THE PROTECTION OF THE CIVILIAN POPULATION AND THE PROHIBITION OF STARVATION AS A METHOD OF CONFLICT. DRAFT TEXTS RELATING TO INTERNATIONAL HUMANITARIAN ASSISTANCE.

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Introduction

The aim of this paper is to review the legal foundations of global humanitarian policy for dealing with famine, with special attention to armed conflict situations and their aftermath.

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

In early 1991, the Geneva Conventions of 1949 were binding on some 164 states, more states than are members of the United Nations. Obstacles persist in extending the number of states parties to the most recent instruments of humanitarian law. In the period mentioned, there were 100 states parties to Additional Protocol I, and 90 states parties to Additional Protocol II. Several of the major powers, as well as numerous other states, have not yet ratified or acceded to the Protocols. Thus, the objective or the task of gaining universal acceptance of the Additional Protocols of 1977, with their more recent and more developed provisions, still remains open. From the legal point of view, the states which are not parties to the Protocols retain greater freedom to accept or decline the applicability of many of the provisions that were set out for the first time in those instruments.

The international humanitarian law of armed conflict derives not only from treaty law but also in part from customary law. Customary law that is relevant in conflict emerges from the actual conduct of belligerents and from other sources, such as military manuals and instructions for the armed forces which are prepared in peacetime. Treaty law and customary international law complement and can reinforce each other. However, the subject of customary law, in the humanitarian field as in other fields, is also beset with certain difficulties and controversy. In particular, it is not always easy to demonstrate that a rule of customary international law exists at all; and even if there is agreement that a rule does exist, there may not be the same consensus as to its exact contents. Therefore, the remarks below concentrate

on the law as it stands in the Geneva Conventions and in their Additional Protocols.

Ratifications and accessions alone do not provide a guarantee that humanitarian principles are upheld or that people in need are always cared for. Implementation of the law is also important, but further consideration of this subject is excluded from the scope of the present inquiry. Nevertheless, because the humanitarian law of armed conflict has been so widely accepted, it seems particularly appropriate to review the contents of the law, having regard to the objective of attaining better standards of protection through the formulation of an improved international humanitarian policy.

Protection of the civilian population

In armed conflict situations every belligerent seeks to win, and military force is applied for this purpose. The law, however, seeks to introduce humanitarian considerations and it may do this best wherever military requirements can give way. As is often said, the law of armed conflict must achieve a compromise between military requirements and humanitarian considerations. If this is true, and if it is sought to extend and enlarge the legal humanitarian sphere, then new areas have to be found where military requirements can give way without a military advantage being lost. Against the background of ever-changing circumstances, accompanied by shifting nuances of advantage and disadvantage, it may still be possible to find such areas. In fact, such a process underlies the development of humanitarian law from its early days, in the

19th century, dealing first of all with the care of the wounded and sick members of armed forces, going on to cover protection of and care for prisoners of war, and then expanding further and attempting to give increasing attention to protection of and assistance for civilians and the civilian population.

Standing behind these developments is the basic principle that belligerents cannot legally adopt every possible means to injure and defeat the enemy. Without this principle, there could hardly be any laws of war at all. Its most recent formulation is found in Additional Protocol I, where such weapons and means of warfare are prohibited which are "of a nature to cause superfluous injury or unnecessary suffering" (AP I, Art. 35(2)). The expressions superfluous injury or unnecessary suffering are not defined, but it is usually considered that they mean injury or suffering which is disproportionate in relation to the military advantage which may be gained.

Turning more closely to the situation of the civilian population, the starting point from the legal perspective is the established distinction between combatants, on the one hand, and those not taking part in hostilities, including civilians, on the other. By the early 20th century this distinction, or principle, had become a legal prohibition: that civilians should not be the direct object of military attacks. Among the first specific examples in law, attacks on undefended localities were prohibited (Hague Regulations, Art. 25). It need hardly be added, however, that the distinction has often been disregarded or abused in practice.

