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Humanitarian Action – A Scope for the Responsibility to Protect?

Part I: Humanitarian Assistance Looking for a Legal Regime Allowing its Delivery to Those in Need under any Circumstances

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Although humanitarian action is a common expression, there is little legal theoretical work upon this precise wording. The Geneva law provides for a regime applicable in case of armed conflict, which is commonly construed as encompassing both humanitarian assistance and humanitarian protection. Humanitarian assistance consists of the provision of physical services (medical care, food, shelter, etc.), whereas protection, in its legal meaning, provides immunity due to a prohibition of killing, wounding or offending dignity. Humanitarian action can be considered as covering both. Additionally, it also refers to field activities conceived in favour of the human being.

But humanitarian assistance also occurs outside armed conflicts, and outside international humanitarian law (IHL) provisions, e.g. in front of natural catastrophes. And humanitarian protection, too, has an existence outside the scope of IHL: namely in favour of refugees.

Obviously, both humanitarian assistance – be it granted during an armed conflict or not – and protection – be it granted by IHL or by another body of law – are subject to violations and exposed to a lack of effectiveness. But humanitarian assistance is much more popular than protection; probably, since it is more visible.

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Therefore, the fact that the humanitarian assistance regime is insufficient to guarantee the actual delivery of assistance has come to the forefront sooner and with a more acute intensity. For the sake of providing a sufficient assistance, many improvements have been looked for by humanitarian workers and, then, by the United Nations (UN) on behalf of the International community.

Therefore, this article consists of three parts that will be published in the subsequent issues.

A first paper will show humanitarian assistance looking for a better legal regime. It will end upon an assessment: for the sake of the human being the UN have reached a point where assistance and protection are no longer that distinct, and where protection is not only defined as a legal immunity. This blurring of lines does not appear as an efficient solution. Hence, the international community has gone further with a new concept: the responsibility to protect.

The second paper will show how responsibility to protect was put forward and which scope it has been assigned up to now.

The third paper will try and advocate for an enlargement of the given scope of the responsibility to protect that could become way to ensure an efficient humanitarian action, under its two aspects: assistance and protection.

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Abstract

Humanitarian assistance existed prior to international humanitarian law (IHL). However, the existence of a legal regime of the humanitarian assistance goes back to the very origin of IHL. The Geneva law provides for a regime applicable in the case of armed conflict, which is commonly construed as encompassing both humanitarian assistance and humanitarian protection. Humanitarian assistance consists of the provision of physical services (medical care, food, shelter, etc.), whereas protection, in its legal meaning, provides immunity due to a prohibition of killing, wounding or offending dignity. Humanitarian action, even though no official definition of it has been enshrined in the Conventions, can be considered as covering both, and as referring to field activities conceived in favour of the human being.

But the implementation of humanitarian assistance has quickly proven to be difficult, due to the changes in geopolitics and in warfare. And the doctrine as well as the UN have tried to make the assistance efficient. Along this way, the UN tackled the theme of protection.

A. Humanitarian Assistance and International Humanitarian Law

It is first through assistance that Henry Dunant approached the issue, bringing assistance by himself, and with the help of the countrywomen of Solferino. The Geneva Convention of 1864 introduced the concept of neutrality as to the status of the wounded soldiers, and the same Convention required that States parties prepare for assistance in times of peace by creating, as a matter of prevention, societies to help the wounded, i.e. the National Red Cross – and later on – Red Crescent Societies.

Since 1949, humanitarian assistance is prescribed for each type of victim and in each type of situation regulated by the Geneva Conventions. Assistance is foreseen for the benefit of wounded and ill soldiers in campaign (Geneva Convention I), for wounded, ill and shipwrecked soldiers at sea (Geneva Convention II), for prisoners of war (Geneva Convention III), and for civilians (Geneva Convention IV, and Additional Protocols I and II). The newest provisions reinforce the humanitarian assistance regime. How-

ever, it has become renowned as a service provided to civilians, since over the last few decades, soldiers are far less in need of assistance than civilians.

