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Revue internationale de la Croix-Rouge

Débat humanitaire : droit, politiques, action

International Review of the Red Cross

Humanitarian Debate: Law, Policy, Action

Mission de la Revue internationale de la Croix-Rouge

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

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

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

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

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

Mission of the International Review of the Red Cross

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

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

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

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

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

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Un texte paraissant dans la *Revue* n'engage que son auteur. En publiant un article dans la *Revue*, ni la rédaction ni le CICR ne prennent position au sujet des opinions exprimées par son auteur. Seuls les textes signés par le CICR peuvent lui être attribués.

Texts published by the *Review* reflect the views of the author alone and not necessarily those of the ICRC or of the *Review*. Only texts bearing an ICRC signature may be ascribed to the institution.

Éditorial

Les conflits armés en Afghanistan et en Irak et les conséquences qui en découlent en termes de lutte contre le terrorisme international dans de nombreux pays ont mis au jour des défis et des risques nouveaux pour la conduite des opérations humanitaires dans les situations de conflit armé et de violence interne. Dans le présent numéro de la Revue, *plusieurs auteurs se penchent sur quelques-uns des principaux défis auxquels les organisations humanitaires sont directement confrontées et qui influent sur leurs stratégies et leurs priorités opérationnelles.*

Jean-Luc Blondel *examine la globalisation et ses incidences sur l'action humanitaire. Il arrive en effet que la globalisation, notamment dans sa dimension économique, contribue à faire éclater les conflits ou à les prolonger. Le terrorisme international et les réactions qu'il a déclenchées sont, eux aussi, considérés dans le contexte de cette globalisation. L'action humanitaire, elle-même, n'est nullement épargnée par le phénomène. Se plaçant du point de vue des opérations du CICR,* Pierre Krähenbühl *considère la corrélation existant entre risques locaux et menaces mondiales. Les délégations sur le terrain ne peuvent apparemment plus se contenter de mesurer la sécurité du milieu où elles opèrent sur la base des seuls indicateurs locaux. Dans l'analyse qu'elles font de la sécurité de leur environnement, elles doivent désormais prendre en compte les menaces mondiales. Cela complique l'évaluation des piliers de la sécurité, tels que l'acceptabilité. Certains des principes opérationnels du CICR, tels que la neutralité et l'impartialité, sont également mis en question dans un monde où les idéologies fortes reviennent au premier plan et où les chocs qui les opposent semblent se multiplier.*

Ruth Abril Stoffels *présente les difficultés que rencontre le droit international humanitaire et ses tendances actuelles dans un domaine d'activité particulier: celui de l'assistance humanitaire. Dans son article, l'auteur analyse le contenu et les limites du droit à une telle assistance dans les conflits armés internes et internationaux. Elle explique aussi comment seule l'assistance qui réunit les critères d'humanité, d'impartialité et de neutralité est protégée par le droit international. Or, aujourd'hui, la difficulté n'est pas seulement de définir ces critères mais d'y satisfaire. Dans ces circonstances, les dilemmes moraux sont inévitables.*

Dans son article, Beat Schweizer *montre que, selon le «contrat» original conclu entre les représentants de l'humanitarisme et les États, le personnel humanitaire était accepté sur les champs de bataille tant qu'il n'était pas perçu comme interférant avec la guerre. C'est ainsi qu'il a été possible de mener une action humanitaire indépendante. Depuis la fin de la guerre froide, l'indépendance dont bénéficie cet «espace humanitaire» ne cesse d'être grignotée. Les organisations humanitaires sont actuellement aux prises avec les conséquences éthiques et politiques de cette évolution.*

L'article de Raj Rana *porte sur les risques qui apparaissent lorsque, en temps de conflit, la frontière entre action militaire et action humanitaire se fait floue. Les forces armées ont considérablement étendu leurs capacités civilo-militaires et les considèrent comme une partie vitale et intégrante de leurs responsabilités, qu'elles soient au combat, qu'elles prennent part à des opérations de paix ou qu'elles participent aux initiatives de reconstruction prises après un conflit par des agences gouvernementales civiles, des*

missions militaires multinationales, des organisations humanitaires ou d'autres. La confusion des rôles militaire, politique et humanitaire risque de compromettre la sécurité du personnel humanitaire ainsi que la perception de leur neutralité et de leur indépendance, qui est fondamentale.

Le président du CICR, Jakob Kellenberger *s'interroge – «Action humanitaire: parler ou se taire?». Cet article répond aux récentes questions qui ont fait suite au scandale d'Abou Ghraib, concernant les procédures du CICR, telles que la tenue d'entretiens bilatéraux confidentiels avec la partie responsable dans un monde où la communication publique jouit d'un pouvoir sans précédent et constitue aussi un moyen de propagande sélectif de portée planétaire. Ces procédures ne sont défendables que si le CICR lui-même est convaincu de réaliser toutes les démarches et de prendre toutes les mesures possibles en termes de qualité, de quantité, de niveau et de temps, et qu'il le fait d'une manière cohérente et fiable.*

Cette édition contient également différents commentaires, rapports et documents en relation avec l'action humanitaire. Elle inclut en particulier un rapport détaillé sur une récente conférence du «Groupe de Luxembourg» sur l'assistance humanitaire en temps de conflit armé; la Résolution (commentée) sur l'assistance humanitaire adoptée par l'Institut de droit international en 2003, et la Politique d'assistance du CICR, adoptée en avril 2004. Cadre de référence et outil pratique orienté vers l'action, ce dernier document veut assurer à l'institution une approche professionnelle, cohérente, intégrée et répondant aux besoins essentiels des personnes et collectivités affectées par les conflits armés et d'autres situations de violence.

Editorial

The armed conflicts in Afghanistan and Iraq and their ramifications for the fight against international terrorism in many countries have highlighted new challenges and risks for the conduct of humanitarian operations in situations of armed conflict and internal violence. In this edition of the Review *several authors reflect on some of the fundamental challenges that directly affect the humanitarian organizations and shape their operational strategies and priorities.*

Jean-Luc Blondel *looks at globalization and its impact on humanitarian action. Globalization and in particular its economic aspects may help to cause conflicts or to prolong them. International terrorism and the reactions it has triggered are also viewed in the context of globalization. Nor does humanitarian action escape being affected in many ways by this phenomenon.* Pierre Krähenbühl *considers the interrelation between local risks and global threats from an operational ICRC viewpoint. It no longer seems sufficient for a given delegation in the field to assess its security environment on the basis of local indicators only. Country delegations therefore need to include the evaluation of global threats in their security analysis. This complicates evaluation of the mainstays of security, such as acceptability. It also calls into question some of the ICRC's operational principles, such as neutrality and impartiality, in a world where strong ideologies are again coming to the fore and clashes between them seem to be increasing.*

Ruth Abril Stoffels *sets forth the current challenges and trends in humanitarian law in a particular field of activity, namely that of humanitarian assistance. In her article she analyses the nature and limits of the right to humanitarian assistance during national and international armed conflict. She also explains how only aid that meets the criteria of humanity, impartiality and neutrality is protected by international law. However, the current difficulty lies not only in defining these criteria, but in meeting them. Against this background, moral dilemmas cannot be avoided.*

Beat Schweizer *shows that the original "deal" between humanitarianism and States was that humanitarian workers were accepted on the battlefield as long as they were not thought to interfere with the warfare. In this way scope was created for independent humanitarian action. Since the end of the Cold War, this "humanitarian space" has steadily been losing its independence. Humanitarian organizations are currently struggling with the ethical and political implications of these developments.*

The article by Raj Rana *discusses the risks that arise when the distinction between military and humanitarian action becomes blurred in times of conflict. Armed forces have considerably expanded their civil-military capacity and see it as a vital and integral part of their duties, whether they are deployed for combat, for peace support operations or as part of the post-conflict reconstruction efforts of civilian government agencies, multinational military missions, humanitarian organizations and others. The mixing of military, political and humanitarian roles may undermine the security of humanitarian personnel and the essential perception of their neutrality and independence.*

ICRC President Jakob Kellenberger *lastly reflects on "Speaking out or remaining silent in humanitarian work". His article is a response to the recent questioning, following the Abu Ghraib scandal, of the ICRC's working procedure, such as holding confidential bilateral*

talks with the party responsible in a world where the power of public communication is stronger than ever, but where such communication is also a selective and global means of propaganda. This procedure is defendable only if the ICRC itself is convinced that it is making every possible approach and taking all possible steps, in terms of quality, quantity, level and time, in a coherent and predictable manner.

The present edition of the Review *also contains several notes, documents and reports related to the issue of humanitarian action. It includes in particular a comprehensive report on a conference recently held in Geneva by the "Luxembourg Group" on humanitarian assistance in armed conflict, the (commented) Resolution on humanitarian assistance adopted in 2003 by the Institute of International Law, as well as the ICRC's Assistance policy. The aim of this ICRC policy paper – a reference framework and a practical, action-oriented tool – is to ensure a professional, coherent, integrated approach that meets the essential needs of individuals and communities affected by armed conflict and other violent situations.*

La globalisation : approche du phénomène et ses incidences sur l'action humanitaire

JEAN-LUC BLONDEL*

Mondialisation, globalisation. Mots slogans ou réalités ? Les deux à la fois, tant ces concepts mélangent des éléments certains, objectifs, et des perceptions plus subjectives. L'origine du phénomène ne peut être datée de manière irréfutable. Suivant les différentes perceptions, la globalisation a commencé avec la « découverte » de l'Amérique en 1492, à l'issue de la Première Guerre mondiale, avec le développement de l'aviation civile, avec la fondation des Nations Unies, à la chute du mur de Berlin ou avec l'invention de l'Internet. Cette variété démontre bien que nous avons affaire à un processus, et non à un fait ponctuel et facilement identifiable.

Nous n'allons pas essayer de définir le phénomène de la globalisation. Nous allons plutôt en rappeler les éléments constitutifs, avant d'examiner les effets de cette (nouvelle) dimension de la vie internationale sur les conflits armés et, parallèlement, sur l'action humanitaire.

Approche du phénomène

La globalisation est, pour ainsi dire, autant une façon de voir le monde que le monde lui-même. Nous pouvons, sans pour autant prétendre à l'exhaustivité, en distinguer au moins les dimensions suivantes :

(i) un « sans-frontiérisme » de principe dans les échanges commerciaux ;
(ii) la diffusion planétaire des modes de production et de consommation capitalistes ;
(iii) une libéralisation des échanges, des investissements et des flux de capitaux ;
(iv) une diminution de la marge de manœuvre des États dans des sphères qui relevaient autrefois de leur plus stricte souveraineté : science et

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recherche, défense (de par la dépendance des progrès technologiques), fiscalité, gestion des crises économiques, politique monétaire;

(v) une extension du réseau Internet, des *networks* médiatiques, du marketing et de la publicité à l'échelle planétaire (véhiculant les valeurs du marché); dans le même ordre, une progressive domination de l'anglais comme langue de communication sur le plan international;

(vi) des innovations technologiques provoquant davantage d'interactions et de densité dans la communication entre sociétés.

Les nombreux auteurs qui se sont attachés à l'étude du phénomène mettent généralement l'accent sur ses dimensions économiques: développement des marchés financiers, croissance des entreprises transnationales, qui semblent peu à peu dominer les économies nationales[1]. Ce processus rend les relations internationales en général plus complexes, en raison, notamment, de la multiplicité des acteurs impliqués, aux responsabilités variables et probablement définies de manière incertaine.

Sur le plan social, la globalisation est pour le moins équivoque[2]: elle est certes un instrument de développement économique mais elle provoque, en même temps, une plus grande polarisation dans les relations sociales; elle rend les économies nationales faibles encore plus vulnérables aux mouvements de capitaux. La limitation de la souveraineté des États se manifeste ainsi de façon dramatique dans le domaine de la protection sociale: la recherche du profit et la mobilité des capitaux qui s'ensuit n'est pas accompagnée – ni au plan national ni au plan international – par des mesures correspondantes de protection des travailleurs. Nous connaissions déjà les mouvements de personnes de la «périphérie» vers le «centre»: paysans, surtout, mais aussi travailleurs d'autres métiers et compétences, quittant les campagnes pour se rendre à la ville, à la recherche de meilleures conditions de vie. S'y ajoutent maintenant, sur une grande échelle, des mouvements transnationaux vers des pôles économiques: le nombre des migrants dits économiques est en constante augmentation, alors même que les pays «d'accueil»

1 Voir notamment: George Soros, *George Soros On Globalization*, Public Affairs, New York, 2002; Sean Kay, «Globalization, power, and security», *Security Dialogue*, Vol. 35, N° 1, Mars 2004, pp. 9-23.

2 Voir Pierre de Senarclens, *Mondialisation, souveraineté et théorie des relations internationales*, Armand Colin, Paris, 1998, en particulier le chapitre 4: «Aspects sociaux de la mondialisation». Du même auteur, voir aussi: «L'humanitaire et la globalisation», *Revue internationale de la Croix-Rouge*, Vol. 82, N° 836, 2000, pp. 311-325. Pour une analyse critique voir également: Serge Halimi, *Le grand bond en arrière*, Fayard, Paris, 2004.

sont souvent loin de leur accorder la sécurité sociale et économique recherchée, ou même un traitement respectueux de leur dignité et de leur santé[3].

La communication est une autre marque significative de la globalisation: la rapidité de la communication et multitude des informations disponibles dans une «bibliothèque» telle que le réseau Internet favorisent les échanges académiques, la recherche scientifique, la formation. La globalisation représente certainement ainsi un facteur positif d'innovation. Mais cette même rapidité et la disponibilité sans contrôle efficace d'informations sensibles, permettent aussi à des réseaux maffieux ou terroristes de communiquer, de mettre à la disposition de criminels des modes de fabrication d'armes, de poisons, ou autres.

La fréquence du recours aux recherches et aux échanges par le réseau Internet, la présence quasi constante d'images télévisées (et son corollaire pernicieux: «c'est vrai, je l'ai vu à la télé»!) ne sont pas sans conséquence pour la communication des idées elles-mêmes. Il devient difficile d'expliquer la complexité des relations internationales ou des sources d'un conflit, par exemple, de mener des débats en profondeur. Les discours et les analyses deviennent souvent simplistes. Une mentalité «fast-food» atteint également le discours intellectuel (qui devient parfois, lui aussi, un «fast-thought»!): il faut aller vite, changer sans cesse de sujet, d'intérêt, de mode.

La globalisation, on le sait, rencontre également des résistances. Les mouvements «altermondialistes» sont d'ailleurs un produit de cette globalisation et agissent largement sur un plan global. Dans un sens, ils représentent à l'échelle planétaire une sorte de «société civile» de résistance, qui propose des valeurs alternatives (ou présentées comme telles) à la domination économique de groupes restreints. Ces mouvements se sont fait également, pour une large part du moins, les avocats des droits de l'homme, de la démocratie, de la participation des peuples à leur destin. Des organisations à rayonnement mondial, gouvernementales ou non, contribuent à la diffusion des idées et des valeurs démocratiques, du sens de la justice (halte à l'immunité pour abus de pouvoir, dénonciation des crimes contre l'humanité, etc.), et s'emploient à promouvoir plus d'ouverture, de tolérance, de communication entre les cultures.

3 Nous devons aussi mentionner ici un autre «mouvement» de population, dans un sens géographiquement inverse: le tourisme, qui peut bien sûr favoriser le contact entre des personnes et leur culture, mais qui provoque aussi des effets sur les cultures authentiques. Dans un autre registre, bien réel aussi, il y a une «globalisation des maladies», notre monde devenant plus sensible aux épidémies ou même simplement à la transmission transnationale et rapide de maladies.

Il n'en demeure pas moins que la libéralisation des échanges n'est pas accompagnée de règles à l'échelon international, pas plus sur le plan économique que sur le plan politique : il manque un équivalent international de la fonction régulatrice que l'État exerce à l'échelon national. L'Organisation des Nations Unies – elle-même signe d'une internationalisation politique – qui cherche à exercer aussi un certain arbitrage dans les domaines économiques et sociaux, n'est pas (encore) à même d'accomplir cette tâche. Il en va de même d'autres organisations régionales ou sectorielles. L'Organisation mondiale du Commerce, relativement nouvelle dans le champ international, s'efforce de jouer un rôle positif dans cette régulation, mais le moins qu'on puisse dire c'est que sa tâche est immense, comme l'a encore récemment montré la Conférence de Cancun (2003).

Globalisation, tensions politiques et conflits

Les conflits armés n'ont pas attendu notre époque pour être globaux : que l'on pense aux deux guerres mondiales, à la colonisation, aux guerres napoléoniennes, voire aux croisades ou à l'extension de l'empire romain, il s'agissait là, déjà, de conflits dont la dimension globale ne peut nous échapper. Aujourd'hui, il est difficile de déterminer dans quelle mesure la globalisation constitue une cause « directe » dans l'origine ou la poursuite des conflits que vit notre monde. On ne peut certes ignorer que les options dominantes en matière économique favorisent les tensions et, comme cela a été indiqué, des résistances parfois violentes. Ce qui est ressenti par des peuples ou des pays, voire à l'échelle d'un continent, c'est l'exclusion, la non-participation aux décisions globales, la marginalisation. Si on prend l'exemple de l'Afrique, on peut percevoir un discours du genre : nous sommes producteurs de biens que nous exportons vers « le Nord », mais nous ne participons pas aux mécanismes de fixation des prix ni aux systèmes d'échanges, nous restons dans une relation de dépendance[4].

Les analyses concernant l'augmentation ou la diminution de la pauvreté en raison de la mondialisation ne sont toutefois pas concluantes. Comme le relève Amartya Sen, la relation de causalité entre misère et violence (y compris belliqueuse) est loin d'être solidement établie, et de toutes manières la pauvreté est un mal suffisamment terrible pour que la lutte pour

4 Voir : Garth Abraham, « 'Africa, the tragedy; Africa, the challenge', NEPAD and the new humanitarian agenda », et Christoph Harnisch, « Le CICR en Afrique : contexte et défis », les deux publiés dans la *Revue internationale de la Croix-Rouge*, Vol. 85, N° 852, respectivement pp. 717-736 et pp. 737-748.

son éradication ne dépende pas d'autres justifications[5]. Les conflits contemporains semblent cependant présenter une dimension économique plus importante que par le passé ou, pour le moins, parmi les multiples raisons de faire la guerre, celles qui tiennent à l'accès aux ressources économiques occupent une place importante[6].

Le lien entre pauvreté et conflits est par contre plus évident si on examine les conséquences de la violence armée, qui augmente la vulnérabilité et le dénuement des populations. Nombre de pays d'Afrique, d'Amérique latine et du Proche-Orient ont connu un appauvrissement cette dernière décennie. Cause ou conséquence de la mondialisation? Cause ou conséquence des conflits? Un peu des deux, sans doute. Mais la question est quelque peu rhétorique et n'importe sans doute guère aux populations affectées, qui souhaitent avant tout et surtout sortir de la misère, donner une bonne éducation à leurs enfants, vivre et non seulement survivre.

Examinons brièvement dans ce contexte la question du terrorisme: phénomène aujourd'hui présenté comme global, le terrorisme ne trouve certainement pas sa cause première dans la globalisation ni dans la pauvreté. Tous les pauvres ne sont pas des terroristes, et bien des terroristes ne sont pas pauvres. Dans leur «combat», certains utilisent largement les instruments de la globalisation, tant sur le plan matériel (usage d'Internet) que sur un plan psychologique et politique (recours à la «caisse de résonance» que constituent les médias, à une menace globale)[7]. La fréquence des actes de terrorisme (et le lien, supposé ou démontré, entre plusieurs de ces actes) et l'intensification de la lutte des États contre ce phénomène ajoutent ainsi une nouvelle dimension aux conflits armés locaux, nationaux et régionaux et à la préservation de la sécurité.

De même, les réseaux maffieux opèrent à l'échelon global: trafic de drogue, de personnes et de matériaux en tous genres. Ces trafics s'alimentent, pour une part du moins, des situations de crise, des zones de «non droit»,

5 Amartya Sen, «Guerres et famines: divisions et incitations», *Désarmement* (ONU), Vol. XIX, N° 3, 1997, pp. 16-31; du même auteur: «Global inequality and persistent conflicts», Communication présentée au Nobel Peace Prize Centennial Symposium, Oslo, Décembre 2001. Voir également: Gilbert Etienne, «Globalization and poverty in developing countries: Myths and facts», *The Geneva Forum*, juin-septembre 2003, pp. 4-15; Sylvie Brunel, Famines et Politique, Presses de sciences politiques, Paris, 2001.

6 Voir notamment: *Forum: War, Money and Survival*, Comité international de la Croix-Rouge, Genève, 2000; Herfried Münkler, *Les guerres nouvelles*, Alvik éditions, Paris, 2003; et du même auteur: «The wars of the 21st century», *Revue internationale de la Croix-Rouge*, N° 849, mars 2003, pp. 7-22.

7 Voir notamment: Karin von Hippel, «Définir les origines du terrorisme: un débat transatlantique?», *La revue internationale et stratégique*, N° 51, automne 2003, pp. 103-113; Steven Metz, «La guerre asymétrique et l'avenir de l'Occident», *Politique étrangère*, 1/2003, pp. 25-40.

touchées elles-mêmes par la violence ou un conflit. La lutte policière contre cette forme de criminalité passe également par des échanges d'informations et des collaborations transnationales plus importantes.

La globalisation est un phénomène qu'il s'agit de saisir en termes d'ambivalences et de contradictions. Considérée comme instrument (et non comme une idéologie) elle peut :

(i) par la diffusion des droits de l'homme, contribuer à un accroissement des libertés, à une plus vaste coopération entre les organisations porteuses de ces valeurs ;
(ii) par l'imposition de modèles économiques et culturels uniformes, faire disparaître des économies traditionnelles originales, briser des cultures ;
(iii) favoriser les échanges scientifiques, maintenir un contact étroit entre les membres de familles dispersées ou, à l'inverse négatif, faciliter la concertation entre organisations criminelles.

S'il est difficile de déterminer en quoi la poursuite de certains conflits serait influencée de manière causale et directe par la globalisation, il n'en reste pas moins que le monde est affecté par les effets ou par la perception de la globalisation. Les conflits que vit le monde ne changent pas tous, et en tout cas pas de la même manière, du fait de la globalisation. Néanmoins, la perception que nous en avons ou la façon dont ils sont présentés ou reliés entre eux sont aujourd'hui différentes. C'est sans doute la lutte globale contre « le » terrorisme qui a le plus d'influence sur la perception que nous avons des conflits : par exemple les conflits dans le Caucase du Nord, en Colombie ou en Indonésie, voire en Irak, ont été « intégrés » à la lutte contre le terrorisme. Si des pays comme l'Afghanistan et la Somalie ont sans doute pu servir de bases à des groupes terroristes agissant sur un plan international, analyser selon un même modèle tous les conflits armés internes ou tous les attentats commis à travers le monde n'aide probablement pas à comprendre les motivations véritables de ces groupes (au demeurant divers), et, partant, ne permet pas de tracer les moyens adéquats pour lutter efficacement contre cette forme de violence. Par ailleurs, il est impératif de comprendre au mieux la spécificité des situations caractérisées par des conflits armés ou des tensions pour identifier les meilleurs moyens de répondre valablement et durablement à ces crises, en particulier pour venir au secours des populations civiles touchées par la violence.

Les approches dites globales n'expliquent pas tout. Il en va de même quand on analyse les sources de conflits. Nous avons parlé plus haut des résistances à la globalisation. L'une d'elles se manifeste par l'affirmation et la volonté de préservation des identités particulières. Cette volonté peut aller

jusqu'à l'utilisation de moyens violents[8]. Cet aspect-là doit également être perçu et compris par les acteurs, par exemple les organisations humanitaires, qui interviennent dans les zones de conflit.

L'accent qui est mis aujourd'hui sur la lutte dite globale contre « le » terrorisme ne doit pas nous faire oublier que la sécurité (personnelle ou d'une communauté nationale) ne se réduit pas à la seule dimension militaire ou policière. Comme le rappelle la Commission sur la sécurité humaine: « la sécurité humaine, au sens le plus large du terme, implique beaucoup plus que l'absence de conflit violent. Elle englobe les droits de l'homme, la bonne gouvernance, l'accès à l'éducation et aux soins de santé et le fait que l'individu a bien les chances et les choix qui lui permettront d'accomplir son potentiel. Chaque pas dans cette direction représente aussi un pas dans la lutte contre la pauvreté, vers la croissance économique et la prévention des conflits. Être à l'abri du besoin et de la peur, laisser aux générations futures un environnement naturel salubre – ce sont là les éléments, liés entre eux, de la sécurité humaine et donc de la sécurité nationale »[9].

Globalisation, incidences sur l'action humanitaire

L'action humanitaire, dont le Comité international de la Croix-Rouge (CICR) est l'un des protagonistes par sa nature et ses principes, possède une dimension résolument universelle, tout en s'attachant fermement à la défense locale et régionale de personnes et populations affectées par l'adversité. Elle ressort de valeurs à la fois « anciennes » (au sens de fondatrices, fondamentales) et « modernes » (elles restent ou redeviennent actuelles): mettre l'être humain au centre de la motivation à l'action, protéger et promouvoir la dignité humaine, être proche des victimes, protéger la vie et la santé, faire participer les personnes touchées par la violence ou une catastrophe à la recherche de solutions, écouter et soutenir les hommes et les femmes plongés dans la souffrance, conduire une action responsable et honnête, fiable et efficace.

Le CICR qui veut mener, sur le plan universel, une action humanitaire impartiale, neutre et indépendante[10], s'appuie pour cela sur les éléments suivants:

8 Voir notamment: François Thual, *Les conflits identitaires*, Éditions Ellipses, Paris, 1995.

9 Sadako Ogata et Amartya Sen, *La sécurité humaine maintenant. Rapport de la Commission sur la sécurité humaine*, Presses de sciences politiques, Paris, 2003, p. 18.

10 Pour une analyse générale de l'action et des défis qui se posent au CICR aujourd'hui, nous renvoyons à l'ouvrage de Michèle Mercier, *Le Comité international de la Croix-Rouge. L'action humanitaire dans le nouveau contexte mondial*, Collection « Le savoir suisse », Presses polytechniques et universitaires romandes, Lausanne, 2004.

(i) d'abord, en raison du fondement juridique de son action, le droit international humanitaire qui jouit aujourd'hui d'une reconnaissance universelle – si ce n'est dans son application (loin s'en faut !), du moins par le fait que quasiment tous les États ont ratifié les Conventions de Genève de 1949 ;
(ii) ensuite, au vu de l'aspiration à l'universel des principes et de l'action d'une institution comme le CICR, de par son action et son appartenance au Mouvement international de la Croix-Rouge et du Croissant-Rouge – un réseau qui lui-même couvre pratiquement l'ensemble de la planète ;
(iii) finalement, pour une raison très pratique : l'action humanitaire, neutre et indépendante du CICR répond à l'universalité de la souffrance et à l'égalité fondamentale des hommes devant ces souffrances (le principe d'impartialité est la conséquence pratique de cette approche : priorité aux détresses les plus urgentes).

Si le CICR doit procéder à une analyse globale des risques (mais aussi, sur un plan moins « sécuritaire », des connexions entre phénomènes sociaux, décisions politiques et économiques), c'est donc parce qu'il est lui-même une institution au rayon d'action universel, à l'œuvre dans presque tous les conflits et situations de violence armée qui agitent le monde. Il assure une présence permanente dans 80 pays ; son personnel (environ 12 000 personnes, recrutées dans les pays d'engagement ou expatriées) représente une centaine de nationalités différentes. La dimension internationale du personnel du CICR et des nombreux collaborateurs locaux, outre qu'elle apporte un « plus » évident à l'universalité voulue du champ d'action – contribuant ainsi à la création, au sein même de l'institution, d'une culture de dialogue –, constitue un outil précieux pour appréhender les cultures particulières, favoriser la communication entre les délégués et les personnes et les populations auprès desquelles ils déploient leur mission.

De même, grâce au réseau que constituent les Sociétés nationales de la Croix-Rouge et du Croissant-Rouge, avec qui il collabore, le CICR s'assure des liens précieux avec d'autres cultures, mentalités et systèmes politiques. Les informations qu'il recueille de cette manière, en plus du soutien opérationnel qu'il reçoit des (et apporte aux) Sociétés nationales représentent une dimension essentielle de la sécurité et de l'efficacité de l'action humanitaire.

Les médias, qui cherchent l'information, la traitent et la diffusent sur un plan global, contraignent l'action humanitaire à des adaptations opérationnelles. L'action humanitaire doit ainsi tenir compte du fait que tout ou presque tout est public : grâce aux médias, tout le monde peut être informé,

en temps réel, des événements qui surviennent partout dans le monde. L'irruption d'images télévisées dans nos salons laisse supposer que tout le monde est concerné et, d'une certaine manière, «partie aux conflits». Par exemple, l'action du CICR en faveur des prisonniers des forces de la coalition en Irak (notamment, dans le cas de la prison d'Abou Ghraib), rendue publique par les médias dès mai 2004, a été diffusée à l'échelle de la planète, et nombre de délégués de l'institution, engagés dans d'autres actions dans le monde, ont dû mener avec leurs interlocuteurs habituels des discussions approfondies sur le sens de la confidentialité des démarches du CICR. De même, les assassinats de collaborateurs du CICR en Afghanistan et en Irak, pour ne citer que les cas les plus récents (2003), ont été commentés dans d'autres pays où le CICR mène une action, y compris dans des régions où il avait dû déplorer, dans un passé récent, la mort violente de certains de ses employés.

Cette situation provoque un sentiment diffus d'insécurité: chez nous et ailleurs, qu'il soit proche ou lointain, c'est (presque) la même chose; c'est, partout, la même guerre (les mêmes soldats, les mêmes voitures piégées, etc.). Ce sentiment est renforcé par la vision – essentiellement, mais pas exclusivement – américaine de la «guerre» contre le terrorisme, présentée comme globale. Ainsi, la globalisation de la menace – qui ne peut être située dans des endroits précis et localisés – est ressentie comme universelle ou pouvant surgir à tout moment de partout. Là encore, l'action humanitaire est touchée:

(i) sur le plan de la gestion des risques: l'analyse locale doit s'accompagner d'une analyse plus large – régionale et globale (mondiale);
(ii) sur le plan de la communication: une institution humanitaire telle que le CICR doit développer dans ce domaine des stratégies régionales et globales lui permettant d'être comprise, reconnue et acceptée par les victimes des conflits armés elles-mêmes, ainsi que par tous les protagonistes qui ont recours à la force armée ou à d'autres formes de violence armée.

D'une manière générale, la dimension globale de la communication – et donc de la «visibilité» constante à laquelle les organisations sont exposées – oblige les acteurs humanitaires, dont le CICR, à une grande cohérence dans l'action et la prise de parole: les médias, les gouvernements, les groupes d'opposition, et bien d'autres observent, comparent, critiquent. Il est dès lors indispensable d'être – et d'être vu dans l'espace et la durée – cohérent, constant et crédible dans les actes et les raisons qui les fondent (y compris, et surtout, en cas d'exception aux règles doctrinales ou opérationnelles).

De même, l'internationalisation du personnel, dont nous avons évoqué les effets positifs, impose à une organisation comme le CICR de déployer en son sein un effort permanent de formation, de «*coaching*» par les cadres, pour maintenir une unité de pensée, l'adhésion aux orientations stratégiques de l'institution, gage de la cohérence des choix opérationnels et de l'efficacité de l'action.

Conclusion: analyser globalement et agir localement

Au terme de ces réflexions sur la globalisation et son incidence sur l'action humanitaire, nous discernons le principal défi qui se pose, dans ce contexte, à l'action humanitaire: analyser globalement et agir localement. Mais aussi: savoir que notre action locale pourra être connue et répercutée, au-delà du contexte d'une intervention particulière. Cette tension entre «extérieur» et «intérieur» se manifeste d'ailleurs dans la conception même de l'action humanitaire, telle que la conçoit le CICR: indépendante des intérêts politiques et économiques particuliers – qu'il faut néanmoins bien connaître –, elle doit rester proche des personnes touchées par les conflits armés, attentive aux besoins, auxquels il faut répondre avec impartialité, rapidité et efficacité.

Abstract

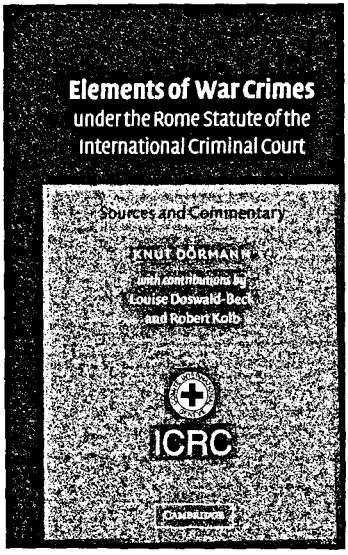
Globalization: Introduction to the phenomenon and its implications for humanitarian action

Jean-Luc Blondel

Globalization is both a fact of life, principally in economics, technology and communication, and an international view of the world. It needs to be considered in terms of its inherent ambivalence and contradictions: it can, for instance, promote cultural and scientific exchange, but it also facilitates coordination between criminal organizations; through the dissemination of human rights it may help to give greater freedom, but may also destroy cultures or inflict damage on traditional economies.

While it is difficult to determine to what extent globalization is directly responsible for starting or prolonging certain conflicts, the economic aspect is probably an increasingly important factor in many contemporary conflicts. Resistance against globalization and the struggle, which may sometimes be violent, to preserve a cultural identity are other factors to be mentioned. The globalization process is serving as a template for terrorism and international endeavours to combat that particular form of violence, with the risk also of oversimplifying the causes of the phenomenon and the challenges it presents.

Humanitarian action — in which the ICRC is one of the key players — has a fundamental international dimension because of the universal nature of international humanitarian law and the principles governing such work on behalf of all victims of armed conflict. Humanitarian action is therefore also affected by globalization in that it has an impact on the way that risks and potential dangers are managed (an analysis of the local situation must go hand in hand with a broader analysis at regional and global levels) and on communication (calling for a large degree of consistency in the conduct of operations and in public statements).



Elements of War Crimes under the Rome Statute of the International Criminal Court - Sources and Commentary

by Knut Dörmann, with contributions by Louise Doswald-Beck and Robert Kolb

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The ICRC's approach to contemporary security challenges: A future for independent and neutral humanitarian action

PIERRE KRÄHENBÜHL*

The first years of the millennium have undoubtedly been difficult — and often dramatic — for the conduct of humanitarian operations. There were threats and attacks deliberately targeting aid organizations and their personnel, a fact that has raised questions about the ability of these organizations to fulfil their mandate and has generated a debate on the future of humanitarian action. There is much at stake in this debate for the ICRC.

In this article, I try to set out some thoughts and indications of how the ICRC assesses these developments and how it plans to address some of their most significant implications.

Evolving environments

Conflict environments in today's world continue to be highly diverse in terms of causes, nature and characteristics. At a global level, a renewed polarization or radicalization is to be noted. This polarization makes itself felt in different ways, but the one that is affecting the conflict environments most perceptibly is the confrontation taking place between a number of States engaged in what is often now referred to as the "war against terrorism" and a series of radical non-State entities determined to oppose them and prepared to resort to the use of non-conventional methods of warfare. These include deliberate attacks against civilians and so-called soft targets, for example humanitarian organizations. Polarization is also apparent in the resurfacing of tensions between the so-called North and South in connection with such issues as poverty, terms of trade and access to and control of resources.

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The consequences of the attacks of 11 September 2001 thus continue to be felt around the world. The global struggle conducted in recent years by the United States of America and its allies has taken on various forms and includes operations both by police and by security forces. A number of States are using the pretext of the "fight against terrorism" to increase the pressure on internal opposition or resistance groups. In many cases the consequences for the civilian population are serious. This was the backdrop for the armed conflicts in Afghanistan and Iraq and the deployment of foreign military forces in those countries.

While a number of individual contexts are affected by these global trends, an assessment of the reasons for conflicts breaking out or continuing in many other parts of the world shows that local causes remain predominant and, besides having political motivations, are usually linked with economic and social issues. In a number of countries, from Nepal to Burundi and from Liberia to Myanmar, conflict or violence stems from internal causes and results in extensive suffering. Identity-driven or so-called ethnic conflicts of the 1990s, with their massive casualties and large-scale population displacements, reappeared drastically this year in the Darfur region of Sudan, but no longer appear to be the commonest form of confrontation. Tactics connected with the "fight against terrorism", including acts of indiscriminate violence perpetrated by non-State entities and the spread of repressive policies in individual States, are at present much more in evidence.

Implications for the security of humanitarian workers

Carrying out humanitarian activities in zones of armed conflict or internal violence has always been a dangerous undertaking. The ICRC currently has more than 11,000 staff members working in 79 contexts worldwide.[1] At every moment of the day they travel to areas that have seen fighting occur, or cross front lines between opposing parties in order to reach the persons they are mandated to protect and assist. They meet, negotiate or conclude agreements with the whole range of arms carriers present in these conflicts, from members of the military to the police, from paramilitary units to rebel movements, from child soldiers to mercenaries. For the ICRC, the security of its personnel is a crucial responsibility. While working in contexts of armed conflict or situations of violence evidently implies being confronted with

1 See the ICRC's Annual Report 2003, June 2003, published on the ICRC website at the following address: http://www.gva.icrc.org/Web/Eng/siteengo.nsf/htmlall/section_annual_report_2003 (visited on 7 July 2004).

significant levels of risk, it has always sought to develop approaches and instruments of security management that limit exposure to such risks to the greatest possible extent. The "classic" security environment is commonly described as one where the main risk is that of finding oneself "in the wrong place at the wrong time". It is worth noting — as we discuss some of the new features in terms of risks — that according to the ICRC's experience this type of security environment remains by far the most widespread in the world today.

That being said, in 2003 the ICRC was the victim of a series of deliberate attacks that claimed the lives of four of its colleagues in Afghanistan and Iraq. A fifth colleague was caught in crossfire and killed in Baghdad. Several other organizations, including the Afghan Red Crescent Society, the UN family and NGOs, suffered similar tragic losses.

Two of these three deliberate attacks, namely those north of Kandahar in March 2003 and south of Baghdad in July 2003, seem to have been the result of an apparent association of the ICRC's presence with the broader international political and military activities taking place in the countries concerned. The same could apply to the October 2003 car-bomb attack on the ICRC offices in Baghdad.

The question that inevitably arises is whether these attacks indicate a new trend. Yet ICRC delegates have been deliberately targeted in the past. The ICRC lost several staff members in deliberate attacks in Burundi and Chechnya in 1996 and in the east of the Democratic Republic of Congo in 2001. Also, other organizations have faced tragedies of their own.

It therefore seems legitimate to ask what is really new today. From an ICRC perspective, what is new in the present context is the global nature of the threat, the fact that it is not necessarily geographically circumscribed. The ICRC's security concept used to be based on an essentially context-based approach. A given delegation in the field would evaluate its security environment on the basis of a series of indicators, such as the acceptability of the ICRC and its activities, a factor that plays a prominent role.

Today, however, although such indicators may appear favourable in a given context, groups or individuals outside the local context or loosely connected with it might nevertheless target the ICRC's staff there.

A complicating factor is the fact that having access to the groups potentially willing to carry out such attacks is at present very difficult, when not downright impossible. Yet for the ICRC, dialogue with all parties involved in or affecting the outcome of a given conflict situation is a vitally important part of its operating procedures. Without such dialogue, it has proved impossible to achieve the required levels of acceptability, and thus

impossible to reach populations at risk so as to carry out the protection and assistance activities the ICRC is mandated to undertake.

Between rejection and instrumentalization

Furthermore, in a polarized environment there are almost always expectations that any player present on the ground ought to take sides. One is friend or foe, ally or enemy and, whatever the choice, a choice has to be made. This makes it all the more complex for organizations such as the ICRC, working on the basis of the principles of independence and neutrality, to get their message across. This imposed polarization results in an increased importance of how the legitimacy of humanitarian action and in particular of the ICRC's neutral and independent way of operating is perceived.

This development entails two specific risks: that of being rejected and that of being instrumentalized. It appears at present that any player seen as influencing in one way or another the stabilization or transition efforts in Afghanistan or in Iraq is potentially at risk. Since in addition the ICRC's identity is perceived in some circles as mainly Western — because of issues related to funding, the emblem, the location of its headquarters — the risk of being mistaken for an integral part of the broader political and military presence in these countries is high. Such a perception might result in rejection of the ICRC as an independent and neutral player and a refusal to grant it access to the victims to whom it wishes to lend its assistance.

Regardless of what the motives behind such acts might have been, the ICRC has strongly condemned the attacks against its staff, which seriously impaired its ability to provide protection and assistance to the extent required by the situations in Iraq and Afghanistan.

Another element of risk is that of being instrumentalized, resulting from the tendency of some State authorities to integrate humanitarian action into the range of tools available to them in the conduct of their campaign against terrorist activities. This tendency has been manifested in various ways during recent months. They include statements by governments describing their military presence in Iraq and Afghanistan as "mainly humanitarian". The concept of the Provincial Reconstruction Team (PRT) and their establishment by the Coalition forces in Afghanistan is another example. The ensuing blurring of lines between the role and objectives of political and military players on the one hand and humanitarian players on the other creates serious problems for an organization such as the ICRC, with regard to perception, acceptability and security at the operational level.

The ICRC's response to security challenges

How does the ICRC intend to address some of the most pressing implications of the aforesaid developments? What must be borne in mind here is the ICRC's priority of ensuring, as much as possible, protection and assistance to the persons protected under the laws of armed conflict, in accordance with the mandate conferred upon it by the international community and its own commitment to do so. However, measures need to be taken in order to ensure the security of its staff, so that they can indeed reach those people and act on their behalf.

Parameters of the ICRC's security management

The ICRC's concept of security management is based on the following main premises:

(i) The ICRC has a largely decentralized management culture, starting from the bottom up. This applies equally to security management. It strongly believes that the closer one is to populations at risk, the better-placed one is to analyse events and formulate strategies to address them. The ICRC has never viewed the security of its staff as distinct from that of the population living in the places where it works. The particular advantage sought in its operational approach is proximity to the people it is attempting to help.

(ii) To remain effective, this broad autonomy — also with regard to security issues — for ICRC delegations in the field has to be embedded in a clearly defined institutional framework: the organization's mandate, the principles of the Movement and the security concept under which the ICRC operates.

The cornerstone of the ICRC's approach to security management is that responsibility lies with the operational managers themselves. There is no separation between security management and operational management. Risk and threat assessment is an integral part of operational strategy definition and implementation.

When the Security Unit attached to the Department of Operations was established at ICRC headquarters ten years ago, an essential precondition set by operational field managers was that responsibility for security management would not be taken away from them. In that sense, the Security Unit functions more as a watchdog and focuses mainly on overall policy development, monitoring, support and training.

The ICRC is also convinced that security — long before it becomes an issue of technical or physical protection — is a matter of acceptance, perception of the organization, individual behaviour of delegates, the ability to listen and to communicate and project a consistent and coherent image of the organization to all parties involved in a conflict situation. In other words, one needs to be predictable, one needs to be seen to be doing what one says.

Impact of the changing environment on the ICRC's general approach to security

The next question is then whether and how the said changes in the environment have had an impact on this overall ICRC approach? Four elements need to be mentioned:

(i) Tragedies such as those that occurred in 2003 could be an inducement to further centralize decision-making at headquarters. The ICRC, however, is convinced that it must maintain a decentralized approach.

(ii) In the light of the current security situation, the ICRC has realized that it needs to take account of the global nature of possible threats in its operations worldwide. It used to be enough to assess local risks and determine the organization's level of acceptance. Nowadays, the ICRC delegations around the globe are also required to assess the impact that global threats and misperceptions could have on their local environment. The security management concept has to include approaches that can raise awareness and levels of preparedness for dangers that may develop beyond the borders of a given context and yet affect it indirectly.

(iii) This also requires new ways of communicating with players potentially able to act in or influence a given situation. Great attention needs to be given to establishing a fruitful dialogue with those who may misunderstand or reject the organization today.

(iv) Lastly, the ICRC is convinced that it remains important to make a strong stand for neutral and independent humanitarian action. Old recipes for a new world? The ICRC thinks differently; it maintains a principled position in the face of challenge.

Arguably, the ICRC could increase its effectiveness in facing these challenges in the following ways:

(i) It needs to improve the integration of national staff members in the security analysis and evaluation carried out in the respective contexts. Similarly, the dialogue on security with key national or local partners,

such as colleagues in National Red Cross or Red Crescent Societies, can and should be improved.

(ii) It needs to increase its knowledge of and develop broader relations with civil society and various existing or emerging non-State players, including traditional, economic, religious and social leaders. It needs to explain better why impartiality or independence matter, and why neutrality is relevant. The fundamental principles that inform its mode of operation and their relevance in the context of conflict environments need to be well understood.

The continuing relevance of neutral, impartial and independent humanitarian action

In the aftermath of 11 September 2001, the relevance of neutral, impartial and independent humanitarian action was questioned. Through its operations in the field, the ICRC seeks to demonstrate in concrete terms that its operational approach is not only credible but necessary in a polarized world.

It is not always easy to explain clearly what neutrality actually means. Taking a neutral position is often mistaken for indifference to the situation at hand. But not taking sides in a conflict does not mean being indifferent. The ICRC is not neutral in the face of violations of international humanitarian law. It takes a conflict as a given fact. It strives to ensure that all those taking part in the hostilities respect humanitarian law. Neutrality is therefore a means to an end, not an end in itself. It is a tool used to ensure access for concrete action in all situations. The ICRC seeks to establish and maintain a dialogue with all parties; no party wielding power over a civilian population would be excluded from such a dialogue. This does not constitute a pronouncement on their worthiness as interlocutors, nor does it grant them any particular status.

Impartiality means that humanitarian action should benefit people without discrimination, thus regardless of their origin, race, sex, religion, etc., and that the ICRC's operations are geared solely to the needs of the victims of armed conflicts. In other words, no one should be deprived of assistance or protection because of what he or she is or believes in. Assistance and protection must be provided according to needs.

Independence, as seen by the ICRC, implies that its humanitarian action needs to be distinct — and perceived as such — from any political or military interests. The reason for working independently is very

straightforward: in any conflict, parties will tend to reject humanitarian organizations they suspect of having ulterior political motives. This explains, unsurprisingly, why the ICRC is so adamant in insisting on respect for the individual identities, mandates and operational approaches of the various organizations working in the humanitarian field. Integrated approaches combining political, military, reconstruction and humanitarian elements, as advocated by the United Nations and a number of States, conflict with the principle of independence as understood by the ICRC and the entire International Red Cross and Red Crescent Movement. Therefore, while these policies can be very effective for organizations with other mandates, the ICRC cannot and will not subscribe to them.

