



UNIVERSITY OF TRENTO - Italy

School of International Studies

Alice Gadler

**Principles Matter: Humanitarian Assistance to
Civilians under IHL**

Supervisor: Dr. Marco Pertile

Advisor: Prof. Roberto Belloni

October 2013

PhD Programme in International Studies

Abstract

The provision of relief to civilians in armed conflict is a sensitive activity, subject to specific regulation in IHL treaties. Challenges emerged on the ground have questioned the comprehensive nature of this legal framework and generated debate on the concept of humanitarian assistance itself, the role of different kinds of actors (local/external, governmental/nongovernmental, armed/unarmed) in providing it, and the value and meaning of the principles traditionally associated to it—humanity, impartiality, neutrality, independence. This research, examining the evolution of State practice and *opinio juris*, provides a comprehensive analysis of the legal regime applicable to the provision of relief to civilians in armed conflict and the different categories of actors involved in it, identifying answers offered by international law (primarily IHL) to issues emerged in practice.

It is argued that humanitarian assistance is a well-defined and limited concept under IHL. Rules on this issue have been subject to progressive development, e.g. those on the protection of humanitarian workers in non-international armed conflict, but State practice has revealed that sovereignty remains important, and the principles of humanitarian assistance continue to embody the balance acceptable to States between military necessity and humanitarian considerations. No right to access or to provide humanitarian assistance without consent from the Parties concerned has developed, including no right to provide relief in non-international armed conflict in territory controlled by non-State armed groups without State consent. Participation in the provision of humanitarian assistance by local and external actors is not prohibited, but the level of protection they enjoy depends on their position under IHL. Different regimes are applicable to distinct armed actors (belligerents/peacekeepers/external armed forces/private security companies) but in all cases respect for the principle of distinction is central. In general, special protection for relief actions and actors remains connected to respect for the principles of humanitarian assistance. This has been confirmed by belligerents' reactions to the increased engagement of humanitarian organisations in protection, as the second essential component of humanitarian action: belligerents have claimed their entitlement to require respect by humanitarian personnel also for the most contested principle—neutrality, meaning non-interference in hostilities and even abstention from involvement in politics.

Acknowledgements and disclaimer

Writing this dissertation was an intense and challenging experience, to which many people have contributed in different ways.

I would have never succeeded without the feedback and support of my supervisor, Dr. Marco Pertile, who skillfully challenged and stimulated me to fully develop my arguments. I am also thankful to the academic and administrative staff at the School of International Studies, as well as all the colleagues and friends who discussed the topic with me during my stays at the Centre de Droit International of the Université Libre de Bruxelles and at the Lauterpacht Centre for International Law of the University of Cambridge. Finally, my PhD examiners, Prof. Maurizio Arcari and Dr. Yutaka Arai, provided me with insightful comments and engaged with me in a truly rewarding discussion.

My work experience with the Brussels Liaison Office of UN OCHA, with CESVI in Bunia, and with the Division for Multilateral Organisations, Policy and Humanitarian Action (MOPHA) of the ICRC offered me the unique opportunity to participate in the daily reality of the field I was researching and learn from seasoned and competent colleagues. However, the views expressed in this dissertation are my own and are in no way intended to represent the views of any of the organisations with which I am, or have been, associated.

My PhD colleagues, my colleagues in Brussels, Bunia and Geneva, and my friends have been there for me throughout these years, raising my spirits up when I needed it and helping me keep the determination to finish this dissertation. Finally, my family has unfailingly supported me in all my decisions and endeavours, and for this I cannot but be extremely grateful.

Table of Contents

List of Abbreviations.....	11
Introduction: What Boundaries for Humanitarian Assistance?.....	15
Plan of the Research.....	16
1. Humanitarian Assistance to Civilians in Armed Conflict: Roots and Debates Related to It	19
1.1. Roots and Development of the Idea, of the Principles Related to It and of Its International Regulation	19
1.2. Debates around Humanitarian Assistance.....	27
1.2.1. Defining the Concept.....	27
1.2.2. Humanitarianism and the Use of Force	33
1.2.3. The Politicisation of Humanitarian Assistance: New Humanitarianism and the Focus on Protection.....	36
1.3. Some Preliminary Theoretical and Methodological Issues.....	42
1.3.1. International Humanitarian Law and its Interaction with International Human Rights Law.....	43
1.3.2. Principles in International Law	55
1.3.3. Issues Related to the Creation of International Law	62
1.3.3.1. The Legal Force of Inter-Governmental Organisations' Resolutions	63
1.3.3.2. The Value of Military Manuals	64
1.3.3.3. The Role of Non-State Actors	66
1.4. Conclusion	72
2. Humanitarian Assistance in IHL Treaties	73
2.1. Humanitarian Assistance to Civilians in the Geneva Conventions and Additional Protocols	74
2.1.1. Applicability of IHL and Humanitarian Assistance.....	75
2.1.1.1. Applicability Ratione Materiae	75
2.1.1.2. Applicability Ratione Personae	78
2.1.2. The Concept and Its Content: Relief, Aid, Assistance.....	82
2.1.3. The Quality of Being 'Humanitarian'	84
2.1.4. Humanitarian Assistance: The Roles of Local and External Actors.....	85
2.1.4.1. Local Authorities	86
2.1.4.2. Local Relief Societies and External Actors	88
2.1.4.2.1. External Relief Actions	92
2.1.4.2.2. Protection of Relief Personnel	98
2.1.4.3. What Role for Armed Forces?.....	102
2.1.5. What Role for the Principles in the Regulation of Humanitarian Assistance?	108
2.1.5.1. The Principles of Humanitarian Assistance in IHL Treaties	109
2.1.5.1.1. The Principles and the Action	110
2.1.5.1.2. The Principles and the Actor.....	114
2.1.5.2. Humanitarian Protection: Questioning the Principles?.....	118

2.1.5.2.1. The ICRC and Protection in IHL Treaties	119
2.1.5.2.2. Other Actors and Protection Activities under IHL.....	124
2.1.5.3. Principles of Humanitarian Action	128
2.2. Conclusion	129
3. Humanitarian Assistance in Practice.....	131
3.1. Humanitarian Assistance in the Cold War: The Principles and the Centrality of Consent	132
3.1.1. Humanitarian Assistance as Part of the Cold War Strategies and the Emergence of Sans- Frontiérisme	132
3.1.2. The ICJ and the Nicaragua Case	138
3.2. Humanitarian Assistance since the 1990s: Under the Spotlight.....	141
3.2.1. The Practice within the UN Framework	142
3.2.1.1. The Instrument of Thematic Resolutions	143
3.2.1.1.1. The Primary Responsibility of the Parties to the Conflict and the Role of Local Actors	144
3.2.1.1.2. Consent, Humanitarian Access and the Facilitation of Humanitarian Assistance	147
3.2.1.1.3. External Relief and the Principles of Humanitarian Assistance.....	151
3.2.1.1.4. Safety and Security of UN and Humanitarian Personnel	159
3.2.1.1.5. The Military and Humanitarian Assistance.....	163
3.2.1.1.6. Conclusion	164
3.2.1.2. Conflict-Specific Resolutions.....	164
3.2.1.2.1. Humanitarian Access and Facilitation of Humanitarian Assistance	166
3.2.1.2.2. Safety, Security and Freedom of Movement of Humanitarian Workers.....	184
3.2.1.2.3. Obstacles to Humanitarian Assistance and Workers as Violations of IHL.....	191
3.2.1.2.4. Sanctions and Humanitarian Exemptions	195
3.2.1.3. Commissions of Inquiry and Fact-Finding Missions: Starvation, Blockades and Humanitarian Access.....	203
3.2.1.4. Conclusion.....	210
3.2.2. The Practice of States and Other Parties to Armed Conflicts	212
3.2.2.1. The Concept of Humanitarian Assistance	213
3.2.2.2. The Primary Responsibility of the Parties to the Conflict and the Role of Local Actors....	219
3.2.2.3. Consent, Humanitarian Access and the Facilitation of Humanitarian Assistance.....	221
3.2.2.4. External Relief and the Principles of Humanitarian Assistance.....	233
3.2.2.5. Safety and Security of Humanitarian Personnel.....	240
3.2.2.6. The Military and Humanitarian Assistance	241
3.2.2.7. Conclusion.....	242
3.3. Conclusion: Restatement of the IHL Framework and Broader Protection in Non-International Armed Conflict.....	242
4. Humanitarian Assistance and Military Actors	247

4.1. The Armed Forces of Belligerents and Relief Workers	248
4.1.1. Civil-Military Relations in the 1990s	248
4.1.1.1. The Use of Armed Guards and Escorts and the Need for Self-Regulation	253
4.1.2. The 21 st Century: Comprehensive Approaches and Counterinsurgency Strategies.....	258
4.1.2.1. The Experiences in Afghanistan and Iraq: The Principle of Distinction and the Concept of Direct Participation in Hostilities	258
4.1.2.2. Military Doctrine: the U.S.	275
4.1.2.3. Military Doctrine: NATO, UK, Canada, EU	279
4.1.2.4. Civil-Military Guidelines: Consent, the Principle of Distinction, and the Principles of Humanitarian Assistance	283
4.1.3. Conclusion	295
4.2. Peacekeepers and Humanitarian Assistance	296
4.2.1. The Role of UN Peacekeepers and Authorised Forces in Humanitarian Assistance in the 1990s	297
4.2.1.1. Creation of a Safe Environment, Facilitation and Support.....	297
4.2.1.2. Humanitarian Assistance in the UNSG's Efforts at Regulating and Reforming Peacekeeping	300
4.2.2. UN Peacekeeping in the 21 st Century: Protection of Civilians (POC) and Integrated Missions	302
4.2.2.1. The Reform of UN Peacekeeping Missions: Towards Integration.....	302
4.2.2.2. UN Peacekeeping Missions, the Protection of Civilians (POC), and Humanitarian Assistance	308
4.2.2.3. Integration and POC: Challenges and Responses.....	317
4.2.3. Conclusion	331
4.3. The Involvement of the Private Sector: Private Military and Security Companies (PMSCs) and Humanitarian assistance.....	332
4.4. Conclusion	340
5. Stretching the Boundaries of Humanitarian Assistance? Humanitarian Assistance and Protection	343
5.1. Limits to Humanitarian Action and Advocacy during the Cold War.....	343
5.2. The Emergence of New Humanitarianism in the 1990s.....	345
5.2.1. Humanitarian Actors, Advocacy and Denunciations.....	345
5.2.2. Humanitarian Actors and Judicial Proceedings	348
5.2.3. Transmission of Information to the Security Council.....	351
5.2.4. Parties to the Conflict and Reactions to the Practice of Humanitarian Organisations.....	354
5.2.5. Attempts at Self-Regulation.....	355
5.2.6. Conclusion: What Limits for Humanitarian Assistance?.....	358
5.3. The 21 st Century and the Protection Discourse: The Triumph of New Humanitarianism?	360
5.3.1. The Traditional Humanitarian Protection Actor in Armed Conflict: The ICRC	361

5.3.2. The Increase in Protection Actors.....	365
5.3.2.1. The UN and the Protection of Civilians	367
5.3.2.2. Humanitarian Actors as Protection Actors	370
5.3.3. Humanitarian Assistance and Humanitarian Protection: Compatible to What Extent?.....	381
5.3.3.1. Humanitarian Assistance and Advocacy as Protection: Flotillas to Gaza	382
5.3.3.2. Protection and Relations with the ICC	387
5.3.3.3. UNSC Sanctions and Humanitarian Agencies as Sources of Information	393
5.3.3.4. Parties to the Conflict and Reactions to the Practice of Humanitarian Organisations.....	395
5.4. Conclusion: What Room for a Principled Approach?.....	401
6. The Current Legal Framework Regulating Humanitarian Action in Conflict: Rules and Limits for the Actors Involved.....	405
6.1. The Role of Parties to the Conflict and Local Actors	407
6.1.1. The Primary Responsibility of Parties to the Conflict	407
6.1.1.1. Satisfying the Basic Needs of Civilians	407
6.1.1.2. Parties to the Conflict and Relief Actions and Actors.....	409
6.1.1.2.1. Parties to the Conflict and Local Relief Actors.....	409
6.1.1.2.2. Parties to the Conflict and External Relief Actions	411
6.1.1.2.3. The Limit of Starvation.....	413
6.1.1.2.4. Consent to Relief Action.....	418
6.1.1.2.5. Relief Personnel	421
6.1.1.2.6. Humanitarian Assistance and Workers under ICL.....	423
6.1.2. The Armed Forces of Belligerents.....	426
6.1.2.1. Armed Escorts	429
6.1.3. Local Population and Relief Organisations	430
6.2. The Role of External Actors	435
6.2.1. Relief Actions	435
6.2.2. Impartial Humanitarian Organisations and Other Organisations.....	440
6.2.2.1. Impartial Humanitarian Organisations	443
6.2.2.1.1. The Right of Humanitarian Initiative	444
6.2.2.1.2. What is an Impartial Humanitarian Organisation	448
6.2.2.1.3. Relief Personnel and the Limits of Their Mission	454
6.2.2.1.4. Other Sources of Protection	467
6.2.3. Third States	469
6.2.4. External Armed Forces	473
6.2.4.1. International Armed Forces Not Involved in the Conflict.....	473
6.2.4.2. UN Peacekeepers.....	475
6.2.4.3. Private Military and Security Companies (PMSCs).....	479
6.3. Conclusion	480

7. Conclusion: Principles Matter.....	485
References	489
Treaties and Other Agreements (in chronological order).....	528
Other Agreements	530
Case-Law.....	531
International	531
<u>ICJ</u>	531
<u>Human Rights Committee (HRC)</u>	532
<u>African Human Rights System</u>	532
<u>European Human Rights System</u>	532
<u>Inter-American Human Rights System</u>	532
<u>ICTY</u>	533
<u>ICTR</u>	533
<u>SCSL</u>	533
<u>ICC</u>	533
<u>Other</u>	534
National	534
National Legislation.....	534
EU Documents	534
Council	534
Commission	535
Other Selected Documents.....	535
Context-Specific Civil-Military Guidelines	536

List of Abbreviations

ACHR	American Convention on Human Rights
AfCHPR	African [Banjul] Charter on Human and Peoples' Rights
AFISMA	African-led International Support Mission to Mali
AFISM-CAR	African-led International Support Mission in the Central African Republic
AMISOM	African Union Mission in Somalia
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
AU	African Union
BiH	Bosnia and Herzegovina
CAR	Central African Republic
CERP	Commander Emergency Response Programme
CESCR	Committee on Economic, Social and Cultural Rights
DRC	Democratic Republic of the Congo
DSRSG	Deputy Special Representative of the Secretary General
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EComHR	European Commission for Human Rights
ECOMOG	Economic Community of West African States Monitoring Group
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community Of West African States
ECtHR	European Court of Human Rights
ERC	(United Nations) Emergency Relief Coordinator
EUFOR Tchad/RCA	European Union Force Chad/CAR
GC I	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)
GC II	Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)
GC III	Convention (III) relative to the Treatment of Prisoners of War (Third Geneva Convention)
GC IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)
Geneva Convention 1864	Convention for the Amelioration of the Condition of the Wounded in Armies in the Field
Guiding Principles on Internal Displacement	<i>Addendum to Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, E/CN.4/1998/53/Add.2, 11 February 1998</i>
Hague Convention II 1899	Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land
Hague Convention IV 1907	Convention (IV) respecting the Laws and Customs of War on Land
Hague Regulations	Regulations concerning the Laws and Customs of War on Land, annexed to Hague Convention IV 1907
HC	(United Nations) Humanitarian Coordinator

HCT	(United Nations) Humanitarian Country Team
HRC	Human Rights Committee
IAC	International Armed Conflict
IACoMHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court
ICCSt.	Rome Statute of the International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICRC Commentary APs	Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., <i>Commentary to the Additional Protocols of 8 June 1977 of the Geneva Conventions of 12 August 1949</i> (Geneva: Martinus Nijhoff Publishers, 1987)
ICRC Commentary GC I	Jean S. Pictet, ed., <i>Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field</i> (Geneva: ICRC, 1952)
ICRC Commentary GC III	Jean S. Pictet, ed., <i>Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War</i> (Geneva: ICRC, 1960)
ICRC Commentary GC IV	Jean S. Pictet, ed., <i>Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War</i> (Geneva: ICRC, 1958)
ICRC Study – Practice I	Jean-Marie Henckaerts and Louise Doswald-Beck, <i>Customary International Humanitarian Law, Volume II: Practice, Part I</i> (Cambridge: Cambridge University Press, 2005)
ICRC Study – Rules	Jean-Marie Henckaerts and Louise Doswald-Beck, <i>Customary International Humanitarian Law, Volume I: Rules</i> (Cambridge: Cambridge University Press, 2005)
ICTR	International Criminal Tribunal for Rwanda
ICTR RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
IDRL	International Disaster Response Law
IFRC	International Federation of Red Cross and Red Crescent Societies
IGO	Intergovernmental Organisation
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ISAF	International Stabilisation Force for Afghanistan
Kampala Convention	African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)
MCDA	Military and Civil Defence Assets
MINURCA	United Nations Mission in the Central African Republic
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MONUA	United Nations Observer Mission in Angola
MONUC	United Nations Mission in the Democratic Republic of Congo

MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
MSF	Médecins sans Frontières
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NIAC	Non-International Armed Conflict
ONUB	United Nations Operation in Burundi
OP UN Safety Convention	Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel
POC	Protection of Civilians
POW	Prisoner of War
PMSC	Private Military and Security Company
PRT	Provincial Reconstruction Team
QIP	Quick Impact Project
RC/HC	(United Nations) Resident Coordinator/Humanitarian Coordinator
St. Petersburg Declaration 1868	Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight
SCSL	Special Court for Sierra Leone
SCSL RPE	Rules of Procedure and Evidence of the Special Court for Sierra Leone
SCSLSt.	Statute of the Special Court for Sierra Leone
SRSG	Special Representative of the Secretary General
TFEU	Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty)
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMI	United Nations Assistance Mission for Iraq
UNAMID	African Union – United Nations Hybrid Operation in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNAVEM III	United Nations Mission in Sierra Leone
UN DFS	United Nations Department of Field Support
UN DPA	United Nations Department of Political Affairs
UN DPI	United Nations Department of Public Information
UN DPKO	United Nations Department of Peacekeeping Operations
UNDSS	United Nations Department of Safety and Security
UNGA	General Assembly of the United Nations
UNHCR	United Nations High Commissioner for Refugees
UNIFIL	United Nations Interim Force in Lebanon
UNISFA	United Nations Interim Security Force for Abyei
UNITAF	Unified Task Force
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in the Sudan
UNMISS	United Nations Mission in the Republic of South Sudan
UN OCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNOCI	United Nations Operation in Côte d'Ivoire
UN OHCHR	United Nations Office of the High Commissioner for Human Rights
UNOMIL	United Nations Observer Mission in Liberia
UNOSOM I	United Nations Operation in Somalia I
UNOSOM II	United Nations Operation in Somalia II
UNPROFOR	United Nations Protection Force

UNRRA	United Nations Relief and Rehabilitation Administration
UN Safety Convention	Convention on the Safety of United Nations and Associated Personnel
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNSOM	United Nations Assistance Mission in Somalia
UN USG	United Nations Under-Secretary General
U.S.	United States of America
USAID	United States Agency for International Development

Introduction: What Boundaries for Humanitarian Assistance?

Civilians often bear the brunt of armed conflict. They do not take part in it, but they are injured, displaced, left hungry and without medical care because of the hostilities. One of the main attainments of the 19th and 20th century was the achievement of an agreement among States that there should be limits to how war is fought and that the conduct of hostilities should be regulated, balancing military necessity with humanitarian considerations. In this framework, it was decided that individuals not or no longer taking part in hostilities should be protected as much as possible from the effects of conflict.

Among the measures to relieve the suffering of civilians affected by conflict, the provision of assistance to keep them alive and satisfy their basic needs is essential. At the same time, this activity embodies the tension between military necessity and humanitarian considerations, since introducing goods such as food and medicines into the territory controlled by a Party to the conflict may be opposed by the enemy Party by fear of it being a way to support combatants. Moreover, in case of non-international armed conflict opposing a State to a non-State armed group, the former is usually wary of making any concession in favour of the armed group, since it might be interpreted as influencing the legal status of this group under international law or its political status. Therefore, States have been ready to accept the entry of goods and possibly personnel into a theatre of conflict only subject to certain conditions.

These conditions have been enshrined in international law, in particular international humanitarian law (IHL), but often challenged in practice, raising questions regarding the ongoing validity of this regulation and its adequacy to respond to all issues arising in the field. The aim of this study is thus to clarify the legal framework regulating the provision of humanitarian assistance to civilians in armed conflict, starting with an analysis of the activities covered and their characteristics, which will include the examination of the legal nature and meaning of the principles of humanity, impartiality, neutrality, and independence, usually associated to humanitarian assistance in armed conflict. The rights and obligations of the different actors involved in this activity will then be analysed, to clarify whether a uniform legal framework applies to all providers of relief and, if not, what different levels of protection exist and what conditions need to be fulfilled to enjoy such protection.

The dissertation will study the practice regarding the provision of humanitarian assistance in armed conflict, to identify the development of trends within this field and clarify the legal framework through a problem-driven approach, looking for answers in IHL to problems arisen in practice.

Plan of the Research

Chapter 1 will introduce the topic of the research by providing an overview of early practice regarding the provision of humanitarian assistance to civilians in armed conflict, preceding its regulation in international treaties, and present the main debates that emerged in this field, that justify a comprehensive analysis of the topic. Some theoretical and methodological choices that will shape the examination and be applied throughout the study will also be introduced.

Chapter 2 will focus on the concept and regulation of humanitarian assistance to civilians in IHL treaties. The framework on humanitarian protection, as a second component of humanitarian action, will also be taken into account, since relief actors have increasingly engaged in both relief and protection, and the legal basis, rules and limits for their involvement in this second field of activity need to be defined, as well as its compatibility with the principles associated to humanitarian assistance.

Chapter 3 will complement the study of treaty law with an analysis of relevant State practice and *opinio juris* post-adoption of the Geneva Conventions of 1949, both within the UN framework, where humanitarian assistance has been devoted increasing attention since the beginning of the 1990s, and outside it. Chapter 4 and 5 will then focus on practice related to two issues that have emerged as particularly controversial and have generated debate on the legitimate role of various kinds of actors in the provision of humanitarian assistance—the involvement of armed actors in the provision of relief, and the engagement of organisations traditionally active in the provision of assistance in protection activities. It has been chosen to devote special attention to these two topics due to their increased relevance in practice, the extent of practitioners' and scholarly debate around them, the legal issues they raise, and the need for a comprehensive study of the evolution of practice in these areas to provide a clear picture of the applicable legal framework, taking into account the various factual situations in the field.

Chapter 4 will study the involvement of armed actors in the provision of relief, be they belligerents' armed forces, national armed forces not engaged in hostilities, peacekeepers, or members of private military and security companies. The possible engagement of each of them in the provision of relief will be clarified

from a legal and practical point of view, and their relationships with humanitarian actors, with possible (legal and practical) consequences for both categories, will be investigated. Through a historical analysis of practice in this field, it will be possible both to appreciate the developments that have taken place and to identify problems and challenges that have emerged, looking for answers in international law, in particular IHL.

The focus of Chapter 5 will be the concept of protection, which has been given increasing attention since the end of the 1990s by actors engaged in the provision of relief. Again, the study will adopt a historical approach to demonstrate that the discourse on protection, and practice associated to it, is the continuation and the result of trends that emerged already during the Cold War and, with more strength, in the second half of the 1990s around the nature of humanitarian assistance. Practice will be analysed to verify both whether it is in accordance with the legal framework offered by IHL treaties, possibly supplementing it in case of unclearly regulated hypotheses, and whether States' reactions to certain conduct by relief organisations have changed over time, so that the scope of legitimate action by these organisations may have broadened (or shrunk) in different periods, with an evolution of the law at the level of custom.

Finally, Chapter 6 will summarise and systematise the results of the analysis undertaken in the previous Chapters by presenting the legal framework applicable to the various categories of actors involved in the provision of humanitarian assistance to civilians in conflict. Given the increased interaction among different kinds of subjects in this field, the aim of the Chapter is to offer an overview as comprehensive as possible of the conduct that each kind of actor might lawfully undertake in this field, the legal basis for it, its limits, and the possible consequences of performing actions outside or in contrast with these limits. Indeed, the necessary precondition for an informed decision regarding whether and how to engage in a certain activity and in interaction with others is arguably knowing one's rights and duties, as well as risks (in legal and practical terms) deriving from such engagement.

1. Humanitarian Assistance to Civilians in Armed Conflict: Roots and Debates Related to It

1.1. Roots and Development of the Idea, of the Principles Related to It and of Its International Regulation

The term ‘humanitarian’ is generally used to indicate someone or something ‘concerned with improving bad living conditions and preventing unfair treatment of people’ or ‘[c]oncerned with humanity as a whole; *spec.* seeking to promote human welfare as a primary or pre-eminent good; acting, or disposed to act, on this basis rather than for pragmatic or strategic reasons’; or to ‘designat[e] an event or situation which causes or involves (widespread) human suffering, *esp.* one which requires the provision of aid or support on a large scale’.¹

The origins of humanitarianism, as ‘concern for human welfare as a primary or pre-eminent moral good’ and ‘action or the disposition to act, on the basis of this concern rather than for pragmatic or strategic reasons’,² are usually placed at the beginning of the 19th century, the moment when ‘individuals started using the concept to characterize their actions and those of others’.³

While charity and compassion existed before, Barnett argues that at the beginning of the 18th century compassion moved from the private to the public sphere, with the antislavery and the missionary movements playing a central role.⁴ Afterwards, since the 19th century, humanitarianism would have come to be characterised by three distinctive features, namely focusing on foreign countries, being increasingly organised and insitutionalised, and being connected to something transcendental, either a religious belief or the belief in an international community united by humanity.⁵ Furthermore, in the second half of the 19th century, humanitarianism shifted its focus from outside the battlefield to the battlefield, becoming what Barnett defines ‘emergency humanitarianism’, which is now ‘the official face of international humanitarianism’.⁶

Capitalising on the emerging push for improved care for wounded soldiers on the battlefield, Henry Dunant published in 1862 his book *A Memory of Solferino*, in which he recounted his experience as witness

¹ *Longman English Dictionary Online – LDOCE*, available at <http://www.ldoceonline.com> (accessed February 15, 2013); *Oxford English Dictionary (OED) Online*, available at <http://www.oed.com> (accessed February 15, 2013).

² *Oxford English Dictionary (OED) Online*, available at <http://www.oed.com> (accessed February 15, 2013).

³ Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Ithaca and London: Cornell University Press, 2011), 19. Similarly, see Philippe Ryfman, *Une Histoire de l'Humanitaire* (Paris: La Découverte, 2008), 6-15.

⁴ Barnett (2011), 49 and 57-75.

⁵ See *Ibid.*, 19-21.

⁶ *Ibid.*, 76.

to the suffering of the soldiers in the battle of Solferino of 1859 and presented the idea of creating in peacetime relief societies comprising volunteers trained to care for wounded in wartime.⁷ He then contributed to the creation of the International Committee of the Red Cross (ICRC) and succeeded in having States negotiating a treaty on relief to wounded soldiers: the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* of 1864 (Geneva Convention 1864) introduced two main concepts: the idea that the wounded should be entitled to receive relief without any distinction as to nationality; and the principle of the neutrality, in the sense of inviolability, of medical personnel and medical establishments and units, as well as of inhabitants of the country helping the wounded. Neutrality should be symbolised by the distinctive sign of the red cross on a white ground.⁸

Rules on relief for wounded, sick, and shipwrecked members of the armed forces, and for prisoners of war (POWs), further developed through successive treaties, always around the idea of the neutralisation of personnel, places and means of transport exclusively devoted to their care, without distinction of nationality.⁹ On the other hand, similar rules for assisting civilians caught up in hostilities were not developed until the mid-20th century.

Despite the absence of written rules, the ICRC and other relief organizations that were gradually created, in particular after WWI, took initiatives in this field. For example, the ICRC organised relief actions in favour of the Russian population during the civil war, in particular over the years 1919-1921, and in favour of the civilian population during the Spanish civil war.¹⁰ During WWI, the future U.S. President Hoover created the American Committee for the Relief of Belgium (the Commission for Relief in Belgium, CRB) to help Belgians under occupation, and, in order to be allowed to provide relief to civilians he ‘convinced both sides that they would gain little from the starvation of the occupied population; the British

⁷ Henry Dunant, *A Memory of Solferino* (Geneva: ICRC, 2007). The book was published in 1862.

⁸ *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, Geneva, August 22, 1864, entered into force June 22, 1865, hereinafter Geneva Convention 1864.

⁹ See *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, July 29, 1899, entered into force September 4, 1900, hereinafter Hague Convention II 1899; *Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864*, The Hague, July 29, 1899, entered into force September 4, 1900; *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Geneva, July 6, 1906, entered into force August 9, 1907; *Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*, The Hague, October 18, 1907, entered into force January 26, 1910; *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Geneva, July 27, 1929, not entered into force; *Convention relative to the Treatment of Prisoners of War*, Geneva, July 27, 1929, not entered into force.

¹⁰ See François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Oxford/Geneva: Macmillan/ICRC, 2003), 96-98, 268-270 and 275-278.

that relief would go to the civilians population and not the German military; and the Germans that food aid would not advantage the allies.’¹¹

The aftermath of WWI saw the birth of Save the Children and the establishment of the High Commission for Refugees by the League of Nations in 1921, which would then become the UN High Commissioner for Refugees (UNHCR), and in response to WWII the UN Relief and Rehabilitation Administration (UNRRA), Oxfam, and CARE were created.¹² Oxfam operated already during the war to feed the Greek population affected by a famine, since Greece was not part of the British embargo and thus British citizens could help the population without appearing unpatriotic (contrary to European countries occupied by Nazi Germany and covered by the embargo).¹³ The ICRC, in collaboration with the Swedish Red Cross, was similarly able to take action in favour of Greek civilians, since the British Navy felt the need to allow the passage of humanitarian relief ‘lest relations be soured with the United States where the Greek lobby was influential’.¹⁴

In this period preceding the adoption of the four Geneva Conventions of 1949 (GCs),¹⁵ practice also led to the development of some rules not directly dealing with assistance to civilians, but influencing the conditions of civilians in armed conflict. Already in 1870, during the Franco-Prussian war, Henry Dunant proposed the designation of certain towns as neutral, so that sick and wounded could be cared for there, and civilians could be spared from the violence of the conflict.¹⁶ The proposal had no success, like an analogous one made by Dunant during the uprisings of the Paris Commune in 1871. The first successful attempt by the ICRC to negotiate a safety zone was during the Spanish Civil War of 1936-1939, followed by ‘mainly private [] initiatives [] during the Chinese-Japanese War, such as the establishment of safety zones in

¹¹ Barnett (2011), supra fn. 3, 87.

¹² On these initial phases of humanitarianism in conflict, see, for example, Michael Barnett and Thomas G. Weiss, *Humanitarianism Contested: Where Angels Fear to Tread* (London and New York: Routledge, 2011), 35-53; Barnett (2011), supra fn. 3, 76-131; focused on the ICRC, David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge [etc.]: Cambridge University Press, 2005), 14-50.

¹³ Barnett (2011), supra fn. 3, 117-118.

¹⁴ Forsythe (2005), supra fn. 12, 44. See also Bugnion (2003), supra fn. 10, 222-229.

¹⁵ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, August 12, 1949, entered into force October 21, 1950 (75 UNTS 31), hereinafter GC I. *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva, August 12, 1949, entered into force October 21, 1950 (75 UNTS 85), hereinafter GC II. *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, August 12, 1949, entered into force October 21, 1950 (75 UNTS 135), hereinafter GC III. *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, August 12, 1949, entered into force October 21, 1950 (75 UNTS 287), hereinafter GC IV.

¹⁶ See Jean S. Pictet, ed., *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), 121. Hereinafter ICRC Commentary GC IV.

Shanghai in 1937 and Nanking in 1938'.¹⁷ This practice, together with the creation of some places of refuge in Jerusalem negotiated by the ICRC in 1948 and a *Draft Convention for the Creation of Hospital Localities and Safety Zones* drawn up in 1938 by a commission of experts convened by the ICRC, formed the basis for the rules on the creation of safety and hospital zones in the GCs, in particular Article 23 First Geneva Convention (GC I), on hospital zones and localities for the wounded and sick within the armed forces; and Articles 14-15 Fourth Geneva Convention (GC IV), respectively on hospital zones for wounded and sick civilians and safety zones for certain categories of the population, and on neutralised zones in areas where fighting is taking place, to shelter wounded and sick combatants or non-combatants and civilians not taking part in the hostilities. In all cases, an agreement between the Parties is required.¹⁸

Still, as far as the provision of relief to civilians was concerned, no legal basis was available to the ICRC or other relief organizations until GC IV, and this is true especially for non-international armed conflict (NIAC). As illustrated by Pictet in the ICRC Commentary to Common Article 3, the rules adopted up to 1949 in favour of military personnel can be interpreted as an application of the 'principle of respect for human personality', which would pre-date the GCs and be applicable to all human beings. However, when the ICRC had tried to intervene in favour of victims of NIAC, such proposal had been often interpreted by States as an unlawful interference in their internal affairs, and a proposal in this sense during the discussion of a draft Convention on the role of the Red Cross in civil wars or insurrections in 1912 had been discarded.¹⁹ Similarly, Pictet underlines that many of the rules included in GC IV on relief to civilians were the results of the experience and initiatives of the ICRC, especially during WWI and WWII, and aimed to

¹⁷ Thomas Desch, "Safety Zones," in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2013), par. 4. Online edition, available at <http://www.mpepil.com> (accessed May 01, 2013). See also Bugnion (2003), supra fn. 10, 96-98, 268-270 and 278-282.

¹⁸ See ICRC Commentary GC IV, 122-124 and 129. See also Desch (2013), supra fn. 17, pars. 5-8. Online edition, available at <http://www.mpepil.com> (accessed May 01, 2013). Carol McQueen, *Humanitarian Intervention and Safety Zones – Iraq, Bosnia and Rwanda* (Basingstoke, Hampshire, and New York, NY: Palgrave Macmillan, 2005), 2-3. Moreover, see arts. 59-60 AP I, on non-defended localities and demilitarized zones: already the Hague Regulations provide in art. 25 that 'the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited', but '[a]lthough the concept of open towns, and the prohibition on attacking them, has been recognized, at least since 1899, no precise regime existed for their establishment until the adoption of [AP I] in 1977.' Jean-Marie Henckaerts, "Non-Defended Towns," in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2009), par. 11. Online edition, available at <http://www.mpepil.com> (accessed May 01, 2013).

¹⁹ ICRC Commentary GC IV, 26-27. See also the different views during the discussion for the adoption of the text of the art. at the 1949 Diplomatic Conference: *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II section B, 325-339. In relation to the ICRC intervention in favour of civilians in the Spanish civil war, Bugnion comments that 'the absence of a legal basis was a severe handicap to its work.' Bugnion (2003), supra fn. 10, 282.

provide a legal basis for similar future initiatives, which until then had been based on negotiations and the good will of the Parties to the conflict.²⁰

An important part of this practice that developed through experience and then informed IHL treaties are the Fundamental Principles of the Red Cross and Red Crescent (Fundamental Principles of the Red Cross).²¹ In its practice of negotiations to assist civilians during conflict, the ICRC (as well as, for example, Oxfam, as mentioned) always focused on the original idea of neutralisation of this assistance, in the sense that it would be aimed at saving the life of people not taking part in the hostilities and would not interfere in the military balance. Starting already in the 19th century, this way of acting was gradually enshrined in the principles that guide the work of all the components of the International Red Cross and Red Crescent Movement, the Fundamental Principles of the Red Cross, which have also shaped the characteristics and boundaries of humanitarian activity in the course of hostilities more in general. Indeed, the principles elaborated within the Movement at various moments since the 19th century have been taken as reference points for humanitarian action, both by States when negotiating IHL treaties, and by other intergovernmental and non-governmental organisations involved in this activity. While the ICRC was created back in 1863, its Fundamental Principles as currently formulated were adopted in 1965 by the 20th International Conference of the Red Cross in Vienna,²² being the result of a process of reflection and elaboration that involved over the years distinguished members of the ICRC, such as Gustave Moynier in the last quarter of the 19th century and Jean Pictet in the 20th century.

Moynier introduced the concepts of ‘*universality, charity, fraternity, equality, non-discrimination*’ as guiding principles for the Red Cross Movement.²³ He also underlined the need for National Societies to comply with what might be translated in the principles of ‘*unity, auxiliary nature, non-discrimination, foresight, solidarity*’ in order to get recognition from the Movement.²⁴ Some of these principles –

²⁰ See the Commentary on arts. 10, 23, 30, 59 and 142 GC IV: ICRC Commentary GC IV, 27-30, 93-95, 178-179, 215, 217, 319-322, 557.

²¹ The Red Cross Movement comprises the ICRC, the various national Red Cross and Red Crescent Societies, and the International Federation of Red Cross and Red Crescent Societies (IFRC).

²² International Movement of the Red Cross and Red Crescent, XXth International Conference of the Red Cross, Vienna, “Resolution VIII, Proclamation of the Fundamental Principles of the Red Cross, October 1965,” reproduced in *International Review of the Red Cross* 5, no. 56 (November 1965): 573-574. After being proclaimed by the 20th International Red Cross Conference in 1965, the Fundamental Principles were made an integral part of the Statutes of the Red Cross and Red Crescent Movement as adopted by the 25th International Red Cross Conference held in Geneva in 1986. See Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006. Available at <http://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf> (accessed March 15, 2011).

²³ André Durand, “Quelques remarques sur l’élaboration des principes de la Croix-Rouge chez Gustave Moynier,” in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Christophe Swinarski (Geneva: ICRC; The Hague: Nijhoff, 1984), 868. Emphasis in the original. Own translation.

²⁴ Ibid., 871. Emphasis in the original. Own translation.

impartiality, political, religious and economic independence, the universality of the Movement and the equality of its members – were then introduced in the Statutes of the ICRC in 1921 and further reaffirmed and supplemented with other principles in 1946.²⁵ Finally, after the systematisation operated by Jean Pictet, the seven Fundamental Principles of the Movement were identified and adopted in 1965—humanity, impartiality, neutrality, independence, voluntary service, unity, and universality.²⁶

Of these, four—humanity, impartiality, neutrality, and independence—have been associated with humanitarian assistance and humanitarian actors also outside the Red Cross Movement, and often invoked by humanitarian actors themselves as the essential criteria for the definition of their identity, arguing that they are rooted in IHL. On the other hand, voluntary service, unity, and universality are more strictly connected to the Movement itself and its internal organisation.

The ‘*essential principle*’, meaning the basis on which the existence itself and the mission of the Red Cross Movement are founded and ‘the expression of the profound motivation of the Red Cross, from which all the other principles are derived’, is humanity.²⁷ It reads:

The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being, it promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.²⁸

Humanity indicates ‘the sentiment or attitude of someone who shows himself to be human’ and, as a Red Cross principle, it includes three components—the relief of human suffering, both physical and moral, the protection of life and health, and the assurance of respect for every human being, mainly through action to guarantee the application of IHL.²⁹

Together with impartiality, the principle of humanity is one of the ‘*substantive principles*’ of the Red Cross Movement, those that ‘stand above all contingencies and particular cases; [...] inspire the organization and determine its acts’; and ‘belong to the domain of objectives and not to that of ways and means.’³⁰

According to impartiality, the Movement

²⁵ ICRC, *The Fundamental Principles of the Red Cross and Red Crescent*, (Geneva: ICRC publication, 1996, ref. 0513), 1. Available at http://www.icrc.org/eng/assets/files/other/icrc_002_0513.pdf (accessed March 11, 2011).

²⁶ See Ibid. 1.

²⁷ Jean Pictet, *The Fundamental Principles of the Red Cross, Commentary* (Geneva: Henry Dunant Institute, 1979), 12. Emphasis in the original.

²⁸ ICRC (1996), supra ftn. 25, 2.

²⁹ Pictet (1979), supra ftn. 27, 20 and 22-27.

³⁰ Ibid., 12-13. Emphasis in the original.

makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.³¹

As explained by Pictet, the principle embodies three different but related concepts—non-discrimination, proportionality, and impartiality in a strict sense. Non-discrimination entails giving care and relief to all human beings, without adverse distinctions based on the fact that they belong to a specific category. In other words, non-discrimination ‘[i]n the context of humanitarian ethics [...] requires that all objective distinctions among individuals be ignored, so that the aid given transcends the most virulent antagonisms’.³² Legitimate priority should be established only on the basis of the specific vulnerabilities of certain categories of individuals, such as children, women or elderly persons. Indeed, non-discrimination is complemented by proportionality, according to which aid and care shall be given in proportion to the suffering of the individual, and giving priority to the most urgent cases.³³

Finally, according to Pictet, ‘[w]hile it was not particularly appropriate to have classified the principles of non-discrimination and of proportionality under the same heading, it was incorrect to have given this heading the designation of *Impartiality*, for this is a personal quality of an individual called upon to make a judgment or choice’.³⁴ In this sense, humanity, non-discrimination, and proportionality are substantive principles, while impartiality is a derivative principle, like neutrality and independence, a way of working that the ICRC follows to obtain the confidence of all the Parties to a conflict. Therefore, according to Pictet, the formulation of the seven Fundamental Principles confuses non-discrimination, which is the real principle, with impartiality, which relates to the way in which the principle is implemented, being ‘a quality required of the agents whose responsibility it is to act for the benefit of those who are suffering’.³⁵

The principle of neutrality, the most contested one among the Red Cross principles, entails that

In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.³⁶

As a derivative principle, neutrality has been formulated and observed by the Red Cross Movement in order to enjoy the confidence of all and thus have access to all the victims in need. A first component of neutrality is ‘military neutrality’, meaning not taking sides in an armed conflict, or, in other words, ‘abstain[ing] from any interference, direct or indirect, in war operations’, ‘not commit[ting] acts which the Conventions refer to

³¹ ICRC (1996), *supra* fn. 25, 4.

³² *Ibid.*, 5.

³³ See Pictet (1979), *supra* fn. 27, 41-43.

³⁴ See *Ibid.*, 48. Emphasis in the original.

³⁵ *Ibid.*, 48-49.

³⁶ ICRC (1996), *supra* fn. 25, 7.

as *harmful to the enemy*, that is to say, acts which by favouring or interfering with the hostilities are injurious to the adverse party.’³⁷ In addition to this, the Red Cross shall also respect ideological neutrality, to avoid the risk of becoming politicised, and it should ‘*not engage at any time in controversies of a political, racial, religious or ideological nature*.’³⁸ Neutrality thus implies that ‘[f]or the Red Cross, there is no just war and no unjust war’ and also that ‘[i]n the field of prevention of war, as in every other field, the Red Cross must refrain from taking sides between countries’, since it would imply becoming involved in politics.³⁹

Moreover, neutrality seems to go a bit further for the ICRC compared to National Societies (which are inevitably connected to their national governments), in the sense that the ICRC ‘treat[s] [governmental entities] on the basis of equality, [does] not express[] itself on their legitimacy, [does] not consider[] whether they are recognized, [does] not judg[e] their politics.’⁴⁰ In accordance with this approach, the ICRC tries to preserve its quality as a neutral intermediary by not publicly denouncing specific conducts by the belligerents that violate IHL, unless as a last resort. In the words of Pictet: ‘One cannot be at one and the same time the champion of justice and of charity. One must choose, and the ICRC has long since chosen to be a defender of charity.’⁴¹

Finally, the principle of independence has been often associated to humanitarian action and assistance, but, as will be seen in the course of the analysis of State practice, sometimes with a meaning different from the one attributed to it by the Red Cross Movement. For the Red Cross independence means that

The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.⁴²

Independence entails, both for the ICRC and for National Societies, ‘*political, religious and economic independence*’, and the ability to be ‘sovereign in [their] decisions, acts and words’.⁴³ This implies that, when carrying out its humanitarian activities, the Movement ‘must rely on its own assessment made on the basis of objective criteria.’⁴⁴ As far as National Societies are concerned, it may seem difficult to reconcile independence with their status as auxiliaries of their national public authorities, but the Societies must have

³⁷ Pictet (1979), *supra* fn. 27, 54-55. Emphasis in the original.

³⁸ *Ibid.*, 56. Emphasis in the original.

³⁹ *Ibid.*, 31-32.

⁴⁰ *Ibid.*, 59.

⁴¹ *Ibid.*, 59-60.

⁴² ICRC (1996), *supra* fn. 25, 9.

⁴³ Pictet (1979), *supra* fn. 27, 61.

⁴⁴ ICRC (1996), *supra* fn. 25, 10.

the necessary autonomy to be able to act in accordance with the Fundamental Principles, and having a ‘democratic structure of [their] organization and freedom in recruiting’ seems to be particularly helpful.⁴⁵

As will be seen in the analysis of State practice in the following Chapters, these Fundamental Principles, developed since the 19th century, as well as the rest of the aforementioned practice, influenced States when adopting GC IV (which is almost universally ratified, with 195 State Parties) and the two Additional Protocols of 1977 (AP I and AP II, the APs).⁴⁶ Still, the adoption of treaty law does not seem to have provided definitive clarity and agreement on the regulation of humanitarian assistance to civilians in armed conflict and the role of different actors in it, as appears from an overview of political and legal debates around the concept of humanitarian assistance to civilians in conflict, its boundaries and characteristics.

1.2. Debates around Humanitarian Assistance

Early practice regarding humanitarian assistance in favour of civilians in conflict, especially by the Red Cross, undoubtedly shaped the development of international regulation of this activity, in particular through the GCs and APs, whose provisions will be analysed in detail in the next Chapter. Still, a brief overview of the ongoing debates around the concept of humanitarian assistance to civilians in conflict and its international regulation will serve to highlight contested areas, which call for clarification and represent the rationale behind this analysis. Legal and political debates have emerged, especially since the 1980s and 1990s, around the definition itself of humanitarian assistance as an activity, its meaning and characteristics; the relation between the provision of humanitarian assistance and the use of armed force; and the relationship between humanitarian activities and other kinds of intervention in crises, in particular political intervention, with an implied challenge to the central idea of the neutralisation of humanitarian assistance.

1.2.1. Defining the Concept

Under IHL, ‘humanitarian assistance’, ‘humanitarian relief’, or ‘humanitarian aid’ is usually presented as a specific concept: an activity with the well-defined aim of saving the lives of people in need, that respects the principles associated with it (humanity, impartiality, and neutrality, sometimes independence), and therefore

⁴⁵ Pictet (1979), supra fn. 27, 68.

⁴⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, June 8, 1977, entered into force December 7, 1978 (1125 UNTS 3), hereinafter AP I. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Geneva, June 8, 1977, entered into force December 7, 1978 (1125 UNTS 609), hereinafter AP II.

is entitled to this specific qualification and to specific protection under the law. However, there is no binding international law instrument clearly defining ‘humanitarian relief’, ‘humanitarian assistance’ or ‘humanitarian aid’.

Definitions provided by scholars, referring either to humanitarian assistance provided in armed conflict or to humanitarian assistance provided in emergency situations more in general (thus including armed conflict, but also natural disasters), tend to agree on a common core but, looking at them in some more detail, disagreement on further elements of the definition can be identified. The minimum common denominator is that humanitarian assistance covers goods and services indispensable for the survival and the fulfilment of the essential needs of the victims of armed conflict.⁴⁷ Definitions then differ in their scope, covering only assistance provided by international actors or also by local ones, and in the presence or absence of reference to the principles inspired by the Fundamental Principles of the Red Cross.

Some authors consider humanitarian assistance to be ‘by definition international’, referring only to relief coming from subjects other than the territorial sovereign, first of all humanitarian organisations.⁴⁸ Others seem to agree that relief comes from subject different from the State, but not necessarily external to it,⁴⁹ and some others further distinguish between primary humanitarian assistance, provided by the State or

⁴⁷ The wording draws inspiration from the 2003 resolution by the Institute of International Law, which in art. I(1) provides that humanitarian assistance refers to ‘all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfillment of the essential needs of the victims of disasters’. Institute of International Law, *Sixteenth Commission: Humanitarian Assistance: Resolution*, Bruges Session, September 2, 2003, art. I(1). Available at http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF (accessed February 2, 2011).

⁴⁸ See, for example, Flavia Zorzi Giustiniani, *Le Nazioni Unite e l'Assistenza Umanitaria* (Naples: Editoriale Scientifica, 2008), 15. Emphasis added. The author supports this position through a reference to a statement made by one member of the Institute of International Law during the work preceding the adoption of the resolution of 2003 on humanitarian assistance. However, as explained below, it seems that such resolution does not endorse this perspective. A similar position is adopted by Sandvik-Nylund, who defines humanitarian assistance as ‘assistance of an exclusively humanitarian character, provided by the international community, to meet the immediate needs of victims of emergency situations.’ Monika Sandvik-Nylund, *Caught in Conflicts: Civilian Victims, Humanitarian Assistance and International Law*, 2nd rev. ed. (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2003), 6-7. Emphasis omitted. Furthermore, defining humanitarian assistance as external relief actions only, see, for example, Denise Plattner, “ICRC Neutrality and Neutrality in Humanitarian Assistance,” *International Review of the Red Cross* 36, no. 311 (April 1996): 161-179; Gerard J. Tanja, “Humanitarian Intervention and Humanitarian Assistance: An Echo from the Past and a Prospect for the Future,” in *Law in Humanitarian Crises – Le Droit Face aux Crises Humanitaires: Volume II: Access to Victims: Right to Intervene or Right to Receive Humanitarian Assistance? – L’Accès aux Victimes: Droit d’Ingérence ou Droit à l’Assistance Humanitaire?*, ed. European Commission Humanitarian Office (Luxembourg: Office for Official Publications of the European Communities, 1995), 92-93. Torroja Mateu defines humanitarian assistance by referring to international relief actions, but then mentions among possible providers of this relief the local population or civil defence, underlining that in such case it is an internal relief action, rather than an international one. See Helena Torroja Mateu, *La Asistencia Humanitaria en la Organización de las Naciones Unidas: Fundamentos y Perspectivas Actuales* (Barcelona: Atelier, 2004), 263-267.

The characterisation of humanitarian assistance as only external also seems to emerge from the *Guiding Principles on the Right to Humanitarian Assistance* adopted in 1993 by the Council of the International Institute of Humanitarian Law in San Remo. See International Institute of Humanitarian Law, “Guiding Principles on the Right to Humanitarian Assistance,” *International Review of the Red Cross* 33, no. 297 (November-December 1993), 520-525 (in particular principle 3). Hereinafter San Remo Guiding Principles.

⁴⁹ It seems that definitions provided by Stoffels and Spieker can be interpreted in this sense. Stoffels does not define assistance as necessarily international, but underlines that under IHL it presupposes the consent of the State where it is provided, so that it is implied that it must come from subjects different from that State. See Ruth Abril Stoffels, *La Asistencia Humanitaria en los Conflictos Armados: Configuración Jurídica, Principios Rectores y Mecanismos de Garantía* (Valencia: Tirant lo Blanch, 2001), 41. Spieker focuses on provisions regulating relief actions carried out by actors other than authorities having *de facto* territorial control

the *de facto* entity having control over the victims of the armed conflict, and secondary (or subsidiary or international) humanitarian assistance, provided by other actors in case the aforementioned State or *de facto* entity does not fulfil its obligations related to primary assistance.⁵⁰

Most of the definitions tend to associate to humanitarian assistance, at least external or secondary one, the fact of being provided in a humanitarian, neutral and impartial form.⁵¹ While these definitions have no legal relevance and no direct practical consequences, differences in definitions might signal uncertainties on the applicable legal regime, in the sense that a definition might hint towards the applicability of the same

and affirms that ‘the term “humanitarian assistance” as used in the framework of armed conflict and international humanitarian law addresses relief schemes provided to a civilian population—generally from outside.’ Heike Spieker, “Humanitarian Assistance, Access in Armed Conflict and Occupation,” in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2008), par. 2. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012). Emphasis added. The qualification of relief schemes being provided ‘generally’ from outside is probably due to the fact that, in situations of occupation, relief can be provided by local relief societies and civil defence organisations. See *Ibid.*, par. 13.

⁵⁰ See Rosario Ojinaga Ruiz, *Emergencias Humanitarias y Derecho Internacional: la Asistencia a las Víctimas* (Valencia: Tirant lo Blanch, 2005), 37. Ojinaga Ruiz defines secondary humanitarian assistance as ‘the *outside provision* of goods and services essential for survival – such as food, water, medicines and medical material, basic shelter, clothes, medical assistance, civil defence, etc. – in conformity with the principles of humanity, neutrality, impartiality and non discrimination.’ *Ibid.*, 33. Emphasis added. Own translation.

On the other hand, Alcaide Fernández includes in subsidiary humanitarian assistance all assistance provided by subjects different from the authorities controlling the territory, including by the affected civilian population itself. He includes in subsidiary humanitarian assistance ‘[l]a iniciativa de los organismos humanitarios’, ‘[l]a iniciativa de las personas protegidas’, ‘[e]l cometido de la población civil’, and ‘[l]os envíos de socorros y las acciones de socorro’. He underlines that consent is generally necessary, in different forms (such as recognition by the government for the National Red Cross Society or other voluntary relief societies under art. 63 GC IV; authorisation for example for religious organisations, relief societies, or any other organisations assisting the protected persons under GC IV pursuant to art. 142 GC IV, and for humanitarian organisations different from components of the Red Cross and Red Crescent Movement under art. 81(4) AP I; consent for civilian civil defence organisations of neutral or other States not Parties to the conflict under art. 64(1) AP I). Joaquín Alcaide Fernández, “La Asistencia Humanitaria en Situaciones de Conflicto Armado,” in *La Asistencia Humanitaria en Derecho Internacional Contemporáneo*, by Joaquín Alcaide Fernández, María del Carmen Márquez Carrasco, and Juan Antonio Carrillo Salcedo (Seville: Universidad de Sevilla, 1997), 31, 37, 39, 40, and 61. See, more in general on primary and subsidiary humanitarian assistance, *Ibid.*, 24-57.

Affirming the primary role of the State in providing humanitarian assistance in situations of armed conflict, and the subsidiary role of outside humanitarian assistance, see also Schindler in UNESCO, *Le Droit à l’Assistance Humanitaire: Actes du Colloque International Organisé par l’UNESCO, Paris, 23-27 Janvier 1995* (Paris: UNESCO, 1996), 35, 38, 154-155, and 157.

Similarly, the resolution on humanitarian assistance adopted by the Institute of International Law in 2003 deals with assistance provided both by the territorial State and by other actors (local or external). Article III of the resolution states:

1. The affected State has the duty to take care of the victims of disaster in its territory and has therefore the primary responsibility in the organization, provision and distribution of humanitarian assistance. As a result, it has the duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses.
2. Any other authority exercising jurisdiction or *de facto* control over the victims of a disaster (for example in case of disintegration of the governmental authority) has the duty to provide them with the necessary humanitarian assistance, and also has all the other duties and rights of the affected State provided for in this Resolution.
3. Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States.

Institute of International Law (2003), *supra* fn. 47, art. III.

The commentary to the article specifies that ‘the responsibility of the State is not only *to give assistance*, but also, on a collateral basis, to prevent the diversion of assistance or the commission of abuses, including the actual confiscation of aid. This duty exists as much as regards *internal as external aid*.’ It further clarifies that ‘[i]f the territorial State is, in material terms, incapable of providing the assistance, or where some equivalent situation prevents it from acting, it must, in conformity with paragraph 3, seek the assistance of the competent international organisations or of third States’ and that ‘the territorial State must seek foreign aid not only if it is wholly prevented from supplying the assistance itself, but also if the assistance it is able to supply from its own resources is insufficient.’ Institute of International Law, *The Humanitarian Assistance: Bruges Resolution 2003* (Paris: Pedone, 2006), 29-30. Emphasis added. See also *Ibid.*, 13 and 22; Budislav Vukas, “The Humanitarian Assistance: 16th Commission,” *Yearbook of the Institute of International Law* 70, part I (2002-2003), 472-473 and 548-549.

⁵¹ See, for example, Abril Stoffels (2001), *supra* fn. 49, 41; Spieker (2008), *supra* fn. 49, par. 1; Maurice Flory, “A la Recherche d’une Définition,” in *Aide Humanitaire Internationale: un Consensus Conflictuel?*, ed. Marie-José Domestici-Met, (Paris: Economica, 1996), 33-34; International Institute of Humanitarian Law (1993), *supra* fn. 48, 521 (preamble); Ojinaga Ruiz (2005), *supra* fn. 50, 33; Olivier Paye, *Sauve Qui Veut? Le Droit International Face aux Crises Humanitaires* (Brussels: Bruylant, 1996), 85-88; Torroja Mateu (2004), *supra* fn. 48, 263-267.

regulation and protection to everything covered by it. Also, labelling a certain action as ‘humanitarian’ might give it a positive allure and imply that it deserves special protection, and broadening the use of this term to cover activities not entitled to protection under IHL might lead to ambiguity in the scope of application of a protection regime and to a weakening of that regime itself.

The analysis of the legal framework applicable to all activities covered by the minimum denominator common to the various definitions is thus necessary in order to clarify whether different regulations are provided for different actors involved in relief efforts, what the rationale behind and the triggering criteria for these different levels of protection are, and thus what the essential characteristics of humanitarian assistance under IHL are, following such rationale. This analysis will also allow taking a position on debates regarding the risks and negative consequences that may derive from too broad a use of the term ‘humanitarian’, to refer to activities not respecting the principles of humanity, impartiality, neutrality and independence, possibly not in accordance with the framework provided by IHL.⁵²

Furthermore, as mentioned, sometimes scholarly definitions cover humanitarian assistance provided to civilians in any kind of emergency situation, be it armed conflict or natural disaster. However, this research focuses on humanitarian assistance provided in armed conflict only, since it presents fundamentally different factual circumstances and a different applicable legal framework, as well as a level of complexity and specific tensions that have increasingly emerged over the past years and are mostly not applicable to natural or other disasters.

Armed conflicts traditionally represent a context for humanitarian action that is different from that of a natural disaster: the provision of relief may influence the balance of the hostilities by either supporting the belligerents (in case it is diverted) or relieving the Parties from the task of satisfying the basic necessities of civilians under their control, thus being able to devote their own resources to other activities, possibly in support of the war effort.⁵³ Problems of access and of security for humanitarian workers are almost constantly present in situations of conflict, and it is in relation to armed conflict (and ‘complex emergencies’,

⁵² See Section 1.2.3.

⁵³ For instance, security issues and perceptions of neutrality are arguably more central in armed conflict scenarios. For a comparison of similarities and differences, see for example David Fisher, “Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: a Comparative Analysis,” *International Review of the Red Cross* 89, no. 866 (June 2007): 345-372. Furthermore, it has been noted that controversies over civil-military relationships have emerged primarily with reference to the provision of assistance in cases of armed conflicts: see Michael Meyer, “The Relationship between the Red Cross and the Armed Forces: a Partnership for Humanitarian Purposes,” in *Making the Voice of Humanity Heard: Essays on Humanitarian Assistance and International Humanitarian Law in Honour of HRH Princess Margriet of the Netherlands*, eds. Liesbeth Lijnzaad, Johanna van Sambeek, and Bahia Tahzib-Lie (Leiden [etc.]: Nijhoff, 2004), 403.

in the working of the UN bodies)⁵⁴ that the issue of protection of civilians (POC) has emerged, with a clear role for humanitarian workers. Moreover, situations of armed conflict involving non-State armed groups usually imply that relief workers need to relate and negotiate with these groups, which often control parts of the territory over which the State exercises no effective authority. Sometimes armed conflicts even take place in an environment characterised by the absence of a functioning State. All these elements make the provision of relief very sensitive and lead to particular problems, which have stimulated the development of a specific regulation under IHL.

On the other hand, in natural or man-made disasters in peacetime, the State affected is usually in the lead of the response and is the main interlocutor for relief actors. Usual problems are related to a need to streamline administrative procedures such as the issue of visas, thus regulated by national laws rather than international law, and it is on this level that, for example, the initiative undertaken by the International Federation of Red Cross and Red Crescent Societies (IFRC) on International Disaster Response Law (IDRL) has mostly focused, trying to stimulate the adoption at the national level of laws facilitating the entry of humanitarian relief and workers in case of disasters.⁵⁵

Over the last two decades, a trend seems to have emerged towards adopting instruments applicable to the provision of humanitarian assistance to civilians in case both of armed conflict and of natural or man-made disasters, for example by UN bodies. The humanitarian system created by General Assembly of the United Nations (UNGA) resolution 46/182, establishing the Emergency Relief Coordinator (ERC), the UN Office for the Coordination of Humanitarian Affairs (UN OCHA), and the Central Emergency Revolving Fund (which has then become the Central Emergency Response Fund – CERF) deals both with natural disasters and instances of complex emergency.⁵⁶ Some documents, as will be seen more in detail in the analysis of State practice, refer to the principles of humanity, impartiality, and neutrality (as well as independence, sometimes), thus connecting them to humanitarian assistance provided in any kind of emergency. Also, the Fundamental Principles of the Red Cross bind all components of the Movement at all times, including when operating in natural disasters. Some scholars have thus investigated the existence of a

⁵⁴ 'Complex emergency' is defined as 'a humanitarian crisis in a country, region, or society where there is total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing United Nations country programme.' UN, *Guidelines on the Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies (the 'MCDA Guidelines')*, March 2003 (Revision I: January 2006).

⁵⁵ See IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study* (Geneva: IFRC, 2007).

⁵⁶ A/RES/46/182, 19 December 1991 (adopted without vote). UNGA and the United Nations Economic and Social Council (ECOSOC) resolutions dealing with strengthening the coordination of humanitarian assistance refer to the UN system and are thus applicable both to armed conflicts and disasters.

legal regime common to situations both of armed conflict and of disaster during peacetime, comprising for example a general right to receive/provide humanitarian assistance in case of emergency under international law.⁵⁷

However, the concept of humanitarian assistance in conflict presents specific characteristics that deserve an autonomous analysis, also taking into account that the applicable regime under IHL calls for study and clarification on its own, since it presents particular challenges, such as applying to State and non-State actors and the need to balance humanitarian considerations with military necessity, and possibly offers specific solutions that are not necessarily applicable in peacetime either. The principles associated to humanitarian assistance have been questioned in terms of their meaning and legal nature mostly with reference to situations of armed conflict; their meaning and status under IHL, which will be clarified in this research, might not necessarily correspond to their meaning and status under international law more in general.

For instance, the International Law Commission (ILC) has been working since 2007 on the topic ‘Protection of persons in the event of disasters’: it has decided to focus on disaster situations different from armed conflict,⁵⁸ and some UN Member States in the UNGA, in the course of the annual debate on the work of the ILC, have questioned the applicability of all of the principles generally associated to humanitarian assistance (in particular neutrality) to the provision of this assistance in situations of disaster in peacetime.⁵⁹

⁵⁷ See, for example, Zorzi Giustiniani (2008), *supra* fn. 48; Ojinaga Ruiz (2005), *supra* fn. 50; Torroja Mateu (2004), *supra* fn. 48; Joaquín Alcaide Fernández, María del Carmen Márquez Carrasco, and Juan Antonio Carrillo Salcedo, *La Asistencia Humanitaria en Derecho Internacional Contemporáneo* (Seville: Universidad de Sevilla, 1997); Paye (1996), *supra* fn. 51; Marie-José Domestici-Met, ed. *Aide Humanitaire Internationale: un Consensus Conflictuel?* (Paris: Economica, 1996); UNESCO, ed., *Le Droit à l'Assistance Humanitaire: Actes du Colloque International Organisé par l'UNESCO, Paris 23-27 Janvier 1995* (Paris: UNESCO, 1996).

⁵⁸ Not only ILC members but also State representatives commenting on the ILC work in the UNGA Sixth Committee have endorsed the adoption of a saving clause explicitly stating that ‘[t]he [] draft articles do not apply to situations to which the rules of international humanitarian law are applicable.’ Article 4, Relationship with international humanitarian law: Report of the International Law Commission, Sixty-second session (3 May–4 June and 5 July–6 August 2010), A/65/10 (2010), par. 330. For States’ views, see debate in the Sixth Committee of the UNGA in 2009 and in 2010: A/C.6/64/SR.18, 28 October 2009; A/C.6/64/SR.20, 30 October 2009; A/C.6/64/SR.21, 30 October 2009; A/C.6/64/SR.22, 2 November 2009; A/C.6/64/SR.22, 3 November 2009; A/C.6/65/SR.22, 27 October 2010; A/C.6/65/SR.23, 28 October 2010; A/C.6/65/SR.24, 29 October 2010; A/C.6/65/SR.25, 29 October 2010; A/C.6/65/SR.26, 1 November 2010. For views in the International Law Commission (ILC), see PROVISIONAL, A/CN.4/SR.2979, 16 July 2008, 7 and 10; PROVISIONAL, A/CN.4/SR.2980, 17 July 2008, 4 and 22; PROVISIONAL, A/CN.4/SR.2981, 18 July 2008, 7 and 26; PROVISIONAL, A/CN.4/SR.2982, 2 July 2008, 6 and 10. Speaking at the Sixth Committee of the General Assembly, Mr. Wisnumurti (Chairman of the ILC) explained:

Draft article 4 covered the relationship of the draft articles with international humanitarian law, particularly the extent to which situations of armed conflict were covered by the draft articles. The provision had been carefully formulated so as to give precedence to the rules of international humanitarian law where applicable. Nonetheless, no categorical exclusion of situations of armed conflict had been made. Such exclusion could prove counterproductive in “complex emergencies”, where a disaster occurred in the same arena as an armed conflict. Hence, while the draft articles did not seek to regulate the consequences of armed conflict, they could nonetheless apply in such situations to the extent that existing rules of international law did not apply.

A/C.6/65/SR.22, 27 October 2010, par. 21.

⁵⁹ See the following statements: by the representative of Greece on 27 October 2010, A/C.6/65/SR.22, 1 December 2010, par. 50; by the representatives of Portugal, Austria, the Netherlands and Estonia on 28 October 2010, A/C.6/65/SR.23, 1 December 2010, pars.

In this sense, this study will deal only with the definition of humanitarian assistance in armed conflict, without investigating whether the concept might be partly different in natural disasters, for example in terms of principles associated to it.

Also, while the majority of the instruments adopted by UN bodies on the issue of humanitarian assistance are non-binding,⁶⁰ the United Nations Security Council (UNSC) has made reference to the provision of humanitarian assistance to civilians in need in binding measures adopted under Chapter VII of the UN Charter, but always and only in the context of armed conflict or complex emergencies.⁶¹

Finally, as will be illustrated in the next two Sections, the concepts of ‘humanitarian’ and more specifically of humanitarian assistance have emerged as the focus of political and legal debates, especially since the 1990s, and these debates have practically almost arisen in connection with situations of armed conflict, rather than disasters taking place in peacetime. In particular, two main debates have emerged (or re-emerged) at the end of the 20th and at the beginning of the 21st century around the concept of ‘humanitarian’, its broad utilisation by a growing number of actors and in relation to a growing range of activities, and possible consequences of it. The first debate is not directly connected to this study, since it focuses on the relation between the provision of relief and the use of armed force, while the other is central to this research, since it looks at the boundaries of humanitarian assistance, the legitimate role of various kinds of actors in it, and its relationship with other modes of intervention in crises.

1.2.2. Humanitarianism and the Use of Force

With the end of the Cold War and interventions such as those in Iraq, Somalia, and Bosnia and Herzegovina (BiH) at the beginning of the 1990s, and then with the NATO bombing of Yugoslavia in 1999, a debate emerged regarding the association of ‘humanitarian’ to armed intervention. The 1999 bombing was justified as an intervention ‘to avert this humanitarian catastrophe’,⁶² an action underpinned by ‘[h]umanitarian

11, 38, 44 and 68; by the representatives of Ireland and the UK on 29 October 2010, A/C.6/65/SR.24, 1 December 2010, pars. 55 and 64; by the representative of India on 29 October 2010, A/C.6/65/SR.25, 1 December 2010, par. 35. See Section 3.2.1.1.3.

⁶⁰ On the non-binding nature of almost all the instruments regulating the protection of persons in disasters, see for example the statement by the Special Rapporteur on the protection of persons in the event of disasters, Mr. Valencia-Ospina, at the ILC in 2008: PROVISIONAL, A/CN.4/SR.2978, 5 August 2008, 15-16.

⁶¹ For example, as will be analysed more in details in Section 3.2.1.2.4., the UNSC adopted sanctions against individuals and entities identified as ‘obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia’ and ‘[i]ndividuals obstructing the access to or the distribution of humanitarian assistance in the eastern part of the Democratic Republic of the Congo’. S/RES/1844 (2008), 20 November 2008, par. 8(c) and S/RES/1857 (2008), 22 December 2008, par. 4(f). On UNSC practice, see the whole Section 3.2.

⁶² Statement by the representative of the U.S., UNSC, Fifty-fourth year, 3988th meeting, Wednesday, 24 March 1999, S/PV.3988, 4.

considerations’,⁶³ ‘an exceptional measure on grounds of overwhelming humanitarian necessity’,⁶⁴ and classified as a ‘humanitarian war’ and an instance of ‘humanitarian intervention’.⁶⁵ The issue arose again for example with reference to Afghanistan in 2001 and Iraq in 2003, with the Bush administration and its allies listing humanitarian motives among the reasons for both interventions.⁶⁶

Scholars have thus developed a specific definition for the concept of ‘humanitarian intervention’, classifying it as ‘the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.’⁶⁷ However, the ICRC has argued that ‘[f]rom the viewpoint of humanitarian law, it is a contradiction in terms to speak of humanitarian “intervention” or “interference”, as the term “humanitarian” should be reserved to describe action intended to alleviate the suffering of the victims’, while “humanitarian intervention” refers to armed intervention, often carried out with a political agenda.’⁶⁸ Similarly, David Rieff has differentiated between ‘argu[ing] for military intervention on political grounds’ and ‘promot[ing] military intervention on humanitarian grounds’, and has judged the latter ‘a contradiction in terms’, since ‘[i]t is a perversion of

⁶³ Statement by the representative of Canada, UNSC, Fifty-fourth year, 3988th meeting, Wednesday, 24 March 1999, S/PV.3988, 6.

⁶⁴ Statement by the representative of the UK, UNSC, Fifty-fourth year, 3988th meeting, Wednesday, 24 March 1999, S/PV.3988, 12.

⁶⁵ As reported, ‘NATO’s Chief Press Officer, Jamie Shea, coined the phrases “humanitarian war” and “humanitarian bombing” to describe NATO’s 1999 intervention in Kosovo’. Jane Barry and Anna Jefferys, *A Bridge too Far: Aid Agencies and the Military in Humanitarian Response*, HPN Paper no. 37 (London: Overseas Development Institute, January 2002), 9. For an overview of scholarly views and works on the intervention in Kosovo and the doctrine of humanitarian intervention in international law, see Robert Kolb, “Note on Humanitarian Intervention,” *International Review of the Red Cross* 85, no 849 (March 2003), 127-128.

⁶⁶ See, for example, George W. Bush, “Bush Announces Military Strikes in Afghanistan,” October 09, 2001, available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_100801.htm (accessed March 10, 2012); George W. Bush, “Message to Saddam,” Washington, DC, March 17, 2003, available at <http://www.presidentialrhetoric.com/speeches/03.17.03.html> (accessed March 10, 2012); Tony Blair, “Full statement to the House of Commons, 18 March 2003,” available at <http://www.guardian.co.uk/politics/2003/mar/18/foreignpolicy.iraq1> (accessed March 10, 2012).

⁶⁷ J. L. Holzgrefe, “The Humanitarian Intervention Debate,” in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, ed. J. L. Holzgrefe and Robert O. Keohane (Cambridge: Cambridge University Press, 2003), 18. Similarly, according to the UN OCHA *Glossary of Humanitarian Terms*, humanitarian intervention ‘is a doctrine generally understood to mean coercive action by States involving the use of armed force in another State without the consent of its government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law’ and examples of humanitarian interventions would be ‘[t]he UN’s operations in Northern Iraq and Somalia, and NATO’s operation in Kosovo’. UN OCHA, *Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict* (New York: UN, 2003), 14. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=100572> (accessed November 5, 2009).

On the other hand, Kolb highlights that, from a legal point of view, humanitarian intervention may be defined ‘as the use of force in order to stop or oppose massive violations of the most fundamental human rights (especially mass murder and genocide) in a third State, provided that the victims are not nationals of the intervening State and there is no legal authorization given by a competent international organization, such as, in particular, the United Nations by means of the Security Council.’ It is thus different from the concept of *intervention d’humanité* and from intervention pursuant to UNSC authorisation. Kolb (2003), *supra* fn. 65, 119-120.

⁶⁸ Anne Ryniker, “The ICRC’s Position on ‘Humanitarian Intervention’,” *International Review of the Red Cross* 83, no. 842 (June 2001), 529.

humanitarianism, which must be either neutral or nothing.⁶⁹ The quality of being ‘humanitarian’ would thus be associated to the aim of helping people, without any other objective and without the use of armed force.

Since 2001, the debate on humanitarian intervention has also found some kind of evolution in the Responsibility to Protect (R2P), a concept elaborated by the International Commission on Intervention and State Sovereignty (ICISS), a commission of experts established by the Government of Canada with some foundations. In its report *The Responsibility to Protect*, the Commission identified the basis of an ‘international responsibility to protect’ in the failure of a State to fulfil its primary responsibility to protect its people, meaning that its ‘population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state ... is unwilling or unable to halt or avert it.’⁷⁰ The international responsibility to protect entails three different responsibilities: to prevent, meaning ‘to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk’; to react, ‘to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention’; and to rebuild, in other words ‘to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.’⁷¹

Clearly, the traditional concept of humanitarian intervention corresponds to the responsibility to react, and in this regard the report further suggests substantive and procedural requirements for undertaking military intervention, including a threshold regarding the actual or potential harm, precautionary measures, and authorisation from the UNSC.⁷² The UNGA in 2005 and then the UNSC in 2006 partially endorsed the R2P doctrine, but only in terms of protection of the population ‘from genocide, war crimes, ethnic cleansing and crimes against humanity.’⁷³

In any case, the topic of humanitarian intervention or R2P is not the direct subject of this study.⁷⁴ On the other hand, scholars have also argued that cases such as Kosovo, Afghanistan, and Iraq have given birth to a new typology of conflict, ‘humanitarian war’, meaning ‘not one in which militaries intervene for

⁶⁹ David Rieff, “Humanitarianism in Crisis,” *Foreign Affairs* 81, no. 6 (November/December 2002), 120.

⁷⁰ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), XI; see also *Ibid.*, pars. 2.29-2.31.

⁷¹ *Ibid.*, XI; see also *Ibid.*, pars. 3.1-3.43, 4.1-4.43, and 5.1-5.31.

⁷² See *Ibid.*, pars. 4.10-4.43, 6.1-6.40 and 7.1-7.51.

⁷³ A/RES/60/1, 24 October 2005 (adopted without vote), pars. 138-139; S/RES/1674 (2006), 28 April 2006, par. 4.

⁷⁴ However, R2P will be mentioned with reference to POC and its implementation in Libya, where the boundaries between R2P and POC seemed to overlap. See Section 4.2.2.2.

humanitarian reasons, but rather, an alliance with the non-governmental humanitarian community to contain the humanitarian effects of Western military actions'.⁷⁵ Humanitarian efforts would have become connected to military intervention, but not as a justification for it, rather as an element of a comprehensive approach encompassing the use of armed force and measures to reduce the impact of the latter on civilians. This phenomenon is connected to this study, which focuses on the provision of life-saving assistance to civilians in need.

1.2.3. The Politicisation of Humanitarian Assistance: New Humanitarianism and the Focus on Protection

As explained in Section 1.1, since Dunant's *A Memory of Solferino*, the idea behind humanitarian assistance in conflict has been that humanitarian actors would take care of the basic needs of civilians caught in the conflict, without interfering in the hostilities or supporting any of the Parties. Given this de-politicised nature of humanitarian action, belligerents should allow humanitarian actors to operate, without attacking them or interfering with their work (for example, by diverting relief). However, in the second half of the 1980s, Ethiopia drew attention to the possible (unintended) contribution and support by humanitarian actors to the political strategies of a Party to the conflict. MSF denounced the strategy of forced displacement implemented by the Ethiopian Government through the diversion of relief aid and was expelled as a result, with the humanitarian community isolating the NGO and criticising its choice of interfering in the internal political affairs of Ethiopia.⁷⁶ When the debate on the possible contribution to the conflict by humanitarian actors re-emerged in the mid-1990s, it led to different results.

Following the accusations made against some NGOs of having fed and helped the Rwandan *génocidaires* in the refugee camps in Eastern Zaire, thus prolonging the conflict,⁷⁷ the humanitarian community started a process of reflection that generated a theoretical strand identified with the name of 'new

⁷⁵ Mark Duffield, Joanna Macrae, and Devon Curtis, "Editorial: Politics and Humanitarian Aid," *Disasters* 25, no. 4 (2001), 272-273.

⁷⁶ See Denis Kennedy, "Humanitarian NGOs and the Norm of Neutrality: A Community Approach," University of Minnesota, Working Paper, February 2008, 16-25. Available at http://www.humansecuritygateway.com/documents/ISA_humanitarianNGOSnormneutrality.pdf (accessed November 15, 2011). For a detailed account of this episode, see Section 5.1.

⁷⁷ See, for example, Alex De Waal, *Famine Crimes: Politics & the Disaster Relief Industry in Africa* (African Rights and The International African Institute in association with Oxford: James Currey; Bloomington & Indianapolis: Indiana University Press, 1997), 188-203. For a criticism of the action of humanitarian organisations in Rwanda, see for example Sarah Kenyon Lischer, "Collateral Damage: Humanitarian Assistance as a Cause of Conflict," *International Security* 28, no. 1 (Summer 2003): 79-109. For an opposite view, describing the reasons against closing down the refugee camps in Zaire, even if the result was to feed both innocent people and *génocidaires*, see Fiona Fox, "New Humanitarianism: Does It Provide a Moral Banner for the 21st Century?," *Disasters* 25, no. 4 (2001), 285-288. For a detailed analysis of the episode, see Section 5.2.1.

humanitarianism'.⁷⁸ It emerged primarily as a reaction to the acknowledgment of the limits and negative consequences deriving from the classical allegedly a-political activity, especially when used by the international community as the only tool to face complex crises, without being accompanied by a political response, as in the case of Rwanda.⁷⁹ Supporters of new humanitarianism proposed a vision of humanitarianism as openly political, as 'an integral part of Western governments' strategy to transform conflicts, decrease violence and set the stage for liberal development.'⁸⁰ Corresponding to this new concept of humanitarian action would also be a widening of its scope to 'include[] human rights, access to medicine, economic development, democracy promotion, and even building responsible states.'⁸¹ Collaboration with political and military actors, as well as possible calls for military intervention, would fall within the scope of humanitarians' legitimate action. The main rationale behind this broadening of the scope of humanitarian action is that the simple provision of relief and assistance to victims of conflicts has been perceived as not sufficient, and part of the humanitarian community has felt the need to try and tackle also the root causes of conflict.⁸²

This new kind of humanitarianism would have found its implementers and promoters in Wilsonian NGOs, emerged in opposition to Dunantist ones and aiming to tackle also the root causes of conflict (and thus of people's suffering), while the latter would stick to the narrower conception of humanitarian assistance, separated from politics and dealing only with the satisfaction of the basic needs of people caught in conflict.⁸³ In other words, multi-mandate organisations, meaning organisations that engage not only in emergency life-saving assistance but also 'in longer-term development and poverty alleviation, as well as advocating for human rights, equality and fairness',⁸⁴ have also claimed a role for themselves, while arguing that respect for the principles of humanitarian action would not be jeopardised by such a broad approach.⁸⁵

This 'goal-oriented' humanitarianism, characterised by 'the integration of human rights and peace building into the humanitarian orbit; the ending of the distinction between development and humanitarian

⁷⁸ See, for example, Duffield, Macrae, and Curtis (2001), *supra* fn. 75; Fox (2001), *supra* fn. 77; Kurt Mills, "Neo-Humanitarianism: The Role of International Humanitarian Norms and Organizations in Contemporary Conflict," *Global Governance* 11 (2005): 161-183; Michael Barnett, "Humanitarianism Transformed," *Perspectives on Politics* 3, no. 4 (December 2005): 723-740.

⁷⁹ See, for example, Mills (2005), *supra* fn. 78; Lischer (2003), *supra* fn. 77.

⁸⁰ Duffield, Macrae, and Curtis (2001), *supra* fn. 75, 269.

⁸¹ Barnett (2005), *supra* fn. 78, 723.

⁸² See, for example, Duffield, Macrae, and Curtis (2001), *supra* fn. 75, 270-271; Fox (2001), *supra* fn. 77, 279-280.

⁸³ Barnett (2005), *supra* fn. 78, 728; in particular, see the sources provided in footnote 33.

⁸⁴ Save the Children, *At a Crossroads: Humanitarianism for the Next Decade* (London: Save the Children UK, 2010), 11.

⁸⁵ See *Ibid.*

relief; and the rejection of the principle of neutrality,⁸⁶ has seriously questioned the concept of humanitarian action as traditionally understood, to the point that it has been argued that humanitarianism ‘is now as much about public relations as it is about helping people, is often used in the service—either directly or indirectly—of foreign policy goals and wartime objectives.’⁸⁷ Thus, a debate has arisen on the politicisation of humanitarian action: even if humanitarianism ‘always [had been] part of politics to the extent that its actions had political effects and relief workers saw themselves as standing with the weak and against the mighty’, it changed, with humanitarian agencies becoming ‘firmly, and in many ways self-consciously, part of politics.’⁸⁸

Some of the supporters of new humanitarianism have argued that the a-political nature of humanitarian action has always been a fiction.⁸⁹ Others have acknowledged the legitimacy for humanitarian agencies to adopt the approach of new humanitarianism but highlighted the risk that it would lead to ‘NGOs providing a humanitarian mask for a new era of foreign interference.’⁹⁰ On the other hand, other scholars have underlined the specific (limited) meaning of humanitarian action and advocated for the need to preserve such meaning. For example, Blondel noted the success of the use of the term ‘humanitarian’ and the risk that it might ‘lose its substance’ because of its multiple uses.⁹¹ He did not exclude the possibility of associating the term with words such as ‘policy’, ‘military’ or ‘economy’, but invoked a distinction between the different actors (humanitarian, military, political) and their responsibilities, in a spirit of complementarity, in order to safeguard the ‘pure’ humanitarian.⁹² Others called for a narrow use of the term ‘humanitarian’, not to cover interventions and actions of a clearly political nature, sometimes arguing that aid not provided exclusively on the basis of need is not humanitarian,⁹³ or at least they advocated the adoption of the necessary precaution by

⁸⁶ Fox (2001), supra fn. 77, 279 and 276.

⁸⁷ Mills (2005), supra fn. 78, 166.

⁸⁸ Barnett (2005), supra fn. 78, 733.

⁸⁹ See, for example, Lischer (2003), supra fn. 77, 86: ‘any humanitarian action in a conflict zone will have political, and possibly military, consequences regardless of the nonpolitical intentions of the provider.’ Paul O’Brien, “Politicized Humanitarianism: A Response to Nicolas de Torrente,” *Harvard Human Rights Journal* 17 (2004), 31-34. Thomas G. Weiss, “Principles, Politics, and Humanitarian Action,” *Ethics and International Affairs* 13, no. 1 (March 1999): 1-22 (in particular, 12-13).

⁹⁰ Duffield, Macrae, and Curtis (2001), supra fn. 75, 273; Fox (2001), supra fn. 77, 285 and 288.

⁹¹ Jean-Luc Blondel, “L’humanitaire appartient-il à tout le monde? Réflexions autour d’un concept (trop?) largement utilisé,” *International Review of the Red Cross* 82, no. 838 (June 2000), 327. Own translation.

⁹² Ibid., 330 and 336. Own translation.

⁹³ See, for example, Cornelio Sommaruga, “Réflexions et Convictions sur l’Humanitaire d’Aujourd’hui et de Demain,” *International Review of the Red Cross* 82, no. 838 (June 2000): 295-310; MSF, “MSF Pulls Out of Afghanistan,” MSF Press Release, July 28, 2004, available at <http://www.msf.org/msf/articles/2004/07/msf-pulls-out-of-afghanistan.cfm> (accessed April 25, 2011); MSF, “NATO Speech – Rheindalen, Germany, December 8, 2009,” MSF Article, December 9, 2009, available at <http://www.msf.org/msf/articles/2009/12/nato-speech.cfm> (accessed April 25, 2011); UN Humanitarian Information Unit – IRIN, “Afghanistan: USAID rejects NGO concerns over aid militarization,” December 02, 2009, available at <http://www.irinnews.org/Report.aspx?ReportId=87288> (accessed July 03, 2010); Jacques Forster, “Challenges to Independent Humanitarian Action in Contemporary Conflicts,” in *Human Security for All: A Tribute to Sergio Vieira de Mello*, ed. Kevin M. Cahill (New York: Fordham University Press and The Center for International Health and Cooperation, 2004), 165-182; Gerard Mc

humanitarian and non-humanitarian actors in their approach so as not to endanger actors following the traditional humanitarian approach.⁹⁴

Furthermore, again in connection to the events that took place in the 1990s and the need to go beyond the mere provision of aid, organisations engaged in relief have got involved in protection as a second component of humanitarian action, meaning measures to contribute to the protection of the human rights of individuals.⁹⁵ Indeed, simply supplying goods and services to keep people alive has led and always risks leading to the paradox of the ‘well fed dead’—victims provided with food and other humanitarian relief are still vulnerable to mistreatment in the absence of (physical) protection.⁹⁶ While in the past only a restricted number of actors, mainly the ICRC and UNHCR, engaged in protection activities, both actors traditionally focused on the provision of humanitarian assistance and the UN have increasingly referred to the protection of civilians and tried to define their respective roles in it. The analysis of this trend is important in the context of a study on humanitarian assistance not only because the same actors have become involved in both protection and assistance activities—so that the former may have consequences for the latter—but also because actors carrying out different activities may operate in the same context and influence each other. Indeed, humanitarian organisations and other actors have devoted more attention and resources to the protection of civilians,⁹⁷ but the meaning and operational content of this concept are unclear. More specifically, it is not clear what protection may or should entail in terms of activities by humanitarian actors and in terms of respect for the principles by actors engaging in both humanitarian assistance and humanitarian protection activities, and the risks of politicisation of their work.

Hugh and Lola Gostelow, *Provincial Reconstruction Teams and Humanitarian–Military Relations in Afghanistan* (London: Save the Children UK, 2004), 7–10. Available at http://www.rusi.org/downloads/assets/Save_the_Children_UK_-_PRTs_and_Humanitarian-Military_Relations_in_Afghanistan_2004_09.pdf (accessed March 12, 2012).

VENRO, quoting the German Red Cross, stated: ‘Measures are humanitarian if they meet the principles of neutrality, impartiality and independence. Aid measures that do not do this are not humanitarian, regardless of any well-meaning intentions and their effectiveness’; also, on the basis of IHL treaties, ‘aid that is not impartial because, for example, it gives preference to a certain section of the population, should not be referred to as humanitarian.’ VENRO, “Armed Forces as Humanitarian Aid Workers? Scope and Limits of Co-operation between Aid Organisations and Armed Forces in Humanitarian Aid,” VENRO Position Paper, May 2003, 4. Available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5Q4FPB/\\$file/venro-cimic-2003.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5Q4FPB/$file/venro-cimic-2003.pdf?openelement) (accessed February 15, 2011).

⁹⁴ Angelo Gnaedinger, “Humanitarian Action: ‘Today’s New Security Environment Has Forced Us Back to Basics,’” ICRC Official Statement, February 27, 2004, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5X6E5T> (accessed July 12, 2010); Pierre Krähenbühl, “Humanitarian Security: ‘A Matter of Acceptance, Perception, Behaviour...,’” ICRC Official Statement, March 31, 2004, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/5XSGWE> (accessed July 12, 2010); Michelle Kelly and Morten Rostrup, “Identify Yourselves: Coalition Soldiers in Afghanistan Are Endangering Aid Workers,” *The Guardian*, February 01, 2002, available at <http://www.guardian.co.uk/world/2002/feb/01/afghanistan.comment> (accessed July 12, 2010).

⁹⁵ See Section 5.3.

⁹⁶ Marc DuBois, “Protection: The New Humanitarian Fig-Leaf,” *Humanitarian Aid on the Move (URD Newsletter)* no. 2 (April 2009), 2. Available at http://www.urd.org/IMG/pdf/Protection_Fig-Leaf_DuBois.pdf.

⁹⁷ For example, an independent study on ‘Protecting Civilians in the Context of UN Peacekeeping Operations’ was jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs and published in November 2009. See Victoria Holt, Glyn Taylor, and Max Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (New York: UN, 2009).

Indeed, this discussion on the nature of humanitarian assistance and of humanitarianism has comprised a debate on the principles of humanity, impartiality (including non-discrimination), neutrality, and independence. While for the components of the International Red Cross and Red Crescent Movement adherence to these principles is required by their Statutes, their relevance for other humanitarian actors has been debated.⁹⁸ It has been sometimes claimed that not all the principles are explicitly required by the treaties and thus some of them are not binding, or that the meaning of these principles for humanitarian actors in general is different from the meaning assigned to them by the Red Cross.⁹⁹

Furthermore, while these principles are invoked by a plurality of actors engaged in the humanitarian field, there is often a lack of clarity on their actual meaning and the rules of conduct that derive from them. For example, the principles of neutrality and impartiality have been sometimes contested to the extent that respecting them would imply not publicly denouncing violations of IHL, not calling for military intervention, and not differentiating between innocent victims and criminals when distributing relief.¹⁰⁰ Various actors within the humanitarian community have questioned the convenience of respecting the principles and even proposed to opt for more practically oriented solutions.¹⁰¹ In this debate, it is not clear whether these principles are purely moral tenets or have a legal relevance as well; what respect for the principles entails in terms of rules of conduct; and what consequences may follow from the choice to respect or not the principles. Also, the principles have been increasingly associated not only to humanitarian assistance but also to protection activities,¹⁰² and again it is not clear whether and to what extent they apply to humanitarian

⁹⁸ See, for example, Surabhi Ranganathan, "Reconceptualizing the Boundaries of 'Humanitarian' Assistance: 'What's in a Name' or 'The Importance of Being Earnest'?", *The John Marshall Law Review* 40, no. 1 (2006): 195-233; Marion Harroff-Tavel, "Does It Still Make Sense to Be Neutral?", *Humanitarian Exchange* 25 (December 2003): 2-4.

⁹⁹ See, for example, Ranganathan (2006), *supra* fn. 98; Roberta Arnold, "The Legal Implications of the Military's 'Humanitarianisation,'" *Revue de Droit Militaire et de Droit de la Guerre* 43, no. 3-4 (2004), 28; Harroff-Tavel (2003), *supra* fn. 98; Heike Spieker, "The International Red Cross and Red Crescent and Military-Humanitarian Relationships," in *Between Force and Mercy: Military Action and Humanitarian Aid*, ed. Dennis Dijkzeul (Berlin: Berliner Wissenschafts-Verlag, 2004), 206; Adam Roberts, "The Role of Humanitarian Issues in International Politics in the 1990s," *International Review of the Red Cross* 81, no. 833 (March 1999), 37-38.

¹⁰⁰ See, for example, Lischer (2003), *supra* fn. 77; Fox (2001), *supra* fn. 77, 275-289.

¹⁰¹ See, for example, O'Brien (2004), *supra* fn. 89: 31-39; Sarah Kenyon Lischer, "Military Intervention and the Humanitarian 'Force Multiplier,'" *Global Governance* 13 (2007): 99-118. According to Weiss,

The sanctity of human life is the first principle of all humanitarians and overrides other considerations; but neutrality, impartiality, and consent are second-order principles that may or may not be accurate tactical guides. Traditional principles were developed as means to safeguard life, but they no longer provide unequivocal guidance and should be modified where necessary.

Weiss (1999), *supra* fn. 89, 12. Roberts wrote in 1999:

bodies such as the ICRC need to recognize, much more openly than they have done so far, that the principles they follow, including those of impartiality and neutrality, are not moral absolutes of universal value. Rather they represent one moral position among several possible moral positions, each of which has its own merits and defects.

Roberts (1999), *supra* fn. 99, 38.

¹⁰² As will be seen, the GCs and APs do not explicitly connect the principles to protection action and A/RES/46/182, for example, does not even contain the words 'protect' or 'protection'. The same is true for the 1994 Red Cross Code of Conduct, which refers to protection twice but always in relation to the protection of agencies themselves (par. 4 and Annex III, par. 3). International Movement of the Red Cross and Red Crescent, Twenty-sixth International Conference, Geneva, 1995. "Annex VI – Code of Conduct

protection, thus being principles not only ‘of humanitarian assistance’ but ‘of humanitarian action’ more in general,¹⁰³ and what they entail in practice.

This study uses the expression ‘principles of humanitarian assistance’ since they have been primarily associated to humanitarian assistance. One of the aims of the research will be to verify whether they can be rightly called ‘principles of humanitarian action’, applicable not only to humanitarian assistance but also to protection activities. One widely used expression is the general one ‘humanitarian principles’, but it has been chosen not to adopt this wording because it is used in GC IV and AP II to make reference to principles of humane treatment and not only to principles guiding relief actions.¹⁰⁴

Considering all these different questions and strands of debate on the concept of humanitarian assistance, with the mostly political points of view that have been proposed, this study will adopt a legal

for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief.” Reproduced in *International Review of the Red Cross* 36, no. 310 (January-February 1996): 119-127.

The *Guiding Principles on Internal Displacement* differentiate between assistance and protection, and associate the principles to humanitarian assistance only (Principle 24). However, according to Principle 27(1): ‘International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.’ *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39 – Addendum: Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 11 February 1998, hereinafter *Guiding Principles on Internal Displacement*.

¹⁰³ For example, while the 2003 UN OCHA *Glossary of Humanitarian Terms* (supra fn. 67) relates the principles to humanitarian assistance, a more recent publication by UN OCHA refers to humanitarian action: it defines impartiality as ‘Humanitarian action must be carried out on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions.’ UN OCHA, “OCHA on Message: Humanitarian Principles,” Version I, April 2010, 1. Available at http://ochanet.unocha.org/p/Documents/OOM_HumPrinciple_English.pdf (accessed March 15, 2012). The *European Consensus on Humanitarian Aid* (par. 8) and the *Treaty on the Functioning of the European Union* as amended by the *Lisbon Treaty* (hereinafter TFEU) (art. 214(1)) connect the principles to humanitarian aid operations, which ‘shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations’. Council of the EU, *Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission: The European Consensus on Humanitarian Aid*, OJ C 25, 30 January 2008, 2; *Consolidated version of the Treaty on the functioning of the European Union*, OJ C 83, 30 March 2010, 47. The (non-binding) *Principles and Good Practice of Humanitarian Donorship* explicitly refer to ‘humanitarian action’ and the principles that should guide it, and define humanitarian action as ‘includ[ing] the protection of civilians and those no longer taking part in hostilities,’ in addition to the provision of humanitarian assistance (par. 3). *Principles and Good Practice of Humanitarian Donorship*, endorsed in Stockholm, June 17, 2003, by Germany, Australia, Belgium, Canada, the European Commission, Denmark, the United States, Finland, France, Ireland, Japan, Luxembourg, Norway, the Netherlands, the United Kingdom, Sweden and Switzerland. Available at www.goodhumanitarianandonorship.org/Libraries/Ireland_Doc_Manager/EN-23-Principles-and-Good-Practice-of-Humanitarian-Donorship.sflb.ashx (accessed March 15, 2012).

¹⁰⁴ See art. 100(1) GC IV (‘The disciplinary regime in places of internment shall be consistent with humanitarian principles’); first *considerando* of the preamble AP II (referring to the ‘humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949’). On this, see also Nicholas Leader, “Proliferating Principles; Or How to Sup with the Devil without Getting Eaten,” *Disasters* 22, no. 4 (1998), 288-289. On the other hand, for example, it seems that within the UN system ‘humanitarian principles’ has been commonly used to refer to the principles of humanity, impartiality, neutrality, and independence. See, for example, S/RES/1674 (2006), 28 April 2006, par. 21; S/PRST/2008/6, 12 February 2008, 1; S/RES/1806 (2008), 20 March 2008, par. 4(f); S/RES/1814 (2008), 15 May 2008, preamble; S/PRST/2008/18, 27 May 2008, 1; S/PRST/2009/1, 14 January 2009, 2; S/RES/1868 (2009), 23 March 2009, par. 4(f); S/PRST/2009/9, 29 April 2009, 3; S/RES/1894 (2009), 11 November 2009, par. 13; S/RES/1916 (2010), 22 March 2010, par. 6(c); S/PRST/2010/25, 22 November 2010, 2; S/RES/1974 (2011), 22 March 2011, preamble; S/PRST/2011/12, 3 June 2011, 1; A/RES/56/175, 19 December 2001, par. 2(a)(xii); A/RES/57/230, 18 December 2002, par. 2(k); A/RES/58/114, 17 December 2003, par. 9; A/RES/59/141, 15 December 2004, par. 11; A/RES/59/314, 13 September 2005, par. 169; A/RES/60/1, 16 September 2005, par. 169; A/RES/60/124, 15 December 2005, par. 7; A/RES/60/233, 23 December 2005, par. 3(m); A/RES/61/134, 14 December 2006, par. 5; A/RES/61/232, 22 December 2006, par. 3(j); A/RES/62/94, 17 December 2007, pars. 6-7; A/RES/65/133, 15 December 2010, preamble; ECOSOC Resolution 2003/5, 15 July 2003, par. 21; ECOSOC Resolution 2004/50, 23 July 2004, par. 19; ECOSOC Resolution 2005/4, 15 July 2005, par. 19; ECOSOC Resolution 2008/36, 25 July 2008, preamble and par. 11; ECOSOC Resolution 2009/3, 22 July 2009, pars. 11 and 18; ECOSOC Resolution 2010/1, 15 July 2010, pars. 12 and 19.

approach to provide clarity and search for answers in international law, in particular IHL. In other words, the aim of this research is to clarify the legal framework regulating the provision of humanitarian assistance to civilians during armed conflict in IHL, as well as the legal and practical relevance of the principles traditionally associated to this activity, and the rules embodied by these principles. While the aforementioned trends have generated doubts on the a-political nature of the provision of humanitarian assistance in conflict—the element traditionally justifying the protection of this activity and of the actors involved in it—and led to a political debate, this study adopts a legal perspective to verify what answers to problems and challenges emerging in practice may be offered by international law, in particular IHL and international human rights law (IHRL). Clearly, State practice might have itself contributed to developments through customary law, so that another objective of the research is to examine whether, in addition to the provisions of IHL treaties, other rules might be identified at the level of custom.¹⁰⁵

Taking into account existing literature on international law regulating the provision of humanitarian assistance to civilians in armed conflict,¹⁰⁶ or in situation of emergency more in general,¹⁰⁷ the present study will further develop and complement it by providing a comprehensive overview of the legal framework applicable in this field, considering challenges emerged in practice and reflected in the aforementioned debates, and looking for answers to them. In this sense, special attention will be given to relationships between relief organisations and military actors, as well as to the role of armed actors in the provision of relief, and to the concept of protection of civilians and the role of different actors in it, in particular actors engaged at the same time in humanitarian assistance.

1.3. Some Preliminary Theoretical and Methodological Issues

To analyse practice in the field of the provision of humanitarian assistance to civilians in armed conflict, some specific theoretical and methodological challenges will need to be taken into account, with regard to the interaction between IHL and other bodies of international law (in particular IHRL), the concept of principles in international law, and some issues related to the formation of IHL, in particular the role of non-

¹⁰⁵ On unclear points in terms of rights and obligations both of those providing assistance and of those called upon to agree to it and/or facilitate it, see, for example, ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,” Report prepared by the ICRC, 31IC/11/5.1.2, Geneva, October 2011, 23-26. Available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> (accessed December 03, 2011).

¹⁰⁶ See, for example, Sandvik-Nylund (2003), *supra* fn. 48; Abril Stoffels (2001), *supra* fn. 49.

¹⁰⁷ See *supra* fn. 57.

State actors in such process. First of all, one has to be aware that IHL is usually the reference legal framework when analysing the international law regulating armed conflict, but in the last few decades a general agreement has emerged that IHRL continues to apply during armed conflict, so that the relationship between the two regimes needs to be taken into account and clarified. In addition, while discourses on humanitarian assistance practically always make reference to the principles of humanity, impartiality, and neutrality (as well as independence, often), the legal status and the nature of these principles under international law and in relation to the concept of ‘principle’ in international law need clarification.

From the point of view of methodology, as will be seen throughout the study, various documents adopted at the international level and relevant to the analysis of the subject are non-binding, in particular in the case of resolutions adopted by intergovernmental bodies such as the UNGA. Their possible contribution to the creation of international law will thus be briefly examined. Similarly, the contribution of military manuals guiding the conduct of armed forces to the formation of international law is not uncontroversial, so that the reasons behind the choice made in this research to consider them as instances of State practice will be clarified.

Finally, the provision of humanitarian assistance has been increasingly characterised by the presence of non-State actors, both in the position of providers and in the role of Parties to the conflict consenting to, regulating, and controlling the activity of providers. Throughout the analysis, special attention will be devoted to the practice of non-State armed groups, inter-governmental organisations (IGOs), non-governmental organisations (NGOs), and PMSCs. However, their role in the formation of customary international law needs to be first analysed.

1.3.1. International Humanitarian Law and its Interaction with International Human Rights Law

In addition to IHL, a second source of regulation of the provision of humanitarian assistance to civilians in armed conflict is IHRL.¹⁰⁸ While IHL and IHRL have developed as two separate disciplines, mainly under

¹⁰⁸ Relevant IHRL treaties are, for example, the *International Covenant on Civil and Political Rights*, New York, December 16, 1966, A/RES/21/2200A, entered into force March 23, 1976 (999 UNTS 171), hereinafter ICCPR; *International Covenant on Economic, Social and Cultural Rights*, New York, December 16, 1966, A/RES/21/2200A, entered into force January 3, 1976 (993 UNTS 3), hereinafter ICESCR; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, November 4, 1950, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively (213 UNTS 222), hereinafter ECHR; *American Convention on Human Rights*, San José, November 22, 1969, entered into force July 18, 1978 (1144 UNTS 123), hereinafter ACHR; *African*

the aegis of the ICRC and of the UN respectively,¹⁰⁹ signs of a relationship and similarities between them were highlighted already by Pictet, who affirmed that humanitarian law understood in a wide sense ‘comprise[d] two branches: the law of war and human rights.’¹¹⁰ He then specified ‘that the two fields [we]re interrelated and, conversely, that they [we]re distinct and should remain so.’¹¹¹

A point of contact between IHL and IHRL can be found in the Martens Clause, inserted for the first time in the preamble to the Hague Convention II 1899 and then in the Hague Convention IV 1907 and, with a different formulation, in Article 1(2) AP I. It provides for the possibility of supplementing treaty law in the field of IHL with rules deriving from ‘principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.’¹¹² The International Conference on Human Rights referred to the Martens Clause in its 1968 resolution entitled ‘Human Rights in Armed Conflicts’. The Conference highlighted the fact that civilians, prisoners, and combatants were not sufficiently protected by existing rules of IHL and requested the UN Secretary-General (UNSG), after consultation with the ICRC, ‘to ensure that in all armed conflicts the inhabitants and belligerents are protected in accordance with “the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience.”’¹¹³ Following this, the UNGA adopted yearly resolutions on the respect for human rights in armed conflicts, and in 1970 it also adopted a resolution on ‘Basic principles for the protection of civilian populations in armed conflict,’ which explicitly stated that ‘[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.’¹¹⁴ Finally, Article 72 AP I provides that the rules of the protocol regulating the treatment of persons

[Banjul] *Charter on Human and Peoples’ Rights*, June 27, 1981 (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)), entered into force October 21, 1986, hereinafter AfCHPR.

¹⁰⁹ See, for example, Robert Kolb, “The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions,” *International Review of the Red Cross* 38, no 324 (September 1998): 409-419.

¹¹⁰ Jean Pictet, “The Principles of International Humanitarian Law,” *International Review of the Red Cross* 6, no. 66 (September 1966), 456.

¹¹¹ Jean Pictet, *Humanitarian Law and the Protection of War Victims* (Leiden: Sijthoff / Geneva: Henry Dunant Institute 1975), 14. Emphasis omitted.

¹¹² *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, October 18, 1907, entered into force January 26, 1910, preamble. Hereinafter Hague Convention IV 1907 and Hague Regulations. See also Hague Convention II 1899, preamble. Art. 1(2) AP I states: ‘In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.’ See also art. 63 GC I, art. 62 GC II, art. 142 GC III, and art. 158 GC IV. For a thorough analysis of the Martens Clause, see Section 1.3.2.

¹¹³ International Conference on Human Rights, Resolution XXIII Human Rights in Armed Conflicts, 12 May 1968. Contained in UN, *Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968*, A/CONF.32/41, 18 (New York: UN, 1968).

¹¹⁴ UNGA res. 2675(XXV), 9 December 1970. See also UNGA res. 2444(XXIII), 19 December 1968; UNGA res. 2597(XXIV), 16 December 1969; UNGA res. 2674(XXV), 9 December 1970; UNGA res. 2676(XXV), 9 December 1970; and UNGA res.

in the power of a Party to the conflict are ‘additional to ... other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.’

It is now generally accepted that IHRL continues to apply in the course of an armed conflict, subject to the possibility of derogation provided for in the relevant instruments,¹¹⁵ and support for this can be found both in the presence of derogation clauses in human rights treaties, which explicitly provide that some rights cannot be derogated from in time of public emergency including war,¹¹⁶ and in decisions by the International Court of Justice (ICJ) and scholarly works.¹¹⁷ Regarding derogations, civil and political rights are usually distinguished as derogable or non-derogable. States are allowed to derogate in time of public emergency from their obligations under human rights treaties, but some rights are explicitly envisaged in the various treaties as non-derogable, such as the right to life, the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, the right to freedom from slavery, and the right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.¹¹⁸

Even when derogations are allowed, they can be undertaken only ‘to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the State’s] other obligations under international law’;¹¹⁹ they must ‘not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’;¹²⁰ and they must be notified to either the other States Parties

2677(XXV), 9 December 1970. UNGA res. 2853(XXVI), 20 December 1971; UNGA res. 3032(XXVII), 18 December 1972; UNGA res. 3102(XXVIII), 12 December 1973; UNGA res. 3319(XXIX), 14 December 1974; UNGA res. 3500(XXX), 15 December 1975; A/RES/31/19, 24 November 1976; A/RES/32/44, 8 December 1977.

¹¹⁵ Israel and the U.S. object to this contextual applicability of IHL and IHRL during armed conflicts, and it might be argued that they can be classified as persistent objectors. However, such a stand seems questionable. See Françoise J. Hampson, “The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body,” *International Review of the Red Cross* 90, no. 871 (September 2008), 550-551; Cordula Droegge, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict,” *Israel Law Review* 40, no. 2 (2007), 323-324.

¹¹⁶ See, for example, Hans-Joachim Heintze, “On the Relationship between Human Rights Law Protection and International Humanitarian Law,” *International Review of the Red Cross* 86, no. 856 (December 2004), 791.

¹¹⁷ Relevant judgements and advisory opinions by the ICJ will be analysed later in this Section: they can play an important role in ascertaining the existence of rules of customary international law, thus verifying the existence of State practice and *opinio juris*, but also possibly contribute to the formation of *opinio juris* of States. See, for example, Tullio Treves, “Customary International Law,” in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2008), pars. 53-59. Online edition, available at <http://www.mpepil.com> (accessed November 29, 2009).

Regarding doctrine on IHRL in armed conflict, see, for example, Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford [etc.]: Oxford University Press, 2011); Roberta Arnold and Noëlle Quéniwet, eds., *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2008).

¹¹⁸ See, for example, art. 4 ICCPR, art. 15 ECHR, art. 27 ACHR. Art. 4 ICCPR also mentions as non-derogable rights: the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation; the right to recognition as a person before the law; and, the right to freedom of thought, conscience and religion. Art. 27 ACHR adds also the rights of the family, the right to a name, the rights of the child, the right to nationality, and the right to participate in government.

¹¹⁹ Art. 16(1) ECHR. Art. 4 ICCPR contains an almost identical formulation and in addition to this it also requires that such measures ‘do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’

¹²⁰ Art. 4(1) ICCPR. See also Human Rights Committee (HRC), General Comment 29: States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, par. 8. Art. 16 ECHR does not contain a similar provision on non-discrimination, but according to

to the treaty in question and/or a specific organ of the organisation that has sponsored the conclusion of the treaty (such as the UNSG for the *International Covenant on Civil and Political Rights* (ICCPR), the Secretary General of the Council of Europe for the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), the Secretary General of the Organization of the American States for the *American Convention on Human Rights* (ACHR)). Furthermore, the Human Rights Committee (HRC), the organ called to monitor respect for the ICCPR, stated in its General Comment 29, devoted to ‘states of emergency’, that during armed conflict additional protection is guaranteed by the application of IHL and that ‘even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.’¹²¹

Similarly, the European Court of Human Rights (ECtHR) ruled that derogations can only be adopted in ‘an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed’;¹²² such situation must be actual or its effects must involve the whole nation, it must threaten the continuance of the organised life of the community, and normal measures or restrictions, permitted by the ECHR for the maintenance of public safety, health and order, must be plainly inadequate.¹²³ Also, permitted derogation measures are only those strictly required by the exigencies of the situation.¹²⁴

According to the Inter-American Commission on Human Rights (IAComHR), ‘measures relating to states of emergency “can only be justified when there is a real threat to law and order or the security of the state”’, the suspension of rights and freedoms ‘must last only for the period of time strictly required by the exigencies of the situation’, and it ‘can only take place to the extent strictly required by the exigencies of the situation.’¹²⁵ In sum, civil and political rights can be derogated from in times of public emergency (including

the ECtHR the measures adopted need to be necessary and proportionate, and the Court has found some measures to be disproportionate due to their discriminatory nature (on the basis of nationality). See ECtHR, *A and Others v. United Kingdom*, App. No. 3455/05, Judgment, 19 February 2009, par. 186.

¹²¹ HRC, General Comment 29: States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, par. 3.

¹²² ECtHR, *Lawless v. Ireland* (No. 3), App. No. 332/57, Judgment, 1 July 1961, par. 28.

¹²³ European Commission for Human Rights (EComHR), *Denmark, Norway, Sweden and the Netherlands v. Greece* (the Greek case), App. Nos. 3321/67, 3322/67, 3323/67 and 3344/67, Report of the Commission, 5 November 1969, par. 153. However, the ECtHR has interpreted these criteria flexibly and has granted the State a margin of appreciation in deciding whether an emergency that threaten the life of the nation exists. See *A. and Others v. the United Kingdom*, App. No. 3455/05, Judgment, 19 February 2009, pars. 179-180; *Ireland v. the United Kingdom*, App. No. 5310/71, Judgment, 18 January 1978, par. 207.

¹²⁴ ECtHR, *Brannigan and McBride v. United Kingdom*, App. Nos. 14553/89 and 14554/89, Judgment, 25 May 1993, pars. 43 and 48-66.

¹²⁵ Inter-American Commission on Human Rights (IAComHR), *Carlos Florentino Molero Coca Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha v. Peru*, Case 11.182, Report No. 49/00, 13 April 2000, pars. 67-69.

armed conflict), but only to the extent strictly necessary, without involving any discrimination, and not if they are explicitly provided in the relevant treaty as non-derogable.¹²⁶

The applicability of economic, social and cultural rights in situations of armed conflict is more problematic, since these rights are by definition programmatic and subject to progressive realisation. No derogation clause is provided in treaties devoted to them,¹²⁷ but each State is required to ‘take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights ... by all appropriate means, including particularly the adoption of legislative measures.’¹²⁸ On the basis of this, the Committee on Economic, Social and Cultural Rights (CESCR), the body responsible for monitoring the implementation of the ICESCR, has affirmed that ‘while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect’ and more precisely the ‘undertaking in article 2 (1) “to take steps”, which in itself, is not qualified or limited by other considerations.’ In this sense, notwithstanding the fact that the rights contained in the ICESCR are susceptible of a progressive realisation over a long period of time, steps must be taken immediately by the States Parties towards this realisation and ‘any deliberately retrogressive measures in that regard’ must be justified. The Committee has thus reached the conclusion that ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party’ and that ‘[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition,’ which include ‘both the resources existing within a State and those available from the international community through international cooperation and assistance.’¹²⁹

¹²⁶ On this topic, see, for example, Doswald-Beck (2011), *supra* fn. 117, in particular 68-105; Valeria Eboli, *La tutela dei diritti umani negli stati d'emergenza* (Milano: Giuffrè, 2010); Sarah Cassella, *La nécessité en droit international: de l'état de nécessité aux situations de nécessité* (Leiden [etc.]: Nijhoff, 2011).

¹²⁷ Art. 4 ICESCR allows States to subject the rights to limitations, but ‘determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’. On limitations, see, for example, Philip Alston and Gerard Quinn, “The Nature and the Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights,” *Human Rights Quarterly* 9, no. 2 (May 1987), 192-206; Sandvik-Nylund (2003), *supra* fn. 48, 64; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Oxford and Portland, Oregon: Hart Publishing, 2009), 100-102; M. Magdalena Sepúlveda, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp [etc.]: Intersentia, 2003).

¹²⁸ Art. 2(1) ICESCR.

¹²⁹ CESCR, General Comment 3: The nature of States parties obligations (Art. 2, par.1), 14 December 1990, E/1991/23, pars. 1-2, 9-10, and 13.

Situations of public emergency and armed conflict may have an impact on the resources available to States to guarantee the full enjoyment of economic, social and cultural rights, and they may also negatively affect territorial control, crucial for the implementation of some of these rights. Nonetheless, this does not mean that this category of rights ceases to apply during conflicts. In some cases, specific IHL provisions exist in the field covered by these rights, which reflect a balance between humanitarian considerations and military necessity.

Once determined that IHRL continues to apply during armed conflict, issues that need clarification in relation to the interaction between IHL and IHRL are, first, the criteria to define this interaction between the two bodies of law and, second, the question of extraterritorial applicability, which is the norm for IHL but the exception for IHRL. On the criteria regulating the interaction between IHRL and IHL, the ICJ has repeatedly expressed itself. In 1996, it dealt with the applicability of IHRL during armed conflict for the first time, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, and it stated that the rights enshrined in the ICCPR continue to apply during conflict, except for the possibility of derogation provided for in the treaty itself.¹³⁰ Furthermore, the Court affirmed that the right to life as provided in the ICCPR should be interpreted in time of armed conflict in light of ‘the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities,’ in other words IHL.¹³¹

In the subsequent Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 2004, the ICJ restated the applicability of human rights instruments in time of armed conflict and further specified that ‘there are thus three possible solutions: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.’¹³² In this sense, to take a decision in the case under examination, the ICJ determined that it had to consider ‘both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.’¹³³ Also, the

¹³⁰ See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996 at 66, par. 25.

¹³¹ Ibid., emphasis in the original.

¹³² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004 at 136, par. 106.

¹³³ Ibid., emphasis in the original.

judges interpreted the ICCPR in the sense that this treaty ‘is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.’¹³⁴

Finally, in the 2005 judgement in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* the Court reaffirmed the position taken in the two advisory opinions on the contextual applicability of IHL and IHRL, but without making reference to the *lex specialis* character of IHL,¹³⁵ so that some authors wondered whether this would amount to an implicit retreat from the approach based on this principle.¹³⁶ Indeed, the application of the *lex specialis* principle to regulate the relationship between IHL and IHRL has been widely analysed and often criticised because of its lack of clarity.¹³⁷

Within this framework, this research will follow the approach applied in practice by the ICJ and supported by the majority of the doctrine on the subject, in the sense that the relation of speciality will be applied with reference to single norms and not to the entire IHL-IHRL regimes. The two branches of international law will still be considered as separate, not only because the aim of protecting human beings in IHL always needs to be balanced against military necessity, but also because, for example, the applicability of IHL obligations to non-State actors is uncontroversial, while the same is not true for the applicability of IHRL obligations.¹³⁸ To operationalise the concurrent applicability of IHL and IHRL norms, inspiration will

¹³⁴ Ibid., par. 111. On the extraterritorial applicability of IHRL treaties, see below in this Section.

¹³⁵ See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment, 19 December 2005, ICJ Reports 2005 at 168, pars. 216-217. Also, it widened the principle of extraterritorial applicability of IHRL to human rights instrument in general, no longer limiting it to the ICCPR: see par. 216.

¹³⁶ See, for example, Droege (2007), *supra* fn. 115, 338.

¹³⁷ In particular, since the international legal system is fragmented and has no clear hierarchical order among its sources and norms, it may be difficult to determine what is the more specific between two norms or, even more radically, between two legal regimes. See Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskeniemi, 13 April 2006, A/CN.4/L.682, pars. 88, 91, 96, 103-104, and 112. On the debate regarding the relation between IHL and IHRL and the concept of *lex specialis*, see also Droege (2007), *supra* fn. 115, 337; Hans-Peter Gasser, “International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion,” *German Yearbook of International Law* 45 (2002), 162; Heintze (2004), *supra* fn. 116, 794; Anja Lindroos, “Addressing the Norm Conflicts in a Fragmented System: The Doctrine of Lex Specialis,” *Nordic Journal of International Law*, 74, no. 1 (2005), 66; Marko Milanovic, “A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law,” *Journal of Conflict and Security Law* 14, no. 3 (Winter 2009), 476; Marco Sassòli and Laura M. Olson, “The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts,” *International Review of the Red Cross* 90, no. 871 (September 2008): 599-627. Criticising the possibility of applying IHL and IHRL in a complementary way, see for example Bill Bowring, “Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights,” *Journal of Conflict and Security Law* 14, no. 3 (Winter 2009): 485-498.

¹³⁸ The applicability of IHL obligations to non-State armed groups is generally acknowledged, even if there is no general agreement on the legal basis for the binding nature of provisions contained in IHL treaties upon these actors (which are not parties to such treaties and have not participated in their negotiations). Proposed legal arguments include: armed groups being bound by customary international law, by general principles of international law, by treaties through succession, or by treaties as *de facto* authorities in a particular territory; the competence of the government to legislate for all its nationals; the binding nature of treaties on third parties; the binding nature of treaties due to intention of the Parties to bind also armed opposition groups; consent/acquiescence by the groups to be bound; and the direct applicability of IHL. See, for example, Sandesh Sivakumaran, “Binding Armed Opposition Groups,” *ICLQ* 55, no. 2 (April 2006): 369-394; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 14-26; Cedric Ryngaert, “Human Rights Obligations of Armed Groups,” *Revue*

be taken from the approach suggested by Campanelli. According to him, ‘the rules protecting human rights – *leges generales* – can continue to be applied during a conflict, on certain conditions: first, their application must be possible *ratione personae* and, if treaty-based rules are involved, *ratione loci*; second, they must not conflict with a special rule of the law of armed conflicts; and, third, they must not be derogated in case of war, public emergency or a similar scenario that would limit or preclude their applicability during an armed conflict.’¹³⁹

In addition, with reference to the right to life in armed conflict, Doswald-Beck has argued in favour of a ‘teleological interpretation’ of the law. Given that both IHL and IHRL ‘try to protect people from unnecessary violence to the degree possible whilst respecting the perceived needs of society,’ the solution proposed is that ‘[s]pecific, clear and well-established rules of IHL can be considered to be *lex specialis*,’ while ‘where there is any kind of doubt, or where the rules are too general to provide all the answers, then human rights law will fill the gap, provided that this law is not incompatible with the overall fundamental aim and purpose of IHL.’¹⁴⁰

In the field of interest of the present study, undoubtedly relevant IHRL provisions are those related to the right to life,¹⁴¹ non-derogable at least in terms of the right not to be arbitrarily deprived of one’s life,¹⁴²

Belge de Droit International 2008/1-2 (2008), 357-358; Yoram Dinstein, “The Interaction between Customary International Law and Treaties,” *Receuil des Cours* 322 (2006), 342-345; Raphaël van Steenberghe, “Non-State Actors from the Perspective of the International Committee of the Red Cross,” in *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, ed. Jean d’Aspremont (London and New York: Routledge, 2011), 212-224.