Arts 23 and 59 of the fourth Geneva Convention outline the regime of humanitarian assistance, as conceived in 1949. It is compulsory for both, a state hosting victims and states whose territory has to be used to reach the victims and to allow the rescuers free passage. Arts 23 and 59 have to be construed in the sense of an obligation, since the sentence is in the future; this is a rule of legal interpretation.[1] However, this consent does have to formally take place, and, thus, bad will can severely impede the delivery of assistance.

In the first Additional Protocol of 1977, an additional obligation binds both, a State hosting victims and states whose territory has to be used to reach the victims and to facilitate the delivery of assistance. Humanitarian rescuers are mentioned in Art. 71:[2] they have to be respected and protected.

Even in non-international armed conflicts, Geneva law foresees the provision of assistance to victims. Thus, common article 3 of the 1949 Convention states that

> "Persons taking no active part in the hostilities, […] shall in all circumstances be treated humanely, […]: "The wounded and sick shall be collected and cared for" and "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."

But, this comprehensive set of provisions is not always sufficient. More and more often, humanitarian workers find themselves in front of reluctant "host" States. This was uncommon with the traditional old style warfare, when States' armies met on a battlefield away from towns and civilians. In such situations the provisions of the Geneva Conventions were sufficient.

[1] See Art. 23, *Geneva Conventions relative to the Treatment of Civilian Persons in Time of War of August 12 1949*, 21 October 1950, 75 U.N.T.S. 287, 302: "Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary."; Art. 59, *Id*., 326: "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal."

[2] Art. 71, *Geneva Conventions, Additional Protocol No. I*, "Personnel participating in relief action".

However, with the increase of non-international armed conflicts, any humanitarian activity takes place - just as the conflict itself - "on the territory of a High Contracting Party". And the given State may consider it inappropriate for foreign humanitarian workers to enter its territory in the name of humanity. That is not to say that every State in the given position refuses humanitarian workers, or that every humanitarian organization attempts to enter without an authorization. This is the result of the type of troubles that have marked the second half of the 20th century: non-international conflicts and widespread violence outside precise conflicts have given less importance to the Geneva Conventions' provisions upon humanitarian assistance.

B. Humanitarian Assistance, a Reality Having its own Life Outside Humanitarian Law

Moreover, assistance is also needed outside conflict situations. One specific type of assistance proved early to be necessary: for travellers and migrants. The Order of Malta was created first to assist Christian pilgrims to Jerusalem and, later on, to protect them.

The 20th century has been one of massive displacements, though it was not the first[3]. After the end of the great migrations of the first millennium A.C., and after the basic structures of international law had been set up, less massive movements occurred. True, one could speak of emigration to colonies. Among the waves of migrants, one can mention persecuted Mayflower pilgrims, Dutch ships of Huguenots emigrating to South Africa, and the soldiers of the United Kingdom that were demobilised after the Waterloo battle put an end to 23 years' turmoil in Europe. Another case is that of economic migrants: Irish people on the brink of starvation at times of the potato crisis that denied them any hope in their country, or the example of Italians and Polish people heading to America at the turn of the century.

In the 20th century, the idea of attributing a specialized status – that of refugee - was first introduced: but refugee law does not primarily provide for assistance. The idea of organising migrations and providing assistance came later on. After World War II, the International Organisation for Migration (IOM) was created for helping transfers and United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) for assisting the displaced Palestinian people. Assisting 10 million people dis-

[3] Cf. the "great invasions" of the late Roman Empire.

placed by the disruption of Pakistan and the mutation of Eastern Pakistan into Bangladesh encouraged the UNHCR – first created for protection - to consider the material situation of displaced persons.

While the idea of creating a status like protection was slowly emerging - something which has not yet come to full status - the need for large-scale assistance had become obvious. After the east Pakistan crisis, Southern Africa, too, had to face large fluxes of population due to the situation created by the political and military confrontation between "White Africa" and the "Frontline States". Massive influxes accepted in Africa as relevant to refugee law,[4] refugee camps hosting Liberation Movements, attacks on the given "sanctuaries" aggravated the situation and made it even more complex. This urged even more the need for an action, firstly through assistance.

