don't destroy terrorists' homes', in *Haaretz*, 6 July 2008, available at: www.haaretz.com/print-edition/opinion/don-t-destroy-terrorists-homes-1.249175 (last visited 17 March 2014).

under Article 33 of the Fourth Geneva Convention. It has referred to the demolitions as 'deterrence', intended to dissuade others from attacking Israeli soldiers or civilians. In so doing, Israeli authorities ignore the protected status of the family members and their home.[57] In other words, it is a message to those who think about committing similar acts and their families that they will face the same consequences. To avoid referring to such actions by their correct name – that is, collective punishment – and evade possible criminal responsibility for an act that qualifies as a war crime, Israel calls it 'deterrence'. By providing this justification, Israel violates IHL and the core humanitarian tenets referred to by the president of the ICRC.

Conclusion

Israel's occupation of the Palestinian territory is now almost fifty years in existence. Palestinians and international organisations and experts have been restating the obvious with respect to the legal status of the Palestinian territory and Israel's violations of international law. Palestinians appreciate organisations and individuals, including the ICRC, that adopt positions and provide analyses regarding the relevance and applicability of international law, and consequently support the rights of the Palestinian population. However, in order for us, the Palestinians, and those who believe in their just cause and in the necessity of international law as a norm that should be applied to all equally, to exceed the limits of theoretical legal debates and discussions with respect to the Palestinian–Israeli conflict, we believe that concrete steps must be taken to restore the value of IHL universally and amongst Palestinians in particular. Unless such steps are taken, all analyses regarding the legal status of the Palestinian territory and Israel's violations of international law are little more than an intellectual exercise.

Some peace proposals deal with settlements, the Wall and the annexation of East Jerusalem as irreversible facts. Such proposals are not a basis for a lasting and just solution founded on principles of international law.

Students often ask about the effectiveness of IHL in relation to the Occupied Palestinian Territory, given Israel's complete disregard for these principles and the international community's failure to date to take any concrete steps to ensure Israel's compliance with this body of international law. My answer to this frequent question is the following: in spite of the fact that IHL in its present form has some lacunae that prevent it from dealing with the new realities of modern warfare and prolonged military occupation, it is, in principle, one of the most significant legal achievements of humanity.[58] Imagine a situation in which Israel, the

57 The definition of protected persons within the meaning of the Fourth Geneva Convention is provided in Art. 4 of the Convention.

58 Regarding prolonged occupation in particular, the ICRC believes that occupation law is, on the whole, adequate to meet the challenges of today's occupations. The ICRC recently led a project that produced the report *Occupation and Other Forms of Administration of Foreign Territory*. The purpose of this initiative, which began in 2007, was to analyse whether and to what extent the rules of occupation law are adequate

Occupying Power, respected international law, or the High Contracting Parties to the Fourth Geneva Convention upheld their legal obligations and had taken action against Israel's occupation in its early stages rather than leaving the situation to reach the current level of deterioration. In such a scenario, the occupation would have probably ended already as it would not have been used as a façade for the colonial enterprise that Israel has pursued at the expense of the right of the Palestinian people to self-determination. On the contrary, Israel's continuous violations of IHL and its impunity have undermined the value of such an important branch of international law and consequently Palestinians have little faith in international law and in those responsible for its implementation.

Furthermore, peace would be easier to achieve and any agreement reached – more sustainable, had the provisions of international law been upheld impartially and since the very outset of Israel's occupation of Palestine. The Israeli–Palestinian conflict, sadly, represents a good example of the challenges to duly implementing IHL, and in particular the law of occupation, when one of the parties to the conflict wilfully disregards its basic tenets, such as the temporary nature of occupation and the prohibition on transferring sovereign rights onto the Occupying Power. This should be a lesson for the future: ensuring respect and implementation of IHL is paramount in order to preserve the value of the law and its ability to protect civilians and their rights from the effects of armed conflicts.

to deal with the humanitarian and legal challenges arising in contemporary occupations, and whether they might need to be reaffirmed, clarified or developed. The overall picture emanating from the expert consultations was that the law of occupation, because of its inherent flexibility, is sufficiently equipped to provide practical answers to most of the humanitarian and legal challenges arising from contemporary occupations. See Tristan Ferraro, *The ICRC Project on Occupation and Other Forms of Administration of Foreign Territory*, 2012, p. 2, available at: www.icrc.org/eng/assets/files/review/2012/irrc-885-occupation-report.pdf.

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INTERNATIONAL REVIEW of the Red Cross

REPORTS AND DOCUMENTS

What's new in law and case law around the world?*

Biannual update on national implementation of international humanitarian law related treaties July – December 2012

The biannual update on national legislation and case law is an important tool in promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL). The ICRC was entrusted with this task in a resolution adopted by the 26th International Conference of the Red Cross and Red Crescent in 1995.

The laws and case law presented below were either adopted by States or delivered by domestic tribunals in the second half of 2012 (July–December) or collected by the Advisory Service during that period. They cover a variety of topics linked to IHL such as status of protected persons, torture, and protection of cultural

ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with the technical expertise required to incorporate international humanitarian law into their domestic legal frameworks; (iii) to collect and facilitate the exchange of information on national implementation measures; and (iv) to support the work of committees on IHL and other bodies established to facilitation the IHL implementation process.

* This selection of national legislation and case law has been prepared by Jana Panakova, Legal Attachée of the ICRC Advisory Service on International Humanitarian Law.

property during an armed conflict or jurisdiction of military tribunals. The full texts of these laws and case law can be found in the ICRC's database on national implementation at: http://www.icrc.org/ihl-nat.

To further its work on implementation of IHL, the ICRC organised a number of workshops and national and regional events in the period under review. Of particular interest was for example the *12th Annual Regional Seminar on International Humanitarian Law* in Pretoria in August 2012, organised by the ICRC Delegation in Pretoria with support from the Advisory Service and co-hosted by South Africa's Department of International Relations and Cooperation. The Seminar brought together representatives of Ministries of Foreign Affairs, Defence, and Justice, as well as Parliamentarians from eighteen countries including Kenya, Uganda, Zimbabwe, Madagascar or South Sudan. For the first time the Seminar was opened to the members of the African Union Commission on International Law, who participated as observers. The aim of the Seminar was to share the experience of the participating countries with regard to the functioning of the National IHL Committees and ratification and implementation of weapons treaties, notably the Convention on Cluster Munitions, Arms Trade Treaty and African Nuclear-Weapon-Free Zone Treaty.

Another way in which the Advisory Service facilitates the domestic implementation of IHL is through support of the National IHL Committees or similar bodies – inter-ministerial or inter-institutional bodies which advise the governments of their respective countries on all matters related to IHL. Such Committees *inter alia* promote ratification of or accession to IHL treaties, make proposals for harmonisation of the domestic legislation with provisions of these treaties and participate in the formulation of the state's position regarding IHL-related matters. There were 101 National IHL Committees across the world by the end of 2012. It is worth noting that in December 2012, Egypt's post-revolution Government decided to re-establish the National IHL Committee previously created in 2000.