Necessary distinction between humanitarian and military action

Advocacy for an independent and neutral approach to humanitarian action includes a claim for maintaining a clear distinction between humanitarian action on the one hand and political-military action on the other. This is not because the ICRC shies away from the military: on the contrary, the ICRC wants, needs and mostly has an active dialogue with the military and other forms of armed groups. Nor does it claim that there are no circumstances — when other players are incapable of fulfilling their mission — in which a military unit might not be a last resort. However, humanitarian activities should not be designed as part of "hearts and minds" military campaigns, nor should they be used as a tool to promote or accompany armed changes of regime. Such a blurring of lines between humanitarian and political or military activities may ultimately prevent humanitarian protection and assistance from being provided in a non-discriminatory manner for all victims of a conflict and must be avoided.

In that regard the ICRC does, for instance, have a problem with the Provincial Reconstruction Teams in Afghanistan. The strictly military or security objectives they have set for themselves are not something the ICRC wishes to comment on. But there is cause for concern in the way they integrate humanitarian responses into an overall military and security concept, whereby responding to the needs of part of the population comes to be seen as a component of a broader strategy designed to defeat an opponent or enemy.

There may be political arguments for promoting or defending that approach. It is, however, important to stress that such a definition of humanitarian action is incompatible with the fundamental principles that govern

the ICRC operations. The ICRC therefore cannot and will not subscribe to or take part in it. It realizes that this might give the impression that the ICRC is once again keen to underline its "apartness", that the world changes and the ICRC continues to insist on the same old principles and strategies. Serious account is taken of these criticisms and of other views on the matter, but the ICRC is convinced that the strategy it has adopted is the one that is most in accordance with its mandate and serves its humanitarian goals best.

Clear identity and dialogue

However, the ICRC has nothing to be complacent about and is keen to learn from the experience of others. There is a genuine determination to engage in a transparent dialogue on these issues with all political, military and humanitarian players and other stakeholders, both in specific conflict situations where the sharing of analysis and threat assessment is often vital, and in more conceptual debates where progress can be achieved in understanding respective interpretations of humanitarian action. Fully recognizing that there are today many other definitions of humanitarian action than the one it has adopted, the ICRC does not claim that all other players should or can agree to its own definition and operational philosophy.

What is important for the ICRC, though, is to make its position well known and clearly understood: it must be able to convey what it will take part in, i.e. dialogue, consultation and, if appropriate, coordination with others, and what it will not accept, i.e. coordination or integration by others. The ICRC is strongly determined to maintain its principled operational approach in place, convinced that it remains as effective and as necessary as ever.

Résumé

La stratégie du CICR face aux défis contemporains en matière de sécurité: un avenir pour l'action humanitaire neutre et indépendante

Pierre Krähenbühl

Les premières années du XXIe siècle ont indéniablement été difficiles – et souvent dramatiques – pour la conduite des opérations humanitaires. La polarisation du monde, de plus en plus marquée, la «guerre contre le terrorisme» et la diversification des acteurs impliqués dans les conflits qui agitent la planète ont transformé l'environnement dans lequel l'action humanitaire est menée. Conjuguée au concept de gestion intégrée des crises (combinant des outils politiques, militaires et humanitaires), cette réalité suscite le risque d'un rejet ou d'une instrumentalisation du personnel humanitaire par les parties aux conflits.

Les nouvelles formes de violence – en particulier la globalisation des risques et des menaces, la dynamique des conflits n'étant plus circonscrite à une seule zone géographique – interpellent aussi les organisations humanitaires. Le fait que les organisations d'aide et leur personnel soient délibérément pris pour cibles soulève des questions quant à la capacité de ces organisations de remplir leur mandat dans certaines situations et a engendré un large débat sur l'avenir de l'action humanitaire.

Il va sans dire que les enjeux de ce débat sont immenses pour le CICR. Dans cet article, le directeur des opérations du CICR émet quelques réflexions et indications sur la manière dont le CICR évalue les évolutions récentes dans l'espace humanitaire, tant en matière de sécurité que sur le plan opérationnel. Elles vont de la gestion de la sécurité, à l'identité et à l'image, à la pertinence constante des principes qui sous-tendent les modes d'action du CICR. L'auteur conclut en définissant les paramètres et les conditions de l'avenir d'une action humanitaire neutre, impartiale et indépendante.

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

RUTH ABRIL STOFFELS*

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

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

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

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

The right to humanitarian assistance

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

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

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

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

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

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

Humanitarian assistance and the right to life

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

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

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

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

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

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

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

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

Humanitarian assistance and international humanitarian law

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

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

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

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

7 Articles 55 and 81.

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

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

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

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

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

8 Articles 38, 39, and particularly Article 23.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 See Articles 70 and 71 of Additional Protocol I.

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

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

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

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

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

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

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

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

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

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

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

Responses to violations of the right to humanitarian assistance

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

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

19 Articles 17 and 23 of the Fourth Geneva Convention.

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

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

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

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

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

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

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

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

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

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

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

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

Implementation mechanisms provided for under international human rights law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Implementation mechanisms provided for under international humanitarian law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United Nations Security Council

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

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

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

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

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

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

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

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

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

Offer of humanitarian assistance

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

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

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

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

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

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

Authorization of the entry, passage and distribution of humanitarian assistance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Unlawful refusal to grant authorization: consequences and remedies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Implementation of humanitarian assistance II: requirements for entitlement to protection

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

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

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

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

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

Humanity

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

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

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

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

Impartiality

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

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

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

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

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

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

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

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

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

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

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

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

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

Neutrality

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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

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

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

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

Résumé

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

Ruth Abril Stoffels

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

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

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

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

Moral dilemmas for humanitarianism in the era of "humanitarian" military interventions

BEAT SCHWEIZER*

In recent years, the "humanitarian" label has been increasingly used by Western governments to legitimize a new and sometimes controversial security agenda. The use of humanitarian reasons to justify international military interventions, combined with the fact that the governments involved in these military operations are usually also the main financiers of the humanitarian system, has led to revived discussions among international humanitarian organizations and NGOs on the ethical principles of humanitarian action. This article deals with a number of moral dilemmas humanitarian organizations are faced with when they — often unwillingly — become part of political and military strategies to reduce conflict and build peace, notably in the aftermath of "humanitarian" military interventions. Recent international operations in Cambodia, Bosnia, Kosovo, Afghanistan and Iraq will serve as examples.

Humanitarianism and ethics

The impulse to help seems to be one of the more pleasant sides of human nature. Rousseau classed it among the "natural" feelings and Adam Smith thought it was inherent to human nature.[1] In addition, the idea that the strong and the rich have a moral obligation to assist the weak and those in need is normative in all major world religions. Not surprisingly, organized charity was therefore largely the domain of religious orders and organizations until the end of the nineteenth century.

Many of today's more secular humanitarian organizations have their origin in Henry Dunant's idea of the Red Cross, famously conceived after Dunant

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had witnessed the terrible Battle of Solferino in 1859. The efforts of the International Committee of the Red Cross (ICRC), formed in response to Dunant's vivid eye-witness account in his book *A Memory of Solferino*, led to the adoption at a Diplomatic Conference of the original Geneva Convention of 1864.[2] This convention not only laid down the rules for *jus in bello* by defining limits for warfare, but also paved the way for the creation of voluntary medical services by granting them the right to assist the wounded on the battlefield.

Largely inspired by this text, which was to become the basis of the 1949 Geneva Conventions, the work of the ICRC, and that of the International Red Cross and Red Crescent Movement that developed from it, has been and continues to be guided by seven fundamental principles: humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

While the principles of voluntary service, unity and universality are relevant mainly for the internal functioning of the Red Cross and Red Crescent Movement, the other principles — humanity, impartiality, neutrality and independence — still provide the basis for discussion on the ethical framework of humanitarian action in general.

Nicholas Leader cautions, however, that these humanitarian principles cannot be seen as the expression of a universal ethic, because they were historically a compromise between military-political necessity and the dictates of conscience and humanity.[3] The "deal" was that the belligerents accepted the role of the humanitarian workers on the condition that humanitarian action would not interfere with the conflict itself. The terms of this "deal" need to be constantly renegotiated.

The humanitarian imperative

The "humanitarian imperative", the ethical basis of most humanitarian organizations, declares that there is an obligation to provide assistance unconditionally, wherever and whenever it is needed. Fiona Terry rightly points out, however, that the primary responsibility for the safety and well-

1 David Rieff, *A Bed for the Night: Humanitarianism in Crisis*, Simon and Schuster, New York, 2002, p. 57.

2 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864.

3 Nicholas Leader, *The Politics of Principles: The Principles of Humanitarian Action in Practice*, Humanitarian Policy Group Report No. 2, Overseas Development Institute, London, March 2000, available at <http://www.odi.org.uk/hpg/papers/hpgreport2.pdf> (last visited on 20 August 2004), p. 11.

being of their citizens belongs to governments and that "humanitarian assistance is necessary only once governments or combatants have been unwilling or unable to shoulder their respective responsibilities."[4] According to this view, humanitarian organizations therefore do not inherit the moral responsibilities that States and governments have failed to uphold.

This fundamental moral dilemma was already raised by Florence Nightingale, who disagreed with Henry Dunant's idea of humanitarian volunteers, arguing that it would relieve States from a part of the burden of going to war.[5] Transposed to today's discussion on "humanitarian" military interventions, it can indeed be asked whether these would be possible without the flotilla of UN agencies and NGOs standing ready to repair the damage and rebuild shattered civil societies after the military operations.

For humanitarian organizations have come to discover — sometimes painfully — that the question of moral responsibility cannot always be easily deferred to governments alone. The dilemmas of humanitarian action were, for example, agonizingly exposed in the huge assistance operation for the Rwandan refugee camps in Zaire in 1994. Not only had many — if not most — of the refugees taken active part themselves in the Rwandan genocide, but their camps also served as sanctuaries and recruitment centres for extremist Hutu militias who continued to murder and plunder inside Rwanda. The responsibility to intervene and impose at least a demilitarization of the camps would clearly have belonged to the government of Zaire or possibly the UN, and humanitarian workers did not fail to point that out. On the other hand, the camps could not have existed without the international humanitarian assistance, and at least some organizations felt that moral responsibility heavily. Some, such as *Médecins Sans Frontières* (MSF), decided to withdraw, but many others stayed and continued their operations. The Rwandan army ultimately attacked the camps in October 1996, leading to even more bloodshed.[6]

Similarly, within a country at war humanitarian operations can unintentionally bestow local and international legitimacy on rebel movements, local warlords or other powerful individuals. First, humanitarian agencies

4 Fiona Terry, *Condemned to Repeat: The Paradox of Humanitarian Action*, Ithaca: Cornell University Press, New York, 2002, p. 17.

5 Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, Harper Collins, London, 1998, pp. 29-32.

6 *Ibid.*, pp. 155-215.

need to negotiate access with the groups in charge of a certain area, thus implicitly recognizing their authority and legitimacy. Secondly, humanitarian operations such as aid distributions and the provision of health services may assist those groups in controlling the population in their area, or even attract an influx of people from other areas. Thirdly, those groups might derive considerable financial benefits from humanitarian operations by imposing charges on transports, levying taxes on imports and employees' salaries, and collecting rent for warehouses, offices and residences.

Humanitarian aid has also been accused of fuelling war economies and prolonging conflict by providing assistance, directly or indirectly, to combatants and their military operations. The conflicts in Somalia, Liberia and Angola are usually mentioned as prime examples. Edward Luttwak, for example, charges that "NGOs, impartial to a fault, even help both sides, thus preventing mutual exhaustion and a resulting settlement"[7] and concludes that "although it may not be possible to constrain interventionist NGOs, they should at least be neither officially encouraged nor funded."[8]

Most humanitarian organizations are indeed keenly aware of the moral dilemmas of their operations and the pitfalls of the "humanitarian imperative". Mary Anderson warns, however, that "it is a moral and logical fallacy to conclude that because aid can do harm, the decision not to give aid would do no harm. In reality, a decision to withhold aid from people in need would have unconscionable negative ramifications."[9] Fiona Terry, armed with a lot of practical experience, sees the problem pragmatically: "We can never construct the best world in which our compassion can immediately translate into an end of suffering, but we can try to build a second-best world based on hard-headed assessments of the needs and options."[10]

Impartiality and independence

The principles of impartiality and independence are in some way direct consequences of the "humanitarian imperative" and the conviction that all people have equal dignity by virtue of their membership in humanity.[11] Impartiality

7 Edward N. Luttwak, "Give war a chance", *Foreign Affairs*, Vol. 78, No. 4, July/August 1999, p. 43.

8 *Ibid.*, p. 44.

9 Mary B. Anderson, *Do No Harm: How Aid Can Support Peace — or War*, Lynne Rienner, Boulder, 1999, p. 2.

10 Terry, *op. cit.* (note 4), pp. 216-217.

11 Rony Braumann, "L'assistance humanitaire internationale" in: Monique Canto-Sperber (ed.), *Dictionnaire de philosophie morale et politique*, Presses Universitaires de France, Paris, 1996, p. 96.

implies that the needs of human beings are assessed and addressed without consideration for origin, race, political or religious belief, gender, etc. In order to be able to act impartially, humanitarian organizations — as a logical consequence — need to be independent from political, religious or ethnic influence.

Although hardly contested as a fundamental ethical principle of humanitarian action, impartiality is often not applied in practice in many international relief operations. Most humanitarian organizations, UN agencies as well as NGOs, depend to a large extent on funds from Western donor governments, whose priorities are — quite legitimately — not influenced by humanitarian concerns alone. While the assessments of humanitarian needs might be impartial, the actions of humanitarian organizations are constrained by the funds made available to them and are therefore subject to the political considerations of donor governments. Donor governments pledged, for example, US$ 207 per person in response to a UN appeal for Kosovo in 1999, whereas only US$ 16 were spent per person in Sierra Leone in the same period, although the objective needs of the latter might have been far greater.[12] Experience shows that even NGOs which depend on funds from the general public collect much greater contributions for certain humanitarian crises than for others.

There are also disparities in assistance within particular contexts, owing to political or security constraints imposed on humanitarian organizations. Such disparities in the level of assistance can be the reason for large population movements.

In addition, it is still quite common for religious or nationalist NGOs to provide assistance primarily to persons of the same respective faith or national and ethnic background. The increasing promotion of faith-based NGOs in the US and the rise of Islamic relief agencies are both likely to present new challenges for defining a universal humanitarianism.[13]

Neutrality

The most sensitive and most contested of Henry Dunant's humanitarian principles is the principle of neutrality. It denotes a duty for humanitarian

12 Oxfam, Briefing Paper: *An End to Forgotten Emergencies?*, Oxfam, Oxford, May 2000, available at: <http://www.oxfam.org.uk/policy/papers/gemg/fgemgsum.htm> (last visited on 10 August 2004).

13 Joanna Macrae, "Analysis and synthesis" in: Joanna Macrae (ed.), *The New Humanitarianisms: A Review of Trends in Global Humanitarian Action*, Humanitarian Policy Group Report No. 11, Overseas Development Institute, London, April 2002, available at:
< http://www.odi.org.uk/hpg/papers/hpgreport2.pdf> (last visited on 10 August 2004), p. 17.

organizations not to take sides in a conflict and not to take any action that might be to the advantage of one side or the other. Historically, this was the price the Red Cross volunteers had to pay to be accepted on the battlefield by the armies of both sides and to enjoy protection and immunity from the hostilities. Even today, the argument that neutrality is an operational tool to gain access to people in need and to maintain a dialogue with all parties to a conflict remains valid for the ICRC.

The question whether neutrality can be morally acceptable in the face of horrendous crimes such as the ethnic cleansing in Bosnia or the genocide in Rwanda merits consideration. Fiona Terry argues, for example, that not addressing the question of who is right and who is wrong assumes that there is moral equality between the oppressor and the victim.[14]

This criticism of alleged moral indifference ultimately led to a split in the humanitarian sector when a group of ICRC doctors, among them Bernard Kouchner, frustrated by delays in receiving permission to assist the starving Biafrans in the Nigerian Civil War (1967-1970), created *Médecins Sans Frontières* (MSF). Their fundamental idea was that concern for the victims should be put above State sovereignty and neutrality of humanitarian action.[15] MSF's example of a politically activist humanitarianism was soon followed by other NGOs, such as Oxfam in the UK. The idea of not only alleviating the suffering but also addressing its root causes by denouncing oppression and injustice, and thus creating a momentum for political change, definitely had something convincing about it.

For the ICRC, on the other hand, neutrality has always also implied confidentiality in that the price of denunciation is usually expulsion from the scene of the suffering, which in turn deprives victims of possible assistance and protection and thus is likely to cause even greater suffering. The two components of MSF's slogan "*Soigner et témoigner*" (care for and bear witness) might in fact in many cases be mutually exclusive.

The ICRC, which now "grudgingly admits" that it should have behaved differently in the face of the Holocaust during World War II,[16] has slightly changed its policy of absolute neutrality and will consider "publicly condemning violations of international humanitarian law as a last resort" [17]

14 Terry, *op. cit.* (note 4), p. 22.

15 *Ibid.*, p. 20.

16 Rieff, *op. cit.* (note 1), p. 20.

17 International Committee of the Red Cross, "Frequently asked questions", available at: <http://www.icrc.org/Web/eng/siteengo.nsf/html/faq> (last visited on 10 August 2004).

and withdraw when it concludes that the harm done by humanitarian assistance outweighs the good, as in the case of the Rwandan refugee camps in Zaire.

The moral dilemma between neutrality and political activism, however, remains difficult to solve for humanitarian organizations. The two approaches seem mutually exclusive but when seen pragmatically are complementary. It might in fact be in the interest of victims of oppression and violence that both philosophies coexist, albeit represented by different organizations. The respective roles of the ICRC and Amnesty International in monitoring conditions of detention for prisoners can serve as an example.

Humanitarianism and international politics

The revelation that there are, in the words of the former UN High Commissioner for Refugees, Sadako Ogata, "no humanitarian solutions to humanitarian problems"[18] had far-reaching consequences. Joanna Macrae concludes that "the 1990s saw the concept of humanitarianism transformed, from a distinctive but narrow framework designed to mitigate the impact of war, into an organizing principle for foreign relations, led largely by the West."[19] The painful lessons of Bosnia, Somalia and Rwanda inspired a number of experiments, principally by the US and the European Union, in integrating humanitarian assistance into the political framework of responses to conflict. Attempts to use humanitarian assistance as political leverage were made, for example, in Serbia, southern Sudan, North Korea and most recently Afghanistan.

The UN followed the trend. The 1999 "Report of the Panel on United Nations Peace Operations" — commonly known as the Brahimi Report — recommended that humanitarian and peacekeeping operations should be combined in an "Integrated Mission Task Force (IMTF)" and placed under the political responsibility of the Special Representative of the Secretary-General (SRSG).[20] The idea has been strongly opposed by most humanitarian UN agencies and NGOs, who argued that such integration would threaten the independence and impartiality of their operations.

18 Quoted in Rieff, *op. cit.* (note 1), p. 22.

19 Macrae, *op. cit.* (note 13), p. 7.

20 United Nations, "Report of the Panel on United Nations Peace Operations", United Nations, New York, 1999, paras. 198-217, available at: <http://www.un.org/peace/reports/peace_operations/> (last visited on 10 August 2004).

The discussions and dilemmas faced by humanitarian NGOs are again clearly illustrated by MSF and Bernard Kouchner. Kouchner's vision was that humanitarianism should be at the service of States: "It is not so much that humanitarians must learn to be political as that States must learn to be humanitarian."[21] His vision was not shared by the other co-founders of MSF, such as Rony Braumann, who thought that political independence was an important ethical principle for humanitarian action. Kouchner left MSF and started yet another NGO in 1980, *Médecins du Monde* (MDM), to realize his vision of humanitarian action.

The more recent trend of "humanitarian" military interventions and the substantial involvement of humanitarian organizations in the subsequent peace-building operations have revitalized the discussion on whether it is morally legitimate to use humanitarian assistance as political leverage to promote conflict resolution, political reconciliation and nation-building.

Humanitarianism and "humanitarian" military intervention

A number of humanitarian activists, prominent among them Bernard Kouchner, had already come to the conclusion in the 1980s that military action, ideally undertaken by the UN, but also by individual great powers if necessary, was the only moral answer to certain humanitarian crises.[22] The trend of "humanitarian interventions", i.e. military operations with the primary aim of protecting or assisting victims of violence, perhaps started with the operation to protect the Iraqi Kurds against the attacks of the Iraqi regime in the aftermath of the 1991 Gulf War. This relatively successful operation was followed by the ill-fated attempts to provide military protection for humanitarian assistance operations in Somalia and Bosnia in 1992. More recent international interventions, such as the NATO interventions in Bosnia and in Kosovo or the Australian-led intervention in East Timor, were also largely justified by citing humanitarian considerations. They also went one step further than previous interventions and established temporary international protectorates to maintain stability and guarantee peace.

While humanitarian and human rights concerns might only have been a secondary priority in the justification for the US-led interventions in Afghanistan and Iraq, humanitarian issues played an important part in their aftermath, at least rhetorically. The Provincial Reconstruction Teams (PRTs)

21 Quoted in Rieff, *op. cit.* (note 1), p. 97.
22 *Ibid.*, p. 66.

in Afghanistan deliberately use humanitarian reconstruction projects as a means for achieving the military objectives of gathering intelligence and winning the "hearts and minds" of the Afghan population. With regard to Iraq, several governments, among them Japan and Thailand, have declared the involvement of their troops in the US-led multinational forces as "purely humanitarian" operations.

Whether or not they welcomed the principle of "humanitarian" military intervention, humanitarian workers were confronted in the wake of these operations with a number of new moral dilemmas, or possibly the old ones in a new guise. Being part of the ostensibly moral plan to bring peace and prosperity to war-torn societies has proved to be more complicated for humanitarian agencies than many of them thought. David Rieff argues, for example, that "independent humanitarianism does many things well and some things badly, but the things it is now called upon to do, such as helping to advance the cause of human rights, contributing to stopping wars, and furthering social justice, are beyond its competence, however one might wish otherwise."[23]

The blurring of the lines between military operations, the implementation of political objectives and humanitarian assistance has had particularly serious consequences for humanitarian workers. Being perceived — at least by some — as part of a Western-dominated military and political operation has caused fundamental security problems for humanitarian organizations in contexts such as Afghanistan and Iraq.

Humanitarian organizations have traditionally been called upon to tackle two major tasks in post-conflict reconstruction. The first is to assist a number of vulnerable groups created by the conflict, such as internally displaced persons, returning refugees, war widows, children, etc. The second task is to revive shattered social services such as health care, water supply and education, with the aim of making them sustainable in the long term.

Sustainable long-term development obviously depends essentially on the political and economic framework and on the institutional and physical infrastructure a State is able to provide. After the most recent international interventions, the political framework has largely been defined by external entities such as intervention or occupation forces. Economic and social policies have been shaped by bilateral donor countries or by international financial institutions (IFIs).

23 *Ibid.*, p. 334.

Michael Pugh points out that a fundamental problem of this approach is that "the conceptual baggage of peace building has included the assumption that external actors wield the power and moral authority to bring about the peaceful change that communities have so signally failed to do."[24]

It is indeed questionable whether outside interventions in war-torn societies can impose reconciliation and bring about self-sustainable peace. The continued need for a strong international military and civilian presence in Bosnia more than nine years after the Dayton Peace Agreement certainly indicates that building peace is more difficult than some protagonists initially thought.

During the 1990s, the international donor community pledged more than US$ 100 billion in aid to almost 40 countries recovering from armed conflict.[25] A large proportion of the external aid to all these countries went into humanitarian relief and development projects with the stipulated intention to lay the foundation for a sustainable transition to economic growth and participatory governance. Although the contexts of the interventions were very different, a number of problems faced by humanitarian organizations involved in the implementation of such projects were very similar in all of them.

Coordination

The first rather more practical challenge encountered by humanitarian and development organizations after an international intervention or a peace agreement is the coordination of activities among themselves and between them and the military and political intervention forces. While there are usually only few international organizations and NGOs in the country during an armed conflict, their number rises sharply at the end of hostilities. The main reasons for the surge in the number of humanitarian agencies are the improved security situation and the increase in available funds from donor governments and the general public. The high-profile media coverage that is usually given to international interventions is also attractive to humanitarian organizations, because it gives them the "visibility" they need to raise funds for their operations.

24 Michael Pugh, "Introduction: The ownership of regeneration and peacebuilding", in: Michael Pugh (ed.), *Regeneration of War-Torn Societies*, St. Martin's Press, New York, 2000, p. 3.

25 Shepard Forman and Stewart Patrick, "Introduction", in: Shepard Forman and Stewart Patrick (eds.), *Good Intentions, Pledges of Aid for Postconflict Recovery*, Lynne Rienner, Boulder/London, 2000, p. 1.

The weak administrative structures of post-conflict governments have regularly been overwhelmed by a crowd of autonomous actors, including donor States, IFIs, UN agencies and NGOs. Stewart Patrick notes that "the resulting amalgam of interests, mandates and capacities can stymie collective action and agreement on burden-sharing, delaying early donor engagement and thwarting agreement on common approaches essential to success."[26] The lack of a coordinated approach has, he says, regularly led to "incoherent strategies, incompatible projects, redundant initiatives, gaps in assistance, insufficient accountability, and minimal organizational learning."[27]

Within months of the 1991 Paris Peace Agreement for Cambodia, the number of international organizations and NGOs working in the country jumped from a handful to several hundreds. Similar developments took place in Bosnia after the Dayton Peace Agreement in 1995 and after the military intervention in Kosovo in 1998. In Afghanistan, the annual humanitarian aid budget for 2001 was approximately US$180 million[28] and increased to almost US$2 billion in 2002 after the US-led intervention.[29]

As funding for many individual humanitarian organizations often depends on their "visibility", intense competition is usually the result. Because of this competition for funds between humanitarian organizations, effective coordination can only come from donor governments, which provide most of these funds. It is usually the same — Western — donor governments that also have the main political stakes in the intervention. Their coherent planning framework of political, military and humanitarian activities therefore risks transforming international organizations and NGOs into implementing agencies of political and possibly even imperialist plans or, as David Rieff puts it, into "an instrument and emblem of the reach of Western governments."[30] A coordinated approach is important to increase efficiency and accountability, but its cost might be that it effectively rules out, or at least marginalizes, the participation of NGOs for which political independence and impartiality are important parts of their ethical basis and self-understanding.

26 Stewart Patrick, "The donor community and the challenge of postconflict recovery" in: Forman and Patrick (eds.), *op. cit.* (note 25), p. 36.

27 *Ibid.*, p. 37.

28 Rieff, *op. cit.* (note 1), p. 296.

29 Transitional Government of Afghanistan, *Analysis of Aid Flows to Afghanistan*, March 2003, available at: <http//:www.afghanistangov.org/resources/mof/cU-GoA-AidAnalysis.pdf> (last visited on 10 August 2004).

30 Rieff, *op. cit.* (note 1), p. 274.

Donor governments quite logically have a tendency to favour humanitarian activities in their direct self-interest. Both in Cambodia and in Bosnia the humanitarian agenda was for example largely dominated for several years by the rapid return of refugees, the highest priority of Western donor countries. In both contexts, the disproportionate level of assistance to returning refugees led to potentially destabilizing social and political tensions with the host communities, which might have been a major factor in the difficulty to achieve reconciliation.

The task of coordinating humanitarian activities in international interventions is often additionally complicated by the fact that the military intervention forces are keen to "win the hearts and minds" of the population and want to be seen to be involved in the provision of humanitarian assistance as well. The difficult relationship between the PRTs of the military intervention forces in Afghanistan and humanitarian organizations serves as an example.

Emergency assistance and sustainable development

Donors and implementers of post-conflict humanitarian and reconstruction programmes are often torn between the need to deliver assistance as quickly as possible and the desire to rely on local capacities to shape and implement the projects and thus ensure their appropriateness and sustainability. In theory there is, however, general agreement that "local ownership" and participation are essential for the long-term sustainability of any social or humanitarian programme.

When the local administration and civil society in general are weak, as is often the case in post-conflict situations, the question which local partners should be involved in the implementation of humanitarian projects is difficult to solve. The national government structure or local authorities? Local NGOs or other non-State actors, such as tribal leaders, local associations and cooperatives or even the private sector?

The choice of local partners invariably implies a clear vision of the future political system and creates a number of dilemmas. Strengthening the national government might be the best guarantee for a coordinated and balanced approach, but it will most certainly lead to a cumbersome bureaucracy and long delays in the disbursement of assistance and risks concentrating too much power in the hands of a few. It might also be problematic for humanitarian agencies to give explicit political support to a government that was put in place by the intervening forces and does not necessarily have sufficient local legitimacy. Favouring cooperation with local authorities might

speed up the planning and approval process, but risks exacerbating political and ethnic divisions within a country and may lead to an unbalanced distribution of the available assistance. Local NGOs can play an important role in implementing humanitarian programmes, but their activities are usually not sustainable in the long run without external assistance. Relying on village elders or local associations might undermine the authority of the State structures and therefore be resented by the latter. Extensive privatization of State assets and services, a neo-liberal approach often favoured by Western donors and peace-builders, can end up in favouritism or "grab-it-ism" and lead to considerable social and political tensions in post-conflict societies.

Pugh rightly points out that external players in such situations are "caught in a dilemma between support for State sovereignty and support for counter-hegemonic civil society, between degrading State responsibility and disdaining non-State activities."[31]

There are also a number of difficulties in defining when and how local capacity-building should begin. After prolonged wars, the institutional and physical infrastructure of a country is invariably in a desperate condition. In the first phase of emergency assistance, there can often be only little concern for local capacities and assistance operations are essentially run by international staff. Although such emergency aid is sometimes necessary to alleviate the suffering and provide a visible peace dividend, it rarely addresses the root causes of poverty and conflict. Prolonged emergency assistance can in fact cause additional problems by creating dependencies and by undermining indigenous self-help capacities.

The transition from emergency relief to development assistance is usually problematic, particularly if there are different organizations and procedures involved. Stewart Patrick notes that "as a rule, relief and development activities are designed by different departments or agencies; funded through distinct windows; approved through dissimilar procedures; shaped by disparate political considerations; subjected to divergent timetables; and implemented by diverse partners."[32]

As a result, prolonged emergency relief operations have often undermined the long-term development prospects. Continued food deliveries generate little or no incentive for the affected population to engage in agricultural rehabilitation programmes; sophisticated and expensive health care

31 Michael Pugh, "The social-civil dimension", in: Pugh (ed.), *op. cit.* (note 24), p. 116.
32 Patrick, *op. cit.* (note 26), p. 39.

services provided by international staff are not sustainable with local resources, and parallel health and education structures draw staff and beneficiaries from the State-run infrastructure.

Changing an initial approach is often not easy. In the case of Cambodia, Peou and Yamada show that when some major donor governments decided in the mid-1990s to support only projects that included local partner institutions, the flow of international assistance dropped significantly, mainly because the local capacities did not exist in spite of several years of ongoing assistance.[33]

Legitimacy

While a peace agreement usually establishes or re-establishes a form of national government, this is often not reflected in the situation on the ground. At the local level, the same political leaders and warlords who took advantage of the political war economy often remain in place. To be able to implement their projects, humanitarian organizations have to cooperate with these local warlords and their power structures and thus provide power and legitimacy to potential spoilers of the peace process.

A 1998 US Institute of Peace report concludes that in Bosnia "millions of relief and reconstruction dollars channeled through local officials have fortified the physical barriers between ethnic communities by allowing political leaders to distribute aid to their side before the efforts to challenge ethnic cleansing were in place (...) Municipal authorities and representatives of displaced ethnic communities use aid to achieve their political ends, to strengthen their sides, and to funnel aid disbursements to favored local suppliers and contractors."[34]

Implementing humanitarian assistance programmes in today's Afghanistan, at least outside Kabul, implies cooperation with local warlords and their power structures and thus helps to confer legitimacy upon them, at least in the eyes of the population under their control. The warlords also levy import duties and taxes on humanitarian assistance, which constitute an important part of their revenues.[35]

33 Sorpong Peou and Kanji Yamada, "Cambodia", in: Forman and Patrick (eds.), *op.cit.* (note 25), p. 96.

34 Julia Demichelis, *NGOs and Peacebuilding in Bosnia's Ethnically Divided Cities*, United States Institute of Peace, Washington, DC, June 1998, available at:
<http://www.usip.org/pubs/specialreports/early/BosniaNGO.html> (last visited on 10 August 2004).

35 United States Institute of Peace, *Unfinished Business in Afghanistan: Warlordism, Reconstruction, and Ethnic Harmony*, United States Institute of Peace, Washington, DC, April 2003, available at:
<http://www.usip.org/pubs/specialreports/sr105.html> (last visited on 10 August 2004).

Strengthening the legitimacy of these warlords could well undermine the long-term prospects for peace and stability in Afghanistan.

Empowerment of local institutions without strict accountability can also lead to corruption. In Cambodia, the rampant corruption of government officials involved in reconstruction projects was attributed to their ridiculously low salaries and the failure of donors to address that problem.[36] Corruption of government officials at all levels was also a problem in the implementation of reconstruction projects in Bosnia.[37]

Conditionality

In order to address the legitimacy problem, James Boyce and others suggest that post-conflict assistance, especially for reconstruction and development, should be used to force compliance with the peace process by imposing a "peace conditionality". This could mean, for example, that reconstruction projects are only implemented if local leaders adhere to an existing peace agreement or if they accept certain specific conditions. Such conditions could include requests for active participation in specific aspects of the peace process, for the handing over of war criminals, for quotas of certain ethnic groups to be among the beneficiaries of the international assistance, or for gender equality.[38]

This type of conditionality was extensively used by a number of bilateral donors and some UN agencies in Bosnia. Withholding international assistance helped to persuade Bosnian Serb leaders to participate in the country's collective presidency in 1996 and led to a political thaw in the *Republika Srpska* in 1997.[39] The Office of the UN High Commissioner for Refugees made assistance to various communities in Bosnia conditional on the return of minorities who had been expelled from those communities during the war. Aid embargoes against unfriendly municipalities were established and in allocating reconstruction funds priority was given to cooperative mayors.[40]

36 Peou and Yamada, *op. cit.* (note 33), p. 96.

37 Zlatko Hertic, Amela Sapacanin, and Susan Woodward, "Bosnia and Herzegovina", in: Forman and Patrick (eds.), *op. cit.* (note 25), pp. 350-353.

38 James K. Boyce, "Beyond good intentions: External assistance and peace building", in Forman and Patrick, *op. cit.* (note 25), pp. 377-379.

39 *Ibid.*, p. 379.

40 Demichelis, *op. cit.* (note 34).

It is highly questionable whether such "peace conditionality" for assistance can indeed force adherence to the peace process or impose reconciliation. Experience in Bosnia has shown that the cooperation from local authorities was often pure lip service in order to get rewards from reconstruction funds, and was stopped or even reversed as soon as a specific project was completed. Ensuring compliance with conditions also requires a degree of authoritarian control that does not sit well with the democratic and participatory pretensions that are usually part of the peace-building rhetoric. Michael Pugh concludes in this context that "attempts to exert leverage through conditionality point to the limits of social engineering."[41]

In addition, Pugh points out that "the conditionality adopted by external actors to manipulate participation by creating or empowering only local institutions that demonstrate a commitment to externally determined goals may result in social exclusion."[42] Such an exclusion may lead to a radicalization of minorities and ultimately undermine the peace process.

For humanitarian organizations, applying conditionality to their assistance projects runs counter to the humanitarian imperative and the principle of impartiality. Most humanitarian organizations therefore feel deeply uncomfortable about applying any form of political conditionality to their activities. One of their arguments is also that the population should not be punished for their leaders, especially if they are not democratically elected.

Some have argued that emergency relief should be unconditional and only longer-term reconstruction and development assistance should be subject to conditions. However, such a distinction is not practical because it risks perpetuating emergency relief assistance with all the negative consequences that this entails.

The policy of "peace conditionality" for humanitarian assistance has placed humanitarian organizations in the dilemma of whether to submit themselves to the principle of self-determination by the populations concerned or to the moral principles of the intervening powers. Supporting self-determination in Bosnia might well have cemented ethnic segregation. It might equally well lead to Islamic rule by Shiite clerics over at least some parts of Iraq.

41 Pugh, *op. cit.* (note 31), p. 123.
42 *Ibid.*, p. 123.

Conclusion

The original deal between humanitarianism and States was that humanitarians were accepted on the battlefield as long as they did not interfere with the actual hostilities. In this way a space was created for independent humanitarian action. Since the 1990s this humanitarian space has increasingly lost its independence, mainly due to the fact that international humanitarian organizations have essentially been funded by States, which have progressively discovered the utility of humanitarian aid as a foreign policy instrument. The idea that humanitarian assistance should be unconditional has been further challenged by the introduction of sets of political or human rights conditions. The incorporation of humanitarian action into the framework of "humanitarian" military interventions and subsequent nation-building exercises has reinforced this trend. Humanitarian organizations and their protagonists continue to struggle with the ethical implications of these developments.

It is in the nature of dilemmas that they have no easy solution. The question is not "whether" humanitarian actions have political consequences, but "what" these will be. A candid ethical assessment of these political consequences is the least that should be expected from humanitarian organizations and their donors. Independent humanitarian organizations are an essential part of this system of checks and balances.

Even if the new forms of humanitarianism might have a moral standing as well, it is essential that sufficient space be preserved and defended for independent, neutral and impartial humanitarian action and the organizations that uphold it. This humanitarian space must be kept clearly distinct from "humanitarian" military interventions.

Résumé

L'humanitarisme confronté à des dilemmes moraux à l'époque des interventions militaires «humanitaires»

Beat Schweizer

Ces dernières années, l'étiquette «humanitaire» a été utilisée de plus en plus souvent par des gouvernements occidentaux pour légitimer de nouvelles priorités, parfois controversées, en matière de sécurité. La justification d'interventions militaires internationales par des motifs humanitaires et le fait que les gouvernements impliqués dans ces opérations militaires soient généralement aussi les principaux bailleurs de fonds du système humanitaire ont relancé le débat parmi les organisations humanitaires internationales et les ONG sur les principes éthiques de l'action humanitaire. Cet article examine un certain nombre de dilemmes moraux auxquels les organisations humanitaires sont confrontées lorsqu'elles sont intégrées – souvent contre leur gré – dans des stratégies politiques et militaires visant à limiter les effets des conflits armés et à bâtir la paix, notamment à la suite d'interventions militaires «humanitaires».

S'il est vrai que les dilemmes n'ont, par essence, pas de solution simple, il est néanmoins important que les membres d'organisations humanitaires et leurs donateurs en prennent conscience et les analysent. L'action humanitaire indépendante et impartiale et les organisations qui veillent à ce qu'elle soit respectée doivent donc être reconnues comme étant une partie essentielle d'un système fondé sur un équilibre subtil, dont le but est de venir en aide le plus efficacement possible aux personnes souffrant de la violence et de l'injustice.

Contemporary challenges in the civil-military relationship: Complementarity or incompatibility?

RAJ RANA*

"The violence directed against humanitarian aid workers has come in a context in which the US backed coalition has consistently sought to use humanitarian aid to build support for its military and political ambitions. MSF denounces the coalition's attempts to co-opt humanitarian aid and use it to 'win hearts and minds'. By doing so, providing aid is no longer seen as an impartial and neutral act, endangering the lives of humanitarian volunteers and jeopardizing the aid to people in need. Only recently, on May 12th 2004, MSF publicly condemned the distribution of leaflets by the coalition forces in southern Afghanistan in which the population was informed that providing information about the Taliban and al-Qaeda was necessary if they wanted the delivery of aid to continue." (Statement by MSF, 28 July 2004)[1]

"Advocacy for an independent and neutral humanitarian approach includes a claim for maintaining a clear distinction between humanitarian action on the one hand and political-military action on the other. Not because the ICRC shies away from the military: on the contrary, we want and often have an active dialogue with them. Nor because we claim that there are not circumstances when — other actors being incapable of fulfilling their missions — a military unit might be a last resort. But because we want to avoid the current blurring of lines produced by the

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> characterization of military 'hearts and minds' campaigns or reconstruction efforts as humanitarian. The ICRC has in that regard a problem with the Provincial Reconstruction Teams in Afghanistan. Not on account of the strictly speaking military or security objectives they have set for themselves. In keeping with our neutrality, that is not a dimension we wish to comment on. We are however concerned because they integrate humanitarian responses into an overall military and security concept, in which responding to the needs of parts of the population can be a constituent part of a strategy to defeat an opponent or enemy."
> (Statement by the ICRC, 31 March 2004)[2]

The 1990s saw the beginnings of a tighter integration of political and military efforts in multinational efforts towards conflict management and resolution, and a new trend of multinational military forces being given humanitarian roles and mandates. In both Bosnia-Herzegovina and Somalia, there was a high risk that these trends would weaken the perception and reality of impartial, independent and neutral humanitarian action in the eyes of both the belligerents and beneficiaries. Humanitarian agencies were able to be neutral and independent only with difficulty when they used, for example, the logistical assets of peacekeeping forces which ultimately became belligerents in the conflicts they were meant to mitigate.

Armed forces were previously unwilling or unable to rise to the "humanitarian" challenge of the Balkans or Somalia with their existing doctrine and training. But by the time NATO took military action in Kosovo in 1999, the "humanitarian" practice of armed forces had adapted to the challenge. Under enormous pressure from their home governments to be seen as "doing good", NATO military forces were prompt to act in the face of a humanitarian crisis. They were as rapid as humanitarian agencies in the delivery of food to refugees in Albania, interposed themselves into the coordination of humanitarian aid and attempted to position their military operations

1 "MSF pulls out of Afghanistan", Médecins Sans Frontières, 28 July 2004, available at: <http://www.msf.org/countries/page.cfm?articleid=8851DF09-F62D-47D4-A8D3EB1E876A1E0D> (last visited on 28 July 2004).

2 Humanitarian security: "A matter of acceptance, perception, behaviour...", address given by the ICRC's Director of Operations to the High-level Humanitarian Forum, Palais des Nations, Geneva, 31 March 2004.

as being a "humanitarian intervention". As humanitarian actors followed the NATO-led ground forces into Kosovo, the blurring of roles between humanitarian actors and the military had reached its high water mark.

In 2001, the ICRC adopted Guidelines for Civil-Military Relations (CMR), based on the experiences of the previous decade.[3] While a relationship with armed forces is natural for an organization that works in contexts of armed conflict, there was a particular need to address both the complexity of multi-dimensional peacekeeping operations and the growing trend towards integrating the efforts of political, military and humanitarian actors. The ICRC's Guidelines (see Annex) address the risks and threats posed by multinational military missions engaging in humanitarian activities or deployed under a humanitarian mandate, while potentially becoming an active participant in hostilities.

Contemporary contexts such as Afghanistan and Iraq confirm the validity and persistence of the earlier fundamental issues and concerns.[4] Some indications of the more recent developments:

- Humanitarian operations have become a mainstream, non-combat function of armed forces, employed equally in combat, stabilization operations or as part of nation-building agendas. Providing assistance to the civilian population, or influencing the humanitarian and reconstruction efforts of others, is considered as a means of "force multiplication" or "force protection".[5] Political authorities expect their armed forces to have improved their civil-military capacities so as to meet their obligations under international humanitarian law, in addition to becoming part of the integral

3 Meinrad Studer, "The ICRC and civil-military relations in armed conflict", *International Review of the Red Cross*, Vol. 83, No. 842, 2001, pp. 367-392. The ICRC has adopted the term civil-military relations to describe the specific relationship between humanitarian actors and multinational military missions in time of armed conflict. This was a deliberate choice in order to differentiate between the ICRC's term and the military terms of "civil-military coordination" (CIMIC-NATO) and "civil affairs" (CA - U.S. Armed Forces) which refer to military doctrine and practice.

4 The 1990s cemented the fundamental issues of cooperation between the ICRC and multinational military missions in situations of armed conflict. The core issues of this relationship include:

- access to victims;
- visits to those detained by multinational military forces;
- exchange of information (security, general situation);
- ICRC mandate to conduct training of armed forces and disseminate international humanitarian law; and
- ICRC support and assistance for treatment of the sick and wounded.

5 "Colin Powell's call for non-governmental organizations to act as 'a force multiplier for us (...) an important part of our combat team' in Iraq shows the dangers." Martin Woolacott, "Humanitarians must avoid becoming tools of power", *The Guardian*, 2 April 2004.

post-conflict political and reconstruction efforts of local authorities, State civilian agencies, humanitarian organizations and others.

- The phenomenon of armed forces engaging in humanitarian action in the 1990s was a new and evolving concept without a road map, and there was room for humanitarian agencies to contest the perceived "militarization" of humanitarian assistance. Today, military and political actors are more certain of how they want to intervene, and consider every armed intervention as a fresh opportunity to test new integrated approaches to conflict management. Humanitarian organizations that fail to align themselves with these integrated approaches are perceived as being entrenched behind the inflexibility of their mandates, or simply out of step with the times.
- At both national and regional levels, there are active efforts to streamline and merge State and military capacities in carrying out future armed interventions. The concept of the latter is one in which the military is able to jump from waging war to peacekeeping to humanitarian assistance on the same day, at times within the same city. Civilian experts will be embedded into military structures to provide support for policing, civil administration and political reform, and to act as advisors to military forces and even as donors to humanitarian, reconstruction and private sector actors.

As the opening quotes from *Médecins Sans Frontières* and the ICRC's Director of Operations make clear, the narrowing down of the humanitarian environment and the increasing security concerns for humanitarian workers must in part be attributed to the involvement of multinational military missions taking on roles that go beyond providing security or engaging in combat.

This article examines the ICRC's view of the civil-military relationship in contemporary humanitarian environments and is based on recent reconsideration of the ICRC's civil-military relations strategy.[6] While the guidelines adopted in 2001[7] remain unchanged, it is clearly necessary to reconsider the analytical framework within which they are relevant. From the tentative attempts of the 1990s to conduct humanitarian activities, armed forces have now moved on to consider such tasks as their mainstream responsibilities in all contexts.

6 The author, who assumes full responsibility for the content of this article, has taken certain liberties in considering the ICRC's guidelines, previously limited to considerations of how the ICRC relates to multinational military missions in armed conflict, and projects these issues onto a broader horizon of interlinked issues and concerns for humanitarian action over the coming decade.

7 Studer, *op. cit.* (note 1), pp. 387-390.

There is a need for creative thought in considering the relationship between multinational military missions and humanitarian actors in time of armed conflict, the current trends and the potential consequences. It is no longer sufficient to limit the discussion to how humanitarian agencies and multinational military missions might cooperate or coordinate. Humanitarian actors are obliged to understand the evolving non-combat doctrine, operations and aims of the military forces with whom they are obliged to share their working environment. Most importantly, civil-military relations can no longer be considered as a subject in isolation. In order to understand the effects today — and more importantly, in the next five to ten years — the evolution of how armed forces see their capacity to take on civilian roles and tasks has to be understood within broader trends of nation-building and integrated approaches to conflict management.