Around the same date, the great drought in the Sahelian areas (reaching from Western to Eastern ends of Africa) increased the sensitivity to humanitarian need outside conflict situations. True, one must acknowledge that the disaster was not everywhere purely natural and that, often an international conflict worsened the impact of the drought, e.g. the outstanding example of Mengistu's rule in Ethiopia.

Anyhow, natural disaster is one last area where humanitarian assistance is required. Be they due to earthquakes, hurricanes, landslides, or floods, people are deprived from their houses and belongings, exposed to cold and water, and are found without access to food or pure water. People in need may rely upon humanitarian assistance for their very survival. And, still, IHL is not applicable, since it is the law of armed conflicts.

Thus, the body of law known as "humanitarian law" is only part of the legal regime of humanitarian assistance. Large rescue operations such as the Goma refugee camps (1994 -1996) or the post–tsunami–operations do not fall under the IHL rule. Thus, the relatively demanding IHL rules cannot even be invoked under some circumstances. And, often the local state in its ridigity keeps assistance away for too long.

A new regime was demanded because of, on the one hand, the bad will of States in situations when they were legally bound by IHL, and, on the other hand, the lack of obligations under other circumstances, namely natural disasters.

[4] According to Art. III of the *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45, 48.

One crisis, the Biafra Crisis, played an important role in the creation of medical organisations, with a status even more private than the ICRC. The latter is entitled, by both the Geneva Conventions and the Statute of the Red Cross and Red Crescent Movement, to advocate with States for the respect of IHL. Moreover, the ICRC is entitled to make proposals for an improvement of IHL.

The Biafra crisis (1967 – 1970) indirectly triggered the creation of medical associations deprived from any international mandate, which, in the beginning, were deemed to be able to act more freely and thus more efficiently than the ICRC, which was considered as overloaded with constraints due to "humanitarian diplomacy."

Such was the case of the Biafran crisis. The Ibos, or Ibibos, the inhabitants of the South Eastern region of Nigeria were, at the end of the British colonial era, better educated in English than the Northern Haussas who used to attend coranic schools. As a consequence, the Ibos provided the new State with a good number of civil servants. But the Muslim Haussas did not accept a non Muslim rule. This triggered an anti-Ibos pogrom campaign. The Ibos fled from the Northern States, mainly towards their birthplaces, which they proclaimed independent under the name of Biafra. However, the Nigerian State decided to fight against this struggle for independence. The Nigerian army in its behavious did neither respect the civilians' immunity nor humanitarian activities.

Here took place the personal adventure which made Bernard Kouchner – the present French Minister for Foreign affairs – famous. Back then, Bernard Kouchner, a young physician, enrolled with the French Red Cross and was sent to the ICRC mission to Biafra. Kouchner encountered heavy difficulties on the host State's side (shelled field hospitals, bombed air strips, lack of cooperation from the neighbouring States, namely Cameroon). The ICRC, as mandated, called upon the States to negotiate in view of a full implementation of the Geneva law. The latter under the circumstances – a civil war – was not very demanding.[5] While the ICRC did its best, Ber-

[5] The text of Art 23, *Geneva Conventions No IV*, relating to civilians and providing that the relevant States "[…] shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary" was not applicable, due to the non international character of the situation. And the common article 3, - specific to this kind of situation -, a new provision adopted thanks to ICRC in the wake of the Spanish civil war, reads as follows: "The wounded and sick shall be

nard Kouchner and some other "French Doctors" considered it unbearable not to be able to freely enter and rescue. They invoked Hippocrates' oath which prohibits abstention in front of distress and equated the ICRC traditional discrete attitude with cowardice, if not with treason of the victims.

As a consequence, Kouchner held a press conference upon his return to Paris, denouncing ICRC at least as much as the Government of Nigeria. Then, together with some colleagues he created Médecins sans Frontières (MSF), the Charter of which was adopted in 1975.

The great famine in Ethiopia (1983-1985), made famous by the BBC and Bob Geldof's Band Aid, triggered a growth in private NGOs, which increasingly developed their own approach to humanitarian action. In the meantime, more and more conflicts broke out inside the boundaries of a single State, thus deserving the status of non-international armed conflicts. Some structural aspects of the given conflicts worsened the picture: the big fluxes of "refugees" (deserving or not the given label) fleeing through the closest border and gathering in camps, the use of these camps as "sanctuaries" by armed groups, and – last but not least – interferences of the so-called "superpowers" supporting either the Government or the insurgency.