Although the principle of the distinction between civilians and combatants was and still is the foundation of an important part of the laws of armed conflict, this principle was for a long time unwritten or uncodified. It was not until Geneva Convention IV of 1949 was adopted after World War II that an instrument containing relatively modest provisions for the protection of the civilian population was introduced. Even then, the principle of distinction between civilians and combatants was not explicitly formulated. However, the principle was codified in Art. 48 of Additional Protocol I of 1977, which lays down the basic rule as follows: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

Additional Protocol I thus represented the greatest positive step in this area of law. However, even such a legal provision as that just quoted cannot guarantee protection to the civilian population. One problem is that in modern warfare virtually the whole of enemy territory and virtually all parts of the economic infrastructure have come to be regarded as a legitimate military target. Massive aerial bombardments can take place far inside a country and far removed from the attacking ground forces. This is a recognized means of long-range warfare by which, as witnessed in the recent bombardments during the Gulf conflict, the opposing forces may be weakened or even defeated without the greater hazards of occupation by land. As a consequence, however, the distinction between military

and non-military objectives becomes blurred and obscured.

Confronted with this type of practice, it may seem unrealistic to suppose that modern war can ever be waged exclusively between combatants, thereby sparing injury to the civilian population. Furthermore, while attacking legitimate military targets, the inflicting of a certain degree of incidental damage on the civilian population is not in breach of the law, unless it is excessive in relation to the "concrete and direct military advantage anticipated"; this rule was included in Additional Protocol I (AP I, Art. 57(2)(a)(iii)). However, indiscriminate attacks are clearly prohibited (AP I, Art. 51 (4)).

While the recent conflict has demonstrated that weapons of ever greater accuracy can be developed, it has proved illusory to suppose that as a result the civilian population will be spared. The question still remains: against which targets the existing weapons will be used; and the related aspect of incidental damage to the civilian population and civilian objects also still remains.

The need to control indiscriminate methods of warfare was a difficult question for the Diplomatic Conference which adopted the Additional Protocols. Because military objectives can be almost any type of object under given circumstances, and they are defined widely in Additional Protocol I itself (AP I, Art. 52(2)), this concept was balanced there by defining more closely the notions of civilians (AP I, Art. 50(1)), civilian population (AP I, Art. 50(2)) and civilian objects (AP I, Art. 52(1)).

As to the definition of civilians, they are persons who

are not members of armed forces (AP I, Art. 50). Under Additional Protocol I, in cases of doubt a person shall be considered to be a civilian. As to civilian objects, in Additional Protocol I they are defined as "all objects which are not military objectives..." (AP I, Art. 52(1)). For the first time in treaty law, both attacks and reprisals against civilian objects were explicitly prohibited by Additional Protocol I. In case of doubt, the presumption is in favour of civilian objects (AP I, Art. 52(3)). The real problem, however, is that the definition of military objectives is not strict or comprehensive. Instead, so far as objects are concerned, the definition leaves considerable freedom of interpretation, and is couched in terms of "military advantage" to be gained (AP I, Art. 52(2)).

These provisions, relating to what is military and what is civilian, thus operate in combination. Despite the inadequacies which have been noted, however, it is the general opinion that the provisions are a very considerable advance over the rudimentary terms that were included in Geneva Convention IV of 1949.

The prohibition of starvation

It has been indicated that the borderline between military objectives and civilian objects is somewhat flexible under the law as it currently stands. This fact, however, seems to reflect military reality. Objects which, under normal circumstances, are purely civilian objects, even including crops and agricultural land, may legally become military objectives if a party to a conflict uses

them for military purposes.

Although it would seem that general and absolute protection is difficult or impossible to attain, certain civilian objects are accorded special protection by the law, especially by the Additional Protocols. In particular, the important Art. 54 of Additional Protocol I protects objects regarded as indispensable to the survival of the civilian population.

The basic principle is set out in Art. 54(1) as follows: "Starvation of civilians as a method of warfare is prohibited." This specific prohibition is short, explicit and absolute. A corresponding provision is found in Additional Protocol II with respect to non-international conflicts (AP II, Art. 14). In accordance with these provisions, the starvation of military personnel remains a legitimate method of conflict.

The remainder of Art. 54 of Additional Protocol I develops the basic principle by describing and prohibiting the most usual forms of attack that can lead to starvation of civilians. Art. 54(2), to quote it in full, provides as follows: "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."