In favour of applying IHRL to non-State actors, see for example Andrew Clapham, “Human Rights Obligations of Non-State Actors in Conflict Situations,” *International Review of the Red Cross* 88, no. 863 (September 2006): 491-523; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006). See also Dieter Fleck, “International Accountability for Violations of the *Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law,” *Journal of Conflict & Security Law* 11, no. 2 (2006), 191-192; Abril Stoffels (2001), *supra* fn. 49, 123-125.

However, it is not generally agreed that IHRL obligations are applicable to non-State actors *de lege lata*: see, for example, Mohamed Abdelsalam Babiker, *Application of Humanitarian and Human Rights Law to the Armed Conflicts of the Sudan: Complementary or Mutually Exclusive Regimes?* (Antwerp, Oxford: Intersentia, 2007), 137-147; Rachel Brett, “Non-governmental Human Rights Organizations and International Humanitarian Law,” *International Review of the Red Cross* 38, no. 324 (September 1998): 531-536; Louise Doswald-Beck and Sandra Krähenmann, “Incorporating International Human Rights Law,” in *National Military Manuals on the Law of Armed Conflict*, 2nd ed., ed. Nobuo Hayashi (Oslo: Torkel Opsahl Academic EPublisher, 2010), 158-159; Droege (2007), *supra* fn. 115, 336; Heike Krieger, “A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study,” *Journal of Conflict & Security Law* 11, no. 2 (2006), 279; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), 194; Laura M. Olson, “Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict,” *Case Western Reserve Journal of International Law* 40 (2009), 450-451; Zegveld (2002), *supra* fn. 138, 148-152.

¹³⁹ Danio Campanelli, “The Law of Military Occupation Put to the Test of Human Rights Law,” *International Review of the Red Cross* 90, no. 871 (September 2008), 656. Moreover, as highlighted by Hampson, “[t]he solution to the *lex specialis* problem in practice has to be capable of being applied by those involved at the time they act or take decisions’ and ‘[i]t cannot be determined after the event, even if that is when it is enforced.’ Hampson (2008), *supra* fn. 115, 562.

¹⁴⁰ Doswald-Beck (2011), *supra* fn. 117, 903. See also Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford [etc.]: Oxford University Press, 2011), 106-126.

¹⁴¹ See art. 6 ICCPR, art. 2 ECHR, art. 4 ACHR, and art. 4 AfCHPR.

¹⁴² See for example ICJ, *Legality of the Threat or Use of Nuclear Weapons* (1996), *supra* fn. 130, par. 25. Similarly, see Ruth Abril Stoffels, “Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps,” *International Review of the Red Cross* 86, no. 855 (September 2004), 518. On the right to life, see also: Yoram Dinstein, “The Right to Life, Physical Integrity and Liberty,” in *The International Bill of Rights*, ed. L. Henkin (New York: Columbia University Press, 1981), 114-137; HRC,

the right to an adequate standard of living, including the right to food,¹⁴³ the right to the highest attainable standard of physical and mental health,¹⁴⁴ and the right to be free from torture or other inhuman, cruel or degrading treatment, non-derogable as far as torture is concerned.¹⁴⁵ All the aforementioned rights, be they civil and political rights or economic, social and cultural ones, shall be guaranteed to all individuals in the territory and under the jurisdiction of a given State without discrimination ‘on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other

General Comment 6: The Right to Life (Article 6), 30 April 1982, sixteenth session. Tomuschat affirms that ‘only specific forms of interference with human life fall within the scope of *jus cogens*, such as genocide.’ Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd ed. (Oxford [etc.]: Oxford University Press, 2008), 38.

¹⁴³ Art. 11(1) of the ICESCR; Article 11(2) recognises ‘the fundamental right of everyone to be free from hunger’, which has been interpreted as the minimum core content of the right, that may not be subjected to any limitation and thus would be non-derogable: see Alston and Quinn (1987), *supra* fn. 127, 201 and 219; CESCR, General Comment 12: The Right to Adequate Food (art. 11), 12 May 1999, E/C.12/1999/5, in particular pars. 6 and 16-17; UN OHCHR and FAO, *The Right to Adequate Food*, Fact Sheet no. 34 (Geneva: United Nations, 2010), 9; Lorenzo Cotula and Margaret Vidar, *The Right to Adequate Food in Emergencies*, FAO Legislative Study no. 77 (Rome: FAO, 2002), 7 and 17. No similar provision on the right to food or to an adequate standard of living is contained in the ECHR or in the AfCHPR (but the African Commission on Human and Peoples’ Rights through its case-law has given protection to the right to food and to the right to housing based on their inseparable link to the dignity of human beings: African Commission on Human and Peoples’ Rights, Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 27 May 2002, Fifteenth Annual Activity report 1999-2000, Annex V, pars. 65 and 60). On the contrary, the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights, recognizes in art. 12 the right to food: *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, San Salvador, November 17, 1988, entered into force November 16, 1999 (O.A.S. Treaty Series No. 69 (1988)), hereinafter Protocol of San Salvador. In addition to the inclusion of ‘adequate food, clothing and housing’ in the concept of adequate standard of living, the CESCR in its General Comment 15 included also the right to water. See CESCR, General Comment 15: The Right to Water (arts. 11 and 12), 20 January 2003, E/C.12/2002/11, in particular pars. 20-29. However, it should be underlined that the UNGA resolution ‘[r]ecogniz[ing] the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights’ (A/RES/64/292, 28 July 2010) was adopted in July 2010 with 122 votes in favour and 41 abstentions, and the statements by the abstaining States included the affirmations that ‘there is no right to water and sanitation in an international legal sense as described by the [...] resolution’, and that ‘the United Kingdom does not believe that there exists at present sufficient legal basis under international law to either declare or recognize water or sanitation as free-standing human rights.’ Statements by the U.S. and the UK representatives respectively preceding the adoption of the resolution: A/64/PV.108, 28 July 2010, 8 and 12.

¹⁴⁴ Art. 12(1) ICESCR, art. 16 AfCHPR, and art. 10 Protocol of San Salvador. On the interpretation of art. 12(1) by the CESCR, see in particular CESCR, General Comment 14: The Right to the Highest Attainable Standard of Health (article 12), 11 August 2000, E/C.12/2000/4, pars. 11, 34-37 and 50-52. According to the General Comment (pars. 43 and 47), the right would include the core and non-derogable immediate obligation to ‘ensure the satisfaction of, at the very least, minimum essential levels of ... essential primary health care.’

¹⁴⁵ See arts. 7 and 4 ICCPR, arts. 3 and 15 ECHR, arts. 5 and 27 ACHR. On the nature of the prohibition of torture as *jus cogens*, see for example Tomuschat (2008), *supra* fn. 142, 38; Manfred Novak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised ed. (Kehl: N.P. Engel, Publisher, 2005), 157-158; ICTY, Trial Chamber, *Prosecutor v. Furundžija*, case no. IT-95-17/1, Judgment, 10 December 1998, par. 153; ECtHR, *Al-Adsani v. United Kingdom*, App. No. 35763/97, Judgment (Merits), 21 November 2001, ECHR 2001-XI, pars. 60-61; HRC, General Comment 29: States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, par. 11. The ICTY in its case-law has determined that the ‘the deprivation of adequate food, water, sleeping and toilet facilities and medical care,’ together with ‘the creation and maintenance of an atmosphere of terror’ in a prison camp, ‘constitutes the offence of cruel treatment’, and that the deliberate deprivation of food can amount to torture if it ‘can be shown to pursue one of the prohibited purposes of torture and to have caused the victim severe pain or suffering’. ICTY, Trial Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as “Pavo”, Hazim Delić, Esad Landžo also known as “Zenga”*, case no. IT-96-21-T, Judgment, 16 November 1998, par. 1119; ICTY, Trial Chamber II, *Prosecutor v. Milorad Krnojelac*, case no. IT-97-25-T, Judgment, 15 March 2002, par. 183. According to some scholars, deliberate starvation of the civilian population may amount to inhuman treatment: see René Jean Dupuy, ‘L’Action Humanitaire,’ in *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven*, ed. Astrid J.M. Delissen and Gerard J. Tanja (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991), 71; Dietrich Schindler, ‘Humanitarian Assistance, Humanitarian Interference and International Law,’ in *Essays in Honour of Wang Tieya*, ed. Ronald St. J. Macdonald (Dordrecht [etc.]: Nijhoff, 1994), 693; see also Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary to the Additional Protocols of 8 June 1977 of the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), 1456 (par. 4794), commentary to art. 14 AP II. Hereinafter ICRC Commentary APs. The ICRC Commentary to the APs further highlights that ‘an action aimed at causing starvation ... could also be a crime of genocide if it were undertaken with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, according to the terms of the Genocide Convention.’ *Ibid.*, 654 (par. 2097), commentary to art. 54 AP I. See also Christa Rottensteiner, ‘The Denial of Humanitarian Assistance as a Crime under International Law,’ *International Review of the Red Cross* 81, no. 835 (September 1999): 555-582.

status', even if it should be acknowledged that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'¹⁴⁶ As will be analysed more in depth throughout the study,¹⁴⁷ these IHRL provisions may have an impact on the rights and duties of States during armed conflict.

Furthermore, in examining the relevance of IHRL treaties for the topic of this research, due regard should be given to the fact that the provision of relief to civilians in need does not concern the sovereign State alone, but often, for example, the Occupying Power or the invading troops of a State. Thus, extraterritorial applicability is common in IHL, contrary to IHRL, where the concept of jurisdiction and control plays a crucial role. While it is uncontroversial that the provisions of IHRL treaties apply to individuals in the territory and under the jurisdiction of State Parties, the extraterritorial applicability of human rights remains contested and has been the object of conflicting decisions by national and international courts (including the ICJ) and by treaty-monitoring bodies.¹⁴⁸ Scholars have classified the two main existing approaches to the extraterritorial applicability of IHRL as the spatial and the personal models of jurisdiction. The former establishes that a State is bound to apply its IHRL obligations with respect to all individuals who find themselves in a territory over which it exercises control, while the latter envisages the existence of IHRL obligations for a State in relation to all individuals over whom it exercises authority and control, independently of whether these individuals find themselves in an area where the State has no territorial control.¹⁴⁹

The case-law of bodies and courts such as the HRC, the IACoMHR and the Inter-American Court on Human Rights (IACtHR), and, in particular, the ECtHR has oscillated between the adoption of the two models, with a string of decisions sometimes difficult to reconcile with each other. As analysed by

¹⁴⁶ HRC, General Comment 18: Non-discrimination, 10 November 1989, pars. 1, 7 and 13. Emphasis added. For the right to life, see art. 2(1) ICCPR; for the right to food, see CESCR, General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), 10 June 2009, E/C.12/GC/20, pars. 7 and 23; for the right to health, see art. 2(2) ICESCR and CESCR, General Comment 14: The Right to the Highest Attainable Standard of Health (article 12), 11 August 2000, E/C.12/2000/4, par. 43. Also, on the prohibition of discrimination in the enjoyment of the rights enshrined in human rights treaties, see: art. 2(1) ICCPR; art. 2(2) ICESCR; art. 14 ECHR; *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, September 04, 2000, entered into force April 01, 2005, art. 1; art. 1 ACHR; art. 3 Protocol of San Salvador; art. 2 AfCHPR.

¹⁴⁷ In particular, see Sections 4.1.2.4. and 6.1.1.

¹⁴⁸ On the extraterritorial application of human rights treaties see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011); Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp [etc.]: Intersentia, 2009); Fons Coomans and Menno T. Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Antwerp [etc.]: Intersentia, 2004); Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), 193-235; Doswald-Beck (2011), *supra* fn. 117, 9-29.

¹⁴⁹ See Milanovic (2011), *supra* fn. 148, 127-208. Similarly, differentiating between a standard of overall territorial control and a standard of power and authority over individuals, see John Cerone, "Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-international Armed Conflict in an Extraterritorial Context," *Israel Law Review* 40, no. 2 (2007): 72-128.

Milanovic, while the IACoMHR and the HRC have been bolder in applying the personal model of jurisdiction,¹⁵⁰ the ECtHR has constantly reaffirmed the exceptional nature of extraterritorial jurisdiction, first applying a territorial model of jurisdiction in cases such as those related to Turkey's control over Cyprus but also in the famous *Bankovic* case, and then moving towards the application of a personal model or of a spatial model mixed with a personal one in cases such as *Issa v. Turkey*, *Isaak and others v. Turkey* and *Al Skeini v. UK*.¹⁵¹ While this last decision has been the closest the ECtHR has come to overruling *Bankovic*, since it applied a personal model in case of a State having 'public powers normally to be exercised by a sovereign government', still this does not imply that it would necessarily apply the personal model in a *Bankovic*-like situation.¹⁵² The ICJ, for its part, has confirmed the extraterritorial applicability of IHRL, but only in cases of territories subject to military occupation, and it has adopted a spatial model of jurisdiction,¹⁵³ meaning that IHRL apply extraterritorially in the occupied territory due to the level of control the Occupying Power exercises over this territory.

In any case, both models contain elements that might be problematic to define, such as, on the one hand, the concept of control over a territory (including its relationship with the threshold of military occupation) and the definition of a territory/area (which might be possibly reduced to a single building) and, on the other hand, the substantive concept of power and authority over an individual sufficient to lead to the emergence of IHRL obligations.¹⁵⁴ Therefore, scholars have proposed the application of a model that

¹⁵⁰ See Milanovic (2011), supra fn. 148, 174-181.

HRC: see *Lopez Burgos v. Uruguay*, Communication No. R.12/52, A/36/40 at 176 (1981), especially pars. 12.1-12.3; *Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, CCPR/C/OP/1 at 92 (1984), especially pars. 10.1-10.3; *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 at 88 (1984), especially pars. 12.1-12.3; Human Rights Committee (HRC), General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, par. 10.

IACoMHR: see *Saldaño v. Argentina*, Report No. 38/99, Annual Report of the IACoMHR 1998 at 289, OEA/Ser.L/V/II.95 Doc. 7 rev., especially pars. 15-20; *Coard et al. v. United States*, Case 10.951, Report No. 109/99, Annual Report of the IACoMHR 1999, especially par. 37; *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republica de Cuba* ('Brothers to the Rescue'), Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999), especially pars. 23-25.

¹⁵¹ The ECtHR applied a spatial model of jurisdiction in: *Loizidou v. Turkey*, App. No. 15318/89, Judgment (Preliminary Objections), 23 March 1995, Series A 310, pars. 62-64; *Loizidou v. Turkey*, App. No. 15318/89, Judgment (Merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pars. 52-57; *Cyprus v. Turkey*, App. No. 25781/94, Judgment (Merits), 10 May 2001, ECHR 2001-IV, pars. 77-78; *Banković and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, Decision, 12 December 2001, ECHR 2001-XII, pars. 71-75. It applied a personal [and sometimes also spatial] model of jurisdiction in: *Issa and Others v. Turkey*, App. No. 31821/96, Judgment, 16 November 2004, pars. 65-82; *Isaak and Others v. Turkey*, App. No. 44587/98, Decision, 28 September 2006, 19-21; *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Judgment, 7 July 2011, pars. 130-150.

Milanovic has underlined that the personal model had been used by the ECoMHR in its earlier jurisprudence, but then abandoned: see *Cyprus v. Turkey*, App. Nos. 6780/74 and 6950/75, Decision, 26 May 1975, at 136, par. 8; *Stocké v. Germany*, App. No. 11755/85, Report of the Commission, 12 October 1989, par. 166. See Milanovic (2011), supra fn. 148, 181-182.

¹⁵² ECtHR, *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Judgment, 7 July 2011, par. 149. See Marko Milanovic, "Al-Skeini and Al-Jedda in Strasbourg," *European Journal of International Law* 23, no. 1 (February 2012), 130-131.

¹⁵³ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), supra fn. 132, pars. 107-113; *Armed Activities on the Territory of the Congo* (2005), supra fn. 135, pars. 179 and 216-220; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order on Provisional Measures, 15 October 2008, ICJ Reports 2008 at 353, par. 109.

¹⁵⁴ See Milanovic (2011), supra fn. 148, 129-170 and 187-207; Lubell (2010), supra fn. 148, 207-227.

differentiates between negative and positive obligations deriving from human rights, with States being required to respect their negative obligations in relation to all individuals under their control and authority according to the personal model of jurisdiction, while being responsible for the fulfilment of positive obligations only towards those individuals who find themselves in a territory over which the State exercises control.¹⁵⁵

In sum, at present the approach by various national and international courts, as well as by UN bodies, to the extraterritorial application of human rights is not consistent or unambiguous, so that the analysis of the contextual applicability of IHL and IHRL provisions to a given situation needs to take into account the different State and non-State actors involved and the different IHL and/or IHRL obligations applicable to each of them, on a case-by-case basis. Even if in more general terms, this will be the approach followed in Chapter 6, analysing the rights and duties of the actors involved in the provisions of humanitarian assistance to civilians in various situations of armed conflict (including military occupation). What can be anticipated is that IHL treaties explicitly protect some human rights, in case both of international armed conflict (IAC) and NIAC.

In the context of IAC, Article 27 GC IV ‘proclaim[s] the principles on which the whole of “Geneva Law” is founded ... the principle of respect for the human person and the inviolable character of the basic rights of individual men and women.’¹⁵⁶ Article 75 AP I further provides fundamental guarantees in favour of ‘persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol’, who ‘shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.’¹⁵⁷

Similar minimum guarantees are provided for NIAC by Article 3 common to the four GCs (Common Article 3), according to which each Party to the conflict shall, as a minimum, treat humanely in all circumstances and without any discrimination all persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness,

¹⁵⁵ See Milanovic (2011), *supra* fn. 148, 209-222; Lubell (2010), *supra* fn. 148, 227-231 (labelling it a ‘contextual approach’); Cerone (2007), *supra* fn. 149, 446-449.

¹⁵⁶ ICRC Commentary GC IV, 200. See Section 2.1.1.2.

¹⁵⁷ Art. 75(1) AP I. See Section 2.1.1.2.

wounds, detention, or any other cause.¹⁵⁸ While Common Article 3 contains rules applicable to NIAC, the ICJ has identified these rules as applicable also to international armed conflicts, as ‘a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts’.¹⁵⁹ Article 4 AP II restates similar minimum guarantees in favour of ‘[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted.’¹⁶⁰

Therefore, the main IHL treaties do not ignore human rights protection; rather they try to adapt it to situations of armed conflict. Nonetheless, when clarifying the rights and obligations of the various actors involved in the provision of humanitarian assistance to civilians in armed conflict, this study will take into account relevant IHRL rules (including possible *jus cogens* rules),¹⁶¹ thus examining whether the evolution of IHRL, and the trend towards the so-called ‘humanization of international law’, may have had an influence on the balance between humanity and military necessity struck at the time of negotiations of the IHL treaties.¹⁶²

1.3.2. Principles in International Law

Given the central position generally assigned to the ‘principles’ of humanity, impartiality, neutrality and (in some cases) independence in relation to ‘humanitarian assistance’, to fully clarify their legal status it is necessary to first analyse the concept of principle in law, and more specifically in international law.

¹⁵⁸ Specific acts against these persons are explicitly prohibited, including violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment. Also, ‘the wounded and sick shall be collected and cared for.’ Art. 3 GC IV.

¹⁵⁹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, 27 June 1986, ICJ Reports 1986 at 14, par. 218. See also ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 102.

¹⁶⁰ According to Greenwood, both art. 75 AP I and art. 4 AP II (as well as art. 5 AP II) would be declaratory of customary law. See Christopher Greenwood, ‘Protection of Peacekeepers: The Legal Regime,’ *Duke Journal of Comparative & International Law* 7, no. 1 (1996), 190; Christopher Greenwood, ‘Customary Law Status of the 1977 Geneva Protocols,’ in *Humanitarian Law of Armed Conflict Challenges Ahead*, ed. Astrid J.M. Delissen and Gerard J. Tanja (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991), 113.

¹⁶¹ There is no general agreement on what rules of international law have *jus cogens* nature. According to the ILC, ‘peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination’. Commentary on Article 26 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission 2001, Volume II, Part 2: Report of the Commission to the General Assembly on the work of its fifty-third session* (UN: New York and Geneva, 2007) 85. The HRC has identified as prohibited by *jus cogens* norms: arbitrary deprivations of life, torture and inhuman or degrading treatment, taking of hostages, imposition of collective punishments, arbitrary deprivations of liberty or deviations from fundamental principles of fair trial, including the presumption of innocence. See HRC, General Comment 29: States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, par. 11. Orakhelashvili considers common art. 3 GCs, as well as art. 75 AP I and art. 4 AP II, to have *jus cogens* nature. See Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008), 64.

¹⁶² See Theodor Meron, *The Humanization of International Law* (Leiden [etc.]: Nijhoff, 2006).

In legal theory, the topic of principles is especially connected to the work of Ronald Dworkin, who elaborated a famous critique to Hart's *The Concept of Law* by underlining that Hart's conception of law,¹⁶³ and more in general the positivist conception of law, does not accommodate the concept of principles of law and thus it does not adequately represent the reality and the way judges take decisions in cases where no clear rule exists to provide a solution.¹⁶⁴ Without entering into the debate on the validity of the positivist account of the concept of law,¹⁶⁵ what is interesting is that Dworkin argues that both rules and principles are legal norms, and that the differences between the two categories lie in their way of application and in their behaviour in case of conflict. On the one hand, '[r]ules are applicable in an all-or-nothing fashion', so that '[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision', and in the event of a conflict between two rules in a specific case, one of the two must be invalid.¹⁶⁶ On the other hand, principles 'do not set out legal consequences that follow automatically when the conditions provided are met', but rather a principle 'states a reason that argues in one direction' and when a decision has to be taken, if more than one principle are applicable and they are in conflict, an action of weighing will have to be carried out so that the most important principle, the one that carries most weight in the specific circumstances, will be applied at the expense of the others, which will anyway continue existing and being valid.¹⁶⁷ According to Dworkin, faced with instances of what Hart calls 'open texture' of the law,¹⁶⁸ meaning cases when no straight solution for a case can be found by applying a rule, the judges do not simply decide on the basis of discretion, exercising a 'law-creating power', but on the basis of principles, which are part of the law.¹⁶⁹

After Dworkin, other legal scholars have reflected on the meaning and role of principles within legal systems, including Hart himself who, in his posthumous postscript to *The Concept of Law*, 'agree[s] that it is a defect in [his] book that principles are touched upon only in passing', and acknowledges the existence of principles that are 'relatively to rules, broad, general, or unspecific,' and 'refer more or less explicitly to some purpose, goal, entitlement, or value,' so that they 'are regarded from some point of view as desirable to

¹⁶³ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994, 2nd ed. with a new Postscript).

¹⁶⁴ See Ronald M. Dworkin, "The Model of Rules," *The University of Chicago Law Review* 35, no. 1 (Autumn 1967), 35-45.

¹⁶⁵ On possible responses to Dworkin's criticisms to Hart's theory, see the Postscript in Hart (1994), *supra* fn. 163, 238-276. See also, for example, Scott. J. Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed," Working Paper no. 77, University of Michigan Law School Public and Legal Theory Working Paper Series, March 2007. Available at http://www.law.yale.edu/documents/pdf/Faculty/Shapiro_Hart_Dworkin_Debate.pdf (accessed June 15, 2011).

¹⁶⁶ Dworkin (1967), *supra* fn. 164, 25 and 27.

¹⁶⁷ *Ibid.*, 25-27.

¹⁶⁸ See Hart (1994), *supra* fn. 163, 124-136.

¹⁶⁹ See Dworkin (1967), *supra* fn. 164, 45.

maintain, or to adhere to, and so not only as providing an explanation or rationale of the rules which exemplify them, but at least contributing to their justification.¹⁷⁰ At the same time, Hart contends that the difference between rules and principles is in reality one of different degree of conclusive character, rather than a strong opposition between ‘all-or-nothing rules and non-conclusive principles’, and that still the discretion and the law-making activity of the judges cannot be eliminated.¹⁷¹ In addition, while non-positivist thinkers such as Alexy argue that principles demonstrate the existence of a necessary connection between law and morality,¹⁷² Hart contends that morality and law exist independently unless the law itself incorporates some moral criteria for the identification of the law.¹⁷³

Even if the literature on principles in the field of the philosophy of law usually focuses on domestic legal systems, it can provide some inspiration for the analysis of the concept of principles in the international legal system. In international law, the term ‘principles’ is generally connected to ‘the general principles of law recognized by civilized nations’ mentioned among the sources of law that the ICJ shall apply in accordance with Article 38(1) of its Statute.¹⁷⁴ Following the intention of the drafters of the ICJ Statute, this reference should cover only principles proper of national legal systems and generally accepted by all nations, which could thus be applied at the international level as well.¹⁷⁵ General principles of law would be thus binding as custom, but different from it because the constitutive element of State practice would need to be searched within domestic legal systems.¹⁷⁶ In addition, these principles would exist when they are applied by the majority of States (not necessarily by all of them), so that a judge of a State where one of these principles does not exist at the domestic level would be entitled to apply it nonetheless.¹⁷⁷

Notwithstanding the intention of the drafters of the Statute, the ICJ has referred not only to principles common to municipal legal systems, but also to principles proper of international relations and thus of the international legal system only,¹⁷⁸ what scholars have called ‘general principles of *international law*’,¹⁷⁹

¹⁷⁰ Hart (1994), *supra* fn. 163, 259-260.

¹⁷¹ See *Ibid.*, 260-263 and 272-276.

¹⁷² See Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford: Oxford University Press, 2002), 68-81.

¹⁷³ See Hart (1994), *supra* fn. 163, 268-272.

¹⁷⁴ *Statute of the International Court of Justice*, annexed to the *Charter of the United Nations*, San Francisco, October 24, 1945.

¹⁷⁵ See, for example, Christian Tomuschat, “Obligations Arising for States Without or Against Their Will,” *Recueil des Cours* 241, no. IV (1993), 312.

¹⁷⁶ See, for example, Benedetto Conforti, *Diritto Internazionale*, 8th ed. (Naples: Editoriale Scientifica, 2010), 46.

¹⁷⁷ See *Ibid.*, 48.

¹⁷⁸ See, for example, Giorgio Gaja, “General Principles of Law,” in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2008). Online edition, available at <http://www.mpepil.com> (accessed June 24, 2011).

¹⁷⁹ Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden: Martinus Nijhoff Publishers, 2008), 41-42. Emphasis added.

amounting to customary international law.¹⁸⁰ As underlined by Dinstein, these are ‘general principles derived from treaties or custom’, and are ‘no different from other norms laid down by treaties and custom.’¹⁸¹ It can thus be affirmed that, similarly to domestic legal systems, ‘the term “principle” as it is generally used in international law means binding law which in most cases may be less precise and more vague than a well-defined rule (for instance provisions in a codification treaty) but which nevertheless has an obligatory character’.¹⁸²

More specifically, in the field of IHL, general principles of international law are mentioned in the Martens Clause, which as reformulated in AP I states that ‘[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.’¹⁸³ Scholars disagree on the interpretation and function of the Clause, especially regarding its function as introducing new sources of IHL, different from treaty and custom.

For example, Miyazaki argues that the principles of international law mentioned in the Clause are ‘a part of [the] general principles of international law and a source of the law of armed conflict’, and, even more significantly, that ‘the laws of humanity and the dictates of the public conscience are *jus cogens* of human society’.¹⁸⁴ Thürer also suggests a direct connection between the Martens Clause and general principles of IHL, proposing that the Clause does not ‘intend[] only to restate the customary law in force’, but rather it ‘refers to a source outside customary and treaty law: general principles of law.’ More specifically, in his view, ‘principles of humanity’ correspond to the elementary considerations of humanity as defined by the ICJ, while the ‘dictates of public conscience’ remain ‘more enigmatic.’¹⁸⁵

A more moderate view is proposed by Meron, according to whom the Clause undoubtedly serves the purpose of guaranteeing that, in case of adoption of an IHL treaty, individuals remain protected by the relevant customary IHL not included in that treaty, so that what is not prohibited by treaty is not necessarily lawful.¹⁸⁶ In addition, the Clause ‘argues for interpreting international humanitarian law, in case of doubt,

¹⁸⁰ See Ibid., 41.

¹⁸¹ Dinstein (2006), supra fn. 138, 260.

¹⁸² Hermann Mosler, “General Principles of Law,” in *Encyclopedia of Public International Law*, Vol. 7, ed. Rudolf Bernhardt (Amsterdam: North-Holland, 1984), 92.

¹⁸³ Art. 1(2) AP I.

¹⁸⁴ Shigeki Miyazaki, “The Martens Clause and International Humanitarian Law,” in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Christophe Swinarski (Geneva: ICRC; The Hague: Nijhoff, 1984), 437 and 440.

¹⁸⁵ Daniel Thürer, “International Humanitarian Law: Theory, Practice, Context,” *Recueil des Cours* 338 (2008), 314.

¹⁸⁶ See Meron (2006), supra fn. 162, 27.

consistently with the principles of humanity and the dictates of public conscience’, and it ‘reinforces a trend, which is already strong in international institutions and tribunals, toward basing the existence of customary law primarily on *opinio juris* rather than actual battlefield practice.’¹⁸⁷ However, despite affirming that the principles of humanity mentioned in the clause are not different from the ‘elementary considerations of humanity, even more exacting in peace than in war’, classified as ‘general and well-recognized principles’ by the ICJ in the *Corfu Channel* case, Meron in a somehow contradictory way argues that such principles do not amount to law, since he considers that ‘[g]overnments are not yet ready to transform broad principles of humanity and dictates of public conscience into binding law.’¹⁸⁸

A solution to this contradiction seems to be proposed by Cassese, who agrees on the effects of the Clause as relaxing the requirement of State practice in favour of *opinio juris* for the formation of customary IHL and as guiding the interpretation of IHL provisions in accordance with the principles of humanity and the dictates of public conscience.¹⁸⁹ He bases his refusal of the view that the Clause would create new sources of international law (humanity and the dictates of public conscience) on an analysis of the *travaux préparatoires* and of subsequent national and international case-law and State practice, which highlights *inter alia* that ‘no international or national court has ever found that a principle or rule had emerged in the international community as a result of “the laws of humanity” or the “dictates of the public conscience”’ and that ‘no international or national court has propounded and acted upon the notion that there existed in the international community two additional and distinct sources of law, in addition to the treaty and custom processes.’¹⁹⁰

Cassese then acknowledges that the ICJ has referred in several cases to ‘elementary considerations of humanity’ and that ‘[i]t has been convincingly argued that, for the Court, those “considerations” constitute a general principle of international law imposing direct obligations upon states’. He underlines that it is not clear both whether these considerations are *jus cogens* or they should come into play only in case of unclear treaty or customary law regulation, and what their content is.¹⁹¹ In any case, even admitting that ‘a general principle of international law concerning considerations of humanity’ exists, the Martens Clause might be

¹⁸⁷ Ibid., 27-28.

¹⁸⁸ Ibid., 21 and 28. ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment of 9 April 1949, 22.

¹⁸⁹ See Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?,” *European Journal of International Law* 11, no. 1 (2000), 212-215. On the other hand, Cassese argues that a reading of the Clause as guaranteeing that areas not regulated by IHL treaty law are still covered by the relevant customary law makes it redundant, since such a guarantee is already contained in the international legal system. See Ibid., 192-193.

¹⁹⁰ Ibid., 208. See also Ibid., 193-212.

¹⁹¹ Ibid., 213.

seen as the origin of this principle, which would have emerged after WWII, and as a provision strengthening the principle (which applied to the whole of international law) in the area of IHL.¹⁹²

Similarly to Thürer, Cassese acknowledges the existence of a general principle of law embodying elementary considerations of humanity and binding upon States. Indeed, as noted by Zyberi, already in 1949, the ICJ in the *Corfu Channel* case ‘appeared to vest a loose concept such as that of *elementary considerations of humanity* with the status of a general principle of law recognized by civilized nations, as provided for by Article 38(c) of its Statute.’¹⁹³ It stated that the Albanian authorities had a duty to ‘notify[], for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and [] warn[] the approaching British warships of the imminent danger to which the minefield exposed them’, and that these obligations ‘[we]re based ... on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.’¹⁹⁴

Later, in the *Nicaragua* case, the ICJ again recalled elementary considerations of humanity and the provision referring to denunciation in each of the four GCs, which provides that such denunciation ‘shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.’¹⁹⁵ Also, the Court found that the rules contained in Common Article 3 are a reflection of these considerations, and they represent ‘a minimum yardstick’ applicable both in IAC and NIAC.¹⁹⁶

Finally, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ identified as basic principles of IHL the principle ‘aimed at the protection of the civilian population and civilian objects and establish[ing] the distinction between combatants and non-combatants’ and the one

¹⁹² See Ibid., 213.

¹⁹³ Gentian Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* (Antwerp [etc.]: Intersentia, 2008), 282. Emphasis in the original. See also Pierre-Marie Dupuy, “Les ‘Considérations Élémentaires d’Humanité’ dans la Jurisprudence de la Cour Internationale de Justice,” in *Mélanges en l’Honneur de Nicolas Valticos: Droit et Justice*, ed. René-Jean Dupuy (Paris: Éditions A. Pedone, 1999), 117-130.

¹⁹⁴ See ICJ, *Corfu Channel* (1949), supra fn. 188, 22.

¹⁹⁵ Art. 158 GC IV. Similarly, see arts. 63 GC I, 62 GC II, and 142 GC III. Quoted in ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), supra fn. 159, par. 218.

¹⁹⁶ Ibid.

‘prohibit[ing] to cause unnecessary suffering to combatants’.¹⁹⁷ The Court ‘refer[red], in relation to these principles, to the Martens Clause’ as stated in AP I and it considered that ‘a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity”’ that the Hague and Geneva Conventions have been almost universally ratified and that ‘these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’.¹⁹⁸ In conclusion, elementary considerations of humanity can be considered as a general principle of IHL, in the sense of a principle that reveals the rationale behind the existence of many IHL treaty and customary rules, and thus can also help interpret those rules and find a solution to specific unregulated cases.

While some authors refer to the ‘principle of humanity’ *tout court* as a general principle of IHL,¹⁹⁹ Sir Michael Wood has for example stressed that the ICJ has repeatedly referred to ‘elementary considerations of humanity’, but it is ‘far from stating a general principle “of humanity” in international law’.²⁰⁰ This debate is particularly relevant for this study, since, as explained in Section 1.1., humanity is one of the principles associated to humanitarian assistance. The following analysis of State practice and *opinio juris* will hopefully contribute to the clarification of the principle of humanity as applied to humanitarian assistance and of its place in IHL and in relation to elementary considerations of humanity.

In sum, the principles usually identified as general principles of IHL are general maxims that contain within themselves the seeds of the more specific rules spelt out in the various IHL treaties, in particular the GCs and APs. To the extent that they are general principles of international law, they are also themselves sources of binding law, so that they may be used to find solutions for situations not regulated, or not clearly regulated, by existing treaty or customary law.²⁰¹

¹⁹⁷ ICJ, *Legality of the Threat or Use of Nuclear Weapons* (1996), supra fn. 130, par. 78.

¹⁹⁸ Ibid., pars. 78-79. In addition to these principles, the ICJ also identified the principle of neutrality as a principle of international law, ‘which is of a fundamental character similar to that of the humanitarian principles and rules’. Ibid., par. 89. The principle of neutrality refers in this case to the international law related to neutral States in armed conflict, but the ICJ did not clearly define the content of the principle (see Ibid.).

¹⁹⁹ See, for example, Thüser (2008), supra fn. 185, 65-67; Zyberi (2008), supra fn. 193, 285-286; Igor P. Blishchenko, “Les principes du droit international humanitaire,” in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Christophe Swinarski (Geneva: ICRC; The Hague: Nijhoff, 1984), 291-294; Yutaka Arai-Takahashi, “The Principle of Humanity under International Humanitarian Law in the ‘Is/Ought’ Dichotomy,” *Japanese Yearbook of International Law* 54 (2011), in particular 340-341.

²⁰⁰ Commission du droit International, Soixante-deuxième session (Première partie), Compte rendu analytique provisoire de la 3056^e séance, Tenue au Palais des Nations, à Genève, le jeudi 3 juin 2010, à 10 heures, A/CN.4/SR.3056, 3 June 2010, 4. Own translation. Blishchenko classifies principles of IHL as having the nature of *jus cogens*, and he includes in the list the principle of humanity. See Blishchenko (1984) supra fn. 199, 291-300.

²⁰¹ According to Pictet, in addition to IHL rules codified in treaties, ‘there exist principles from which these rules derive’, such as the principles mentioned in the various versions of the Martens clause. These principles would play the crucial role of ‘motivat[ing] the whole, enabl[ing] the respective value of the facts to be appreciated and also offer[ing] solutions for unexpected cases’, as well as

Finally, different from principles of IHL but related to them are the Fundamental Principles of the Red Cross. While the principles of IHL, ‘mainly embodied in the Geneva Conventions for the protection of the victims of war’, ‘have an official character, [and] regulate in wartime the conduct of States vis-à-vis their enemies’, the Fundamental Principles of the Red Cross ‘serve at all times to inspire the action of the Red Cross as a private institution’.²⁰² Pictet defines the concept of principle, with reference to the Fundamental Principles of the Red Cross, as ‘simply a rule, based upon judgement and experience, which is adopted by a community to guide its conduct’.²⁰³ However, it is also true that ‘there are certain principles, such as those of humanity and of non-discrimination, which in a sense are common to both [IHL and the Red Cross]’.²⁰⁴

Inspired by the Fundamental Principles of the Red Cross, but different from them, are the principles generally associated to humanitarian assistance and humanitarian action—humanity, impartiality, neutrality, and (more recently) independence. These two different types of principles and their place in the international legal system, as well as questions such as what their status in international law is, what their content is, and to which actors they apply, still remain unclear and debated, as illustrated in Section 1.2.3, so that this study will try and provide some clarity on these issues.

1.3.3. Issues Related to the Creation of International Law

From the point of view of methodology, the subject of the research and the important role played by certain types of documents and certain actors in this field call for some clarification on the value that will be assigned to these documents and actors in the formation of customary international law. In particular, intergovernmental organisations’ bodies, such as the UNGA and the UNSC, have adopted numerous and far-reaching resolutions on humanitarian assistance to civilians in conflict. Notwithstanding the fact that these

‘contribut[ing] towards filling gaps in the law and help[ing] in their future development by indicating the path to be followed’. He mentions, amongst others, the principle of non-discrimination and the principle of neutrality, according to which ‘[h]umanitarian assistance is never an interference in a conflict’. Principles of application of the principle of neutrality are the following: ‘[i]n exchange for the immunity granted to it, medical personnel should refrain from any hostile act’; ‘[m]edical personnel are given protection as healers’; and, ‘[n]o one shall be molested or convicted for having given treatment to the wounded or sick.’ Jean Pictet, “The Principles of International Humanitarian Law,” *International Review of the Red Cross* 6, no. 67 (October 1966), 511-512, 525 and 531. Jean Pictet, “The Principles of International Humanitarian Law,” *International Review of the Red Cross* 6, no. 68 (November 1966), 567-570. See also *Ibid.*, 570-581; Pictet (September 1966), *supra* fn. 110.

Zyberi talks about ‘the principle of humanitarian assistance, a corollary of the principle of humanity, which is also included in the international humanitarian law instruments’, which would have been clarified by the ICJ in the *Nicaragua* case by paying ‘due tribute ... to the humanitarian ideals of the ICRC’, ‘spell[ing] out in clear terms what are the purposes of humanitarian assistance, namely the prevention and alleviation of human suffering and the protection of life and health of the human being’, and ‘ma[king] it clear that for humanitarian assistance not to be considered as intervention in the internal affairs of a State, it should be given to all the parties in need without discrimination’. Zyberi (2008), *supra* fn. 193, 287-289. Emphasis omitted.

²⁰² Pictet (1979), *supra* fn. 27, 8.

²⁰³ *Ibid.*, 12. He underlines that, in this sense, some of the Fundamental Principles ‘include two or three concepts, bringing to about fifteen the real number of principles’. *Ibid.*

²⁰⁴ *Ibid.*, 8.

bodies are composed of States' representatives, these resolutions are not necessarily considered as State practice and/or *opinio juris* of those States. Similarly, military manuals are an important reference for armed forces engaged in conflict, but their role in the formation of international law remains controversial.

Finally, non-State actors are central actors in the area of this research, both as Parties to the conflict and as providers of humanitarian assistance. Therefore, their practice represents a crucial contribution to the general practice in this field, but it is generally not considered as directly relevant for the formation of customary international law. These three issues will be analysed more in details in the rest of this Section, to clarify the approach adopted throughout the study.

1.3.3.1. The Legal Force of Inter-Governmental Organisations' Resolutions

It is generally acknowledged that (non-binding) resolutions adopted in the framework of the UN or other international or regional organisations by organs composed of States' representatives may be taken into account for the formation of customary international law as instances of *opinio juris*, but that this relevance depends on their formulation, their voting records and the statements by States preceding the adoption or explaining their vote posture.²⁰⁵ In this sense, UNGA resolutions adopted by consensus and phrased as declaratory of rules of international law may reflect the *opinio juris* of the States adopting them.²⁰⁶ Another element to take into account when weighing the value to accord to a specific resolution is 'the consistency of State practice outside it'.²⁰⁷ For example, in its Nuclear Weapons Advisory Opinion, the ICJ stated: 'The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.'²⁰⁸ In this sense, resolutions supported by consistent practice might be accorded more value for the formation of customary rules than resolutions contradicted by practice.

²⁰⁵ See, for example, Michael Akehurst, "Custom as a Source of International Law," *The British Yearbook of International Law* 47 (1974/1975), 6-7; Dinstein (2006), *supra* fn. 138, 303-312; Treves (2008), *supra* fn. 117, pars. 44-46. Online edition, available at <http://www.mpepil.com> (accessed November 29, 2009).

²⁰⁶ Dinstein (2006), *supra* fn. 138, 303-310. On the effects of recommendations and declarations of international organisations, see, for example, Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 5th revised ed. (Leiden/Boston: Martinus Nijhoff Publishers, 2011), 767-792 (pars. 1217-1261).

²⁰⁷ Jean-Marie Henckaerts, "Customary International Humanitarian Law: a Response to US Comments," *International Review of the Red Cross* 89, no. 866 (June 2007), 478.

²⁰⁸ ICJ, *Legality of the Threat or Use of Nuclear Weapons* (1996), *supra* fn. 130, par. 73.

It is also possible that resolutions do not declare already existing customary law, but rather contribute to the formation of new customary law, in the sense that ‘thanks to the development of post-resolution general State practice followed by a post-resolution communal *opinio juris*, the substance of such a UNGA resolution — which may not even have been adopted by consensus — is capable of acquiring in time the lineaments of custom, despite the fact that it started out as a merely hortatory text.’²⁰⁹ The same is true for a specific type of UNGA resolutions, which has been attributed particular relevance by scholars – declarations of principles. Some rules stated in these declarations are already customary or binding on States based on the UN Charter. All other principles remain non-binding, notwithstanding the solemn nature of the declarations, but they can contribute to the formation of customary law as instances of State practice.²¹⁰

In addition, according to some scholars, recommendations by UN organs can be attributed the so-called ‘effect of legality’, meaning that, despite the non-binding nature of these recommendations towards UN Member States, ‘a State does not commit a wrongful act when, in order to carry out a recommendation of a UN organ, it acts in a way that is contrary to commitments previously undertaken by agreement or to obligations deriving from customary international law’.²¹¹

This study will thus take into account, on a case-by-case basis, non-binding resolutions of intergovernmental bodies as possible instances of State practice and possible manifestations of the *opinio juris* of States regarding the existence of certain rules in international law. To establish the relevance of these resolutions, attention will be given to their voting record, to their formulations in terms of legal duties or mere hortatory statements, and to statements by States preceding or following their adoption.

1.3.3.2. *The Value of Military Manuals*

In the field of IHL, one of the available sources for determining the position of a State on the law is represented by military manuals, meaning manuals containing instructions for the armed forces on the law to apply in the context of armed conflicts. For example, military manuals have been extensively cited as

²⁰⁹ Dinstein (2006), *supra* fn. 138, 307. Dinstein highlights the need for State practice: even in case of a resolution unanimously adopted and expressing communal *opinio juris*, ‘[c]ommunal *opinio juris* (as expressed in the resolution) is not sufficient by itself to create custom, and a general practice of States must be shown to exist as well.’ *Ibid.*, 309.

²¹⁰ See Gaetano Arangio-Ruiz, “The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations – with an Appendix on the Concept of International Law and the Theory of International Organisation,” *Receuil des Cours* 137 (1972-III), 431-518.

²¹¹ Benedetto Conforti, *The Law and Practice of the United Nations*, 3rd revised ed. (Leiden/Boston: Martinus Nijhoff Publishers, 2005), 291.

instances of State practice in the 2005 ICRC Study on customary IHL.²¹² Similarly, it has been affirmed that ‘national manuals provide evidence of state practice and *opinio juris* in relation to the states by which they are issued.’²¹³

However, the use of military manuals as evidence of State practice and/or *opinio juris* has been strongly criticised, with the United States (U.S.) affirming for example that it ‘does not agree that *opinio juris* has been established when the evidence of a State’s sense of legal obligation consists predominately of military manuals’, since ‘a State’s military manual often (properly) will recite requirements applicable to that State under treaties to which it is a party’ and ‘States often include guidance in their military manuals for policy, rather than legal, reasons.’²¹⁴ Finally, care should be exercised in distinguishing between ‘military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements.’²¹⁵

It should be acknowledged that military manuals could contain instructions based on obligations undertaken by a State through a treaty and thus not necessarily reflecting the *opinio juris* of that State on the customary nature of the obligation.²¹⁶ Moreover, it might not always be easy to define whether instructions contained in military manuals reflect policy choices or represent legal obligations. In any case, the purpose of military manuals is ‘ultimately practical’,²¹⁷ which implies that these manuals and other military doctrines aim to direct the practice of soldiers in the field and to have practical implications for the actual conduct of armed conflict. Therefore, they will be taken into consideration in this research not as evidence of *opinio juris* but as instances of State practice.²¹⁸

²¹² Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), xlii. Emphasis added. Hereinafter ICRC Study – Rules. In the Study, IHL ‘[r]ules that were supported by military manuals were, considering the totality of practice, supported by practice of such a nature as to conclude that a rule of law was involved and not merely a policy consideration or a consideration of military or political expediency that can change from one conflict to the next.’ Henckaerts (2007), supra fn. 207, 483.

²¹³ Charles Garraway, “The Use and Abuse of Military Manuals,” *Yearbook of International Humanitarian Law* 7 (2004), 431.

²¹⁴ John B. Bellinger, III and William J. Haynes II, “A US Government Response to the International Committee of the Red Cross study Customary International Humanitarian Law,” *International Review of the Red Cross* 89, no. 866 (June 2007), 446-447. However, in the same article Bellinger, when discussing some examples of U.S. practice, makes reference ‘generally’ to ‘U.S. Joint Publication 3-07.6, Joint Tactics, Techniques, and Procedures for Foreign Humanitarian Assistance’. Ibid., 452, fn. 21. The DOD Dictionary defines ‘Joint Publication’ as ‘A compilation of agreed to fundamental principles, considerations, and guidance on a particular topic, approved by the Chairman of the Joint Chiefs of Staff that guides the employment of a joint force toward a common objective’ and ‘Joint Doctrine’ as ‘Fundamental principles that guide the employment of US military forces in coordinated action toward a common objective and may include terms, tactics, techniques, and procedures.’ U.S. Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms (DOD Dictionary)*, Joint Publication 1-02 (JP 1-02) (8 November 2010, as amended through 15 December 2012), 202 and 155.

²¹⁵ Bellinger and Haynes (2007), supra fn. 214, 447

²¹⁶ See, for example, Michael Bothe, “Customary International Humanitarian Law: Some Reflections on the ICRC Study,” *Yearbook of International Humanitarian Law* 8 (2005), 157.

²¹⁷ Garraway (2004), supra fn. 213, 440.

²¹⁸ In this sense, see the approach adopted by the editors of the ICRC Study on customary IHL: Henckaerts (2007), supra fn. 207, 475 and 483. Similarly, Iain Scobbie, “The Approach to Customary International Law in the Study,” in *Perspectives on the ICRC*

Resort to these sources might also be one of the only ways to fill the gap of knowledge of practice in the field. As underlined by the Appeal Chamber of the ICTY, '[w]hen attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour'.²¹⁹ Therefore, '[i]n appraising the formation of customary rules or general principles ... reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.'²²⁰

1.3.3.3. *The Role of Non-State Actors*

Non-State actors play a key role in the provision of humanitarian assistance, both as Parties to the conflict and as IGOs or NGOs engaged in this activity. Their position with reference to the formation of customary law poses interesting questions. Indeed, IHL imposes obligations and arguably grants rights to non-State armed groups in the context of NIACs, both in its treaty and in its customary form.²²¹ While the traditional approach to the formation of customary law does not acknowledge any role for non-State armed groups,²²² this total neglect has been questioned, not least because if armed groups had a role in the formation of customary rules of international law, they would be probably more motivated to respect those rules.²²³

The approach followed by the authors of the ICRC Study on customary IHL confirms that '[t]he practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements, does not constitute *State practice* as such',²²⁴ but this would not exclude *per se* that this practice may have a relevance by itself. Indeed, the authors continue by stating that 'such practice may contain evidence of the acceptance of certain rules in non-international armed

Study on Customary International Humanitarian Law, ed. Elizabeth Wilmshurst and Susan Breau (Cambridge: Cambridge University Press, 2007), 39: 'Can States dissociate themselves from purportedly official statements to disavow that they express either its practice or *opinio juris*?'.

²¹⁹ ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić* (1995), supra fn. 159, par. 99.

²²⁰ Ibid. The Court then mentioned various national military manuals as evidence of State practice (Ibid., pars. 130-131). On this decision, see also Zegveld (2002), supra fn. 138, 22-24.

²²¹ See supra fn. 138.

²²² See, for example, Jean-Marie Henckaerts, "Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law," *Collegium, Special Edition: Relevance of International Humanitarian Law to Non-State Actors Proceedings of the Bruges Colloquium 25th-26th October 2002*, 27 (Spring 2003), 128-129.

²²³ See, for example, Marco Sassoli, "Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian and International Human Rights Law," Paper submitted to the Armed Group Conference, Vancouver, Canada, 13-15 November 2003, 6. Available at <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf> (accessed January 10, 2012).

²²⁴ ICRC Study – Rules, xlii. Emphasis added.

conflicts’, but ‘its legal significance is unclear’.²²⁵ Other authors have gone a bit further, claiming that some evidence has started emerging of the fact that ‘the consent of armed opposition groups is relevant for their obligations under international customary law.’²²⁶ Reference is made to the stance taken by the ICTY Appeals Chamber, which listed ‘the behaviour of belligerent States, Governments and insurgents’ as ‘factors [...] instrumental in bringing about the formation of the customary rules’.²²⁷

Finally, some scholars have even argued that non-State armed groups already contribute to the formation of customary IHL of NIAC, based on the following reasoning:

Customary law is based on the behaviour of the subjects of a rule, in the form of acts and omissions or (whether qualified as practice *latu sensu* or evidence for *opinio juris*) in the form of statements, mutual accusations and justifications for their own behaviour. The subjects of the rules relevant to non-State actors are also those actors. IHL implicitly confers a limited international legal personality to armed groups involved in armed conflicts, i.e. providing them the functional international legal personality necessary to have the rights and obligations foreseen by it.²²⁸

While this position can be appealing, it should be underlined that it is not the majority view among scholars, who tend to agree that at present ‘whatever the influence of these non-state actors may be, states remain the exclusive international law-makers. [...] these actors may well now have a formal international legal personality derived from their rights and duties but that has not endowed them with any formal and actual law-making powers.’²²⁹

Adopting the more conservative approach and assuming that the practice of non-State armed groups is not relevant to the formation of customary rules, one may still argue that this practice (like the practice of all other non-State actors) can play an indirect role, meaning that it can acquire significance on the basis of States’ reactions to it, in the form of protests or absence of protests.

However, it should be underlined that while condemnation of a certain conduct as a violation of a rule of IHL may be undoubtedly used as evidence of the existence of such a rule, the significance of the absence of condemnation of a certain act by a non-State actor has been questioned. Along these lines, the absence of reaction to a conduct that anyway does not contribute to the formation of customary law could not

²²⁵ Ibid.

²²⁶ Zegveld (2002), *supra* fn. 138, 26.

²²⁷ ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić* (1995), *supra* fn. 159, par. 108. In the previous paragraph, it reported as relevant practice that of ‘the rebels (the FMLN) in El Salvador’.

²²⁸ Sassòli (2003), *supra* fn. 223, 6.

²²⁹ Jean d’Aspremont, “International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?,” in *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers*, ed. Math Noortmann and Cedric Ryngaert (Farnham/Burlington: Ashgate, 2010), 178. The same author continues: ‘Only states and international organizations are actually entrusted with a law-making power in international law. [...] Although influential, non-state actors are thus not formal law-makers. It is argued here that they however are vivid *law-consumer*. Indeed, one cannot deny that non-state actors extensively resort to the discourse of international law on the international plane. They also invoke the law in their own interest or in the interest of others. [...] Influence in international law-making processes and law-consumption go undoubtedly hand-in-hand.’ Ibid., 187. Emphasis in the original.

be counted as practice confirming the permissibility of such action under customary international law.²³⁰ The concept in question here is that of acquiescence, meaning the absence of protests by States to a certain behaviour taken by another State, which in general leads to assume that such behaviour is accepted as legitimate and that a permissive rule of customary international law exists. Thus, protests by States or the absence of protests would be relevant for the formation of customary law only with regard to acts by other States and not by non-State armed groups.²³¹ This same reasoning would apply to States' reactions to statements or practice of IGOs (and their human rights bodies) or of NGOs, which play a central role in the provision of humanitarian assistance.

Traditionally, these two kinds of non-State actors have been considered differently in terms of their role in the formation of customary rules. IGOs have been recognised as having (limited) legal personality and as being bound to respect customary international law (while they are not bound by treaties to which they are not parties),²³² so that it has been also acknowledged that they may contribute to the formation of customary international law of IGOs.²³³ In other words, since these organisations are addressees of rights and obligations under international law, they would have (at least a limited) international legal personality and would contribute to the formation of the law applicable to them. In this sense, organs of these organisations that are not composed of States' representatives may nevertheless give rise to practice relevant for the formation of custom. As underlined by Bothe,

‘[t]he important point is not only that these organisations possess international legal personality, but that they are actors which actually apply the relevant law. If they do, they have the same opportunity as other actors who do the same: by applying the law, they participate in the constant process of shaping it.’²³⁴

Reports of the UNSG and of other UN bodies will be taken into consideration in this research insofar as they contain accounts of conducts by States and non-State actors, but instruments such as the UNSG bulletin on

²³⁰ Scobbie (2007), supra fn. 218, 45: referring to statements by human rights bodies, the author notes that ‘[o]ne may wonder how the failure to react to a non-binding instrument can give rise to a claim of acquiescence which might be relevant to the custom-formation process.’

²³¹ On acquiescence, see I. C. MacGibbon, “The Scope of Acquiescence in International Law,” *The British Yearbook of International Law* 31 (1954): 143-186; I. C. MacGibbon, “Customary International Law and Acquiescence,” *The British Yearbook of International Law* 33 (1957): 115-145; Akehurst (1974/1975), supra fn. 205, 38-42; Nuno Sérgio Marques Antunes, “Acquiescence,” in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2008). Online edition, available at <http://www.mpepil.com> (accessed January 14, 2012).

²³² Bothe (2005), supra fn. 216, 148-149. Schermers and Blokker, supra fn. 206, 986-1005 (pars. 1562-1579).

²³³ Jean-Marie Henckaerts, “Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law,” *Collegium, Special Edition: Relevance of International Humanitarian Law to Non-State Actors Proceedings of the Bruges Colloquium 25th-26th October 2002*, 27 (Spring 2003), 129.

²³⁴ Bothe (2005), supra fn. 216, 160.

the observance of IHL by UN peacekeepers will also be counted as instances of UN practice relevant for the development of customary international law, at least applicable to the organisation itself.²³⁵

Differently from international organisations, NGOs are not usually acknowledged as addressees of international rights or duties or as possessing international legal personality and their relevance in the formation of customary law is generally limited to lobbying and pressuring States.²³⁶ However, to the extent that (certain kinds of) NGOs were the addressees of rights and duties under international law regulating the provision of humanitarian assistance to civilians in armed conflict,²³⁷ their practice might be taken into account indirectly, in terms of absence of reactions by Parties to the conflict to a certain interpretation of the law put forward by the NGOs and to actual conduct in accordance with this interpretation.²³⁸ However, again, this absence of protests or opposition may follow from policy considerations and such absence in relation to a conduct that is irrelevant for the formation of customary law may arguably not be qualified as acquiescence and thus as evidence of the development of custom. On the other hand, absence of reaction to actual conduct may be more significant than absence of protests against NGOs' statements. In addition, NGOs' practice in the form of reports may be used as a source of information to reconstruct State practice and international law, as has been done in national and international case-law.²³⁹

Finally, following the reasoning that gives relevance to organisations' practice to the extent that they have international rights and obligations, their practice can be relevant by itself. This approach would apply for example to the ICRC, which is a private association registered under Swiss law but has been recognised

²³⁵ UNSG, *Secretary-General's Bulletin: Observance by United Nations forces of international humanitarian law*, 6 August 1999, ST/SGB/1999/13. In this sense, see, for example, ICRC Study – Rules, xli; Bothe (2005), *supra* fn. 216, 160.

²³⁶ See, for example, Steve Charnovitz, "Nongovernmental Organizations and International Law," *The American Journal of International Law* 100, no. 2 (April 2006), 356-357 and 361-363; Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge [etc.]: Cambridge University Press, 2005), 74-78 and 114-115; Emmanuel Decaux, "La Contribution des Organisations Non Gouvernementales à l'Elaboration des Regles du Droit International des Droits de l'Homme," in *Les Organisations Non Gouvernementales et le Droit International des Droits de l'Homme/International Human Rights Law and Non Governmental Organizations*, ed. G. Cohen-Jonathan and Jean-François Flauss (Brussels: Bruylant, 2005): 23-39. This last contribution also underlines the role of NGOs in the negotiation and adoption of soft law, such as codes of conduct.

²³⁷ For example, Lindblom affirms that 'diverse categories of NGOs are afforded rights, protection and obligations under international humanitarian law' and that 'International humanitarian law, for its part, provides impartial humanitarian NGOs with several international rights, provided that the conflicting parties consent to the assistance of the organisations.' Lindblom (2005), *supra* fn. 236, 206 and 217. Also, for example, according to David:

Les ONG privées, pourvu qu'elles soient humanitaires et impartiales, sont directement titulaires d'un droit international, ce droit est opposable aux Etats qui, sans motif valable, s'obstineraient à décliner cette assistance. Il peut être invoqué par son titulaire à l'encontre de toute autorité judiciaire ou administrative qui prétend y faire obstacle sur la base de son droit interne.

Eric David, *Principes de Droit des Conflits Armés*, 4th ed. (Brussels: Bruylant, 2008), 529 (par. 2.375).

On the 'right of initiative of the International Committee of the Red Cross or any other impartial humanitarian body', see *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II section B, 122.

²³⁸ See, for example, Françoise Bouchet-Saulnier, "Coutume: Espace de Création et d'Activisme pour le Juge et pour les Organisations Non Gouvernementales," in *Droit Internationale Humanitaire Coutumier: Enjeux et Défis Contemporains*, ed. Paul Tavernier and Jean-Marie Henckaerts (Brussels: Bruylant, 2008): 161-171.

²³⁹ See, for example, ICJ, *Armed Activities on the Territory of the Congo* (2005), *supra* fn. 135, pars. 73 and 298; ICC, Trial Chamber III, *Situation in Central African Republic, in Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, case no. ICC-01/05-01/08, Decision on the admission into evidence of items deferred in the Chamber's "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute", 27 June 2013.

as possessing a limited international legal personality, because of the tasks assigned to it by States in the GCs and APs.²⁴⁰ The authors of the ICRC Study on customary IHL decided to include ‘official ICRC statements, in particular appeals and memoranda on respect for international humanitarian law, [...] as relevant practice because the ICRC has international legal personality’,²⁴¹ and they have been strongly criticised for this.²⁴² This demonstrates that the approach that connects the role in the formation of customary international law to international legal personality and to being the addressees of rights and obligations under international law is still not widely supported by scholars and States.

In response to the criticisms, one of the authors of the ICRC Study clarified that statements by the ICRC were not used as ‘primary sources of evidence supporting the customary nature of a rule’, but only ‘to reinforce conclusions that were reached on the basis of state practice alone’.²⁴³ In any case, the author pointed out that practice by the ICRC was used by the Appeals Chamber of the ICTY as an element of international practice, together with ‘two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals’.²⁴⁴ Actually, the judges took into considerations the ICRC action in terms of stimulating Parties to armed conflicts to adhere to IHL, so that they concluded that ‘[t]he practical *results* the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.’²⁴⁵ ICRC practice was relevant only to the extent that it stimulated changes in State practice.

Even taking the view adopted by some authors that the ICRC is not granted any right under international law by IHL treaties (thus it would not have international legal personality), rather it is the

²⁴⁰ See, for example, Bugnion (2003), *supra* fn. 10, 954-972, and on the relevance of ICRC practice for the formation of customary law, in particular 963; Christian Dominicé, “La personnalité juridique internationale du CICR,” in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Christophe Swinarski (Geneva: ICRC; The Hague: Nijhoff, 1984), 663-673; Raymond Ranjeva, “Les Organisations Non Gouvernementales et la Mise en Œuvre du Droit International,” *Recueil des Cours* 270 (1997), 97-98; Roland Portmann, *Legal Personality in International Law* (Cambridge [etc.]: Cambridge University Press, 2010), 110-114.

On the ICRC being neither an NGO nor an international or intergovernmental organisation, see Gabor Rona, “The ICRC’s Status: In a Class of Its Own,” ICRC website, February 17, 2004, available at <http://www.icrc.org/eng/resources/documents/misc/5w9fjy.htm> (accessed January 25, 2013).

²⁴¹ ICRC Study – Rules, xli.

²⁴² See Yoram Dinstein, “The ICRC Customary International Humanitarian Law Study,” in *The Law of War in the 21st Century: Weaponry and the Use of Force*, ed. Anthony M. Helm (Newport, Rhode Island: Naval War College, 2006), 102; Bellinger and Haynes (2007), *supra* fn. 214, 445.

²⁴³ Henckaerts (2007), *supra* fn. 207, 478.

²⁴⁴ ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić* (1995), *supra* fn. 159, par. 108.

²⁴⁵ *Ibid.*, par. 109. Emphasis added.

beneficiary of obligations due by States to all other State Parties to those treaties,²⁴⁶ clearly the practice by the ICRC and Parties to armed conflicts' reactions to it will be crucial to identify the current state of the law.

As far as ICRC statements are concerned, scholars have argued that they would have the same relevance for the formation of customary international law as 'UN resolutions', meaning 'that of persuasive evidence of the existence of a customary law norm'.²⁴⁷ In other words, they could contribute to persuading States that a customary norm exists and thus to follow it. A similar role is generally attributed also to the judgments and acts of international or hybrid courts and tribunals, which are non-State international actors in the sense of organs not composed of States' representatives. Despite not being State practice, 'a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect' and, in addition to this, these courts 'can also contribute to the emergence of a rule of customary international law by influencing the subsequent practice of States and international organizations'.²⁴⁸

To sum up, even if the direct contribution of the practice of some of the aforementioned non-State actors (with the exclusion of IGOs) to the development of customary law is still uncertain, for sure such practice has an indirect role to play in the sense that it can stimulate States' reactions, either positive or negative. Its analysis (to the extent that this practice is known) is thus necessary.²⁴⁹ ICRC practice, when available, will be given particular consideration, both because it is widely considered to have (at least a partial) international personality and because, having been designated by the international community as the guardian of IHL,²⁵⁰ it has 'made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law', and thus for example it 'has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict'.²⁵¹ Moreover, the Conference of the International Red Cross and Red Crescent Movement comprises not only the ICRC, the IFRC and the National Societies of the Red Cross and Red Crescent, but also all the 195 State Parties to the Geneva

²⁴⁶ See Tarcisio Gazzini, "A Unique Non-State Actor: the International Committee of the Red Cross," Provisional draft, ILA Committee on non-state actors – Leuven 26-28 March 2009, available at: http://ghum.kuleuven.be/ggs/projects/non_state_actors/publications/gazzini_bis.pdf (accessed January 2, 2013).

²⁴⁷ Bothe (2005), *supra* fn. 216, 159.

²⁴⁸ ICRC Study – Rules, xl. The authors then specify that '[w]hat States claim before international courts, however, is clearly a form of State practice.' *Ibid.*, xli. See also Bothe (2005), *supra* fn. 216, 158-159.

²⁴⁹ In order to identify practice of non-State actors, for example regarding the issue of consent to humanitarian access given by non-State actors in non-international conflicts, or regarding the conduct of humanitarian NGOs, articles and reports by NGOs and from websites such as BBC News, IRIN, Reliefweb, and Reuters AlertNet will be needed as secondary sources (given that documents contained in the ICRC archives are sealed for 40 years), in addition to reports by the UNSG and by other UN bodies.

²⁵⁰ See Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law* (Geneva: ICRC, 1998).

²⁵¹ ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić* (1995), *supra* fn. 159, par. 109.

Conventions, so that resolutions adopted by the Conference could arguably play a role similar to resolutions of the UNGA.

1.4. Conclusion

Having illustrated the origins of the idea of humanitarian assistance to civilians in armed conflict, early practice, and the existing debates around this activity, which show the ongoing controversies over its regulation in international law, the next Chapters will proceed with the examination of this regulation through the in-depth analysis of post-WWII State practice and *opinio juris*, starting from the legal framework offered by the GCs and APs. Throughout the research, the analysis will be guided by the theoretical and methodological questions and choices illustrated in this Chapter.

2. Humanitarian Assistance in IHL Treaties

When analysing the legal regime regulating humanitarian assistance in the course of armed conflict, the first step is defining the object of the study—humanitarian assistance.

IHL treaties do not define ‘humanitarian assistance’, they do not even include the term, but they contain the regulation of various conducts that are generally categorised as manifestations of the activity ‘provision of humanitarian assistance to civilians in armed conflict’, the core common to the various definitions offered by scholars—life-saving goods and services for civilians in need.¹ This Chapter will thus analyse the relevant provisions of IHL treaties, to identify the characteristics of humanitarian assistance and the rationale behind its protection, as well as the regulation of this activity in the various kinds of armed conflict. Indeed, beside the political, practical or ethical reasons for using the term ‘humanitarian’ or ‘humanitarian assistance’ to qualify a certain act, it is also important to clarify the criteria relevant for the application of a certain legal regime under IHL. In other words, acts broadly qualified as ‘humanitarian assistance’ might be subject to different legal regimes under IHL, and the actors performing them might be granted different levels of protection.

The elements composing the concept, such as the terms ‘relief’, ‘aid’, and ‘assistance’, and the qualification as ‘humanitarian’, will be examined, as well as the role of local and external actors in this field. Furthermore, given the traditional association of humanitarian assistance with the principles of humanity, impartiality, and neutrality (as well as independence, sometimes), and the debate that has emerged around these principles in terms of their legal and practical relevance, the extent to which the Fundamental Principles of the Red Cross have been enshrined in IHL treaties will be examined. Finally, the scope of the analysis will be broadened to include the regulation of protection as the second component of humanitarian action and as an area where organisations active in relief have claimed an increasing role. The treaties will be studied to identify the boundaries of this role and the possible criteria for an actor’s engagement in both protection and assistance, including in terms of fulfilment of the principles of humanitarian assistance.

¹ See Section 1.2.1. According to Flory, humanitarian assistance is defined as a specific activity by its content and the rules regulating its management. See Maurice Flory, “A la Recherche d’une Définition.” In *Aide Humanitaire Internationale: un Consensus Conflictuel?*, ed. Marie-José Domestici-Met, (Paris: Economica, 1996), 31.

2.1. Humanitarian Assistance to Civilians in the Geneva Conventions and Additional Protocols

Since there is no binding international law instrument clearly defining ‘humanitarian relief’, ‘humanitarian assistance’ or ‘humanitarian aid’, the concept of humanitarian assistance will be clarified through an examination of the legal regime regulating conducts corresponding to the core content common to the various definitions proposed. Since scholars sometimes make reference also to ‘humanitarian relief’, ‘humanitarian aid’, or ‘humanitarian action’ more in general, and to differences between these terms,² possible distinctions emerging from IHL treaties will be taken into consideration.

The legal framework regulating the provision of humanitarian assistance to civilians in armed conflict, the starting point of the analysis, is rooted in the distinction between IAC (including belligerent occupation) and NIAC, and in the different levels and kinds of protection granted to different categories of persons within the civilian population. At the same time, the provision of relief to civilians in need is part and parcel of the protection regime envisaged for various categories of civilians. Therefore, with a view to understanding the concept of humanitarian assistance to civilians in armed conflict, it is necessary to first introduce the different situations of armed conflict in which this activity can take place. Subsequently, the categories of civilians entitled to protection in each of these different situations will be briefly presented, before proceeding with the analysis of humanitarian assistance as a specific component of this protection.

² For example, some authors prefer to use ‘humanitarian relief’, remaining faithful to the language used in the GCs and APs: see, for instance, ICRC Study – Rules, 105-111 (Chapter 8, ‘Humanitarian Relief Personnel and Objects’) and 186-202 (Chapter 17, ‘Starvation and Access to Humanitarian Relief’). Sandvik-Nylund differentiates between relief, which ‘seems to refer to more concrete acts, such as “relief consignments” and “relief convoys”,’ and humanitarian assistance, which ‘is more of an overall concept, covering both the relief consignments and the whole humanitarian operation or programme.’ In her view, even wider is the scope of humanitarian action, which ‘is more holistic in that it encompasses both assistance as well as the physical safety and the guarantee of the legal and human rights of the beneficiaries.’ Monika Sandvik-Nylund, *Caught in Conflicts: Civilian Victims, Humanitarian Assistance and International Law*, 2nd rev. ed. (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2003), 4-5. In a similar fashion, seeing humanitarian relief as a concept narrower than humanitarian assistance, Alcaide Fernández lists ‘[l]os envíos de socorros y las acciones de socorro’ (corresponding in the English version of the Conventions and Protocols to consignments/shipments of relief and relief actions: see, for example, the titles in the various official languages of arts. 23 and 108 GC IV, art. 70 AP I and art. 18 AP II) as one of the components of subsidiary humanitarian assistance. See Joaquín Alcaide Fernández, ‘La Asistencia Humanitaria en Situaciones de Conflicto Armado,’ in *La Asistencia Humanitaria en Derecho Internacional Contemporáneo*, by Joaquín Alcaide Fernández, María del Carmen Márquez Carrasco, and Juan Antonio Carrillo Salcedo (Seville: Universidad de Sevilla, 1997), 40. Spieker sees humanitarian assistance as ‘the most prominent activity within the broader concept of “humanitarian action”, the latter ranging from short-term relief to rehabilitation and reconstruction activities, and further to development co-operation, often even encompassing measures of disaster preparedness, prevention, and risk reduction.’ Heike Spieker, ‘Humanitarian Assistance, Access in Armed Conflict and Occupation,’ in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2008), par. 1. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012). The commentary to the 2003 resolution by the Institute of International law clarifies that ‘[h]umanitarian action is a wider term than humanitarian aid or assistance. It encompasses any act whereby aid is given to a distressed population, particularly where the population’s fundamental rights are affected.’ Institute of International Law, *The Humanitarian Assistance: Bruges Resolution 2003* (Paris: Pedone, 2006), 20.

2.1.1. Applicability of IHL and Humanitarian Assistance

Some general issues regarding the applicability of IHL assume particular relevance in the framework of this study, so that it is worthy briefly presenting them to be then fully able to grasp their significance for the topic of this research.

In terms of the applicability of IHL *ratione materiae*, it will be seen that the regulation of the provision of humanitarian assistance to civilians in the GCs and APs differs for the different situations of conflict, so that it is essential to distinguish between the kinds of conflict and know the elements to qualify an armed conflict.

From the point of view of applicability *ratione personae*, IHL includes different regimes of protection and different rights for various categories of civilians, including in the field of humanitarian assistance. Therefore, a preliminary overview of the categories of protected persons is useful to fully understand these differences and their rationale.

2.1.1.1. Applicability Ratione Materiae

The provision of humanitarian assistance to civilians, like many other activities in situations of armed conflict, is regulated in a different way depending on the classification of the armed conflict. The legal framework established by the GCs and APs differentiates between two types of armed conflict—IAC and NIAC. In addition, a situation of occupation may derive from an IAC, so that a specific legal regime exists to regulate this situation, as a subset of the legal framework regulating IAC.

Regulation of the conduct of hostilities in wars between States started in the second half of the 19th century, with the adoption of instruments such as the Geneva Convention 1864 and the Saint Petersburg *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* of 1868.³ The GCs introduced the concept of IAC, which is defined in Article 2 common to the four GCs, stating that the Conventions ‘shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by

³ Geneva Convention 1864. *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, Saint Petersburg, November 29-December 11, 1868, entered into force December 11, 1868. Hereinafter St. Petersburg Declaration 1868.

one of them.’⁴ IAC is thus a conflict between States, and, according to the ICRC Commentary, exists based on objective criteria, since it covers ‘[a]ny difference arising between two States and leading to the intervention of members of the armed forces ... even if one of the Parties denies the existence of a state of war’, and does not depend on ‘how long the conflict lasts, or how much slaughter takes place.’⁵

If a Party to an IAC establishes control over part of the territory of an adverse Party, the legal regime regulating occupation becomes applicable. According to Article 42 of the *Regulations Respecting the Laws and Customs of War on Land*, annexed to Hague Convention IV 1907 (Hague Regulations), ‘[t]erritory is considered occupied when it is actually placed under the authority of the hostile army’, and ‘[t]he occupation extends only to the territory where such authority has been established and can be exercised.’ This definition of occupation has been widened by the GCs, which establish in Common Article 2 that, in addition to being applicable in case of occupation emerging during hostilities, the Conventions ‘shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.’⁶ Such a widened definition has arguably assumed customary nature.⁷

In any case, determining the beginning and the end of an occupation is not easy and different approaches exist.⁸ For example, Thürer identifies at least two different interpretations of the degree of authority necessary to give rise to occupation. A first interpretation, adopted *inter alia* by Pictet in the ICRC Commentary to GC IV, argues that ‘a situation of occupation exists whenever a party to a conflict is exercising some level of authority or control over territory belonging to the enemy’, so that ‘advancing troops could be considered an occupation, and thus bound by the law of occupation during the invasion phase of hostilities.’⁹ On the other hand, according to a ‘more restrictive’ approach, ‘a situation of

⁴ On the difference between the concepts of ‘war’ and of ‘armed conflict’, see, for example, Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict,” in *Research Handbook of International Conflict and Security Law*, eds. Nigel White and Christian Henderson (Cheltenham [etc.]: Edward Elgar Publishing, 2013), 265-267.

⁵ ICRC Commentary GC IV, 20. Following the adoption of AP I, the legal regime applicable to IAC has become applicable also to ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’ (art. 1(4) AP I).

⁶ For a more detailed explanation of the widening of the concept of occupation by the GCs, see, for example, Adam Roberts, “What is a Military Occupation?,” *British Yearbook of International Law* 55, no. 1 (1984), 252-253.

⁷ See Robert Kolb and Sylvain Vit  , *Le droit de l’occupation militaire – Perspectives historiques et enjeux juridiques actuels* (Brussels: Bruylant, 2009), 75-85 and 110-114; Eyal Benvenisti, *The International Law of Occupation* 2nd ed. (Oxford [etc.]: Oxford University Press, 2012), 1-7.

⁸ See, for example, Tristan Ferraro, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory* (Geneva: ICRC, 2012).

⁹ Daniel Th  rer, “Current Challenges to the Law of Occupation,” *Collegium, Special Edition: Current Challenges to the Law of Occupation Proceedings of the Bruges Colloquium 20th-21st October 2005*, 34 (Autumn 2006), 12. See ICRC Commentary to art. 6 GC IV:

‘the word “occupation”, as used in the Article, has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention

occupation only exists once a party involved in a conflict is in a position to exercise the level of authority over enemy territory that is necessary to enable it to discharge all the obligations imposed by the law of occupation', meaning that 'the invading power must be in a position to substitute its own authority for that of the government of the territory', even if only over a portion of the State's territory.¹⁰

The end of occupation might coincide with the withdrawal of the troops of the Occupying Power, if this is followed by the establishment of a legitimate government and not of a puppet government that is in reality controlled by the Occupying Power, or with the establishment of a legitimate government, which consents to the presence of the armed forces of the (former) Occupying Power in its territory.¹¹

Finally, the category of NIAC has been traditionally much less regulated than IAC, because of States' desire to preserve their sovereignty and their reluctance to regulate and limit at the international level events taking place within the national borders. In 1949, the only provision dealing with NIAC adopted in the four GCs was Common Article 3. It provides a series of minimum guarantees and applies to all Parties to the conflict, both States and non-State actors. The threshold for the applicability of Common Article 3 is the existence of an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. The article thus covers both conflicts between a State and a non-State armed group, and between non-State armed groups. In addition, the violence must reach the threshold of armed conflict, which has been identified by the Appeals Chamber of the ICTY as 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.¹² Indicative criteria to establish whether this threshold has been reached are 'the intensity of the conflict and the

does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. ... The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.'

ICRC Commentary GC IV, 60.

¹⁰ Thürer (2006), supra fn. 9, 12. In this sense, see, for example, UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383 (2004), 275, par.11.3; U.S. Army, Judge Advocate General's Legal Center and School, *Operational Law Handbook 2012* (Charlottesville, Virginia: International and Operational Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, 2012), 33; Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), 31-49. For an analysis of the debate on the beginning of occupation, see, for example, Roberts (1984), supra fn. 6, 256-257; Kolb and Vité (2009), supra fn. 7, 137-150. On the scope of application *ratione personae* of the law of occupation, see Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2009), 12-15.

¹¹ On the end of occupation and of the application of the law of occupation, see art. 6(3) GC IV and art. 3(b) AP I; ICRC Commentary GC IV, 62-63; ICRC Commentary APs, 67-69 (pars. 151-160); Roberts (1984), supra fn. 6, 257-260; Dinstein (2009), supra fn. 10, 270-285; Kolb and Vité (2009), supra fn. 7, 150-169.

¹² ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 70.

organization of the parties to the conflict.’¹³ Finally, according to a textual interpretation of Common Article 3, a NIAC needs to take place ‘in the territory *of one*’ State Party to the GCs.¹⁴ Nonetheless, it has been argued that the only reason for choosing such a formulation was to ‘make it clear that common Article 3 may only be applied in relation to the territory of States that have ratified the 1949 Geneva Conventions’,¹⁵ and that the reference would be ‘to the territory of any High Contracting Party, not necessarily that of a state actually a party to the conflict’, so that it could cover conflicts that are not purely internal.¹⁶

The regulation applicable to NIAC has been expanded and improved with the adoption of AP II, but the threshold for the application of the provisions contained in the Protocol has been set higher than the application of Common Article 3. Indeed, pursuant to Article 1(1) AP II, the Protocol ‘*develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application,*’ and it applies to armed conflicts not covered by Article 1 AP I and that ‘take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups’, thus excluding conflicts between non-State armed groups.¹⁷ Moreover, for AP II to apply, it is necessary that these dissident armed forces or organised armed groups are ‘under responsible command’ and exercise a degree of control over part of the State territory so as to be able to ‘carry out sustained and concerted military operations and to implement th[e] Protocol.’¹⁸

2.1.1.2. *Applicability Ratione Personae*

In case of IAC, GC IV protects mainly civilians in the hands of the enemy, thus not civilians in their own State of nationality, nationals of a State not Party to GC IV, or civilians of a neutral or co-belligerent State who find themselves in the territory of one of the Parties to the conflict, which has normal diplomatic

¹³ ICTY, Trial Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Opinion and Judgment, 7 May 1997, par. 562. See, more in detail, pars. 561-568. For further references to case-law on this issue, see Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations,” *International Review of the Red Cross* 91, no. 873 (March 2009), 76. See also Milanovic and Hadzi-Vidanovic (2013), *supra* fn. 4, 282-284.

¹⁴ Emphasis added.

¹⁵ Vité (2009), *supra* fn. 13, 78.

¹⁶ Milanovic and Hadzi-Vidanovic (2013), *supra* fn. 4, 289. See, more in general, *Ibid.*, 29-33. See also Vité (2009), *supra* fn. 13, 89-92.

¹⁷ Emphasis added.

¹⁸ Art. 1(1) AP II. Furthermore, art. 1(2) AP II clarifies that the Protocol ‘shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.’ On the scope of application of AP II, see ICRC Commentary APs, 1348-1356 (pars. 4446-4479). See also, for example, Vité (2009), *supra* fn. 13, 79-80; Milanovic and Hadzi-Vidanovic (2013), *supra* fn. 4, 285-286. Both Vité and Milanovic and Hadzi-Vidanovic also examine, as a third source for the definition of NIAC (but relevant for the application of international criminal law (ICL), not of IHL), arts. 8(2)(d) and 8(2)(f) of the *Rome Statute of the International Criminal Court*, Rome, July 17, 1998, entered into force July 1, 2002 (2187 UNTS 90), hereinafter ICCSt. See Vité (2009), *supra* fn. 13, 80-83; Milanovic and Hadzi-Vidanovic (2013), *supra* fn. 4, 287-288.

relations with their State of nationality.¹⁹ This approach was due to the resistance of States to create IHL provisions interfering with the internal relationships of a State with its own nationals (and with nationals of allied States).²⁰ However, few provisions (Articles 13 to 26 GC IV) apply to ‘the whole of the populations of the countries in conflict, without any adverse distinction’,²¹ and they include provisions regarding humanitarian relief, as will be illustrated below.

Persons protected under GC IV have the right to be protected, respected, and treated humanely, in all circumstances and without any adverse distinction;²² the right to receive medical attention and hospital treatment ‘to the same extent as the nationals of the State concerned’, and to practice their religion and receive spiritual assistance.²³ In addition, the wounded, sick, infirm, and expectant mothers are entitled to ‘particular protection and respect.’²⁴ Special protection is also envisaged for persons that not only find themselves in the power of a Party to the conflict, but are also deprived of their liberty as a consequence of internment and thus are in a situation of particular vulnerability.²⁵

New provisions on the protection of civilians in case of IAC have been introduced by AP I, which defines civilians as ‘any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol,’ thus as any person who is neither a member of the armed forces of a Party to the conflict nor a prisoner of war (POW).²⁶ Also, ‘[i]n

¹⁹ Indeed, art. 4 GC IV defines protected persons as ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’ On the other hand, ‘[n]ationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.’ However, the Appeals Chamber of the ICTY in the *Tadić* case has interpreted extensively this category, arguing that the determinant factor might be not always nationality, but in certain cases ethnicity or, more in general, ‘allegiance to a Party to the conflict.’ ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Judgment, 15 July 1999, par.166.

²⁰ See, for example, Ruth Abril Stoffels, *La Asistencia Humanitaria en los Conflictos Armados: Configuración Jurídica, Principios Rectores y Mecanismos de Garantía* (Valencia: Tirant lo Blanch, 2001), 105.

²¹ Art. 13 GC IV.

²² See art. 27 GC IV. However, the same article provides that Parties to the conflict are entitled to ‘take such measures of control and security in regard to protected persons as may be necessary as a result of the war.’

²³ See art. 38 GC IV. The same article provides that children under fifteen years, pregnant women and mothers of children under seven years shall be granted preferential treatment ‘to the same extent as the nationals of the State concerned.’ Also, in case a protected person has lost his job because of the armed conflict and cannot find a new one because of the control exercised upon him by the Party to the conflict, the latter has the duty to ‘ensure his support and that of his dependents’. Art. 39 GC IV.

²⁴ Art. 16(1) GC IV. Special care shall also be given by the Parties to the conflict to ‘children under fifteen, who are orphaned or are separated from their families as a result of the war,’ in terms of ‘their maintenance, the exercise of their religion and their education’. Art. 24 GC IV.

²⁵ For example, internees are entitled to be provided free of charge for their own maintenance and that of their dependents, if necessary; to receive the necessary medical attention, to be interned in premises that are adequate from the point of view of hygiene and health, to receive adequate food and clothing, to be allowed to practice their religion, and to take part in ‘intellectual, educational and recreational pursuits’ (which shall be ‘encourage[d]’ by the Detaining Power). See arts. 81, 91-92, 85, 89-90, 93, and 94 GC IV. As far as children and young people are concerned, their education ‘shall be ensured’. Art. 94 GC IV.

²⁶ Art. 50(1) AP I. Art. 4(A) GC III states:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

case of doubt whether a person is a civilian, that person shall be considered to be a civilian.²⁷ Again, AP I grants specific protection to vulnerable categories within civilians, such as women and children in the power of a Party to the conflict, who are entitled to respect and protection.²⁸ Similarly, all the wounded, sick, and shipwrecked ‘shall be respected and protected’, be treated humanely in all circumstances, and receive, ‘to the fullest extent practicable and with the least possible delay’, the necessary medical care.²⁹

Finally, all civilians who are affected by conflict or occupation in accordance with Article 1 AP I, are in the power of a Party to the conflict, and do not enjoy a more favourable treatment under other provisions of GC IV or AP I, are entitled to some fundamental guarantees under Article 75 AP I,³⁰ including the right to humane treatment in all circumstances without any adverse discrimination, respect for their person, honour, convictions and religious practices. Explicitly prohibited in any circumstance are conducts such as violence to the life, health, or physical or mental well-being of persons, outrages upon personal dignity, collective punishments.

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

...

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Art. 43 AP I is devoted to ‘armed forces’ and it reads:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 GC III) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

²⁷ Art. 50(1) AP I.

²⁸ See arts. 76 and 77 AP I.

²⁹ Art. 10 AP I. Distinctions among these individuals shall be based only on medical grounds. Also, art. 11 AP I protects ‘physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty’ because of the armed conflict.

³⁰ These persons may include, for example, nationals of States not Parties to the Conventions, of States not Parties to the conflict (and with normal diplomatic representation in the State in whose power the persons are), and of allied States (with normal diplomatic representation in the State in whose power the persons are); persons who have become refugees or stateless persons after the beginning of the conflict (otherwise they are covered by art. 73 AP I); mercenaries; other persons who are denied prisoner of war (POW) status; and, protected persons who are deprived of certain rights on the basis of art. 5 GC IV. See ICRC Commentary APs, 869-871 (pars. 3022-3032).

A second group of civilians considered as deserving of protection at the time of the negotiations of GC IV were the inhabitants of occupied territories.³¹ In addition to Article 75 AP I, in case of occupation the civilian population of the occupied territory enjoy protected status under Article 4 GC IV (as well as any other civilian fulfilling the necessary conditions) and is entitled to the ensuing protection.³² Also, the provisions applicable to ‘the whole of the populations of the countries in conflict, without any adverse distinction,’³³ as well as those granting special protection to specific categories of civilians,³⁴ apply.

In NIAC, Common Article 3 (whose customary nature is now widely recognised, in addition to the almost universal ratification of the GCs by 195 States)³⁵ stipulates the right of every person not taking active part in hostilities to be treated humanely and the right of wounded and sick civilians to be collected and cared for. Article 4 AP II lists some ‘fundamental guarantees’ applicable to ‘[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted’. They include humane treatment in all circumstances without any adverse distinction, respect for their person, honour and convictions and religious practices, and the prohibition of acts such as violence to the life, health and physical or mental well-being, collective punishments, and outrages upon personal dignity. Also, AP II devotes special attention to the wounded, sick, and shipwrecked, who have the right to be respected and protected, be treated humanely, and receive the necessary medical care ‘to the fullest extent practicable and with the least possible delay.’³⁶

In sum, different categories of civilians are entitled to different kinds and levels of protection under GC IV and the APs, based on the criteria of their vulnerability and, in certain cases, of their nationality.³⁷ Furthermore, the protection provided to civilians is different in IAC, NIAC, and occupation, both because of the level of control on civilians in situations such as occupation, and because of States’ concerns related to sovereignty. As part of the protection granted to these different categories of civilians in situations of IAC or NIAC, IHL treaties contain a specific legal regime regulating the provision of relief.

³¹ ICRC Commentary GC IV, 45.

³² See art. 27, 76, 81, 85, 89-91, and 93-94 GC IV.

³³ Art. 13 GC IV.

³⁴ See arts. 16, 18-22, 24 GC IV; arts. 76-77 AP I.

³⁵ See, for example, ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, 27 June 1986, ICJ Reports 1986 at 14, par. 218 (see also Section 1.3.1.); ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić* (1995), supra fn. 12, par. 98; ICTR, Trial Chamber I, *Prosecutor v. Jean-Paul Akayesu*, case no. ICTR-96-4, Judgement, 2 September 1998, par. 608.

³⁶ Art. 7 AP II. Distinctions among these individuals shall be based on medical grounds only.

³⁷ However, as already mentioned, the criteria of nationality might be interpreted (and has been interpreted, by the ICTY) as allegiance to a Party to the conflict. See supra fn. 19.

2.1.2. The Concept and Its Content: Relief, Aid, Assistance

The terms ‘humanitarian assistance’, ‘humanitarian relief’ or ‘humanitarian aid’ do not appear as such in the GCs or APs, but the treaties use the word ‘relief’. In GC IV, ‘relief’ is mostly used to indicate a certain class of goods shipped or consigned to civilians in need, meaning goods necessary for their survival, primarily ‘food and medical supplies’.³⁸ Reference is made to ‘spiritual aid or material relief’, ‘individual or collective relief that may be sent’, ‘relief schemes’, ‘consignments ... to be used for the relief of the needy population’, ‘relief consignments’, ‘relief parcel’, ‘relief supplies’, ‘[m]edical relief supplies’, ‘individual relief consignments’, ‘collective relief shipments’, ‘collective relief’, ‘relief shipments’, and ‘supply of effective and adequate relief’.³⁹ Correspondingly, organisations working to ensure the survival of civilians, in other words devoted to ‘the protection of civilian persons and ... their relief’,⁴⁰ are referred to as ‘relief societies’.⁴¹

In sum, relief in GC IV comprises goods that can be shipped, consigned and distributed, including ‘medical and hospital stores and objects necessary for religious worship’ and ‘essential foodstuffs, clothing and tonics’,⁴² while services, such as the provision of medical care or spiritual aid, are usually mentioned separately (similarly, medical personnel and religious organisations are mentioned separately from relief organisations).⁴³

A similar approach is adopted in the two APs: AP I refers to ‘relief’, ‘relief actions’, ‘[o]ffers of [...] relief’, ‘distribution of relief consignments’, ‘relief consignments, equipment and personnel’, ‘relief personnel’, and ‘relief mission’.⁴⁴ Relief actions are required when the civilian population ‘of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69’, and these supplies are ‘food and medical supplies ... clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population [...] and objects necessary

³⁸ Art. 55 GC IV.

³⁹ Arts. 30, 38, 59-63, 76, 108-111, 142 GC IV, and the various arts. in Annex II to GC IV, ‘Draft Regulations concerning Collective Relief’. Similarly, see art. 30 GC II; arts. 56, 72-74, 108, 125 GC III, and the various arts. in Annex III to GC III, ‘Regulations Concerning Collective Relief (see Art. 73)’.

⁴⁰ Art. 10 GC IV (similarly, art. 9 GC I, GC II, and GC III).

⁴¹ Arts. 39, 63, 140, 142 GC IV. Similarly, see art. 18 GC I; arts. 14, 24, 25 GC II; arts. 123 and 125 GC III.

⁴² Art. 23 GC IV. Similarly, art. 55 and 58 GC IV regarding occupation.

⁴³ Art. 30 GC IV refers to ‘spiritual aid’, while arts. 38, 58, and 76 GC IV to ‘spiritual assistance’. ‘[m]edical attention is mentioned in arts. 38 (which adds also ‘hospital treatment’), 76, and 81 GC IV. Art. 142 GC IV makes reference to ‘religious organizations, relief societies, or any other organizations assisting the protected persons’ and to ‘all facilities for visiting the protected persons, for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes, or for assisting them in organizing their leisure time within the places of internment.’

⁴⁴ Arts. 69-71 AP I. The title of the Section comprising these articles is ‘Relief in Favour of the Civilian Population’.

for religious worship’.⁴⁵ Similarly, pursuant to Article 18 AP II, relief actions shall be undertaken when ‘the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies’.⁴⁶ In sum, relief identifies goods essential for the survival of persons, but also for their religious worship.⁴⁷

However, Article 70 AP I also mentions relief personnel and relief equipment, so that ‘relief actions’ as used in AP I include not just goods (‘relief’ in the strict sense), but also the personnel and equipment instrumental to the transportation and distribution of these goods, as well as the services provided by these personnel, all covered under the more general term of ‘assistance’.⁴⁸

Assistance would then cover humanitarian activities exceeding those directly related to the provision and distribution of essential items. As affirmed by the ICRC representative Mr Sandoz during the conference for the negotiation of the APs, ‘Part VI of draft Protocol II dealt not only with relief actions (Article 33) but also with the recording of living and dead victims of the conflict and the transmission of information concerning them (Article 34), and with the activities of national Red Cross and other relief societies (Article 35)’, and therefore ‘[t]he heading “Relief” proposed in the ICRC draft did not reflect the entire contents of Part VI and might appropriately be replaced by a more general term such as “Humanitarian assistance”’.⁴⁹

In sum, from an analysis of IHL treaties, ‘relief’ is generally used to indicate goods necessary for the survival of people in need, and relief actions cover the provision of such goods and all other necessary ‘assistance’ (in the form of equipment, services, and the personnel called to provide such services). The additional characteristics deriving from the qualification of relief/assistance as ‘humanitarian’ are the subject of next Section.

⁴⁵ Arts. 70(1) and 69(1) AP I.

⁴⁶ The only other provision in AP II mentioning relief is art. 5, affirming the right of persons deprived of their liberty for reasons related to the armed conflict to ‘receive individual or collective relief’.

⁴⁷ The French translation of relief confirms this interpretation, since the term is in its plural form, ‘secours’ (and relief societies is translated as ‘sociétés de secours’).

Humanitarian aid seems to be sometimes used as a synonym for humanitarian relief. See, for example, ICRC Study – Rules, 108, 188, 197-198, 200, 202. For instance, the English version of GC IV makes reference to ‘relief societies’ and of AP I to ‘aid societies’, while the French version many times translation both expressions in the same way, as ‘sociétés de secours’. See art. 142 GC IV, entitled ‘Relief societies and other organizations’ and ‘Sociétés de secours et autres organismes’; art. 17 AP I, entitled ‘Role of the civilian population and of aid societies’ and ‘Rôle de la population civile et des sociétés de secours’; art. 18 AP II, entitled ‘Relief societies and relief actions’ and ‘Sociétés de secours et actions de secours’.

⁴⁸ According to art. 71 AP I, relief personnel, ‘[w]here necessary, [] may form part of the *assistance* provided in any relief action, in particular for the transportation and distribution of relief consignments’. Emphasis added. Supporting such a meaning of ‘relief actions’, see also Abril Stoffels (2001), *supra* fn. 20, 115. Similarly, see *Ibid.*, 120-121 with reference to NIAC and the interpretation of ‘relief actions’ in AP II.

⁴⁹ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. XII, 348, CDDH/II/SR.88, par. 24.

2.1.3. The Quality of Being ‘Humanitarian’

The term ‘humanitarian’ is used in the four GCs and in the two APs with reference to medical activities or to relief actions and other activities carried out by components of the International Red Cross and Red Crescent Movement, other relief organisations, or civilian civil defence organisations.⁵⁰ From a textual interpretation of IHL treaties, actions carried out with humanitarian purposes, or ‘humanitarian actions’ are those that have the only purpose of saving lives or alleviating suffering, while being deprived of any characteristic or goal that may amount to interference in the conflict. As explained by Blondel, ‘[w]ithout actually defining the word “humanitarian”, IHL, like other branches of law, makes clear its aims, which are to ensure respect for human life and to promote health and dignity *for all*. It is concerned with men and women *for their own sake*, setting aside weapons, uniforms and ideologies, men and women who could very well be ourselves.’⁵¹ The balance between humanitarian considerations and military necessity has been enshrined in IHL and reflected in the various protection regimes in favour of different categories of victims of the conflict. Furthermore, a systemic interpretation of AP I, taking into account in particular the section on civil defence, and its *travaux préparatoires* (again, especially the discussion connected to civil defence) confirm the qualification of an action as ‘humanitarian’ when its sole aim is to guarantee the survival and dignity of people as human beings.

Article 61(1), the first of the seven articles of AP I devoted to civil defence, starts by defining civil defence as ‘the performance of some or all of the undermentioned *humanitarian tasks* intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival.’⁵² The following list of humanitarian tasks includes activities clearly covered by the concept of humanitarian assistance as the provision of goods and services necessary for the survival of the civilian population: management of shelters; medical services, including first aid, and religious assistance; detection and marking of danger areas; provision of emergency accommodation and supplies; emergency repair of indispensable public utilities; assistance in the preservation of objects essential for survival. Civil defence organisations are ‘those establishments and other

⁵⁰ Common art. 3, arts. 9, 10, 21, 22 GC I; arts. 9, 10, 27, 34, 35 GC II; arts. 9, 10, 123 GC III; arts. 10, 11, 15, 19, 59, 61, 63, 96, 140 GC IV; arts. 5, 9, 13, 15, 17, 22, 32, 60, 61, 70, 74, 81 AP I; arts. 9, 11, 18 AP II. In few instances, ‘humanitarian’ seems to refer more in general to principles and rules to ensure respect for individuals and their humane treatment: see art. 100 GC IV, arts. 49 and 72 AP I, and preamble AP II. On civil defence organisations, see Section 2.1.4.3.

⁵¹ Jean-Luc Blondel, “The Meaning of the Word ‘Humanitarian’ in Relation to the Fundamental Principles of the Red Cross and Red Crescent,” *International Review of the Red Cross* 29, no. 273 (November-December 1989), 512. Emphasis added.

⁵² Art. 61(1) AP I. Emphasis added.

units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the [aforementioned] tasks [], and which are assigned and devoted exclusively to such tasks’,⁵³ and it is envisaged that military personnel may be part of civilian civil defence organisations and be protected even during armed conflict, under strict conditions.⁵⁴

Therefore, under IHL treaties humanitarian tasks are not a prerogative of non-governmental or non-military organisations, but they are activities characterised by the fact that they do not interfere in the conflict and do not contribute to it. Indeed, during the negotiations of the two APs, it was repeatedly affirmed by various States’ representatives that the rationale behind providing special protection for civil defence was its ‘purely humanitarian tasks of safeguarding the life and property of the civilian population’.⁵⁵ In this sense, the Swiss representative argued that ‘[c]ivil defence was a humanitarian activity as deserving of attention as medical services, if not more so since prevention was better than cure and it was even more important to protect the civilian population than to look after the wounded and give the dead a decent burial.’⁵⁶

The qualification as ‘humanitarian’ of acts having purely live-saving purposes, thus a non-political nature, not representing interference with hostilities, finds support also in the ICRC Commentary to GC IV, which argues that for activities to be ‘purely humanitarian’, they need to ‘be concerned with human beings as such, and [...] not be affected by any political or military consideration.’⁵⁷ Correspondingly, an organisation to be humanitarian needs to be ‘concerned with the condition of man, considered solely as a human being, regardless of his value as a military, political, professional or other unit.’⁵⁸

2.1.4. Humanitarian Assistance: The Roles of Local and External Actors

The provisions in IHL treaties on civil defence organisations and on their role in performing humanitarian activities prove that there is a clear role in humanitarian activities for local actors, including organisations authorised or even established (at least in case of IAC) by one of the Parties to the conflict. However, as can be inferred also from the scholarly definitions mentioned in Section 1.2.1., the provision of external or

⁵³ Art. 61(2) AP I.

⁵⁴ See art. 67(1) AP I. For a more detailed analysis of the role of the military in humanitarian assistance, see Section 2.1.4.3.

⁵⁵ Statement by the representative of Denmark. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. XII, 82, CDDH/II/SR.61, par. 69. Similarly, see the following statements: by the representative of the Union of Soviet Socialist Republics, Ibid., 77, CDDH/II/SR.61, par. 46; by the representative of Norway, Ibid., 78, CDDH/II/SR.61, par. 52; by the representative of Switzerland, Ibid., 87, CDDH/II/SR.62, par. 15.

⁵⁶ Ibid., 365, CDDH/II/SR.90, par. 4.

⁵⁷ ICRC Commentary GC IV, 97.

⁵⁸ ICRC Commentary GC IV, 96.

international assistance is not necessarily subject to the same regulation as the provision of assistance by the Parties themselves or by organisations based in the territory they control.⁵⁹

Indeed, when regulating the provision of assistance to civilians in conflict, there are contrasting values at stake. On the one hand, humanitarian considerations and the protection of everyone's human rights would call for regulation at the international level of the responsibilities of all the actors who play a role in this activity. On the other hand, the principle of sovereignty militates against interference by international law in the internal choices of a State. This Section focuses on the provisions in IHL treaties related to the role and obligations of the different actors involved in the satisfaction of the basic needs of the civilian population. After examining the role of authorities having control over a territory, the analysis turns to local relief organisations and external actors, and it then ends by devoting specific attention to the role of the military.

2.1.4.1. Local Authorities

Besides the provisions on respect and protection, humane treatment, and medical care for protected persons examined above in Section 2.1.1.2., authorities having *de facto* control over a territory have specific obligations under IHL treaties for the provision to civilians of goods and services to satisfy their basic needs only if they are an Occupying Power. The Occupying Power shall adequately supply the civilian population of the occupied territory '[t]o the fullest extent of the means available to it,' by 'ensuring ... food and medical supplies' and by, 'in particular, bring[ing] in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.'⁶⁰ Pursuant to Article 69 AP I, the Occupying Power 'shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.'⁶¹ Thus, under AP I there is a duty for the Occupying Power to satisfy as much as possible the needs of the civilian population, and to respect the principle of non-discrimination while doing so.

⁵⁹ The term 'external' was used, for example, by the ILC Special Rapporteur Mr. Eduardo Valencia-Ospina in his 2010 *Third report on the protection of persons in the event of disasters*: 'The phrase "external assistance" is taken from the ASEAN Agreement [ASEAN Agreement on Disaster Management and Emergency Response, Vientiane, July 26, 2005], and reflects the fact that this provision does not purport to govern the State's relationship with humanitarian actors established within its own borders.' A/CN.4/629, 31 March 2010, par. 100.

⁶⁰ Art. 55 GC IV.

⁶¹ It should be noted that art. 69 AP I is part of the specific section in AP I devoted to 'Relief in favour of the civilian population', which comprises arts. 68 to 71 AP I (Section II of Part IV, devoted to the Civilian Population).

The ICRC draft which formed the basis of the negotiations of AP I contained a specific article entitled 'Supplies' stating that '[t]o the fullest extent possible and without any adverse distinction, the Parties to the conflict shall ensure the provision of foodstuffs, clothing, medical and hospital stores and means of shelter for the civilian population.'⁶² However, during the negotiations this provision was limited to occupied territories. The representative of the U.S. openly criticised the words 'without any adverse distinction', saying that they 'would prevent a Party to the conflict, no matter how desperate its situation, from establishing priorities within its population with respect to the distribution of essential supplies' and since 'a country fighting for survival would of necessity lay down priorities, giving preference in particular to its armed forces and essential labour', '[i]t would be unrealistic to require a State not to assign reasonable priorities while on a war footing.'⁶³ Therefore, the obligation of the Parties to the conflict to satisfy the basic needs of all civilians under their control without discrimination has not been enshrined in GC IV or the APs.

The principle of sovereignty and a State's freedom to decide how to satisfy the needs of its own nationals have thus prevailed during the negotiations of the GCs and APs: there is no explicit obligation on the sovereign to satisfy the essential needs of its nationals (nor to provide 'relief' or 'assistance' to them). On the other hand, whenever authorities exercise power over individuals who are not their own nationals, specific obligations are provided by IHL. Not only the Occupying Power is obliged to satisfy the basic needs of the civilian population of the occupied territory,⁶⁴ and pursuant to AP I to respect the principle of non-discrimination in doing it, but it shall also agree to supplementary relief consignments if needed. Similarly, Parties to an IAC have specific duties related to the full enjoyment by protected persons of their rights regarding receiving relief, and the same is true in NIAC under AP II with regards to persons deprived of their liberty.

Protected persons under GC IV have the right to receive the individual or collective relief that may be sent to them,⁶⁵ and in case protected persons have lost their job because of the armed conflict and cannot

⁶² *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. I, Part Three: Draft Additional Protocols to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, 20. The article was then modified and limited to occupied territories, and has now become art. 69 AP I, entitled 'Basic needs in occupied territories'.

⁶³ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. XII, 316, CDDH/II/SR.84, par. 31.

⁶⁴ The Occupying Power has also specific duties related to ensuring the proper working of 'all institutions devoted to the care and education of children,' which has to be fulfilled 'with the cooperation of the national and local authorities', and of 'the medical and hospital establishments and services, public health and hygiene in the occupied territory'. See arts. 50 and 56 GC IV. Art. 57 GC IV poses limits to the possibility of requisition of civilian hospitals by the Occupying Power.

⁶⁵ See art. 38 GC IV. Also, children under fifteen years, pregnant women and mothers of children under seven years shall be granted preferential treatment 'to the same extent as the nationals of the State concerned.'

find a new one because of the control exercised upon them by the Party to the conflict, the latter has the duty to allow them to ‘receive allowances from their home country, the Protecting Power, or the relief societies referred to in Article 30 [GC IV].’⁶⁶ Similarly, internees have the right to receive ‘individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies, as well as books and objects of a devotional, educational or recreational character which may meet their needs.’⁶⁷ These provisions apply also in situations of occupation, where moreover, ‘[s]ubject to imperative reasons of security, protected persons ... shall be permitted to receive the individual relief consignments sent to them’.⁶⁸ In NIAC, Article 5 AP II emphasises the right to receive individual or collective relief for ‘persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained’.

2.1.4.2. Local Relief Societies and External Actors

To guarantee the implementation of the aforementioned provisions on consignments and shipments, IHL treaties contain rules on the facilities to be granted to relief organisations and on the ‘right of humanitarian initiative’.⁶⁹ Indeed, the Occupying Power ‘shall permit ministers of religion to give spiritual assistance to the members of their religious communities’, and ‘accept consignments of books and articles required for religious needs and ... facilitate their distribution in occupied territory’.⁷⁰ Except in case of urgent security needs, recognised National Red Cross or Red Crescent Societies shall be allowed to pursue their activities in an occupied territory ‘in accordance with Red Cross principles, as defined by the International Red Cross Conferences,’ and other relief societies shall be allowed ‘to continue their humanitarian activities under similar conditions.’⁷¹ The Occupying Power ‘may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities’.⁷²

Both in IAC and in occupation, in relation to protected persons deprived of their liberty, the Detaining Power shall grant to representatives of religious organisations, relief societies, or any other organisations assisting the protected persons, ‘all facilities for visiting the protected persons, for distributing

⁶⁶ Art. 39 GC IV.

⁶⁷ Art. 108 GC IV. See also art. 109-112 GC IV.

⁶⁸ Art. 62 GC IV.

⁶⁹ With reference to the presentation of draft Common art. 3 by the Seventh Report drawn up by the Special Committee of the Joint Committee 16 July 1949: ‘the right of initiative of the International Committee of the Red Cross or any other impartial humanitarian body was safeguarded’. *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II section B, 122.

⁷⁰ Art. 58 GC IV.

⁷¹ Art. 63(1)(a) GC IV.

⁷² Art. 63(1)(b) GC IV.

relief supplies and material from any source, intended for educational, recreational or religious purposes, or for assisting them in organizing their leisure time within the places of internment,' but it has the right to 'limit the number of societies and organizations.'⁷³ In addition, protected persons subject to detention or occupation have the right to make application to any organisation that might assist them.⁷⁴ These organisations are entitled to be 'granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations' and the Detaining or Occupying Powers shall 'facilitate, as much as possible,' the visits to protected persons of all organisations 'whose object is to give spiritual aid or material relief to such persons'.⁷⁵

Under Article 81 AP I, the activities of the ICRC, local and foreign Red Cross and Red Crescent organisations, and other humanitarian organisations shall be facilitated. The ICRC has the right to be granted all facilities by the Parties to the conflict to carry out the humanitarian functions in favour of the victims of the conflict assigned to it by the GCs and AP I, and, subject to the consent of the Parties to the conflict, it may carry out 'any other humanitarian activities in favour of these victims.'⁷⁶ The Parties to the conflict shall grant the necessary facilities to their respective National Red Cross and Red Crescent Societies for carrying out activities in favour of the victims to the conflict 'in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the red Cross as formulated by the International Conferences of the Red Cross.'⁷⁷ Similar assistance activities by other National Red Cross and Red Crescent Societies and by their League shall be facilitated 'in every possible way' by the Parties to the conflict and each High Contracting Party.⁷⁸ Finally, the Parties to the conflict and each High Contracting Party shall grant similar facilities, 'as far as possible, ... to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which

⁷³ Art. 142 GC IV. Such visits, according to art. 142, may be undertaken by 'representatives of religious organizations, relief societies, or any other organizations assisting the protected persons' and they may entail also 'distributing relief supplies and material from any source, intended for educational, recreational or religious purposes, or for assisting [the protected persons] in organizing their leisure time within the places of internment.'

⁷⁴ See art. 30 GC IV.

⁷⁵ Art. 30 GC IV. These entitlement to visit protected persons to provide them with relief is in addition to the right to visit to protected persons (either in internment or not) that the representatives or delegates of Protected Powers and delegates of the ICRC enjoy under art. 143 GC IV ('except for reasons of imperative military necessity, and then only as an exceptional and temporary measure').

⁷⁶ Art. 81(1) AP I.

⁷⁷ Art. 81(2) AP I.

⁷⁸ Art. 81(3) AP I.

perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.’⁷⁹

A general right of initiative is granted by Article 10 GC IV to the ICRC and other impartial humanitarian organisations, but the article clearly states the need for consent of ‘the Parties to the conflict concerned,’⁸⁰ without putting any explicit limit to the discretion in granting or denying such consent. According to the ICRC Commentary, ‘[i]n theory, all humanitarian activities are covered’, provided that the organisation which carries them out is humanitarian,⁸¹ and the activities are ‘purely humanitarian’ and impartial.⁸² This general right of initiative, amounting to the right to offer to undertake humanitarian activities for the protection and relief of civilians, has been supplemented in Article 17 AP I with a general right of the civilian population and of aid societies to collect and care for the wounded, sick, and shipwrecked, and not to be harmed, prosecuted, convicted or punished for such humanitarian acts.⁸³ While Article 17 simply refers to ‘aid societies’, the ICRC Commentary specifies that ‘aid societies should be understood to mean “voluntary aid societies duly recognized and authorized by their governments”,’ so that ‘[a] profit-making society or a society established without complying with the rules imposed by national legislation, could ... not fall under this provision.’⁸⁴

A right of initiative exists also in NIAC, with Common Article 3 establishing the right of ‘an impartial humanitarian body, such as the International Committee of the Red Cross,’ to offer its services to the Parties to the conflict. This provision binds all the Parties to a conflict, including non-State actors, and the obligation therein is ‘absolute for each of the Parties,’ in the sense that its respect cannot be based on the principle of reciprocity.⁸⁵ Furthermore, Article 18(1) AP II provides that ‘[r]elief societies located in the

⁷⁹ Art. 81(4) AP I. A further change in the role of the ICRC and impartial humanitarian organisations has been introduced by art. 5 AP I, with the regime of the substitutes of Protecting Powers.

⁸⁰ Indeed, it states: ‘The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.’

⁸¹ ICRC Commentary GC IV, 96.

⁸² ICRC Commentary GC IV, 97. Possible activities covered by Article 10 include all those activities instrumental to the implementation of ‘the general principle contained in Article 27’, such as: ‘representations, interventions, suggestions and practical measures affecting the protection accorded under the Convention; [...] the sending and distribution of relief (foodstuffs, clothing and medicaments), in short, anything which can contribute to the humane treatment provided for under Article 27; [...] the sending of medical and other staff.’ Ibid. These activities ‘are not necessarily concerned directly with the provision of protection or relief’, rather they ‘may be of any kind and carried out in any manner, even indirect, compatible with the sovereignty and security of the State in question.’ Ibid., 98.

⁸³ Art. 17(1) AP I. Under art. 17(2) AP I, it is envisaged that the Parties to the conflict may appeal to the civilian population and aid societies to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location. In this case, those responding to the appeal are entitled to be granted protection and the necessary facilities, in case ‘the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for as long as they are needed.’

⁸⁴ This interpretation is justified on the ground that ‘[t]his was the intention of the authors of the draft, and it was not contested by anyone during the CDDH.’ ICRC Commentary APs, 213 (par. 708).

⁸⁵ ICRC Commentary GC IV, 37.

territory of the High Contracting Party [...] may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict' and that the 'civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.'

These provisions regarding either local or external organisations engaging in relief are part of the framework offered by IHL to guarantee the survival of civilians in need, especially protected persons detained or subject to occupation, which are in the complete power of a Party. However, local relief societies and external ones are regulated differently. Regulation of the former seems to fall completely within the sovereign domain of the State and, in any case, looking at the balance of the conflict, assistance provided by local societies using resources at their disposal in the territory does not risk interfering in hostilities by introducing new resources (allowing the Party controlling the territory to use some of its own resources for purposes other than assisting civilians). Rather, in this case the activity of local relief organisations is just one way at the disposal of the authorities to fulfil their duties under IHL and IHRL regarding the satisfaction of the basic needs of protected persons and civilians.

On the other hand, relief provided from outside (even if distributed through local relief societies) and relief actions undertaken by external actors risk interfering in hostilities by providing an advantage to the Party concerned, so IHL has found a balance through explicit regulation of these activities. This reasoning explains why only external relief actions and external organisations that satisfy specific criteria are granted special protection under IHL. It similarly explains why, in situations of occupation (where the Occupying Power is not the sovereign power and controls civilians that are not its own nationals) specific rules are introduced in Articles 63 and 142 GC IV for the protection of local relief societies with corresponding guarantees that these societies do not interfere in the conflict.⁸⁶

Article 81(4) AP I, which arguably covers local humanitarian organisations and requires Parties to the conflict and other States to grant them, 'as far as possible', the necessary facilities to carry out their humanitarian activities, provides that these organisations shall be 'duly authorized by the respective Parties to the conflict' and exercise their humanitarian activities in accordance with what is provided in the GCs and APs, meaning that 'the activities of aid societies must be impartial and may not compromise military operations' and that the organisations 'must submit themselves to any security rules imposed upon them, and

⁸⁶ According to the ICRC Commentary to art. 63 GC IV, 'The protection granted to Red Cross Societies and other relief societies in occupied territory places the directors and staff of the societies under an obligation to observe strict neutrality and take the utmost care to abstain from any political or military activities.' ICRC Commentary GC IV, 333.

may not use their privileged situation to collect and transmit political or military information'.⁸⁷ Still, no provision of the GCs or APs entitles them to be authorised or recognised if they operate in accordance with these criteria, so that authorisation arguably remains the key criterion for local societies.

2.1.4.2.1. External Relief Actions

As just mentioned, the need to find a balance between humanitarian considerations and military necessity emerges with clarity in the regulation by IHL treaties of external relief actions, meaning relief actions addressed to civilians in the territory under the control of a Party to the conflict and coming from outside that territory. Article 23, which is among the few provisions of GC IV that apply to 'the whole of the populations of the countries in conflict, without any adverse distinction',⁸⁸ states that all High Contracting Parties have the obligation to 'permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases', whereas this obligation is limited to the free passage of 'medical and hospital stores and objects necessary for religious worship' for civilians in general. Thus, under GC IV free passage of relief shall be granted, but there is no obligation for the Party where these consignments are destined to accept them: there is no right to receive relief from outside for the civilian population of a Party to a conflict in general, even if it is inadequately supplied.

Furthermore, the High Contracting Party concerned has the right to prescribe technical arrangements, it may make its permission conditional 'on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers' and it can refuse to allow the free passage if it is not satisfied that 'there are no serious reasons for fearing' that the consignments may be diverted, or not effectively controlled, or that they may lead to 'a definite advantage' for the enemy.⁸⁹

⁸⁷ ICRC Commentary APs, 945 (par. 3337). This is confirmed by the ICRC Commentaries to art. 142 GC IV and art 17 AP I. See ICRC Commentary GC IV, 559-560 and 563-534; ICRC Commentary APs, 213 (par. 708).

⁸⁸ Art. 13 GC IV.

⁸⁹ See art. 23 (2)-23(4) GC IV. The rationale behind the distinction between types of good whose passage is allowed for all civilians and goods which should be guaranteed to certain categories of persons only is explained in the ICRC Commentary: the latter may be 'a means of reinforcing the war economy,' while the former may not. Also, according to the Commentary, the provision covers not only 'relief consignments in the strict sense of the term, sent by States or humanitarian organizations or private persons,' but also for example 'the import of merchandise which a belligerent has acquired regularly through trade channels from allied or neutral States' (arguably, because the text simply refers to consignments intended for specific categories of civilians, not narrowly to relief consignments). ICRC Commentary GC IV, 180-181.