In the given context, humanitarian assistance encountered a new kind of dysfunction: instrumentalization. The latter was a strong aspect of food aid in the Ethiopian crisis mentioned above, where the authorities controlled distribution and made use of the "hunger weapon" in their fight against opponents, namely Tigrean populations. MSF's withdrawal from Ethiopia, aimed at refusing to give any caution to the system, turned to be one of the mythic episodes of the humanitarian saga. Together with the less mediatised ICRC's withdrawal, they called for new improvements of the system.

C. Looking for a Better Implementation Through a New Legal Approach

The "French Doctors"' – and by the government of France - forwarded concept of "*ingérence*" is too often considered a denial of any legal constraint in humanitarian action. This is not this author's personal analysis. Regardless, some more history is necessary.

The concept of "*ingérence*" goes back to the Afghan-Soviet war (1979-1989) which became a major turning point in the humanitarian assistance status saga. The American support to Afghan groups of warriors com-

collected and cared for." This does not show the existence of any obligation for the affected State. Even if the word "assistance" itself is not written.

bined with the strong NGO presence in the Afghan refugee camps in Pakistan and the freedom of movement of Afghan warriors in the Pakistani tribal areas created a very specific situation. Humanitarian workers were in a position to enter Afghanistan without the pro-Soviet Government of Afghanistan's permission, thanks to the help of warriors who were celebrated by the "free world" as freedom heroes.[6] Some of those humanitarian workers were eventually caught by the Soviet army and charged with espionage.

A situation developed where the Pakistan-based humanitarian workers were able to deploy to Afghanistan through the Tribal zones of the North Western Province, with the approval and sometimes even the help of the armed groups resisting the Soviet army. Conversely, this army, together with the pro-soviet Kabul government, was unable to prevent humanitarian workers from entering the territory. Even though some humanitarian workers were charged of spying by the pro-USSR Kabul government.

Thus, the State's and allies' bad will was by-passed, which created the illusion of a kind of "post-State situation" where the people's right to self determination together with the NGO's will were able to neglect the local State bad will, thus overriding the fundamental inter-State nature of the international society.

This was the origin of the French term "*ingérence humanitaire*". This concept was put forward during a congress held in Paris in January 1987 called the "Premier Congrès de Droit et de Morale Humanitaires." The meeting, which was somehow sponsored by the French government, ended with the Prime Minister committing to propose to the UN General Assembly (UNGA) a resolution including this concept, the text of which was voted on during the congress itself.

What we can name "humanitarian ideology" – human life and humanitarian rescue first – had still to be enshrined in positive international law, which has proven to be less easy than presumed. At a time when human rights where more and more strongly asserted,[7] the attempt to have a State committed to allow access of humanitarian goods to those in need, launched by the UN Office for Disaster Relief, UNDRO, was in vain.[8]

6 Although many rebel groups were USSR-supported, the USA did not always support the governments. Their support to the Nicaraguan Contras is a famous example of this.

7 The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 23 I.L.M. 1027 (1984) and the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S 3.

8 This attempt failed in 1984, when UN Member States had refused to conclude a treaty.

Thus was born the idea of a civil society, which could impose on States its approach to major values, even though the UNGA minimized the significance of the resolution proposed by France[9].

After the fall of the Berlin Wall, humanitarian assistance *per se* became a component of international relations, relatively far from the assistance conceived by Dunant as a duty in a context of conflict. And impeding humanitarian action became to be qualified as "threat to peace" in several international crises.

A first step was made in the Iraqi-Kurdish affair, which happened to be both the climax in the so-called "*ingérence*" approach and the beginning of a new era of the Security Council-drawn humanitarian assistance scheme.