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

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

With regard to non-international conflicts, it is

important to note that the basic prohibition of starvation of civilians "as a method of combat" was also included in Additional Protocol II (AP II, Art. 14). Nevertheless, several of the supplementary rules found in Additional Protocol I were not included in the shorter instrument. While the provisions contained in Additional Protocol II are in essence comparable to those quoted above, and include also protection of objects indispensable to the survival of the civilian population, they are certainly much simplified as a whole. It may be mentioned, however, that the ICRC Commentary on the Additional Protocols rightly describes the relevant provisions in Additional Protocol II as a specific application of the general obligation of the parties to the Geneva Conventions of 1949 to guarantee humane treatment in all circumstances to persons taking no active part in hostilities (GC, Common Art. 3). The basic underlying rules that were expressed in the older conventions still retain their applicability, notwithstanding the problems of specifying the obligations in greater detail in the more recent law.

The ICRC Commentary also points out in a brief remark that Additional Protocol I did not change the law of naval blockade (AP I, Art. 49(3)). The question of blockade is a controversial matter and its legal aspects will not be examined here. Nevertheless, the question cannot be ignored either, because international law does permit the imposition of a blockade on an enemy port or coastline. There are various aspects involved. A blockade can be a collective measure or a sanction employed in a confrontation between states of unequal strength. It is admissible under Art. 42 of the United Nations Charter. It may be an aspect of economic warfare. In armed conflict a

blockade amounts to a form of siege, intended to interrupt transportation and facilitate the defeat or conquest of the enemy by cutting off supplies. In whatever form it appears, a blockade usually has consequences which are not restricted to military objectives but also take effect against the civilian population. In fact, civilians are often the principal victims of such a measure, since they may have the lowest priority in the distribution of food supplies. In practice, places under blockade or siege are often regarded as a single military objective; thus, despite the prohibition of indiscriminate attacks, civilians can easily become the victims of starvation, even when passage is provided for medical consignments or relief (GC IV, Art. 23; AP I, Art. 70; AP II, Art. 18(2)).

Humanitarian assistance

To summarize at this point, on the one hand the important legal prohibitions have been considered: the prohibition of starvation of civilians as a method of conflict, and the prohibition of attacks on civilian objects which are indispensable for the survival of the civilian population. On the other hand, when this line of defence has failed, relief actions are necessary. The provision of humanitarian assistance to the needy, the victims, and the survivors, is also an important means of giving substance to the principle of protection of the civilian population. Albeit belated and often inadequate, assistance is thus the active counterpart of protection. The concepts of protection and assistance are closely related and complementary.

The subject of relief actions under the international humanitarian law of armed conflict should therefore be examined in greater detail. As to terminology, the Geneva Conventions and Additional Protocols mainly employ the expressions "relief" or "relief actions". Nevertheless, wherever these terms are not explicitly required by the context, the expressions "humanitarian assistance" or "humanitarian assistance operations" will be preferred here. Recent conflicts have again shown how much the civilian population can be affected, and how sudden and urgent the needs for assistance can be. Because this is a wide subject, only a very brief review can be undertaken here.

With regard to assistance in favour of the civilian population, the earlier law, Geneva Convention IV of 1949, contained two different approaches. One general article was phrased in terms of allowing the free passage of certain consignments (GC IV, Part II, Art. 23). A group of more specific articles covered relief in occupied territory (GC IV, Part III, Arts. 59-62). The article dealing with consignments was limited and restrictive; and in occupied territory the occupying power was placed under the obligation of ensuring the food and medical supplies of the civilian population (GC IV, Art. 55).

Geneva Convention IV did not provide for a clear obligation to undertake relief actions. The deficiencies of relief actions under the Geneva Conventions were to some extent remedied by Additional Protocol I of 1977 (AP I, Art. 70). But it must be recalled that the Additional Protocols have not been ratified as widely as the Geneva Conventions. Thus for some states the old law still

applies, while for other states the more recent instruments supply the applicable legal rules. Moreover, the Protocols cannot be said to provide all the solutions to contemporary problems of humanitarian assistance. Where the law is weak, or cannot strictly be applied at all, even emphasis that is otherwise rightly placed on better implementation or positive interpretation is unlikely to bring about substantial improvements.