The first section of this article examines how the military sees its role in taking on civilian (non-combat) tasks, and the doctrine that determines it. Concrete examples are given of such military non-combat operations that the ICRC encounters in the field. The second section situates these developments within broader trends of multinational armed interventions and the conduct of hostilities. The third section takes a critical look at how neutral, independent humanitarian action is being perceived by armed forces audiences, and outlines possible considerations of increasing importance for the ICRC in maintaining its relevance.

How does the military see its role?

There is a wealth of texts that describe the relationship between the military and humanitarian actors in time of armed conflict.[8] The subjects covered include the humanitarian and political aspects of the relationship,

8 A cross-section of views on civil-military relations include the following: Sarah E. Archer, "Civilian and military cooperation in complex humanitarian operations", *Combined Arms Center Military Review*, March-April 2003, available online at: http://www.leavenworth.army.mil/milrev/ English/MarApro3/indxmao3.htm> (advocates improved synergy, cooperation and coordination between the military and humanitarian organizations in achieving common end states); "Armed forces as humanitarian aid workers? Scope and limits of co-operation between aid organizations and armed forces in humanitarian aid". *Verband Entwicklungspolitik Deutcher Nichtregierungs-Organisationen e. V.*, May 2003, available online at : <http://venro.org/publikationen/archiv/Position%20Paper%20Armed%20Forces%20and%20Humanitarian%20A.PDF> (last visited on 10 March 2004) (comprehensive overview of the civil-military relationship, focusing on the trend towards militarization of humanitarian assistance); Jane Barry and Anna Jefferys, "A bridge too far: Aid agencies and the military in humanitarian response", *Humanitarian Practice Network*, 6 May 2004, available online at: <http://www.odihpn.org/ report.asp?ID=2398> (15 June 2004) (clarifies the key issues of debate, and

the cultural differences between the humanitarian and military worlds and some of the persistent issues that the two groups must resolve at the field level. The latter includes greater coordination to avoid duplication of efforts, the sensitivities of exchanging security information, or the basic "reach out" efforts to overcome the reticence of both actors that share the same working environment. Interestingly, there is relatively little written about how armed forces understand their role in assuming civilian tasks. However, without closer consideration of how the military understands its evolving role in humanitarian activities, humanitarian agencies are unclear about whom exactly they are dealing with. Furthermore, within the complex military world of hierarchy and acronyms it is prerequisite to understand how the military interface with humanitarian agencies fits into broader military operations. The following therefore is an examination of some definitions of the military practice of non-combat functions, including the provision of humanitarian assistance by armed forces, and attempts to understand their significance for the present debate.[9]

"Civil-military cooperation" (CIMIC) and "Civil affairs" (CA) are the names used by NATO and the United States Armed Forces (USAF), respectively, to describe those non-combat functions of their armed forces that deal with civilian functions, or involve armed forces taking on tasks typically performed by civilian authorities, NGOs or international humanitarian organizations. In order to avoid confusion with the military terms, the ICRC deliberately chose the term "civil-military relations" (CMR) to describe the relationship between humanitarian organizations and multinational military missions in situations associated with armed conflict.

proposes greater dialogue on policy and practice); Eric James, "Two steps back: Relearning the humanitarian-military lessons learned in Afghanistan and Iraq", *The Journal of Humanitarian Assistance*, October 2003, available online at: <http://www.jha.ac/articles/a125.htm> (raises doubts about the cohesiveness of the relationship between humanitarian and military actors, and suggests that growing discord can be seen as having set the relationship "two steps back"); Damian Lily, "The peacebuilding dimension of civil-military relations in complex emergencies: A briefing paper", *International Alert*, August 2002, (advocacy for enhancing cooperation between military and humanitarian actors); Michael Pugh, "The challenge of civil-military relations in international peace operations", *Disasters*, Vol. 25, No. 4, 2001, pp. 345-357 (highlights the integrative approach the military has adopted in attempts to institutionalize the civil-military relationship); Adam Siegel, "Civil-military marriage counseling: Can this union be saved?", *Special Warfare*, December 2002, pp. 28–34, available online at: <http://www.jha.ac/articles/a140.pdf> (focuses on the military's perception of its civilian counterparts).

9 NATO and United States Armed Forces doctrines are chosen as examples, given their availability in the public realm, their relevance to the key contexts of Afghanistan and Iraq, and the ICRC's practical field experience with these armed forces in time of armed conflict.

It has to be imagined that armed forces have developed such doctrine with a view to improving their capacity to meet their obligations towards the civilian population as laid down by international humanitarian law. This law does not expressly address the issue of civil-military relations or the delivery of assistance by armed forces, nor does it preclude a party to a conflict or an occupying power from meeting the needs of the civilian population by means of its armed forces. Specifically, parties to a conflict and/or occupying powers have the obligation to ensure that the civilian population under their control is adequately provided with food, medical supplies, clothing, bedding, means of shelter and other items essential to its survival.[10] The key issue under international humanitarian law in considering civil-military cooperation and civil affairs lies in assessing whether the civilian population is being provided with these basic supplies in an impartial manner, without any adverse distinction.[11]

It must be emphasized that neither the concept of civil-military cooperation nor that of civil affairs is a new phenomenon. Both have been part of the major military operations of the twentieth century. For example, the Provincial Reconstruction Teams set up in Afghanistan in 2004 have their roots in the Strategic Hamlet Project implemented by the United States Armed Forces during the Vietnam War. In the latter example, Special Forces personnel were deployed alongside USAID[12] civilian representatives in a hearts and minds campaign to provide development assistance while waging a counter-insurgency campaign. The post-Cold War period has seen the importance of civil-military cooperation and civil affairs rise and become more of a mainstream capacity of armed forces.

Their respective military definitions are the following:

- "CIMIC (civil-military cooperation) is the co-ordination and co-operation, in support of the mission, between the NATO Commander and civil

10 Article 69.2 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 ("Additional Protocol I").

11 Article 69.1 Additional Protocol I.

12 United States Agency for International Development, Disaster Assistance Response Teams:

"A DART is a rapid response management team composed of disaster relief specialists who conduct assessments, identify and prioritize needs, manage onsite relief activities, recommend response actions, and coordinate with affected country and other response organizations. The teams are typically deployed after devastating disasters of significant magnitude. DARTs have been deployed world-wide, including deployments to Iraq immediately following the aftermath of the recent conflict, to affected populations in Angola's 27-year civil war, and to provide humanitarian relief to communities affected by the drought through out Ethiopia". "USAID Disaster Assistance Response Team (DART) Deploys to Liberia", 6 August 2003, <http://www.usaid.gov/press/releases/2003/pr030806.html>.

populations, including national and local authorities, as well as international, national and non-governmental organizations and agencies."[13]

- "Civil Affairs (CA) are those interrelated military activities that embrace the relationship between military forces and civil authorities and populations. CA missions include civil-military operations and civil administration (...) CA encompasses the activities that military commanders take to establish and maintain relations between their forces and the civil authorities and general population, resources, and institutions in friendly, neutral, or hostile areas where their forces are employed. Commanders plan and conduct CA activities to facilitate military operations and help achieve politico-military objectives derived from US national security interests. Establishing and maintaining military-to-civil relations may entail interaction between US, multinational and indigenous security forces, and governmental and nongovernmental agencies as part of missions tasked to a JFC [Joint Forces Command]. These activities may occur before, during, subsequent to or in the absence of other military actions."[14]

There are clearly differences in scope between civil-military cooperation and civil affairs doctrine. NATO foresaw civil-military cooperation as the interface intended first and foremost to improve coordination and reduce overlap with civilian organizations and authorities. There was no explicit call to "conduct" humanitarian projects within the doctrine; there was also no strict "exclusion" of such projects, provided that they supported the military mission.

The civil affairs approach of the United States Armed Forces described above is more difficult to categorize. It promotes an approach that seeks to influence the civilian environment in support of their armed forces. This can take the form of trying to win hearts and minds, or of applying tactics to break the morale of the enemy or reduce the support they receive from the civilian population. Civil affairs operations can consciously substitute for civilian authorities and organizations, if such practice supports the commander's intent (and objectives) with regard to the civilian population. Civil affairs staff and operations bring skills and approaches that can be seen as oriented towards occupation, or for winning the civilian population's hearts and minds in order to combat an insurgency.

13 "AJP-9: NATO Civil-Military Co-operation (CIMIC) Doctrine", North Atlantic Treaty Organization (NATO), June 2003, <http://www.nato.int/ims/docu/AJP-9.pdf>, (last visited on 24 June 2004).

14 Joint Chiefs of Staff Library, 20 June 2004, *<http://www.dtic.mil/doctrine/>* (last visited on 24 June 2004).

The two approaches are broadly moving towards convergence, or at least share sufficient common ground to be compatible. The "Cold Warrior" generation of NATO officers who defended the limited interface role of civil-military cooperation is being replaced by a generation of officers whose formative years have been spent operating within the complexities of the Balkans, Sierra Leone, Somalia and Afghanistan. The current generation of multinational military missions practising civil-military cooperation and civil affairs see no contradiction in a fighting force actively conducting humanitarian operations, or fulfilling this role in what they perceive as a "humanitarian vacuum" in contexts such as Iraq.

Civil-military cooperation and civil affairs should not be considered as a completely benign military function or one that can be considered in isolation from combat and intelligence gathering. With the restructuring of armed forces over the last decade, civil-military cooperation and civil affairs have been bundled together with the bulk of non-combat operations that are part of a commander's range of tools for waging war — globally referred to as "information operations" (InfoOps). Civil-military cooperation and civil affairs are complementary to the other public function of "media operations" (MediaOps), while "psychological operations" (PsyOps) and "electronic warfare" are often undertaken in support of intelligence objectives. As such, there can be no complete separation between military humanitarian activities and intelligence gathering. This trend extends equally to armed forces involved in UN-mandated peace operations.[15]

The concepts of civil-military cooperation and civil affairs are starting to spread. Within western armed forces, they are no longer limited to a small cadre of specialists. Particularly with the United States Armed Forces, combat forces in general are becoming active in the provision of assistance. In Asia, some national armed forces are seeing civil-military cooperation or civil affairs as one of the three pillars of their doctrine, together with intelligence gathering and combat. In Africa, civil-military cooperation doctrine is developing along the lines of "traditional" 1990s peace operations, but will inevitably adopt "humanitarian" operations as a standard complement to the security and stability roles of armed forces.

15 Examples of this include the SFOR and ISAF military missions, which control newspapers, radio and television stations. From these platforms, they are able to control the flow of "good news" to the local population, and can attempt to influence public opinion and behaviour in their favour and towards broader political objectives.

To humanitarian actors, civil-military cooperation and civil affairs can be understood as follows:

- it is the interface to facilitate unity of effort between military forces and the relevant civilian entities, including local, national or regional authorities, non-governmental and international organizations;
- it serves as the focal point within the military for monitoring and influencing the general and humanitarian situation facing the civilian population;
- civil-military cooperation and civil affairs staff play the role of humanitarian diplomats and act as the conscience of their commander, though as a combat support function and not as operational decision makers;
- civil-military cooperation and civil affairs are part of a broader range of non-combat tools that a commander employs to dominate whatever landscape is being faced — the media (national/international), the civilian population (winning support for his forces/denying support to the enemy), intelligence, and in support of broader political objectives (nation-building, integrated approach, etc.);
- current civil-military cooperation and civil affairs humanitarian projects conducted by armed forces are almost identical in implementation to those of humanitarian organizations.[16] The *modus operandi* of their teams includes needs assessments, definition of projects, securing of financing (military or national donors), finding implementing partners or contractors and evaluating the impact of their projects.

The following examples attempt to put a face to the civil-military cooperation and civil affairs operations that humanitarian actors have to contend with in contemporary contexts.

Afghanistan: Provincial Reconstruction Teams

USAID describes Provincial Reconstruction Teams (PRTs) as: "Joint Civil Military units, which strengthen the reach of the central government through improved security and the facilitation of reconstruction and development efforts".[17]

16 Afghanistan provides multiple examples: ISAF maintains 10 CIMIC teams, with a total budget of US$1.2 million. Each CIMIC team has its own district of responsibility in Kabul province; each finds small-scale, short-term projects that it can finance — providing furniture to a school, rehabilitating a clinic, etc. The CIMIC approach as a whole attempts to coordinate the PRTs' projects with the IGO/NGO community and the national and local authorities.

17 USAID PowerPoint Presentation given for ICRC Kabul, April 2004. The presentation goes on to describe the specific tasks of PRTs in detail: "Relationship building; Monitoring and reporting; Security support for

Provincial Reconstruction Teams can be seen as a sort of civilian-military annex to a military force, and are oriented towards a nation-building role as part of both military strategy and political aims. They are employed equally by NATO forces under the UN-mandated International Stability Force (ISAF) and by Coalition Forces involved in Operation Enduring Freedom. There are civilian State and donor representatives permanently based in the Provincial Reconstruction Teams, who maintain some authority over projects and approach.

With over US$180 million available to finance 10 Provincial Reconstruction Teams in 2004, they have substantial influence and means. Functioning as a sort of security platform from which civilian representatives select projects, implementation is then undertaken by the International Organization for Migration (covering northern Afghanistan) and UNOPs (southern Afghanistan). Projects are largely infrastructure-oriented and include roads, offices and schools. Only a fraction of the financing is for direct provision of humanitarian assistance by combat troops.

UN Mission in Liberia (UNMIL): Quick Impact Projects (QIP)

To cite the words of the Commander of the Pakistani UNMIL garrison in Voinjama, Liberia: "For the sake of humanity and as a goodwill gesture, we distributed some bags of rice and clothing to the local people we met here to ease their suffering."[18]

UNMIL's military contingents show that UN-mandated military missions are also providing humanitarian assistance as an integral task. A variety of Quick Impact Projects with small budgets are implemented by armed

Bonn processes; Security briefs/information sharing; Mediation; Prioritization of reconstruction and development efforts; Implementation of assistance projects; Approximately US$125 million in 2004 project funding". In addition to State donor financing, US$40 million is available to the military via Department of Defence programmes managed by USAF.

See also a further example from an article published during the 2004 NATO Summit in Istanbul: "The idea with Afghanistan is that you learn from experience, things that have worked, the PRTs, Provincial Reconstruction Teams, are liked by many people," said Mr Cagaptay. "They think it is a great idea. They think it is a successful marriage of civilian-military teams. It is also great for PR [public relations] because you can convince the people that you are working for them when you actually do projects on the ground and I think people would like to see this idea pursued further in Afghanistan and also elsewhere if NATO does get involved". Meredith Buel, "Europe NATO summit expected to focus on Iraq, Afghanistan", *Voice of America News*, 23 June 2004.

18 "Liberia: Key northern Liberian town faces relief crisis", *Integrated Regional Information Networks* (IRIN), 19 May 2003, available online at: < http://www.reliefweb.int/w/rwb.nsf/o/89a7aa1f5fc3d78085256e9900705551?OpenDocument>.

forces as goodwill gestures and presumably integrated into the broader relief efforts of other humanitarian actors.[19] Additionally, as active participants in the Disarmament, Demobilization, and Reintegration process, the various military contingents of UNMIL have been implementing a food/cash exchange-for-weapons programme, with mixed results (for example, riots by would-be demobilized soldiers and ensuing security concerns for the civilian population).

Some aspects of the relationship with humanitarian agencies mirror the issues of the 1990s, particularly the lack of coordination between military and humanitarian actors. In one example, an UNMIL battalion unilaterally decided to provide medical assistance to a hospital where the ICRC was already working. The ICRC ultimately chose to abandon its programme to avoid duplication of effort, and leave the support of the civilian hospital to UN troops.[20]

Despite not having an explicit mandate from the United Nations to conduct humanitarian operations, there is apparently US$1 million available at the UN Department of Peacekeeping Operations for the various UN military contingents in Liberia to conduct local humanitarian projects.

Situating civil-military relations within broader trends

In the last decade, the relationship between humanitarian agencies and multinational military missions was one that could be understood with a fairly narrow examination of the differences and complementarities of the two groups at times performing similar roles. Today, a broader view must be taken to understand the complexity of the environment in which humanitarian actors work and the associated risks.

Civil-military cooperation and civil affairs, and military non-combat operations more generally, are only a subset of broader trends in the humanitarian environment within which the ICRC is concerned about the

19 The so-called Brahimi Report clearly advocates: "(...) flexibility for heads of United Nations peace operations to fund 'quick impact projects' that make a real difference in the lives of people in the mission area..." Lakhdar Brahimi, *Report of the Panel on United Nations Peace Operations*, 21 August 2000, UN Doc.A/55/305 (2000).

20 A similar scenario occurred in Kunduz, Afghanistan, where PRT forces belonging to the UN mandated International Stability Force again chose to support a hospital that had been part of the ICRC's ongoing medical programmes. Again, the ICRC chose to withdraw in order to avoid duplication of efforts and to reduce the risk of a humanitarian organization (the ICRC) being confused with military forces. The ICRC had to resume its support when the next rotation of ISAF forces decided that the programme no longer fitted in with its objectives or financing.

civil-military relationship. In the following projection of current trends an outline is given of future conflict environments that are likely to be characterized by a further blurring of functions, roles and mandates. It is this type of environment that humanitarian agencies will have to contend with in the future.

The growing sophistication of armed forces

"In one moment in time our service members will be feeding and clothing displaced refugees — providing humanitarian assistance. In the next moment, they will be holding two warring tribes apart — peacekeeping. Finally, they will be fighting a highly lethal mid-intensity battle. All in the same day, all within three city blocks."[21]

Armed forces will train and fight in a way adapted to the complexity that General Krulak describes here. Even lower-level combat commanders will have to place growing emphasis on peacekeeping/stability operations and humanitarian assistance. Non-combat functions will be seen as core tasks in all contexts, including situations of armed conflict. Armed forces' media operations (information campaigns) will further dominate the public realm, obscuring the realities and human costs of war with sound bites about their humanitarian and reconstruction efforts. The military will continue to use the image and symbol of their assistance/reconstruction efforts as a way of winning support locally, regionally and, importantly, back home.

Despite its efforts to further professionalize armed forces to equal the challenge of multi-faceted operations, the military will still depend upon the integration of civilian functions and specialists into its military structures. Embedded civilians will take on further importance, with State civilian advisors for humanitarian, reconstruction or political matters, private contractors in traditional combat-support functions, and as in-house State donor representatives.

To keep pace with the evolving realities of conflict, the ICRC will have to draw the attention of a broader spectrum of actors to their obligations under humanitarian law in conflict. It will not be sufficient to address only States party to a conflict, greater investment will also be required in constructive dialogue with, for example, private military or security companies, private contractors, police forces, trainers and other relevant players.

21 Charles C. Krulak (former Commander, United States Marine Corps), "Three block warfare: Fighting in urban areas", Speech to the National Press Club, Washington, 10 October 1997.

There could be some positive aspects to civilian integration into armed forces. Civilians might promote greater cultural sensitivity of armed forces, lobby for greater awareness of the effects of conflict on civilian populations, provide both technical and political advice and ensure awareness of humanitarian needs and action in the waging of war. The inclusion of civilian and contracted experts and support resources in armed forces might enhance the fulfilment of international humanitarian law responsibilities by States, but the contrary could also be the case.

Instrumentalizing humanitarian and reconstruction assistance

When armed forces (and political decision makers) perceive that there is a "humanitarian vacuum", they may try to fill it themselves or find short-term solutions that further their own military aims. This response will probably be based upon their experiences in contexts such as Afghanistan and Iraq, where humanitarian agencies are unable to function for lack of adequate security or in accordance with their *modus operandi*. The growing belief that humanitarian assistance is a tool that they can utilize may become a prevailing consideration on the part of armed forces.

While humanitarian agencies will largely continue to impartially provide needs-based assistance to those affected by conflict, armed forces will at times employ humanitarian assistance as a means to attain a strategic or tactical military goal. Armed forces might use tactics of bartering assistance to the civilian population in exchange for intelligence, to improve the protection of their own force, for the winning of hearts and minds, or as a means of coercing or rewarding cooperation. There is consequently a risk of cohabitation of incompatible approaches to humanitarian assistance in contexts of armed conflict. Humanitarian actors may be forced to revise their respective policies on assistance or to reconsider withdrawing from contexts that are too politically sensitive or too insecure for them to function effectively, thus leaving the task of humanitarian assistance to the military forces who are, in fact, partly or wholly responsible for the insecurity and the perceived partiality of those very agencies.

"Barno [United States Armed Forces Commander of Operation Enduring Freedom in Afghanistan] suggested that it was time for relief groups to accept that they could not be neutral after a stream of deliberate attacks on de-miners and well-diggers (...) 'They probably have to, and they are, realizing that they are now operating in a different world,' he said."[22]

22 "General plans changes in Afghan strategy", *Associated Press*, 20 December 2003.

For conflicts in the media spotlight, parties to a conflict will use heavy leverage on the press, engaging in activities traditionally conducted by civilian agencies and each competing to market a "with us or against us" relationship with humanitarian actors.

Nation-building and integrated approaches to conflict management

The UK government has proposed "(...) the setting up of the Post Conflict Reconstruction Unit (PCRU) working closely with the Foreign and Commonwealth Office and the Ministry of Defence. The PCRU will include staff from DFID [Department for International Development], FCO [Foreign and Commonwealth Office] and MoD [Ministry of Defence]. It will plan and implement strategies, including civilian deployment, for post-conflict reconstruction and military-to-civilian transition, which will involve the recruitment, training, deployment and management of skilled civilian staff and appropriate resources. A Senior Officials' Steering Group will provide strategic policy and operational direction."[23]

Multinational armed interventions and peace operations will steadily become a more sophisticated endeavour. As seen in Afghanistan, multinational military forces (both International Stability Force and Coalition

23 "Director for UN, Conflict and Humanitarian Division", *Homepage for DFID, the UK Department for International Development*. 6 July 2004, <www.dfid.gov.uk/Recruitment/ files/jaextdirunchjobdescript.doc>. See also: United Kingdom Ministry of Defence, "Public Service Agreement 2005-06 to 2007-08", July 2004, available online at: <http://www.mod.uk/linked_files/issues/finance/psatechnotes_2005-2008.pdf>: "Target 2.1 (...) the Foreign and Commonwealth Office (FCO), the Department for International Development (DFID), and the Ministry of Defence (MoD) to work together (and if appropriate with other Government Departments) to improve the impact of Her Majesty's Government's (HMG) overall effort in areas suffering from violent conflict, or where there is tension which might lead to violent conflict. It also requires them as part of this work to seek improvements in the effectiveness of the efforts of the international community to prevent or end violent conflicts. This covers work in all the areas of activity to which HMG contributes at different parts of the conflict cycle. The Post Conflict Reconstruction Unit (PCRU), which will be set up in 2004 to co-ordinate FCO/DFID/MOD post-conflict work aims to ensure better planning, implementation and management of the UK's contribution to post-conflict situations, primarily when UK forces are deployed. The PCRU will involve officials principally from the three departments, but will draw on other government departments as appropriate. It will gradually become operational and reach its full capacity in early 2006". Simliar suggestions can be found in the aforementioned Brahimi Report: "The Panel recommends that Integrated Mission Task Forces (IMTFs) be created, with staff from throughout the United Nations system seconded to them, to plan new missions and help them reach full deployment, significantly enhancing the support that Headquarters provides to the field. There is currently no integrated planning or support cell in the Secretariat that brings together those responsible for political analysis, military operations, civilian police, electoral assistance, human rights, development, humanitarian assistance, refugees and displaced persons, public information, logistics, finance and recruitment". Brahimi, *op.cit.* (note 13), Executive summary.

Forces) will find broadening synergies with national authorities and UN political bodies. Cooperation may range from coordination of the information campaign to support of election processes and cementing the authority of a new government. While not a new phenomenon, the distinction between civilian agencies and military actors will increasingly cease to be relevant in the eyes of the population and authorities. Humanitarian organizations and personnel will simply be expected to integrate into the broader efforts made by the international community, regardless of the threats to neutrality or independence.

In the specific relationship between humanitarian actors and multinational military missions, there is a risk that the gap between policy and practice will grow. Some humanitarian actors will, with difficulty, resist political and financial pressures to integrate into broader efforts. Others will simply accept that they are not neutral or independent, and adapt their *modus operandi* to the realities of the situation. Collective and constructive dialogue on the civil-military relationship might become difficult for a community of humanitarian agencies with divergent mandates.

Outsourcing of tasks in armed conflict

"Two highly complex and vitally important post-conflict reconstruction projects — the Loya Jirga Elections and the National Currency Exchange Program — were planned and executed by the company [Global Risk Strategies — PSC] on behalf of the UN and the US and Afghan Governments. Controlling and utilizing a range of aircraft, vehicles, communications and logistics equipment, and liaising in over thirty locations across the country with all levels of national and local Government and military, company personnel ensured that these vital developments were a success."[24]

Particularly in the case of Iraq, the absence of humanitarian workers because of security concerns is cementing the military perception that humanitarian organizations lack the will to face the dangers. Key States, armed forces and possibly humanitarian actors will push for even greater use of civilian contractors to carry out humanitarian and reconstruction activities, thus outsourcing risks, roles and responsibilities.

State civilian agencies (departments of foreign affairs, development, etc.) will also embrace the notion of outsourcing their programmes to the private sector. This approach will allow greater political control of imple-

24 "Our experience", *Global Risk Strategies*, 30 June 2004, <http://www.globalrsl.com/>.

mentation and choice of projects and target populations, and will inductively limit responsibility and accountability. By extension, humanitarian organizations risk becoming implementing agencies to the private sector, particularly in large-scale structural development programmes and even in contexts that are still qualified as armed conflicts.

Old recipes for a new world?

> "In these typically difficult times it is better for us to focus our humanitarian minds on engagement and not complaint. Instead of lamenting about the forces ranged against us, we should be planning and preparing, making relationships and building alliances, persuading or outwitting our opponents. We need to get tactical: to win where we can and to retreat where we cannot. Now is not the time, as some are advocating, to invest in yet more interminable debates that pander to a culture of complaint and seek to re-define humanitarian action from first principles once again. Nor is it the time to form a square and defend humanitarian values. They are simply not that threatened. Instead, it is the time to get decisive about where we can and cannot operate and to get innovative about how we do things. It is the time to be creative about humanitarian agency rather than to wallow in humanitarian agony."[25]

Hugo Slim has pinpointed the challenges facing humanitarian actors in the complexity of contexts such as Afghanistan and Iraq today, and prescribes a simple remedy of renewed engagement. The call to "win where we can and to retreat where we cannot" perhaps all too sadly describes the *modus operandi* imposed on such organizations in these two contexts.[26] While there is much credence given to the pragmatism of humanitarian organizations choosing contexts in which they work, or finding innovative solutions to old problems, there are also fixed limits to how far the ICRC or other organizations can "bend the rules" to face new challenges. For an organization like the ICRC — that is mandated to impartially protect and assist victims of conflict, without any distinction based on nationality, race, religion, politics or other criteria — the choice of where to work is dictated above all by where the victims are

25 Hugo Slim, "A call to alms: Humanitarian action and the art of war", *Centre for Humanitarian Dialogue*, February, 2004. <http://www.hdcentre.org/index.php?aid=85>. (last visited on 31 July 2004).

26 In Afghanistan an ICRC delegate was killed in April, 2003, forcing the ICRC to drastically reduce its presence and activities in the south of the country. Likewise, after the car bomb attack in October 2003 on its delegation in Baghdad, the ICRC was obliged to reduce its visibility, staff and programmes in a context in which it was unable to conduct all of its protection and assistance activities safely.

found. Thus, the issue is perhaps not how humanitarian organizations might adapt to the realities, but whether they should in the first place.

This final section takes a look at how the ICRC and its particular brand of humanitarian action are being perceived by military audiences, in light of the evolutions in doctrine and the environment for humanitarian action. The ICRC and its strict adherence to neutrality and independence are something of an anachronism to armed forces audiences being trained to better understand and integrate all political, military and humanitarian action, whatever their assignment.

The following paraphrases the relationship of the ICRC with multinational military missions. For this relationship it advocates:

- maintaining its independence of decision making and action;
- keeping a clear distinction between humanitarian, political and military roles and actors in times of armed conflict; and
- maintaining a dialogue at all times, and at all levels, with multinational military missions, whatever their status in the conflict.

Not surprisingly, in light of the evolution of civil-military cooperation and civil affairs doctrine and operations and the broader trends in peace operations and conflict management, some States and other armed forces often perceive the ICRC as stubbornly resistant to change or simply outdated. Whatever their perception, the ICRC's position is limited by principles[27] that exclude closer cooperation, or subordination of the ICRC's brand of humanitarian action to broader political goals or new trends in warfare and multinational interventions. It does not, however, exclude dialogue and engagement.

The ICRC has a Unit for Relations with Armed and Security Forces, a group of military and police specialists who guide the organization through its liaising with armed, security and police forces throughout the world.[28]

27 "The ICRC's starting point in defining its relationship with the military are the Fundamental Principles of the Red Cross and Red Crescent as well as the relevant provisions of international humanitarian law. These provide the general framework for the nature and scope of this relationship". Studer, *op. cit.* (note 1), p. 386.

28 Concerning the activities of the ICRC's Unit for Relations with Armed and Security Forces, see: "Integration of law of armed conflict", ICRC, Geneva, May 2003: "ICRC mandate: in 1977, the ICRC was mandated by the international community to support national programmes undertaken by States for the integration of international humanitarian law into the education, training, doctrine and operations of armed forces around the world.

Two-track approach: over time, the ICRC has developed two different, but complementary, approaches towards armed forces.

• *Dissemination* activities (PREDIS) aim at obtaining understanding by the parties for ICRC activities and guaranteeing access to the victims and security.

The Unit works steadily to make the specific role and identity of the ICRC known to armed forces worldwide,[29] particularly to those armed forces deploying on missions abroad, to senior levels of command and to people who are influential in policy and training at strategic levels.

To use western European contexts as a barometer of perception, the reaction to such ICRC dissemination efforts is increasingly animated. This is largely due to the fact that armed forces have a growing operational experience in contexts shared with humanitarian actors, and a wealth of personal experience — both positive and negative — of the possibilities for coordination and complementarity between military and humanitarian action. These are some examples of common reactions by armed forces to ICRC presentations:

- often there is some surprise when confronted with the ICRC's strict advocacy for neutrality and independence. There is scepticism amongst officers who are being asked by their political authorities to conduct "Three Block Warfare" (i.e. war fighting, peacekeeping and providing humanitarian assistance within three city blocks) — only to find that not all civilian organizations are comfortable moving into areas made "permissive" (in a security sense) by the military. Some of the more thoughtful audiences begin to question the very essence of humanitarian action, and respond that their military missions and role are also guided by principles of neutrality, independence and impartiality;

• *Integration* activities (PREIMP) aim at having armed forces adopt concrete mechanisms or measures to ensure respect for international humanitarian law principles, specially protected persons and objects as well as the necessary means to this end.

According to the prevailing security situation in the country and its operational needs, a delegation may give preference to one or the other or even to a combination thereof".

The ICRC employs 27 delegates worldwide, supporting the training efforts of over 100 armed and security forces.

29 A typical presentation includes the following: (i) an introduction to the mandate of the ICRC to show its specific role linked to contexts of war and internal violence and based on the Geneva Conventions; (ii) a presentation of the structure of the Red Cross and Red Crescent Movement to explain the different Red Cross/Red Crescent entities that might be present in a given context where a multinational military mission may be deployed; (iii) an explanation of the principles of neutrality and independence to lead into the presentation, and help explain to audiences the ICRC's advocacy for a distinction to be maintained between military, political and humanitarian action; (iv) an explanation of the *modus operandi* of the ICRC to stress that it is a predictable humanitarian organization that works in the same manner worldwide and a presentation of its core activities; (v) a closing explanation of the ICRC's position on civil-military relations and concerns with regard to the developments described in this article. A key message for armed forces is that for an organization such as the ICRC, which is active in zones of conflict worldwide, a relationship with armed forces is only natural.

- reluctance to accept that if "we" are all working towards the same goals, then why can't "we" work together?[30] Armed forces often assume that there is a desired end state to the military mission with which they have been entrusted — stability, security, elections, etc. "Joint Integrated Approaches", or the unity of effort of military, diplomatic and economic power, are ways in which armed forces understand their niche in the broader integrated approaches to nation-building. Interestingly, their approach is often to focus their strategic aim and end state on the same target population — victims of war. It is difficult to explain that the ICRC has the same unremitting interest in assisting the victims of conflict, though without the necessity to integrate into the political-military strategy and all the while conscious of the efforts of others.

The crux of the matter can be summarized thus: "You [ICRC] are afraid we [armed forces] will exploit you for intelligence purposes, you would prefer us to stay out of the humanitarian business, you want to work towards the same goal of helping the people, but not *with us* — what do you want us to do?"

Understandably, there is a certain frustration with an organization that can be perceived as asking for everything and its opposite. On the one hand, the ICRC expects a fixed relationship and a discussion on topics that are of concern to armed forces whatever their status in the conflict — ICRC access to victims, detention by armed forces, etc.[31] The organization is equally concerned that the blurring of roles and actors will create the perception of having taken sides in the conflict and thus place it and its staff at risk. There is no one way to clarify how the ICRC and its position are perceived.[32]

30 As an example of such reactions: "The NGOs and international organizations and military, coalition, ISAF, seem to me all [to have] the same objective. Because we have the same objectives - whether we work together or not — we are going to be working for the same objective irregardless of what coordination happens between those groups (...) No one here wants to work in an insecure environment. No one here wants to see the Afghan population with the kind of economy that it has now. Everyone wants to see an increase in stability, an increase in prosperity, and just because we have the same objectives, we are going to be seen as marching together regardless of what the NGOs or the military want or don't want. Both parties are looking at doing the same thing for the same good reasons but they are not conflicting. They add to each other and they combine with each other, and that is good." "Afghanistan: Interview with US-led coalition civil military coordination centre", *IRIN News*, 9 April 2004, <http://www.IRINNew.org>.

31 See footnote 9 above.

32 As early as 2001 the issue of how the ICRC is perceived by others working in the same area in time of armed conflict was considered with regard to civil-military relations. The term "ecumenism" was used to describe the realities of the ICRC's pragmatic positioning vis-à-vis an evolving civil-military relationship:

Key considerations for the way forward

The concepts of neutrality and independence are increasingly misunderstood and/or distorted to fit other agendas. The challenge for the future will be for the ICRC to find the means that distinguish it from all other actors. Some of the key considerations as to the relationship with multinational military missions — and indeed advocated by the ICRC beyond the scope of the civil-military relationship — include the following:

- In a world becoming ever more polarized, the need for neutral and independent humanitarian action as provided by the ICRC is essential in limiting the means employed in warfare and the human cost of war and armed violence.
- There remains a need for neutral and independent humanitarian actors in times of armed conflict; neutrality is a pivotal aspect of humanitarian action and is not a concept that can be abandoned and reinstated at will.
- It is critical to maintain a distinction between humanitarian activity and politically motivated aid.
- While there is room for divergent approaches to providing humanitarian and reconstruction assistance in time of armed conflict, all players must understand that their actions affect all those with whom they share the same geographic and humanitarian environment. Engagement and dialogue are the core remedy.
- It is essential to gain the acceptance and trust of all parties to a conflict regardless of their status within it, in order to have access to the people affected by the conflict and be able to provide them with protection and assistance. Whether the ICRC's brand of humanitarian action is accepted or not, the ICRC needs to maintain the perception of its neutrality and independence that enables it to protect and assist on all sides of the existing or potential front lines.

"Ecumenism — a policy we prefer — constitutes a sort of third way, frequently followed by the ICRC as a matter of course. It more clearly acknowledges the existence of a tendency towards closer cooperation between military and humanitarian action, in particular within the UN framework, which attempts to accommodate rather than thwart or ignore such cooperation and thus comes half way between 'damage control' and 'constructive engagement'. The ICRC should be tolerant of other approaches and resist the temptation to believe that its humanitarian policy alone is correct. The differences in perception pose a conceptual challenge to the ICRC, namely to determine what is the essence of humanitarian action and what is merely a pragmatic choice depending on the context." Studer, *op. cit.* (note 1), p. 386.

Concluding remarks

The conclusion to be drawn is in many ways epitomized by the ICRC Guidelines on civil-military relations (see Annex), which continue to govern the organization's relations with multinational military missions in time of armed conflict despite the continuing changes taking place in that environment. Some closing points however need to be added.

Today, the narrowing down of the humanitarian environment felt by the ICRC in both Afghanistan and Iraq can in part be attributed to the involvement of multinational armed forces assuming roles that go beyond providing security or engaging in combat. In both contexts, armed forces are increasingly active in roles typically filled by civilians. The distinction between humanitarian, political and military action becomes blurred when armed forces are perceived as being humanitarian actors, when civilians are embedded into military structures, and when the impression is created that humanitarian organizations and their personnel are merely tools within integrated approaches to conflict management.

If Afghanistan and Iraq are a new benchmark for the civil-military relations challenges facing the ICRC, there should be concern that the issues facing humanitarian agencies in such situations, if not the situations themselves, will only increase in the years to come. Political and military decision makers are consolidating the lessons they have learned and proposing even more extensive synergies of political, humanitarian and military action.

Civil-military cooperation and civil affairs, and the greater issue of improving synergy between military and civilian efforts in multinational interventions, will be a key priority for both States and armed forces. Concepts of future operations will have military forces working closely with their national civilian counterparts towards a form of "integrated approach" at the national, regional and inter-governmental levels.

The challenges of the civil-military relationship today cannot be resolved by consultation solely between humanitarian and military actors; a more comprehensive approach to an influential and diverse range of political leaders and opinion makers is necessary if the ICRC is to maintain its position as a major humanitarian actor, with a mandate to work in situations of armed conflict and violence.

The ICRC is committed to focusing its engagement with political circles and armed forces on a "back-to-basics" approach clearly explaining the role and identity of the organization. While perhaps neither side will allow itself to be persuaded to adopt the principles of the "adversary", each must understand and respect the notions of complementarity and distinction.

Résumé

Les défis contemporains dans la relation entre civils et militaires : complémentarité ou incompatibilité?

Raj Rana

Durant les années 1990, les organisations humanitaires ont vu croître le nombre des acteurs dans les situations de conflit où elles menaient leur action. La guerre froide ayant pris fin, les forces armées ont été déployées dans le cadre de missions de maintien de la paix, dans lesquelles elles ont souvent assumé, outre leur fonction traditionnelle – garantir la sécurité –, un rôle et un mandat humanitaires. Le risque que ces forces militaires multinationales, en plus de fournir une assistance humanitaire, deviennent des belligérants, portait atteinte à l'image de neutralité et d'indépendance de l'action humanitaire. Les humanitaires se sont défendus avec vigueur et à juste titre de toute «militarisation» de l'action humanitaire.

En 2004, les dimensions des relations entre civils et militaires ont considérablement changé. Les acteurs politiques et militaires ont pris de vitesse les humanitaires, et la participation active des forces armées à l'assistance humanitaire est devenue une réalité. La distinction entre l'action militaire, l'action politique et l'action humanitaire s'estompe progressivement quand les forces armées sont considérées comme des humanitaires, quand les civils sont incorporés dans les structures militaires et quand il semble que les acteurs humanitaires ne sont que de simples outils dans les stratégies intégrées de gestion des conflits ou la création d'une nation. La distinction est plus floue encore lorsque les forces armées font de leurs efforts d'assistance humanitaire et de reconstruction les piliers de leurs objectifs militaires et de leurs campagnes de communication, sur les plans local et international. Ces aspects posent d'immenses défis à l'action et aux acteurs humanitaires aujourd'hui, et en poseront sans doute de plus grands dans l'avenir.

Cet article se penche sur la vision que le CICR a de la relation entre civils et militaires dans les environnements humanitaires contemporains, et se fonde sur un examen récent de la stratégie de l'institution à l'égard de cette relation. La deuxième partie de l'article présente, pour référence, les lignes directrices du CICR sur les relations entre civils et militaires.

Annex: ICRC Guidelines on Civil-Military Relations

The general framework

The ICRC's starting point in defining its relationship with the military are the Fundamental Principles of the Red Cross and Red Crescent as well as the relevant provisions of international humanitarian law. These provide the general framework for the nature and scope of this relationship.

The ICRC works independently of any objective of a political or military nature. Its activities include not only assistance to the victims of armed conflict and internal violence but also — fundamentally — their protection, on the basis of both humanitarian law and principles.

The following three points are important for the ICRC. They concern the respective nature of military intervention and ICRC humanitarian action as well as the relationship between the two and possibilities for cooperation:

- The objective of the ICRC's humanitarian action is not to settle conflicts but to protect human dignity and save lives. ICRC humanitarian activities cannot in any way be subordinated to political and/or military objectives and considerations.
- The primary objective of multinational military missions should, in the ICRC's view, be to establish and maintain order and security and to facilitate a comprehensive settlement of conflict.
- The ICRC must maintain its independence of decision-making and action, while consulting closely with international military missions which are deployed in the same theatre of operations. There should be consultation at every stage, at both strategic and operational levels.

Within the International Red Cross and the Red Crescent Movement, the ICRC seeks to exercise leadership regarding the policy and operational aspects of civil-military relations in armed conflict. In particular, it provides clear directives for the relationship between National Red Cross and Red Crescent Societies working as "Participating National Red Cross or Red Crescent Societies" (i.e. contributing to a Red Cross / Red Crescent operation on foreign soil) and the military contingents of their respective countries. Should such a relationship be problematic in terms of respect for the Movement's Fundamental Principles, appropriate action will be taken by the ICRC, in accordance with the Movement's Statutes[33] and the Seville Agreement.[34]

33 Statutes of the International Red Cross and Red Crescent Movement, 1986.

34 Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement, 26 November 1997, published in IRRC, No. 322, March 1998, p. 159.

Cooperation in practice

Dialogue with political and military policy-makers and decision-makers

The ICRC seeks to establish and/or maintain a dialogue with the political and military circles that formulate the policy for military intervention in emergencies arising from armed conflict. Particular attention is paid to developing dialogue between the relevant agencies and bodies of the United Nations, NATO and the European Union. The primary aim of such a dialogue is to promote the ICRC's view of humanitarian action and, where necessary, to foster and maintain contacts useful for operational cooperation and for enhancing respect for international humanitarian law.

Moreover, the ICRC seeks such dialogue outside the Western world as well, especially in regions where there is a marked desire to "regionalize" peacekeeping.

Operational cooperation with peacekeeping forces

When possible, the ICRC fosters contact with a view to exchanging relevant information, especially in situations where it is operating in the same theatre as military forces. Where necessary, the ICRC assigns one or more persons to be in charge of liaison with the military command in the field and others, at headquarters, with the supreme military command concerned.

The ICRC also maintains contacts with the relevant political and military authorities, urging them to define the mandate of peacekeeping forces clearly in terms of its humanitarian implications so as to avoid any ambiguity with its own mandate and role. It tries to ensure in particular that military action does not impinge on the impartiality, neutrality and independence of its work. It endeavours, too, to make sure that international humanitarian law is respected by international military missions.

Without resorting as a rule (which may be waived in exceptional circumstances) to armed protection for its own operations, including relief convoys, it welcomes any efforts by international military missions to create a safe environment for humanitarian activities.

Protection of ICRC equipment and facilities by armed guards

The ICRC does not rule out the protection of its equipment and facilities by armed guards in situations where such protection is considered indispensable (for example, because crime is rife). However, the impact of such arrangements on the perception of the ICRC's neutrality and impartiality is regularly assessed.

Use by the ICRC of military or civil defence resources

In general, the ICRC is wary about using military or civil defence resources, considering that such use should be impelled by needs rather than prompted by availability. The ICRC does not object to their use by other humanitarian organizations, provided that its own activities are not impeded thereby.

In cases where the ICRC does use such resources (because they are offered on conditions that provide a clear advantage or because comparable civilian assets are not available), it makes sure that their use poses no threat to it being perceived as neutral and impartial and is in keeping with its operational strategy and principles.

The ICRC's contribution to training

By means of courses on international humanitarian law and the basic principles governing humanitarian action, the ICRC seeks to influence or be directly involved in the training of military personnel participating in military missions abroad. To this end it establishes and maintains organization-to-organization relations with military academies and other facilities that train military and civilian personnel for such missions. It provides the measure of cooperation which it finds appropriate, ranging from ad hoc contributions to formal and long-term cooperation (such as that in the programme launched with SHAPE).

The ICRC also endeavours through its training programmes to familiarize its staff with international military missions and the various concepts of civil-military cooperation applied in the field.

ICRC participation in conferences on the relationship between military and humanitarian action

By taking an active part in multilateral and other conferences dealing with the relationship between military and humanitarian action, the ICRC aims to promote its view of crisis management and to share its operational experience. It also seeks to develop and maintain a network of contacts among those who deal with issues of international security.

The participation of the ICRC in such events is determined by the possibilities it is given to contribute to the debate and/or the relevance for it of the subject matter to be discussed.

ICRC participation in military training exercises

The ICRC takes part — selectively — in military training exercises when invited to do so and when such exercises are intended as a vehicle for training in the military management of crises that includes the humanitarian/military relationship. Its aim on such occasions is to make its mandate and activities better known and to spread knowledge of international humanitarian law; its contribution should begin at the planning stage. Priority is given to international exercises.

Speaking out or remaining silent in humanitarian work

JAKOB KELLENBERGER*

The question of whether — and if so, to what extent — a humanitarian organization should publicize and denounce violations of international humanitarian law and other wrongs, and name those responsible for them, is as acute as ever — particularly for the ICRC, as the examples given by Michael Ignatieff in *Hard Choices*[1] or by Jonathan Benthall in *Disasters, Relief and the Media*[2] show. There are reasons for this, and an attempt must be made to explain them. From time to time public or published statements by the ICRC also dominate the political arena. While unintentionally becoming caught up in the cut and thrust of political debate, they also show how the ICRC operates in the complex world of tension between political interests and humanitarian concerns. Hence the subject may also give an unusual insight into the work of the ICRC and the conditions under which it is carried out.

Specificity of the ICRC

The ICRC is one of many humanitarian organizations, which differ greatly from each other in terms of how they operate and where they are deployed. The sharp increase in such organizations is part of the changing humanitarian environment of recent times. However, the ICRC, with around 12,000 staff — more than 11,000 of whom are out in the field in areas of armed conflict or tension and elsewhere — is a large organization with a number of specific features.

In the international humanitarian law treaties the various States have expressly assigned certain tasks to the ICRC, either exclusively or together with other unspecified humanitarian organizations. Though not an international organization in the same way as the Office of the UN High Commissioner for Refugees, for example, it is therefore less free in terms of what it may or may not do than a non-governmental organization.

* The author is the President of the International Committee of the Red Cross.

The ICRC performs its core mandate, namely to protect and assist the victims of armed conflicts and internal disturbances, worldwide; it confines itself neither to selected geographic areas nor to specific categories of people. In the age of global communication, this means that what it does, the image it projects of itself — and especially what it says in public — in one place becomes known almost immediately everywhere else it is working. This limits the scope for a communication approach which is tailored to the local environment and possibly to particular attitudes, and is essentially pragmatic.