Similarly, according to pars. 103-104 of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, in case of naval blockade:

103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

- (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

Article 70 AP I has extended the possibility of relief actions in favour of the civilian population in general in IAC, stating that in case the population of any territory under the control of a Party to the conflict (other than the occupied territory) is inadequately supplied with ‘clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population [...] and objects necessary for religious worship’,⁹⁰ then ‘relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions.’⁹¹ In this case, the Parties that are called to give their consent, according to the ICRC Commentary, are the State from which the relief has to come and the one to which the relief is addressed.⁹² The Parties to the conflict may not divert relief consignments; rather they shall protect them and facilitate their rapid distribution.⁹³ Furthermore, all the High Contracting Parties have a duty to ‘allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel’ and not to divert them, but these Parties have a right of control over relief and relief personnel, meaning that they have the right to prescribe technical arrangements, and impose the supervision of a Protecting Power over the distribution of the relief.⁹⁴ Finally, all the Parties are required to encourage and facilitate international co-ordination of the relief actions.⁹⁵

In sum, while relief actions shall be provided to civilians in general, the consent of the Parties concerned is still required. However, already during the negotiations of the Protocols, it was clarified by some delegates (and not opposed by others) that the need for agreement ‘did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its

104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Sanremo, 12 June 1994. Available at <http://www.icrc.org/IHL.nsf/52d68d14de6160e0c12563da005fdb1b/7694fe2016f347e1c125641f002d49ce!OpenDocument> (accessed February 15, 2013).

⁹⁰ Art. 69 AP I: art. 70(1) AP I reads ‘[i]f the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69...’.

⁹¹ Art. 70(1) AP I.

⁹² ICRC Commentary APs, 820 (par. 2807). Bothe argues in the same sense, explaining that ‘[a] person or an organization willing to undertake a relief action cannot just rush from one country through another country to a third country without asking the competent authorities of those countries for their permission.’ Michael Bothe, “Article 70 – Relief Actions,” in *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, by Michael Bothe, Karl Joseph Partsch, and Waldemar A. Solf (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982), 434. Existing practice regarding the need for consent by the State from which the relief has to come for relief actions undertaken by private individuals or organisations will be analysed, so that a position on this issue will be taken in Section 6.2.1.

⁹³ Art. 70(4) AP I.

⁹⁴ Art. 70(2)-70(3) AP I.

⁹⁵ Art. 70(5) AP I.

agreement must do so for valid reasons, not for arbitrary or capricious ones.’⁹⁶ Valid reasons may be invoked in case ‘the conditions justifying such an action were [not] met and the action [did not] compl[y] with the criteria’ provided for in the article.⁹⁷ Also, limits to the possibility of denying consent to relief actions may be found in another innovation introduced by AP I: Article 54 prohibits starvation of civilians as a method of warfare, including a prohibition against destruction of objects indispensable to the survival of the civilian population.⁹⁸ If the refusal of legitimate offers of relief actions was to lead to the starvation of the civilian population, such a choice might be interpreted as the adoption of starvation as a method of warfare.⁹⁹

The legal framework on external relief for civilians in need is stronger in situations of occupation. Not only is Article 54 AP I applicable but the Occupying Power, if it does not satisfy the basic needs of the civilian population of the occupied territory, also has an ‘unconditional’ obligation under Article 59 GC IV to agree to relief schemes for the inadequately supplied civilian population of the occupied territory, in order to provide them in particular with ‘foodstuffs, medical supplies and clothing,’ and to facilitate these schemes ‘by all the means at its disposal.’¹⁰⁰ Such relief schemes may be undertaken by States or by ‘impartial humanitarian organizations such as the International Committee of the Red Cross;’¹⁰¹ the Occupying Power has the obligation not to divert relief and it cannot impose charges or taxes on it.¹⁰² However, the distribution of the relief *shall* be supervised by the Protecting Power, or eventually by a neutral Power, the ICRC or another impartial humanitarian body. All the High Contracting Parties shall grant free passage to these relief consignments and permit their transit and transport, free of charge, but having the right to search the

⁹⁶ This statement was made by the representative of the Federal Republic of Germany and endorsed by the representatives of the U.S., of the Netherlands, of the Union of Soviet Socialist Republics, and of the United Kingdom. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-1977), vol. XII, 336-337, CDDH/II/SR.87, pars. 27-31.

⁹⁷ ICRC Commentary Aps, 819 (par. 2805).

⁹⁸ More precisely, it is prohibited to ‘attack, destroy, remove or render useless objects indispensable to the survival of the civilian population ... 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.’

With regards to naval blockade, the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* provides in par. 102:

The declaration or establishment of a blockade is prohibited if:

- (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

International Institute of Humanitarian Law (1994), *supra* fn. 89.

⁹⁹ See ICRC Commentary Aps, 820, 1457, and 1479 (pars. 2808, 4798, and 4885). The Commentary further affirms that ‘an action aimed at causing starvation ... could also be a crime of genocide if it were undertaken with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’. *Ibid.*, 654, (par. 2097).

Art. 54(5) AP I provides an exception to the prohibition of starvation in case of scorched earth policy: ‘In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.’

¹⁰⁰ The obligation is defined ‘unconditional’ by ICRC Commentary GC IV, 320 (commentary to art. 59).

¹⁰¹ Art. 59 GC IV.

¹⁰² See arts. 60-61 GC IV.

consignments, regulate their passage, and ‘be reasonably satisfied [...] that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.’¹⁰³

In NIAC, in case the civilian population is ‘suffering undue hardship owing to a lack of the supplies essential for its survival,’ relief actions for civilians in need shall be undertaken: such actions must be ‘of an exclusively humanitarian and impartial nature and [...] conducted without any adverse distinction,’ and the consent ‘of the High Contracting Party concerned’ is needed.¹⁰⁴ Also, Article 14 AP II prohibits starvation of civilians as a method of combat, including the prohibition to ‘attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population.’ It thus limits at least in part the discretion in refusing consent to relief actions for the civilian population. The regulation of external relief actions and of external relief organisations is clearly more stringent than that of local relief societies, in the sense that the criteria of being humanitarian and impartial return both for the actions, whoever the subject undertaking them, and the organisations. If these criteria are satisfied, IHL grants specific protection.¹⁰⁵

In sum, the regulation of the provision of relief and assistance to civilians in need in IHL treaties clearly envisages a role for authorities having *de facto* control over a territory, for local relief actors and the local population more in general,¹⁰⁶ and for external actors, which may be States, IGOs or NGOs. At the same time, external relief actions, thus what can be labelled *external* humanitarian assistance, are subject in IHL treaties to special regulations—such as being humanitarian and impartial in character—that do not apply to local humanitarian assistance. This is arguably connected to the principle of sovereignty and the autonomy of a State in regulating relief organisations and the provision of relief to civilians under its control and in its territory, so that consent for local relief organisations to operate should be implied in the authorisation granted to them by the State,¹⁰⁷ while external organisations should obtain this consent *ad hoc*.¹⁰⁸ Following

¹⁰³ Arts. 59(3-4) and 61 GC IV. The duty to allow free passage is applicable also pursuant to art. 23 GC IV.

¹⁰⁴ Art. 18(2) AP II.

¹⁰⁵ For a detailed analysis of this, see Sections 6.2.1. and 6.2.2.

¹⁰⁶ As a further confirmation, the ICRC Commentary to Article 18 AP II states: ‘The article lays down the conditions under which victims of conflicts may be assisted and protected while giving States every guarantee of non-intervention; it consists of two paragraphs which each have a separate scope and purpose though they complement each other. Paragraph 1 deals with *humanitarian assistance within the frontiers of the State* in whose territory the armed conflict is taking place, while paragraph 2 provides for the possibility of *organizing international relief actions* there.’ ICRC Commentary APs, 1476-1477 (par. 4870). This broad scope of humanitarian assistance as both internal and international seems to be endorsed also by Jean Pictet, who spells as one of the principles of IHL the maxim that ‘[h]umanitarian assistance is never an interference in a conflict’, and in the discussion on the application of this principle, makes reference both to ‘[i]mmunity accorded the [*sic*] establishments and personnel of the Army Medical Service, as well as those of the Red Cross’ and to the principle that ‘[n]o one shall be molested or convicted for having given treatment to the wounded or sick.’ Jean Pictet, ‘The Principles of International Humanitarian Law,’ *International Review of the Red Cross* 6, no. 68 (November 1966), 567-569.

¹⁰⁷ See arts. 63 and 142 GC IV and arts. 9(2) and 81(4) AP I.

¹⁰⁸ However, even in case of a local organisation, it seems that a certain degree of autonomy from the Parties to the conflict is necessary for it to be able to carry out its tasks in a truly impartial way. For example, it is required that civilian civil defence

the same rationale, AP II in Article 18 states the need to obtain the ‘consent of the High Contracting Party concerned’ for undertaking relief actions in favour of civilians in need.

Among outside organisations, either of an international or national nature, impartial and humanitarian ones are given special attention and a legal basis for their activities in IHL treaties.¹⁰⁹ For example, Article 9(2) AP I regulates the protection of ‘permanent medical units and transports (other than hospital ships [...]) and their personnel made available to a Party to the conflict for humanitarian purposes’ by ‘a neutral or other State which is not a Party to that conflict’, by ‘a recognized and authorized aid society of such a State’, or by ‘an impartial international humanitarian organization.’ A difference is thus drawn between aid societies of a State Party to the conflict, which need to be recognised and authorised by such a State, and international organisations, which need to be humanitarian and impartial to be entitled to specific rights, such as the right to offer their services under Article 10 GC IV and Common Article 3(2), without such an offer being considered an unlawful interference in the internal affairs of the State.

Furthermore, the intervention of external humanitarian organisations and the undertaking of relief actions are arguably secondary to the action of local authorities and relief societies. Not only both Article 70 AP I and Article 18 AP II cover only relief actions (humanitarian, impartial, and conducted without any adverse distinction) undertaken when the civilian population is inadequately supplied,¹¹⁰ but the ICRC Commentary to Common Article 3 argues, in relation to the right of humanitarian initiative, that ‘[i]t is obvious that outside help can only, and should only, be supplementary’ and that only when ‘the national authorities and National Red Cross Society of a country [are] not [] able to cope with requirements; nor [is] the National Red Cross [] in a position to act everywhere with the necessary efficiency’, then ‘[a]dditional help will [...] be necessary’, and ‘[t]he Party to the conflict which [...] refuses offers of charitable service from outside its frontiers will incur a heavy moral responsibility.’¹¹¹ While the right of initiative is arguably

organisations be ‘respected and protected’ and ‘entitled to perform their civil defence tasks except in case of imperative military necessity.’ Art. 62(1) AP I.

¹⁰⁹ See *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II section B, 60, statement by the U.S. representative regarding art. 10 GC IV: ‘He pointed out that in the United States of America were many welfare organizations of a non-international character. It would be most regrettable if in time of war they were prevented from carrying out their activities on account of a clause in the present Convention.’ See also, with reference to the same article, *Ibid.*, 111: ‘The Special Committee did not think it advisable to add to the conditions which such a body was to fulfil, that of being of an international character. There were humanitarian bodies which were not of an international character, and it would be regrettable if a provision in the Conventions prevented them from carrying out their activities in wartime.’

¹¹⁰ See also the ICRC Commentary to Article 18 AP II: ICRC Commentary APs, 1477 and 1479 (pars. 4871-4872 and 4877-4879).

¹¹¹ ICRC Commentary GC IV, 41-42. The corresponding provision regarding humanitarian initiative in case of international armed conflict, Article 10 GC IV, speaks of impartial humanitarian organisations and of the need for them to obtain the consent ‘of the Parties to the conflict concerned’ to carry out their activities. The ICRC Commentary clarifies that consent is necessary exactly because ‘[a] belligerent Power can obviously not be obliged to tolerate in its territory activities of any kind by any foreign organization.’ *Ibid.*, 98. Emphasis added.

general and nothing prevents an impartial humanitarian body to offer its services, in case there is no real humanitarian need and/or local organisations can cope, this offer can be legitimately turned down.

IHL treaties impose obligations on States regarding the provision of humanitarian assistance to civilians in the territory under their control mainly in terms of allowing and facilitating external relief actions (in addition to supplementary provisions on protected persons and other vulnerable categories), and associate external relief actions to specific criteria. External relief (as well as relief provided by the Occupying Power to civilians in need in the occupied territory) to be legitimate and protected under IHL treaties, needs to be humanitarian and distributed without any adverse distinction. These criteria clearly resemble the principles that scholars and practitioners traditionally associate to humanitarian assistance—humanity, impartiality, neutrality, as well as sometimes independence.¹¹² Nonetheless, these principles are not explicitly envisaged in the IHL treaties and, as mentioned in Section 1.2.3., the exact meaning of each principle in terms of rules of conducts and the extent to which respect for these rules is a condition for special rights and protection under IHL are debated.

For example, the rules embodied by the principles might impose conduct that can be satisfied only by certain kinds of actors. Under IHL treaties, it seems that no distinction is made by reason of the different actors undertaking relief actions, so that even if a State does it, it has to fulfil the criteria provided by the APs in terms of the action being impartial and humanitarian and conducted without any adverse distinction.¹¹³ The possibility for States to engage in external relief is explicitly mentioned in Article 59 GC IV in relation to relief consignments for the inadequately supplied civilian population of the occupied territory. Even if impartiality is not required, according to the ICRC Commentary ‘[o]nly those States which are neutral—in particular the Protecting Power—are capable of providing the essential guarantees of impartiality.’¹¹⁴ While one may argue that it is in the interests of the victims that even non-neutral States undertake relief actions (either in occupied or non-occupied territory), respect for the principles of impartiality and non-

¹¹² See, for example, Abril Stoffels (2001), *supra* fn. 20, 333-391; Flavia Zorzi Giustiniani, *Le Nazioni Unite e l'Assistenza Umanitaria* (Naples: Editoriale Scientifica, 2008), 131-197; Rosario Ojinaga Ruiz, *Emergencias Humanitarias y Derecho Internacional: la Asistencia a las Víctimas* (Valencia: Tirant lo Blanch, 2005), 261-274.

¹¹³ In this sense, see, for example, Bothe in his commentary to art. 70 AP I: ‘the question of *what kind of organization can undertake relief action* ... was extensively debated by the experts’ conferences, but in the end it was not possible to find a suitable formula, so the question was dropped and is not dealt with. In principle, it could be anybody, provided that the requirements (to be discussed) are met: a private individual, a national relief society, the League of the Red Cross Societies, the ICRC, a non-governmental international organization (if this is within the powers conferred on it under its constitution).’ The requirements discussed afterwards are the need for consent and the conditions that ‘*relief is really necessary*,’ that the relief action is ‘*humanitarian*, non political, and *impartial*’, and ‘the *prohibition of “adverse distinction”*’. Bothe (1982), *supra* fn. 113, 433-435. Emphasis in the original.

¹¹⁴ ICRC Commentary GC IV, 321.

discrimination ensures that these actions are purely humanitarian,¹¹⁵ as argued for instance by Alcaide Fernández.¹¹⁶ Also, given the special position granted to impartial humanitarian organisations, this category needs to be clearly defined.

2.1.4.2.2. Protection of Relief Personnel

Connected to the topic of the actors entitled to undertake relief actions is the issue of the personnel participating in these actions, and personnel engaged in the provision of relief more in general. Indeed, together with goods, external relief actions may comprise the participation of personnel tasked with the delivery and distribution of such goods and the provision of the necessary services. These persons are not the subject of any specific provision or special protection under GC IV, which only entitles to respect and protection ‘[c]ivilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases’, and ‘[p]ersons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases.’¹¹⁷ Furthermore, convoys, trains, vessels and aircrafts devoted to the care of wounded and sick civilians, the infirm and maternity cases shall be respected.¹¹⁸ To ensure the protection of all these buildings, personnel, and means of transport, the GC IV provides that they shall or may be marked with the emblem of the Red Cross.¹¹⁹

Duly accredited delegates of relief societies authorised to visit detained protected persons are entitled to receive all necessary facilities, and in case of occupation, personnel of recognised National Red Cross Societies, other relief societies, and special organisations of a non-military character established for ensuring the living conditions of the civilian population may not be changed by the Occupying Power (subject to temporary and exceptional measures imposed for urgent reasons of security).¹²⁰ Outside these specific

¹¹⁵ To make sure that these principles are fulfilled, the treaties grant to the Parties to the conflict and the Parties allowing the transit of relief limited rights of control over such relief actions exactly.

¹¹⁶ See Alcaide Fernández (1997), *supra* fn. 2, 37.

¹¹⁷ Art. 18(1) GC IV (see also art. 19 GC IV, on the cessation of this protection) and art. 20 GC IV respectively. Moreover, under art. 56(1) GC IV, in situation of occupation ‘[m]edical personnel of all categories shall be allowed to carry out their duties.’

¹¹⁸ Arts. 21-22 GC IV.

¹¹⁹ See arts. 18(3) (allowing civilian hospitals to be marked by means of the emblem only if authorised by the State), 20(2) (requiring the use of the emblem by personnel in occupied territory and in zones of military operations), 21 (for vehicles, trains and vessels), and 22(2) (for aircraft, which ‘may be marked’) GC IV. The emblem is described in art. 38 GC I: ‘As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the Medical Service of armed forces. Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, those emblems are also recognized by the terms of the present Convention.’

¹²⁰ See arts. 142 and 63 GC IV.

provisions, external relief workers may be protected as protected persons,¹²¹ or may be civilians (if nationals of neutral States, for example), like local relief workers, thus not entitled to any special protection under GC IV.

Again, under AP I, civilian medical units (if they fulfil the necessary conditions) are entitled to respect and protection,¹²² just like means of transport devoted to the transport of wounded, sick, and shipwrecked persons.¹²³ Similarly, medical personnel and religious personnel are specifically defined in Article 8 AP I and are entitled to special protection.¹²⁴ Article 8 AP I also provides a definition of ‘[d]istinctive emblem’,¹²⁵ which should be used to make medical and religious personnel and medical units and transports identifiable.¹²⁶

Furthermore, AP I has innovated the regulation of the protection of relief personnel, which under Article 71 shall be respected, protected, assisted in carrying out their mission, and granted freedom of

¹²¹ They will thus be entitled to the protection under arts. 27, 38, and 39 GC IV, and, in case of occupation and/or deprivation of liberty, to the applicable specific protection.

¹²² See arts. 12-13 AP I. Under these provisions, to be entitled to protection, medical units shall belong to one of the Parties to the conflict; be recognised and authorised by the competent authority of one of the Parties to the conflict, or be authorised in conformity with art. 27 GC I [regulating the possibility for recognised Society of a neutral country of lending the assistance of its medical personnel and units to a Party to the conflict] or art. 9(2) AP I [extending the regulation under art. 27 GC I to ‘permanent medical units and transports (other than hospital ships...) and their personnel made available to a Party to the conflict for humanitarian purposes: (a) by a neutral or other State which is not a Party to that conflict; (b) by a recognized and authorized aid society of such a State; (c) by an impartial international humanitarian organization’]. Civilian medical units shall not be used to shield military objectives from attack and their protection shall cease if they are used to commit, outside their humanitarian function, acts harmful to the enemy. For a definition of ‘medical units’, see art. 8(e) AP I.

¹²³ For the detailed regulation of medical vehicles, hospital ships and coastal rescue craft, other medical ships and craft, and medical aircraft, see arts. 21-31 AP I.

¹²⁴ Under art. 8(c)-(d) AP I:

c) “medical personnel” means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-paragraph e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:

i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;

ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;

iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2;

d) “religious personnel” means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

i) to the armed forces of a Party to the conflict;

ii) to medical units or medical transports of a Party to the conflict;

iii) to medical units or medical transports described in Article 9, paragraph 2; or

iv) to civil defence organizations of a Party to the conflict.

On their protection, see arts. 15-16 AP I.

¹²⁵ See art. 8(l) AP I: “Distinctive emblem” means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies’.

¹²⁶ See arts. 18 and 23 AP I. AP I further prohibits ‘to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol’ (art. 38(1)); prohibits to kill, injure or capture an adversary by using perfidy, defined as ‘[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence’ (art. 37(1)); and establishes that ‘the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol’ amounts to a grave breach (art. 85(3)(f)). See also art. 8(2)(b)(vii) ICCSt., establishing as a war crime in IAC ‘[m]aking improper use ... of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury’.

movement, except in case of imperative military necessity.¹²⁷ However, participation of these personnel in relief actions shall be approved by the Party that controls the territory in which they will operate, and their mission might be terminated, if they exceed it.¹²⁸ Regarding the kind of personnel that might be part of the assistance provided and thus covered by this provision, the only criterion is that their deployment must be necessary. It may thus be argued that protection under Article 71 AP I could cover all personnel whose role is instrumental in the provision of relief to the civilians in need.¹²⁹ Medical and religious personnel seem to be a specific category, different from the category of relief personnel protected by Article 71 AP I.¹³⁰ Still, nothing in the treaties opposes an interpretation according to which in case personnel carrying out medical duties do not fulfil the criteria listed in Article 8,¹³¹ they may indeed be considered as relief personnel protected under Article 71 AP I, if they operate with the agreement of the Parties concerned, they do not exceed their humanitarian mission, and they respect the criteria of humanitarian and impartial relief action, carried out without any adverse distinction.¹³²

To the extent that the principles of humanitarian assistance are crucial to the mission of relief personnel, this last concept is also in need of some clarification. Furthermore, the possible consequences of exceeding the mission, as well as the conducts that might amount to a violation of the terms of mission, and the difference between those and acts amounting to direct participation in hostilities or acts harmful to the enemy, will be a further object of analysis.¹³³

A systemic interpretation of AP I supports the fact that Article 71 AP I applies only to non-nationals of the Party to the conflict in whose territory they are going to operate (in the case of occupation, non-nationals of the Occupying Power and of the occupied territory). Not only the whole section on relief to the civilian population focuses on relief coming from outside, and Article 70 AP I mentions relief personnel as a component of these actions, together with consignments and equipment, but the ICRC Commentary to

¹²⁷ Art. 71 (1)-(3) AP I. This provision applies obviously also in case of occupation.

¹²⁸ Art. 71(1) and 71(4) AP I.

¹²⁹ Schneider-Enk takes into consideration the possible interpretation according to which relief actions under art. 70 AP I can only be undertaken by impartial humanitarian organisations, and thus personnel protected under art. 71 AP I are only personnel belonging to these organisations, but discards it in the end, arguing that as long as a relief action is humanitarian and impartial, any personnel necessary to such action is protected under art. 71 AP I. See Michaela Schneider-Enk, *Der völkerrechtliche Schutz humanitärer Helfer in bewaffneten Konflikten: die Sicherheit des Hilfspersonals und die "neuen" Konflikte* (Hamburg: Kovac, 2008), 87-89.

¹³⁰ See arts. 12-16 AP I.

¹³¹ Meaning the criterion of being 'assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under [art. 8]e) or to the administration of medical units or to the operation or administration of medical transports', for example by virtue of being 'medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict'.

¹³² In this sense, see ICRC Commentary APs, 833-834 (pars. 2880 and 2889) (commentary to art. 71 AP I). Furthermore, the performance of medical activities enjoys general protection under art. 16 AP I.

¹³³ See Section 6.2.2.1.3.

Article 70 explains that the rationale behind the introduction of this article was the fact that '[a]part from personnel involved in actions under the responsibility of the ICRC, who consequently enjoy the protection of the red cross emblem, *personnel participating in relief actions* are only protected, outside the regime of the Protocol, by general rules applicable to *civilians of States which are not Parties to the conflict*'.¹³⁴

The rationale behind providing special protection in IAC only for external relief actors, without referring explicitly to national personnel engaged in relief, is probably that the Party to the conflict should not have reasons to interfere with relief activities by its own nationals in its territory. However, States felt the need in Article 17 AP I to state explicitly that local relief societies or the local civilian population 'shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas' and that '[n]o one shall be harmed, prosecuted, convicted or punished for such humanitarian acts'; in case it is the Party to the conflict itself that appeals to the civilian population or these aid societies to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location, it shall grant 'both protection and the necessary facilities to those who respond to this appeal', and the same protection and facilities shall be granted by the adverse Party, in case it gains or regains control of the area. Care offered to enemies *hors de combat* was thus considered as a possible sensitive activity and regulated.

Finally, under Article 75 AP I, fundamental guarantees are provided for all those who fulfil the three cumulative criteria of being affected by a situation of IAC (including occupation) as defined by Article 1 AP I, being 'in the power of a Party to the conflict', and 'not benefit[ing] from more favourable treatment under the Conventions or under [AP I]'. This article might thus be applicable to relief workers who are not protected persons under GC IV, possibly including also workers who are nationals of the Party to the conflict in whose territory they operate (or who are nationals of the Occupying Power), but this is debated due to the decision taken at the negotiating stage to exclude an explicit reference to a Party to the conflict's own nationals.¹³⁵

In NIAC, medical and religious personnel,¹³⁶ and medical units and transports shall also be respected and protected pursuant to AP II.¹³⁷ The distinctive emblem of the Red Cross or Red Crescent shall be used,

¹³⁴ ICRC Commentary APs, 832 (par. 2871). Emphasis added.

¹³⁵ See ICRC Commentary APs, 868-869 (pars. 3017-3021). In favour of the applicability of art. 75 AP I also to local relief workers, see Schneider-Enk (2008), *supra* fn. 129, 92-93.

¹³⁶ See arts. 9-10 AP II: medical and religious personnel shall be granted all available help for the performance of their duties and shall not be compelled to carry out tasks which are incompatible with their humanitarian mission. Medical personnel may not be

‘[u]nder the direction of the competent authority concerned,’ to identify the medical and religious personnel and medical units, and medical transports.¹³⁸ The emblem shall be respected in all circumstances and not be used improperly.¹³⁹ No specific provision for the protection of relief personnel in general is included in AP II. However, as long as they do not take active part in hostilities, relief workers will be entitled to the protection offered by Common Article 3 and, if applicable, by Article 4 AP II (and Article 5 AP II, in case their liberty has been restricted). Still, neither the right to have their activities facilitated nor the right to freedom of movement unless for reasons of imperative military necessity are granted. Consent for relief actions is needed, thus arguably consent for relief personnel that might be part of these actions.

Starting from this treaty law on the protection of relief personnel in IACs and NIACs, this study will analyse relevant State practice and *opinio juris* to both clarify the terms and limits of this protection in IAC, under treaty and customary law, and to verify whether in NIACs protection exceeding that granted to those not taking active part in hostilities has developed, for example in terms of freedom of movement. Moreover, the research will determine whether this protection might be applicable to military actors engaged in relief, either belligerents or not, since this question has increasingly emerged in practice and finds only a limited answer in IHL treaties, as will be explained next.

2.1.4.3. *What Role for Armed Forces?*

Part of the issue of the actors entitled to perform relief actions and their status under IHL is also the role of the military. Indeed, the role of the military in the provision of relief, as will emerge from the analysis of State practice, has been the focus of attention and debate, especially since the end of the 1990s. In particular, within the broader debate on the politicisation and instrumentalisation of humanitarian assistance and of the humanitarian discourse, some authors and practitioners have argued that the concept of humanitarian assistance cannot be associated to the military in the context of armed conflict if they provide aid as part of their military strategy and thus have goals other than saving the lives of civilians in need, since their aim

required to prioritise any person except on medical grounds; nobody shall be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom; and, ‘[p]ersons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.’

¹³⁷ See art. 11 AP II, which also provides that the protection of medical units and transports shall cease if they are used to commit hostile acts, outside their humanitarian function.

¹³⁸ Art. 12 AP II.

¹³⁹ Art. 12 AP II.

would not be strictly humanitarian and such aid would not fulfil the principles associated to (external) humanitarian assistance.¹⁴⁰

The issue is first of all one of labelling and perception, in the sense that defining as ‘humanitarian assistance’ something that does not fulfil the criteria to be qualified as such might lead to confusion regarding the concept and possibly to a weakening of the special protection associated to it. If belligerents distribute relief and claim that they are engaged in a humanitarian activity, and at the same time they collect intelligence, adverse Parties and beneficiaries of relief might suspect that also other actors engaged in humanitarian assistance might be involved in intelligence collection or other activities connected to the conflict.

Furthermore, one might wonder whether combatants and/or armed forces not involved in the conflict, such as peacekeepers, can legitimately engage in the provision of humanitarian assistance, and if so, under what conditions, and whether they are entitled to special protection while undertaking such activities. This is relevant not only for the military personnel of peacekeeping missions themselves, but also for relief actors that may have to decide whether to collaborate with them and civilians who may receive assistance from them, in terms of knowing the risks of being legitimately attacked or hit as collateral damage. Indeed, a second profile of the role of military forces in the provision of relief relates to the possible support (in various forms) that they might provide to humanitarian organisations and relief personnel: if these organisations and personnel are to avoid jeopardising their special status under IHL, they might have to respect specific limits in their interaction with the military, especially with belligerents.

The analysis of State practice might help identify problems that have emerged in practice and clarify developments that have occurred in relation to the involvement of the military in the provision of relief and possible specific rules applicable to them because of that. Still, IHL treaties should be the starting point of the analysis, to understand whether a clear position on the role of the military in relief emerges from the texts.

The provision of relief to civilians by the armed forces of a Party to the conflict is neither explicitly prohibited nor explicitly provided for in the GCs and APs.¹⁴¹ However, apart from the provisions on medical

¹⁴⁰ See Section 1.2.3. (fn. 93).

¹⁴¹ A possible exception may be in case of occupation, where it is provided that the Occupying Power has the duty to satisfy the basic needs of the population in the occupied territory, and thus it may choose to do it through the use of its armed forces. However, this possibility is not explicitly envisaged in the treaties. According to Spieker, the criteria provided in art. 70 AP I are conditions to the right to offer (and to the right to receive) humanitarian assistance, but not ‘preconditions of humanitarian action as such’. If the

and religious personnel,¹⁴² AP I contains some provisions on civilian civil defence organisations, which envisage the possibility that elements of the armed forces of a belligerent take part, in their national territory and under strict conditions, in relief activities in favour of civilians and enjoy special protection. In GC IV there is arguably just one reference to civil defence organisations. Under Article 63 GC IV, in situations of occupation, ‘the activities and personnel of special *organizations of a non-military character*, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues’ are entitled to the same treatment reserved to recognised National Red Cross or Red Crescent Societies and other relief societies.¹⁴³ In other words, except in case of urgent security needs, these organisations shall be allowed to pursue their activities and the Occupying Power ‘may not require any changes in their personnel or structure, which would prejudice their activities,’¹⁴⁴ but in turn these organisations shall stick to their strictly humanitarian tasks, meaning ‘observe strict neutrality and take the utmost care to abstain from any political or military activities.’¹⁴⁵

Civil defence organisations are explicitly regulated, and given a role in humanitarian assistance, in AP I. These organisations are characterised by their governmental nature (and governmental control) and by the fact that the provisions devoted to them are the only ones that explicitly envisage a role for the military side by side with civilian actors in the provision of humanitarian relief and in the performance of other humanitarian undertakings more in general. As already mentioned, civil defence organisations are defined by Article 63 AP I as ‘those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict’ to perform any of a specific set of activities, and ‘assigned and devoted exclusively’ to these activities.¹⁴⁶ These specific assignments, listed in the same article, are ‘*humanitarian tasks* intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival’. They are enumerated in an exhaustive list: ‘(a) warning; (b) evacuation; (c) management of shelters; (d)

military provide impartial humanitarian assistance and conduct it without any adverse distinction, the preconditions under art. 70 AP I (and customary law) are satisfied (neutrality would not be required under IHL: for example, ‘an occupying power providing humanitarian assistance cannot abstain from taking side in hostilities and, thus, cannot be neutral’). Heike Spieker, “The International Red Cross and Red Crescent and Military-Humanitarian Relationships,” in *Between Force and Mercy: Military Action and Humanitarian Aid*, ed. Dennis Dijkzeul (Berlin: Berliner Wissenschafts-Verlag, 2004), 206.

¹⁴² See Section 2.1.4.2.2.

¹⁴³ Art. 63(2) GC IV. Emphasis added.

¹⁴⁴ Art. 63(1)(a)-(b) GC IV.

¹⁴⁵ ICRC Commentary GC IV, 333.

¹⁴⁶ Art. 61(2) AP I.

management of blackout measures; (e) rescue; (f) medical services, including first aid, and religious assistance; (g) fire-fighting; (h) detection and marking of danger areas; (i) decontamination and similar protective measures; (j) provision of emergency accommodation and supplies; (k) emergency assistance in the restoration and maintenance of order in distressed areas; (l) emergency repair of indispensable public utilities; (m) emergency disposal of the dead; (n) assistance in the preservation of objects essential for survival; (o) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization.¹⁴⁷

Civilian civil defence organisations and their personnel shall be respected and protected, and be entitled to perform their tasks except in case of imperative military necessity.¹⁴⁸ This protection shall also apply both to ‘civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control,’¹⁴⁹ and to ‘[m]embers of the armed forces and military units assigned to civil defence organizations’.¹⁵⁰ However, the latter are entitled to this protection only if they are exclusively and permanently engaged, during the whole conflict, in civil defence activities and they conduct themselves in such a way as to not give rise to any doubt that they might be associated to the activities of the armed forces and participating in hostilities. Indeed, members of the armed forces assigned to civil defence organisations shall *inter alia*, be ‘permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61,’ clearly distinguishable from the other members of the armed forces by displaying the international distinctive sign of civil defence (an equilateral blue triangle on an orange ground),¹⁵¹ and equipped only with light individual weapons for maintaining order or for self-defence; they shall not perform any other military duty in the course of the conflict, nor participate directly in hostilities, and they shall perform their civil defence tasks only within the national territory of their Party.¹⁵² Finally, the protection granted to civilian civil defence organisations, and their personnel and materials ceases only in case they ‘they commit or are used to commit, outside their proper tasks, acts harmful to the enemy.’¹⁵³

¹⁴⁷ Art. 61(1) AP I. Emphasis added.

¹⁴⁸ Art. 62(1) AP I.

¹⁴⁹ Art. 62(2) AP I.

¹⁵⁰ Art. 67(1) AP I.

¹⁵¹ Art. 66 AP I.

¹⁵² Art. 67(1) AP I.

¹⁵³ Art. 65 (1) AP I. Paragraphs 2 and 3 of art. 65 AP I explicitly exclude from the category of acts harmful to the enemy: the fact ‘that civil defence tasks are carried out under the direction or control of military authorities;’ the cooperation of ‘civilian civil defence personnel [...] with military personnel in the performance of civil defence tasks,’ or the fact that ‘some military personnel are attached to civilian civil defence organizations;’ the incidental benefit deriving from the performance of civil defence tasks to

Civilian civil defence organisation of States other than the Parties to the conflict are entitled to equivalent respect and protection, but they need to obtain the consent and operate under the control of the Party to the conflict in whose territory they perform civil defence tasks, and their assistance shall be notified to ‘any adverse Party concerned.’¹⁵⁴ Civil defence activity shall not be considered an interference in the conflict, as long as it is ‘performed with due regard to the security interests of the Parties to the conflict concerned.’¹⁵⁵ In any case, as already mentioned, military personnel cannot be used to carry out civil defence tasks abroad.¹⁵⁶

The provisions on civilian civil defence contained in AP I apply also in case of occupation, in which case moreover civilian civil defence organisations are entitled to receive the necessary facilities to perform their tasks, and while the Occupied Power may disarm their personnel for security reasons, it cannot divert their buildings or material from their purpose nor requisition them, if such a conduct would be harmful to the civilian population.¹⁵⁷ In relation to civilian civil defence organisations of neutral States or States not taking part in the conflict and of international co-ordinating organisations, the Occupying Power ‘may only exclude or restrict the[ir] activities [...] if it can ensure the adequate performance of civil defence tasks from its own resources or those of the occupied territory.’¹⁵⁸

In sum, AP I does not exclude the armed forces of a belligerent from the provision of humanitarian relief, but imposes strict requirements in order for them to engage in this activity and be entitled to special protection.¹⁵⁹ This protection is justified by the fact that the military personnel concerned engage exclusively

‘military victims, particularly those who are hors de combat,’ and the fact that ‘civilian civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence.’

¹⁵⁴ Art. 64(1) AP I.

¹⁵⁵ Art. 64(1) AP I.

¹⁵⁶ See art. 67(1)(f) AP I.

¹⁵⁷ Art. 63 AP I.

¹⁵⁸ Art. 64(3) AP I. Finally, in occupied territories, just like in areas where fighting is taking place or is likely to take place, civilian civil defence personnel should be recognisable by the international distinctive sign of civil defence and by an identity card certifying their status. Art. 66(3) AP I.

¹⁵⁹ The *Framework Convention on Civil Defence Assistance* of May 2000 defines ‘Civil Defence Unit’ as ‘relief personnel, equipment and goods belonging to the Civil Defence Service of the Supporting State [...] identifiable by the national or international emblem (blue equilateral triangle on an orange background) of Civil Defence’ (art. 1(g), emphasis added), without specifying whether (thus without excluding that) military personnel can be part of civil defence units. ‘Civil Defence Service’ means ‘a structure or any other state entity established with the aim of preventing disasters and mitigating the effects of such disasters on persons, on property and the environment’ (art. 1(b)) and ‘Disaster’ has the broad meaning of ‘an exceptional situation in which life, property or the environment may be at risk’ (art. 1(c)). In any case, the Convention covers ‘action undertaken by the Civil Defence Service of a State for the benefit of another State, with the objective of preventing, or mitigating the consequences of disasters’ and ‘includ[ing] all duties assigned to the Civil Defence Service of the Parties and accepted by the Beneficiary Parties, potentially with the assistance of any other partner’ (art. 1(d)). The regulation of this form of assistance resembles IHL rules: assistance shall be either requested by the State in need or offered by another State and accepted by the one in need; the offers of assistance shall comply with the principles of sovereignty and of non-intervention in the internal affairs of a State, as well as respect the customs of such State; and the modalities to be followed in carrying out the assistance include the duties not to discriminate and to undertake assistance ‘in a spirit of humanity, solidarity and impartiality’ (art. 3(a)-3(d)). *Framework Convention on Civil Defence Assistance*, Geneva, May 22, 2000, entered into force September 23, 2001 (2172 UNTS 213).

in humanitarian activities, meaning activities that do not interfere in the conflict (thus confirming the concept of humanitarian assistance as non-political). In case armed forces outside civil defence organisations and/or outside their national territory were to engage in the provision of relief to civilians in need in conflict, this role would not find specific protection under IHL treaties, nor a specific regulation.

If the rationale behind the strict regulation adopted under AP I is not only that protection is deserved exclusively by those truly committed to purely humanitarian activities, but also that allowing subjects to get involved in both humanitarian action and combat might jeopardise the principle of distinction between civilians and combatants,¹⁶⁰ lead to suspect towards humanitarians and to a reduction in their protection in practice, armed forces involved in hostilities should never engage in humanitarian activities. On the other hand, one might argue that the interest of civilians in need would be best served by the provision of all the available relief and help, so that the military should get involved in the provision of relief even without respecting the principles generally associated to it, but they should avoid calling it ‘humanitarian assistance’ and would not be entitled to protection. The choice not to label this activity as ‘humanitarian assistance’ would be justified on the basis of the need to safeguard the principle of distinction between combatants (or civilians taking direct part in hostilities) and civilians and not to weaken protection for the latter, and would result from a systemic and teleological interpretation of IHL treaties (while it does not seem to emerge from a literal interpretation of these treaties).

This issue is part and parcel of the more general debate, illustrated in Section 1.2.3., around the principles of humanity, impartiality, neutrality, and independence, inspired by the Fundamental Principles of the Red Cross and commonly associated to humanitarian assistance more in general. The nature of these principles under IHL and their content in terms of rules of conduct, as well as their applicability to different kind of actors involved in the provision of relief, have been subject to different interpretation. To provide clarity, the next Section will complete the analysis of the treaties by providing an overview of their provisions that reflect rules embodied in the Fundamental Principles of the Red Cross, applying either to the action of providing assistance to civilians in need or the actor performing it. This will be then complemented with the examination of the relevance of the principles in the framework regulating protection in IHL treaties, given the increasing involvement in protection activities by actors engaged in relief, and then in the following Chapters by the study of other instances of State practice and *opinio juris*.

¹⁶⁰ For a more detailed analysis of the principle of distinction, see Section 4.1.2.1.

2.1.5. What Role for the Principles in the Regulation of Humanitarian Assistance?

As emerges from the analysis of IHL treaties, humanitarian assistance covers the provision, *based on needs and devoid of political or military goals*, of goods and services indispensable for the survival and the fulfilment of the essential needs of the victims of armed conflict, including the personnel necessary for such provision. In other words, an action is ‘humanitarian’ if its purpose is to save the lives of those in need, without favouring a political position within the conflict and without being used for achieving political or military aims, thus representing no interference in the conflict and being entitled to special protection.

While humanitarian tasks can be carried out both by nationals and national organisations of the Parties to the conflict and by external governmental or non-governmental organisations (or even States), specific regulations exist for external relief actions, comprising goods, equipment, and personnel. External humanitarian assistance is entitled to special protection, but only if it satisfies certain criteria and is subjected to a certain degree of control by the Parties to the conflict concerned (and by transit States), in order to make sure that it does not interfere in the conflict. These criteria have been traditionally embodied in the principles of humanity, impartiality, and neutrality, which have become associated with humanitarian assistance *tout court*. The principle of independence has also been increasingly referred to.

At the same time, as illustrated by the debates centred on the so-called new humanitarianism presented in Section 1.2.3., the legal relevance of these principles for actors other than the components of the International Red Cross and Red Crescent Movement, the rules of conduct that all these principles embody, as well as the consequences following respect or non-respect for these rules by various categories of actors and their applicability to protection activities (thus to humanitarian action *tout court*), have been controversial.

Leaving aside for the moment the debate on the possibility for NGOs (except for the ICRC) to be subjects of international law and direct addressees of rights (that, if violated, give rise to State responsibility) and obligations under IHL,¹⁶¹ it should be taken into account that international law may impose on States and

¹⁶¹ On NGOs not being generally considered subjects of international law (but possibly having a limited international status), see Section 1.3.3.3. (fn. 236) as well as, for example, Stephan Hobe, “Non-Governmental Organizations,” in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2010), pars. 23 and 38-45. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012). See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (London and New York: Routledge, 1997) 96-100. On the other hand, on NGOs having rights under international law, see Section 1.3.3.3. (fn.237). The existence of rights for NGOs under international law in the field object of this study will be examined in Section 6.2.2.

other Parties duties only in respect to certain types of NGOs, so that NGOs should be aware of the possible consequences deriving from the choice to follow the principles or not. Respect for the principles might be required by way of national laws, for example regulating NGOs, or conditions imposed upon access on a case-by-case basis, with denial of access in case of lack of respect. In addition, the principles might become binding upon intergovernmental or non-governmental actors by way of conditions imposed by donors or of an obligation to ensure respect for the principles imposed on all the States Parties to a certain treaty.

The analysis of treaty law, followed in the next Chapters by the study of State practice and *opinio juris*, will help clarify what requirements IHL treaties allow Parties to armed conflicts to impose on actors engaged in humanitarian assistance and/or humanitarian protection, whether these requirements correspond (at least in part) to the principles traditionally associated with humanitarian assistance, what the legal status and meaning of these principles are, and what they entail in practice.

2.1.5.1. The Principles of Humanitarian Assistance in IHL Treaties

While the term ‘principle’ is used several times in GC IV and the APs, these instruments never mention ‘principles of humanitarian assistance’, ‘principles of humanitarian relief’, or ‘principles of humanitarian action’.¹⁶² However, as already seen, these treaties make use of the terms ‘humanitarian’, ‘impartial’, and ‘without any adverse distinction’ in some provisions related to relief actions and actors. Accordingly, even if the Fundamental Principles of the Red Cross bind the components of the Red Cross Movement only, some of the requirements imposed by them have been included in IHL and are traditionally subsumed in the principles associated to humanitarian assistance.

As argued in Section 2.1.3., the qualification ‘humanitarian’ associated to relief and assistance in IHL refers to the quality of aiming to save the lives of people in need and alleviate their suffering, without pursuing any political or military goal. In addition, specific rules are provided in IHL treaties for the provision of humanitarian assistance, in particular for external relief actions, since introducing food and other resources into the territory controlled by one Party to a conflict is a politically sensitive act and it can

¹⁶² GC IV and the APs refer to ‘humanitarian principles’, used not with reference to relief actions or activities by humanitarian actors, but more in general to refer to principles of humane treatment (see Section 1.2.3. fn. 104), to ‘principles of humanity’ (art. 1(2) AP I; fourth *considerando* of the preamble AP II), and ‘Red Cross principles’ or ‘fundamental principles of the Red Cross’ (art. 63(a) GC IV makes reference to the ‘Red Cross principles, as defined by the International Red Cross Conferences’ with regards to the activities of the National Red Cross and Red Crescent Societies and other relief societies in the occupied territory; art. 81(2-3) AP I makes reference to ‘the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross’ in regard to the humanitarian activities of the Red Cross (Red Crescent, Red Lion and Sun) organisations and of the League of Red Cross Societies).

be easily viewed by the opposite Party as an activity that alters the balance of the conflict. These rules and their degree of correspondence with the Fundamental Principles of the Red Cross are the subject of this Section.

2.1.5.1.1. The Principles and the Action

As already mentioned, regarding external humanitarian assistance, meaning assistance provided neither by the belligerent in control of the territory where victims find themselves nor by other local actors, GC IV recognises a right of initiative in the context of both IAC and NIAC. In the first case, Article 10 entitles the ICRC or ‘any other impartial humanitarian organization’ to undertake ‘humanitarian activities ... for the protection of civilian persons and for their relief’, ‘subject to the consent of the Parties to the conflict concerned’. In case of NIAC, Common Article 3 states in more general terms the possibility for ‘[a]n impartial humanitarian body, such as the International Committee of the Red Cross, [to] offer its services to the Parties to the conflict.’ Both these articles require the consent of the Party to which the offer is made and they also seem to limit the range of actors that can present such offer. On the other hand, the types of actions that can be carried out under these provisions are not specified; they are only required to be humanitarian in case of IAC.

However, according to the ICRC Commentary, specific criteria shall be respected when carrying out activities under Articles 3 and 10 GC IV. In the case of Common Article 3, ‘[f]or offers of service to be legitimate, and acceptable, they must come from an organization which is both *humanitarian* and *impartial*, and the services offered and rendered must be *humane* and *impartial* also.’¹⁶³ Similarly, in the case of Article 10, ‘[i]t is not enough for the organization which offers its services to be humanitarian and impartial’, but ‘[i]ts activities, too, [...] must be purely humanitarian in character; that is to say they must be concerned with human beings as such, and must not be affected by any political or military consideration.’¹⁶⁴ In addition, ‘[i]t follows from the wording that these activities must also be impartial.’¹⁶⁵ According to the ICRC Commentary, it is not necessary for humanitarian activities to be ‘concerned directly with the provision of

¹⁶³ ICRC Commentary GC IV, 42. Emphasis in the original.

¹⁶⁴ Ibid., 97.

¹⁶⁵ Ibid..

protection or relief”, rather they ‘may be of any kind and carried out in any manner, even indirect, compatible with the sovereignty and security of the State in question.’¹⁶⁶

The APs have expanded the legal framework regulating the possibility of providing external humanitarian assistance (in territories other than occupied ones), but still both Article 70 AP I and Article 18 AP II restrict the allowed relief actions to ‘relief actions which are humanitarian and impartial in character and conducted without any adverse distinction’, and ‘relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction’ respectively.

First of all, the relief shall be necessary for the survival of the civilian population. Second, an action shall be humanitarian, in other words it shall be ‘aimed at bringing relief to victims, i.e., in the present case, the civilian population lacking essential supplies.’¹⁶⁷ The relief must be ‘not political’¹⁶⁸ and it must not be diverted and used for purposes different from the relief of civilians in need. According to the ICRC Commentary, an act to be humanitarian necessarily needs to be undertaken out of ‘humanitarian motives’, out of interest for the victims, and not ‘in the hope of financial reward’,¹⁶⁹ but such a qualification seems difficult to implement, unless the actor makes its intention manifest (for example, in the case of a for-profit organisation engaged in for-profit activities).

Third, an action must be impartial, which means, on the one hand, that it shall avoid all adverse discriminations, as stated in the article itself, by respecting ‘the principle of non-discrimination, including the principle of proportionality (i.e., the sharing according to needs) as a general aim and an ideal which cannot always be achieved, especially in a limited action.’¹⁷⁰ On the other hand, the action must also be impartial ‘in the real sense of the word’, meaning that ‘those conducting the action or providing the relief must resist any temptation to divert relief consignments or to favour certain groups or individuals rather than others because of personal preferences.’¹⁷¹ Impartiality thus applies both to the admission of a relief action, requiring that it ‘must not be designed to give an undue advantage to one side’, and to its actual implementation.¹⁷² The requirement of avoiding any adverse distinction applies mostly to the implementation of the action, since

¹⁶⁶ Ibid., 98.

¹⁶⁷ ICRC Commentary APs, 817 (par. 2798).

¹⁶⁸ Bothe (1982), *supra* fn. 113, 435.

¹⁶⁹ ICRC Commentary APs, 216-217 (par. 717), on art. 17(1) AP I.

¹⁷⁰ Ibid., 818 (par. 2802).

¹⁷¹ Ibid., 818 (par. 2802).

¹⁷² Michael Bothe (1982), *supra* fn. 113, 435.

‘[o]nly in rare cases will it be clear that a relief action is going to be conducted with “adverse distinction”’.¹⁷³ It should be noted that adverse distinctions are prohibited, while discrimination on humanitarian grounds, meaning on the basis of special vulnerabilities and of individual needs and their urgency, is allowed.¹⁷⁴

In sum, relief covered by Article 70 AP I (and thus arguably also by Article 18(2) AP II) is only that ‘essential for the survival of the civilian population, sent for purely humanitarian reasons and to be distributed without any adverse distinction.’¹⁷⁵ These conditions do not necessarily prohibit, as partial, actions undertaken in favour of one side only, for example by a State. It has been argued that ‘it would be stupid to wish to force such a State to abandon the action’,¹⁷⁶ and Article 70 AP I itself establishes a duty to allow transit of the assistance ‘even if such assistance is destined for the civilian population of the adverse Party’.¹⁷⁷ Similarly, ‘impartial humanitarian organizations, such as the ICRC’, are not obliged to carry out actions in favour of all Parties to the conflict. However, these organisations ‘themselves accept the obligation of adopting an [*sic*] universal approach for all victims of armed conflict in order to preserve their credibility’ and thus they choose to act only on the basis of ‘the needs of *all* the victims concerned, regardless of any criteria of nationality, and independently of the Party to which they belong.’¹⁷⁸ In any case, even considering actions in favour of a Party only as not prohibited, if during these actions individuals in need who belong to the other Party are encountered, it is arguable that they should be helped without discrimination by reason of their affiliation, otherwise the action would clearly entail an adverse discrimination.

In the specific case of occupied territories, neither Article 59 GC IV nor the supplementary Article 69 AP I specify that relief actions undertaken in favour of civilians must be humanitarian, impartial, or conducted without any adverse distinction. However, the humanitarian nature of the relief consignments can be inferred from Article 59 GC IV, which provides that transit States have the right ‘to be reasonably satisfied through the Protecting Power that these consignments are to be used *for the relief of the needy population* and are not to be used for the benefit of the Occupying Power.’¹⁷⁹ Moreover, pursuant to Article 61 GC IV, the distribution of these consignments ‘*shall* be carried out with the cooperation and under the supervision of the Protecting Power’ or of ‘a neutral Power, [] the International Committee of the Red Cross

¹⁷³ Ibid., 435.

¹⁷⁴ See, for example, art. 27 GC IV and art. 70(1) AP I. See also ICRC Commentary GC IV, 97. ICRC Commentary APs, 139-140 (pars. 417-418).

¹⁷⁵ ICRC Commentary APs, 823 (par. 2825). See also Ibid., 1480 (par. 4889).

¹⁷⁶ Ibid., 818 (par. 2803).

¹⁷⁷ See Bothe (1982), *supra* fn. 113, 435.

¹⁷⁸ ICRC Commentary APs, 818-819 (par. 2804).

¹⁷⁹ Emphasis added.

or [] any other impartial humanitarian body.’¹⁸⁰ The aim of this provision is clearly to ensure the humanitarian nature of the consignments and their impartial distribution. Article 69 AP I also imposes a duty on the Occupying Power to ensure the provision of essential supplies for the civilian population in the occupied territory without any adverse distinction, so that it has been argued that also with reference to external relief actions, ‘[i]t seems legitimate to recognize that [they] should comply with the condition of being humanitarian and impartial in character’, even if ‘this criterion must not be abused in order to avoid any action.’¹⁸¹

The need for humanitarian activities to be impartial, in the sense of being undertaken without any adverse distinction and discriminating only on the basis of the needs and their urgency, is restated various times in the treaties,¹⁸² so that it is arguable that impartiality in the provision of assistance, as an application of ‘one of the fundamental principles of international humanitarian law, i.e., non-discrimination in aiding victims’,¹⁸³ is intimately connected to the humanitarian nature of a relief action and to its qualification as such. It is thus clear that relief actions covered by IHL treaties are humanitarian and impartial actions, while all actions not classifiable as such may in principle be considered interference in the conflict.

The principle of neutrality is not mentioned in the treaties, also and first of all in order to avoid confusion with the regime of neutrality of States and their nationals: associating the term ‘neutral’ with medical personnel might have led to the erroneous conclusion ‘that medical formations would lose their nationality.’¹⁸⁴ However, while the word ‘neutral’ is not used in the treaties, the idea of the ‘neutralisation’ or ‘neutrality’ of humanitarian assistance is still central to IHL. Pictet identified as one of the principles of IHL the ‘principle of neutrality’, meaning that ‘[h]umanitarian assistance is never an interference in a conflict’.¹⁸⁵

¹⁸⁰ Emphasis added. A similar right to make their consent conditional to the ‘distribution of this assistance being made under the local supervision of a Protecting Power’ is granted to transit States by art. 70(3) AP I. In all cases, transit States are allowed under art. 23 GC IV to make their permission ‘conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers’, and it has been argued that this task may be carried out also by ‘another neutral State or any impartial humanitarian organization.’ ICRC Commentary GC IV, 183.

¹⁸¹ ICRC Commentary APs, 813 (par. 2784).

¹⁸² See, for example, art. 13 GC IV, arts. 9 and 10 AP I, and arts. 7 and 9 AP II. In addition, see ICRC Commentary APs, 202 (par. 659), on art. 16(1) AP I; 802 (par. 2748), on art. 67(2) AP I; 944-945 (par. 3337), on art. 81(4) AP I; and, 1426 (par. 4687), on art. 10(1) AP II. In favour of the humanitarian and impartial nature of relief actions in IAC and/or NIAC, see, for example, the statements during the Diplomatic Conference of 1974-1977 by the representatives of Jordan, the Holy See, and the ICRC: *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. VII, 147, CDDH/SR.53, par. 40; *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. XII, 313 and 319, CDDH/II/SR.84, pars. 10 and 41; *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. XII, 348, CDDH/II/SR.88, par. 25.

¹⁸³ ICRC Commentary APs, 802 (par. 2748).

¹⁸⁴ Pictet (1966), *supra* fn. 106, 568.

¹⁸⁵ *Ibid.*, 567.

Therefore, medical personnel and units are entitled to be respected and protected, but in exchange they are obliged to ‘refrain absolutely from all interference, whether direct or indirect, in hostilities.’¹⁸⁶ In this sense, it can be argued that at least military neutrality is implicitly required by IHL treaties, especially through the provisions that aim to ensure that assistance is not diverted and not used for purposes different from helping the civilian population in need.

2.1.5.1.2. The Principles and the Actor

GC IV and the APs not only require relief actions to satisfy some requirements, but also reserve some special rights in the field of humanitarian assistance to actors that fulfil specific criteria. First of all, GC IV reserves the right of humanitarian initiative, in the case of IAC and NIAC respectively, to ‘[a]n impartial humanitarian body, such as the International Committee of the Red Cross’ and ‘the International Committee of the Red Cross or any other impartial humanitarian organization’.¹⁸⁷ According to the ICRC Commentaries, these organisations need to be ‘concerned with the condition of man, considered solely as a human being, regardless of his value as a military, political, professional or other unit’.¹⁸⁸ It is necessary that, in addition to the humanitarian character of the activities carried out by the organisation, ‘the organization *itself* has a humanitarian character, and as such, follows only humanitarian aims’, so that ‘organizations with a political or commercial character’ are not covered by provisions on humanitarian organisations.¹⁸⁹

To be impartial, an organisation shall

observe[] the principle of non-discrimination in its activities and, when providing medical aid ..., [] not make “any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria”. In other words, the organization must respect the principle of impartiality, which is one of the fundamental principles of the Red Cross.¹⁹⁰

Regarding the relation between impartiality and the possibility for impartial humanitarian organisations to work in favour of one Party to the conflict only, the authors of the Commentary argue that the essential factor is that these organisations are ready and available to carry out their activities in favour of both

¹⁸⁶ Ibid., 568. On the cessation of protection of civilian hospitals and medical units in case they are used to commit, outside their humanitarian activities, acts harmful to the enemy, see art. 19 GC IV, art. 13 AP I, and art. 11 AP II.

¹⁸⁷ Arts. 3 and 10 GC IV. Similarly, on the right of ‘impartial humanitarian organizations such as the International Committee of the Red Cross’ to undertake relief consignments in favour of the inadequately supplied civilian population of occupied territories, see art. 59 GC IV.

¹⁸⁸ ICRC Commentary GC IV, 96.

¹⁸⁹ ICRC Commentary APs, 143 (par. 440). Emphasis in the original.

¹⁹⁰ ICRC Commentary APs, 143 (par. 439).

Parties.¹⁹¹ If then access and/or the necessary conditions are accorded by one belligerent only, resulting in inequality of the services rendered by an organisation to the Parties to the conflict, impartiality is nevertheless not violated.¹⁹² Otherwise, the qualification of the organisation as impartial may be questioned.

As already mentioned, IHL treaties do not reserve the task of undertaking relief actions for civilians that are inadequately supplied (both in IAC and NIAC) to impartial humanitarian organisations, either governmental or non-governmental, or to actors that satisfy specific criteria such as offering guarantees of impartiality and efficacy.¹⁹³ For example, States are explicitly allowed under Article 59 GC IV to undertake relief consignments in favour of the inadequately supplied civilian population of the occupied territory. However, the ICRC Commentary argues that only neutral States, and in particular the Protecting Power, are suitable to carry out such consignments, because only these States are ‘capable of providing the essential guarantees of impartiality.’¹⁹⁴ In addition, transit States have a series of mechanisms at their disposal to make sure that the relief is indeed used for the benefit of the civilians in need only and is distributed impartially and without any adverse distinction,¹⁹⁵ and these States are obliged under Article 70 AP I to allow the passage only of relief satisfying these criteria.¹⁹⁶ Similarly, with reference to relief actions in NIAC, the ICRC Commentary explicitly argues that ‘[w]hat is meant in particular is relief actions which may be undertaken by the ICRC or any other impartial humanitarian organization.’¹⁹⁷

Finally, humanitarian organisations and relief personnel are regulated by Articles 81 and 71 AP I. Article 81 AP I deals with the ICRC, National Red Cross Societies, and then in general with ‘the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.’ It is arguable that these organisations can be both local and foreign, since the preceding paragraph of the same article makes reference to the ICRC and both local and foreign National Societies, and local relief organisations are elsewhere mentioned in the AP I, for example in Article 17. This interpretation is supported by the ICRC Commentary, which affirms that these organisations

¹⁹¹ See ICRC Commentary GC IV, 97.

¹⁹² In this sense, see ICRC Commentary GC IV, 97.

¹⁹³ On the possibility for humanitarian organisations to be either governmental or non-governmental in character, see the statement by Pictet (ICRC) during the negotiations of the AP I: *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. XII, 462, CDDH/II/SR.98, par. 50.

¹⁹⁴ ICRC Commentary GC IV, 321.

¹⁹⁵ See arts. 23, 59 and 61 GC IV, and art. 70(3) AP I.

¹⁹⁶ See ICRC Commentary APs, 822-823 (par. 2825).

¹⁹⁷ *Ibid.*, 1479 (par. 4879).

‘include those referred to in Articles 30 and 142 GC IV and Articles 9 and 17 AP I’ and adds that they shall undertake their activities impartially, without ‘compromis[ing] military operations’, and they shall be ‘duly authorized by the Parties to the conflict’, ‘submit themselves to any security rules imposed upon them, and [] not use their privileged situation to collect and transmit political or military information.’¹⁹⁸ Following this interpretation, local relief societies would be merely required under IHL treaties to be authorised by the Party to which they belong in order to operate but, to be entitled to invoke the applicability of Article 81 AP I, they should also be humanitarian and act in conformity with the GCs and AP I.¹⁹⁹

Article 71 AP I, while not mentioning any principle that relief personnel must respect in order to be entitled to operate, makes their participation conditional upon approval by the Party in whose territory they will work and imposes upon them a ‘terms of mission’ limit. While, as already mentioned, the boundaries of this limit and the consequences of exceeding it need to be clarified through an analysis of State practice and *opinio juris*, their mission arguably consists of acting in an impartial manner and with the sole objective of carrying out the humanitarian relief action. The personnel and their mission shall be instrumental to the provision of relief: the ICRC Commentary refers to ‘experts in transport, in relief administration, in organization’, and possibly medical or paramedical personnel.²⁰⁰

In sum, pursuant to the GC IV and APs, as it is also explained in the ICRC Commentaries, a specific role in external humanitarian assistance actions in conflict is reserved to actors that are usually humanitarian, impartial, and militarily neutral, or that, in the case of relief actions by States, can at least provide guarantees that their action will be impartial. On the other hand, the requirement that humanitarian actors shall be ideologically neutral, meaning not taking a position in the conflict, in order to be qualified as such and be entitled to offer their services does not emerge from the treaties.²⁰¹ In this sense, some scholars have argued in favour of the duty to respect the principle of neutrality for impartial humanitarian actors, but only to the extent of not providing military or economic advantages or disadvantages to the Parties to the conflict and not causing prejudice to such Parties (military neutrality), while denouncing gross human rights violations or engaging in ‘controversies of a political, racial, religious or ideological nature’ (contrary to ideological

¹⁹⁸ Ibid., 945 (pars. 3337-3338). Similarly, see Karl Josef Partsch, “Article 81 – Activities of the Red Cross and Other Humanitarian Organizations,” in *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, by Michael Bothe, Karl Joseph Partsch, and Waldemar A. Solf (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982), 498.

¹⁹⁹ See arts. 63 and 142 GC IV, and arts. 9(2) and 81(4) AP I.

²⁰⁰ ICRC Commentary APs, 833 (par. 2879-2880)

²⁰¹ See also ICRC Commentary GC IV, 97 (commentary to art. 10 GC IV).

neutrality) would not be prohibited.²⁰² On the other hand, another group of scholars seems to argue in favour of the applicability of neutrality to humanitarian actors more in general, including the duty not to take position on the causes of the conflict and not to favour any ideological position (but not the prohibition to denounce gross violations of human rights, which would not imply taking sides in the conflict).²⁰³ Finally, other authors, including members of the International Red Cross and Red Crescent Movement itself, argue that neutrality as defined by the Red Cross is only binding on the Movement itself, on the basis of its Statutes, while other actors involved in humanitarian assistance do not necessarily need to be neutral.²⁰⁴

Independence as a Fundamental Principle of the Red Cross is also absent from IHL treaties and it is not mentioned in the ICRC Commentaries either, so that it appears that it is not required to be qualified as an impartial humanitarian actor under IHL.

Finally, this legal framework regulating humanitarian assistance in conflict and actors engaged in this activity, and the relevance of the principles in it, is only one part of the legal framework governing humanitarian action in IHL more in general. Indeed, as will be illustrated next, IHL treaties envisage the protection of civilians as a second crucial element complementary to the provision of assistance. The rules in IHL treaties devoted to protection and the relevance of the principles of humanitarian assistance in this second area of work deserve examination, in order to clarify the overall framework and verify whether and at what conditions one and the same actor might engage in both activities.

²⁰² See, for example, Alcaide Fernández (1997), *supra* fn. 2, 77-79; Ojinaga Ruiz (2005), *supra* fn. 112, 269-274; Denise Plattner, "ICRC Neutrality and Neutrality in Humanitarian Assistance," *International Review of the Red Cross* 36, no. 311 (April 1996): 161-179; Kate Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law*, HPG Report 5, March 2000 (London: Overseas Development Institute, 2000), 8-9. According to Blondel:

Je traiterai de l'action humanitaire neutre. Il y a d'autres formes d'action humanitaire qui ne sont pas nécessairement neutres. Je crois que l'impartialité dans la distribution de l'aide est un élément constitutif de l'action humanitaire, dans le sens de: priorité, sans discrimination à l'attention ceux qui vivent dans une situation de plus grande détresse. La neutralité ne me semble pas, par contre, être un élément constitutif, ni obligatoire de l'action humanitaire. On peut faire un choix partisan, défendre une cause spécifique et mener une action humanitaire. ... Le droit international humanitaire offre une source indispensable à la compréhension du principe de neutralité, (mais il serait là plus juste de parler d'inviolabilité de la personne: blessé, prisonnier, etc. hors de combat). Le DIH ne stipule pas qu'une organisation humanitaire soit neutre (ni indépendante). Il affirme (et donc exige) par contre que l'action humanitaire ne comporte pas de dimension partisane. L'action humanitaire ne doit pas apporter une contribution active aux hostilités. Elle doit être impartiale. Le CICR a choisi, de plus, d'être neutre et indépendant.

Jean-Luc Blondel, "Neutralité et Action Humanitaire," *Refugee Survey Quarterly* 26, no. 4 (2007), 189 and 191.

²⁰³ See, for example, Maurice Torrelli, "From Humanitarian Assistance to 'Intervention on Humanitarian Grounds'?", *International Review of the Red Cross* 32, no. 288 (May-June 1992), 239-241; Zorzi Giustiniani (2008), *supra* fn. 112, 140-144 and 193-197; Abril Stoffels (2001), *supra* fn. 20, 361-389; Ruth Abril Stoffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps," *International Review of the Red Cross* 86, no. 855 (September 2004), 539 and 543.

²⁰⁴ See, for example, Heike Spieker (2004), *supra* fn. 141, 206. See also Johanna Grombach Wagner, "An IHL/ICRC Perspective on 'Humanitarian Space,'" *Humanitarian Exchange* 32 (December 2005), 26; and Surabhi Ranganathan, "Reconceptualizing the Boundaries of 'Humanitarian' Assistance: 'What's in a Name' or 'The Importance of Being Earnest'?", *The John Marshall Law Review* 40, no. 1 (2006): 195-233. Claiming that actors involved in relief do not need to be neutral and/or impartial (but not explicitly claiming that they are still entitled to be covered by the provisions addressed to impartial humanitarian organisations), see Adam Roberts, "The Role of Humanitarian Issues in International Politics in the 1990s," *International Review of the Red Cross* 81, no. 833 (March 1999), 37-38.

2.1.5.2. Humanitarian Protection: Questioning the Principles?

As has been seen in Section 1.2.3., protection as a second component of humanitarian action has gained relevance since the end of the 1990s, due to the need felt by humanitarian actors to supplement the mere provision of relief with attention for respect for the human rights of victims in need. The term protection has been increasingly associated with humanitarian assistance,²⁰⁵ but the role of humanitarian organisations is unclear, in terms of operational activities they might perform and of respect for the principles by actors engaging in both humanitarian assistance and humanitarian protection activities.²⁰⁶ While the first idea coming to mind when thinking about the protection of civilians in armed conflict may be physical protection, this is not the primary meaning of the term under IHL. Already from the titles of GC IV and the APs, which are ‘relative to the Protection of Civilian Persons in Time of War’ and ‘relating to the Protection of Victims’ of IAC and NIAC respectively, it can be deduced that protection under IHL refers to the legal protection granted to individuals, the legal rules put in place to minimise the effects of hostilities on them.

Furthermore, within the main IHL treaties, the term ‘protection’ and the verb ‘protect’ appear numerous times and they generally impose certain conducts on the armed forces and the authorities of the Parties to the conflict. First, specific categories of persons and objects (such as hospitals) shall be *protected and respected*. These two verbs are present already in Article 1 Geneva Convention 1864 and they return various times in the four GCs and in the APs. According to the ICRC Commentaries, “[t]he word “respect” (*respecter*) means, according to the Dictionary of the French Academy, “to spare, not to attack” (*épargner, ne point attaquer*), whereas “protect” (*protéger*) means “to come to someone’s defence, to lend help and support” (*prendre la défense de quelqu’un, prêter secours et appui*).²⁰⁷ In this sense, individuals entitled to respect and protection shall not be ‘attack[ed], kill[ed], illtreat[ed] or in any way harm[ed]’ and they shall be aided and given ‘such care as [their] condition require[s].’²⁰⁸

Second, protection appears in the reference to the category of individuals designed as ‘protected persons’ under each GC, meaning the primary beneficiaries of the provisions of each of these treaties. Third, the part of GC IV entitled ‘General Protection of Populations against Certain Consequences of War’ and the

²⁰⁵ See below Section 5.3.

²⁰⁶ While this Chapter focuses on protection activities and the principles of humanitarian assistance in IHL treaties, the debate on protection activities and their boundaries will be analysed in Chapter 5.

²⁰⁷ Jean S. Pictet, ed., *Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952), 134-135. Hereinafter ICRC Commentary GC I. Similarly, see ICRC Commentary GC IV, 133-134; ICRC Commentary APs, 146 (par. 446).

²⁰⁸ ICRC Commentary GC I, 135.

section of AP I called ‘General Protection [of the Civilian Population] Against Effects of Hostilities’ are mainly devoted to protection from attack, corresponding to the word ‘respect’ more than to ‘protect’ in the pair.²⁰⁹ All these three meanings of ‘protection’ (respect and protect, protected persons, general protection of the civilian population) refer primarily to the conduct that the authorities and armed forces of the Parties to the conflict shall adopt during the hostilities.²¹⁰

On the other hand, a more specific meaning of protection, strictly related to the aforementioned ones and most interesting for the purpose of this research, refers to the activities carried out by humanitarian actors, first and foremost the ICRC. Indeed, protection has been identified as part of the activities of the International Red Cross and Red Crescent Movement since the 1950s, with the terms ‘assistance’ and ‘protection’ being introduced into the Statutes of the Movement in 1952 ‘to give specific meaning to what was once termed “humanitarian activities.”’²¹¹ The content of this term for the Movement finds its basis first of all in the GCs and APs, which in the case of IAC explicitly assign to the ICRC some specific protective tasks, either in addition or substitution to the Protecting Powers, or to the ICRC only.²¹²

Given the increased engagement in protection by so-called non-mandated actors, meaning organisations engaged in relief activities not having a specific protection mandate in their statutes, contrary to the ICRC and UNHCR, the analysis of the relevant provisions contained in the main IHL treaties is necessary in order to clarify what role in protection activities is envisaged (and/or permitted) for the ICRC, for other humanitarian organisations, and for other actors, as well as limits and criteria for all these actors for concurrent engagement in assistance and protection.

This examination will then represent the background and the reference point for the analysis in Chapter 5 of the increased focus on protection of civilians in conflict by humanitarians and by the UN in the 21st century, with the corresponding search for the content and limits of this concept.

2.1.5.2.1. The ICRC and Protection in IHL Treaties

²⁰⁹ See Yves Sandoz, “La notion de protection dans le droit international humanitaire et au sein du Mouvement de la Croix-Rouge,” in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Christophe Swinarski (Geneva: ICRC; The Hague: Nijhoff, 1984), 978.

²¹⁰ See *Ibid.*, 979-980.

²¹¹ ICRC, “ICRC Protection Policy: Institutional Policy,” *International Review of the Red Cross* 90, no. 871 (September 2008), 752.

²¹² Both the ICRC and the Protecting Powers are assigned protection tasks also by GC I, GC II and GC III, in relation to wounded, sick and shipwrecked members of the armed forces and to prisoners of war. However, this Chapter focuses only on protection activities in favour of civilians, in line with the scope of the research, thus in GC IV.

The ICRC has been assigned specific protective tasks by the GCs and APs, both within the framework of the Protecting Powers regime and on its own account. The regime of the Protecting Powers, originally introduced by the GCs and subsequently modified by AP I, has been designed mainly to facilitate and supervise the application of the GCs and AP I in IAC.²¹³ Protecting Power is defined by AP I as ‘a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol’, and GC IV clarifies that the duty of the Protecting Powers is ‘to safeguard the interests of the Parties to the conflict’.²¹⁴ However, probably because many (if not all, as will be seen) of the functions of the Protecting Powers are humanitarian in nature, the regime of the Protecting Powers envisages a role for the ICRC as well.

Under GC IV, Parties to a conflict may agree to assign the functions of the Protecting Powers under the Convention to ‘an international organization which offers all guarantees of impartiality and efficacy’, which thus acts as a substitute.²¹⁵ Furthermore, in case the Parties do not agree on the designation of a Protecting Power or a substitute, the Detaining Power ‘shall request’ a neutral State or an organisation of the aforementioned type to carry out the functions of the Protecting Power under the Convention.²¹⁶ Finally, in case both of these options fail, and no Protecting Power or substitute is designated, pursuant to Article 11(3) GC IV ‘a humanitarian organization, such as the International Committee of the Red Cross’ can carry out the *humanitarian functions* of the Protecting Power, either at the request of the Detaining Power or upon its own offer to do so (which the Detaining Power shall accept). According to this last solution, the ICRC would not act as a proper substitute and thus its independence would be better guaranteed.²¹⁷

Regarding the identification of the humanitarian functions of the Protecting Power, the ICRC has clarified that all of the Protecting Power’s activities under the GCs can be considered humanitarian,²¹⁸ and

²¹³ See art. 9(1) GC IV: ‘The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict.’

²¹⁴ Art. 2(c) AP I and art. 9(1) GC IV.

²¹⁵ See art. 11 GC IV and 5 AP I. On the regime of the Protecting Powers, see, for example, J. de Preux, “Protecting Power,” *International Review of the Red Cross* 25, no. 245 (March-April 1985): 86-95; George A.B. Peirce, “Humanitarian Protection for the Victims of War: the System of Protecting Powers and the Role of the ICRC,” *Military Law Review* 90 (1980): 89-162; Christian Dominicé and Jovića Patnogić, “Les Protocoles additionnels aux Conventions de Genève et le système des Puissances protectrices,” *Annales de droit international médical* 28 (1979): 24-50.

²¹⁶ Art. 11(2) GC IV.

²¹⁷ See ICRC Commentary GC IV, 109.

²¹⁸ See Peirce (1980), *supra* fn. 215, 138; François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Oxford/Geneva: Macmillan/ICRC, 2003), 884-885.

the same has been argued regarding additional activities under AP I.²¹⁹ Following the modifications of the Protecting Power regime introduced by Article 5 AP I, if a Protecting Power is not appointed, the ICRC *shall* offer its good offices to facilitate a designation and, if still no Protecting Power is chosen, the ICRC can offer to act as a substitute and the Parties *shall* accept the offer (but still, the offer shall be made ‘after due consultations with the said Parties and taking into account the result of these consultations’ and ‘functioning of such a substitute is subject to the consent of the Parties to the conflict’).

Protecting Power functions, which the ICRC can perform as a substitute or under Article 11(3) GC IV, include, in the field of supervision,²²⁰ supervising the distribution of relief in favour of civilians in need,²²¹ supervising the evacuation of children,²²² being informed of the names of protected persons who have been denied permission to leave the territory of a Party to the conflict (and of the reasons for it) and who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence,²²³ receiving complaints from internees regarding the conditions of internment,²²⁴ inspecting the record of disciplinary punishments of internees and being provided with a record of the internees’ deaths,²²⁵ and be informed of any enquiry opened by the Detaining Power regarding the death of or serious injury to a protected person, and be provided with the resulting report.²²⁶ In situations of occupation, the Protecting Power is also entitled to be informed of transfers or evacuations carried out by the Occupying Power,²²⁷ to verify the state of food and medical supplies in occupied territory,²²⁸ to be informed of proceedings instituted by the Occupying Power against protected persons, to attend their trial, and to be informed of the judgment if the sentence exceeds a certain time limit;²²⁹ and to be contacted by any worker and intervene.²³⁰ AP I has extended these activities to include being entitled to inspect the record of ‘all

²¹⁹ See Bugnion (2003), 900-901. In addition, Peirce underlines that during negotiations of both the GCs and the APs, the role of the Protecting Power (and its substitutes) ‘was not extended to include supervision of the conduct of hostilities or formal investigative and reporting functions.’ Peirce (1980), *supra* fn. 215, 144.

²²⁰ Inspiration for the division of the Protecting Power’s tasks has been taken from de Preux, who distinguishes between ‘good offices’, ‘scrutiny’, and ‘intermediary’. See de Preux (1985), *supra* fn. 215: 86-95.

²²¹ See arts. 23(3) GC IV and 70(3) AP I; see arts. 59-61 GC IV for relief in the occupied territory (art. 61 explicitly envisages the possibility of delegating the supervision over the distribution of relief, ‘by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body’).

²²² See art. 78(1) AP I.

²²³ See arts. 35(3) and 43(2) GC IV.

²²⁴ See art. 101(2) GC IV.

²²⁵ Arts. 123(5) and 129(3) GC IV.

²²⁶ See art. 131 GC IV.

²²⁷ See art. 49(4) GC IV.

²²⁸ See art. 55(3) GC IV.

²²⁹ See arts. 71(2-3) and 74 GC IV. Moreover, on the rights of the Protecting Power in connection to the defence of a protected person and to the execution of death sentences, see arts. 72(2) and 75(2-3) GC IV respectively. Art. 126 GC IV extends by analogy the applicability of arts. 71-76 GC IV to ‘proceedings against internees who are in the national territory of the Detaining Power.’

²³⁰ See art. 52(1) GC IV.

medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty’ as a result of an armed conflict,²³¹ and attending the proceedings on the adjudication of POW status to an individual who has taken part in hostilities.²³²

Acting as an intermediary, the Protecting Power can transmit demands of voluntary internment of protected persons;²³³ it shall notify the Detaining Power of any transfer of protected persons carried out in violation of the Convention, so that the latter can remedy to the situation;²³⁴ it is entitled to be informed of the location of places of internment and to transmit such information to the Powers concerned;²³⁵ it shall be informed by the Detaining Power of the measures taken to implement the provisions governing the internees’ relations with the exterior (correspondence, relief, etc.);²³⁶ and it shall transmit information on protected persons who have been taken into custody, placed in assigned residence, or interned, from the Detaining Power to the country of origin.²³⁷ The Parties to the conflict may also have recourse to the Protecting Power to transmit one another the translations of GC IV and AP I and implementing laws and regulations.²³⁸ Finally, the Protecting Power can offer its good offices to settle disagreements between the Parties to a conflict on the application or interpretation of the Convention.²³⁹

In addition to activities that the ICRC can carry out as a substitute of the Protecting Power or under Article 11(3) GC IV, the treaties attribute some protection activities either to both the Protecting Power and the ICRC or to the ICRC specifically. The attribution to both of these institution of certain tasks does not amount to a duplication of efforts, since the Protecting Power is nominated by a State and thus acts in the interest of that State (for example visiting only detained persons who are nationals of that State), while the ICRC is entrusted such tasks by all the States Parties to the Convention and acts on the basis of its Fundamental Principles.²⁴⁰ Activities for which GC IV and AP I mention explicitly both the ICRC and the Protecting Powers include, in the field of good offices, ‘lend[ing] [its] good offices in order to facilitate the institution and recognition of [] hospital and safety zones and localities’,²⁴¹ and contributing to the

²³¹ Art. 11(6) AP I.

²³² See art. 45(2) AP I.

²³³ See art. 42(2) GC IV.

²³⁴ See art. 45(3) GC IV.

²³⁵ See art. 83(2) GC IV.

²³⁶ See art. 105 GC IV.

²³⁷ See art. 137(1) GC IV.

²³⁸ See arts. 145 GC IV and 84 AP I.

²³⁹ See art. 12 GC IV; it is also envisaged that a person delegated by the ICRC may take part in the meeting between the Parties.

²⁴⁰ See Bugnion (2003), *supra* fn. 218, 861-862.

²⁴¹ Art. 14(3) GC IV.

conclusion of an agreement for the establishment of a demilitarised zone.²⁴² As far as the supervisory (and assistance) role of the ICRC and the Protecting Powers is concerned, they can assist protected persons (who have the right to have every facility to make application to them),²⁴³ visit detained protected persons,²⁴⁴ receive communications from the Internee Committees;²⁴⁵ be provided with the list of labour detachments of internees;²⁴⁶ supervise the accounts opened by the Detaining Power for each internee and provide allowances to internees;²⁴⁷ be informed of possible reasons for the Detaining Power to limit the quantity of individual parcels and collective shipments interned persons are allowed to receive;²⁴⁸ and supervise the distribution of relief to internees and convey these relief shipments (and mail) in case the Powers concerned cannot do it because of military operations.²⁴⁹

Finally, protection activities with which the ICRC is explicitly entrusted are connected to its right to propose ‘to the Powers concerned’ the organisation of a ‘Central Information Agency for protected persons, in particular for internees, [...] in a neutral country’.²⁵⁰ This Central Information Agency (called Central Tracing Agency in AP I) has the right to receive a duplicate of the certificate explaining the medical treatment obtained by each internee,²⁵¹ an internment card with relevant information for each newly-interned person,²⁵² a certified copy of internees’ records of death,²⁵³ information concerning and personal valuables left by protected persons who have been kept in custody, subjected to assigned residence or interned (to be then transmitted to the country of origin),²⁵⁴ and lists of graves of deceased internees.²⁵⁵ In addition, the Agency shall be facilitated in its work by the Parties to the conflict and all the High Contracting Parties;²⁵⁶ it has the right to receive from Parties to the conflict both information concerning persons reported missing (by another party to the conflict) and requests for such information;²⁵⁷ and it shall obtain from the country that

²⁴² See art. 60(2) AP I.

²⁴³ See arts. 30(1) and 39(3) GC IV. See also art. 40(4) GC IV, on the applicability of art. 30(1) GC IV to protected persons who have been compelled to work; and art. 78(3) GC IV, on the applicability of art. 39 GC IV to protected persons made subject to assigned residence by the Occupying Power and thus required to leave their homes.

²⁴⁴ See arts. 76(6) and 143 GC IV. See also art. 125(4) GC IV.

²⁴⁵ See art. 104(3) GC IV. See also art. 102 GC IV.

²⁴⁶ See art. 96 GC IV.

²⁴⁷ See art. 98(2-3) GC IV.

²⁴⁸ See art. 108(2) GC IV.

²⁴⁹ See arts. 109(3) and 111(1) GC IV.

²⁵⁰ Art. 140 GC IV. Pursuant to art. 113(1) GC IV, this Agency can act as an intermediary (in alternative to the Protecting Power) to transmit ‘wills, powers of attorney, letters of authority, or any other documents intended for internees or despatched by them.’

²⁵¹ See art. 91(4) GC IV.

²⁵² See art. 106 GC IV.

²⁵³ See art. 129(3) GC IV.

²⁵⁴ See arts. 137 and 139 GC IV.

²⁵⁵ See art. 130(3) GC IV, to be read in conjunction with art. 137 GC IV.

²⁵⁶ See art. 26 GC IV and art. 74 AP I.

²⁵⁷ See art. 33 AP I. Pursuant to art. 33(3) AP I, both the information and the requests can be transmitted either directly or through the Protecting Power or the Central Tracing Agency or national Red Cross Societies.

receives evacuated children a card for each child with photographs, to be sent to the ‘Central Tracing Agency of the International Committee of the Red Cross’.²⁵⁸

General reference is made to ‘some humanitarian organization’ for the task of facilitating the conclusion of an agreement between the Parties for the establishment of a neutralised zone, so that the ICRC is arguably included.²⁵⁹ Among protection activities in a broad sense one may also refer to the role assigned to the ICRC by Article 97 AP I, which states that in case amendments to the Protocol are proposed, it shall be involved in the consultations in order to decide whether to convene a conference.²⁶⁰ Finally, Article 10 GC IV grants the ICRC a general right of initiative to carry out humanitarian activities ‘for the *protection* of civilian persons and for their relief’, and Article 81(1) AP I obliges the Parties to the conflict to ‘grant to the International Committee of the Red Cross all facilities, within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure *protection* and assistance to the victims of conflicts’.²⁶¹

In contrast to these detailed (intermediary, supervisory and good offices) protective tasks that the ICRC may perform in IAC, the instrument of the Protecting Power is not envisaged by the treaties for NIAC, and the only reference to the ICRC is the possibility for it to offer its services to the Parties to the conflict pursuant to Common Article 3, which can arguably include protection activities.²⁶²

2.1.5.2.2. Other Actors and Protection Activities under IHL

In general, in the past, protection activities (in the strict sense) in favour of civilians in armed conflict fell under the remit of agencies with a specific mandate in this sense, meaning, in addition to the ICRC, UNHCR.²⁶³ Other organisations engaged in humanitarian assistance seemed to be generally wary of getting involved in protection, probably due to the political sensitivity of activities such as monitoring respect for the law. Representations or even public denunciation of violations may generate the *perception* by the relevant

²⁵⁸ Art. 78(3) AP I.

²⁵⁹ See art. 15(1) GC IV.

²⁶⁰ Similarly, art. 98 AP I charged the ICRC with the task of consulting the High Contracting Parties within four years from the adoption of AP I, and, if necessary, convene a meeting of technical experts to amend Annex I to the AP I (on regulations concerning identification, lastly amended in 1993).

²⁶¹ Emphasis added.

²⁶² See, for example, Yves Sandoz, “Le droit d’initiative du Comité International de la Croix-Rouge,” *German Yearbook of International Law* 22 (1979), 363.

²⁶³ See Section 5.3.2.

authorities of a humanitarian organisation as not purely humanitarian, or as favouring the opposite Party, and may thus lead to restrictions being imposed on agencies' access to victims in need.

However, IHL treaties envisage a role in protection activities for actors different from the ICRC (and UNHCR), provided that they satisfy certain conditions, which at a first examination appear to be related to the principles associated to humanitarian assistance. Indeed, as will be shown in this Section, while the GCs and APs require humanitarian assistance provided by external actors to comply with the requirements of being humanitarian, impartial, and non-discriminatory, they do not require the fulfilment of any principle for the implementation of protection activities. However, the treaties reserve protection activities to actors that satisfy certain requirements (probably because only such actors can enjoy from the Parties to the conflict the necessary trust to be charged with undertaking protection activities), and this might indirectly influence the nature of their actions. As already mentioned, while Common Article 3 and Article 10 GC IV simply refer to the possibility for impartial humanitarian organisations to offer their services to the Parties to the conflict (the latter explicitly mentioning activities 'for the protection of civilian persons and for their relief'), the ICRC Commentary argues that these services shall be humanitarian and impartial.²⁶⁴

In case of IAC, the possibility to act as a substitute of the Protecting Power is provided not only for the ICRC, but also for international organisations offering guarantees of impartiality and efficiency.²⁶⁵ In case of absence of a Protecting Power, the Detaining Power can request 'an international organization which offers all guarantees of impartiality and efficacy' to perform the functions assigned by the GC IV to the Protecting Powers; otherwise, humanitarian organisations are entitled to offer their good offices to the Parties to the conflict for the designation of a Protecting Power and, if still no designation takes place, they are entitled to carry out 'the *humanitarian* functions performed by Protecting Powers', and the Detaining Power shall accept, provided that these organisations can 'undertake the appropriate functions and [] discharge them impartially'.²⁶⁶ While the entitlement to carry out the humanitarian functions of the Protecting Power and to facilitate the designation of a Protecting Power is specifically entrusted to humanitarian organisations, the possibility of acting as a proper substitute does not refer to a 'humanitarian' organisation. Organisations which are not humanitarian, but can offer adequate guarantees of impartiality and efficiency, can act as

²⁶⁴ See ICRC Commentary GC IV, 42 and 97.

²⁶⁵ See arts. 11(1) GC IV and 5 AP I.

²⁶⁶ Art. 11(2), 11(3) and 11(4) GC IV, and art. 5(3) and 5(4) AP I. Pursuant to art. 5(4) AP I, in case no Protecting Power is designated, 'any other organization which offers all guarantees of impartiality and efficacy' can offer to act as a substitute, but such an offer shall be made 'after due consultations with the said Parties and taking into account the result of these consultations', and the functioning of the substitute is then subject to the consent of the Parties to the conflict.

substitutes.²⁶⁷ However, in practice the ICRC has been the only organisation that has been asked to carry out protection activities proper of the Protecting Powers and has done so.²⁶⁸

In addition to the regime of the Protecting Powers, in the field of protection activities, impartial humanitarian organisations can offer their good offices and act as intermediary between the belligerents in order, for example, to establish neutralised or demilitarised zones.²⁶⁹ Humanitarian character and impartiality would also be criteria that need to be fulfilled by actors charged with supervising the distribution of relief consignments, both in occupied and non-occupied territories, as well as in places of internment.²⁷⁰ Indeed, while for the supervision of distribution of relief to internees Article 109 GC IV simply refers to ‘representatives of the Protecting Powers, the International Committee of the Red Cross, or any other organization giving assistance to internees’, according to the ICRC Commentary the third category mentioned would comprise only ‘a humanitarian body which affords every guarantee of impartiality and competence, like the International Committee of the Red Cross, and which is thus duly authorized by the Detaining Power to check the distribution of parcels.’²⁷¹

More in general, organisations that may assist internees are entitled to the same rights as the ICRC in the sense of having their visits to protected persons facilitated as much as possible by the Detaining or Occupying Powers,²⁷² sending allowances to internees,²⁷³ communicating with the Internee Committees (which shall receive the necessary facilities for this);²⁷⁴ being informed if the quantity of shipments to internees is limited by reason of military necessity; supervising the distribution of these shipments; and conveying such shipments in case the Powers concerned cannot do it because of military operations.²⁷⁵ These organisations assisting internees are not required to be impartial or humanitarian, but the ICRC Commentary to Article 30 GC IV (which lists these relief organisations under the heading ‘[h]umanitarian [o]rganizations’) specifies that, while in certain cases where ‘there can never be enough assistance, it is

²⁶⁷ A debate on the possible role of the UN in the designation of a body which should act as a substitute of the Protecting Power took place, and the idea was rejected. See Peirce (1980), *supra* fn. 215, 139, 141, 144 and 153-154.

²⁶⁸ See, for example, Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War. An Introduction to International Humanitarian Law*, 3rd ed. (Geneva: ICRC, 2001), 72-73; Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Volume I: Outline of International Humanitarian Law*, 3rd ed. (Geneva: ICRC, 2011), Chapter 13, 13. However, envisaging a possible future role for ‘international organizations and special organs’, see Horst Fischer “Protection of Prisoners of War,” in *The Handbook of International Humanitarian Law*, 2nd ed., ed. Dieter Fleck (Oxford: Oxford University Press, 2008), 382-383 (par. 706).

²⁶⁹ See art. 15 GC IV and art. 60 AP I.

²⁷⁰ For example, see art. 61 GC IV. See also the ICRC Commentary to art. 23 GC IV: ICRC Commentary GC IV, 182-184. ICRC Commentary to art. 109 GC IV: ICRC Commentary GC IV, 458.

²⁷¹ ICRC Commentary to art. 109 GC IV: ICRC Commentary GC IV, 458.

²⁷² See art. 30 GC IV. See also art. 39(3) GC IV.

²⁷³ See art. 98 GC IV.

²⁷⁴ See art. 104 GC IV.

²⁷⁵ See arts. 108-109 and 111 GC IV.

essential to call upon all possible sources of relief”, still “[t]hese organizations, however, whether national or international, must likewise strictly avoid, in their humanitarian activities, any action hostile to the Power in whose territory they are working or to the Occupying Power”, since “[t]hese principles ... govern all forms of relief organized in connection with the Geneva Convention.”²⁷⁶ In addition, all the aforementioned protective activities related to internees are strictly connected to the provision of relief, and the ICRC Commentary recommends that the organisations undertaking them focus on the provision of relief only, rather than on monitoring respect for the GCs.

Indeed, the ICRC Commentary to Article 142 GC IV argues that the aim of visits to detained protected persons by relief societies is the provision of aid and assistance in organising leisure time, while these visits should not ‘touch on other aspects of the life of protected persons’, otherwise ‘they would become to a certain extent a check on the application of the Convention.’²⁷⁷ According to the Commentary, this last task was entrusted by States both in 1949 and in 1974-1977 to Protecting Powers (or their substitutes) and the ICRC only. Demonstration of this is the fact that the draft of the GC III contained a paragraph in the article devoted to *supervision* that read: ‘[t]he Detaining Powers may allow the representatives of other bodies to visit the prisoners of war to whom such bodies may desire to convey spiritual aid or material relief.’²⁷⁸ However, the paragraph was deleted, on the grounds that it should have been placed in the article analogous to Article 142 GC IV, dealing with relief societies and other organisations (Article 125 GC III).²⁷⁹ In this sense, the Commentary wonders whether the belligerents would ‘still tolerate such activities on the part of relief societies and ... not, therefore, out of mistrust, hinder them in their other tasks, which are much more essential’, and it suggests that it ‘seems expedient that relief societies, if they wish their right to visit protected persons to remain worthwhile and effective, should use it with the greatest circumspection and prudence.’²⁸⁰

In sum, the characteristics of being humanitarian and impartial recur in the GCs and APs also for organisations entitled to undertake protective activities, in connection with the fact that States have been

²⁷⁶ ICRC Commentary GC IV, 215 and 218. Similarly, regarding the facilitation by the Detaining Power of visits to protected persons by the representatives of other organisations whose object is to give spiritual aid or material relief to such persons (art. 30(3) GC IV), the Commentary argues that the Detaining Power ‘is under a moral obligation to give its consent to the work of any organization which is capable of performing the tasks and is *impartial*.’ Ibid., 219. Emphasis added.

²⁷⁷ ICRC Commentary GC IV, 562. Analogously, see Jean S. Pictet, ed., *Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), 597. Hereinafter ICRC Commentary GC III.

²⁷⁸ *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I, 99 (art. 116(5) draft GC III).

²⁷⁹ *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II section A, 366 (referring to art. 115 draft GC III, now art. 125 GC III).

²⁸⁰ ICRC Commentary GC IV, 562. Similarly, see ICRC Commentary GC III, 597.

ready to entrust protection activities only to actors that offer guarantees of impartiality and can be trusted. The same organisations may thus engage in both humanitarian assistance and protection but, as highlighted by the ICRC Commentary, protection activities can be sensitive, so that relief organisations should carefully balance the performance of protective functions with the need to have access to people to provide them with humanitarian assistance.

2.1.5.3. Principles of Humanitarian Action

It is clear from the legal system created by GC IV and the APs that (external) humanitarian assistance actions, in order to have a legal basis in the treaties and special protection, shall satisfy a number of criteria, especially having a purely humanitarian nature and being conducted impartially, in the sense of not making distinctions among potential beneficiaries except on humanitarian grounds—specific vulnerabilities and needs. Only respect for these criteria guarantees that this assistance does not represent interference in the conflict and can thus be entitled to have access in case civilians are inadequately supplied. The same criteria of humanitarian character and impartiality are not explicitly provided in the treaties for protection actions, but they arguably apply also to this kind of activities, especially given their sensitive character and thus the possibility of performing them only for actors that offer *inter alia* guarantees of impartiality.

Organisations that fulfil specific requirements, so that they can be trusted by the Parties to the conflict and be perceived as impartial and not involved in the conflict, can claim a right to offer humanitarian services in favour of civilians without it being considered an interference in the conflict, while other actors are entitled to offer to carry out impartial humanitarian relief actions, and no specific role for them in protection is envisaged.

While respect for military neutrality emerges from the treaties as a requirement for the performance of relief action, ideological neutrality and independence do not appear to be required for actors engaged in relief actions, not even for impartial humanitarian organisations. As far as protective actions are concerned, military neutrality can be deduced from the whole regime of the Protecting Powers: despite the fact that a Protecting Power acts in the interest of one of the belligerents, its appointment is subject to the approval of the opposing Party, and the whole idea behind nominating Protecting Powers and entrusting them with the humanitarian functions listed in the treaties is to make sure that IHL is respected and applied correctly, so

that a Protecting Power that provided a military advantage in favour of its designating Party would undoubtedly exceed its mission.

The regulation of local relief actors is almost entirely left to the discretion of local authorities, except for the entitlement to the facilities provided by Article 81(4) AP I, which is reserved to humanitarian and arguably impartial organisations. Finally, the involvement of military personnel in the provision of relief to civilians in need is regulated by IHL treaties only within the framework of civil defence organisations, with special protection granted to these personnel in exchange for their exclusive engagement in humanitarian activities (within their national territory) and the absence of any interference in hostilities.

2.2. Conclusion

As emerges from this Chapter, IHL treaties offer a detailed framework regulating the provision of relief to civilians in IAC, while the regulation of this activity in NIAC is less developed. Some issues remain debated or unclearly disciplined both in IAC and NIAC. For example, the role of Parties to the conflict, and in particular their armed forces, in the provision of relief in favour of civilians in territory under their control, be they their own nationals or not, is not the subject of a comprehensive regulation in IHL, except for medical or religious personnel or members of civilian civil defence organisations. Cases arguably not envisaged in the GCs and APs have occurred in practice, such as the deployment of peacekeepers and the adoption of military strategies envisaging, if not a direct participation of the armed forces in the provision of relief, a specific role for humanitarian activities and actors in the attainment of military objectives, thus calling for a clarification of the relationships between military and humanitarian actors operating in the same theatre.²⁸¹ Related to this second profile is again the question of the protection of relief personnel and the limits they shall respect in order to avoid exceeding their mission (as well as consequences if they do), thus the issue of humanitarian principles and the rules of conduct they imply.

More in general, the legal framework regulating the provision of humanitarian assistance to civilians in armed conflict has been tested numerous times following the adoption of the GCs and then of the APs, and

²⁸¹ Tsui affirms: ‘Intergovernmental bodies are yet to address the issue of the engagement of military actors in the provision of humanitarian assistance in conflict situations, including in situations where the military is a party to the conflict. There remains a need for intergovernmental endorsed policy and guidance on the use of military assets in the provision of humanitarian assistance during complex emergencies. The policy should articulate the degree of engagement and conduct, as well as the relationship with humanitarian actors.’ Edward Tsui, “Analysis of Normative Developments in Humanitarian Resolutions since the Adoption of 46/182: An Independent Review by Edward Tsui (Consultant)”, 2009, available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1112151> (accessed March 8, 2012).

the issue has become the subject of debates and decisions within the UN and other international organisations. The principles of humanitarian action have been consistently restated in a plurality of *fora*, but at the same time made the object of diverging interpretations and criticisms. In this sense, the legal rules have been put to the test of State practice, and the next Chapters will analyse whether they have been confirmed, weakened, or modified through this practice.²⁸²

The investigation of State practice and *opinio juris* will take into account not only resolutions and statements issued by IGOs and States, but also specific episodes in which the essence of the principles and the rules of behaviour they would entail have been called into question, in order to evaluate the reactions of the members of the international community. To provide a full account of the debate around the Fundamental Principles of the Red Cross and their meaning, as well as of their influence on other actors involved in humanitarian assistance, the practice of IGOs and NGOs will be also taken into consideration. Despite lacking international legal personality, NGOs have been playing an increasingly important role in the field of humanitarian assistance and, in the last few years, of humanitarian protection, so that their practice and States' reactions to it cannot be ignored.

²⁸² For instance, some scholars have asserted that customary law at present offers a more detailed and complete regulation than the treaties, especially as far as NIACs are concerned: see, for example, the Study realized by the ICRC on customary IHL, in particular rules 31-32 and 53-56: ICRC Study – Rules, 105-111 and 186-202. See also Abril Stoffels (2001), *supra* fn. 20; Ojinaga Ruiz (2005), *supra* fn. 50; Zorzi Giustiniani (2008), *supra* fn. 112.

Other authors have identified possible changes in the legal framework regulating the provision of humanitarian assistance, at least in NIAC, following the emergence of new humanitarianism: see Mary Ellen O'Connell, "Humanitarian Assistance in Non-International Armed Conflict: The Fourth Wave of Rights, Duties and Remedies," *Israel Yearbook on Human Rights* 31 (2001): 208-210.

3. Humanitarian Assistance in Practice

One of the first occasions when humanitarian assistance to civilians in conflict came under the spotlight was the crisis in Biafra at the end of the 1960s, with the outspoken criticism against ICRC's conduct.¹ Throughout the following decades, the number and the role of NGOs active in this field continued to grow, so that international attention increased throughout the 1980s and then even more in the 1990s, due both to the nature of the armed conflicts at the time and to the proliferation of actors engaged in or concerned with humanitarian assistance, including the UN. Humanitarian organisations experienced painful failures and dilemmas and started a debate that led some scholars and practitioners to advocate a so-called 'new humanitarianism', in partial break with the traditional principles. The beginning of the 21st century, marked by a focus by the UN on protection of civilians (POC) and a reform process of UN peacekeeping towards integrated missions, by the formulation of the concept of responsibility to protect (R2P), and by the beginning of the so-called War on Terror (WoT), with the emphasis on military strategies considering the provision of relief to civilians as a tool in conflict, has presented further challenges for humanitarian action in favour of civilians in conflict, stimulating again debate on its politicisation and militarisation and questions about its principles.

This Chapter investigates the practice related to the provision of humanitarian assistance to civilians in armed conflict since the Cold War, focusing on the implications that this practice has had from the point of view of the legal regime regulating this activity. This analysis will be followed by the study of practice related to two specific issues that have gained in relevance and complexity since the beginning of the 21st century for the challenges they present for the provision of relief to civilians in conflict and that deserve autonomous examination—the involvement of armed actors in this field, and the protection of civilians.

Practice during the Cold War is presented, proceeding then with the analysis of practice since the 1990s, when the issue of humanitarian assistance to civilians in armed conflict acquired increased relevance in terms of size of the phenomenon and attention at the international level, especially by UN bodies. Practice within the UN framework is examined first, followed by other instances of practice by States and non-State parties to armed conflicts. The major armed conflicts in which humanitarian assistance has been one the focal points of international attention are taken into account, including all the armed conflicts for which at

¹ See Section 3.1.1.

least a UN body has expressed itself with regard to humanitarian assistance, in order to have a picture as comprehensive as possible of the practice.²

3.1. Humanitarian Assistance in the Cold War: The Principles and the Centrality of Consent

3.1.1. Humanitarian Assistance as Part of the Cold War Strategies and the Emergence of *Sans-Frontiérisme*

Throughout the Cold War, States mainly provided humanitarian assistance based on political equilibriums, thus to allies only in a clearly discriminatory way.³ Humanitarian organisations were sometimes an instrument of this approach and sometimes challenged it, since the engagement of a growing number of actors in the provision of humanitarian assistance to civilians caught in conflict led to questioning the model of humanitarian action promoted by the ICRC and by States.

The conflict in Biafra, Nigeria, is generally identified as a milestone in the practice regarding the provision of relief to civilians in conflict, stimulating the creation in 1971 of Médecins sans Frontières (MSF) and the birth of the *sans-frontiérisme* movement. Until that moment, the ICRC had been almost the only organisation providing relief during armed conflict.⁴ UNHCR had been created for protecting refugees, but it was still involved in protection and not much in the provision of humanitarian assistance. Other organisations had started emerging after WWI and even more after WWII, but their focus had been on helping Europe recover from the war, while only later they extended their activities to non-European States, engaging in cross-border operations and questioning the need for consent after Biafra.⁵

Biafra proclaimed its independence from Nigeria in May 1967 and a NIAC between the two followed. While Nigeria was soon set to win, the conflict attracted considerable international attention due to

² The study analyses relevant practice up to the end of September 2013.

³ See, for example, Eric A. Belgrad, "The Politics of Humanitarian Aid," in *The Politics of International Humanitarian Aid Operations*, ed. Eric A. Belgrad and Nitza Nachmias (Westport (Connecticut), London: Praeger, 1997), 8-10; S. Neil MacFarlane, "Humanitarian Action and Conflict," *International Journal: Quarterly of the Canadian Institute of International Affairs* 54, no. 4 (1998-1999), 544.

⁴ See African Rights, *Humanitarianism Unbound? Current Dilemmas Facing Multi-Mandate Relief Operations in Political Emergencies*, African Rights Discussion Paper No. 5 (London: African Rights, November 1994), 5.

⁵ See, for example, Katarina West, *Agents of Altruism: The Expansion of Humanitarian NGOs in Rwanda and Afghanistan* (Aldershot [etc.]: Ashgate, 2001), 29-31; Alex De Waal, *Famine Crimes: Politics & the Disaster Relief Industry in Africa* (African Rights and The International African Institute in association with Oxford: James Currey; Bloomington & Indianapolis: Indiana University Press, 1997), 77-79; Philippe Ryfman, *Une Histoire de l'Humanitaire* (Paris: La Découverte, 2008), 48-56; Paul Grossrieder, "Humanitarian Action in the 21st Century: The Danger of a Setback," *Refugee Survey Quarterly* 21, no. 3 (October 2002), 26-28.

the images of starving people broadcasted by the media and the claim, made by the Biafran government and repeated by many aid agencies, that the Nigerian government was trying to starve the Biafran population.⁶ The ICRC managed to negotiate access to provide relief to Biafra only by carrying out flights at its own risk, and suspended its operations after an airplane was taken down by the Nigerian government.⁷

Some doctors sent by the French Red Cross into Biafra without consent from Nigeria (since France supported the former),⁸ including Bernard Kouchner, criticised the ICRC arguing that, by choosing not to speak out about the abuses of human rights committed by the Nigerian government against civilians in Biafra, it had become complicit. Notwithstanding the possible overestimation of these abuses, as well as the underestimation of the role of the Biafran government itself in stimulating or at least not preventing them,⁹ Kouchner and some of his fellows participated in the founding of MSF in 1971. MSF opposed the principle of neutrality as defined and implemented by the ICRC,¹⁰ and asserted the need for humanitarians to have access to victims in need wherever they were, also outside the limits posed by IHL and without the consent of the sovereign State,¹¹ marking the birth of the so-called *sans-frontiérisme* movement. Consent from the State, in particular in situations of NIAC, and challenges to it emerged as a common thread in other conflicts of the Cold War era where humanitarian relief came to the international attention, in particular Cambodia, Ethiopia, and Sri Lanka,¹² and in the ICJ judgement in the *Nicaragua* case, as will be seen in the next Section.

⁶ See De Waal (1997), *supra* fn. 5, 74-76.

⁷ See, for example, David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge [etc.]: Cambridge University Press, 2005), 67.

⁸ The conflict between Biafra and Nigeria did not follow the usual Cold War alliances, with Nigeria being supported by Britain, Egypt, the Soviet Union, and the U.S., and Biafra by France, China, Rhodesia, South Africa, and Portugal. See Eleanor Davey, "From *Tiers-Mondisme* to *Sans-Froniérisme*: Revolutionary Idealism in France from the Algerian War to Ethiopian Famine," PhD diss. (Queen Mary, University of London, 2011), 64. On the exploitation by the French government of the French Red Cross missions to deliver also weapons and mercenaries, see Anne Vallaeys, "Le paravent humanitaire," *Libération*, May 29, 2007, available at <http://www.liberation.fr/tribune/0101103435-le-paravent-humanitaire> (accessed April 17, 2012).

⁹ See De Waal (1997), *supra* fn. 5, 76-77; see also Rony Brauman, "Les liaisons dangereuses du témoignage humanitaire et des propagandes politiques Biafra, Cambodge, les mythes fondateurs de Médecins Sans Frontières," CRASH Paper, 2006. Originally published in *Crises extrêmes, Face aux massacres, aux guerres civiles et aux génocides*, edited by Marc Le Pape, Claudine Vidal, Johanna Siméant (Paris: Editions La Découverte, 2006). Available at http://www.msf-crash.org/drive/f723-rb-2006-les-liaisons-dangereuses-du-temoignage-humanitaire-et-des-propagandes-politiques_fr-p.14_.pdf (accessed May 12, 2011).

¹⁰ The emergence of *sans-frontiérisme* from the point of view of bearing witness will be analysed in Section 5.1.

¹¹ See, for example, Mario Bettati, *Le Droit d'ingérence: mutation de l'ordre international* (Paris: Odile Jacob, 1996), 78-80. See also the following statement by Kouchner: 'In the first era we asked the government: "Are we authorized? Can we receive the clearance to go and take care of your people, Mr. Government, Mr. Dictator?" If they refused, there was no way to cross the border. It could only be through ICRC involvement and neutrality. The next era was that of the French Doctors. We were asking the government the same question: "Mr. Dictator, will you allow us to care for your patients?" If they said "Yes, okay," we'd come. If they refused, we'd say, "Sorry, but we're coming anyway"—and would cross the border. It was physically difficult, and some of our people died. Others have been imprisoned for years.' Bernard Kouchner, "The Future of Humanitarianism: 23rd Annual Morgenthau Memorial Lecture," March 02, 2004, Carnegie Council on Ethics and International Affairs, New York. Available at <http://www.carnegiecouncil.org/resources/transcripts/4425.html> (accessed September 05, 2011). Grossrieder (2002), *supra* fn. 5, 29.

¹² Furthermore, one might mention Lebanon as a Cold War conflict where humanitarian assistance was devoted international attention: in 1982 the UNSC '[d]emand[ed]' that the Government of Israel lift immediately the blockade of the city of Beirut in order

Cambodia presented problems to humanitarian organisations after the invasion in 1978 by Vietnam and the replacement of the Khmer Rouge regime with a new government, not recognised as legitimate by the U.S. and their allies due to Vietnam's association with the Soviet sphere of influence.¹³ Humanitarians had difficulties obtaining the consent of the new government to operate in areas under its control and at the same time continue their operations in favour of Cambodian displaced people in areas controlled not by the government but by the Khmer Rouge, at the border with Thailand.¹⁴ In 1979, the UNGA '[s]trongly appeal[ed]' to all States and national and international humanitarian organizations to render, on an urgent and non-discriminatory basis, humanitarian relief to the civilian population of Kampuchea, including those who have sought refuge in neighbouring countries', and '[u]rge[d]' all parties to the conflict to co-operate in every possible way to facilitate the humanitarian relief efforts'.¹⁵

On the one hand, the ICRC and UNICEF decided, based on the principles of impartiality and non-discrimination, to continue their operations in favour of refugees and displaced along the border, even if the new government opposed such actions.¹⁶ The reasoning behind ICRC's decision not to suspend cross-border operations from Thailand into Cambodian territory not controlled by the new government was that, based on its Fundamental Principles and in particular impartiality, it had the duty to assist all victims in need, it had to offer its services to all the Parties, and it could not be pushed by a government to violate these principles; moreover, surrendering to the conditions by the Cambodian government might set a precedent for future negotiations with other national authorities in NIACs.¹⁷ If the situation in Cambodia was to be qualified as a NIAC between the new government and the Khmer Rouge, the ICRC position would support an interpretation of Common Article 3 as allowing impartial humanitarian organisations to undertake relief actions in territories under the control of non-State armed groups also against the will of the State concerned.

to permit the dispatch of supplies to meet the urgent needs of the civilian population and allow the distribution of aid provided by United Nations agencies and by non-governmental organizations, particularly the International Committee of the Red Cross (ICRC)'. S/RES/515 (1982), 29 July 1982, par. 1.

¹³ See, for example, Brian Walker, "NGOs Break the Cold War Impasse in Cambodia," in *Humanitarian Diplomacy: Practitioners and Their Craft*, ed. Larry Minear and Hazel Smith (Tokyo: UN University Press, 2007), 135-136.

¹⁴ Supporting the qualification of the conflict as IAC, see A/RES/34/22, 14 November 1979, preamble; A/RES/35/6, 22 October 1980, preamble. Referring also to occupation, see A/RES/37/6, 28 October 1982, preamble. In 1979-1981, the UNGA voted three times to consider the deposed Khmer Rouge government still the legal government in Cambodia. Thus, according to Gasser, the relations between Vietnamese forces and Khmer Rouge troops would be regulated by IHL on IAC; 'between the invading forces and the civilian population of Kampuchea' by IHL on occupation; and 'between the armed forces of the authorities in Phnom Penh and the Khmer Rouge' by IHL on NIAC (Common art. 3). Hans-Peter Gasser, "Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon," *The American University Law Review* 33 (1983), 154-155.

¹⁵ A/RES/34/22, 14 November 1979, pars. 1 and 4. Similarly, see A/RES/35/6, 22 October 1980, pars. 7 and 10.

¹⁶ See François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Oxford/Geneva: Macmillan/ICRC, 2003), 375-376 and 810-812.

¹⁷ See *Ibid.*, 811.

The governmental opposition forced the ICRC and UNICEF to lengthy negotiations with the government to have access to areas it controlled, but in the end they succeeded, without having to suspend their operations along the border, achieving what they considered a victory of principled humanitarianism.¹⁸

On the other hand, a Consortium of NGOs led by Oxfam prioritised the access to civilians in the government-controlled territory, obtaining permission from the newly installed government only on condition that they recognised it as the official government and did not provide relief to the refugees through the Thai-Cambodian border. Still, they justified accepting this deal on the basis of the humanitarian imperative and detachment from politics, in the sense of refusal to support the Western alliance's position not to recognize the new government.¹⁹ Notwithstanding different interpretations and applications of the principles, all the organisations placed consent of the authorities at the basis of their operations in territory they controlled,²⁰ while their positions diverged on the need for governmental authorisation for cross-border operations in rebel-held areas. In any case, humanitarian organisations paid a price for access—'surrender[ing] control over distribution to political authorities' and thus allowing high levels of diversion of relief by both Parties.²¹

Diversion took place also in Afghanistan during the Cold War period, when NGOs engaged in unauthorised cross-border operations from Pakistan to provide aid in areas under Mujaheddin control.²² Again, they were following the Cold War logic, acting as an instrument of the Western policy which aimed to support the Mujaheddin against Kabul communist government, and being considered by donors 'convenient middlemen, obscuring the original source of funding'.²³ Donors accepted high rates of diversion, and aid's distribution 'reflected political ties and proximity rather than absolute humanitarian need.'²⁴ Cross-border operations supported both civilians and rebels in Afghanistan, but were conducted on a small scale

¹⁸ See Ibid., 375-376 and 810-812.

¹⁹ See Walker (2007), supra fn. 13, 133-152.

²⁰ On the other hand, MSF organised a march to raise the international attention on the situation of Cambodian refugees at the Thai border and to obtain the opening of the border, but without success. Cambodia also stimulated a clear turn towards *témoignage* within the organisation. This issue will be analysed in Section 5.1. See Fabrice Weissman, "Silence, on soigne... Un aperçu des prises de positions publiques de MSF, de la guerre froide à la guerre contre le terrorisme," in *Agir à tout prix? Négociations humanitaires: l'expérience de Médecins Sans Frontières*, eds. Claire Magone, Michaël Neuman, and Fabrice Weissman (Paris: Editions La Découverte, 2011), 235-237. Questioning the existence of a famine in Cambodia, on which MSF's position and march were based, see Brauman (2006), supra fn. 9.

²¹ MacFarlane (1998-1999), supra fn. 3, 546; see more in general Ibid., 545-547.

²² Underlining that cross-border operations were illegal in both Pakistan and Afghanistan, see Helga Baitenmann, "NGOs and the afghan war: The politicisation of humanitarian aid," *Third World Quarterly* 12, no. 1 (1990), 73-74.

²³ Jonathan Goodhand, "Aiding violence or building peace? The role of international aid in Afghanistan," *Third World Quarterly* 23, no. 5 (2002), 841-843. The author notes that, differently from NGOs, '[u]ntil 1988 both the UN and the International Committee of the Red Cross (ICRC) were constrained by sovereignty issues from providing aid in Mujaheddin-held areas.' Ibid., 842. See also Baitenmann (1990), supra fn. 22. Davey (2011), supra fn. 8, 76.

²⁴ Goodhand (2002), supra fn. 23, 842.

and in secrecy until the mid-1980s, and afterwards they were just one tool among those used by the U.S. and other donors to channel assistance to the Mujaheddin,²⁵ thus no account of a great international outcry at the time against the lack of impartiality and military neutrality of these operations has been found.

On the contrary, consent by the Government and diversion of relief gave rise to controversy in Ethiopia, which was affected by a famine in the North in the mid-1980s that got world coverage thanks to initiatives such as Geldof's Band Aid and Live Aid. The famine, at the time generally attributed to natural causes, was in reality mostly due to the strategies adopted by the Ethiopian government in the conflicts it was fighting against rebels and the Eritrean liberation movement.²⁶ Once relief was provided, the government manipulated it so as to prevent it from being distributed in rebel-controlled areas and to implement a policy of relocation of the populations living in rebel-held areas.²⁷ While MSF-France chose to denounce this policy and was expelled from the country,²⁸ other international NGOs and the ICRC (in line with its action in Cambodia) provided cross-border relief from Sudan into rebel-controlled areas without consent from the Ethiopian government, primarily to the relief societies created by the rebels and liberation movements, the Relief Society of Tigray (REST), created by the Tigrayan People's Liberation Front (TPLF), and the Eritrean Relief Association (ERA), created by the Eritrean People's Liberation Front (EPLF).²⁹ Cross-border programmes were tolerated by Sudan, allegedly to prevent an inflow of refugees in its territory.³⁰

This conduct seems to confirm, like in the case of Cambodia, an interpretation of IHL by the ICRC and other NGOs (funded by States) as allowing them to offer their services to all Parties in NIAC and provide relief in rebel-held areas without the consent of the government, or even against its explicit refusal.

²⁵ See Nigel Nicholds and John Borton, *The Changing Role of NGOs in the Provision of Relief and Rehabilitation Assistance: Case Study 1 – Afghanistan/Pakistan*, ODI Working Paper 74 (London: Overseas Development Institute, January 1994), in particular 43-64 and 93-97.

²⁶ See, for example, De Waal (1997), *supra* fn. 5, 115-121; Rosario Ojinaga Ruiz, *Emergencias Humanitarias y Derecho Internacional: la Asistencia a las Víctimas* (Valencia: Tirant lo Blanch, 2005), 317; African Rights (1994), *supra* fn. 4, 11-12. Ethiopia was already a Party to GC IV, while it became a Party to AP I on April 8, 1994.

²⁷ See De Waal (1997), *supra* fn. 5, 120-121 and 123-127.

²⁸ See Section 5.1.

²⁹ See De Waal (1997), *supra* fn. 5, 127-132. On ICRC, see Forsythe (2005), *supra* fn. 7, 80-81, 100, and 303. On Ethiopia's opposition to cross-border operations, see Human Rights Watch, "Evil Days – 30 Years of War and Famine in Ethiopia," September 1991, 177-178, 204, and 285. Available at <http://www.hrw.org/sites/default/files/reports/Ethiopia919.pdf> (accessed June 30, 2013).

³⁰ See U.S. Congress, "Famine Relief in Ethiopia: An Update – Hearing before the International Task Force of the Select Committee of Hunger," House of Representatives, One Hundred First Congress, Second Session, Washington DC, May 08, 1990, Serial no. 101-19. Available at http://www.developmentgap.org/africa/Famine_relief_Ethiopia_Hearing_before_international_task_force_select_committee_on_hunger_house_of_representatives.pdf (accessed June 30, 2013).