The Kurdish Iraqi minority, which had already suffered greatly from the Saddam Hussein regime, was obviously not on his side during the 1991 Gulf war. The end of this war, though a defeat for Saddam, did not amount to the end of the regime. Therefore, the Kurds feared reprisals. They fled in great number their cities, heading to the Turkish and Iranian borders. In early April 1991, there were more than one million in the mountains, exposed to cold, hunger and exhaustion. This case study is of the highest importance. On the "*ingérence*" side, we can point to an armed intervention, which is even stronger than the illegal cross-border humanitarian activities carried out in Afghanistan. On the other hand, for the first time, an activity aimed at providing humanitarian assistance was in a position to argue it was based in a UN Security Council (UNSC) resolution.

This turning point was marked by the then famous resolution 688,[10] adopted by the UNSC in the face of atrocities committed by Saddam's regime both in the South of Iraq (against the Shia majority) and in the North (against the Kurdish minority). For the first time, the UNSC recognized a "threat to peace", and hence its own jurisdiction, for a situation where a State abused human rights of its own population[11]. However, the UNSC did take advantage of this statement to take precise measures aimed at restoring the internal order. It was up to the main States of the victorious Coalition to take a strong attitude: upon a French request, soon joined by the United

9 GA Res. 43/131, 8 December 1988 and GA Res. 45/100, 14 December 1990. These resolutions do not encompass the word, neither the concept of "*ingérence*". They only call for a better cooperation of local States with humanitarian organisations.

10 SC Res. 688, 5 April 1991.

11 *Id*., para. 1: "Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security".

Kingdom, the USA, and then Spain and the Netherlands, was carried out the *Provide Comfort* operation. Without any Iraqi authorization, some battalions of the given armies went into the Iraqi Kurdish area entering from Turkey. They stayed for some three months, helping the Kurd population to go back to their cities under protection and helping them to build roads for this purpose, which were called the "blue roads". However, if the security of civilians was the objective, the means were not permitted. For sure, the UNSC could have authorized the operation, as it had done for the Gulf war itself[12]; however, it did not go any further than qualifying the situation and calling upon the Iraqi State to cooperate in order to improve the populations' situation. Thus it was an unauthorized interference in Iraq's affairs, although aimed at "providing population with comfort". This was the archetype of the "*ingérence*" concept. For the first time, armed forces were used in favour of the human being, in a way which was not that of the old "*intervention d'humanité*" of the 19th century. It was not, unlike before, in order to fight those who endangered protected persons. In this specific case, the French, British and US troops, each in its area of responsibility, together with Spanish and Dutch troops, were acting more as a kind of police force with added logistical competencies.

D. Looking for a Better Implementation Through the Recourse to Peacekeeping Tools

Even more significant steps towards the internationalization of the humanitarian assistance regime came with two major milestones: the Somalia 1992 -1995 and the Bosnia-Herzegovina 1993 – 1995 affairs.

In Somalia**,** a State where the society was structured by clanic belonging, clashes between clans in a context of severe drought, made the situation unsafe for humanitarian workers who had answered the "Somali call", according to UNSC resolution 794.[13] Being unsafe for humanitarian worker, the situation was as a consequence unsafe for drought-hit and famine starving populations.

In Bosnia-Herzegovina, the claim of Serbian and Croatian populations for independence from the Sarajevian Muslim-led government, to-

[12] The UNSC had resorted to the concept of "self defence" (Art. 51 Charter of the United Nations), in order to authorize "the States cooperating with Kuwait" (SC Res. 778, 2 October 1992) to act in collective self defence.

[13] SC Res. 794, 3 December 1992.

gether with attempts for uniting Bosnian Serbs with Serbia and Bosnian Croats with Croatia resulted in severe activities of ethnic cleansing. ~~At~~ At stake was the issue of which group would rule over which territory. For the sake of creating or (re)creating "pure" areas, a severe ethnic cleansing became part of the sad game. Thus, civilians became direct targets of forced displacement and sometimes even elimination. Humanitarian assistance heading to besieged cities was often blocked by militia-held checkpoints.