Characteristic of the ICRC are its absolute commitment to remaining in close proximity to the victims of armed conflict and its unremitting pursuit of that goal. It seeks above all to gain access to the victims of armed conflict and internal violence in order to protect and help them. All other considerations — with the exception of security — are strictly subordinated to this goal. To achieve it, the ICRC must ensure that its presence and its activities in the conflict area are accepted by all parties with any influence on the hostilities and their consequences in humanitarian terms. Only by so doing can it continue to perform its mandate worldwide. Despite its difficulties in gaining access to certain areas, for which there are various reasons, the ICRC continues to enjoy very wide acceptance and what may well be unique access to areas of conflict.

The ICRC's operational environment

The environment in which the ICRC operates — the war zones and flashpoints of the world — has changed drastically in recent years. It is important for the subject, too, to bear this point in mind. Many of these "new" conflicts, most of which are civil wars, are characterized by a disregard for the rules and by belligerents who are as hard to comprehend as they are to contact. "In a civil war," wrote H. M. Enzensberger in 1993, "every abstract and rationally complex justification for the use of force evaporates."[3] He was thinking mainly of the Balkans, but the phenomenon is unfortunately more widespread than that. Also the private warlords who had disappeared from Europe since the seventeenth century are now emerging again in many conflict areas as State structures there collapse.[4] Wallenstein's succession arrange-

1 Michael Ignatieff, "The stories we tell: Television and humanitarian aid", in: Jonathan Moore (ed.), *Hard Choices: Moral Dilemmas in Humanitarian Intervention*, Rowman & Littlefield Publishers, Boston, 1998, pp. 287-302.

2 Jonathan Benthall, *Disasters, Relief and the Media*, I. B. Tauris & Co Ltd, London/New York, 1993.

3 Hans Magnus Enzensberger, *Aussichten auf den Bürgerkrieg*, Suhrkamp, Frankfurt am Main, 1993, p.20.

4 See Herfried Münkler, *Die Neuen Kriege*, 6th edition, Rowohlt Verlag GmbH, Reinbek bei Hamburg, 2003, especially pp. 59 ff.

ment seems to be simpler than Schiller's. It is extremely difficult to fit the complex situations of today's conflicts into the categories laid down in international humanitarian law. Whereas the existing law is based on nationality, membership of an ethnic group is playing an ever more important part.

Features of modern-day conflicts

Among the main characteristics of the conflicts in connection with which the ICRC today works are:

- the lack of clarity regarding the situation in combat zones;
- the trend toward polarization and radicalization that run along a number of worldwide fault lines;
- the civil wars that for many years have characterized armed conflict around the globe;
- globalization and the accompanying deregulation, which has brought not only the well-known benefits but has also increased the scope for action by non-State armed groups;
- the failed, or failing, States that no longer have a central government capable of exerting its authority or providing the basic services needed for the population's well-being;
- the global "war" against terrorism;
- growing difficulty in gaining access to those affected by armed conflict;
- the increased risk of humanitarian aid being misused, or rejected outright;
- the growing threat to the safety of field staff working for humanitarian organizations;
- the double standards applied to comparable situations.

None of this is new. However, the dimensions that terrorism — and the response to terrorism — have taken on, as well as the increasing prominence of non-State armed groups, are for me relatively new phenomena.

Various causes of conflict

Today's conflicts are for the most part characterized by their causes. The major causes of conflict have been and remain:

- the drive by groups and individuals for political and economic power;
- failed and failing States that are no longer able to maintain law and order;
- the struggle for access to raw materials;
- poverty and social distress, often in the context of collapsing State structures and a situation in which one or more ethnic groups are discriminated against or feel that they are discriminated against. (Attention has

been drawn to this explosive combination in particular by François Thual.[5] In comments very useful for conflict analysis, the British historian Eric Hobsbawm[6] has noted that, regarding conflicts aimed at asserting group identity, attention should be paid to the extent to which tensions are exacerbated and exploited "from above" or spontaneously develop "from below". The causal relationship between poverty and war must be viewed both ways. In other words, armed conflict is also a leading cause of poverty and other misery.);

- the trend toward polarization and radicalization along various fault lines, combined with a corresponding weakening — or total absence — of willingness to resist violence;
- the unprecedented scale of terrorism, which can — as we saw in Afghanistan in October 2001 — lead to an unprecedented level of response to it;
- the experience of war, which itself can lead to future wars, above all when these conflicts are waged with absolute disregard for the international rules of warfare.

Though it sounds self-evident, the point should nevertheless be made that the outbreak of armed conflict generally requires a combination of causes. And it is essential to distinguish between major and minor causes and between real and pretended causes.

Devaluation of international humanitarian law

In view of these observations and anticipated developments, it is unlikely that the significance of non-State parties to conflicts will diminish in the foreseeable future. Since globalization and the accompanying deregulation have moreover enhanced the standing and the capacity for action of non-State protagonists, it is also unlikely that a phenomenon observed in connection with the so-called "new" conflicts will soon come to an end. I refer here to the widespread devaluation of the rules of the international law of war and the total lack of restraint of many parties to conflict, especially vis-à-vis the civilian population, which is more and more frequently the real target. In various places one of the cornerstones of international humanitarian law, namely the distinction between combatants and civilians, is being eroded. The utter disregard for this law by certain non-governmen-

5 François Thual, *Les conflits identitaires*, Ellipses, Paris, 1995.
6 Eric Hobsbawm, *The New Century*, Abacus, London, 2000.

tal armed groups and attempts to qualify some rules in the context of combating terrorism are new challenges for the ICRC. It is confronted with new types of belligerents and new forms of warfare.[7]

It is in such a setting that the ICRC now does most of its work. In many places it can no longer rely on a high degree of willingness to comply with the rules of international humanitarian law, or assume that the organization and its working principles will be known and respected. In many conflict areas, we would also be ill-advised to assume that we could count on being trusted in advance for our independence, impartiality and neutrality. All too often, trust in these principles of the ICRC will first have to be won through consistent and thus predictable behaviour, as well as through tirelessly explaining what we are doing. This observation is also of relevance here.

The ICRC's different legal bases

The fact that internal conflicts are now the rule has yet another consequence. The legal basis for ICRC activities in international humanitarian law carries far more weight in conflicts between States than it does in internal ones, where concerns over sovereignty are particularly strong. States that have ratified the relevant legal instruments are obliged in international conflicts to allow visits by the ICRC to persons detained in connection with the conflict, such as prisoners of war or civilian internees in Iraq.[8] The same legal obligation does not apply in internal armed conflicts, like that in Sudan.[9] In such cases, it is necessary to negotiate agreements which are usually temporary and can be terminated. States will consent to these and other agreements only if they are sure that the ICRC will not make public the information it acquires in the course of its humanitarian activity or its ensuing requests but will only discuss matters in confidence with the competent authorities. After all, allowing an organization to visit prisoners regularly and to talk to them in private is no small curtailment of the sovereignty of a State.

7 The ICRC responded to these tendencies in the report on international humanitarian law and the challenges of contemporary armed conflicts that it presented at the 28th International Conference of the Red Cross and Red Crescent: ICRC, "International humanitarian law and the challenges of contemporary armed conflicts", *International Review of the Red Cross*, Vol. 86, No. 853, March 2004, pp. 213-244.

8 Article 126 of the Third Geneva Convention relative to the Treatment of Prisoners of War, and Article 143 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

9 Article 3 common to all four Geneva Conventions gives the ICRC the right to take the initiative in non-international armed conflicts, in that it may offer its services to the warring parties. For situations other than armed conflicts — in internal disturbances, for example — only the Statutes of the International Red Cross and Red Crescent Movement (Article 5) provide for a similar humanitarian right of initiative.

Handling knowledge

Given the environment in which it works and the way in which it operates, the ICRC knows a lot. It acquires this knowledge above all through its humanitarian activity and uses it exclusively for that activity. As this knowledge is often sensitive, politically delicate and capable of being used for various ends, there is a serious risk of ill-considered words embroiling the organization in political polemics. The international position which the ICRC enjoys and the sparing use it makes of public appeals and statements lend it considerable weight. The fact that it refrains from making public statements and appeals, even where there is a precedent of a statement having been made in comparable circumstances but in a different place, does not go unnoticed either.

For this reason, whether to speak out publicly or remain silent in its humanitarian work is a major issue for the ICRC. The importance of speaking out or, more importantly still, of issuing public statements, is sometimes overestimated, sometimes underestimated. The age in which we live — loquacious as it is, swift to pass judgment and ever ready to express an opinion — tends to overestimate the impact of speaking out.

Tension between action and testimony

The ICRC's position with regard to public statements and appeals is often controversial and has sometimes given rise to fierce debate. The best-known example dates back to the autumn of 1942 when the ICRC refrained from making a public appeal for the protection of the civilian population. The ICRC was harshly criticized for this, especially by Jewish organizations. The critics attached little importance to its fear at the time that such an appeal could lead to a loss of access to some two million Allied prisoners of war whom the ICRC was then assisting. Nor did they attach much weight to the doubts, which played a part in its decision, that such an appeal would improve in any way the situation of the civilian population and particularly the inmates of the concentration camps. In 1988, commenting on Jean-Claude Favez' book,[10] the ICRC reaffirmed its doubts as to the effectiveness that such an appeal would have had.[11]

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

11 Jean-Claude Favez, *Une mission impossible? Le CICR, les déportations et les camps de concentration nazis*, Éditions Payot, Lausanne, 1988, p. 378.

Some commentators, fully aware of the tension between the determination to act in a humanitarian manner and the desire to testify in public, saw the silence of the ICRC at that time as a turning point in the history of the organization: "Pour préserver cette activité d'assistance, la Croix-Rouge prend la désastreuse décision de ne pas témoigner de ce qu'elle sait sur les camps d'extermination".[12]

Yet in face of this genuine dilemma far less assiduity is shown in examining the question of what — apart from taking an admittedly important moral stand — can be expected from public appeals under certain circumstances and in considering what effect they might have on existing humanitarian activity.

The important issue to realize both now and in the future, particularly for a humanitarian organization in the ICRC's position, is that decisions on whether to speak out or remain silent can have far-reaching consequences, not only in terms of whether the ICRC can carry on with its humanitarian activities but also for its image and the way in which it is perceived. For certain groups, those decisions can weigh more heavily than what a humanitarian organization does.

Restraint in making public statements

When it comes to public statements, the ICRC continues to be regarded as relatively discreet or at least reserved, as it undoubtedly is in comparison with other organizations. However, comparisons can be misleading, given the different tasks and activities of different organizations. This perception of the ICRC may come as a surprise in view, for example, of the many public statements and appeals made by the organization during the Balkan wars. The public was left in no doubt about what was going on, as the following two examples will show.

In a public appeal to the warring parties in Bosnia-Herzegovina in August 1992, the ICRC denounced the detention and inhumane treatment of innocent civilians and called on the parties to take a series of measures, and in particular to comply with the terms of the Third and Fourth Geneva Conventions.[13] A description of the desperate plight of the civilian popula-

12 Jean-Christophe Rufin, *L'aventure humanitaire*, Gallimard, Évreux, 1994, p. 71. ("To preserve this assistance activity, the Red Cross took the disastrous decision not to state what it knew of the extermination camps.")

13 "The ICRC and the conflict in former Yugoslavia", *International Review of the Red Cross*, Vol. 74, No. 290, September/October 1992, pp. 488-493.

tion was also the focal point of an appeal to the belligerents in June 1995 to reach a humanitarian consensus by taking concrete individual measures, such as helping to restore the water supply in Sarajevo and the surrounding area.

The second example is the ICRC's public statement on the Kosovo crisis in September 1998,[14] in which it drew attention to the critical situation of the civilian population and emphasized that responsibility for ensuring the safety of and respect for the civilian population lay with the Serbian authorities. It urged the Albanian representatives and the UCK to do their utmost to put an end to the killings.

Why cite these particular examples? Because they show that the ICRC does not refrain from public comment, but does avoid one-sided or at least too explicit condemnations of individual parties to conflict. While this approach is sometimes criticized, it clearly reflects the ICRC's overriding concern that the possibility to provide humanitarian aid must not be jeopardized by public declarations. Though I am not saying that they are bound to have that effect, the likelihood is enough to proceed with caution.

More generally speaking, it is important that the ICRC should play its part in providing public information on the sufferings of the population in war zones and the complexities of today's conflicts. There is plenty of scope for giving information without breaching the confidentiality indispensable for the ICRC's activities and without joining in the rush to pass judgment.

Top priority: access to the victims

The organization is criticized for giving absolute priority to carrying out its humanitarian task rather than providing the public with as much information as possible, all the more so as people realize that ICRC staff would have a lot to tell. Our staff are confronted daily with violations of international humanitarian law, in some cases very serious ones, and they know the conditions in the most remote prisons, prisoner-of-war camps and internment centres. Few organizations have such comprehensive inside knowledge of the real situation, the real conditions in war zones and areas of tension. As we have already seen, it is not for the ICRC to make one-sided condemnations. In an age when people are quick to pass judgment and histrionic expressions of concern and condemnation are highly rated regardless of their actual impact on conditions, this reticence may alienate some or disturb others because it does not fit in with widely held expectations. What

14 Public statement by the ICRC on the situation in Kosovo, published in the *International Review of the Red Cross*, Vol. 325, December 1998, pp. 725-728.

characterizes the ICRC is not so much an excessive discretion as a refusal to pass judgment publicly and to make one-side condemnations.

Nevertheless, the reluctance of the ICRC to make public pronouncements is undeniable. The reason for this reserve is twofold: it does not want to risk losing its access to the victims of conflict by doing so, and it has reservations about the extent to which public declarations can mobilize opinion. Incidentally, the restraint that the ICRC imposed on its staff in dealing with the public during the Biafra war was one of the reasons that led Bernard Kouchner — an ICRC staff member at the time — to help found *Médecins sans Frontières* in 1971. He felt that the "old lady", as the ICRC was then familiarly known in MSF circles, called for too much restraint and placed too many restrictions on the spontaneous expression of opinions.

The utmost caution always needs to be observed in the use of words. Indeed, the very decision whether to engage in public debate — and if so, where and when — has to be taken carefully. The German philosopher Hans-Georg Gadamer, when speaking about language and conversation, took the view that we ourselves do not so much make conversation as we are drawn into and get caught up in it.[15]

Over and above our own intentions, language and context determine what remains of what we have said. For a humanitarian organization like the ICRC, which is almost always working in contexts ranging from the emotional to the irrational, this too is an important consideration. We must not only be clear about what we want to say or not say, but must also consider carefully when and where we should get involved in public debate.

Subsidiary nature of public appeals

Perhaps nothing better illuminates the relationship of the ICRC to public statements and to public denunciations of breaches of international humanitarian law than the fact that, as a rule, the organization resorts to such means only when its confidential approaches remain fruitless and it comes to the conclusion that it can make no further meaningful contribution to the protection and support of the victims of the conflict.[16] Public denunciation is a second- or third-best alternative. To put it another way: as a rule, this step will be taken only when the ICRC concludes that a public

15 Hans-Georg Gadamer, *Wahrheit und Methode*, Crossroad, New York, 1990.

16 "Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law", *International Review of the Red Cross*, Vol. 221, March-April, 1981, pp. 76-83.

denunciation or public appeal will do more for the victims of a conflict than its work in the field. In assessing the implications of this comment, it should also be borne in mind that the ICRC's experience of the mobilizing effect of public appeals has not necessarily been convincing, although admittedly their effect cannot be verified in detail.

It would be hard to conceive of a more dramatic and urgent public appeal to the international community than that of 28 April 1994, some three weeks after the start of the genocide in Rwanda which then continued for three months. The ICRC called on the governments concerned to take all possible measures to put an immediate end to the massacres. In order to save its own delegates in Rwanda from almost certain death, the ICRC did not initially use the term "genocide". However, the circumlocutions employed — "systematic carnage", "the extermination of a large part of the civilian population" — left no room for doubt about what was going on. And for anyone who might still be plagued by doubts, the situation was clarified in numerous press releases issued during April using such terms as "chaos", "carnage", "massacre", "human tragedy", etc.[17] But for all their clarity, these public statements did not result in the rapid international reaction that was desired. It was not until 22 June that the UN Security Council gave France the green light to carry out a humanitarian operation during the two-month period until implementation of the resolution of 17 May raising the number of staff of the UN Assistance Mission for Rwanda (UNAMIR) to 5,500.[18]

The point of this example is not to denounce the slow response of the international community but to remind those who advocate a quick public indictment that people may often be content with just that. I say this in full knowledge of the enormous importance currently placed on "highlighting". The problem is simply that this generally amounts to nothing more than calling on someone else to do something. The victims, however, need actual help and actual protection. In making this point, I do not underestimate the very great importance of lending a voice to those who have no rights and who would not otherwise be heard. The position of the ICRC with regard to public comment is understandable only to those who know that access to all victims of armed conflict has higher priority for it than anything else except security considerations. And when it sets a priority, there are no half measures.

17 For a detailed account of the ICRC's activities in Rwanda in 1994, see <http://www.cicr.org/Web/fre/sitefreo.nsf/html/rwanda> (last visited on 17 July 2004).

18 UN Security Council resolution No. 929 of 22 June 1994.

The ICRC also strives to maintain a reasonable balance between the responsibility it accepts and its own capacity for action. If I may paraphrase a remark by Enzensberger, the ICRC does not wish to swell the ranks of those who shirk their responsibilities by setting moral requirements — for itself and others — that bear no relation to any real capacity for action.[19] In a world in which virtually every activity — including talking — must be exploitable for a wide variety of purposes, including entertainment, laying down priorities can seem strongly dogmatic, even though it is self-evident from the victims' point of view. The ICRC does not see itself as the moral conscience of mankind and knows that it cannot prevent armed conflicts. What it absolutely does want is to do everything in its power to help the victims of conflict and to desist from everything that could jeopardize access to them. In a way, it may be seen as standing in defence of minimum civilized standards under difficult conditions. The merits or demerits of public comment must be measured by this setting of priorities.

Two things must not be forgotten: "speaking out publicly" or "remaining silent" are both actions highly relevant to the security of ICRC staff. Moreover, there is plenty of scope for public comment that does not in any way jeopardize the conduct of humanitarian activity, for instance the many occasions to spread knowledge of international humanitarian law and to make new proposals for its further development. In Colombia alone, the ICRC has conducted 1,340 seminars and meetings attended by almost 60,000 participants from governmental and non-governmental organizations.

Openness and confidentiality

So far, all of my references have been to public comment. However, public comment is certainly not the only or necessarily the most effective form of comment. ICRC staff frequently do speak out very plainly. When they come across violations of international humanitarian law, they take the matter up with the warring parties, and often with commanders of forces in very remote areas, to explain the law applicable and demand compliance. That takes guts. The personal risk in doing so is far greater than in publishing indictments far away from the conflict zone.

Furthermore, prison reports, which are confidential, contain ICRC recommendations on ways to improve conditions of detention. These recommendations are discussed with the competent authorities. During their

19 Hans Magnus Enzensberger, *Civil War*, London 1994.

next visit to the prisoners, ICRC delegates check to see which recommendations have been implemented. Reports on the conduct of hostilities and assessing the extent to which the civilian population is protected in military operations are drawn up and presented to the warring parties. In other words, it is important to realize that the reticence of the ICRC in public does not mean that it says nothing about what it sees and does not speak out in order to improve conditions. In the end, it places more trust in confidential persuasion than in the effects of public denunciations.

The ICRC also prefers to adopt a confidential approach when conditions in places of detention or in conflict areas constitute a violation of international humanitarian law. Only when repeated confidential approaches fail to put an end to those conditions, or at least to improve them, does the ICRC consider going public. However, it takes that decision only once it is convinced that going public will help the people concerned. In practice this is generally a step-by-step procedure during which everything possible is done in the field and at headquarters to improve the humanitarian situation. Above all, care must be taken not to weaken the position of the field personnel in charge by bypassing one or more phases in our intervention. A comparison of the ICRC's public statements on Guantánamo in February 2002, May 2003 and January 2004 provides an example of this approach.[20] Before the ICRC goes public, it naturally assesses the actual improvements that can be anticipated from doing so. The generally meagre outcome of public protests, expressions of consternation and condemnatory gestures also has to be considered.

Given everything that ICRC delegates see and experience, it often requires a great effort for them not to give free rein to their sense of outrage. Describing to the public — often with distinct emotional overtones — the dreadful conditions in prison X in country A may satisfy those among the population who are avid for news, and the denunciation may improve the victims' situation, at least in the short term. However, further access may subsequently be refused and hardly anyone will then wonder what awaits security prisoners when they are no longer visited. Moreover, the decision to go public cannot be taken in response to one specific situation; consideration must also be given to its possible impact in other contexts. By going public about the conditions in country A are we denying ourselves access to the victims in country B or C ?

20 See Press releases No. 02/11 of 9 February 2002, No. 03/36 of 28 May 2003 and No. 04/03 of 16 January 2004.

Maintaining confidentiality often requires considerable discipline and a degree of humility in an environment in which a little knowledge is relatively often outweighed by a great desire to name and shame. It was, for example, very tempting to reply to comments that confidential approaches had done nothing to remedy conditions in the Iraqi prisons by spelling out the improvements that the ICRC delegates had observed after their visits to the notorious Abu Ghraib prison near Baghdad.[21] Whatever is said in retrospect, I have no doubt that the improvements, which were made long before the appalling photos of prisoners being subjected to inhumane and humiliating treatment were published, were attributable partly — if not largely — to the ICRC's forthright demands.

The ICRC and the media

Some people may believe that changes are brought about more effectively today — particularly in open democratic societies — if the lever of publicity is used. They argue that the world in which we live is largely shaped by the media, and that the ICRC, too, should therefore adopt a different approach to its operations and its communication work than in the past.

Of course, the ICRC's communication strategy has to take the level of media attention being given to a particular scene of conflict into account. However, the ICRC usually works far beyond the reach of the media spotlight in all war zones and without regard for the intensity of media coverage. Its primary obligation is to the victims of violence. The report that was leaked to the press shows that prisoners felt they could trust their conversations in private with the ICRC representatives, and that while in prison they were able to talk about their inhumane treatment. It also shows that the ICRC was outspoken in its endeavours to improve the situation. Confidentiality is not the same as inactivity or complicity.

It is a moot question whether a public denunciation by the ICRC of the conditions in Iraqi prisons would have had the same or a similar effect as the worldwide publication of those photos. The crucial factor is that the ICRC considers that — both in the longer term and in specific cases — its

21 The *Wall Street Journal* of 7 May 2004 quoted lengthy excerpts from a confidential report dated January 2004 on the conditions in prisons in Iraq visited by the ICRC, which had been handed to the Coalition forces in February 2004. The report was published without the ICRC's consent. It is marked as confidential and intended only for the authorities to which it was given, and attention is expressly drawn to the fact that it may not be published in part or in its entirety without the ICRC's consent. The compiling and submission of a report is part of the ICRC's standard procedure for prison visits worldwide.

tried and tested procedure for prison visits is effective and beneficial for victims the world over, including the confidential nature of its reports. This is also its firm and unqualified opinion with regard to the prisoners in Iraq.

The relationship between the ICRC and the media is much closer and more complex than might be thought from what has been said. Their representatives are often working in the same environment and the ICRC has a genuine interest in media coverage of armed conflicts, which also serves as a reminder of many conflicts otherwise forgotten. For instance, during the first month of the genocide in Rwanda the ICRC enabled a dozen journalists to reach Kigali, though they left again two days later.

Alerting the media to the conditions in war zones and general humanitarian concerns, such as establishing responsibility for the removal of unexploded ordnance, is of operational importance for the ICRC. Where States have no clearly definable or recognizable strategic interests at stake, only by mobilizing public opinion can governments be persuaded to act. There the media play a decisive role. Moreover, anyone who followed the ICRC's public statements on the sensitive issues in the first half of 2004 will know that the ICRC remains less silent in public than insinuations or accusations often imply.

Careful consideration essential

It might be thought that there are no problems attached to the principle of restraint in making public statements and appeals. Here a few questions remain that I would not wish to avoid. Does not extreme restraint in publicly denouncing serious violations and allocating blame ultimately tend to favour the perpetrators? At times there is even talk of complicity with the oppressors. Cannot a more durable and widespread improvement in the living conditions of a suffering population be achieved by public statements or denunciations and the action they trigger than by keeping silent in public to facilitate the provision of humanitarian aid? Above all, how certain is it that a bolder and more challenging approach in public will lead to the ICRC being kicked out of a country in which it is carrying out humanitarian activities?

It is not certain that the ICRC would be forced to leave, and in any case each conflict area has to be assessed individually. Yet the likelihood of humanitarian work being seriously impaired is great enough to necessitate a clear idea of the probable consequences before going public. There will, however, always be situations in which there is no alternative but to speak out boldly. In view of the potential consequences, that is one of the hardest decisions of all to take.

A large-scale public condemnation can set a development in motion that is more advantageous in the long term than humanitarian aid in an unfavourable and unchanging socio-political environment. While I do not believe that humanitarian aid prolongs wars, it may indirectly delay the advent of peace and reforms if it prevents the sort of drastic deterioration which alone would induce the international community or forces within the country itself to take decisive action. Nevertheless, I have serious doubts that a public condemnation would elicit this response. It is much more likely to have little or no impact while simultaneously leaving many people suddenly deprived of the help of a humanitarian organization.

The absolute priority of maintaining access to the victims can admittedly have the side-effect of leaving a country's warlords or oppressors with a less negative international public image than they deserve. But this is not such a dilemma as it seems: there are nowadays many organizations that concentrate on the public denunciation of abuses and, as they are not involved in any humanitarian activity in the countries concerned, they have no worries about being expelled. These advocacy organizations are playing a very important part. Since there is no shortage of them, there is no need for the ICRC to establish new priorities.

Such is the nature of the ICRC's work that the circumstances in which it speaks out or remains silent are always exceptional. In the emotional and irrational environment of conflict, every word, depending on the party and point of view, has its own significance and resonance. For an organization like the ICRC, it is essential to be acutely sensitive to words and their resonance, determined by past and present associations which are not always readily apparent. In conflict situations, the meaning and impact of words really make themselves felt.

There is no universally applicable recipe for when it is appropriate to speak out publicly or remain silent. Each time, before deciding, the actual situation will have to be carefully considered. The ICRC certainly has no cause to underestimate the importance of public communication. While it cannot, for the various reasons above, give in to the current desire for hasty judgments and sweeping condemnations, it must and will make resolute use of the public arena to tell of the plight of people in many parts of the world, explain complex and obscure conflict situations and promote fundamental humanitarian concerns. Though aware that instant condemnation is in greater demand, we must follow that course undeterred.

Consistency and predictability

In view of the serious consequences it may have, the decision to speak out publicly or remain silent is particularly difficult in an organization such as the ICRC. It must never lose sight of its basic mandate, whatever the pressure of public or other opinion. It must, however, have a keen sense of when to raise its voice. Whether it has had this sense of timing is ultimately shown by whether going public has improved the situation of the people it sought to protect. That is not easy to judge. The impact of a public statement on the specific situation referred to may be relatively straightforward to assess — but that is not true of other areas in which it works. In the case of an organization like the ICRC, the effects of public comment have to be assessed from a global perspective. An organization whose delegates visited 470,000 detainees in more than 1,900 places of detention in some 80 countries last year[22] has to consider what public condemnation of prison conditions in country A means in terms of its access to prisons in countries B and C.

Now and again people come up with misleading "alternatives", such as that of "either discretion or efficiency". Yet the very purpose of discretion is to enhance the efficiency of humanitarian activity — with a worldwide and not only a local ambition. If it fails to do that, it needs to be thoroughly reviewed. I set great store by consistency in the ICRC's public statements. If a decision to go public is taken in one place, the same step must be taken in comparable conditions somewhere else, even if the consequences for the organization's activity are different. Consistency and predictability are valuable assets. Being consistent in public comment and in public silence is a fundamental prerequisite for the ICRC's credibility.

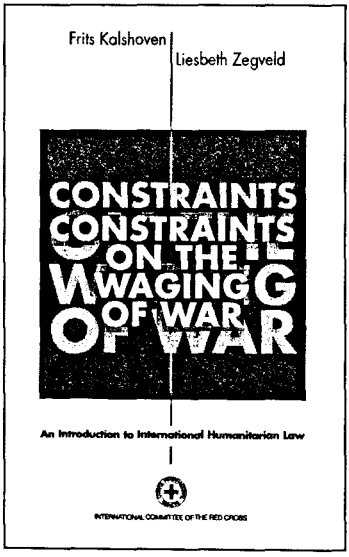
22 See ICRC *Annual Report 2003*, ICRC, Geneva, 2004, p. 42.

Résumé:

Action humanitaire: parler ou se taire?

Jakob Kellenberger

La position du CICR sur les déclarations et les appels publics est souvent controversée et a parfois donné lieu à des débats passionnés. Dans cet article, le président du CICR décrit la manière dont l'institution agit dans un monde complexe de tensions entre, d'une part, l'action et les préoccupations humanitaires et, d'autre part, la dénonciation de violations du droit international humanitaire et le témoignage dans l'espace public. Il met en évidence l'engagement inconditionnel du CICR à rester proche des victimes des conflits armés et à entretenir un dialogue constructif avec les autorités pour protéger et aider les victimes. Toutes les autres considérations – hormis la sécurité – passent donc impérativement après cet objectif. L'institution préfère adopter une approche confidentielle, même lorsque la situation observée dans des lieux de détention ou des zones de conflit constitue une violation du droit humanitaire. Si ses démarches confidentielles répétées ne font pas cesser les violations, ou tout au moins n'améliorent pas la situation, c'est alors seulement que le CICR envisage d'alerter l'opinion publique, s'il considère qu'il est dans l'intérêt des personnes concernées. On reproche parfois au CICR de donner la priorité absolue à sa mission humanitaire au lieu de fournir au public le plus d'informations possible. L'auteur fait valoir que le but même de la discrétion est d'avoir, à l'échelon mondial, un accès aux victimes aussi large que possible. Si cette façon de procéder ne devait pas aboutir, elle devrait alors être réexaminée radicalement. Enfin, M. Kellenberger met l'accent sur la nécessité pour le CICR d'être conséquent et fidèle à ce qu'on attend de lui dans ses déclarations publiques, afin de renforcer la crédibilité de l'institution.



Constraints on the Waging of War: An Introduction to International Humanitarian Law

by Fritz Kalshoven and Liesbeth Zegveld

Bringing together the principal rules of humanitarian law, from its origins to its most recent development, this book focuses on the rules governing weapons and the field of international criminal law. Combining theory and actual practice, this book will appeal to specialists as well as to students turning to the subject for the first time.

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Rwanda 1994: un témoignage: « On peut tuer autant de gens qu'on veut, on ne peut pas tuer leur mémoire »

PHILIPPE GAILLARD*

Ce témoignage est celui de Philippe Gaillard, chef de délégation du Comité international de la Croix-Rouge (CICR) au Rwanda en 1993 et 1994. Il reflète le discours qu'il a prononcé à l'occasion d'une conférence organisée par le Musée international de la Croix-Rouge et du Croissant-Rouge à Genève, sous le titre «Rwanda 1994: la vraie vie est absente (Arthur Rimbaud)».

Il n'est pas dans mon intention de réécrire ici l'histoire du Rwanda. Je rappellerai simplement quelques dates charnières: 1959 – révolution hutue; 1962 – accession à l'indépendance; 1973 – coup d'État du président Habyarimana – octobre 1990 – début des hostilités entre le Front patriotique rwandais (FPR) et l'armée gouvernementale; 6 avril 1994 – assassinat du président Habyarimana; 4 juillet 1994 – prise de Kigali et du pouvoir par le Front patriotique rwandais.

En juillet 1993, le président du CICR se rendit au Rwanda. Au cours de sa visite, M. Sommaruga rencontra notamment le président Habyarimana. De cette rencontre, ma mémoire n'a retenu qu'un seul détail: lorsque M. Sommaruga aborda la question des mines antipersonnel – et il y en avait alors 30 000, surtout dans le nord du Rwanda, sur la ligne de front – et de leurs conséquences dramatiques pour les populations civiles, le président Habyarimana lui répondit qu'il en était parfaitement conscient, mais qu'à son avis le plus important était moins de «déminer les champs de thé ou les champs de pommes de terre, que de déminer les cœurs...»

* L'auteur est actuellement chef de délégation du Comité international de la Croix-Rouge (CICR) au Pérou. Les opinions exprimées dans cet article reflètent celles de l'auteur et non celles du CICR.

J'étais arrivé au Rwanda quinze jours auparavant et voilà qu'au détour d'une seule métaphore j'apprenais deux choses fondamentales: premièrement, que les fleurs de la rhétorique n'étaient pas forcément l'apanage des poètes, puisqu'un chef d'État osait se lancer sur un terrain aussi glissant et cela au cours d'un entretien tout à fait formel et, deuxièmement, que le cœur des Rwandais était miné et peut-être prêt à éclater dans le sang et dans la fureur.

Une semaine après l'entretien entre M. Sommaruga et le président Habyarimana, un accord de paix était signé à Arusha, en Tanzanie, entre le chef d'État rwandais, le général Habyarimana, et le président des rebelles du FPR, Alexis Kanyarengwe. Tout allait donc pour le mieux dans le meilleur des mondes le 4 août 1993.

C'est en repensant à cet optimisme forcené, partagé par les plus hautes instances internationales – le moment de la signature de l'accord de paix –, que j'ai relu dernièrement *Candide* où Voltaire s'amuse à décrire, non sans ironie et antiphrase, un champ de bataille:

> «Rien n'était si beau, si leste, si brillant, si bien ordonné que les deux armées. Les trompettes, les fifres, les hautbois, les tambours, les canons formaient une harmonie telle qu'il n'y en eut jamais en enfer. Les canons renversèrent d'abord à peu près six mille hommes de chaque côté; ensuite la mousqueterie ôta du meilleur des mondes environ neuf à dix mille coquins qui en affectaient la surface. La baïonnette fut aussi la raison suffisante de la mort de quelques milliers d'hommes. Le tout pouvait bien se monter à une trentaine de mille âmes. Candide, qui tremblait comme un philosophe, se cacha du mieux qu'il put pendant cette boucherie héroïque. Enfin, tandis que les deux rois faisaient chanter des Te Deum chacun dans son camp, il prit le parti d'aller raisonner ailleurs des effets et des causes. Il passa par-dessus des tas de morts et de mourants, et gagna d'abord un village voisin; il était en cendres: c'était un village abare que les Bulgares avaient brûlé, selon les lois du droit public. Ici des vieillards criblés de coups regardaient mourir leurs femmes égorgées qui tenaient leurs enfants à leurs mamelles sanglantes; là, des filles éventrées, après avoir assouvi les besoins naturels de quelques héros, rendaient les derniers soupirs; d'autres à demi brûlées criaient qu'on achevât de leur donner la mort. Des cervelles étaient répandues sur la terre à côté de bras et de jambes coupés.»

Les premiers signes de l'«héroïque boucherie», pour reprendre l'expression de Voltaire, ne remontent pas à l'assassinat du président Habyarimana, le 6 avril 1994. Quelques semaines seulement après la signature de l'accord

de paix d'Arusha, en août 1993, une cinquantaine de paysans étaient assassinés dans le nord du pays.

Les troupes onusiennes du général Dallaire, cible permanente des railleries de Radio-Télévision-Libre des Mille-Collines, furent incapables de faire la lumière sur ce massacre.

En janvier 1994, Kigali connaissait un regain de violence. Scénario identique en février, doublé de l'assassinat politique de deux personnalités d'envergure: Félicien Katawasi, ministre, et Martin Bouchiana, président de la CDR, un parti hutu de tendance radicale. Rupture du dialogue entre militaires gouvernementaux et militaires du FPR, escarmouches entre belligérants dans le nord du pays.

À la veille de Pâques, le 4 avril 1994, toutes sortes de rumeurs circulaient, y compris dans les milieux diplomatiques, comme quoi quelque chose de grave allait se passer. Le nonce apostolique, Mgr Giuseppe Bertelli, me convoqua et m'en avisa, me conseillant même de rester vigilant et prêt à agir. La chose grave se produisit deux jours plus tard, le soir du 6 avril, vers 20 heures, lorsque l'avion qui ramenait le président du Rwanda, Juvénal Habyarimana, et le président du Burundi, fut abattu d'un tir de missile juste au-dessus de l'aéroport de Kigali.

Je me trouvais à ce moment-là en réunion avec des dirigeants du Front patriotique rwandais à l'intérieur du Parlement qui, depuis le 28 décembre 1993 – le jour des Saints Innocents! –, et suite aux accords de paix d'Arusha, servait de siège aux rebelles en pleine ville de Kigali.

Il y avait avec moi deux collègues de travail. Nous avons passé la nuit dans un fond de salle inondé d'eau, entourés de sacs de sable pour nous protéger des balles et des mortiers de l'armée gouvernementale, qui avait commencé à tirer sur le Parlement. Nous étions au courant du drame, les radios rwandaises l'avaient annoncé une heure à peine après la chute de l'avion présidentiel.

La folie meurtrière qui s'est emparée du peuple rwandais a été instantanée. Nous l'avons constaté dès le matin du 7 avril, en observant les premiers massacres systématiques de populations civiles. À l'intérieur du Parlement, les membres du Front patriotique rwandais bouillonnaient de rage et d'impatience, assistant comme nous, impuissants, aux premières évidences de l'hécatombe. Je les voyais s'en prendre aux soldats de l'ONU, les suppliant d'intervenir ou de les laisser intervenir, eux, les combattants du FPR. Mais les soldats de l'ONU restaient inflexibles et ne bronchaient pas. Sans doute ne comprenaient-ils pas ce qui se passait.

La tension ne cessait de monter. Pressé par mes deux collègues, eux-mêmes pressés par leurs épouses sans arrêt au téléphone – il fonctionnait

encore à ce moment-là –, j'avais, nous avions l'impression d'être pris dans un véritable piège à rats.

Rester au Parlement avec le FPR nous transformait en cible militaire. Sortir du Parlement équivalait à nous exposer aux balles, aux barrages et à la merci de l'éventuelle miséricorde divine. Nous avons finalement décidé de quitter le Parlement, nous faisant traiter de fous et d'inconscients, tant par le FPR que par les officiers onusiens sur place.

Quelque part, dans le *Voyage au bout de la nuit*, Céline écrit: «Quand le moment du monde à l'envers est venu et que c'est être fou que de demander pourquoi on vous assassine, il devient évident qu'on passe pour fou à peu de frais, encore faut-il que ça prenne. Et quand il s'agit d'éviter le grand écartelage, il se fait dans certains cerveaux de magnifiques efforts d'imagination.» Dans le cas particulier de cette journée du 7 avril 1994 à 13 h 30, Céline avait particulièrement raison.

Sur le chemin du retour, nous avons retrouvé une collègue de travail, Muriel, qui était restée seule dans une de nos maisons, puis nous avons poursuivi notre route. À un barrage, des soldats gouvernementaux, ivres, nous ont arrêtés. Ils réclamaient notre voiture. Je suis sorti du véhicule, je me suis présenté à leur chef, particulièrement ivre – les chefs ont toujours droit à plus de bière que les soldats – je lui ai serré la main et lui ai demandé son nom. Il a refusé de me le donner. Le plus important dans ces moments-là, c'est surtout de ne pas montrer qu'on est mort de peur. Il faut garder tout son aplomb, regarder les gens droit dans les yeux et, quitte à raconter des blagues, trouver des arguments convaincants.

Je fis savoir, sans sourciller, à notre militaire ivre, que j'habitais le même quartier que le ministre de la Défense, Augustin Bizimana, et que son directeur de cabinet, le colonel Téoneste Bagosora, et que je ne manquerais pas de les informer du comportement peu discipliné de ce barrage.

Le militaire a semblé impressionné par mes connaissances dans la hiérarchie et nous a laissés passer. Deux minutes plus tôt, il tenait sa mitraillette braquée sur mon estomac: je n'en revenais pas. Céline avait définitivement raison, du moins en ce que concerne le grand écartelage et les efforts d'imagination.

Dans le quartier où résidaient la plupart des délégués, massacres et pillages avaient été systématiques dès l'assassinat du président Habyarimana. Il en était de même dans toute la ville de Kigali: brigandages, règlements de compte, pillages, viols, tueries ethniques, assassinats politiques ont fait de Kigali un charnier sans doute sans précédent depuis la Seconde Guerre mondiale, si l'on fait exception du Cambodge de Pol Pot.

C'est sans doute devant la peur provoquée par l'hystérie collective du crime et de la destruction, devant l'ampleur du drame humain qui se déroulait en pleine rue et dans les maisons mêmes, que toutes les ambassades, toutes les agences onusiennes, toutes les organisations non gouvernementales, tous les projets de développement et de coopération ont fermé leurs portes et ont quitté le pays, qui par avion, qui par route, à partir du 10 avril, abandonnant sur place leurs collaborateurs rwandais, souvent dans la détresse la plus complète.

Les troupes onusiennes fortes de quelque 2500 hommes avant le 6 avril, n'en comptèrent plus que 300 après cette date, laissant le très courageux général Dallaire bien démuni, en termes tant de moyens que de mandat.

La MINUAR (la Mission des Nations Unies pour l'assistance au Rwanda, née de l'accord de paix d'Arusha du 4 août 1993) était devenue un fantôme politique et logistique.

Entre-temps, essentiellement pour des raisons de sécurité, nous avions décidé de rassembler tous les délégués du CICR à l'intérieur même de la délégation et d'évacuer ceux d'entre eux qui n'étaient pas absolument indispensables à son fonctionnement.

Nous avions également commencé, avec l'aide de la Croix-Rouge rwandaise, à évacuer des blessés vers une école située à quelques pas de la délégation et que nous avions transformée en hôpital de campagne. Nous étions conscients, sans doute à des degrés divers, qu'évacuer et soigner des blessés dans un tel contexte de violence relevait quelque part du pari stupide: la violence qui s'était emparée du Rwanda n'était pas destinée à neutraliser l'autre, en le faisant prisonnier ou en le blessant, mais à l'éliminer purement et simplement à coups de machette ou de tournevis. Les blessés que nous ramassions étaient en fait des survivants que les tueurs, en particulier les miliciens Interahamwe, n'avaient pas eu le temps d'achever.

À deux reprises, en avril 1994, nos ambulances furent arrêtées à des barrages de miliciens, les blessés déchargés de force et achevés sous nos yeux. À la Radio-Télévision-Libre des Mille-Collines, on annonça que le CICR transportait *«des ennemis de la République déguisés en faux blessés»*. Explications, protestations, communiqués de presse depuis Genève, repris par les médias occidentaux, effet boomerang sur le terrain, prise de conscience par le gouvernement et les médias rwandais de la détérioration considérable, accablante de leur image, correction, campagne de sensibilisation sur le droit des blessés à être soignés et sur le rôle de la Croix-Rouge.

Quelques jours plus tard, nos ambulances n'avaient plus de problèmes pour circuler librement à Kigali.

L'assassinat de ces blessés dans nos ambulances nous a permis d'en sauver des milliers d'autres, près de 10 000 entre le 10 avril et le 4 juillet 1994, selon les statistiques de notre hôpital de fortune.

Dix mille personnes, ce n'est rien dans un conflit où près d'un million ont péri en moins de trois mois. C'est juste un millimètre d'humanité sur des kilomètres d'horreur. Les risques que nous avons pris pour sauvegarder ce millimètre d'humanité en valaient-ils la peine ? Combien d'entre nous ne se sont-ils pas posé la question en se disant, encore une fois comme Céline : « Je refuse la guerre et tout ce qu'il y a dedans, je ne la déplore pas, moi, je ne me résigne pas, je ne pleurniche pas dessus, je la refuse tout net avec tous les hommes qu'elle contient. Je ne veux rien avoir à faire avec eux, avec elle. Seraient-ils 995 millions et moi tout seul c'est eux qui ont tort et c'est moi qui ai raison parce que je suis le seul à savoir ce que je veux, je ne veux plus mourir. »

Les autres, ceux qui étaient partis, les diplomates, les coopérants, les agences onusiennes et les ONG n'avaient-ils pas eu raison en se disant comme Rimbaud : « Le plus malin est de quitter ce continent où la folie rôde pour pourvoir d'otages ces misérables » ?

L'immense majorité de nos collaborateurs rwandais avaient pu rejoindre la délégation, beaucoup d'entre eux avec leur famille, des enfants surtout.

Qu'allaient-ils devenir si nous partions ? Des centaines de milliers de personnes fuyaient Kigali, fuyaient les campagnes au fur et à mesure que le FPR gagnait du terrain. Fallait-il les laisser mourir de faim sur les routes ?

L'hôpital de la ville de Kigali, bombardé par les rebelles, avait fermé ses portes. L'hôpital du CICR a accueilli une moyenne de cent blessés par jour pendant 90 jours ; il a été menacé par des miliciens ivres, désespérés ; il a été bombardé par les rebelles. Une véritable saison en enfer, et inédite, celle-là, je vous le jure. Rimbaud encore : « Faiblesse ou force te voilà, c'est la force tu ne sais ni où tu vas, ni pourquoi tu vas, entre partout, répond à tout, on ne te tuera pas plus que si tu étais cadavre ».

C'est un peu ce que nous avons fait à Kigali et en d'autres endroits du Rwanda : nous sommes allés, nous sommes entrés, nous avons répondu au lieu de déguerpir, nous nous sommes déployés au lieu de nous renfermer, nous avons dialogué et, dans l'enfer rwandais, nous avons parlé avec tous les diables.

La préfecture de Kigali avait besoin de carburant pour faire le plein des camions qui évacuaient les cadavres dans des bennes à ordures. Nous lui avons offert le fuel. Une autorité préfectorale nous a confié, trois semaines plus tard, en secret, que 67 000 cadavres avaient été évacués dans la seule ville de Kigali.

Par manque de chlore et de sulfate d'alumine, Kigali s'est retrouvée sans eau. Nous avons fourni les produits nécessaires, repoussant ainsi de quinze jours l'agonie de la station centrale de pompage.