Universal participation in IHL treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict, and is therefore a priority for the ICRC. In the period under review, nine of the twenty-eight main IHL and other related international conventions and protocols[1] were ratified or acceded to by various States. In particular, there has been notable accession to the *Convention on Cluster Munitions* (CCM). Five states have ratified the Convention in the second half of 2012 and at least four have adopted legislation that gives domestic effect to the Convention's provisions. In this regard it is worth noting that although the CCM was adopted rather recently, it had already seventy-seven States Party by the end of 2012, showing the true interest of States in regulating and prohibiting the use of weapons that have taken a heavy toll on civilians for the past 40 years both, during fighting and after the end of military operations.

Apart from the twenty-eight IHL-related international conventions and protocols mentioned above, the Advisory Service also follows ratification of

1 To view the full list of IHL-related treaties, please visit the ICRC Treaty Database: http://www.icrc.org/ihl.

other international treaties that may be of a relevance *inter alia* for the protection of persons during armed conflict and the prevention and repression of violations of IHL, such as the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or *International Convention for the Protection of all Persons from Enforced Disappearance*. With regards to the latter, four states have ratified the Convention in the second half of 2012, bringing the total number of ratifications as of 31 December 2012 to 37. The Convention entered into force in December 2010.

Ratifications and Accessions

JULY – DECEMBER 2012

Conventions	States	Ratification date	Total number of ratifications
1980 Convention on Conventional Weapons	Burundi	13 July 2012	**115**
1980 Protocol II to the Convention on Conventional Weapons	Burundi	13 July 2012	**92**
1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	United Arab Emirates Lao (People's Democratic Republic of) Nauru	19 July 2012 26 September 2012 26 September 2012	**153**
1995 Protocol IV to the Convention on Conventional Weapons	Cuba	14 November 2012	**101**
1997 Anti-Personnel Mine Ban Convention	Poland	27 December 2012	**161**
1999 Hague Protocol to the Hague Convention on Cultural Property	Mali	15 November 2012	**64**
2000 Optional Protocol to the Convention on the Rights of Child	Indonesia Nigeria Swaziland	24 September 2012 25 September 2012 24 September 2012	**150**
2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Mauritania Austria	3 October 2012 4 December 2012	**65**

(*Cont.*)

Conventions	States	Ratification date	Total number of ratifications
2003 Protocol V to the Convention on Conventional Weapons	Burundi Turkmenistan Cuba	13 July 2012 23 July 2012 14 November 2012	**81**
2005 Additional Protocol III to the Geneva Conventions	Uruguay	19 October 2012	**61**
2006 Convention against Enforced Disappearances	Colombia Peru Mauritania Samoa	11 July 2012 26 September 2012 3 October 2012 27 November 2012	**37**
2008 Convention on Cluster Munitions	Hungary Cameroon Switzerland Peru Australia	3 July 2012 12 July 2012 17 July 2012 26 September 2012 8 October 2012	**77**

National implementation of international humanitarian law

A. Legislation

Australia

Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012

On 21 August 2012, Australia's Senate passed the *Criminal Code Amendment (Cluster Munitions Prohibition) Act*. The Act amends the *Criminal Code Act of 1995*, ensuring consistency between Australian law and the *Convention on Cluster Munitions* (hereinafter CCM) by creating offences and penalties in relation to cluster munitions and explosive bomblets. The substantive provisions of the Act commence on the day the CCM comes into force for Australia – on the first day of the sixth month after Australia deposits its instrument of ratification. Australia ratified the CCM on 8 October 2012.

The definitions of cluster munition and explosive bomblets provided for in the Act correspond to those stipulated in the CCM. The Acts prohibits the direct use, development, production, acquiring, stockpiling, retention and transfer of cluster munition. Additionally, the same penalty (10 years of imprisonment) applies to those who assist, encourage or induce another person to do any of the proscribed acts presuming that the latter person carries out the act and the former one intended the act to be carried out.

The Act further provides for four situations – 'defences' – whereby specific circumstances allow for exceptions to the stipulated prohibitions. Firstly, the Minister of Defence can authorise specified members of the Australian Defence Force (hereinafter ADF) or other Australian public officials to acquire or retain specified cluster munitions for the purpose of either development of or training in cluster munition detection, clearance or destruction; for development of cluster munition counter-measures; or for their destruction. Secondly, cluster munitions may be transferred for the same purpose to another State Party to the CCM. Thirdly, Australians who are members of the ADF would not commit an offence under the present Act if they act in the course of military cooperation with a country not party to the CCM; their conduct is not connected with the Commonwealth committing any of the acts prohibited by the present law (e.g. use, production, stockpiling or transfer of cluster munition); and it does not consist of expressly requesting the use of cluster munitions where the choice of munition used is within Australia's effective control. And lastly, the Act allows for the stockpiling, retention or transfer of a cluster munition by a member of the armed forces or by a person connected with these armed forces of a country that is not Party to the CCM and it is done in the course of military cooperation with the ADF and in connection with the use of a base, an aircraft or a ship on the Australian territory by the said foreign armed forces.

Colombia

Legislative Act 1 of 2012 which establishes legal instruments of the transitional justice within the framework of article 22 of the Constitution and other provisions, 31 July 2012

The Legislative Act 1/2012, or so-called *Legal Framework for Peace*, amends the Constitution of Colombia by inserting two transitory articles 66 and 67. The former article writes transitional justice into the Constitution with the expressed aim to end the non-international armed conflict, secure lasting peace and security for the people of Colombia, while guaranteeing the right of victims to truth, justice and reparations.

The Act introduces the concept of 'transitional justice instruments' and instructs Congress to adopt a statutory law in this regard. A law shall equally establish a Truth Commission, the mandate of which may include formulation of the recommendations for the application of the transitional justice instruments. Inherent in the transitional justice mechanisms are also criteria for prioritization of penal prosecution, which shall be determined by the Attorney General.

The Act further instructs Congress to determine the selection criteria that would allow to focus the efforts on the criminal investigation of those most responsible for war crimes, genocide and crimes against humanity; and to authorise a conditional waiver of criminal prosecution in all cases that have not been selected.

The gravity and representativeness of a case shall be taken into account when drafting the criteria for selection. Through a statutory law, Congress shall further determine in which cases the convicted individual is eligible for a suspension of the sentence or for an alternative sentence.

Such a differentiated treatment shall only be available in the framework of a peace agreement and shall apply to 'illegal armed groups that have taken part in the non-international armed conflict' on one hand and to the state agents in relation to their participation in the same conflict on the other. 'Illegal armed groups that have not taken part in the non-international armed conflict' are excluded from the application of the transitional justice instruments; and so are members of illegal armed groups that have recidivated after their demobilisation. Further conditions include handing over weapons, contributing to the clarification of the truth, providing reparation to the victims, releasing hostages and unlawfully recruited minors.

The new provisional article 67 foresees a statutory law that would determine which crimes are to be considered 'political crimes' for the purpose of future participation in politics. It explicitly excludes from future participation in politics those who were convicted and sentenced for either genocide or crimes against humanity.

The deadline for Congress to adopt the laws that will give effect to the Legislative Act 1/2012 is four years.

Legislative Act No. 2 of 2012 that amends articles 116, 152 and 221 of the Constitution of Colombia

On 27 December 2012, the President of the Republic of Colombia signed into law Legislative Act No. 2 of 2012 that modifies the Colombian Constitution by expanding the scope of country's military criminal jurisdiction.

The Act establishes a 'Court of Criminal Guarantees' (*Tribunal de Guarantías Penales*) that will monitor any investigation or prosecution of a member of the Public Force (*La Fuerza Pública*; includes both armed and police forces). The Court shall also settle any jurisdictional conflicts that may arise between the ordinary jurisdiction and the military one.