This interpretation is compatible with Common Article 3, but clearly not with Article 18(2) AP II.³¹ In any case, given the sensitivity of the issue, no right to provide relief without governmental consent was claimed publicly (especially not by States), the aid was provided clandestinely and without publicity, and some other organisations such as UNICEF refused to take part in this operation, probably because of fear of the consequences they would have suffered from the government by choosing to operate without consent.³² Indeed, for example, an ICRC staff later reported:

During the Ethiopian civil war we embarked on covert cross border activity between Sudan, Eritrea and Tigray. Many humanitarian organisations were there, and hundred of trucks entered to “liberate Eritrea” and provide food supplies. When a flood occurred in south Sudan, the humanitarian community turned its attention to Khartoum, and talked to the government on our transparency. The government responded stunned, are you joking? These were the same people who had illegally helped humanitarian organisations with access into Eritrea, so they blocked relief aid for two years.³³

The need for governmental consent to provide relief to rebel-held areas in NIAC was more openly challenged in 1987, by India. The government of Sri Lanka was engaged in a NIAC against the Liberation Tigers of Tamil Eelam (LTTE) and it was enforcing a blockade against the Jaffna peninsula, controlled by the LTTE.³⁴ India asked governmental permission to provide humanitarian relief to the civilian population in the peninsula but without success. After some ships sent by the Indian Red Cross were obliged to return to India without discharging their humanitarian cargo, India decided to send some military airplanes, which entered the Sri Lankan air space without authorisation and dropped relief on the Jaffna peninsula. This intervention, which did not involve the use of armed force, was justified by India as ‘prompted by “the continuing deteriorating of the conditions of the civilian population” in northern Sri Lanka, which ... was of “legitimate concern to India and a threat to peace and security in the region.”’³⁵ Sri Lanka lamented a violation of its sovereignty and an unlawful interference in its internal affairs, and the intervention was neither widely condemned nor widely approved by other States or by the UNSC.³⁶

³¹ According to art. 1(4) AP I, AP I applies also to armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination. However, Ethiopia became a Party to AP I only in 1994.

³² See De Waal (1997), *supra* fn. 5, 130-131.

³³ Geoff Loane, Head of Mission ICRC London, “Barriers to Negotiating Humanitarian Access: The Experience of the ICRC,” Opening statement at the Norwegian Refugee Council Conference on Humanitarian Access, Oslo, September 06, 2010, 3. Available at <http://www.nrc.no/?did=9510371> (accessed June 12, 2013).

³⁴ Sri Lanka was a Party to GC IV, but it was not (and is not) a Party to AP II.

³⁵ Steven R. Weisman, “India Airlifts Aid to Tamil Rebels,” *The New York Times*, June 05, 1987, available at <http://www.nytimes.com/1987/06/05/world/india-airlifts-aid-to-tamil-rebels.html?pagewanted=all&src=pm> (accessed April 18, 2012). On other possible reasons triggering the intervention, see Yogesh K. Tyagi, “The Concept of Humanitarian Intervention Revisited,” *Michigan Journal of International Law* 16, no. 3 (Spring 1995), 896.

³⁶ It is reported that

The U.S. Government expressed “regrets.” The Government of China called the humanitarian operation an intervention in Sri Lanka’s internal affairs. All the South Asian countries disapproved of the intervention, and the South Asian Association for

Governmental consent to relief actions in NIACs thus started being challenged, more or less openly, by non-State actors and in one instance by a State during the Cold War, possibly starting a trend towards the abolition of such a requirement at least in relation to rebel-held areas accessible without transiting through territories controlled by the Government. The ICJ seemed to offer support to this in its 1986 judgement in the *Nicaragua* case.

3.1.2. The ICJ and the *Nicaragua* Case

In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* the ICJ had to pronounce itself on the support given by the U.S. to the rebels which were opposing the government of Nicaragua, the *contras*. Since, starting from September 1984, the U.S. had decided to cut off all its aid to the *contras* except for ‘humanitarian assistance’,³⁷ the ICJ had to evaluate the content and modalities of the provision of humanitarian assistance to another State in NIAC under international law. In June 1985, the U.S. Congress had approved an appropriation of \$27 million to be destined to ‘humanitarian assistance to the Nicaraguan democratic resistance’, meaning that this aid could not be used by the CIA or the Department of Defence and that, according to the meaning attributed to ‘humanitarian assistance’ in the law, it covered ‘the provision of food, clothing, medicine, and other humanitarian assistance, and it d[id] not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death.’³⁸

The Court stated that not just the offer, but also the provision of humanitarian assistance in NIAC, differently for example from the provision of weapons to rebels, ‘cannot be regarded as unlawful intervention’, thus contrary to Article 2(4) of the UN Charter and the principle of non-intervention in the internal affairs of other States (*jus ad bellum*), ‘or as in any other way contrary to international law’, but this

Regional Cooperation (SAARC) did not condemn India only because of India's de facto veto. Sri Lanka did not raise this question at the United Nations because of its international isolation and also for fear of exposure of its questionable human rights record.

Ibid., 896.

Shortly afterwards, an agreement was reached by India and Sri Lanka on the modalities for the delivery of humanitarian assistance to the Jaffna peninsula, including distribution by a governmental body and supervision by the National Red Cross Societies of India and Sri Lanka. See, for example, Ruth Abril Stoffels, *La Asistencia Humanitaria en los Conflictos Armados: Configuración Jurídica, Principios Rectores y Mecanismos de Garantía* (Valencia: Tirant lo Blanch, 2001), 326-327; Ojinaga Ruiz (2005), *supra* fn. 26, 332-333.

³⁷ See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, 27 June 1986, ICJ Reports 1986 at 14, par. 94.

³⁸ *Ibid.*, par. 97.

assistance to be qualified as such shall respect the first and second of the Fundamental Principles of the Red Cross—humanity and impartiality (in the sense of non-discrimination).³⁹ According to the ICJ,

if the provision of “humanitarian assistance” is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely “to prevent and alleviate human suffering”, and “to protect life and health and to ensure respect for the human being”; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.⁴⁰

The judgment thus offers two profiles relevant to this study. First, it seems to endorse the lawfulness of the provision of humanitarian assistance that satisfies the principles of humanity and impartiality in NIAC without governmental consent.⁴¹ Second, the ICJ made reference to the limited purposes that assistance must have in order to be truly humanitarian, and to the principle of non-discrimination that must be respected in the distribution of this assistance, to ensure its strictly humanitarian nature.

Regarding the first profile, while the Court appears to offer a legal basis to the conduct adopted by India the following year, it should be acknowledged that its reasoning does not seem to focus strictly on the relevant IHL provisions on relief actions in favour of civilians. Rather, it seems to deny the qualification of humanitarian assistance to the aid given by the U.S. to the *contras* in Nicaragua due to the fact that it did not respect the principle of non-discrimination, being addressed to the *contras* only and not to everybody in need in Nicaragua. It is excluded that the ‘provision of strictly humanitarian aid to *persons or forces* in another country’ amounts to unlawful intervention, but it is not clarified whether (thus not affirmed that) providing such assistance directly to a Party to the conflict without monitoring its distribution, or providing it to a ‘force’ would still fulfil the criteria of humanitarian and impartial character and be in accordance with IHL.

It is therefore arguable that the statement by the ICJ should simply be interpreted as excluding the possibility that in principle the provision of goods essential for the survival of persons, provided to all in need without any adverse discrimination, might automatically amount to a violation of international law. IHL then provides specific criteria at the disposal of Parties to the conflict and other transit States, such as the need for consent (and the right to legitimately deny it if the relief action does not fulfil the prescribed conditions) and the possibility of imposing technical agreements and supervision, to make sure that such

³⁹ Ibid., par. 242-243.

⁴⁰ Ibid., par. 243.

⁴¹ In this sense, see, for example, Joaquín Alcaide Fernández, “La Asistencia Humanitaria en Situaciones de Conflicto Armado,” in *La Asistencia Humanitaria en Derecho Internacional Contemporáneo*, by Joaquín Alcaide Fernández, María del Carmen Márquez Carrasco, and Juan Antonio Carrillo Salcedo, (Seville: Universidad de Sevilla, 1997), 69-70. Interpreting the judgement as not requiring consent only for the provision of relief supplies (without personnel entering with these supplies), to be distributed to all Parties to the conflict without discrimination, see Dietrich Schindler, “Humanitarian Assistance, Humanitarian Interference and International Law,” in *Essays in Honour of Wang Tieya*, ed. Ronald St. J. Macdonald (Dordrecht [etc.]: Nijhoff, 1994), 699.

provision of relief does indeed respect the principle of non-discrimination and benefits only civilians or other protected persons who are entitled to receive it under IHL.⁴² In any case, the lawfulness of the provision of assistance in NIAC without consent from the State by actors other than States, such as IGOs or NGOs, is not dealt with in the ICJ judgement and will have to be investigated in subsequent practice.

In relation to the reference by the ICJ to the principles of humanitarian assistance, scholars have criticised the choices not to mention the principle of neutrality and to affirm the need to provide assistance to both Parties to a NIAC in order to fulfil the principle of non-discrimination. According to Kalshoven, a careful reading of the GCs and AP I shows that ‘neither the Red Cross principle of impartiality, including non-discrimination, nor that of neutrality require a National Society to lend, or even offer, assistance to all parties to an international armed conflict’.⁴³ Similarly in case of NIAC, even if treaty-law is silent on this point, in his view if ‘a National Society not located in the country at war provides assistance to those in need on one side only, this activity need not bring it into conflict with the Fundamental Principles of the Red Cross’, *if such a decision is taken not on political grounds but rather on the basis of the principles of neutrality and impartiality*, for example due to ‘considerations such as the human suffering caused by the conflict and the absence on the side of the Contras of adequate medical and other needed facilities’.⁴⁴

The offer of services to all Parties to the conflict is usually a characteristic of the ICRC, but even this organisation does not always operate in the territory controlled by all Parties, since it generally intervenes only with the consent of the Parties concerned.⁴⁵ In the case of a State, offers of assistance to a Party to the conflict only will most probably be connected to political sympathy and thus, as clarified by Kalshoven, ‘inherently partial in nature’.⁴⁶

However, it may be argued that the reasoning of the ICJ is correct, if it is interpreted in the sense that in principle humanitarian assistance in NIAC should be offered and provided to all in need, unless humanitarian criteria themselves lead to decide to provide it to civilians under the control of one Party only.⁴⁷ Even if assistance is provided to one Party only, it should be given to all those in need in the territory

⁴² Criticising the ICJ for not having resorted to IHL provisions, differentiating relief actions in favour of civilians from the provision of relief to rebels, see Ojinaga Ruiz (2005), *supra* fn. 26, 226-228. Interpreting the ICJ judgment as not implying the lawfulness of relief actions by States or IGOs in the absence of consent, see also Abril Stoffels (2001), *supra* fn. 36, 308-311.

⁴³ Frits Kalshoven, “Impartiality and Neutrality in Humanitarian Law and Practice,” *International Review of the Red Cross* 29, no. 273 (November-December 1989), 525.

⁴⁴ *Ibid.*, 527.

⁴⁵ See *Ibid.*, 527-532.

⁴⁶ *Ibid.*, 519.

⁴⁷ In favour of such a narrow definition of ‘humanitarian assistance’ provided by States to Parties to a NIAC, see Alcaide Fernández (1997), *supra* fn. 41, 71-77.

controlled by such Party, without any discrimination except on humanitarian grounds.⁴⁸ In addition, this assistance should be used to benefit those in need and not to interfere in the hostilities. In this sense, Torrelli lamented the absence in the ICJ judgment of any reference to the principle of neutrality, given that it is ‘the prime condition for humanitarian action’,⁴⁹ and indeed at no point does the ICJ specify that beneficiaries of this aid can be only civilians or other persons protected under the GCs (and APs), rather it refers to ‘the provision of strictly humanitarian aid to persons *or forces* in another country, whatever their political affiliations or objectives’.⁵⁰ Reference to military neutrality—the need for the aid not to interfere in the conflict, not just in terms of its aim, but also its actual effect—would have been appropriate.⁵¹

In sum, the judgment cannot be arguably seen as legitimising unilateral relief actions in favour of rebels in NIAC against the will of the Government, and at the same time it should not be interpreted as preventing offers of relief to one Party only. This interpretation seems to find support, as will be analysed in the rest of this Chapter, in post-Cold War practice, which has been characterised by growing attention to the provision of humanitarian assistance to civilians in conflict, due to the end of the Cold War dynamics, the outbreak of numerous conflicts, mostly NIACs, the significant challenges posed by belligerents in many of these conflicts to the legal regime for humanitarian assistance to civilians provided by IHL treaties, and the increase of NGOs in terms of number and influence.

3.2. Humanitarian Assistance since the 1990s: Under the Spotlight

The 1990s signed a marked increase in attention to the issue of humanitarian relief to civilians in conflict, especially within the framework of the UN. Bernard Kouchner had advocated in the 1970s the possibility for humanitarian NGOs to intervene in armed conflicts absent consent from national authorities without violating international law, arguing that NGOs would not be bound by the duty of non-interference in the internal affairs of a State and might be punished only under the domestic law of the State where they

⁴⁸ This requirement would be in application of ‘a fundamental principle of application which applies not only to Part II [of the AP I, on wounded, sick and shipwrecked], but to all the Conventions and Protocols, namely, the fact that this Part applies to persons concerned *without any adverse distinction*’, so that ‘it is obviously incompatible with this principle to refuse a blanket, to reduce food rations, or to disadvantage any persons or categories of persons in any way solely because they belong to a particular race or practise a particular religion.’ ICRC Commentary APs, 139 (par. 417, commentary to art. 9(1) AP I). Similarly, on the duty of medical personnel to operate without discriminating on grounds different from medical ones, see Ibid., 147-148 (pars. 452-454, commentary to art. 10(2) AP I).

⁴⁹ Maurice Torrelli, “From Humanitarian Assistance to ‘*Intervention on Humanitarian Grounds*’?,” *International Review of the Red Cross* 32, no. 288 (May-June 1992), 240.

⁵⁰ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), supra fn. 37, par. 242. Emphasis added.

⁵¹ See also Abril Stoffels (2001), supra fn. 36, 352-357; Ojinaga Ruiz (2005), supra fn. 26, 227.

intervene.⁵² In the late 1980s-early 1990s, he was among the proponents of a *droit d'ingérence*, meaning a right for States and IGOs to have access to victims of armed conflicts, even in the absence of the consent of the Party controlling the territory.⁵³

Moreover, France was the driving force behind the adoption of some of the first and most important UNGA resolutions on humanitarian assistance in the early 1990s, which have since been matched by attention to this topic and the adoption of measures in this field by the UNSC, in relation to most of the armed conflicts it has dealt with since the end of the Cold War. More in general, given the growing size of the phenomenon of humanitarian assistance, the UN has devoted increasing attention to the issue, its regulation and principles, and humanitarian organisations and NGOs have multiplied and grown in size and visibility, trying to influence the practice of Parties to conflicts and the UN.

3.2.1. The Practice within the UN Framework

The topic of humanitarian assistance has emerged since the beginning of the 1990s as a focus of UN attention, both in general terms through (increasingly detailed) thematic resolutions and with reference to specific armed conflicts. The UNGA and then ECOSOC have mostly looked at humanitarian assistance in thematic resolutions, on the coordination of the humanitarian system of the UN and on the safety and security of UN and humanitarian personnel. In addition to this, the UNGA and the Commission on Human Rights, now Human Rights Council, have focused on specific conflicts not on the agenda of the UNSC. The UNSC, for its part, has not only adopted thematic resolutions related to humanitarian assistance, but also called upon the Parties to most of the conflicts on its agenda to ensure humanitarian access and guarantee the safety, security, and freedom of movement of humanitarian workers. It has condemned obstacles to the work of humanitarian personnel; provided a special place for humanitarian assistance within sanctions regimes; and participated in the trend of establishing fact-finding missions and commissions of inquiry in relation to specific armed conflicts or military operations, which through their reports have contributed *inter alia* to the clarification of the legal regime in the area of interest to this study.

⁵² See Bettati (1996), *supra* fn. 11, 12. For a detailed analysis of this issue, see Section 6.2.2.1.1.

⁵³ See, for example, Mario Bettati and Bernard Kouchner, *Le Devoir d'ingérence* (Paris: Denoël, 1987); Bettati (1996), *supra* fn. 11. On the concept, see also, for example, Yves Sandoz, "'Droit' ou 'Devoir d'ingérence' and the Right to Assistance: The Issues Involved," *International Review of the Red Cross* 32, no. 288 (May-June 1992): 215-227; Alain Pellet, "Droit d'ingérence ou devoir d'assistance humanitaire? Problèmes politiques et sociaux," *La Documentation française* no. 758-759 (December 1995); Olivier Corten and Pierre Klein, *Droit d'ingérence ou obligation de réaction?*, 2nd ed. (Brussels: Bruylant, 1996); Olivier Corten, "Les ambiguïtés du droit d'ingérence humanitaire," *Le courrier de l'UNESCO* (July/August 1999): 57-59.

3.2.1.1. *The Instrument of Thematic Resolutions*

At the beginning of the 1990s, the UNGA started adopting a variety of thematic resolutions devoted to humanitarian assistance, such as the annual resolutions on strengthening the coordination of the emergency humanitarian assistance of the UN and on the safety and security of humanitarian personnel and protection of UN personnel. It was undoubtedly the UNGA that played the central role in posing the bases of the UN humanitarian apparatus and in providing guidance on humanitarian assistance and the humanitarian community more in general.

Since the end of the 1990s, thematic resolutions on humanitarian assistance have been adopted also by the newly established (in 1998) ECOSOC humanitarian segment and by the UNSC, which has focused in particular on protection of civilians (POC). Moreover, some UNGA resolutions first developed in the 1990s have been repeatedly refined through the addition of new provisions, arguably also in response to challenges faced by actors in the field and concerns voiced by the humanitarian community.

As a starting point, it should be clarified that no UN organ has formulated any clear definition of humanitarian assistance or relief. Still, resolutions by both the UNGA and the UNSC devoted to de-mining classify this activity as humanitarian,⁵⁴ and UNGA resolutions devoted to the protection of children feature education as an additional component of humanitarian assistance for children.⁵⁵ Furthermore, the UNGA and UNSC have sometimes underlined that humanitarian assistance includes ‘the supply of food, medicines, shelter and health care, for which access to victims is essential’,⁵⁶ ‘food, water, electricity, fuel and

⁵⁴ See, for example, A/RES/52/173, 18 December 1997, par. 11; A/RES/53/26, 17 November 1998, par. 12; A/RES/54/191, 17 December 1999, pars. 17-18; A/RES/55/120, 6 December 2000, pars. 18-19; A/RES/56/219, 21 December 2001, pars. 19-20; A/RES/58/127, 19 December 2003, par. 7; A/RES/60/97, 8 December 2005, par. 2(c); S/RES/1005 (1995), 17 July 1995, preamble; S/PRST/1996/37, 30 August 1996, 1-2; S/RES/1320 (2000), 15 September 2000, par. 2(h); S/PRST/2002/7, 28 March 2002, 2; S/RES/1590 (2005), 24 March 2005, par. 4(c); S/RES/1706 (2006), 31 August 2006 (12-0-3), par. 9(c). Similarly, see *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects*, Geneva, May 3, 1996, entered into force December 3, 1998 (2048 UNTS 93), hereinafter Amended Protocol II Certain Conventional Weapons Convention, art. 12(5)(a)(ii).

⁵⁵ See, for example, A/RES/51/77, 12 December 1996, par. 30; A/RES/52/107, 12 December 1997, par. 13; A/RES/59/314, 13 September 2005, par. 118; A/RES/60/1, 16 September 2005, par. 118; A/RES/64/290, 9 July 2010, par. 7; A/RES/67/87, 13 December 2012, par. 23 (on strengthening of the coordination of emergency humanitarian assistance of the United Nations); S/RES/1261 (1999), 30 August 1999, par. 17(a).

The UNSC, in its thematic resolution on children and armed conflict has highlighted ‘the particular needs of children including, inter alia, the provision and rehabilitation of medical and educational services to respond to the needs of children, the rehabilitation of children who have been maimed or psychologically traumatized, and child-focused mine clearance and mine-awareness programmes.’ S/RES/1261 (1999), 30 August 1999, par. 17(a).

⁵⁶ A/RES/46/182, 19 December 1991, Annex, par. 6. Similarly, see A/RES/45/100, 14 December 1990, par. 4; A/RES/51/194, 17 December 1996, preamble; A/RES/51/240, 20 June 1997, pars. 156-157; A/RES/52/211 A, 19 December 1997, par. 6; A/RES/53/1 O, 17 December 1998, preamble; A/RES/53/203 B, 18 December 1998, par. 6; A/RES/54/96 J, 17 December 1999, preamble; A/RES/54/189 B, 17 December 1999, par. 10; A/RES/56/112, 14 December 2001, preamble; A/RES/65/100, 10 December 2010,

communications’,⁵⁷ ‘fuel used for humanitarian purposes’,⁵⁸ ‘electricity and water supply’,⁵⁹ ‘the provision and rehabilitation of medical and educational services to respond to the needs of children, the rehabilitation of children who have been maimed or psychologically traumatized, and child-focused mine clearance and mine-awareness programmes’,⁶⁰ and ‘food, fuel and medical treatment’.⁶¹ Interestingly, for the first time in 2013 ECOSOC in its annual resolution on ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’ has referred to ‘the basic humanitarian needs of affected populations, including food, shelter, health, clean water *and protection*’.⁶²

The main points that have been repeatedly affirmed in these thematic (non-binding) resolutions are the primary responsibility of Parties to the conflict to satisfy the basic necessities of civilians in need, and their obligation to allow humanitarian access and facilitate the provision of humanitarian assistance that respect the principles of humanity, impartiality, neutrality, and independence, as well as to guarantee the safety, security and freedom of movement of humanitarian relief personnel.

3.2.1.1.1. The Primary Responsibility of the Parties to the Conflict and the Role of Local Actors

In 1988 and 1990, France promoted the adoption by the UNGA of two milestone resolutions devoted to humanitarian assistance, in particular to ‘humanitarian assistance to victims of natural disasters and similar emergency situations’, UNGA resolutions 43/131 of 8 December 1988 and 45/100 of 14 December 1990.⁶³ The general reference to ‘similar emergency situations’ is due to opposing views among States on the inclusion in the scope of the resolution of political catastrophes;⁶⁴ while not referring explicitly to armed conflict, it has been argued that the two resolutions would cover this kind of situation according to their promoter, the French Mario Bettati.⁶⁵ They were followed on 19 December 1991 by UNGA resolution

preamble. See also A/RES/51/242, Annex II, par. 18: ‘Foodstuffs, medicines and medical supplies should be exempted from United Nations sanctions regimes. Basic or standard medical and agricultural equipment and basic or standard educational items should also be exempted; a list should be drawn up for that purpose. Other essential humanitarian goods should be considered for exemption by the relevant United Nations bodies, including the sanctions committees.’ All resolutions adopted without vote.

⁵⁷ S/RES/859 (1993), 24 August 1993, par. 3.

⁵⁸ S/PRST/1994/2, 10 January 1994.

⁵⁹ S/PRST/1998/26, 31 August 1998.

⁶⁰ S/RES/1261 (1999), 30 August 1999, par. 17(a).

⁶¹ S/RES/1860 (2009), 8 January 2009 (14-0-1), par. 2. See also S/PRST/2009/1, 14 January 2009, Annex: Aide Memoire For the consideration of issues pertaining to the protection of civilians in armed conflict, Addendum: Selection of agreed language.

⁶² E/RES/2013/6, 17 July 2013, par. 27. The resolution was adopted by consensus.

⁶³ See Mario Bettati, “Ingérence, Intervention ou Assistance Humanitaire?,” in *International Legal Issues Arising under the United Nations Decade of International Law*, ed. Najeeb Al-Nauimi and Richard Meese (The Hague [etc.]: Nijhoff, 1995), 935-962.

⁶⁴ See Bettati (1996), *supra* fn. 11, 106.

⁶⁵ See Maurice Torrelli, “La neutralité en question,” *Revue Générale de Droit International Public* 96, no. 1 (1992), 41; Schindler (1994), *supra* fn. 41, 690.

46/182, the first one on the ‘Strengthening of the coordination of humanitarian emergency assistance of the United Nations’, which refers in broader terms to ‘natural disasters and other emergencies’ (also mentioning complex emergencies, thus armed conflict) and remains to date the main UN source for the guiding principles regulating the provision of humanitarian assistance, listed in its Annex.

All these three resolutions acknowledge the primary role of the affected State and/or of the Parties to the conflict in the satisfaction of the basic needs of civilians under their control, and this role has been repeatedly affirmed throughout the years in other resolutions adopted by the UNGA,⁶⁶ in thematic resolutions and presidential statements that the UNSC started adopting towards the end of the 1990s, for example on children and armed conflict and on the protection of civilians in armed conflict,⁶⁷ and in statements by States representatives within the UNGA, the UNSC, and the ECOSOC in the course of thematic debates.⁶⁸

⁶⁶ On the respect for sovereignty and the primary role of the affected State, see, for example, A/RES/43/131, 8 December 1988, preamble; A/RES/45/100, 14 December 1990, preamble; A/RES/46/182, 19 December 1991, Annex, pars. 3-4; A/RES/51/194, 17 December 1996, preamble; A/RES/51/240, 20 June 1997, pars. 156-157; A/RES/57/150, 16 December 2002, preamble; A/RES/58/114, 17 December 2003, preamble; A/RES/59/141, 15 December 2004, preamble. All resolutions adopted without vote.

On the primary role of the Parties to the conflict to protect civilians and satisfy their basic needs, see also, for example, S/PRST/2000/1, 13 January 2000, 1; S/RES/1653 (2006), 27 January 2006, par. 10; S/RES/2086 (2013), 21 January 2013, par. 8(h); ECOSOC, Humanitarian Affairs Segment, Agreed conclusions 1998/1, par. 4; ECOSOC Resolution 2003/5, 15 July 2003, par. 34.

⁶⁷ Stressing the primary responsibility of national authorities for providing protection and relief for children affected by armed conflict, see S/PRST/2008/6, 12 February 2008, 1; S/PRST/2009/9, 29 April 2009, 3; S/RES/1882 (2009), 4 August 2009, preamble; S/RES/1998 (2011), 12 July 2011, preamble; S/RES/2068 (2012), 19 September 2012 (11-0-4), preamble; S/PRST/2013/8, 17 June 2013, 1.

Stating the primary responsibility of Parties to armed conflicts to take all feasible steps to ensure the protection of affected civilians, see S/RES/1674 (2006), 28 April 2006, preamble; S/RES/1738 (2006), 23 December 2006, preamble; S/PRST/2008/18, 27 May 2008, 1; S/PRST/2009/1, 14 January 2009, 1; S/RES/1894 (2009), 11 November 2009, preamble; S/PRST/2010/25, 22 November 2010, 1; S/PRST/2013/2, 12 February 2013, 1.

⁶⁸ See, for example, the annual thematic debate on ‘Strengthening of the coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance’ within the UNGA: A/53/PV.58 and A/53/PV.59, 16 November 1998; A/54/PV.58 and A/54/PV.59, 19 November 1999; A/55/PV.71 and A/55/PV.72, 24 November 2000; A/57/PV.58 and A/57/PV.59, 25 November 2002; A/58/PV.37 and A/58/PV.38, 20 and 21 October 2003; A/59/PV.51 and A/59/PV.52, 11 November 2004; A/60/PV.51 and A/60/PV.52, 14 November 2005; A/61/PV.52 and A/61/PV.53, 13 November 2006; A/62/PV.53 and A/62/PV.54, 19 November 2007; A/63/PV.43 and A/63/PV.45, 10 and 11 November 2008; A/64/PV.59 and A/64/PV.60, 7 December 2009; A/65/PV.67, 15 December 2010; A/66/PV.86, 15 December 2011; A/67/PV.55, 13 December 2012.

See also the annual debate of the humanitarian affairs segment of the ECOSOC, on ‘Special economic, humanitarian and disaster relief assistance’.

In the context of the UNSC, see, for example, the debates on ‘Protection for humanitarian assistance to refugees and others in conflict situations’: S/PV.3778 (and Resumption 1), 21 May 1997; S/PV.3932, 29 September 1998. The debate on ‘Protection of United Nations personnel, associated personnel and humanitarian personnel in conflict zones’: S/PV.4100 (and Resumption 1), 9 February 2000. The debate on ‘Maintaining peace and security: Humanitarian aspects of issues before the Security Council’: S/PV.4109, 13 March 2000. The debates on ‘Civilians in armed conflict’: S/PV.4990 (and Resumption 1), 14 June 2004; S/PV.5100 (and Resumption 1), 14 December 2004; S/PV.5319, 9 December 2005; S/PV.5577 (and Resumption 1), 4 December 2006; S/PV.5703, 22 June 2007; S/PV. 5898 (and Resumption 1), 27 May 2008; S/PV.6066 (and Resumption 1), 14 January 2009; S/PV.6151 (and Resumption 1), 26 June 2009; S/PV.6354 (and Resumption 1), 7 July 2010; S/PV.6427 (and Resumption 1), 22 November 2010; S/PV.6531 (and Resumption 1), 10 May 2011; S/PV.6650 (and Resumption 1), 9 November 2011; S/PV.6790, 25 June 2012; S/PV.6917 (and Resumption 1), 12 February 2013.

The same responsibility has been highlighted with reference to assistance and protection to IDPs and refugees that find themselves within the jurisdiction of a State.⁶⁹ In this field, the UNGA has been clearly inspired in its resolutions by the (non-binding) *Guiding Principles on Internal Displacement*,⁷⁰ presented to the Commission on Human Rights in 1998 and since then referred to by various intergovernmental institutions, including the UNGA.⁷¹ The guiding principles spell out rights and duties, acknowledging that '[n]ational authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction' and that '[i]nternally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities' and 'shall not be persecuted or punished for making such a request.'⁷² Furthermore, '[a]ll humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination'.⁷³ Given that national authorities are primarily responsible for the provision of humanitarian assistance,⁷⁴ and that the principles apply to *all* humanitarian assistance, one might infer that national

⁶⁹ Since 2001, in the bi-annual resolution on protection and assistance to IDPs, the UNGA has *emphasised* the primary responsibility of States 'to provide protection and assistance to internally displaced persons within their jurisdiction' and *called upon* Governments to provide protection and assistance to IDPs, as well as 'to facilitate the efforts of the relevant United Nations agencies and humanitarian organizations in these respects, including by further improving access to internally displaced persons and by maintaining the civilian and humanitarian character of camps and settlements for internally displaced persons where they exist'. A/RES/56/164, 19 December 2001, preamble and par. 10; A/RES/58/177, 22 December 2003, preamble and par. 11; A/RES/60/168, 16 December 2005, preamble and par. 12; A/RES/62/153, 18 December 2007, preamble and par. 15; A/RES/64/162, 18 December 2009, preamble and par. 16; A/RES/66/165, 19 December 2011, preamble and par. 18. All adopted without vote.

Similarly, the UNGA annual resolution on assistance to refugees, returnees and displaced persons in Africa, adopted since 2000, has included since 2008 a reminder that 'host States have the primary responsibility for the protection of and assistance to refugees on their territory', and that 'States have the primary responsibility to provide protection and assistance to internally displaced persons within their jurisdiction'. A/RES/63/149, 18 December 2008, preamble; A/RES/64/129, 18 December 2009, preamble; A/RES/65/193, 21 December 2010, preamble; A/RES/66/135, 19 December 2011, preamble; A/RES/67/150, 20 December 2012, preamble. Moreover, the UNGA has '[c]all[ed] upon States, in cooperation with international organizations, within their mandates, to take all necessary measures to ensure respect for the principles of refugee protection and, in particular, to ensure that the civilian and humanitarian nature of refugee camps is not compromised by the presence or the activities of armed elements'. A/RES/55/77, 4 December 2000, par. 17. Similarly, see A/RES/56/135, 19 December 2001, par. 15; A/RES/57/183, 18 December 2002, par. 17; A/RES/58/149, 22 December 2003, par. 17; A/RES/59/172, 20 December 2004, par. 12; A/RES/60/128, 16 December 2005, par. 13; A/RES/61/139, 19 December 2006, par. 14; A/RES/62/125, 18 December 2007, par. 16; A/RES/63/149, 18 December 2008, par. 16; A/RES/64/129, 18 December 2009, par. 17; A/RES/65/193, 21 December 2010, par. 17; A/RES/66/135, 19 December 2011, par. 17; A/RES/67/150, 20 December 2012, par. 16. All adopted without vote.

⁷⁰ *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39 – Addendum: Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 11 February 1998, hereinafter *Guiding Principles on Internal Displacement*.

⁷¹ See Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, Studies in Transnational Legal Policy no. 38 (Washington, DC: The American Society of International Law, 2008), vii-ix. The view has been taken that, despite not being a binding document, the Guiding Principles 'reflect and are consistent with international human rights law and international humanitarian law and to a large extent thus codify and make explicit guarantees protecting internally displaced persons that are inherent in these bodies of law.' *Ibid.*, viii.

⁷² Principles 3 and 25(1) *Guiding Principles on Internal Displacement*. Furthermore, individuals should be protected from displacement and their fundamental rights should be protected in the course of displacement. See principles 5-9 and 10-23 respectively *Guiding Principles on Internal Displacement*.

⁷³ Principle 24(1) *Guiding Principles on Internal Displacement*. Emphasis added.

⁷⁴ In this sense, see also the *Compilation and analysis of legal norms* prepared by Mr. Deng: *Internally displaced persons-Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57 – Compilation and analysis of legal norms*, E/CN.4/1996/52/Add.2, 5 December 1995, pars. 380-381.

authorities have to respect these principles when assisting their own displaced nationals. In this sense, the principles would apply beyond external relief, also to local assistance.

While the UNGA and ECOSOC thematic resolutions on the strengthening of the coordination of the UN emergency assistance arguably refer to external relief actions, as will be explained in the next Section, they have featured since 2006 an encouragement to States ‘to create an enabling environment for the capacity-building of local authorities and local and national non-governmental and community-based organizations in providing humanitarian assistance’.⁷⁵ The UN bodies have not questioned or supplemented the existing IHL regime, which requires local relief societies to be recognised by the authorities, but emphasised the role of these actors, acknowledging the increasing risks they run: for example, the UNGA thematic resolution on the safety and security of UN and humanitarian personnel has included since 1999 a focus on locally recruited staff and their security.⁷⁶

3.2.1.1.2. Consent, Humanitarian Access and the Facilitation of Humanitarian Assistance

As mentioned, the guiding principles on the provision of humanitarian assistance listed in the Annex to UNGA resolution 46/182 have emerged as the main reference in this field within the UN system. It is arguable that at least some of these principles aim to apply to humanitarian assistance in general, not only to that provided within the framework of the UN system.⁷⁷ The resolution begins by stating ‘the need to strengthen further and make more effective the collective efforts of the international community, *in particular* the United Nations system, in providing humanitarian assistance,’ and it continues by adopting the

⁷⁵ A/RES/61/134, 14 December 2006, par. 4. Similarly, see A/RES/62/94, 17 December 2007, par. 12; A/RES/63/139, 11 December 2008, par. 10; A/RES/64/76, 7 December 2009, par. 11; A/RES/65/133, 15 December 2010, par. 12; A/RES/66/119, 15 December 2011, par. 14. All resolutions adopted without vote. Similarly, see ECOSOC Resolution 2006/5, 18 July 2006, par. 9; ECOSOC Resolution 2007/3, 17 July 2007, par. 4; ECOSOC Resolution 2008/36, 28 July 2008, par. 2; ECOSOC Resolution 2009/3, 22 July 2009, par. 2; ECOSOC Resolution 2010/1, 15 July 2010, par. 4; ECOSOC Resolution 2011/8, 21 July 2011, par. 5; ECOSOC Resolution 2012/3, 20 July 2012, par. 5; ECOSOC Resolution 2013/6, 17 July 2013, par. 2.

⁷⁶ See A/RES/54/192, 17 December 1999, preamble; A/RES/56/217, 21 December 2011, par. 19; A/RES/57/155, 16 December 2002, par. 20; A/RES/58/122, 17 December 2003, par. 22; A/RES/59/211, 20 December 2004, par. 18; A/RES/60/123, 15 December 2005, par. 18; A/RES/61/133, 14 December 2006, par. 18; A/RES/62/95, 17 December 2007, par. 18; A/RES/63/138, 11 December 2008, par. 21; A/RES/64/77, 7 December 2009, par. 24; A/RES/65/132, 15 December 2010, par. 27; A/RES/66/117, 15 December 2011, par. 28; A/RES/67/85, 13 December 2012, par. 29.

⁷⁷ For example, the then President of the ICRC Sommaruga affirmed in 1993: ‘The Movement notes with great satisfaction that three of these principles, namely, *humanity, impartiality and neutrality*, were mentioned in General Assembly resolution 46/182 and thus recognized as the cornerstones of *all humanitarian endeavour*.’ Cornelio Sommaruga, “Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations Organization: Statement by Mr. Cornelio Sommaruga, President of the International Committee of the Red Cross at the United Nations General Assembly (New York, 20 November 1992),” *International Review of the Red Cross* 33, no. 292 (January-February 1993), 52. First emphasis in the original, second emphasis added.

text of the Annex ‘for the strengthening of the coordination of emergency humanitarian assistance of the United Nations system’.⁷⁸

However, the Annex itself opens with some general statements, including the importance of humanitarian assistance for victims of emergencies, the fact that it ‘*must* be provided in accordance with the principles of humanity, neutrality and impartiality’, and the need to respect the ‘sovereignty, territorial integrity and national unity of States’ in accordance with the UN Charter, so that ‘humanitarian assistance should be provided with the consent of the affected country and *in principle* on the basis of an appeal by the affected country,’⁷⁹ and each State has ‘the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory’.⁸⁰ After these general statements, the focus of the Annex shifts to the UN and its ‘central and unique role ... in providing leadership and coordinating the efforts of the international community to support the affected countries’, affirming that the UN ‘should ensure the prompt and smooth delivery of relief assistance in full respect of the above-mentioned principles’ and then developing guidance and new instruments in the field of humanitarian assistance provided by the UN.⁸¹

Based on this textual analysis of the Annex, it is arguable that when States recall in general terms the principles contained in resolution 46/182 as the principles to be followed when providing humanitarian assistance, they do not refer to the UN system only, but more generally to intergovernmental and non-governmental organisations providing such assistance, at least. The acknowledgement in the resolution that the affected State ‘has the primary role in the *initiation, organization, coordination, and implementation* of humanitarian assistance within its territory’ seems to imply that ‘humanitarian assistance’ covers only

⁷⁸ A/RES/46/182, preamble and par. 1. Emphasis added.

⁷⁹ A/RES/46/182, Annex, pars. 1-3. Emphasis added.

⁸⁰ A/RES/46/182, Annex, par. 4. Similarly, see /RES/43/131, 8 December 1988, par. 2; A/RES/45/100, 14 December 1990, par. 2; A/RES/51/194, 17 December 1996, preamble; A/RES/51/240, 20 June 1997, par. 157. All resolutions adopted without vote. Similarly, see ECOSOC, Humanitarian Affairs Segment, Agreed Conclusions 1998/1, par. 4; ECOSOC Resolution 2003/5, 15 July 2003, preamble; ECOSOC Resolution 2004/50, 23 July 2004, preamble; ECOSOC Resolution 2009/3, 22 July 2009, par. 9; ECOSOC Resolution 2010/1, 15 July 2010, par. 9; ECOSOC Resolution 2011/8, 21 July 2011, par. 11; ECOSOC Resolution 2012/3, 20 July 2012, par. 12; ECOSOC Resolution 2013/6, 17 July 2013, par. 10. On the primary role of the affected State in the coordination of international humanitarian assistance, see also, for example, S/RES/1637 (2005), 11 November 2005, preamble [Iraq].

On the facilitation of transit and distribution of assistance, see, for example, International Movement of the Red Cross and Red Crescent, XXIInd International Conference of the Red Cross, Istanbul, “Resolution XXVI, Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, September 1969,” pars. 5-6, recalled in UNGA Res. 2675 (XXV), 9 December 1970, par. 8; A/RES/45/100, 14 December 1990, par. 4; A/RES/46/182, 19 December 1991, Annex, pars. 6-7; A/RES/51/77, 12 December 1996, par. 30 [rights of the child]; A/RES/52/107, 12 December 1997, par. 13 [rights of the child]; A/RES/51/194, 17 December 1996, preamble; A/RES/51/242, 15 September 1997, par. 21; A/RES/59/141, 15 December 2004, preamble. All resolutions adopted without vote.

⁸¹ A/RES/46/182, Annex, pars. 12-42.

external assistance, provided either by the UN system or other organisations or States, and this seems to be confirmed more in general by references to humanitarian assistance by UN bodies in their resolutions.⁸²

Calls upon the Parties to armed conflicts to ensure humanitarian access and facilitate the provision of humanitarian assistance have been repeated also in thematic resolutions and presidential statements that the UNSC started adopting in the late 1990s,⁸³ including on children and armed conflict,⁸⁴ with a specific call upon Parties to armed conflicts to minimise the harm suffered by children through measures such as “‘days of tranquillity” to allow the delivery of basic necessary services’,⁸⁵ and the condemnation of denial of humanitarian access to children as a violation of international law;⁸⁶ and on the protection of civilians in armed conflicts.⁸⁷ In the presidential statement on POC adopted in 2010 the UNSC ‘emphasize[d] that all

⁸² A/RES/46/182, Annex, par. 4. Emphasis added. The interpretation according to which UN organs do not refer to humanitarian assistance provided by the UN system only but to external humanitarian assistance more in general finds support, for example, in the fact that the UNSC has repeatedly addressed its recommendations in a more general fashion, for example including ‘other international humanitarian organizations’ (S/PRST/1997/34, 19 June 1997, 2), ‘humanitarian workers’ (S/RES/1231 (1999), 11 March 1999, par. 4), ‘international humanitarian organizations and non-governmental organizations’ (S/PRST/2000/7, 13 March 2000, 3), ‘humanitarian organizations’ (S/RES/1296 (2000), 19 April 2000, par. 11; S/RES/1502 (2003), 26 August 2003, preamble; S/PRST/2004/46, 14 December 2004, 2), and ‘all, within the framework of humanitarian assistance’ (S/RES/1674 (2006), 28 April 2006, par. 21; S/PRST/2008/6, 12 February 2008, 1; S/PRST/2009/9, 29 April 2009, 3; S/RES/1894 (2009), 11 November 2009, par. 13; S/PRST/2010/25, 2 November 2010, 2).

Also, resolutions by UNGA and ECOSOC, even if focused on the strengthening of the coordination of emergency humanitarian assistance of the UN, have referred to the contribution made by ‘[i]ntergovernmental and non-governmental organizations working impartially and with strictly humanitarian motives’, and then to the principles of humanity, impartiality, and neutrality, to be given consideration by all those involved in providing humanitarian assistance. See ECOSOC, Humanitarian Affairs Segment, Agreed conclusions 1998/1, par. 4; A/RES/43/131, 8 December 1988 (adopted without vote), preamble and par. 3. A/RES/46/182, Annex, pars 5-6 and 2. Similarly, see A/RES/45/100, 14 December 1990 (adopted without vote), preamble and par. 4.

⁸³ On protection for humanitarian assistance to refugees and others in conflict situations, see S/PRST/1997/34, 19 June 1997, 1. See also S/PV.3778 and S/PV.3778 (Resumption 1), 21 May 1997; S/PV.3942, 10 November 1998.

On ‘Maintaining peace and security: Humanitarian aspects of issues before the Security Council’, see S/PRST/2000/7, 13 March 2000, 2.

On ‘Protection of United Nations personnel, associated personnel and humanitarian personnel in conflict zones’, see S/PRST/2000/4, 11 February 2000, 2; S/RES/1502 (2003), 26 August 2003, par. 4.

⁸⁴ S/RES/1261 (1999), 30 August 1999, par. 11; S/RES/1314 (2000), 11 August 2000, par. 7; S/RES/1379 (2001), 20 November 2001, par. 5; S/PRST/2002/12, 7 May 2002, 2; S/RES/1460 (2003), 30 January 2003, preamble; S/RES/1539 (2004), 22 April 2004, preamble; S/PRST/2008/6, 12 February 2008, 1; S/PRST/2009/9, 29 April 2009, 3.

Similarly, calling for humanitarian access and the provision of humanitarian assistance to children, see the UNGA thematic resolution on the rights of the child: A/RES/51/77, 12 December 1996, pars. 23 and 30; A/RES/52/107, 12 December 1997, VI, pars. 7 and 13; A/RES/53/128, 9 December 1998, par. 12; A/RES/54/149, 17 December 1999, par. 10; A/RES/55/79, 4 December 2000, par. 15; A/RES/57/190, 18 December 2002 (175-2-0), par. 16; A/RES/58/157, 22 December 2003 (179-1-0), par. 46(b); A/RES/59/261, 23 December 2004 (166-2-1), par. 48(d); A/RES/60/231, 23 December 2005 (130-1-0), par. 33(c); A/RES/61/146, 19 December 2006 (185-1-0), par. 36(e); A/RES/62/141, 18 December 2007 (183-1-0), par. 41(e); A/RES/63/241, 24 December 2008 (159-1-0), par. 55(g). All resolutions adopted, if not specified otherwise, without vote. Similarly, see the thematic resolutions on the rights of the child adopted (all without vote) by the Commission on Human Rights: E/CN.4/RES/1997/78, 18 April 1997, par. 12(c); E/CN.4/RES/1998/76, 22 April 1998, par. 12(c); E/CN.4/RES/2000/85, 28 April 2000, par. 49.

⁸⁵ S/RES/1261 (1999), 30 August 1999, par. 8. Similarly, see S/RES/1314 (2000), 11 August 2000, par. 14, S/RES/1379 (2001), 20 November 2001, par. 4; S/PRST/2002/12, 7 May 2002, 2; S/RES/1998 (2011), 12 July 2011, par. 4.

Similarly, see A/RES/51/77, 12 December 1996, par. 23, A/RES/52/107, 12 December 1997, VI, par. 7. Both adopted without vote.

⁸⁶ See S/RES/1539 (2004), 22 April 2004, par. 1; S/PRST/2006/48, 28 November 2006, 2; S/PRST/2008/6, 12 February 2008, 2; S/PRST/2008/28, 17 July 2008, 1; S/PRST/2009/9, 29 April 2009, 1-2; S/RES/1882 (2009), 4 August 2009, par. 1; S/PRST/2010/10, 16 Jun 2010, 1; S/RES/1998 (2011), 12 July 2011, par. 1; S/RES/2068 (2012), 19 September 2012 (11-0-4), par. 2; S/PRST/2013/8, 17 June 2013, 1. Similarly, see the thematic resolutions on the rights of the child adopted (without vote) by the Human Rights Council: A/HRC/RES/7/29, 28 March 2008, par. 38; A/HRC/RES/19/37, 23 March 2012, par. 43; A/HRC/RES/22/32, 22 March 2013, par. 25.

⁸⁷ S/PRST/1999/6, 12 February 1999, 1; S/RES/1265 (1999), 17 September 1999, par. 7; S/RES/1296 (2000), 19 April 2000, par. 8; S/PRST/2004/46, 14 December 2004, 2; S/RES/1674 (2006), 28 April 2006, par. 22; S/PRST/2008/18, 27 May 2008, 1;

civilians affected by armed conflict, including those suffering losses as a result of lawful acts under international law, *deserve assistance* and recognition in respect of their inherent dignity as human beings’,⁸⁸ without anyway referring to a right to receive assistance.

The UNSC has further ‘*[e]xpresse[d]* its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Council’s disposal in accordance with the Charter of the United Nations’.⁸⁹ In particular, noting that ‘the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict *may constitute a threat to international peace and security*, and, in this regard, reaffirm[ing] its readiness to consider such situations and, where necessary, to adopt appropriate steps’,⁹⁰ the UNSC has ‘*invite[d]* States and the Secretary-General to bring to its attention information regarding the *deliberate denial of [] access [of humanitarian personnel to civilians in armed conflicts] in violation of international law*, where such denial may constitute a threat to international peace and security,’ expressed its willingness to adopt the appropriate necessary steps based on such information,⁹¹ and ‘*[i]ndicate[d]* its willingness to consider the appropriateness and feasibility of temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population’.⁹²

Finally, in 2009, the UNSC expressed its intention, without differentiating between IAC and NIAC, to ‘[c]all on parties to armed conflict to comply with the *obligations applicable to them under international humanitarian law* to take all required steps to protect civilians and to facilitate the rapid and unimpeded passage of relief consignments, equipment and personnel’; and ‘[m]andate UN peacekeeping and other relevant missions, where appropriate, to assist in creating conditions conducive to safe, timely and unimpeded humanitarian assistance’.⁹³

S/PRST/2009/1, 14 January 2009, 2; S/RES/1894 (2009), 11 November 2009, par. 14; S/PRST/2010/25, 22 November 2010, 2; S/PRST/2013/2, 12 February 2013, 3-4.

⁸⁸ PRST/2010/25, 22 November 2010, 3. Emphasis added.

⁸⁹ S/RES/1265 (1999), 17 September 1999, par. 10; S/RES/1894 (2009), 11 November 2009, par. 4.

⁹⁰ S/RES/1296 (2000), 19 April 2000, par. 5; S/RES/1674 (2006), 28 April 2006, par. 26; S/RES/1738 (2006), 23 December 2006, par. 9; S/RES/1894 (2009), 11 November 2009, par. 3. Emphasis added.

⁹¹ S/RES/1296 (2000), 19 April 2000, par. 8. Emphasis added.

⁹² S/RES/1296 (2000), 19 April 2000, par. 15.

⁹³ S/RES/1894 (2009), 11 November 2009, par. 15. Emphasis added.

In addition to the responsibilities of the Parties to the conflict in relation to humanitarian access, sometimes the role of third States in it has been acknowledged: the Annex to UNGA resolution 46/182 urges States neighbouring the one affected by an emergency ‘to participate closely with the affected countries in international efforts, with a view to facilitating, to the extent possible, the transit of humanitarian assistance.’⁹⁴ The UNSC has called upon ‘all parties concerned, including neighbouring States,’ to cooperate fully with UN agencies in providing humanitarian access.⁹⁵

3.2.1.1.3. External Relief and the Principles of Humanitarian Assistance

The abovementioned calls for humanitarian access and the facilitation of humanitarian assistance have been generally connected to the fulfilment by such humanitarian assistance actions of the principles that ensure that they exclusively aim to help civilians in need. Already in 1970, a UNGA resolution dealing with ‘[b]asic principles for the protection of civilian populations in armed conflicts’ indirectly recalled the principle of non-discrimination as central to the provision of relief to civilians in conflict.⁹⁶ The resolution affirmed that ‘[t]he provision of *international relief* to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights’, and that in case of armed conflict, the ‘Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, *shall* apply’.⁹⁷ According to this Declaration, disaster relief in favour of the civilian population ‘is to be provided without discrimination and the offer of such relief by an impartial international humanitarian organisation ought not to be regarded as an unfriendly act.’⁹⁸

In resolution 43/131, the UNGA ‘recall[ed]’ that, in emergencies, ‘the principles of humanity, neutrality and impartiality must be given utmost consideration by all those involved in providing humanitarian assistance’, reaffirming at the same time the sovereignty of the States affected by these

⁹⁴ A/RES/46/182, Annex, par. 7. Emphasis added. On the role of neighbouring States in facilitating the transit of humanitarian assistance, see A/RES/59/141, 15 December 2004, preamble.

⁹⁵ S/RES/1296 (2000), 19 April 2000, par. 8.

⁹⁶ UNGA Res. 2675 (XXV), 9 December 1970.

⁹⁷ UNGA Res. 2675 (XXV), 9 December 1970, par. 8. Emphasis added. Similarly, see A/RES/46/182, 19 December 1991, Annex (where the external nature of humanitarian assistance can be deduced from the reference to the need for consent of the affected country and from the fact that the affected State is given the primary role in the ‘initiation, organization, coordination, and implementation’ of humanitarian assistance: pars. 3-4)

⁹⁸ International Movement of the Red Cross and Red Crescent (1969), *supra* fn. 80, 632-633 (par. 4).

emergencies.⁹⁹ Since then, similar formulations have been repeated in almost all the successive thematic resolutions adopted by the UNGA covering the provision of humanitarian assistance in armed conflict (at least one per year up to today),¹⁰⁰ and have also been recalled in the ECOSOC resolutions on the coordination of the humanitarian assistance system of the UN, either explicitly or by reference to the guiding principles annexed to UNGA resolution 46/182.¹⁰¹

Indeed, the Annex to Resolution 46/182 acknowledges a role in international cooperation to respond to emergencies for ‘[i]ntergovernmental and non-governmental organizations *working impartially and with strictly humanitarian motives*’, whose work should be facilitated by States whose population is in need of humanitarian assistance,¹⁰² and affirms that humanitarian assistance ‘*must* be provided in accordance with the principles of humanity, neutrality and impartiality’.¹⁰³ Similarly, according to the *Guiding Principles on Internal Displacement*, ‘[i]nternational humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced’ and this offer shall not be considered ‘an unfriendly act or an interference in a State’s internal affairs and shall be considered in good faith’, so that consent shall not be withheld arbitrarily, in particular ‘when authorities concerned are unable or unwilling to provide the required humanitarian assistance.’¹⁰⁴ Humanitarian assistance shall not be diverted and authorities ‘shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced’, but at the same

⁹⁹ A/RES/43/131, 8 December 1988 (adopted without vote), preamble and par. 2.

¹⁰⁰ See A/RES/45/100, 14 December 1990, preamble and par. 2; A/RES/46/182, 19 December 1991, Annex: “Guiding Principles on the strengthening of the coordination of humanitarian emergency assistance of the United Nations”, pars. 2 and 3; A/RES/50/19, 28 November 1995, par. 2; A/RES/51/194, 17 December 1996, preamble; A/RES/51/240, 20 June 1997, pars. 156-157; A/RES/52/171, 16 December 1997, par. 3; A/RES/54/98, 8 December 1999, par. 3; A/RES/56/102, 14 December 2001, par. 3; A/RES/57/150, 16 December 2002, preamble; A/RES/58/114, 17 December 2003, preamble; A/RES/58/118, 17 December 2003, par. 3; A/RES/59/141, 15 December 2004, preamble and par. 9; A/RES/59/171, 20 December 2004, preamble; A/RES/60/1, 16 September 2005, par. 169; A/RES/60/124, 15 December 2005, preamble; A/RES/61/134, 14 December 2006, preamble; A/RES/62/94, 17 December 2007, preamble; A/RES/63/138, 11 December 2008, preamble and par. 8; A/RES/63/139, 11 December 2008, preamble; A/RES/64/76, 7 December 2009, preamble; A/RES/64/77, 7 December 2009, preamble and par. 8; A/RES/65/132, 15 December 2010, preamble and par. 8; A/RES/65/133, 15 December 2010, preamble; A/RES/66/117, 15 December 2011, preamble and par. 8; A/RES/66/119, 15 December 2011, preamble; A/RES/67/85, 13 December 2012, preamble and par. 8; A/RES/67/85, 13 December 2012, preamble. All resolutions adopted without vote.

¹⁰¹ See ECOSOC, Humanitarian Affairs Segment, Agreed Conclusions 1999/1, par. 3; ECOSOC Resolution 2002/32, 26 July 2002, preamble; ECOSOC Resolution 2003/5, 15 July 2003, preamble; ECOSOC Resolution 2004/50, 23 July 2004, preamble and par. 17; ECOSOC Resolution 2005/4, 15 July 2005, preamble; ECOSOC Resolution 2006/5, 18 July 2006, preamble; ECOSOC Resolution 2007/3, 17 July 2007, preamble; ECOSOC Resolution 2008/36, 28 July 2008, preamble; ECOSOC Resolution 2009/3, 22 July 2009, preamble and pars. 9 and 11; ECOSOC Resolution 2010/1, 15 July 2010, preamble and pars. 9 and 12; ECOSOC Resolution 2011/8, 21 July 2011, preamble and par. 19; ECOSOC Resolution 2012/3, 20 July 2012, preamble and pars. 15 and 24; ECOSOC Resolution 2013/6, 17 July 3, preamble and pars. 15 and 23.

¹⁰² A/RES/46/182, 19 December 1991, Annex, pars. 5-6. Emphasis added. Similarly, acknowledging the role of ‘local and non-governmental organizations working in an impartial manner and with strictly humanitarian motives’, see A/RES/45/100, preamble and par. 3; A/RES/43/131, 8 December 1988, par. 3; ECOSOC, Humanitarian Affairs Segment, Agreed Conclusions 1998/1, par. 4.

¹⁰³ A/RES/46/182, 19 December 1991, Annex, par. 2.

¹⁰⁴ Principle 25(2) Guiding Principles on Internal Displacement. Emphasis added.

time ‘[a]ll humanitarian assistance shall be carried out in accordance with the *principles of humanity and impartiality and without discrimination*.’¹⁰⁵ The *Operational Guidelines on Human Rights and Natural Disasters*, presented by the UNSG Representative on human rights of IDPs in January 2006, which aim to be applicable also to disasters happening in situations of armed conflict, provide *inter alia* that ‘[h]umanitarian action should be carried out in accordance with the principles of humanity, impartiality and, *in countries with armed conflict*, neutrality’ and that ‘[h]umanitarian assistance should not be diverted.’¹⁰⁶

Since 2003, the UNGA has added in the thematic resolution on strengthening the coordination of the UN emergency humanitarian assistance a fourth principle for the provision of humanitarian assistance: independence.¹⁰⁷ Independence has been constantly restated by all UN organs together with humanity, impartiality and neutrality.¹⁰⁸ For example, the yearly UNGA resolution on the safety and security of humanitarian personnel and the protection of UN personnel, first adopted in 1997, has featured since 2008 a reaffirmation of the principles of humanitarian action and a call upon ‘all States, all parties involved in armed conflict and all humanitarian actors to respect the principles of neutrality, humanity, impartiality and independence for the provision of humanitarian assistance’ (reinforcing the reaffirmation in the preamble of resolution 46/182, constant since 1998).¹⁰⁹

Towards the end of the 1990s the UNSC started holding thematic debates and adopting resolutions and presidential statements which increasingly focused on humanitarian assistance, and it often restated the importance of upholding and respecting the principles. In its 1997 presidential statement on ‘Protection for humanitarian assistance to refugees and others in conflict situations’, it ‘stresse[d] the importance of the activities of the relevant United Nations bodies, agencies and other international humanitarian organizations and the need for these activities to continue to be carried out in accordance with the principles of humanity, neutrality and impartiality of humanitarian assistance’.¹¹⁰ Similar statements featured in thematic resolutions

¹⁰⁵ Principles 24(2), 25(3), and 24(1) Guiding Principles on Internal Displacement. Emphasis added.

¹⁰⁶ A/HRC/4/38/Add.1, 23 January 2006, guideline B.1.5. Emphasis added.

¹⁰⁷ A/RES/58/114, 17 December 2003, preamble.

¹⁰⁸ Also, for example, according to 2010 “OCHA on Message”, independence means ‘[h]umanitarian action must be autonomous from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented.’ UN OCHA, “OCHA on Message: Humanitarian Principles,” Version I, April 2010, 1. Available at http://ochanet.unocha.org/p/Documents/OOM_HumPrinciple_English.pdf (accessed March 15, 2012).

¹⁰⁹ See A/RES/63/138, 11 December 2008, preamble and par. 8; A/RES/64/77, 7 December 2009, preamble and par. 8; A/RES/65/132, 15 December 2010, preamble and par. 8; A/RES/66/117, 15 December 2011, preamble and par. 8; A/RES/67/85, 13 December 2012, preamble and par. 8.

¹¹⁰ S/PRST/1997/34, 19 June 1997, 2.

and presidential statements on children and armed conflict,¹¹¹ ‘Maintaining peace and security: Humanitarian aspects of issues before the Security Council’,¹¹² ‘Protection of United Nations personnel, associated personnel and humanitarian personnel in conflict zones’,¹¹³ and on protection of civilians in armed conflict.¹¹⁴

Finally, the need for external humanitarian assistance to comply with the principles contained in the various resolutions adopted by the UNGA and the other UN organs has been repeatedly affirmed throughout the years in statements by States representatives within the UNGA, the UNSC, and the ECOSOC in the course of thematic debates and before or after the adoption of resolutions.¹¹⁵ States have sometimes referred to the need to respect the principles by using the verb ‘should’ or have underlined the ‘importance’ of following these principles, but other times they have also employed stronger expressions such as ‘shall’ or ‘need’.¹¹⁶ These statements have been often made in the framework of the thematic debates on the humanitarian assistance system of the UN (within the UNGA and the ECOSOC), so that it is not always clear whether States referred only to the humanitarian assistance provided by UN actors and their partners. In any case, all NGOs acting as implementing partners of UN agencies would be covered by reference to UN humanitarian assistance. Furthermore, at least in certain cases, reference has been made to the international community in general, thus to all actors involved in the provision of (external) humanitarian assistance.¹¹⁷

The only principle that has been defined by UN bodies is independence, meaning ‘the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold

¹¹¹ See S/PRST/2008/6, 12 February 2008, 1; S/PRST/2009/9, 29 April 2009, 3.

¹¹² See S/PRST/2000/7, 13 March 2000, 3;

¹¹³ See S/RES/1502 (2003), 26 August 2003, preamble;

¹¹⁴ See S/RES/1296 (2000), 19 April 2000, par. 11; S/PRST/2004/46, 14 December 2004, 2; S/RES/1674 (2006), 28 April 2006, par. 21; S/PRST/2008/18, 27 May 2008, 1; S/PRST/2009/1, 14 January 2009, 2; S/RES/1894 (2009), 11 November 2009, par. 13; S/PRST/2010/25, 22 November 2010, 2 and 24; S/PRST/2013/2, 12 February 2013, 4.

¹¹⁵ See *supra* fn. 68.

¹¹⁶ See, for example, statements by the representatives of India, Switzerland, Mexico, China, India, U.S., Egypt, Antigua and Barbuda (on behalf of the Group of 77 and China), Colombia, Sweden (on behalf of the EU), Canada (on behalf of Australia, Canada and New Zealand), Sudan, Peru, Pakistan, Brazil, Japan, and the EU. A/53/PV.58, 16 November 1998, 19; and A/53/PV.59, 16 November 1998, 20; A/54/PV.59, 19 November 1999, 9; A/57/PV.58, 25 November 2002, 25; A/58/PV.37, 20 October 2003, 26; A/61/PV.52, 13 November 2006, 15; A/62/PV.53, 19 November 2007, 26; A/63/PV.43, 10 November 2008, 8; A/63/PV.45, 11 November 2008, 4; A/64/PV.59, 7 December 2009, 9; E/2009/SR.28, 20 July 2009, 4, 7 and 9; S/PV.3778 (Resumption 1), 21 May 1997, 21; S/PV.3932, 29 September 1998, 7; S/PV.4990 (Resumption 1), 14 June 2004, 10; S/PV.6917, 12 February 2013, 25; S/PV.6917 (Resumption 1), 12 February 2013, 22.

¹¹⁷ See, for example, statements by the representatives of Iran, China, Morocco (on behalf of the Group of 77 and China), Russian Federation, U.S., Egypt, Colombia, Peru, South Africa, Rwanda, Japan, Croatia, Czech Republic (speaking on behalf of the EU), and Indonesia. A/57/PV.58, 25 November 2002, 7; A/57/PV.58, 25 November 2002, 25; A/58/PV.37, 20 October 2003, 12; A/59/PV.51, 11 November 2004, 25; A/61/PV.52, 13 November 2006, 15; A/62/PV.53, 19 November 2007, 26; A/63/PV.45, 11 November 2008, 4; E/2009/SR.28, 20 July 2009, 9; E/2010/SR.36, 15 July 2010, 3; S/PV.3778 (Resumption 1), 21 May 1997, 36; S/PV.4990 (Resumption 1), 14 June 2004, 10; S/PV.6066, 14 January 2009, 20, 26, and 31.

with regard to areas where humanitarian action is being implemented'.¹¹⁸ This definition does not coincide with the one adopted by the International Red Cross and Red Crescent Movement, which insists on the independence of the Movement rather than of its action, by highlighting that National Societies must maintain sufficient autonomy from their national governments to be 'able at all times to act in accordance with the principles of the Movement',¹¹⁹ that both the ICRC and National Societies shall have '*political, religious and economic independence*', and be 'sovereign in [their] decisions, acts and words',¹²⁰ and that they 'must rely on [their] own assessment made on the basis of objective criteria' to carry out their humanitarian mandates.¹²¹

Closer to ICRC's approach, rather than UNGA's one, is, for example, MSF's position: its members 'undertake ... to maintain complete independence from all political, economic or religious powers',¹²² by 'be[ing] discrete and [] abstain[ing] from linking or implicating MSF politically, institutionally or otherwise through personal acts or opinions'.¹²³ The MSF movement itself commits to strive to ensure its independence, in the sense of 'independence of spirit which is a condition for independent analysis and action, namely the freedom of choice in its operations, and the duration and means in carrying them out', by 'refus[ing] to serve or be used as an instrument of foreign policy by any government' and, from a financial standpoint, 'endeavour[ing] to ensure a maximum of private resources, to diversify its institutional donors, and, sometimes, to refuse financing that may affect its independence'.¹²⁴

The principles of humanity, neutrality, and impartiality have not been defined by the UNGA (or any other UN body). The *Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict*, issued by the UN Office for the Coordination of Humanitarian Affairs (UN OCHA) in 2003, contains a definition of all the principles, based on the ICRC ones; but the Glossary specifies that 'the definitions provided do not necessarily reflect the position of the United Nations or its Member States', even

¹¹⁸ A/RES/58/114, 17 December 2003, preamble.

¹¹⁹ ICRC, *The Fundamental Principles of the Red Cross and Red Crescent*, (Geneva: ICRC publication, 1996, ref. 0513), 9. Available at http://www.icrc.org/eng/assets/files/other/icrc_002_0513.pdf (accessed March 11, 2011).

¹²⁰ Jean Pictet, *The Fundamental Principles of the Red Cross, Commentary* (Geneva: Henry Dunant Institute, 1979), 61.

¹²¹ ICRC (1996), *supra* fn. 119, 10.

¹²² Doctors Without Borders website, "About Us: Charter," available at <http://www.doctorswithoutborders.org/aboutus/charter.cfm> (accessed April 15, 2011).

¹²³ MSF, *Chantilly Principles* (1995), section I.5. Available at <http://association.msf.org/sites/default/files/documents/Principles%20Chantilly%20EN.pdf> (accessed May 10, 2012).

¹²⁴ *Ibid.*

if they are the result of a long consultative process undertaken within the UN.¹²⁵ Humanity means that ‘[h]uman suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women and the elderly’ and that ‘[t]he dignity and rights of all victims must be respected and protected.’¹²⁶ According to neutrality, ‘[h]umanitarian assistance must be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature’ (thus without requiring such disengagement ‘at any times’, as for the Red Cross components).¹²⁷ Impartiality means that ‘[h]umanitarian assistance must be provided without discriminating as to ethnic origin, gender, nationality, political opinions, race or religion’ and ‘[r]elief of the suffering must be guided solely by needs and priority must be given to the most urgent cases of distress.’¹²⁸

In his 2008 report on the ‘[s]trengthening of the coordination of emergency humanitarian assistance of the United Nations’ and in following ones, the UNSG has included definitions of the applicable principles, drawing upon those developed and updated by UN OCHA,¹²⁹ including independence and referring not simply to ‘humanitarian assistance’ but to ‘humanitarian action’ more in general. According to the reports, ‘[h]umanitarian action *must* be conducted in compliance with the principles of humanity, impartiality, neutrality and independence as reaffirmed in General Assembly resolutions 46/182 and 58/114’; after the definitions of these principles, it is recommended that ‘*[a]ll actors engaged in the response to complex emergencies and natural disasters should be strongly urged to promote greater respect for the humanitarian principles of humanity, neutrality, impartiality and independence*’.¹³⁰

Finally, another thematic work undertaken within the UN framework deserves to be mentioned to clarify the relevance of the principles of humanitarian assistance and States’ positions on them. Since 2006,

¹²⁵ UN OCHA, *Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict* (New York: UN, 2003), 2. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=100572> (accessed November 5, 2009). Hereinafter UN OCHA Glossary. The UN OCHA Glossary states that ‘[h]umanitarian assistance must be provided in accordance with the basic humanitarian principles of humanity, impartiality and neutrality, as stated in General Assembly Resolution 46/182’ and it adds that ‘the UN seeks to provide humanitarian assistance with full respect for the sovereignty of States.’ Ibid., 13.

¹²⁶ Ibid., 15. 2010 OCHA publication “OCHA on Message”, presented as ‘a reference product to enable staff to communicate OCHA’s position on key issues’, defines humanity as follows: ‘Human suffering must be addressed wherever it is found. The purpose of humanitarian action is to protect life and health and ensure respect for human beings.’ UN OCHA (2010), supra fn. 108, 1.

¹²⁷ UN OCHA Glossary (2003), supra fn. 125, 15. However, according to the 2010 “OCHA on Message”, neutrality means more in general that ‘[h]umanitarian actors must not take sides in hostilities or engage in controversies of a political, racial, religious or ideological nature.’ UN OCHA (2010), supra fn. 108, 1.

¹²⁸ UN OCHA Glossary (2003), supra fn. 125, 15. According to 2010 “OCHA on Message”, impartiality implies that ‘[h]umanitarian action must be carried out on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions.’ UN OCHA (2010), supra fn. 108, 1.

¹²⁹ Compare UN OCHA Glossary (2003), supra fn. 125, 14-15; and UN OCHA (2010), supra fn. 108.

¹³⁰ A/63/81-E/2008/71, 30 May 2008, pars. 18 and 64(a). Emphases added. Similarly, see A/64/84-E/2009/87, 28 May 2009, pars. 23 and 68(a); A/65/82-E/2010/88, 25 May 2010, par. 71(a); A/66/81-E/2011/117, 16 May 2011, pars. 71, 74, and 80(a); A/67/89-E/2012/77, 25 May 2012, par. 44; A/68/84-E/2013/77, 20 May 2013, par. 76(a).

the International Law Commission (ILC) has been dealing with the topic of ‘Protection of persons in the event of disasters’, provisionally deciding to limit itself to situations of disaster where IHL does not apply.¹³¹ Still, members of the Commission and States during their discussions have referred by comparison to the legal framework regulating armed conflict. For example, the ILC has provisionally adopted a draft Article stating that ‘[r]esponse to disasters shall take place in accordance with the *principles of humanity, neutrality and impartiality, and on the basis of non-discrimination*, while taking into account the needs of the particularly vulnerable.’¹³² According to the report by the Special Rapporteur Valencia-Ospina, the principles of humanity, impartiality, and neutrality are ‘requirements to balance the interests of the affected State and the assisting actors’ and they were ‘[o]riginally found in international humanitarian law and in the fundamental principles of the Red Cross’.¹³³

Impartiality is ‘commonly understood as encompassing’ the three principles of non-discrimination, proportionality, and impartiality in a strict sense: non-discrimination has its roots in IHL and has then ‘acquired the status of a fundamental rule of international human rights law’, having found expression also in the UN Charter.¹³⁴ Humanity is classified in the report as ‘a long-standing principle in international law’, which ‘[i]n its contemporary sense ... is the cornerstone of the protection of persons in international law, as it serves as the point of articulation between international humanitarian law and the law of human rights.’¹³⁵ Expression of this principle, which again came to the forefront of international law thanks to IHL, is the obligation of humane treatment, enshrined in Common Article 3, but more in general, as reflected by the ICJ judgements in the *Corfu channel* case and in the *Nicaragua* case, ‘[h]umanity as a legal principle ... guides the international legal system both in war and in peace’, providing ‘the common ground shared by international humanitarian law and the law of human rights.’¹³⁶ Finally, according to the Special Rapporteur, neutrality is also applicable in the context of natural disasters and entails that ‘actions taken in response to disasters are neither partisan or political acts nor substitutes for them’, thus implying that ‘those responding

¹³¹ See Protection of Persons in the Event of Disasters: Texts of draft articles 1, 2, 3, 4 and 5 as provisionally adopted by the Drafting Committee, A/CN.4/L.758, 24 July 2009, art. 4.

¹³² Protection of persons in the event of disasters: Texts and titles of draft articles 6, 7, 8 and 9 provisionally adopted by the Drafting Committee on 6, 7 and 8 July 2010, A/CN.4/L.776, 14 July 2010, art. 6. Emphasis added.

¹³³ *Third report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/629, 31 March 2010, paras. 15 and 18.

¹³⁴ See arts. 1(3) and 55(c) UN Charter. See *Third report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/629, 31 March 2010, paras. 31-36.

¹³⁵ See *Third report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/629, 31 March 2010, par. 37.

¹³⁶ See *Third report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/629, 31 March 2010, paras. 38-47.

to disasters should abstain from any act which might be interpreted as interference with the interests of the State' and that 'the affected State must respect the humanitarian nature of the response activities'.¹³⁷

As reported by Dr. Valencia-Ospina, during debate in the UNGA Sixth Committee, '[a]greement was expressed by several States with the inclusion of the principles of humanity, neutrality and impartiality in draft article 6, since those principles embodied elements that were useful in clarifying the underpinnings of *third-State conduct* with respect to a disaster that occurred in another State, albeit encompassing a significant measure of overlap.'¹³⁸ However, on neutrality, opposing views were expressed, as some States supported its inclusion 'so as to ensure that those providing assistance carry out their activities with the sole aim of responding to the disaster in accordance with humanitarian principles and not for purposes of interfering in the domestic affairs of the affected States',¹³⁹ while others considered that neutrality is 'closely connected with armed conflict and therefore could cause confusion and unnecessary complications, since even if construed more broadly, [it] presupposed the existence of two opposing parties, which was not the case in the context of disasters.'¹⁴⁰ In addition, 'in the absence of armed conflict, impartiality and non-discrimination would cover the same ground as neutrality.'¹⁴¹ Various proposals were also made to add a reference to the principle of independence, the principle of non-interference in internal affairs of States and the principle of non-discrimination.¹⁴² The debate indirectly confirmed the applicability of the three principles, including neutrality, in armed conflict.

¹³⁷ *Third report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/629, 31 March 2010, paras. 28-29.

¹³⁸ *Fourth report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/643, 11 May 2011, par. 12, making reference to the statements by Switzerland (A/C.6/65/SR.22, 1 December 2010, par. 37), Greece (A/C.6/65/SR.22, 1 December 2010, par. 50), Czech Republic (A/C.6/65/SR.23, 1 December 2010, par. 24), Monaco (A/C.6/65/SR.23, 1 December 2010, par. 87), Poland (A/C.6/65/SR.23, 1 December 2010, par. 100) and Islamic Republic of Iran (A/C.6/65/SR.24, 1 December 2010, par. 37). Emphasis added.

¹³⁹ *Fourth report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/643, 11 May 2011, par. 14, making reference to the statements by Switzerland (A/C.6/65/SR.22, 1 December 2010, par. 37), China (A/C.6/65/SR.22, 1 December 2010, par. 62), Pakistan (A/C.6/65/SR.24, 1 December 2010, par. 57), Sri Lanka (A/C.6/65/SR.26, 1 December 2010, par. 43), and the Russian Federation (A/C.6/65/SR.23, 1 December 2010, par. 56).

¹⁴⁰ *Fourth report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/643, 11 May 2011, par. 14, making reference to the statements by Portugal (A/C.6/65/SR.23, 1 December 2010, par. 11), Ireland (A/C.6/65/SR.24, 1 December 2010, par. 55), and Austria (A/C.6/65/SR.23, 1 December 2010, par. 38).

¹⁴¹ *Fourth report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/643, 11 May 2011, par. 14, making reference to the statements by Estonia (A/C.6/65/SR.23, 1 December 2010, par. 68), Monaco (A/C.6/65/SR.23, 1 December 2010, par. 87), and Austria (A/C.6/65/SR.23, 1 December 2010, par. 38).

¹⁴² *Fourth report on the protection of persons in the event of disasters by Eduardo Valencia-Ospina, Special Rapporteur*, A/CN.4/643, 11 May 2011, par. 12, making reference to the statements by the Czech Republic (A/C.6/65/SR.23, 1 December 2010, par. 24) and Thailand (A/C.6/65/SR.23, 1 December 2010, par. 70) (principle of independence); the Russian Federation (A/C.6/65/SR.23, 1 December 2010, par. 56) (principle of non-interference); Hungary (A/C.6/65/SR.21, 24 November 2010, par. 33), Ireland (A/C.6/65/SR.24, 1 December 2010, par. 55) and India (A/C.6/65/SR.25, 1 December 2010, par. 35) (principle of non-discrimination). On non-discrimination, see also the statements by Indonesia (A/C.6/65/SR.24, 1 December 2010, par. 68) and France (A/C.6/65/SR.23, 1 December 2010, par. 84).

3.2.1.1.4. Safety and Security of UN and Humanitarian Personnel

Instrumental to the provision of humanitarian assistance is the presence of humanitarian relief personnel, who have thus been a further focus of UN thematic resolutions. Since 1997, the UNGA has adopted a yearly resolution on the safety and security of humanitarian personnel and the protection of UN personnel, in which it has called on States and other Parties to armed conflicts to respect international law related to the safety and security of humanitarian personnel and UN and associated personnel, as well as to ensure safe and unhindered humanitarian access,¹⁴³ and at the same time has affirmed ‘the necessity’ for these personnel to respect national laws of the countries where they operate.¹⁴⁴

This resolution has become gradually more detailed, introducing the aforementioned reference to locally recruited personnel and, since 2004, the need for humanitarian and UN personnel to be attentive to local customs and clearly communicate their purpose to local populations.¹⁴⁵ Similarly, according to the *Guiding Principles on Internal Displacement*, the personnel involved in the provision of humanitarian assistance, as well as their transport and supplies, are entitled to respect and protection, but they shall also

¹⁴³ See A/RES/52/167, 16 December 1997, pars. 1 and 3; A/RES/53/87, 7 December 1998, pars. 3 and 11; A/RES/54/192, 17 December 1999, pars. 2 and 3; A/RES/55/175, 19 December 2000, pars. 3, 4, and 9; A/RES/56/217, 21 December 2011, pars. 3, 4, and 12; A/RES/57/155, 16 December 2002, pars. 4 and 5; A/RES/58/122, 17 December 2003, pars. 3, 4, and 5; A/RES/59/211, 20 December 2004, preamble and pars. 3 and 4; A/RES/60/123, 15 December 2005, preamble and pars. 3, 4, and 11; A/RES/61/133, 14 December 2006, preamble and pars. 2, 4, and 11; A/RES/62/95, 17 December 2007, preamble and pars. 4 and 11; A/RES/63/138, 11 December 2008, preamble and pars. 2, 3, 4, 11, and 13; A/RES/64/77, 7 December 2009, preamble and pars. 2, 3, 4, 11, and 13; A/RES/65/132, 15 December 2010, preamble and pars. 4, 12, 13, and 14; A/RES/66/117, 15 December 2011, preamble and pars. 4, 12, 13, and 14; A/RES/67/85, 13 December 2012, preamble and pars. 2, 4, and 13.

Since 2003, the UNGA also in the annual resolution on the strengthening of the coordination of UN emergency humanitarian assistance has called ‘upon all Governments and parties in complex humanitarian emergencies, in particular in armed conflicts and in post-conflict situations, in countries in which humanitarian personnel are operating, in conformity with the relevant provisions of international law and national laws, to cooperate fully with the United Nations and other humanitarian agencies and organizations and to ensure the safe and unhindered access of humanitarian personnel as well as supplies and equipment in order to allow them to perform efficiently their task of assisting the affected civilian population, including refugees and internally displaced persons’. A/RES/58/114, 17 December 2003, par. 10; A/RES/59/141, 15 December 2004, par. 18; A/RES/60/124, 15 December 2005, par. 2; A/RES/61/134, 14 December 2006, par. 20; A/RES/62/94, 17 December 2007, par. 24; A/RES/63/139, 11 December 2008, par. 25; A/RES/64/76, 7 December 2009, par. 26; A/RES/65/133, 15 December 2010, par. 27; A/RES/66/119, 15 December 2011, par. 33; A/RES/67/87, 13 December 2012, par. 37. Similarly, see also ECOSOC Resolution 2002/32, 26 July 2002, par. 22; Resolution 2003/5, 15 July 2003, par. 7; ECOSOC Resolution 2004/50, 23 July 2004, par. 9; ECOSOC Resolution 2009/3, 22 July 2009, par. 12; ECOSOC Resolution 2010/1, 15 July 2010, par. 13; ECOSOC Resolution 2011/8, 21 July 2011, par. 20; ECOSOC Resolution 2012/3, 20 July 2012, par. 25; ECOSOC Resolution 2013/6, 17 July 2013, par. 24.

¹⁴⁴ See A/RES/52/167, 16 December 1997, par. 5; A/RES/53/87, 7 December 1998, par. 13; A/RES/54/192, 17 December 1999, par. 9; A/RES/55/175, 19 December 2000, par. 11; A/RES/56/217, 21 December 2011, par. 15; A/RES/57/155, 16 December 2002, par. 15; A/RES/58/122, 17 December 2003, par. 13; A/RES/59/211, 20 December 2004, par. 13; A/RES/60/123, 15 December 2005, par. 12; A/RES/61/133, 14 December 2006, par. 14; A/RES/62/95, 17 December 2007, par. 14; A/RES/63/138, 11 December 2008, par. 16; A/RES/64/77, 7 December 2009, par. 16; A/RES/65/132, 15 December 2010, par. 17; A/RES/66/117, 15 December 2011, par. 17; A/RES/67/85, 13 December 2012, par. 18. Similarly, see ECOSOC, Humanitarian Affairs Segment, Agreed Conclusions 1998/1, par. 7.

¹⁴⁵ See A/RES/59/211, 20 December 2004, par. 20; A/RES/60/123, 15 December 2005, par. 13; A/RES/61/133, 14 December 2006, par. 15; A/RES/62/95, 17 December 2007, par. 15; A/RES/63/138, 11 December 2008, par. 17; A/RES/64/77, 7 December 2009, par. 17; A/RES/65/132, 15 December 2010, par. 18; A/RES/66/117, 15 December 2011, par. 18; A/RES/67/85, 13 December 2012, par. 19. Similarly, see ECOSOC Resolution 2004/50, 23 July 2004, par. 14. See also ECOSOC Resolution 2012/3, 20 July 2012, par. 29: ‘Encourages the United Nations and other relevant humanitarian actors to include as part of their risk management strategy the building of good relations and trust with national and local governments and to promote acceptance by local communities and all relevant actors, in order to enable humanitarian assistance to be provided in accordance with humanitarian principles’.

‘give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard’, respecting the ‘relevant international standards and codes of conduct’.¹⁴⁶

In 1994, the UNGA adopted the *Convention on the Safety of United Nations and Associated Personnel* (UN Safety Convention),¹⁴⁷ which prohibits attacks against UN and associated personnel, their equipment and premises, and requires States Parties to take all appropriate measures to ensure the safety and security of these personnel.¹⁴⁸ Furthermore, the Convention lists as crimes against UN and associated personnel the intentional commission against any of them of a ‘murder, kidnapping or other attack upon the person or liberty’; a ‘violent attack upon the official premises, the private accommodation or the means of transportation ... likely to endanger his or her person or liberty’; a ‘threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act’; an ‘attempt to commit any such attack’; and an ‘act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack’.¹⁴⁹ Each State Party shall criminalise these conducts, establish jurisdiction over them (based on the principles of territoriality or active nationality), and prosecute or extradite alleged offenders.¹⁵⁰

¹⁴⁶ Principles 26 and 27(1) Guiding Principles on Internal Displacement.

In its annual resolution on assistance to refugees, returnees and displaced persons in Africa, adopted since 1999, the UNGA has *inter alia* ‘urge[d] States, parties to conflict and all other relevant actors to take all necessary measures to protect activities related to humanitarian assistance, to prevent attacks on and kidnapping of national and international humanitarian workers and to ensure their safety and security, call[ed] upon States to investigate fully any crimes committed against humanitarian personnel and bring to justice persons responsible for such crimes, and call[ed] upon organizations and aid workers to abide by the national laws and regulations of the countries in which they operate’.

A/RES/55/77, 4 December 2000, par. 19. Similarly, see A/RES/54/147, 17 December 1999, par. 13; A/RES/56/135, 19 December 2001, par. 16; A/RES/57/183, 18 December 2002, par. 17; A/RES/58/149, 22 December 2003, par. 18; A/RES/59/172, 20 December 2004, par. 14; A/RES/60/128, 16 December 2005, par. 15; A/RES/61/139, 19 December 2006, par. 16; A/RES/62/125, 18 December 2007, par. 18; A/RES/63/149, 18 December 2008, par. 18; A/RES/64/129, 18 December 2009, par. 19; A/RES/65/193, 21 December 2010, par. 17; A/RES/66/135, 19 December 2011, par. 19. All adopted without vote.

Since 2005, these thematic resolutions have stated that ‘assistance and protection are mutually reinforcing and that inadequate material assistance and food shortages undermine protection’. A/RES/60/128, 16 December 2005, par. 11; A/RES/61/139, 19 December 2006, par. 12; A/RES/62/125, 18 December 2007, par. 14; A/RES/63/149, 18 December 2008, par. 14; A/RES/64/129, 18 December 2009, par. 15; A/RES/65/193, 21 December 2010, par. 15; A/RES/66/135, 19 December 2011, par. 15; A/RES/67/150, 20 December 2012, par. 14.

¹⁴⁷ *Convention on the Safety of United Nations and Associated Personnel*, December 9, 1994, entered into force January 15, 1999 (2051 UNTS 391). Hereinafter UN Safety Convention. See A/RES/49/59, 9 December 1994.

¹⁴⁸ See art. 7 UN Safety Convention. Pursuant to art. 8,

Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

¹⁴⁹ Art. 9 UN Safety Convention.

¹⁵⁰ See arts. 9-19 UN Safety Convention. In their turn, under art. 6, UN and associated personnel shall, ‘[w]ithout prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties ... (a) Respect the laws and regulations of the host State and the transit State; and (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.’

However, the scope of application of the UN Safety Convention is limited to a UN operation ‘established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control’, when either this operation has the ‘purpose of maintaining or restoring international peace and security’ or the UNSC or the UNGA ‘has declared, for the purposes of th[e] Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation’.¹⁵¹ The Convention does not apply ‘to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.’¹⁵² Moreover, covered are ‘United Nations and associated personnel’, with the latter meaning:

- (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;
- (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;
- (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency, to carry out activities in support of the fulfilment of the mandate of a United Nations operation;¹⁵³

In sum, humanitarian personnel will be protected only if they are staff of the UN or of an organisation with a ‘very close contractual link with the United Nations.’¹⁵⁴

In 2005, the UNGA adopted an *Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel*,¹⁵⁵ based on the fact that ‘United Nations operations conducted for the purposes of delivering humanitarian, political or development assistance in peacebuilding and of delivering emergency humanitarian assistance which entail particular risks for United Nations and associated personnel require the

¹⁵¹ Art. 1(c) UN Safety Convention. Neither the UNSC nor the UNGA has ever used the option of declaring exceptional risk. See Huw Llewellyn, “The Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel,” *International & Comparative Law Quarterly* 55, no. 3 (2006), 721.

¹⁵² Art. 2 UN Safety Convention.

¹⁵³ Art. 1(b) UN Safety Convention. Art. 1(a) defines ‘United Nations personnel’ as:

(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;

(ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;

¹⁵⁴ Antoine Bouvier, “‘Convention on the Safety of United Nations and Associated Personnel’: Presentation and Analysis,” *International Review of the Red Cross* 35, no 309 (November-December 1995), 656.

¹⁵⁵ *Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel*, December 8, 2005, entered into force August 19, 2010 (A/60/518). Hereinafter OP UN Safety Convention. See A/RES/60/42, 8 December 2005 (without vote), Annex.

extension of the scope of legal protection under the Convention to such personnel'.¹⁵⁶ The Protocol extends the applicability of the UN Safety Convention to 'all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of: (a) Delivering humanitarian, political or development assistance in peacebuilding, or (b) Delivering emergency humanitarian assistance.'¹⁵⁷ The Protocol does not change the definition of protected personnel, so that humanitarian organisations are protected only as long as they are associated to the UN.

Regarding the concept of UN missions established for the purpose of delivering emergency humanitarian assistance, it has been reported that the '[u]se of th[e] term [emergency humanitarian assistance] was not controversial in the negotiations and gave rise to no discussion' and that '[t]his reflects broad agreement as to its meaning', in the sense that '[t]he term describes the UN's humanitarian work in preventing and responding to emergencies, whether caused by natural disasters, environmental (man-made) disasters or armed conflicts—and combinations of armed conflict with other disasters, known as "complex" emergencies.'¹⁵⁸ This category would thus cover operations established by UN OCHA, as part of the UN Secretariat, or by any other agency established by and deriving its authority from a UN organ, such as UNDP, UNICEF, WFP, and UNHCR, while it would not extend to 'operations established by autonomous organizations within the UN system and by the Specialised Agencies', such as FAO or WHO.¹⁵⁹

The UNSC has similarly called upon Parties to armed conflict to ensure the safety and security of humanitarian personnel and condemned any attacks against them in a few presidential statements and resolutions it adopted on this topic, recalling also 'obligations of all United Nations personnel and associated personnel, and humanitarian personnel, to observe and respect the national laws of the host State in

¹⁵⁶ Preamble OP UN Safety Convention.

¹⁵⁷ Art. II(1) OP UN Safety Convention. The OP further specifies that art. II(1) 'does not apply to any permanent United Nations office, such as headquarters of the Organization or its specialized agencies established under an agreement with the United Nations' and that '[a] host State may make a declaration to the Secretary-General of the United Nations that it shall not apply the provisions of this Protocol with respect to an operation under article II(1)(b) which is conducted for the sole purpose of responding to a natural disaster. Such a declaration shall be made prior to the deployment of the operation.' Art. II(2)-II(3) OP UN Safety Convention.

¹⁵⁸ Llewellyn (2006), *supra* fn. 151, 725. Llewellyn continues:

As with peacebuilding, emergency humanitarian assistance passes through phases of activity from delivering relief, through reconstruction and rehabilitation activity, toward sustainable solutions and development. And as with UN peacebuilding operations, there is no express limit on the time period for which emergency humanitarian assistance operations fall within the scope of application of the Protocol. The relevant General Assembly resolutions suggest that emergency humanitarian assistance comes to an end when the assistance ceases to be in the nature of relief work, and becomes solely development assistance. Unlike peacebuilding, it is accepted that emergency humanitarian assistance includes promoting preventive action.

Ibid.

¹⁵⁹ *Ibid.*, 725.

accordance with international law and the Charter of the United Nations’,¹⁶⁰ and in other thematic documents,¹⁶¹ including on children and armed conflict,¹⁶² on ‘Protection for humanitarian assistance to refugees and others in conflict situations’,¹⁶³ and later on the protection of civilians in armed conflict,¹⁶⁴ where it has also condemned attacks against humanitarian workers and denial of humanitarian assistance to civilians as violations of international law.¹⁶⁵ In its 2009 resolution on POC, the UNSC expressed its intention to ‘[c]onsistently condemn and call for the immediate cessation of all acts of violence and other forms of intimidation deliberately directed against humanitarian personnel’; ‘[c]all on parties to armed conflict to comply with the *obligations applicable to them under international humanitarian law to respect and protect humanitarian personnel and consignments used for humanitarian relief operations*’; and, ‘[t]ake appropriate steps in response to deliberate attacks against humanitarian personnel’.¹⁶⁶

3.2.1.1.5. The Military and Humanitarian Assistance

While the role of the military in the provision of humanitarian assistance will be analysed in the next Chapter, specifically devoted to this topic, it should be highlighted that the UNGA and ECOSOC have repeatedly asserted the ‘fundamentally civilian character of humanitarian assistance’, ‘the leading role of civilian organizations in implementing humanitarian assistance, particularly in areas affected by conflicts’ and ‘the need, in situations where military capacity and assets are used to support the implementation of humanitarian assistance, for their use to be in conformity with international humanitarian law and humanitarian principles’, taking note of the guidelines on civil-military relationships developed by the Inter-Agency Standing Committee (IASC).¹⁶⁷

¹⁶⁰ See S/PRST/1997/13, 12 March 1997; S/PRST/2000/4, 11 February 2000; S/RES/1502 (2003), 26 August 2003, preamble and pars. 1 and 3.

¹⁶¹ On ‘Maintaining peace and security: Humanitarian aspects of issues before the Security Council’, see S/PRST/2000/7, 13 March 2000, 2.

¹⁶² S/RES/1261 (1999), 30 August 1999, par. 12.

¹⁶³ See S/PRST/1997/34, 19 June 1997, 1-2; S/PRST/1998/30, 29 September 1998, 1-2.

¹⁶⁴ On the need for combatants to ensure the safety, security and freedom of movement of UN and associated personnel, as well as personnel of international humanitarian organisations, see S/RES/1265 (1999), 17 September 1999, par. 8; S/RES/1296 (2000), 19 April 2000, par. 12; S/PRST/2002/41, 20 December 2002, 1; S/PRST/2003/27, 15 December 2003, 1; S/PRST/2004/46, 14 December 2004, 2; S/RES/1674 (2006), 28 April 2006, par. 22; S/PRST/2010/25, 22 November 2010, 2.

¹⁶⁵ S/PRST/1999/6, 12 February 1999, 1; S/RES/1265 (1999), 17 September 1999, par. 9; S/PRST/2004/46, 14 December 2004, 2; S/RES/1674 (2006), 28 April 2006, par. 5; S/RES/1674 (2006), 28 April 2006, par. 23; S/PRST/2010/25, 22 November 2010, 2.

¹⁶⁶ S/RES/1894 (2009), 11 November 2009, par. 16. Emphasis added.

¹⁶⁷ These guidelines are the 1994 Oslo Guidelines (UN, DHA-Geneva, *Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief* – “Oslo Guidelines”, May 1994), applicable only to disasters, and the MCDA Guidelines, applicable to complex emergencies and analysed in Section 4.1.2.4. A/RES/58/114, 17 December 2003, par. 9. Similarly, see A/RES/59/141, 15 December 2004, pars. 11-12; A/RES/60/124, 15 December 2005, par. 7; A/RES/61/134, 14 December 2006, par. 5; A/RES/62/94, 17 December 2007, par. 6. Similarly, see A/RES/65/133, 15 December 2010, preamble; A/RES/66/119, 15 December 2011, preamble;

3.2.1.1.6. Conclusion

As all the aforementioned thematic documents formulated within the UN framework show, humanitarian assistance to civilians in conflict has been given growing emphasis since the beginning of the 1990s, with attention to the responsibilities of Parties to the conflict, the role of local actors and external ones, humanitarian access and the principles of humanitarian assistance (with the recent addition of independence), and the safety and security of humanitarian workers. The regulation provided by IHL has been confirmed either implicitly or explicitly, through references to applicable IHL, and possibly strengthened, for example with the condemnation by the UNSC of the denial of humanitarian assistance to civilians in conflict (without differentiating between IAC and NIAC) as a violation of international law, which may as well amount to a threat to international peace and security in accordance with Article 39 of the UN Charter. These trends in thematic resolutions have been mirrored, as will be analysed in the next Section, in conflict-specific resolutions adopted by the UNSC and sometimes by the UNGA.

3.2.1.2. Conflict-Specific Resolutions

Since the beginning of the 1990s, the UNSC has constantly called on Parties to both IACs and NIACs to allow unfettered access to humanitarian assistance and international humanitarian organisations to all victims in need, as well as to guarantee the safety, security and freedom of movement of humanitarian workers, possibly also going beyond treaty law, in particular with regard to NIAC.

A/RES/67/87, 13 December 2012, preamble. 18. See also ECOSOC Resolution 2003/5, 15 July 2003, preamble and par. 21; ECOSOC Resolution 2004/50, 23 July 2004, pars. 19 and 21; ECOSOC Resolution 2006/5, 18 July 2006, par. 13; ECOSOC Resolution 2008/36, 25 July 2008, par. 11; ECOSOC Resolution 2009/3, 22 July 2009, par. 18; ECOSOC Resolution 2010/1, 15 July 2010, par. 19; ECOSOC Resolution 2011/8, 21 July 2011, par. 25; ECOSOC Resolution 2012/3, 20 July 2012, par. 30; ECOSOC Resolution 2013/6, 17 July 2013, par. 30.

Established by UNGA res. 46/182, the Inter-Agency Standing Committee (IASC) is a decision-making group that includes UN operational agencies as members and, as standing invitees, organizations such as the WB, IOM, ICRC, IFRC and NGO consortia. See UN OCHA, "OCHA on Message: Inter-Agency Standing Committee," Version 1, December 2011, 1. Available at https://docs.unocha.org/sites/dms/Documents/120229_OOM-IASC_eng.pdf (accessed March 15, 2012).

In addition, in July 2011 the UNGA adopted a resolution on improving the effectiveness and coordination of military and civil defence assets *for natural disaster response*, in which it '[r]eaffirm[ed] the principles of neutrality, humanity, impartiality and independence for the provision of humanitarian assistance', '[e]mphasize[d] the fundamentally civilian character of humanitarian assistance, and reaffirm[ed] the need in situations of natural disaster in which military capacity and assets are used to support the implementation of humanitarian assistance, for such use to be undertaken with the consent of the affected State and in conformity with international law, including international humanitarian law, as well as humanitarian principles;', and '[r]ecall[ed] in this regard the revised guidelines on the use of military and civil defence assets in disaster relief, and stresses the value of their use and of the development by the United Nations, in consultation with States and other relevant actors, of further guidance on civil-military relations in the context of humanitarian activities'. A/RES/65/307, 1 July 2011 (without vote), pars. 1-3. Emphasis added.

While there is general agreement on the non-binding nature of UNSC presidential statements, UNSC resolutions can be binding upon Member States pursuant to Articles 25 and 103 UN Charter, in case they do not comprise mere recommendations but measures adopted under Chapter VII of the UN Charter. However, unless the UNSC explicitly declares that it is acting under Chapter VII, it is not always easy to classify a resolution, or parts of it, as adopted under Chapter VII and thus binding upon States (and possibly also non-State Parties to armed conflicts)¹⁶⁸ or merely hortatory. Scholars have different views on this issue, with Pellet and Cot, for example, arguing that even without any explicit determination under Article 39 UN Charter, it is possible to identify binding decisions by the UNSC, thus adopted under Chapter VII, on the basis of the use of binding language such as ‘orders’, ‘demands’, ‘decides’, while mere hortatory language such as ‘calls upon’, ‘urges’ or ‘requests’ would not imply obligations for the Member States.¹⁶⁹ Anyway, they also suggest that a resolution might include both binding provisions and non-binding ‘decisions’ and ‘requests’.¹⁷⁰

Johansson disagrees with their approach, arguing that ‘[a] Security Council Resolution is considered to be “a Chapter VII resolution” if it makes an explicit determination that the situation under consideration constitutes a threat to the peace, a breach of the peace, or an act of aggression, and/or explicitly or implicitly states that the Council is acting under Chapter VII *in the adoption of some or all operative paragraphs*’.¹⁷¹ Indeed, in some cases the UNSC has explicitly affirmed that it was acting under Chapter VII at the beginning

¹⁶⁸ See, for example, Nico Krisch, “Introduction to Chapter VII: The General Framework,” in *The Charter of the United Nations: A Commentary* 3rd ed. Vol. II, ed. Bruno Simma et. al. (Oxford: Oxford University Press, 2012), 1270-1271 (par. 68):

the SC has ... developed a consistent practice of creating obligations for non-State entities themselves. In conflicts such as those in Bosnia, Angola, Afghanistan, the Democratic Republic of the Congo, Sierra Leone, Sudan, and Côte d’Ivoire, the Council has ‘demanded’ compliance from ‘all parties’ or from particular non-State groups such as the Bosnian Serbs, UNITA in Angola, the Afghan Taliban, or the Ivorian Forces Nouvelles. Thereby the SC has created obligations for entities other than States, thus departing from the general approach of the Charter, which relies primarily on member State action to implement collective decisions. But Arts 39 and 41 are flexible enough to accommodate non-governmental targets, and Art. 40 mentions a call on ‘the parties concerned’, which can be understood in a broader sense as well. In any event, member States have accepted the SC’s practice, thus confirming a development of the Charter framework.

Similarly, see Anne Peters, “Article 25,” in *The Charter of the United Nations: A Commentary* 3rd ed. Vol. II, ed. Bruno Simma et. al. (Oxford: Oxford University Press, 2012), 800-804 (pars. 34-44).

¹⁶⁹ See Jean-Pierre Cot and Alain Pellet, *La Charte des Nations Unies: Commentaire article par article*, 2nd ed. (Paris: Economica, 1991), 653-654 and 686-687. The authors quote the language from UNSC resolutions in French: binding expressions would be ‘ordonne’, ‘prescrive’, ‘requiert’, ‘donne l’ordre’, ‘décide’, ‘exige’; non-binding expressions include ‘demande’, ‘invite’, ‘recommande’, ‘fait appel’, and ‘prie’. Ibid., 686-687.

See also Krisch (2012), *supra* fn. 168, 1268 (par. 65):

While the SC typically directs its measures to member States, it has increasingly addressed other actors as well—non-members, international organizations, non-State entities, and individuals. It typically does so through *recommendations*; for example, it often ‘calls upon’ international organizations to act in accordance with its resolutions. More serious questions, however, are posed by attempts to address non-State actors through mandatory action.

Emphasis added. See also Ibid., 1269-1270 (par. 67).

¹⁷⁰ See Cot and Pellet (1991), *supra* fn. 169, 663-664.

¹⁷¹ Patrik Johansson, “The Humdrum Use of Ultimate Authority: Defining and Analysing Chapter VII Resolutions,” *Nordic Journal of International Law* 78, no. 3 (2009), 320-321 and 326. Emphasis added. On the basis of this definition, he then provides a list of Chapter VII resolutions adopted between 1946 and 2008: see Ibid., 339-342.

of the operative paragraphs of a resolution, while other times it has done so with reference to some of these paragraphs only, often those imposing economic measures under Article 41 UN Charter or authorising the use of force by peacekeeping missions.

For the topic of this study it will be taken into account both whether references to humanitarian assistance were made under Chapter VII, and the language that was used, highlighting for example whether the UNSC *called upon* the Parties to an armed conflict to adopt a certain conduct or *demand*ed them to do so, in order to evaluate the position of the UNSC on the topic.¹⁷² Even if not binding upon the addressees, strong statements under Chapter VII might carry a heavy international pressure. Moreover, if such requests make reference to applicable IHL or existing obligations under IHL, they contribute to the identification and strengthening of such law; and, in any case, requests from the UNSC aim to influence and direct State practice, and they might be considered as evidence of *opinio juris*, possibly contributing to the formation of customary law, especially if adopted unanimously and supported by corresponding State practice.¹⁷³ According to a database developed by the International Peace Institute on compliance with UNSC resolutions addressing civil war between 1989 and 2006, around 65% of UNSC demands to Parties to NIACs had a medium or high compliance score (almost 8% high or full; almost 20% medium-high; and around 37% medium-low), while in almost 35% of the cases the compliance rate was low or none. Of these demands, 11% were related to humanitarian access and humanitarian relief.¹⁷⁴

3.2.1.2.1. Humanitarian Access and Facilitation of Humanitarian Assistance

¹⁷² Resolutions where Chapter VII is explicitly invoked either at the beginning of the operative paragraphs or in the section that includes the relevant paragraph(s) on humanitarian assistance will be put in **bold** in the ftns. Other resolutions that have been classified (by Johansson) or may be classified as adopted under Chapter VII, for example because they include a determination of the existence of a threat to international peace and security, will be underlined in ftns., unless Chapter VII is explicitly recalled in certain paragraphs different from those dealing with humanitarian assistance. Unless otherwise specified, all resolutions mentioned in this study have been unanimously adopted.

¹⁷³ See Section 1.3.3.1. See also the reference made by the ICTY Appeal Chamber in the *Tadić* case to UNSC statements and resolutions as relevant for the formation of *opinio juris*, especially if unanimously adopted: ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, pars. 113-116 and 133-134.

¹⁷⁴ See International Peace Institute, “Understanding Compliance with UN Security Council Resolutions Addressing Civil Wars: Trends in Compliance,” available at <http://public.tableausoftware.com/views/SCCDataseWebPortal/TrendsinCompliance?:embed=y> (accessed June 22, 2013); and James Cockayne, Christoph Mikulaschek, and Chris Perry, “The United Nations Security Council and Civil War: First Insights from a New Dataset,” International Peace Institute, September 2010 14-15. Available at http://www.ipinst.org/media/pdf/publications/ipi_rpt_unsc_and_civil_war_epub.pdf (accessed June 22, 2013).

One of the milestones in UNSC practice related to humanitarian access and the provision of humanitarian assistance more in general is resolution 688 of 5 April 1991,¹⁷⁵ adopted shortly after the end of the first Persian Gulf War, when Iraqi Kurds fled towards the Turkish border for fear of brutal governmental repression following a local uprising.¹⁷⁶ In the resolution, the UNSC ‘[c]ondemn[ed] the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten[ed] international peace and security in the region’ and ‘[i]nsist[ed] that Iraq allow[ed] immediate access by *international humanitarian organizations* to all those in need of assistance in all parts of Iraq and ma[de] available all necessary facilities for their operations’.¹⁷⁷

Access for humanitarian assistance and humanitarian organisations to theatres of conflicts became a constant feature in UNSC resolutions and statements. Calls from the UNSC to facilitate relief and/or ensure the conditions for its delivery were present in its resolutions and statements related to both the IACs and the NIACs it dealt with in the 1990s. In Somalia,¹⁷⁸ the UNSC *called upon* and *urged* the Parties to ‘facilitate the delivery by the United Nations, its specialized agencies and other humanitarian organizations of humanitarian assistance to all those in need of it, under the supervision of the coordinator’,¹⁷⁹ and ‘ensure unhindered access to those in need’.¹⁸⁰ In December 1992, determining ‘that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitute[d] a threat to international peace and security’, the UNSC ‘[d]emand[ed] that all parties, movements and factions in Somalia t[ook] all measures necessary to facilitate

¹⁷⁵ On the debate on whether S/RES/688 (1991) is a Chapter VII resolution, see Johansson (2009), *supra* fn. 171, 314-315.

¹⁷⁶ Res. adopted with the abstention of China and India and the contrary votes of Cuba, Yemen, and Zimbabwe.

¹⁷⁷ S/RES/688 (1991), 5 April 1991 (10-3-2), pars. 1 and 3. Emphasis added. The UNSC further requested the UNSG to use all the resources at his disposal to address the needs of refugees and IDPs, and ‘[a]ppeal[ed] to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts’. *Ibid.*, pars. 5-6. Previously, in the course of the First Persian Gulf War, asking Iraq to give access to Kuwait to representatives of humanitarian organisations, especially the ICRC, and condemning its refusal of the offer by the Government of Kuwait to send humanitarian assistance to the Kuwaiti people under occupation, see A/RES/45/170, 18 December 1990, pars. 5 and 8. Afterwards, calling on Iraq to cooperate with international humanitarian organisations and facilitate their work, see E/CN.4/RES/1992/60, 3 March 1992 (47-1-1), pars. 6-7; E/CN.4/RES/1993/74, 10 March 1993 (36-1-15), par. 9; E/CN.4/RES/1994/74, 9 March 1994 (34-1-18), pars. 8(b) and 9; E/CN.4/RES/1995/76, 8 March 1995 (31-1-21), pars. 8(c) and 10; E/CN.4/RES/1996/72, 23 April 1996 (30-0-21), par. 6(e-f); E/CN.4/RES/1997/60, 16 April 1997 (31-0-22), par. 3(i+k); E/CN.4/RES/1998/65, 21 April 1998 (32-0-21), par. 3(j+m); E/CN.4/RES/1999/14, 23 April 1999 (35-0-18), par. 3(j-k); E/CN.4/RES/2000/17, 18 April 2000 (32-0-21), par. 3(j-k).

¹⁷⁸ Throughout the 1990s, Somalia was plagued by a NIAC started with the overthrowing of Siad Barre in 1991.

¹⁷⁹ S/RES/733 (1992), 23 January 1992, par. 7. See also S/RES/746 (1992), 17 March 1992, par. 3; S/RES/751 (1992), 24 April 1992, par. 14; S/PRST/1996/4, 24 January 1996, 2; S/PRST/1997/8, 27 February 1997, 2; S/PRST/1997/57, 23 December 1997, 2; S/PRST/1999/31, 12 November 1999, 2; S/PRST/2000/22, 29 June 2000, 1. Similarly, see A/RES/51/30 G, 13 December 1996, preamble.

¹⁸⁰ S/PRST/1999/16, 27 May 1999, 2. See also S/PRST/2001/1, 11 January 2001, 2; S/PRST/2001/30, 31 October 2001, 3. Similarly, urging the parties to ensure safe access, protect relief workers and guarantee their freedom of movement, see the following resolutions by the Commission on Human Rights (all adopted without vote): E/CN.4/RES/1994/60, 4 March 1994, par. 3; E/CN.4/RES/1995/56, 3 March 1995, par. 2; E/CN.4/RES/1996/57, 19 April 1996, par. 3; E/CN.4/RES/1997/47, 11 April 1997, par. 3; E/CN.4/RES/1998/59, 17 April 1998, par. 3(c); E/CN.4/RES/1999/75, 28 April 1999, par. 5(c); E/CN.4/RES/2000/81, 27 April 2000, par. 6(c).

the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affected population in Somalia.¹⁸¹

In relation to the conflict in Bosnia and Herzegovina (BiH),¹⁸² the UNSC in 1992-1995 *called* on the Parties to ensure the necessary conditions for the delivery and unimpeded access of humanitarian assistance,¹⁸³ and repeatedly *demand*ed to these Parties to ensure the flow of humanitarian assistance,¹⁸⁴ in particular towards the six safe areas established by the UNSC itself, also within resolutions adopted under Chapter VII.¹⁸⁵ The UNSC further declared, acting under Chapter VII, that in the safe areas Parties *should* observe '[f]ull respect [] of *the rights* of the United Nations Protection Force (UNPROFOR) and the international humanitarian agencies to free and unimpeded access to all safe-areas in the Republic of Bosnia and Herzegovina and full respect for the safety of the personnel engaged in these operations'.¹⁸⁶

Similar calls were made with regard to other conflicts in Africa, which presented problems of access for humanitarian workers mainly due to insecurity, logistic problems, and looting, for example Liberia,¹⁸⁷

¹⁸¹ S/RES/794 (1992), 3 December 1992, preamble and par. 2. However, it should be noted that the UNSC explicitly referred to Chapter VII in two different pars. of the resolutions, when authorising States to take all necessary measures to enforce the arms embargo and those participating in the authorised multinational force to take all necessary means to establish a secure environment for humanitarian relief operations (pars. 16 and 10).

¹⁸² On the qualification of the conflicts in the former Yugoslavia as having both internal and international aspects, see ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić* (1995), supra fn. 173, pars. 72-77. On the classification of the conflict in BiH between Bosnian Serbs and the central authorities of BiH in 1992 as IAC, see ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Judgment, 15 July 1999, par. 162. On this decision, see, for example, Katherine Del Mar, "The Requirement of 'Belonging' under International Humanitarian Law," *European Journal of International Law* 21, no. 1 (2010): 105-124.

¹⁸³ See S/RES/752 (1992), 15 May 1992, par. 8; S/RES/764 (1992), 13 July 1992, pars. 5-6; S/RES/787 (1992), 16 November 1992 (13-0-2), par. 18; S/26661, 28 October 1993, 1; **S/RES/908 (1994), 31 March 1994, pars. 19 and 22.** Similarly, see A/RES/46/242, 25 August 1992, par. 14; A/RES/48/88, 20 December 1993, par. 12.

¹⁸⁴ S/RES/758 (1992), 8 June 1992, par. 8; S/25302, 17 February 1993, 1; S/25361, 3 March 1993, 1-2; S/25520, 3 April 1993, 1; S/26716, 9 November 1993, 1; S/PRST/1994/1, 7 January 1994, 1-2; S/PRST/1994/11, 14 March 1994, 1.

¹⁸⁵ **S/RES/757 (1992), 30 May 1992 (13-0-2), par. 17; S/RES/819 (1993), 16 April 1993, par. 8; S/RES/859 (1993), 24 August 1993, par. 3; S/RES/998 (1995), 16 June 1995 (13-0-2), par. 4.**

¹⁸⁶ **S/RES/824 (1993), 16 April 1993, par. 4(b).** Emphasis added.

¹⁸⁷ The conflict was started in 1989 by Taylor's National Patriotic Front of Liberia (NPFL) and lasted until 2003 with a couple of years of calm after the 1997 elections. Humanitarian organisations suffered diversion of aid and the looting of their assets (which then contributed to the war economy). See, for example, the UNSG reports: S/1994/1167, 14 October 1994, pars. 38-40; S/1995/9, 6 January 1995, pars. 27-28; S/1996/47, 23 January 1996, pars. 14 and 30.

Calling to provide humanitarian access to humanitarian agencies, see S/PRST/2002/36, 13 December 2002, 3-4; **S/RES/1497 (2003), 1 August 2003 (12-0-3), par. 11;** S/PRST/2003/14, 27 August 2003, 1; **S/RES/1509 (2003), 19 September 2003, par. 8.** See also A/RES/55/176, 19 December 2000, par. 7; A/RES/57/151, 16 December 2002, par. 2.

Calling or *urging* to facilitate the delivery of humanitarian assistance (cooperating with organisations engaged in this activity), see S/RES/866 (1993), 22 September 1993, par. 11; S/RES/911 (1994), 21 April 1994, par. 7; S/PRST/1994/33, 13 July 1994, 2; S/RES/950 (1994), 21 October 1994, par. 10; S/RES/1100 (1997), 27 March 1997, par. 6; **S/RES/1509 (2003), 19 September 2003, par. 8.**

Demanding to facilitate the delivery of humanitarian assistance (cooperating with organisations engaged in this activity), see S/RES/972 (1995), 13 January 1995, par. 7; S/RES/985 (1995), 13 April 1995, par. 6; S/RES/1001 (1995), 30 June 1995, par. 13; S/RES/1014 (1995), 15 September 1995, par. 13; S/RES/1020 (1995), 10 November 1995, par. 14; S/RES/1041 (1996), 29 January 1996, par. 6; S/RES/1059 (1996), 31 May 1996, par. 7; S/RES/1071 (1996), 30 August 1996, par. 10; S/RES/1083 (1996), 27 November 1996, par. 8. However, none of these res. is a Chapter VII res. according to Johansson. On the contrary, S/RES/813 (1993) would be one, and in it the UNSC demanded that the Parties refrained from any action that would impede or obstruct the delivery of humanitarian assistance: S/RES/813 (1993), 26 March 1993, par. 15.

Sierra Leone,¹⁸⁸ Burundi,¹⁸⁹ and Guinea Bissau.¹⁹⁰ Throughout the NIAC in Rwanda,¹⁹¹ the UNSC *called* upon the Parties to ensure safe passage and unimpeded delivery of humanitarian assistance to all in need in Rwanda;¹⁹² after the genocide, it kept *calling* upon the States hosting the refugees and IDPs, in particular the Government of Rwanda, to facilitate the delivery of humanitarian assistance;¹⁹³ and then it made similar calls during the conflict that erupted in the border region of Zaire in 1996.¹⁹⁴ In the NIAC in Angola,¹⁹⁵ the UNSC constantly *appealed* to the Parties ‘strictly to abide by *applicable rules of international humanitarian law, including* unimpeded access for humanitarian assistance to the civilian population in need’ (including

¹⁸⁸ The Revolutionary United Front (RUF) invaded Sierra Leone in March 1991 from Liberia and started a conflict that lasted, throughout three *coups d'état* (in 1992, 1996, and 1997), various ceasefires and peace agreements, for more than a decade, until President Kabbah declared its end in January 2002. Humanitarian workers experienced limited access to areas of the country due to general insecurity and episodes of kidnapping, harassment (including by the ECOWAS Ceasefire Monitoring Group, ECOMOG, allegedly) and looting of property, which led to the withdrawal of most of the international personnel of humanitarian NGOs and of the UN in certain moments. See, for example, S/1997/811, 21 October 1997, pars. 11 and 13; S/1998/486, 9 June 1998, par. 48; S/1998/960, 16 October 1998, par. 40; S/1998/1176, 16 December 1998, par. 56; S/1999/237, 4 March 1999, par. 36; S/1999/237, 4 March 1999, par. 28; S/1999/1223, 6 December 1999, pars. 26 and 35; S/2000/455, 19 May 2000, par. 52. *Calling* to end any interference with the delivery of humanitarian assistance, see S/PRST/1997/42, 6 August 1997, 2; S/RES/1132 (1997), 8 October 1997, par. 2; S/PRST/1997/52, 17 November 1997, 2; S/PRST/1998/13, 20 May 1998, 2; S/RES/1370 (2001), 18 September 2001, par. 6.

Calling to guarantee safe access to civilians in need, see S/PRST/1998/5, 26 February 1998, 2; S/PRST/1999/13, 15 May 1999, 2; S/RES/1260 (1999), 20 August 1999, par. 14; S/RES/1270 (1999), 22 October 1999, par. 22.

¹⁸⁹ See S/PRST/1996/1, 5 January 1996, 1-2; S/PRST/1999/32, 12 November 1999, 1; S/RES/1286 (2000), 13 January 2000, par. 9; S/PRST/2001/17, 29 June 2001, 1. See also E/CN.4/RES/1996/1, 27 March 1996, par. 14; E/CN.4/RES/1997/77, 18 April 1997, par. 11; E/CN.4/RES/1998/82, 24 April 1998, par. 9; E/CN.4/RES/2000/20, 18 April 2000, par. 9. All adopted without vote.

The conflict lasted from October 1993 until 2005; on its ethnic connotation and connection with the genocide in Rwanda, see S/1996/116, 15 February 1996, par. 3; S/1996/116, 15 February 1996, par. 3. The conflict was characterised by limits to humanitarian access because of the general insecurity associated with the hostilities, as well as violence against and disrespect for the status of foreign humanitarian personnel. See, for example, S/1996/335, 3 May 1996, pars. 23 and 27; S/1996/660, 15 August 1996 (14-0-0), par. 5 and 18-26; S/2003/1146, 4 December 2003, pars. 54-58; S/2004/902, 15 November 2004, par. 51. ‘[T]he politicization of the inter-ethnic conflict itself [] made it ever more difficult for humanitarian organizations to be perceived by the population as neutral, as their assistance [wa]s judged to favour one side or the other.’ S/1996/660, 15 August 1996 (14-0-0), par. 20.

¹⁹⁰ See S/PRST/1998/31, 6 November 1998, 1-2; S/RES/1216 (1998), 21 December 1998, par. 5; S/RES/1233 (1999), 6 April 1999, par. 11.

¹⁹¹ The conflict ended with the victory of the Rwandan Patriotic Front (RPF) and the establishment of a national coalition Government on 19 July 1994.

¹⁹² See S/RES/912 (1994), 22 April 1994, par. 13; S/PRST/1994/21, 30 April 1994, 2.

¹⁹³ See S/PRST/1995/22, 27 April 1995, 3; S/RES/997 (1995), 9 June 1995, par. 8; S/RES/1029 (1995), 12 December 1995, par. 10.

¹⁹⁴ See S/PRST/1996/44, 1 November 1996, 1; S/RES/1078 (1996), 9 November 1996, par. A-5; **S/RES/1080 (1996), 15 November 1996, par. 6**; S/PRST/1997/5, 7 February 1997, 1; S/PRST/1997/11, 7 March 1997, 1; S/PRST/1997/19, 4 April 1997, 1; S/PRST/1997/22, 24 April 1997, 1. Similarly, see the following res. adopted by the Commission on Human Rights: E/CN.4/RES/1997/58, 15 April 1997 (without vote), par. 3(f).