Vers la mi-avril, le gouvernement intérimaire a fui Kigali pour Gitarama, plus au sud. C'était pathétique de voir tous ces ministres quitter l'Hôtel des Diplomates en plein centre de Kigali, portant eux-mêmes leurs valises et suivis de leur marmaille en pleurs. L'un d'eux, Mathieu Ngirumpatse, président du MNRD, le parti gouvernemental, était à court d'essence. Je lui en ai offert, à la délégation, devant tous nos employés locaux terrifiés. Un ministre qui n'avait pas de voiture me demanda de l'aider. Je le casai dans la voiture d'un autre ministre que je connaissais personnellement. Après tout, même entre ministres, dans des circonstances comme celles-là, on peut se permettre un minimum de solidarité! C'était pitoyable, je ne savais pas si je devais rire ou pleurer! L'Hôtel des Diplomates vidé de ses augustes et nobles occupants, je rentrai à la délégation et relus un poème que j'ai lu et relu des dizaines de fois à Kigali. D'Arthur Rimbaud encore, et qui s'intitule *Matin*. Il est tiré, lui aussi, d'*Une saison en enfer*:

> «N'eus-je pas une fois une jeunesse aimable, héroïque, fabuleuse à écrire sur des feuilles d'or, – trop de chance! Par quel crime, par quelle erreur, ai-je mérité ma faiblesse actuelle? Vous qui prétendez que des bêtes poussent des sanglots de chagrin, que des malades désespèrent, que des morts rêvent mal, tâchez de raconter ma chute et mon sommeil. Moi je ne puis pas plus m'expliquer que le mendiant avec ses continuels *Pater* et *Ave Maria*. Je ne sais plus parler.
>
> Pourtant, aujourd'hui, je crois avoir fini la relation de mon enfer. C'était bien l'enfer, l'ancien, celui dont le fils de l'homme ouvrit les portes.
>
> Du même désert, à la même nuit, toujours mes yeux las se réveillent à l'étoile d'argent, toujours sans que s'émeuvent les Rois de la vie, les trois mages, le cœur, l'âme, l'esprit. Quand irons-nous par delà les grèves et les monts, saluer la naissance du travail nouveau, la sagesse nouvelle, la fuite des tyrans et des démons, la fin de la superstition, adorer – les premiers! – Noël sur la terre!
>
> Le chant des cieux, la marche des peuples! Esclaves, ne maudissons pas la vie.»

Ce soir-là, je bus pas mal d'alcool. Notre administrateur, Jean Pascal Chapatte, avait réussi à acheter du Pauillac 1986 à cinq dollars la bouteille. Le pillage des magasins de luxe et des résidences d'ambassadeurs avait du bon. Dans mon sommeil, je rêvais que je n'étais pas à Kigali, j'étais seul dans un couvent bénédictin en plein centre de New York en feu, c'était magnifique.

Quelques jours plus tard, nous installions une sous-délégation à Gitarama, plus précisément à Kabgayi, le plus grand bastion catholique du pays.

Kabgayi disposait d'un hôpital et de nombreux locaux dans lesquels étaient venus se réfugier des civils, près de 35 000, en majorité tutsis, tous très exposés à la furie populaire. Des dizaines, peut-être des centaines d'entre eux sont morts dans des conditions atroces lors de rafles nocturnes parfaitement ciblées et organisées.

Les problèmes étaient énormes. À plusieurs reprises, je me déplaçai de Kigali à Kabgayi, discutai avec les autorités religieuses et gouvernementales, amenai des ministres sur place, des gradés militaires aussi, pour leur faire prendre conscience de l'ampleur du désastre et des conditions infra-humaines dans lesquelles survivait leur peuple, indépendamment de toute considération ethnique.

Ils acquiesçaient, mais leur niveau de désorganisation, leur sentiment d'impuissance, leur découragement étaient tels qu'ils étaient incapables de mettre un terme à la folie meurtrière et au massacre systématique qu'ils avaient contribué à organiser, une partie d'entre eux en tout cas. Je dis bien une partie d'entre eux, car j'ai rencontré au sein du gouvernement hutu, qui tombera début juillet 1994, des personnes lucides dépourvues de toute haine raciale.

Je pense à M. Jean de Dieu Habineza, ministre du Travail et des Affaires sociales, qui, à la demande du CICR – et avec tout l'appui du nouveau chef d'état-major des forces armées rwandaises, le général Augustin Bizimungu – s'est rendu personnellement dans un orphelinat près de Gisenyi pour sauver d'une mort certaine près de 300 enfants dont les parents venaient d'être massacrés.

Je pense aussi aux généraux Marcel Gatzinzi, ancien chef d'état-major, et Léonidas Rousatira, commandant de l'École supérieure militaire, tous deux modérés, ouverts à l'analyse et au dialogue, et désespérés par le comportement assassin et suicidaire de certains de leurs collègues.

Je pense enfin et surtout au colonel François Munyengango, officier de liaison de la délégation du CICR, qui à lui tout seul a contribué à sauver des centaines de civils sans défense, dont 600 orphelins en danger de mort à Butare, dans le sud du pays. Le colonel était atteint d'une maladie incurable. C'est sans doute la raison pour laquelle le ministre de la Défense l'avait nommé officier de liaison du CICR. Il est décédé quelques mois plus tard. Que Dieu le garde !

Je pense encore à certaines autorités de la préfecture de Cyangugu qui, à force de patience et de persuasion de notre part, et malgré les innombrables pressions dont elles étaient l'objet de la part des miliciens Interahamwe, ont tout fait pour éviter que ne soient assassinés quelque 9000 civils parqués dans le camp de Nyarushishi, les seuls survivants tutsis de toute la préfecture de Cyangugu. Les rescapés de Nyarushishi seront plus tard protégés par les troupes françaises de l'opération Turquoise.

Que l'on me comprenne bien, je ne cherche pas à minimiser la tragédie rwandaise. Ce qui s'est passé au Rwanda est tout simplement monstrueux, inadmissible, indescriptible. Les Rwandais se sont suicidés en moins de trois mois.

Ce que je veux dire, à travers les quelques exemples cités plus haut, c'est simplement qu'au sein même de la plus profonde et impénétrable horreur, il s'est trouvé des hommes et des femmes d'un courage et d'une lucidité suffisamment exceptionnels pour déposer une fleur d'humanité sur ce qu'ils savaient être un véritable charnier national, un génocide.

Ce que je veux dire aussi, c'est que les médias occidentaux ont peut-être été trop simplistes dans leur analyse en présentant le drame rwandais comme un conflit ethnique. Il est facile, et sans doute fort pratique, de tirer sur la corde ethnique lorsqu'on est incapable de résoudre un problème politique qui a trait au partage du pouvoir.

Le problème ethnique rwandais n'est peut-être que le masque derrière lequel se cache, ou s'est caché, une minorité d'hommes politiques et de militaires qui ne voulaient pas que l'on touche à leurs privilèges, patiemment acquis au cours de vingt ans de démocratie habyarimanesque.

Le drame c'est que, comme toujours dans ces cas-là, ce ne sont jamais les responsables qui paient l'incroyable facture de la violence, mais les petits, les paysans, les illettrés qui achètent comme du pain bénit n'importe quelle propagande diffusée en particulier au travers des insanités radiophoniques de Radio-Télévision-Libre des Mille-Collines. Ce sont ceux-là qui ont vécu une saison en enfer, beaucoup plus que nous. Ce sont ceux-là les véritables damnés de la terre, qu'ils soient à Sarajevo, en Afghanistan, au Libéria ou au Rwanda.

C'est à eux que je pense en vous relisant la supplique rimbaldienne: «Esclaves, ne maudissons pas la vie». C'est à eux aussi que devait penser ce haut dignitaire du Front patriotique rwandais, plus tard ministre et aujourd'hui ambassadeur de son pays en Europe, lorsqu'il me dit vers la fin avril 1994: «Monsieur Gaillard, nous savons ce qui se passe mais nous savons aussi, que même après Hiroshima, il y a eu des survivants.» Ces mots sont

restés gravés dans ma mémoire, comme de la glace transparente dans la faille d'un rocher.

Il est toujours surprenant, lorsqu'on est noyé dans la foule d'un carnaval macabre, d'avoir affaire à des interlocuteurs lucides, sans état d'âme, qui ne laissent rien transparaître de leurs propres blessures. Pour certains êtres humains, en particulier pour ceux qui côtoient les sphères du pouvoir, les impératifs politiques et militaires sont une telle priorité qu'ils n'ont sans doute pas d'autre choix.

Entre-temps, le CICR avait ouvert une sous-délégation à Ngara, en Tanzanie, pour venir en aide à près de 3000 réfugiés hutus qui avaient fui devant la progression du Front patriotique rwandais. Parmi ces réfugiés, il y avait sans aucun doute beaucoup de miliciens qui avaient du sang jusqu'au cou.

Nous avons ouvert une sous-délégation à Goma, au Zaïre, et une autre à Bukavu, également au Zaïre, pour aider les populations déplacées vers l'ouest du pays, à Ruhengeri, Gyseni, Kibuye, Cyangugu, Gibengo. Les besoins étaient énormes, l'agressivité des miliciens difficile à maîtriser.

Nous avons aussi ouvert une sous-délégation à Kabale, en Ouganda, pour venir en aide aux populations civiles du nord du pays, sous contrôle des rebelles du FPR : un territoire à peu près vide, au maximum un demi-million d'habitants, pour la plupart concentrés dans des camps de fortune. Alors qu'un mois auparavant nous nous demandions si nous allions quitter le Rwanda ou pas, nous étions désormais présents dans six endroits du pays, répartis entre la zone gouvernementale et la zone rebelle, ainsi qu'à la périphérie, sur les frontières tanzanienne, ougandaise et zaïroise.

À Kigali, notre hôpital ne désemplissait pas. Bien plus, il était saturé. Il fallait trouver une solution, et vite. Nous avons alors décidé de commencer à transférer les blessés convalescents de notre hôpital de fortune, situé du côté de la ville sous contrôle gouvernemental, à l'hôpital du Roi Fayçal, de l'autre côté de la ligne de front, sous contrôle des rebelles. Nous avons nettoyé l'hôpital du Roi Fayçal en deux jours, avec l'aide de Médecins sans Frontières, et nous avons commencé les transferts. Il fallait passer plusieurs barrages de miliciens Interahamwe. C'était délicat et dangereux. Nous n'avons d'abord transféré que des blessés hutus, puis un mélange savant des deux, hutus et tutsis, plusieurs fois. Et puis, il n'y a plus eu de blessés hutus à transférer, seulement des blessés tutsis. Là, les choses se sont compliquées. Nous avons été arrêtés à un barrage formé de gardes présidentiels et de miliciens, juste au milieu du pont qui marquait la ligne de front et où, quelques jours plus tôt, des casques bleus avaient été pris pour cibles par les rebelles du FPR. Impossible d'aller plus loin. Les miliciens montaient sur le camion et

criaient «*Inyenzi! Inyenzi!*» (littéralement: «*cancrelats!*», nom péjoratif donné aux Tutsis par les extrémistes hutus). Un moment, j'ai cru que nous allions droit au massacre. J'ai demandé à un membre de la garde présidentielle de consulter ses chefs par radio pour qu'ils nous accordent l'autorisation de passer. Rien à faire. J'ai sauté dans ma voiture et suis remonté jusqu'aux bâtiments de l'état-major des forces armées rwandaises. Là, un colonel a griffonné quelques mots en rwandais sur un bout de papier et m'a dit: «Ça devrait jouer...» Je suis retourné sur le pont. Tout le monde était encore vivant. J'ai montré mon bout de papier au garde présidentiel. Appel radio. Attente interminable. Et puis finalement, ces mots: «C'est bon, vous pouvez passer!»

Nous avons poursuivi notre chemin. J'étais blême. Il fallait maintenant passer le barrage des rebelles. L'un d'eux est monté dans le camion, puis dans la remorque du camion. Quand il est redescendu, il était au bord des larmes. Il s'est approché de moi et m'a dit: «Tu as ramené mon frère! Tu as ramené mon frère!» J'ai souri pour ne pas pleurer: c'était beaucoup d'émotion à la fois. Depuis mon expérience rwandaise, je n'ai plus assisté à aucun regroupement de famille dispersée par la guerre. Je suis relativement blindé contre l'horreur, mais les belles choses, je ne leur résiste plus, elles me font monter les larmes du fond du ventre et me retournent l'estomac.

La progression militaire du FPR était impressionnante. Avant la fin du mois de mai, les rebelles avaient pris Byumba, Kayanza, Rwamagana. Ils contrôlaient la frontière tanzanienne. Ils avaient traversé le Bugesera et coupé la route qui mène de Kigali à la frontière burundaise, au nord de Butare. Les autorités gouvernementales, qui avaient quitté Kigali pour Gitarama vers la mi-avril, abandonnaient maintenant Gitarama pour se rendre à Goma, à la frontière zaïroise.

Quelques jours plus tard, Kabgayi et Gitarama tombaient aux mains des rebelles. À Kabgayi, les délégués du CICR s'en étaient sortis indemnes, de même que les blessés de l'armée gouvernementale, qui se trouvaient dans notre hôpital de fortune, au sein même de l'évêché, et n'avaient pas pu fuir avec le reste de la troupe, car ils étaient incapables de marcher.

Les rebelles forcèrent les délégués à quitter Kabgayi, jugé trop dangereux, pour Nyanza, plus au sud. Je leur donnai l'ordre de se plier aux injonctions du FPR. Les délégués déménagèrent à Nyanza avec tous les blessés de guerre: ceux de l'armée gouvernementale furent considérés comme des prisonniers de guerre par le FPR. De plus, près de 30 000 civils, en grande majorité tutsis, déplacés à Kabgayi et qui avaient vécu un véritable cauchemar pendant près de deux mois, étaient vivants. Dans un tel contexte, c'était beaucoup.

À Kigali même, notre situation était des plus inconfortables. Mi-mai, un de nos convois de nourriture fut délibérément visé par le FPR, à la sortie de la ville, en direction de Gitarama. Pendant une heure et demie, les délégués Pierre Gratzl, François Conrad et Ian Stefanski ont essuyé une pluie de balles et de mortier. Pierre Gratzl a été blessé au ventre par un éclat d'obus. Le général Dallaire le sauva de ce mauvais pas en envoyant sur place, et à notre demande, deux véhicules blindés. Pierre Gratzl fut opéré dans notre hôpital. Ce jour-là, j'ai découvert un nouveau mot du vocabulaire français: la laparotomie.

Pierre Gratzl est un ami de collège. Cela faisait vingt-sept ans que nous nous connaissions et je suis quelque part persuadé, même si c'est difficile à dire quand on est timide comme je le suis, que Pierre Gratzl n'aurait sans doute pas accepté de venir dans l'enfer de Kigali si je n'y avais pas été moi-même. Si c'est comme ça, c'est plutôt sympathique de sa part.

Un jour, à Kigali, il n'y a plus eu d'eau du tout. À partir de ce moment-là, nous sommes allés chercher de l'eau à une source à cinq minutes de la délégation, une véritable aubaine.

Nous avons ainsi pu nous laver tous les jours. Quand la mort, avec toutes ses odeurs, rôde autour de vous, c'est important de se laver. J'ai un système digestif qui fonctionne comme une horloge. Je vide mes intestins tous les matins aussitôt levé. Quand je prends une douche, je récupère l'eau de rinçage dans un bac en plastique. Je pleure parfois, accroupi dans la baignoire. Mes pleurs se mélangent divinement bien à l'eau de rinçage. Puis je verse toutes ces eaux sales dans la toilette, évacuant du coup mes excréments à l'égout de la ville.

On me pardonnera ces détails techniques. Du reste ce ne sont pas des détails techniques: la vérité relève bien plus de la psychiatrie que de l'économie ménagère. Le fait est qu'il est fondamental, dans de telles circonstances, pour son propre équilibre mental, de pouvoir évacuer sa propre merde avec ses propres larmes. Le pH du corps entier, le pH de l'âme aussi, redevient normal. L'acidité de la nuit disparaît et on peut à nouveau marcher, sans tituber.

Le lendemain de l'accident de Pierre Gratzl, je marchais à nouveau, sans tituber. J'oublie un autre détail. À l'époque de cet accident, un obus de mortier est tombé sur la délégation du CICR, tuant sur le coup deux personnes et en blessant cinq autres. C'était trop, et ces obus provenaient du FPR!

Dès le début du conflit, en octobre 1990, le Front patriotique rwandais nous avait donné des assurances formelles qu'il respecterait le droit international humanitaire, le mandat du CICR et le travail des délégués.

Les contacts entre le CICR et le mouvement rebelle étaient très réguliers, connus de tous, y compris du gouvernement rwandais.

En juillet 1993, le président Sommaruga avait rencontré le président de la République, Juvénal Habyarimana, mais il avait aussi rencontré le président du FPR, Alexis Kanyarengwe.

Après la signature de l'accord de paix d'Arusha, le 4 août 1993, les contacts entre le CICR et les rebelles du FPR étaient quasiment quotidiens. La position du FPR à notre égard avait-elle changé? Pour le savoir, il nous fallait rencontrer les rebelles et si possible au plus haut niveau.

C'est le responsable des opérations du CICR pour l'Afrique, Jean-Daniel Tauxe, qui s'est déplacé de Genève en Ouganda. Plutôt courageux de sa part. Il est toujours appréciable de ne pas se sentir abandonné par sa hiérarchie. De mon côté, profitant d'un déplacement de mon ami le général Dallaire et de l'ambassadeur onusien José Ayala Lasso dans le nord du pays, je me rendis par route jusqu'à Byumba, où je rencontrai le général Paul Kagamé, le chef des rebelles, et lui sollicitai un entretien pour Jean-Daniel Tauxe et moi-même deux jours plus tard, ce qui me fut accordé immédiatement.

Le général Kagamé nous dit: «*It's not our aim to shoot at you*». Je lui répondis: «*General, it's good to know but please, don't kill us, even by mistake*». Puis nous avons ri.

Il est toujours réconfortant d'apprendre que si l'on doit mourir ce ne sera jamais qu'en raison d'une erreur de tir! Parce que des erreurs de tir, il y en a encore eu, dont une monumentale, la troisième semaine de juin, lorsque deux obus sont tombés pile sur la salle des urgences de notre hôpital, tuant sept blessés et en blessant à nouveau gravement une dizaine d'autres. J'étais dans tous mes états.

On devrait toujours doubler les cours de droit international humanitaire de cours d'artillerie et de balistique. Mais le mandat du CICR n'est paraît-il pas assez large pour que l'on débatte de ce genre de considérations jugées trop agressives!

J'alertai la BBC, CNN, Radio France Internationale, etc., pour leur raconter nos malheurs, histoire d'apprendre aux artilleurs du FPR à mieux tirer.

La presse internationale, même lorsqu'elle fonctionne au régime «*fast food news*», a parfois du bon. En tout cas, le FPR n'a pas apprécié du tout, mais alors pas du tout, de voir entamer de la sorte son image d'armée disciplinée, organisée, respectueuse des conventions internationales.

Entre la fin juin et le tout début juillet 1994, le président du FPR lui-même, Alexis Kanyarengwe, nous a adressé deux lettres nous demandant de déménager notre délégation et notre hôpital dans un autre endroit de Kigali. Personnellement, et cela fait des années que ça dure, j'ai toujours préféré

recevoir des lettres plutôt que des obus. Une blessure par lettre ne se soigne pas forcément sur une table d'opération. Il nous fallait gagner du temps, Kigali était encerclée par les rebelles et n'allait pas tarder à tomber.

Nous avons répondu à la première lettre en demandant au président Kanyarengwe d'avoir l'obligeance de nous indiquer un lieu sûr, dans Kigali même, où déménager notre délégation et notre hôpital. Nous n'avons pas eu le temps de répondre à la seconde parce que, dans la nuit du 3 juillet 1994, des officiers de l'armée gouvernementale nous ont appelés à trois reprises par téléphone pour nous dire que l'armée allait quitter Kigali cette nuit-là, et nous remercier d'avoir eu le courage d'être restés pour sauver ce que nous avions pu sauver.

La veille, une équipe de miliciens armés jusqu'aux dents avaient débarqué dans notre hôpital. Ils amenaient avec eux une jeune femme tutsie. Ils me dirent:

> «Cette femme est infirmière, nous l'avons gardée avec nous toutes ces dernières semaines pour qu'elle prenne soin de nous en cas d'incidents. C'est une ennemie. Nous allons quitter la ville maintenant et nous avons décidé de ne pas la tuer... Nous avons pensé qu'elle serait plus utile dans votre hôpital que morte. Au revoir!»

Je les remerciai dans les formes et leur souhaitai bonne route. Il y a parfois des miracles qui vous vont droit au cœur.

À l'aube du 4 juillet, les troupes du FPR circulaient librement dans toute la ville de Kigali. J'invitai deux officiers du FPR, deux majors, à boire une bière à la délégation, ce qu'ils acceptèrent avec joie.

C'est le lendemain que j'ai quitté le Rwanda, non sans avoir encore une fois dîné avec le général Dallaire, qui m'offrit un ruban. Je lui fis cadeau de mon insigne Croix-Rouge, en lui précisant qu'il n'avait pas le droit de le porter. Même si les mandats dont nous étions chargés étaient très différents, le général Dallaire avait vécu le même cauchemar que nous, peut-être pire: il avait perdu treize de ses hommes, dont une dizaine dans des circonstances atroces, assassinés à bout portant. Sa tête avait été mise à prix par les miliciens Interahamwe.

Dès début juin, le général Dallaire ne pouvait plus traverser les lignes du front et vivait quasiment reclus dans son quartier général. Je me souviens que, dans les semaines qui ont précédé la chute de Kigali, il nous avait chargés, à plusieurs reprises, de remettre des lettres aux autorités gouvernementales, ce qui était la preuve qu'entre elles et la MINUAR le dialogue était rompu.

Il faut dire que maintenir le dialogue avec toutes les forces belligérantes rwandaises, entre le 6 avril et le 4 juillet 1994, a constitué sans doute la partie la plus difficile de notre travail, un exercice d'équilibrisme permanent.

Dialoguer, c'est d'abord et surtout écouter l'autre, surtout si c'est le désespoir qui amène l'autre chez vous. C'est lui servir de référence, même sans parler, surtout peut-être sans parler. Dialoguer, c'est aussi percevoir la façon dont l'autre vous comprend, pour autant qu'il soit encore en état de comprendre quelque chose.

En ce sens, à Kigali, la délégation du CICR a été en état de dialogue permanent, même dans les pires moments, surtout dans les pires moments. Le dialogue est la pierre d'angle de la sécurité, bien avant les véhicules blindés et les gilets pare-balles. Le dialogue est un signe d'ouverture, un signe de confiance. Le véhicule blindé est l'expression physique d'une crainte, d'un repli, l'expression d'une fausse force, d'une force agressive. Le dialogue est l'expression d'une force tranquille, dont votre interlocuteur sort parfois rechargé.

La coordination interne est un autre point clé de la réussite ou non d'une mission. Entre Genève, Nairobi, Kinshasa, Bujumbura, Kabale, Goma, Bukavu, Kabgayi, Ngara, Kampala et Kigali, cela fait en tout onze bases d'action auxquelles il faut donner une cohérence.

La perception que l'on a d'un conflit n'est pas forcément la même à Genève que sur le terrain. Dans le cas du Rwanda, cela n'a pas été le cas, il n'y a jamais eu de divergences entre Genève et nous, sur le terrain.

Et puis, il y a la presse, la plupart des journalistes sont des vautours de l'immédiat, des cinématographes du morbide. Pas tous. De toute façon, ce sont eux qui façonnent l'opinion publique, à l'extérieur en tout cas. Mais leurs commentaires ont des répercussions à l'intérieur. Les belligérants sont parfois, et ce n'est pas seulement le cas du Rwanda, très sensibles à leur image. Il nous fallait faire très attention à nos déclarations. Parfois, nous nous sommes même offert la frustration de nous taire, mais dans ces cas-là, la frustration est souvent une question de survie.

Il y a enfin et surtout la qualité et le courage des gens qui travaillent avec vous sur le terrain. J'ai déjà cité les noms de Pierre Gratzl, de François Conrad, d'Ian Stefanski. Je voudrais aussi rendre hommage à Patrick Gasser, Jean-Pascal Chapatte, Hervé Le Guillouzic, Didier Grond, Valérie Le Van, André Musy, Markus Dolder, et à toute l'équipe de Médecins sans Frontières: Gilbert Ascotte, John Sanding, Isabelle, Matto, Cornelia, René, bref à tous ceux qui ont permis à notre délégation de rester toujours solidaire, même et surtout dans les pires moments. Je voudrais remercier également mon épouse Maria-Teresa, qui a travaillé dans le nord du Rwanda et ne m'a jamais,

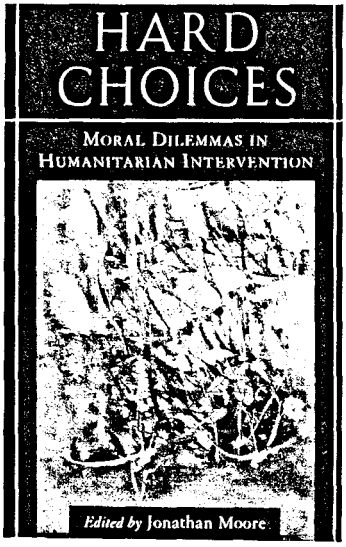
jamais, jamais mis sous pression pour que nous quittions le pays. Et puis, je voudrais enfin rendre un hommage très sincère à tous nos collaborateurs rwandais locaux hutus, tutsis, mélange des deux, sans qui nous n'aurions jamais pu fonctionner, car eux seuls avaient cette connaissance des détails indispensables à la survie, à la définition de l'important. Et l'important, c'était surtout de ne pas mourir.

Les enfants de ces collaborateurs, des dizaines, se terraient dans les couloirs de la délégation lors des bombardements. J'ai joué avec eux chaque fois que j'ai pu le faire. Ils ont fini par me surnommer « le grand-père ».

C'est pour ces enfants-là et pour tous les autres enfants rwandais qui ont survécu au massacre (j'ai appris des années plus tard et avec beaucoup d'émotion qu'il y avait de nombreux enfants au Rwanda dont le prénom était « Gaillard »... *la vita è bella!*) que je voudrais vous proposer un dernier texte de Garcia Lorca, tiré des Pièces complémentaires de *Poète à New York* et qui s'intitule *Enfance et mort*:

« Pour chercher mon enfance, mon Dieu !
j'ai mangé des oranges pourries, des vieux papiers,
des colombiers vides
et j'ai trouvé mon petit corps mangé par les rats
au fond de la citerne avec les chevelures de fous.
Mon costume de marin
n'était pas imprégné de l'huile des baleines,
mais il avait l'éternité vulnérable des photographies,
Noyé, oui, bien noyé, dors, ô mon fils, dors,
enfant vaincu au collège et dans la valse de la rose
blessée,
stupéfait de l'aube sombre que fait le duvet sur les
cuisses,
stupéfait de l'homme en toi qui mâchais du tabac sur
ton côté gauche.
J'entends un fleuve sec plein de boîtes de conserve
où chantent les égouts, où l'on jette des chemises
ensanglantées,
un fleuve de chats pourris qui font les corolles et les
anémones
pour tromper la lune qui s'appuie doucement sur eux.
Ici, tout seul avec mon noyé.
Ici tout seul avec la brise des mousses froides et des
couvercles de fer-blanc.

Ici tout seul je vois qu'on m'a fermé la porte.
On m'a fermé la porte et il y a un groupe de morts
qui joue à tirer sur des cibles, un autre groupe de morts
qui cherche dans la cuisine les peaux de melon,
et, solitaire, tout bleu, inexplicable, un mort
qui me cherche dans les escaliers, qui plonge les mains
dans la citerne,
tandis que les astres emplissent de cendre les serrures
des cathédrales
et que les gens restent soudain avec tous leurs petits habits.
Pour chercher mon enfance, mon Dieu!
j'ai mangé des citrons pressés, des étables, des journaux
jaunis,
mais mon enfance était un rat qui s'enfuyait par un jardin très sombre
vers une maison de pianos violemment assaillie par
la lune. »
(7 octobre 1929, New York)



Hard Choices: Moral Dilemmas in Humanitarian Intervention

by Jonathan Moore

This volume of original essays by influential figures in international policy-making, practitioners and academics offers insights into the conflicting moral pressures brought to bear in various types of humanitarian operations. The authors address issues relating to human rights, development, economic sanctions, the arms trade, refugees, HIV and the media. Together they make the case that, although there are no easy answers, paying due regard to moral considerations can improve the quality of decision-making and intervention in internal conflicts.

Available in English and French
English edition: Rowman and Littlefield, Lanham, Oxford, 1998

CHF 45.- / Ref. 2166
French edition: Gallimard, Paris, 1999
CHF 35.- / Ref. 2166

François Bugnion's *The International Committee of the Red Cross and the Protection of War Victims*

MICHAEL A. MEYER*

The English-language version of François Bugnion's remarkable book[1] could not appear at a more opportune time. The International Committee of the Red Cross (ICRC) has been under increased media scrutiny since the unauthorized publication in early May 2004 of its report on the treatment by Coalition forces of prisoners of war and other protected persons in Iraq. In some countries, the credibility or effectiveness of the ICRC's long-established confidential approach has been questioned.

Before that, the ICRC had to deal with the deliberate car bomb attack on its offices in Baghdad in October 2003, and the need to find ways to continue to carry out its humanitarian operations throughout Iraq, where it had been working for over 23 years. In 2003, three ICRC expatriate delegates and two locally recruited staff members were wilfully killed in Afghanistan and Iraq alone.

The aftermath of the attacks in the United States in September 2001 and the continuing response to global terrorism have increased the need for independent and neutral humanitarian action. The ICRC is the sole aid organization that has the status and capability to provide such protection to victims of armed conflicts, but it can do so only with the consent of the warring parties. It is therefore essential, now more than ever, for the ICRC to be known and accepted in every quarter.

What is the ICRC? How is it constituted? What tasks are assigned to it, and what principles guide its work? These are the contemporary questions that are answered in full in this fascinating overview of world events, humanitarian action and legal innovation. Until now there has been no text in the English language that explained in detail how the ICRC got to where it is today, that clarified its position and roles under international humanitarian law and its own place in the general international legal order. Now there is, and it is a veritable gold-mine of information for those interested in such subjects.

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Readers should not be deterred by the sheer size of this volume. Yes, it is an admirable reference work, supplemented by comprehensive bibliographies, footnotes, tables and indexes. Historians and legal scholars will find it to be of very high quality. But it is also written in a very readable style (the translators are to be commended), taking a broad historical and legal perspective, with each chapter preceded by an appropriate literary or other quotation. Even those who already have some knowledge of the history of the ICRC and international humanitarian law will benefit from the author's insights and appreciate the clear and useful summaries and assessments which end most chapters.

Bugnion's penetrating analysis and his long and varied experience working for the ICRC, helping to apply humanitarian law and carry out humanitarian activities and witnessing at first hand many of the events described in this book, make it rich in substance and give it a value a purely academic study would not possess. Nor is it the work of an apologist: he does not hesitate to criticize past actions of the ICRC or to make clear his disagreement with positions it has adopted, despite his obvious dedication to its humanitarian ideals and his firm belief in its value as an institution.

The original French version of the book was reviewed by the late Jacques Freymond in this journal[2], and I shall not attempt to repeat his knowledgeable appraisal. It should, however, be mentioned that the English version includes a foreword in which former ICRC President Cornelio Sommaruga responds to many of Bugnion's main points or conclusions, and which itself merits careful reading. The focus of the entire work is on the ICRC's activities to protect war victims ("protection" being understood in its widest sense as encompassing all humanitarian activities, including relief). The volume is divided into three "books", and each one could constitute a book in itself in terms of quality and content: a historical account covering events and developments from Solferino to Hiroshima; an analysis of the duties and powers assigned to the ICRC under international humanitarian law to protect victims of armed conflict; and an examination of the ICRC's legal personality, composition and relations with Switzerland. The conclusions on future challenges for the ICRC, although written in 1994, address issues which have proved to be of continuing importance to the ICRC and in world affairs in general. They include challenges both within the ICRC, such as its priorities and human and financial resources, and outside, such as the

1 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC and Macmillan, Geneva, 2003, lxviii & 1161 pages.

2 *International Review of the Red Cross*, Vol. 35, No. 307, July-August 1995, pp. 477-480.

changing nature of warfare, competition among humanitarian organizations, the politicization of humanitarian aid, the role of the media, and relations with the other components of the International Red Cross and Red Crescent Movement. The fact that the author, as a senior executive at the ICRC, has been in a position to influence the institution's response to internal and external challenges in recent years perhaps gives special interest to this section, but does not diminish the foresight it shows.

Even those with a good historical knowledge of the ICRC will find Bugnion's succinct accounts both enjoyable and useful. As he observes, the ICRC's "history is like the drum of a seismograph which records all the crises through which humanity passes". Salient points in the institution's development are identified and help the reader to understand today's ICRC, its policies and working methods. The author notes that similar ideas to improve the care of the wounded on the battlefield had been proposed before the establishment of the original Committee of Five (the forerunner of the ICRC). The Committee's great achievement was to transform those ideas into reality, and that same initiative and constructive action have been central features of the organization ever since. Bugnion explains how the 1864 Geneva Convention covers volunteers even though there was no express reference to them in the text (answer: they were considered part of the military medical services). The importance of the ICRC's independence to enable it to help protect prisoners of war was highlighted during World War I. It became necessary to emphasize the ICRC's neutrality and impartiality during the Italo-Ethiopian War of 1935-36. The explanation given then would not be out of place in helping to respond to current issues, such as why the ICRC is granted special immunity from testifying before the International Criminal Court and other war crimes tribunals. There are nuggets of fascinating information, such as how IBM helped the ICRC to trace missing persons, especially members of the armed forces, during World War II (of some relevance today, when corporate social responsibility is under discussion and the said company is alleged to have enabled the Nazi regime to compile records of concentration camp victims). Some historical events still colour current perceptions, such as that of the ICRC's response to the Holocaust, and the author's appraisal is unfailingly fair.

His careful analysis of the ICRC's role under international humanitarian law to protect victims of armed conflict is admirable and could prove to be of practical use to government and military legal advisers. One or two points are made which, if read in isolation, might be queried; for instance, the text of Article 1.4 of 1977 Additional Protocol I has not turned out to be "a vitally important provision" in practice, except insofar as it has been a significant factor in dissuading some major States from becoming party to the treaty. Bugnion is correct to

note that the traditional ICRC view on the binding force of Article 3 common to the four 1949 Geneva Conventions (Common Article 3) for insurgents is less than wholly convincing, and right to suggest alternative approaches. Both in this connection and more generally, he attributes great importance to the role of custom, including the part played by it in the development of the ICRC's own work. He underscores the value of the ICRC's right of humanitarian initiative, and gives a useful account of the arguments frequently put forward to refuse the ICRC's offers of services. There is a helpful examination of the potential for the ICRC to act as a substitute for Protecting Powers, and the institution should be encouraged to give further consideration to performing this role, if only on a pragmatic basis, to assist in the implementation of international humanitarian law.

Champions of international humanitarian law are sometimes criticized for being legal absolutists whose main interest in regulation is to prevent all war. The author, while noting the nobility of this ideal, also recognizes that it is unrealistic. The sense of realism which informs his discussion of the ICRC and its efforts to protect war victims is reflected, too, in his consideration of international humanitarian law.

Bugnion's book could furthermore help to increase understanding within the International Red Cross and Red Crescent Movement: National Societies may be less familiar with the ICRC, and the explanation of its specific nature and mandate may serve to show why National Societies and the International Federation need to support the ICRC in carrying out its genuinely unique role. It also shows the need for complementary organizations to deal with the many humanitarian challenges outside of armed conflicts and internal violence or where the involvement of a neutral intermediary is unnecessary.

There are several basic works on the ICRC and the Movement which no collection on international humanitarian law or humanitarian action or policy should be without. To these works by Boissier, Durand and Pictet must be added this book by François Bugnion, a "magnum opus" in every sense of the term. It is to be hoped that he will some day be able to bring the present work up to date, perhaps by adding another chapter.

The ICRC and international humanitarian law have been criticized of late. This book serves to reaffirm the importance of both. It will be accessible to lawyers or other specialists and to non-legal readers alike. It is a work of timeless quality, which could be used creatively to develop the ICRC's potential to protect war victims. In our increasingly polarized world, where people of good will dedicated to humanitarian values exist on both sides, this book will help to demonstrate why the ICRC continues to deserve unified and universal support.

«Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé»: quelques réflexions préliminaires sur l'avis consultatif de la Cour internationale de Justice

ROSEMARY ABI-SAAB*

Le récent avis consultatif rendu par la Cour internationale de justice sur les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*[1] marque une nouvelle étape dans l'examen par la Cour de différents aspects du droit humanitaire. Il s'ajoute à une série d'affaires où la Cour s'est déjà prononcée en matière de droit humanitaire, de manière plus approfondie dans certains cas que dans d'autres, notamment l'affaire du *Détroit de Corfou*[2], l'affaire des *Prisonniers pakistanais*[3], l'affaire du *Nicaragua*[4], ou encore, plus récemment l'avis consultatif de la Cour sur la *Licéité de la menace ou de l'emploi des armes nucléaires*[5].

Comme on le verra en détail, la Cour apporte des précisions quant au droit applicable en cas d'occupation militaire, particulièrement la quatrième Convention de Genève de 1949 et la quatrième Convention de La Haye de 1907, ainsi que des instruments des droits de l'homme. La nature des règles spécifiques applicables et des droits et obligations qui en découlent pour la puissance occupante fait également l'objet du prononcé de la Cour, tout comme l'identification des obligations non respectées par la puissance occupante dans le cas d'espèce, et les conséquences juridiques de ce non-respect pour la puissance occupante, les États tiers et les organisations internationales.

Ce sont ces considérations qui font essentiellement l'objet des pages qui suivent, où on s'efforcera de suivre le raisonnement de la Cour, et de voir dans quelle mesure son prononcé contribue à clarifier et à préciser certaines normes essentielles du droit humanitaire[6].

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Rappel chronologique

Le 8 décembre 2003, le Secrétaire général des Nations Unies communiquait à la Cour internationale de justice la décision de l'Assemblée générale, adoptée lors de sa dixième session extraordinaire d'urgence[7], de demander à la Cour, en vertu de l'article 65 de son Statut, de rendre d'urgence un avis consultatif sur la question suivante:

> «Quelles sont en droit les conséquences de l'édification du mur qu'Israël, puissance occupante, est en train de construire dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est, selon ce qui est exposé dans le rapport du Secrétaire général, compte tenu des règles et des principes du droit international, notamment la quatrième Convention de Genève de 1949 et les résolutions consacrées à la question par le Conseil de sécurité et l'Assemblée générale?»

La Cour fixait, par ordonnance, au 30 janvier 2004 la date limite pour la présentation des exposés écrits qui pouvaient être soumis sur cette question. Elle fixait de même au 23 février 2004 le début des audiences publiques, au cours desquelles des exposés oraux pouvaient être présentés, que les États et organisations autorisées aient ou non présenté des pièces écrites[8].

1 Cour internationale de Justice (CIJ), *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, Avis consultatif, 9 juillet 2004 (ci-après *Avis 2004*). Cet avis et les opinions et déclarations individuelles des juges de la Cour sont disponibles sur: <http://www.icj-cij.org/cijwww/cdocket/cmwp/cmwpframe.htm> (visité 26 août 2004).

2 CIJ, *Affaire du Détroit de Corfou (Royaume-Uni c. Albanie)*, fond, 9 avril 1949, *CIJ Rec. 1948*, p. 4.

3 CIJ, *Procès de prisonniers de guerre pakistanais (Pakistan c. Inde)*, 15 décembre 1973, *CIJ Rec. 1973*, p. 344.

4 CIJ, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-unis d'Amérique)* (ci-après *Affaire du Nicaragua*), fond, 27 juin 1986, *CIJ Rec. 1986*, p. 14.

5 CIJ, *Licéité de la menace ou de l'emploi d'armes nucléaires*, Avis consultatif, 8 juillet 1996, <http://www.icj-cij.org/cijwww/ccases/cunan/cunanframe.htm> (visité 30 août 2004).

6 Dans cette optique, il n'y a pas lieu d'examiner ici les objections qui ont été soulevées au cours de la procédure écrite contre la compétence de la Cour et l'admissibilité de la demande en l'espèce. Voir en général les paragraphes 14 à 42 de l'*Avis 2004* où la Cour répond à ces objections.

7 Résolution ES-10/14 de l'Assemblée générale, UN Doc. A/RES/ES-10/14 (2003). Voir les paragraphes 18 et suivants de l'*Avis 2004*, où la Cour décrit les événements qui ont conduit à l'adoption de la résolution ES-10/14.Vu l'optique que nous avons choisie, nous n'examinerons pas ici les objections qui ont été soulevées et les arguments avancés quant à la prétendue irrégularité de la convocation de cette session, ni le prétendu dépassement de la compétence de l'Assemblée générale dans sa demande d'avis; objections auxquelles la Cour répond, en les réfutant, aux paragraphes 28 et 33 à 35 de l'*Avis 2004*.

8 On notera en passant les délais extrêmement brefs fixés par la Cour pour le dépôt des exposés écrits après la requête pour avis, et le début de la procédure orale. Malgré cela, 49 exposés écrits ont été déposés dans les délais, par des États membres, les Nations Unies et quelques organisations internationales autorisées par la Cour à intervenir. En ce qui concerne la Palestine, la Cour avait décidé, dans la même ordonnance du 19 décembre 2003, que, du fait que l'Assemblée générale avait accordé à la Palestine un statut spécial d'observateur, et que

Après avoir statué, à l'unanimité des quinze juges de la Cour, en faveur de sa compétence pour répondre à la demande d'avis consultatif et, par quatorze voix contre une (celle du juge Buergenthal[9]), décidé de donner suite à la demande d'avis, la Cour rendait son avis consultatif le 9 juillet 2004.

Le 20 juillet 2004, l'Assemblée générale des Nations Unies adoptait l'avis de la Cour, à une très importante majorité de 150 votes pour, six contre et dix abstentions[10].

Le prononcé de la Cour

Il nous paraît opportun de citer ici les points du dispositif de l'Avis, autres que ceux portant sur la compétence de la Cour et l'admissibilité de la demande, et qui répondent concrètement à la question posée par l'Assemblée générale. Tous ont été adoptés par quatorze voix contre une (celle du juge Buergenthal), à l'exception du point 3D qui a rencontré deux voix négatives (celles du juge Buergenthal et du juge Kooijmans):

«La Cour (...) 3) *Répond* de la manière suivante à la question posée par l'Assemblée générale:

A. L'édification du mur qu'Israël, puissance occupante, est en train de construire dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est, et le régime qui lui est associé, sont contraires au droit international;

B. Israël est dans l'obligation de mettre un terme aux violations du droit international dont il est l'auteur; il est tenu de cesser immédiatement les

celle-ci était co-auteur du projet de résolution portant requête d'avis consultatif, la Palestine pouvait également soumettre un exposé écrit et participer à la procédure orale (*Avis 2004*, par. 4 et 5). Par ailleurs, la Ligue des États arabes et la Conférence islamique, en réponse à leur demande, étaient également autorisées par la suite à présenter des exposés écrits et à participer à la procédure orale (*ibid.* par. 6). Quinze États ou organisations ont participé à la procédure orale. Pour sa part, Israël, qui avait présenté un volumineux exposé écrit, a choisi de ne pas participer à la procédure orale.

9 Dans une déclaration jointe à l'Avis de la Cour, le juge Buergenthal, qui avait voté en faveur de la compétence de la Cour, estime que celle-ci aurait dû exercer son pouvoir discrétionnaire et refuser de rendre un avis. Toutefois, il explique clairement que si ce vote négatif l'a conduit à voter également négativement sur tous les autres points substantiels du dispositif, cela ne veut pas dire que la construction du mur par Israël ne soulève pas de sérieux problèmes en droit international: «My negative votes with regard to the remaining items of the dispositif should not be seen as reflecting my view that the construction of the wall by Israel on the Occupied Palestinian territory does not raise serious questions as a matter of international law. I believe it does...» (Déclaration du juge Buergenthal, par. 1).

10 A/RES/ES-10/15. Les six voix contre sont: Israël, États-Unis d'Amérique, Australie, Micronésie, Îles Marshall et Palaos. Les dix abstentions: Cameroun, Canada, El Salvador, Nauru, Ouganda, Papouasie-Nouvelle-Guinée, Îles Salomon, Tonga, Uruguay, Vanuatu.

travaux d'édification du mur qu'il est en train de construire dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est, de démanteler immédiatement l'ouvrage situé dans ce territoire et d'abroger immédiatement ou de priver immédiatement d'effet l'ensemble des actes législatifs et réglementaires qui s'y rapportent, conformément au paragraphe 151 du présent avis;

C. Israël est dans l'obligation de réparer tous les dommages causés par la construction du mur dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est;

D. Tous les États sont dans l'obligation de ne pas reconnaître la situation illicite découlant de la construction du mur et de ne pas prêter aide ou assistance au maintien de la situation créée par cette construction; tous les États parties à la quatrième Convention de Genève relative à la protection des personnes civiles en temps de guerre, du 12 août 1949, ont en outre l'obligation, dans le respect de la Charte des Nations Unies et du droit international, de faire respecter par Israël le droit international humanitaire incorporé dans cette convention;

E. L'Organisation des Nations Unies, et spécialement l'Assemblée générale et le Conseil de sécurité, doivent, en tenant dûment compte du présent avis consultatif, examiner quelles nouvelles mesures doivent être prises afin de mettre un terme à la situation illicite découlant de la construction du mur et du régime qui lui est associé. »

Quelques clarifications préliminaires

La Cour apporte tout d'abord une précision terminologique, étant donné les objections formulées à l'égard de l'emploi du terme « mur » dans le titre de l'Avis. Elle précise qu'elle a simplement utilisé le même terme que celui employé par l'Assemblée générale dans sa requête:

> « (...) le « mur » en question est un ouvrage complexe, de sorte que ce terme ne peut être entendu dans son sens physique strict. Toutefois, les autres termes utilisés par Israël (« clôture ») ou par le secrétaire général (« barrière »), pris dans leur acception physique, ne sont pas plus exacts. De ce fait, dans le présent avis, la Cour a choisi d'user de la terminologie employée par l'Assemblée générale. »[11]

11 *Avis 2004*, par. 67. L'utilisation du terme « mur » par la Cour a été vivement critiquée par Israël dans son exposé écrit, comme reflétant une position qui manque d'objectivité. Voir *Written Statement of the*

La Cour note que la requête de l'Assemblée générale porte sur les « conséquences juridiques de l'édification du mur *dans le territoire palestinien occupé y compris à l'intérieur et sur le pourtour de Jérusalem-Est* » (c'est nous qui soulignons). En conséquence, « la Cour ne considère pas qu'elle a à examiner les conséquences juridiques de la construction des parties du mur sur le territoire même d'Israël »[12].

C'est donc bien le parcours du mur à l'intérieur du territoire palestinien occupé, et le type de construction – impliquant la confiscation de terrains, la destruction d'habitations, ainsi que le régime d'opération qui lui est associé[13] – qui pose problème[14].

Pour préciser les conséquences juridiques de l'édification du mur dans le territoire palestinien occupé, la Cour va devoir d'abord déterminer si celle-ci et le régime qui lui est associé sont ou non contraires au droit international: « Elle procédera donc à cette détermination avant de traiter des conséquences juridiques de la construction. »[15]

Government of Israel, par. 2.6 à 2.8: « Given the intentionally pejorative use of the term 'wall', and the ready availability of the neutral term 'barrier' used in the Secretary-General's report, Israel (...) objected to the Court's adoption of the term 'wall' in the formulation of the name of the case », *ibid.*, par. 2.8.