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

With regard to non-international conflicts, Common Art. 3 of the Geneva Conventions provided that an impartial humanitarian body may offer its services to the parties to a conflict. The ICRC is mentioned as an example of such a body. Additional Protocol II of 1977 added that relief actions for the civilian population "shall be undertaken subject to the consent of the High Contracting Party

concerned" (AP II, Art. 18). As is well known, this formula has given rise to controversy and to problems of access in situations where assistance can be most urgently needed. In some cases the applicability of Common Art. 3 or of Protocol II may simply be denied by the party concerned. In other cases, notwithstanding a need for humanitarian assistance, the degree of violence in a given situation may be insufficient to enable the provisions of the international humanitarian law of armed conflict to be invoked.

It should be mentioned that the relevant provisions of the Geneva Conventions and Additional Protocols emphasize the humanitarian and impartial nature of relief actions, and of relief societies. The relief societies or relief agencies encountered in practice in the field are very diverse in character. Their various roles cover a wide spectrum of humanitarian action. As examples, relief actions could involve military services, national civil defence organizations, national Red Cross or Red Crescent Societies, other authorized relief societies, the International Committee of the Red Cross (ICRC), the League of Red Cross and Red Crescent Societies, international governmental organizations such as operational agencies of the United Nations system, as well as national and international non-governmental organizations or voluntary agencies either based in the country concerned or coming from abroad, not to mention the efforts of private persons acting spontaneously.

This list of relief societies and agents of humanitarian assistance serves to illustrate the great variety of contemporary responses, not all of which are taken into

account fully in the Geneva Conventions and Additional Protocols, and not all to an equal extent. In comparison to the period when the existing legal instruments were brought into being in 1949 and even 1977, many more private or non-governmental organizations are involved in humanitarian activity today. Non-governmental organizations work in all types of situations, and as a group their actions form an important or even an essential part of the global humanitarian system. Resources provided by governments are sometimes channelled through such organizations in considerable quantity. In certain situations, governments providing humanitarian assistance may find it more expedient to remain in the background, as "donors", leaving all actions conducted inside an affected region to their operational intermediaries. In some cases such intermediary organizations may not be constituted for exclusively humanitarian purposes, or their operations may not always reflect exclusively humanitarian principles. Competition in humanitarian matters is an additional factor which can exacerbate the problems of assistance in some emergency situations where, almost by definition, difficulties and obstacles to effective action already abound.

In the light of the considerations mentioned above, it becomes clear that the parts of the law of armed conflict which deal with humanitarian assistance for civilians, although an advance over former times, are relatively weak in relation to contemporary circumstances. Moreover, the existing legal provisions relating to relief actions and relief societies, like all of humanitarian law, must be applied in practice and this will always involve interpretation of the law, usually under difficult field

conditions. In particular, the government of the state or the local authority concerned will seek to apply its own interpretation, and it may be a narrow interpretation and a restrictive application of the law that results. If states parties so intend, there is room for them to use the letter of the law to evade compliance with its spirit.

When the civilian population has no other means of survival at its disposal, people may flee en masse to places where they hope to obtain the necessities of life. The destructiveness of war and the weaknesses of the applicable law have combined to contribute to the phenomenon witnessed in recent times of humanitarian agencies setting up relief stations just across the border outside an affected country. A neighbouring state may provide a more favourable and suitable location for relief actions, including hospitals for the wounded and injured, reception for displaced persons, and the distribution of food and medicine. The practice of what has been called external humanitarian assistance is significant because it can provide greater opportunities for the conduct of humanitarian operations, although in some cases it can also contribute to new problems, such as the influx of additional refugees. It seems that the necessity for this type of response is a direct result of the inadequacies in the contemporary legal context for humanitarian action.

The subject of humanitarian assistance can hardly be examined without at least briefly mentioning the aspect of coordination, which is relevant to relief operations in both war and peace. However, from the strictly legal point of view there is not much to be added. There is general agreement that coordination can improve the effectiveness

of humanitarian action, and in practice a variety of approaches are to be found among the agencies and at the different levels involved. Yet defining and achieving the most appropriate coordination mechanisms has not proved easy. In principle, every organization seems to be in favour of coordination, but in practice the problems arise in determining who shall coordinate and who shall be coordinated. So far, the main responses in this area are of a political, institutional or administrative nature rather than of a legal character.