On the conflict and its humanitarian impact, see the following letters from the UNSG to the President of the UNSC: S/1996/875, 25 October 1996; S/1996/878, 25 October 1996; S/1996/916, 7 November 1996.

¹⁹⁵ The NIAC opposed for three decades (1975-2002) the ruling party MPLA (Movimento Para Libertacao de Angola) to the rebel faction UNITA (Uniao Nacional para Independencia Total de Angola). Humanitarians lacked access to large areas of the country, mainly due to insecurity, logistic problems, and the presence of mines, and to the alleged use by the government of a ‘scorched earth’ policy. See, for example, the UNSG reports, including S/1994/611, 24 May 1994, par. 17; S/1994/740/Add.1, 29 June 1994; S/1999/202, 24 February 1999, par. 28. The period 1998-2002 was particularly problematic for humanitarian access. The government was accused of denying relief to civilians in need in parts of the country under the control of UNITA in order to deprive UNITA of supplies, and since 1998 both the government and UNITA would have prevented humanitarian relief from accessing 80% of Angolan territory. See Christophe Ayad, “L’arme de la famine en Angola,” *Libération*, June 28, 2002. Available at <http://www.liberation.fr/monde/0101417880-l-arme-de-la-famine-en-angola> (accessed June 2, 2011). While the UNSG reports did not present such an alarming picture, MSF, having gained access to areas previously inaccessible after the cease-fire, denounced the insufficient response by the Angolan Government and the UN to the grave humanitarian crisis in the country. See MSF, “Angola: Sacrifice of a People,” October 2002. Available at http://www.doctorswithoutborders.org/publications/reports/2002/angola1_10-2002.pdf (accessed June 2, 2011).

through the establishment of agreed humanitarian relief corridors).¹⁹⁶ In Sudan, the UNGA ‘[r]ecognize[d] *the need for neutrality and impartiality* of humanitarian activities, and the full cooperation of all parties’, as well as the need for Operation Lifeline Sudan to respect the sovereignty of Sudan,¹⁹⁷ called on the Parties to the conflict to protect relief workers and allow access to international organisations to provide humanitarian assistance to those in need in the country,¹⁹⁸ and at the same time ‘[s]tresse[d] ... the importance of strict observance of the principles and guidelines of Operation Lifeline Sudan, and of *international humanitarian law reaffirming the necessity for humanitarian personnel to respect national laws*’.¹⁹⁹

As far as non-African conflicts of the 1990s are concerned, humanitarian access to Kosovo was first identified by the UNSC as one of the conditions to reconsider the arms embargo imposed against the Federal Republic of Yugoslavia (FRY),²⁰⁰ and then constantly *demande*d or *called* for throughout 1998 and 1999, also on the basis of commitments adopted by the President of the FRY.²⁰¹ In Afghanistan,²⁰² with the gradual ascension to power of the Taliban in the second half of the 1990s, the UNSC and the UNGA *called upon* or *urged* the Parties not to obstruct the provision of humanitarian assistance to victims in need through

¹⁹⁶ See S/RES/811 (1993), 12 March 1993, par. 11. Emphasis added. Similarly, see S/RES/834 (1993), 1 June 1993, par. 13; S/RES/851 (1993), 15 July 1993, par. 19. *Urging* or *calling upon* the Parties, see also S/RES/890 (1993), 15 December 1993, par. 10; S/PRST/1994/7, 10 February 1994, 2; S/RES/932 (1994), 30 June 1994, par. 11; S/PRST/1994/45, 12 August 1994, 2; S/PRST/1994/52, 9 September 1994, 2; S/PRST/1995/18, 13 April 1995, 2; S/PRST/1995/27, 11 May 1995, 2; S/PRST/2001/24, 20 September 2001, 2. *Demanding* the Parties to guarantee access and safety and freedom of movement of humanitarian supplies, see S/RES/864 (1993), 15 September 1993, par. 14; S/RES/966 (1994), 8 December 1994, par. 10; S/RES/1055 (1996), 8 May 1996, par. 21; S/RES/1064 (1996), 11 July 1996, par. 21; S/RES/1075 (1996), 11 October 1996, par. 18; S/RES/1087 (1996), 11 December 1996, par. 16.

¹⁹⁷ A/RES/53/1 O, 17 December 1998, par. 4 and preamble. Similarly, see A/RES/54/96 J, 17 December 1999, par. 4 and preamble; A/RES/56/112, 14 December 2001, par. 4 and preamble. All resolutions adopted without vote. On Operation Lifeline Sudan (OLS), see Section 3.2.2.

¹⁹⁸ See A/RES/49/198, 23 December 1994 (101-13-49), preamble and par. 11; A/RES/50/197, 22 December 1995 (94-15-54), par. 8; A/RES/51/30 I, 13 December 1996 (103-34-15), pars. 9-10; A/RES/51/112, 12 December 1996 (100-16-50), par. 10; A/RES/52/140, 12 December 1997 (93-16-58), pars. 7 and 10; A/RES/53/1 O, 17 December 1998 (without vote), par. 10; A/RES/54/96 J, 17 December 1999 (without vote), par. 9; A/RES/54/182, 17 December 1999 (89-30-39), par. 3(c); A/RES/55/116, 4 December 2000 (85-32-49), par. 3(f); A/RES/56/112, 14 December 2001 (without vote), preamble and par. 10; A/RES/56/175, 19 December 2001 (79-37-48), par. 3(i); A/RES/57/230, 18 December 2002 (80-62-33), par. 3(g).

Similarly, see the following res. adopted by the Commission on Human Rights: E/CN.4/RES/1993/60, 10 March 1993 (35-9-8), par. 12; E/CN.4/RES/1994/79, 9 March 1994 (35-9-9), par. 12; E/CN.4/RES/1995/77, 8 March 1995 (33-7-10), par. 18; E/CN.4/RES/1996/73, 23 April 1996 (without vote), par. 17; E/CN.4/RES/1997/59, 15 April 1997 (without vote), par. 18; E/CN.4/RES/1998/67, 21 April 1998 (31-6-16), par. 3; E/CN.4/RES/1999/15, 15 April 1999 (without vote), par. 3(c); E/CN.4/RES/2000/27, 18 April 2000 (28-0-24), par. 3(c).

¹⁹⁹ A/RES/53/1 O, 17 December 1998, par. 10; A/RES/54/96 J, 17 December 1999, par. 9; A/RES/56/112, 14 December 2001, par. 10. Emphasis added. All adopted without vote.

²⁰⁰ See **S/RES/1160 (1998), 31 March 1998 (14-0-1), par. 16(c)**. NATO’s intervention in 1999 added an IAC to the already existing NIAC between the Kosovo Liberation Army (KLA) and Yugoslav forces. On the qualification of the conflict in Kosovo, see Maria-Daniella Marouda, “Application of International Humanitarian law in Contemporary Armed Conflicts: Is It ‘Simply’ a Question of Facts?,” in *Armed Conflicts and International Humanitarian Law 150 Years after Solferino. Acquis and Prospects*, ed. Stelios Perrakis and Maria-Daniella Marouda (Athens: Sakkoulas/Brussels: Bruylant, 2009), 219-222.

²⁰¹ *Demanding*, see **S/RES/1199 (1998), 23 September 1998 (14-0-1), pars. 4-5**. *Calling* for access or *emphasising the need* for Parties to allow it, see S/PRST/1998/25, 24 August 1998, 1; S/RES/1239 (1999), 14 May 1999 (13-0-2), par. 3; **S/RES/1244 (1999), 10 June 1999 (14-0-1), par. 12**. See also A/RES/53/164, 9 December 1998 (122-3-34), pars. 10, 11, 17, and 24. On the impediment of access to humanitarian convoys by the FRY authorities, see S/1998/470, 4 June 1998, par. 29; S/1998/834, 4 September 1998, par. 26.

Similarly, see also the following Commission on Human Rights’ res.: E/CN.4/RES/1999/18, 23 April 1999 (46-1-6), par. 13(d).

²⁰² The country was caught in a NIAC from 1989, when the USSR troops withdrew from the country, until the end of 2001, when the intervention by the U.S. and its allies gave a new dimension to the conflict.

blockades,²⁰³ and not to restrict or impede humanitarian operations but rather facilitate them and ensure humanitarian access.²⁰⁴

Calls for access, as well as for the facilitation (or non-obstruction) of humanitarian assistance, were also made upon the Parties to the conflict in Afghanistan post-9/11,²⁰⁵ as well as to Parties in Somalia, where the WoT, piracy, and then the 2011-2012 famine have sparked renewed attention to the conflict (with the UNSC adopting again resolutions, also under Chapter VII) and led to the deployment of a new AU peacekeeping mission (AMISOM) to foreign military interventions by Ethiopia and Kenya, and to the deployment of a UN peacekeeping mission (UNSOM).²⁰⁶ The UNSC has not only *called upon* the Parties to

²⁰³ See S/PRST/1996/6, 15 February 1996, 1; S/PRST/1998/9, 6 April 1998, 2; S/PRST/1998/22, 14 July 1998, 2. Similarly, see A/RES/52/211 A, 19 December 1997, par. 6; A/RES/53/203 B, 18 December 1998, par. 5; A/RES/54/189 B, 17 December 1999, par. 8; A/RES/55/174 B, 14 December 2000, par. 11. All the UNGA resolutions were adopted without vote. Indeed, the Taliban were criticised because the suffering endured by the civilian population due to the conflict and the way of fighting it, which included blockades of entire areas of the country: see, for example, A/52/826-S/1998/222, 17 March 1998, par. 26; A/52/957-S/1998/532, 19 June 1998, par. 37.

²⁰⁴ See S/PRST/1997/55, 16 December 1997, 2; S/PRST/1998/22, 14 July 1998, 2; S/PRST/1998/24, 6 August 1998, 2; S/RES/1198 (1998), 28 August 1998, par. 9; S/RES/1214 (1998), 8 December 1998, par. 11; S/PRST/1999/29, 22 October 1999, 2; S/PRST/2000/12, 7 April 2000, 1; **S/RES/1333 (2000), 19 December 2000 (13-0-2), preamble and par. 13**. Similarly, see A/RES/52/211 A, 19 December 1997, par. 6; A/RES/53/203 B, 18 December 1998, par. 6; A/RES/54/189 B, 17 December 1999, pars. 7 and 10; A/RES/55/119, 4 December 2000, par. 18; A/RES/55/174 B, 14 December 2000, par. 8. All the UNGA resolutions were adopted without vote.

See also the following res. adopted by the Commission on Human Rights: E/CN.4/RES/1985/38, 13 March 1985, par. 4; E/CN.4/RES/1986/40, 12 March 1986, par. 10; E/CN.4/RES/1998/70, 21 April 1998 (without vote), par. 5(e); E/CN.4/RES/1999/9, 23 April 1999 (without vote), par. 9(e); E/CN.4/RES/2000/18, 18 April 2000 (without vote), par. 8(f).

²⁰⁵ *Calling upon* the Parties or *underlining the need* for the Parties to ensure access, see S/RES/1419 (2002), 26 June 2002, par. 12; S/RES/1868 (2009), 23 March 2009, preamble; S/RES/1917 (2010), 22 March 2010, preamble; S/RES/1974 (2011), 22 March 2011, par. 18; S/RES/2041 (2012), 22 March 2012, par. 29; S/RES/2096 (2013), 19 March 2013, par. 29.

On access, see also A/RES/56/176, 19 December 2001, par. 11; A/RES/56/220 B, 21 December 2001, par. 11; A/RES/57/113 B, 6 December 2002, par. 11; A/RES/57/234, 18 December 2002, par. 21; A/RES/58/26 B, 5 December 2003, par. 9; A/RES/59/112 B, 8 December 2004, par. 2; A/RES/60/32 B, 30 November 2005, par. 2; A/RES/61/18, 28 November 2006, par. 6; A/RES/62/6, 5 November 2007, par. 6; A/RES/63/18, 10 November 2008, par. 16; A/RES/64/11, 9 November 2009, par. 17; A/RES/65/8, 4 November 2010, par. 20; A/RES/66/13, 21 November 2011, par. 20; A/RES/67/16, 27 November 2012, pars. 21, 41, and 79. All the UNGA resolutions were adopted without vote.

On the facilitation of humanitarian assistance, see A/RES/56/176, 19 December 2001, par. 12(f); A/RES/56/220 B, 21 December 2001 (without vote), par. 12.

According to the ICRC, the conflict in Afghanistan has become a NIAC in June 2002, with the establishment of the transitional government: see UK House of Commons, Select Committee on International Development, "Appendices to the Minutes of Evidence: Appendix 8: Letter from the Clerk of the Committee to Philip Spoerri, Legal Adviser, ICRC, and Reply," 20 December 2002, available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm> (accessed June 15, 2012). Questioning this qualification, see Siobhan Wills, "The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection," *Netherlands International Law Review* 58, no. 2 (2011): 173-208. On the qualification of the conflict in Afghanistan, see also Yutaka Arai-Takahashi, "Disentangling Legal Quagmires: The Legal Characterisation of the Armed Conflicts in Afghanistan since 6/7 October 2001 and the Question of Prisoner of War Status," *Yearbook of International Humanitarian Law* 5 (December 2002): 61-105.

²⁰⁶ A Transitional Federal Government (TFG) was formed in 2004, opposed by the Islamic Courts Union (ICU). Ethiopia intervened militarily in support of the TFG in 2006, internationalising the conflict; afterwards, the African Union Mission in Somalia (AMISOM) deployed (S/RES/1744 (2007), 21 February 2007, par. 4), and Al Shabaab emerged in 2007 and gained control of most of the country (but not Somaliland and Puntland). In June 2011 the President of the TFG and the Speaker of the Transitional Federal Parliament signed the Kampala Accord, to defer the elections and form a new government in the meantime. Kenyan and Ethiopian armed forces entered Somalia in October and November 2011 respectively and gained control of parts of the country, and the Kenyan troops were integrated into AMISOM in June 2012. The UNSC decided to establish the United Nations Assistance Mission in Somalia (UNSOM) in May 2013. See S/RES/2102 (2013), 2 May 2013.

On the internationalisation of the armed conflict in Somalia, see for example, Marouda, who also mentions 'the air strikes launched by US air force against transnational terrorist groups operating in the area' to justify the applicability of the law of IAC. Marouda (2009), *supra* fn. 200, 226-228.

allow humanitarian access,²⁰⁷ and to facilitate humanitarian assistance,²⁰⁸ but also adopted multiple Chapter VII resolutions *demanding* that the Parties ensure full humanitarian access.²⁰⁹ In few of these resolutions, the UNSC has made reference to rules of international law, when it has ‘*demand[ed]*’ that all parties ensure full and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance across Somalia, *consistent with humanitarian, human rights and refugee law*,²¹⁰ and later ‘*[d]emand[ed]*’ that all parties ensure full, safe and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance across Somalia, *in accordance with humanitarian principles of impartiality, neutrality, humanity and independence*’.²¹¹

Similarly, in the DRC, former Zaire, where armed conflicts in various regions and involving different Parties have been ongoing since 1998 and have led to often overlapping IACs and NIACs and to occupation,²¹² the UNSC has repeatedly ‘*call[ed]*’ for safe and unhindered access for humanitarian agencies

²⁰⁷ *Calling upon* or *urging* the Parties, or *underlining the crucial importance* of them ensuring humanitarian access, see S/PRST/2002/8, 28 March 2002, 4; S/PRST/2006/11, 15 March 2006, 2; **S/RES/1772 (2007), 20 August 2007, par. 20; S/RES/1801 (2008), 20 February 2008, par. 14; S/PRST/2008/33, 4 September 2008, 1; S/RES/1863 (2009), 16 January 2009, par. 3; S/RES/1872 (2009), 26 May 2009, par. 4; S/RES/2093 (2013), 6 March 2013, preamble.**

Similarly, see the following res. adopted by the Commission on Human Rights: E/CN.4/RES/2003/78, 25 April 2003, par. 8(l); E/CN.4/RES/2004/80, 21 April 2004, par. 12(d); E/CN.4/RES/2005/83, 21 April 2005, par. 9(a). And the following res. adopted (all without vote) by the Human Rights Council: A/HRC/RES/7/35, 28 March 2008, par. 7; A/HRC/RES/12/26, 2 October 2009, par. 3; A/HRC/RES/15/28, 1 October 2010, par. 4; A/HRC/RES/17/25, 17 June 2011, par. 4; A/HRC/RES/19/28, 23 March 2012, par. 13; A/HRC/RES/20/21, 6 July 2012, pars. 8-9; A/HRC/RES/21/31, 28 September 2012, par. 5.

²⁰⁸ See S/PRST/2000/22, 29 June 2000, 1; S/PRST/2003/2, 12 March 2003, 3; S/PRST/2003/19, 11 November 2003, 2; S/PRST/2004/3, 25 February 2004, 2; S/PRST/2004/24, 14 July 2004, 2. See also A/RES/66/120, 15 December 2011 (without vote), par. 12.

²⁰⁹ See S/PRST/2006/31, 13 July 2006, 2; **S/RES/1744 (2007), 21 February 2007, par. 11; S/PRST/2007/13, 30 April 2007, 1; S/PRST/2007/19, 14 June 2007, 2; S/PRST/2007/49, 19 December 2007, 1-2; S/RES/1814 (2008), 15 May 2008, par. 12; S/RES/1910 (2010), 28 January 2010, par. 17; S/RES/1964 (2010), 22 December 2010, par. 17; S/PRST/2011/6, 10 March 2011, 2; S/RES/2002 (2011), 29 July 2011, par. 5; S/RES/2010 (2011), 30 September 2011, preamble and par. 26; S/RES/2036 (2012), 22 February 2011, preamble and par. 16; S/PRST/2012/4, 5 March 2012, 2-3; S/RES/2060 (2012), 25 July 2012, par. 6; S/RES/2067 (2012), 18 September 2012, par. 19.**

²¹⁰ **S/RES/2036 (2012), 22 February 2011, par. 16.** Emphasis added. See also Ibid., preamble; **S/RES/2010 (2011), 30 September 2011, preamble; S/PRST/2012/4, 5 March 2012, 2-3.**

²¹¹ **S/RES/2060 (2012), 25 July 2012, par. 6.** Emphasis added. Highlighting the need for the Parties to the armed conflict in Somalia to allow safe access to humanitarian workers, see also A/RES/56/106, 14 December 2001, par. 9; A/RES/57/154, 16 December 2002, par. 6; A/RES/58/115, 17 December 2003, par. 9; A/RES/59/218, 22 December 2004, par. 9; A/RES/60/219, 22 December 2005, pars. 3 and 10; A/RES/66/120, 15 December 2011, par. 12. All adopted without vote. See also A/HRC/RES/7/35, 28 March 2008, par. 7; A/HRC/RES/12/26, 2 October 2009, par. 3; A/HRC/RES/15/28, 1 October 2010, par. 4; A/HRC/RES/17/25, 17 June 2011, par. 4; A/HRC/RES/19/28, 23 March 2012, par. 13. All adopted without a vote.

²¹² On Uganda being an Occupying Power in Ituri (DRC) in August 1998-June 2003, see ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment, 19 December 2005, ICJ Reports 2005 at 168, pars. 57, 118, and 178. On Uganda as an Occupying Power in Ituri and the existence of an IAC there from July 2002 to 2 June 2003, and on the existence of a NIAC in Ituri from 2 June to December 2003 (to which AP II was applicable), see ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, in Case of the *Prosecutor v. Thomas Lubanga Dyilo*, case no. ICC-01/04-01/06, Decision on the confirmation of charges, Public Redacted Version with Annex I, 29 January 2007, pars. 220, 226, and 227-237. On the existence of a NIAC between the UPC/FPLC (Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo) and other armed groups between September 2002 and 13 August 2003, see ICC, Trial Chamber I, Situation in the Democratic Republic of the Congo, in the Case of the *Prosecutor v. Thomas Lubanga Dyilo*, case no. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, pars. 70, 564-565, and 567. On the classification of the armed conflicts in the DRC, see also E/CN.4/1999/31, 8 February 1999, par. 41; E/CN.4/2000/42, 18 January 2000, par. 20.

Foreign armies effectively withdrew by mid-2003, but armed conflict continued to exist in the eastern part of the country (North and South Kivu and Ituri). See, for example, Victoria Holt, Glyn Taylor, and with Max Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (New York: UN, 2009), 246-286.

to all those in need’,²¹³ and later expressed *demands* in this sense,²¹⁴ has called for the facilitation of humanitarian assistance;²¹⁵ and, in some cases, acting under Chapter VII, has ‘*demand[ed]*’ that all parties concerned grant immediate, full and unimpeded access by humanitarian personnel to all persons in need of assistance, *as provided for in applicable international law*,²¹⁶ as well as *stressing* ‘the importance of ensuring the full, safe and unhindered access of humanitarian workers to people in need *in accordance with international law*’ in the Great Lakes region.²¹⁷ Following hostilities between governmental forces and the M23 rebel movement in 2012, the UNSC repeatedly ‘call[ed]’ on all parties, in particular the M23, to allow safe, timely and unhindered humanitarian access to the areas under the control of M23 and in the wider region *in accordance with international law, including applicable international humanitarian law and the guiding principles of humanitarian assistance*.²¹⁸

Calls for humanitarian access and cooperation with humanitarian actors have been made for the conflicts in Côte d’Ivoire;²¹⁹ the NIAC in Darfur, Sudan,²²⁰ where the UNSC has *demand[ed]* ‘that the

²¹³ S/PRST/1998/26, 31 August 1998, 2. Similarly, see S/PRST/1998/36, 11 December 1998, 2; S/RES/1234 (1999), 9 April 1999, par. 9; S/RES/1258 (1999), 6 August 1999, par. 11; S/RES/1291 (2000), 24 February 2000, par. 12; S/RES/1304 (2000), 16 June 2000, par. 16; S/PRST/2000/28, 7 September 2000, 1; S/RES/1332 (2000), 14 December 2000, par. 13; S/RES/1341 (2001), 22 February 2001, par. 11; S/RES/1445 (2002), 4 December 2002, par. 14; S/PRST/2008/40, 29 October 2008, 1; S/RES/1843 (2008), 20 November 2008, preamble.

Similarly, see A/RES/55/117, 4 December 2000 (102-2-63), par. 3(f); A/RES/55/166, 14 December 2000, par. 5; A/RES/56/100, 14 December 2001, par. 10; A/RES/56/173, 19 December 2001 (90-3-69), par. 3(f); A/RES/57/146, 16 December 2002, par. 12; A/RES/57/233, 18 December 2002, par. 4(f); A/RES/58/123, 17 December 2003 (169-1-0), par. 13; A/RES/58/196, 22 December 2003, par. 4(h); A/RES/59/207, 20 December 2004 (76-2-100), par. 5(i); A/RES/60/170, 16 December 2005 (102-3-67), par. 5(e). Unless specified otherwise, adopted without vote. See also E/CN.4/RES/2000/15, 18 April 2000, par. 3(c); E/CN.4/RES/2003/15, 17 April 2003, par. 4(j); E/CN.4/RES/2005/85, 21 April 2005, par. 5(d); A/HRC/RES/S-8/1, 1 December 2008, par. 4. All adopted without vote.

²¹⁴ See S/RES/1468 (2003), 20 March 2003, par. 14; S/PRST/2003/6, 16 May 2003, 1; S/RES/1493 (2003), 28 July 2003, par. 12; S/RES/1856 (2008), 22 December 2008, par. 23; S/RES/2053 (2012), 27 June 2012, par. 26.

²¹⁵ See S/PRST/2001/19, 24 July 2001, 1; S/RES/1445 (2002), 4 December 2002, par. 14; S/RES/1906 (2009), 23 December 2009, preamble; S/RES/2053 (2012), 27 June 2012, preamble. See also A/RES/53/1 L, 7 December 1998, par. 4; A/RES/54/96 B, 8 December 1999, par. 5; A/RES/56/100, 14 December 2001, par. 10; A/RES/57/146, 16 December 2002, par. 13; A/RES/58/123, 17 December 2003 (169-1-0), par. 19. All adopted, unless indicated otherwise, without vote. A/HRC/RES/S-8/1, 1 December 2008 (adopted without a vote), pars. 1 and 4.

²¹⁶ S/RES/1756 (2007), 15 May 2007, par. 13; S/RES/1794 (2007), 21 December 2007, par. 17. Emphasis added. *Urging* Parties to act in this sense, see S/RES/1565 (2004), 1 October 2004, par. 21. Already in 2001, the UNSC had *called* ‘on all parties to ensure, in accordance with relevant international law, the full, safe and unhindered access of relief personnel to all those in need and the delivery of humanitarian assistance, in particular to all children affected by the conflict’. S/RES/1355 (2001), 15 June 2001, par. 19.

²¹⁷ S/RES/1653 (2006), 27 January 2006, par. 10. Emphasis added.

²¹⁸ S/PRST/2012/22, 19 October 2012, 1; S/RES/2076 (2012), 20 November 2012, par. 11; S/PRST/2013/11, 25 July 2013, 4.

²¹⁹ See S/PRST/2002/42, December 2002, 2; S/PRST/2003/25, 5 December 2003, 2; S/RES/1975 (2011), 30 March 2011, par. 10. See also A/HRC/RES/16/25, 25 March 2011 (without vote), par. 7. Côte d’Ivoire was the theatre of a NIAC from in September 2002 until 2007, and of another NIAC at the end of 2010 and in the first months of 2011.

²²⁰ *Calling upon* or *urging* the Parties to allow full and unimpeded access by humanitarian personnel to all people in need of assistance, see S/PRST/2004/18, 25 May 2004, 1-2; S/RES/1564 (2004), 18 September 2004 (11-0-4), preamble; S/RES/1574 (2004), 19 November 2004, par. 11; S/RES/1590 (2005), 24 March 2005, par. 9; S/PRST/2005/48, 13 October 2005, 1; S/RES/1706 (2006), 31 August 2006 (12-0-3), preamble; S/RES/1769 (2007), 31 July 2007, par. 19; S/PRST/2010/24, 16 November 2010, 3; S/PRST/2011/3, 9 February 2011, 2; S/PRST/2011/12, 3 June 2011, 1; S/RES/2035 (2012), 17 February 2012, preamble. Similarly, see E/CN.4/RES/2005/82, 21 April 2005 (without vote), par. 3(c).

Demanding that the Parties ensure access, see S/RES/1828 (2008), 31 July 2008 (14-0-1), par. 13; S/RES/1881 (2009), 6 August 2009, par. 12; S/RES/1935 (2010), 30 July 2010, par. 10; S/PRST/2011/8, 21 April 2011, 2; S/RES/2003 (2011), 29 July 2011, preamble and par. 15; S/RES/2063 (2012), 31 July 2012 (14-0-1), preamble and par. 14.

Government of Sudan, all militias, armed groups and all other stakeholders ensure the full, safe and unhindered access of humanitarian organizations and relief personnel, and the delivery of humanitarian assistance to populations in need, *while respecting United Nations guiding principles of humanitarian assistance including humanity, impartiality, neutrality and independence*;²²¹ the NIACs in the Central African Republic (CAR) and in Chad,²²² where the UNSC *requested* the Parties to the conflict to protect humanitarian workers and ‘provide humanitarian personnel with immediate, free and unimpeded access to all persons in need of assistance, *in accordance with applicable international law*’;²²³ the hostilities in the CAR due to the presence of the Ugandan rebel faction LRA (Lord’s Resistance Army) in 2011-2012;²²⁴ the NIAC in Burundi, where the UNSC *urged* ‘all those concerned [in Burundi] to allow full unimpeded access by humanitarian personnel to all people in need of assistance *as set forth in applicable international humanitarian law*’;²²⁵ the conflict in Iraq post-2004, thus after the establishment of the interim Iraqi Government, when the UNSC *urged* all those concerned ‘*as set forth in international humanitarian law, including the Geneva Conventions and the Hague Regulations*’, to allow full and unimpeded access by humanitarian personnel to all people in need of assistance and make available, as far as possible, all necessary facilities for their operations;²²⁶ the NIAC in Yemen,²²⁷ and the NIACs in Myanmar.²²⁸

Calling on the Parties facilitate the operations of humanitarian personnel including by lifting administrative burdens and restrictions, see S/PRST/2004/18, 25 May 2004, 1-2; S/RES/1556 (2004), 30 July 2004 (13-0-2), par. 1; S/PRST/2007/15, 25 May 2007, 1; S/RES/1784 (2007), 31 October 2007, par. 12; S/RES/1812 (2008), 30 April 2008, par. 17; S/RES/1870 (2009), 30 April 2009, par. 13; S/RES/1919 (2010), 20 April 2010, par. 13; S/RES/2003 (2011), 29 July 2011, par. 15; S/RES/2063 (2012), 31 July 2012 (14-0-1), par. 14 (Azerbaijan abstained).

Demanding such cooperation with humanitarians, see S/RES/1769 (2007), 31 July 2007, par. 14.

On the qualification of the conflict, see, for example, Marouda (2009), supra fn. 200, 231-234.

²²¹ *S/RES/2113 (2013), 30 July 2013, par. 16.*

²²² *In favour of the classification of the conflicts in Sudan, the CAR, and Chad as separate NIACs, see Marouda (2009), supra fn. 200, 232-234.*

The conflicts were characterised by the restriction of humanitarian space due to insecurity and attacks targeting aid workers. On Chad, see, for example: S/2007/400, 3 July 2007, pars. 45-47; S/2008/444, 8 July 2008, pars. 15 and 18; S/2008/601, 12 September 2008, pars. 12-14, 19, and 52; S/2008/760, 4 December 2008, pars. 12-13 and 16-18; S/2009/199, 14 April 2009, par. 11 and 16-18; S/2009/359, 14 July 2009, pars. 6 and 19-21; S/2009/535, 14 October 2009, pars. 9 and 14; S/2010/409, 30 July 2010, pars. 2-3; S/2011/64, 9 February 2011, pars. 36-42; S/2011/278, 29 April 2011, pars. 20-22. On the CAR, see, for example, S/2007/376, 22 June 2007, par. 14; S/2008/410, 23 June 2008, pars. 28-29; S/2009/66, 3 February 2009, pars. 45-47; S/2010/217, 29 April 2010, par. 5; S/2101/295, 10 June 2010, par. 45; S/2011/241, 13 April 2011, pars. 31-35; S/2011/311, 16 May 2011, par. 41.

²²³ *S/RES/1778 (2007), 25 September 2007, par. 17. Emphasis added. See also S/RES/1861 (2009), 14 January 2009, par. 22; S/RES/1923 (2010), 25 May 2010, par. 22.*

²²⁴ *See S/PRST/2011/21, 14 November 2011, 2; S/RES/2031 (2011), 21 December 2011, par. 17; S/PRST/2012/18, 29 June 2012, 3; S/RES/2088 (2013), 24 January 2013, par. 9.*

²²⁵ *S/RES/1545 (2004), 21 May 2004, par. 12. Emphasis added.*

²²⁶ *S/RES/1770 (2007), 10 August 2007, preamble. Emphasis added. See also S/RES/1830 (2008), 7 August 2008, preamble; S/RES/1883 (2009), 7 August 2009, preamble; S/RES/1936 (2010), 5 August 2010, preamble; S/RES/2001 (2011), 28 July 2011, preamble; S/RES/2061 (2012), 25 July 2012, preamble; S/RES/2110 (2013), 24 July 2013, preamble.*

*According to the ICRC, the conflict in Iraq Became a NIAC with the cessation of occupation, following ‘the hand-over of power from the Coalition Provisional Authority to the interim Iraqi Government on 28 June 2004’. ICRC, “Iraq post 28 June 2004: Protecting Persons Deprived of Freedom Remains a Priority,” August 5, 2004, available at <http://www.icrc.org/eng/resources/documents/misc/63kkj8.htm> (accessed June 15, 2012). See also Daniel Thürer, “Current Challenges to The Law Of Occupation,” *Collegium, Special Edition: Current Challenges to the Law of Occupation Proceedings of**

Similarly, in the 2006 conflict in Lebanon opposing the Hezbollah to Israel,²²⁹ various States within the UNSC urged Parties to the conflict to provide unhindered access to humanitarian assistance,²³⁰ and the UNSC itself *urged* ‘all parties to grant immediate and unlimited access to humanitarian assistance’,²³¹ and called for the implementation of a ceasefire comprising ‘humanitarian access to civilian populations, including safe passage for humanitarian convoys’.²³²

With reference to the recent NIACs in Sudan, in South Kordofan and Blue Nile, and in the contested area of Abyei, erupted following the declaration of independence of South Sudan in July 2011, the UNSC has *urged* and later *demand*ed Parties to the conflict in Abyei to ‘provide humanitarian personnel with full,

the Bruges Colloquium 20th-21st October 2005, 34 (Autumn 2006), 18-23. Questioning this qualification, see Wills (2011), *supra* fn. 205.

²²⁷ *Requesting* the Parties to allow full, safe and unhindered access for the delivery of humanitarian aid, as well as to facilitate the work of UN agencies and other relevant organisations, see S/RES/2014 (2011), 21 October 2011, par. 10. See also S/PRST/2012/8, 29 March 2012, 2; S/RES/2051 (2012), 12 June 2012, par. 13.

²²⁸ The UNGA first *urged* the Government of Myanmar to allow the safe and unhindered access of humanitarian personnel to assist in the return and reintegration process of IDPs and refugees. See A/RES/55/112, 4 December 2000, par. 15; A/RES/56/231, 24 December 2001, par. 19. All adopted without vote. Later, it *urged* the Government of Myanmar to allow the safe and unhindered access of the UN and international humanitarian organisations and cooperate fully with them ‘to ensure the provision of humanitarian assistance and to guarantee that it does reach the most vulnerable groups of the population’, sometimes also making explicit reference to the existence of conflict in certain areas of the country. A/RES/57/231, 18 December 2002, par. 4(d); A/RES/58/247, 23 December 2003, par. 4(c); A/RES/59/263, 23 December 2004, par. 3(k); A/RES/60/233, 23 December 2005, par. 3(m); A/RES/61/232, 22 December 2006 (82-25-45), par. 3(j); A/RES/62/222, 22 December 2007 (83-22-47), par. 4(f); A/RES/63/245, 18 December 2008 (80-25-45), par. 4(i); A/RES/64/238, 24 December 2009 (86-23-39), par. 22; A/RES/65/241, 24 December 2010 (85-26-46), par. 21 (mentioning also ‘the need for a swift facilitation of requests for visa and in-country travel permission’ and thus ‘encourag[ing] the Government to build on the experience of the Tripartite Core Group and to continue its cooperation to allow humanitarian assistance to reach all persons in need throughout the country’); A/RES/66/230, 24 December 2011 (83-21-39), par. 23 (again referring to visas); similarly, but focusing on access to the Rakhine State, see A/RES/67/233, 24 December 2012, par. 15(b). All adopted, if not otherwise indicated, without vote. Similarly, see E/CN.4/RES/2003/12, 16 April 2003 (without vote), par. 4(d); E/CN.4/RES/2004/61, 21 April 2004 (without vote), par. 4(d); E/CN.4/RES/2005/10, 14 April 2005 (without vote), par. 5(f).

Calling upon the Government of Myanmar to cooperate fully with humanitarian organisations, including by ensuring humanitarian access, see also A/HRC/RES/S-5/1, 2 October 2007, par. 8; A/HRC/RES/6/33, 14 December 2007, par. 9; A/HRC/RES/7/31, 28 March 2008, par. 3(d); A/HRC/RES/8/14, 18 June 2008, par. 3; A/HRC/RES/8/27, 27 March 2009, par. 9; A/HRC/RES/13/25, 26 March 2010, par. 17. All adopted without vote. Similarly, see A/HRC/PRST/23/1, 14 June 2013, (i).

²²⁹ On the qualification of the conflict as an IAC, see *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*, A/HRC/3/2, 23 November 2006, pars. 50-62; Marouda (2009), *supra* fn. 200, 234-236. Questioning such a classification, see Sylvain Vit  , ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations,’ *International Review of the Red Cross* 91, no. 873 (March 2009), 91-92. See also Marko Milanovic and Vidan Hadzi-Vidanovic, ‘A Taxonomy of Armed Conflict,’ in *Research Handbook of International Conflict and Security Law*, ed. Nigel White and Christian Henderson (Cheltenham [etc.]: Edward Elgar Publishing, 2013), 295-296.

Israel was accused of impeding the delivery of humanitarian assistance to civilians in need in the territory controlled by the Hezbollah by denying safe transit to ambulances and humanitarian convoys, and of further contributing to the worsening of the humanitarian situation by carrying out indiscriminate attacks and attacks against dual-use objects, such as vital infrastructure for transports. See, for example, *Report of the Special Rapporteur on the right to food, Jean Ziegler, on his mission to Lebanon*, A/HRC/2/8, 29 September 2006, pars. 14-18; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter K  lin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari: Mission to Lebanon and Israel (7-14 September 2006)*, A/HRC/2/7, 2 October 2006, pars. 37 and 49-51; *Report of the Commission of Inquiry on Lebanon* (2006), *supra*, pars. 14-15, 136-148, 162-187, and 208. See also, for example, Amnesty International, ‘Israel/Lebanon: Deliberate destruction or “collateral damage”? Israeli attacks on civilian infrastructure,’ Report MDE 18/007/2006, August 2006; Amnesty International, ‘Israel/Lebanon: Out of all proportion - civilians bear the brunt of the war,’ Report MDE 02/033/2006, November 2006.

Israel was also accused of imposing a sea and air blockade on Lebanon. See *Report of the Commission of Inquiry on Lebanon* (2006), *supra*, pars. 20-22 and 268-275.

²³⁰ See in particular: S/PV.5493, 21 July 2006, the statements by Slovakia and China; S/PV.5493 (Resumption 1), 21 July 2006, the statements by Greece, Switzerland, Norway, Canada, and Guatemala.

²³¹ S/PRST/2006/35, 30 July 2006, 1.

²³² S/RES/1701 (2006), 11 August 2006, pars. 1 and 7.

safe and unhindered access to civilians in need of assistance and all necessary facilities for their operations, *in accordance with applicable international humanitarian law*,²³³ and later *‘in accordance with international law, including applicable international humanitarian law, and guiding principles of humanitarian assistance’*,²³⁴ and *‘[s]trongly urge[d] Sudan and the SPLM-N to accept the tripartite proposal submitted by the African Union, the United Nations and the League of Arab States, to permit humanitarian access to the affected population in the two areas, ensuring in accordance with applicable international law, including applicable international humanitarian law, and guiding principles of emergency humanitarian assistance, the safe, unhindered and immediate access of United Nations and other humanitarian personnel, as well as the delivery of supplies and equipment, in order to allow such personnel to efficiently perform their task of assisting the conflict-affected civilian population’*.²³⁵

Similarly, in response to the coup in Mali in 2012, the UNSC *called* ‘on all parties in Mali to allow timely, safe and unimpeded access of humanitarian aid to civilians in need, *in accordance with international law, including applicable international humanitarian law, and guiding principles of emergency humanitarian assistance*’,²³⁶ and adopted an analogous formulation with reference to parties in the LRA-affected region in Africa.²³⁷ It repeated the same call in the case of Syria, but at first omitting the reference to applicable IHL and adding a call upon all parties in Syria, in particular the Syrian authorities, to cooperate fully with the UN and relevant humanitarian organizations to facilitate the provision of humanitarian

²³³ S/RES/2032 (2011), 22 December 2011, par. 9; S/PRST/2012/5, 6 March 2012, 2; S/RES/2047 (2012), 17 May 2012, par. 11. Emphasis added.

²³⁴ S/RES/2075 (2012), 16 November 2012, par. 13; S/RES/2104 (2013), 29 May 2013, par. 17. The UNSC also *‘Renew[ed] its call on Sudan and South Sudan to provide full support to the United Nations, including by promptly issuing visas to military, police and civilian United Nations personnel, including humanitarian personnel, without prejudice to their nationality, facilitating basing arrangements and flight clearances, and providing logistical support’*: S/RES/2075 (2012), 16 November 2012, par. 10; S/RES/2104 (2013), 29 May 2013, par. 14.

²³⁵ **S/RES/2046 (2012), 2 May 2012, par. 4.** Emphasis added. Similarly, see S/PRST/2012/5, 6 March 2012, 2. *Demanding* that ‘the Government of Sudan and the SPLM-N cooperate fully with the United Nations and other humanitarian agencies and organizations,’ see S/PRST/2012/5, 6 March 2012, 2. In August 2012, the UNSC ‘call[ed] on the Government of Sudan and SPLM North to fully and faithfully implement [the] terms [of the tripartite plan proposed by the UN, AU and League of Arab States] to expedite the unhindered delivery of this assistance as rapidly as possible, *in accordance with applicable international law, including applicable international humanitarian law and the accepted principles of humanity, neutrality, impartiality and independence in the provision of humanitarian assistance.*’ S/PRST/2012/19, 31 August 2012, 2. See also S/PRST/2013/14, 23 August 2013, 2; A/HRC/RES/18/16, 29 September 2011 (adopted without vote), par. 8.

Similarly, calling on the Parties to facilitate access and welcoming the signature of the MoU, see A/HRC/RES/18/16, 29 September 2011 (without vote), par. 8; A/HRC/RES/21/27, 28 September 2012, pars. 5 and 12.

Calling upon ‘all parties to allow, in accordance with relevant provisions of international law, the full, safe and unhindered access of relief personnel to all those in need and delivery of humanitarian assistance, in particular to internally displaced persons and refugees’, see S/RES/2109 (2013), 11 July 2013, par. 13.

²³⁶ S/PRST/2012/9, 4 April 2012, 2. Emphasis added. The UNSC further *‘[d]emand[ed] that all parties in Mali ensure full, safe and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance’*: **S/RES/2056 (2012), 5 July 2012, par. 14; S/RES/2085 (2012), 20 December 2012, par. 16.**

²³⁷ See S/PRST/2012/28, 19 December 2012, 3; S/PRST/2013/6, 29 May 2013, 3.

assistance.²³⁸ Later, the UNGA and the Human Rights Council have also explicitly *demanded* ‘that the Syrian authorities facilitate the access of humanitarian organizations to all people in need through the most effective routes, including by providing authorization for cross-border humanitarian operations as an urgent priority, and encourage[d] all parties in the Syrian Arab Republic to facilitate the delivery of assistance in areas under their control, including across conflict lines, in order to implement fully the humanitarian response plan’.²³⁹

The obligations of the Parties under international law, including IHL, were explicitly recalled by the UNSC also in the case of the NIAC Libya, with the adoption of language focusing on the duty of belligerents, in particular the Libyan authorities, to allow the passage of humanitarian assistance and relief workers. The UNSC first *urged* the Libyan authorities to ‘[e]nsure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country’,²⁴⁰ and then *demanded* that they complied ‘with their obligations under international law, including international humanitarian law, human rights and refugee law and t[ook] all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance’.²⁴¹

The U.S.-led intervention in Iraq in 2003 led to a situation of occupation, so that the UNSC recalled the obligations of the Occupying Power/s under IHL, including under Article 55 GC IV, *requested* them to strictly abide by these obligations and *urged* ‘all parties concerned, consistent with the Geneva Conventions

²³⁸ See S/PRST/2012/10, 5 April 2012, 2; S/RES/2042 (2012), 14 April 2012, par. 10; S/RES/2043 (2012), 21 April 2012, par. 11. However, for example, in May 2012 ICRC President Jakob Kellenberger was reported as saying that the fighting in some areas in the previous months might have amounted to NIAC. See Stephanie Nebehay, “Some Syria Violence Qualifies as Civil War-Red Cross,” Reuters AlertNet website, May 8, 2012. Available at <http://www.trust.org/alertnet/news/some-syria-violence-qualifies-as-civil-war-red-cross/> (accessed May 8, 2012). In mid-July 2012, the ICRC ‘conclude[d] that there [wa]s [at the time] a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country (including, but not limited to, Homs, Idlib and Hama).’ ICRC, “Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting,” Operational Update, July 17, 2012, available at <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm> (accessed January 15, 2013). On the qualification of the crisis in Syria as a NIAC, see also *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/21/50, 16 August 2012, par. 12.

Calling upon the Syrian authorities to allow safe and unhindered access for humanitarian assistance, see also A/RES/66/253, 16 February 2011 (137-12-17), par. 10; A/RES/67/183, 20 December 2012 (135-12-36), par. 12; A/RES/67/262, 15 May 2013 (107-12-59), par. 14; A/HRC/RES/S-16/1, 29 April 2011 (26-9-7), par. 3; A/HRC/RES/S-17/1, 23 August 2011 (33-4-9), par. 7; A/HRC/RES/S-18/1, 2 December 2011 (37-4-6), par. 4(h); A/HRC/RES/19/22, 23 March 2012 (41-3-2), par. 9; A/HRC/RES/S-19/1, 1 June 2012 (41-3-2), par. 11; A/HRC/RES/20/22, 6 July 2012 (41-3-3), par. 9; A/HRC/RES/21/26, 28 September 2012 (41-3-3), par. 16; A/HRC/RES/22/24, 22 March 2013 (41-1-5), par. 27.

²³⁹ A/RES/67/262, 15 May 2013 (107-12-59), par. 15. Emphasis added. Similarly, see A/HRC/RES/23/1, 29 May 2013 (36-1-8), par. 6; A/HRC/RES/23/26, 14 June 2013 (37-1-9), par. 24.

²⁴⁰ S/RES/1970 (2011), 26 February 2011, par. 2(e).

²⁴¹ S/RES/1973 (2011), 17 March 2011 (10-0-5), par. 3. Emphasis added. Similarly, see A/HRC/RES/S-15/1, 25 February 2011 (without vote), pars. 4 and 10; A/HRC/RES/17/17, 17 June 2011 (without vote), par. 3.

and the Hague Regulations, to allow full unimpeded access by international humanitarian organizations to all people of Iraq in need of assistance and to make available all necessary facilities for their operations’.²⁴²

Similarly, the legal regime of occupation is applicable to the occupied Palestinian territory (oPt), while its applicability to Gaza after September 2005 has been highly controversial.²⁴³ In 2002, during Operation Defensive Shield,²⁴⁴ the UNSC *called upon* ‘the Government of Israel, the Palestinian Authority and all States in the region to cooperate with the efforts to achieve the goals set out in the Joint Statement’ issued by the Quartet, which *inter alia* ‘call[ed] on Israel to fully comply with international humanitarian principles and to allow full and unimpeded access to humanitarian organizations and services’.²⁴⁵

²⁴² See S/RES/1472 (2003), 28 March 2003, preamble and pars. 1 and 8.

²⁴³ Qualifying Israel as Occupying Power, see, for example:

- the UNGA: A/RES/61/119, 14 December 2006 (157-9-14), preamble; A/RES/66/79, 9 December 2011 (159-9-4), pars. 5 and 10;
- the Human Rights Council: A/HRC/S-9/2, 3: I. Resolution adopted by the Council at its ninth special session: S-9/1 The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, 12 January 2009 (33-1-13);
- the ICRC: ICRC, “ICRC gravely concerned about humanitarian situation in Gaza,” News release 06/77, July 13, 2006, available at <http://domino.un.org/UNISPAL.nsf/59c118f065c4465b852572a500625fea/038217e85eec4aa2852571d10051a7b3?OpenDocument&Click=> (accessed May 23, 2011); ICRC, “Gaza: no end in sight to hardship and despair,” Interview, May 20, 2011, available at <http://www.icrc.org/eng/resources/documents/interview/2011/palestine-israel-interview-2011-05-19.htm> (accessed May 23, 2011);
- the UN Special Rapporteur for Human Rights in the Occupied Territories: Richard Falk, “Statement by Prof. Richard Falk, United Nations Special Rapporteur for Human Rights in the Occupied Territories,” December 27, 2008, UN OHCHR website. Available at <http://www.unhchr.ch/huricane/huricane.nsf/view01/F1EC67EF7A498A30C125752D005D17F7?opendocument> (accessed May 23, 2011);
- the UN Fact Finding Mission on the Gaza Conflict: *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, 15 September 2009, pars. 277-279; hereinafter Goldstone Report;
- NGOs such as Human Rights Watch and Amnesty International: Human Rights Watch, *World Report 2011: Events of 2010* (New York: Human Rights Watch, 2011), 538; Amnesty International, *The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability* (London: Amnesty International Publications, 2009), 7, available at <http://www.amnesty.org/en/library/asset/MDE15/007/2009/en/4dd8f595-e64c-11dd-9917-ed717fa5078d/mde150072009en.pdf> (accessed May 23, 2011).

Qualifying Israel as no longer Occupying Power, see Israel and its Supreme Court: Supreme Court of Israel sitting as the High Court of Justice, *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence*, HCJ 9132/07, 30 January 2008, par. 12. Both the State of Israel and its Supreme Court agree that anyway IHL has remained applicable, due to the existence of an armed conflict between Israel and Hamas, the organisation controlling the Gaza Strip. See *Ibid*.

²⁴⁴ Operation Defensive Shield was a military operation conducted by Israel in various cities of the West Bank between the end of March and the beginning of May 2002. See the UNSG report A/ES-10/186, 30 July 2002, pars. 14-22.

²⁴⁵ S/PRST/2002/9, 10 April 2002, 1 and Annex: Joint Statement, 2. The Quartet comprised the Minister of Foreign Affairs of the Russian Federation Igor Ivanov, the Secretary of State of the United States Colin Powell, the Minister for Foreign Affairs of Spain Josep Pique and the High Representative for European Union Common Foreign and Security Policy Javier Solana, together with the UNSG Kofi Annan.

Afterwards, given that medical personnel and humanitarian organisations were completely denied access to a refugee camp in the city of Jenin for four days after the end of the incursion by Israeli armed forces, the UNSC, ‘[c]alling for the lifting of restrictions imposed, in particular in Jenin, on the operations of humanitarian organizations, including the International Committee of the Red Cross and United Nations Relief and Works Agency for Palestine Refugees in the Near East,’ ‘[e]mphasize[d] the urgency of access of medical and humanitarian organizations to the Palestinian civilian population’. S/RES/1405 (2002), 19 April 2002, preamble par. 3 and par. 1. In addition, see the statements by: the representative of Spain on behalf of the EU, S/PV.4506, 3 April 2002, 10; the representatives of Bahrain, Cyprus, Norway, and France, S/PV.4506 (Resumption 1), 3 April 2002, 15, 21, 32, and 33; the representatives of Norway, Ireland, Mexico, Colombia, Singapore, and South Africa on behalf of the Non-Aligned Movement, S/PV.4510, 8 April 2002, 6-8, 16-17, and 21; the representatives of Spain on behalf of the EU, Lebanon, and Republic of Korea, S/PV.4510 (Resumption 1), 8 April 2002, 6 and 23; the representatives of Spain on behalf of the EU, Brazil, India, Canada, Indonesia, and Republic of Korea S/PV.4515, 18 April 2002, 14, 21, 26, 34, 36, and 38; the representatives of France, Ireland, Mexico, and the Syrian Arab Republic, S/PV.4515 (Resumption 1), 19 April 2002, 5-6, 10, 12, and 16. On the events in the camp, see A/ES-10/186, 30 July 2002, pars. 62-69.

Afterwards, the UNSC welcomed the adoption by Israel and the Palestinian Authority of an *Agreement on Movement and Access* and the *Agreed Principles for the Rafah Crossing* in November 2005, in which both Parties committed themselves to measures aimed at a facilitation of the movement of goods and persons to and from Gaza and the West Bank.²⁴⁶ UNSC members, the UNGA and the Human Rights Council repeatedly called for the implementation of the Agreement throughout the following years.²⁴⁷ However, since Hamas' takeover in June 2007, Israel has imposed the closure of land crossings and a naval blockade upon Gaza and enforced it with increased rigidity.²⁴⁸

The blockade has been condemned as a violation of international law by both the UNSG and a plurality of States during UNSC meetings, because of the unlawful restrictions Israel has imposed on the access to humanitarian assistance and the ensuing consequences for the civilian population,²⁴⁹ and the Human Rights Council has considered the 'siege' of Gaza 'collective punishment of the Palestinian civilians'.²⁵⁰ The situation further aggravated with operation Cast Lead and the so-called Gaza Conflict at the

²⁴⁶ See S/PRST/2005/57, 30 November 2005, 1. See website of the Israel Ministry of Foreign Affairs, "Agreed documents on movement and access from and to Gaza: 15 Nov 2005," November 15, 2005. Available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm> (accessed May 25, 2011).

²⁴⁷ See, for example, statements by the representatives of France (S/PV.5824, 22 January 2008, 15) and BiH (S/PV.6325, 31 May 2010, 11; S/PV.6363, 21 July 2010, 11-12), and by USG/ERC Mr. John Holmes (S/PV.6077, 27 January 2009, 3-4). See also A/RES/61/119, 14 December 2006 (157-9-14), preamble and par. 14; A/RES/62/93, 17 December 2007, par. 13; A/RES/63/98, 5 December 2008 (165-8-4), par. 10; A/RES/63/140, 11 December 2008, par. 14; A/RES/64/94, 10 December 2009 (162-9-5), preamble and par. 10; A/RES/64/125, 16 December 2009, par. 17; A/RES/65/16, 30 November 2010 (165-7-4), par. 13; A/RES/65/134, 15 December 2010, par. 17; A/RES/66/17, 30 November 2011 (167-7-4), par. 13; A/RES/66/79, 9 December 2011 (159-9-4), par. 10; A/RES/66/118, 15 December 2011, par. 17; A/RES/67/86, 13 December 2012, par. 17; A/RES/67/121, 18 December 2012 (164-8-6), par. 12. All adopted, unless indicated otherwise, without vote. A/HRC/RES/2/4, 27 November 2006 (45-1-1), par. 4; A/HRC/RES/7/18, 27 March 2008 (46-1-0), par. 5; A/HRC/RES/10/18, 26 March 2009 (46-1-0), par. 5; A/HRC/RES/13/7, 24 March 2010 (46-1-0), par. 7; A/HRC/RES/16/31, 25 March 2011 (45-1-0), par. 6; A/HRC/RES/19/16, 22 March 2012 (44-1-2), preamble and par. 9; A/HRC/RES/22/28, 22 March 2013 (46-1-0), preamble and par. 10.

²⁴⁸ See, for example, BBC News, "Profile: Gaza Strip," BBC News website, updated January 6, 2009. Available at http://news.bbc.co.uk/2/hi/middle_east/5122404.stm (accessed May 20, 2011); Goldstone report, pars. 311-312.

²⁴⁹ See, for example, the statements by various national representatives in S/PV.5824, 22 January 2008 (among others, Mr. Lynn Pascoe, USG for Political Affairs, *Ibid.*, 4); S/PV.5824 (Resumption 1), 22 January 2008; S/PV.5827, 30 January 2008; S/PV.5846, 26 February 2008 (especially by Mr. Robert H. Serry, Special Coordinator for the Middle East Peace Process and UNSG Personal Representative, and Mr. John Holmes, USG/ERC, *Ibid.*, 4 and 6); S/PV.5847, 1 March 2008; S/PV.5859 and S/PV.5859 (Resumption 1), 25 March 2008; S/PV.6022, 25 November 2008; S/PV.6030, 3 December 2008; S/PV.6049, 18 December 2008; S/PV.6060, 31 December 2008; S/PV.6061, 6 January 2009; S/PV.6061 (Resumption 1), 7 January 2009; S/PV.6077, 27 January 2009; S/PV.6100 and S/PV.6100 (Resumption 1), 25 March 2009; S/PV.6171 and S/PV.6171 (Resumption 1), 27 July 2009; S/PV.6201 and S/PV.6201 (Resumption 1), 14 October 2009; S/PV.6265 and S/PV.6265 (Resumption 1), 27 January 2010; S/PV.6298 and S/PV.6298 (Resumption 1), 14 April 2010; S/PV.6325, 31 May 2010; S/PV.6340, 15 June 2010; S/PV.6363 and S/PV.6363 (Resumption 1), 21 July 2010; S/PV.6404 and S/PV.6404 (Resumption 1), 18 October 2010; S/PV.6470 and S/PV.6470 (Resumption 1), 19 January 2011; S/PV.6520 and S/PV.6520 (Resumption 1), 21 April 2011; S/PV.6590 and S/PV.6590 (Resumption 1), 26 July 2011; S/PV.6636 and S/PV.6636 (Resumption 1), 24 October 2011; S/PV.6706 and S/PV.6706 (Resumption 1), 24 January 2012; S/PV.6816, 25 July 2012; S/PV.6906 and S/PV.6906 (Resumption 1), 23 January 2013; S/PV.6950 and S/PV.6950 (Resumption 1), 24 April 2013.

See also pars. 102-104 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Section 2.1.4.2.1. (ftns. 89 and 98).

²⁵⁰ A/HRC/RES/S-6/1, 24 January 2008 (30-1-15), preamble par. 4. It '[d]emand[ed] that the occupying Power, Israel, lift[ed] immediately the siege it ha[d] imposed on the occupied Gaza Strip, restore[d] continued supply of fuel, food and medicine and reopen[ed] the border crossings'. *Ibid.*, par. 3. Similarly, see A/HRC/RES/S-9/1, 12 January 2009 (33-1-13), preamble and par. 6; A/HRC/RES/S-9/1, 12 January 2009 (33-1-13), par. 6; A/HRC/RES/S-12/1 C, 16 October 2009 (25-6-11), preamble;

end of 2008,²⁵¹ so that the UNSC ‘[e]mphasiz[ed] the need to ensure sustained and regular flow of goods and people through the Gaza crossings’, ‘[c]all[ed] for the unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel and medical treatment’, and ‘[w]elcome[d] the initiatives aimed at creating and opening humanitarian corridors and other mechanisms for the sustained delivery of humanitarian aid’.²⁵²

These calls by the UNSC were supplemented by calls by the Human Rights Council, which also made explicit reference to IHL and/or international law: classifying the siege of the Gaza Strip as a collective punishment, it ‘demand[ed] that the occupying Power, Israel, lift its siege, open all borders to allow access and free movement of humanitarian aid to the occupied Gaza Strip, including the immediate establishment of humanitarian corridors, *in compliance with its obligations under international humanitarian law*’.²⁵³

In a few occasions, the role of neighbouring countries in facilitating the passage of humanitarian assistance to the theatre of the aforementioned conflicts was also restated and calls in this sense made,²⁵⁴ and access for the ICRC and other relevant organisations to detained persons was *demand[ed]*, in the case of BiH and Syria,²⁵⁵ or it was *called for* or its *importance was emphasised*, in the DRC, Afghanistan, and Myanmar.²⁵⁶

A/HRC/RES/13/8, 24 March 2010 (31-9-7), preamble and par. 13; A/HRC/RES/16/29, 25 March 2011 (30-1-15), preamble and par. 14; A/HRC/RES/19/16, 22 March 2012 (44-1-2), par. 9.

²⁵¹ Reference is here made to ‘the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009’. Goldstone Report, par. 1.

²⁵² S/RES/1860 (2009), 8 January 2009 (14-1-0), preamble and pars. 2 and 3. See also S/PRST/2010/9, 1 June 2010, 1.

²⁵³ A/HRC/RES/S-9/1, 12 January 2009 (33-1-13), preamble and pars. 1, 2, 6, and 14. Emphasis added. On operation Cast Lead, see also below Sections 3.2.1.3. and 3.2.2.3.

²⁵⁴ After the genocide in Rwanda, the UNSC *called* upon neighbouring States to facilitate the ‘transfer of goods and supplies to meet the needs of the displaced persons within Rwanda’. S/PRST/1994/21, 30 April 1994, 2. Similarly, see S/PRST/1995/22, 27 April 1995, 3.

In the case of Liberia, it ‘encourage[d] neighbouring countries of Liberia to continue to give access to international humanitarian organizations and non-governmental humanitarian groups to border areas where refugees and displaced people are.’ S/PRST/2002/36, 13 December 2002, 3-4.

It *urged* countries in the region to facilitate the provision of assistance to Somalia (S/PRST/2007/13, 30 April 2007, 1; **S/RES/1772 (2007), 20 August 2007, par. 20; S/RES/1801 (2008), 20 February 2008, par. 14**), then more specifically ‘*urge[d]* the countries in the region to facilitate the provision of humanitarian assistance, including the timely, safe and unhindered passage of essential relief goods into Somalia by land or via air and sea ports’ (**S/RES/1814 (2008), 15 May 2008, par. 12**).

It ‘[c]all[ed] on all parties to armed conflict in the Great Lakes region to comply with the obligations applicable to them under international humanitarian law ... to facilitate the rapid and unimpeded passage of relief consignments, equipment and personnel’. **S/RES/1906 (2009), 23 December 2009, preamble**.

With reference to Mali, the UNSC ‘*Acknowledge[d]* the cooperative policy of neighbouring States, including Algeria, Burkina Faso, Mauritania and Niger in keeping their borders open for refugees and in facilitating the passage of humanitarian personnel, equipment and supplies, and *encourage[d]* these States to continue this policy and contribute to a stabilization of the situation wherever possible’: **S/RES/2056 (2012), 5 July 2012, par. 15**.

²⁵⁵ On BiH, see **S/RES/770 (1992), 13 August 1992 (12-0-3), par. 3; S/RES/771 (1992), 13 August 1992, par. 4**. Similarly, see **S/RES/1019 (1995), 9 November 1995, par. 2**. Similarly, see A/RES/46/242, 25 August 1992, par. 9.

On Syria, see A/RES/67/262, 15 May 2013 (107-12-59), preamble and par. 5; similarly, see A/RES/67/183, 20 December 2012 (135-12-36), par. 3.

²⁵⁶ On the DRC, see S/PRST/1998/26, 31 August 1998, 2. On Afghanistan, see S/RES/1974 (2011), 22 March 2011, par. 21; A/RES/66/13, 21 November 2011, par. 42; A/RES/67/16, 27 November 2012, par. 41; E/CN.4/RES/1998/70, 21 April 1998 (without vote), par. 5(f). On Myanmar, see A/RES/62/222, 22 December 2007 (83-22-47), par. 5(i); A/RES/63/245, 18 December 2008 (80-

As this overview demonstrates, humanitarian access has become a constant feature in resolutions adopted by UN bodies in relation to situations of armed conflict since the beginning of the 1990s, be they IACs, military occupation, or NIACs. The practice by the UNSC to call on Parties to NIACs to allow timely, full and unhindered access to humanitarian assistance and humanitarian organisations, referring to IHL obligations, seems to point towards the fact that the UNSC considers that an obligation in this sense exists in customary IHL applicable to NIACs, in case civilians are in need and the local response is inadequate. The trend towards strengthening the legal framework regulating NIACs that emerged in the 1990s has found confirmation in the 21st century. Furthermore, the practice started with Somalia, BiH, and Kosovo, of *demanding* under Chapter VII that Parties allow humanitarian access, putting particular pressure on them, has continued, arguably in relation to those conflicts presenting particular challenges to humanitarian workers: DRC, Somalia, Darfur, Libya, Abyei, South Kordofan and Blue Nile, and Mali. In some cases, these *demands* under Chapter VII have been related to applicable obligations under IHL, thus reinforcing support to the argument that the UNSC considers humanitarian access compulsory under IHL for Parties to IACs and NIACs (the latter being the majority of the conflicts in question), at least in situations that represent a threat to international peace and security under Article 39 UN Charter, including because of the dramatic humanitarian situation.

Even if more rarely, the facilitation of humanitarian assistance has been sometimes the object of UNSC *demands* under Chapter VII (Darfur and Abyei once respectively) and of reference to obligations under IHL (in resolutions on Iraq, but almost always in preamble, and on Abyei), and *calls* in this sense have been very common. In any case, given the importance attributed by the UNSC to full and unhindered humanitarian access, its calls may be interpreted as necessarily comprising also facilitation of this access, in the sense that obstacles to the activities of humanitarian personnel would render their access to victims void and would arguably contravene UNSC's demands, as well as possibly IHL.

While the UNSC or UNGA have not usually made explicit reference to the need for consent or to the existence of a right to access only for impartial humanitarian actions carried out without any adverse

25-45), par. 5(h); A/RES/64/238, 24 December 2009 (86-23-39), par. 23; A/RES/65/241, 24 December 2010 (85-26-46), par. 22; A/RES/66/230, 24 December 2011 (83-21-39), par. 24; A/RES/67/233, 24 December 2012 (without vote), par. 18. Similarly, see E/CN.4/RES/1994/85, 9 March 1994 (without vote), par. 18; E/CN.4/RES/1995/72, 8 March 1995 (without vote), par. 21; E/CN.4/RES/1996/80, 23 April 1996 (without vote), par. 19; E/CN.4/RES/1998/63 21 April 1998 (without vote), par. 4(d); E/CN.4/RES/1999/17, 23 April 1999 (without vote), par. 7(f). Also, on Darfur, see E/CN.4/RES/2005/82, 21 April 2005 (without vote), par. 3(h).

distinction and for impartial humanitarian organisations, there is also no identifiable trend towards the clear abandonment of these requirements, since calls and demands have always been addressed to Parties to the conflict. *Demands* for humanitarian access under Chapter VII by the UNSC might imply a duty to grant such access, thus limiting the role of consent, but in any case this access would arguably cover only actions satisfying the principles of humanity, impartiality, and neutrality, as listed by the UNGA, and the actors implementing them (*humanitarian* workers). In this sense, no *droit d'ingérence* for States can be derived from the resolutions adopted by the UNSC since the 1990s. Furthermore, calls and demands by the UNSC, by calling on the Parties to allow and facilitate humanitarian access, have implicitly acknowledged their role in consenting to the access of humanitarian assistance and workers and in facilitating the work of the latter. Still, assuming that the requirements provided by IHL treaties remained valid, UN practice would show (and contribute to) an increasing level of similarity between IHL regulating NIACs and IHL regulating IACs, and a strengthening of the legal framework not only for NIACs to which Common Article 3 is applicable but also for those to which AP II is applicable, since neither of these instruments mentions access for humanitarian organisations or relief personnel. In NIAC, calls and demands have been usually addressed to all Parties to the conflict, without specifying if States and/or humanitarian organisations would be allowed to undertake relief actions in rebel-held territory without consent by the State concerned. Clearly, such an interpretation cannot be implied lightly, given that it is contrary to the will of State as expressed in Article 18(2) AP II.

However, it should be underlined that there have been exceptions to this constant attention to humanitarian access in armed conflict, the most debated one being probably Sri Lanka.²⁵⁷ Restrictions to

²⁵⁷ Moreover, while the UNSC in the 1990s had *called* 'for unimpeded access for international humanitarian relief assistance' and for the facilitation of such assistance in Abkhazia (Georgia) [on access, see S/RES/876 (1993), 19 October 1993, par. 7; on facilitation, see S/RES/892 (1993), 22 December 1993, par. 7; S/RES/1866 (2009), 13 February 2009, par. 4], it took no action in August 2008 when Russia intervened in South Ossetia (Georgia), entering into an IAC with Georgia. However, humanitarian access was one of the most debated issues, and various States insisted on the need to allow humanitarian access to all areas to humanitarian organisations. See S/PV.5952, 8 August 2008, the statements by Italy, the U.S., and Costa Rica; S/PV.5953, 10 August 2008, the statement by Viet Nam; S/PV.5961, 19 August 2008, the statements by France, the U.S., Croatia, and Belgium; and, S/PV.5969, 28 August 2008, the statements by France, Italy, the UK, and Belgium.

In 2009 and 2010 the UNGA '[u]nderline[d] the urgent need for unimpeded access for humanitarian activities to all internally displaced persons, refugees and other persons residing in all conflict-affected areas throughout Georgia'. A/RES/63/307, 9 September 2009 (48-19-78), par. 4; A/RES/64/296, 7 September 2010 (50-17-86), par. 4; A/RES/66/283, 3 July 2012 (60-15-82), par. 4.

In 2009, the UNSG underlined the impediments to humanitarian access of UN agencies deriving from 'conflicting policies regulating access to South Ossetia', since '[t]he Georgian law on the occupied territories prohibits any humanitarian activity except that accredited by Georgia and undertaken from within Georgia', but 'the South Ossetian side and the Government of the Russian Federation insist that humanitarian actors enter South Ossetia via the Russian Federation with the authorization of the South Ossetian side.' S/2009/277, 29 May 2009, Annex, par. 12. Similarly, see *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin – Addendum: Mission to Georgia*, A/HRC/10/13/Add.2, 13 February 2009, pars. 55 and 59-60.

The 2008 IAC 'superseded' two conflicts of a non-international character, the one between Georgia and South Ossetia and the other between Georgia and Abkhazia.' Marouda (2009), *supra* fn. 200, 226.

access were critical in the final phase of the NIAC in the country, in early 2009,²⁵⁸ with reports of human suffering and insufficient provision of healthcare and basic supplies, both because civilians were prevented from leaving areas controlled by the LTTE where the conflict was raging, and because ongoing fighting prevented humanitarian organisations from having access to those in need.²⁵⁹ The UNSC, in spite of holding informal meetings, receiving briefings on the fighting in Sri Lanka from the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator (USG/ERC), Mr John Holmes, and discussing Sri Lanka in debates on the protection of civilians,²⁶⁰ took no action.²⁶¹ The Human Rights Council adopted a resolution but on 27 May 2009, a few days after the conflict had officially ended, and without any mention of access.²⁶²

²⁵⁸ The armed conflict officially ended on May 16, 2009. See, for example, BBC News, "Sri Lanka army 'defeats rebels'," BBC News Website, May 16, 2009. Available at http://news.bbc.co.uk/2/hi/south_asia/8053542.stm (accessed May 18, 2011).

²⁵⁹ See International Crisis Group (ICG), "War Crimes in Sri Lanka," Asia Report N°191, 17 May 2010, i, 21 and 25. Otterman, Sharon, "Trapped Civilians Now Able to Flee, Sri Lanka Says," *The New York Times*, May 14, 2009. Available at <http://www.nytimes.com/2009/05/15/world/asia/15lanka.html> (accessed May 18, 2011). ICRC, "Sri Lanka: ICRC Reiterates Concern for Civilians Cut Off by the Fighting," Interview, March 4, 2009. Available at <http://www.icrc.org/eng/resources/documents/interview/sri-lanka-interview-040309.htm> (accessed May 18, 2011). ICRC, "Sri Lanka: Thousands of Civilians Still Trapped," Operational Update No 09/03, April 30, 2009. Available at <http://www.icrc.org/eng/resources/documents/update/sri-lanka-update-300409.htm> (accessed May 18, 2011). ICRC, "Sri Lanka: Humanitarian Assistance Can No Longer Reach Civilians," News Release 09/103, May 14, 2009. Available at <http://www.icrc.org/eng/resources/documents/news-release/sri-lanka-news-140509.htm> (accessed May 18, 2011). UN, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, iii, pars. 73-79, 106-108, 124-131, 176, 209-212, and 247. Available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (accessed May 18, 2011). In addition, hospitals were shelled and, according to the ICG, humanitarian operations were deliberately targeted and shelled. See ICG (2010), supra, 10-20. UN, *Report of the Secretary-General's Panel of Experts* (2011), supra, iii, pars. 81-96, 103-105, 109-111, 176-177, 206-208, and 239, and references to ICRC news releases therein. Available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (accessed May 18, 2011).

²⁶⁰ See ICG (2010), supra fn. 259, fn. 135. See the statement by Mr. Holmes on 14 January 2009: S/PV.6066, 14 January 2009, 4. See also the UNSG Report on the protection of civilians in armed conflict, S/2009/277, 29 May 2009, par. 30, and its Annex: Constraints on humanitarian access, in particular pars. 9, 15, 22, 24, 28, 32, 34, and 47. The report was criticised for containing 'considerable factual inaccuracies in some places' by the representative of Sri Lanka: S/PV.6151 (Resumption 1), 26 June 2009, 23.

²⁶¹ The UNSC only issued a press statement on 13 May 2009, 'express[ing] grave concern over the worsening humanitarian crisis in north-east Sri Lanka, in particular the reports of hundreds of civilian casualties in recent days, and call[ing] for urgent action by all parties to ensure the safety of civilians'; 'acknowledg[ing] the legitimate right of the Government of Sri Lanka to combat terrorism' and 'demand[ing] that the LTTE lay down its arms and allow the tens of thousands of civilians still in the conflict zone to leave'; 'call[ing] on the Government of Sri Lanka to take the further necessary steps to facilitate the evacuation of the trapped civilians and the urgent delivery of humanitarian assistance to them', as well as 'call[ing] on the Government of Sri Lanka to ensure the security of those displaced by the conflict and to cooperate with the United Nations, the International Committee of the Red Cross (ICRC), and other international humanitarian organizations in providing humanitarian relief and access to them as soon as they leave the conflict zone'; and 'demand[ing] that all parties respect their obligations under international humanitarian law'. SC/9659, 13 May 2009.

²⁶² In the resolution, the Human Rights Council '[r]ecall[ed] ... that States have the duty and responsibility to provide protection and humanitarian assistance to all segments of the population, including internally displaced persons, *without discrimination*,' '[r]eaffirm[ed] the respect for the sovereignty, territorial integrity and independence of Sri Lanka and its sovereign rights to protect its citizens and to combat terrorism', and '[e]ncourage[d] the Government of Sri Lanka to continue to pursue its existing cooperation with relevant United Nations organizations, in order to provide, to the full extent of their capabilities, in cooperation with the Government of Sri Lanka, basic humanitarian assistance, in particular, safe drinking water, sanitation, food and medical and health-care services to internally displaced persons'. Furthermore, it '[a]cknowledge[d] the commitment of the Government of Sri Lanka to provide access as may be appropriate to international humanitarian agencies in order to ensure humanitarian assistance to the population affected by the past conflict, in particular internally displaced persons, with a view to meeting their urgent needs and encourages the Sri Lankan authorities to further facilitate appropriate work' and '[w]elcome[d] the continued cooperation between the Government of Sri Lanka, relevant United Nations agencies and other humanitarian organizations in the provision of humanitarian assistance to the affected people, and encourages them to continue to cooperate with the Government of Sri Lanka'. A/HRC/RES/S-11/1, 27 May 2009 (29-12-6), preamble and pars. 3, 5, and 8. Emphasis added.

3.2.1.2.2. Safety, Security and Freedom of Movement of Humanitarian Workers

A second major issue that has been constant in decisions of the UNSC (and in resolutions by the UNGA) in relation to all the aforementioned conflicts is that of the safety, security, and freedom of movement of UN and humanitarian personnel. *Calls* upon the Parties to ‘take all the necessary measures to ensure the safety of personnel sent to provide humanitarian assistance, to assist them in their tasks and to ensure full respect for the rules and principles of international law regarding the protection of civilian populations’,²⁶³ as well as to ensure their freedom of movement,²⁶⁴ *demand*s in this sense (in a couple of cases arguably in the framework of action under Chapter VII),²⁶⁵ and *reminders* of the Parties’ responsibility for the safety and security of humanitarian personnel,²⁶⁶ characterised the conflict in Somalia throughout the 1990s.

The UNSC *demand*ed Parties to the conflict in BiH, often in resolutions where it declared that it was acting under Chapter VII,²⁶⁷ to ensure the safety and security of the personnel of international humanitarian organisations,²⁶⁸ as well as their freedom of movement,²⁶⁹ and of access.²⁷⁰ In one case, the UNSC ‘[r]eaffirm[ed] ... the *obligation* on all the parties to ensure the complete freedom of movement of personnel of the United Nations and other relevant international organizations throughout the territory of the Republic of Bosnia and Herzegovina at all times’.²⁷¹

²⁶³ S/RES/733 (1992), 23 January 1992, par. 8. See also S/RES/746 (1992), 17 March 1992, par. 8; S/RES/751 (1992), 24 April 1992, par. 14; S/RES/897 (1994), 4 February 1994, preamble; S/PRST/1996/47, 20 December 1996, 1; S/PRST/1997/8, 27 February 1997, 2; S/PRST/1997/57, 23 December 1997, 2; S/PRST/1999/16, 27 May 1999, 2; S/PRST/1999/31, 12 November 1999, 2; S/PRST/2000/22, 29 June 2000, 1; S/PRST/2001/1, 11 January 2001, 2; S/PRST/2001/30, 31 October 2001, 3. See also, for example, A/RES/47/160, 18 December 1992, par. 13; A/RES/48/201, 21 December 1993, par. 6; A/RES/49/21 L, 20 December 1994, par. 6.

²⁶⁴ See S/RES/746 (1992), 17 March 1992, par. 8; S/RES/751 (1992), 24 April 1992, par. 14; S/PRST/1997/8, 27 February 1997, 2; S/PRST/1997/57, 23 December 1997, 2; S/PRST/1999/16, 27 May 1999, 2; S/PRST/1999/31, 12 November 1999, 2; S/PRST/2000/22, 29 June 2000, 1; S/PRST/2001/1, 11 January 2001, 2; S/PRST/2001/30, 31 October 2001, 3. See also, for example, A/RES/47/160, 18 December 1992, par. 13; A/RES/48/201, 21 December 1993, par. 6; A/RES/49/21 L, 20 December 1994, par. 6.

²⁶⁵ See S/RES/794 (1992), 3 December 1992, par. 3; **S/RES/814 (1993), 26 March 1993, par. 9; S/RES/923 (1994), 31 May 1994, preamble and par. 5.**

²⁶⁶ S/RES/954 (1994), preamble and par. 7; S/PRST/1996/4, 24 January 1996, 2;

²⁶⁷ S/RES/770 (1992), 13 August 1992 (12-0-3); S/RES/819 (1993), 16 April 1993; S/RES/824 (1993), 16 April 1993; S/RES/998 (1995), 16 June 1995 (13-0-2). In the case of S/RES/771 (1992), 13 August 1992, the UNSC concluded the resolution stating that it ‘[d]ecide[d], acting under Chapter VII of the Charter of the United Nations, that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, [had to] comply with the provisions of the present resolution, failing which the Council w[ould] need to take further measures under the Charter’ (par. 7).

²⁶⁸ See S/RES/758 (1992), 8 June 1992, par. 7; S/RES/761 (1992), 29 June 1992, par. 4; **S/RES/770 (1992), 13 August 1992 (12-0-3), par. 6; S/RES/819 (1993), 16 April 1993, par. 10; S/PRST/1994/1, 7 January 1994, 1-2 (demand); S/PRST/1994/11, 14 March 1994, 2; S/RES/998 (1995), 16 June 1995 (13-0-2), par. 1.** Expressing *calls* upon the Parties in this sense, see S/RES/787 (1992), 16 November 1992 (13-0-2), par. 18; S/26661, 28 October 1993, 1. As already mentioned, the UNSC affirmed that full respect for the safety of the personnel engaged in humanitarian operations should be observed in safe areas: **S/RES/824 (1993), 16 April 1993, par. 4(b).** Similarly, see A/RES/46/242, 25 August 1992, par. 9.

²⁶⁹ See **S/RES/819 (1993), 16 April 1993, par. 10; S/PRST/1994/11, 14 March 1994, 2; S/RES/998 (1995), 16 June 1995 (13-0-2), par. 1.** Similarly, see A/RES/46/242, 25 August 1992, par. 9.

²⁷⁰ See S/PRST/1994/1, 7 January 1994, 1-2; **S/RES/1004 (1995), 12 July 1995, par. 5.** As already mentioned, the UNSC affirmed that full respect for the safety of the personnel engaged in humanitarian operations should be observed in safe areas: **S/RES/824 (1993), 16 April 1993, par. 4(b).**

²⁷¹ S/RES/1019 (1995), 9 November 1995, par. 4. Emphasis added.

Throughout the 1990s, the UNSC similarly *called* upon the Parties to guarantee the safety and security, and the freedom of movement of the personnel engaged in the provision of humanitarian assistance in the conflicts in Angola, where it '[e]mphasize[d] that both parties *must* respect and ensure the safety and security of international personnel in Angola';²⁷² Liberia;²⁷³ Sierra Leone, where it 'recall[ed] the obligations of all concerned to ensure the protection of United Nations and other *international* personnel in the country';²⁷⁴ Rwanda and then DRC;²⁷⁵ Burundi;²⁷⁶ Afghanistan, where it 'underline[d] that the Taliban *must*

²⁷² S/RES/966 (1994), 8 December 1994, par. 11. Emphasis added. *Calling* upon the Parties, *urging* them, or *appealing* to them, see S/RES/834 (1993), 1 June 1993, par. 14; **S/RES/864 (1993), 15 September 1993, par. 15**; S/PRST/1994/7, 10 February 1994, 2; S/RES/932 (1994), 30 June 1994, par. 11; S/PRST/1994/52, 9 September 1994, 2; S/RES/966 (1994), 8 December 1994, pars. 10-11; S/PRST/1995/18, 13 April 1995, 2; S/RES/1045 (1996), 8 February 1996, pars. 11-12; S/PRST/1997/39, 23 July 1997, 1; S/RES/1164 (1998), 29 April 1998, par. 5; S/RES/1173 (1998), 12 June 1998, par. 9; S/RES/1180 (1998), 29 June 1998, par. 5; S/RES/1213 (1998), 3 December 1998, par. 7; S/PRST/1998/37, 23 December 1998, 2; S/PRST/1999/3, 21 January 1999, 2; S/RES/1229 (1999), 26 February 1999, par. 6; **S/RES/1237 (1999), 7 May 1999, par. 12**; S/PRST/1999/26, 24 August 1999, 2. In 1995, UNAVEM II was replaced UNAVEM III: see S/RES/976 (1995), 8 February 1995.

Demanding the Parties, see S/PRST/1995/11, 10 March 1995, 2; S/RES/1055 (1996), 8 May 1996, par. 21; S/RES/1064 (1996), 11 July 1996, par. 21; S/RES/1075 (1996), 11 October 1996, par. 18; S/RES/1087 (1996), 11 December 1996, par. 16; S/PRST/1998/14, 22 May 1998, 1; S/RES/1190 (1998), 13 August 1998, par. 9; S/RES/1195 (1998), 15 September 1998, par. 9; S/RES/1202 (1998), 15 October 1998, par. 10. None of these resolutions is classified as Chapter VII resolution by Johansson.

²⁷³ *Calling* upon the Parties or *urging* them, see **S/RES/813 (1993), 26 March 1993, par. 15**; S/RES/856 (1993), 10 August 1993, par. 4; S/RES/866 (1993), 22 September 1993, par. 12; S/RES/911 (1994), 21 April 1994, par. 8; S/PRST/1994/33, 13 July 1994, 2; S/PRST/1994/53, 13 September 1994, 1; S/PRST/1996/16, 9 April 1996, 1; **S/RES/1478 (2003), 6 May 2003, par. 8**; **S/RES/1509 (2003), 19 September 2003, preamble and par. 5**.

Demanding respect for the status of organisations and personnel delivering humanitarian assistance, see S/RES/950 (1994), 21 October 1994, par. 8; S/RES/972 (1995), 13 January 1995, par. 7; S/RES/985 (1995), 13 April 1995, par. 6; S/RES/1001 (1995), 30 June 1995, par. 13; S/RES/1014 (1995), 15 September 1995, par. 13; S/RES/1020 (1995), 10 November 1995, par. 14; S/RES/1041 (1996), 29 January 1996, par. 6; S/RES/1059 (1996), 31 May 1996, par. 7; S/RES/1071 (1996), 30 August 1996, par. 10; S/RES/1083 (1996), 27 November 1996, par. 8.

See also A/RES/51/30 B, 5 December 1996, preamble and par. 5; A/RES/55/176, 19 December 2000, par. 7; A/RES/57/151, 16 December 2002, par. 2.

²⁷⁴ S/PRST/1997/29, 27 May 1997, 1. Emphasis added. *Urging* or *calling* upon the Parties, see S/PRST/1998/13, 20 May 1998, 2; S/RES/1260 (1999), 20 August 1999, par. 14; S/RES/1270 (1999), 22 October 1999, par. 22; S/RES/1370 (2001), 18 September 2001, par. 6. *Demanding* respect for the status of organisations and agencies delivering humanitarian assistance, see S/RES/1181 (1998), 13 July 1998, par. 12 (not a Chapter VII resolution according to Johansson). See also E/CN.4/RES/2000/24, 18 April 2000 (without vote), par. 5(e).

²⁷⁵ *Called* upon the Parties to respect 'the safety and security of the civilian population and of the foreign communities living in Rwanda as well as of UNAMIR [the United Nations Assistance Mission for Rwanda] and other United Nations personnel', see S/PRST/1994/16, 7 April 1994, 1.

Demanding to avoid 'any acts of intimidation or violence against personnel engaged in humanitarian and peace-keeping work', see S/RES/918 (1994), 17 May 1994, par. 11; similarly, see S/RES/925 (1994), 8 June 1994, par. 11.

UNAMIR was established in October 1993, after the signing of the Arusha Peace Agreement by the Government of Rwanda and the RPF in August 2003, to stop the hostilities started with the invasion of Northern Rwanda from Uganda by the RPF in 1990. See S/RES/872 (1993), 5 October 1993; *Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front*, Arusha, August 4, 1993.

Following the genocide, *calling* on the States hosting the refugees and displaced people, in particular the Government of Rwanda, to ensure the safety of both refugees and international humanitarian workers, see S/PRST/1994/59, 14 October 1994, 1. *Acknowledging the responsibility* of the Government of Rwanda in this sense, see S/RES/997 (1995), 9 June 1995, preamble; S/RES/1029 (1995), 12 December 1995, preamble; S/RES/1050 (1996), 8 March 1996, preamble. See also E/CN.4/RES/1995/91, 8 March 1995 (without vote), par. 15; E/CN.4/RES/1997/66, 16 April 1997 (without vote), par. 14.

Calling on the Parties to the conflict in Zaire to ensure the security and freedom of movement of international humanitarian workers, see S/PRST/1996/44, 1 November 1996, 1; **S/RES/1078 (1996), 9 November 1996, par. A-5**; **S/RES/1080 (1996), 15 November 1996, par. 6**; S/PRST/1997/5, 7 February 1997, 1; S/PRST/1997/11, 7 March 1997, 1; S/PRST/1997/19, 4 April 1997, 1; S/PRST/1997/22, 24 April 1997, 1.

²⁷⁶ *Calling* on the Parties, in particular the Government, to ensure the safety, security, freedom of movement, and unhindered access of the personnel of international humanitarian organisations, see S/PRST/1996/1, 5 January 1996, 1-2; S/PRST/1999/32, 12 November 1999, 1; S/RES/1286 (2000), 13 January 2000, pars. 9-11; S/PRST/2001/6, 2 March 2001, 1; S/PRST/2001/17, 29 June 2001, 1; S/PRST/2001/26, 26 September 2001, 2; S/PRST/2002/40, 18 December 2002, 3; S/PRST/2003/30, 22 December 2003, 1-2. See also E/CN.4/RES/1996/1, 27 March 1996, preamble and par. 15; E/CN.4/RES/1997/77, 18 April 1997, pars. 10 and 18; E/CN.4/RES/2000/20, 18 April 2000, par. 9. All adopted without vote.

provide guarantees for the safety, security and freedom of movement for United Nations and associated humanitarian relief personnel’;²⁷⁷ and Kosovo.²⁷⁸ In relation to the conflict in Myanmar, it was the UNGA that repeatedly ‘*call[ed] upon* the Government of Myanmar to respect fully the obligations under the Geneva Conventions of 12 August 1949, in particular the obligations under article 3 common to the Conventions and to make use of such services as may be offered by impartial humanitarian bodies’.²⁷⁹

Similarly, the UNGA repeatedly highlighted the need for the Parties to the armed conflict in Somalia to guarantee the safety, security and freedom of movement of humanitarian actors,²⁸⁰ and the UNSC after 2001 not only has continued to *urge* or *call upon* the Parties to act in this sense,²⁸¹ but has also *demand*

Acting under Chapter VII, the also *requested* all Parties ‘to cooperate fully with the deployment and operations of ONUB, in particular by ensuring the safety and freedom of movement of United Nations and associated personnel, as well as the personnel of humanitarian, development and aid organizations, throughout the territory of Burundi’, and ‘reaffirm[ed] the obligation of all parties to comply fully with the rules and principles of international humanitarian law applicable to them related to the protection of humanitarian and United Nations personnel’. **S/RES/1545 (2004), 21 May 2004, pars. 11-12.**

When the Government that came to power in mid-1996 implemented a policy of regroupment, ‘collecting people in camps, an exercise initiated by the former Government in March 1996’ (S/1997/547, 15 July 1997, par. 20), the UNSC pressed it ‘to halt the policy of forced regroupment and to allow the affected people to return to their homes, with full and unhindered humanitarian access throughout the process’, as well as to grant full access to humanitarian and human rights organisations to all these camps (S/PRST/1999/32, 12 November 1999, 2; S/RES/1286 (2000), 13 January 2000, par. 10). The government justified these camps as ‘a temporary measure to ensure the safety of people in certain areas of the country’, affirming that they would be dismantled in areas where security had been re-established (S/1997/547, 15 July 1997, par. 22). However, the humanitarian community questioned the nature of the camps and the forced displacement that they created, to the point that MSF in 1999 decided to suspend its activities in some of these camps because of the impossibility to act following its principles and because of the refusal of the Burundian authorities to recognise the status of civilian internees to the displaced people in the camps. See Sylvie Giossi Caverzasio, ed., *Strengthening Protection in War: A Search for Professional Standards: Summary of Discussions Among Human Rights and Humanitarian Organizations, Workshops at the ICRC, 1996-2000* (Geneva: ICRC, 2000), 83-84.

²⁷⁷ **S/RES/1333 (2000), 19 December 2000 (13-0-2), par. 13.** Emphasis added. *Calling upon* or *urging* the Parties, see S/PRST/1998/9, 6 April 1998, 2; S/PRST/1998/22, 14 July 1998, 2; S/PRST/1998/24, 6 August 1998, 2; S/RES/1214 (1998), 8 December 1998, par. 11; S/PRST/1999/29, 22 October 1999, 2; **S/RES/1333 (2000), 19 December 2000 (13-0-2), par. 13.** Expressing *demands* in this sense, see S/PRST/1996/40, 28 September 1996, 1; S/RES/1198 (1998), 28 August 1998, par. 7; S/PRST/1998/27, 15 September 1998, 1; S/PRST/2000/12, 7 April 2000, 1-2.

Similarly, see A/RES/50/189, 22 December 1995, par. 9; A/RES/51/108, 12 December 1996, pars. 8-9; A/RES/52/145, 12 December 1997, par. 9; A/RES/52/211 A, 19 December 1997, par. 5; A/RES/53/203 A, 18 December 1998, par. 12; A/RES/53/203 B, 18 December 1998, par. 4; A/RES/54/189 B, 17 December 1999, par. 6; A/RES/55/174 A, 14 December 2000, par. 17; A/RES/55/174 B, 14 December 2000, preamble and pars. 8, 10, and 13. All the UNGA resolutions were adopted without vote.

See also the following res., all adopted without vote by the Commission on Human Rights: E/CN.4/RES/1991/78, 6 March 1991, par. 12; E/CN.4/RES/1992/68, 4 March 1992, par. 22; E/CN.4/RES/1993/66, 10 March 1993, par. 13; E/CN.4/RES/1994/84, 9 March 1994, par. 19; E/CN.4/RES/1995/74, 8 March 1995, par. 13; E/CN.4/RES/1996/75, 23 April 1996, par. 12; E/CN.4/RES/1997/65, 16 April 1997, par. 8; E/CN.4/RES/1998/70, 21 April 1998, par. 5(e); E/CN.4/RES/1999/9, 23 April 1999, par. 9(e); E/CN.4/RES/2000/18, 18 April 2000, par. 8(f).

²⁷⁸ In this case, the UNSC *demand*: see **S/RES/1203 (1998), 24 October 1998 (13-0-2), par. 8.**

²⁷⁹ A/RES/47/144, 18 December 1992, par. 10; A/RES/48/150, 20 December 1993, par. 13; A/RES/49/197, 23 December 1994, par. 16; A/RES/50/194, 22 December 1995, par. 15; A/RES/51/117, 12 December 1996, par. 15; A/RES/52/137, 12 December 1997, par. 19; A/RES/53/162, 9 December 1998, par. 16. All adopted without vote. Similarly, see E/CN.4/RES/1993/73, 10 March 1993, par. 14; E/CN.4/RES/1997/64, 16 April 1997, par. 3(f); E/CN.4/RES/2000/23, 18 April 2000, par. 9(j); E/CN.4/RES/1994/85, 9 March 1994, par. 17; E/CN.4/RES/1995/72, 8 March 1995, par. 20; E/CN.4/RES/1996/80, 23 April 1996, par. 18; E/CN.4/RES/1998/63 21 April 1998, par. 4(i); E/CN.4/RES/1999/17, 23 April 1999, par. 7(i). All adopted without vote. Moreover, in 1992 the UNGA ‘*request[ed]* the Government of Myanmar to invite the presence of the International Committee of the Red Cross in Myanmar in order for it to carry out its humanitarian tasks’. A/RES/47/144, 18 December 1992, par. 11.

²⁸⁰ See A/RES/51/30 G, 13 December 1996, par. 8; A/RES/56/106, 14 December 2001, par. 9; A/RES/57/154, 16 December 2002, par. 6; A/RES/58/115, 17 December 2003, par. 9; A/RES/59/218, 22 December 2004, par. 9; A/RES/60/219, 22 December 2005, pars. 3 and 10. All adopted without vote.

²⁸¹ See S/PRST/2002/8, 28 March 2002, 4; S/PRST/2003/19, 11 November 2003, 2; S/PRST/2004/3, 25 February 2004, 2; S/PRST/2004/24, 14 July 2004, 2; S/PRST/2006/11, 15 March 2006, 2; **S/RES/1772 (2007), 20 August 2007, par. 20; S/RES/1801 (2008), 20 February 2008, par. 14; S/RES/1814 (2008), 15 May 2008, par. 12; S/PRST/2009/15, 18 May 2009, 1; S/PRST/2009/19, 9 July 2009, 1; S/PRST/2009/31, 3 December 2009, 1; S/RES/1910 (2010), 28 January 2010, par. 17;**

under Chapter VII that they do it,²⁸² and in certain cases specifically highlighted the obligations of the Transitional Federal Institutions in this field.²⁸³

Moreover, *calls* upon the Parties by the UNSC and the UNGA to guarantee the safety, security, and freedom of movement of humanitarian personnel have been made in relation to the DRC,²⁸⁴ where sometimes the UNSC has even ‘*recall[ed]*’ that the parties *must* also provide guarantees for the safety, security and freedom of movement of United Nations and associated humanitarian relief personnel’;²⁸⁵ Afghanistan;²⁸⁶ Iraq, with the UNSC *urging* all those concerned ‘*as set forth in international humanitarian law, including the Geneva Conventions and the Hague Regulations*’, to promote the safety, security and freedom of movement of humanitarian personnel and United Nations and its associated personnel and their assets;²⁸⁷ Lebanon;²⁸⁸ Abkhazia;²⁸⁹ Côte d’Ivoire;²⁹⁰ and Darfur,²⁹¹ where the UNSC also *demand*ed under

S/RES/1964 (2010), 22 December 2010, par. 17; S/RES/2002 (2011), 29 July 2011, par. 5; S/RES/2060 (2012), 25 July 2012, par. 5.

²⁸² See S/PRST/2006/31, 13 July 2006, 2; **S/RES/1744 (2007), 21 February 2007, par. 11;** S/PRST/2007/13, 30 April 2007, 1; **S/RES/2036 (2012), 22 February 2011, par. 16.**

²⁸³ S/PRST/2005/11, 7 March 2005, 2; S/PRST/2005/32, 14 July 2005, 2; S/PRST/2005/54, 9 November 2005, 2.

²⁸⁴ On safety and security: S/PRST/1998/26, 31 August 1998, 2. Similarly, *urging* the Parties in this sense, see S/PRST/1998/36, 11 December 1998, 2; **S/RES/1234 (1999), 9 April 1999, par. 9;** S/RES/1258 (1999), 6 August 1999, par. 11; S/RES/1332 (2000), 14 December 2000, preamble; **S/RES/1445 (2002), 4 December 2002, par. 14;** S/PRST/2003/6, 16 May 2003, 1; S/PRST/2008/40, 29 October 2008, 1. Par. 3 of **S/RES/1592 (2005), 30 March 2005**, ‘*[u]rge[d]* the Government of National Unity and Transition to do its utmost to ensure the security of civilians, including humanitarian personnel, by effectively extending State authority’. Similarly, see **S/RES/1649 (2005), 21 December 2005, par. 8.**

Similarly, see A/RES/55/117, 4 December 2000 (102-2-63), par. 3(f); A/RES/55/166, 14 December 2000, par. 5; A/RES/56/100, 14 December 2001, par. 10; A/RES/56/173, 19 December 2001 (90-3-69), par. 3(f); A/RES/57/146, 16 December 2002, par. 12; A/RES/57/233, 18 December 2002, par. 4(f); A/RES/58/123, 17 December 2003 (169-1-0), par. 13; A/RES/58/196, 22 December 2003, par. 4(h); A/RES/59/207, 20 December 2004 (76-2-100), par. 5(i); A/RES/60/170, 16 December 2005 (102-3-67), par. 5(e). All adopted, unless specified otherwise, without vote.

On freedom of movement: See S/RES/1258 (1999), 6 August 1999, par. 9. Similarly, see A/RES/55/117, 4 December 2000 (102-2-63), par. 3(f); A/RES/56/173, 19 December 2001 (90-3-69), par. 3(f); A/RES/57/233, 18 December 2002, par. 4(f); A/RES/58/196, 22 December 2003, par. 4(h); A/RES/59/207, 20 December 2004 (76-2-100), par. 5(i); A/RES/60/170, 16 December 2005 (102-3-67), par. 5(e). All adopted, unless specified otherwise, without vote.

On safety, security, and freedom of movement, see also E/CN.4/RES/2000/15, 18 April 2000, par. 3(c); E/CN.4/RES/2003/15, 17 April 2003, par. 4(j); E/CN.4/RES/2005/85, 21 April 2005, par. 5(d). All adopted without vote.

²⁸⁵ **S/RES/1291 (2000), 24 February 2000, par. 12.** Emphasis added. Similarly, see **S/RES/1304 (2000), 16 June 2000, par. 16;** **S/RES/1341 (2001), 22 February 2001, par. 11;** **S/RES/1355 (2001), 15 June 2001, par. 19;** **S/RES/1565 (2004), 1 October 2004, par. 21;** **S/RES/1756 (2007), 15 May 2007, par. 13;** **S/RES/1794 (2007), 21 December 2007, par. 17.**

²⁸⁶ See S/RES/1378 (2001), 14 November 2001, pars. 2 and 5; **S/RES/1386 (2001), 20 December 2001, par. 5;** S/RES/1419 (2002), 26 June 2002, par. 12.

See also A/RES/56/176, 19 December 2001, pars. 11 and 12(f); A/RES/56/220 B, 21 December 2001, par. 11; A/RES/57/113 B, 6 December 2002, par. 11; A/RES/57/234, 18 December 2002, par. 21; A/RES/58/26 B, 5 December 2003, par. 9; A/RES/59/112 B, 8 December 2004, par. 2; A/RES/60/32 B, 30 November 2005, par. 2; A/RES/61/18, 28 November 2006, par. 7; A/RES/62/6, 5 November 2007, par. 7; A/RES/63/18, 10 November 2008, par. 16; A/RES/64/11, 9 November 2009, par. 17; A/RES/65/8, 4 November 2010, par. 20; A/RES/66/13, 21 November 2011, par. 20; A/RES/67/16, 27 November 2012, par. 21. All the UNGA resolutions were adopted without vote.

²⁸⁷ S/RES/1770 (2007), 10 August 2007, preamble. Emphasis added. **S/RES/1472 (2003), 28 March 2003, par. 8;** S/RES/1830 (2008), 7 August 2008, preamble; S/RES/1883 (2009), 7 August 2009, preamble; S/RES/1936 (2010), 5 August 2010, preamble; S/RES/2001 (2011), 28 July 2011, preamble; S/RES/2061 (2012), 25 July 2012, preamble; S/RES/2110 (2013), 24 July 2013, preamble.

²⁸⁸ See S/PRST/2006/34, 27 July 2006, 1; S/PRST/2006/35, 30 July 2006, 1.

²⁸⁹ See S/PRST/1996/43, 22 October 1996, 2; S/RES/1096 (1997), 30 January 1997, par. 14; S/RES/1124 (1997), 31 July 1997, par. 14; S/RES/1150 (1998), 30 January 1998, par. 9; S/RES/1225 (1999), 28 January 1999, par. 10; S/RES/1339 (2001), 31 January 2001, pars. 12-13; S/RES/1393 (2002), 31 January 2002, par. 14.

²⁹⁰ The UNSC *requested* the Parties to the conflict to ensure ‘the unimpeded and safe movement of the personnel of humanitarian agencies’ in 2003: **S/RES/1479 (2003), 13 May 2003, par. 10.** In 2004, the UNSG noted that ‘[i]n spite of the highly volatile political

Chapter VII that ‘all armed groups, including rebel forces, ... facilitate the safety and security of humanitarian staff’.²⁹² Similarly, the UNSC has *demande*d that in Mali ‘all parties and armed groups t[ook] appropriate steps to ensure the safety and security of humanitarian personnel, equipment and supplies, *in accordance with international law, including applicable international humanitarian, human rights and refugee law*’.²⁹³ In relation to Syria, the Human Rights Council has called upon all sides to respect the safety of humanitarian workers.²⁹⁴

It is interesting to note that in some of the conflict situations of the 1990s in which humanitarian access was especially problematic the UNSC made explicit reference to the principles. It ‘*call[ed] upon* the Somali factions to cooperate *on the basis of the principles of neutrality and non-discrimination* with the United Nations agencies and other organizations carrying out humanitarian activities’;²⁹⁵ it *called* upon the Parties to the conflict in Angola to ‘concur and cooperate with United Nations humanitarian assistance activities *on the basis of the principles of neutrality and non-discrimination*, to guarantee the security and freedom of movement of humanitarian personnel, and to ensure necessary, adequate and safe access and logistics by land and air’;²⁹⁶ and it *called* upon ‘all parties to the conflict in Sierra Leone fully to respect human rights and international humanitarian law and the *neutrality and impartiality of humanitarian workers*, and to ensure full and unhindered access for humanitarian assistance to affected populations’.²⁹⁷

The same observation applies to the four situations in the 21st century where attacks and violence against aid workers have been more vocally condemned, as well as Mali. Again regarding Somalia, the

environment, the parties to the conflict [] recognized the principles of neutrality, impartiality and independence that govern the activities of the humanitarian and development actors, and access [was] generally [] granted throughout the country.’ S/2004/3, 6 January 2004, par. 40. Bigger obstacles to humanitarian access were reported later in 2004 and in 2005, but no specific action was adopted by the UNSC. See S/2004/962, 9 December 2004, par. 76, and S/2005/604, 26 September 2005, par. 45.

In 2011, the UNSC ‘*reiterat[ed]* that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians and facilitate the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel’. **S/RES/1975 (2011), 30 March 2011, preamble.**

²⁹¹ *Calling upon* Parties to the conflict in Darfur ‘to promote the safety, security and freedom of movement of humanitarian personnel and their assets’, see S/PRST/2004/18, 25 May 2004, 1-2. Similarly, *calling upon* the Parties, see **S/RES/1556 (2004), 30 July 2004 (13-0-2), par. 1.** *Urging* all Parties to the conflict ‘to allow humanitarian agencies to move freely and safely throughout Darfur and the Sudan to carry out their vital work’, see A/HRC/RES/9/17, 24 September 2008 (without vote), par. 14.

²⁹² **S/RES/1564 (2004), 18 September 2004 (11-0-4), par. 10;** S/RES/1574 (2004), 19 November 2004, par. 11; **S/RES/2113 (2013), 30 July 2013, par. 16.**

²⁹³ **S/RES/2056 (2012), 5 July 2012, par. 14.** Emphasis added. See also **S/RES/2085 (2012), 20 December 2012, par. 16.**

²⁹⁴ A/HRC/RES/22/24, 22 March 2013 (41-1-5), par. 27; A/HRC/RES/23/26, 14 June 2013 (37-1-9), par. 24.

²⁹⁵ S/PRST/1999/16, 27 May 1999, 2.

²⁹⁶ S/PRST/1999/3, 21 January 1999, 2. Similarly, see S/RES/1229 (1999), 26 February 1999, par. 6; S/RES/1237 (1999), 7 May 1999, par. 12; S/PRST/1999/26, 24 August 1999, 2.

²⁹⁷ S/RES/1231 (1999), 11 March 1999, par. 4. Emphasis added. This specific wording was probably adopted in response to the call to the UNSC made by the UNSG in its 4 March 1999 report: ‘Relief workers and the civilian population need your support in continuously calling on all parties to the conflict to re-commit themselves to respecting international humanitarian law by: recognising the neutrality and impartiality of all humanitarian organizations; full guaranteeing the absolute safety and security of humanitarian personnel, including relief items and equipment; and calling upon the Government of Sierra Leone to confirm its willingness to permit the unimpeded flow of humanitarian assistance to all parts of the country.’ S/1999/237, 4 March 1999, par. 39.

UNSC reaffirmed the ‘humanitarian principles of humanity, neutrality, impartiality and independence’,²⁹⁸ as well as *demanding*, as already mentioned, ‘that all parties ensure full, safe and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance across Somalia, *in accordance with humanitarian principles of impartiality, neutrality, humanity and independence*’;²⁹⁹ it ‘[c]all[ed] ... on all the parties to respect the principles of *neutrality and impartiality* in the delivery of humanitarian assistance’ in the DRC;³⁰⁰ ‘[e]mphasiz[ed] the need for all, within the framework of humanitarian assistance, of upholding and respecting *the humanitarian principles, of humanity, neutrality, impartiality and independence*’ in Afghanistan;³⁰¹ in Darfur ‘underscore[d] the importance of upholding *the principles of neutrality, impartiality and independence* in the provision of humanitarian assistance’;³⁰² and *renewed its call* ‘for all parties in Mali to allow for *impartial, neutral, full and unimpeded access* for humanitarian aid’.³⁰³

As emerges from this rapid overview, the safety, security, and freedom of movement of humanitarian workers in IACs and NIACs has assumed a central place in all conflicts addressed by the UNSC and UNGA since the 1990s. Furthermore, like in the case of humanitarian access, the UNSC did not limit itself to calls upon the Parties, but in the 1990s *demand[ed]* in Chapter VII resolutions that the Parties to the conflict in Somalia, BiH, and Kosovo guaranteed the safety and security of humanitarian workers. It did the same in the 21st century in the cases of Somalia, Darfur, and Mali, and in DRC it has recalled the Parties that they *must* provide guarantees in this sense.

The focus in NIACs not only on the provisions of humanitarian assistance and on the safety and security of humanitarian workers (anyway following from their civilian status), but also on their access and freedom of movement, seems to add to the provisions of Common Article 3 and AP II and might point

²⁹⁸ S/RES/1814 (2008), 15 May 2008, preamble; S/RES/2010 (2011), 30 September 2011, preamble; S/PRST/2012/4, 5 March 2012, 2. In 2011, the UNGA also ‘[r]eaffirm[ed] the principles of neutrality, humanity, impartiality and independence for the provision of humanitarian assistance, and the need for all actors engaged in the provision of humanitarian assistance in situations of complex emergencies and natural disasters to promote and fully respect these principles’. A/RES/66/120, 15 December 2011 (without vote), preamble.

²⁹⁹ S/RES/2060 (2012), 25 July 2012, par. 6. Emphasis added.

³⁰⁰ S/RES/1341 (2001), 22 February 2001, par. 12.

³⁰¹ S/RES/1974 (2011), 22 March 2011, preamble; S/RES/2011 (2011), 12 October 2011, preamble; S/RES/2041 (2012), 22 March 2012, preamble. Emphasis added.

³⁰² S/RES/2003 (2011), 29 July 2011, par. 15; S/RES/2063 (2012), 31 July 2012 (14-0-1), par. 14. Emphasis added. *Calling* ‘on all the Sudanese parties to respect the neutrality, impartiality and independence of humanitarian assistance’, see S/PRST/2006/21, 9 May 2006, 2.

³⁰³ S/RES/2056 (2012), 5 July 2012, preamble. Emphasis added. See also S/RES/2100/2013, 25 April 2013, preamble: ‘*Emphasizing* the need for all parties to uphold and respect the humanitarian principles of humanity, neutrality, impartiality and independence in order to ensure the continued provision of humanitarian assistance, the safety of civilians receiving assistance and the security of humanitarian personnel operating in Mali and *stressing* the importance of humanitarian assistance being delivered on the basis of need’.

towards a strengthening of the legal framework, increasingly analogous to that applicable to IAC.³⁰⁴ While the meanings of humanitarian assistance and humanitarian workers/organisations for the UNSC have been never defined explicitly, the occasional mention of impartiality and neutrality seems to refer to the framework provided by IHL.

The focus on the access and safety of humanitarian workers in the 1990s was criticised by De Waal as a ‘significant, if little noticed, re-writing of international humanitarian law at the UN Security Council’ that took place especially with the conflicts in Iraq, Bosnia and Herzegovina (BiH) and Somalia and reinforced ‘the right of “humanitarian access” and the privileged status of humanitarian organizations and UN forces.’³⁰⁵ In his view, ‘[t]he privileging of humanitarian agencies [went] hand in hand with the emasculation of their duties to ensure impartiality and non-abuse of aid’, so that ‘[n]on-entry or withdrawal [wa]s seen as the very last resort, rather than the agencies’ most important card in ensuring that humanitarian principles [we]re upheld.’³⁰⁶ In this way, ‘humanitarian impunity’ developed, meaning ‘the automatic legal privileging of *all* actions by *all* humanitarian agencies.’³⁰⁷ However, as just mentioned, reference was constantly made to *humanitarian* organisations, and the key UNGA resolution regarding the provision of humanitarian assistance (as well as other thematic resolutions analysed) includes the duty to respect the principles of humanity, impartiality, and neutrality. The UNSC has mentioned these principles in some resolutions particularly focused on humanitarian relief and access; it has never shown an intention in its resolutions to deviate neither from IHL and the meaning of ‘humanitarian’ action/actor it entails, nor from the general framework for humanitarian assistance developed at the UN level, including in UNGA resolutions;³⁰⁸ and it has recently included specific reference to ‘guiding principles of emergency humanitarian assistance’. All these elements offer support to the argument that humanitarian organisations and actions covered or, in the words of De Waal, privileged by the UNSC were and are only those respecting the principles. In this sense, despite consent of the Parties to the access of relief personnel not being usually

³⁰⁴ For example, in 2007 the conflict in Iraq was already arguably a NIAC, and in the preamble of S/RES/1770(2007), 10 August 2007, the UNSC ‘[u]rg[ed] all those concerned as set forth in international humanitarian law, including the Geneva Conventions and the Hague Regulations, to allow full unimpeded access by humanitarian personnel to all people in need of assistance, and to make available, as far as possible, all necessary facilities for their operations, and to promote the safety, security and freedom of movement of humanitarian personnel and United Nations and its associated personnel and their assets’.

³⁰⁵ De Waal (1997), *supra* fn. 5, 189.

³⁰⁶ *Ibid.*, 189-190. In this sense, see also Françoise Bouchet-Saulnier, “Point de Vue d’Une Juriste Appartenant au Monde des ONG,” in *Aide Humanitaire Internationale: un Consensus Conflictuel?*, ed. Marie-José Domestici-Met (Paris: Economica, 1996), 204.

³⁰⁷ De Waal (1997), *supra* fn. 5, 190. Emphasis in the original.

³⁰⁸ See also Sections 4.1.2.1. and 6.2.2.1.2. (fn. 213 and 214), referring to instances where the UNSC has differentiated between humanitarian and development action, and Section 3.2.1.2.4., on humanitarian exemptions to sanctions regimes.

restated explicitly, even demands in this sense under Chapter VII would arguably cover only personnel involved in actions respecting the principles of humanitarian assistance and the terms of mission limit under IHL.

3.2.1.2.3. Obstacles to Humanitarian Assistance and Workers as Violations of IHL

In addition to calling for respect for humanitarian assistance and safety and security of humanitarian workers, the UNSC and UNGA since the 1990s have also condemned attacks, violence and obstacles against the provision of humanitarian assistance as violations of IHL. The UNSC ‘[s]trongly condemn[ed] all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirm[ed] that those who commit[ted] or order[ed] the commission of such acts w[ould] be held individually responsible in respect of such acts’.³⁰⁹ Similarly, it condemned *as violations of IHL* in the conflict in BiH ‘deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property’;³¹⁰ and the UNGA ‘[c]ondemn[ed] all blockades or other interference in the delivery of humanitarian relief supplies to the Afghan people as a violation of international humanitarian law’.³¹¹

In Angola, the UNSC condemned attacks (in particular by UNITA) against UN personnel involved in the provision of humanitarian assistance *as violations of IHL* and condemned ‘any action, including laying of landmines, which threatens the unimpeded delivery of humanitarian assistance’.³¹² Similarly, the UNSC

³⁰⁹ S/RES/794 (1992), 3 December 1992, par. 5. Emphasis added. In the preamble of the same res., the UNSC expressed its ‘grave alarm at continuing reports of widespread violations of international humanitarian law occurring in Somalia, including reports of violence and threats of violence against personnel participating lawfully in impartial humanitarian relief activities; deliberate attacks on non-combatants, relief consignments and vehicles, and medical and relief facilities; and impeding the delivery of food and medical supplies essential for the survival of the civilian population’. Emphasis added. Similarly, see S/PRST/1999/16, 27 May 1999, 2; S/PRST/1999/31, 12 November 1999, 2; S/PRST/2001/1, 11 January 2001, 2; S/PRST/2001/30, 31 October 2001, 2.

³¹⁰ S/RES/771 (1992), 13 August 1992, preamble. Similarly, see S/RES/787 (1992), 16 November 1992 (13-0-2), par. 7; S/25162, 25 January 1993, 1; S/25334, 25 February 1993, 1-2; S/25520, 3 April 1993, 1; S/RES/819 (1993), 16 April 1993, par. 8; S/RES/824 (1993), 16 April 1993, preamble; S/RES/913 (1994), 22 April 1994, preamble. Similarly, see A/RES/49/196, 23 December 1994, par. 14.

See also E/CN.4/RES/1993/7, 23 February 1993 (without vote), par. 14; E/CN.4/RES/1994/72, 9 March 1994 (without vote), pars. 10 (a-b-d), 11, and 12; E/CN.4/RES/1995/89, 8 March 1995 (44-0-7), pars. 4-5 and 17;

³¹¹ A/RES/53/203 B, 18 December 1998, par. 5. Emphasis added.

³¹² S/RES/864 (1993), 15 September 1993, par. 13; S/RES/945 (1994), 29 September 1994, par. 10. Similarly, see S/RES/903 (1994), 16 March 1994, par. 7; S/RES/922 (1994), 31 May 1994, par. 10; S/RES/932 (1994), 30 June 1994, par. 10; S/RES/952 (1994), 27 October 1994, par. 7; S/RES/1075 (1996), 11 October 1996, par. 19; S/RES/1164 (1998), 29 April 1998, par. 4. The disappearance of some ‘humanitarian relief workers’ in August 1994 led to repeated demands by the UNSC for their release and calls for the full cooperation of the Parties to the conflict with the UN investigation on the issue. See S/RES/945 (1994), 29 September 1994, par. 11; S/RES/952 (1994), 27 October 1994, par. 8. Calling on Parties to refrain from impeding humanitarian assistance, see also E/CN.4/RES/1994/88, 9 March 1994 (without vote), par. 4.

throughout the 1990s condemned (even if without explicitly qualifying these acts as IHL violations): attacks against and detention of the personnel of the international agencies and organisations delivering humanitarian assistance in Liberia, as well as the looting of their equipment, supplies, and personal property;³¹³ attacks against international humanitarian personnel in Burundi;³¹⁴ attacks on humanitarian convoys and personnel, as well as hostage-taking and detention of these personnel in Sierra Leone,³¹⁵ and interferences in the provision of aid and misappropriation of such aid in Rwanda and neighbouring countries.³¹⁶

This UN practice, supplemented by the adoption of the UN Safety Convention in 1994, has probably contributed to the formation of a consensus at the international level on the seriousness of attacking personnel engaged in the provision of humanitarian assistance, so that the ICC Statute includes the war crime of ‘[i]ntentionally directing attacks against personnel, installations, material, units or vehicles *involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations*, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict’, applicable both in IAC and NIAC.³¹⁷ The UNGA has regularly welcomed and recalled this provision in its thematic resolutions on the safety and security of UN and associated personnel and humanitarian personnel.³¹⁸ Furthermore, it has constantly condemned ‘any act or failure to act which obstructs or prevents humanitarian personnel from discharging their humanitarian functions, or which entails their being subjected to threats, the use of force or physical attack frequently resulting in injury or death’;³¹⁹

³¹³ See S/PRST/1994/53, 13 September 1994, 1; S/RES/950 (1994), 21 October 1994, par. 7; S/RES/1059 (1996), 31 May 1996, par. 6; S/RES/1071 (1996), 30 August 1996, par. 8; S/RES/1083 (1996), 27 November 1996, par. 7. See also A/RES/51/30 B, 5 December 1996, par. 4.

³¹⁴ See S/RES/1040 (1996), 29 January 1996, preamble; S/RES/1049 (1996), 5 March 1996, par. 2; S/PRST/1999/32, 12 November 1999, 1; S/RES/1286 (2000), 13 January 2000, par. 8. Exhorting Parties not to hamper the work of humanitarian organisations, see E/CN.4/RES/1999/10, 23 April 1999, par. 14; E/CN.4/RES/2000/20, 18 April 2000, par. 20; E/CN.4/RES/2003/16, 17 April 2003, par. 16. All adopted without vote.

³¹⁵ See S/PRST/1995/57, 27 November 1995, 1; S/PRST/1997/29, 27 May 1997, 1; S/PRST/1997/42, 6 August 1997, 2; S/PRST/1998/5, 26 February 1998, 2.

³¹⁶ S/PRST/1994/75, 30 November 1994, 1. See also E/CN.4/RES/1995/91, 8 March 1995 (without vote), paras. 3 and 13.

³¹⁷ Arts. 8(2)(b)(iii) and 8(2)(e)(iii) ICCSt. Emphasis added.

³¹⁸ See A/RES/53/87, 7 December 1998, preamble; A/RES/54/192, 17 December 1999, preamble; A/RES/55/175, 19 December 2000, preamble; A/RES/56/217, 21 December 2011, preamble; A/RES/57/155, 16 December 2002, preamble; A/RES/58/122, 17 December 2003, preamble; A/RES/59/211, 20 December 2004, preamble; A/RES/60/123, 15 December 2005, preamble; A/RES/61/133, 14 December 2006, preamble; A/RES/62/95, 17 December 2007, preamble; A/RES/63/138, 11 December 2008, preamble; A/RES/64/77, 7 December 2009, preamble; A/RES/65/132, 15 December 2010, preamble; A/RES/66/117, 15 December 2011, preamble.