In Article 3, the Act equips courts-martial, military and police courts with an exclusive jurisdiction over offences committed by members of the Public Force in active service and in relation to this service, as well as an exclusive jurisdiction to prosecute violations of international humanitarian law (with the exceptions listed below) committed by members of the same force. Crimes against humanity, genocide, enforced disappearances, extrajudicial executions, sexual violence, torture and forced displacement are however explicitly excluded from the subject-matter jurisdiction of the military judiciary.

The Act further stipulates that in cases where the acts of the members of the Public Force are committed in relation to an armed conflict, the investigating and prosecuting authorities shall apply exclusively international humanitarian law

(IHL). Here the Act foresees a statutory law that would harmonise the Colombian penal law with the rules of IHL and interpret the latter.

Law No. 1592 of 2012 which introduces amendments to Law No. 975 of 2005 by enacting provisions for the reintegration of members of armed groups outside the law, which shall effectively contribute to the achievement of national peace, as well as other provisions for humanitarian agreements and other provisions

Law No. 1592, adopted on 3 December 2012, amends the Law No. 975 of 2005 on the demobilisation of illegal armed groups, otherwise known as the *Justice and Peace Law*. Among other modifications it also harmonises the latter with *Law No. 1448 on the provision of attention, assistance and integral reparation to the victims of the internal armed conflict and other provisions* that was adopted in 2011.

The Law broadens the definition of victims in the *Justice and Peace Law* by including family members of the direct victims that have suffered damage as a result of crimes committed by the 'illegal armed groups'. It equally provides for differential approach and special protection of particularly vulnerable groups, notably women, children, elderly, indigenous communities, farmers, social leaders, Unions members, victims of forced displacement, disabled people or members of racial and ethnical minorities.

Furthermore, according to Law 1592, the aim of the justice and peace process should not only be to establish the truth about the facts under investigation, but also to identify 'patterns of macro-criminality' in the actions of 'illegal armed groups' and to 'reveal the contexts, causes and the reasons for it'.

Another significant change is the inclusion of a notion of *priorización de casos* (prioritisation of cases). The Law mandates the Office of the Attorney General to determine the prioritization criteria for the exercise of criminal action, aiming at clarifying the macro-criminality pattern in the actions of the illegal armed groups, while concentrating research efforts on those bearing the greatest responsibility for the said actions.

The Law further provides grounds for termination of or withdrawal from the justice and peace process; for the exclusion from the list of the candidates for the justice and peace process; as well as for revocation of alternative sanctions and legal benefits, e.g. when it is revealed that the beneficiary did not acknowledge all the crimes committed or did not hand to the authorities all the property acquired either by him/her or by the illegal armed group.

Lastly, the Law 1592 attributes primacy to the justice and peace system over the ordinary justice system, stipulating that 'in cases of conflict or collision between jurisdictions of Higher Judicial District Courts having jurisdiction over the cases referred to in the present Law and any other judicial authority, jurisdiction of the Justice and Peace judiciary will always prevail'.

Guatemala

Cluster Munitions and Explosive Bomblets Act 2012, Decree No. 22/2012

On 7 September 2012, the Congress of the Republic of Guatemala adopted an act implementing the *Convention on Cluster Munitions* that the country ratified in November 2010. The Act largely follows the language of the Convention, prohibiting the use, development, production, acquisition, stockpiling, retention and transfer, whether direct or indirect, of cluster munitions and explosive bomblets. It equally proscribes the manufacture, import, export, possession and carrying of cluster munitions, as well as acting as an intermediary in any of those activities. Those held accountable for any of the above listed offences could be sentenced to 12–18 years of imprisonment. To 10–15 years would be sentenced those who assist, encourage or induce a person to participate in any of the above listed acts.

The Act foresees three types of situations where the otherwise proscribed conduct would not constitute a punishable offence: when the acquisition, possession or retention of cluster munitions is authorised by the Ministry of Defence for the purpose of the development of or training in cluster munition detection, clearance or destruction; when the possession, retention of transfer of cluster munitions is necessary for their deactivation or destruction or for the purpose of a criminal proceeding; and when Guatemala participates in a common operation with countries not parties to the CCM.

Section 10 of the Act provides for assistance to the existing victims of the use of cluster munitions by obliging the Ministry of Public Health and Social Assistance to design a plan that would secure victims' protection.

Lastly, the *Cluster Munitions and Explosive Bomblets Act 2012* also amends the Guatemala's *Arms and Ammunition Act of 2009* by including a more comprehensive definition of what constitutes a chemical weapon.

Nauru

Geneva Conventions Act 2012

On 6 November 2012, the Parliament of the Republic of Nauru passed an act that gives effect to the *1949 Geneva Conventions* and their *1977* and *2005 Additional Protocols*. The Act was drafted on the basis of the ICRC Model Law for the implementation of the Geneva Conventions.[2] The Act criminalises breaches against the Conventions, provides protection against the misuse of protected emblems and other protected items and provides guidance as to the legal proceeding against protected prisoners of war and protected internees.

2 For the text of the *Geneva Conventions and Additional Protocols Model Law,* please visit: http://www.icrc.org/eng/assets/files/other/model_law_gc-ap-i-ii-iii.pdf

New Zealand

Geneva Conventions (Third Protocol – Red Crystal Emblem) Amendment Act 2012

On 11 December 2012, New Zealand amended the *Geneva Conventions Act* of 1958 by introducing an additional distinctive emblem of the Red Crystal and thus implementing the 2005 Additional Protocol III to the Geneva Conventions.

Cultural Property (Protection in Armed Conflict) Act 2012

On 11 December 2012, the Royal Assent was given to the *Cultural Property Act* that gives effect to the *1954 Hague Convention on the Protection of Cultural Property* and meets various obligations required before New Zealand can accede to the Convention's *1954* and *1999 Protocols*. The Act equally amends the *New Zealand Extradition Act of 1999, the 1981 Flags, Emblems and Names Protection* Act and *1992 Mutual Assistance in Criminal Matters Act.*

The definition of what constitutes 'cultural property' is identical with the definition found in the 1954 Convention. The Act criminalises largely three groups of offences: (1) serious violations of *Second Protocol to the 1954 Hague Convention* (the most serious of violations are qualified as 'grave violation offences'); (2) removal of cultural property from the occupied territory; and (3) unauthorised use of the distinctive emblem of the *1954 Hague Convention*. None of these offences can however be prosecuted without the consent of the Attorney General. A person alleged to have committed an offence may be nonetheless arrested or a warrant for his/her arrest may be issued and executed, but no further proceedings may be taken until the consent has been obtained.

The Act further provides for responsibility of superiors for acts committed by those under their effective command and control, as well as for responsibility of directors and managers of corporate bodies for offences committed by the latter.

The jurisdiction of New Zealand courts to prosecute offences committed under this Act is not limited to the acts committed on the territory of New Zealand, but extends to the serious violations committed outside its borders by either nationals of New Zealand, persons who are subject to the *Armed Forces Discipline Act of 1971* or persons who 'have been found in New Zealand, ha[ve] not been extradited, and [are] to be charged with, or in relation to, a grave violation offence.'