In summary, it can hardly be denied that the factors of giving consent to humanitarian assistance actions, and keeping control over both the operations themselves and the agencies involved, are of central importance in law and in practice. There are many ways in which the authorities can exercise a legal or a factual discretion to apply controls to humanitarian operations, or even to withhold consent. Nevertheless, it does seem that the range of provisions relating to relief actions that is part of international humanitarian law, when viewed as a whole, indicates a clear development. The general trend in the Geneva Conventions and their Additional Protocols is that if at all possible relief agencies should be given access to the areas of need and to the victims of conflict who require assistance. But of course there is a wide gulf between "should" and "must", even though the law in this area may not necessarily seek strict compulsion.

As already indicated, the need for humanitarian action in favour of civilians arises not only during conflict, but also in peacetime. In the immediate aftermath of a conflict, in the period of transition to peace, and in the

phase of reconstruction there are the strongest practical needs to start or to continue humanitarian assistance operations, and also the weakest legal foundations for such actions. The needs, the practice and the law are most at variance in this zone: the needs of the victims are at their greatest; the practice of assistance is at its most difficult in view of the disruption of normal relations; and the law that has been considered above, if it is applicable at all, has the least to offer in terms of concrete measures that could contribute to the central aspects of assistance operations. Often most serious, extending across the boundary between war and peace, are the problems of humanitarian assistance for refugees and displaced persons, especially in cases of massive exodus. Moreover, in various other types of disasters in peacetime, not connected with armed conflict, urgent relief action or humanitarian assistance is also required. The pursuit of these considerations thus leads the discussion to the frontiers of the subject where the existing legal texts are left behind and possible future developments come into view.

Draft texts

It will be appropriate to examine very briefly some of the different proposals and expert studies which have been made in recent years, seeking to develop legal instruments or policy relating to relief actions or humanitarian assistance in general.

One of the first matters raised in this context, and examined within the United Nations, related to the legal

status of special relief units. The questions of status, jurisdiction and legal liability which can arise whenever personnel or units undertake humanitarian assistance activities outside their own country or are made available by international organizations were raised in the United Nations General Assembly in 1965. Proposals which were then made relating to the legal status of relief units covered three situations in which such units might operate: first, as a unit within the UN system; second, as a national unit placed at the disposal of the country in need, with the United Nations as a party to the arrangements; and third, as a national unit operating independently under a bilateral agreement. It was suggested that a long term objective might be to regulate this matter by an international agreement or agreements. The preparation of guidelines for such agreements was given consideration within the United Nations. However, despite general consensus on the need to facilitate relief operations, the differing views of potential donor and recipient states as well as widely varying field conditions seem to have hindered the further development or use of such guideline agreements.

The International Law Association (ILA), a private non-governmental organization composed of legal scholars from all over the world, proposed a model relief agreement relevant to the question of the status of relief units. The ILA started to study legal problems of disaster relief operations in the early 1970s and concentrated on formulating a draft model agreement intended to regulate some of the problematic aspects of international humanitarian action, based on agreements which had actually been used in relief operations. The ILA's model agreement

in its final version was presented in 1980. The proposals emphasized technical matters which can be of importance during a relief operation. Such a relief operation, within the context of the model agreement, was seen exclusively as one which has been requested or accepted by the receiving state.

The next proposal is best referred to as the "Measures to expedite international relief", following the title used by its promoters. In the resolution which established the Office of the United Nations Disaster Relief Co-ordinator (UNDRO) in 1971, the UN General Assembly invited potential recipient governments to consider appropriate legislative or other measures to facilitate the receipt of assistance (UN GA Res. 2816 (XXVI), para. 8(e)). The resolution referred to some issues which could contribute to more effective relief operations, emphasizing the problems of overflight and landing rights, and necessary privileges and immunities for relief units. A study of this matter, started jointly by UNDRO and the League of Red Cross and Red Crescent Societies, concentrated on identifying obstacles to the delivery of emergency relief supplies to consignees within disaster stricken countries. A small step towards overcoming such obstacles was taken when the Customs Co-operation Council adopted an instrument on customs procedures relating to urgent consignments.

In 1977 a final report was produced, containing recommendations which concentrated on facilitating the functioning of relief personnel and the delivery of relief consignments. In the same year, the UN Economic and Social Council, the International Conference of the Red Cross and the UN General Assembly all reaffirmed the measures to

expedite international relief. However, the expected measures granting the necessary facilities and immunities and taking other relevant action did not materialize.