³¹⁹ A/RES/52/167, 16 December 1997, par. 2. Similarly, see A/RES/53/87, 7 December 1998, par. 10; A/RES/54/192, 17 December 1999, par. 4; A/RES/55/175, 19 December 2000, par. 5; A/RES/56/217, 21 December 2011, par. 5; A/RES/57/155, 16 December 2002, par. 6; A/RES/58/122, 17 December 2003, par. 6; A/RES/59/211, 20 December 2004, par. 10; A/RES/60/123, 15 December 2005, par. 9; A/RES/61/133, 14 December 2006, par. 9; A/RES/62/95, 17 December 2007, par. 9; A/RES/63/138, 11 December 2008, par. 10; A/RES/64/77, 7 December 2009, par. 10; A/RES/65/132, 15 December 2010, par. 11; A/RES/66/117, 15 December 2011, par. 11.

and, ‘the acts of murder and other forms of physical violence, abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention to which those participating in humanitarian operations are increasingly exposed, as well as acts of destruction and looting of their property’, calling on States to prosecute those responsible and end impunity.³²⁰

The condemnation of attacks and violence against humanitarian personnel, sometimes supplemented by a *demand* that the perpetrator be brought to justice, have continued in relation to conflicts towards the end of the 1990s and onwards, such as the DRC,³²¹ Afghanistan,³²² Sudan (Darfur),³²³ and Somalia,³²⁴ where this condemnation has been supplemented by a condemnation of ‘targeting and obstruction of the delivery of humanitarian aid by Al-Shabaab and other armed groups in Somalia’,³²⁵ of ‘politicization, misuse, and

³²⁰ A/RES/54/192, 17 December 1999, preamble. Similarly, see A/RES/53/87, 7 December 1998, preamble; A/RES/55/175, 19 December 2000, preamble; A/RES/56/217, 21 December 2011, preamble; A/RES/57/155, 16 December 2002, preamble; A/RES/58/122, 17 December 2003, preamble; A/RES/59/211, 20 December 2004, preamble; A/RES/60/123, 15 December 2005, preamble; A/RES/61/133, 14 December 2006, preamble; A/RES/62/95, 17 December 2007, preamble; A/RES/63/138, 11 December 2008, preamble; A/RES/64/77, 7 December 2009, preamble; A/RES/65/132, 15 December 2010, preamble; A/RES/66/117, 15 December 2011, preamble.

³²¹ See S/RES/1653 (2006), 27 January 2006, par. 8; S/PRST/2012/22, 19 October 2012, 1; **S/RES/2076 (2012), 20 November 2012, par. 3; S/RES/2078 (2012), 28 November 2012, par. 6.** For such a *condemnation*, matched by a *demand* that perpetrators be brought to justice see **S/RES/1355 (2001), 15 June 2001, par. 17; S/RES/1484 (2003), 30 May 2003, par. 6.** *Condemning* the attacks and ‘*emphasizing* that those responsible for such attacks must be brought to justice’, see **S/RES/1856 (2008), 22 December 2008, preamble; S/RES/1906 (2009), 23 December 2009, preamble; S/RES/1925 (2010), 28 May 2010, preamble; S/RES/1991 (2011), 28 June 2011, preamble; S/RES/2053 (2012), 27 June 2012, preamble.**

³²² See S/RES/1868 (2009), 23 March 2009, preamble; S/RES/1917 (2010), 22 March 2010, preamble; S/RES/1974 (2011), 22 March 2011, par. 18; **S/RES/2011 (2011), 12 October 2011, preamble; S/RES/2041 (2012), 22 March 2012, par. 29; S/RES/2069 (2012), 9 October 2012, preamble; S/RES/2096 (2013), 19 March 2013, par. 29.**

See also A/RES/56/176, 19 December 2001, par. 11; A/RES/56/220 B, 21 December 2001, par. 10; A/RES/57/113 B, 6 December 2002, par. 10; A/RES/58/26 B, 5 December 2003, par. 8; A/RES/59/112 B, 8 December 2004, par. 3; A/RES/60/32 B, 30 November 2005, par. 3; A/RES/61/18, 28 November 2006, par. 7; A/RES/62/6, 5 November 2007, par. 7; A/RES/66/13, 21 November 2011, par. 9; A/RES/67/16, 27 November 2012, par. 10. All the UNGA resolutions were adopted without vote. See also E/CN.4/RES/1998/70, 21 April 1998 (without vote), par. 3(c).

³²³ *Condemning* attacks against civilians, including humanitarian workers, see **S/RES/1755 (2007), 30 April 2007, preamble.** Condemning ‘those parties to the conflict who have failed to ensure the full, safe and unhindered access of relief personnel to all those in need in Darfur as well as the delivery of humanitarian assistance’: **S/RES/1769 (2007), 31 July 2007, preamble; S/RES/1828 (2008), 31 July 2008 (14-0-1), preamble.**

Demanding that the Parties put an end to atrocities, including against humanitarian workers, see S/PRST/2005/67, 21 December 2005, 1; **S/RES/1769 (2007), 31 July 2007, par. 14; S/PRST/2007/35, 2 October 2007, 1; S/RES/1828 (2008), 31 July 2008 (14-0-1), par. 11; S/RES/1881 (2009), 6 August 2009, par. 7; S/RES/1935 (2010), 30 July 2010, preamble and par. 9; S/RES/2003 (2011), 29 July 2011, preamble and par. 14; S/RES/2063 (2012), 31 July 2012 (14-0-1), preamble and par. 13.**

Expressing *calls* in this sense, see S/RES/1713 (2006), 29 September 2006, preamble; S/RES/1779 (2007), 28 September 2007, preamble; S/RES/1841 (2008), 15 October 2008, preamble; S/RES/1891 (2009), 13 October 2009, preamble; S/RES/1945 (2010), 14 October 2010, preamble.

Similarly, see E/CN.4/RES/2005/82, 21 April 2005, par. 3(l); A/HRC/RES/4/8, 30 March 2007, par. 4; A/HRC/RES/6/35, 14 December 2007, par. 7; A/HRC/RES/7/15, 27 March 2008, par. 6; A/HRC/RES/9/17, 24 September 2008, par. 9. All adopted without vote.

³²⁴ Explicitly *condemning* attacks and violence against humanitarian workers as violations of IHL, see S/PRST/2002/8, 28 March 2002, 4; **S/RES/1910 (2010), 28 January 2010, preamble and par. 16; S/RES/1964 (2010), 22 December 2010, preamble and par. 15; S/RES/2002 (2011), 29 July 2011, preamble; S/RES/2010 (2011), 30 September 2011, preamble and par. 22; S/RES/2093 (2013), 6 March 2013, par. 26.**

The UNGA ‘deplore[d] any attacks on humanitarian personnel’: A/RES/66/120, 15 December 2011 (without vote), par. 11.

³²⁵ S/PRST/2011/6, 10 March 2011, 2; **S/RES/2002 (2011), 29 July 2011, preamble; S/RES/2010 (2011), 30 September 2011, preamble.**

misappropriation of humanitarian assistance by armed groups’,³²⁶ and of ‘the expulsion of humanitarian organizations, the ban on the activities of humanitarian personnel, and the targeting, hindering or prevention of the delivery of humanitarian assistance in Somalia by armed groups’.³²⁷ The UNGA and Human Rights Council have condemned all attacks against humanitarian and medical personnel in Syria.³²⁸ In addition, the UNSC ‘recall[ed] the unacceptability of the destruction or rendering useless of objects indispensable to the survival of the civilian population, and in particular of using cuts in the electricity and water supply as a weapon against the population’ in the DRC,³²⁹ and ‘deplore[d] abductions of United Nations and humanitarian personnel’ in Abkhazia.³³⁰

In sum, obstructing and impeding the provision of relief to civilians in need has been identified as a violation of IHL by UN bodies both in IACs and NIACs. On the other hand, as will be illustrated below in Section 3.2.2.3., under the ICC Statute the obstruction of relief is a war crime (part of the crime of starvation of civilians as a method of warfare) only for IACs.³³¹ Attacks against personnel involved in the distribution of humanitarian assistance have been also condemned by the UNSC, and these attacks (covering also objects) are now criminalised by the ICC Statute both in NIACs and IACs, even if only in case of humanitarian assistance missions in accordance with the UN Charter, a concept that, as will be examined in detail in Section 3.2.2.1. below, will need to be clarified by the judges in their case-law. These attacks, if targeting UN and associated personnel, shall be criminalised by State Parties to the UN Safety Convention and its Optional Protocol, like other conducts such as kidnapping, which under the ICC Statute might be covered by other provisions protecting not humanitarian personnel specifically but civilians more in general. All these elements demonstrate that the protection of relief actions and personnel has undergone a significant evolution since the 1990s in the realms both of IHL, with the rules on NIAC becoming similar to treaty law regarding IAC, and of ICL.

Another area of intervention by the UNSC that might have influenced the law on the provision of humanitarian assistance to civilians has been that of sanctions adopted under Chapter VII of the UN Charter.

³²⁶ **S/RES/1916 (2010), 19 March 2010, par. 4.** Similarly, see **S/RES/1972 (2011), 17 March 2011, par. 3; S/RES/2060 (2012), 25 July 2012, par. 5; S/RES/2067 (2012), 18 September 2012, preamble; S/RES/2093 (2013), 6 March 2013, preamble; S/RES/2102 (2013), 2 May 2013, preamble; S/RES/2111 (2013), 24 July 2013, par. 21.**

³²⁷ A/RES/66/120, 15 December 2011 (without vote), par. 11.

³²⁸ See A/RES/67/183, 20 December 2012 (135-12-36), par. 13; A/RES/67/262, 15 May 2013 (107-12-59), par. 16; A/HRC/RES/22/24, 22 March 2013 (41-1-5), par. 9.

³²⁹ S/PRST/1998/26, 31 August 1998, 1.

³³⁰ S/PRST/2000/32, 14 November 2000, 2.

³³¹ Art. 8(2)(b)(xxv) ICCSt.

3.2.1.2.4. Sanctions and Humanitarian Exemptions

While not immediately connected to the IHL framework regulating humanitarian assistance to civilians in conflict, sanctions regimes adopted under Chapter VII by the UNSC may contribute to elucidating this framework. Not only do they demonstrate once again the particular relevance and treatment reserved to humanitarian assistance and actors implementing it in the course of armed conflicts, but they might also help clarify the meaning of humanitarian assistance (and the actors entitled to access and protection to provide it) in the practice of the UNSC.

Indeed, humanitarian assistance has been not only a reason for the imposition of economic measures under Article 41 of the UN Charter, as for example in the cases of Kosovo in 1998³³² and of Libya in 2011,³³³ but it has also become a prominent feature in the exemptions to sanctions regimes, in particular following international outcry at the consequences on the civilian population of the blanket sanctions regime adopted against Iraq after the invasion of Kuwait in 1990. Resolution 661 established the sanctions regime, targeting the whole of the population and providing exemptions from the export ban for ‘supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs’, and from the ban on transfer of funds for ‘payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs’.³³⁴ The same resolution also created a Committee charged with monitoring the implementation of the sanctions regime,³³⁵ and entitled to ‘determine whether humanitarian circumstances have arisen’.³³⁶ More in details, the UNSC formulated specific guidelines to avoid the diversion of humanitarian relief to the Iraqi military, by stating that the approved ‘foodstuffs should be provided through the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision, in order to ensure that they reach the intended beneficiaries’.³³⁷ Similarly, the UNSC ‘recommend[ed] that medical supplies should be

³³² See S/RES/1160 (1998), 31 March 1998 (14-0-1), pars. 8 and 16(c).

³³³ See S/RES/1970 (2011), 26 February 2011, pars. 2(c) and 27.

³³⁴ S/RES/661 (1990), 6 August 1990 (13-0-2), pars. 3(c) and 4.

³³⁵ S/RES/661 (1990), 6 August 1990 (13-0-2), par. 6.

³³⁶ S/RES/661 (1990), 13 September 1990 (13-0-2), preamble. The Committee made a determination that ‘circumstances applied “with respect to the entire civilian population of Iraq in all parts of Iraq’s national territory”’ on 22 March 1991. UN Department of Political Affairs (UN DPA), *Repertoire of the Practice of the Security Council – Supplement 1989-1992* (New York: UN, 2007), 157.

³³⁷ S/RES/666 (1990), 13 September 1990 (13-2-0), par. 6.

exported under the strict supervision of the Government of the exporting States or by appropriate humanitarian agencies.’³³⁸

Regarding the content of humanitarian exceptions and thus the meaning of humanitarian assistance, the UNSC indirectly gave quite a detailed description of it (even if not comprehensive) when in resolution 687 of 8 April 1991 decided that ‘the prohibitions against the sale or supply to Iraq of commodities or products, other than medicines and health supplies, and prohibitions against financial transactions related thereto contained in resolution 661 (1990) shall not apply to foodstuffs notified to the Security Council Committee established by resolution 661 (1990) ... or, with the approval of that Committee, under the simplified and accelerated “no-objection” procedure, to materials and supplies for essential civilian needs *as identified in the report of the Secretary-General dated 20 March 1991*, and in any further findings of humanitarian need by the Committee’.³³⁹

The UNSG report in question called for an immediate removal of sanctions related to ‘food supplies’ and ‘the import of agricultural equipment and supplies’, stating the urgent need for ‘major quantities of ... milk, wheat flour, rice, sugar, vegetable oil and tea’, as well as seeds and ‘fertilizers, pesticides, spare parts, veterinary drugs, agricultural machinery and equipment’.³⁴⁰ In addition, in the field of water, sanitation and health, the necessary assistance included all the required materials to ensure potable water, garbage collection and a functioning sewage system, as well as the required medicines and equipment for hospitals, and ‘fuel, power and communications’, without which all the other measures would risk being ineffective.³⁴¹ Finally, authorisation for the import of essential building materials was recommended.³⁴²

Notwithstanding the humanitarian exemptions provided by the UNSC, the humanitarian consequences of the sanctions on the Iraqi population were dramatic, and the Sanctions Committee was

³³⁸ S/RES/666 (1990), 13 September 1990 (13-2-0), par. 8.

³³⁹ S/RES/687 (1991), 8 April 1991 (12-1-2), par. 20. Emphasis added.

³⁴⁰ S/22366, 20 March 1991, par. 18.

³⁴¹ More in detail: ‘the necessary quantities of fuel for generators and transport [of water]; lubricants for engines; aluminium sulphate; chlorine; generators for water stations; skid-mounted river water treatment units; chemical dosing pumps; gas chlorinators; pump sets; spare parts; collars for water pipes; and reagents for chemical tests;’ ‘fuel and spare parts for garbage collection trucks, as well as insecticides; fuel and spare parts for the sewage disposal system ...; and hoses for drawing water with tanker-trucks;’ ‘essential drugs and vaccines, as approved earlier, on a more extended scale, chemicals and reagents, generators, battery-operated incubators, means of alternative communication, requirements for the reinstitution of the cold chain for vaccines, and some vehicles’. S/22366, 20 March 1991, par. 27.

³⁴² See S/22366, 20 March 1991, par. 29. Similarly, more in general, a Note by the President of the UNSC on ‘Work of the Sanctions Committees’ of January 1999 suggested that ‘[f]oodstuffs, pharmaceuticals and medical supplies’ as well as ‘[b]asic or standard medical and agricultural equipment and basic or standard educational items’ should be exempted from UN sanctions regimes, and ‘[o]ther essential humanitarian goods should be considered for exemption’ (e.g. ‘efforts should be made to allow the population of the targeted countries to have access to appropriate resources and procedures for financing humanitarian imports’). S/1999/92, 29 January 1999, par. 16. See also *Ibid.*, pars. 11-15.

criticised because of its political nature (being composed of all the members of the UNSC, usually represented by diplomats) and its lack of accountability and transparency.³⁴³ In addition to this, it did not coordinate with the Committees created for the implementation of the other sanctions regimes (one for each), so that '[h]umanitarian exemptions tend[ed] to be ambiguous and [were] interpreted arbitrarily and inconsistently.'³⁴⁴ As a result of these criticisms, the UNSC did no longer adopt comprehensive sanctions regimes except in the case of the FRY, in which it imposed an arms embargo and other sanctions, with the corresponding humanitarian exceptions, followed by a ban on military flights in the airspace of BiH to guarantee the safety of humanitarian flights.³⁴⁵ The UNSC resorted instead to the imposition of targeted or smart sanctions, addressed only at those most responsible for the acts threatening peace and security, for example in the cases of UNITA in Angola,³⁴⁶ and the Taliban in Afghanistan.³⁴⁷

At times, the imposition of sanctions by regional organisations created problems for humanitarian activities (additional to those related to the application of the exemption regimes by the UNSC Sanctions Committees), as in Burundi after 1996,³⁴⁸ and in Sierra Leone following the *coup d'état* of 1997, when the

³⁴³ See, for example, François Alabrune, "La Pratique des Comités des Sanctions du Conseil de Sécurité depuis 1990," *Annuaire Français de Droit International* 45 (1999): 226-279; Paul Conlon, "Legal Problems at the Centre of United Nations Sanctions," *Nordic Journal of International Law* 65, no. 1 (1996): 73-90; Paul Conlon, "The Humanitarian Mitigation of UN Sanctions," *German Yearbook of International Law* 39 (1996): 249-284. In addition to the provision of humanitarian exemptions, in 1996 the UNSC established, through agreement with the Iraqi government, the Oil-for-Food programme, to allow Iraq to sell certain amounts of oil and use the money to buy 'medicine, health supplies, foodstuffs, and material and supplies for essential civilian needs' (S/RES/986 (1995), 14 April 1995, par. 8; see also S/RES/1284 (1999), 17 December 1999 (11-0-4)), par. 17).

³⁴⁴ Ms Graça Machel quoted in CESCR, General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, 12 December 1997, E/C.12/1997/8, par. 5.

³⁴⁵ The arms embargo was imposed with S/RES/713 (1991), 25 September 1991, par. 6; the flight ban with S/RES/781 (1992), 9 October 1992 (14-0-1). The sanctions regime was then repeatedly modified.

The UNSC adopted comprehensive sanctions also against Haiti in 1993, but the country was not in a situation of armed conflict. See S/RES/841 (1993), 16 June 1993.

³⁴⁶ The sanctions were imposed in 1993 and repeatedly widened and extended until the end of 2002. They included an arms embargo, a travel ban for UNITA members and their families and a ban on UNITA flights, except for 'medical emergency or ... flights of aircraft carrying food, medicine, or supplies for essential humanitarian needs, as approved in advance by the [ad-hoc Sanctions] Committee'. See S/RES/864 (1993), 15 September 1993, par. 19; S/RES/1127 (1997), 28 August 1997, pars. 4-5; S/RES/1173 (1998), 12 June 1998, pars. 11-13; S/RES/1448 (2002), 9 December 2002, par. 2.

³⁴⁷ The UNSC adopted sanctions first in the form of a flight ban and freezing of funds, and then also of an arms embargo and additional measures, in each case providing for humanitarian exemptions. See S/RES/1267 (1999), 15 October 1999, par. 4; and S/RES/1333 (2000), 19 December 2000 (13-0-2), pars. 5, 8, and 10.

Exemptions: to arms embargo, see S/RES/1333 (2000), 19 December 2000, par. 6; to flight ban, see S/RES/1267 (1999), 15 October 1999, par. 4(a), and S/RES/1333 (2000), 19 December 2000, par. 11; to assets freeze, see S/RES/1267 (1999), 15 October 1999, par. 4(b). Moreover, under S/RES/1333 (2000), 19 December 2000, par. 12, the Sanctions Committee 'shall maintain a list of approved organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan, including the United Nations and its agencies, governmental relief agencies providing humanitarian assistance, the International Committee of the Red Cross and nongovernmental organizations as appropriate,' and 'the prohibition imposed by paragraph 11 above shall not apply to humanitarian flights operated by, or on behalf of, organizations and governmental relief agencies on the list approved by the Committee'. The Committee shall keep such list under regular review, and notify organisations in case of de-listing.

³⁴⁸ Following a *coup d'état* in July 1996, neighbouring States imposed sanctions, which created problems for the humanitarian activities of the UN and NGOs and required a process of negotiations with the Regional Sanctions Coordination Committee in order to have humanitarian exemptions approved. These exemptions at first were limited to 'only medicines and foodstuffs destined expressly for the Rwandan refugees still in Burundi', then they were gradually extended to 'urgent medical items and laboratory equipment, as well as food supplements for infants and hospital patients', the import by the UN of 'limited quantities of fuel for the

regional organisation ECOWAS did not only call for an oil and arms embargo, as well as a travel ban and freezing of funds for members of the junta and their families, but also recommended that members of ECOWAS ‘shall abstain from shipping and delivering humanitarian goods to the illegal regime, except with the prior approval of the Authority of Heads of State and Government of ECOWAS.’³⁴⁹ The enforcement of the embargo, which required *inter alia* ‘that ECOMOG inspect[ed] humanitarian shipments at the border of Sierra Leone and Guinea’, also created difficulties for the provision of humanitarian assistance in the country.³⁵⁰

After the 1990s, which emerged as ‘the sanctions decade’,³⁵¹ and witnessed an evolution and refinement of Chapter VII sanctions regimes centred around humanitarian considerations and the provision of humanitarian relief, the 21st century has confirmed the centrality of humanitarian considerations in the framework of sanctions through the constant adoption of targeted sanctions and of humanitarian exemptions, as already done in the cases of Angola, Sierra Leone, and the Taliban. In this sense, arms embargoes have generally not applied to weapons and protective clothing intended solely for humanitarian use (e.g. to be utilised for de-mining activities) or exported by UN personnel and humanitarian workers for personal use; flight bans have exempted flights approved by the relevant Committee on grounds of humanitarian need, and travel bans have featured an exemption for travels approved by the Committee for humanitarian purposes (including religious obligations); assets freeze have not applied to money determined by the relevant States to be necessary for basic expenses, such as foodstuffs, rent, medicines, and public utility charges (and without any objection by the Committee). This is true for the sanctions adopted in relation to

distribution of these goods’, and ‘twice-weekly humanitarian flights between Nairobi and Bujumbura.’ S/1996/887, 29 October 1996, pars. 24-36.

³⁴⁹ Art. 5 of the Decision on sanctions against the Junta in Sierra Leone, Economic Community of West African States, Twentieth session of the Authority of Heads of State and Government, held at Abuja, on 28 and 29 August 1997. Reproduced in S/1997/695, 8 September 1997, Annex II. On the control of humanitarian assistance by ECOMOG, see also Economic Community of West African States six-month peace plan for Sierra Leone (23 October 1997-22 April 1998): Elaboration of the ECOWAS Peace Plan, reproduced in S/1997/824, 28 October 1997, Annex II, par. 3.

Targeted sanctions, including humanitarian exemptions, were then adopted also by the UNSC (S/RES/1132 (1997), 8 October 1997, pars. 5-6 and 7(b)), and repeatedly modified until 2010 (S/RES/1940 (2010), 29 September 2010).

³⁵⁰ S/1998/103, 5 February 1998, par. 30; see also pars. 28-31. In particular, Guinea ‘control[ed] the only practical road access for humanitarian convoy to Sierra Leone’ and ‘[d]espite ECOWAS having agreed to UNOCHA recommendations on sanctions exemptions mechanisms, not a single relief item ha[d] crossed the border under the formal mechanism [until February 1998].’ S/1998/155, 25 February 1998, Annex: Interim Report of the Inter-Agency Mission to Sierra Leone, par. 8. See also pars. 26-28.

Some commentators interpreted the reduction in humanitarian assistance to Sierra Leone in the period after the coup not just as the result of practical shortcomings in the enforcement of the embargo, but as a deliberate political choice by donors to withdraw assistance. See Henry Dunant Centre for Humanitarian Dialogue, *February 2003 Report: Politics and Humanitarianism: Coherence in Crisis?* (Geneva: Henry Dunant Centre for Humanitarian Dialogue, 2003), 10; Tanja Schümer, *New Humanitarianism: Britain and Sierra Leone, 1997-2003* (Basingstoke: Palgrave Macmillan, 2008), 8-9.

³⁵¹ David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder, CO [etc.]: Rienner, 2000).

Liberia,³⁵² DRC,³⁵³ Somalia,³⁵⁴ Sudan,³⁵⁵ Côte d'Ivoire,³⁵⁶ and Libya.³⁵⁷ In the conflict in Libya, the safe passage of humanitarian assistance was one of the elements at the basis of the adoption of an arms embargo and targeted sanctions against the Libyan authorities,³⁵⁸ and of the establishment of a flight ban,³⁵⁹ with an exemptions for 'flights whose sole purpose [wa]s humanitarian, such as delivering or facilitating the delivery of assistance, including medical supplies, food, humanitarian workers and related assistance, or evacuating foreign nationals from the Libyan Arab Jamahiriya', or authorised to protect civilians or to enforce compliance with the ban itself.³⁶⁰

Furthermore, since 2008-2009 the obstruction of humanitarian assistance has become a criterion for identifying and listing individuals to be targeted by economic measures. In late 2008, for the first time, the UNSC decided to apply targeted sanctions in the form of a travel ban, freezing of funds, and arms embargo against individuals and entities designated by the competent Sanctions Committee 'as obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia',³⁶¹ and then it '[u]nderscore[d] the importance of humanitarian aid operations, condemn[ed] politicization, misuse, and misappropriation of humanitarian assistance by armed groups and call[ed] upon

³⁵² Exemptions: to arms embargo, see S/RES/1343 (2001), 7 March 2001, par. 5(c)-5(d), S/RES/1521 (2003), 22 December 2003, par. 2(f)-2(g), and S/RES/1903 (2009), 17 December 2009, par. 5(b)-5(c); to travel ban, see S/RES/1343 (2001), 7 March 2001, par. 7(b), and S/RES/1521 (2003), 22 December 2003, par. 4(c); to assets freeze, see S/RES/1532 (2004), 12 March 2004, par. 2(a).

³⁵³ Exemptions: to arms embargo, see S/RES/1493 (2003), 28 July 2003, par. 21, S/RES/1596 (2005), 18 April 2005, par. 2(c), and S/RES/1807 (2008), 31 March 2008, par. 3(b)-3(c); to travel ban, see S/RES/1596 (2005), 18 April 2005, par. 14, and S/RES/1807 (2008), 31 March 2008, par. 10(a); to assets freeze, see S/RES/1596 (2005), 18 April 2005, par. 16(a), and S/RES/1807 (2008), 31 March 2008, par. 12(a).

³⁵⁴ Exemptions: to the arms embargo, see S/RES/1356 (2001), 19 June 2001, pars. 2-3, and S/RES/2060 (2012), 25 July 2012, pars. 11-12; to travel ban, see S/RES/1844 (2008), 20 November 2008, par. 2(a), and S/RES/1907 (2009), 23 December 2009 (13-1-1), par. 11(a); to assets freeze, see S/RES/1844 (2008), 20 November 2008, par. 4(a), and S/RES/1907 (2009), 23 December 2009, par. 14(a).

³⁵⁵ Exemptions: to arms embargo, see S/RES/1556 (2004), 30 July 2004 (13-0-2), par. 9; to travel ban, see S/RES/1591 (2005), 29 March 2005 (12-0-3), par. 3(f); to assets freeze, see S/RES/1591 (2005), 29 March 2005, par. 3(g). The sanctions have been imposed upon, *inter alia*, 'those individuals, as designated by the [Sanctions] Committee ..., based on the information provided by Member States, the Secretary-General, the High Commissioner for Human Rights or the Panel of Experts established [to assist the Committee], and other relevant sources, who ... commit violations of international humanitarian or human rights law or other atrocities, [or] violate the [sanctions regime]': S/RES/1591 (2005), 29 March 2005, par. 3(c). The Sanctions Committee has been explicitly given a quasi-judicial function.

³⁵⁶ Exemptions: to arms embargo, see S/RES/1572 (2004), 15 November 2004, par. 8(b)-8(c), and S/RES/2045 (2012), 26 April 2012, par. 3(b)-3(c); to travel ban, see S/RES/1572 (2004), 15 November 2004, par. 10; to assets freeze, see S/RES/1572 (2004), 15 November 2004, par. 12(a). Similarly to Sudan, since 2004 these targeted sanctions have been imposed *inter alia* against 'any other person determined [by the Sanctions Committee] as responsible for serious violations of human rights and international humanitarian law in Côte d'Ivoire on the basis of relevant information', thus transforming the Sanctions Committee in a quasi-judicial body. S/RES/1572 (2004), 15 November 2004, par. 9.

³⁵⁷ Exemptions to: arms embargo, see S/RES/1970 (2011), 26 February 2011, par. 9, and S/RES/2009 (2011), 16 September 2011, par. 13(b); travel ban, see S/RES/1970 (2011), 26 February 2011, par. 16(a); assets freeze, see S/RES/1970 (2011), 26 February 2011, par. 19(a), and S/RES/2009 (2011), 16 September 2011, par. 16(a).

It is true also for sanctions adopted in situations different from armed conflict: Syria (exemptions to travel ban and assets freeze, see S/RES/1636 (2005), 31 October 2005, Annex) and Guinea-Bissau (exemptions to travel ban, see S/RES/2048 (2012), 18 May 2012, par. 5).

³⁵⁸ See S/RES/1970 (2011), 26 February 2011, pars. 2(c) and 27.

³⁵⁹ S/RES/1973 (2011), 17 March 2011 (10-0-5), preamble and pars. 6-12.

³⁶⁰ S/RES/1973 (2011), 17 March 2011 (10-0-5), pars. 6-7.

³⁶¹ S/RES/1844 (2008), 20 November 2008, par. 8(c).

Member States and the United Nations to take all feasible steps to mitigate these aforementioned practices in Somalia'.³⁶²

At the same time, an exemption from the freezing of funds of designated individuals and entities has been provided for 'the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners'.³⁶³ No similar exemption was provided when the UNSC again adopted financial and travel sanctions against individuals obstructing the access to or the distribution of humanitarian assistance in the eastern part of the DRC.³⁶⁴ The difference might be interpreted as an implied acknowledgment by the UNSC that in Somalia it could be necessary to make payments to individuals or groups seen as threatening the peace or political process (e.g. Al Shabaab, designated as a terrorist organization by the U.S. in March 2008)³⁶⁵ in order to ensure the delivery of humanitarian assistance in certain parts of the country.

In any case, the UNSC limited the exemption in Somalia to a specific category of humanitarian assistance, probably to avoid as much as possible instrumentalisation, indirectly providing an image of organisations that it considers both humanitarian and reliable: the UN, its specialised agencies or programmes, and humanitarian organisations having observer status with the UNGA that provide humanitarian assistance, as well as their implementing partners. Humanitarian organisations that provide humanitarian assistance and have observer status with the UNGA arguably include (at least) the International Organization for Migration (IOM), the ICRC and the IFRC.³⁶⁶ On the other hand, independent humanitarian NGOs such as MSF are covered by the exemption only if they are qualifiable as 'implementing partners'.

³⁶² S/RES/1916 (2010), 19 March 2010, par. 4. Similarly, see S/RES/1972 (2011), 17 March 2011, par. 3; in the preamble of the same resolution, the Council '[u]nderscor[ed] the importance of upholding the principles of neutrality, impartiality, humanity and independence in the provision of humanitarian assistance'. Similarly, see also S/RES/2060 (2012), 25 July 2012, par. 5; S/RES/2111 (2013), 24 July 2013, par. 21.

³⁶³ S/RES/1916 (2010), 19 March 2010, par. 5. Similarly, see S/RES/1972 (2011), 17 March 2011, par. 4; S/RES/2002 (2011), 29 July 2011, par. 9; S/RES/2060 (2012), 25 July 2012, par. 7; S/RES/2111 (2013), 24 July 2013, par. 22 (adding as a specification for implementing partners, 'including bilaterally or multilaterally funded NGOs participating in the United Nations Consolidated Appeal for Somalia'). Imposing the freezing of funds, see S/RES/1844 (2008), 20 November 2008, par. 3.

³⁶⁴ See S/RES/1857 (2008), 22 December 2008, par. 4(f). Previously, the Security Council had '*condemn[ed]* those who seek to hamper the provision of assistance to civilians in need'. S/RES/1445 (2002), 4 December 2002, par. 14. The sanctions imposed by S/RES/1857 (2008) added to other previously imposed sanctions: see S/RES/1807 (2008), 31 March 2008.

³⁶⁵ See Ken Menkhaus, "Stabilisation and Humanitarian Access in a Collapsed State: the Somali Case," *Disasters* 34, S3 (2010), S332. Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Independent Study Commissioned by UN OCHA and NRC, July 2013, 75. Available at https://docs.unocha.org/sites/dms/Documents/CT_Study_Full_Report.pdf (accessed September 10, 2013).

³⁶⁶ For a full list of intergovernmental organisations and other entities that have received a standing invitation to participate as observers in the sessions and the work of the UNGA, see <http://www.un.org/en/members/intergovorg.shtml> (accessed May 15, 2011).

According to the USG/ERC, an implementing partner is ‘a non-governmental organization or community-based organization that has undergone due diligence to establish its bona fides by a United Nations agency or another non-governmental organization, and that reports when requested to the Resident and Humanitarian Coordinator for Somalia on mitigation measures.’³⁶⁷ In addition, implementing partners can be recognised based on two characteristics: ‘(a) The organization is part of the consolidated appeals process for Somalia (or the common humanitarian fund process); (b) The organization is represented in a cluster’s 3W matrix (*Who does What and Where*).’³⁶⁸ In other words, it seems that implementing partners are organisations part of the UN coordination structure in the country, the clusters system.

In its July 2011 report, the Monitoring Group created by the UNSC to assist the Sanctions Committee on Somalia recommended that ‘[t]he Security Council should consider extending the waiver [from the sanction of freezing of funds] to “other neutral humanitarian actors”’.³⁶⁹ The UNSC did not follow this recommendation and rather chose to further specify the concept of implementing partners, adding ‘bilaterally or multilaterally funded NGOs participating in the UN Consolidated Appeal for Somalia’.³⁷⁰ Indeed, the introduction of a concept such as ‘neutral humanitarian actors’ would have required the Sanctions Committee to decide on which actors can be defined as neutral and humanitarian, possibly leading to criticisms against its decisions on the issue, or to ask UN OCHA to determine the question, putting the Office in an uneasy position. Still, NGOs not participating in the UN system for humanitarian coordination would not be covered by the exemption.

In terms of actual implementation of the sanction regime and thus of practice by the Parties to the conflict related to humanitarian access, the Monitoring Group created by the UNSC to assist the Sanctions Committee on Somalia presented allegations regarding the misappropriation and misuse of food aid, facilitated or at least allowed by the proceedings adopted by the aid community, in particular the World Food Programme (WFP);³⁷¹ considered the trend of kidnapping aid workers as ‘fundamentally motivated by financial gain through ransom demands, analogous to piracy, and only secondarily ideologically based’;³⁷² and described in details the obstructions posed to humanitarian assistance, first and foremost by Al Shabaab,

³⁶⁷ S/2010/372, 13 July 2010, Annex.

³⁶⁸ S/2010/372, 13 July 2010, Annex.

³⁶⁹ S/2011/433, 18 July 2011, par. 452(a).

³⁷⁰ S/RES/2002 (2011), 29 July 2011, par. 9.

³⁷¹ S/2010/91, 10 March 2010, pars. 232-261. On the corrective measures adopted by WFP and other actors, see S/2011/433, 18 July 2011, pars. 243-252 and Annex 7.8.

³⁷² S/2010/91, 10 March 2010, par. 262.

in the form of threats and violence against aid workers, ‘expulsions, raids and closures of international and local aid offices due to their alleged “Christian” affiliations or United States funding’,³⁷³ and demands for taxation and registration.³⁷⁴ The Group of Experts created by the UNSC to provide the Sanctions Committee on DRC with a list of individuals who have violated the sanctions regime concluded that ‘the majority of security incidents affecting humanitarian operations are opportunistic acts of banditry by armed actors who usually remain unidentified’, it did not find ‘evidence of intent on the part of individual commanders systematically to prevent the distribution of humanitarian assistance’.³⁷⁵ In other words, it seems that violations were not really connected to the conflict strategy of the Parties in the DRC, where they rather appeared to be episodes of criminality and banditry, and in the case of Somalia. When the provision of humanitarian assistance was limited by Al Shabaab in the framework of the hostilities, the armed group, at least in some cases, seemed to invoke reasons (whose actual existence in practice can be debated) to justify its actions on the basis of the IHL regime, namely lack of neutrality by the organisations in their actions, thus indirectly confirming it.

The centrality of humanitarian assistance in conflict, as well as its specific and limited meaning, has thus been confirmed by the evolution of the sanctions regimes adopted by the UNSC since the 1990s. Indeed, since 2009, the imposition of ‘[t]argeted and graduated measures as a response to the wilful impediment of humanitarian access and to attacks against humanitarian workers’ has been listed as a measure to ensure humanitarian access and the safety and security of humanitarian workers in the Aide Memoire collecting measures to be adopted by the UNSC for the protection of civilians in armed conflict.³⁷⁶

³⁷³ S/2011/433, 18 July 2011, par. 204.

³⁷⁴ On instances of denial of humanitarian access by Al-Shabaab and of obstruction or diversion of humanitarian assistance by other actors (including in areas under TFG control), as well as on best practices adopted by humanitarian actors to minimise diversion, see S/2011/433, 18 July 2011, pars. 189-242 and Annexes 7.1-7.7; S/2012/544, pars. 79-92 and Annexes 6.1-6.2. In addition, on the situation of the provision of humanitarian assistance in Somalia, obstacles to it, and risk mitigation measures adopted by the aid community, see the reports of the UN Resident and Humanitarian Coordinator (RC/HC) for Somalia: S/2010/372, 13 July 2010, Enclosure to the Annex; S/2010/580, 24 November 2010, Enclosure to the Annex; S/2011/125, 14 March 2011, Enclosure to the Annex; S/2011/694, 10 November 2011, Enclosure to the Annex; S/2012/546, 16 July 2012, Enclosure to the Annex; S/2012/856, 20 November 2012, Enclosure to the Annex.

³⁷⁵ S/2010/596, 29 November 2010, par. 149; similarly, see S/2011/738, 2 December 2011, par. 663: ‘banditry, criminality and logistical challenges remained the main obstacles to the delivery of humanitarian assistance.’ Creating the Group of Experts, see S/RES/1533 (2004), 12 March 2004.

³⁷⁶ S/PRST/2009/1, 14 January 2009, Annex, 24. Similarly, see S/PRST/2010/25, 22 November 2010, Annex, 26.

3.2.1.3. *Commissions of Inquiry and Fact-Finding Missions: Starvation, Blockades and Humanitarian Access*

Despite not directly reflecting the views of States or the UN Secretariat, another useful document to clarify the legal regime on the provision of humanitarian assistance to civilians in armed conflict, as well as respect for this regulation in actual practice throughout the 2000s, are reports by special rapporteurs and groups of experts, such as commissions of inquiry and fact-finding missions established by various organs within the UN.³⁷⁷ These tools have been used in politically sensitive situations and episodes, such as the 2006 Lebanon war, the so-called Gaza flotilla of May 2010,³⁷⁸ and the final phase of the conflict in Sri Lanka, and the experts have drafted reports explaining the applicable legal framework, trying to clarify the actual facts and the conduct of the Parties involved, and sometimes also taking a position on specific IHL violations, including with regard to humanitarian assistance.

The UNSC itself created an international commission of inquiry on Darfur in 2004, tasking it *inter alia* with the investigation of reports of violations of IHL and IHRL and the identification of perpetrators.³⁷⁹ Defining the applicable legal framework, the members of the Commission determined that customary rules of IHL regarding NIAC include the prohibition of intentional attacks against humanitarian assistance or peacekeeping missions in accordance with the UN Charter, as provided in the ICC Statute, and the prohibition on the destruction of objects indispensable to the survival of the civilian population.³⁸⁰ In relation to the Lebanon war of 2006, various UN Special Rapporteurs have argued that Israel's conduct possibly amounted to violations of the right to food under IHL and IHRL, as well as to grave breaches of the GCs and

³⁷⁷ It has been affirmed: 'We have seen an unprecedented proliferation of commissions of inquiry initiated in response to recent violent events involving alleged breaches of human rights and violations of the laws of armed conflict.' Agnieszka Jachec Neale, "Human Rights Fact-Finding into Armed Conflict and Breaches of the Laws of War," *Proceedings of the Annual Meeting (American Society of International Law)* 105 (March 23-26, 2011), 86. Similarly, see Philip Alston, "Commissions of Inquiry as Human Rights Fact-Finding Tools," *Proceedings of the Annual Meeting (American Society of International Law)* 105 (March 23-26, 2011), 81. See also Agnieszka Jachec-Neale, "Fact-Finding," in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2011), online edition, available at <http://www.mpepil.com> (accessed February 03, 2012); S/2010/579 (UNSG Report on POC), 11 November 2010, pars. 87-91; S/2012/376, 22 May 2012 (UNSG Report on POC), pars. 64-69; Theo Boutruche, "Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice," *Journal of Conflict and Security Law* 16, no. 1 (2011): 105-140; Micaela Frulli, "Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry," *Journal of International Criminal Justice* 10, no. 5 (2012): 1323-1338.

On the use of such kind of reports as evidence, see for example See, for example, ICJ, *Armed Activities on the Territory of the Congo* (2005), *supra* fn. 212, par. 237.

³⁷⁸ See Section 5.3.3.1.

³⁷⁹ See S/RES/1564 (2004), 18 September 2004 (11-0-4), par. 12.

³⁸⁰ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General – Pursuant to Security Council Resolution 1564 of 18 September 2004*, Geneva, 25 January 2005, par. 166 (v) and (x). Available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (accessed July 20, 2012).

AP I and to war crimes.³⁸¹ The Commission of Inquiry established by the Human Rights Council in connection to this conflict concluded that ‘[f]ailure to provide free and uninterrupted access for humanitarian assistance to civilian population in need, as well as the imposition of unnecessary movement limitations on humanitarian convoys constitute[d] a grave violation of international humanitarian law obligations to ensure access to humanitarian assistance and to provide security guarantees for their effective deployment’; and ‘Israel’s blockade of Lebanese airport and ports ... [had] led to great suffering for the civilian population, damage to the environment, and substantial economic loss’ and thus was ‘a violation of essential principles of international law, international humanitarian law and human rights law.’³⁸²

Similarly, Israel’s conduct was scrutinised by a Fact-Finding Mission established by the Human Rights Council after operation Cast Lead and the so-called Gaza Conflict,³⁸³ which in its report, the so-called Goldstone report, commented on the case-law by the Israeli Supreme Court related to Israel’s duties towards Gaza in terms of basic necessities and humanitarian assistance. The Fact-Finding Mission classified the Gaza Strip as still occupied by Israel,³⁸⁴ and determined that Israel had directed attacks against ‘the foundations of civilian life in Gaza’, targeting and destroying ‘industrial infrastructure, food production, water installations, sewage treatment plants and housing’, and thus made itself responsible of violation of Article 54(2) AP I, which in the opinion of the mission amounts to customary law.³⁸⁵ In particular, the Mission held that even if the population in Gaza was not on the edge of starvation, this was due only to the contribution made by external humanitarian assistance, and thus Israel was not automatically absolved from a breach of the prohibition of starvation under Article 54 AP I, since ‘States cannot escape their obligations not to deny the

³⁸¹ See *Report of the Special Rapporteur on the right to food, Jean Ziegler, on his mission to Lebanon*, A/HRC/2/8, 29 September 2006, par. 31 (also affirming that most of AP I provisions relevant to the right to food ‘are considered part of customary international law’, and referring in par. 10 to art. 54(2) AP I); *Report of the Special Rapporteurs* (2006), supra fn. 229, par. 99 (on violations of IHL allegedly committed by Hezbollah, including indiscriminate attacks and violations of the principle of distinction, see Ibid., pars. 68-75 and 100); *Report of the Commission of Inquiry on Lebanon* (2006), supra fn. 229, pars. 317-340.

³⁸² Ibid., pars. 334-335.

Furthermore, ‘[a]ll attacks on civilian infrastructure, including roads, bridges, airport and ports, water facilities, factories, farms and shops, in particular far from the confrontations in the South, even in cases of “dual use”, [could] not be justified in each instance under military necessity and [had been] disproportionate to the military advantage they provided’; ‘[b]y targeting clearly marked LRC and civil defence ambulances and personnel carrying out their activities, and by the direct attacks and the collateral damage caused to medical facilities, IDF [had] committed a serious violation of customary and conventional international humanitarian law’; and the various violations committed by IDF cumulatively amounted to collective punishment. Ibid., pars. 320, 323, and 331.

The Commission of Inquiry was created through S-2/1. The grave situation of human rights in Lebanon caused by Israeli military operations, 11 August 2006 (27-11-8), pars. 1 and 7. The resolution is contained in A/HRC/S-2/2, 17 August 2006, 3-6.

³⁸³ The Mission was tasked to investigate ‘all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression’. A/HRC/S-9/2, page 3: I. Resolution adopted by the Council at its ninth special session: S-9/1 The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, 12 January 2009 (33-1-13), preamble par. 14 and pars. 1, 2, 6, and 14.

³⁸⁴ Goldstone Report, par. 279.

³⁸⁵ Goldstone report, Chap. XIII (pars. 913-1031). In addition, Israel’s conduct amounted to a violation of the right to food and the right to an adequate standard of living. See Ibid., pars. 941, 961, 988, and 1007.

means of sustenance simply by presuming the international community will fill the gap they have created by deliberately destroying the existing capacity.’³⁸⁶

The Mission’s report then took issue with a string of case-law by the Israeli Supreme Court regarding Israel’s duties for the satisfaction of the needs of civilians in Gaza. The Mission’s components made reference to a 2008 judgement by the Israeli Supreme Court in which it established the existence of humanitarian duties upon Israel, despite it not being an Occupying Power in Gaza any longer, ‘deriv[ing] from the state of armed conflict that exist[ed] between [Israel] and the Hamas organization that control[led] the Gaza Strip; ... from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that [had been] created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip [was at that moment] almost completely dependent upon the supply of electricity from Israel.’³⁸⁷

The Court affirmed that ‘according to the rules of customary international humanitarian law each party to a conflict is bound to refrain from impeding the transfer of basic humanitarian items of aid to the population that requires them in the areas that are under the control of that party to the dispute’,³⁸⁸ but then it did not limit Israel’s obligations to the duty of allowing the passage of essential supplies, as accepted by Israel itself.³⁸⁹ The judges also seemed to imply a duty of Israel itself to supply electricity, by reason of the almost complete dependence of Gaza from the State, without clarifying the legal basis of this duty.³⁹⁰ Having analysed the facts, the Court concluded that Israel was not in breach of its duties, since it ‘[wa]s indeed monitoring the situation in the Gaza Strip, and allowing the supply of the amount of fuel and electricity needed for the essential humanitarian needs in the area.’³⁹¹

The Fact-Finding Mission noted that the Court had established the duty of Israel to provide fuel and electricity in a sufficient amount to satisfy the basic humanitarian needs of the civilian population, but at the same time it ‘[had] not indicate[d] what would constitute “essential humanitarian needs” and appeared to

³⁸⁶ Goldstone report, par. 936.

³⁸⁷ Supreme Court of Israel, *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence* (2008), supra fn. 243, par. 12.

³⁸⁸ Ibid., par. 14.

³⁸⁹ Israel acknowledged the application of arts. 23 GC IV, and 54 and 70 AP I: see Ibid., par. 13.

³⁹⁰ For an analysis of the judgement, see Section 3.2.2.3.

³⁹¹ Supreme Court of Israel, *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence* (2008), supra fn. 243, par. 20.

have left those details for the authorities to determine’.³⁹² The experts questioned the compliance by Israel with the minimum requirements imposed by the Court with reference to the supply of fuel and electricity to the Gaza Strip and argued that ‘[w]hatever th[e] somewhat vague standard [“vital humanitarian needs”] may be, Israel is bound to ensure supplies to meet the humanitarian needs of the population, to the fullest extent possible.’³⁹³ Thus, Israel had violated this obligation and its other obligations as the Occupying Power in the Gaza Strip, through both the blockade and its conduct during the Gaza Conflict, amounting *inter alia* to a breach of Articles 23 GC IV and 54 AP I, both reflective of customary law, and to a form of collective punishment (prohibited by Article 33 GC IV).³⁹⁴

The customary nature of Article 54 AP I was examined also by another Commission, this time established not by the UN but by States, the Eritrea-Ethiopia Claims Commission. It seemed to take a narrow view in 2005, limiting itself to the conclusion that ‘the provisions of Article 54 that prohibit attack against drinking water installations and supplies that are indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the adverse Party had become part of customary international humanitarian law by 1999’.³⁹⁵

Finally, various panels and groups of experts were also constituted (by the Human Rights Council, the UNSG – Palmer Report, Israel – Turkel Report, and Turkey – Turkish Commission Report) to clarify the circumstances of the interception of the flotilla heading towards Gaza in May 2010,³⁹⁶ and a Panel of Experts on Accountability in Sri Lanka was appointed by the UNSG.³⁹⁷ Among the reports on the flotilla, whose

³⁹² Goldstone report, par. 325. A (restrictive) clarification of the meaning of humanitarian needs had been provided by the Supreme Court of Israel in December 2009, when it stated that, in general, ‘[p]ermitting residents to enter Israel for this purpose [of prison visits] is not among the basic humanitarian needs of Gaza residents which Israel is obliged to allow even today’. Nonetheless, such visits may be permitted if there are humanitarian reasons. Supreme Court of Israel sitting as the High Court of Justice, *Anbar et al. v. GOC Southern Command et al.*, HCJ 5268/08; *Adalah, Legal Center for Arab Minority Rights in Israel et al. v. Minister of Defence et al.*, HCJ 5399/08, 9 December 2009, par. 7.

³⁹³ Goldstone report, pars. 326 and 1310.

³⁹⁴ See Goldstone report, pars. 1305-1335.

³⁹⁵ Eritrea Ethiopia Claims Commission, Partial Award – Western Front, Aerial Bombardment and Related Claims – Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, between The State of Eritrea and The Federal Democratic Republic of Ethiopia, The Hague, December 19, 2005, par. 105.

³⁹⁶ The Public Commission to Examine the Maritime Incident of 31 May 2010 – The Turkel Commission, *Report – Part one*, January 2011. Available at <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> (accessed May 31, 2011). Hereinafter Turkel Report. *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011, par. 157 and Appendix I: The Applicable International Legal Principles. Available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf (accessed June 20, 2012). Hereinafter Palmer Report. *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, A/HRC/15/21, 27 September 2010. Hereinafter A/HRC/15/21. Turkish National Commission of Inquiry, *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, Ankara, February 2011. Available at <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf> (accessed September 10, 2011). Hereinafter Turkish Commission Report.

³⁹⁷ UN, *Report of the Secretary-General’s Panel of Experts* (2011), supra fn. 259.

findings will be analysed more in detail in Section 5.3.3.1., the so-called Turkel Report considers as relevant customary law Articles 54 and 70 AP I and Paragraphs 102, 103, and 104 of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual), however highlighting that starvation prohibited under Article 54 AP I ‘should not be understood to simply cause hunger’, but rather to ‘try[] to deprive the population ... of food or to annihilate or weaken the population by means of starvation.’³⁹⁸

The Palmer Report lists Article 54(1) AP I as a rule of customary international law, affirming that it should also apply to the law of naval warfare but underlining that, in accordance with the San Remo Manual (which ‘provides a useful reference’ in identifying the rules of customary international law regulating naval blockade), a blockade is illegal only if it has *the sole purpose* of starving the civilian population; on the other hand, if starvation of civilians follows as a side effect of the blockade, and not as its intention, the free passage of objects essential to the survival of the population shall be allowed by the Blockading Power, subject to the right of control of the latter.³⁹⁹ Furthermore, ‘a blockade as a method of warfare is illegal if the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage obtained by the imposition of the blockade.’⁴⁰⁰

Finally, the report by the Turkish National Commission of Inquiry confirms the customary nature of the rules contained in the San Remo Manual for IACs, but denies that Israel might invoke them in the case in question, given that it refused to characterise its conflict with Hamas and armed groups in Gaza as an IAC.⁴⁰¹ On the other hand, the Palmer report reasons *a contrario* that, taking into account the existing blockade,

³⁹⁸ See Turkel Report, *supra* fn. 396, pars. 33, 75-78, 81 and 87. For pars. 102-104 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, see Section 2.1.4.2.1. (fns. 89 and 98). On the basis of these provisions, the Report considers that the implementation of the naval blockade by Israel was in accordance with international law. No violation of the prohibition of starvation or of the duty not to deprive the civilian population of the objects essential for its survival were determined, the blockade was deemed to be proportionate and lawful, and the closure was not classified as collective punishment of the civilian population in Gaza, since no intention in this sense could be identified. No violation of IHRL was found, since the IHL regulating naval blockades was deemed to prevail as *lex specialis*. See Turkel Report, pars. 75-87, 98-100 and 103-106. For a criticism of the blockade as proportional and legitimate, see Amichai Cohen and Yuval Shany, ‘The Turkel Commission’s Flotilla Report (Part One): Some Critical Remarks’, EJIL: Talk! – Blog of the European Journal of International Law, January 28, 2011. Available at <http://www.ejiltalk.org/the-turkel-commissions-flotilla-report-part-one-some-critical-remarks/> (accessed May 31, 2011).

³⁹⁹ See Palmer Report, *supra* fn. 396, par. 157 and Palmer Report, Appendix I: The Applicable International Legal Principles, pars. 33-35.

⁴⁰⁰ Palmer Report, *supra* fn. 396, Appendix I: The Applicable International Legal Principles, par. 36. Similarly to the Turkel Report, the Palmer Report classifies the blockade (but considered separately from the land crossings policy) as lawful and proportional. See Palmer Report, pars. 69-82. On the other hand, the report by the fact-finding mission established by the Human Rights Council classifies the interception as unjustified and illegal, since ‘the blockade was inflicting disproportionate damage upon the civilian population in the Gaza strip’, and Israel’s actions as ‘amount[ing] to collective punishment’. A/HRC/15/21, *supra* fn. 396, pars. 54 and 56-57.

⁴⁰¹ See Turkish Commission Report, *supra* fn. 396, 61-63. Similarly to the report by the fact-finding mission established by the Human Rights Council, the Turkish Commission Report considers the blockade to be unlawful and disproportionate. See *Ibid.*, 60-83.

‘[t]he Panel considers the conflict should be treated as an international one for the purposes of the law of blockade’,⁴⁰² and the provisions deemed applicable by the Turkel report similarly refer to IAC. The Goldstone report pragmatically contends that ‘as the Government of Israel suggests, the classification of the armed conflict in question as international or non-international, may not be too important as “many similar norms and principles govern both types of conflicts”’.⁴⁰³ Regarding the meaning of starvation, the Turkish Report adopts a broader view than the Turkel Report, stating that ‘there is no litmus test and certainly the general lack of access to food and nutrition should be considered to constitute a level of unacceptable starvation.’⁴⁰⁴

The Panel of Experts on Accountability in Sri Lanka reported that in the final phase of the conflict, in the first months of 2009, instances of human suffering and insufficient provision of healthcare and basic supplies took place, both because civilians were prevented from leaving areas controlled by the LTTE where conflict was ongoing, and because ongoing fighting prevented humanitarian organisations from having access to those in need;⁴⁰⁵ in addition, hospitals were shelled.⁴⁰⁶ The Panel considered that all these conducts amounted to violations of customary IHL applicable to NIAC,⁴⁰⁷ which includes a duty to provide care for the sick and wounded (as established in Common Article 3), a duty for the Parties ‘to respect and protect all medical personnel, medical units, medical transports, humanitarian relief personnel and humanitarian relief objects’, and not to attack ‘medical personnel and objectives displaying the distinctive emblem of the Geneva Conventions’, and civilian objects; ‘[r]equirements of special protection of medical and humanitarian personnel and objects’, the prohibition of starvation as a method of warfare and a duty to allow

⁴⁰² Palmer Report, supra fn. 396, par. 73. The case has been suggested as a possible instance of implicit recognition of belligerency: see Milanovic and Hadzi-Vidanovic (2013), supra fn. 229, 299-300.

The qualification of the conflict between Israel and Hamas is controversial: classifying it as an IAC, see the Israeli Supreme Court in the *Targeting Killing* case, pars. 16-18. Questioning the reasoning of the Courts, see, for example, Marko Milanovic, “Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case,” *International Review of the Red Cross* 89, no. 866 (June 2007), 381-386; Roy S. Schondorf, “The *Targeted Killings* Judgment – A Preliminary Assessment,” *Journal of International Criminal Justice* 5, no. 2 (May 2007), 303-305.

⁴⁰³ Goldstone report, par. 282. See also Vaïos Koutroulis, “Appréciation de l’application de certaines règles du droit international humanitaire dans les rapports portant sur l’interception de la flottille naviguant vers Gaza,” *Revue Belge de Droit International* 2012/1 (2012) : 90-122.

⁴⁰⁴ Turkish Commission Report, supra fn. 396, 68.

⁴⁰⁵ See UN, *Report of the Secretary-General’s Panel of Experts* (2011), supra fn. 259, iii, pars. 73-79, 106-108, 124-131, 176, 209-212, and 247. See also Section 3.2.1.2.1. (fn. 259).

⁴⁰⁶ See UN, *Report of the Secretary-General’s Panel of Experts* (2011), supra fn. 259, iii, pars. 81-96, 103-105, 109-111, 176-177, 206-208, and 239. See also Section 3.2.1.2.1. (fn. 259).

⁴⁰⁷ Sri Lanka is not a Party to AP II.

and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, impartial in character and conducted without any adverse distinction, subject to Parties' right of control.⁴⁰⁸

Finally, the Commission of Inquiry created by the Human Rights Council to investigate IHRL violations in the Syrian Arab Republic since March 2011 determined in its third report, in August 2012, that the situation in the country amounted to a NIAC.⁴⁰⁹ In the following three reports adopted until August 2013, the Commission of Inquiry not only repeatedly recommended to all Parties to allow humanitarian access,⁴¹⁰ but also affirmed that IHL prohibits the use of starvation as a method of warfare and that in case of siege, 'inhabitants must be allowed to leave and the besieging party must allow free passage of foodstuffs and other essential supplies', and 'Parties to the conflict must allow and facilitate the unimpeded passage of humanitarian relief.'⁴¹¹ This determination is all the more relevant since Syria is not a Party to AP II.

While not reflecting the views of States and not amounting to State practice or *opinio juris*, these reports may contribute both to the determination of the facts related to specific conflicts (thus State practice and practice by non-State armed groups) and, as a subsidiary source, to the clarification of the customary IHL regulating the provision of humanitarian assistance to civilians in armed conflict. The customary nature of Articles 54 and 70 AP I has been repeatedly stated, and it has been acknowledged also by Israel, which is not a Party to AP I. Similarly, the Commission of Inquiry has applied to the Syrian conflict the prohibition of starvation in NIAC, despite Syria not being a Party to the AP II, and also the duty to allow civilians to leave a besieged area, despite siege being regulated in treaties only for IAC. The strictly humanitarian and impartial nature of relief has been maintained, both by Israel and by rapporteurs, while the latter highlighted the somehow vague nature of the concept of basic humanitarian needs, and thus indirectly the discretion of

⁴⁰⁸ UN, *Report of the Secretary-General's Panel of Experts* (2011), supra fn. 259, iii, pars. 206-212.

⁴⁰⁹ See A/HRC/21/50, 16 August 2012, supra fn. 238, par. 12. The Commission was established through A/HRC/RES/S-17/1, 22 August 2011 (33-4-9), par. 13.

⁴¹⁰ See A/HRC/21/50, 16 August 2012, supra fn. 238, par. 153; *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/22/59, 5 February 2013, pars. 176-177; *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/23/58, 18 July 2013, par. 165; *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/24/46, 16 August 2013, par. 200(j).

⁴¹¹ A/HRC/23/58, 18 July 2013, supra fn. 410, par. 142. Similarly, see A/HRC/24/46, supra fn. 410, 16 August 2013, par. 171. Both Government and government-affiliated militia on the one hand, and anti-government forces on the other hand, were found to have imposed sieges in violation of IHL rules, and the Government was found to have carried out attacks on crops 'with the deliberate aim of limiting the availability of food': see A/HRC/23/58, 18 July 2013, pars. 143-148; A/HRC/24/46, 16 August 2013, pars. 172-190 and Annex III, pars. 38-40.

Also, the Commission of Inquiry stated that, under customary IHL, 'field hospitals, as medical units, are afforded special protection [], be they military or civilian, fixed or mobile, permanent or temporary, as long as they are organised and utilised for medical purposes' and that 'the protection from attack accorded to medical units and hospitals, shall not cease unless they are used to commit hostile acts, outside their humanitarian function, and only after a warning has been given and after the warning has remained unheeded for a reasonable time?; finally, '[t]he presence of soldiers or fighters solely for the protection of the hospital or for the maintenance of order does not alter the hospital or medical unit's protected status'. The commission concluded that the Government had violated Common Article 3, providing that wounded and sick shall be collected and cared for. A/HRC/22/59, 5 February 2013, supra fn. 410, Annex XII, pars. 27-29 and 40.

Parties to the conflict in the interpretation of the threshold for the application of Articles 70 AP I and 18(2) AP II.

3.2.1.4. Conclusion

A comprehensive analysis of practice related to the provision of humanitarian assistance to civilians in armed conflict within the UN framework reveals a clear and constant attention for this topic, with different instruments adopted since the beginning of the 1990s, acquiring new details over time. Thematic resolutions, first adopted by the UNGA, have become common within the UNSC as well, and they have increased in length and details, arguably also reflecting ongoing debates, for instance on the role of the military in the provision of relief. Conflict-specific resolutions adopted by the UNSC have similarly focused on humanitarian access and on the safety, security, and freedom of movement of humanitarian workers, expressing its requests in these fields as *demands* under Chapter VII of the UN Charter addressed to Parties to the most problematic armed conflicts in terms of provision of humanitarian assistance to civilians in need, both throughout the 1990s and in the 21st century.

It might be argued that demands to Parties to NIAC on the basis of Chapter VII provide an autonomous legal basis for the duty to allow and facilitate unhindered humanitarian access and the freedom of movement of humanitarian relief personnel, without necessarily indicating a belief by States in the UNSC that an IHL rule in this sense exists. However, calls and demands for safe, full and unhindered access have been sometimes explicitly connected to existing IHL, and in general the consistent practice of the UN in this field throughout the years, not only featuring demands under Chapter VII but often calls upon Parties, suggests that States in the UNSC believe that the IHL framework applicable to NIAC under the treaties has been strengthened, with the applicability of rules on the access, safety, and freedom of movement of humanitarian workers analogous to those for IAC. Furthermore, while not strictly amounting to State practice or *opinio juris*, reports by Commissions of Inquiry created at the UN level have supported the customary nature of some key provisions, such as Articles 54 and 70 AP I, and the prohibition of starvation as a method of warfare in NIAC.

In its resolutions, the UNSC when dealing with conflicts particularly dangerous for relief personnel has also sometimes made explicit reference to the principles of humanitarian action. In general, the need for

consent has not been mentioned by the UNSC, and often the criteria to be respected by humanitarian actors and actions have been similarly omitted, but UN bodies' resolutions have made constant reference to *humanitarian* access, *humanitarian* assistance and *humanitarian* personnel or organisations. In this sense, allusion to the principles is arguably implied, since the concept of humanitarian assistance and actors refers either to the IHL framework or, at least, to the guidelines regarding this topic by the UNGA, especially resolution 46/182 (never quoted in any UNSC resolution or presidential statement, but repeatedly recalled by States in their statements before the UNSC and recently arguably referred to through the mention of 'guiding principles of humanitarian assistance').⁴¹²

In 2011, the representative of the Syrian Arab Republic before the UNSC quoted Paragraphs 3 and 4 of UNGA resolution 46/182, highlighting respect for sovereignty, the need for consent, and the primary role of the affected State in the initiation and organisation of humanitarian assistance. Furthermore, the fact that the UNSC has constantly called upon the Parties to ensure humanitarian access, and sometimes demanded that they act in this sense, implies the need for consent from these Parties, which can be overstepped only if the UNSC itself, making a determination under Article 39 UN Charter, judges that the provision of humanitarian assistance without consent, or against the will of the relevant Party, is a necessary measure to adopt under Chapter VII.⁴¹³ The possibility in NIAC to undertake relief actions in rebel-held areas without consent by the State has never been stated, so that it cannot be affirmed that the UNSC has endorsed a *droit d'ingérence* or *sans-frontiérisme*.

Other elements present in UN bodies' resolutions have been the condemnation of obstacles to the provision of humanitarian assistance, including attacks against humanitarian personnel, as violations of IHL, in both IAC and NIAC, possibly going beyond the ICC Statute in the criminalisation of the obstruction of relief also in NIAC.⁴¹⁴ Again the concepts of humanitarian assistance and actors have not been defined by the UNSC, but the implementation and interpretation of the humanitarian exemptions to sanctions regimes seem

⁴¹² See, for example, the statements by the representatives of Cuba (S/PV.3778 (Resumption 1), 21 May 1997), Indonesia, (S/PV.3932, 29 September 1998), Egypt (S/PV.4100, 9 February 2000; S/PV.4109, 9 March 2000; S/PV.4130 (Resumption 1), 19 April 2000; S/PV.6427, 22 November 2010, on behalf of NAM), Colombia (S/PV.4109 (Resumption 1), 9 March 2000; S/PV.4877 (Resumption 1), 9 December 2003; S/PV.4990 (Resumption 1), 14 June 2004; S/PV.5577 (Resumption 1), 4 December 2006), India (S/PV.4109 (Resumption 1), 9 March 2000; S/PV.5225, 12 July 2005), the Syrian Arab Republic (S/PV.4312 (Resumption 1), 23 April 2001), Mexico (S/PV.4507, 4 April 2002), Brazil (S/PV.4990, 14 June 2004; S/PV.6151, 26 June 2009), South Africa (S/PV.4990 (Resumption 1), 14 June 2004; S/PV.5319, 9 December 2005; S/PV.5703, 22 June 2007), Ghana (S/PV.5703, 22 June 2007; S/PV.6427 (Resumption 1), 22 November 2010), Pakistan (S/PV.6917, 12 February 2013, 16), and Iran (S/PV.6917 (Resumption 1), 12 February 2013, 10, on behalf of NAM).

⁴¹³ On the need for this measure to be strictly instrumental to the enforcement of international peace and security, see Gaetano Arangio-Ruiz, "On the Security Council's 'Law-Making'," *Rivista di Diritto Internazionale* 83, no. 3 (2000), 627-628.

⁴¹⁴ See Section 3.2.1.2.3. and, for a detailed analysis of the relevant provisions of the ICCSt., Section 3.2.2.3.

to confirm that the UNSC follows IHL in identifying the strictly life-saving nature of humanitarian aid and the need for organisations involved in the provision of humanitarian assistance to provide guarantees of trustworthiness in order to be entitled to special protection.

3.2.2. The Practice of States and Other Parties to Armed Conflicts

Further sources of State practice and *opinio juris* on humanitarian assistance can be found also outside the UN, for example in treaties,⁴¹⁵ undoubtedly binding for State Parties, and agreements concluded between States and non-State Parties to armed conflicts, such as ceasefire agreements or peace agreements, whose legal nature is controversial (especially if they include non-State Parties) and which are not generally considered to be binding treaties,⁴¹⁶ but which may at least show both the importance of the issue of humanitarian relief in armed conflict and the general agreement, at the level of commitment, to the content of IHL rules on access and distribution of assistance. Furthermore, Parties to armed conflicts have sometimes signed agreements or MoUs on humanitarian assistance with the UN, comprising possibly binding commitments,⁴¹⁷ and adopted commitments through military manuals and national laws. Finally, Israel has clarified its position on IHL rules before its Supreme Court, and decisions by this court themselves can be considered as instances of State practice and evidence of *opinio juris*.

⁴¹⁵ As explained by the ICJ in the *North Sea Continental Shelf* case, a provision in a treaty can reflect already existing customary law, can crystallise a customary, or can become accepted as customary law after its adoption. See ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Merits, Judgement, 20 February 1969, ICJ Reports 1969 at 3, pars. 62-80. See also International Law Association, Committee on Formation of Customary (General) International Law, "Final Report of the Committee – Statement of Principles Applicable to the Formation of General Customary International Law," London Conference (2000), 42-54. Available at <http://www.ila-hq.org/en/committees/index.cfm/cid/30> (accessed July 28, 2013). In particular, 'there seems to be no reason of principle why [a succession of similar bilateral treaties], however numerous, should be *presumed* to give rise to new rules of customary law or to constitute the State practice necessary for their emergence. ... there seems to be no special reason to *assume* that this is the case, unless it can be shown that these provisions demonstrate a widespread acceptance of the rules set out in these treaties *outside the treaty framework*.' Ibid., 48. In this sense, treaties concluded by States not party to AP I and/or AP II might be particularly relevant. States party neither to AP I nor to AP II include: Eritrea, India, Indonesia, Iran, Israel, Malaysia, Myanmar, Nepal, Pakistan, Somalia, Sri Lanka, Thailand, Turkey, and the U.S. On the other hand, Iraq, DPRK, Mexico, and Syria are parties to AP I but not to AP II.

⁴¹⁶ See, for example, Christine Bell, "Peace Agreements: Their Nature and Legal Status," *The American Journal of International Law* 100, no. 2 (April 2006): 373-412; Olivier Corten and Pierre Klein, "Are Agreements between States and Non-State Entities Rooted in the International Legal Order?," in *The Law of Treaties Beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford [etc.]: Oxford University Press, 2011): 3-24.

⁴¹⁷ To identify whether an MoU is a treaty or a non-binding instrument, attention should be given to the intention of the parties, as well as the wording and object of the document: see ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgement, 1 July 1994, ICJ Reports 1994 at 112, pars. 21-30. See also, for example, Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge [etc.]: Cambridge University Press, 2011), 189-190.

3.2.2.1. The Concept of Humanitarian Assistance

States have concluded several treaties applicable also in situations of armed conflict that refer to humanitarian relief and assistance, and they do it in accordance with the definitions of the terms derived from the GCs and APs.⁴¹⁸ For example, the *Convention on Temporary Admission* of 1990 defines ‘relief consignments’ as ‘all goods, such as vehicles and other means of transport, blankets, tents, prefabricated houses or other goods of prime necessity, forwarded as aid to those affected by natural disaster and similar catastrophes.’⁴¹⁹ The *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations* of 1998 defines ‘[r]elief operations’ as ‘those activities designed to reduce loss of life, human suffering and damage to property and/or the environment caused by a disaster.’⁴²⁰

The *Draft Convention on Expediting the Delivery of Emergency Assistance* of 1984, which has never entered into force, identifies emergency assistance as comprising relief consignments and services ‘of an exclusively humanitarian and non-political character provided to meet the needs of those affected by disasters’, and distinguishes between ‘relief consignments’, which ‘means goods such as vehicles, foodstuffs, seeds and agricultural equipment, medical supplies, blankets, shelter materials or other goods of prime necessity, forwarded as assistance to those affected by disasters’, and ‘services’, which ‘means the personnel, equipment, means of transport and action necessary to meet the needs’.⁴²¹ The *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)* of October 2009 (Kampala Convention) defines humanitarian assistance as including goods and services.⁴²²

The *Protocol II to the Convention on Certain Conventional Weapons* endorses a view of humanitarian activity as non-political by providing that humanitarian missions are devoted to assisting

⁴¹⁸ However, it should be acknowledged that the definitions contained in these various treaties are usually valid only ‘for the purposes’ of the specific agreement containing them, and some of these agreements contain a saving clause for international law (sometimes making explicit reference to IHL). See, for example, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, Kampala, October 22-23, 2009, entered into force December 06, 2012, hereinafter Kampala Convention, art. 20(2); *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*, Tampere, June 18, 1998, entered into force January 8, 2005 (2296 UNTS 5), hereinafter Tampere Convention, art. 10. In any case, they might be interpreted as reflecting IHL, at least.

⁴¹⁹ *Convention on Temporary Admission*, Istanbul, June 26, 1990, entered into force November 27, 1993, Annex B.9: Annex Concerning Goods Imported for Humanitarian Purposes, art. 1(b). The Convention defines ‘goods imported for humanitarian purposes’ as ‘medical, surgical and laboratory equipment and relief consignments’. Ibid., art. 1(a).

⁴²⁰ Art. 1(12) Tampere Convention. On the applicability of the Convention to armed conflict, see IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study* (Geneva: IFRC, 2007). 157. Art. 1(6) defines ‘disaster’ as ‘a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.’

⁴²¹ *Office of the United Nations Disaster Relief Co-Ordinator: Report of the Secretary-General: Addendum: Proposed Draft Convention on Expediting the Delivery of Emergency Assistance*, A/39/267/Add.2 – E/1984/96/Add.2, 18 June 1984, art. 1(a), 1(c) and 1(d).

⁴²² Humanitarian assistance ‘shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services’. Art. 9(2)(b) Kampala Convention.

victims of a conflict and comprise UN humanitarian missions, ICRC missions, humanitarian missions by the IFRC and National Red Cross and Red Crescent Societies, and missions by impartial humanitarian organisations (including impartial humanitarian demining missions).⁴²³ The principle of impartiality is not explicitly mentioned with reference to UN humanitarian missions, but Article 12(7) of the Protocol requires the ‘personnel participating in the forces and missions referred to in this Article’ to ‘respect the laws and regulations of the host State’ and ‘refrain from any action or activity incompatible with the impartial and international nature of their duties’.

At the regional level, both the binding EU Council Regulation 1257/96 of 20 June 1996 and the non-binding *European Consensus on Humanitarian Aid* of 2007, a document jointly agreed by the Council and the representatives of Member States’ governments which ‘provides a common vision that guides the action of the EU, both at its Member States and Community levels, in humanitarian aid in third countries’, provide that relief operations to save lives in emergencies are a component of the humanitarian assistance/humanitarian aid provided by the EU.⁴²⁴ Furthermore, Council Regulation 1257/96 states that ‘the sole aim’ of humanitarian aid is ‘to prevent or relieve human suffering’,⁴²⁵ and according to the *European Consensus on Humanitarian Aid* the objective of its humanitarian aid is ‘to provide a needs-based emergency response aimed at preserving life, preventing and alleviating human suffering and maintaining human dignity wherever the need arises if governments and local actors are overwhelmed, unable or unwilling to act.’⁴²⁶

⁴²³ Art. 12, devoted to the ‘[p]rotection from the effects of minefields, mined areas, mines, booby-traps and other devices’, establishes different levels of protection for different kinds of mission, coming from outside and ‘performing functions in an area with the consent of the High Contracting Party on whose territory the functions are performed’. Four types of missions deserving protection are listed: ‘[p]eace-keeping and certain other forces and missions’ (the requirement of the High Contracting Party’s consent does not apply to ‘any United Nations force or mission performing peace-keeping, observation or similar functions in any area in accordance with the Charter of the United Nations’); ‘[h]umanitarian and fact-finding missions of the United Nations System’; ‘[m]issions of the International Committee of the Red Cross’; and, ‘[o]ther humanitarian missions and missions of enquiry’. The last category comprises the following missions when they are performing functions in the area of a conflict or to assist the victims of a conflict:

- (i) any humanitarian mission of a national Red Cross or Red Crescent Society or of their International Federation;
- (ii) any mission of an impartial humanitarian organization, including any impartial humanitarian demining mission; and
- (iii) any mission of enquiry established pursuant to the provisions of the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.

Art. 12(1)-12(5) Amended Protocol II Certain Conventional Weapons Convention.

⁴²⁴ See Council of the European Communities, Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid, *Official Journal* L 163, 02/07/1996, 0001-0006, preamble; Council of the EU, *Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission: The European Consensus on Humanitarian Aid*, OJ C 25, 30 January 2008, 2, pars. 6-8. Similarly, art. 214 TFEU limits the aim of EU humanitarian aid operations to ‘provid[ing] *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations’.

⁴²⁵ Council of the European Communities (1996), *supra* fn. 424, preamble. Emphasis added. Arguably, this statement made in the preamble paragraph of the regulation refers to humanitarian aid in general, not only to the regime applicable to the humanitarian aid of the EU. Indeed, the first art. of the regulation then refers to ‘[t]he Community’s humanitarian aid’ and also the following arts. deal with ‘Community aid’. *Ibid.*, preamble and arts. 1, 3, and 4. Emphasis added.

⁴²⁶ Council of the EU (2008), *supra* fn. 424, 2, par. 8.

Also, the *Cotonou Agreement* between the African, Caribbean and Pacific (APC) States and the EU (and its Member States), following amendments introduced in 2010, contains an article specifying that '[h]umanitarian and emergency assistance shall aim to save and preserve life and to prevent and relieve human suffering wherever the needs arise',⁴²⁷ and another listing as aims of humanitarian and emergency assistance the following:

- (a) safeguard human lives in crises and immediate post-crisis situations;
- (b) contribute to the financing and delivery of humanitarian aid and to the direct access to it of its intended beneficiaries by all logistical means available;
- (c) carry out short-term rehabilitation and reconstruction to enable the victims to benefit from a minimum of socio-economic integration and, as soon as possible, create the conditions for a resumption of development ...;
- (d) address the needs arising from the displacement of people (refugees, displaced persons and returnees) following natural or man-made disasters so as to meet, for as long as necessary, all the needs of refugees and displaced persons (wherever they may be) and facilitate action for their voluntary repatriation and re-integration in their country of origin; and
- (e) assist the ACP State or region in setting up short term disaster prevention and preparedness mechanisms, including for prediction and early warning, with a view to reducing the consequences of disasters.⁴²⁸

Also at the regional level, under the *Arab Cooperation Agreement Regulating and Facilitating Relief Operations*, '[r]elief [o]perations' are 'all forms of relief services particularly the provision of urgently needed materials, personnel and other services, which must be procured from external sources with the approval of local relief authorities in order to save the lives of victims of natural disasters and people in emergency situations *provided that personal business interests are excluded*.'⁴²⁹

Finally, in the field of international criminal law (ICL), the *Rome Statute of the International Criminal Court* (ICC Statute), as already mentioned, lists as a war crime, in the context of both IAC and NIAC, '[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved

⁴²⁷ *Agreement amending for the second time the Partnership Agreement between the Members of the African, Caribbean and Pacific group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, June 2010, hereinafter Cotonou Agreement amended 2010, art. 72(1). Art. 72(1) starts by providing that '[h]umanitarian, emergency and post-emergency assistance shall be provided in situations of crisis.' Differently from humanitarian and emergency assistance, '[p]ost-emergency assistance shall aim at rehabilitation and linking the short-term relief with longer term development programmes.' Ibid. Art. 72(2) then clarifies that '[s]ituations of crisis, including long-term structural instability or fragility are situations posing a threat to law and order or to the security and safety of individuals, threatening to escalate into armed conflict or to destabilise the country.' These situations 'may also result from natural disasters, man-made crises such as wars and other conflicts or extraordinary circumstances having comparable effects related, inter alia, to climate change, environmental degradation, access to energy and natural resources, or extreme poverty.'*

⁴²⁸ Art. 72a(1) Cotonou Agreement amended 2010.

⁴²⁹ *Arab Cooperation Agreement Regulating and Facilitating Relief Operations*, Arab League Decision No. 39, 3 September 1987, art. 1(c). Emphasis added. 'Relief [i]tems' cover '[a]ll materials used in the relief of victims of Natural Disasters and Emergencies such as vehicles and other means of transport, food and medical items, clothes, bed covers, tents, prefabricated houses, and other relief materials deemed to be of paramount importance as aid to people affected by natural disasters and other emergencies.' Ibid., art. 1(d). The Agreement explicitly covers situations of conflict.

in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'.⁴³⁰ No definition of 'humanitarian assistance mission' is given, nor is it specified when such a mission is in accordance with the UN Charter. No decision by the ICC exists on this topic, and commentators have proposed different points of view. The central issue is what qualifies as humanitarian assistance mission, meaning what criteria a mission shall satisfy to be defined as such and what actors can undertake it and be protected by the provisions in question. While the ICC Statute deals with ICL and not IHL, since the crime in question is a war crime, it finds its roots in IHL, which might thus be fundamental for its interpretation.

On the one hand, Bothe traces the origin of these provisions of the ICC Statute to the UN Safety Convention and equates the scope of application of the provisions in the former to the scope of application of the latter: the scope of protection would cover UN and associated personnel and, in case of NGOs, only '[p]ersons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency', in accordance with Article 1(b)(iii) UN Safety Convention.⁴³¹

On the other hand, other authors such as Cottier support a broader interpretation of humanitarian assistance missions, distinguishing them from activities of the components of the International Red Cross and Red Crescent Movement assigned to these organisations by the GCs and APs (which use the distinctive emblems of the Geneva Conventions and are covered by two other specific provisions of the ICC Statute),⁴³² and envisaging NGOs and IGOs as possible actors in these missions.⁴³³ Certain criteria would need to be

⁴³⁰ Art. 8(2)(b)(iii) and 8(2)(e)(iii) ICCSt. Similarly, for NIAC, see art. 4(b) *Statute of the Special Court for Sierra Leone*, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone*, Freetown, 16 January 2002, hereinafter SCSLSt. Available at <http://www.scsl.org/LinkClick.aspx?fileticket=uClnd1MJEW%3d&tabid=176> (accessed January 25, 2013).

⁴³¹ See Michael Bothe, "War Crimes," in *The Rome Statute of the International Criminal Court: A Commentary, Volume I*, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (Oxford [etc.]: Oxford University Press, 2002), 410. Bothe argues that the provision 'refers, by implication, to th[e] definition of the scope of application of the Convention on Safety', because otherwise 'the crime would be rather ill defined as the notion of "humanitarian assistance or peacekeeping mission" is quite vague.' *Ibid.*, 412.

⁴³² Arts. 8(2)(b)(xxiv) and 8(2)(e)(ii) ICCSt. In this sense, see Michael Cottier, "Article 8 para. 2 (b) (iii)," in *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 2nd ed., ed. Otto Triffterer (Munich: C.H.Beck-Hart-Nomos, 2008), 333; Kriangsak Kittichaisaree, *International Criminal Law* (Oxford [etc.]: Oxford University Press, 2001), 161. Werle seems to favour a cumulative protection, arguing that humanitarian activities of the components of the Red Cross and Red Crescent Movement are 'also protected by Article (8)(2)(b)(xxiv) of the ICC Statute'. Gerhard Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005), 382. *Emphasis added.*

⁴³³ Cottier (2008), *supra* fn. 432, 333. Similarly, see Werle (2005), *supra* fn. 432, 382. Kittichaisaree refers to 'any individual, group of individuals, or organization': Kittichaisaree (2001), *supra* fn. 432, 161. According to Cottier, also individual States may offer humanitarian assistance, but 'questions as to the humanitarian and impartial character of such missions are more likely to be raised.' Cottier (2008), 333.

respected by a mission to be humanitarian and in accordance with the UN Charter: humanitarian assistance covered by the provision would be primarily ‘relief assistance, that is, assistance to prevent or alleviate human suffering of victims of armed conflicts and other individuals with immediate and basic needs’;⁴³⁴ humanitarian assistance mission would need to be undertaken ‘in the pursuit of humanitarian relief purposes’;⁴³⁵ and ‘guided by the *humanitarian* needs of the suffering individuals, and be[ing] of an *impartial* and *non-discriminatory* nature’;⁴³⁶ the use of force by these missions would be allowed only in self-defence,⁴³⁷ and the consent of ‘the parties to the conflict the territory of which [the humanitarian assistance] must pass or in which it carries out its tasks’ should be obtained.⁴³⁸ Finally, to be ‘in accordance with the Charter of the United Nations’, a humanitarian assistance mission should not involve ‘any use of force or intervention in internal affairs’.⁴³⁹

Dörmann, for his part, acknowledges that there is no definition of a ‘humanitarian assistance mission’ in IHL treaties but argues that the relevant provisions of these treaties, such as Articles 70-71 AP I, as well as the rules dealing with medical personnel ‘give the necessary guidance’.⁴⁴⁰ The interpretation of these provisions is thus crucial and would probably lead to conditions similar to those listed by Cottier, even if a final position will be taken in Chapter 6, after having concluded the analysis of State practice and *opinio juris*.⁴⁴¹ This should allow clarifying also issues such as whether ‘a mission [should] be excluded from the protection when it does not respect these fundamental principles and/or does not have the agreement of the host State, and what [...] the threshold [should be]’.⁴⁴²

⁴³⁴ Humanitarian assistance is thus different from development aid. Cottier (2008), supra fn. 432, 332. Similarly, see Werle (2005), supra fn. 432, 382.

⁴³⁵ Kittichaisaree (2001), supra fn. 432, 161.

⁴³⁶ Cottier (2008), supra fn. 432, 332. Emphasis in the original. Similarly, see Kittichaisaree (2001), supra fn. 432, 161; Werle (2005), supra fn. 432, 382.

⁴³⁷ Cottier (2008), supra fn. 432, 332. Similarly, see Werle (2005), supra fn. 432, 382.

⁴³⁸ Cottier (2008), supra fn. 432, 332-333. No reference to the need for the country of origin of the relief action to give its consent is mentioned.

⁴³⁹ Cottier (2008), supra fn. 432, 331. Other personnel of humanitarian organisations will still be entitled to be protected as civilians, which is a criterion that must be satisfied by personnel covered by the specific provision on humanitarian assistance missions as well. In sum, it seems that this special provision has a symbolic value and it really does not extend the scope of protected persons. However, some spaces for an enhanced protection deriving from art. 8(2)(b)(iii) and 8(2)(e)(iii) may still be found. See Alice Gadler, ‘The Protection of Peacekeepers and International Criminal Law: Legal Challenges and Broader Protection,’ *German Law Journal* 11, no. 6 (2010): 585-608.

⁴⁴⁰ On medical personnel, he lists arts. 24-27, 36, and 39-44 GC I; arts. 42-44 GC II; arts. 18-22 GC IV; art. 6 Annex I to GC IV; arts. 8, 12-15, 18, and 23-24 AP I; art 1 Annex I of 1993 to AP I. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge [etc.]: Cambridge University Press, 2003), 158 and 350-362.

The authors of the ICRC Study simply state that ‘[t]he reference to humanitarian assistance is intended to refer to *such assistance* being carried out either in the context of peacekeeping operations by troops or civilians, or in other contexts by civilians.’ ICRC Study – Rules, 582. Emphasis added.

⁴⁴¹ See Section 6.2.2.1.4.

⁴⁴² Cottier (2008), supra fn. 432, 333. In any case, the personnel and objects would still be entitled to be protected as civilians and civilian objects, as long as they do not engage in hostilities. It should be noted that in the context of NIAC the ICCSt. does not

Military doctrines confirm alleviation of suffering in emergencies as the main focus of humanitarian assistance operations. The U.S. armed forces define Humanitarian Assistance (HA) as ‘[p]rograms conducted to relieve or reduce the results of natural or manmade disasters or other endemic conditions such as human pain, disease, hunger, or privation that might present a serious threat to life or that can result in great damage to or loss of property.’⁴⁴³ Humanitarian and Civic Assistance (HCA) is instead used to describe ‘assistance to the local populace provided by predominantly US forces in conjunction with military operations and exercises’,⁴⁴⁴ which ‘must fulfill unit training requirements that *incidentally* create humanitarian benefit to the local populace.’⁴⁴⁵

The Canada Joint Doctrine Manual *Law of Armed Conflict at the Operational and Tactical Levels* issued in 2001 defines ‘Relief Action’ by explaining that ‘[a] relief action for the benefit of the civilian population affected by an armed conflict means the provision of food, water, medical supplies, clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population, and objects necessary for religious worship.’⁴⁴⁶ In the *NATO Glossary of Terms and Definitions* ‘humanitarian assistance’ (HA) means, ‘[a]s part of an operation, the use of available military resources to assist or complement the efforts of responsible civil actors in the operational area or specialized civil humanitarian organizations in fulfilling their primary responsibility to alleviate human suffering’; ‘humanitarian aid’ is defined as ‘[t]he resources needed to directly alleviate human suffering’, and ‘humanitarian operation’ (HUMRO) is ‘[a]n

criminalise as a war crime intentionally directing attacks against civilian objects, so that it is definitely important to clarify the scope of protection granted to objects involved in a humanitarian assistance mission. However, according to the authors of the ICRC Study, ‘[m]aking civilian objects the object of attack [...] is essentially the same as the war crime of “destroying the property of an adversary unless such destruction ... be imperatively demanded by the necessities of the conflict”’, which is criminalised as a war crime in NIAC by art. 8(2)(e)(xii) ICCSt. ICRC Study – Rules, 597.

⁴⁴³ U.S. Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms (DOD Dictionary)*, Joint Publication 1-02 (JP 1-02) (8 November 2010, as amended through 15 December 2012), 133.

⁴⁴⁴ *Ibid.*, 133.

⁴⁴⁵ U.S. Joint Chiefs of Staff, *Joint Operations*, Joint Publication 3-0 (JP 3-0) (17 September 2006, Incorporating Change 2, 22 March 2010), VII-7. Emphasis added. Assistance provided under the heading of HCA is generally limited to the following categories:

- (a) Medical, dental, and veterinary care provided in rural or underserved areas of a country.
- (b) Construction and repair of basic surface transportation systems.
- (c) Well drilling and construction of basic sanitation facilities.
- (d) Rudimentary construction and repair of public facilities such as schools, health and welfare clinics, and other nongovernmental buildings.
- (e) Activities relating to the furnishing of education, training, and technical assistance concerning detection and clearance of explosive hazards (i.e., landmines).

Ibid.

⁴⁴⁶ Canadian National Defence, *Law of Armed Conflict at the Operational and Tactical Levels*, Joint Doctrine Manual B-GJ-005-104/FP-021, (August 2001), GL-16. Correspondingly, ‘[a] relief consignment means supplies intended to benefit the civilian population affected by an armed conflict and includes food, water, medical supplies, clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population, and objects necessary for religious worship.’ *Ibid.* According to Fenrick, ‘although the *Joint Doctrine Manual* contains guidance, it is not itself a legally binding instrument.’ William J. Fenrick, “Reflections on the Canadian Experience with Law of Armed Conflict Manuals,” in *National Military Manuals on the Law of Armed Conflict*, 2nd ed., ed. Nobuo Hayashi (Oslo: Torkel Opsahl Academic EPublisher, 2010), 103.

operation specifically mounted to alleviate human suffering in an area where the civil actors normally responsible for so doing are unable or unwilling adequately to support a population.’⁴⁴⁷

3.2.2.2. *The Primary Responsibility of the Parties to the Conflict and the Role of Local Actors*

Some instances of State practice also confirm the role of the Parties to the conflict and local actors in the provision of humanitarian relief to civilians in conflict. The Kampala Convention, adopted in October 2009 in the framework of the AU to prevent internal displacement and protect and assist IDPs, clarifies the obligations, responsibilities and roles of States in this regard, but also of ‘armed groups, non-state actors and other relevant actors, including civil society organizations.’⁴⁴⁸ It defines IDPs to include ‘persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict ..., and who have not crossed an internationally recognized State border’,⁴⁴⁹ and reflects most of the rules of IHL regarding assistance to and protection applicable to IDPs, containing also a saving clause that safeguards the rights and protection granted to IDPs by IHL.⁴⁵⁰

The role of the State where IDPs find themselves is clearly envisaged, with the convention requiring State Parties to ‘[p]rovide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance [...] and where appropriate, extend such assistance to local and host communities’.⁴⁵¹ They ‘shall bear the primary duty and responsibility for providing protection of and humanitarian assistance to internally displaced persons within their territory or jurisdiction without discrimination of any kind’, therefore they are bound to provide sufficient protection and assistance to IDPs, and if they lack the necessary resources, to ‘cooperate in seeking the assistance of international organizations

⁴⁴⁷ NATO Standardization Agency (NSA), *NATO Glossary of Terms and Definitions (English and French)*, AAP-06(2012) (April 2012), 2-H-5. For the French definition, see *Ibid.*, 3-A-14, 3-A-5 and 3-O-4.

⁴⁴⁸ Art. 2 Kampala Convention: ‘Objectives’.

⁴⁴⁹ Art. 1(k) Kampala Convention.

⁴⁵⁰ Art. 20(2) Kampala Convention. Moreover, under art. 3(1)(e), States Parties are required to ‘[r]espect and ensure respect for international humanitarian law regarding the protection of internally displaced persons’. As noted by Ojeda, ‘[a]lthough [art. 7 Kampala Convention’s] title is very large “Protection and Assistance to Internally Displaced Persons in Situations of Armed Conflict”, its actual listing of detailed obligations is limited to the ones binding on armed groups. ... Of course, States’ obligations under IHL are mentioned in other provisions of the Convention’. Stephane Ojeda, “The Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects,” *Refugee Survey Quarterly* 29, no. 3 (September 2010), 65. Similarly, see ICRC, “Root causes and prevention of internal displacement: the ICRC perspective,” Statement by Jakob Kellenberger, President of the ICRC, at the Special summit on refugees, returnees and IDPs in Africa, Kampala, Uganda, 23 October 2009. Available at <http://www.icrc.org/eng/resources/documents/statement/displacement-statement-231009.htm> (accessed June 15, 2012).

⁴⁵¹ Art. 9(2)(b) Kampala Convention. Also, States Parties have the duty to ‘protect the rights of internally displaced persons regardless of the cause of displacement by refraining from, and preventing, [...] [s]tarvation.’ Art. 9(1)(e) Kampala Convention.

and humanitarian agencies, civil society organizations and other relevant actors’, which in their turn ‘may offer their services to all those in need.’⁴⁵² The Kampala Convention thus interestingly commits State Parties themselves, when providing humanitarian assistance to IDPs in their territory, to respect the principle of non-discrimination.⁴⁵³ IDPs, for their part, are recognised as having a ‘right ... to peacefully request or seek protection and assistance, in accordance with relevant national and international laws’, and not to be punished or prosecuted for this.⁴⁵⁴

The primary responsibility of authorities for protecting people in case of disaster is similarly affirmed in the *European Consensus on Humanitarian Aid*,⁴⁵⁵ and the subsidiary nature of external humanitarian assistance emerges also from EU Council Regulation 1257/96.⁴⁵⁶ Among military doctrines, the British military manual specifies in relation to NIAC that the State concerned has the primary responsibility to care for civilians in need, while a secondary role is reserved to local relief societies and the civilian population (and still, the final decision regarding their offers of services rests on the authorities).⁴⁵⁷

Finally, references to both local and international NGOs can be found for example in peace agreements. The 2000 peace agreement signed by (some of) the Parties to the conflict in Burundi committed the Government to ‘allow international organizations and *international and local* non-governmental organizations unrestricted access to returnees and other *sinistrés* for purposes of the delivery of humanitarian assistance’, and to ‘guarantee the safety of the staff of such organizations’;⁴⁵⁸ and the 1992 agreement on humanitarian issues concluded by several Parties to the conflict in Somalia provided *inter alia* that ‘[t]he fair

⁴⁵² Art. 5(1) and 5(6) Kampala Convention. Other related duties of State Parties are to ‘[r]espect and ensure respect for the principles of humanity and human dignity of internally displaced persons’, to ‘[r]espect and ensure respect for the humanitarian and civilian character of the protection of and assistance to internally displaced persons, including ensuring that such persons do not engage in subversive activities’, and to ‘[e]nsure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel’. Art. 3(1)(c), 3(1)(f), and 3(1)(j) Kampala Convention.

⁴⁵³ Specific obligations are also provided for non-state armed groups, but they are limited to the prohibition of impairing relief efforts and attacking relief personnel, without any obligation to directly satisfy the basic needs of IDPs under their control. The only obligation in this sense may be derived from the prohibition to ‘[d]eny[] internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separat[e] members of the same family’. See art. 7(5) Kampala Convention. As far as the (primary) enforcement of all these prohibitions is concerned, it is the duty of States Parties to ‘take measures aimed at ensuring that armed groups act in conformity with their obligations’. Art. 5(11) Kampala Convention.

⁴⁵⁴ Art. 5(9) Kampala Convention.

⁴⁵⁵ See Council of the EU (2008), *supra* fn. 424, 2, par. 4.

⁴⁵⁶ See Council of the European Communities (1996), *supra* fn. 424, preamble: ‘people in distress, victims of natural disasters, wars and outbreaks of fighting, or other comparable exceptional circumstances have a right to international humanitarian assistance *where their own authorities prove unable to provide effective relief*’. Emphasis added.

⁴⁵⁷ See UK Joint Doctrine and Concepts Centre (JDCC), Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383 (JSP 383) (2004 Edition), par. 15.54 and *Ibid.*, 409, fn. 128.

⁴⁵⁸ *Arusha Peace and Reconciliation Agreement for Burundi*, Arusha, August 28, 2000, Protocol III ‘Peace and Security for All’, art. 26(1)(d), and Protocol IV ‘Reconstruction and Development’, art. 7. Emphasis added. Available at <http://www.issafrica.org/AF/profiles/Burundi/arusha.pdf> (accessed April 20, 2012).

distribution of the supplies should be under the responsibility of the *indigenous and international* NGO personnel and *the competent concerned parties*.⁴⁵⁹

3.2.2.3. *Consent, Humanitarian Access and the Facilitation of Humanitarian Assistance*

The commitments undertaken by the State Parties to the Kampala Convention are not limited to directly taking care of IDPs in their territory, but they extend to external relief actions through the obligations to ‘take necessary steps to effectively organize, *relief action that is humanitarian, and impartial in character*, and guarantee security’, ‘allow rapid and unimpeded passage of all relief consignments, equipment and personnel’ to IDPs, and ‘enable and facilitate the role of local and international organizations and humanitarian agencies, civil society organizations and other relevant actors, to provide protection and assistance’ to IDPs.⁴⁶⁰ Still, States maintain a ‘right to prescribe the technical arrangements under which such passage is permitted’, and international organisations and humanitarian agencies also have duties to fulfil, since they shall ‘discharge their obligations under th[e] Convention in conformity with international law and the laws of the country in which they operate’, respect the rights of IDPs in accordance with international law while providing them protection and assistance, and ‘be bound by the *principles of humanity, neutrality, impartiality and independence of humanitarian actors*, and ensure respect for relevant international standards and codes of conduct.’⁴⁶¹

Non-State armed groups are also the addressees of obligations related to humanitarian access, namely the (negative) obligations not to hamper the provision of protection and assistance to IDPs, not to deny them their basic rights, not to attack humanitarian personnel or material as well as not to divert such material, and not to ‘violat[e] the civilian and humanitarian character’ of the places where IDPs are sheltered.⁴⁶²

The duty to allow humanitarian access in case of risk of starvation for the population, at least in IAC, is confirmed by the ICC Statute, which criminalises as a war crime in IAC ‘[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including

⁴⁵⁹ *All-Party Meeting on the Somali Humanitarian Issues: The Bahir Dar Agreement*, Bahir Dar, June 02, 1991, par. 3. The Agreement is reproduced in S/24184, 25 June 1992, Annex.

⁴⁶⁰ Art. 5(7). Emphasis added. The requirement that assistance and protection to IDPs have ‘humanitarian and civilian character’ implies, *inter alia*, ‘ensuring that such persons do not engage in subversive activities’. Art. 3(1)(f).

⁴⁶¹ Arts. 5(7), and 6(1)-6(3). Emphasis added.

⁴⁶² Art. 7(5).

wilfully impeding relief supplies as provided for under the Geneva Conventions’.⁴⁶³ While no corresponding war crime is listed for NIAC, among crimes against humanity, extermination is defined as ‘includ[ing] the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’.⁴⁶⁴

National military manuals also seem to reflect the regulation of external relief actions provided by IHL treaties, sometimes even adopting a narrower approach regarding the subjects entitled to offer such relief, in particular States. For example, the German military manual *Humanitarian Law in Armed Conflict* states that ‘[i]f the civilian population of a party to the conflict is inadequately supplied with indispensable goods, relief actions by *neutral* States or humanitarian Organizations shall be permitted’.⁴⁶⁵ It does not mention the need for these actions to be external or humanitarian and impartial in nature and conducted without any adverse distinction, but the narrowing of the category of States that would be entitled to carry out such actions seems to imply the need for guarantees of impartiality. In case of occupation, ‘[i]f the whole or part of the population of an occupied territory is inadequately supplied, the occupying power shall agree to relief actions conducted by other states or by humanitarian organizations’.⁴⁶⁶

Conversely, the British military manual provides that in case of occupation ‘[r]elief schemes relate particularly to the provision of food, medical supplies, and clothing and may be undertaken by *neutral* states or impartial humanitarian organizations such as the ICRC’.⁴⁶⁷ No such limitation to neutral States is provided for relief actions in IAC in general,⁴⁶⁸ for which the Manual does mention the need to be humanitarian and

⁴⁶³ Art. 8(2)(b)(xxv) ICCSt. Emphasis added.

⁴⁶⁴ Art. 7(2)(b) ICCSt. For an analysis of both these provisions and of other provisions of the ICCSt. that may be relevant to the provision of humanitarian assistance to civilians in armed conflict, see Section 6.1.1.2.6.

⁴⁶⁵ The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, ed., *Humanitarian Law in Armed Conflicts - Manual*, DSK VV207320067 (August 1992) (English translation of ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch*, August 1992), par. 503. Emphasis added. The paragraph continues by stating that ‘[e]very State and in particular the adversary, is obliged to grant such relief actions free transit, subject to its right of control’ and by making reference to art. 23 GC IV and art. 70 AP I. Article 18 AP II is not mentioned in the Manual, and art. 71 AP I is referred to only with reference to occupation. See next fn.

The *German Handbook* has been described as ‘a statement of international humanitarian law as it is understood by the Federal Republic of Germany’ and it ‘has been implemented as a *Zentrale Dienstvorschrift*, i.e., a regulation binding upon all services of the German armed forces.’ Wolff Henchel von Heinegg, “The German Manual,” in *National Military Manuals on the Law of Armed Conflict*, 2nd ed., ed. Nobuo Hayashi (Oslo: Torkel Opsahl Academic EPublisher, 2010), 109-110.

⁴⁶⁶ The Federal Ministry of Defence of the Federal Republic of Germany (1992), *supra* fn. 465, par. 569. Reference is made to art. 59 GC IV and arts. 69-71 AP I.

⁴⁶⁷ UK Joint Doctrine and Concepts Centre (JDCC), Ministry of Defence (2004), *supra* fn. 457, par. 11.45. Emphasis added. In a footnote, the manual notes: ‘[a]lthough GC IV, Art 59, refers to “States”, Pictet, Commentary on GC IV, 321 suggests that only neutral states are capable of providing the essential guarantees of impartiality. AP I, Art 70 is capable of more flexible interpretation.’ *Ibid.*, 90, fn. 81. On the contrary, in case of inadequately supplied population in an occupied territory, the German manual simply states that ‘the occupying power shall agree to relief actions conducted by other states or by humanitarian organizations’. The Federal Ministry of Defence of the Federal Republic of Germany (1992), *supra* fn. 465, par. 569. Reference is made to art. 59 GC IV and arts. 69-71 AP I.

⁴⁶⁸ See UK Joint Doctrine and Concepts Centre (JDCC), Ministry of Defence (2004), *supra* fn. 457, 90, fn. 81.

impartial in character and carried out without any adverse distinction, and simply states that the agreement of the parties concerned is necessary, in accordance with Article 70(1) AP I, and that '[t]here is ..., except for those specific consignments covered by the Convention, no duty to agree to them though there is a duty to consider in good faith requests for relief operations.'⁴⁶⁹

In NIAC, even if the primary role in taking care of civilians in need is reserved to the State concerned and the secondary one to local relief societies and the civilian population, as a last resort the British manual foresees that humanitarian organisations should intervene and undertake an 'exclusively humanitarian and impartial action for [the] relief [of the civilian population]', subject to the consent of the State concerned, even if a limit to the denial of such consent is provided by the prohibition of starvation as a method of combat in Article 14 AP II.⁴⁷⁰

The British manual acknowledges such prohibition of starvation of civilians as a method of warfare also in IAC; further affirms the non-derogable nature of the right to life; and derives from it that 'the destruction of crops, foodstuffs, and water sources, to such an extent that starvation is likely to follow, is also prohibited.'⁴⁷¹ In case of siege, since the rules on starvation and on the duty to allow the passage of relief to civilians might 'prolong the siege and render an attack or bombardment more likely,' the Manual suggests that 'consideration may be given to allowing all civilians and the wounded and sick to leave the besieged area' and, in case the evacuation of civilians is impeded by the military authorities of the besieged area (possibly amounting to a breach of AP I and a war crime) or refused by civilians themselves, 'so long as the

⁴⁶⁹ Ibid., par. 9.12.3. The 'specific consignments covered by the Convention' whose passage shall be allowed include, according to a footnote, not only 'medical and hospital stores and objects necessary for religious worship; also essential foodstuffs, clothing, and tonics for children under 15, expectant mothers, and maternity cases', as provided in Article 23 GC IV, but also 'essential foodstuffs for all civilians', in accordance with the prohibition of starvation as a method of warfare under Art. 54(1) AP I. Ibid., 221, fn. 32.

⁴⁷⁰ Ibid., par. 15.54 and Ibid., 409, fn. 129. On the prohibition of starvation, see also Ibid., par. 15.50. The manual further states that '[t]he protection and delivery of relief supplies will usually be dealt with in agreements between the state concerned and the relief agencies in question', and '[w]henver the military situation permits, the delivery and distribution of humanitarian aid to people in need *must* be permitted', since '[s]tarvation as a method of warfare is prohibited.' Ibid., pars. 15.27.1 and 15.27.2. Emphasis added.

⁴⁷¹ Ibid., pars. 15.19 and 15.19.1. See also Ibid., pars. 5.19, 5.27, 5.27.1, 5.27.2, and 15.50. Reprisals against object essential for the survival of the civilian population should thus be prohibited but, on ratification of AP I, the UK stated that

The obligations of Articles 51 to 55 are accepted on the basis that any adverse party against which the [UK] might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, ... in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the [UK] will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the [UK] will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The [UK] will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.

Ibid., pars. 16.19 and 16.19.1.

besieging commander left open his offer to allow civilians and the wounded and sick to leave the besieged area, he would be justified in preventing any supplies from reaching that area.⁴⁷²

The Canadian Manual is less comprehensive than the aforementioned ones in the field of relief actions, since it does not mention Articles 59 GC IV, 69 and 71 AP I, or 18 AP II, and it refers to Article 70 AP I only in very broad terms in relation to the duty to allow the passage of relief in siege warfare.⁴⁷³ However, it reproduces Articles 54 AP I and 14 AP II in their entirety, even specifying that if a State undertakes a scorched earth policy on its national territory, ‘the destruction of objects indispensable to the survival of the civilian population should not leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.’⁴⁷⁴

The German manual, in relation to blockades (thus IAC), clarifies that both starvation of the civilian population as a method of warfare and the hindering of relief shipments for the civilian population are prohibited; it then classifies ‘starvation of civilians by destroying, removing or rendering useless objects indispensable to the survival of the civilian population’ as a grave breach of IHL, making reference to Articles 54 AP I and 14 AP II.⁴⁷⁵

On the contrary, the U.S. military manuals on land and naval warfare, which reflect only the relevant GC IV provisions, do not explicitly prohibit starvation of civilians as a method of warfare, rather the one on naval warfare prohibits the ‘intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, *for the specific purpose* of denying the civilian population of their use’ and mirrors the San Remo Manual by clarifying that ‘[a] blockade is prohibited if *the sole purpose* is to starve the civilian population or to deny it other objects essential for its survival.’⁴⁷⁶ The 2012 edition of the *U.S. Operational Law Handbook* further states that the U.S. ‘rejects ...

⁴⁷² Ibid., pars. 5.34.2.-5.34.3. On blockade, mirroring pars. 102-104 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, see Ibid., pars. 13.74-13.76. For pars. 102-104 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, see Section 2.1.4.2.1. (fns. 89 and 98).

⁴⁷³ See Canadian National Defence (2001), *supra* fn. 446, par. 614(6).

⁴⁷⁴ Ibid., par. 619(2). On arts. 54 AP I and 14 AP II, see also Ibid., pars. 445, 618, 619, 708, 1507(4), and 1721.

⁴⁷⁵ See The Federal Ministry of Defence of the Federal Republic of Germany (1992), *supra* fn. 465, pars. 1051 and 1209. See also Ibid., pars. 463 and 479.

⁴⁷⁶ U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, (NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A) (July 2007), pars. 8.3 and 7.7.2.5. Emphases added. It has been argued that this absence of a clear prohibition of starvation might be due to ‘the traditionally lawful use of sieges to compel the surrender of the enemy through starvation and other privation which will necessarily impact civilians caught in the besieged location.’ George Cadwalader, “The Rules Governing the Conduct of Hostilities in Additional Protocol I to the Geneva Conventions of 1949: A Review of Relevant United States References,” *Yearbook of International Humanitarian Law* 14 (2011), 167 (fn. 143).

broad prohibitions on attacking [] objects [indispensable to the survival of the civilian population] when used to support enemy forces.⁴⁷⁷

Rules of the GCs and APs on medical personnel, transports and units, on the red cross emblem, on civil defence, on the Occupying Power's duties, and on obligations related to the passage of relief are generally reflected in all the aforementioned national military manuals.⁴⁷⁸ The right of humanitarian initiative for impartial humanitarian organisations is explicitly mentioned in the U.S. and Canadian manuals for both IAC and NIAC and in the UK one for NIAC, while the German one refers to it only in relation to the ICRC.⁴⁷⁹

The obligations of States related to the needs of civilians in conflict have been analysed also by the Supreme Court of Israel, which examined the duties of Israel in relation to the basic needs of civilians in Gaza in two different cases, in 2008 and 2009. In 2008 Israel, considering itself no longer an Occupying Power in the Gaza Strip, acknowledged the applicability of Article 23 GC IV, as well as Article 70 AP I, to which it attributed customary nature, and Article 54 AP I,⁴⁸⁰ but considered the scope of its obligation to allow the passage of humanitarian goods to Gaza as extending only to essential goods and in the amount necessary to satisfy the basic humanitarian needs of the civilian population,⁴⁸¹ and it argued that the restrictions imposed were justified and legitimate in this sense.⁴⁸² As already mentioned in Section 3.2.1.3., the Court established that Israel, no longer Occupying Power in Gaza, still had humanitarian duties, and this was due to the existence of a conflict between Israel and Hamas, the degree of control the former exercised over the border crossing to the Strip, and the relationship of almost complete dependency of the Strip upon the supply of electricity from Israel, as a result of the long period of occupation.⁴⁸³ It identified these obligations not just in the duty of allowing the passage of essential supplies, but arguably also in a duty of

⁴⁷⁷ U.S. Army, Judge Advocate General's Legal Center and School, *Operational Law Handbook 2012* (Charlottesville, Virginia: International and Operational Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, 2012), 25.

⁴⁷⁸ For the analysis of these and additional national military manuals, see the relevant practice listed in the ICRC Study.

⁴⁷⁹ See U.S. Headquarters Department of the Army, *The Law of Land Warfare*, Field Manual No. 27-10 (FM 27-10) (July 1956 incorporating Change 1 of July 1976), Appendix A-5 and A-7; Canadian National Defence (2001), *supra* fn. 446, pars. 1106, 1516(1), and 1708(2); UK Joint Doctrine and Concepts Centre (JDCC), Ministry of Defence (2004), *supra* fn. 457, pars. 15.4.2 and 16.13; The Federal Ministry of Defence of the Federal Republic of Germany (1992), *supra* fn. 465, par. 1220.

⁴⁸⁰ Supreme Court of Israel, *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence* (2008), *supra* fn. 243, par. 13.

⁴⁸¹ See *Ibid.*, par. 15.

⁴⁸² See *Ibid.*, pars. 2-3.

⁴⁸³ See *Ibid.*, par. 12.

Israel itself to supply electricity, by reason of the almost complete dependence of Gaza from the State, however concluding that Israel was not in breach of its duties.⁴⁸⁴

Shany criticised the position adopted by the Court, since '[w]arring parties are not generally required by IHL to provide each other with basic supplies', with occupation being an exception to this, and no other legal basis for the decision was specified.⁴⁸⁵ He argued that a duty to provide the enemy with essential supplies does not have a basis in IHL, but possibly in some kind of extraterritorial application of IHRL, so that 'it appears that the Court's decision in *Bassiouni* can be regarded as the outcome of balancing the human rights of Gaza residents with Israel's national interest.'⁴⁸⁶ The result was a decision according to which 'Israel assumes obligations that go beyond the requirements of IHL in situations of siege but that fall short of the requirements applicable in situations of occupation.'⁴⁸⁷

While the reading of the judgment by Shany is correct, other possible legal bases for Israel's obligations might be proposed, even accepting the position that Israel is no longer Occupying Power in Gaza. Benvenisti has argued that Israel might have obligations deriving from the previous situation of occupation: in his view, in case of voluntary withdrawal leading to the termination of occupation, 'the plans for the termination should include ensuring public order in civil life for the duration of the termination process and immediately in its aftermath'.⁴⁸⁸ He argues that the Occupying Power is bound under Article 43 Hague Regulations to take all the measure in its power during occupation to restore and ensure public order and safety, but nothing prevents an interpretation of this provision according to which 'during the occupation the occupant would make provisions for the period immediately after its planned withdrawal.'⁴⁸⁹ He proceeds to argue that the application of the law of occupation would not necessarily terminate with the end of occupation, but it would be 'morally necessary' that the Occupying Power continue having obligations afterwards, as long as the situation generated by the occupation is not fully in the hands of the new authorities.⁴⁹⁰ A literary interpretation of the treaties does not seem to offer unequivocal support to such position, since States included in treaties similar obligations only with respect to specific persons: Article

⁴⁸⁴ Ibid., pars. 14, 17-18, and 20.

⁴⁸⁵ Yuval Shany, "The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. Prime Minister of Israel*," *Israel Law Review* 42, no. 1 (January 2009), 108. See also Ibid., 116.

⁴⁸⁶ Ibid., 114.

⁴⁸⁷ Ibid., 116.

⁴⁸⁸ Eyal Benvenisti, "The Law on the Unilateral Termination of Occupation," Tel Aviv University Law Faculty Papers, Working Paper 93 (August 2008), 9-10. Available at <http://law.bepress.com/taulwps/art93/> (accessed June 25, 2012).

⁴⁸⁹ See Eyal Benvenisti, *The International Law of Occupation* 2nd ed. (Oxford [etc.]: Oxford University Press, 2012), 87. Emphasis in the original.

⁴⁹⁰ See Ibid., 86-89.

3(b) AP I provides that the GCs and AP I shall cease to apply ‘on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter’, since they shall continue to benefit from the relevant provisions of the GCs and AP I ‘until their final release, repatriation or re-establishment.’

In the alternative, classifying the situation of Gaza as a siege and a naval blockade, the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* prohibits the establishment of a blockade if ‘the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.’⁴⁹¹ While it seems that once a blockade has been established, the duties of the Blockading Power are limited to allowing the passage of essential supplies to civilians in need,⁴⁹² still one might argue that Israel has a duty to guarantee that the essential needs of the civilian population in Gaza are satisfied because otherwise it would render the establishment of the naval blockade (and of the siege, by analogy) illegal *ab initio*, since the withdrawal of Israeli troops from the Strip, given that the situation of dependency of Gaza on Israel already existed at that point and the calculation of the proportionality of the blockade has not changed.

In 2009, the Supreme Court dealt again with Israel’s duties towards civilians in Gaza, in relation to Operation Cast Lead. The Court confirmed the duty for Israel as a Party to the conflict, ‘as long as [it] has control of the transfer of necessities and the supply of humanitarian needs to the Gaza Strip,’ to ‘allow the civilian population to have access, *inter alia*, to medical facilities, food and water, as well as additional humanitarian products that are needed to maintain civilian life.’⁴⁹³ Thus, it confirmed the customary nature of the obligation to provide the civilian population in general, and not only specific categories of civilians, with the goods necessary to satisfy their basic needs. As far as the Operation Cast Lead is concerned, the Israeli Supreme Court was persuaded that the organisational measures adopted by the Israeli armed forces during the Operation, including the establishment of a ‘special health operations room’ for coordinating the evacuation and treatment of the wounded and of an operations room for coordinating with international organisations engaged in non-medical humanitarian activities and for maintaining an updated picture of the

⁴⁹¹ Par. 102 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. See Section 2.1.4.2.1. (ftn. 98). The analysis of the possible customary nature of this provisions, as well as of other relevant provisions included in the Manual, is part of this research: see Section 6.1.1.2.3.

⁴⁹² See pars. 103-104 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. See Section 2.1.4.2.1. (ftn. 89).

⁴⁹³ The Supreme Court sitting as the High Court of Justice, *Physicians for Human Rights and others v. Prime Minister of Israel and others*, H CJ 201/09; *Gisha Legal Centre for Freedom of Movement and others v. Minister of Defence*, H CJ 248/09, 19 January 2009, par. 27.

humanitarian situation, despite being still susceptible of improvement, were sufficient proof of the commitment of Israel to the respect for its obligations towards the wounded and sick and the provision of the necessary essential supplies (including electricity and fuel) to the civilian population.⁴⁹⁴

Further State practice on humanitarian access has emerged in 2012-2013 in relation to consent from the State in NIAC and the possibility for UN agencies, the ICRC and/or NGOs to undertake cross-border relief operations in rebel controlled-territory, without the authorisation or against the explicit will of the Government. Practice related to the conflict in Syria has harshly revealed the ongoing differences in the interpretation of legitimate action under the right of humanitarian initiative enshrined in Common Article 3, even among humanitarian organisations.⁴⁹⁵

MSF has been vocal in vindicating its right to have access to the northern part of the Syrian territory, no longer under governmental control, against the will of the Government, by obtaining consent from the rebels only and crossing the border from Turkey.⁴⁹⁶ Still, MSF's appeal to donors to openly fund cross-border operations by NGOs not authorised by the government has not resulted in an open funding policy in favour of such operations (even if few donors might have given some support without taking such a public position), and even Turkey has only tolerated NGOs but officially allowing them to deposit goods at the border with Syria, to be then collected by people inside Syria and distributed, but not to people crossing the border, and it has forced them to work in a semi-clandestine fashion.⁴⁹⁷ The UN humanitarian branch has consistently affirmed that the agreement of all Parties concerned would be needed to undertake cross-border

⁴⁹⁴ See *Ibid.*, pars. 22-29.

⁴⁹⁵ Syria is not a Party to AP II.

⁴⁹⁶ MSF has also reported having requested governmental authorization to operate in government-controlled territory, but not having received it. See MSF, "Syria: MSF treats 44 wounded after bombing in Idlib," January 17, 2013, available at <http://www.msf.org/article/syria-msf-treats-44-wounded-after-bombing-idlib> (accessed September 10, 2013); MSF, "Syria: MSF Criticises Aid Imbalances," MSF Press Release, January 29, 2013, available at <http://www.msf.org.uk/article/syria-msf-criticises-aid-imbalances> (accessed September 10, 2013); MSF, "Syria: Humanitarian Assistance Deadlocked," March 07, 2013, available at <http://lb-web1.doctorswithoutborders.org/press/release.cfm?id=6670&cat=press-release> (accessed September 10, 2013); Marie-Noële Rodrigue and Fabrice Weissman, "Le CICR doit oser briser l'embargo humanitaire en Syrie," *Le Temps*, March 19, 2013, available at <http://www.letemps.ch/Page/Uuid/90730828-8fe4-11e2-9fca-35dc2edbbea3%7C0#.UjWH3tKriSo> (accessed September 10, 2013).