Samoa

Cluster Munitions Prohibition Act 2012

On 27 April 2012, almost exactly two years after Samoa ratified the Convention on Cluster Munitions, the *Cluster Munitions Prohibition Act* came into force giving effect to the Treaty provisions. Apart from prohibiting the conduct proscribed

by the CCM, the Act goes considerably beyond the scope of the Convention by *inter alia* prohibiting investment of funds in the development or production of cluster munitions. For an investment to be considered a breach of the Act, it is sufficient that the person had knowledge that the funds were to be used for the said purpose. The law defines funds as 'assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired; and . . . legal documents or instruments in any form evidencing title to, or an interest in, assets of any kind.'

Interestingly, the Act provides for corporate liability for the use, development or transfer of cluster munitions, as well as for other proscribed acts. In Section 8, it stipulates that 'if an offence was committed by a corporation, the following, as well as the corporation, shall be deemed to be guilty of the offence'. The Act then goes on to provide for individual criminal liability of the director, manager, secretary or another officer in a comparable position unless they prove that the offence was committed without their consent and that they 'exercised all such diligence to prevent the commission of the offence as ought to have been exercised, having regards to the nature of his or her functions in that capacity, and to all the circumstances.'

Lastly, the Act binds the Minister of Foreign Affairs of Samoa to publicly specify the number of cluster munitions that he/she authorised for the purpose of development of or training in cluster munition detection, clearance or destruction.

Sierra Leone

Sierra Leone Geneva Conventions and Additional Protocols Act 2012

On 21 August 2012, the Parliament of Sierra Leone adopted an act that gives domestic effect to the *1949 Geneva Conventions* and their *1977 Additional Protocols*. The Act was drafted on the basis of the ICRC Model Law for the implementation of the Geneva Conventions.[3]

The Act guarantees the repression of violations of international humanitarian law by creating offences and penalties for grave breaches as defined in the Geneva Conventions, as well as for other violations of the Conventions and their Additional Protocols. With regards to grave breaches, the Act covers not only offences committed by citizens of Sierra Leone or those committed on its territory, but extends its application to persons of 'whatever nationality' committing said offences 'within or outside [of] Sierra Leone.' Section 2(5) the Act further highlights the universal jurisdiction of the courts in Sierra Leone to prosecute violations of international humanitarian law: '[w]here a person commits an offence under this section outside Sierra Leone that person may be tried and punished as if the offence was committed in Sierra Leone.'

In section 4, which largely follows the language of Article 28 of the *Rome Statute of the International Criminal Court*, the legislators provide for the

3 *Ibid.*

responsibility of military commanders and other superiors for the offences committed by those under their effective command and control.

The Act further follows the structure of the ICRC Geneva Conventions Model Act and deals with the legal proceeding with respect to protected persons and prevention of the abuse of the Emblem of the Red Cross and of other signs and signals protected by the Conventions.

Sierra Leone Red Cross Society Act 2012

The new *Red Cross Society Act* passed by the Parliament and signed into law by the President of Sierra Leone on 3 December 2012 replaces the legislation dating from 1962. Fifty years after the Sierra Leone Red Cross Society was created, the new legislation provides a much needed update of the description of the Society's role and activities and further protects the Red Cross emblem against misuse. Furthermore, the Act enhances the Sierra Leone Red Cross Society's financial independence through exempting it from taxes and obliging the Government to support the National Society through subventions.

South Africa

Implementation of the Geneva Conventions Act 2012

On 11 July 2012, the President of the Republic of South Africa assented to the Implementation of the Geneva Conventions Act of 2012, which gives domestic force to the *1949 Geneva Conventions* and their *1977 Additional Protocols*. The Act was drafted on the basis of the ICRC Model Law for the implementation of the Geneva Conventions.[4] South Africa is not a Party to the 2005 Additional Protocol III to the Geneva Conventions and the present Act does not make any reference in this regard.

The Act effectively enacts the Conventions and Protocols into law. It aims to ensure compliance with the Conventions and prevent and punish breaches of their provisions. Within this aim it creates offences for grave breaches of the Conventions and Protocols, as well as for failure to comply with their other provisions.

The Act foresees a responsibility of superior officers, whether military or civilian, for the offences committed by their subordinates. It equally provides for prosecution of those responsible for violating the Conventions, wherever the alleged violations may have taken place: 'Any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge related was committed outside the Republic.' The Act thus introduces, for the first time in South Africa, the principle of unlimited universal jurisdiction.

4 *Ibid.*

The Act also guarantees protection of emblems, flags, insignia and other material protected under the Geneva Conventions and Additional Protocols and creates relevant offences and penalties. Apart from individual criminal responsibility of directors and managers of a corporate body, the Act equally foresees corporate liability for the use or display of a protected sign or emblem without the consent of the Minister of Defence.

Lastly, the Act makes an explicit reference to the *Implementation of the Rome Statute of the International Criminal Court Act of 2002,* ensuring that the former will by no means be interpreted as 'limiting, amending, repealing or otherwise altering any provision' of the latter Act, nor as 'exempting any person from any duty or obligation' imposed by that Act or as prohibiting any person from complying with any of its provisions.

South Sudan

Geneva Conventions Act 2012

On 16 July 2012, the National Legislative Assembly of South Sudan passed a law giving effect to the Geneva Conventions and their Additional Protocols. The Act was drafted on the basis of the ICRC Model Law for the implementation of the Geneva Conventions.[5]

The Act creates offences and penalties for grave breaches of the Conventions and Additional Protocols, as well as for other violations of the said treaties. With regards to grave breaches, the Act equips the courts in South Sudan with universal jurisdiction to try 'any person, of whatever nationality, who [committed, aided, abetted or procured other person to commit grave breaches] in the Republic of South Sudan or elsewhere.'

The Act further deals with the legal proceedings in respect of protected persons and proscribes the use or display of Red Cross, Red Crescent emblems and other items protected by the Conventions and their Additional Protocols without the consent of the Minister of Justice.

Switzerland

Federal Law on War Material Amendment Act 2012

On 16 March 2012, the Swiss Federal Assembly passed an amendment to its *Federal Law on War Material* adopted in 1996, thus giving effect to the Convention on Cluster Munitions that Switzerland ratified on 17 July 2012. The amendment inserts into Chapter 2 of the Law Article 8a which deals specifically with cluster munitions, prohibiting their development, manufacture, import, export, transit, stockpiling, handing over, acquisition or acquisition as an intermediary. The Act equally penalises facilitation or incitement to commit any of the prohibited acts. Retention,

5 *Ibid.*

acquisition or transfer of cluster munitions is nonetheless permitted if authorised for the purpose of developing and training personnel in techniques of detection, clearance and destruction of cluster munitions.

Apart from implementing the CMC, the *Federal Law on War Material Amendment Act 2012* also introduces a ban on direct and indirect financing of prohibited war material. The notion of 'prohibited war material' refers not only to cluster munitions but equally covers chemical, biological and nuclear weapons, as well as anti-personnel landmines. The Act defines the direct financing as *the 'direct extension of credits, loans and donations or comparable financial benefits to cover or advance the costs of the development, manufacturing or the acquisition of prohibited war material.' Indirect financing is referred to as 'participation in the companies that develop, manufacture or acquire prohibited war material or a purchase of bonds or other investment products issues by these companies'. However, such conduct will be considered a violation of the Law only if the intention of the person is to* 'bypass the prohibition on direct financing'.