The work was carried forward in a study published in 1982 by the United Nations Institute for Training and Research (UNITAR) entitled "Model Rules for Disaster Relief Operations". The stated purpose of the model rules was "to contribute to closing the lacunae in international humanitarian law regarding assistance to victims of disasters" and "to overcome some of the legal restrictions and bureaucratic impediments which are often major obstacles to the success of a relief operation". A total of 17 model rules for bilateral agreements were formulated. The scope of application of the proposed rules extended to so-called natural and man-made disaster situations. However, no definition of disaster was considered necessary by the authors of the study, because the proposed rules were designed to be brought into effect only on the basis of an agreement between the parties in particular circumstances.

The Office of the United Nations Disaster Relief Co-ordinator continued to consider possible legal measures which could contribute to improving the provision of disaster relief. A report presented to UNDRO in 1983 concentrated on technical impediments to the delivery of relief supplies and included a proposed draft convention for expediting emergency relief. The draft convention was then considered by a group of experts who provided further recommendations with a view to enabling these proposals for expediting the delivery of humanitarian assistance to gain wider acceptance. Again, however, no further developments

took place. Not all organizations involved or potentially involved were in favour of such an approach. A draft convention on assistance was also brought forward at the same period within the Organization of American States, but it likewise met with no success.

Separate efforts were made by the International Atomic Energy Agency (IAEA) to formulate an instrument designed to facilitate emergency assistance in the event of radiation accidents. Guidelines for mutual emergency assistance arrangements were adopted in 1983, and conventions on assistance in the event of a radiological emergency and on early notification of a nuclear accident were introduced in 1986 under the auspices of the IAEA following the Chernobyl nuclear disaster. The relatively rapid response of the IAEA member states in this special case is of interest, and the legal obligations contained in these very specific conventions deserve to be closely scrutinized. However, it remains uncertain to what extent the 1986 convention on assistance in a radiological emergency can offer a model for a general field where humanitarian operations are needed in somewhat different circumstances, and are conducted with regularity by a great variety of organizations and other actors.

It could be added that the promotion of a new international humanitarian order, emphasizing that humanitarian issues remain relatively neglected in international relations, was a more recent proposal brought before the UN General Assembly. The expressed objective of the proposal was to seek a comprehensive approach to humanitarian problems, and to contribute to filling the existing gaps in basic humanitarian instruments and in

mechanisms for humanitarian action. One suggestion in the original proposal relevant to the present subject was to frame a universal declaration of humanitarian principles, which would in turn support the development of humanitarian law beyond the area of armed conflict.

Further proposals and initiatives have also been made, in published works or in other studies with particular objectives. Several such proposals and initiatives have presented this matter for further consideration or even have advocated the adoption of various types of instrument relating to humanitarian assistance. Separate proposals have been made relating to minimum humanitarian standards to be observed, concentrating on a wider range of civil and political rights but without ignoring the aspect of humanitarian assistance actions. This is not the place to discuss these various proposals in further detail. It is also not possible here to mention all the relevant internal resolutions and other existing texts of many of the organizations involved, such as the 1969 Red Cross Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, or the Principles and Rules for Red Cross Disaster Relief. Such existing texts have a close relationship to the present subject.

Conclusions

On the basis of experience with all the various existing texts, and the new proposals and studies, it can be clearly seen that extending the legal foundations for humanitarian assistance in the situations of greatest need constitutes a

difficult task. If this is to be an objective of current humanitarian policy, lessons should be drawn from the results of previous work tending in the same direction.

While it seems reasonable to assert that present international regulation of humanitarian efforts is inadequate and could be improved, the legal responses that should follow are not yet entirely apparent. Despite the various attempts seeking to regulate international humanitarian assistance activities in general, and despite the various existing documents of an internal nature which do regulate the activities of particular organizations, there is still no international normative instrument which deals comprehensively with humanitarian action, which has gained wide acceptance, and which can be applied globally. Such an instrument could take the form of a convention, a declaration, a series of bilateral agreements based on a common pattern, or simply a set of working guidelines subscribed to by the principal actors involved. In this regard, it may even be inappropriate to think only or primarily in terms of global responses, when efforts could perhaps also be concentrated productively on developing successful regional solutions applicable in the regions of greatest need.