⁴⁹⁷ See Marie-Pierre Allié and Fabrice Weissman, "Syrie: soutenons les opérations humanitaires transfrontalières," *Le Monde*, January 29, 2013, available at http://www.lemonde.fr/idees/article/2013/01/29/syrie-soutenons-les-operations-humanitaires-transfrontaliere_1823949_3232.html (accessed September 10, 2013); International Crisis Group (ICG), "Blurring the Borders: Syrian Spillover Risks for Turkey," Europe Report N°225, 30 April 2013, 15-18 and 30-36. Available at <http://www.crisisgroup.org/~media/Files/europe/turkey-cyprus/turkey/225-blurring-the-borders-syrian-spillover-risks-for-turkey.pdf> (accessed September 10, 2013).

operations into Syria, and a similar approach has been followed also by the ICRC, which has chosen to push for cross-line operations to reach as many civilians as possible from within the country.⁴⁹⁸

Similarly, unauthorised cross-border operations have been reportedly undertaken by NGOs from South Sudan into the Sudanese regions of South Kordofan and Blue Nile, without consent from the Sudanese Government, but without any publicity, to avoid being expelled from Sudan, and without public acknowledgment by any donor regarding financial support for these operations, which may be interpreted as a tacit admission that such financing would amount to an unlawful interference in the internal affairs of a State.⁴⁹⁹ The USG/ERC has stated that she would support cross-border operations only if agreed to by both the Sudanese and South Sudanese governments, and Sudan has argued that it would consider any unauthorised cross-border aid operation as a hostile act.⁵⁰⁰

Finally, regulation of humanitarian access during conflict, especially by international NGOs and IGOs, has been also a recurrent topic of agreements concluded by Parties to the conflict, either with the UN or between themselves. In the first category, one of the most well-known examples is the one that gave birth in 1989 to Operation Lifeline Sudan (OLS). In that year, the UN managed to broker an unsigned deal with the Parties to the NIAC in Sudan, the Government of Sudan (GoS) and the rebels of the Sudan People's Liberation Movement/Army (SPLM/A), in order to create a consortium of NGOs guided by the UN and allowed to provide humanitarian assistance to the victims in need. The resulting OLS, which, like the civil war, had a turbulent history,⁵⁰¹ marked the first negotiated instrument granting access to all victims in need, also in the territory controlled by the rebels, in exchange for control by the UN (UNICEF in the Southern

⁴⁹⁸ See UN OCHA, "OCHA Operations Director: Humanitarians Must Have Access to Make Sure Aid Reaches Syrians in Desperate Need," OCHA Press Release, January 29, 2013, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Press%20Release%20on%20Syria%20John%20Ging%2029%20January%202013.pdf> (accessed September 10, 2013). USG/ERC Valerie Amos, in her statement to the UNSC in April 2013, urged the UNSC to 'consider alternative forms of aid delivery, including cross-border operations': S/PV.6949, 18 April 2013, 3. Luis Lema, "Le CICR justifie sa philosophie d'action en Syrie," *Le Temps*, February 16, 2013, available at <http://www.letemps.ch/Page/Uuid/081d91b2-77b3-11e2-93eb-d6072136ce26%7C1> (accessed September 10, 2013). Pierre Krähenbühl, "There are no 'good' or 'bad' civilians in Syria – we must help all who need aid," *TheGuardian.com*, March 03, 2013, available at <http://www.theguardian.com/commentisfree/2013/mar/03/red-cross-aid-inside-syria> (accessed September 10, 2013).

⁴⁹⁹ See Martin Plaut, "1m Sudanese trapped in dire need beyond reach of aid agencies," *TheGuardian.com*, February 11, 2013, available at <http://www.theguardian.com/global-development/2013/feb/11/sudanese-trapped-beyond-aid-agencies> (accessed September 10, 2013). Sudan became a Party to AP II in 2006.

⁵⁰⁰ See Colum Lynch, "The other Sudanese civil war," *Foreign Policy*, March 14, 2012, available at http://www.mukeshkapila.org/download/the_other_sudanese_civil_war.pdf (accessed September 10, 2013). See also Sudan Tribune, "Sudan welcomes African, Arab and UN initiative to deliver humanitarian aid to South Kordofan," *Sudan Tribune*, February 08, 2012, available at http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=41542 (accessed September 10, 2013).

⁵⁰¹ See, for example, Alex De Waal, *Food and Power in Sudan: A Critique of Humanitarianism* (London: African Rights, 1997); Ataul Karim et al., *Operation Lifeline Sudan: A Review* (Geneva: UN, 1996); Larry Minear, *Humanitarianism under Siege: A Critical Review of Operation Lifeline Sudan* (Trenton, NJ: Red Sea Press; Washington, DC: Bread for the World, Institute on Hunger and Development, 1991).

part of the country) of the relief provided through the OLS. Furthermore, against the background of a trend towards a ‘deregulation of humanitarianism’,⁵⁰² the OLS arguably represented ‘a reversion to a more tightly regulated humanitarianism’ and careful control by the GoS in the areas under its direct control and, to a certain extent and mostly through flight bans, also in areas controlled by the rebels.⁵⁰³

An MoU on the provision of humanitarian assistance to civilians in need was signed also by the UN and the Government of Iraq (GoI) in 1991,⁵⁰⁴ providing for the establishment of humanitarian centres (UNHUCs) to facilitate the provision of humanitarian assistance to those in need, monitor the situation and provide advice to the Iraqi authorities.⁵⁰⁵ The Parties to the MoU ‘agreed that *humanitarian assistance is impartial and that all civilians in need, wherever they are located, are entitled to receive it*’ and that ‘[a]ll Iraqi officials concerned, including the military, w[ould] facilitate the safe passage of emergency relief commodities throughout the country.’⁵⁰⁶ While the GoI was called to cooperate in granting access to UN humanitarian personnel throughout the country, and it was expected to agree on terms of association for the humanitarian activities of other organisations, its sovereignty was reaffirmed,⁵⁰⁷ and in practice it sometimes exploited the need for its agreement under the MoU in order to block the opening of UNHUCs in certain sensitive places.⁵⁰⁸

Within the second category, agreements concluded by Parties to armed conflicts, one can mention the 1999 *Lomé Peace Agreement* in Sierra Leone, in which the Parties committed ‘to guarantee safe and unhindered access by all humanitarian organizations throughout the country in order to facilitate delivery of humanitarian assistance, *in accordance with international conventions, principles and norms which govern humanitarian operations*’, and to guarantee the safety and movement of humanitarian personnel and the

⁵⁰² See De Waal (1997), *supra* fn. 501, 127-128.

⁵⁰³ *Ibid.*, 129.

⁵⁰⁴ *Memorandum of Understanding relating to the arrangements for the deployment of the United Nations guards contingent for the United Nations humanitarian centres*, Baghdad April 18, 1991 (1606 UNTS 119). Hereinafter MoU April 1991.

⁵⁰⁵ Pars. 4 and 6 MoU April 1991.

⁵⁰⁶ Pars. 11 and 12 MoU April 1991. Emphasis added See also *Memorandum of Understanding on the United Nations humanitarian programme for Iraq, Kuwait and the Iraq/Iran and Iraq/Turkey border areas*, Baghdad, November 24, 1991 (1659 UNTS 3), par. 12. Iraq also agreed to the deployment of UN guards (see S/22663, 31 May 1991, Annex to the Enclosure (Memorandum of Understanding signed on 18 April 1991)), charged for example with protecting UN and NGOs personnel and property, giving ‘operational support in such activities as the return of refugees’, and ‘inject[ing] an element of stability into a volatile situation’ (Michael Stopford, “Humanitarian Assistance in the Wake of the Persian Gulf War,” *Virginia Journal of International Law* 33 (Spring 1993), 501).

⁵⁰⁷ Pars. 20 and 15-16 MoU April 1991.

⁵⁰⁸ See Stopford (1993), *supra* fn. 506, 495-496. In addition, agreement on successive MoUs was not easy to reach, and humanitarian actors faced repeated difficulties. See *Ibid.*

security of their properties.⁵⁰⁹ They also reaffirmed their commitment to the *Statement on the Delivery of Humanitarian Assistance in Sierra Leone* of June 1999, including commitments to ‘respect for international convention [*sic*], principles and norms, which govern *the right of people to receive humanitarian assistance*’ and to guarantee safe and unhindered access to ‘*duly registered humanitarian agencies*’, as well as the security of their properties.⁵¹⁰

Two 1991 and 1992 MoUs concluded between Croatia and the Socialist Federal Republic of Yugoslavia and among the Parties to the conflict in BiH, respectively, included a commitment to ‘consent and cooperate with operations to provide the civilian population with *exclusively humanitarian, impartial and non-discriminatory* assistance’, in particular by the ICRC,⁵¹¹ an obligation to conduct hostilities in accordance with Article 54 AP I, and a duty to ‘allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively for the other party’s civilian population ...’.⁵¹²

Commitments to humanitarian access and the security of humanitarian property featured also, for example, in a 1992 agreement on humanitarian issues concluded by several Parties to the conflict in Somalia,⁵¹³ in the 1994 *Agreement on a Cease-Fire in the Republic of Yemen (Yemen)*,⁵¹⁴ and in a 2000 peace agreement signed by (some of) the Parties to the conflict in Burundi.⁵¹⁵ The 1999 *Lusaka Ceasefire Agreement* related to hostilities in the DRC committed the States signatories not only to facilitate humanitarian assistance, but also to guarantee access to the ICRC and Red Crescent ‘for the purpose of

⁵⁰⁹ S/1999/777, 12 July 1999, Annex, art. XXVII. Emphasis added. In the *Agreement on a Ceasefire* preceding the signing of the *Lomé Peace Agreement*, the Government and the RUF had already agreed to ‘[g]uarantee safe and unhindered access by humanitarian organizations to all people in need; establish safe corridors for the provision of food and medical supplies to ECOMOG soldiers behind RUF lines, and to RUF combatants behind ECOMOG lines’. S/1999/585, 20 May 1999, Annex, par. 4.

⁵¹⁰ S/1999/777, 12 July 1999, Annex, Annex 4. Emphasis added.

⁵¹¹ *Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the Socialist Federal Republic of Yugoslavia*, Geneva, 27 November 1991, par. 9. *Agreement between Representatives of Mr. Alija Izetbegović (President of the Republic of Bosnia and Herzegovina and President of the Party of Democratic Action), Representatives of Mr. Radovan Karadžić (President of the Serbian Democratic Party), and Representative of Mr. Miljenko Brkić (President of the Croatian Democratic Community)*, Geneva, 22 May 1992, par. 2.6. Both quoted in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume II: Practice, Part I* (Cambridge: Cambridge University Press, 2005), 1177. Hereinafter ICRC Study – Practice I.

⁵¹² *Memorandum of Understanding* (1991), supra fn. 511, pars. 9 and 6. *Agreement between Representatives* (1992), supra fn. 511, pars. 2.6 and 2.5. Both quoted in ICRC Study – Practice I, 1177, and 1124, 1149, 1166, and 1170.

⁵¹³ *All-Party Meeting* (1991), supra fn. 459, pars. 1-3. The Agreement is reproduced in S/24184, 25 June 1992, Annex.

⁵¹⁴ *Agreement on a Cease-Fire in the Republic of Yemen (Yemen)*, Moscow, June 30, 1994, par. 3. The Agreement is reproduced in S/1994/778, 30 June 1994, Annex.

⁵¹⁵ *Arusha Peace and Reconciliation Agreement* (2000), supra fn. 458, Protocol III ‘Peace and Security for All’, art. 26(1)(d), and Protocol IV ‘Reconstruction and Development’, art. 7.

arranging the release of prisoners of war and other persons detained as a result of the war as well as the recovery of the dead and the treatment of the wounded'.⁵¹⁶

In the context of Darfur, the Parties to the 2005 *Protocol between the Government of the Sudan (GoS), the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) on the Improvement of the Humanitarian Situation in Darfur* committed themselves to 'guarantee unimpeded and unrestricted access for humanitarian workers and assistance' and protect civilians;⁵¹⁷ and the 2006 *Darfur Peace Agreement* between the GoS and the SLA/M, which anyway did not put an end to the fighting, committed the Parties to 'refrain from any act that may jeopardize the humanitarian operations in Darfur and ... create appropriate security conditions for the unimpeded flow of humanitarian assistance and goods, guarantee security in the camps hosting IDPs and the creation of conducive atmosphere for their voluntary return and refugees to their areas of origin'.⁵¹⁸ In the Doha Document for Peace in Darfur, to which the Government of Sudan (GoS) and the Liberation and Justice Movement committed through an agreement on 14 July 2011, the Parties have undertaken *inter alia* to adopt measures to ensure life in safety and dignity for IDPs, refugees and victims of conflict, including by ensuring the delivery of humanitarian assistance, especially women and children, and to ensure humanitarian access for helping IDPs, refugees and victims of conflict.⁵¹⁹ Actions that 'may impede or delay the provision of humanitarian assistance or protection to civilians and restrict free movement of people' are prohibited, like any activity that 'would undermine or endanger humanitarian operations in Darfur'.⁵²⁰ Again, commitments regarding unrestricted humanitarian

⁵¹⁶ S/1999/815, 23 July 1999, Annex, art. III, pars. 9 and 10. On the release of detained persons, see also S/1999/815, 23 July 1999, Annex, Enclosure I: Annex 'A' to the Cease-Fire Agreement, pars. 3.1 and 3.2.

⁵¹⁷ *Protocol between the Government of the Sudan (GoS), the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) on the Improvement of the Humanitarian Situation in Darfur*, Abuja, November 09, 2004, pars. 1 and 2.

⁵¹⁸ *Darfur Peace Agreement*, Abuja, May 05, 2006, art. 22, par. 214(e). See also art. 24, par. 226(b-d); art. 25, pars. 257-261 (on the establishment of the Joint Humanitarian Facilitation and Monitoring Unit); art. 26, par. 262 and ff.

⁵¹⁹ *Doha Document for Peace in Darfur (DDPD)*, Doha, May 2011, art. 42, pars. 220 and 222, and art. 63, par. 341(ii). The Parties also 'acknowledge[d] the leading humanitarian role of the specialised international organisations commissioned by the United Nations Secretary General to coordinate among all the bodies assisting with protection, shelter, camp management in situations of internal displacement and protection, assistance and solutions for refugees.' Furthermore, the Document includes an obligation for the GoS to 'extend urgent aid to IDPs, including food, shelter, education, medical care, and other medical and health services, together with the other necessary humanitarian and social services', and obligations for the Parties to 'enable and facilitate access by the UN and the specialised agencies and national, regional and international humanitarian organisations without hindrance and impediment to IDPs, including their camps, in accordance with arrangements agreed upon with the GoS' and to 'secure and protect humanitarian aid routes and the security of humanitarian staff.' Ibid., art. 42, par. 223, and art. 45, pars. 230 and 233-234. *Agreement on the adoption of the Doha Document for Peace in Darfur*, Doha, July 14, 2011.

⁵²⁰ *DDPD* (2011), supra fn. 519, art. 63, par. 340(vi), art. 68, par. 405(iii), and art. 70, par. 414.

access for humanitarian assistance and for access and freedom of movement of relief workers are included in the ceasefire signed by the GoS and JEM in February 2013.⁵²¹

The ceasefire signed by the Parties in the Central African Republic in January 2013 includes a provision in which they commit to facilitate the delivery of humanitarian assistance, including through the establishment of humanitarian corridors and the creation of favourable conditions for the provision of assistance to IDPs and people in need.⁵²²

3.2.2.4. *External Relief and the Principles of Humanitarian Assistance*

As appears already from some of the aforementioned instances of State practice on humanitarian access, Parties to armed conflicts have often provided criteria to be fulfilled by external relief actions, usually referring to the principles of humanitarian assistance. For example, State Parties to the Kampala Convention undertake to ‘take necessary steps to effectively organize, relief action that is humanitarian, and impartial in character, and guarantee security’ and ‘uphold and ensure respect for the *humanitarian principles of humanity, neutrality, impartiality and independence of humanitarian actors*’.⁵²³ At the same time, as already mentioned, international organisations and humanitarian agencies are similarly obliged to respect ‘the principles of humanity, neutrality, impartiality and independence of humanitarian actors’, as well as ‘relevant international standards and codes of conduct.’⁵²⁴

EU Council Regulation 1257/96 of 20 June 1996 concerning humanitarian aid includes general considerations on the ‘*right to international humanitarian assistance*’ of victims of armed conflicts, in case of inability or unwillingness of their own authorities to provide effective relief⁵²⁵, on the purely life-saving aim of humanitarian aid and its a-political, impartial and non-discriminatory nature, and on the duty to respect and encourage the independence and impartiality of humanitarian organisations in implementing humanitarian aid.⁵²⁵ These considerations are reflected in the discipline of the Community’s humanitarian aid

⁵²¹ See *Ceasefire Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan (JEM)*, Doha, February 10, 2013, pars. 1(e), 4(e-g), 5(b).

⁵²² See *Accord de cessez-le-feu entre le Gouvernement de la République Centrafricaine et la Coalition Seleka*, Libreville, January 11, 2013, art. 2.

⁵²³ Art. 5(7) and 5(8) Kampala Convention. Emphasis added. At the same time, a saving clause is provided to the extent that nothing in art. 5 of the Convention ‘shall prejudice the principles of sovereignty and territorial integrity of states.’ Art. 5(12) Kampala Convention.

⁵²⁴ Art. 6(3) Kampala Convention.

⁵²⁵ Council of the European Communities (1996), *supra* fn. 424, preamble. Emphasis added. As mentioned, all these statements made in the preambular paragraphs of the regulation seem to refer to humanitarian aid in general, not only to the regime applicable to the humanitarian aid of the EU. See Section 3.2.2.1. (fn. 425).

by the Regulation,⁵²⁶ and in Article 214 of the *Treaty on the Functioning of the European Union* (TFEU), stipulating that EU's operations in the area of humanitarian aid 'shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination.'⁵²⁷

The TFEU does not offer a definition of the principles, but the (non-binding) *European Consensus on Humanitarian Aid* affirms that the EU 'is firmly committed to upholding and promoting [...] the principles of neutrality, impartiality, humanity and independence of humanitarian action, *enshrined in International Law, in particular International Humanitarian Law*' and defines these principles.⁵²⁸ Humanity 'means that human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population' and that '[t]he dignity of all victims must be respected and protected.'⁵²⁹ Neutrality is defined as meaning 'that humanitarian aid must not favour any side in an armed conflict or other dispute', and impartiality 'that humanitarian aid must be provided solely on the basis of need, without discrimination between or within affected populations'.⁵³⁰

While the Consensus also includes the principle of independence, defined as 'the autonomy of humanitarian objectives from political, economic, military or other objectives,' which 'serves to ensure that the sole purpose of humanitarian aid remains to relieve and prevent the suffering of victims of humanitarian crises',⁵³¹ this principle is absent in Article 214 TFEU. A key guarantee is thus missing against the risk of alignment of EU choices in the field of humanitarian aid with its priorities in foreign policy, since the first sentence of the same Article 214 provides that '[t]he Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union.'⁵³² On the other hand, independence appears in the *Cotonou Agreement*, which specifies that humanitarian assistance shall be provided 'exclusively according to the needs and interests of the victims of the crisis situation and in line with the principles of international humanitarian law and with respect to humanity,

⁵²⁶ See art. 1: 'The Community's humanitarian aid shall comprise assistance, relief and protection operations on a non-discriminatory basis to help people in third countries, particularly the most vulnerable among them, and as a priority those in developing countries, victims of natural disasters, man-made crises, such as wars and outbreaks of fighting, or exceptional situations or circumstances comparable to natural or man-made disasters'. Council of the European Communities (1996), *supra* fn. 424, art. 1. Emphasis added.

⁵²⁷ Art. 214(2) TFEU.

⁵²⁸ Council of the EU (2008), *supra* fn. 424, 2, par. 3.

⁵²⁹ *Ibid.*, 2, par. 11.

⁵³⁰ *Ibid.*, 2, pars. 12-13.

⁵³¹ *Ibid.*, 2, par. 14.

⁵³² On the other hand, the EU Consensus specifies in par. 15 that 'EU humanitarian aid is not a crisis management tool.'

neutrality, impartiality and independence’, in particular excluding ‘discrimination between victims on grounds of race, ethnic origin, religion, gender, age, nationality or political affiliation’.⁵³³

In the *European Consensus on Humanitarian Aid*, EU donors have also committed themselves to the *Principles and Good Practice of Good Humanitarian Donorship* (GHD Principles).⁵³⁴ These non-binding principles were elaborated in 2003 in Stockholm by a group of 17 donors, and they were subsequently endorsed by the Development Assistance Committee of the Organization for Economic Co-operation and Development (OECD-DAC) in April 2006. While the principles deal with the way humanitarian funding is allocated by donors, they start with a section on the objectives and definition of humanitarian assistance, which includes the following statement:

‘Humanitarian action should be guided by the humanitarian principles of humanity, meaning the centrality of saving human lives and alleviating suffering wherever it is found; impartiality, meaning the implementation of actions solely on the basis of need, without discrimination between or within affected populations; neutrality, meaning that humanitarian action must not favour any side in an armed conflict or other dispute where such action is carried out; and independence, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented.’⁵³⁵

The GHD Principles commit the donors to allocate humanitarian funding ‘in proportion to needs and on the basis of needs assessments’, and promote the use of IASC guidelines and principles on humanitarian activities, the *Guiding Principles on Internal Displacement*, and the Red Cross Code of Conduct.⁵³⁶

Criteria to be respected by relief actions appear also in agreements concluded by Parties to specific armed conflicts. In the MoU to regulate the provision of humanitarian and development assistance, signed in Afghanistan in 1998, the Taliban and the UN agreed that ‘men and women shall have the right to education and health care and necessary development activities, based on international standards and in accordance with Islamic rules and Afghan culture’, but at the same time ‘acknowledge[d] the economic difficulties and the specific cultural traditions that make this goal [of increasing the participation of men and women in health, education — especially health education — and food security] challenging’, thus agreeing that

⁵³³ Art. 72(1) and 72(4) Cotonou Agreement amended 2010.

⁵³⁴ *Principles and Good Practice of Humanitarian Donorship*, endorsed in Stockholm, 17 June 2003 by Germany, Australia, Belgium, Canada, the European Commission, Denmark, the United States, Finland, France, Ireland, Japan, Luxembourg, Norway, the Netherlands, the United Kingdom, Sweden and Switzerland. Available at http://www.goodhumanitarianandonorship.org/Libraries/Ireland_Doc_Manager/EN-23-Principles-and-Good-Practice-of-Humanitarian-Donorship.sflb.ashx (accessed August 25, 2011). See Council of the EU (2008), *supra* fn. 424, in particular 2-3, pars. 18-21, and 9, par. 80.

⁵³⁵ *Principles and Good Practice of Humanitarian Donorship* (2003), *supra* fn. 534, par. 2.

⁵³⁶ *Ibid.*, pars. 6 and 16. On the Red Cross Code of Conduct, see Section 5.2.5.

‘women’s access to and participation in health and education will need to be gradual.’⁵³⁷ This kind of concession by the UN has been criticised as contrary to the principles of humanitarian action and to the fundamental principle of non-discrimination, thus possibly amounting to a treaty concluded in violation of *jus cogens* (if the principle of non-discrimination and/or the right to life are acknowledged as having such a status) or at least contrary to customary law applicable to the UN (the principle of non-discrimination).⁵³⁸

In Sudan, the principles of humanitarian action were repeatedly restated and attributed a central role in the plans of action and agreements concluded through the years by the UN and Parties to the conflict in the framework of the OLS. The first 1989 Plan of Action, ‘a set of informal, bilateral agreements between the warring parties and the UN’, called for the recognition of the ‘neutrality of humanitarian relief’, the transport exclusively of humanitarian relief by aid convoys, and the access by relief personnel to all civilians in need.⁵³⁹ The second (again informal and unsigned) 1990 Plan of Action, further expanded on the principles of humanitarian action, underlining *inter alia* the neutral nature of relief to civilians in need, wherever they found themselves, but also the need for all relief operations to be conducted in a transparent and accountable way, to be guaranteed by UN supervision.⁵⁴⁰ Parties in Sudan thus acknowledged, albeit informally, the neutrality of humanitarian assistance, even if they then used it as a benchmark against relief workers, with the Government of Sudan (GoS) repeatedly lamenting the loss of neutrality by the OLS and threatening to close it down as a consequence.⁵⁴¹

⁵³⁷ *Memorandum of Understanding between The Islamic Emirate of Afghanistan and The United Nations*, May 13, 1998, arts. 12-13; reproduced in *International Journal of Refugee Law* 10, no. 3 (1998): 586-592. See also A/52/957-S/1998/532, 19 June 1998, par. 40. While the classification of education in general as humanitarian assistance might be controversial, the UNSC has been clear in including it as a component of humanitarian assistance for children, and in any case healthcare is undoubtedly an activity to satisfy the basic needs of women. See Section 3.2.1.1.

⁵³⁸ See Verdirame (2011), *supra* fn. 417, 187-191. Moreover, even after the signature of the MoU, agencies kept facing difficulties operating because of the fighting and general insecurity (e.g. A/55/393-S/2000/875, 18 September 2000, pars. 9 and 32), of restrictions placed by Taliban on their movements (e.g. A/53/455-S/1998/913, 2 October 1998, pars. 30 and 34), and of the ongoing discriminatory laws and regulations issued by the Taliban authorities, for example prohibiting the employment of women except in the Taliban-controlled health system, together with burdensome administrative procedures for humanitarian organisations (e.g. A/55/633-S/2000/1106, 20 November 2000, par. 52; A/55/907-S/2001/384, 19 April 2001, par. 45; S/2001/695, 13 July 2001, par. 18-19; A/55/1028-S/2001/789, 17 August 2001, pars. 43-44). In 2000, the UNGA ‘[s]trongly condemn[ed] substantial restrictions introduced by the Taliban authorities on the operations of the United Nations, in particular the ... decree of law banning the employment of Afghan women in the United Nations and nongovernmental programmes, except in the health sector’. A/RES/55/174 B, 14 December 2000 (without vote), par. 12.

⁵³⁹ Karim et al. (1996), *supra* fn. 501, 22-23.

⁵⁴⁰ *Ibid.*, 24.

⁵⁴¹ See De Waal (1997), *supra* fn. 501, 135. At the beginning of the 1990s, a UN official was reported saying that ‘[t]here [wa]s a big political backlash from the 1980s [when it had seemed that] NGOs [had taken] over the country. The government fe[lt] that NGOs [we]re a real threat to its sovereignty’ (*Ibid.*, 148). Starting with the 1992 negotiations of the OLS, the GoS seemed to become more reluctant to allow access to people in need in areas under its control, accepting UN coordination of relief assistance to populations only ‘in conflict affected areas’, limiting in practice the role of the UN as coordinator only to the Southern part of the country (Karim et al. (1996), *supra* fn. 501, 25-26). Commentators who criticised the OLS for its performance did not really question the principles, but their actual implementation—especially because the broadening of OLS’ activities in certain areas towards rehabilitation and capacity-building contrasted with the principles—and the lack of means for guaranteeing their enforcement (see De Waal (1997), 341 and 369-370).

After the formulation of Ground Rules on the provision of humanitarian assistance in Southern Sudan in 1992, the UN signed an *Agreement on Ground Rules* with the SPLM/A and then two other rebel factions (but not with the GoS) in 1995 and 1996,⁵⁴² reaffirming the commitment of all signatories to the principles of humanitarian action: in a *Statement of Humanitarian Principles*, they declared that ‘[t]he right to receive humanitarian assistance and to offer it is a fundamental humanitarian principle’, and ‘[t]he guiding principle of OLS and SRRA [Sudan Relief and Rehabilitation Association, the relief arm of the SPLM/A] is that of humanitarian neutrality — an independent status for humanitarian work beyond political or military considerations’.⁵⁴³ In operational terms, such neutrality had to be assured by guaranteeing that relief was provided on the basis of needs only and without any adverse distinction, that it did not ‘seek to advance any political agenda’, and that it was not used for military advantage.⁵⁴⁴ The principle of transparency of OLS activities was reaffirmed, and the principle of ‘[s]trengthening local capacity to prevent future crises and emergencies and to promote greater involvement of Sudanese institutions and individuals in all humanitarian actions’ was added.⁵⁴⁵

The Agreement then set out detailed mutual obligations, including the duty for ‘[a]ll UN/NGO workers [] to act in accordance with the humanitarian principles previously defined: provision of aid according to need, neutrality, impartiality, accountability and transparency’, implying ‘non-involvement in political/military activity’ and no ‘act[ing] or divulg[ing] information in a manner that w[ould] jeopardise the security of the area.’⁵⁴⁶ In its turn, the SRRA had to ‘commit itself to the humanitarian principles defined above and not allow itself to be motivated by political, military or strategic interests’, and each rebel faction ‘recognise[d] and respect[ed] the humanitarian and impartial nature of UN agencies and those NGOs which ha[d] signed a letter of understanding with UNICEF/OLS and SRRA.’⁵⁴⁷ In addition, the SRRA was given the power to approve ‘[a]ll externally supported programmes and projects in SPLM/A-controlled areas, ... (both locally and at SRRA head office) prior to their implementation.’⁵⁴⁸

⁵⁴² Mark Bradbury, Nicholas Leader, and Kate Mackintosh, *The ‘Agreement on Ground Rules’ in South Sudan*, HPG Report 4, March 2000 (London: Overseas Development Institute, 2000), 37-38.

⁵⁴³ Iain Levine, “Promoting Humanitarian Principles: The Southern Sudan Experience,” RRN Network Paper 21, May 1997, 26. Emphasis added. Available at http://kms1.isn.ethz.ch/serviceengine/Files/ISN/97740/ipublicationdocument_singledocument/454517b4-2dc5-44fb-ac20-a79854eb62ed/en/networkpaper021.pdf (accessed April 10, 2011).

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid., 27.

⁵⁴⁶ Ibid.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

Finally, the December 1999 *Agreement on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affected Civilian Populations*, signed by the GoS, the SPLM, and the UN, listed as basic principles the ‘right’ of war-affected civilian populations ‘to receive humanitarian assistance’ and their ‘right to retain all humanitarian assistance for which they [we]re targeted’, with the corresponding duty to allow free and unimpeded access to ‘all humanitarian agencies accredited by the UN for humanitarian work in the Sudan’; the ‘right’ of beneficiaries ‘to receive protection’; the obligation for humanitarian action to ‘respect and promote the human dignity of beneficiaries’; the right of beneficiaries to be protected from ‘forcible relocation from their legal or recognized place of residence’; and the need for monitoring and evaluation.⁵⁴⁹ In cases in which ‘due to factors such as, but not limited to, theft, looting, taxation or diversion, food and other relief supplies [we]re not reaching targeted beneficiaries, the Parties to the Conflict agree[d] that these supplies c[ould] no longer be defined as humanitarian assistance’ and that the UN had the right to temporarily suspend the provision of such supplies.⁵⁵⁰

Also in the context of the NIAC in Darfur, the GoS signed two Joint Communiqués in 2004 and 2007 with the UN on the provision of humanitarian assistance. The first one, establishing ‘a “moratorium on restrictions” for all humanitarian work in Darfur’, to be monitored by a special ‘high level Joint Implementation Mechanism (JIM)’, was repeatedly extended until the signature of the second one.⁵⁵¹ In the 2007 Joint Communiqué, both Parties ‘re-affirm[ed] their commitment to work in the spirit of transparency and accountability, to respect basic humanitarian principles of impartiality, humanity and independence of humanitarian actors, to respect freedom of access to all the population irrespective of their locations and to provide assistance based on assessed needs.’⁵⁵² The UN ‘agreed on the principle of strengthening the capacity of national NGOs’,⁵⁵³ and both Parties ‘call[ed] upon the staff of humanitarian organizations to do their utmost to respect the national sovereignty, applicable laws and customs and traditions in the areas where they [we]re operating’.⁵⁵⁴

⁵⁴⁹ *Agreement on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affected Civilian Populations*, Geneva, December 15, 1999, pars. 1-6. Available at <http://reliefweb.int/node/57372> (accessed July 27, 2011). Emphasis added.

⁵⁵⁰ *Ibid.*, par. 6.

⁵⁵¹ *Joint Communiqué between the Government of Sudan and the United Nations on the occasion of the visit of UN SG to Sudan*, 29 Jun - 3 Jul 2004, Khartoum, July 03, 2004. Available at <http://reliefweb.int/node/149718> (accessed July 27, 2011).

⁵⁵² *Joint Communiqué between the Government of Sudan and the United Nations on Facilitation of Humanitarian Activities in Darfur*, March 28, 2007, par. 3. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1087655> (accessed July 27, 2011). Again, a high-level committee was established to monitor the implementation of the Joint Communiqué.

⁵⁵³ *Ibid.*, par. 4.

⁵⁵⁴ *Ibid.*, par. 5.

Similarly, the principles of humanitarian action have featured in most if not all of the agreements concluded by belligerents in Darfur, starting from the *Humanitarian Ceasefire Agreement on the Conflict in Darfur* of April 2004, whose annexed *Protocol on Establishing a Humanitarian Assistance in Darfur* listed as principles to be followed humanity, impartiality, neutrality, dignity, transparency, and accountability.⁵⁵⁵ Noteworthy is that the formulation of the principle of neutrality was similar to the Red Cross one, thus including ideological neutrality,⁵⁵⁶ and that the definition of humanity read: ‘Human sufferings will be taken into account wherever they are found; rights of all vulnerable persons will be respected and protected. *The rights to receive assistance and protection, and to provide it, is [sic] fundamental.*’⁵⁵⁷ The following year, the Parties to the *Protocol between the Government of the Sudan (GoS), the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) on the Improvement of the Humanitarian Situation in Darfur* declared themselves ‘[a]ware of the need to adhere to the humanitarian principles embodied in the UN Charter and other relevant international instruments, especially the principles of neutrality and impartiality of humanitarian assistance and aid workers’.⁵⁵⁸

The same Parties in 2005 signed the *Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur*, providing in Paragraph 8 that ‘[h]umanitarian assistance [would] be provided on the basis of humanitarian principles including those enshrined in International Humanitarian Law, UN norms and standards.’⁵⁵⁹ The *Darfur Peace Agreement* signed in May 2006 by the GoS and the SLA/M reaffirmed and comprised as annexes all the previous aforementioned agreements.⁵⁶⁰

Finally, the principle of non-discrimination is contained also in national laws regulating the provision of humanitarian aid, for example the Spanish law on development cooperation of 1998,⁵⁶¹ and the Swiss 2001 *Ordonnance sur l’aide en cas de catastrophe à l’étranger*.⁵⁶²

⁵⁵⁵ *Humanitarian Ceasefire Agreement on the Conflict in Darfur*, N’djamena, April 08, 2004. The Agreement was signed by the Government of Sudan, the Sudan Liberation Movement/Army (SLA/M), and the Sudanese Justice and Equality Movement (SJEM). Available at http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_040408_Humanitarian%20Ceasefire%20Agreement%20on%20the%20Conflict%20in%20Darfur.pdf (accessed July 27, 2011).

⁵⁵⁶ See art. 3 of the Protocol. See also art. 5 of the Protocol, on transparency.

⁵⁵⁷ Art. 1 of the Protocol. Emphasis added.

⁵⁵⁸ *Protocol between the GoS, the SLM/A and the JEM* (2004), supra fn. 517, preamble. Emphasis added.

⁵⁵⁹ *Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur*, Abuja, July 5, 2005.

⁵⁶⁰ *Darfur Peace Agreement* (2006), supra fn. 518, art. 22, par. 214(e). See also art. 24, par. 226(b-d); art. 25, pars. 257-261 (on the establishment of the Joint Humanitarian Facilitation and Monitoring Unit); art. 26, par. 262 and ff.

⁵⁶¹ The term ‘ayuda humanitaria’ identifies ‘el envío urgente, con carácter no discriminado, del material de socorro necesario, incluida la ayuda alimentaria de emergencia, para proteger vidas humanas y aliviar la situación de las poblaciones víctimas de catástrofe natural o causadas por el hombre o que padecen una situación de conflicto bélico.’ Spain, *Ley 23/1998, de 7 de julio, de Cooperación Internacional para el Desarrollo*, art. 12.

3.2.2.5. *Safety and Security of Humanitarian Personnel*

Corresponding to regulation of humanitarian access and relief action, States and Parties to armed conflicts have agreed on commitments on the safety and security of personnel implementing these actions. In the Kampala Convention, State Parties undertake to ‘respect, protect and not attack or otherwise harm humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons’.⁵⁶³ State Parties to the ICC Statute indirectly assume similar commitments, through the criminalisation as war crimes applicable both in IAC and NIAC of ‘[i]ntentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law’ and, as already mentioned, ‘[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict’.⁵⁶⁴

Among peace agreements, the 1999 *Lomé Peace Agreement* committed the Parties to guarantee the safety and movement of humanitarian personnel and the security of their properties;⁵⁶⁵ the 2006 *Darfur Peace Agreement* committed the Government of Sudan and the SLA/M to ‘refrain from any act that may jeopardize the humanitarian operations in Darfur and ... create appropriate security conditions for the unimpeded flow of humanitarian assistance and goods, guarantee security in the camps hosting IDPs and the creation of conducive atmosphere for their voluntary return and refugees to their areas of origin’;⁵⁶⁶ and the Doha Document for Peace in Darfur commits the Parties to ensure ‘[u]nimpeded access of humanitarian assistance to the population in need and the protection of humanitarian workers and their operations in areas under their control’, and prohibits ‘[a]cts of intimidation, hostility, violence or attacks against ... members of local or international humanitarian agencies including UN agencies, international organisations and non-

⁵⁶² Switzerland, *Ordonnance sur l’aide en cas de catastrophe à l’étranger (OACata)*, October 24, 2001, art. 4: ‘L’aide en cas de catastrophe est dispensée de manière neutre, impartiale et exempte de considérations d’ordre politique.’ The act defines ‘catastrophe’ as ‘un événement naturel ou un événement causé par l’homme dont la communauté qui en est victime ne peut pas maîtriser les effets directs en ne comptant que sur ses propres forces’. Ibid., art. 2(a). A 1976 federal statute defines the aim of humanitarian assistance as ‘contribuer, par des mesures de prévention ou de secours, à la sauvegarde de la vie humaine lorsqu’elle est menacée ainsi qu’au soulagement des souffrances; elle est notamment destinée aux populations victimes d’une catastrophe naturelle ou d’un conflit armé.’ Switzerland, *Loi fédérale sur la coopération au développement et l’aide humanitaire internationales*, 1976, art. 7.

⁵⁶³ Art. 5(10) Kampala Convention.

⁵⁶⁴ Art. 8(2)(b)(xxiv) and 8(2)(e)(ii), and 8(2)(b)(iii) and 8(2)(e)(iii) ICCSt. On this, see also Section 6.1.1.2.6.

⁵⁶⁵ S/1999/777, 12 July 1999, Annex, art. XXVII.

⁵⁶⁶ *Darfur Peace Agreement* (2006), supra fn. 518, art. 22, par. 214(e). See also art. 24, par. 226(b-d); art. 25, pars. 257-261 (on the establishment of the Joint Humanitarian Facilitation and Monitoring Unit); art. 26, par. 262 and ff.

governmental organisations, their personnel, installations or equipment, and members of the media;’ and of ‘[r]estrictions on the safe, free and unimpeded movement of humanitarian agencies’.⁵⁶⁷

In the course of the conflict on Rwanda, UN humanitarian organisations formulated principles to guide humanitarian operations in the country, which were then agreed to by both the Rwandan government and the RPF, and which included a commitment to the security of relief workers, beneficiaries and relief supplies, as well as provision of aid based on need, without discrimination on grounds of race, ethnic group, religion or political affiliation.⁵⁶⁸ Finally, a commitment by Afghan authorities to ‘take appropriate and immediate action to ensure the security, safety and protection of UN staff, premises and vehicles’ appeared in the 1998 MoU between the Taliban and the UN.⁵⁶⁹

3.2.2.6. *The Military and Humanitarian Assistance*

A final area covered by State practice, confirming the views adopted by the UN, in particular the UNGA, is the role of the military in humanitarian assistance. The GHD Principles commit donors to ‘[a]ffirm the primary position of civilian organisations in implementing humanitarian action, particularly in areas affected by armed conflict’, and ensure that if ‘military capacity and assets are used to support the implementation of humanitarian action, ... such use is in conformity with international humanitarian law and humanitarian principles, and recognises the leading role of humanitarian organisations.’⁵⁷⁰

Similarly, according to the *European Consensus on Humanitarian Aid*, ‘[t]he use of civil protection resources and military assets in response to humanitarian situations must be in line with the Guidelines on the Use of Military and Civil Defence Assets in complex emergencies ... in particular to safeguard compliance with the humanitarian principles of neutrality, humanity, impartiality and independence’, and more specifically ‘[i]n order to avoid a blurring of lines between military operations and humanitarian aid, it is essential that military assets and capabilities are used only in very limited circumstances in support of

⁵⁶⁷ *DDPD* (2011), supra fn. 519, art. 63, pars. 341(ii) and 340(v) and (vii).

⁵⁶⁸ See S/1994/565, 13 May 1994, pars. 8-9.

⁵⁶⁹ *Memorandum of Understanding* (1998), supra fn. 537, art. 9.

⁵⁷⁰ *Principles and Good Practice of Humanitarian Donorship* (2003), supra fn. 534, par. 19. Furthermore, adherents to the principles should ‘[s]upport the implementation of the 1994 Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief and the 2003 Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies.’ *Ibid.*, par. 20. See Section 4.1.2.4.

humanitarian relief operations as a “last resort”,’ and ‘a humanitarian operation making use of military assets must retain its civilian nature and character.’⁵⁷¹

3.2.2.7. Conclusion

All the aforementioned instances of State practice and *opinio juris* outside the UN framework show that States, as well as non-State Parties to armed conflicts, have confirmed through their commitments the boundaries of the concept of humanitarian assistance and the validity of the IHL framework offered by treaties in this field, and have contributed to broadening protection in NIAC through demands and calls reflecting rules analogous to those formulated for IAC in IHL treaties, in particular as far as relief personnel is concerned. While Parties have acknowledged their duties in relation to humanitarian assistance to civilians in conflict, they have also confirmed their rights, in terms of criteria that relief actions shall respect to be legitimate and of control over these actions and personnel implementing them. The responsibilities of these personnel have emerged, not only in agreements between Parties to the conflict and the UN, but also, for example, in the Kampala Convention, which reflects the relevant rules of IHL but includes also a duty for humanitarian actors themselves to respect the principles of humanitarian action. Finally, respect for IHL and the principles may be further stimulated through criteria imposed by States as donors on NGOs and other organisations receiving funding, especially in the framework of the GHD (even if it remains non-binding), so that even local relief societies, for instance, might be required to respect the principles of humanitarian action.

3.3. Conclusion: Restatement of the IHL Framework and Broader Protection in Non-International Armed Conflict

This overview of the relevance of humanitarian action in the major humanitarian crises since the 1990s highlights the attention given by the UNSC and other UN bodies to the provision of humanitarian assistance to civilians in armed conflict, both in thematic and in country-specific resolutions and statements, as well as the commitments in this field undertaken by States and other Parties to armed conflicts. Already during the Cold War, increasing attention was given by States and Parties to armed conflicts to humanitarian assistance

⁵⁷¹ Council of the EU (2008), *supra* fn. 424, 6-7, pars 57, 61, and 63. See Section 4.1.2.4.

to civilians in conflict, its limits and the need for consent, and this was reflected also in the examination of the issue by the ICJ.

Throughout the 1990s and the first decade of 21st century, humanitarian assistance and relief workers have gained increased importance in the framework of UN practice, with UN bodies repeatedly calling upon Parties to ensure safe access for humanitarian assistance and workers, guarantee the safety and security of humanitarian personnel (with their equipment) and their freedom of movement, and facilitate the provision of humanitarian relief. Being adopted in the context of both IACs and NIACs, and sometimes referring to applicable IHL, these calls have arguably contributed to a growing convergence of the legal regimes applicable to the different kinds of conflicts, and thus a significant development of the law regulating NIACs, at least in terms of rights of relief workers. Furthermore, impediments to the delivery of humanitarian assistance and violence against humanitarian workers (as civilians) have been condemned as violations of IHL, and this trend has been reflected in the adoption of treaties in the realm of ICL.

At the same time, some of the criteria and limits clearly established in IHL treaties, even if not explicitly recalled in every instance, seem to emerge: for example, humanitarian workers have been called to respect the national laws of the country where they are operating (thus implicitly excluding an endorsement of *sans-frontiérisme*), their protection and rights have been sometimes connected and justified on the basis of the principles of humanitarian assistance, and even if humanitarian assistance has never been clearly defined, its character as essential goods and services for the survival of the civilian population emerges from non-exhaustive formulations of relief goods in resolutions, as well as from humanitarian exemptions to sanction regimes. It thus seems that the UNSC and UNGA have restated the legal framework applicable to IACs, and possibly extended the applicability of some parts of it to NIACs. While neither the need for consent for the access of humanitarian assistance and workers nor the possibility for the Parties concerned to impose limits and controls have been usually specified, no explicit UN-sanctioned *droit d'ingérence* for States has emerged (outside the hypothesis of action authorised by the UNSC under Chapter VII).

State and non-State parties to specific armed conflicts, as well as States in treaties, military manuals, and commitments as donors, have similarly restated the framework provided by treaty-law and reflected a parallel evolution to that witnessed within the UN. In other words, there has been an increased acknowledgement of the centrality of humanitarian assistance in conflict, in a few instances even as a *right*

of victims, and reference in NIACs to rules analogous to those applicable in IACs. Still, the limits of humanitarian assistance and actors, as well as the right of control exercisable by the Parties, have been confirmed, with a usual reference to the principles of humanity, impartiality and neutrality.

Finally, even if violations of the legal framework have taken place in practice, as has been detailed for example in reports by commissions of inquiry and fact-finding missions, States have generally reacted, in particular through UN organs, by calling on the Parties to respect the law, with Israel being a key example; condemning these conducts and qualifying them as violations of international law, as in the case of attacks against humanitarian personnel and the obstruction of the provision of humanitarian assistance; and sometimes even adopting additional measures to stimulate respect for the law, such as the imposition of sanctions, either as general response to the obstacles posed to humanitarian action (e.g. Kosovo, Libya), or as specific targeted measures against individuals responsible for hampering such action (e.g. Somalia, DRC). When Parties have tried to justify their conduct, as in the case of Israel, they have done it by invoking IHL treaty rules as well.

The next two Chapters will complement the legal framework as it has emerged from the study of IHL treaties and State practice within the UN framework and outside it, mainly at the level of commitments, by focusing on two issues that have appeared in practice as presenting particular challenges to this framework. Chapter 4 will be devoted to the topic of the role of armed actors in the provision of humanitarian assistance to civilians in armed conflict, in order to identify what this role has been and may be in accordance with IHL, and how humanitarian personnel and the military have interacted and should interact, on the basis of the possible practical and legal consequences that might follow from different kinds of relationships.

Chapter 5 will focus on the topic of protection of civilians, which, as illustrated in Section 2.1.5.2., is a second component of humanitarian action, explicitly regulated by IHL treaties and to which the principles of humanitarian action apply. As anticipated in Section 1.2.3., Relief personnel have increasingly focused on protection since the beginning of the 21st century, as a necessary counterpart of provision of assistance, but their role in this field is not clearly defined. In particular, the possible impact of protection activities on the provision of humanitarian assistance by one and the same actor needs to be clarified. To do this, the Chapter

will trace the evolution of protection since Cold War, when the focus was on bearing witness, and then throughout the 1990s, with the emphasis on new humanitarianism and human rights approaches.

4. Humanitarian Assistance and Military Actors

An area of humanitarian action that since the end of the 1990s has gained growing international attention from practitioners and the academic community has been the involvement in this field of armed personnel, and the increased interaction between them and humanitarian actors in many theatres of operations. At the beginning of the 21st century, for example, the armed conflicts in Afghanistan and Iraq marked the emergence of a controversial trend with the implementation of counterinsurgency strategies—the idea that activities aiming to win the ‘hearts and minds’ of the civilian population are a crucial component of the military effort, together with combat tasks. The involvement of belligerent armed forces in activities generally performed by civilian actors has led to criticisms due to the risks it may generate for civilian humanitarian actors, also in terms of perception by the Parties to the conflict, and for the beneficiaries of assistance.

Similar concerns have appeared in the fields of deployment of UN peacekeeping missions (especially integrated ones), which have often operated in unstable situations and have been tasked with robust mandates, close to peace enforcement. In this sense, while the relationships between humanitarians and peacekeepers are usually different from those between humanitarians and belligerents, given the impartial stance of peacekeepers and their non-involvement in the conflict, in certain cases this difference seems difficult to uphold.

Both in relation to national (and regional organisations’) military strategies and to the UN doctrine on integrated missions, measures have been adopted, as will be seen, to take into account some of the complaints expressed by humanitarian actors. Nonetheless, this Chapter will examine problems that emerged in State practice to identify the critical issues that still remain to be solved and require a thorough analysis not only regarding their implications in practice, but also from an IHL perspective, so that well-informed decisions can be taken in each case. In particular, the IHL framework regulating the possible role of the armed forces of belligerents, military forces not engaged in hostilities, and peacekeepers in the provision of relief needs to be clarified, including in the field of the provision of armed escorts for relief personnel and the relationships with these personnel more in general. Similarly, this research will study the limits to be respected by relief personnel in their relationships with belligerents and other military forces, in order not to

exceed the terms of their missions and/or not to become direct participant in hostilities, and, if one of these two hypotheses materialises, its possible legal and practical consequences.

Finally, the increasing involvement of private military and security companies (PMSCs) in conflict scenarios has started posing new challenges to humanitarian action and actors, not only in terms of the possible use of PMSCs' services by humanitarians themselves, but also regarding the potential role of PMSCs in the provision of humanitarian assistance as competitors to humanitarian actors.

4.1. The Armed Forces of Belligerents and Relief Workers

4.1.1. Civil-Military Relations in the 1990s

While the military engaged in the provision of relief and development assistance to civilians as part of their military campaigns in a few occasions at the beginning of the 20th century and then during the Cold War,¹ it was in the 1990s that the expansion in the number and role of civilians (and especially non-governmental) actors in the field of humanitarian assistance led to debates on the relationships between military and humanitarian personnel when they share the same theatre of operations.

NGOs were presented with the challenge of operating alongside armed forces in 1991, when the U.S., France, and the UK undertook an operation to enforce a no-fly zone in the northern part of Iraq and provide humanitarian relief to the Iraqi Kurds crammed at the border with Turkey—Operation Provide Comfort. The operation had its headquarters in Turkey, on the basis of Turkey's consent, but it also entered the territory of Iraq and operated in Northern Iraq. Iraq contested resolution 688 (1991), and thus also the operation, as a violation of the principle of non-intervention in the internal affairs of a State, while the intervening States based their action on the resolution, interpreting “humanitarian organizations” [to which Iraq had been required to grant immediate access] to include military forces with the specific and limited mission of humanitarian assistance.²

The operation implied a role for the military in the provision of assistance, posing the issue of the division of labour and the relationship between them and civilian relief workers. However, this relationship

¹ For example, referring to the US operations in the Philippines (1898–1902), Vietnam (1967–75) and El Salvador (1980–92), and to the French strategy in Algeria (1954–62), see Sultan Barakat, Seán Deely and Steven A. Zyck, “‘A Tradition of Forgetting’: Stabilisation and Humanitarian Action in Historical Perspective,” *Disasters* 34, S3 (2010): S297–S319.

² Michael E. Harrington, “Operation Provide Comfort: A Perspective in International Law,” *Connecticut Journal of International Law* 8, no. 2 (Spring 1993), 637–638 and 643.

was uncontroversial thanks to a series of circumstances: it mainly centred on logistics; UNHCR took control over the camps for displaced persons within Iraq after less than two months; and the operation ended in July 1991.³

On the contrary, humanitarian-military relationships were problematic in other conflicts in the 1990s, especially Somalia and Kosovo. In Somalia, lack of security seemed to hamper humanitarian efforts, so that military intervention to provide security was acknowledged as improving the situation at first. However, the increased militarisation of the environment, due both to the presence of international armed forces and to the need for humanitarian organisations to hire armed guards, led some humanitarian organisations to withdraw, such as MSF-France in September 1993.⁴ Furthermore, once international armed forces became involved in the conflict and expanded their mission to include the political objective of capturing general Aideed, security for humanitarian activities and actors deteriorated, as well as their perception by Somalis due to association with the international forces.⁵ In some cases, such a perception was allegedly justified: CARE Australia was reported helping and hosting U.S. military officers in its compound in Mogadishu right in the hours preceding the deployment of UNITAF, and carrying them around in its marked vehicles.⁶ Nonetheless, this conduct was not publicised at the time and no reaction by Somali forces is known, probably also due to the state of anarchy plaguing the country. In general, armed factions seemed to focus on profiting from relief diversion rather than establishing clear limits for relief workers.⁷

Conversely, the FRY Government reacted to the alleged involvement in intelligence collection by two Australian and one Serb members of CARE Australia by arresting them in March-April 1999, following

³ It was replaced by Operation Restore Comfort II, focused on the maintenance of the no-fly zone to avoid violence against the Kurds. See *Ibid.*, 646. On operation Provide Comfort, see also, for example, Chris Seiple, *The U.S. Military/NGO Relationship in Humanitarian Interventions* (Carlisle Barracks, PA: U.S. Army War College, Center for Strategic Leadership, Peacekeeping Institute, 1996), 21-63.

⁴ See Michaël Neuman, "Somalie. Tout est négociable. Entretien avec Benoît Leduc (ancien chef de mission et responsable de programmes de la section française de MSF en Somalie)," in *Agir à tout prix? Négociations humanitaires: l'expérience de Médecins Sans Frontières*, ed. Claire Magone, Michaël Neuman and Fabrice Weissman (Paris: Éditions La Découverte, 2011), 103; Seiple (1996), *supra* fn. 3, 123-124.

⁵ For example, 'World Vision personnel were attacked by militia forces expressing their displeasure with the US-led enforcement.' Daniel L. Byman, "Uncertain Partners: NGOs and the Military," *Survival* 43, no. 2 (Summer 2001), 104. See also VENRO, "Armed Forces as Humanitarian Aid Workers? Scope and Limits of Co-operation between Aid Organisations and Armed Forces in Humanitarian Aid," VENRO Position Paper, May 2003, 10. Available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5Q4FPB/\\$file/venro-cimic-2003.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5Q4FPB/$file/venro-cimic-2003.pdf?openelement) (accessed February 15, 2011).

⁶ See Sue Neales and Andrew Clennell, "CARE aided US agents in Somalia," *Sydney Morning Herald*, February 9, 2000. Available at <http://www.hartford-hwp.com/archives/27e/428.html> (accessed April 20, 2011). On UNITAF, see below Section 4.2.1.1.

⁷ On diversion see, for example, Alex De Waal, *Famine Crimes: Politics & the Disaster Relief Industry in Africa* (African Rights and The International African Institute in association with Oxford: James Currey; Bloomington & Indianapolis: Indiana University Press, 1997), 169-170 and 183-184; Andrew S. Natsios, "Humanitarian Relief Interventions in Somalia: The Economics of Chaos," *International Peacekeeping* 3, no. 1 (Spring 1996), 74-80.

the NATO intervention in Kosovo, and sentencing them to several years of jail.⁸ Notwithstanding the truth of the charges, which were always denied by the workers and by the Australian Government,⁹ but confirmed in an investigation carried out by an SBS television reportage,¹⁰ the incompatibility of any interference of humanitarian workers in military operations was restated. The special envoy of the Australian Government sent a letter to the Presidents of the FRY and of Serbia underlining the nature of CARE Australia as ‘a non-governmental, non-political, developmental and humanitarian organization’, which being ‘a humanitarian organization, often working in conflict situations, ... *does not and cannot take sides* in military conflicts’ and ‘is concerned only to help people in distress’.¹¹ While Article 71 AP I provides that if they exceed their mission relief personnel might be expelled, in this case they were put on trial:¹² the ICRC Commentary does indeed foresee such a possibility, even if discourages it,¹³ and in any case the possibility of expulsion would not have applied to the two local relief workers.

Humanitarians-belligerents relationships were central in Kosovo also in relation to the direct involvement of NATO and its Member States in the humanitarian effort. NATO played a role not only in guaranteeing humanitarian access, but also in the actual provision of humanitarian assistance. As stated by Krähenbühl, ‘[t]he militarization of humanitarian assistance in the case of Yugoslavia went further than anything experienced in the case of UNPROFOR in Bosnia’, since ‘NATO contingents deploying in Albania and stationed in FYR [Former Yugoslav Republic] Macedonia were establishing camps for refugees, handing them over subsequently to non-governmental organizations, and at times continuing to ensure security around the perimeter’; ‘[m]ilitary personnel became involved in attempts to reunite families and in

⁸ However, they were later pardoned by Milosevic and released in September 1999. See Nigel McCarthy, “Aid Workers, Intelligence Gathering and Media Self-Censorship,” *Australian Studies in Journalism* 9 (2000), 31; and the statement by the representative of Australia in the plenary session of the UNGA, A/54/PV.16, 29 September 1999, 8.

⁹ See, for example, the statement by the representative of Australia in the UNSC, S/PV.4100 (Resumption 1), 9 February 2000, 6.

¹⁰ See McCarthy (2000), *supra* fn. 8, 33-35. According to SBS, ‘CARE Canada had a contract to recruit monitors on behalf of the Organisation for Security and Co-operation in Europe, the OSCE. They were to gather political, social and military intelligence in Kosovo.’ Quoted *Ibid.*, 34. A transcript of the SBS television program can be found at <http://www.nettime.org/Lists-Archives/nettime-l-0002/msg00088.html> (accessed April 19, 2011).

¹¹ S/1999/438, 19 April 1999, Annex. Emphasis added. The envoy conceded that ‘[t]he nature of situation reports relating to this humanitarian activity were detailed and described military impediments to the distribution of humanitarian supplies’, but he clarified that the information ‘was used solely for the purpose of serving an advanced humanitarian mission’ and thus at the most ‘the nature of the situation reports prepared by CARE employees in Yugoslavia could be described as naive and capable of misinterpretation’ (*Ibid.*). Five days earlier, the Australian Government had sent a letter to the UNSG stating that ‘after extensive inquiries both here and overseas we have no evidence whatsoever that either of them engaged in intelligence activities as apparently alleged by the Yugoslav Government’. S/1999/417, 14 April 1999, Annex.

¹² On the possibility that a similar conduct may amount to direct participation in hostilities, see Section 4.1.2.1.

¹³ See ICRC Commentary APs, 836 (par. 2906).

several other forms of relief provision'; and, 'NATO also made some of its vast logistic resources available to humanitarian agencies to transport their own material into the region more quickly.'¹⁴

Such an extensive involvement of national military contingents of NATO Member States in the humanitarian efforts in Albania, Macedonia and then Kosovo was mainly connected to the scale of the refugee crisis and the insufficient means at the disposal of the humanitarian community. UNHCR chose to ask for NATO support because the latter had assets and logistic capabilities that allowed it to quickly respond to the mass exodus of civilians fleeing from Kosovo into neighbouring countries and otherwise the response by humanitarian agencies would have been insufficient.¹⁵ This decision to cooperate with a Party to the conflict (an intervention not authorised by the UNSC) can be defended on the basis of the lack of other viable options at the outbreak of the emergency and of the humanitarian imperative, but undoubtedly represented a 'deviation from the traditional norm that humanitarians be impartial and neutral.'¹⁶

The principles of humanitarian action were further called into question by the attitude of governments of NATO Member States participating in the intervention that, '[e]ager to keep public opinion supportive of the bombing, ... encouraged high-visibility activities by their own military contingents and "their own" national NGOs'.¹⁷ In practice, the principle of impartiality in the provision of aid was violated at the expenses of the Serbs,¹⁸ with the EU accused by UN OCHA in Belgrade and the IFRC of 'providing fuel and provisions to opposition-run municipalities [in Serbia] while applying strict sanctions to the rest of the country.'¹⁹ Similar violations of the criteria for relief actions under IHL would have justified refusal of passage by transit States, or refusal of passage by the Serbs for aid addressed to opposition-run municipalities.²⁰

NATO's involvement in the humanitarian effort was generally acknowledged as critical to respond to the first phase of the humanitarian emergency, but at the same time brought to general attention the

¹⁴ Pierre Krähenbühl, "Conflict in the Balkans: Human Tragedies and the Challenge to Independent Humanitarian Action," *International Review of the Red Cross* 82, no. 837 (March 2000), 19.

¹⁵ See Larry Minear, Ted van Baarda, and Marc Sommers, "NATO and Humanitarian Action in the Kosovo Crisis," Occasional Paper no. 36, Thomas J. Watson Jr. Institute for International Studies, Brown University, Providence, 2000. Available at <http://reliefweb.int/sites/reliefweb.int/files/resources/6619C68702463E01C1256C2200249CF7-natokosovo36.pdf> (accessed April 28, 2012).

¹⁶ Astri Suhrke, Michael Barutciski, Peta Sandison, Rick Garlock, *The Kosovo Refugee Crisis: An Independent Evaluation of UNHCR's Emergency Preparedness and Response* (Geneva: UNHCR Evaluation and Policy Analysis Unit, 2000), EPAU/2000/001, February 2000, par. 519.

¹⁷ Minear, van Baarda, and Sommers (2000), *supra* fn. 15, 34. See also Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford [etc.]: Oxford University Press, 2000), 213-214.

¹⁸ See *Ibid.*, 211.

¹⁹ David Chandler, "The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda," *Human Rights Quarterly* 23, no. 3 (August 2001), 200.

²⁰ See Section 2.1.4.2.1. (arts. 23 GC IV, 71 AP I, 18(2) AP II).

possible role of the military in humanitarian action and the difficulties and risks connected to it, in particular due to the association of humanitarian actors to a Party to the conflict and to armed forces, whose involvement in humanitarian activities is guided by military and political priorities.²¹ In Kosovo, the principles of humanitarian action were kept as a reference point for civil-military relations and departure from them, for example by UNHCR, as mentioned, was considered as a limited exception justified by the circumstances and the need to save lives. However, the risk of such reasoning is that if it was generalised and each humanitarian organisation felt entitled to freely choose to disregard the principles if it thought it to be the best option in a given context, it would be difficult to avoid an impact on the perception of other organisations by the belligerents. Furthermore, if such a position became a claim to a right for humanitarian organisations to carry out relief actions without respecting the principles of impartiality and (military) neutrality, this would be contrary to IHL treaties.²²

To respond to all these dilemmas on the limits of humanitarian actors in conflict and their interaction with belligerents and military actors more in general, the humanitarian community tried to better define these relationships, even though through non-binding instruments. The ICRC was the first organisation to adopt specific guidelines, in 2001. They stated the ICRC's need to adhere to its Fundamental Principles and thus, on the one hand, its openness to dialogue with military policy-makers and decision makers, as well as to contact with the military when operating in the same theatre, and, on the other hand, its wariness to use military and civilian defence assets and its rule not to resort, save in exceptional circumstances, to armed protection for its operations. In any case, 'any efforts by international military missions to create a safe environment for humanitarian activities' were welcomed.²³

The ICRC initiative was followed by the adoption by the Inter-Agency Standing Committee (IASC) in March 2003 of the *Guidelines on the Use of Military and Civil Defence Assets to Support United Nations*

²¹ See Minear, van Baarda, and Sommers (2000), *supra* fn. 15, in particular 57-63. NATO's involvement in the humanitarian sphere continued after the end of the bombing campaign, when it was deployed pursuant to S/RES/1244 (1999) of 10 June 1999, and it has been argued that 'the initial involvement of the NATO-led forces in [humanitarian assistance] tasks, when they were still perceived by some of the parties to the conflict as an invader, may have jeopardised the safety of aid workers.' Roberta Arnold, "The Legal Implications of the Military's 'Humanitarisation,'" *Revue de Droit Militaire et de Droit de la Guerre* 43, no. 3-4 (2004), 42.

²² See Sections 2.1.5.1.1. and 2.1.5.1.2. (arts. 3, 10, 59 GC IV; 69, 70 AP I; 18(2) AP II).

²³ Meinrad Studer, "The ICRC and Civil-Military Relations in Armed Conflict," *International Review of the Red Cross* 83, no. 842 (June 2001), 387-390. Then, see International Movement of the Red Cross and Red Crescent, Council of Delegates, "Resolution 7 and Annex: Relations between the Components of the Movement and Military Bodies, Seoul, 16-18 November 2005," reproduced in *International Review of the Red Cross* 87, no. 860 (December 2005): 792-800.

Humanitarian Activities in Complex Emergencies (MCDA Guidelines), which again centred on the principles of humanitarian action, as will be explained below in Section 4.1.2.4.²⁴

4.1.1.1. *The Use of Armed Guards and Escorts and the Need for Self-Regulation*

A similar need for self-regulation by humanitarians emerged in relation to another controversial trend involving armed actors: the choice by humanitarian organisations in some conflicts in the 1990s to hire armed guards and escorts to protect their premises and humanitarian convoys.

Somalia marked ‘the first time that the International Committee of the Red Cross hired armed guards’,²⁵ a choice it repeated in the FRY.²⁶ More in general, all the agencies on the ground in Somalia challenged the principles of humanitarian action by using armed guards and escorts, arguably fuelling the conflict.²⁷

Afterwards, the issue of armed escorts arose in Liberia and Sierra Leone,²⁸ in both cases involving soldiers from the ECOWAS mission deployed in the countries, ECOMOG.²⁹ In particular, in Liberia, ECOMOG got involved in the conflict and was clearly aligned against Taylor, and this led to increased distrust by armed factions towards the UN (which supported ECOMOG’s intervention and was thus perceived as politically biased) and other relief actors associated with it.³⁰ Possibly also because of this distrust, in 1996 the Liberian National Transitional Government (LNTG) announced that humanitarian NGOs would be escorted. The UNSG Special Representative, on behalf of the humanitarian community, ‘informed LNTG that he welcomed its provision of escorts for humanitarian activities’, but at the same time

²⁴ On early discussion by the IASC on the topic, in 1995, see UN OCHA and IASC, *Civil-Military Guidelines & Reference for Complex Emergencies* (Geneva: UN, 2008), x-xi.

²⁵ Alex De Waal, “African Encounters,” *Index on Censorship* 23, no. 6 (November-December 1994), 19.

²⁶ See Cornelio Sommaruga, “Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations Organization: Statement by Mr. Cornelio Sommaruga, President of the International Committee of the Red Cross at the United Nations General Assembly (New York, 20 November 1992),” *International Review of the Red Cross* 33, no. 292 (January-February 1993), 53.

²⁷ Beside the ICRC, the NGOs SOS, MSF, CISP, Save the Children UK, International Medical Corps and CARE are mentioned as NGOs present in Somalia in 1991, and it is reported that ‘[a]ll [external relief agencies operating in Somalia in 1991] were forced to purchase armed protection from the local militias.’ See Ken Menkhaus, “Stabilisation and Humanitarian Access in a Collapsed State: the Somali Case,” *Disasters* 34, S3 (2010), S323; John G. Sommer, *Hope Restored? Humanitarian Aid in Somalia 1990-1994* (Refugee Policy Group, 1994), 14. See also De Waal (1997), *supra* fn. 7, 169-170.

²⁸ In Sierra Leone, some organisations resorted to armed escorts, provided by either ECOWAS or private companies, while the ICRC reportedly hired a private security company to protect its property only. See, for example, Christopher Spearin, “Humanitarian Non-Governmental Organizations and International Private Security Companies: The ‘Humanitarian’ Challenges of Moulding a Marketplace,” Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper No. 16 (2007), 11-12 and 22. Available at <http://www.dcaf.ch/Publications/Publication-Detail?lng=en&id=32641> (accessed June 5, 2011).

²⁹ ECOMOG was deployed in Liberia from 1990 until 1997 and afterwards was redeployed to Sierra Leone. In Liberia, ECOMOG was supported since 1993 by a UN observer mission, UNOMIL (S/RES/866 (1993), 22 September 1993).

³⁰ See Philippa Atkinson and Nicholas Leader, *The ‘Joint Policy of Operation’ and the ‘Principles and Protocols of Humanitarian Operation’ in Liberia*, HPG Report 3, March 2000 (London: Overseas Development Institute, 2000), 12-14 and 18.

highlighted ‘that care must be taken to ensure respect for the principles and protocols governing the delivery of humanitarian assistance and to allow the humanitarian community freedom of movement in carrying out its work.’³¹

Both in Liberia and Sierra Leone, disagreements and tensions among humanitarian organisations on the use of armed guards and escorts led to the adoption of some self-regulation in the form of (non-binding) rules. In 1995, humanitarian NGOs and UN agencies working in Liberia elaborated a set of guidelines called *Principles and Protocols of Humanitarian Operations* (PPHO) to which they committed, in view of the fact that ‘if all agencies apply the same principles to humanitarian aid and base their operations on them, a much stronger front for negotiating access to populations would be created in the long term’.³² The document listed the five principles of impartiality (‘help[ing] without discrimination such as ethnic origins, nationality, religious beliefs or political opinions’), neutrality (‘[n]ot taking the side of any of the parties to the hostilities nor supporting any aspect of the conflict’), independence (‘act[ing] solely on humanitarian considerations and to be independent of political or military agendas or other non-humanitarian based pressures’), consent (‘consent of parties to the conflict guarantees sustainable action and safety of all those involved’), and targeted assistance (‘[t]o engage in effective and transparent operations which are based on evaluated needs and which must be closely monitored’).³³

To operationalise the aforementioned principles, six points were dealt with in more detail, including armed escorts. In particular, armed personnel should not be carried in humanitarian vehicles and armed escorts, including from ECOMOG, should be used ‘with extreme caution’, taking into account the risks they may create and the threats to humanitarian neutrality.³⁴ Specific criteria to consider when deciding whether

³¹ S/1996/47, 23 January 1996, par. 22.

³² Humanitarian Assistance in Liberia - Principles and Protocols of Humanitarian Operations. Available at http://www.google.co.uk/url?sa=t&rct=j&q=4.10%20humanitarian%20assistance%20in%20liberia%20-%20principles%20and%20protocols%20of%20humanitarian%20operations&source=web&cd=1&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.unicef.org%2Fpathtraining%2FDocuments%2FSession%25204%2520Humanitarian%2520Principles%2FTrainer%2520Resources%2F4.10%2520Humanitarian%2520Assistance%2520in%2520Liberia.doc&ei=HpsKUhyBrLQGIY6B2AM&usg=AFQjCNGNK8b0c9JHFCxJ4OQF6LHh_UgJkA&bvm=bv.50500085,d.ZG4 (accessed June 15, 2013). However, the PPHO had ‘no legal status in Liberian law, international law, or the law of the home countries of the agencies concerned’, opt-in and opt-out mechanisms were not clearly defined, and at first no monitoring and compliance mechanism was established. Atkinson and Leader (2000), *supra* fn. 30, 21-22. In 1996, the Programmes Complaints and Violations Committee (PCVC) was established, but it focused more on violations by the Parties to the conflict than by humanitarian actors themselves. See *Ibid.*, 22 and 39.

³³ Humanitarian Assistance in Liberia - Principles and Protocols of Humanitarian Operations, par. 2.

³⁴ Humanitarian Assistance in Liberia - Principles and Protocols of Humanitarian Operations, par. 3.3. Other points were: the need-based nature of humanitarian action; the independence of humanitarian access negotiations from political and military issues; the need not to make any payment to have access to any area; the need to ensure the safety of the staff and property of the organisations, also in order to avoid fuelling the war economy; and the need for agencies to show solidarity to each other, in the sense that ‘[t]he upholding of an agreed code of behaviour w[ould] strengthen the position of *all* agencies’. *Ibid.*, pars. 3.1.-3.2. and 3.4.-3.6.. Emphasis in the original.

to resort to an armed escort were: approval by the Party controlling the territory where assistance would be delivered; level of humanitarian needs; deterrent effect of the escort; protection by the escort only against ‘unaffiliated bandits and common criminals not against organised armed groups or parties to a conflict.’³⁵

The difficulties faced by humanitarians grew in mid-1996 and were symbolised by the looting in April 1996 of ‘an estimated \$20m worth of humanitarian goods’ in Monrovia, during fighting.³⁶ The ICRC repeatedly affirmed that due to the looting of its equipment, as well as the various operational practices of the relief organisations present in Liberia, ‘conducting a neutral and impartial humanitarian operation [was] becoming ever more difficult and uncertain’, so that there was an urgent need for the establishment of the necessary security conditions for humanitarian activities.³⁷ Humanitarian organisations adopted, in addition to the PPHO, the *Joint Policy of Operations* (JPO), which provided for a narrow focus only on a limited set of lifesaving activities, until the Parties guaranteed the necessary security conditions for resuming other humanitarian activities.³⁸ These organisations thus reached an agreement to make the aid conditional (not on respect for IHRL, but) on the existence of the necessary security conditions, still guaranteeing core lifesaving activities.³⁹

Similarly, in Sierra Leone humanitarian agencies tried to achieve a common approach, also to gain a stronger negotiating position with Parties to the conflict, by agreeing on a *Code of Conduct for Humanitarian Assistance* after the coup in 1997, disseminating it, and revising it in 1998 in order to adapt it to the changed situation in the field.⁴⁰ The Code contained guidelines such as the prohibition to barter relief assistance for access or passage through check-points, the prohibition of carrying armed personnel in humanitarian vehicles, and the obligation to consult with other humanitarian agencies before employing private security

³⁵ Humanitarian Assistance in Liberia - Principles and Protocols of Humanitarian Operations, Appendix 1.

³⁶ Atkinson and Leader (2000), *supra* fn. 30, 15.

³⁷ Jean-Daniel Tauxe, ‘Liberia, Humanitarian Logistics in Question,’ *International Review of the Red Cross* 36, no. 312 (May-June 1996): 352-354. See also ICRC, ‘“Now Back in Liberia, ICRC Calls for Fundamental Reappraisal. ICRC Press Release No. 96/15, 22 April 1996,”’ *International Review of the Red Cross* 36, no. 312 (May-June 1996): 351-352.

According to the ICRC, ‘in Liberia in 1996 ... the competition between the organizations in the field resulted in the prolongation of the conflict, thus gravely endangering the victims.’ Statement by Mrs Junod, ICRC, before the Security Council, S/PV.3875 (Resumption), 24 April 1998, 13.

³⁸ Atkinson and Leader (2000), *supra* fn. 30, 22-24. Later the policy was reviewed in the sense of restricting not the types of allowed activities, but the capital input that could be brought to Liberia to implement these activities. See *Ibid.* Again, compliance mechanisms were almost absent. See *Ibid.*, 31-32.

³⁹ Furthermore, humanitarian actors played a key role in pushing for the adoption by ECOWAS of conditionality within the political process, meaning the possibility for factions to be excluded from the upcoming elections in case they violated IHL. See *Ibid.*, 15-16.

⁴⁰ *Code of Conduct for Humanitarian Assistance in Sierra Leone*. See, for example, S/1998/486, 9 June 1998, par. 50; S/1998/750, 12 August 1998, par. 45; S/1998/1176, 16 December 1998, par. 53.

personnel.⁴¹ However, it was a voluntary code and no specific enforcement and sanctioning mechanism was established.

The 1998 updated version of the Code listed the ‘humanitarian principles’ that should guide humanitarian activities, whose ‘basic elements’ could be found in UNGA resolution 46/182, as well as in treaties including the GC IV, the APs, and the 1989 *Convention on the Rights of the Child*, and which comprised humanity (‘[h]uman suffering should be addressed wherever it is found’; ‘[t]he dignity and rights of all victims must be respected and protected’; ‘[a]ll parties concerned must grant free and unimpeded access for humanitarian assistance activities and the staff of humanitarian organisations’), neutrality (‘[h]umanitarian assistance should be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature’; ‘[h]umanitarian aid is not a partisan or political act and should not be viewed as such’; ‘[i]t has an independent status beyond political or military considerations’) and impartiality (‘[h]umanitarian assistance is provided without discrimination as to ethnic origin, gender, nationality, political opinion, race or religion’).⁴² Cooperation and needs assessment were reaffirmed as operating guidelines, implying *inter alia* the duties not to pay for humanitarian access, to share information with other humanitarian actors, and not to transport armed personnel on humanitarian vehicles.⁴³ Finally, the primary responsibility of Parties to the conflict for the well-being of civilians under their control and for the safety and security of staff involved in humanitarian activities was recalled, as well as the importance that neighbouring States facilitated, to the extent possible, the transit of humanitarian assistance and personnel.⁴⁴

In addition to these conflict-specific guidelines, adopted both to clarify to Parties to the conflict their duties with respect to humanitarian action and to try and find some degree of consistency in the conduct of the various humanitarian actors in the field, guidelines on armed escorts of general application were adopted. First, after Somalia and BiH, the ICRC adopted an internal guidance on the use of armed escorts, reaffirming its conviction that humanitarian and military activities must be kept separated, and ‘rul[ing] out the use of

⁴¹ See UN Department of Humanitarian Affairs, “Sierra Leone Humanitarian Situation Report 24 - 30 Jun 1997,” available at <http://reliefweb.int/node/31351> (accessed June 5, 2011). See also S/1995/975, 21 November 1995, par. 32.

⁴² The principle that humanitarian assistance should be given only to the intended civilians, based on needs, and with special attention for vulnerable groups was subsumed under the heading ‘[b]eneficiaries’, and further principles were ‘[a]ccountability’, ‘[c]apacity-[b]uilding’, and ‘[h]uman [r]ights’, this last one indicating that ‘[p]rotection of basic human rights is a fundamental aspect of humanitarian action’ and ‘[t]he fundamental human right of all persons to live in safety and dignity must be affirmed and protected.’ “Code of Conduct for Humanitarian Assistance in Sierra Leone”, reproduced as Annex I in *United Nations, United Nations Consolidated Inter-Agency Appeal for Sierra Leone: January-December 1999* (New York and Geneva: UN, 1998), 86-87.

⁴³ *Ibid.*, 87.

⁴⁴ *Ibid.*, 87-88.

armed escorts to protect humanitarian convoys or any other humanitarian activity.⁴⁵ On the other hand, in the presence of high levels of banditry and criminality, the ICRC did not rule out the possibility to ensure the safety of its staff and premises by resorting to ‘armed guards at residences and at the workplace’ (as it did in Sierra Leone), but using ‘guards recruited from local, officially recognized security firms’ and only ‘as long as it is accepted by the authorities and the population, and only to protect staff from criminal activity.’⁴⁶

This ICRC initiative was followed by the *Non-Binding Guidelines on When to Use Military or Armed Escorts* adopted by the IASC in September 2001. They state, as a general rule, that ‘humanitarian convoys will not use armed or military escorts’, but this might happen in exceptional circumstances, provided that all of the following criteria are met: local authorities shall be unable or unwilling to provide a secure environment without the use of escorts; the level of humanitarian needs shall demand the delivery of assistance, which is not possible without escorts; armed or military escorts would provide a credible deterrent, without putting at risk beneficiaries and civilians in general; and use of escorts would not have long-term implications for the ability of the humanitarian organization to perform its work safely.⁴⁷ In addition, humanitarians should be able to maintain their separate civilian identity and should be entitled to decide whether to request or accept military or armed escorts on the basis of purely humanitarian criteria.⁴⁸ All these criteria have been confirmed in the 2013 revised edition of the Guidelines, which also includes a flowchart on the use of armed escorts for humanitarian convoys.⁴⁹

From the point of view of IHL, escorts from the armed forces of the host State, even if involved in a NIAC, might be imposed as necessary to implement the obligation to respect and protect relief personnel, explicitly provided in Article 71 AP I for IAC and possibly analogously applicable to NIAC as a customary rule (if not already in the mid-1990s, at least now).⁵⁰ Unless the State or the authorities controlling a certain

⁴⁵ ICRC, “The ICRC and the use of armed guards,” News Release 97/04, January 30, 1997. Available at <http://www.icrc.org/eng/resources/documents/misc/57jncq.htm> (accessed August 20, 2011). Similarly, see ICRC, “Report on the Use of Armed Protection for Humanitarian Assistance: Extract from Working Paper, ICRC and International Federation, Council of delegates, Geneva, 1-2 December 1995,” December 01, 1995. Available at <http://www.icrc.org/eng/resources/documents/misc/57jneg.htm> (accessed August 20, 2011).

⁴⁶ ICRC (1997), *supra* fn. 45.

⁴⁷ Inter-Agency Standing Committee (IASC), *Use of Military or Armed Escorts for Humanitarian Convoys: Discussion Paper and Non-Binding Guidelines*, September 14, 2001, 10. Available at <http://www.unhcr.org/refworld/docid/4289f1b54.html> (accessed January 3, 2010).

⁴⁸ See *Ibid.*, 13.

⁴⁹ See Inter-Agency Standing Committee (IASC), *IASC Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys*, endorsed by the members of the Inter-Agency Standing Committee (IASC), February 27, 2013. Available at <https://docs.unocha.org/sites/dms/Documents/Armed%20Escort%20Guidelines%20-%20Final.pdf> (accessed September 10, 2013).

⁵⁰ The ICRC Commentary to art. 71 AP I explicitly provides that in case a relief action needs to be undertaken in danger zones, and it does not benefit from the red cross emblem, one option is that ‘the instigators of the action, the Protecting Power (or its substitute) responsible for its supervision, and the receiving Party to the conflict’ can decide to attach an armed escort to the convoy. ICRC

territory make passage for relief workers conditional on agreeing to an armed escort, which would thus be a ‘security requirement’, of which relief personnel shall take account pursuant to Article 71 AP I, it is up to humanitarian actors to choose whether to resort to such a tool. In deciding, they should take into account that escorts provided by combatants may be legitimate military targets and humanitarians (but also beneficiaries) might risk being caught in an attack as collateral damage. Even if provided by peacekeepers not involved in the conflict or by private military and security companies (PMSCs), armed escorts may involve risks, as will be analysed in more detail in the Sections focused on peacekeeping and PMSCs (Sections 4.2.2.3. and 4.3. respectively).

4.1.2. The 21st Century: Comprehensive Approaches and Counterinsurgency Strategies

4.1.2.1. The Experiences in Afghanistan and Iraq: The Principle of Distinction and the Concept of Direct Participation in Hostilities

With the interventions in Afghanistan in 2001 and in Iraq in 2003, the challenges for humanitarian organisations deriving from attempts by belligerents to use humanitarian relief and development as part of their strategies to win the conflict came to the foreground. Differently from experiences in the 1990s, the use of humanitarian aid and the cooperation with humanitarian actors in these two conflicts were not a response to the emergency of the situation, but a planned strategy to win support from the civilian population, as part of so-called counterinsurgency (COIN) or stabilisation approaches. Relief actors lamented the risks deriving from the association of humanitarian action with the military strategy of belligerents, urging both belligerents and relief agencies themselves to uphold the principles and maintain the distinction between military and humanitarian actors.

As analysed in Chapter 1, IHL envisages responsibilities for belligerents in terms of satisfying the basic needs of civilians under their control, especially in case of military occupation, as in Iraq. Article 69 AP I requires the Occupying Power to provide for the essential needs of the civilian population of the occupied territory ‘to the fullest extent of the means available to it and without any adverse distinction’.⁵¹ Thus, the principle of non discrimination shall be applied by the armed forces of the Occupying Power when

Commentary APs, 834 (pars. 2887-2888). For a more detailed analysis of the terms ‘respect and protect’, see Section 2.1.5.2. above. On the practice related to an analogous obligation for Parties to NIACs, see Sections 3.2.1.1.4., 3.2.1.2.2. and 3.2.2.5. above.

⁵¹ In the case of Iraq, the UK as a Party to AP I was bound to respect the criterion of non-discrimination, while for the U.S. it would have been applicable only if part of customary IHL regulating IAC.

providing relief. Outside of situations of occupation, no explicit obligation is provided by IHL treaties except for protected persons under GC IV; still, practice has generated questions and controversy on the involvement of belligerents in relief provision, which will be the starting point of the analysis in this Chapter, to clarify applicable IHL. This examination will also allow verifying, for instance, whether IHL provides a legal basis to claims opposing the qualification of relief provided as part of military strategies as ‘humanitarian’, and whether such a qualification might entail legal consequences.

At the beginning of its intervention in Afghanistan, in October 2001, the then U.S. Secretary of State Colin Powell called into question the respect for the specific identity and role of humanitarian organisations by describing U.S. NGOs as ‘a force multiplier’ of the coalition and as ‘an important part of our combat team’.⁵² Subsequently, the Director of the U.S. Agency for International Development (USAID), Andrew Natsios, talked in 2003 at a forum organised by InterAction, ‘the largest alliance of U.S.-based international nongovernmental organizations [] focused on the world’s poor and most vulnerable people’,⁵³ and affirmed that for NGOs receiving funds from USAID, ‘proving results counts, but showing a connection between those results and U.S. policy counts as well.’⁵⁴ In 2009, the then U.S. Special Representative for Afghanistan and Pakistan, Richard Holbrooke, lamented the deficit in U.S. intelligence on Afghanistan and the Taliban and affirmed that ‘the U.S. would “concentrate on that issue, partly through the intelligence structure” and partly through private aid groups that provide humanitarian and other services in Afghanistan’, since ‘[h]e estimated that 90 percent of U.S. knowledge about Afghanistan lie[d] with aid groups.’⁵⁵

This last statement and the previous ones more in general seem to imply that humanitarian actors were not involved in the provision of relief only, rather they supported one of the Parties to the conflict. They thus illustrate a first problematic aspect of the relationships between humanitarian and military actors, namely the exact limit that the former shall respect in order: a) not to exceed their mission as relief personnel under Article 71 AP I, being otherwise liable to have their mission terminated and possibly being prosecuted, as in the case of CARE Australia in the former Yugoslavia; and/or b) not to lose protection from attack as

⁵² Secretary of State Colin Powell, “Remarks to the National Foreign Policy Conference for Leaders of Nongovernmental Organizations.” October 26, 2001. Available at http://avalon.law.yale.edu/sept11/powell_brief31.asp (accessed November 19, 2009). The role of humanitarian assistance in U.S. military strategies in Afghanistan and Iraq and in U.S. military doctrine has been analysed by the author in Alice Gadler, “Armed Forces as Carrying both the Stick and the Carrot? Humanitarian Aid in U.S. Counterinsurgency Operations in Afghanistan and Iraq,” *Göttingen Journal of International Law* 3, no. 1 (2011): 217-250.

⁵³ InterAction website, “About InterAction,” available at <http://www.interaction.org/about-interaction> (accessed April 24, 2011).

⁵⁴ Andrew S. Natsios, “Remarks by Andrew S. Natsios, Administrator, USAID: InterAction Forum, Closing Plenary Session, May 21, 2003.” Available at <http://www.usaid.gov/press/speeches/2003/sp030521.html> (accessed April 24, 2011).

⁵⁵ Robert Burns, “Envoy Laments Weak US Knowledge about Taliban,” *Associated Press*, April 7, 2009, available at <http://www.foxnews.com/wires/2009Apr07/0,4670,USAfghanistan,00.html> (accessed March 21, 2011).

civilians not taking direct part in hostilities.⁵⁶ The importance of such a reflection is further supported, for example, by an analogous statement of October 2009 by the then French Minister of Foreign Affairs, Bernard Kouchner, according to which French diplomacy did not have any official contact with Hamas, the organisation ruling the Gaza Strip, but obtained information from international organisations operating in the Strip, in particular French NGOs.⁵⁷

The transmission of information ‘of a military nature’ is envisaged in the ICRC Commentary to Article 71 AP I as a conduct exceeding the mission of relief personnel and thus legitimising the termination of such mission, the expulsion of the personnel from the country, and even possibly their prosecution.⁵⁸ More serious consequences might follow from a conduct amounting to direct participation in hostilities. The concept of direct participation in hostilities is not defined in IHL treaties, which simply refer to ‘[p]ersons taking no active part in the hostilities’ and persons ‘who take a direct part in hostilities’.⁵⁹ According to the ICRC’s *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*,⁶⁰ which anyway has not been free from criticisms,⁶¹ direct participation in hostilities ‘refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict’ and it has three constitutive elements: ‘(1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.’⁶² In terms of the provision of intelligence, the Guidance argues that the transmission of tactical intelligence to carry out an attack may amount to direct participation in hostilities, in case the act meets the three cumulative

⁵⁶ More in general, on the protection of civilians taking direct part in hostilities in IAC and NIAC, see Knut Dörmann, “Unlawful Combatants,” in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2011). Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012).

⁵⁷ Le Monde, “Le chef du bureau politique du Hamas demande l'intervention de Paris,” October 6, 2008, available at http://www.lemonde.fr/proche-orient/article/2008/10/06/le-chef-du-bureau-politique-du-hamas-demande-l-intervention-de-paris_1103296_3218.html (accessed June 18, 2012).

⁵⁸ See ICRC Commentary APs, 836 (pars. 2901--2906).

⁵⁹ Art. 3(1) GC IV, arts. 51(3) AP I, and art. 13(3) AP II. According to the ICRC Commentary to art. 51(3) AP I, ‘[i]t seems that the word “hostilities” covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon’; direct participation ‘means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces’; finally, ‘[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort’, since ‘[t]he latter is often required from the population as a whole to various degrees.’ According to the ICRC Commentary to art. 13(3) AP II, ‘[t]he term “direct part in hostilities” ... implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.’ ICRC Commentary APs, 618-619 (pars. 1943-1945) and 1453 (par. 4787).

⁶⁰ Niels Melzer (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009). The Guidance ‘is an expression solely of the ICRC’s views’ and ‘does not purport to change the law, but provides an interpretation of the notion of direct participation in hostilities within existing legal parameters.’ Ibid., 6.

⁶¹ For critical analyses of the ICRC Guidance, see, for example, the contributions in *New York University Journal of International Law and Politics* 42, no. 3 (2010); Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis,” *Harvard Law School National Security Journal* 1 (2010): 5-44.

⁶² Melzer (ICRC) (2009), supra fn. 60, 43 and 46.

requirements.⁶³ However, the collection by a civilian of intelligence other than of a tactical nature would not amount to direct participation.⁶⁴ Following this reasoning, a relief worker would become a direct participant in hostilities because of the transmission of intelligence to a belligerent only if:

- his conduct was ‘likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack’: according to experts participating in the meetings leading to the elaboration of the Guidance, the first hypothesis would cover ‘all acts that adversely affect or aim to adversely affect the enemy’s pursuance of its military objective or goal’ and, in case of transmission of tactical information, the decisive factor for qualifying the conduct as direct participation would be ‘the importance of the transmitted information for the direct causation of harm and, thus, for the execution of a concrete military operation’;⁶⁵
- there was ‘a direct causal link’ between his act and ‘the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part’: it means that the act must not be simply part of the ‘general war effort’ (such as the production of weapons or construction of infrastructure) and must not be just a ‘war-sustaining activit[y]’ (like political propaganda), rather a conduct ‘designed to cause – i.e. bring about the materialization of – the required harm’, and causing it through direct causation, meaning bring it about ‘in *one causal step*’ (even if in conjunction with other acts);⁶⁶
- his act was ‘*specifically designed* to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another’: such a criterion would not require the existence of a specific mindset of the individual (relief worker, in this case), but would look at the ‘objective purpose of the act ... expressed in the design of the act or operation’, so that ‘[t]he causation of harm in individual self-defence or defence of others against violence prohibited under IHL’, ‘the perpetration of war crimes or other violations of IHL outside the conduct of hostilities’, or the resort to violence among civilians not ‘specifically designed to support a party to an armed conflict in its military confrontation with another’ would not amount to direct participation; clearly, the existence of this last criterion might prove

⁶³ See Ibid., 35, 55, 66, and 81.

⁶⁴ See Ibid., 35.

⁶⁵ Ibid., 47-48.

⁶⁶ Ibid., 51-55. Emphasis added.

particularly difficult to establish, and the Guidance suggests that ‘the decisive question should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party.’⁶⁷

It is thus not necessary for someone to be willing to contribute with his act to the military effort of a Party: it is just the act itself that should be (perceived as) designed to support one Party by directly causing the required level of harm to another. In any case, such a narrow approach is not unanimously supported, so that it cannot be taken for granted that belligerents in the field will use it as reference to decide whether to attack or not a civilian on the basis of his alleged status as direct participant in hostilities. For example, Schmitt argues that the requirement of direct causation in the sense of the harm being brought about in one causal step is excessive. In his view,

a civilian who gathers information on the movement of particular forces may report that information to an intelligence fusion center that in turn studies it and passes on the resulting analysis to a mission planning cell. The cell, depending on such factors as risk, value, and availability of attack assets, may decide to continue monitoring those forces and to only attack them once they are confirmed present and determined vulnerable. The causal link would be more than a single step, but the information would be no less critical to the ultimate attack. The initial identification of the forces surely represents direct participation.⁶⁸

Moreover, the act would not need to be necessary to the operation causing the harm, but it would be sufficient for it to be ‘an integral part’ of such operation: in this sense, ‘[w]hile an attack typically has a greater chance of success and poses less risk to the attacker as the degree and reliability of intelligence increases, the absence of particular intelligence may not preclude its execution’, and ‘[t]he fact that the additional intelligence is not indispensable does not exclude its collection from the ambit of direct participation.’⁶⁹ Schmitt judges that this kind of conduct should be classified as direct participation but would not be if one applied the ICRC approach. However, according to the author of the Guidance, ‘[c]ontrary to what Schmitt suggests, under the Interpretive Guidance, “gathering tactical intelligence on the battlefield” would clearly amount to direct participation in hostilities—not because that activity alone is likely to harm

⁶⁷ Ibid., 58-64. Emphasis added.

⁶⁸ Schmitt (2010), supra fn. 61, 29-30. In any case, Schmitt agrees on the distinction between tactical intelligence and strategic intelligence: ‘Gathering, analyzing, and disseminating tactical intelligence usually amounts to direct participation because the relationship between the intelligence and the immediate conduct of hostilities is close, whereas strategic intelligence would not be sufficiently related to the hostilities to render related activities direct participation. Operational level activities constitute the grey area. It is essential to emphasize the situational nature of the determination.’ Michael N. Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,” *Chicago Journal of International Law* 5, no. 2 (Winter 2004), 543-544.

⁶⁹ Schmitt (2010), supra fn. 61, 30.

the enemy in “one causal step,” but because it constitutes a preparatory measure integral to the subsequent tactical operation which, in turn, is designed to harm the enemy in “one causal step.”⁷⁰

Existing case-law on direct participation in hostilities, in particular the so-called *Targeted Killings* judgment by the Supreme Court of Israel, takes the view that ‘a civilian is taking part in hostilities when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for the hostilities’: thus, ‘a person who collects intelligence on the army, whether on issues regarding the hostilities ..., or beyond those issues’ would be a direct participant in hostilities.⁷¹ On the contrary, a ‘person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid’ or who ‘distributes propaganda supporting those unlawful combatants’ would be taking only an indirect part in the hostilities.⁷²

In sum, according to all these different views, the possibility that a relief worker by transmitting information to belligerents might perform an act amounting to direct participation in hostilities and thus lose immunity from attack seems to be quite remote but cannot be excluded, especially given that a specific intent on the part of the worker is not necessary.⁷³

From an operational point of view, U.S. and allied armed forces in Afghanistan were also accused by humanitarian actors of blurring the distinction between military and humanitarian efforts by airdropping food parcels together with leaflets making the delivery of humanitarian assistance conditional upon the provision of intelligence information,⁷⁴ and choosing to have coalition forces moving around in civilian clothes and sometimes with concealed weapons, even ‘claim[ing] they [we]re on a “humanitarian mission” to assist NGOs in their work’, thus leading civilians to suspect humanitarian workers of being in reality American soldiers.⁷⁵

⁷⁰ Nils Melzer, “Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities,” *New York University Journal of International Law and Politics* 42, no. 3 (2010), 867.

⁷¹ Supreme Court of Israel sitting as the High Court of Justice, *The Public Committee against Torture in Israel et al v. The Government of Israel et al*, H CJ 769/02, 11 December 2006, pars. 33 and 35.

⁷² Ibid., par. 35. On the concept of unlawful combatant, see Dörmann (2011), see supra fn. 56. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012).

⁷³ See also Shannon Bosch, “Relief Workers: The Hazards of Offering Humanitarian Assistance in the Theatre of War,” *South African Yearbook of International Law* 35 (2010): 56-79.

⁷⁴ See Kenny Gluck, “Coalition Forces Endanger Humanitarian Action in Afghanistan,” May 6, 2004, available at <http://www.msf.org/msf/articles/2004/05/coalition-forces-endanger-humanitarian-action-in-afghanistan.cfm> (accessed March 18, 2011). See also Ewen MacAskill, “Pentagon Forced to Withdraw Leaflet Linking Aid to Information on Taliban,” *The Guardian*, May 6, 2004, available at <http://www.guardian.co.uk/world/2004/may/06/afghanistan.usa> (accessed March 18, 2011).

⁷⁵ See Michelle Kelly and Morten Rostrup, “Identify Yourselves: Coalition Soldiers in Afghanistan Are Endangering Aid Workers,” *The Guardian*, February 1, 2002, available at <http://www.guardian.co.uk/world/2002/feb/01/afghanistan.comment> (accessed March 18, 2011). See also Patricia M. Diskett, Steve Hansch, and Tim Randall, “Civil-Military Relations in Humanitarian Assistance:

Following the example of some special forces operating in Afghanistan, ‘some civil-affairs commanders decided to allow their teams to wear civilian clothes while conducting operations’, and these teams, while ‘not deny[ing] that they were U.S. soldiers ... did attempt to blend into the community to the extent possible’, and ‘also emphasized to Afghans that their mission was to provide assistance.’⁷⁶ Decisions on whether to wear uniforms or distinctive signs varied from region to region, and were guided by ‘[c]oncerns about force protection, particularly given the significant exposure of the small civil-affairs teams’.⁷⁷ It was acknowledged that ‘the decisions planted seeds for confusion among Afghans when USAID, IO, and NGO assistance providers arrived wearing civilian clothes.’⁷⁸ After complaints voiced by UN OCHA on behalf of the humanitarian community in Afghanistan and a letter written by some major InterAction members to U.S. National Security Advisor Condoleezza Rice,⁷⁹ the U.S. military decided to discontinue the practice.⁸⁰ Notwithstanding the policy reasons that may have led to adopt such a conduct (and then stop it), it is important to examine its legality under IHL. As a starting point, it should be clarified that not all members of the armed forces wear, nor do they need to wear, military uniforms, and even combat personnel may be allowed to wear civilian clothing (for example when on holiday).⁸¹ However, in the specific Afghan case, at least in the initial phase of the conflict, the debate referred to full members of the armed forces deployed on the frontline arguably in IAC and not engaged in counter-terrorist operations against Taliban/al Qaeda.⁸²

The central guiding principle in IHL relevant to this situation is distinction. Both in IAC and NIAC, Parties to the conflict have a duty to always distinguish between civilians and combatants or civilians taking direct part in hostilities, refraining from attacking civilians not or no longer taking direct part in hostilities;

Where Next in the Aftermath of 11 September?,” in *Between Force and Mercy: Military Action and Humanitarian Aid*, ed. Dennis Dijkzeul (Berlin: Berliner Wissenschafts-Verlag, 2004), 321. Nicolas de Torrente, “The War on Terror’s Challenge to Humanitarian Action,” *Humanitarian Exchange* no. 22 (November 2002), 44. Against these criticisms, see for example Joseph J. Collins and Michael J. McNerney, “Security and Humanitarian Assistance: The US Experience in Afghanistan,” in *Between Force and Mercy: Military Action and Humanitarian Aid*, ed. Dennis Dijkzeul (Berlin: Berliner Wissenschafts-Verlag, 2004): 187-200.

⁷⁶ Olga Oliker et al., *Aid During Conflict: Interaction between Military and Civilian Assistance Providers in Afghanistan, September 2001–June 2002* (Santa Monica [etc.]: RAND Corporation, 2004), 48-49.

⁷⁷ *Ibid.*, 49. See also W. Hays Parks, “Special Forces’ Wear of Non-Standard Uniforms,” in *Issues in International Law and Military Operations*, ed. Richard B. Jaques (Newport, Rhode Island: Naval War College, 2006), 71.

⁷⁸ Oliker et al. (2004), *supra* fn. 76, 49.

⁷⁹ See *Ibid.*, 92-93; InterAction, “Humanitarian Leaders Ask White House to Review Policy Allowing American Soldiers to Conduct Humanitarian Relief Programs in Civilian Clothes,” April 2, 2002, available at <http://reliefweb.int/node/98572> (accessed June 18, 2012).

⁸⁰ See Oliker et al. (2004), *supra* fn. 76, 93. See also James Brooke, “Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right,” *The New York Times*, September 12, 2002, available at <http://www.nytimes.com/2002/09/12/us/vigilance-memory-kandahar-pentagon-tells-troops-afghanistan-shape-up-dress-right.html?pagewanted=all&src=pm> (accessed June 18, 2012); Parks (2006), *supra* fn. 77, 73.

⁸¹ See Toni Pfanner, “Military Uniforms and the Law of War,” *International Review of the Red Cross* 86, no. 853 (March 2004), 101.

⁸² See W. Hays Parks, “Special forces’ Wear of Non-Standard Uniforms,” *Chicago Journal of International Law* 4, no. 3 (Fall 2003), 503 (fn. 19).

they shall also distinguish between civilian and military objectives, and attack only military targets.⁸³ In NIAC, the concept of direct participation in hostilities is central to respect for the principle of distinction. In IAC, under IHL treaty law, combatants are required to distinguish themselves from civilians.⁸⁴ IHL treaties do not explicitly require combatants to wear uniforms,⁸⁵ but to be entitled to prisoner of war (POW) status in IAC, the principle of distinction needs to be respected. GC III does not prescribe that members of armed forces of Parties to the conflict (and members of militias or volunteer corps forming part of such armed forces) distinguish themselves from civilians to be entitled to POW status, while members of other militias and other volunteer corps, including resistance movements, belonging to a Party to the conflict need to fulfil a series of conditions, including ‘having a fixed distinctive sign recognizable at a distance’ and ‘carrying arms openly’.⁸⁶ It has been noted that these conditions were not spelt out for regular armed forces because ‘the drafters of the 1949 Geneva Conventions[] considered that regular armed forces implicitly have all those characteristics, thereby also meeting the criteria pertaining to identification’.⁸⁷

AP I thus provides in general that ‘combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack’, and if they cannot distinguish themselves, in order to retain their POW status (and to avoid the charge of perfidy, as will be explained below), they shall carry their arms openly ‘during each military engagement, and ... during such time as [they are] visible to the adversary while [they are] engaged in a military

⁸³ On the principle of distinction, see St. Petersburg Declaration 1868; art. 25 Hague Regulations (Section 1.1., fn.18); Part II GC IV, in particular arts. 14-23; arts. 48 and 51-60 AP I. Art. 13(2) AP II enshrines the principle of protection of civilians, which implies respect for the principle of distinction. See also, for example, UNGA res. 2444(XXIII), 19 December 1968, par. 1(c) (‘principles for observance by all governmental and other authorities responsible for action in armed conflicts: ... (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;’) On the customary origin and nature of the principle, both in IAC and NIAC, see, for example, ICRC Commentary APs, 598-599 and 1449-1459 (pars. 1863-1871 and 4772); ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, pars. 110-118; ICTY, Trial Chamber, *Prosecutor v. Milan Martić*, case no. IT-95-11, Decision, 8 March 1996, par. 10; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996 at 66, pars. 78-79. See also the whole Part I of ICRC Study – Rules, and in particular 3-8 and 25-29: rules 1 and 7 (distinction between civilians and combatants, and distinction between civilian and military objectives); Jann K. Kleffner, ‘From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference,’ *Netherlands International Law Review* 54, no. 2 (August 2007): 315-336.

⁸⁴ According to art. 48 AP I, ‘[i]n 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.’ See also, for example, Pfanner (2004), supra fn. 81, 103-104.

⁸⁵ See art. 1 Hague Regulations 1907, art. 4(a) GC III, art. 43 AP I.

⁸⁶ Art. 4(A)(1-2) GC III. The other two conditions are being commanded by a person responsible for his subordinates and conducting their operations in accordance with the laws and customs of war. Similarly, see art. 1 Hague Regulations.

⁸⁷ Pfanner (2004), supra fn. 81, 111 (referring to ICRC Commentary GC III, 63). The author continues: ‘This does not necessarily mean that the individual members do not qualify as prisoners of war if they do not fulfil them. States Parties are expected to take the requisite steps to give effect to these implied elements and specifically ensure that the members of their armed forces distinguish themselves from the civilian population, usually by wearing a military uniform.’ Ibid.

deployment preceding the launching of an attack in which [they are] to participate.’⁸⁸ Absence of compliance with these requirements, thus violation of the principle of distinction, implies the loss of combatant status, so that ‘criminal prosecution becomes possible, even for hostile acts which would not be punishable in other circumstances’,⁸⁹ and the forfeiture of the right to be a POW, but a combatant in this situation shall still ‘be given protections equivalent in all respects to those accorded to prisoners of war’ by GC III and AP I.⁹⁰

Moreover, AP I explicitly prohibits perfidy, meaning the killing, injury or capture of an adversary through ‘[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence’.⁹¹ Also, wearing the uniform of one’s armed forces may play a key role in relation to POW status since, pursuant to Article 46 AP I, ‘any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy’, but ‘[a] member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.’⁹²

Based on these provisions, Parks argues that IHL does not require military personnel to wear a full uniform or a distinctive sign (what he calls ‘non-standard uniform’) at all times, and that ‘[w]earing a partial uniform, or even civilian clothing, is illegal only if it involves perfidy’; and ‘[m]ilitary personnel wearing non-standard uniforms or civilian clothing are entitled to prisoner of war status if captured’, but ‘[t]hose

⁸⁸ Art. 44(3) AP I.

⁸⁹ ICRC Commentary APs, 538 (par. 1719).

⁹⁰ Art. 44(4) AP I. These guarantees include humane treatment and respect for their person and honour, prohibition of torture, questioning in a language they understand, guarantees on their living conditions, limits to the kind of labour they can be requested to perform and working conditions, rights related to their financial resources and to their relations with the exterior, guarantees regarding the possibility of complaining regarding their conditions of captivity and of having representatives, guarantees related to penal and disciplinary sanctions and to judicial proceedings (fair trial guarantees), treatment in case of death (arts. 13-14, 17, 25-121 GC III). Also, pursuant to art. 45(3) AP I, they will be entitled to the guarantees offered by art. 75 AP I.

⁹¹ Art. 37 AP I. Examples of perfidy include ‘the feigning of civilian, non-combatant status’ and ‘of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict’. Ibid. The ICCSt. lists as a war crime both in IAC and NIAC ‘[k]illing or wounding treacherously individuals belonging to the hostile nation or army’. Art. 8(2)(b)(xi) and 8(2)(e)(ix) ICCSt.

⁹² Art. 46(1)-46(2) AP I. Art. 46(3)-46(4) further states:

A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

captured wearing civilian clothing may be at risk of denial of prisoner of war status and trial as spies.’⁹³ Therefore, according to him, ‘civilian clothing, with weapon concealed and no visual indication that the individual is a member of the military... is lawful for intelligence gathering or other clandestine activities’ and leads to a violation of IHL only in case of perfidy, meaning ‘treacherous use of civilian clothing that is the proximate cause of death or injury of others.’⁹⁴ However, he also acknowledges that an analysis of State practice reveals that in IAC ‘military necessity for wearing non-standard uniforms or civilian clothing has been regarded by governments as extremely restricted’, being ‘limited to intelligence collection or Special Forces operations in denied areas’, and that “[f]orce protection” is not a legitimate basis for wearing a non-standard uniform or civilian attire.’⁹⁵

Similarly, Pfanner acknowledges that IHL does not require combatants to wear a uniform; practice has rather tended towards simply requiring a distinctive sign; and ‘[t]he wearing of civilian clothes is only illegal if it involves perfidy’.⁹⁶ However, he underlines that under IHL a combatant shall be distinguishable from the civilian population; ‘State practice and jurisprudence indicate clearly that combatants who do not distinguish themselves from the civilian population while engaged in an attack or in a military operation prior to an attack shall forfeit their rights as prisoners of war’; and while the wearing of a uniform or a distinctive sign is not necessarily the only and indispensable element to decide whether a combatant has respected the principle of distinction, it is a relevant criterion.⁹⁷ In sum, ‘*[t]he failure of a combatant to distinguish himself from the civilian population is certainly a breach of the law of war,*’ and in case it constitutes perfidy it may be punished as a war crime.⁹⁸

In the specific case of Afghanistan, the decision by U.S. military commanders to put an end to the practice of civil affairs and special operation forces moving around in civilian clothes and with their weapons concealed might be interpreted not just as a policy choice, but also as a necessary measure to ensure full

⁹³ Parks (2006), supra ftn. 77, 76.

⁹⁴ Ibid., 79-82.

⁹⁵ Ibid., 90. In this sense, Parks argues that ‘[n]o valid military necessity exists for conventional military forces, whether combat (combat arms, such as infantry, armor or artillery), combat support (*such as Civil Affairs*), or combat service support personnel, to wear non-standard uniforms or civilian attire in international armed conflict.’ Ibid. Emphasis added.

⁹⁶ Pfanner (2004), supra ftn. 81, 104-106. He continues by specifying:

However, combatants who are captured while engaged in espionage, i.e. when gathering information through an act of false pretences or deliberately in a clandestine manner in territory controlled by an adverse party, may be tried as spies. It should be emphasized that here a distinctive sign does not replace the uniform. This applies in particular to members of the armed forces acting in “disguise or under false pretence”, and in particular if instead of their own uniform they wear civilian clothes or the uniform of the enemy. Additional Protocol and numerous military manuals explicitly mention the wearing of uniforms as an essential factor in deciding whether or not a soldier was engaged in spying.

Ibid., 106.

⁹⁷ Ibid., 108 and 118-121.

⁹⁸ Ibid., 121. Emphasis added.

compliance with IHL, especially in the case of civil affairs personnel, since it seems that these soldiers failed to distinguish themselves from the civilian population (even if it was reported that they did not deny being U.S. soldiers), just by reason of force protection. The obligations of military forces in relation to the wearing of uniforms might be different in case they were engaged not in military operations but in law enforcement operations, directed against civilians, aiming to maintain public order, and common especially in situation of occupation.⁹⁹ Still, the U.S. did not qualify itself as Occupying Power in Afghanistan, it did not justify undercover operation by its soldiers there as law enforcement operations, and the rationale behind the wearing civilian clothes seemed to be force protection.

Furthermore, in case of occupation, according to a position paper on humanitarian-military relations adopted in 2010 by the Steering Committee for Humanitarian Response (SCHR),¹⁰⁰ while nothing prohibits an Occupying Power to fulfil its obligations under IHL regarding the satisfaction of the basic needs of the population through its military, still '[t]he phrase "relief actions ... of an exclusively humanitarian and impartial nature" [arts. 18(2) AP II and 70(1) AP I] ... means that the military must not misrepresent itself, or allow itself to be perceived as a civilian humanitarian actor in order to carry out activities related to military operations (for example, intelligence collection)', since it would pervert the intention of the law, and lead to uncertainty as to the respective roles of civilian humanitarian actors and the military.¹⁰¹ Similarly, leaflets making humanitarian assistance conditional upon the provision of intelligence by the civilian population are contrary to the rules in IHL treaties guaranteeing the protection and satisfaction of the basic needs of civilians as long as they do not directly participate in hostilities, and protecting humanitarian assistance as long as it does not interfere in hostilities. Relating humanitarian relief to intelligence would put both humanitarian personnel and beneficiaries at risk of being perceived as direct participants in hostilities and thus of being attacked.

⁹⁹ On undercover operations in occupied territory, see Tristan Ferraro, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory* (Geneva: ICRC, 2012), 129-130. Also, on police operations in situations of occupation, see, for example, Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers," *European Journal of International Law* 16, no. 4 (September 2005), 665-668.

¹⁰⁰ The SCHR is 'an alliance for voluntary action of Care International, Caritas Internationalis, International Committee of the Red Cross, International Federation of the Red Cross and Red Crescent Societies, Lutheran World Federation, Oxfam International, Save the Children, World Council of Churches/ACT, World Vision International', created in 1972. Steering Committee for Humanitarian Response (SCHR), "SCHR Position Paper on Humanitarian-Military Relations," January 2010, available at <http://www.actalliance.org/resources/policies-and-guidelines/ghp-principles-of-partnership/153-SCHRPositionPaperonHumanitarianMilitaryRelationsJanuary2010.pdf> (accessed June 18, 2012), 1. In 2010, the paper was revised for the second time.

¹⁰¹ Ibid., 2. The paper further states: 'Particularly in situations other than occupation, the duty to provide for the population is understood as being about facilitating the work of humanitarian actors (when they are present) to provide assistance rather than doing it directly, i.e. duty here as understood in IHL does not automatically translate into direct provision of assistance.' Ibid., 3. Emphasis omitted.

In the context of NIAC, IHL does not regulate the use of uniforms or distinct signs by the armed forces of the State and/or non-State armed groups, but it has been argued that non-State entities and individuals taking direct part in hostilities are obliged under customary IHL to respect the principle of distinction in their operations, thus abiding by the principles of proportionality, prohibition of indiscriminate attacks and precautions against the effects of attacks against civilians, and these precautions ‘can only be met by fighters visibly distinguishing themselves from the civilian population.’¹⁰² In this sense, the ICTY stated that the prohibition of attacks on civilians, as well as the prohibition of perfidy, would apply also in NIAC,¹⁰³ even if, according to Moir, ‘it could be argued that the ICTY has lost touch with reality somewhat in their assertion.’¹⁰⁴ The ICC Statute lists as a war crime “‘killing or wounding treacherously a combatant adversary’ in NIAC,¹⁰⁵ and the ICRC Study concludes that the prohibition of perfidy applies in NIAC.¹⁰⁶ A couple of instances of practice reveal that humanitarian actors at least partially succeeded in ensuring respect for the principle of distinction in terms of identification of means of transport of belligerents in situations arguably classifiable as NIAC. In Afghanistan in 2009, ISAF and U.S. forces were criticised for employing white vehicles, traditionally used by humanitarian actors, and this led to a decision by international forces under NATO command to stop using white vehicles (but not by U.S. forces outside ISAF);¹⁰⁷ similarly, in Darfur in 2006, the complaints by the UNSG (however not referring to any violation of IHL) succeeded in convincing the Government to clearly distinguish its helicopters from those used by the UN for humanitarian activities.¹⁰⁸

A more general blurring of political/military and humanitarian action was lamented also in Iraq, where the fact that the Occupying Powers were among the main providers of funds to NGOs made the

¹⁰² Pfanner (2004), supra fn. 81, 122.

¹⁰³ See ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić* (1995), supra fn. 83, para. 225

¹⁰⁴ Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), 146 (fn. 63).

¹⁰⁵ See art. 8(2)(b)(xi) and 8(2)(e)(ix) ICCSt.

¹⁰⁶ See ICRC Study – Rules, 221-226 (rule 65). Practice listed in support of this finding includes military manuals, national laws and other instances of State practice, the ICTY case-law, See ICRC Study – Practice I, 1368-1457.

¹⁰⁷ See UN Humanitarian Information Unit – IRIN, “Afghanistan: Aid Agencies Win NATO Concession on Vehicle Markings,” June 1, 2009, available at <http://www.irinnews.org/Report.aspx?ReportId=84634> (accessed March 20, 2011). While reporting that ‘[i]nternational forces under NATO command in Afghanistan w[ould] stop using white vehicles from 1 June in response to calls from NGOs for clearer markings to distinguish between civilian and military vehicles’, it was underlined that this policy ‘w[ould] not apply to thousands of US troops operating beyond the writ of NATO/ISAF and engaged mainly in counter-insurgency and “anti-terrorism” military activities.’

¹⁰⁸ In 2006 the UNSG lamented that ‘in Northern and Western Darfur the recent use by the Government of a white helicopter identical to those operated by AMIS and the United Nations, with actual AMIS markings on at least one occasion, [wa]s placing the lives of aid workers and protection forces at risk’ and he ‘strongly urge[d] the Government to avoid the use of any vehicle or aircraft markings that might blur the line between humanitarian and military operations.’ More than two years later, the UNSG reported that ‘[t]o ensure that UNAMID helicopters, as well as those being used for international humanitarian activities in Darfur, [we]re clearly distinguishable, the Government ha[d] instructed the armed forces and the civil aviation authorities to ensure that Government helicopters [we]re no longer painted white and [we]re distinct from those used by international actors.’ S/2006/148, 9 March 2006, par. 18; S/2008/659, 17 October 2008, par. 23.

preservation of an appearance of independence for the latter particularly difficult.¹⁰⁹ Before the intervention, the U.S. Department of Defence (DoD) established an Office for Reconstruction and Humanitarian Assistance (ORHA) within the Pentagon, instead of relying on USAID as usual practice, highlighting the importance of humanitarian activity as a political and military tool.¹¹⁰

Moreover, two tools developed for the first time in Afghanistan and Iraq by American and coalition forces in the field of relief have stimulated concern from humanitarian agencies and NGOs regarding the blurring of the distinction between military and humanitarian actors—Provincial Reconstruction Teams (PRTs) and the Commander's Emergency Response Program (CERP). The U.S. started establishing PRTs in Afghanistan in 2002, followed by other nations and with NATO's International Security Assistance Force (ISAF) taking control over all the existing ones by 2006.¹¹¹ Since 2005, PRTs were established in Iraq as well. They have been classified as '[p]erhaps the most important of new initiatives' by the U.S. in the field of counterinsurgency, since they 'bring together civilian and military personnel to undertake the insurgency-relevant developmental work that has been essential to success in both Iraq and Afghanistan.'¹¹² The central characteristic of PRTs is that they include both civilian and military components, even if the size of each of them, the ratio between military and civilian members, and the military or civilian leadership can vary.¹¹³

PRTs in Afghanistan have been strongly criticised for contributing to the blurring of the distinction between humanitarian and military actors, since in certain cases they have been involved in the direct provision of assistance, not respecting the traditional principles:¹¹⁴ such assistance, not being provided solely

¹⁰⁹ Antonio Donini, Larry Minear, and Peter Walker, "Between Cooptation and Irrelevance: Humanitarian Action after Iraq," *Journal of Refugee Studies* 17, no. 3 (2004), 261-262.

¹¹⁰ See Sarah Kenyon Lischer, "Military Intervention and the Humanitarian 'Force Multiplier'," *Global Governance* 13 (2007), 105. On this and other aspects of the politicisation of humanitarian aid in Iraq, see Nicolas de Torrente, "Humanitarian Action under Attack: Reflections on the Iraq War," *Harvard Human Rights Journal* 17 (2004), 1.

¹¹¹ ISAF is a multinational force created in accordance with the Bonn Conference in December 2001, whose leadership was assumed by NATO on 11 August 2003. It should be underlined that ISAF operates in Afghanistan under a mandate by the UNSC, differently from Coalition Forces. See, for example, ISAF, *ISAF PRT Handbook, Edition 4* (2010), 2.

¹¹² U.S. Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide* (January 2009), preface.