12 *Avis 2004*, par. 67. On relèvera toutefois que la quasi-totalité du mur déjà construite ou à construire se trouve en territoire palestinien occupé, et suit un parcours qui répond de toute évidence à des considérations autres que purement sécuritaires. Pour le tracé tel qu'il est connu aujourd'hui, voir notamment le Rapport du Secrétaire général établi en application de la résolution ES-10/13, de l'Assemblée générale, 24 novembre 2003 (UN Doc. A/ES-10/248); le Rapport du rapporteur spécial de la Commission des droits de l'homme, John Dugard, sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967, 8 septembre 2003, UN Doc. E/CN.4/20004/6; les cartes détaillées annexées au Rapport écrit de la Palestine. On relèvera aussi l'utilisation, dans la demande d'avis de l'Assemblée générale, des termes « territoire palestinien occupé » ; la Cour a suivi cette terminologie dans son avis. Dans son exposé écrit, par. 2.9, Israël critique l'utilisation de cette terminologie, qui impliquerait l'existence de lignes de démarcation devenues frontières d'un futur État palestinien: « The underlying assumption appears to be that the so-called 'Green Line' or Armistice Demarcation Line (...) is the presumptive and immutable border of a putative Palestinian state ». Israël conteste ici des frontières qui n'ont pas encore été fixées, non pas le fait que le territoire en question soit un « territoire occupé », ce qu'Israël a toujours contesté jusqu'ici.

13 Sur le régime associé à la construction du mur, voir *Avis 2004*, par. 85: « Il convient (...) de relever que la construction du mur s'est accompagnée de la mise sur pied d'un régime administratif nouveau. Les forces de défenses israéliennes ont en effet édicté en octobre 2003 des ordonnances établissant comme « zone fermée » la partie de la Cisjordanie qui se trouve entre la Ligne verte et le mur. » (*Ibid.*).

14 Dans un communiqué de presse du 18 février 2004 (N° 04/12), soit cinq jours avant le début des plaidoiries orales, le CICR adoptait une position très claire à l'égard de la construction de « la barrière », particulièrement ses conséquences humanitaires pour la population palestinienne, et affirmait que cette construction est contraire au droit international: « Le CICR estime que la barrière en Cisjordanie est contraire au droit international humanitaire, dans la mesure où son tracé s'écarte de la 'Ligne verte' et empiète sur les territoires occupés... Le CICR demande donc instamment à Israël de ne pas planifier, construire ou maintenir cette barrière en territoire occupé ».

15 *Avis 2004*, par. 68.

Le droit applicable

Afin de répondre au fond à la question qui lui a été posée par l'Assemblée générale, à savoir quelles sont les conséquences juridiques de la construction d'un mur dans le territoire palestinien occupé, la Cour s'arrête tout d'abord à la détermination des « règles et principes de droit international qui sont pertinents pour l'appréciation de la licéité des mesures prises par Israël ». Elle identifie trois sources de droit applicable en l'espèce: (i) le droit international général et en particulier certains principes fondamentaux des Nations Unies; (ii) le droit humanitaire; (iii) les droits de l'homme.

Le droit de la Charte

C'est dans la Charte et dans les résolutions adoptées en vertu de la Charte par l'Assemblée générale et le Conseil de sécurité, et dans le droit international coutumier, que la Cour identifie les « règles et principes » du droit international général applicables en l'espèce. La Cour dégage essentiellement deux principes:

- *L'interdiction de recourir à la menace ou à l'emploi de la force*, « soit contre l'intégrité territoriale ou l'indépendance politique de tout État, soit de toute autre manière incompatible avec les buts des Nations Unies » (art. 2.4), et son corollaire, qui est l'illicéité de toute acquisition de territoire résultant de la menace ou de l'emploi de la force, principe affirmé notamment dans la résolution 2625 (XXV) de l'Assemblée générale[16]. La Cour rappelle que dans l'affaire du *Nicaragua*[17], elle avait affirmé le caractère de droit coutumier de ces principes: « Les principes énoncés dans la Charte au sujet de l'usage de la force reflètent le droit international coutumier; cela vaut également pour ce qui en est le corollaire, l'illicéité de toute acquisition de territoire résultant de la menace ou de l'emploi de la force. »[18]
- Le deuxième principe identifié par la Cour est celui du *droit des peuples à disposer d'eux-mêmes* (autrement dit, le droit à l'autodétermination), principe consacré par la Charte et réaffirmé par la résolution 2625 (XXV) de l'Assemblée générale: « Tout État a le devoir de s'abstenir de recourir à toute mesure de coercition qui priverait de leur droit à l'autodétermination (...) les peuples mentionnés [dans ladite résolution]. » La Cour rappelle que ce principe est réaffirmé également à l'article premier commun aux deux Pactes des droits de l'homme: « Tous les peuples ont le droit de disposer d'eux-mêmes »,

16 Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre États, 24 octobre 1970, UN Doc. A/2625 (XXV).

17 *Affaire du Nicaragua*, *op. cit.* (note 4), pp. 98 à 101.

18 *Avis 2004*, par. 87.

article qui précise de plus que: «Les États parties au présent Pacte, y compris ceux qui ont la responsabilité d'administrer des territoires non autonomes et des territoires sous tutelle, sont tenus de faciliter la réalisation du droit des peuples à disposer d'eux-mêmes, et de respecter ce droit...».
Dans ce même contexte du droit à l'autodétermination, la Cour rappelle qu'une première fois, en 1971, dans l'Avis consultatif sur le *Sud-Ouest africain*[19], elle a souligné que «l'évolution du droit international à l'égard des territoires non autonomes, tel qu'il est consacré par la Charte des Nations Unies, a fait de l'autodétermination un principe applicable à tous ces territoires»[20]. Elle rappelle également qu'elle s'est référée à ce principe à plusieurs reprises dans sa jurisprudence ultérieure[21]. La Cour a de plus précisé qu'«aujourd'hui le droit des peuples à disposer d'eux-mêmes est un droit opposable *erga omnes*»[22].

Le droit humanitaire

La détermination préalable du statut actuel du territoire en cause est particulièrement importante au regard de l'applicabilité des règles et principes de droit humanitaire. La Cour rappelle tout d'abord l'article 42 du Règlement de La Haye, selon lequel: «Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie. L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.»

Au cours du conflit de 1967, qui a opposé, notamment, Israël à l'Égypte et à la Jordanie, les forces armées israéliennes ont occupé l'ensemble de ce qui restait des territoires qui avaient constitué la Palestine sous mandat britannique. Ainsi que l'affirme la Cour, il s'agit bien de «territoires occupés dans lesquels Israël avait la qualité de puissance occupante (...). L'ensemble de ces territoires (y compris Jérusalem-Est) demeurent des territoires occupés et Israël y a conservé la qualité de puissance occupante»[23].

19 CIJ, *Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276(1970) du Conseil de Sécurité*, Avis consultatif, 21 juin 1971, *CIJ Rec. 1971*, par. 52 et 53.

20 *Avis 2004*, par. 88.

21 Voir CIJ, *Sahara occidental*, Avis consultatif, 16 octobre 1975, *CIJ Rec. 1975*, par. 162.

22 CIJ, *Timor oriental (Portugal c. Australie)*, Arrêt, 30 juin 1995, *CIJ Rec. 1995*, par. 29.

23 *Avis 2004*, par. 78. Israël a toujours contesté le caractère de territoires «occupés», ces territoires n'ayant pas appartenu, selon Israël, à la Jordanie et à l'Égypte avant 1967. Suivant ce raisonnement, Israël a ainsi toujours refusé l'applicabilité de la quatrième Convention de Genève à ces territoires; il s'agirait de territoires «administrés» par Israël. Pour les conditions d'applicabilité de la IVe Convention au territoire palestinien occupé et la position d'Israël sur point, voir ci-dessous. Pour le statut du territoire en général, voir *ibid.*, par. 70 et suivants.

La Cour estime tout d'abord que, bien qu'Israël ne soit pas partie à la quatrième Convention de La Haye de 1907 à laquelle est annexé le Règlement, les dispositions de ce dernier ont acquis un caractère coutumier, ainsi qu'en a jugé le Tribunal militaire international de Nuremberg: les « règles définies dans la convention étaient reconnues par toutes les nations civilisées et étaient considérées comme une formulation des lois et coutumes de la guerre »[24]. La Cour rappelle que, dans sa jurisprudence, elle a abouti à la même conclusion en ce qui concerne les droits et devoirs des belligérants dans la conduite des opérations militaires[25].

De plus, la Cour rappelle les relations de la quatrième Convention de Genève avec les Conventions de La Haye. En effet, l'article 154 de la quatrième Convention de Genève précise que, dans les rapports entre les parties liées par la quatrième Convention de La Haye et les parties à la quatrième Convention de Genève, celle-ci complète les sections II et III du Règlement annexé aux Conventions de La Haye, la section III concernant « l'autorité militaire sur le territoire de l'État ennemi ».

En ce qui concerne l'applicabilité de la quatrième Convention de Genève, la Cour n'ignore pas les positions divergentes exprimées au cours de la procédure, notamment celle d'Israël, qui conteste l'applicabilité *de jure* de cette Convention au territoire palestinien occupé, tout en ayant affirmé à plusieurs reprises qu'il en mettait en œuvre les « dispositions humanitaires ».

La thèse israélienne est fondée sur l'interprétation qu'Israël fait de l'article 2, commun aux quatre Conventions de Genève, qui détermine leur champ d'application, et plus particulièrement du paragraphe 2 de cet article qui précise: « La Convention s'appliquera également dans tous les cas d'occupation de tout ou partie du territoire d'une Haute Partie contractante, même si cette occupation ne rencontre aucune résistance militaire. »

Israël ne considère pas que cette Convention soit applicable au territoire palestinien occupé, dans la mesure où « le territoire n'était pas reconnu comme souverain avant son annexion par la Jordanie et l'Égypte et où, en conséquence, il ne s'agit pas d'un territoire d'une Haute Partie contractante au regard de la Convention »[26].

24 Jugement du Tribunal militaire international de Nuremberg du 30 septembre et 1er octobre 1946, p. 65. Cité dans l'*Avis 2004*, par. 89.

25 CIJ, *Licéité de la menace ou de l'emploi d'armes nucléaires*, *op.cit.* (note 5), par. 75.

26 Voir par. 3 de l'annexe I au Rapport du Secrétaire général, intitulé « Résumé de la position juridique du Gouvernement israélien », auquel la Cour se réfère, *Avis 2004*, par. 90.

En réponse à cette prise de position, la Cour relève en revanche (ainsi, d'ailleurs, que la majorité des participants à la procédure) le premier paragraphe du même article 2: « (...) la présente Convention s'appliquera en cas de guerre déclarée ou de tout autre conflit armé surgissant entre deux ou plusieurs des Hautes Parties contractantes même si l'état de guerre n'est pas reconnu par l'une d'elles. »

Autrement dit, la quatrième Convention de Genève est applicable « dès lors que deux conditions sont remplies: l'existence d'un conflit armé (que l'état de guerre ait ou non été reconnu); la survenance de ce conflit entre deux parties contractantes »[27]. Pour la Cour, le deuxième paragraphe de l'article 2, sur lequel Israël fonde sa position, n'est pas une restriction au champ d'application de la Convention fixé par le premier paragraphe de cet article. « Il tend seulement à préciser que, même si l'occupation opérée au cours du conflit a eu lieu sans rencontrer de résistance militaire, la Convention demeure applicable. »[28] La Cour précise à ce propos que cette interprétation reflète l'intention des auteurs de la quatrième Convention. On peut relever à cet égard le *Commentaire* publié par le CICR sur la quatrième Convention de Genève[29], qui précise le sens que les auteurs de la Convention ont voulu donner au deuxième paragraphe de l'article 2: « On a voulu combler une lacune que laissait subsister le premier alinéa. »[30] Cet alinéa ne vise pas les cas d'occupation intervenant au cours des hostilités, où la Convention entre en vigueur dès le début des hostilités, et qui sont visés par le premier alinéa de cet article. Le deuxième alinéa concerne les cas où l'occupation se fait sans déclaration de guerre et sans hostilités[31].

La Cour relève encore que cette même interprétation a également été suivie par le CICR, qui, dans une déclaration du 5 décembre 2001[32], a précisé qu'il « a toujours affirmé l'applicabilité *de jure* de la quatrième Convention de Genève aux territoires occupés depuis 1967 par l'État d'Israël, y compris Jérusalem-Est ». Elle rappelle également les positions prises par l'Assemblée générale et le Conseil de sécurité dans diverses résolutions[33].

27 Voir *Avis 2004*, par. 95.

28 *Ibid.*, par. 95.

29 La Convention de Genève relative à la protection des personnes civiles en temps de guerre (IV), Commentaire, Genève, CICR, 1956, Vol. IV (Ci-après *Commentaire*).

30 *Ibid.*, p. 27.

31 Voir *ibid.*

32 Conférence de Hautes Parties contractantes à la quatrième Convention de Genève, 5 décembre 2001, Déclaration du Comité international de la Croix-Rouge, par. 2.

33 Voir les références à certaines de ces résolutions les plus importantes, *Avis 2004*, par. 98 et 99.

La Cour rappelle encore que les États parties à la quatrième Convention de Genève, ont également retenu cette interprétation dans une Déclaration adoptée à l'issue de leur Conférence tenue le 15 juillet 1999, où ils « ont réaffirmé que la quatrième Convention de Genève était applicable au territoire palestinien occupé, y compris Jérusalem-Est. »[34]

Enfin, la Cour cite l'arrêt de la Cour suprême d'Israël, du 30 mai 2004, qui a jugé que : « (...) les opérations militaires des forces de défense israéliennes à Rafah, dans la mesure où elles affectent des civils, sont régies par la quatrième Convention de La Haye concernant les lois et coutumes de la guerre sur terre de 1907 (...) et par la Convention de Genève relative à la protection des personnes civiles en temps de guerre de 1949. »[35]

En conclusion, la Cour estime que :

« (...) la quatrième Convention de Genève est applicable dans tout le territoire occupé en cas de conflit armé surgissant entre deux ou plusieurs parties contractantes. Israël et la Jordanie étaient parties à cette Convention lorsque éclata le conflit armé de 1967. Dès lors, ladite Convention est applicable dans les territoires palestiniens qui étaient avant le conflit à l'est de la Ligne verte, et qui ont à l'occasion de ce conflit été occupés par Israël, *sans qu'il y ait lieu de rechercher quel était auparavant le statut exact de ces territoires*. »[36] (c'est nous qui soulignons)

Après avoir affirmé l'applicabilité de la quatrième Convention au territoire palestinien occupé, la Cour ne traite que brièvement le problème important de la fin de l'application de la Convention[37]. L'article 6 de la quatrième Convention (début et fin de l'application) précise en effet à son alinéa 3, que : « En territoire occupé, l'application de la présente Convention cessera un an après la fin générale des opérations militaires. » La Cour, en identifiant les dispositions spécifiques des instruments applicables dans le cas d'espèce, dit que la IVe Convention distingue « entre les dispositions applicables lors des opérations militaires ayant trait à l'occupation et celles qui demeurent applicables pendant toute la durée de l'occupation »[38]. Sans aller plus avant, elle se

34 Cité *ibid.*, par. 96.

35 Cité dans *Avis 2004*, par. 100.

36 *Ibid.*, par. 101.

37 On relèvera que la quatrième Convention est la seule des quatre Conventions de Genève qui contienne des dispositions spécifiques visant la fin générale de son application. Voir *Commentaire*, *op. cit.* (note 29), pp. 63 et ss. (Commentaire sur l'article 6).

38 *Avis 2004*, par. 125.

borne à s'en remettre à la suite de cet alinéa, qui précise que: «(...) néanmoins, la Puissance occupante sera liée pour la durée de l'occupation – pour autant que cette Puissance exerce les fonctions de gouvernement dans le territoire en question – par les dispositions des articles suivants de la présente Convention: 1 à 12, 27, 29 à 34, 47, 49, 51, 52, 53, 59, 61 à 77 et 143.»[39]

Ces articles recouvrent essentiellement les dispositions générales (art. 1 à 12); le traitement humain à l'égard des personnes protégées, prévu à l'article 27; les interdictions de certains actes de contrainte, torture, pillage, etc., prévues aux articles 29 à 34; l'intangibilité des droits des personnes protégées (art. 47); l'interdiction de déportation de personnes protégées (art. 49); l'interdiction de la destruction de biens mobiliers ou immobiliers (art. 53); la distribution de secours (art. 59 à 63); la législation pénale et la procédure pénale (art. 64 à 75); le traitement des détenus (art. 76 à 77); les dispositions relatives au contrôle d'application de la Convention par la Puissance protectrice (art. 143). En d'autres termes, seules les dispositions qui ont trait directement aux opérations militaires, cesseront de s'appliquer au terme d'un an[40].

On relèvera ici que l'article 3 du Protocole I additionnel aux Conventions de Genève de 1949 (intitulé «Début et fin de l'application») va bien dans ce même sens à son alinéa b), tout en le formulant différemment de l'article 6 de la quatrième Convention: «(...) l'application des Conventions et du présent Protocole cesse, sur le territoire des Parties au conflit, à la fin générale des opérations militaires et, dans le cas des territoires occupés, à la fin de l'occupation...».

En abandonnant ainsi le langage de l'article 6 de la quatrième Convention, cet article du Protocole retourne à un texte qui avait d'ailleurs été adopté par la Conférence préparatoire de Stockholm, mais rejeté par la Conférence diplomatique de 1949[41], pour accommoder les circonstances particulières issues de la Seconde Guerre mondiale. Mais, comme le remarque le Commentaire du CICR sur les Protocoles additionnels à propos du retour à cette solution dans l'article 3, «(...) le progrès est manifeste et rend sans objet, à l'avenir, toute dispute sur le moment exact de la fin générale des opérations militaires»[42].

39 Voir *ibid.*

40 Voir CICR, *Commentaire, op. cit.* (note 29), p. 70 (commentaire du paragraphe 3 de l'article 6).

41 Voir Yves Sandoz, Christophe Swinarski et Bruno Zimmerman (eds.), *Commentaire des Protocoles additionnels de 1977 aux Conventions de Genève de 1949*, CICR, Genève, 1986, p. 68 (commentaire de l'article 3 du Protocole I).

42 *Ibid.*

Il peut paraître surprenant, dans ce contexte, que la Cour n'ait pas porté son attention spécifiquement sur les problèmes qui découlent, pour le territoire occupé et les personnes civiles, d'une occupation prolongée[43].

Les droits de l'homme

L'applicabilité dans le territoire palestinien occupé des conventions internationales relatives aux droits de l'homme auxquelles Israël est partie est également contestée par ce dernier, qui affirme que « (...) le droit humanitaire est le type de protection qui convient dans un conflit tel que celui qui existe en Cisjordanie et dans la bande de Gaza, tandis que les instruments relatifs aux droits de l'homme ont pour objet d'assurer la protection des citoyens vis-à-vis de leur propre gouvernement en temps de paix »[44].

La Cour, pour déterminer si les instruments des droits de l'homme sont applicables en territoire palestinien occupé, est amenée à s'interroger sur deux aspects de la question: les rapports entre le droit humanitaire et les droits de l'homme d'une part, et, d'autre part, l'applicabilité des instruments relatifs aux droits de l'homme hors du territoire national.

- Les rapports entre le droit humanitaire et les droits de l'homme

La Cour rappelle tout d'abord qu'elle s'est déjà prononcée clairement sur cette question dans son avis consultatif sur la *Licéité de la menace ou de l'emploi d'armes nucléaires*, où certains avaient soutenu, lors de la procédure, que le Pacte international relatif aux droits civils et politiques « vise la protection des droits de l'homme en temps de paix, alors que les questions relatives à la privation illicite de la vie au cours d'hostilités sont régies par le droit international applicable dans les conflits armés »[45].

La Cour a écarté cette prise de position en déclarant que:

> « (...) la protection offerte par le Pacte international relatif aux droits civils et politiques ne cesse pas en temps de guerre, si ce n'est par l'effet de l'article 4 du Pacte, qui prévoit qu'il peut être dérogé, en cas de danger

43 Voir à ce sujet l'étude d' Adam Roberts, « Prolonged military occupation. The Israeli-Occupied territories since 1967 », *American Journal of International Law*, Vol. 84, 1999, pp. 44 et ss.; également, du même auteur, « What is occupation? », *British Yearbook of International Law*, Vol 55, 1985, pp. 249 à 305. Voir également en général l'étude approfondie d'Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, particulièrement pp. 107 à 149, 181 à 189 et 209 à 212.

44 Voir l'Annexe I au Rapport du Secrétaire général, citée dans *Avis 2004*, par. 103.

45 CIJ, *Licéité de la menace ou l'emploi d'armes nucléaires*, *op. cit.* (note 5), par. 24; cité dans *Avis 2004*, par. 105.

public, à certaines des obligations qu'impose cet instrument. (...) En principe, le droit de ne pas être arbitrairement privé de la vie vaut aussi pendant les hostilités. C'est toutefois, en pareil cas, à la *lex specialis* applicable, à savoir le droit applicable dans les conflits armés... qu'il appartient de déterminer ce qui constitue une privation arbitraire de la vie. »[46]

Ainsi, de manière générale, la Cour affirme que « la protection offerte par les conventions régissant les droits de l'homme ne cesse pas en cas de conflit armé, si ce n'est par l'effet de clauses dérogatoires du type de celle figurant à l'article 4 du Pacte international relatif aux droits civils et politiques »[47]. Pour répondre à la question qui lui est posée, « (...) la Cour aura en l'espèce à prendre en considération les deux branches du droit international précitées, à savoir les droits de l'homme et, en tant que *lex specialis*, le droit international humanitaire »[48].

La Cour met ainsi bien en évidence l'application en toutes circonstances des droits de l'homme, et leur application conjointe et complémentaire au droit humanitaire dans les situations de conflit armé.

- Application des instruments des droits de l'homme hors du territoire national

Le champ d'application du Pacte international relatif aux droits civils et politiques est fixé par son article 2, paragraphe 1 : « Les États parties au présent Pacte s'engagent à respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence les droits reconnus dans le présent Pacte, sans distinction aucune... ».

Pour la Cour, l'interprétation à donner à cette disposition peut vouloir dire que le champ d'application du Pacte s'étend à la fois aux individus se trouvant « sur le territoire d'un État et ceux se trouvant hors de ce territoire, mais relevant de la compétence de cet État »[49]. En effet, la Cour note que la compétence des États est avant tout territoriale, mais qu'elle s'exerce aussi parfois hors du territoire national. « Compte tenu de l'objet et du but du Pacte international relatif aux droits civils et politiques, il apparaîtrait natu-

46 *Ibid.*

47 *Ibid.*, par. 106.

48 *Ibid.* Pour la relation entre le droit humanitaire et les droits de l'homme dans les conflits internes, voir en général, Rosemary Abi-Saab, « Human rights and humanitarian law in internal conflicts », in : Daniel Warner (éd.) *Human Rights and Humanitarian Law. The Quest for Universality*, Kluwer Law International, The Hague, 1997, pp. 107 à 123.

49 *Avis 2004*, par. 108.

rel que, même dans cette dernière hypothèse, les États parties au Pacte soient tenus d'en respecter les dispositions »[50]. Selon la Cour, les travaux préparatoires et la pratique constante du Comité des droits de l'homme vont dans ce sens[51]. Elle relève cependant la position d'Israël, qui, dans son rapport au Comité des droits de l'homme, estime que « le pacte et les instruments de même nature ne s'appliquent pas directement à la situation (...) dans les territoires occupés »[52].

Dans ses conclusions sur cette question, la Cour « estime que le pacte international relatif aux droits civils et politiques est applicable aux actes d'un État agissant dans l'exercice de sa compétence en dehors de son propre territoire »[53].

La Cour arrive à la même conclusion en ce qui concerne le pacte international relatif aux droits économiques, sociaux et culturels, qui ne comporte aucune disposition relative à son champ d'application: « (...) on ne saurait exclure qu'il s'applique à la fois aux territoires placés sous la souveraineté d'un État partie et ceux sur lesquels un tel État exerce une juridiction territoriale. »[54] La Cour mentionne à cet effet l'article 14 du Pacte qui prévoit des mesures transitoires: « Tout État partie au présent Pacte qui, au moment où il devient partie, n'a pas encore pu assurer dans sa métropole ou dans les territoires placés sous sa juridiction le caractère obligatoire et la gratuité de l'enseignement primaire... ».

Israël pour sa part, qui n'accepte pas l'applicabilité des instruments des droits de l'homme dans des situations de conflit armé, refuse l'applicabilité du Pacte international relatif aux droits économiques, sociaux et culturels, dans le territoire palestinien occupé; thèse à laquelle la Cour dit ne pas pouvoir souscrire:

> « (...) les territoires occupés par Israël sont soumis depuis plus de trente-sept ans à la juridiction territoriale d'Israël en tant que puissance occupante. Dans l'exercice des compétences dont il dispose à ce titre, Israël est

50 *Ibid.*, par. 109.

51 La Cour indique qu'en ce qui concerne l'interprétation à donner à l'article 2, l'examen des travaux préparatoires du Pacte montre qu'« en adoptant la rédaction qu'ils ont retenue, les auteurs du Pacte n'ont pas entendu faire échapper les États aux obligations qui sont les leurs lorsqu'ils exercent leur compétence hors du territoire national. Ils ont seulement voulu éviter que des personnes résidant à l'étranger puissent se prévaloir envers leur État d'origine de droits ne relevant pas de la compétence de ce dernier, mais de celle de leur État de résidence ». *Ibid.*

52 *Ibid.*, par. 110.

53 *Ibid.*, par. 111.

54 *Ibid.*, par. 112.

tenu par les dispositions du Pacte international relatif aux droits économiques, sociaux et culturels. En outre, il est tenu de ne pas faire obstacle à l'exercice de tels droits dans les domaines où la compétence a été transférée à des autorités palestiniennes. »[55]

On relèvera ici, avec la Cour, que le Comité des droits de l'homme a affirmé à deux reprises, en 1998[56] puis en 2003[57], lors de l'examen des rapports périodiques d'Israël, premièrement que « l'applicabilité des règles du droit international humanitaire ne fait pas obstacle en soi à l'application du Pacte... »[58]; et deuxièmement, que:

« (...) l'applicabilité des règles du droit international humanitaire ne fait pas obstacle non plus à la responsabilité que doivent assumer les États parties, en vertu du paragraphe 1 de l'article 2 du Pacte, pour les actes accomplis par leurs autorités hors de leur propre territoire, y compris dans les territoires occupés. En conséquence... dans les circonstances actuelles, les dispositions du Pacte s'appliquent au profit de la population des territoires occupés... »[59]

Quant à la Convention relative aux droits de l'enfant du 20 novembre 1989, la Cour relève son article 2 qui stipule que « [l]es États parties s'engagent à respecter les droits qui sont énoncés dans la (...) Convention et à les garantir à tout enfant relevant de leur juridiction... ». De l'avis de la Cour, et pour les mêmes raisons que celles indiquées précédemment, cette Convention est donc également applicable dans le territoire palestinien occupé.

La construction du mur et les violations du droit applicable

Après avoir déterminé, de manière générale, les règles et principes de droit international applicables, en particulier les règles de droit humanitaire, la Cour examine si la construction du mur porte atteinte spécifiquement à ces règles et principes.

55 *Ibid.*

56 Observations finales du Comité des droits de l'homme: Israël, 18 août 1998, UN Doc. CCPR/C/79/Add. 93, par. 10.

57 Observations finales du Comité des droits de l'homme: Israël, Examen des rapports soumis par les États parties conformément à l'article 40 du Pacte. Deuxième rapport périodique d'Israël, 21 août 2003, UN Doc. CCPR/CO/78/ISR, par. 11.

58 *Ibid.* Voir également les Observations finales du Comité sur les droits économiques, sociaux et culturels: Israël, 23 mai 2003, UN Doc. E/C.12/1/Add. 90, par. 15 et 31, qui adopte la même position.

59 *Ibid.*

Il est souvent difficile, dans cette partie de l'avis, de suivre le raisonnement de la Cour, car celle-ci se réfère davantage aux règles applicables qu'aux violations spécifiques de ces règles par la construction du mur et les autres mesures prises par la puissance occupante.

• Les problèmes relevés par la Cour découlent essentiellement du tracé retenu pour la construction du mur « qui consacre sur le terrain les mesures illégales prises par Israël (...) en ce qui concerne Jérusalem et les colonies de peuplement »[60]. La Cour constate en effet que le tracé sinueux suivi par la construction du mur « a été fixé de manière à inclure dans la zone [fermée] la plus grande partie des colonies de peuplement installées par Israël dans le territoire palestinien occupé (y compris Jérusalem-Est) »[61], ces colonies ayant été établies « contrairement aux prescriptions du sixième alinéa de l'article 49»[62] (c'est nous qui soulignons). Cet alinéa prévoit que « [l]a Puissance occupante ne pourra procéder à la déportation ou au transfert d'une partie de sa population civile dans le territoire occupé par elle ».

La Cour relève d'ailleurs que la construction du mur selon le tracé choisi risque de modifier la composition démographique du territoire palestinien occupé, dans la mesure où elle suscite le départ de populations palestiniennes de certaines zones[63].

• La Cour remarque de plus que la construction du mur a entraîné des destructions et réquisitions de propriétés contraires aux articles 46 et 52 du Règlement de La Haye et à l'article 53 de la quatrième Convention de Genève. L'article 46 du Règlement de La Haye prévoit en effet que la propriété privée doit être respectée et ne peut être confisquée; l'article 52 autorise cependant des réquisitions dans certaines limites seulement. L'article 53 de la quatrième Convention de Genève stipule pour sa part que: « Il est interdit à la Puissance occupante de

60 *Ibid.*, par. 122.

61 *Ibid.*, par. 119. Au paragraphe 85 de son Avis, la Cour définit la « zone fermée »: «(...) la construction du mur s'est accompagnée de la mise sur pied d'un régime administratif nouveau. Les forces de défense israéliennes ont en effet édicté en octobre 2003 des ordonnances établissant comme 'zone fermée' la partie de la Cisjordanie qui se trouve entre la Ligne verte et le mur. (...) Les résidents de cette zone ne peuvent désormais y demeurer et les non-résidents y accéder, que s'ils sont porteurs d'un permis ou d'une carte d'identité délivrés par les autorités israéliennes (...) L'entrée et la sortie de la zone fermée ne peuvent être opérées que par des portes d'accès qui sont ouvertes peu fréquemment et pour de courtes durées ».

62 *Ibid.*, par. 120. Voir la Déclaration du juge Buergenthal (par. 9) en ce qui concerne le paragraphe 6 de l'article 49, relatif au transfert de populations civiles de la puissance occupante dans le territoire occupé: « I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law ».

63 *Avis 2004*, par. 122.

détruire des biens mobiliers ou immobiliers, appartenant individuellement ou collectivement à des personnes privées, à l'État ou à des collectivités publiques, à des organisations sociales ou coopératives, sauf dans les cas où ces destructions seraient rendues absolument nécessaires par les opérations militaires. »

• Ainsi que le confirme la Cour, la construction du mur et le régime qui lui est associé, avec la constitution d'enclaves, ont apporté des restrictions importantes à la liberté de circulation des habitants du territoire occupé (à l'exception des ressortissants israéliens ou assimilés), liberté de circulation garantie par le premier alinéa de l'article 12 du Pacte international relatif aux droits civils et politiques: « Quiconque se trouve sur le territoire d'un État a le droit d'y circuler librement et d'y choisir librement sa résidence. » La Cour observe également que la construction du mur entrave la liberté d'accès aux lieux saints chrétiens, juifs et musulmans[64].

• La construction du mur et le régime qui lui est associé entravent également l'exercice par les résidents palestiniens de leur droit au travail, à la santé et à l'éducation, dont les garanties sont prévues par le Pacte sur les droits économiques, sociaux et culturels, à ses articles 6 et 7 (droit au travail); 10 (protection et assistance à la famille et aux enfants); 11 (droit à un niveau de vie suffisant); 12 (droit à la santé); 13 et 14 (droit à l'éducation).

La Cour relève encore que la Convention relative aux droits de l'enfant contient des dispositions semblables à ses articles 16, 24, 27 et 28. Cette Convention est applicable au territoire palestinien occupé, de par son article 2 qui stipule que « [l]es États parties s'engagent à respecter les droits qui sont énoncés dans la (...) Convention et à les garantir à tout enfant relevant de leur juridiction... ».

En traitant du droit applicable, la Cour mentionne ainsi un grand nombre d'articles qu'elle juge pertinents en l'espèce. Cependant, lorsqu'elle en vient aux violations, elle ne s'arrête spécifiquement qu'à celles qui ont trait à quelques-uns des articles, qu'elle considère les plus importants dans le contexte particulier de la construction du mur et du droit de l'occupation en général[65].

64 Voir le rappel historique du régime des lieux saints, *Avis 2004.*, par. 129.

65 Voir l'opinion individuelle du juge Higgins (par. 24): «...it should not escape attention that the Court has in the event found violations only of Article 49 of the Fourth Geneva Convention..., and of Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention.... I agree with these findings». Voir également l'opinion individuelle du juge Kooijmans (par. 29): «I share the Court's view... that Israel by constructing the wall and establishing the associated régime has breached its obligation under certain provisions of [the applicable international instruments] (...) I regret that the summary of the Court's findings (...) does not contain a list of treaty provisions which have been breached».

• Au-delà des dispositions de droit humanitaire et des droits de l'homme auxquelles la construction du mur et le régime qui lui est associé ont porté atteinte, la Cour rappelle la règle coutumière de l'inadmissibilité de l'acquisition de territoires par la guerre. Malgré les affirmations d'Israël concernant le caractère temporaire de la construction du mur et son édification pour des raisons purement sécuritaires, la Cour dit qu'elle « ne saurait rester indifférente à certaines craintes exprimées devant elle d'après lesquelles le tracé du mur préjugerait la frontière future entre Israël et la Palestine et la crainte qu'Israël pourrait intégrer les colonies de peuplement et les voies de circulation les desservant »[66]. Elle estime que la construction du mur et le régime qui lui est associé « créent sur le terrain un 'fait accompli' qui pourrait fort bien devenir permanent, auquel cas, et nonobstant la description officielle qu'Israël donne du mur, la construction de celui-ci équivaudrait à une annexion *de facto* »[67].

• La construction du mur et son tracé conduisant à une amputation du territoire palestinien et à des « modifications dans [sa] composition démographique », « s'ajoutant aux mesures prises antérieurement, dresse [selon la Cour] un obstacle grave à l'exercice par le peuple palestinien de son droit à l'autodétermination et viole de ce fait l'obligation incombant à Israël de respecter ce droit »[68].

Les justifications possibles de la construction du mur

La Cour remarque que certaines dispositions du droit humanitaire permettent de tenir compte des impératifs militaires dans certaines circonstances. Ainsi le deuxième alinéa de l'article 49 de la quatrième Convention de Genève prévoit une réserve à l'interdiction des transferts forcés de populations: « (...) la Puissance occupante pourra procéder à l'évacuation totale ou partielle d'une région occupée déterminée, si la sécurité de la population ou d'impérieuses raisons militaires l'exigent. »

66 *Avis 2004*, par. 121.

67 *Ibid.* Voir également l'opinion individuelle du juge Kooijmans (par. 30): *« I... share the Court's concern that the construction of the wall creates a fait accompli »*.

68 *Avis 2004*, par. 122. Voir également l'opinion individuelle du juge Higgins (par. 30), qui n'est pas d'avis que la construction du mur est une entrave sérieuse à l'autodétermination du peuple palestinien: « (...) it seems to me quite detached from reality for the Court to find that it is the wall that presents a 'serious impediment' to the exercise of [the right to self-determination] ». Voir dans le même sens l'opinion individuelle du juge Kooijmans (par. 31, on self-determination).

On notera toutefois que l'article parle ici d'« évacuation » et non de déportation ou de transfert forcé de population, l'évacuation étant par nature une mesure provisoire, prise dans l'intérêt même des populations, et entourée d'une série de garanties prévues au même article[69]. Mais, ainsi que le relève la Cour, cette réserve ne couvre pas le dernier alinéa de l'article 49, qui interdit la déportation ou le transfert d'une partie de sa propre population civile dans le territoire occupé par elle.

De même, l'article 53 relatif à l'interdiction de la destruction des biens mobiliers ou immobiliers, prévoit également une réserve : « Sauf dans les cas où ces destructions seraient rendues absolument nécessaires par les opérations militaires. »

La Cour dit cependant ne pas être convaincue « que les destructions opérées contrairement à l'interdiction édictée à l'article 53 de la quatrième Convention de Genève aient été rendues absolument nécessaires par des opérations militaires »[70]. Elle n'est pas davantage convaincue que « la poursuite des objectifs de sécurité avancés par Israël nécessitait l'adoption du tracé choisi pour le mur »[71], ni que la construction du mur, selon le tracé retenu, était le seul moyen de protéger les intérêts d'Israël contre les menaces dont il se disait victime. Elle en conclut que les mesures prises par Israël ne sauraient être justifiées par la nécessité militaire ni par des considérations de sécurité nationale.

• On peut être surpris de voir que la Cour n'examine pas plus directement la construction du mur sous l'angle du principe de proportionnalité entre les effets escomptés de la mesure (à savoir, la prévention des attaques provenant du territoire palestinien) et les dommages infligés à la population civile, principe largement admis en droit humanitaire. C'est dans le contexte de l'entrave à la liberté de circulation, garantie par l'article 12 du Pacte international relatif aux droits civils et politiques, qu'on trouve une brève mention du principe de proportionnalité, où la Cour se borne à se référer à ce principe tel qu'adopté par le Comité des droits de l'homme, pour qui les restrictions envisagées « doivent constituer le moyen le moins perturbateur parmi ceux qui pourraient permettre d'obtenir le résultat recherché »[72], et elle estime que « ces conditions ne sont pas remplies en l'espèce »[73]. La Cour

69 Voir à ce propos CICR, Commentaire, *op. cit.* (note 29), p. 302.

70 *Avis 2004*, par. 135.

71 *Ibid.*, par. 137.

72 *Ibid.*, par. 135.

73 *Ibid.*

conclut, cependant, que les mesures prises par Israël ne sauraient être justifiées par la nécessité militaire ni par des considérations de sécurité nationale.

Le juge Kooijmans, dans son opinion individuelle, et le juge Buergenthal, dans sa déclaration, soulignent tous deux que si la Cour avait examiné le problème de la construction du mur sous l'angle de la proportionnalité, elle aurait été amenée à conclure que cette construction ne passait pas ce test[74].

• La Cour remarque qu'Israël s'est prévalu, pour la construction du mur, de son droit inhérent de légitime défense. En citant le texte de l'article 51 de la Charte, la Cour en conclut rapidement que cet article « reconnaît ainsi un droit de légitime défense en cas d'agression armée par un État contre un autre État »[75], et que l'article 51 de la Charte est sans pertinence dans le cas particulier, étant donné que la menace invoquée par Israël pour justifier l'exercice de son droit de légitime défense a son origine à l'intérieur du territoire sur lequel Israël exerce son contrôle, et non en dehors de ce territoire[76].

74 Voir l'opinion individuelle du juge Kooijmans (par. 34): «(...) the construction of the wall should also have been put to the proportionality test (...) it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test (...) The route chosen for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect... »; et la déclaration du juge Buergenthal (par. 9): «(...) given the demonstrable great hardship to which the affected Palestinian population is being subjected in and around the enclaves created by those segments of the wall, I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self-defence».

75 Voir l'opinion individuelle du juge Higgins (par. 33): «There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State».

76 Dans son opinion individuelle, le juge Higgins ne partage pas ce point de vue (par. 34): «I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory...». Voir dans le même sens la déclaration du juge Buergenthal (par. 6): «(...) it is irrelevant that Israel is alleged to exercise control in the Occupied Palestinian Territory (...) or that the attacks do not originate from outside the territory. For to the extent that the Green Line is accepted by the Court as delimiting the dividing line between Israel and the Occupied Palestinian Territory, to that extent the territory from which the attacks originate is not part of Israel proper. Attacks coming from across that line must therefore permit Israel to exercise its right of self-defence...». Pour sa part, le juge Kooijmans, dans son opinion individuelle (par. 35), relève que la Cour ne prend pas ici en compte l'évolution récente de la notion de légitime défense, telle que reflétée dans les résolutions récentes du Conseil de sécurité, où les attaques ne sont pas attribuées à un État particulier. Il cite à ce propos les résolutions 1368 (2001) et 1373 (2001) du Conseil de sécurité et remarque: «The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence». Voir dans le même sens la déclaration du juge Buergenthal (par. 6), qui se réfère à ces mêmes résolutions: «In neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only...». Voir également l'opinion individuelle du juge Higgins (par. 33).

• La Cour s'est demandé si Israël pouvait se prévaloir d'un état de nécessité pour exclure l'illicéité de la construction du mur. Elle rappelle ses déclarations antérieures en la matière: que « l'état de nécessité constitue une cause, reconnue par le droit international coutumier », qui « ne saurait être admise qu'à titre exceptionnel », et que cet état de nécessité « ne peut être invoqué qu'à certaines conditions strictement définies, qui doivent être cumulativement réunies; et l'État concerné n'est pas seul juge de la réunion de ces conditions »[77].

La Cour conclut qu'« Israël ne saurait se prévaloir du droit de légitime défense ou de l'état de nécessité, comme excluant l'illicéité de la construction du mur (...) En conséquence, la Cour juge que la construction du mur et le régime qui lui est associé sont contraires au droit international »[78].

Conséquences juridiques des violations

Étant parvenue à la conclusion qu'Israël, par la construction du mur et l'instauration du régime qui lui est associé, a violé certaines des obligations internationales qui lui incombent, la Cour procède à l'examen des conséquences juridiques de ces violations, objet même de la question qui lui est posée par l'Assemblée générale, et cela tant pour État d'Israël que pour les États tiers et l'Organisation des Nations Unies.

De manière générale, et pour ce qui est de l'articulation des effets de ces violations, la Cour s'est inspirée dans une large mesure du projet d'articles de la Commission du droit international sur la « Responsabilité de l'État pour faits internationalement illicites »[79], même si elle ne l'a pas suivi dans tous ses détails, comme le relèvent le juge Higgins et le juge Kooijmans dans leurs opinions individuelles.

Conséquences juridiques pour Israël

Étant donné l'illégalité de la construction du mur par Israël et du régime qui lui est associé, la responsabilité d'Israël est engagée selon le droit international. Il s'ensuit que:

(i) Israël « est tout d'abord tenu de respecter les obligations internationales auxquelles il a contrevenu par la construction du mur en territoire

77 Cité dans l'*Avis 2004*, par. 140.

78 *Avis 2004*, par. 142.

79 Adopté par la Commission de droit international et annexé à la résolution de l'Assemblée générale 56/82, 12 décembre 2001, UN Doc. A/RES/56/82.

palestinien occupé »[80], en premier lieu « le droit à l'autodétermination du peuple palestinien et les obligations auxquelles il est tenu en vertu du droit international humanitaire et du droit international relatif aux droits de l'homme... » Israël doit également « assurer la liberté d'accès aux Lieux saints passés sous son contrôle à la suite du conflit de 1967 »[81].

(ii) Deuxièmement, et plus concrètement, Israël a « l'obligation de mettre un terme à la violation de ses obligations internationales »[82]. En conséquence, Israël a l'obligation de « cesser immédiatement les travaux d'édification du mur qu'il est en train de construire dans le territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est », et de démanteler immédiatement les portions de cet ouvrage qui y sont déjà construites[83].

De plus, les violations par Israël résultant également du régime juridique associé à la construction du mur, Israël a l'obligation d'abroger immédiatement et de priver d'effet l'ensemble des actes législatifs et réglementaires constituant ce régime.

(iii) Troisièmement, la Cour affirme l'obligation pour Israël de procéder à la réparation des dommages dont il est responsable. La construction du mur ayant en effet entraîné la réquisition et la destruction d'habitations et autres biens, Israël est tenu de restituer les biens saisis, de réparer tous les dommages et de procéder à l'indemnisation des personnes physiques et morales « qui auraient subi un préjudice matériel quelconque du fait de la construction du mur »[84].

Conséquences juridiques pour les États tiers et l'Organisation des Nations Unies

Après avoir mis en évidence les obligations qui découlent pour Israël de ses violations de certains principes et règles de droit international, la Cour en vient à identifier également les obligations qui incombent aux États autres qu'Israël du fait de la construction du mur par ce dernier. Autrement dit, la Cour reconnaît que les violations par Israël de ses obligations internationales imposent des obligations substantielles aux autres États.

80 *Avis 2004*, par. 149.

81 *Ibid.*

82 *Ibid.*, par. 150. La Cour rappelle à ce propos qu'elle a clairement affirmé dans d'autres circonstances l'obligation pour un État responsable d'un fait internationalement illicite d'y mettre fin (voir *ibid.* les divers arrêts pertinents qui y sont mentionnés).

83 *Ibid.*, par. 151.

84 *Ibid.*, par. 153. La Cour rappelle ici les modalités de la réparation en droit coutumier formulées par la Cour permanente dans l'affaire de *l'Usine de Chorzów*, citée *ibid.*

Pour la Cour, ces obligations s'imposent aux États tiers du fait que parmi « les obligations internationales violées par Israël figurent des obligations *erga omnes* »[85]. La Cour place ainsi au rang des obligations *erga omnes* violées par Israël: « L'obligation de respecter le droit du peuple palestinien à l'autodétermination ainsi que certaines des obligations qui sont les siennes en vertu du droit international humanitaire. »[86]

La Cour rappelle ce qu'elle a dit à ce propos dans l'affaire du *Timor oriental*[87]: « (...) le droit des peuples à disposer d'eux-mêmes, tel qu'il s'est développé à partir de la Charte et de la pratique de l'Organisation des Nations Unies, est un droit opposable *erga omnes*. »

En ce qui concerne le droit humanitaire, la Cour réitère ce qu'elle avait déjà dit dans son avis consultatif sur la *Licéité de la menace ou de l'emploi d'armes nucléaires*, à savoir qu'« un grand nombre de règles du droit humanitaire applicable dans les conflits armés sont si fondamentales pour le respect de la personne humaine et pour des 'considérations élémentaires d'humanité'...[qu'elles] s'imposent [...] à tous les États, qu'ils aient ou non ratifié les instruments conventionnels qui les expriment, parce qu'elles constituent des principes intransgressibles du droit international coutumier »[88].

La Cour avait d'ailleurs déjà affirmé ce principe dans l'affaire du *Détroit de Corfou*[89], et plus généralement dans l'affaire du *Nicaragua*[90] où, pour la première fois, la Cour s'est prononcée de manière détaillée sur le caractère coutumier des « principes généraux » du droit humanitaire, lesquels s'imposent de manière absolue, en toutes circonstances et indépendamment de l'appartenance des États concernés à la communauté conventionnelle.