The qualification of "threat to peace" given to the above mentioned situations gave way to a wealth of measures the UNSC was entitled to adopt under Chapter VII. For the most part, the UNSC resorted to weaker measures in comparison to Chapter VII ones. Following the track that emerged under Secretary General Dag Hammarkjoeld in 1956 with the Suez affair, the UNSC created two peacekeeping operations - UNOSOM for Somalia and the UNPROFOR II for Bosnia-Herzegovina.[14]

With the Somali and the Bosnian crises, the legal status of humanitarian assistance was thoroughly renewed. Indeed, the bad will - be it, in Somalia, that of clanic groups, or, in Bosnia-Herzegovina, that of more structured militias, if not of the State itself[15] - could be overcome without any reference to the concept of, "*ingérence*", since the balance was no longer between the sovereign host States' will and the humanitarian workers desire to work. The UNSC decision made it a matter of peacekeeping, hence, a matter of UN jurisdiction. The ones who could, under the circumstances, impede humanitarian assistance were threatening the peace. This legal ground being taken for granted, the type of UNSC measures were altered under the pressure of needs.

In Somalia, as well as in Bosnia-Herzegovina, the "Chapter 6.5" peacekeeping scheme has proven to be insufficient. Purely peacekeeping forces had no legal basis for imposing measures in favour of peace. Unlike forces under Art. 42, peacekeeping operations under "Chapter 6.5" have: a weak legal regime: belligerents have to give their consent to the creation of the resolution; they must not have any input in the crisis and must keep an impartial attitude; and, above all, they cannot make use of force outside the case of individual self-defence of their members.

14 UNPROFOR I was due to watch over a cease fire implementation in Croatia but the outbreak of the Bosnian war brought the UNSC to create a peacekeeping force devoted to the protection of humanitarian assistance.

15 The Government of Sarejvo as to Sarajevian Serbs.

This last aspect made it impossible for the given forces – even though made of soldiers and often of well-trained ones[16] - to open roads, which were hindered by belligerents. There was something nonsensical in such a situation and, a large share of the opinion criticised and even mocked UNPROFOR. A strong call came from both western opinion and some belligerents – e.g. the Bosnian government – for a reinforced mandate.

This came in two steps. First, the call for an additional force, external to the peacekeeping operation, like the former *Provide Comfort* mission. In Somalia, it was named *Restore Hope*; and for Bosnia, UNSC resolution 770[17] called upon member States to provide forces. Then came the reinforcement of the peacekeeping forces, which progressively (in Bosnia-Herzegovina), or more suddenly ((in Somalia, coming only after blue helmets had been slaughtered)) obtained the right to shoot. UNSC Resolutions 836[18] adopted in June 1993 as to Bosnia-Herzegovina and UNSC resolution 837[19] also adopted in June 1993 as to Somalia stand at the peak of the peacekeeping forces' mandate.

The entitlement for using force was not the same in both of these cases. In Bosnia- Herzegovina, there was an escalation. First, there was an entitlement for armed escorts shooting not only on behalf of individual self-defence.[20] Then for the same Bosnian theatre was created a new concept: the UN protected safe areas. First, these were granted the "safety areas" label[21] with the idea that their status was impressive enough for protecting them from any attack or use of famine as a weapon.

However, this device suffered from a poor local and strategic analysis. Whereas IHL provides for "hospital and safety zones and localities"[22] and "neutralized zones"[23] without strategic stake (since they receive "wounded,

16 In Bosnia-Herzegovina, almost all of them came from Western Europe, namely France, United Kingdom, Italy, Spain, Germany.

17 SC Res. 770, 13 August 1992: "Calls upon States to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance […]."

18 SC Res. 836, 4 June 1993.

19 SC Res. 837, 6 June 1993.

20 As the peace-keeping force concept allows from its very designing by the United Nations Secretary General Dag Hammarskjoeld and the Canadian Minister of Foreign Affairs, Lester Pearson.