Whatever approach may turn out to be the most suitable, the problem of legal measures relating to humanitarian assistance will be likely to arise at several different levels. One important level concerns the technical arrangements to expedite the assistance itself; the concern here is with measures which facilitate the efficient delivery of relief consignments, the movement and functioning of relief personnel, and arrangements in

connection with communications. A further level of legal interest relates to more fundamental aspects, and to the underlying principles of humanitarian assistance; here it seems necessary to consider the framework for initiation and control of operations, and adherence to recognized humanitarian standards during operations. A related and possibly more ambitious objective might involve dealing with a somewhat broader range of humanitarian issues, covering more than the international assistance aspects alone; the results could be reflected in a comprehensive draft charter or universal declaration of general humanitarian principles. Such a charter would also have to clearly approach the questions of a right of and a right to humanitarian assistance.

In summary, it seems that practical measures designed to expedite humanitarian activities are always an important need, but such measures should be supported on suitable foundations and principles. However, the humanitarian field is wide, and humanitarian assistance is required in many different situations. From a global international perspective, the greatest needs for humanitarian assistance occur within the context of poverty and underdevelopment. Assistance for refugees and displaced persons should also be taken into account. Here again, there is usually a close relationship to development issues, and to human rights. Moreover, the need for humanitarian assistance is in many cases only a symptom of other underlying problems, including political and security aspects, which arise both within states and between states. Thus, in view of the wide field, either the scope of any draft text should be carefully defined, which would be a supplementary and difficult task in itself, or the instrument must be

globally conceived and left open to all situations of need. This, likewise, may not be easy to achieve while simultaneously attaining a reasonable degree of practical effectiveness of the provisions adopted.

The problems of initiation, acceptance and control of humanitarian assistance operations must be faced by those who draft any proposed new instrument. The states in a position to provide assistance do not necessarily believe that they are under a legal duty to do so, and the states where assistance is needed do not always agree that they must accept such operations. In addition, legal problems arise when seeking to deal with the special question of humanitarian assistance provided to a de facto régime, or to persons in need in an area of territory temporarily outside effective governmental control. When a particular solution to these problems is adopted, the consequences which will follow must be weighed up in relation to the objectives to be attained in any new instrument. At present there is necessity for consent to receive assistance on the part of a receiving state and willingness to provide it on the part of an assisting state or organization. These two features probably constitute the main prerequisites for humanitarian operations, and the approach taken in regard to these aspects will unmistakably influence the character of any future draft text.

Perhaps there is an advantage that if humanitarian assistance is only provided with the consent of all the parties concerned, no further explicit definition of the scope of a proposed new instrument would seem to be necessary. It is therefore appropriate to consider whether any proposed text should attempt to deal only with what

might be called the main-stream cases, where humanitarian assistance is required and is provided with the full willingness and consent of all concerned. This approach could lead ultimately to a "codification" of the accepted current practices of a largely technical nature. Alternatively, a new text could attempt to include provisions which deal with more controversial matters and with the real problem cases, such as those arising during and on the periphery of internal conflicts, or even with all possible circumstances in which the application of general humanitarian principles would be desirable. This approach would be likely to involve a more far-reaching "progressive development" of the law. In the case of both approaches it would of course be a much more difficult task to attain the objective of the adoption of a new instrument in a binding legal form rather than in a non-binding form.

Several special difficulties and recurring problems inherent in the subject matter also have to be faced. Thus, for example, the question of transit through third countries can hardly be avoided. Detailed regulation of this matter has often seemed best left to more specific agreements concluded between the parties concerned, but this would have the disadvantage of creating a partial or fragmentary regulation of the subject. The same would apply to the aspects of privileges, immunities and facilities, which are also controversial matters sometimes regarded as best left to specific agreements. The old question of coordination of humanitarian assistance is also a recurring problem.

It may also be surprisingly difficult to provide satisfactory definitions of even the most common terms

employed in the humanitarian sphere, including a definition of the concept "humanitarian" itself, which in practice can be stretched beyond recognition. It would appear that the best approach in this regard may be to deliberately avoid the problem of formulating impossibly difficult definitions. No definition can by itself eliminate the political component which is present in so many humanitarian matters.