Quant aux obligations juridiques concrètes des États tiers dans le cas d'espèce, étant donné « la nature et l'importance des droits et obligations en cause »[91], la Cour identifie des obligations de trois ordres: ne pas reconnaître la situation illicite découlant de la construction du mur; ne pas prêter aide ou

85 *Ibid.*, par. 155.

86 *Ibid.*

87 CIJ, *Timor Oriental, op. cit.* (note 22), par. 29, (cité dans l'*Avis 2004*, par. 156).

88 CIJ, *Licéité de la menace ou de l'emploi d'armes nucléaires, op. cit.*(note 5), para 79.

89 CIJ, *Affaire du Détroit de Corfou, op. cit.* (note 2), p. 22.

90 CIJ, *Affaire du Nicaragua, op. cit.* (note 4), par. 216 et suivants.

91 La Cour rappelle dans ce contexte sa jurisprudence dans l'affaire de la *Barcelona Traction Light and Power Company, Limited, CIJ Rec. 1970*, par. 33: « de telles obligations, par leur nature même, 'concernent tous les États' et, 'vu l'importance des droits en cause, tous les États peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés' ». Dans son opinion individuelle, le juge Higgins ne partage pas ce raisonnement (voir par. 37).

assistance au maintien de la situation créée par cette construction; faire respecter par Israël, en ce qui concerne les États parties à la quatrième Convention de Genève et en vertu de son article premier, le droit international humanitaire incorporé dans cette Convention[92]. Les États tiers doivent par ailleurs veiller à ce qu'il soit mis fin aux entraves à l'exercice, par le peuple palestinien, de son droit à l'autodétermination.

Quant aux obligations des Nations Unies, et particulièrement de l'Assemblée générale et du Conseil de sécurité, la Cour conclut qu'ils doivent « examiner quelles nouvelles mesures doivent être prises afin de mettre un terme à la situation illicite découlant de la construction du mur et du régime qui lui est associé »[93].

Pour la Cour, c'est donc du caractère *erga omnes* des obligations violées par Israël que découlent des conséquences juridiques pour les États tiers[94].

Le juge Higgins et le juge Kooijmans, dans leurs opinions individuelles, disent ne pas pouvoir suivre le raisonnement de la Cour sur la corrélation entre le caractère *erga omnes* de certains droits et obligations dont tous les États ont un intérêt à leur protection, et l'imposition automatique d'obligations individuelles à des États autres que celui qui les a violées[95].

C'est plutôt le caractère impératif, ou *jus cogens*, des règles violées, reflétant l'importance des valeurs et intérêts sociaux qu'elles protègent, qui peut le mieux expliquer les obligations qu'elles imposent aux États tiers, en cas de violation, pour ramener la situation à une conformité au droit international.

92 Voir sur ce point l'opinion individuelle du juge Kooijmans, qui se réfère aux travaux préparatoires de l'article 1 commun aux Conventions de Genève de 1949 et ne partage pas l'avis de la Cour sur ce point (par. 46 à 50): « I simply do not know whether the scope given by the Court to this Article in the present opinion is correct as a statement of positive law ».

93 *Avis 2004*, par. 160.

94 Le juge Higgins estime pour sa part que les principes « intransgressibles » du droit international s'imposent parce qu'ils sont reconnus en tant que principes de droit coutumier et non en tant que règles *erga omnes* (opinion individuelle du juge Higgins, par. 39).

95 Voir l'opinion individuelle du juge Higgins (par. 37), qui se réfère au Commentaire de la Commission de droit international sur le projet d'articles sur la Responsabilité des États pour des faits internationalement illicites (A/56/10, p. 278): *« As the International Law Commission has correctly put it in the Commentaries (...), there are certain rights in which, by reason of their importance 'all states have a legal interest in their protection'. It has nothing to do with imposing substantive obligations on third parties to a case »*. Dans son opinion individuelle (par. 40), le juge Kooijmans se réfère également au projet d'articles de la Commission de droit international, sur la Responsabilité des États, citant plus particulièrement l'article 41: *« I must admit that I have considerable difficulty in understanding why a violation of an obligation erga omnes by one State should necessarily lead to an obligation for third States »*; ainsi qu'il le relève, l'article 41 *« does not refer to individual obligations of third States as a result of serious breach. (...) What is called for in the face of serious breach is a joint and co-ordinated effort by States to counteract the effects of these breaches » (ibid).*

En guise de conclusion

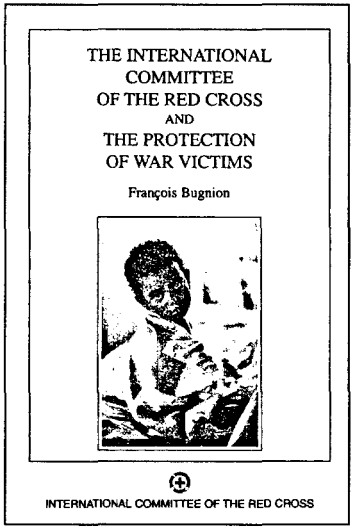
Ayant ainsi suivi pas à pas, sous l'angle du droit humanitaire, le cheminement de la Cour pour répondre à la question qui lui a été posée dans la demande d'avis, nous devons souligner l'importance des conclusions de la Cour, organe judiciaire suprême de la communauté internationale, qui font jurisprudence au-delà du cas d'espèce. En effet, la Cour « dit le droit », et cela dans un domaine où, malgré l'existence d'instruments juridiques universellement reconnus, le refus de les appliquer est encore trop fréquent.

La Cour avait déjà exprimé à diverses reprises l'existence de principes fondamentaux d'humanité qui s'appliquent en toutes circonstances, indépendamment de la qualification juridique des situations et indépendamment de l'appartenance des États concernés à la communauté conventionnelle; principes « intransgressibles », selon l'avis de la Cour dans l'affaire de la *Licéité de la menace ou de l'emploi d'armes nucléaires*; règles de droit coutumier ou de *jus cogens*. Elle avait, dans l'affaire du *Nicaragua*, identifié ces principes comme étant ceux contenus dans l'article 3 commun aux quatre Conventions de Genève (reflétant à leur tour ce qu'elle avait appelé en 1949, dans l'affaire de *Corfou*, « considérations élémentaires d'humanité »); principes qui s'imposent de manière absolue et en toutes circonstances, les Conventions n'étant que l'expression, et à certains égards le développement, de ces principes.

La question posée ici à la Cour l'a placée sur un plan plus concret, celui du droit de l'occupation militaire, qui lui a permis de réaffirmer l'existence et la pertinence continue, dans les conditions actuelles, de certaines règles fondamentales du droit humanitaire, dans ses deux versants de Genève et de La Haye, ainsi que du droit international des droits de l'homme, dont elle a réaffirmé l'application conjointement et cumulativement au droit humanitaire en cas d'occupation.

Mais la Cour ne s'est pas arrêtée à l'identification et à l'affirmation des règles qui composent le régime juridique spécifique de l'occupation; elle a situé cette occupation dans le cadre plus général des principes fondamentaux de la Charte, qui non seulement coiffent ce régime, mais aussi lui dictent l'issue et la manière d'y parvenir[96].

96 Voir les par. 161 et 162 de l'Avis de la Cour.



The International Committee of the Red Cross and the protection of war victims

by François Bugnion

How the ICRC is constituted, what tasks are assigned to it and what principles guide its work — these are some of the questions that the author seeks to answer. Examining the tasks and role of the ICRC both from a historical and from a legal point of view, the book shows how the development of international humanitarian law is reflected in the action taken by the ICRC. Ideal for consultation, the book is simple and direct in style, and is intended primarily for people engaged in humanitarian work and specialists in humanitarian law.

This is the English translation of the second edition of François Bugnion's book *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre* (Geneva, ICRC, June 2000).

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Politique d'assistance du CICR

(Adoptée par l'Assemblée du Comité international de la Croix-Rouge le 29 avril 2004)

Version publique

1. Introduction

Au fil des dernières décennies, la gamme des activités menées par le CICR en matière d'assistance[1] s'est diversifiée, et les programmes dans ce domaine ont pris une ampleur croissante. Cette expansion et cette diversification sont dues à divers facteurs qui ont fait évoluer le concept d'assistance humanitaire bien au-delà de simples réponses d'urgence.

Les actions d'urgence elles-mêmes sont devenues complexes, cherchant à être plus « intelligentes », afin d'atteindre un maximum d'efficacité et de minimiser les effets pervers que peut provoquer l'aide humanitaire. Dans de nombreux contextes, les conflits se sont installés dans la durée, forçant ainsi les programmes d'assistance à s'inscrire dans le plus long terme pour répondre à des besoins tout à la fois urgents et récurrents, voire chroniques. Dans ces situations, il est nécessaire également d'adapter les réponses humanitaires, et bien souvent, d'allier programmes d'urgence et de réhabilitation pour favoriser les activités de soutien ou de mobilisation, stimuler les mécanismes d'adaptation et la responsabilisation des autorités compétentes.

Le CICR est également confronté à la multiplication des acteurs présents dans l'espace humanitaire, à la diversité de leurs spécialisations, de leurs capacités et de leurs modes d'action, dans une logique tout à la fois de complémentarité et de concurrence. Au sein du Mouvement international de la Croix-Rouge et du Croissant-Rouge, tel que défini par l'Accord de Séville, il doit exercer sa fonction de « Lead Agency » dans les situations de conflit armé et guider les autres composantes dans la mise en œuvre d'activités qui sont le plus souvent liées aux programmes d'assistance. Parallèlement, l'insécurité grandissante qui règne dans certains contextes, allant parfois

jusqu'au rejet de l'aide humanitaire, impose à l'institution une adaptation de ses approches et de ses stratégies.

Dans cet environnement complexe, le CICR veut être et demeurer une institution humanitaire de référence, neutre, impartiale, indépendante, crédible et fiable, et à la fois professionnelle et généraliste. Son approche intégrée[2], visant à apporter protection et assistance aux victimes des conflits armés et d'autres situations de violence, lui confère une identité forte et unique. Le CICR veut être et rester proche de ces personnes et collectivités et être capable de répondre de manière rapide et adéquate à leurs besoins essentiels.

Le CICR dispose d'une capacité d'intervention rapide et efficace en cas de crise aiguë. Il veut jouer un rôle dans la prévention de catastrophes humanitaires et il doit continuer à couvrir certains besoins essentiels dans les situations de crise chronique et, parfois même, dans les situations de post-crise.

Les programmes santé, eau et habitat et sécurité économique du CICR sont un élément crucial de cette approche. Afin d'adapter au mieux sa réponse dans ces domaines aux situations actuelles, l'Institution a choisi de maintenir une palette d'activités principales pour lesquelles elle possède une capacité interne.

La mise en œuvre de la politique d'assistance contribuera à positionner le CICR comme acteur important dans le champ humanitaire. Elle est par ailleurs un préalable indispensable pour disposer de bases saines et solides à partir desquelles il sera possible de mener des réflexions institutionnelles de plus grande ampleur, visant à répondre aux défis auxquels l'humanitaire en général, et le CICR en particulier, vont être confrontés dans les décennies à venir.

Des tendances profondes influencent l'évolution du monde: augmentation de la paupérisation, des exclusions, de l'urbanisation, élargissement du fossé Nord-Sud et détérioration des termes d'échanges, problèmes d'adéquation des politiques économiques, agraires, sociales et démographiques, dégradation de l'environnement, apparition ou réapparition de pandémies, utilisation d'armes non conventionnelles, etc.

Le CICR doit suivre l'impact de ces tendances sur la conduite de ses actions d'assistance, afin d'adapter, dans la mesure du possible, ses modalités d'action.

1 Par assistance, nous visons spécialement ici les actions menées dans les domaines de la santé, de l'eau et de l'habitat, et de la sécurité économique.

2 Approche intégrée institutionnelle: intégration des programmes et des activités dans une stratégie d'ensemble – combinaison optimale de la large palette d'activités du CICR et des modes d'action appropriés à la situation (à ne pas confondre avec le concept d'intégration développé par les Nations Unies).

Outil pratique orienté vers l'action, ce document vise un triple but:

- guider les processus de décision en matière d'assistance, afin d'assurer une approche professionnelle, cohérente, intégrée et répondant aux besoins essentiels des personnes et collectivités affectées par les conflits armés et d'autres situations de violence;
- clarifier et assurer la position des activités d'assistance et de la Division de l'assistance au sein du CICR et leur permettre ainsi de contribuer de manière optimale à donner une identité forte au CICR;
- servir de cadre de référence au développement de lignes directrices thématiques pour les différents domaines de l'assistance.

Cette politique constitue une mise à jour de la doctrine « *Engagement de secours par le CICR* » (du 12 décembre 1988). Pour les situations de transition elle s'inscrit dans le cadre défini par la doctrine « *L'action du CICR en période de transition: ligne de conduite* » (du 28 novembre 2002).

2. Action du CICR

Conformément à l'article 5.2 des Statuts du « Mouvement international de la Croix-Rouge et du Croissant-Rouge »[3], l'activité du CICR s'exerce en cas de conflit armé international, de conflit armé non international et de situation de troubles intérieurs. En plus, et conformément à l'article 5.3 de ces mêmes Statuts, des activités d'assistance peuvent être mises en œuvre hors de ces situations. Dans ces situations, le CICR a pour mission de fournir protection et assistance aux victimes civiles et militaires.

Le CICR intervient en priorité, dans les situations où son action a une valeur ajoutée pour les populations touchées, plus précisément quand:

- son rôle d'institution et d'intermédiaire neutres et indépendants lui assure un accès privilégié aux populations et aux autorités compétentes;
- son approche intégrée de l'assistance et de la protection est de nature à favoriser le respect des droits des individus en accord avec la lettre et l'esprit des différents corps de droits (droit international humanitaire, droits de l'homme, droit des réfugiés);
- son ancrage dans le contexte, et la bonne connaissance qu'il a de ce dernier, lui confèrent une légitimité d'agir;
- il a la capacité et les compétences nécessaires pour apporter l'aide indispensable là où il peut les mobiliser.

3 Mouvement dans le texte qui suit.

La stratégie du CICR est fondée sur la combinaison de cinq modes d'action: persuasion, mobilisation, dénonciation, soutien et substitution/prestation directe. La persuasion et la mobilisation sont les modes d'action privilégiés lorsqu'il s'agit de faire cesser des violations du DIH, de les prévenir et de sensibiliser/pousser les autorités à fournir aux populations affectées[4] des services essentiels à leur survie et au respect de leur dignité (la dénonciation restant exceptionnelle).[5] Le soutien et la substitution/prestation directe sont les modes d'action privilégiés lorsqu'il s'agit de contribuer à la fourniture de services essentiels ou d'en assurer la responsabilité lorsque les autorités sont dans l'incapacité de le faire.

Toutefois si les circonstances l'amènent à fournir des services aux populations affectées, le CICR n'a pas pour vocation de se substituer aux responsabilités des autorités. Il poursuit ses efforts envers celles-ci pour qu'elles prennent en charge ces services et ainsi assument pleinement leurs obligations.

L'assistance doit donc toujours être considérée comme faisant partie d'une stratégie globale du CICR. Ceci implique obligatoirement une collaboration étroite entre tous les programmes et tous les échelons décisionnels.

3. Principes directeurs

3.1. Prise en compte des populations et de leurs besoins

Le CICR effectue sa mission dans la proximité des populations affectées. Les systèmes de valeurs et les vulnérabilités spécifiques des populations concernées ainsi que la perception que celles-ci ont de leurs besoins sont pris en compte.

3.2. Assistance humanitaire performante

Les programmes du CICR sont planifiés, mis en œuvre et contrôlés conformément aux normes de pratique professionnelle les plus élevées. Pour préserver sa capacité de fournir une assistance de qualité et performante, le CICR participe à l'analyse et la mise au point de normes professionnelles avec des instituts académiques et d'autres instances associées.

4 Par populations affectées nous entendons populations affectées par les conséquences des conflits armés et autres situations de violence.

5 Le CICR se réserve de prendre publiquement position sur des violations du droit international humanitaire si certains conditions strictes sont réunies: (i) ces violations sont importantes et répétées; (ii) les délégués ont été les témoins directs de ces violations, ou l'existence et l'ampleur de ces violations sont établies au moyen de sources sûres et vérifiables; (iii) une telle publicité est dans l'intérêt des personnes ou populations atteintes ou menacées; et (iv) les démarches faites à titre confidentiel n'ont pas réussi à faire cesser les violations.

Voir aussi les articles dans cette *Revue* du Président du CICR, Jakob Kellenberger (sur la confidentialité) et de son Directeur des opérations, Pierre Krähenbühl (sur le futur de l'action neutre, impartiale et indépendante).

3.3. Normes éthiques

L'assistance du CICR se fait dans le respect des normes éthiques, en l'occurrence, les principes applicables du Mouvement, le principe de ne pas nuire, ainsi que les principes des Codes de Conduite[6] pertinents. L'action du CICR est toujours dirigée dans le meilleur intérêt des populations subissant les conséquences des conflits armés et autres situations de violence.

3.4. Responsabilités au sein du Mouvement

Le CICR assure ses responsabilités en tant que composante du Mouvement conformément à l'Accord de Séville et aux Statuts du Mouvement en vigueur. Dans les situations de conflit armé, troubles intérieurs et leurs suites directes, le CICR assume un double niveau de responsabilité dans l'action: d'une part sa responsabilité spécifique en tant qu'acteur humanitaire exerçant les activités qui découlent de son mandat propre et, d'autre part, sa responsabilité de coordinateur de l'action internationale de toutes les autres composantes du Mouvement engagées dans les opérations ou intéressées à y contribuer. Il doit assurer une coordination et une information adéquates sur ces deux types de responsabilité qui co-existent.

3.5. Partenariat avec d'autres acteurs humanitaires

Le CICR est particulièrement attentif à s'associer avec des acteurs humanitaires dont les modes opératoires et les politiques d'assistance sont compatibles avec les principes et l'action de l'Institution.

4. Stratégies

4.1. Analyse globale du contexte et des besoins

Le CICR fait une analyse globale des contextes (sécurité, aspects économiques, politiques, sociaux, environnementaux et culturels) afin d'identifier les problèmes et les besoins des populations affectées, ainsi que leur relation avec les différents acteurs, ressources et services. Il s'attache tout particulièrement à déterminer si violations il y a et, le cas échéant, si elles sont délibérées ou pas. Cette analyse, régulièrement actualisée à l'échelon local, régional et international, permet au CICR de définir, adapter ou modi-

6 *Code de Conduite pour les organisations intervenant lors des opérations de secours en cas de catastrophes* adopté par le Conseil des Délégués du CICR à Birmingham en 1993, ainsi que les *Règles à observer par les collaborateurs du CICR en mission* et les *Règles de comportement en délégation*.

fier ses stratégies d'intervention. Enfin, le CICR analyse chaque situation et évalue les risques encourus par rapport à l'impact attendu. C'est sur cette base que le CICR définit sa propre action et qu'il guide l'implication des autres composantes du Mouvement intéressées à participer à l'opération.

4.2. Approche intégrée

Les activités d'assistance mises en œuvre par le CICR sont flexibles et multisectorielles. Elles ont pour but de répondre aux besoins essentiels des populations affectées. L'approche intégrée des programmes d'assistance est fondée sur un concept de santé globale[7], qui comprend la fourniture (de) et/ou l'accès à l'eau potable, à la nourriture, à un habitat, aux soins et aux services de santé de base.

L'intégration des activités de l'assistance dans l'action du CICR se réalise en grande partie au travers du choix et de la combinaison des modes d'action. La même approche s'applique aux activités d'assistance conduites par d'autres composantes du Mouvement dans les situations de conflit.

4.3. Combinaison de modes d'action

Le CICR recourt à la persuasion, la mobilisation et, au besoin, la dénonciation pour amener les autorités à assumer la responsabilité qui leur incombe de fournir des services essentiels aux populations touchées. Si le CICR estime que ses efforts ne vont pas aboutir à une réponse adéquate et opportune des autorités, et que le problème est d'importance[8], il peut simultanément agir de manière appropriée, en engageant différentes activités de soutien et/ou de substitution/prestation directe.

Les délégations définissent et mettent en place la meilleure combinaison de modes d'action, afin d'optimiser les effets des activités du CICR. La mixité des modes d'action et le poids qui est donné à chacun d'eux sont déterminés par l'importance et l'urgence des problèmes identifiés, le type des besoins à satisfaire et la réponse effective et potentielle des autorités et des autres acteurs.

4.3.1 Persuasion

Dans les domaines relevant de leurs compétences, les collaborateurs du CICR ont pour responsabilité fondamentale de déterminer dans quelle

7 Organisation mondiale de la santé, *Définition de la santé*.

8 L'importance englobe la sévérité du problème, son ampleur et les risques de détérioration future.

mesure les autorités n'assurent pas les services requis (par manque de volonté et/ou de capacité), ainsi que le degré d'urgence découlant du non-accomplissement de leurs obligations. Ils contribuent en outre aux démarches que le CICR fait auprès des autorités pour les amener à respecter l'obligation qui leur incombe de préserver la vie, la santé et la dignité des personnes, des groupes et des populations sous leur contrôle.

4.3.2 Soutien aux structures/partenaires

Le CICR apporte un soutien aux structures et aux partenaires locaux s'il considère qu'ils constituent une option viable pour assurer l'accès de la population affectée aux biens et aux services essentiels. Un tel soutien peut être envisagé si:

- les structures/les partenaires sont déterminés à apporter une assistance conformément aux principes d'humanité, d'impartialité et d'éthique partagée;
- les structures/les partenaires sont à même d'intégrer le soutien du CICR et de mettre en œuvre les programmes d'assistance nécessaires.

Dans les domaines relevant de leurs compétences, les collaborateurs du CICR ont pour responsabilité de participer à l'identification des structures/des partenaires les plus appropriés ainsi que de planifier et de mettre en œuvre les activités liées à ce mode d'action.

Ce mode d'action constitue le meilleur moyen de préserver les structures existantes sur le long terme. En outre, la collaboration avec les structures/les partenaires locaux valorise l'action et peut servir de base à un retrait responsable de l'institution.

4.3.3 Substitution/prestation directe

La décision de se substituer aux autorités et de fournir un service direct aux personnes affectées dépend de l'urgence et de l'importance des besoins. Ce mode d'action peut être envisagé quand:

- les besoins sont importants et les autorités responsables n'ont pas la capacité d'y répondre ou qu'il n'y a pas d'autorité responsable;
- les besoins sont importants et les autorités responsables n'ont pas la volonté d'y répondre;
- les conditions de sécurité et/ou les risques qu'une assistance indirecte soit mal utilisée ou mal perçue l'exigent;
- les activités d'assistance favorisent la protection des personnes affectées.

Dans les domaines relevant de leurs compétences, les collaborateurs du CICR ont pour responsabilité de planifier et de mettre en œuvre les activités d'assistance liées à ce mode d'action.

4.3.4 Mobilisation[9]

Le CICR peut mobiliser des tiers[10] qui s'attacheront soit à convaincre les autorités d'assumer leurs responsabilités soit à agir directement (eux-mêmes) ou indirectement (en apportant un soutien à d'autres) en faveur des populations touchées. Dans les domaines relevant de leurs compétences, les collaborateurs du CICR ont pour responsabilité de repérer les acteurs les plus à même d'exercer une influence sur les autorités ou de fournir l'aide requise.

4.3.5 Dénonciation

En cas de violations importantes et répétées du droit international humanitaire le CICR peut, en conformité avec sa doctrine et donc à titre exceptionnel[11], s'engager dans une démarche de dénonciation.

4.4. Coordination

Dans la mesure où cela ne met pas en danger son indépendance, sa neutralité et sa sécurité, le CICR promeut une coordination de ses activités avec celles des autres acteurs afin d'assurer la plus grande complémentarité possible de l'action humanitaire en faveur des personnes dans le besoin. Il peut être nécessaire d'adapter les mécanismes de coordination suivant la situation (par exemple, nécessité de garantir la confidentialité). Au sein du Mouvement, les activités d'assistance de toutes les composantes du Mouvement présentes et actives sur le terrain sont étroitement coordonnées afin de maximiser leur impact sur les personnes affectées et de projeter une image cohérente de l'action du Mouvement dans le pays.

4.5. Partage des tâches et des responsabilités

Le CICR envisage un partage des tâches et des responsabilités avec d'autres acteurs humanitaires, de manière formelle ou informelle, dans la

9 *La communication publique du CICR – politique, principes directeurs et audiences prioritaires* (2004).
10 Il peut s'agir d'États, d'organisations internationales ou régionales, de compagnies privées, d'individus.
11 *L'action du CICR en cas de violation du DIH* (1981).

mesure où cela ne porte pas atteinte à son indépendance, sa neutralité, sa sécurité, son accès à des zones touchées par le conflit et à sa capacité de conduire des activités de protection. Le partage des responsabilités peut porter sur les aspects suivants:

- secteur ou domaine d'action (santé, eau/assainissement, logement, alimentation et articles domestiques essentiels);
- géographie (la population touchée est répartie entre les organisations, selon son lieu de résidence ou l'endroit où elle se trouve);
- division de la population touchée en sous-catégories (par exemple, personnes déplacées[12], blessés de guerre).

4.6. Collaboration avec les partenaires

Le CICR développe et maintient un réseau d'acteurs locaux et internationaux. Les actions sont mises en place en collaboration avec ces acteurs uniquement si leurs modes opératoires et leurs politiques d'assistance sont compatibles avec les objectifs, les stratégies et les principes du CICR et si cette collaboration ne compromet pas la capacité du CICR de fournir une assistance de qualité en temps opportun. Les composantes du Mouvement sont des partenaires privilégiés du CICR mais non exclusifs.

4.7. Adaptation et innovation

Si les stratégies énumérées plus haut n'apportent pas une solution adéquate à un problème particulier, le CICR considère l'élaboration d'autres stratégies, en tenant compte des nombreuses variables dans l'environnement régional, national et international (en particulier la sécurité).

5. Action du CICR dans le domaine de l'assistance

L'existence de besoins essentiels non couverts chez les populations affectées est le moteur de l'action du CICR dans le domaine de l'assistance. Le processus décisionnel conduisant à toute intervention comprend deux niveaux d'analyse.

5.1. Premier niveau: le CICR identifie les populations pour lesquelles une assistance est prioritaire

À cette fin il s'appuie sur les critères suivants:

12 Comprend les personnes déplacées à l'intérieur de leur propre pays, les réfugiés et les «*returnees*».

5.1.1 Identification des populations affectées se fondant sur:

- les catégories spécifiquement protégées par le DIH (par exemple, prisonniers de guerre, personnes privées de liberté, blessés et malades, populations civiles et les naufragés);
- les risques réels ou potentiels liés à la nationalité, la religion, les origines ethniques, le sexe, le genre (rôles et responsabilités culturels liés au sexe), l'appartenance sociale, l'opinion politique ou toute autre discrimination arbitraire.

5.1.2 Définition du degré de la crise touchant ces populations

Le degré de la crise est défini en fonction de l'accès aux ressources existantes et de la capacité des services de satisfaire aux besoins essentiels des populations:

- crise émergente et pré-crise: les besoins essentiels sont encore couverts, mais le risque existe qu'ils ne le soient plus;
- crise aiguë: certains besoins essentiels ne sont pas couverts;
- crise chronique: les besoins essentiels ne sont pas correctement couverts et une crise aiguë pourrait ressurgir;
- post-crise: les besoins essentiels sont couverts par les structures existantes, dont la viabilité reste néanmoins fragile.

5.1.3 Importance des problèmes

L'identification des problèmes à traiter en priorité tient compte de leur importance en fonction des dimensions suivantes:

- la sévérité du problème (mortalité, incidence, souffrance, handicap);
- l'ampleur du problème (le nombre de personnes affectées);
- les risques de détérioration future (la tendance).

5.1.4 Impact escompté de l'intervention sur les populations

L'intervention du CICR est conditionnée par l'impact potentiel que son action aura sur les populations ciblées.

5.2. Second niveau: pour une population identifiée le CICR définit les modalités de son intervention

5.2.1 Intégration institutionnelle

Les activités de l'assistance sont intégrées dans l'action du CICR, selon les principes directeurs (point 3) et les stratégies (point 4).

5.2.2 Cohérence de l'action d'assistance

Les actions du CICR en matière d'assistance sont orientées par la pyramide de la santé publique qui exige une approche intégrée dans les domaines de la sécurité économique, de l'eau et habitat, et des services de santé. Il en résulte la définition d'un ensemble d'activités intégrées.

Cette approche globale nécessite le recours à des outils de gestion tels que:

- l'analyse des systèmes (par exemple, systèmes de santé, d'échanges);
- la planification;
- la coordination;
- le suivi des projets/programmes;
- l'évaluation des actions.

5.2.3 Capacité à réaliser des activités principales

Parmi le large éventail d'activités mis en œuvre par la communauté humanitaire en réponse aux besoins des populations affectées, le CICR, se fondant sur son expérience, a défini des activités qu'il considère comme principales. Ces activités, dont le niveau de priorité et de mise en œuvre restent en fonction du contexte, sont les suivantes:

- production, stockage et distribution d'eau potable;
- assainissement du milieu et gestion des déchets;
- réhabilitation et gestion énergétique: alimentation électrique d'installations vitales telles les usines de production d'eau et les hôpitaux; technique appropriée pour la cuisson et le chauffage;
- planification spatiale, conception et mise en place de camps pour personnes déplacées et construction d'abris appropriés (*transitional human settlements*);
- distribution de rations alimentaires;
- distribution d'articles domestiques essentiels;
- distribution de semences, d'outils agricoles, d'engrais et de matériel de pêche;
- réhabilitation de l'agriculture et de l'irrigation;
- gestion du bétail;
- réhabilitation du petit commerce et de l'artisanat;
- soins de santé primaire (SSP): paquet minimum d'activités;
- soutien aux victimes de violences sexuelles;
- soins pré-hospitaliers et évacuation des blessés;
- soins hospitaliers d'urgence (chirurgie, obstétrique, médecine et pédiatrie) et gestion hospitalière;
- réhabilitation de structures médicales et autres bâtiments existants;

- programmes de nutrition thérapeutique;
- programmes de réhabilitation physique; et
- santé en milieu carcéral.

Pour ses activités principales, le CICR s'est doté des compétences professionnelles et de la capacité logistique nécessaire à la mise en œuvre, ainsi que d'une capacité de recherche opérationnelle et de développement normatif dans le but d'adapter ses politiques, ses lignes directrices et son action à l'évolution de l'environnement humanitaire dans les domaines de l'assistance.

5.2.4 Partenariat

En l'absence de contraintes relatives à son indépendance et à sa neutralité, le CICR peut engager des activités en partenariat avec un ou plusieurs autres acteurs, en particulier les composantes du Mouvement. Cet engagement se fera si le CICR ne dispose pas de la capacité suffisante, si d'autres acteurs sont mieux à même de répondre aux problèmes ou si cette modalité d'engagement est privilégiée. Une attention particulière sera apportée au maintien et au développement des capacités des Sociétés nationales travaillant dans leur propre pays.

5.2.5 Diversification des activités

Une diversification peut être envisagée lorsque les activités principales susmentionnées ne répondent pas de la manière la plus appropriée aux besoins identifiés ou qu'un partenariat n'est pas possible. La diversification doit être considérée comme une activité nouvelle et envisagée lorsque les conditions suivantes sont remplies:

- l'importance du problème identifié exige une intervention;
- les autres acteurs ne peuvent pas ou ne veulent pas répondre aux besoins identifiés;
- les connaissances spécialisées nécessaires sont mobilisables;
- elle ne porte pas atteinte aux activités principales;
- elle est efficace et efficiente.

5.2.6 Autres paramètres à considérer

Une intervention peut aussi être envisagée si:

- les activités d'assistance servent de point d'entrée à des activités de protection;
- les activités d'assistance facilitent le positionnement et favorisent l'acceptabilité du CICR.

Dans le cas où le CICR déciderait d'intervenir sur la base de l'un de ces paramètres, il doit impérativement tenir compte des implications à long terme que le programme risque d'engendrer et seules des activités principales seront envisagées.

5.2.7 Faisabilité de l'intervention

Les paramètres suivants sont considérés afin de déterminer les chances de succès de l'intervention:

- l'acceptation de l'intervention;
- la prise en compte du cadre légal national;
- les conditions de sécurité;
- les ressources humaines, financières et logistiques;
- la conformité avec le cadre de gestion institutionnel.

5.3. Mise en œuvre

Le CICR adapte sa réponse à la situation.

En situation de crise aiguë, le CICR souhaite maintenir une capacité opérationnelle immédiatement mobilisable. Ce facteur va contribuer à renforcer l'identité d'un CICR proche des populations affectées et efficace dans l'urgence tout en tenant compte des contraintes sécuritaires.

En situation de pré-crise, autant que possible, le CICR va intervenir afin de prévenir une catastrophe humanitaire en soutenant lui-même un système existant ou en mobilisant d'autres acteurs pour le faire.

En situation de crise chronique, le CICR met un accent particulier à trouver des solutions durables aux problèmes rencontrés et envisage une reprise de ses programmes par les autorités responsables, en renforçant les capacités des services, ou par d'autres acteurs. Pour les cas particuliers où il a une responsabilité résiduelle[13], le CICR poursuit son action.

En situation de post-crise le CICR assume ses responsabilités résiduelles.

5.3.1 Eau et habitat

Les programmes dans le domaine de l'eau et de l'habitat ont pour objectifs de garantir aux populations affectées l'approvisionnement en eau

13 Le CICR a une responsabilité résiduelle vis-à-vis des personnes qu'il a assistées durant le conflit et plus particulièrement parmi celles-ci, celles que l'interruption de ses programmes mettrait en danger ou celles à propos desquelles il savait au moment d'entamer l'action, que son engagement devait être durable. Voir la doctrine *L'action du CICR en période de transition* (2003).

potable et en eau à usage domestique, ainsi que de préserver l'habitat, qui protège la population des risques environnementaux. Leur but ultime est de contribuer à réduire la mortalité, la morbidité et les souffrances que peut provoquer la dislocation du système d'approvisionnement en eau et de l'habitat. L'accès à l'eau et au logement devient problématique à la fois pendant et après un conflit.

Dans les situations de crise aiguë, les sources d'eau sont parfois délibérément prises pour cibles. Il arrive que les habitants soient contraints de quitter leur maison pour chercher de l'eau dans un environnement hostile ou que les réseaux d'adduction d'eau aient été endommagés par les combats ou soient inaccessibles pour d'autres raisons. Le CICR assure un accès à l'eau, un assainissement du milieu et aide les structures de santé de base à travers des actions d'urgence et un soutien aux structures existantes.

Dans les situations de crise émergente, de crise chronique et d'après-crise, le CICR s'attache en priorité à soutenir et à renforcer les structures existantes par le biais de programmes de réhabilitation spécifiques, répondant de manière viable et durable aux besoins de la population.

5.3.2 Sécurité économique

L'objectif principal des programmes de sécurité économique est de préserver ou de rétablir les moyens de subsistance permettant aux ménages affectés par les conflits armés de couvrir leurs besoins essentiels.

Dans les situations de crise aiguë, quand la subsistance ne peut pas être assurée par les moyens de production, le CICR fournit les secours (vivres et articles domestiques essentiels) nécessaires pour préserver la vie et favoriser le redémarrage des activités de production, principalement à travers la distribution d'intrants agricoles.

Dans les situations de crise émergente, de crise chronique et d'après-crise, le CICR s'attache en priorité à soutenir et renforcer les moyens de production à travers des programmes adaptés au système économique de la population. Ces programmes portent principalement sur les secteurs suivants: réhabilitation agricole, santé animale et gestion du bétail, initiatives micro-économiques. Le CICR offre des opportunités à d'autres composantes du Mouvement pour qu'elles s'engagent dans des activités de sécurité économique dans ces situations. Il portera une attention particulière à la coopération avec la Société nationale travaillant dans son propre pays.

5.3.3 Santé

Les activités de santé visent à donner aux populations affectées l'accès à des soins préventifs et curatifs de base, qui répondent aux normes universellement reconnues. Dans ce cadre, une assistance est fournie aux services de santé locaux ou régionaux, que le CICR est parfois amené à remplacer temporairement.

Dans les situations de crise émergente ou aiguë, lorsque l'accès aux structures de santé et la fourniture de soins sont en jeu, le CICR apporte un soutien aux services de santé de base, de soins pré hospitaliers (premiers secours et évacuations médicales) et de soins hospitaliers d'urgence. Les services de santé de base sont des composantes choisies des soins de santé primaires (SSP)[14]: soins curatifs ambulatoires au moyen de médicaments essentiels, santé maternelle et infantile (SMI), campagnes de vaccination, ainsi que gestion des conséquences de la violence sexuelle. Les soins hospitaliers sont axés sur la gestion des urgences chirurgicales, médicales, pédiatriques et obstétriques.

Dans les situations de crise chronique et d'après-crise, le CICR peut envisager d'apporter un soutien à un plus grand nombre de composantes des SSP, en plus des services de santé de base définis plus haut. Le programme élargi de vaccination (PEV) et la promotion de la santé et de l'hygiène sont du nombre. Les soins hospitaliers sont généralisés. Les capacités en matière de gestion hospitalière sont renforcées. Des services plus diversifiés sont alors fournis dans les domaines des soins médicaux, chirurgicaux, pédiatriques et obstétriques.

Quel que soit le degré de la crise:

- les blessures de guerre peuvent conduire à une amputation et à d'autres handicaps graves, qui sont pris en charge dans le cadre de programmes de réhabilitation physique;
- le CICR assure l'accès aux soins de santé de base et à la prévention de tout mauvais traitement dans les lieux de détention; il apporte un soutien à la lutte contre les épidémies. Sur le plus long terme, le CICR s'emploie à consolider les systèmes de santé dans les lieux de détention en renforçant les capacités de gestion des autorités.

14 Les SSP sont un processus auquel participe la communauté et qui, conduit en consultation avec la société civile, a pour but d'évaluer les besoins et de mettre en place des activités de santé dans les domaines suivants: 1) soins ambulatoires au moyen de médicaments essentiels; 2) SMI, y compris la planification familiale; 3) PEV; 4) lutte contre les maladies transmissibles; 5) promotion de la santé et de l'hygiène; 6) éducation à la santé; 7) santé mentale; 8) eau; et 9) nutrition.

6. Directives opérationnelles

6.1. Intégration des populations affectées dans la planification et la gestion des programmes

Les populations affectées sont, dans la mesure du possible, associées à l'identification de leurs besoins ainsi qu'à la définition et la mise en œuvre des programmes. Le CICR prend des mesures pour renforcer les capacités des organismes locaux compétents à même d'assumer la responsabilité des activités d'assistance ou de participer activement aux actions du CICR.

6.2. Évaluations initiales (assessment) de la situation – besoins intégrés et analyse du contexte

En matière d'assistance, les évaluations initiales se fondent sur un réseau d'information aussi large que possible et considèrent toujours tout un éventail de questions et de domaines. Ceux-ci englobent non seulement les domaines d'action de l'assistance, mais aussi ceux qui sont liés à la protection des populations et à la sécurité. L'analyse prend en compte les scénarios possibles (par exemple, *si aucune assistance n'est fournie*). Le personnel chargé de l'assistance apporte sa contribution à l'analyse globale de la délégation et en tire partie en retour.

6.2.1 Les missions d'évaluations initiales, conformément au principe d'approche intégrée, sont conduites conjointement par des représentants des programmes santé, eau et habitat, et sécurité économique, ainsi que par les responsables d'autres programmes impliqués. Les priorités de la délégation et du CICR sont prises en considération dans toute analyse.

6.2.2 Les méthodes d'évaluations initiales sont, dans la mesure du possible, compatibles avec celles d'autres acteurs. Cette compatibilité sert de base à une comparaison des données dans le temps et à travers les lieux géographiques, et facilite considérablement l'adaptation à des circonstances et des contextes en évolution.

6.2.3 Partenaires d'évaluations initiales: les évaluations peuvent être conduites conjointement avec d'autres acteurs humanitaires poursuivant des objectifs similaires, en l'absence de contraintes relatives à l'indépendance du CICR, à la nature des données collectées, aux conditions de sécurité ou à l'accès aux populations.

6.2.4 Les rapports d'évaluations initiales contiennent des informations opportunes et concises qui facilitent la planification et la mise en œuvre de réponses adaptées aux besoins. Ils fournissent en outre des informations sur la

stratégie générale d'action de la délégation. Exception faite des données relatives à la sécurité, des données politiquement délicates et des données protégées, les informations sur la santé, l'eau, l'assainissement et la sécurité économique peuvent être partagées avec les autres acteurs humanitaires impliqués et les autorités concernées.

6.3. Planification des programmes et des projets d'assistance

La planification des programmes et des projets d'assistance doit respecter la méthodologie définie dans le processus de planification du CICR (*Planning for Results*). Si la durée prévue du programme ou du projet est supérieure à 12 mois, ce facteur est intégré dans le plan initial tout en préservant la flexibilité nécessaire pour réagir à l'évolution de la situation. Dans ce cas, les besoins en ressources (humaines, financières, logistiques, etc.) sont planifiés et explicitement formulés pour la totalité de la durée du programme proposé.

Il est impératif, dans le cas des projets/programmes à plus long terme, que le CICR coopère autant que possible avec les partenaires locaux, en insistant sur le renforcement des capacités et la durabilité des projets/programmes. Les projets/programmes de longue durée doivent s'inscrire dans les politiques des autorités concernées. La planification du CICR doit prendre en compte les plans des autres composantes du Mouvement qui travaillent en coordination avec lui et des autres organisations internationales, et plus particulièrement de celles qui interviennent dans la durée.

6.4. Mise en œuvre

Le CICR doit disposer des compétences et des capacités logistiques nécessaires à une mise en œuvre rapide et efficace de ses activités principales. Les activités qui sont entreprises avec des acteurs étatiques ou privés (par exemple, des ministères ou des associations communautaires respectivement) doivent faire l'objet, dans la mesure du possible, d'un accord formel écrit. Il en va de même avec les composantes du Mouvement.

6.5. Stratégies d'entrée et de désengagement

Des stratégies d'entrée et de désengagement sont prévues dans les plans initiaux. Celles-ci, et notamment pour les stratégies de désengagement, sont élaborées avec la participation des acteurs concernés. Cela favorisera la participation et l'adhésion de la communauté au programme, dès la mise en œuvre, et permettra d'identifier en temps opportun les partenaires potentiels du processus de sortie ultérieur. Les stratégies de sortie sont transparentes et

flexibles. S'il n'est pas possible de mettre en place une stratégie qui prévoit le transfert des activités, le CICR peut conserver un certain degré de responsabilité résiduelle à l'égard d'une population qu'il aide à trouver des solutions avec une ou des composantes du Mouvement intéressées à s'engager à moyen terme, maximisant ainsi le potentiel de complémentarité existant au sein du Mouvement.

6.6. Suivi (*monitoring*)

Un système de suivi de la situation contextuelle et de la performance des programmes est mis en place dès le début de l'intervention afin de garantir, à partir d'indicateurs choisis, une vérification systématique et continue de l'évolution et des progrès réalisés. Ce système de suivi permet une prise de décision opportune et appropriée.

6.7. Bilan et évaluation

Le suivi est complété par des bilans (*reviews*) et des évaluations indépendantes. Ces derniers ont pour objectifs de tirer les enseignements facilitant l'amélioration des politiques et des pratiques. Ils contribuent aussi à améliorer la performance, la transparence et la redevabilité (*accountability*) de l'institution.

7. Conclusion

La politique d'assistance reflète d'une part la nécessité d'avoir un cadre simple et cohérent permettant une prise de décisions concertée et efficace, tout en restant suffisamment flexible pour prendre en compte la complexité actuelle et future des situations dans lesquelles le CICR est amené à intervenir. La politique d'assistance du CICR réconcilie ces deux nécessités en les canalisant selon un processus décisionnel logique et transparent.

ICRC Assistance Policy

(Adopted by the Assembly of the International Committee of the Red Cross on 29 April 2004)

Public version

1. Introduction

In recent decades, the ICRC's assistance activities[1] have diversified and its assistance programmes have expanded. This development is due to a variety of factors that have caused the concept of humanitarian assistance to evolve well beyond mere emergency responses.

Emergency response itself has become increasingly complex, seeking to be more "intelligent" in order to achieve maximum effectiveness and to minimize the adverse consequences that humanitarian aid can have. In many situations, conflicts have become entrenched, forcing assistance work to cover the longer term, to meet needs that are at once urgent and recurrent, or even chronic. As a result, humanitarian work must be adapted and, very often, a link established between emergency and rehabilitation programmes in order to promote support or mobilization activities, stimulate adaptation mechanisms and persuade the authorities concerned to shoulder their responsibilities.

The ICRC is also faced with a proliferation of actors carrying out humanitarian work and the diversity of their areas of specialization, their abilities and their working methods, a situation that has fostered a spirit both of complementarity and of competition. Under the Seville Agreement, the ICRC acts as the International Movement of the Red Cross and the Red Crescent's "lead agency" in the event of armed conflict and guides the other components in carrying out activities that, more often than not, are linked to assistance programmes. At the same time, the growing insecurity in some situations, which can go as far as the rejection of humanitarian aid, has forced the ICRC to modify its approaches and strategies.

In this complex environment, the ICRC seeks to be and remain a neutral, impartial and independent humanitarian organization with a recognized status,

an organization that is credible, reliable and able to carry out a wide range of activities in a highly professional manner. Its integrated approach,[2] designed to provide victims of armed conflict and other violent situations with both protection and assistance, gives it a strong and unique identity. The organization also wishes to be, and stay, in close proximity to these people, whether individuals or groups, so that it can respond quickly and appropriately to their essential needs.

The ICRC has the capacity to act rapidly and effectively in the event of an acute crisis. It strives to play a role in preventing events that are disastrous in humanitarian terms. At the same time, it must continue to meet certain essential needs in chronic crises and sometimes even in post-crisis situations.

The ICRC's programmes in the areas of health, water and habitat, and economic security are a key aspect of this approach. In order to optimize its response to present day situations, the organization has opted to maintain a spectrum of core activities for which it possesses the internal capacity needed.

Implementing the present Assistance Policy will help the ICRC position itself as a major player in the humanitarian sphere. It is also a prerequisite for laying sound foundations from which to launch a more wide-ranging internal discussion on how humanitarian organizations in general, and the ICRC in particular, can meet the challenges of the coming decades.

Developments in today's world are influenced by deep-seated trends: increasing poverty, marginalization, urbanization, the widening of the North-South divide and the deterioration in the terms of trade, problems formulating and implementing adequate economic, agricultural, social and demographic policies, the deteriorating environment, the appearance or reappearance of pandemics, the use of non-conventional weapons, and so on.

The ICRC must monitor the impact of these trends on the conduct of its assistance work so that it can, insofar as possible, adapt its working methods accordingly.

The aim of this policy paper — a practical, actionoriented tool — is threefold:

- to guide decision making on matters having to do with assistance, so as to ensure a professional, coherent, integrated approach that meets the

1 Assistance activities are primarily those carried out in the fields of health, water and habitat, and economic security.