Uganda

The Prevention and Prohibition of Torture Act 2012

On 27 July 2012, the President of the Republic of Uganda assented to the Prevention and Prohibition of Torture Act that gives effect to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* that Uganda ratified in 1987.

The Act defines torture as 'any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as (a) obtaining information or a confession from the person or any other person; (b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.' While the definition is drafted on the basis of the Convention against Torture, the Act widens the definition of torture to include 'omission', as well as to the acts committed by private individuals.

In line with the Convention against Torture, the Act excludes exceptional circumstances, such as the existence of an armed conflict, to serve as a defence to a charge of torture. The Act equally excludes defence of superior orders, prevents punishment of persons who disobey orders to undertake actions amounting to torture and enacts responsibility of superior officers over acts of torture committed by their subordinates.

The Act criminalises not only infliction of torture, but also aiding or abetting, procuring, financing, soliciting, inciting, recommending, encouraging or rendering support to a person, while knowing or having reason to believe that the support will be used for commission of torture. Moreover, the Act creates a separate

offence for those who act as accessories 'after the fact to the offence of torture'. An accessory is a person who 'receives or assists another who is, to his or her knowledge, guilty of an offence under this Act, in order to enable him to escape punishment', but explicitly excludes a wife and a husband of a person guilty of torture.

The Act further prevents admissibility of evidence obtained by means of torture, prohibits the use of information obtained by torture and excludes granting of amnesty to a person accused of committing torture. It equally includes the principle of *non-refoulement* and foresees protection of victims, witnesses and persons reporting torture.

Apart from the jurisdiction based on the principle of territoriality and active and passive personality, the Prevention and Prohibition of Torture Act extends the jurisdiction of the Ugandan courts over acts of torture committed by 'any person who is for the time being present in Uganda or in any territory under the control or jurisdiction of Uganda.' A consent of the Director of Public Prosecutions is however required for the prosecution of non-citizens.

B. Case Law

Finland

Case against François Bazaramba, Supreme Court, 22 October 2012

On 22 October 2012, Finland's Supreme Court rejected an appeal by the defence of Francois Bazaramba, a Rwandan-born pastor who had been convicted of involvement in the 1994 genocide. Mr. Bazaramba came to Finland as a refugee in 2003. Finland rejected a request for his extradition submitted by the Rwandan Government on the grounds that it was unlikely that Rwanda would be able to guarantee a fair trial for the suspected *génocidaire*. This decision triggered the jurisdiction of Finnish courts, as the Finnish penal code provides for a provision *aut dedere aut judicare* for all crimes with a maximum sentence of over six years. The court's jurisdiction was also based on a principle of universal jurisdiction for international crimes, provided for in the country's penal code.

On 11 June 2010, the District Court of Itä-Uusimaa handed down the first universal jurisdiction-based judgement in Finland, finding Francois Bazaramba guilty of genocide through killing, as well as through inflicting on Tutsis conditions of life calculated to bring about their physical destruction.[6] The Court sentenced Mr. Bazaramba to life imprisonment. Both parties appealed the judgement. In September 2011 the Helsinki Court of Appeals sent a 14-member team of judges, prosecutors, clerks and interpreters to Rwanda to visit the crime scene and

6 See Press Release of the District Court of ITÄ- UUSIMAA, 11 June 2010, 'Judgement in a criminal case of genocide, *Prosecutor v. Francois Bazaramba* (R 09/404)', available at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Finland/Bazaramba_Press_Release_EN.pdf.

hear witnesses. Moreover, in the light of the large number of witnesses living outside Finland, the Court also held some court sessions in Rwanda, Tanzania and Zambia.

On 30 March 2012 the Helsinki Court of Appeals upheld Bazaramba's conviction. His defence subsequently sought a leave to appeal the decision in front of the Finland's Supreme Court. On 22 October 2012, the Supreme Court refused the grant the appeal, rendering the ruling of the Helsinki Court of Appeal final.

Switzerland

Case A. v. Office of the Attorney General of Switzerland, Federal Criminal Court, 25 July 2012

On 25 July 2012, the Swiss Federal Criminal Court delivered its decision in the case against the former Algerian Minister of Defence Khaled Nezzar, denying the existence of an immunity *ratione materiae* for war crimes allegedly committed during the Algerian Civil War that would preclude the Federal Prosecutor from proceed with his investigation against the Mr. Nezzar.

Mr. Nezzar was appointed as Minister of Defence of Algeria in 1990. A year later, he was among the generals who decided to depose then-President Chadli Bendhedid, marking the beginning of the Algerian Civil War (1992–2000). Between 1992 and 1994, Nezzar was a member of the High Council of State – a provisional governing body that exercised the powers attributed by the Constitution to the President. In 2011, when Mr. Nezzar was travelling through Switzerland, a Swiss non-governmental organisation Track Impunity Always (TRIAL) and two refugees of Algerian origin filed a criminal complaint with the Swiss authorities, accusing him of war crimes and torture committed during the Algerian Civil War. The legal counsel of Mr. Nezzar argued, among other points,[7] that his client enjoys immunity for acts committed between 1992 and 1994 owing to his position of the Minister of Defence and a member of the *Haut Comité d'État* (hereinafter 'HCE'). He equally challenged the exercise of criminal jurisdiction by Swiss authorities due to the lack of a link between the accused and Switzerland. With regard to the latter argument, the Federal Criminal Court acknowledged that the presence of the accused on Swiss territory is indeed an essential condition for conducting criminal proceedings in Switzerland for acts committed abroad. The Court however argued against an overly strict interpretation of the condition, which would 'in practice amount to allowing the offender to decide whether or not the prosecution shall proceed.' The Court held that the condition must be met at the time of the opening of the criminal proceedings and the fact that the accused leaves Switzerland is not enough to hinder such proceedings.

7 The other arguments of the Defence included violation of the principle of non-retroactivity of criminal law; non-existence of a required strict link between the accused and Switzerland, as well as an absence of a refusal of an extradition request by the State concerned (i.e. Algeria). See *Case A. v. Office of the Attorney General of Switzerland*, Federal Criminal Court, 25 July 2012, 'Presentation of Facts', para. G, available at: http://www.trial-ch.org/fileadmin/user_upload/documents/affaires/algeria/BB.2011.140.pdf.

As concerns the accused's defence of immunity from jurisdiction, the Court agreed that while serving as Algeria's Defence Minister and a member of the HCE, Khaled Nezzar benefitted from immunity *ratione personae* covering both his official acts and acts committed in his personal capacity. This immunity is however of a temporary nature and is thus, in the Court's view, 'extinct'.[8] With regard to the immunity *ratione materiae,* the Court acknowledged that residual immunity prevails even after leaving the office and protects an individual from prosecution for official acts performed whilst in the office. This immunity however does not cover acts committed by the former official before or after leaving the office, nor does it cover criminal offences committed in his/her private capacity during the period whilst in office.

The Court recognized an explicit trend at the international level to restrict the immunity of (former) Heads of State for crimes contrary to rules of *jus cogens*, such as genocide, crimes against humanity and torture. Considering whether immunity *ratione materiae* covers all acts committed by the accused during his office and supersedes the need to ascertain his possible responsibility with respect to the alleged grave violations of human rights, the Court concluded that '[i]t would be contradictory and futile to, on one hand, affirm the intention to combat against these grave violations of the most fundamental human values and, on the other, to accept a wide interpretation of the rules governing functional immunity, which would benefit former State officials with the concrete result to hinder, *ab initio*, any investigation. In such case, it would be difficult to admit that conduct contrary to fundamental values of the international legal order can be protected by rules of that very same order.'[9] The Court consequently rejected the existence of immunity *ratione materiae* as a defence against violations of peremptory norms of international law and thus cleared the way to continue the prosecution of Khaled Nezzar for war crimes.