21 SC Res. 819, 16 April 1993; SC Res. 824, 6 May 1993.

22 Art. 14 *Geneva Convention No. IV*.

23 *Id.*, Art. 15.

sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven [...]"[24] and "a) wounded and sick combatants or non-combatants;(b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character [...])"[25], the six selected safety zones (Srebrenica, Sarajevo, Gorazde, Zepa, Bihac, Tuzla) were real stakes for the belligerents. Sarajevo, of course being the capital, had endured a tumultuous history since the 1914 attack on the Archduke Franz-Ferdinand that triggered the outburst of World War I. Such was the case in the Drina Valley cities as well. Zepa, Gorazde, Srebrenica were major stakes due to the historic importance recognized to his valley by the Bosnian Serb population and militia. The Valley still bears the stigma of World War II fights between the "Wehrmacht" on the one side, and on the other side Partisans and royalist resistants led by general Mihailovic. Tuzla and Bihac were Muslim strongholds surrounded by Serb strongholds which reinforced their value as stake in the war. Most of these cities were host to Bosnian Muslims and Muslim State Army, which still reinforced the significance as a stake. Thus, the granting by a UNSC resolution of the status of safe area was not sufficient to guarantee any immunity.[26]

The next step was ordering UNPROFOR to "use all means" in order to defend the safe areas.

In Somalia, the rise in the mandate was even stronger since, after a slaughter committed against 24 Pakistani blue helmets, the troops received the right to "take all necessary measures"[27] in order to seize those responsible for their slaughter and "to establish the effective authority of UNOSOM II throughout Somalia."[28]

E. From Securing Assistance Provision, the Stress has Shifted to Physical Protection

Legally, the UN solution seemed much better than the "*ingérence*", since there was a legal basis: Chapter VII of the UN Charter (UNC)[29]. No "*ingérence*" can be reproached to the UNSC as long as it invokes a threat to peace in terms of Art. 2 para. 7 UNC.

24 *Id.*, Art. 14.
25 *Id.*, Art. 15.
26 SC Res. 959, 19 November 1994; SC Res. 900, 4 March 1994.
27 SC Res. 837, 6 June 1993.
28 *Id.*
29 SC Res. 836, 4 June 1993; SC Res. 837, *supra* note 27.

But practically, the so-called "protected persons" were unsafe. However, in the meantime, human security was coming to the forefront with the United Nations Development Programme (UNDP) preparing its famous report listing its different branches.[30] Even worse, the years 1994 and 1995 saw events at the peak of human insecurity, which could be considered as the bare proof of the lack of guarantees provided by this physical approach to protection.

From April to July 1994, events developed in Rwanda which were to receive the label of genocide[31]: from 500 000 to 800 000 people were killed, most of them on ethnic basis and thanks to ruthless planning. The UN troops in Kigali were not numerous; but it seems that in the very beginning, they could have had a decisive input with a stronger mandate. The death of the Prime Minister, at least, could probably have been avoided.

But in Srebrenica, one of the Drina Valley besieged "safe areas", the mandate set up by UNSC resolution 836 was in vain. As a matter of excuse for the Dutch "blue helmets" who did not want to make the ultimate sacrifice, one must acknowledge firstly their insufficient number, and secondly some failures in the definition of the security zones (e.g. no delimitation) and a very confusing attitude of Bosnian forces (who left the city when the danger was increasing).

As such, in the second half of 1995 the safe areas created for physical humanitarian protection were disqualified and the humanitarian community was deluded. The events, which were to occur at the end 1996 in Eastern Zaïre, were no less dramatic, since they saw after the disqualification of the Security Zones the disqualification of refugee camps. By mid-August 1994, some two million Rwandan people had fled to Eastern Congo faced with this situation. Ethnic Tutsis, who represented the bulk of victims of the spring genocide, were also a group from which emerged the new government. The camps were stigmatized by the new Rwandan Tutsi authorities as being host to genocide perpetrators. They were also subject to attacks by Zairian Tutsis with the help of Rwandan forces, without gaining any help from the international community. The humanitarian world was more than deluded, it was internally torn apart between those calling for punishment of genocide perpetrators and those looking with compassion at the Goma, Bukavu and Uvira refugees, killed, wounded or compelled to flee into the rainforest.

30 United Nations Development Programme: *Human Development Report 1994: New Dimensions of Human Security* (1994).

31 SC Res. 955, 8 November 1994.

Therefore, new ways were needed.