2 An integrated approach is the inclusion of all ICRC programmes and activities in an overall strategy — optimal combination of a wide range of activities and modes of action appropriate to a given situation (not to be confused with the concept of integration developed by the United Nations).

essential needs of individuals and communities affected by armed conflict and other violent situations;
- to clarify and affirm the position of assistance work and of the Assistance Division within the ICRC, thereby helping to provide the organization with a strong identity;
- to serve as a reference framework for the formulation of thematic guidelines applicable to different areas of assistance.

The present document constitutes an updating of the policy paper *Engagement de secours par le CICR* (of 12 December 1988). It also takes account of the policy paper *ICRC action in periods of transition: Guidelines* (of 28 November 2002).

2. ICRC action

In accordance with Article 5.2 of the Statutes of the International Red Cross and Red Crescent Movement,[3] the ICRC takes action in connection with international armed conflicts, non-international armed conflicts and internal disturbances. Under Article 5.3 of the Statutes, it may also furnish assistance in situations other than the abovementioned. In these circumstances, the ICRC's task is to provide protection and assistance for civilian and military victims.

In terms of priority, the ICRC takes action in situations where its work has added value for the affected population, and more specifically where:

- its role as a neutral and independent organization and intermediary facilitates access to those in need and to the authorities concerned;
- its integrated approach to assistance and protection can promote respect for the rights of the individual in accordance with the letter and spirit of the law (be it international humanitarian law, human rights law or refugee law);
- its presence in and knowledge of a given situation lend it particular legitimacy;
- it can mobilize the capacity and skills needed to provide essential aid.

The ICRC's strategy is based on a combination of five modes of action: persuasion, mobilization, denunciation, support and substitution/direct provision of services. Persuasion and mobilization are the preferred modes of

3 Hereafter the Movement.

action when it seeks to stop or prevent violations of international humanitarian law and to make the authorities aware of their responsibilities while urging them to meet the essential needs of the affected group.[4] This also applies to preserving their dignity. Denunciation is reserved for exceptional cases.[5] Support and substitution/direct provision are the preferred modes of action when what is needed is to help supply essential services or to take responsibility for them when the authorities are unable to do so.

While circumstances may lead the ICRC to provide services for affected groups, it is not the organization's role to relieve the authorities of their responsibilities. The ICRC will continue to urge them to ensure delivery of those services and fully meet their obligations.

Assistance must always be regarded as forming part of an overall ICRC strategy. This necessarily entails close cooperation among all programmes and all levels of decision making.

3. Guiding Principles

3.1. Taking the affected group and its needs into account

The ICRC seeks to work in close proximity to the affected group. The organization must take account of the local value systems and the group's specific vulnerabilities and perception of its needs.

3.2. Effective humanitarian assistance of high quality

ICRC programmes must be planned, implemented and monitored in accordance with the highest professional standards. If the ICRC is to preserve its capacity to provide high quality and effective assistance, it must analyse and develop professional standards in conjunction with academic institutions and other relevant bodies.

4 Those suffering the consequences of armed conflicts and other violent situations.

5 The ICRC reserves the right to make public statements concerning violations of international humanitarian law if certain strict conditions are fulfilled: (i) these violations are major and repeated; (ii) the ICRC delegates have witnessed the violations with their own eyes, or the existence and extent of those breaches were established by reliable and verifiable sources; (iii) the steps taken confidentially have not succeeded in putting an end to the violations; and (iv) such publicity is in the interest of the persons or populations affected or threatened.

See also the articles elsewhere in this *Review* by the President of the ICRC, Jakob Kellenberger (on confidentiality) and by its Director of Operations, Pierre Krähenbühl (on the future of neutral, impartial and independent action).

3.3. Ethical norms

When providing assistance, the ICRC must respect certain ethical standards, namely the applicable principles of the Movement, the principle of do no harm, and the principles set out in the relevant codes of conduct.[6] The best interests of those suffering the consequences of armed conflict and other violent situations must always guide the ICRC's activities.

3.4. Responsibilities within the Movement

As a component of the Movement, the ICRC must discharge its responsibilities in compliance with the Seville Agreement and the Statutes of the Movement currently in force. During armed conflict or internal disturbances and in their direct aftermath, the ICRC has a dual responsibility: its responsibility as a humanitarian organization for carrying out the specific activities arising from its mandate and its responsibility for coordinating the international action taken by any components of the Movement involved in an operation or wishing to contribute to it. The ICRC must provide effective coordination and information in relation to both types of responsibility.

3.5. Partnerships with other humanitarian actors

The ICRC must take particular care to associate with humanitarian actors whose working methods and policies are compatible with its own principles and work.

4. Strategies

4.1. Overall analysis of the situation and needs

The ICRC conducts an overall analysis of each situation in which it is involved (security and economic, political, social, environmental and cultural aspects) in order to identify the problems and needs of the affected groups in terms of resources and services and their relationship with the various actors involved. It especially endeavours to determine whether there have been violations of international humanitarian law and, if so, whether or not they are deliberate. This analysis, regularly updated at the local, regional and international levels, enables the ICRC to draw up, adapt or

6 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-governmental Organizations (NGOs) in Disaster Relief (adopted by the Council of Delegates of the ICRC in Birmingham in 1993), ICRC Regulations for Personnel on Mission, Rules of Conduct for ICRC Staff on Assignment.

alter its operational strategies. Finally, the ICRC analyses each situation and assesses risks in relation to expected impact. This is the basis on which the organization determines its own course and guides the work of other components of the Movement who wish to take part in an operation.

4.2. Integrated approach

The ICRC's assistance work is flexible and wide-ranging. Its aim is to meet the essential needs of the affected group. The assistance integrated approach is based on a concept of overall health[7] and includes the supply of and/or access to safe drinking water, food, a habitat and basic health care and health services.

The inclusion of assistance in ICRC action as a whole depends largely on the choice and combination of modes of action. The same approach is applied to assistance provided by other components of the Movement in cases of conflict.

4.3. Combining different modes of action

The ICRC uses persuasion, mobilization and, where necessary, denunciation to induce the authorities to meet their obligation to provide essential services for the affected groups. Where the ICRC considers that its efforts are not going to bring about a satisfactory, timely response from the authorities, and that the problem is a serious one, it may simultaneously engage in appropriate support and/or substitution/direct provision activities.

ICRC delegations must decide how best to combine and introduce different modes of action in order to optimize the impact of their activities. How various modes of action are combined, and the weight given to each, are determined by the importance and urgency of the problems identified, the types of needs and the current and potential responses from the authorities and other actors involved.

4.3.1 Persuasion

It is the fundamental responsibility of ICRC staff, within their respective spheres of competence, to determine the extent to which the authorities fail to meet their obligation to provide essential services (because they are unwilling and/or unable to do so) and the scale of the emergency that this

7 World Health Organisation, *Definition of health.*

has created. In addition, they contribute to the representations the ICRC makes to the authorities in an effort to persuade them to respect their obligation to preserve the lives, health and dignity of individuals, groups and populations under their control.

4.3.2 Support for local structures/partners

The ICRC provides support for local structures and partners wherever it considers that they constitute a viable means of ensuring access by the group affected to basic goods and services. Such support may be considered if:

- the structures/partners are willing to provide assistance in accordance with the principles of humanity, impartiality and shared ethics;
- the structures/partners are in a position to absorb the ICRC's support and to implement the necessary assistance programmes.

Within their respective spheres of competence, ICRC staff are responsible for helping to identify the most appropriate structures/partners and for planning and implementing the activities connected with this mode of action, which constitutes the best way of preserving existing structures over the long term. Furthermore, cooperation with local structures/partners enhances the ICRC's work and may provide a basis for a responsible withdrawal by the organization.

4.3.3 Substitution/direct provision of services

The decision to substitute for the authorities and to provide a direct service for those affected depends on the urgency and gravity[8] of the needs to be met. This mode of action may be considered when:

- the needs are great and the responsible authorities are not able to meet them, or where no such authorities exist;
- the needs are great and the responsible authorities are not willing to meet them;
- security conditions and/or the risk that indirect assistance might be misused or ill received so require;
- assistance will help protect the persons affected.

Within their respective spheres of competence, ICRC staff are responsible for planning and implementing the assistance activities associated with this mode of action.

8 The gravity of a problem takes into account its severity, its scale and the risk of any aggravation of the problem.

4.3.4 Mobilization[9]

The ICRC may mobilize third parties[10] who will endeavour to persuade the authorities to shoulder their responsibilities or, failing that, will strive either directly (themselves) or indirectly (by supporting others) to assist those affected. Within their respective spheres of competence, ICRC staff are responsible for identifying those who are in the best position to influence the authorities or to provide the necessary aid.

4.3.5 Denunciation

In case of important and repeated violations of international humanitarian law the ICRC may, in accordance with its policy guidelines and thus in exceptional cases,[11] take steps to denounce those responsible.

4.4. Coordination

Insofar as this does not jeopardize its independence, neutrality or security, the ICRC promotes coordination of its activities with those of other actors to ensure the greatest possible complementarity of diverse efforts to provide those in need with humanitarian aid. Coordination mechanisms may have to be adapted, depending on the situation (for example, a need to ensure confidentiality). Within the Movement, the assistance activities of all the components present and active in the field are closely coordinated so as to maximize their impact on the persons affected and to project a coherent image of the Movement's work in the country concerned.

4.5. Sharing tasks and responsibilities

The ICRC considers sharing tasks and responsibilities with other humanitarian organizations, formally or informally, insofar as this does not undermine its independence, its neutrality, its security, its access to areas affected by conflict or its ability to carry out protection activities. Responsibilities may be shared in relation to the following aspects:

- sector or field of activity (health, water and sanitation, housing, food and essential household items);

9 *ICRC public communication: policy, guiding principles and priority audiences* (2004).
10 Such as States, international or regional organizations and private firms or individuals.
11 *Action by the ICRC in the event of breaches of international humanitarian law* (1981).

- geography (responsibility for the affected groups is divided up among different organizations, depending on where the people live or are located);
- category of affected person (for example, displaced persons,[12] war wounded).

4.6. Partnerships

The ICRC develops and maintains a network of local and international partners. Its activities are carried out in cooperation with these partners only where their working methods and policies are compatible with the ICRC's objectives, strategies and principles and where this cooperation does not weaken the ICRC's ability to provide effective and timely assistance. Other components of the Movement are the ICRC's preferred, but not exclusive, partners.

4.7. Adaptation and innovation

If the strategies described above do not offer a suitable solution to a particular problem, the ICRC will consider drawing up other strategies, taking into account the many variables in the regional, national and international environment (in particular, security).

5. Action in the field of assistance

Unmet essential needs are what drive ICRC assistance work. The decision making process leading to any action is based on two levels of analysis.

5.1. First level: the ICRC identifies the groups for whom assistance is a priority

To this end, it relies on the following criteria:

5.1.1 Category of persons affected:

- persons specifically protected by international humanitarian law (for example, prisoners of war, persons deprived of their freedom, the wounded and sick, civilians and the shipwrecked);
- persons currently or potentially at risk owing to their nationality, religion, ethnic origin, sex, gender (cultural roles and responsibilities based on sex), membership of a social group, political opinions or any other characteristic that may be the basis of arbitrary discrimination.

12 Includes people displaced within their own countries, refugees and returnees.

5.1.2 Degree of crisis

This is determined on the basis of access to existing resources and the capacity of existing services to meet essential needs:

- emerging crisis and pre-crisis situation — essential needs are still being met, but there is a risk that they will not continue to be met;
- acute crisis — certain essential needs are not being met;
- chronic crisis — essential needs are not being entirely met and an acute crisis could recur;
- post-crisis situation — essential needs are being met by existing services but these remain fragile.

5.1.3 Gravity of problems

In identifying the problems to be tackled as a priority, account is taken of:

- their severity (e.g. mortality rate, incidence, degree of suffering, disability);
- their scale (number of people affected);
- the risk of aggravation (trend).

5.1.4 Anticipated impact of action

The ICRC's decision to step in will depend on the expected results of its assistance on the target group.

5.2. Second level: for each group identified, the ICRC defines the form that the operation will take

5.2.1 Integration within overall ICRC action

Assistance activities are integrated in the ICRC's overall work in accordance with the above-mentioned guiding principles (point 3) and strategies (point 4).

5.2.2 Coherence of assistance activities

Assistance activities are oriented by the public health pyramid, which requires an integrated approach in the areas of water and habitat, economic security and health services. The result is a welldefined range of integrated activities.

This comprehensive approach calls for management tools such as:

- systems analysis (health, trade, etc.);
- planning;
- coordination;

- monitoring of programmes/projects;
- evaluation.

5.2.3 Capacity to carry out core activities

Among the wide range of activities carried out by humanitarian agencies in response to the needs of affected groups, the ICRC, drawing on its experience, has defined a set of activities it regards as core. These activities, whose level of priority and implementation depend on the context, are as follows:

- supply, storage and distribution of drinking water;
- environmental sanitation and waste management;
- energy supply for key installations such as hospitals, water treatment plants and water distribution networks, and appropriate technologies for cooking and heating;
- transitional human settlements (spatial planning, design and setting up of camps, construction of appropriate shelter);
- distribution of food rations;
- distribution of essential household items;
- distribution of seed, farming tools, fertilizer and fishing tackle;
- rehabilitation of agriculture and irrigation;
- livestock management;
- revival of small trade and handicrafts;
- minimum package of activities derived from primary health care (PHC);
- support for victims of sexual violence;
- pre-hospital care and medical evacuation of the wounded;
- emergency hospital care (surgery, obstetrics, paediatrics, internal medicine) and hospital management;
- repair/upgrading of medical facilities and other buildings;
- therapeutic feeding;
- physical rehabilitation programmes;
- health in detention.

The ICRC has equipped itself with the professional skills and logistical capacity required to implement these core activities. It also has the ability to upgrade its operational skills and methods and to develop new standards, which enables it to adapt its policies, guidelines and operations to the changing environment for humanitarian endeavour in the various fields of assistance.

5.2.4 Partnerships

Where this sets no constraints on its independence or neutrality, the ICRC may undertake activities in partnership with one or more other actors, in particular other components of the Movement. This will be done where the ICRC does not have sufficient capacity, where other actors are in a better position to respond to the problems or where this is the preferred course of action. Particular attention will be paid to maintaining and developing the capacity of National Societies working in their own country.

5.2.5 Diversification of activities

Diversification may be considered where the above-mentioned core activities do not meet the needs identified in the most appropriate manner or where there is no possibility of a partnership. Any diversification must be regarded as a new activity and may be considered where:

- the gravity of the problem demands action;
- other actors are unable or unwilling to meet the needs identified;
- the ICRC has access to the necessary specialized knowledge;
- this diversification does not jeopardize the ICRC's core activities;
- these new activities promise to be carried out in an effective and efficient manner.

5.2.6 Other parameters to be considered

Action may also be considered where:

- assistance activities can serve as a launching pad for protection;
- assistance activities facilitate the positioning and promote the acceptability of the ICRC.

Should the ICRC decide to act on the basis of any of these parameters, it must take into account the possible longterm implications of the programme and consider only core activities.

5.2.7 Feasibility of action

The following factors are taken into consideration in order to gauge an operation's chances of success:

- how the operation will be received;
- the national legal framework;
- security conditions;
- human, financial and logistical resources;
- compatibility with the ICRC's management framework.

5.3. Implementation

The ICRC adapts its response to the situation.

In acute crises, the ICRC seeks to maintain a rapid response operational capacity. This will help strengthen its identity as an organization that works in close proximity to the affected groups and is effective in dealing with emergencies, while at the same time taking security constraints into account.

In pre-crisis situations, the ICRC takes action insofar as possible to prevent what could be a disaster in humanitarian terms, either by supporting existing systems or by mobilizing other entities to do so.

In chronic crises, the ICRC focuses on finding sustainable solutions to the problems it encounters. In particular, it explores the possibility of handing over its programmes to the authorities concerned — by strengthening the capacity of their services — or to other organizations. In cases where it has a residual responsibility,[13] the ICRC continues its activities.

In post-crisis situations, the ICRC shoulders its residual responsibilities.

5.3.1 Water and habitat

Water and habitat programmes are designed to ensure access to safe water (for both drinking and household use) and to a safe living environment. The ultimate aim is to help reduce the rates of mortality and morbidity and the suffering caused by the disruption of the water supply system or damage to the habitat. Access to water and housing is problematic both during and after a conflict.

In situations of acute crisis, sources of water are sometimes deliberately targeted. People may be forced to leave their homes to go and look for water in a hostile environment, or water supply systems may have been damaged by fighting, or be inaccessible for other reasons. The ICRC ensures access to water and safe environmental sanitation conditions and helps basic health care facilities by means of emergency action and support for existing facilities.

In emerging crises, chronic crises and post-crisis situations, the ICRC's priority is to support and strengthen existing structures through specific programmes that meet the needs of the population in a viable, sustainable manner.

13 The ICRC has a residual responsibility towards the persons it has assisted during a conflict, particularly those who may be endangered by a cessation of its work or those the ICRC knew would need a long-term commitment when it began its work. See the ICRC policy paper on *ICRC Action in periods of transition* (2003).

5.3.2 Economic security

The main purpose of economic security programmes is to preserve or restore the ability of households affected by armed conflict to meet their essential needs.

In acute crises, when the means of production can no longer ensure subsistence, the ICRC provides the relief (food and essential household items) needed to sustain life and facilitate resumed production, chiefly through the distribution of agricultural equipment and supplies.

In emerging crises, chronic crises and post-crisis situations, the ICRC's priority is to support and bolster the means of production through programmes tailored to the local economy. These programmes mainly concern: reviving agriculture, livestock health and management, and microeconomic initiatives. The ICRC provides other components of the Movement with opportunities to become involved in economic security activities in these situations. It must give special attention to cooperation with National Societies working in their own country.

5.3.3 Health

ICRC activities to promote health are designed to ensure that the affected groups have access to basic preventive and curative care meeting universally recognized standards. To this end, the organization assists local or regional health services, which it sometimes has to replace temporarily.

In emerging or acute crises, when access to medical facilities and the provision of health care are at risk, the ICRC provides support for basic health services, pre-hospital care (first aid and medical evacuation) and emergency hospital care. The basic services are selected from among the components of primary health care:[14] outpatient curative care using essential drugs, mother and child care, vaccination campaigns, and dealing with the consequences of sexual violence. Hospital care focuses on the management of emergencies in the fields of surgery, paediatrics, obstetrics and internal medicine.

In chronic crises and post-crisis situations, the ICRC may consider providing support for a broader range of primary health care activities than those cited above. These may include expanded immunization programmes, the

14 Primary health care is a process in which the community takes part. Carried out in consultation with civil society, it aims to assess health related needs and to implement health activities in the following fields: (1) ambulatory health care using essential drugs; (2) mother and child care, including family planning; (3) expanded immunization programmes; (4) programmes to fight communicable diseases; (5) health and hygiene promotion; (6) health education; (7) mental health; (8) water; and (9) nutrition.

promotion of health and hygiene and expanded hospital care. It may also take steps to strengthen hospital management. More diversified services are thus provided in the fields of surgery, paediatrics, obstetrics and internal medicine.

Whatever the degree of crisis:

- war wounds may lead to amputation or other serious disabilities, which are dealt within the framework of physical rehabilitation programmes;
- the ICRC guarantees access to basic health care, prevents ill-treatment in places of detention and helps fight epidemics. In the longer term, it endeavours to consolidate health care systems in places of detention by strengthening the management ability of the authorities concerned.

6. Operational directives

6.1. Involving the affected group in programme planning and management

Insofar as possible, the affected group must be involved in identifying its own needs and in designing and implementing programmes to meet those needs. The ICRC acts to build the capacity of competent local bodies capable of taking responsibility for assistance activities or playing an active part in the ICRC's work.

6.2. Assessing the situation — integrated needs and background analysis

The assessment of assistance needs must be based on an information network that is as broad as possible and must include a wide range of issues and areas of endeavour. These must encompass not only assistance related areas of activity, but also those relating to protection of the group concerned and security. Various possible scenarios should be taken into account (for example, "what is likely to happen if no assistance is provided"). Staff in charge of assistance should contribute to the delegation's overall analysis of the situation, and they in turn will benefit from it.

6.2.1 Initial assessment of needs: According to the integrated approach, these must be carried out jointly by representatives of the health, water and habitat, and economic security programmes, and representatives of other programmes involved. The priorities of the ICRC and the delegation concerned must always be taken into consideration.

6.2.2 Assessment methods: These must, insofar as possible, be compatible with those of other actors. This compatibility provides a basis for a comparison of data over time and in different places, and considerably facilitates adaptation to changing circumstances and situations.

6.2.3 Assessment partners: Assessments may be carried out jointly with other humanitarian organizations pursuing similar objectives, where this in no way limits the ICRC's independence or affects the nature of the data collected, security conditions or access to the people in need.

6.2.4 Assessment reports: These must contain timely, concise information that facilitates the planning and implementation of appropriate responses to needs. In addition, they must provide information on the delegation's overall action strategy. Information on health, water, sanitation and economic security may be shared with the other humanitarian organizations involved and with the authorities concerned, except for data relating to security and politically sensitive or protected data.

6.3. Planning assistance programmes and projects

In designing assistance programmes and projects, ICRC staff must respect the methods laid down in the ICRC's "Planning for Results" (PFR) process. In the case of programmes or projects that are to last more than 12 months, the duration should be taken into account in the initial planning document while steps are taken to ensure the flexibility needed to respond to any changes in the situation. In such cases, the resources required (human, financial, logistical, etc.) must be planned and explicitly stated for the entire duration of the proposed programmes.

It is vital, in the case of longer-term programmes or projects, for the ICRC to work as closely as possible with local partners and in so doing to emphasize capacity building and sustainability. Long-term programmes or projects should fit in with the policies of the authorities concerned. The ICRC's planning must also take into account the activities of components of the Movement working in coordination with it and those of other international organizations, especially those involved over the long term.

6.4. Implementation

The ICRC must have the skills and logistical capacity needed to carry out its core activities rapidly and effectively. Activities undertaken with government or private entities (for example ministries or community associations) must, wherever possible, be the subject of a formal agreement in writing. The same goes for components of the Movement.

6.5. Entry and exit strategies

Entry and exit strategies must be provided for in the initial plans and, for exit strategies in particular, must be drawn up together with the other actors concerned. This will promote community participation and support for the programme, right from the start, and will make it possible to identify in good time potential partners for the exit process later on. Exit strategies must be transparent and flexible. If it is impossible to adopt a strategy providing for the handover of activities, the ICRC may retain some degree of residual responsibility for the group it is assisting, or may find solutions with one or more components of the Movement who wish to be involved in the medium term, thereby maximizing the potential for complementarity within the Movement.

6.6. Monitoring

From the beginning, a system is put in place for situation monitoring and performance monitoring to ensure the systematic and continuous assessment of progress over time in using selected indicators. This monitoring system will promote timely and appropriate decision making.

6.7. Review and evaluation

Monitoring must be supplemented by reviews and independent evaluations. These are intended to draw lessons that can be used to improve policies and practices, and help enhance the organization's overall performance, transparency and accountability.

7. Conclusion

The present Assistance Policy reflects the need to have a simple, consistent framework that will allow for effective consultation and decision making while at the same time remaining sufficiently flexible to take account of the current and future complexity of the situations in which the ICRC works. The Policy reconciles these two needs by channelling them into a logical and transparent decision making process.

National implementation of international humanitarian law

Biannual update on national legislation and case law
January – June 2004

A. Legislation

Belgium

The Law concerning the Cooperation with the International Criminal Court and International Criminal Tribunals was promulgated on 29 March 2004, published on 1 April 2004[1] and entered into force on the same day. The Law stipulates that the Minister of Justice is the central competent authority for receiving requests for cooperation from the International Criminal Court (the Court) and transmitting to the Court requests for cooperation from Belgian judicial authorities. The Law contains detailed provisions on the removal of a case from the Belgian courts and (temporary) arrest, transfer and transit of persons at the request of the Court. It also provides for other forms of international cooperation such as the identification and interrogation of persons, gathering of evidence, transmission of documents, search for and transfer of persons, and protection of victims and witnesses. The Law also provides for stays of execution and rejections of requests for cooperation in specific cases, and regulates the execution of the decisions of the Court by Belgium. It makes it an offence subject to fining and/or imprisonment to obstruct the administration of justice by the Court. The Law also sets out the procedure for applying for the position of judge at the Court. Concerning cooperation with the International Criminal Tribunals for the former Yugoslavia and Rwanda (the Tribunals), the Law provides that the Minister of Justice is also the central competent authority for receiving requests from the Tribunals. The Law contains provisions on the removal of a case from the Belgian courts, (temporary) arrest and transfer of persons at the request of the Tribunals and execution of the decisions of the Tribunals

by Belgium. It also provides for other forms of international cooperation such as the identification of persons, gathering of evidence, transmission of documents, measures of seizure, and protection of victims and witnesses.

Belize

The 2003 Anti-personnel Mines Act, Act No. 24 of 2003, was assented to on 5 January 2004 and published on 10 January 2004. It implements the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (the 1997 Ottawa Convention). The Act makes it an offence to use, develop or produce an anti-personnel mine in Belize, or to participate in the acquisition of, or possess or participate in the transfer of, an anti-personnel mine or its components in Belize. It also makes it an offence to in any way assist, encourage or induce any person to engage in such activities. The Act permits the transfer of anti-personnel mines for the purpose of destruction, and, subject to the authorization of the Commandant, Belize Defence Force, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques, or for use in any criminal investigation or proceeding in which the anti-personnel mine in question is or may be evidence. The Commandant, Belize Defence Force, is responsible for the search for and destruction of anti-personnel mines and their components. The Act also implements the international fact-finding missions regime established by the Ottawa Convention and provides for privileges and immunities for the members of these missions. Obstruction of any member of a fact-finding mission constitutes an offence. Any person who fails to comply with a notice served by the Commandant, Belize Defence Force, requesting that information be given or records kept for purposes of the Ottawa Convention commits an offence. The Act also stipulates that all information required to be furnished to the Secretary-General of the United Nations under the Ottawa Convention shall be furnished by the minister to whom responsibility for defence is assigned.

Colombia

Law 875 on the Use of the Emblem of the Red Cross or Red Crescent and other emblems protected by the Geneva Conventions of 1949 and the

1 *Moniteur Belge*, No. 113, 174th year, Thursday 1 April 2004.

Additional Protocols of 1977 was promulgated on 2 January 2004,[2] was published[3] and entered into force on the same day. It sets out rules on use of the emblem as a protective device by religious and medical personnel, by units and transports of the police and armed forces under the control of the Ministry of Defence, by civilian medical personnel, units and transports expressly authorized by the Ministry of Health, and by Colombia's National Society and entities belonging to a foreign Red Cross or Red Crescent Society or to other components of the International Red Cross and Red Crescent Movement. It also provides rules on use of the emblem as an indicative device by Colombia's National Society and entities belonging to a foreign Red Cross or Red Crescent Society or to other components of the International Red Cross and Red Crescent Movement. All national authorities (including the Ministries of Defence and Health) and the Colombian Red Cross shall exercise strict control over use of the emblem. The law provides for sanctions for unlawful uses of the emblem. It also refers to the perfidious use of the emblem punished under Art. 143 of the Colombian Penal Code and provides for additional disciplinary sanctions in case of perfidious use of the emblem by public services.

Mauritius

The Biological and Toxin Weapons Convention Act of 2004, Act No. 2 of 2004, was passed by the National Assembly of Mauritius on 13 March 2004 and assented to on 6 April 2004. The Act implements the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC). The Act provides for prohibitions relating to biological and toxin weapons as enshrined in Article I of the BWC. It adds that "no person shall transfer any biological agent or toxin to another person, where he knows or has reasons to believe that the biological agent or toxin is likely to be kept or used otherwise than for prophylactic, protective or other peaceful purposes" (Section 5.2). Any person who contravenes the prohibitions contained in the Act commits an offence and is liable to penal servitude. The Act also stipulates that the intermediate Court has jurisdiction to try an offence

2 Ley 875 del 2 de enero de 2004 por la cual se regula el uso del emblema de la Cruz Roja y de la Media Luna Roja y otros emblemas protegidos por los Convenios de Ginebra del 12 de agosto de 1949 y sus protocoles adicionales.

3 *Diario Oficial* 45.418, 2 January 2004.

under the Act in every case where the act constituting the offence is committed in the Republic of Mauritius or by a citizen of Mauritius, whether the act constituting the offence is committed within or outside the Republic of Mauritius.

The Mutual Assistance in Criminal and Related Matters Act of 2003, Act No. 35 of 2003, was passed by the National Assembly on 19 August 2003 and assented to on 17 September 2003. The Act makes provisions for mutual assistance between the Republic of Mauritius and a foreign State or any international criminal tribunal in relation to serious offences, including those committed before the entry into force of the Act. The Act stipulates that, in respect of a request from a State or an international criminal tribunal, the Republic of Mauritius may grant the request, in whole or in part, "on such terms and conditions as it thinks fit" (Section 5.3). It provides for a number of grounds for the Republic of Mauritius to refuse, in whole or in part, the request from a foreign State. The Act further specifies the forms of mutual assistance, such as the procedure for an evidence-gathering order or a search warrant, a foreign request for a virtual evidence-gathering order, a request for transfer of detained persons to Mauritius, a foreign request for consensual transfer of detained persons from Mauritius, a foreign request for a restraining order or confiscation and a foreign request for the location of the proceeds of crime.

Namibia

The Geneva Conventions Act of 2003, No. 15 of 2003, was promulgated on 28 November 2003, published on 18 December 2003[4] and entered into force on the same day. The Act gives effect to the Geneva Conventions of 1949 and to Protocol I additional to these Conventions. It contains provisions on the punishment of grave breaches of the four Geneva Conventions and Additional Protocol I and establishes universal jurisdiction with regard to these crimes. The Act also provides for the jurisdiction of the High Court of Namibia for the purpose of determining the prisoner-of-war status of persons who have taken part in hostilities, in accordance with Article 45, paragraphs 1 and 2 of Protocol I additional to the Geneva Conventions. The Act sets out the obligation to serve notice of trial of protected prisoners of war and internees on the protecting power or the accused or prisoner's representative, and contains provisions on the legal representation of prisoners of war, on appeal by protected prisoners of

4 *Government Gazette of the Republic of Namibia*, No. 3,109, Government Notice No. 256.

war and internees and on reduction of sentence and custody. Finally, the Act provides for the prevention of misuse of the red cross emblem and other emblems, signs, signals, identity cards, insignia and uniforms as prescribed for the purpose of giving effect to Additional Protocol I of 1977.

Niger

Law No. 2003-025 of 13 June 2003 modifying Law No. 61-27 of 15 July 1961 introducing the Penal Code, and Law No. 2003-026 of 13 June 2003 modifying Law No. 61-33 of 14 August 1961 introducing the Code of Penal Procedure, came into force and were published in the official gazette of the Republic of Niger on 7 April 2004.

Law No. 2003-025 introduces, among other things, into Part III of Book II of the Penal Code, a preliminary chapter entitled "Crimes against humanity and war crimes" comprising four sections: genocide, crimes against humanity, war crimes and common principles. The first three sections give definitions of the crimes in question. The definition of war crimes refers to the Geneva Conventions and their two Additional Protocols. Article 208.7 of the fourth section also states that immunity resulting from a person's official status does not apply to the provisions of this chapter. Article 208.8 bans statutory limitations on public action and on sentences related to the crimes covered by the chapter. It also gives national courts jurisdiction to hear cases filed under the chapter, regardless of where the crime was committed.

Law No. 2003-026 introduces, among other things, the following modifications to the Code of Penal Procedure: separation of civil action from public action, right to counsel for anyone brought before the Attorney General (*Procureur de la République*) and for anyone after the first 24 hours of detention, and separation of minors from adults in places of detention. It also introduces changes regarding official designations (names of courts, legal officers) and maximum periods of detention. Section VII discusses the grounds for and terms of provisional detention. It also provides for compensation for persons held in provisional detention during a procedure that ends in their acquittal.

Paraguay

Law No. 2.365 prohibiting the misuse of the name, distinctive signs and emblems of the Red Cross[5] was promulgated on 23 April 2004, published

5 Ley no 2.365 que modifica la Ley no 993 del 6 de agosto de 1928, "Que prohibe el uso del nombre, signos distintivos y emblemas de la cruz roja".

on 29 April 2004[6] and entered into force on 9 May 2004. It sets out rules on the use of the emblem as a protective device by medical personnel, units and vehicles in times of armed conflict, and by armed forces medical personnel, units and vehicles, by civilian or military religious personnel, and, with the authorization of the Ministry of National Defence, by Paraguayan Red Cross medical personnel, units and vehicles, and by civilian medical personnel and hospitals and other civilian medical units or vehicles. The Law also sets out rules on the use of the emblem as an indicative device by the Paraguayan Red Cross and foreign Red Cross and Red Crescent Societies. The use of the emblem by the ICRC and the International Federation of Red Cross and Red Crescent Societies is also provided for. The Ministry of National Defence exercises control over the use of the emblem. Persons guilty of misuse, and in particular of perfidious use, of the emblem are considered to have committed a war crime and shall be liable to a fine in peacetime and to imprisonment in wartime.

Seychelles

The Anti-Personnel Mines (Prohibition) Act was passed by the National Assembly on 30 March 2004, received presidential assent and came into force on 8 April 2004, and was published in the official gazette on 12 April 2004. The Act gives effect to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction. It defines anti-personnel mines as those "designed to be exploded by the presence, proximity or contact of a person." Mines that are designed to explode on contact with or at the approach of a vehicle and that are equipped with an anti-handling device are excluded from the Act's scope of application. The Act makes it an offence subject to imprisonment for a term of five years to use, develop, produce or otherwise acquire, stockpile, retain or transfer anti-personnel mines in the Seychelles. It also makes it an offence to in any way aid and abet, encourage or induce another person to engage in such activities. The same punishment applies to such acts committed outside the country by a Seychelles national. Subject to authorization by the Minister of Defence, the Act nevertheless permits designated persons to transfer anti-personnel mines for the purpose of destroying them and to retain or transfer such mines for the purpose of developing or training others in mine-detection, mine-clearance or mine-destruction techniques. The Act

6 *Gaceta Oficial de la Republica del Paraguay*, no 34, 29 de abril de 2004.

also implements the international fact-finding mission regime established by the Ottawa Convention and provides for five years' imprisonment for the wilful obstruction of its activities.

Uzbekistan

The Law on use and protection of the red crescent and red cross emblems (No. 615-II) was promulgated on 29 April 2004, published on 22 May 2004[7] and entered into force on the same day. It sets out rules on the use of the emblem as a protective device by army medical personnel, units and vehicles, by civilian medical units, personnel and vehicles and, with the consent of the Ministry of Defence of the Republic of Uzbekistan, by medical units, personnel and vehicles of the Red Crescent Society of Uzbekistan made available to army medical units in wartime, and, with the consent of the Ministry of Defence of Uzbekistan and under the control of the Red Crescent Society of Uzbekistan, of foreign Red Cross and Red Crescent Societies made available to army medical units. It also sets out rules on the use of the emblem as an indicative device by the Red Crescent Society of Uzbekistan and by civilian medical units with the consent of the Red Crescent Society of Uzbekistan, and by foreign Red Cross and Red Crescent Societies under the control of the Red Crescent Society of Uzbekistan. It provides for the use of the emblems by the ICRC and by the International Federation of Red Cross and Red Crescent Societies. The Law states that the emblems shall be protected by the State. Persons guilty of misuse, and in particular of perfidious use, of the emblems in times of armed conflict shall be liable to punishment.

Zambia

The Prohibition of Anti-personnel Mines Act No. 16 of 2003 was assented to on 11 December 2003. The Act implements the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (the 1997 Ottawa Convention). It broadly defines anti-personnel mines as encompassing any other mine or device which performs in a manner consistent with an anti-personnel mine as defined in the Ottawa Convention. The Act makes it an offence subject to fining and/or imprisonment to use, develop, produce, otherwise acquire,

7 *People's Word*, published by the Cabinet of Ministers.

transfer, deal in, import or export an anti-personnel mine, or to possess, procure, manufacture, stockpile, transfer, deal in, import or export a component part or plans or designs for the purpose of manufacturing an anti-personnel mine or a component part. It also makes it an offence to in any way assist, encourage or induce any person to engage in such activities. The Act provides for the surrender of anti-personnel mines and their forfeiture to the State. It allows the retention of the minimum number of anti-personnel mines absolutely necessary for the development of and training in mine detection, mine de activation, mine clearance or mine destruction techniques. The Act applies to all Zambian citizens, all foreign persons living in Zambia, all foreign firms and companies operating in Zambia, all corporate bodies registered in Zambia and any member of an armed force including any person seconded to the armed forces whether or not the person is a Zambian. The Act also implements the international fact-finding missions regime established by the Ottawa Convention and provides for privileges and immunities for the members of these missions. Obstruction of any member of a fact-finding mission constitutes an offence. The Act also contains a provision on international cooperation rendered or received by Zambia under Article 6 of the Ottawa Convention. It establishes the Zambian Anti-personnel Mine Action Centre, which shall be responsible for all mine-clearance programmes under the control and supervision of the Minister for Foreign Affairs, and the Anti-personnel Committee, whose functions are to formulate and review anti-personnel mine policy, to review activities relating to anti-personnel mines, to establish an Anti-personnel Mines Trust Fund and to implement the Ottawa Convention.

B. National Committees on International Humanitarian Law

Greece

The Greek Committee for the Implementation and Dissemination of International Humanitarian Law was set up by Ministerial Decree No. 2/53482/2002 issued on 24 December 2003 and published on 16 January 2004. The Decree came into force on the date of its official publication. The Committee is a permanent body of the Ministry of Foreign Affairs. It is made up of representatives from the Ministry of Foreign Affairs and the Ministries of National Defence; Internal Affairs, Public Administration and Decentralization; Public Order; Education and Religious Affairs; Justice; Health and Social Solidarity; and Culture; the General Secretariat of the New Generation and the Directorate of Political and Emergency Planning.

The Committee also includes two members of the teaching or research staff of a Greek institution of higher education who are specialized in international humanitarian law (IHL), a representative of the Hellenic Red Cross and a person providing scientific support. The Committee's purpose is to promote the implementation and dissemination of IHL. Its activities include advising the Ministry of Foreign Affairs on the implementation of IHL by the administration and various agencies; putting forward initiatives and proposals designed to encourage civil society to take action in the field of IHL; and making recommendations and proposals concerning relevant legislation, the ratification of international treaties and the dissemination of IHL to the media, NGOs, social partners and various agencies. The Committee prepares progress and activity reports and maintains contacts with universities, research centres and international bodies, including the International Committee of the Red Cross, and with similar authorities and agencies in other countries. The Committee may set up working groups on particular issues and invite other agencies or senior civil servants to take part in its work on an ad hoc basis. The chairman, his deputy and the expert providing scientific support are appointed for renewable three-year terms.

Poland

The Polish Commission for International Humanitarian Law Affairs was established by Prime Minister's Regulation No. 51 of 20 May 2004, published on 27 May 2004[8] and entered into force on the same day. The Commission is a consultative and advisory body for the prime minister. It is composed of the chairman, an undersecretary in the Ministry of Foreign Affairs, the deputy-chairman, a representative of the head of the Prime Minister's Office, representatives of the ministers in charge of home affairs, public administration, foreign affairs, public finances, culture and protection of national heritage, science, public health, higher education, national defence and justice, and a secretary appointed by the chairman. Other persons invited by the chairman may also take part in the work of the Commission. The Commission is allowed to employ experts. The Commission's mandate is to promote the standards of international humanitarian law and introduce them into the Polish system. Among the tasks of the Commission are: analysing international agreements on international

8 *Monitor Polski* (Official Gazette), 27 May 2004.

humanitarian law and putting forward proposals of legislation to implement them, presenting to the prime minister views on legislative and educational activities in the field of international humanitarian law, analysing legislation being prepared, government programmes and other documents, and preparing projects for educational programmes in the field of international humanitarian law. The Commission also has the task of maintaining ties with other committees in Poland and abroad concerned with international humanitarian law, and of formulating Poland's position at international conferences based on proposals of the minister in charge.

Syrian Arab Republic (the)

The National Committee on International Humanitarian Law in the Syrian Arab Republic was established by Decree No. 2,989 of 2 June 2004, which entered into force on 3 June 2004. It is chaired by the State Minister for Red Crescent Affairs and the Law of the Sea and otherwise composed of representatives of the Ministries of Foreign Affairs, Defence, Interior and Justice, a professor of public international law (from the Ministry of Higher Education), the president of the Syrian Arab Red Crescent and a representative of the Syrian civil defence. The mandate of the National Committee is to coordinate national action to disseminate international humanitarian law, adopt national legislation, examine violations, improve knowledge of international humanitarian law and patronize the Syrian Arab Red Crescent and the general directorate for civil defence and international cooperation.

C. Case Law

Israel

On 30 June 2004, the Israeli High Court handed down its decision on a petition brought by several Palestinian villages concerning the legality of orders issued by the Israel Defense Forces (IDF) commander regarding the route of several contested sub-sections of the West Bank barrier. The petitioners contended that the barrier's proposed path would seriously disturb life in their villages. The Court considered two distinct questions: the legal authority of the IDF commander to build a barrier in the West Bank and the proportionality of the barrier's impact on the security situation in view of the harm it would cause the local population.

The Court ruled that, contrary to the petitioners' arguments, the construction of the barrier was motivated not by political but by security

considerations, which, in the Court's opinion, justified taking possession of land in the West Bank. At the same time, the Court held that, along with the authority to build the barrier, the IDF commander had a legal duty to strike a proper balance between security needs and humanitarian concerns. This duty was based, according to the Court, on provisions of Israeli administrative law and public international law. While the Court upheld the IDF commander's position regarding the security grounds for the barrier, it nevertheless ruled that he had not acted proportionately. It found that although the commander had taken account of the grave security issues at stake, he had failed to give due consideration to the barrier's infringement on the rights of the area's 35,000 inhabitants.

Both the petitioners and the Council for Peace and Security had proposed alternative routes for the barrier. The respondent claimed that those routes would seriously jeopardize national security. The Court found that a certain degree of risk had to be endured if due account were to be taken of humanitarian considerations and that, while the barrier's impact on the local population could not be totally avoided, the IDF commander should take measures to limit that impact by altering the path of the barrier in most of the areas referred to in the petition. The petition was denied with regard to one order concerning the western part of the path. Another order, concerning the village of Har Adar, was returned to the respondents for further consideration.

Nepal

On 9 January 2004, after a petition was filed by a national human rights organization, the Supreme Court of Nepal issued a directive ordering the government to conduct necessary studies and enact laws implementing the 1949 Geneva Conventions. The petitioners argued that, although Nepal had ratified the Geneva Conventions in 1964, no specific national legislation had been adopted to implement them. According to the petitioners, this constituted an infringement on the rights of the Nepalese people, who were caught up in a civil war, and a violation of the National Treaty Act, which provides for the adoption of legislation to implement treaties. The government and the National Assembly replied that the Human Rights Commission Act had been adopted with the Geneva Conventions in mind, and that, in any case, those Conventions were applicable only in time of war, which did not correspond to the situation in Nepal. The Supreme Court nevertheless decided that, even if the Human Rights Commission Act

implemented some of the provisions of the Geneva Conventions, further laws to address all aspects of those Conventions had to be adopted.

United States

On 28 June 2004 the US Supreme Court issued three decisions regarding the rights of US citizens and aliens detained on US territory or at the Guantanamo Bay naval base in Cuba, all of them as "enemy combatants."

The first case concerns a US citizen, José Padilla, who was brought to New York and held in federal custody after being arrested on US soil for allegedly having plotted with al-Qaeda. The US president subsequently issued an order to the US secretary of defence designating Mr. Padilla as an "enemy combatant" and directing that he be held in military custody. Padilla was later moved to a Navy brig in South Carolina. Counsel for the detainee filed a *habeas corpus* petition in the US District Court for the Southern District of New York (Southern District), which alleged that Mr. Padilla's military detention violated the Constitution and named as respondents the president, the secretary of defence and the commander of the place of detention. The Court of Appeals for the Second Circuit agreed with the District Court on the designation of the secretary of defence as a proper respondent to the *habeas corpus* petition, owing to his "personal involvement" in the case, and on the extension of the District Court's jurisdiction over the secretary under New York's long-arm statute, notwithstanding his absence from the Southern District. At the same time, unlike the District Court, the Court of Appeals held that the President lacked the authority to detain Padilla in military custody. The Supreme Court dismissed the case, saying that the commander in charge of the place of detention was the only proper respondent to the petition, because the custodian was the sole person with the ability to effectively bring the prisoner before the court, and, moreover, that the Southern District lacked jurisdiction over the case because the petition should have been filed in the place of confinement, i.e. the District of South Carolina.

The Supreme Court only ruled on jurisdictional matters and did not address the question of whether the president had the authority to hold Mr. Padilla in military custody.

In the second case, Yaser Esam Hamdi, an American citizen captured in Afghanistan, detained at an American naval base in South Carolina and designated by the government as an "enemy combatant" for having allegedly fought with the Taliban during the conflict, filed a *habeas corpus* petition

alleging that the government was holding him in violation of the Constitution. The petition also claimed that the detainee had gone to Afghanistan for other purposes than to fight with the Taliban and did not therefore qualify for "enemy combatant" status. A declaration to the contrary was made by an official from the Department of Defence. The District Court, however, asked for additional evidence from the government to support the petitioner's detention. The US Court of Appeals for the Fourth Circuit reversed the District Court's request and dismissed the *habeas corpus* petition, holding that the undisputed fact that the petitioner was captured in an active combat zone was sufficient cause for detention and that, if express congressional authorization were required to detain an American citizen, the provisions of the Congress' Authorization for Use of Military Force Resolution should serve that purpose. The Supreme Court handed down a divided opinion. Four justices upheld the "enemy combatant" status, deeming the detention to be legal, and the four other justices ruled that the detention was unauthorized and therefore illegal. However, all the justices recognized the petitioner's right to a meaningful opportunity to contest his detention.

The third case, *Rasul at al.*, concerns a number of detainees held at Guantanamo Bay. The petitioners, two Australians and 12 Kuwaitis captured in Afghanistan during the hostilities, filed suits challenging the legality of their detention and alleging that they had never fought against the US, that they had never been charged with wrongdoing and that access to judicial guaranties had been denied them. The District Court construed the suits as *habeas corpus* petitions and dismissed them for want of jurisdiction, holding that aliens detained outside the US may not invoke *habeas corpus* relief. The US Court of Appeals for the District of Columbia Circuit confirmed this opinion. The Supreme Court, however, held that US courts had jurisdiction to consider challenges to the legality of the detention of the petitioners as their reach extended to aliens held in territories over which the US exercised plenary and exclusive jurisdiction (such as Guantanamo Bay Naval Base).

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