United Kingdom

Case Ndiku Mutua et al. v. the Foreign and Commonwealth Office, the High Court of Justice, 5 October 2012

On 5 October 2012 the Hon. Justice McCombe of the High Court of Justice held that a fair trial against the British Government is possible even 50 years after the alleged torture and other ill-treatment of the claimants during the Mau Mau insurgency in Kenya. The emergency lasted between 1952 and 1960 and involved Kikuyu-dominated anti-colonial group called Mau Mau and elements of the British Army. The claimants in the present case are five individuals that have been allegedly detained and subjected to severe torture in the hands of the Colonial

8 *Ibid.*, para 5.4.2.

9 See unofficial translation from French provided by the Swiss non-governmental association TRIAL (Track Impunity Always), para 5.4.3, available at: http://www.asser.nl/upload/documents/20130221T040104-Nezzar_Judgm_Eng_ translation%2025-07-2012.pdf.

Administration's security forces. They submit that British military officers exercised 'full command and control over the entire security apparatus within the colony and were thus in a position to prevent … tortious conduct by those under their command and control.'[10] The defendant's principal argument was that too much time had elapsed; that the majority of those on the defendant's side who might have given oral evidence are now dead, and that fair trial is thus no longer possible.

Hon. Justice McCombe considered in length the availability of documents and witnesses. He concluded that, thanks to a large amount of relevant documentation (including official minutes and memoranda of the UK War Council and minutes of the Chief Secretary's Complaints Coordinating Committee set up in 1954 to monitor and manage serious complaints made against the security forces and local administrators in Kenya), a fair trial remained possible.

Moreover, Justice McCombe noted with dissatisfaction that the defendant had failed to adequately take into account the number of potential witnesses at lower levels of government and the army, who are still alive and might be able to supplement its case. Lastly, Justice McCombe underlined the fact that the burden of proof lies upon the claimants and thus serves as an important safeguard for the defendant.

Case Secretary of State for Foreign and Commonwealth Affairs v. Yunus Rahmutullah, the Supreme Court, 31 October 2012

On 31 October 2012 the Supreme Court of the United Kingdom unanimously dismissed the appeal of the Secretary of State for Foreign and Commonwealth Affairs, and by a majority of five votes to two, it equally dismissed the cross-appeal of Mr. Rahmutullah. The latter appellant is a Pakistani citizen who was transferred to the United States forces after being detained by the British forces in February 2004 in an area of Iraq under United States' control. Contrary to a Memorandum of Understanding entitled '*An Arrangement for the Transfer of Prisoners of War, Civilian Internees and Civilian Detainees*' signed in 2003 between United States, the United Kingdom and Australia, the United States forces transferred Mr. Rahmutullah to the detention facility in Bagram, Afghanistan without the knowledge of the United Kingdom authorities.

An application had been made on behalf of Mr. Rahmatullah for a writ of *habeas corpus* requiring his release. On 14 December 2011, the Court of Appeal issued a writ of *habeas corpus* requiring the United Kingdom to seek the return of Mr. Rahmatullah or demonstrate why it was not possible to secure that outcome. The Secretary of State appealed this decision. In response to the request by the British authorities, the United States responded on 8 February 2012, asserting the legality of Mr. Rahmatullah's detention and suggesting that a request

10 See *Ndiku Mutua et al. v. the Foreign and Commonwealth Office,* Case No. [2012] EWHC 2678 (QB), 5 October 2012, para. 21, available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/mutua-fco-judgment-05102012.pdf.

for repatriation has already been submitted by the Government of Pakistan to the United States Government.

On 23 February 2012, a second judgement in the case was delivered by the United Kingdom Court of Appeal, concluding that the United States' letter was a sufficient response to the writ of *habeas corpus* as it demonstrated that the United Kingdom could not secure the release of Mr. Rahmatullah. Mr. Rahmatullah cross-appealed the decision.

The judgement of the Supreme Court discussed *inter alia* the applicability of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (hereinafter 'GC IV') to the situation of Mr. Rahmatullah. The Court notably discusses whether he would qualify as a 'protected person' under Article 4 of GC IV. The Court adopted the interpretation of the article by Jack L. Goldsmith III, United States Assistant Attorney General, who suggested that the phrase 'territory of a belligerent state' does not refer to a territory of any state that participates in the armed conflict covered by the Geneva Conventions, but to the 'home territory of the party to the conflict in whose hands the citizen of the neutral state finds himself.'[11] The Court concurred with this interpretation: 'To adopt the first interpretation would run entirely counter to the purpose of the [C]onvention … Why should nationals of a neutral state who happen to be in a country where a conflict is taking place be denied protection under the [C]onvention simply because their country enjoys normal diplomatic relations with the state into who hands they fall? That would arbitrarily – and for no comprehensible reason – remove from the protection of the [C]onvention an entire swathe of person who would be entirely deserving of and who naturally ought to be entitled to that protection.'[12]

The Court however rejected Mr. Goldsmith interpretation of the phrase 'find themselves' as suggesting that protection of Article 4 of GC IV is limited to those whose present on the territory of the belligerent state is incidental (thus excluding Mr. Rahmatullah who according to the United States' authorities travelled to Iraq for the express purpose of engaging the United States in hostilities): 'to make happenstance or coincidence a prerequisite of protection seems to … introduces a wholly artificial and unwarranted restriction on its availability under the [C]onvention.'[13]

The Court consequently concluded that Mr. Rahmatullah indeed qualified as a 'protected person' under GC IV. As a result, not only was his transfer from the occupied territory of Iraq a *prima facie* breach of Article 49 of the GC IV (relating to deportations, transfers and evacuations), but his continued internment by the United States forces long after the close of hostilities also violated Article 133 of GC IV (regulating internment modalities after the close of hostilities). As a Power responsible for the transfer of the protected person under Article 45 of GC IV, the United Kingdom Government was 'under a clear obligation, on becoming aware

11 See *Case Secretary of State for Foreign and Commonwealth Affairs v. Yunus Rahmutullah, the Supreme Court,* 31 October 2012, para. 30, available at: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0142_Judgment.pdf.

12 *Ibid*., para. 32.

13 *Ibid*., para. 34.

of any failure on the part of the United States to comply with any provisions of [GC IV], to correct the situation or to request the return of Mr. Rahmatullah.'[14] Elsewhere in the judgement, the Court reiterated that '[t]he illegality [of Mr. Rahmatullah detention'] rests not on whether the United States was in breach of [GC IV] but on the proposition that, conscious of those apparent violations, the United Kingdom was bound to take the steps required by Article 45 of [GC IV].'[15]

United States

Case Salim Ahmed Hamdan v. United States of America on Petition for Review from the United States Court of Military Commissions Review, United States Court of Appeals for the District of Columbia Circuit, 16 October 2012

In the case against Salim Hamdan, the driver of Osama in Laden captured in Afghanistan in 2001, the United States Court of Appeals decided on whether the United States Government has authority to prosecute Mr. Hamdan for 'material support of terrorism'.