It can be seen that many attempts and suggestions have been made to improve the law. Is this a positive sign, showing that there is a gradual movement in the direction of further codification or progressive development? Or must the lack of success of these initiatives be regarded as demonstrating that little further progress is possible at the moment? It seems that despite the great needs, the necessary elements of realism have not been found. Quite simply, the much closer alignment of interests which will be required, if genuine progress is to be made, has not yet taken place. If this assessment is correct, perhaps it would be appropriate to try to analyse more clearly how the separate interests of the victims, of the relief agencies and institutions, and of the states and their authorities can be so divergent as to give rise to obstacles to urgently needed humanitarian action in favour of the civilian population in the situations under consideration.

In conclusion, perhaps the important common feature of most of the relevant draft texts which have been produced so far is that they attempt to concentrate on what may be called a humanitarian kernel, set within the whole complex of problems relating more generally to human rights and human dignity in war and peace. The relevant drafts nearly

all deal purely or primarily with the humanitarian assistance aspect. In essence, these proposals suggest that it may at least be possible to try to ensure that assistance is forthcoming, is brought in, and is given to the suffering and needy, on the basis of fundamental humanitarian principles. Despite the evident difficulties in proceding further, perhaps at least this humanitarian minimum position has some chance of being strengthened and developed, complementary to the existing instruments and approaches. Indeed, as a final thought, if humanitarian matters become a subject of greater international concern, this could in turn have positive repercussions in other areas of policy where increased cooperation is also urgently needed.

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INTERNATIONAL HUMANITARIAN ASSISTANCE

Selected instruments, proposals and studies

(since 1975)

1. Annex concerning urgent consignments (Annex F.5 to the International Convention on the simplification and harmonization of Customs procedures, Kyoto, 18 May 1973), approved in Brussels on 18 June 1976.

2. ASEAN Declaration for Mutual Assistance on Natural Disasters, 26 June 1976 (Declaration of the foreign ministers of Indonesia, Malaysia, Philippines, Singapore and Thailand: Association of South-East Asian Nations).

3. Measures to expedite international relief (XXIIIrd. International Conference of the Red Cross, Resolution VI; Office of the United Nations Disaster Relief Co-ordinator, Report of the Secretary-General, United Nations Doc. A/32/64, Annex II, pp. 1-7, 12 May 1977; United Nations Economic and Social Council resolution 2102 (LXIII), 3 August 1977; United Nations General Assembly resolution 32/56, 8 December 1977).

4 Resolution 102 (1978) on powers and responsibilities of local and regional authorities regarding civil protection and mutual aid in the event of disasters occurring in frontier regions, with appendix of two model agreements, Conference of Local and Regional Authorities of Europe, 22 June 1978.

5. Draft model agreement relating to humanitarian relief actions - Projet d'accord-type relatif aux actions de secours humanitaires (International Law Association, Report of the Fifty-Ninth Conference, Belgrade, 17-23 August 1980 (ILA: 1982), pp. 521-527).

6. New international humanitarian order - Jordan: request for the inclusion of an additional item in the agenda of the thirty-sixth session, United Nations Doc. A/36/245, 30 October 1981.

7. Model rules for disaster relief operations (M.El. Baradei et al.. United Nations Institute for Training and Research, Policy and Efficacy Studies No. 8 (UNITAR: 1982), UN Sales No. E.82.XV.PE/8).

8. Draft Convention on expediting the delivery of emergency assistance (United Nations General Assembly and Economic and Social Council, Office of the United Nations Disaster Relief Co-ordinator, Report of the Secretary-General, United Nations Doc. A/39/267/Add.2 - E/1984/96/Add.2, pp. 5-18, 18 June 1984).

9. Draft Inter-American Convention to facilitate assistance in cases of disaster (Recommendations and Reports of the Inter-American Juridical Committee, Organization of American States, Official Documents (OAS, Secretariat for Legal Affairs: 1985), Vol. XVI (1984), pp. 34-38).

10. Resolution of the International Academy of Human Rights, 31 August 1986.

11. Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. Vienna. 26 September 1986 (International Atomic Energy Agency, Doc. GC(SPL.I)/RESOLUTIONS (1986)).

12. Resolution on the recognition of the duty to provide humanitarian assistance and the right to this assistance - Résolution sur la reconnaissance du devoir d'assistance humanitaire et du droit à cette assistance, Conference on Humanitarian Law and Morals, Paris, 26-28 January 1987.

13. Humanitarian assistance to victims of natural disasters and similar emergency situations, United Nations General Assembly resolution 45/100, 14 December 1990.