F. Looking for Direct Armed Protection of Populations Together with Assistance

The Kosovo conflict in 1999 was another turning point, marked in turn by a high degree of physical protection. In 1989, after the suppression of the autonomy of the Serbian region named Kosovo, a clandestine parallel administration developed. Albanian Kosovars no longer sent their children to Serbian schools, rarely declared births to Serbian authorities, and no longer went to public hospitals. The EU undertook funding assistance for parallel services. The situation worsened when an armed conflict broke out between the Serbian army and the UCK (Kosovo liberation army). When the crisis was approached through peacekeeping tools, assistance appeared to be only ~~a~~ part of the help needed.

An OSCE-led cease-fire verification mission (KVM) was set up in order to monitor the belligerents' behaviour. Soon, the head of mission warned that massive killings by Serbs were suspected. The North Atlantic Treaty Organization's (NATO) answer was a military operation built upon a UNSC resolution, which, however, provided no direct authorisation, but had only foreseen new developments in case the KVM would assess failures. Whatever the legality of this operation, we are there in front of the NATO's conviction that both, assistance and legal protection to ban killings, were insufficient.

Physical protection through the military was put forward as the primary solution, assistance remaining a side way of alleviating the plight of populations who, during the air strikes, fled to Albania and Macedonia.

G. Looking for a Multi-Track System

1. The armed protection program, shaped in the '90s and illustrated by names such as Provide Comfort, Restore Hope, UNPROFOR, safe areas, but also Srebrenica, Kigali and Goma, did not disappear in the first decade of the 21st century. In Ivory Coast, Sierra Leone, Democratic Republic of Congo, Darfur, and Chad – whenever civilians were at risk – the UN, more and more frequently together with other organisations, created or called for creation of peacekeeping forces, some of them belonged to so-called "integrated missions." These missions undertook a variety of activities from peacekeeping to humanitarian activities such as human rights monitoring

and gender sensitizing over to human rights monitoring and gender sensitizing.

Such missions have often been criticized for the threat they are deemed to create for "humanitarian space". It is not only about protecting humanitarian assistance and humanitarian workers against major threats to life, coming from voluntary targeting. Beyond this huge problem, there is another one. With the deployment of military forces, lines can be blurred between protection and assistance, as well as between providers of both. Because of the voluntary nature of the danger, legal protection through persuasion tends to be replaced by physical scud. And, since the situation is so dangerous, assistance can sometimes only be brought by armed actors. For these actors, providing assistance may also make their military activities seem more acceptable. Some authors which are very hostile to the on-going Afghani affair crisis management have considered the Provincial Reconstruction Teams (PRT) as a fighting activity.

However the efficiency of such operations remains problematic, and has been once again heavily challenged by the Darfur affair, all the more as the "host" State has managed to avoid well-trained peacekeepers. Indeed, Sudan has successfully refused any significant non-African presence.

2. Hence, the search for legal formulae able to reinforce humanitarian assistance goes on, namely around legal formulae, and alongside two different tracks. The first one is that of international obligations; the second is that of the internal legal regime of humanitarian services and staff.

As to international obligations, the Institute for International Law has proposed the concepts of "right to assistance" and "duty to assist" in a comprehensive approach of all types of assistance and all types of distress. This initiative was adopted in a 2003 resolution in Bruges.

According to rule 55 of the ICRC survey on customary law[32] issued in 2005, the given body of law provides that both a State hosting victims and states whose territory has to be used to reach the victims "shall allow" access to humanitarian aid, which more or less corresponds to the provisions in the Conventions and Additional Protocols.

As to the internal regime of humanitarian services and staff, the International Federation of the Red Cross and the Red Crescent has made a huge work which resulted in 2007 in guidelines for internal law relating to humanitarian assistance, providing that visas for staff, customs procedures,

[32] See J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules*, ICRC, Cambridge (especially Rule 55 and 56).

radiofrequencies – which belong to State's jurisdiction – must be devised in order to facilitate assistance. Furthermore, in the wake of the December 26, 2004 Tsunami, some legal improvements have been arranged in the UN legal system concerning humanitarian reform (clusters, pool funds, coordinators, etc.)[33]. However, none of the above-mentioned devices, at any stage of the 150 years long humanitarian saga – and notably over the last 40 years – has brought any guarantee for assistance, nor for protection.

Therefore, there is still room for improvement; and the concept of "Responsibility to Protect" can help.

[33] See www.humanitarianreform.org.

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