Firstly, the Court considered whether such prosecution is possible on the basis of the 2006 Military Commissions Act (hereinafter 'MCA'). MCA defines the material support of terrorism as a war crime and the Act served as a basis for Hamdan's conviction by a military commission. The Court of Appeal however held that the MCA does not authorize retroactive prosecution for conduct committed before enactment of the Act, unless the conduct was already prohibited under existing legislation as a war crime triable by a military commission.[16] The Court then went on to consider whether the prosecution for material support of terrorism is possible on the basis of the law applicable at the time Mr. Hamdan was a member of Al Qaeda. The only statute that did apply at the time was 10 USC § 821, which authorised the use of military commissions to try violations of the 'law of war'.

The Court found this to mean 'international law of war' and admitted that indeed 'international law does establish at least some forms of terrorism, including intentional targeting of civilian populations, as a war crime'.[17] However, the Court noted that neither the Geneva Conventions, nor the Rome Statute of the International Criminal Court or statutes of other international criminal tribunals make a reference to the concept of 'material support for terrorism'.

14 *Ibid*., para. 38.
15 *Ibid*., para. 53.
16 See *Case Salim Ahmed Hamdan v. United States of America on Petition for Review from the United States Court of Military Commissions Review*, United States Court of Appeals for the District of Columbia Circuit, 16 October 2012, pp. 5 and 18, available at: http://www.lawfareblog.com/wp-content/uploads/2012/10/Hamdan-D.C.-Circuit.pdf.
17 *Ibid*., p. 22.

The Court thus concluded that 'material support for terrorism' was not an international-law war crime under 10 USC § 821 at the time Mr. Hamdan engaged in the relevant conduct. It consequently reversed the judgement of the Court of Military Commissions Review and 'direct[ed] that Hamdan's conviction for material support of terrorism be vacated.'[18]

18 *Ibid.*, p. 28.

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INTERNATIONAL REVIEW of the Red Cross

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This selection is based on the new acquisitions of the ICRC Library and Public Archives

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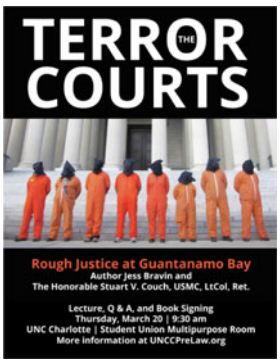
BOOK REVIEW



The terror courts: rough justice at Guantanamo Bay

Jess Bravin*

Book review by Diane Marie Amann, Emily and Ernest Woodruff Chair in International Law, University of Georgia School of Law. Email: amann@uga.edu

Transitional justice literature tends to focus discussions of accountability on the actions of states and international organisations. Typically examined are institutional mechanisms, such as truth commissions and claims commissions, international and internationalised criminal tribunals, and whatever civil or criminal remedies may be available in national courts. On occasion, mechanisms of a less legalistic nature, like monuments, are discussed; even these, however, are often the result of official action. The extent to which popular culture can promote accountability is rarely explored. This is an unfortunate omission. Particularly in the absence of official moves toward accountability for wrongdoing, cultural production – films, plays, paintings, works of fiction and nonfiction – can make essential contributions to the public record. A prime nonfiction example is *The Terror Courts: Rough Justice at Guantanamo Bay*, Jess Bravin's gripping and comprehensive book about the trials endured by participants in US military commissions set up in the wake of the terrorist attacks of 11 September 2001, attacks frequently discussed under the shorthand term '9/11'.

Bravin, who covers the US Supreme Court for the *Wall Street Journal*, puts his journalistic skills to good use in *Terror Courts*. In rough chronological order, he traces the origins of the plan to try post-9/11 captives by military commissions, the political machinations by which the idea became the proclaimed policy of

* Published by Yale University Press, hardcover 2013, paperback 2014.

President George W. Bush, and the many starts and stops in the years since Bush issued his Military Order of 13 November 2001.[1] Concluding with the most recent developments, Bravin persuasively demonstrates the failings of the commissions, as a matter both of domestic law enforcement strategies and of international humanitarian law obligations. Bravin animates these familiar contours with deft character sketches of persons who played parts in the commissions' project – persons whom he has interviewed or, in some cases, observed from the vantage point of the reporter covering the proceedings at Guantánamo. By way of example, David Addington, the civilian legal counsel who helped Vice-President Dick Cheney circumvent inter-agency procedures in order to secure George Bush's approval of military commissions, is 'a secretive, dour man' disliked by military lawyers.[2] Neal Katyal, the Georgetown professor who spearheaded the legal challenge to the commissions, is 'cerebral, and even icy behind designer rectangular eyeglass frames.'[3] Guantánamo detainees whom the United States vilified likewise become human in Bravin's telling – Salim Ahmed Salim Hamdan, the Yemeni driver of Osama bin Laden whose lawsuit against the Bush order prevailed in the Supreme Court, is 'The Man from Al Qaeda', while Australian David Hicks, who served only one year after pleading guilty in a military commission to material support for terrorism, is 'The Kangaroo Skinner'.

Torture and cruelty – the subjection of captives to techniques such as strobe-lighting, blasting of loud music, sexual humiliation, shackling, sleep deprivation, stress positions and waterboarding – is a constant motif of *Terror Courts*. Giving voice to the issue is V. Stuart Couch, a Marine lawyer-pilot and devout Christian whom the reader comes to know by his nickname of 'Tater', short for 'couch potato'. As Bravin tells it, the North Carolinian joined the Guantánamo prosecution team eager to bring to justice those responsible for 9/11, an attack that had claimed his Marine Corps 'buddy'.[4] Couch's enthusiasm gave way to doubt and frustration when case after case proved dependent on statements obtained through coercive interrogations – interrogations often conducted by the CIA or other agencies outside of and hostile to the ordinary military structure. Couch's discoveries prompted him repeatedly to fight not for but against the prosecution of alleged Al Qaeda operatives.

At the core of the controversy was law. Bravin's Berkeley Law training is evident in his careful treatment both of the international law principles that applied and of the ways that various participants in the military commissions project responded to those principles. Common Article 3 to the Geneva Conventions of 1949 forbids 'cruel treatment', 'torture', 'taking of hostages' and 'outrages upon personal dignity, in particular, humiliating and degrading treatment,' Bravin observes, while another treaty to which the United States belongs, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

1 Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001).
2 *Terror Courts*, pp. 24 and 309.
3 *Ibid*., p. 54.
4 *Ibid*., p. 20.

or Punishment, bans both torture and the invocation of superior orders to justify committing torture.[5] Defence lawyers, along with prosecutors like Couch, relied on these provisions to contest the use of statements extracted by coercion. But high-ranking Bush administration officials deflected such complaints, asserting that the US Constitution granted the president unreviewable discretion to act as commander-in-chief.

In the end, judges would review the president's Military Order, and in so doing they would hold the terms of Common Article 3 to be enforceable in US courts. Quoted in *Terror Courts* is the trial judge's statement, during a hearing in Hamdan's lawsuit, 'that Common Article 3 is passed into customary international law or that it is a minimum yardstick' by which military commissions procedures must be measured.[6] The judge's reasoning eventually won favour in the Supreme Court. As Bravin recounts, Justice John Paul Stevens stated for the majority:

> [M]ilitary commissions must themselves comply with the law of war, including the Geneva Conventions. Bush's commissions, he wrote, failed the lowest Geneva standard, Common Article 3, which required trial 'by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'[7]

Although the Court's judgment brought a stop to the prosecution of Hamdan pursuant to Bush's order, it did not mark the end of military commissions. *Terror Courts* thus proceeds to detail the speedy enactment of a substantially similar plan, complete with Congress' decree that the new military commissions satisfied Common Article 3 standards. Part of the 2006 legislative package, Bravin adds, was a provision effectively 'immunizing administration officials from prosecution for torture and other crimes'.[8] Then-Senator Barack Obama voted against the statute. But three years later, President Obama pushed through legislation that revised and reinstated the commissions, on urging from the Pentagon's new general counsel, Jeh Johnson, and over the objection of Secretary of State Hillary Clinton and her legal adviser, Harold Koh.[9] As 'consolation prizes', Bravin writes, 'the administration agreed to ask the Senate to ratify agreements expanding protections under the Geneva Conventions, including one that had been collecting dust since President Reagan signed it in 1987'.[10] At the time of this writing, the agreement to which Bravin refers, Additional Protocol II to the Geneva Conventions of 12 August 1949

5 *Ibid*., p. 144.
6 *Ibid*., p. 216.
7 See *Hamdan* v. *Rumsfeld*, 548 US 557, 629-30, 2006 (Stevens, J., joined by Kennedy, Ginsburg, Breyer and Souter, J. J.) (setting forth passage paraphrased by Bravin in text, p. 303).
8 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 USC § 948–950, 18 USC § 2441, 42 USC § 2000). See *Terror Courts*, p. 311.
9 *Ibid*., pp. 353–359, 364–365. See also Military Commissions Act of 2009, Pub. L. No. 111-84, tit. 18, 123 Stat. 2190, 2574-2614 (codified at 10 U.S.C. §§ 948a ff.). Johnson would serve in this position from 2009 to 2012; a year later, Obama nominated him to be the Secretary of the Department of Homeland Security, a post he assumed late in 2013. *See* 'Homeland Security's New Chief', in *New York Times*, 26 December 2013, A26; Ellen Nakashima, 'Driven by Memories of that "Darkest" Day', in *Washingon Post*, 19 October 2013, A3.
10 *Terror Courts*, p. 365.

and relating to the Protection of Victims of Non-International Armed Conflicts, still languishes on the Senate's list of pending treaties, while the sibling protocol pertaining to international armed conflicts does not appear on the list at all.[11]

More than a dozen years have elapsed since 9/11, yet verdicts have been entered against precious few of the detainees supposed to be slated for trial by military commission. Pretrial disputes mire proceedings against Khalid Sheikh Mohammed and four other remaining 9/11 defendants[12] – as Bravin explains, charges against the sixth defendant were dropped on account of torture.[13] Most of the detainees convicted by commissions have already been released; in stark contrast, those suspects who were tried in federal criminal courts continue to serve stiff sentences in high-security penitentiaries. As if his enumeration in *Terror Courts* of these systemic failings were not enough, Bravin assails a keystone of 'all three versions' of the Guantánamo project: 'Only aliens can be tried by military commission; American citizens, no matter the war crime or terrorist act alleged against them, are exempt from commissions jurisdiction.'[14] He also indicates that US actions may have risked undercutting a basic customary international humanitarian law norm; that is, that '[t]he obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity'.[15] To be precise, Bravin warns that the practices surrounding the Guantánamo commissions 'invite reciprocal action by hostile governments.'[16]

The Epilogue to the 2013 hardback edition of *Terror Courts* concludes with the news that a 'seismic blow came just as this book was going to press': the conviction of Hamdan, the so-called Man from Al Qaeda, had been vacated in a federal appellate decision which called into question all military commission prosecutions for material support of terrorism.[17] As revised in the 2014 paperback edition, the Epilogue explains that by dint of a subsequent judgment, it now encompasses convictions for conspiracy as well.[18] More fits and starts seem

11 See US Department of State, *Treaties Pending in the Senate*, available at: www.state.gov/s/l/treaty/pending/; White House, *Fact Sheet: New Actions on Guantánamo and Detainee Policy*, 7 March 2011 (urging Senate to act on Protocol II but writing that 'the Administration continues to have significant concerns with Additional Protocol I', even as it states that Article 75 of the latter treaty 'is consistent with our current policies and practice and is one that the United States has historically supported'), available at: www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy.

12 See, e.g., Billy Kenber, 'Official: 9/11 Attorneys Were Improperly Queried', in *Washington Post*, 21 September 2013, A2.

13 *Terror Courts*, pp. 252–259, 322–323.

14 *Ibid*., p. 372.

15 International Committee of the Red Cross, *Customary International Humanitarian Law*, Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, Cambridge, 2005, Rule 140.

16 *Ibid*., p. 373.

17 *Ibid*., pp. 377–378 (2013 hardback edition). Except for this part of the Epilogue, pagination and content are the same in both editions.

18 *Ibid*., pp. 377–379 (2014 paperback edition), discussing *Al Bahlul* v. *United States*, No. 11-1324 (D.C. Cir. Jan. 25, 2013) (reversing detainee's conviction in recognition of holding in *Hamdan* v. *United States*, 696 F.3d 1238 (D.C. Cir. 2012)), available at 2013 WL 297726). See also Linda Greenhouse, 'Fish or Cut Bait', in *New York Times Opinionator*, 3 October 2013 (reporting on consequent *en banc* oral argument in

inevitable, and Bravin's chronicle of the first dozen years represents an invaluable resource for understanding the military commissions project going forward.

It is also invaluable to understanding what has occurred in the past, given that no official accountability process is in the offing. As Bravin reports, in a 2009 speech restarting the commissions, the incumbent president squelched proposals for such a process:

> Despite his scathing critique of the Bush administration's bizarre legal claims and the institutionalized cruelty they enabled, Obama said that no one would be held accountable. 'I have no interest in spending all of our time re-litigating the policies of the last eight years,' he said. Rather than 'pointing our fingers at one another . . . we need to focus on the future.'[19]

That announcement, Bravin continues, precluded 'any accountability or even an independent inquiry, like the 9/11 Commission, that could authoritatively establish what had taken place.'[20]

Through vivid prose and painstaking reportage, Bravin himself constructs a record of official responses to fundamental principles of international humanitarian law. *Terror Courts* thus contributes to a trove of cultural production exploring errors and excesses in the United States' post-9/11 campaign against terrorism – artefacts as varied as Karen J. Greenberg's *The Least Worst Place: Guantanamo's First 100 Days* (Oxford University Press, 2009) and Fernando Botero's *Abu Ghraib* series of drawings and paintings.[21] At a time when officials do not pursue persons responsible for admitted wrongdoing, works like these constitute, in the short term, a crucial component of accountability. In the longer term, they may encourage the adoption of effective and transparent accountability mechanisms. Such a process could do much to entrench – in the United States and elsewhere – compliance with international humanitarian law.

Al Bahlul, an argument also described in *Terror Courts*, p. 379 (2014 paperback edition), available at: http://opinionator.blogs.nytimes.com/2013/10/02/fish-or-cut-bait/.

19 *Terror Courts*, p. 358.

20 *Ibid.*

21 See Kenneth Baker, 'Abu Ghraib's Horrific Images Drove Artist Fernando Botero into Action', in *San Francisco Chronicle*, 29 January 2007, E1.

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