¹¹³ In 2005, the PRT Executive Steering Committee stated that PRTs 'will assist The Islamic Republic of Afghanistan to extend its authority, in order to facilitate the development of a stable and secure environment in the identified area of operations, and enable Security Sector Reform (SSR) and reconstruction efforts.' Barnett R. Rubin, Humayun Hamidzada, and Abby Stoddard, "Afghanistan 2005 and Beyond: Prospects for Improved Stability Reference Document," Netherlands Institute of International Relations 'Clingendael' Conflict Research Unit, April 2005, Appendix I. Available at http://www.clingendael.nl/publications/2005/20050400_cru_paper_barnett.pdf (accessed March 18, 2011). On the absence still in 2008 of '[any] clear definition of the PRT mission, [any] concept of operations or doctrine, [any] standard operating procedures,' see U.S. House of Representatives, Committee on Armed Services, Subcommittee on Oversight & Investigations, *Agency Stovepipes vs Strategic Agility: Lessons We Need to Learn from Provincial Reconstruction Teams in Iraq and Afghanistan* (April 2008), 18.

¹¹⁴ See, for example, ISAF (2010), *supra* fn. 111, 196. See also Actionaid et al., *Quick Impact, Quick Collapse: The Dangers of Militarized Aid in Afghanistan*, January 2010, 3. Available at <http://www.oxfam.org/en/policy/quick-impact-quick-collapse> (accessed March 18, 2011). Stephen Cornish and Marit Glad, *Civil-Military Relations: No Room for Humanitarianism in Comprehensive Approaches*, Security Policy Library no. 5-2008 (Flekkefjord: Den Norske Atlanterhavskomite / The Norwegian Atlantic Committee, 2008).

on the basis of the needs of the beneficiaries but rather being guided by military objectives, would be not impartial and thus not humanitarian according to some NGOs.¹¹⁵ Furthermore, it has been claimed that PRTs, at least in certain cases, have engaged in the collection of intelligence while providing relief and thus have generated suspicion among the population that actors providing humanitarian assistance more generally may be allied with a belligerent and collectors of intelligence.¹¹⁶

In Iraq PRTs seem to have been less dangerous than in Afghanistan in terms of blurring the humanitarian-military distinction, partly because Iraqi PRTs were more focused on ‘improv[ing] the capacity of provincial government bodies’ and ‘improving budget execution’.¹¹⁷ In any case, also in Iraq the military has been active in providing humanitarian assistance and contingents have sometimes ‘portray[ed] their presence as essentially humanitarian,’ so that it has been ‘often virtually impossible for Iraqis (and sometimes for humanitarian professionals) to distinguish between the roles and activities of local and international actors, including military forces, political actors and other authorities, for-profit contractors, international NGOs, local NGOs, and U.N. agencies.’¹¹⁸

Following the concerns and vocal criticism of the humanitarian community, the PRT Steering Committee in Afghanistan approved *PRT Policy Note Number 3* in 2007, stating *inter alia* that ‘[h]umanitarian assistance is that which is life saving and addresses urgent and life-threatening humanitarian needs’, that ‘[i]t must not be used for the purpose of political gain, relationship building, or “winning hearts

¹¹⁵ See Gerard Mc Hugh and Lola Gostelow, *Provincial Reconstruction Teams and Humanitarian–Military Relations in Afghanistan* (London: Save the Children UK, 2004), 39–40. See also MSF, “NATO Speech – Rheindalen, Germany, December 8, 2009,” December 9, 2009. Available at http://www.msf.org/msfinternational/invoke.cfm?objectid=4D960DB3-15C5-F00A-25F3109B1C8DFD0A&component=toolkit.article&method=full_html&mode=view (accessed April 15, 2011); Pierre Krähenbühl, “Humanitarian Security: ‘A Matter of Acceptance, Perception, Behaviour...’,” ICRC Official Statement, March 31, 2004, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/5XSGWE> (accessed March 18, 2011). On the allocation of aid to the various regions on the basis of insecurity rather than needs, see also Actionaid et al. (2010), *supra* fn. 114, 3–4. UNAMA, “UN Humanitarian Coordinator Press Conference,” February 17, 2010, available at <http://unama.unmissions.org/Default.aspx?tabid=1761&ctl=Details&mid=1892&ItemID=7810> (accessed March 18, 2011). British and Irish Agencies Afghanistan Group (BAAG) & European Network of NGOs in Afghanistan (ENNA), “Aid and Civil-Military Relations in Afghanistan,” BAAG and ENNA Policy Briefing, October 2008, 11. Available at <http://www.baag.org.uk/publications/category/reports> (accessed March 18, 2011). It is also arguable that aid provided by military actors supporting a party to a conflict can hardly be classified as neutral.

¹¹⁶ NATO itself in 2007 contributed to a perception that ‘[h]umanitarian assistance operations’ helped in gathering information for ‘tracking down anti-government forces’ and contributed to ‘fight[ing] the global war on terror.’ NATO, “ARSIC-N and ANA travel outside boundaries to deliver aid,” December 23, 2007, available at <http://ocha-gwapps1.unog.ch/rw/RWB.NSF/db900SID/PANA-7A7FC7?OpenDocument> (accessed March 18, 2011).

¹¹⁷ Nima Abbazadeh et al., *Provincial Reconstruction Teams: Lessons and Recommendations* (Princeton, NJ: Woodrow Wilson School of Public & International Affairs, Princeton University, January 2008), 12. Also, differently from those in Afghanistan, U.S. PRTs in Iraq were civilian-led, with a member of the Department of State playing the leading role in each of them. U.S. House of Representatives, Committee on Armed Services, Subcommittee on Oversight & Investigations (2008), *supra* fn. 113, 14. The PRT programme in Iraq ended in 2011. See Special Inspector General for Iraq Reconstruction (SIGIR), *Quarterly Report and Semiannual Report to the United States Congress*, January 30, 2012, 37.

¹¹⁸ Greg Hansen, *Taking Sides or Saving Lives: Existential Choices for the Humanitarian Enterprise in Iraq: Humanitarian Agenda 2015: Iraq Country Study*, Feinstein International Center Briefing Paper (June 2007), 43–44. Available at <https://wikis.uit.tufts.edu/confluence/download/attachments/14553635/HA2015+Iraq+Country+Study.pdf?version=1> (accessed March 18, 2011).

and minds””, and that it ‘must be distributed on the basis of need and must uphold the humanitarian principles of humanity, impartiality and neutrality.’¹¹⁹ Moreover, the fourth edition of the *ISAF PRT Handbook* states a duty to apply and respect the traditional core humanitarian principles for all actors involved in the provision of humanitarian assistance, including the military ‘while undertaking to be a partner to humanitarian agencies’, and it differentiates humanitarian assistance, with the principles that characterise it, from the ‘the activities of a military force’, which ‘are not always driven by the same constraints.’¹²⁰ The Handbook, together with *PRT Policy Note Number 3*, has been taken into account in the handbook *Money As A Weapon System Afghanistan* of December 2009 adopted by the U.S. Forces in Afghanistan (USFOR-A).¹²¹

From the point of view of IHL, the central reference point remains the principle of distinction: adopting a broader focus than physical appearance and the use of military uniforms, maintaining a clear language can undoubtedly contribute to respect for this principle. Relief personnel, for their part, when deciding how to relate with belligerents and whether to choose them as a ‘partner’, should consider that collaborating with belligerents might be legitimately interpreted as exceeding their mission and, under treaty law regulating IAC and possibly also under customary law applicable to NIAC, might lead to their possible expulsion or prosecution, if they fall in the hands of the opposing Party. Moreover, specific conducts such as the transmission of tactical intelligence would render relief personnel direct participants in hostilities and possible targets for attacks.

Concern about the involvement of the military in the provision of aid to civilians and respect for the principle of distinction was voiced also in relation to the Commander’s Emergency Response Program (CERP), another innovation introduced by the U.S. in the framework of the interventions in Afghanistan and Iraq, established for the first time in Iraq in 2003. The U.S., as an Occupying Power, fulfilled its obligations under IHL to satisfy the basic needs of the population by using seized funds belonging to the former Iraqi

¹¹⁹ PRT Executive Steering Committee, *Policy Note Number 3: PRT Coordination and Intervention in Humanitarian Assistance* (22 February 2007, updated on 29 January 2009), available at https://www.cimicweb.org/Documents/PRT%20CONFERENCE%202010/Policy_Note_3_Humanitarian_Assistance.pdf (accessed March 18, 2011), par. 4. Emphasis omitted. On the membership and function of the PRT Executive Steering Committee see ISAF, “PRT Executive Steering Committee Meets,” ISAF News Release 2007-124, February 23, 2007, available at <http://www.nato.int/isaf/docu/pressreleases/2007/02-february/pr070223-124.html> (accessed March 19, 2011).

¹²⁰ ISAF (2010), *supra* fn. 111, 185-186.

¹²¹ U.S. Forces, Afghanistan (USFOR-A), *Money As A Weapon System Afghanistan (MAAWS-A)* (December 2009), 60-61.

regime.¹²² When, towards the end of 2003, it was realised that the seized funds had been almost entirely spent, Congress decided to continue the programme with U.S. funds and to start the programme in Afghanistan as well.¹²³ Cumulatively, as of June 2013 the Congress has appropriated for CERP \$3.96 billion in Iraq and \$3.64 billion in Afghanistan, plus \$1.02 billion for the Afghanistan Infrastructure Fund (AIF), created in 2012.¹²⁴ For the Fiscal Year 2014, the DoD requested \$0.1 billion for CERP in Afghanistan and \$0.3 billion for the AIF.¹²⁵

CERP is defined as a programme ‘designed to enable local commanders in Iraq and Afghanistan to respond to urgent *humanitarian relief* and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the indigenous population’.¹²⁶ This programme has been identified as ‘ammunition’,¹²⁷ as a critical instrument ‘provid[ing] local commanders with the funds and flexibility required to bring needed urgent *humanitarian assistance* and reconstruction to areas that have been affected by years of conflict and neglect’ and thus as representing ‘a unique, rapid, high-impact *COIN tool*’.¹²⁸ However, CERP has been again criticised for being used for the distribution of relief on the basis of political and military strategic objectives, rather than purely on the basis of needs, and leading to a blurring of the distinction between military and humanitarian actors and roles.¹²⁹

All these developments prompted vocal reactions at the beginning of the 2000s, first and foremost by strictly humanitarian agencies such as MSF and even the ICRC, which criticised the strategies aiming at co-opting humanitarian action to win the ‘hearts and minds’ of the civilian population.¹³⁰ The bombing of the

¹²² For a detailed description of the origins of CERP, see Mark Martins, “No Small Change of Soldiering: The Commander’s Emergency Response Program in Iraq and Afghanistan,” *The Army Lawyer* (February 2004), 3-6.

¹²³ *Ibid.*, 9-10.

¹²⁴ See Special Inspector General for Iraq Reconstruction (SIGIR), *Quarterly Report to the United States Congress*, April 30, 2012, 16. In Iraq the CERP is no longer available for new obligations. See *Ibid.*, 3. Special Inspector General for Afghanistan Reconstruction (SIGAR), *Quarterly Report to the United States Congress*, July 30, 2013, 82-83.

¹²⁵ U.S. Department of Defense, *Fiscal Year 2014 Budget Request: Overview - Addendum A: Overseas Contingency Operations* (May 2013), 5.

¹²⁶ U.S. Department of Defense, *DoD Financial Management Regulation Volume 12, Chapter 27* (January 2009), 27-3. Emphasis added. ‘[U]rgent’ means ‘any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate action.’ *Ibid.* The primary destination of CERP funds should be ‘small-scale projects that, optimally, can be sustained by the local population or government’, meaning projects of less than \$500,000 each, while special procedures are required for approval of more expensive ones. Areas in which CERP funds can be spent include water and sanitation, food production and distribution, healthcare, education, battle damage/repair, condolence payments, hero payments, and other urgent humanitarian or reconstruction projects. See *Ibid.*, 27-3 – 27-5. For definitions of these categories and a list of potential projects, see *Ibid.*, Annex A (January 2009).

¹²⁷ David H. Petraeus, Lieutenant General, “Learning Counterinsurgency: Observations from Soldiering in Iraq,” *Military Review* (January-February 2006), 4. Emphasis omitted.

¹²⁸ U.S. Department of Defense, *Fiscal Year 2010 Budget Request: Summary Justification* (May 2009), 4-5. Emphasis added.

¹²⁹ See, for example, Actionaid et al. (2010), *supra* fn. 114, 3-4. On the blurring of the distinction between humanitarian and military actors, see, for example, Hansen (2007), *supra* fn. 118, 58.

¹³⁰ See, for example, Angelo Gnaedinger, “Humanitarian Action: ‘Today’s New Security Environment Has Forced Us Back to Basics,’” ICRC Official Statement, February 27, 2004, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5X6E5T>

ICRC in Baghdad in October 2003, following the bombing of the UN headquarters in August of the same year and the killing of an ICRC engineer in Afghanistan in March 2003,¹³¹ seemed to confirm that adherence to the traditional principles no longer guaranteed protection, and that attacks against international humanitarian organisations were rather motivated by their identification with the Western world. Nonetheless, humanitarian organisations attributed it at least partly to ‘a blurring of the lines caused by the close association of some other humanitarian agencies with MNF-I [Multi-National Force – Iraq]’,¹³² and chose to stick to the traditional principles and the strategy of acceptance.¹³³ Similarly, when MSF withdrew from Afghanistan for almost five years after some of its staff were attacked and killed,¹³⁴ it blamed the ‘coalition’s attempts to co-opt humanitarian aid and use it to “win hearts and minds”’ and explicitly called for multi-mandated organizations to involve only in humanitarian relief or in development in a politicised context such as Afghanistan.¹³⁵ Indeed, some NGOs active in humanitarian assistance allegedly created confusion regarding their position with respect to belligerents because they got involved also in development and reconstruction activities, which by supporting the government are more openly political.¹³⁶

Apart from the analysis of the conducts by various actors in Afghanistan and Iraq and their qualification and possible consequences under IHL, it should also be highlighted that these conducts and reactions to them seem to have led to developments in State practice, especially in military doctrines, not only applicable to Afghanistan and Iraq, as already mentioned, but also of general application.¹³⁷ There

(accessed July 12, 2010); Krähenbühl (2004), *supra* fn. 115; Statement by the ICRC Deputy Director of Operations, Mr. Stillhart, before ECOSOC, E/2009/SR.29, 20 July 2009, 2-3; MSF, “MSF Pulls Out of Afghanistan,” MSF Press Release, July 28, 2004, available at <http://www.msf.org/msf/articles/2004/07/msf-pulls-out-of-afghanistan.cfm> (accessed April 25, 2011); MSF (2009), *supra* fn. 115; Michiel Hofman and Sophie Delaunay (MSF), “Afghanistan: A Return to Humanitarian Action,” MSF Report, March 2010, available at http://www.doctorswithoutborders.org/publications/reports/2010/MSF-Return-to-Humanitarian-Action_4311.pdf (accessed April 25, 2011).

¹³¹ See Fiona Terry, “The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action,” *International Review of the Red Cross* 92, no. 880 (December 2010), 3.

¹³² Karl Mattli and Jörg Gasser, “A Neutral, Impartial and Independent Approach: Key to ICRC’s Acceptance in Iraq,” *International Review of the Red Cross* 90, no. 869 (March 2008), 159.

¹³³ The ICRC temporarily adopted a less visible presence in the country and remote-control management of some of its activities, and at the same time reinforced its adherence to the Fundamental Principles and the dissemination of its identity and activities. See *Ibid.*, 159.

¹³⁴ See Médecins sans Frontières (2004), *supra* fn. 130.

¹³⁵ See Hofman and Delaunay (MSF) (2010), *supra* fn. 130, 6.

¹³⁶ The involvement of NGOs also in development activities was also partly due to the fact that, as noted by the UNSG, already in 2005 NGOs ‘[we]re adapting to the post-conflict reconstruction reality’. A/59/744-S/2005/183, 18 March 2005, par. 56. See also Parks (2006), *supra* fn. 77, 73: ‘Social reform was another Civil Affairs/NGO point of tension. Contrary to claims of neutrality and impartiality, many NGOs in Afghanistan moved into advocacy of women’s rights and human rights. This caused friction with US Army Civil Affairs, whose role is to provide humanitarian relief without interference in local customs, however objectionable they may be.’

¹³⁷ Insecurity and sporadic attacks against humanitarian workers continued to restrict humanitarian access to certain parts of Iraq in certain periods (e.g. S/2004/710, 3 September 2004, par. 7; S/2004/959, 8 December 2004, pars. 3 and 49; S/2006/137, 3 March 2006, par. 61; S/2009/102, 20 February 2009, par. 45), but no attacks as striking as those of 2003 targeted humanitarians afterwards. In Afghanistan, on the other hand, insecurity, attacks and violence against humanitarian workers continued and increased from 2008 onwards, restricting humanitarian access (e.g. A/57/850-S/2003/754, 23 July 2003, par. 24; A/62/722-S/2008/159, 6 March 2008,

seems to have been some kind of acknowledgement in U.S. and NATO military doctrine of the inappropriateness, if not the unlawfulness, of certain conducts not strictly prohibited under IHL treaties, as will be illustrated in the next Sections. Furthermore, the situation in Afghanistan and Iraq might have also contributed to the emphasis by UN bodies and States in the first years of the 21st century on the ‘fundamentally civilian character of humanitarian assistance’ and ‘the leading role of humanitarian organizations in implementing humanitarian assistance’,¹³⁸ on the possibility to apply conditionality to the provision of development aid, while ‘humanitarian assistance should be provided wherever there is a need’,¹³⁹ and on the addition in 2003 of the principle of independence.¹⁴⁰

4.1.2.2. *Military Doctrine: the U.S.*

From the point of view of U.S. military doctrine, Afghanistan and Iraq have led to a shift in the importance of soft power in relation to hard power in the strategy to win contemporary wars. Based on the consideration that ‘[i]nsurgency will be a large and growing element of the security challenges faced by the United States in the 21st century’,¹⁴¹ the U.S. concluded that ‘[a]chieving victory will assume new dimensions as [the U.S.] strengthen[s] [its] ability to generate “soft” power.’¹⁴² The U.S. DoD has thus devoted growing attention to activities that have been traditionally considered in the realm of civilian actors, including the provision of humanitarian assistance and development assistance. A 2005 Secretary of Defence’s directive gave comparable priority to combat operations and ‘stability operations’,¹⁴³ the latter meaning ‘various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and *humanitarian relief*.’¹⁴⁴

Stability operations, together with offensive and defensive operations, are a primary component of counterinsurgency campaigns, whose success requires a ‘unity of effort’ among the military and other actors

par. 20; A/63/372-S/2008/617, par. 20; S/2008/695, 18 November 2008, par. 51; A/63/892-S/2009/323, 23 June 2009, par. 20; A/64/364-S/2009/475, 22 September 2009, par. 56; A/64/705-S/2010/127, 10 March 2010, par. 43; A/65/552-S/2010/463, 14 September 2010, par. 37; S/2011/55, 3 February 2011, pars. 48-55).

¹³⁸ See Sections 3.2.1.1.5. and 3.2.2.6.

¹³⁹ S/RES/1401 (2002), 28 March 2002, par. 4. Similarly, see S/RES/1471 (2003), 28 March 2003, par. 4.

¹⁴⁰ See Section 3.2.1.1.3.

¹⁴¹ U.S. Government Interagency Counterinsurgency Initiative (2009), *supra* fn. 112, Preface.

¹⁴² U.S. Headquarters Department of the Army, *Stability Operations*, Field Manual No. 3-07 (FM 3-07) (October 2008), Foreword.

¹⁴³ U.S. Department of Defense, *Directive 3000.05, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations* (28 November 2005), par. 4.1. In this Directive, stability operations were defined as ‘[m]ilitary and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions’ (par. 3.1).

¹⁴⁴ U.S. Department of Defense, *Instruction Number 3000.05, Stability Operations* (16 September 2009), par. 3. Emphasis added.

present in the theatre of operations,¹⁴⁵ as well as the employment by the armed forces of ‘a mix of familiar combat tasks and skills more often associated with nonmilitary agencies’, being ‘nation builders as well as warriors.’¹⁴⁶ In 2006 the U.S. published its first military field manual on counterinsurgency (COIN) after 20 years,¹⁴⁷ centred around the assumption that, given that it is difficult to identify insurgents among the population, it is necessary not only to use hard means of combat, in the sense of military force to defeat the enemy, but also soft means, meaning methods and instruments to gain the trust of the local population, which may then deny support to the insurgents and possibly help identify them.¹⁴⁸

Central to COIN are civil-military operations, meaning ‘[t]he activities of a commander that establish, maintain, influence, or exploit relations between military forces, governmental and nongovernmental civilian organizations and authorities, and the civilian populace in a friendly, neutral, or hostile operational area *in order to facilitate military operations, to consolidate and achieve operational US objectives*’ and that ‘may include performance by military forces of activities and functions normally the responsibility of the local, regional, or national government.’¹⁴⁹ These strategies and military instruments clearly contain a significant potential for encroachment by the military upon the so-called humanitarian space, as it arguably happened in Afghanistan and Iraq, even if recent documents seem to have inserted certain safeguards.

For example, despite its focus on ‘comprehensive approach’,¹⁵⁰ the U.S. 2008 *Stability Operations Field Manual* contains an appendix on ‘Humanitarian Response Principles’,¹⁵¹ which explicitly recognises that ‘[p]roviding humanitarian aid and assistance is primarily the responsibility of specialized civilian,

¹⁴⁵ U.S. Headquarters Department of the Army, *Counterinsurgency*, Field Manual No. 3-24 (FM 3-24), Marine Corps Warfighting Publication No. 3-33.5 (December 2006), 2-1. Unity of effort means ‘[c]oordination and cooperation toward common objectives, even if the participants are not necessarily part of the same command or organization - the product of successful unified action.’ U.S. Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms (DOD Dictionary)*, Joint Publication 1-02 (JP 1-02) (8 November 2010, as amended through 15 December 2012), 310.

¹⁴⁶ U.S. Headquarters Department of the Army (2006), *supra* fn. 145, foreword.

¹⁴⁷ *Ibid.*

¹⁴⁸ See, for example U.S. Joint Chiefs of Staff (2006), *Counterinsurgency Operations*, Joint Publication 3-24 (JP 3-24) (October 2009), X-2. U.S. Headquarters Department of the Army, *supra* fn. 145, 1-1. U.S. military sources define insurgency as ‘[t]he organized use of subversion and violence by a group or movement that seeks to overthrow or force change of a governing authority.’ U.S. Joint Chiefs of Staff (2010, as amended through 15 December 2012), *supra* fn. 145, 142.

¹⁴⁹ U.S. Joint Chiefs of Staff, *Civil-Military Operations*, Joint Publication 3-57 (JP 3-57) (July 2008), GL-6. Emphasis added.

¹⁵⁰ Meaning ‘an approach that integrates the cooperative efforts of the departments and agencies of the United States Government, intergovernmental and nongovernmental organizations, multinational partners, and private sector entities to achieve unity of effort toward a shared goal’. U.S. Headquarters Department of the Army (2008), *supra* fn. 142, 1-4 – 1-5.

¹⁵¹ *Ibid.*, Appendix E. The 2003 version of this manual already acknowledged that ‘[t]he first line of security for most NGOs is adherence to a strict principle of neutrality’ and that ‘[a]ctions which blur the distinction between relief workers and military forces may be perceived as a threat to this principle, resulting in increased risk to civilian aid workers’, but the new version complements the paragraph with a reference to the principles of impartiality and independence and devotes much more space to humanitarian organisations. U.S. Headquarters Department of the Army, *Stability Operations and Support Operations*, Field Manual No. 3-07 (February 2003), A-11. U.S. Headquarters Department of the Army (2008), *supra* fn. 142, A-10.

national, international, governmental, and nongovernmental organizations and agencies’, but that ‘military forces are often called upon to *support* humanitarian response activities either as part of a broader campaign, such as Operation Iraqi Freedom, or a specific humanitarian assistance or disaster relief operation.’¹⁵² UNGA resolution 46/182 is identified in the Appendix as ‘articulat[ing] the principal tenets for providing humanitarian assistance—humanity, neutrality, and impartiality—while promulgating the guiding principles that frame *all humanitarian response activities*’.¹⁵³ Parts of four different documents enunciating humanitarian principles are reproduced or summarised, including the *Guidelines for Relations between U.S. Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments*, adopted in 2007 DoD and InterAction.¹⁵⁴ These guidelines list a series of instructions for the U.S. armed forces, which ‘should be observed *consistent with military force protection, mission accomplishment, and operational requirements*’, such as the recommendation that military personnel wear uniforms or other clothes to distinguish themselves from humanitarian actors when carrying out relief activities, and the recommendation to arrange meetings with NGOs in advance and possibly outside military installations, for the exchange of information. Recommendations are also formulated for humanitarian NGOs, including not to wear military clothes, not to co-locate with the military and not to travel in military vehicles.¹⁵⁵

¹⁵² Ibid., E-1. The actions of the military in this field usually ‘fall under the primary stability task, restore essential services.’ Ibid. Confirming the supporting role of the military in humanitarian assistance, see U.S. Joint Chiefs of Staff, *Stability Operations*, Joint Publication 3-07 (JP 3-07) (September 2011), III-26.

¹⁵³ U.S. Headquarters Department of the Army (2008), *supra* fn. 142, E-1. Emphasis added.

¹⁵⁴ United States Institute of Peace, InterAction & U.S. Department of Defense, *Guidelines for Relations between U.S. Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments*, July 2007, available at <http://www.usip.org/resources/guidelines-relations-between-us-armed-forces-and-nghos-hostile-or-potentially-hostile-envi> (accessed March 19, 2011). The other documents reproduced are the 10 principles listed in the 1994 Red Cross Code of Conduct (see Section 5.2.5.); some of the principles of the Oslo Guidelines (which do not apply to armed conflict situations); and the ‘principles and concepts’ (pars. 17-30) listed in the 2004 IASC Reference paper on Civil-Military Relationship in Complex Emergencies (‘complement[ing] the “Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies” of March 2003’, which are neither reproduced nor mentioned in the Field Manual; on both these documents, see Section 4.1.2.4.). IASC, “Civil-Military Relationship in Complex Emergencies - An IASC Reference Paper,” 28 June 2004, available at http://reliefweb.int/sites/reliefweb.int/files/resources/BF9A102F314266F1C125740F004C00A9-iasc_jun2004.pdf (accessed June 2, 2012).

¹⁵⁵ A limitation of these guidelines is that they do not apply to the relationships of U.S. armed forces with humanitarian NGOs in general, but only with ‘Non-Governmental Organizations [...] belonging to InterAction that are engaged in humanitarian relief efforts in hostile or potentially hostile environments.’ United States Institute of Peace, InterAction & U.S. Department of Defense (2007), *supra* fn. 154, ‘Key Terms’ section. Available at <http://www.usip.org/resources/guidelines-relations-between-us-armed-forces-and-nghos-hostile-or-potentially-hostile-envi> (accessed March 19, 2011). However, it should be noted that in the appendix to the U.S. Stability Operations FM 2008, the whole InterAction-U.S. DoD guidelines are reproduced, except for the definitions of key terms, so that it seems that ‘non-governmental humanitarian organization’ may be interpreted by the U.S. administration to include non-InterAction members. U.S. Headquarters Department of the Army (2008), *supra* fn. 142. Reference to the InterAction-U.S. DoD *Guidelines* as ‘official guidance on dealing specifically with humanitarian NGOs’ is contained also in See, for example U.S. Joint Chiefs of Staff (2009), *supra* fn. 148, IV-3.

Still, some ambiguity regarding the possible instrumental use of these NGOs remains, in particular as an important source of intelligence. In the 2006 Counterinsurgency Field Manual, NGOs are listed among the ‘key counterinsurgency participants’ and thus they arguably fall among those which commanders should ‘seek to persuade and influence ... to contribute to achieving COIN objectives’ in their attempt ‘to achieve unity of effort’.¹⁵⁶ The 2008 Joint Doctrine for Civil-Military Operations clarifies that information obtained from NGOs should be ‘acquired in a collateral fashion, and not part of intelligence collection operations’.¹⁵⁷ However, the reason for this is that NGOs ‘will hesitate or refuse to cooperate if there are any implications that this comes under the heading of “intelligence gathering.”’¹⁵⁸ Recent documents also provide that the relationship of the armed forces with NGOs should be managed primarily by civil affairs personnel, who are explicitly defined as not being intelligence gatherers.¹⁵⁹ The reasoning offered is that, since NGOs may have valuable information that ‘is frequently not available through military channels’, ‘[t]herefore, it is important not to compromise the neutrality of the IGOs [intergovernmental organizations] and NGOs and to avoid *the perception by their workers* that their organizations are part of an intelligence gathering mechanism.’¹⁶⁰

In the end, even if civilian affairs personnel are not intelligence gatherers, they are nonetheless personnel who collect information that ‘can supplement the intelligence effort’ and ‘general information provided by personnel from IGOs and NGOs may corroborate intelligence gained from other sources.’¹⁶¹ Furthermore, in counterinsurgency operations all counterinsurgents are potential collectors.¹⁶² NGOs might thus risk exceeding their mission or being perceived as such, and possibly even becoming direct participants in hostilities, by providing information or intelligence to a belligerent.

¹⁵⁶ U.S. Headquarters Department of the Army (2006), *supra* fn. 145, 2-4 and 2-3.

¹⁵⁷ U.S. Joint Chiefs of Staff (2008), *supra* fn. 149, IV-16.

¹⁵⁸ *Ibid.*, IV-16. The previous version of the joint doctrine merely stated: ‘[b]ecause of NGOs’, international organizations’, and other organizations’ and agencies’ sensitivities regarding negative perceptions generated by working with military organizations, the term “information” should be used in place of “intelligence.”’ U.S. Joint Chiefs of Staff, *Joint Doctrine for Civil-Military Operations*, Joint Publication 3-57 (February 2001), III-23.

¹⁵⁹ U.S. Joint Chiefs of Staff (2008), *supra* fn. 149, II-14.

¹⁶⁰ U.S. Joint Chiefs of Staff, Interagency, *Intergovernmental Organization, and Nongovernmental Organization Coordination During Joint Operations Vol I*, Joint Publication 3-08 (JP 3-08) (March 2006), III-26. Emphasis added. Hereinafter U.S. Coordination JP 2006. See also U.S. Joint Chiefs of Staff, *Joint Operations*, Joint Publication 3-0 (JP 3-0) (17 September 2006, Incorporating Change 2, 22 March 2010), V-18.

¹⁶¹ U.S. Headquarters Department of the Army, *Civil Affairs Operations*, Field Manual No. 3-05.40 (FM 3-05.40) (September 2006), 3-30; and U.S. Coordination JP 2006, III-22.

¹⁶² U.S. COIN JP 2009, V-3 and V-4.

4.1.2.3. Military Doctrine: NATO, UK, Canada, EU

The emphasis on the need for comprehensive approaches, stability/stabilisation operations, and civil-military coordination has increasingly emerged not only in U.S. military doctrine, but also in the military doctrines of NATO, several Western States, and the EU, posing new challenges for humanitarian actors.¹⁶³

For example, in 2009, the members of the North Atlantic Council affirmed that '[e]xperience in the Balkans and Afghanistan demonstrates that today's security challenges require a comprehensive approach by the international community, combining civil and military measures and coordination' that '[i]ts effective implementation requires all international actors to contribute in a concerted effort',¹⁶⁴ and that NATO would 'improve [its] own contribution to such a comprehensive approach, including through a more coherent application of its crisis management instruments and efforts to associate its military capabilities with civilian means.'¹⁶⁵

According to NATO, civil-military cooperation (CIMIC) is '[t]he coordination and cooperation, *in support of the mission*, between the NATO Commander and civil actors, including the national population and local authorities, as well as international, national and non-governmental organizations and agencies.'¹⁶⁶ The immediate purpose of CIMIC is 'to establish and maintain the full co-operation of the NATO commander and the civilian authorities, organisations, agencies and population within a commander's area of operations in order to allow him to fulfil his mission'.¹⁶⁷ Similarly, the 2006 UK Joint Doctrine on Civil-Military Co-Operation (CIMIC), accepting NATO definition of CIMIC, specifies that the UK approach 'is

¹⁶³ While these countries and regional organisations are not the only ones that have developed comprehensive approaches and CIMIC doctrines, the analysis here is limited to them because of their advanced stage in the development of such doctrines, their relevance in recent conflicts and peace support operations, and the availability of their military doctrines and documents. In any case, for a presentation of the experiences of other countries with comprehensive approaches: looking at UN, EU, NATO, OSCE, Austria, Canada, Czech Republic, Finland, France, Germany, Greece, Hungary, Norway Poland, Spain, Sweden, UK, and U.S., see Crisis Management Initiative, Kristiina Rintakoski, and Mikko Autti, eds., *Seminar Publication on Comprehensive Approach: Trends, Challenges and Possibilities for Cooperation in Crisis Prevention and Management* (Helsinki: Ministry of Defence, 2008), available at <http://www.finlandnato.org/public/default.aspx?nodeid=31559&contentlan=2&culture=en-US> (accessed July 5, 2012), including Annexes I-III. Looking at UN, U.S., UK, Australia, Denmark, Norway, Netherlands, and Germany, see LtCol Robert R. Scott (USMC) and CAPT Jeffrey D. Maclay (USN) with David Sokolow, "NATO and Allied Civil-Military Co-Operation Doctrine, Operations, & Organization of Forces," Center for Strategic & International Studies (January 2009), available at http://csis.org/files/media/csis/pubs/090128_nato_civil_military_doctrine_and_ops.pdf (accessed July 5, 2012).

¹⁶⁴ NATO, "Strasbourg / Kehl Summit Declaration – Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg / Kehl," NATO Press Release: (2009) 044, April 4, 2009, par. 18.

¹⁶⁵ Ibid..

¹⁶⁶ NATO Standardization Agency (NSA), *NATO Glossary of Terms and Definitions (English and French)*, AAP-06(2012) (April 2012), 2-C-5. Emphasis added.

¹⁶⁷ NATO/EAPC (Euro-Atlantic Partnership Council), NATO Military Policy on Civil-Military Co-Operation (CIMIC): Note by the Chairman, EAPC/PFP(PCG)N(2001)0004 (9 July 2001), par. 9. These principles are applicable also when NATO is engaged in peace support operations (PSO), meaning 'operation[s] that impartially make[] use of diplomatic, civil and military means, normally in pursuit of United Nations Charter purposes and principles, to restore or maintain peace' and which 'may include conflict prevention, peacemaking, peace enforcement, peacekeeping, peacebuilding and/or humanitarian operations.' NATO (2012), *supra* fn. 166, 2-P-3.

that CIMIC allows military operations to make a coherent contribution to UK and international political objectives' and that CIMIC aims 'to allow the Commander to interact effectively, on a day-to-day basis, with the civil environment in the Joint Operations Area (JOA)', by 'influencing the attitudes and conduct of civil agencies and populations,' so as to 'maximise support to operations, minimise interference, increase Campaign Authority and enhance force protection'.¹⁶⁸

According to Canadian military doctrine, CIMIC, 'when conducted in an impartial, neutral and independent manner in the eyes of national authorities and the local population, is a force multiplier,' and its main purpose is 'to achieve the necessary cooperation between civil authorities and the CF [Canadian Forces] with a view to improving the probability of success of CF operations.'¹⁶⁹ CIMIC comprises civil-military cooperation operations, which 'facilitate military assistance to civil authorities and organizations, and provide support to civil authorities and the civil population' with the aim to 'support a commander's mission and Canadian national policy and interests'.¹⁷⁰ Moreover, 'a comprehensive approach strategy', to ensure that all elements of national and coalition power, as well as regional organizations, multilateral bodies, international institutions, and NGOs are working within a unifying theme to consider and to address the full range of influences and factors in a destabilized environment,¹⁷¹ might include stability operations, meaning 'specific missions and tasks carried out by armed forces to maintain, restore, or establish a climate of order', possibly comprising 'the restoration of essential services (including the provision of humanitarian assistance) and longer-term reconstruction of the state's infrastructure' either when and as long as civilian agencies are not present or 'in order to engender ongoing support from the local populace'.¹⁷²

In July 2008, the EU Military Committee also agreed on an *EU Concept for Civil-Military Co-operation (CIMIC) for EU-led Military Operations*, which defines CIMIC as covering 'the co-operation and coordination, as appropriate, between the EU military force and independent external civil organisations and actors (International Organisations (IOs), Non-Governmental Organisations (NGOs), local authorities and populations)', and differentiates it from Civil-Military Co-ordination (CMCO), which covers 'internal EU

¹⁶⁸ UK Ministry of Defence, *Civil-Military Co-Operation (CIMIC)*, Joint Doctrine Publication 3-90 (JDP 3-90) (April 2006), pars. 105, 108, and 110. Similarly, see UK Ministry of Defence, *Civil-Military Co-Operation (CIMIC)*, Interim Joint Warfare Publication 3-90 (IJWP 3-90) (November 2003), pars. 108, 109, and 111(b).

¹⁶⁹ Canadian National Defence, *Civil-Military Cooperation in Peace, Emergencies, Crisis and War*, B-GG-005-004/AF-023 (January 1999), par. 106(1).

¹⁷⁰ *Ibid.*, par. 201 (1).

¹⁷¹ Canadian National Defence, *Canadian Military Doctrine*, Canadian Forces Joint Publication, B-GJ-005-000/FP-001 (April 2009), par. 0641.

¹⁷² *Ibid.*, par. 0641(c).

co-ordination of the EU's own civil and military crisis management instruments, executed under the responsibility of the Council.'¹⁷³ The concept, 'compatible and consistent with NATO CIMIC policies, concepts and doctrine', defines CIMIC as 'the co-ordination and co-operation at all levels - between military components of EU-led military operations and civil actors external to the EU, including the local population and authorities, as well as international, national and non-governmental organisations and agencies - *in support of the achievement of the military mission* along with all other military functions.'¹⁷⁴

In terms of actual tasks that may be part of CIMIC, NATO includes, as a form of 'Support to the Civil Environment', the 'provision of humanitarian aid',¹⁷⁵ meaning '[t]he resources needed to directly alleviate human suffering'.¹⁷⁶ Humanity, impartiality, and neutrality (the latter defined Red Cross-style) are presented as 'the three humanitarian principles adopted by the international community and under which most civil aid organisations operate and upon which humanitarian action is based'.¹⁷⁷ NATO 2013 Joint Allied Doctrine on CIMIC further defines these principles as guiding principles of UN humanitarian assistance under UNGA resolution 46/182, and affirms that NATO forces should apply them when operating under UN authorities.¹⁷⁸ Only in exceptional circumstances the military 'may be required to take on tasks normally the responsibility of a mandated civil authority, organisation or agency', in case 'the appropriate civil body is not present or is unable to carry out its mandate and where an otherwise unacceptable vacuum would arise'.¹⁷⁹ Handover to civilian authorities should be carried out as soon as possible, and in any case '[a]ll practicable measures will be taken to avoid compromising the neutrality and impartiality of humanitarian organisations'.¹⁸⁰

According to the EU doctrine, CIMIC core functions fall under the three categories of 'Civil-Military Liaison (CML), Support to the Civil Environment (SCE) and Support To the military Force (STF)', and in relation to the last one it is specified that 'unless otherwise specifically provided in the mandate, military forces should only be used to support humanitarian activities in exceptional circumstances upon the request

¹⁷³ Council of the EU, EU Concept for Civil-Military Co-operation(CIMIC) for EU-led Military Operations, 11 July 2008, 11716/1/08 REV 1, par. 4.

¹⁷⁴ Ibid., pars. 5 and 15. Emphasis added.

¹⁷⁵ NATO, *NATO Civil-Military Co-Operation (CIMIC) Doctrine*, AJP-9 (June 2003), 3-5.

¹⁷⁶ NATO (2012), *supra* fn. 166, 2-H-5.

¹⁷⁷ NATO (2003), *supra* fn. 175, 8-4 – 8-5.

¹⁷⁸ See NATO, *Allied Joint Doctrine for Civil-Military Cooperation - Edition A Version 1*, AJP-3.4.9 (February 2013), 6-2. The publication further states that NATO personnel involved in humanitarian activities should know and apply 'as appropriate' the SPHERE standards. Ibid., 68.

¹⁷⁹ NATO/EAPC (2001), *supra* fn. 167, par. 11.

¹⁸⁰ Ibid.

by humanitarian actors and as a last resort'.¹⁸¹ The execution of CIMIC tasks may include the '[p]rovision of services or facilities to meet immediate life sustaining needs of the population' and '[c]lose co-ordination with the medical staff and coordination of medical assistance to the local population', but only if 'no civilian organisation is able to meet those needs and in co-ordination with them.'¹⁸²

In terms of relations with humanitarian actors, the UK military doctrine highlights that '[t]here is provision within the Geneva Conventions of 1949 authorising the presence of impartial humanitarian organisations within conflict regions' and that '[a]s a general principle, international humanitarian assistance is only provided at the request, or with the concurrence, of the host nation', but in the absence of a functioning government 'NGOs may operate on the basis of their legal agreements with UN agencies or as independent agencies.'¹⁸³ It is underlined that '[h]umanitarian assistance by civilian aid organisations is rendered in accordance with 3 principles'—humanity, impartiality, and neutrality (the latter defined as '[h]umanitarian organisations must not assist, condone or justify hostilities or take sides in political, religious or ideological disputes')—and specified that humanitarian organisations focus on maintaining the humanitarian space and a distinction between their role and the role of the military, underlining that the involvement of the military in humanitarian assistance should be in accordance with the relevant UN guidelines and that anyway there should be exchange of information.¹⁸⁴

This last activity is acknowledged as sensitive, so that notwithstanding the need for exchange of information with civilian actors in CIMIC, UK doctrine recommends that '*[t]he perception that CIMIC is supporting Intelligence gathering or is propagating disinformation should be guarded against.*'¹⁸⁵ Similarly, according to NATO, 'CIMIC personnel will be a valuable source of local information and will be advocates of the military cause, but they will rapidly become ineffective if used for collecting information for

¹⁸¹ Council of the EU (2008), *supra* fn. 173, pars. 16-19.

¹⁸² *Ibid.*, par. 24(j)(1) and 24(j)(3).

¹⁸³ UK Ministry of Defence (2006), *supra* fn. 168, pars. 302-304. Similarly, see UK Ministry of Defence (2003), *supra* fn. 168, Annex 2A, pars. 2A2-2A4.

¹⁸⁴ UK Ministry of Defence (2006), *supra* fn. 168, pars. 310-313. The relevant UN Guidelines are the so-called MCDA Guidelines, analysed below (Section 4.1.2.4.). Similarly, see UK Ministry of Defence (2003), *supra* fn. 168, Annex 2A, pars. 2A8-2A13; UK Ministry of Defence, *Security and Stabilisation: The Military Contribution*, Joint Doctrine Publication 3-40 (JDP 3-40) (November 2009), par. 516.

¹⁸⁵ UK Ministry of Defence (2006), *supra* fn. 168, par. 402(g). Emphasis added. Furthermore, '[m]ilitary activities or projects in direct support of civil society', so-called 'Quick Impact Projects (QIP), ... should meet urgent stabilisation and reconstruction needs and contribute to the resumption of normal life in post-conflict societies'; they 'should be agreed with the appropriate civil authority but ... also take account of the views of the local population'; and they 'should contribute to the creation of a more normal and secure environment and may, by shaping local perceptions, generate force protection benefits and other support to the force'. *Ibid.*, 411(d). Similarly, see UK Ministry of Defence (2003), *supra* fn. 168, par. 306(i) and par. 417(d). The definition of 'humanitarian assistance' by NATO is quoted: UK Ministry of Defence (2006), *supra* fn. 168, par. 411(b).

intelligence production or as a means of propagating disinformation.’¹⁸⁶ According to the EU CIMIC concept, while it is acknowledged that ‘civilian sources may often provide information on the civil situation, which can influence the planning and execution of the EU-led military operation’, it is also underlined that ‘CIMIC elements must not be *deliberately* used for intelligence gathering.’¹⁸⁷ Finally, a very significant remark in UK doctrine is that “‘hearts-and-minds” activities are undertaken to achieve political and military objectives’ and ‘[n]either neutral nor impartial, [they] should not be described as humanitarian’; such activities ‘should be properly coordinated with the appropriate civil actors.’¹⁸⁸

This overview of military doctrines by NATO, UK, Canada and EU reveals the emergence of a growth in attention for civilian resources as necessary to succeed in conflict and peace operations, and for activities other than combat to be performed by the military. The distinction between military and humanitarian actors and the primacy of civilians in the provision of emergency assistance are acknowledged. Furthermore, no suggestion that the military might or should enjoy special protection when engaged in relief activity has been found. For humanitarian actors, collaboration with the military and information sharing risks leading to being perceived as associated with one belligerent.

4.1.2.4. *Civil-Military Guidelines: Consent, the Principle of Distinction, and the Principles of Humanitarian Assistance*

Another instrument developed, in this case by humanitarian organisations, to deal with the consequences of comprehensive approaches and CIMIC strategies, and more in general with the contextual presence of civilian and military actors in theatres of humanitarian action, has been non-binding guidelines on civil-military relationships.

While the UN Department of Humanitarian Affairs (DHA) adopted *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief*, so-called Oslo Guidelines, already in 1994,¹⁸⁹ it was only in 2003 that the IASC adopted similar guidelines for situations of complex emergencies, including conflict. The *Guidelines on the Use of Military and Civil Defence Assets in Complex Emergencies*, so-called

¹⁸⁶ NATO (2003), supra fn. 175, 2-3.

¹⁸⁷ Council of the EU (2008), supra fn. 173, par. 22(b)(1). Emphasis added.

¹⁸⁸ UK Ministry of Defence (2006), supra fn. 168, par. 412. Similarly, see UK Ministry of Defence (2003), supra fn. 168, par. 306(j). Furthermore, UK military doctrine underlines that also stabilisation activities, having explicitly political aims, are not impartial and thus they are different from humanitarian activities. See UK Ministry of Defence (2009), supra fn. 184, 1A-4 and par. 203.

¹⁸⁹ UN, DHA-Geneva, *Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief* – “Oslo Guidelines,” May 1994.

MCDA Guidelines, were elaborated in 2003 by a group of representatives of humanitarian agencies as well as of IGOs and States and then revised in 2006, and they aim to ‘provide[] guidelines for the use of *international* military and civil defence personnel, equipment, supplies and services in support of the United Nations (UN) in pursuit of humanitarian objectives in complex emergencies.’¹⁹⁰ They are addressed primarily to UN humanitarian components and agencies and to forces supporting them, but it is suggested that they ‘could also be used by decision-makers in Member States and regional organizations when considering the use of military and civil defence resources to provide assistance to civilian populations’ and ‘may also be of value to international military or civil defence commanders, including peacekeeping forces, in the pursuit of their missions.’¹⁹¹ They represent the main reference document in terms of attempt to provide a comprehensive regulation of civil-military relations in conflict.

Humanitarian assistance, meaning ‘aid to an affected population that seeks, as its primary purpose, to save lives and alleviate suffering of a crisis-affected population’, ‘*must* be provided in accordance with the basic humanitarian principles of humanity, impartiality and neutrality’, as provided by UNGA resolution 46/182 and defined in the 2003 UN OCHA Glossary.¹⁹² Respect for the sovereignty of State and thus the principle of consent for the provision of assistance are also listed.¹⁹³ Indeed, the affected State has ‘primary responsibility for providing humanitarian assistance to persons within its borders’, so that ‘[e]ven though UN humanitarian agencies have been requested by the affected State or the UN Secretary General to provide *additional* assistance, the affected State has the right to decline the use of UN MCDA or the use of other

¹⁹⁰ UN, *Guidelines on the Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies (the ‘MCDA Guidelines’)*, March 2003 (Revision I: January 2006), par. 11. Hereinafter MCDA Guidelines. MCDA are defined as follows: ‘relief personnel, equipment, supplies and services provided by foreign military and civil defence organizations for international humanitarian assistance. Furthermore, civil defence organization means any organization that, under the control of a Government, performs the functions enumerated in Article 61, paragraph (1), of Additional Protocol I to the Geneva Conventions of 1949’. Ibid., par. 4.

¹⁹¹ MCDA Guidelines, *supra* fn. 190, par. 15. Par. 19 specifies that the Guidelines do not aim to modify existing IHL, introducing a saving clause: ‘These guidelines will not, in any way, affect the rights, obligations or responsibilities of States and individuals under international humanitarian law. This includes, but is not limited to, *the obligation to allow and facilitate rapid and unimpeded delivery of relief consignments, equipment and personnel, protect such consignments, and facilitate their rapid distribution*. Nor will these guidelines affect the obligations of States that are parties to the United Nations Conventions on the Safety and Security of United Nations Personnel, the Geneva Conventions of 1949 and their Additional Protocols of 1977, or the United Nations Charter.’ Emphasis added.

¹⁹² MCDA Guidelines, *supra* fn. 190, pars. 2 and 22. For the purpose of the guidelines, assistance is then divided in three categories, on the basis of ‘the degree of contact with the affected population’: direct assistance (‘the face-to-face distribution of goods and services’), indirect assistance (‘at least one step removed from the population and involv[ing] such activities as transporting relief goods or relief personnel’), and infrastructure support (‘involv[ing] providing general services, such as road repair, airspace management and power generation that facilitate relief, but are not necessarily visible to or solely for the benefit of the affected population’). Ibid. While the guidelines ‘are primarily intended for use by UN humanitarian agencies and their implementing and operational partners, [a]ll humanitarian actors should also be familiar with the principles, concepts and procedures set out herein and encouraged to adhere to them, as appropriate’ (par. 14 MCDA Guidelines). In this sense, even if the definition and principles to be respected when providing humanitarian assistance are based on UNGA resolution 46/182, which is devoted to the UN system, still these principles may be applied by non-UN or associated personnel.

¹⁹³ MCDA Guidelines, *supra* fn. 190, par. 23..

military and civil defence resources by UN humanitarian agencies on a case-by-case basis.’¹⁹⁴ It is specified that, ‘[a]s a matter of principle, the military and civil defence assets of belligerent forces or of units that find themselves actively engaged in combat shall not be used to support humanitarian activities’; in other cases, the use of MCDA should take place upon request of humanitarians (the RC/HC), based on humanitarian criteria and as a last resort, should ensure that the humanitarian operation retains its ‘civilian nature and character’, remaining under control of humanitarian organisations, should be limited in time and scale, and should avoid the direct provision of assistance by military actors, to the extent possible.¹⁹⁵

A difference is drawn between UN MCDA and MCDA of ‘other deployed forces’, in terms of their use and protection. UN MCDA are those that ‘have been placed under the control of the UN humanitarian agencies and deployed on a full-time basis specifically to support UN humanitarian activities’, and it is provided that ‘[i]n principle, unarmed UN MCDA, accepted as neutral and impartial, and clearly distinguished from other military units, can be used to support the full range of humanitarian activities’, even if they should be used for direct assistance only as a last resort.¹⁹⁶ In the framework of UN MCDA, ‘*[m]ilitary and civil defence personnel employed exclusively in the support of UN humanitarian activities should be clearly distinguished from those forces engaged in other military missions, including the military component of peacekeeping missions, peace operations and peace support, and accorded the appropriate protection by the affected State and any combatants.*’¹⁹⁷

On the other hand, in the case of other deployed forces, which ‘are under the direction, and/or support of other entities, normally have security related missions, and may or may not be readily available’, use of these forces in support of UN humanitarian activities is envisaged as ‘more problematic’, also because they might be involved in the provision of assistance to civilians not purely based on needs, but ‘motivated by a desire to legitimize missions, gain intelligence, and/or enhance protection of forces’.¹⁹⁸ The guidelines highlight that humanitarian activities shall be kept separate from ‘political and military agendas’, even if consultation shall be maintained to ensure that the assistance provided by other deployed forces ‘does not

¹⁹⁴ Ibid., par. 56. Emphasis added.

¹⁹⁵ Ibid., pars. 25-26. On the concept of last resort, see also Ibid., par. 7 (‘Military assets should be requested only where there is no comparable civilian alternative and only the use of military assets can meet a critical humanitarian need. The military asset must therefore be unique in capability and availability.’), and UN OCHA, ‘Foreign Military and Civil Defence Assets in Support of Humanitarian Emergency Operations: What Is Last Resort?’, April 2012, available at <http://ochanet.unocha.org/p/Documents/Last%20Resort%20Pamphlet%20-%20FINAL%20April%202012.pdf> (accessed August 31, 2012).

¹⁹⁶ MCDA Guidelines, *supra* ftn. 190, pars. 31 and 38.

¹⁹⁷ Ibid., par. 39. Emphasis added. On means to ensure this distinction, see Ibid., par. 40.

¹⁹⁸ Ibid., pars. 31 and 35.

undermine the legitimacy and credibility of humanitarian efforts'.¹⁹⁹ Furthermore, it is clarified that in case military forces different from UN MCDA engage in the provision of relief, they 'are in principle not granted any special protection nor are they authorised to display the emblems of the supported UN humanitarian agencies.'²⁰⁰

Even if no MCDA are used, it is suggested that some level of civil-military coordination (CMCoord) should be established between humanitarian and military in complex emergencies, meaning '[t]he essential dialogue and interaction between civilian and military actors in humanitarian emergencies that is necessary to protect and promote humanitarian principles, avoid competition, minimize inconsistency, and when appropriate pursue common goals', to be implemented through strategies that range 'from coexistence to cooperation' and through activities such as information sharing and, when appropriate, division of tasks or collaborative planning.²⁰¹

The MCDA Guidelines were complemented in 2004 by a more general (non-binding) reference paper on Civil-Military Relationship in Complex Emergencies adopted by the IASC, covering as military actors 'the local or national military, multi-national forces, UN peacekeeping troops, international military observers, foreign occupying forces, regional troops or other officially organized troops' and specifying that 'cooperation – the closer form of coordination – with belligerent forces should in principle not take place, unless in extreme and exceptional circumstances and as a last resort.'²⁰² The need for all humanitarian action to respect the principles of humanity, neutrality and impartiality is stated, implying the needs-based provision of humanitarian assistance and that '[t]he delivery of humanitarian assistance to all populations in need must be neutral and impartial – it must come without political or military conditions and humanitarian staff must not take sides in disputes or political positions'.²⁰³ Still, it is admitted that, notwithstanding the principles of impartiality and neutrality, 'the key humanitarian objective of providing protection and assistance to populations in need may at times necessitate a pragmatic approach, which might include civil-military coordination.'²⁰⁴

¹⁹⁹ Ibid., par. 35.

²⁰⁰ Ibid., par. 48.

²⁰¹ Ibid., pars. 10 and 50-55.

²⁰² IASC (2004), *supra* fn. 154, pars. 10 and 13. Emphasis omitted. The Paper also refers to par. 25 MCDA Guidelines, stating that 'As a matter of principle, the military and civil defence assets of belligerent forces or of units that find themselves actively engaged in combat *shall not* be used to support humanitarian activities.' Ibid., par. 38. Emphasis in the original.

²⁰³ Ibid., pars. 17 and 20-21. Emphasis in the original.

²⁰⁴ Ibid., par. 18. However, in any case 'ample consideration must be given to finding the right balance between a pragmatic and a principled response, so that coordination with the military would not compromise humanitarian imperatives.' Ibid.

The IASC reference paper further recommends that the principle of distinction between combatants and non-combatants shall be upheld at all times, that humanitarian actors must always lead humanitarian activities and shall avoid relying on the military, and that ‘[u]se of military assets, armed escorts, joint humanitarian-military operations and any other actions involving visible interaction with the military must be the option of last resort’, where ‘there is no comparable civilian alternative and only the use of military support can meet a critical humanitarian need.’²⁰⁵ Relief operations carried out by military forces, even if with a ‘purely “humanitarian”’ intention, are strongly discouraged except in ‘extreme and exceptional circumstances’ (e.g. there is no other actor on the ground or the needs exceed the capacity and/or resources of the humanitarians), because they might be not purely needs-based and ‘may jeopardize or seriously undermine the overall humanitarian efforts by non-military actors.’²⁰⁶

Regarding information sharing, the Reference Paper suggests in generic terms not to share ‘any information gathered by humanitarian organisations in fulfilment of their mandate that might endanger human lives or compromise the impartiality and neutrality of humanitarian organizations’, while humanitarian actors and the military may share information on the general security situation, on humanitarian location and activities (for de-confliction), on population movements, on relief activities implemented by the military, post-strike information and information relevant for mine-action activities.²⁰⁷

The MCDA Guidelines and the IASC reference paper have been taken into account for the formulation of crisis-specific guidelines on coordination between humanitarians and armed forces under national command and control in Afghanistan, Iraq, Pakistan,²⁰⁸ Libya, and Mali. The central tenets of last

²⁰⁵ Ibid., pars. 22-23 and 29-30.

²⁰⁶ Ibid., pars. 43-45.

²⁰⁷ Ibid., pars. 35-36. Emphasis added.

²⁰⁸ The country experienced a devastating earthquake in 2005, followed by a wave of internal displacement caused by an internal armed conflict in 2008-2010, and floods in the summer of 2010. In all these cases, the national armed forces were heavily involved in the provision of relief, and this posed challenges to humanitarian organisations in relation to their response to the internal displacement crisis, since the government of Pakistan was one of the Parties to the conflict affecting certain areas of the country (even if it constantly denied the existence of a conflict).

On the existence of an armed conflict, see, for example, ICRC, “Afghanistan/Pakistan: put the humanitarian factor on the agenda,” ICRC Press Briefing, April 1, 2009. Available at <http://www.icrc.org/eng/resources/documents/press-briefing/pakistan-afghanistan-press-briefing-010409.htm> (accessed May 18, 2011). Following the 2010 floods, the UNGA adopted a resolution in August 2010 that mentioned neither the existence of an armed conflict and the applicability of IHL, nor the importance of respecting the traditional principles of humanitarian action. However, following the adoption of the resolution, the representative of Belgium on behalf of the EU affirmed that ‘in a region still affected by a conflict that has triggered the displacement of millions of people since 2009, it is crucial that humanitarian aid be perceived as neutral and in line with international humanitarian law and on the basis of the humanitarian principles of humanity, neutrality, impartiality and independence’, and the representative of Yemen on behalf of the Group of 77 and China similarly referred to the need to uphold the principles of neutrality, humanity and impartiality. A/RES/64/294, 19 August 2010 (without vote); A/64/PV.110, 19 August 2010, 8 and 21-22. The existence of an armed conflict in Pakistan was similarly mentioned by the representatives of Denmark and Italy. See Ibid., 10 and 20. On the Government of Pakistan being a Party to the conflict, see, for example, the statement by the representative of Pakistan before the Security Council on 22 November 2010: S/PV.6427 (Resumption 1), 22 November 2010, 16.

resort, unique capability, timeliness, and clear humanitarian direction in the use of military assets are common to all these guidelines,²⁰⁹ as well as the principle of last resort for the use of military escorts.²¹⁰ Furthermore, the principles of humanitarian action, as well as the need to maintain a distinction between civilian and military actors and to maintain flows of information with the military but transmitting only certain kinds of information, are constantly present.²¹¹

In Afghanistan and Iraq, where national armed forces were present both as part of UN-mandated peace operations and as belligerents, respect for the principle of distinction was central. For example, in 2002 the DSRSG-RRR [Relief, Recovery & Reconstruction] and Designated Official for Security in Afghanistan clarified that information could be shared freely with ISAF, a ‘UN-mandated force [that] conducts peace operations in Kabul’, and ‘ISAF m[ight] also be used to provide indirect assistance ... or infrastructure support’.²¹² On the contrary, the level of interaction with Coalition Forces, engaged in combat operations and in civic action projects with ‘an aid component aiming at improving the well being of the population, but ... not humanitarian in nature’, should be carefully managed, even if maintaining a certain degree of information sharing.²¹³

²⁰⁹ See UNAMA/IMTF (Integrated Mission Task Force), *Guidance On Use of Military Aircraft for UN Humanitarian Operations During the Current Conflict in Afghanistan*, 7 November 2001, par. 3; Afghanistan Civil Military Working Group, *Guidelines for the Interaction and Coordination of Humanitarian and Military Actors in Afghanistan*, version 1.0, 20 May 2008, par. 8; UN OCHA, *General Guidance for Interaction between United Nations Personnel and Military and Civilian Representatives of the Occupying Power in Iraq*, version 3.0, 8 May 2003, par. 9; UN OCHA, *Guidelines for Humanitarian Organisations on Interacting With Military and Other Security Actors in Iraq*, 20 October 2004, 7-8, available at <http://www.unhcr.org/refworld/docid/4289f2f74.html> (accessed July 25, 2011); UN OCHA, *Guidelines for UN and other Humanitarian Organizations on Interacting with Military, Non-State Armed Actors and Other Security Actors in Iraq*, August 2008, par. 3.7, available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1109265> (accessed July 25, 2011); UN HCT Pakistan, *Guidelines for Civil-Military Coordination*, 5 March 2010, 6-7 and 12; UN OCHA, *Guidance on the Use of Foreign Military Assets to Support Humanitarian Operations in the Context of the Current Crisis in North Africa*, 25 March 2011, available at http://reliefweb.int/sites/reliefweb.int/files/resources/73165994747DBE518525785E0066C2CE-Full_report.pdf (accessed August 20, 2011); UN OCHA, *Guidance on the Use of Foreign Military and Civil Defence Assets (MCDA) to Support Humanitarian Operations in the Context of the Current Military Intervention in Mali*, 01 February 2013, 1, available at <https://docs.unocha.org/sites/dms/Documents/130201%20Guidance%20on%20the%20Use%20of%20MCDA%20in%20Mali%20FINAL.pdf> (accessed September 10, 2013).

²¹⁰ See Afghanistan Civil Military Working Group (2008), *supra* fn. 209, par. 7; UN OCHA (2003), *supra* fn. 209, 8 May 2003, pars. 10-11; UN OCHA (2004), *supra* fn. 209, 5-6; UN OCHA (2008), *supra* fn. 209, par. 3.8; UN HCT Pakistan (2010), *supra* fn. 209, 6-7 and 12-13; UN OCHA (2013), *supra* fn. 209, 2.

²¹¹ See Afghanistan Civil Military Working Group (2008), *supra* fn. 209, pars. 4-6 and 11; UN OCHA (2003), *supra* fn. 209, pars. 4-8 and 16; UN OCHA (2004), *supra* fn. 209; UN OCHA (2008), *supra* fn. 209; UN HCT Pakistan (2010), *supra* fn. 209, 6-7 and 12-14; UN OCHA (2013), *supra* fn. 209, 1.

²¹² UNAMA DSRSG-RRR and Designated Official for Security, *Relationships with Military Forces in Afghanistan – guidelines for UNAMA Area Coordinators and other UN personnel*, 2002.

²¹³ *Ibid.* Interestingly, in the guidelines adopted in 2008 for Afghanistan, attention is also given to protection activities in the form of human rights reporting, suggesting that ‘[m]ilitary and humanitarian actors should report as soon as possible any alleged violations of human rights, women and children’s rights, international humanitarian law or Afghan criminal law by any of the parties to the conflict to the appropriate staff within their organisations or chains of command’, but that ‘[h]umanitarian actors may refrain from reporting violations where this could create an unacceptable security risk.’ Alleged violations ‘should then be reported, as appropriate, to the relevant Afghan authorities, Afghan Independent Human Rights Commission, the International Committee of the Red Cross, UNAMA or, where appropriate, UNHCR’ and ‘[m]ilitary and humanitarian actors will cooperate with any investigation conducted by these authorities’. Afghanistan Civil Military Working Group (2008), *supra* fn. 209, par. 12.

In Mali, the HCT also adopted a common position on the interaction between humanitarian actors and armed forces deployed in Mali, including French armed forces as part of ‘Operation Serval’, troops from ECOWAS African-led International Support Mission to Mali (AFISMA), and other troops.²¹⁴ The paper suggested adopting a coexistence strategy for civil-military interaction, meaning no participation of military personnel in humanitarian and/or cluster meetings, and distinction between humanitarian and military actors, but minimum essential coordination.²¹⁵

In Pakistan, the focus of attention were the relationships between humanitarians and local national armed forces, due to the debate on the role of humanitarian agencies within the stabilisation strategy of the Pakistan Government, more specifically in the IDP crisis generated by governmental military operations in the Swat valley in 2008-2010.²¹⁶ To uphold the principle of distinction, the Guidelines formulated by the Humanitarian Country Team (HCT) proposed different approaches to civil-military coordination strategies in case of complex emergencies and of natural disasters in peacetime: in the first case, the adoption of a coexistence strategy was recommended, implying that ‘there are no common goals to pursue and actors merely operate side by side’, so that the principle of distinction is key; in the second case, a cooperation strategy should be adopted, meaning that ‘there is a common goal and agreed strategy, and all parties accept to work together’, so that distinction between military and civilian actors should be ensured, but focusing

²¹⁴ UN HCT Mali. Humanitarian Country Team Position on the Interaction between the Humanitarian Community and Armed Forces Present in Mali. 26 February 2013. Available at [https://docs.unocha.org/sites/dms/Documents/2012%2003%2021%20Position%20Paper%20HCT%20Mali%20-%20Interaction%20with%20Armed%20Forces%20\(EN\)%20Draft%20TE.pdf](https://docs.unocha.org/sites/dms/Documents/2012%2003%2021%20Position%20Paper%20HCT%20Mali%20-%20Interaction%20with%20Armed%20Forces%20(EN)%20Draft%20TE.pdf) (accessed September 10, 2013).

The paper stated that it was supplementary to the *Code de Conduite pour l'opérationnalisation de l'Assistance Humanitaire* already adopted by the HCT, in which the HCT members committed to the humanitarian principles, to advocate for their respect by all Parties, to stick to the negotiations strategies and the needs assessment approaches detailed in the document, and to apply the principles provided by the IASC guidelines regarding the use of armed escorts. See UN HCT Mali, *Code de Conduite pour l'opérationnalisation de l'Assistance Humanitaire*, July 12, 2012, available at <https://mali.humanitarianresponse.info/en/system/files/documents/files/Mali%20-%20Code%20de%20Conduite%20pour%20l%27Operationalisation%20de%20l%27Assistance%20Humanitaire.pdf> (accessed September 10, 2013).

²¹⁵ UN HCT Mali (2013), supra fn. 214, 1.

²¹⁶ For example, a member of MSF addressed multi-mandated agencies and advocated, given the centrality of stabilisation strategies for the government and its allies and the ensuing risk of instrumentalisation for humanitarian action, ‘a clearer distinction between development activities that, however unwillingly, serve the objectives of the Pakistani government and the West, and a principled, humanitarian approach with an immediate, life-saving goal only’, since ‘in the absence of such a choice, the value of humanitarian principles in gaining access and acceptance is rapidly being eroded.’ Jonathan Whittall, “‘We Don’t Trust That’: Politicised Assistance in North-West Pakistan,” *Humanitarian Exchange Magazine* 49 (January 2011), 16.

See also, for example, Humanitarian Policy Group, *A Clash of Principles? Humanitarian Action and the Search for Stability in Pakistan*, HPG Policy Brief 36 (London: Overseas Development Institute, September 2009). Marion Péchayre, *Humanitarian Action in Pakistan 2005-2010: Challenges, Principles, and Politics*, Feinstein International Center Briefing Paper (January 2011). Available at <http://sites.tufts.edu/feinstein/2011/humanitarian-action-in-pakistan-2005-2010> (accessed June 2, 2012). John Cosgrave, Riccardo Polastro, and Farwa Zafar, “Inter-Agency Real Time Evaluation (IA RTE) of The Humanitarian Response to Pakistan’s 2009 Displacement Crisis Commissioned by the Inter-Agency Standing Committee: Final Report, Version 1.95,” August 9, 2010, 3-4 and 30-39. Available at http://ochanet.unocha.org/p/Documents/IARTE_PK_Displacement_2010_final_report.pdf (accessed July 5, 2012).

first on ‘the achievement of common objectives.’²¹⁷ Also, the actual implementation of the guidelines has been often questioned: for example, in Pakistan, following the floods in 2010 some UN agencies and NGOs chose to use the strategic air bridge established by NATO, notwithstanding the opposition of the HCT since the last resort criterion was not fulfilled (‘air and sea transport was available commercially’).²¹⁸ Similar concerns regarding the role of humanitarian assistance in the context of national stabilisation strategies, and the parallel role of national armed forces, a belligerent in the conflict, have been voiced in relation to the armed conflict in Colombia,²¹⁹ but no guidelines have been formulated.

Relationships between humanitarian and belligerents have thus clearly emerged as controversial, in theatres such as Afghanistan, Iraq, Mali, Pakistan, and Colombia. According to the MCDA Guidelines and the IASC Reference Paper, in principle assets by belligerents should not be used. Country-specific guidelines have drawn further inspiration from these general guidance to identify principles for the interaction between humanitarians and military forces of Parties to the conflict. Still, as highlighted by Tsui, this issue of engagement of the military in providing relief, including when they are belligerents, has not yet been addressed by States at the intergovernmental level.²²⁰ Furthermore, it has been noted that the formulation of the principles in the existing guidelines remains quite general, offering limited guidance at the operational level, for example on the criteria to implement in practice the principle of last resort, or to choose whether to use an armed escort, or on what kind of information to share and not to share with the military.²²¹

The guidelines also lack a legal analysis of the legitimate role of belligerent armed forces in the provision of relief under IHL, which may lead to a situation where “[u]ncertainties of the legal basis

²¹⁷ UN HCT Pakistan (2010), *supra* fn. 209, 12-16.

²¹⁸ Nicki Bennett, “Civil–Military Principles in the Pakistan Flood Response,” *Humanitarian Exchange Magazine* 49 (January 2011), 13.

²¹⁹ See, for example, Francisco Rey Marcos, “Military Participation in Humanitarian Action: Reflections on the Colombia Case,” *Humanitarian Exchange* no. 45 (December 2009): 6-9; Caritas Europa, “Bridging the Gap between Policy & Practice: The European Consensus on Humanitarian Aid and Humanitarian Principles,” October 2011, 13. Available at http://www.caritas-europa.org/module/FileLib/BridgingtheGap_ENdefinite.pdf (accessed July 5, 2012). See also EU Commission, “Commission Staff Working Paper accompanying the document Report from the Commission to the European Parliament and the Council - Annual report on the European Union’s Humanitarian Aid and Civil Protection Policies and their implementation in 2010,” SEC(2011) 709 final, 10 June 2011, 54; S/2012/171, 21 March 2012, par. 46. On qualification of the conflict in Colombia, see Rafael Nieto Navia, “¿Hay o no hay conflicto armado en Colombia?,” *Anuario Colombiano de Derecho Internacional* 1, no. 1 (2008): 139-159; Maria-Daniella Marouda, “Application of International Humanitarian law in Contemporary Armed Conflicts: Is It ‘Simply’ a Question of Facts?,” in *Armed Conflicts and International Humanitarian Law 150 Years after Solferino. Acquis and Prospects*, ed. Stelios Perrakis and Maria-Daniella Marouda (Athens: Sakkoulas/Brussels: Bruylant, 2009), 222-223.

²²⁰ See Edward Tsui, “Analysis of Normative Developments in Humanitarian Resolutions since the Adoption of 46/182: An Independent Review by Edward Tsui (Consultant)”, 2009, par. 58. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1112151> (accessed March 8, 2012). Furthermore, “[t]here remains a need for intergovernmental endorsed policy and guidance on the use of military assets in the provision of humanitarian assistance during complex emergencies”, a policy that ‘should articulate the degree of engagement and conduct, as well as the relationship with humanitarian actors.’ *Ibid.*

²²¹ See Victoria Metcalfe and Michelle Berg, *Country-Specific Civil–Military Coordination Guidelines*, HPG Working Paper (London: Overseas Development Institute, August 2012), 2-3 and 5.

necessary to conduct effective advocacy with the military forces to protect humanitarian space in these circumstances, as well as fear of repercussions on the organisation for engaging in such debates, make it difficult for humanitarian actors to engage in a principled manner with national military forces”.²²² As analysed in Section 2.1.4.3., IHL does not exclude a role for the military in humanitarian activities and the provision of relief, especially in case of belligerent occupation, when the Occupying Power is required to satisfy the basic needs of the population and one of the options is clearly to do it through its armed forces.²²³ According to some humanitarians, relief activities by the military, including by the Occupying Power, should not be classified as ‘humanitarian assistance’ but just as ‘the fulfilment of humanitarian obligations, which fall upon the military as a result of international humanitarian law.’²²⁴ Still, even more important is to clarify the limits of lawful engagement and the protection of belligerent forces when engaging in these activities.

What may be argued is that when IHL explicitly provides a role for the belligerents in the provision of relief to civilians in need, as it does for the Occupying Power, it requires this relief to be distributed without any adverse distinction (Article 69(1) AP I). On the other hand, in IAC ‘hearts and minds’ activities, including the provision of relief based on criteria different from humanitarian needs, are not envisaged (thus also not explicitly prohibited) in IHL. This relief, given without respecting the principles, following military and/or political priorities, should not be categorised as humanitarian, as has been advocated by humanitarians and sometimes accepted by military actors, for example in the ISAF PRT Handbook in Afghanistan and in UK military doctrine.²²⁵ In any case, even if the armed forces of a Party to the conflict provide relief respecting the principles of humanity and impartiality, IHL neither offers them any special protection, unless they act as part of civil defence organisations in their national territory, nor exempts them from the obligation to respect the principle of distinction, being otherwise liable in IAC to loss of POW status and trial as spies. On the other hand, external relief actions that respect the criteria prescribed by IHL, even if carried

²²² The IASC, quoted in Victoria Metcalfe, Simone Haysom, and Stuart Gordon, *Trends and Challenges in Humanitarian Civil–Military Coordination. A Review of the Literature*, HPG Working Paper (London: Overseas Development Institute, May 2012), 13. Emphasis added. See also Metcalfe and Berg (2012), *supra* fn. 221, 3.

²²³ In this sense, see, for example, Johanna Grombach Wagner, “An IHL/ICRC Perspective on ‘Humanitarian Space,’” *Humanitarian Exchange* no. 32 (December 2005), 25. Also, underlining that ‘the military can contribute to humanitarian efforts; it, for example, has an obligation under international humanitarian law to evacuate wounded civilians’: Pierre Krähenbühl, “The Militarization of Aid and Its Perils,” ICRC Article, February 22, 2011. Available at <http://www.icrc.org/eng/resources/documents/article/editorial/humanitarians-danger-article-2011-02-01.htm> (accessed June 5, 2012).

²²⁴ UNHCR, *UNHCR and the Military: A Field Guide* (September 2006), <http://www.unhcr.org/refworld/pdfid/465702372.pdf> (accessed June 25, 2012).

²²⁵ See Sections 4.1.2.1. and 4.1.2.3. According to Tsui, ‘[t]he direct provision of humanitarian assistance by military and/or other armed actors, who are directly involved in the conflict, is incompatible with the principles that guided [*sic*] humanitarian assistance (humanity, neutrality, impartiality and independence).’ Tsui (2009), *supra* fn. 220, par. 121.

out by military actors (not belonging to a belligerent and thus not combatants), might be covered by and protected under the relevant provisions (Article 70 AP I).²²⁶

Regarding belligerents and the provision of relief to their own nationals in IAC, the negotiating history of the AP I demonstrates that States were not ready to impose on themselves the prohibition to make any adverse distinction among their own citizens, in order for example to give priority not only to members of the military over civilians but also to essential workforce over other civilians. Similarly, IHL treaties do not comprise any explicit duty for Parties to NIAC to provide relief without adverse discrimination to all civilians not taking direct part in hostilities in territory under their control.

It can be argued that this explicit will of States to avoid any regulation in this field under IHL should prevent from resorting to IHRL as an additional source of rules to fill the void.²²⁷ However, adopting an approach that favours the interests of civilians in need, it might be interesting to explore whether the principle of non-discrimination under IHRL, a body of law that keeps applying during armed conflict, might limit the discretion of States in this field. The prohibition of discrimination has been considered as having acquired the status of customary law and/or of general principle of law,²²⁸ and according to Pictet the principle of non-discrimination, meaning that '[i]ndividuals shall be treated without any distinction based on race, sex, nationality, language, social standing, wealth, political, philosophical or religious opinions, or on any other similar criteria', is common to both IHL and IHRL.²²⁹ The HCR has defined non-discrimination as 'a basic and general principle relating to the protection of human rights', so basic that for example while under art. 4 ICCPR State Parties are allowed 'to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, *inter alia*, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'²³⁰ Similarly, under Article 2(2) ICESCR, States Parties undertake to guarantee exercise of the rights listed in

²²⁶ Heike Spieker, "The International Red Cross and Red Crescent and Military-Humanitarian Relationships," in *Between Force and Mercy: Military Action and Humanitarian Aid*, ed. Dennis Dijkzeul (Berlin: Berliner Wissenschafts-Verlag, 2004), 206 and 221.

²²⁷ Arguing that the lack of a detailed regulation of a certain issue under IHL can be at times a deliberate choice, which would thus prevent from applying more detailed IHRL provision, see Marco Pertile, "Il Principio di Proporzionalità nell'Interazione tra Diritto Umanitario e Tutela dei Diritti Umani: Strumento per la Risoluzione delle Antinomie o Mero Argomento Retorico?," in *La Tutela dei Diritti Umani e il Diritto Internazionale*, eds. Adriana Di Stefano and Rosario Sapienza (Naples: Editoriale Scientifica, 2012), 179-180.

²²⁸ See Daniel Moeckli, *Human Rights and Non-discrimination in the 'War on Terror'* (Oxford [etc.]: Oxford University Press, 2008), 66-68. See also: World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993 (A/CONF.157/24 (Part I), chap. III), par. 15: 'Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law. ...'

²²⁹ Moreover, 'Differences in treatment should however be made for the benefit of individuals in order to counter inequalities resulting from their personal situation, their needs or their distress.' Jean Pictet, "The Principles of International Humanitarian Law," *International Review of the Red Cross* 6, no. 67 (October 1966), 525 and 531.

²³⁰ HRC, General Comment 18: Non-discrimination, 10 November 1989, pars. 1-2.

the treaty ‘without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*.’²³¹

The principle of non-discrimination in the enjoyment of the human rights relevant to this study, such as the right to food, might thus play a role in establishing the duties applicable to States vis-à-vis their nationals in terms of satisfaction of the basic needs of different categories of civilians, especially considering that scholars and treaty-bodies have argued that the right to be free from hunger has non-derogable nature.²³² Discrimination has been defined in a similar fashion by the HRC and the CESCR, as ‘any distinction, exclusion, restriction or preference which is based on any ground *such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.’²³³ As just mentioned, as a right enshrined in the ICESCR, the right to food shall be guaranteed without discrimination, and the list of prohibited grounds in Article 2(2) ICESCR is non exhaustive. Examples of ‘other status’ that have been proposed include ‘homeless people (including street children), orphans, the elderly, nomadic and traveller communities, persons with disabilities, persons affected by illness, including HIV/AIDS, victims of natural or man-made disasters, including conflicts and war, internally displaced persons and refugees.’²³⁴

However, even under these grounds, a differentiation of treatment may be legitimate under IHRL, if ‘the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate’ under IHRL.²³⁵ For example, IHL itself explicitly provides for special protection in favour of vulnerable categories of civilians, such as children, expectant mothers, wounded and sick persons, and

²³¹ Emphasis added.

²³² See Section 1.3.1. (ftn. 143). The CESCR in its general comment on the right to food has explicitly stated not only that ‘[v]iolations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger’ and ‘[s]hould a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations’, but also that ‘any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.’ CESCR, General Comment 12: The Right to Adequate Food (art. 11), 12 May 1999, E/C.12/1999/5, paras. 17-18.

²³³ HRC, General Comment 18: Non-discrimination, 10 November 1989, par. 7. Similarly, see CESCR, General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), 10 June 2009, E/C.12/GC/20, par. 7. Emphasis added.

²³⁴ UN OHCHR and FAO, *The Right to Adequate Food*, Fact Sheet No. 34 (Geneva: United Nations, 2010), 41 (ftn. 27).

²³⁵ HRC, General Comment 18: Non-discrimination, 10 November 1989, par. 13. Similarly, see CESCR, General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), 10 June 2009, E/C.12/GC/20, par. 13. See also Council of Europe, *Explanatory Report to Protocol 12 of the ECHR*, 4 November 2000, paras. 18-19; IACtHR, *Proposed Amendments to the Naturalisation Provisions of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984, par. 56; IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003, par. 89. On the specificity of discriminations based on nationality, see Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford [etc.]: Oxford University Press, 2011), 54-55.

persons deprived of their liberty.²³⁶ On the basis of the case-law of the different treaty bodies, scholars have identified some criteria to judge whether a difference is lawful or implies a violation of the prohibition of discrimination: there is no need for a specific discriminatory intention for a differential treatment to violate the prohibition (so that a discriminatory effect might suffice), but differential treatment needs to be proven by comparing persons in a comparable position being treated differently or persons in a completely different position being treated analogously.²³⁷ In case the differential treatment is proven, to be lawful it needs to be proportionate in the sense that ‘the means employed ... must be suitable to achieve the aim pursued; ... the measure must be necessary in the sense that no less restrictive measure is available; and ... the disadvantage imposed on the affected individuals and groups must not be disproportionate to the importance of the aim pursued’.²³⁸ It has been argued that these criteria would apply also in case of derogations (for which only the ICCPR explicitly provide that they shall not entail discrimination), since ‘the “strictly required by the exigencies of the situation” test, contained in all derogation clauses, makes the lawfulness of derogating measures involving discrimination highly unlikely’.²³⁹

In the field of the satisfaction of basic needs in conflict, it may be argued that IHL provides a legitimate basis for discrimination, for instance in the satisfaction of the right to food. Discriminations by a Party among its own nationals in terms of satisfaction of their basic needs might be based on their role in supporting the military effort, since giving precedence to the war effort in situation of armed conflict that threatens the existence itself of the State and limited resources might be considered a legitimate aim to pursue. However, these discriminations would need to be proportionate, especially in terms of the disadvantage imposed upon certain civilians not being disproportionate to the aim of guaranteeing support of the military effort, and they would find a limit in the duty to respect non-derogable rights, such as the right to life or, according to some scholars, the right to freedom from hunger,²⁴⁰ and thus also in the duty to respect the guarantees of humane treatment provided *inter alia* by Common Article 3 and Article 75 AP I. According to the CESCR, a State violates the treaty when it ‘fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger’ and, to be able to invoke the unavailability of resources as a justification, it should demonstrate not only that ‘every effort has been made

²³⁶ See arts. 16, 24, 38 GC IV; arts. 10, 76-77 AP I.

²³⁷ See Moeckli (2008), *supra* fn. 228, 73-76.

²³⁸ *Ibid.*, 78.

²³⁹ *Ibid.*, 90.

²⁴⁰ See, Section 1.3.1. (fn. 143).

to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations’, but also that ‘it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.’²⁴¹

4.1.3. Conclusion

All the aforementioned instances of practice demonstrate, on the one hand, the increased attention devoted by military actors and strategies to the provision of humanitarian assistance to civilians in conflict, in the framework of so-called comprehensive or stabilisation strategies and COIN,²⁴² with the problematic issues that this entails from the point of view of IHL, and, on the other hand, developments at the level of military doctrines and of non-binding instruments to try and regulate interactions in conflict settings between humanitarian and military actors. In general, military doctrines limit themselves to suggesting certain behaviours towards relief personnel, sometimes explicitly conditioning its respect to the more important goal of achieving the mission objective.

Civil-military guidelines contain often vague principles, and remain non-binding instruments, even if they have been referred to in a plurality of documents such as the (non-binding) *EU Consensus on Humanitarian Aid*, the (non-binding) *Principles and Good Practice of Good Humanitarian Donorship*, U.S. and UK military doctrine, and UNGA and ECOSCO resolutions. Moreover, respect for the UN OCHA Guidance on the use of foreign military assets in Libya and for the MCDA Guidelines was advocated in the (binding) decision taken by the Council of the EU in April 2011, in which it decided to conduct a military operation ‘in order to support humanitarian assistance in the region’, but only if so requested by UN OCHA and without ‘impact[ing] on the neutrality or impartiality of the humanitarian actors’.²⁴³ The decision thus gave relevance to non-binding documents and endorsed the principle of last resort for the use of military assets for the provision of humanitarian assistance.

²⁴¹ CESCR, General Comment 12: The Right to Adequate Food (art. 11), 12 May 1999, E/C.12/1999/5, par. 17. Similarly, see CESCR, General Comment 3: The nature of States parties obligations (Art. 2, par.1), 14 December 1990, E/1991/23, pars. 10 and 13-14.

²⁴² See, for example, Sarah Collinson, Samir Elhawary, and Robert Muggah, “States of Fragility: Stabilisation and Its Implications for Humanitarian Action,” *Disasters* 34, S3 (2010): S275-S296.

²⁴³ Council of the EU, *COUNCIL DECISION 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya)*, OJ L 89, 05 April 2011, 17-18, considering 5 and pars. 1 and 2. In the concrete case, UN OCHA never called for the activation of the operation.

Practice in the field regarding the involvement of military actors in the provision of relief is regulated by some basic rules of IHL, such as the principle of distinction, and further guidance has been adopted, mostly non-binding in nature. Still, risks of blurring the roles and perception of humanitarian organisations are still present, for example in terms of information sharing, so possible consequences of interaction should be taken into account by all actors, in particular in relation to their mission limit and the concept of direct participation in hostilities for relief organisations, and perception in this sense.

4.2. Peacekeepers and Humanitarian Assistance

Civil-military relationships have gained increased attention also in the framework of peace operations, a term used by the UN Department of Peacekeeping Operations (UN DPKO) to refer to '[f]ield operations deployed to prevent, manage, and/or resolve violent conflicts or reduce the risk of their recurrence'.²⁴⁴ Still, operations of this kind have posed challenges partly different from those already analysed in relation to interaction with belligerents.

UN peacekeeping in its original form presupposes the deployment of an impartial military force in a post-conflict theatre, with consent from the Parties and with an authorisation to use force only in self-defence.²⁴⁵ Given these characteristics, peacekeepers are thus different from combatants, and the limits of their relationships with humanitarian actors are arguably different. On the other hand, as will be explained in this Section, evolution within UN peacekeeping has complicated this initial scenario, with instances of peacekeepers getting involved in conflict (or being deployed as peace enforcers from the start) and with multi-dimensional mandates that might alter the perception of mission's members as impartial, thus influencing also the stand of humanitarian actors towards them. From the point of view of IHL, key criteria to guide the engagement of peacekeepers in relief provision and their relationships with humanitarian organisations will be again the principle of distinction and the limits imposed upon civilians in order not to become direct participants in hostilities. Humanitarian organisations belonging to the UN family might find themselves in a sensitive position, being associated to the UN more broadly and thus also to the

²⁴⁴ UN DPKO/UN DFS (Department of Field Support), *United Nations Peacekeeping Operations: Principles and Guidelines (so-called Capstone Doctrine)* (New York: UN, 2008), 98.

²⁴⁵ See, for example, Alex J. Bellamy, Paul Williams, and Stuart Griffin, *Understanding Peacekeeping* (Cambridge [etc.]: Polity Press, 2004), 173-174.

peacekeeping mission (even more so in case of an integrated mission), and being possibly expected by the UNSC to cooperate with the peacekeeping efforts in some ways.

4.2.1. The Role of UN Peacekeepers and Authorised Forces in Humanitarian Assistance in the 1990s

An instrument increasingly applied in the 1990s by the UNSC to achieve its goals of maintaining international peace and security, including by ensuring the provision of humanitarian assistance during conflict, was the creation of peacekeeping forces or the authorisation to Member States to establish multinational forces whose mandate included tasks related to humanitarian assistance. In general, armed forces were tasked with contributing to the creation of a safe environment for the provision of humanitarian aid and/or to the protection of humanitarian convoys and personnel, and not with directly providing humanitarian relief. Notwithstanding these limits in the mandate, these experiences stimulated debate on the legitimate role of UN-mandated and/or -commanded armed forces in the provision of humanitarian assistance in situation of armed conflict and the extent to which such tasks would be in accordance with the traditional model of peacekeeping.

4.2.1.1. Creation of a Safe Environment, Facilitation and Support

The first UN peacekeeping mission endowed with a mandate including humanitarian relief was the UN Operation in Somalia I, UNOSOM I, tasked with facilitating a cessation of hostilities and the maintenance of a ceasefire, so as to allow for the provision of humanitarian assistance, provide security for UN personnel and equipment at the port of Mogadishu, and ‘escort deliveries of humanitarian supplies from there to distribution centres in Mogadishu and its immediate environs.’²⁴⁶ It was followed by a Unified Task Force (UNITAF) led by the U.S., established on the basis of the Chapter VII authorisation by the UNSC to ‘use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’,²⁴⁷ and then by a second UN peacekeeping mission (UNOSOM II), or rather a peace enforcement one, mandated *inter alia* to ‘secure or maintain security at all ports, airports and lines of communications required for the delivery of humanitarian assistance’ and ‘protect, as required, the personnel, installations and

²⁴⁶ S/23829, 21 April 1992, par. 27; S/RES/751 (1992), 24 April 1992, pars. 2 and 7.

²⁴⁷ S/RES/794 (1992), 3 December 1992, par. 10.

equipments of [UN] and its agencies, ICRC as well as NGOs and to take such forceful action as may be required to neutralize armed elements that attack, or threaten to attack, such facilities and personnel'.²⁴⁸

Peacekeepers under UN command and control (in the case of UNOSOM II) and UNSC-authorised operations under national command (as UNITAF) were thus authorised to use armed force to ensure a safe environment for humanitarians and to guarantee the physical security of relief personnel, convoys and supplies. Similarly, after the UN Protection Force (UNPROFOR) in BiH was mandated under Chapter VI to reopen the Sarajevo airport and then to ensure the delivery of humanitarian assistance,²⁴⁹ the UNSC called on Member States to take *all the necessary measures* to facilitate in coordination with the UN 'the delivery by relevant [UN] humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina'.²⁵⁰ Later, the UNSC identified Sarajevo and five towns as 'safe areas' and authorised UNPROFOR under Chapter VII 'acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys'.²⁵¹

In Rwanda, UNAMIR was given a Chapter VI mandate, expanded in relation to humanitarian assistance from 'assist[ing] in the coordination of humanitarian assistance activities in conjunction with relief operations' to 'assist[ing] in the resumption of humanitarian relief operations to the extent feasible' and then, in May-June 1994, 'contribut[ing] to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas' and 'provid[ing] security and support for the distribution of relief supplies and humanitarian relief operations'.²⁵² Under Chapter VII, the UNSC in June 1994 authorised the creation for two months of a multinational operation entitled to use 'all necessary means to achieve the humanitarian

²⁴⁸ S/RES/814 (1993), 26 March 1993, par. 5; S/25354, 3 March 1993, par. 57(e)-(f).

²⁴⁹ See S/RES/758 (1992), 8 June 1992, par. 2; S/RES/761 (1992), 29 June 1992, par. 1; S/RES/764 (1992), 13 July 1992, par. 2. UNPROFOR was later granted the authority to 'prevent entry of persons other than those who are resident of the UNPA [UN Protected Area] or who are bona fide temporary visitors to the area', and to control the crossing points on the international frontiers: S/RES/769 (1992), 7 August 1992, par. 2, referring to the UNSG report S/24353, 27 July 1992, see pars. 17 and 22. The mandate was then further enlarged to include performing additional functions 'including the protection of convoys of released detainees if requested by the [ICRC]': S/RES/776 (1992), 1 September 1992 (12-0-3), par. 2.

²⁵⁰ S/RES/770 (1992), 13 August 1992 (12-0-3), par. 2.

²⁵¹ S/RES/836 (1993), 4 June 1993 (13-0-2), par. 9.

²⁵² S/RES/872 (1993), 5 October 1993, par. 3(g); S/RES/912 (1994), 22 April 1994, par. 8(b); S/RES/918 (1994), 17 May 1994, par. 3 (a) and 3 (b); S/RES/925 (1994), 8 June 1994, par. 4(a) and 4(b).

objectives set out' in the mandate of UNAMIR as modified in June 1994.²⁵³ The UNSC stressed 'the strictly humanitarian character of this operation which shall be conducted in an impartial and neutral fashion, and shall not constitute an interposition force between the parties'.²⁵⁴ The principles of impartiality and neutrality were thus ambiguously associated to a military mission authorised to use armed force to achieve its objective, underlining the different meaning of these terms when associated by the UNSC to peacekeeping missions, and the use sometimes of a 'misleading ... rhetoric'.²⁵⁵

The operation, which was led by France and came to be known as Opération Turquoise, was based in Zaire but operated in Rwanda, creating a humanitarian safe zone that was then passed over to UNAMIR's control. The creation of a multinational force 'for humanitarian purposes' was authorised again by the UNSC in 1996 in eastern Zaire, in the aftermath of the Rwandan genocide, to *facilitate* the return of humanitarian organisations, the delivery of humanitarian aid, and the repatriation of refugees and return of IDPs.²⁵⁶ However, this force was never established in practice.²⁵⁷

No authorisation under Chapter VII was provided to UN peace missions in Angola between 1995 and 1999, tasked with *facilitation* of and support to humanitarian assistance,²⁵⁸ and to the UN Observer Mission in Liberia (UNOMIL), mandated since 1995, to '*support, as appropriate, humanitarian assistance activities*'.²⁵⁹

This rapid overview of peacekeeping and peace-enforcement operations in the 1990s shows that they started being mandated with tasks connected to the provision of humanitarian assistance to civilians, most of the times in terms of guaranteeing the security necessary for relief organisations to operate and of facilitating or supporting these operations under Chapter VI. However, in some cases operations under UN command and control or under national command and control were also authorised under Chapter VII to use force to

²⁵³ S/RES/929 (1994), 22 June 1994 (10-0-5), pars. 1-4.

²⁵⁴ S/RES/929 (1994), 22 June 1994 (10-0-5), preamble.

²⁵⁵ See Marc Weller, "The Relativity of Humanitarian Neutrality and Impartiality," Paper presented at the 1997 Annual Conference of the American Society of International Law, Washington DC., *Journal of Humanitarian Assistance*, February 1998. Available at <http://sites.tufts.edu/jha/archives/119> (accessed August 31, 2012). Taylor B. Seybolt, "The Myth of Neutrality," *Peace Review* 8, no. 4 (1996), 523-524.

²⁵⁶ See S/RES/1080 (1996), 15 November 1996, pars. 3 and 5.

²⁵⁷ A similar multinational protection force 'to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance' was authorised the following year by the UNSC to respond to the civil unrest in Albania. Member States participating in the force were also authorised under Chapter VII to 'ensure the security and freedom of movement of the personnel of the said multinational protection force'. S/RES/1101 (1997), 28 March 1997 (14-0-1), pars. 2 and 4.

²⁵⁸ For the UN Angola Verification Mission III, UNAVEM III (February 1995 – June 1997), see S/1995/97, 1 February 1995, par. 14(d); S/RES/976 (1995), 8 February 1995, par. 1. For the UN Observer Mission in Angola, MONUA (June 1997 – February 1999), see S/1997/438, 5 June 1997, par. 41; S/RES/1118 (1997), 30 June 1997, par. 2.

²⁵⁹ S/RES/1020 (1995), 10 November 1995, par. 2. UNOMIL was established by S/RES/866 (1993), 22 September 1993, and it completed its mandate in September 1997.

implement their mandates related to humanitarian assistance, generally amounting to the physical protection of supplies, convoys and personnel, thus acknowledging the need to act as peace-enforcers because the traditional criteria of peacekeeping, such as the end of conflict and consent of the parties, were lacking.

4.2.1.2. Humanitarian Assistance in the UNSG's Efforts at Regulating and Reforming Peacekeeping

These instances of UN peacekeeping missions, which were mandated to ensure the provision of humanitarian assistance and safety of humanitarian personnel, and found themselves operating in situations of active conflict, were the result and provided further stimulus within the UN Secretariat for a process of reflection on the instrument of peacekeeping and for efforts to further define it. The UNSG started this process with his 1992 report *An Agenda for Peace*, which envisaged humanitarian assistance, provided in compliance with the guidelines contained in UNGA resolution 46/182, as a key component of preventive diplomacy, and defined 'peacekeeping' as 'the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well.'²⁶⁰

The 1995 *Supplement to an Agenda for Peace*, observing the changes in the international scenario and the practice that emerged of tasking peacekeepers with protection of humanitarian aid, noted that this practice contributed to the violation of the three cardinal principles of peacekeeping— 'the consent of the parties, impartiality and the non-use of force except in self-defence.'²⁶¹ Furthermore, the engagement of peacekeepers in armed conflicts, for example in Somalia (UNOSOM II) and in the FRY (UNPROFOR),²⁶² raised the question of the applicability of IHL to armed forces under UN command and control, since the UN is not and cannot be a Party to the GCs and APs.²⁶³ As a result, in 1999 the UNSG issued the *Secretary-*

²⁶⁰ A/47/277-S/24111, 17 June 1992, pars. 29-30 and 20.

²⁶¹ A/50/60-S/1995/1, 25 January 1995, pars. 33-35.

²⁶² See Daphna Shrager, "The Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law: a Decade Later," *Israel Yearbook on Human Rights* 39 (2009), 360-363.

²⁶³ On the applicability of IHL to peacekeepers, see, for example, Luigi Condorelli, Anne-Marie La Rosa and Sylvie Scherrer, eds., *Les Nations Unies et le droit international humanitaire/The United Nations and international humanitarian law, Proceedings of the international symposium held on the occasion of the 50th anniversary of the United Nations* (Geneva, 19, 20 and 21 October 1995), (Paris: Éditions Pedone, 1996); Robert Kolb, *Droit Humanitaire et Opérations de Paix Internationales: les Modalités d'Application du Droit International Humanitaire dans les Opérations de Maintien ou de Retablissement de la Paix auxquelles Concourent une Organisation Internationale (en particulier les Nations Unies)* (Geneva [etc.]: Helbing & Lichtenhahn; Brussels: Bruylant, 2006); Robert Kolb, Gabriele Porretto, and Sylvain Vité, *L'Application du Droit International Humanitaire et des Droits de l'Homme aux Organisations Internationales: Forces de Paix et Administrations Civiles Transitoires* (Brussels: Bruylant, 2005); Gian Luca Beruto, ed., *International Humanitarian Law, Human Rights and Peace Operations. Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008* (Sanremo: International Institute of Humanitarian Law, 2009). See also Section 6.2.4.2.

General's Bulletin: Observance by United Nations forces of international humanitarian law, applicable to 'United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement', thus 'applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.'²⁶⁴

Underlining that the principles listed are not 'an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation', the Bulletin states *inter alia*, without distinguishing between IAC and NIAC, that: UN forces shall not 'attack[], destroy[], remov[e] or render[] useless objects indispensable to the survival of the civilian population, such as food stuff, crops, livestock and drinking-water installations and supplies'; persons *hors de combat* and detained persons shall be treated humanely in all circumstances and without discrimination; women and children are entitled to special protection; the wounded and sick, as well as medical personnel and establishments, shall be respected and protected; the Red Cross and Red Crescent emblems shall be respected; and '[t]he United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect personnel, vehicles and premises involved in such operations.'²⁶⁵

Reflection on the experiences (and failures) of peacekeeping and their terrible humanitarian consequences, for example in the former Yugoslavia, Somalia, and Rwanda,²⁶⁶ triggered a complex reform, partly begun in 1997 within the UNSG report *Renewing the United Nations: A Programme for Reform*,²⁶⁷ and then accelerated with the focus by the UNSC on POC,²⁶⁸ and with the so-called Brahimi Report in 2000.²⁶⁹

²⁶⁴ UNSG, *Secretary-General's Bulletin: Observance by United Nations forces of international humanitarian law*, 6 August 1999, ST/SGB/1999/13, Section 1.1.

²⁶⁵ *Ibid.*, Sections 2, 7, 8, and 9. At the time of the adoption of the Bulletin there were doubts about the customary nature of some of the provisions contained in it, but not on those mentioned above, apart from the one on attacks against objects indispensable to the survival of the civilian population. See Shrager (2009), *supra* fn. 262, 366-371. For an analysis of the Bulletin, see also, for example, Luigi Condorelli, "Les progrès du droit international humanitaire et la circulaire du secrétaire général des Nations Unies du 6 août 1999," in *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, ed. Laurence Boisson de Chazournes and Vera Gowlland-Debbas (The Hague [etc.]: Nijhoff, 2001): 495-505.

²⁶⁶ See the *Report of the Secretary-General pursuant to General Assembly resolution 53/35: The fall of Srebrenica* (A/54/549, 15 November 1999) and the *Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda* (S/1999/1257, 16 December 1999, enclosure).

²⁶⁷ A/51/950, 14 July 1997. On peacekeeping, see in particular *Ibid.*, pars. 112-115.

²⁶⁸ See Sections 4.2.2.2. and 4.2.2.3.

²⁶⁹ A/55/305-S/2000/809, 21 August 2000.

4.2.2. UN Peacekeeping in the 21st Century: Protection of Civilians (POC) and Integrated Missions

4.2.2.1. The Reform of UN Peacekeeping Missions: Towards Integration

The reports on Rwanda and Srebrenica and the 2000 *Report of the Panel on United Nations Peace Operations*, so-called Brahimi Report,²⁷⁰ stimulated a process of reform of UN peacekeeping that has marked the evolution in the characteristics of operations deployed since the turn of the century. Over the 1990s, the trend towards the deployment of multidimensional peacekeeping operations, meaning operations with multiple components and mandates, in some cases with mandates expanded to include the use of force under Chapter VII, called into question the traditional characteristics of UN peacekeeping missions: the presence of a ceasefire and the end of active hostilities, consent from the Parties, and authorisation to peacekeepers to use force in self-defence (hence the difference from peace enforcement). The deployment of multi-dimensional missions in very unstable and volatile scenarios, characterised by a fragile consent and the risk that violence may erupt again, dragging peacekeepers into the conflict, triggered efforts at reforming peacekeeping to guarantee its success in similar situations.

Already in 1997, the UNSG report *Reviewing the United Nations: A Programme for Reform* proposed a series of leadership and management reforms at headquarters level and, highlighting that '[a]n integrated approach is particularly important in the field, where lack of cohesion or differences among the [UN] entities can be exploited by the parties', suggested that in theatres of deployment of 'large multidisciplinary field operations', the UNSG Special Representative (SRSG) should be given authority over all the different components of the UN in the country: 'the force commanders, civilian police commissioners, resident coordinators [RCs] and humanitarian coordinators [HCs]'.²⁷¹ The UNSG implemented this suggestion in 2000 through a Note of Guidance providing that the SRSG 'has the authority and responsibility to establish the political framework for, and provide overarching leadership to, the UN team in country'.²⁷² Within this overall framework, the RC and the HC, sometimes represented by the same person, would be responsible for the planning and coordination of UN development and humanitarian operations respectively,

²⁷⁰ A/55/305-S/2000/809, 21 August 2000.

²⁷¹ A/51/950, 14 July 1997, par. 119. The report also announced a 'major restructuring of Secretariat machinery responsible for coordinating humanitarian assistance', to strengthen the role of the Emergency Relief Coordinator (ERC) and make it more effective. Ibid., pars. 77 and 180-193.

²⁷² UNSG, *Note from the Secretary-General: Guidance on the Relations between Representatives of the Secretary-General, Resident Coordinators and Humanitarian Coordinators*, 30 October 2000, pars. 2, 9, and 13.

and in case of multidimensional peace missions the RC/HC should be designated as UNSG Deputy Special Representative (DSRSG), when feasible.²⁷³

To match at headquarters level this unified leadership in the field, the Brahimi Report proposed to remedy to the absence of an ‘integrated planning or support cell’ in UN DPKO involving staff responsible *inter alia* for which those responsible for political analysis, military operations, civilian police, human rights, development, humanitarian assistance, refugees and displaced persons by creating Integrated Mission Task Forces.²⁷⁴ Furthermore, noting that peacekeeping operations in the 1990s were not deployed into post-conflict situations but ‘*to create such situations*’ and therefore ‘peacekeepers and peacebuilders [we]re inseparable partners in complex operations’, it supported the realisation by peace missions of “‘quick impact projects” [QIPs] aimed at real improvements in quality of life, to help establish the credibility of a new mission’, with the advice of the RC/HC so as to avoid conflict with other development and humanitarian programmes.²⁷⁵ The Brahimi report has thus been labelled ‘an extreme example of the merging of humanitarian aid and political agendas by suggesting a need for an overarching command-and-control structure that uses humanitarian aid as simply a “tool in the toolbox” of conflict management.’²⁷⁶

Against the background of a UN integrated approach in the field under the leadership of the SRSRSG,²⁷⁷ UN DPKO underlined the importance that all UN departments and agencies at headquarters level work ‘to ensure that UN humanitarian and political efforts complement and reinforce one another *while protecting the fundamental principles of humanitarian assistance*.’²⁷⁸ At field level, it was foreseen that the HC role might be entrusted in the RC (in order to ensure a better transition from relief to development), who in turn might be also designated DSRSG, thus becoming integrated into the peacekeeping mission.²⁷⁹ While acknowledging possible tensions between humanitarians and peacekeepers, since ‘[o]n one hand is the need for a coherent UN response, one that assists in finding a lasting solution to a crisis, and on the other hand is the need to ensure that however long a conflict lasts, civilians are provided basic protection, including

²⁷³ Ibid., pars. 4, 5, 11, and 13.

²⁷⁴ A/55/305-S/2000/809, 21 August 2000, par. 198.

²⁷⁵ A/55/305-S/2000/809, 21 August 2000, pars. 19, 28, and 37. Emphasis added.

²⁷⁶ Jane Barry and Anna Jefferys, *A Bridge too Far: Aid Agencies and the Military in Humanitarian Response*, Humanitarian Practice Network Paper no. 37, January 2002 (London: Overseas Development Institute, 2002), 8.

²⁷⁷ See, for example, UN DPKO, Peacekeeping Best Practices Unit, *Handbook on United Nations Multidimensional Peacekeeping Operations* (New York: UN, December 2003), 17 and 166.

²⁷⁸ Ibid., 165. The Handbook identifies humanity, impartiality, and neutrality (the latter defined as ‘[t]o take no side in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature’) as the principles governing humanitarian assistance, and it recalls that ‘[p]roviding humanitarian assistance is the responsibility of the national government or governments concerned.’ Ibid., 160.

²⁷⁹ See Ibid., 201-202.

humanitarian aid', no clear solutions were given, rather it was suggested to share information and undertake common analysis.²⁸⁰

Even if the direct delivery of humanitarian assistance was acknowledged as a civilian task, to which the military component of a peacekeeping mission can contribute by creating an enabling environment, UN DPKO admitted that military assets might be used and that '[m]ilitary contingents also undertake humanitarian activities on their own initiative, using their own resources', in order to improve relations with the local population and the Parties to the conflict, thus improving security and consent.²⁸¹ It was recommended that such activities 'be based on the international humanitarian objectives and policy framework in the mission area and avoid duplication of effort with humanitarian agencies', as well as contribute to local capacity-building and be sustainable.²⁸²

The 2005 *Report on Integrated Missions* and the endorsement by the UNSG of the Integrated Mission Planning Process (IMPP) in June 2006 were further steps towards implementation of some of the recommendations of the Brahimi Report and the increasing integration of peacekeeping missions.²⁸³ The *Report on Integrated Missions* proposed a definition of 'integrated mission' as 'an instrument with which the UN seeks to help countries in the transition from war to lasting peace, or address a similarly complex situation that requires a system-wide UN response, through subsuming various actors and approaches within an overall political-strategic crisis management framework.'²⁸⁴ It highlighted 'dilemma relat[ing] to the contraposition of the *partiality* involved in supporting a political transition process as opposed to the continued need for *impartiality* (or neutrality) in providing certain forms of humanitarian assistance', and noted that such a tension was exacerbated by the 'ambiguous' and 'rather all-embracing nature of humanitarianism,' with the corresponding 'need for greater specificity and clearer humanitarian priorities, particularly when it came to difficult field operations'.²⁸⁵ The 'hearts and minds' activities of military contingents, for example QIPs, were further acknowledged as possible sources of tensions and unintended consequences on the humanitarian operating environment, so that the study team called for a clear doctrine

²⁸⁰ Ibid., 168.

²⁸¹ Ibid., 64.

²⁸² Ibid., 64.

²⁸³ Espen Barth Eide, Anja Therese Kaspersen, Randolph Kent, and Karen von Hippel, *Report on Integrated Missions: Practical Perspectives and Recommendations*, Independent Study for the Expanded UN ECHA Core Group, May 2005. *United Nations Integrated Missions Planning Process (IMPP) Guidelines Endorsed by the Secretary-General on 13 June 2006*, reproduced in *International Peacekeeping* 15, no. 4 (August 2008): 588-607. Hereinafter IMPP Guidelines.

²⁸⁴ Eide, Kaspersen, Kent, and von Hippel (2005), supra fn. 283, 9 and 14.

²⁸⁵ Ibid., 6 and 28. Emphasis in the original.

on this issue.²⁸⁶ It also suggested that UN OCHA offices in the field should be ‘physically distinct, open to the wider community, be a recognised part of the UN family but not be *integrated*.’²⁸⁷

The *United Nations Integrated Missions Planning Process (IMPP) Guidelines*, endorsed by the UNSG in June 2006, defined ‘integrated peace support operations’, shortened as ‘integrated missions’, as missions characterised by the existence of ‘a shared vision among all UN actors as to the *strategic objective* of the UN presence at country level’, and they followed the *Report on Integrated Missions* by stating that ‘form (mission structure) should follow function and be tailored to the specific characteristics of each country setting.’²⁸⁸ The specificity of humanitarian assistance was taken into account by affirming that integration would be the guiding principle for complex UN operations in post-conflict situations, for ‘linking the different dimensions of peace support operations (political, development, humanitarian, human rights, rule of law, social and security),’ but at the same time ‘[t]he integrated mission planning process will ensure that humanitarian principles (as outlined in GA resolution 46/182) are respected so that they are upheld in the implementation of the Mission’s mandate and support the creation of an effective humanitarian operating environment.’²⁸⁹ Specific attention should be devoted to guaranteeing that the mission in implementing its mandate respect humanitarian principles ‘[i]n situations where violent conflict and/or tensions have reemerged and/or where serious humanitarian needs exist’.²⁹⁰

The need for the SRSG in integrated missions to uphold humanitarian principles was confirmed also by the UNSG *Note of Guidance on Integrated Missions* of 2006, issued to update the 2000 Note of Guidance, which identified integration as the guiding principle for complex UN operations in post-conflict situations, envisaged that the SRSG would be supported by a triple-hatted DSRSG/RC/HC, and tasked the latter with ensuring that possible ‘hearts and minds’ activities or QIPs carried out by the mission would not jeopardise humanitarian and development operations, and with planning and coordinating development and humanitarian activities, also engaging with NGOs.²⁹¹ The UNSG then issued a decision on integration in

²⁸⁶ Ibid., 31.

²⁸⁷ Ibid., 33. Emphasis in the original.

²⁸⁸ IMPP Guidelines (2008), supra fn. 283, 589. Emphasis added.

²⁸⁹ Ibid., 590-591. The UNGA in 2004 had ‘[c]all[ed] upon the [UNSG] to ensure that the design and implementation of [UN] integrated missions take into account the principles of humanity, neutrality and impartiality as well as independence for the provision of humanitarian assistance’. A/RES/59/141, 15 December 2004 (without vote), par. 9. See also ECOSOC Resolution 2004/50, 23 July 2004, pars. 17-18; ECOSOC Resolution 2005/4, 15 July 2005, par. 19.

²⁹⁰ IMPP Guidelines (2008), supra fn. 283, 601.

²⁹¹ UNSG, *Note from the Secretary-General: Guidance on Integrated Missions*, 17 January 2006, pars. 4, 6, 10, 12, 18, 19, and 22. The guidance on QIPs has been acknowledged and detailed by UN DPKO, confirming the need for coordination with the RC/HC or

June 2008, confirming again integration ‘as the guiding principle for *all conflict and post-conflict situations* where the UN has a Country Team and a multi-dimensional peacekeeping operation or political mission/office, whether or not these presences are structurally integrated.’²⁹² While different structural forms in the field should be possible, in all cases there should be ‘(i) a shared vision of the UN’s strategic objectives, (ii) closely aligned or integrated planning, (iii) a set of agreed results, timelines and responsibilities for the delivery of tasks critical to consolidating peace, and (iv) agreed mechanisms for monitoring and evaluation.’²⁹³

All these successive developments in peacekeeping missions’ doctrine were collated by UN DPKO in 2008 in the so-called Capstone Doctrine, which noted that in multidimensional peacekeeping missions ‘a clear distinction must be made between politically motivated actions to end conflict and move toward national development, and apolitical humanitarian assistance based exclusively on impartial response to assessed need, aimed at saving lives, alleviating suffering and maintaining or restoring the dignity of people affected by conflict’, since such a distinction ‘better assures humanitarian agencies safe and secure access throughout a conflict zone.’²⁹⁴ In order to ensure this, UN OCHA has elaborated three different possible models of structural relationships within an integrated UN presence:²⁹⁵ in countries emerging from crisis, with ‘a political / security context that is usually still in flux’, a “‘one foot in, one foot out” approach’ should be usually applied, characterised by limited structural integration, with ‘a combined DSRSG/RC/HC position, and a clearly identifiable OCHA presence outside the mission structure.’²⁹⁶ In case of ‘[p]ersistent widespread conflict or lack of a credible peace process,’ both UN OCHA and the HC should be outside the UN mission, in a “‘two feet out” approach.’²⁹⁷ Finally, in case of exceptionally stable post-conflict settings, ‘a fully integrated “two feet in” approach’ can be chosen, with ‘a combined DSRSG/RC/HC or simply a

DSRSG/RC/HC ‘to ensure that approved projects do not duplicate or undermine the humanitarian or developmental activities of other actors.’ UN DPKO, *DPKO Policy Directive: Quick Impact Projects (QIPs)*, 12 February 2007, par. 12.

²⁹² UNSG, *Decision of the Secretary-General – Decision No. 2008/24 – Integration*, 26 June 2008, par. i. Emphasis added.

²⁹³ Ibid., par. i(c). Moreover, ‘[i]ntegration arrangements should take full account of recognized humanitarian principles, allow for the protection of humanitarian space, and facilitate effective humanitarian coordination with all humanitarian actors.’ Ibid., par. i(d).

²⁹⁴ UN DPKO/UN DFS, *supra* fn. 244, 73-74. On ‘hearts and minds’ activities and humanitarian assistance, see Ibid., 30.

²⁹⁵ UN OCHA, *OCHA Policy Instruction: OCHA’s Structural Relationships within an Integrated UN Presence*, 1 May 2009. The Policy Instruction defined ‘integrated UN presence’, on the basis of the UNSG Decision on Integration of 2008, as ‘any context in which the United Nations has a multidimensional peacekeeping operation or political mission in addition to a United Nations Country Team’. Ibid., par. 2.1. Comprised in this term are all the situation qualified as ‘integrated mission’, meaning ‘structurally integrated field missions, for example, UN peacekeeping or special political missions that have a double or triple-hatted DSRSG/RC/HC who report to the SRSG/Head of Mission’ (this definition is taken from the document *IMPP Guideline --: Role of the Headquarters: Integrated Planning for UN Field Presences*, May 2009, approved by the UNSG). Ibid., par. 2.2.

²⁹⁶ UN OCHA (2009), *supra* fn. 295, par. 4.4. See also Ibid., par. 6.1.

²⁹⁷ Ibid., par. 4.5. See also Ibid., par. 6.2. The Instruction notes that ‘[t]hese situations may become more likely’, since ‘[i]n recent years, UN DPKO has been increasingly tasked by the Security Council to deploy in situations where there is no peace to keep’. Ibid., fn. 14.

DSRSG/RC if conditions warrant the phasing out of the HC position' and 'no identifiable OCHA field office, though OCHA may provide residual humanitarian capacity, if needed, through a field presence based in the Resident Coordinator's office'.²⁹⁸

Finally, in its 2010 policy on UN-CIMIC, defined as 'a military staff function that contributes to facilitating the interface between the military and civilian components of an integrated mission, as well as with the humanitarian and development actors in the mission area, in order to support UN mission objectives',²⁹⁹ UN DPKO has acknowledged the specific needs of humanitarian actors by providing that coordination of UN-CIMIC with humanitarian actors shall be in accordance with UN-CMCoord, a concept elaborated by the IASC and referring to 'the humanitarian civil-military coordination function that provides the necessary interface between humanitarian and military actors to protect and promote the humanitarian principles and achieve the humanitarian objectives in complex emergencies and natural disaster situations'.³⁰⁰

In sum, the UN peacekeeping architecture has undergone significant reforms since the end of the 1990s, adopting a decisive trend towards integration in order to maximise the impact of the UN in a given country and clearly envisaging the possibility that peacekeeping missions operate in situations of armed conflict. Concerns and limits connected to the identity of humanitarian assistance and the need for humanitarian actors to respect the principles of humanitarian action have been acknowledged and taken into account both by the UNSG and by UN DPKO. Nonetheless, integration remains the guiding principles of '*all conflict and post-conflict situations* where the UN has a Country Team and a multi-dimensional peacekeeping operation or political mission/office'. This implies that if UN OCHA does not succeed in obtaining that a separate HC is appointed or at least in being itself excluded from structural integration, problems for all humanitarian actors within the UN family and their implementing partners might arise in terms of pressure to compromise the principles to implement other components of the mission's mandate, or in terms of perception (which might influence the perception of the humanitarian community more in

²⁹⁸ Ibid., par. 4.6. See also Ibid., par. 6.3.

²⁹⁹ UN DPKO, *Policy: Civil-Military Coordination in UN Integrated Peacekeeping Missions (UN-CIMIC)*, October 2010, par. 1.

³⁰⁰ Ibid., pars. 12 and 1. Specific attention is devoted to the position of humanitarian actors in relation both to information sharing and to civil assistance, 'a support function that includes two types of related activities undertaken by the military component of a UN integrated mission', which are to be undertaken 'as appropriate and within mission capabilities' and might be both implemented as QIPs: '[p]rovid[ing] support to ensure a coordinated mission response to requests for assistance from humanitarian and development actors'; and '[f]acilitat[ing] the interaction between the mission and the local civilian population and authorities, in relation to Community Support Projects undertaken by the military components'. Ibid., pars. 15-16.

UN-CMCoord is defined in IASC (2004), *supra* fn. 154, par. 10.

general). As will be illustrated in Section 4.2.2.3., these problems have indeed emerged in practice. At the same time, notwithstanding the mission's structure, tensions have also arisen between humanitarians and the military in relation to the respective roles in the protection of civilians (POC).

4.2.2.2. UN Peacekeeping Missions, the Protection of Civilians (POC), and Humanitarian Assistance

Since 1999 the UNSC has devoted debates, statements and resolutions to POC and, in addition to clarifying that the primary responsibility for protecting civilians rests on States and Parties to an armed conflict (through respect for IHL rules on the conduct of hostilities, satisfaction of the basic needs of people—if necessary through external assistance—, and accountability for violations),³⁰¹ it has introduced POC as an almost constant feature in UN peacekeeping missions deployed in conflict or fragile post-conflict situations. In 2009, the then Chief of the Peacekeeping Best Practices Section at the UN identified three major shifts in UN peacekeeping since the end of the 1990s-beginning of the 21st century. In addition to 'the multidimensional nature of missions', which has become even more pronounced than in the 1990s, with 'peacekeeping missions ... meant to work closely with humanitarian and development partners' and with 'the combining of the development and humanitarian coordination function in the person of the Deputy Special Representative of an integrated mission', the other two major shifts are 'the interaction between UN peacekeeping and the other actors in peace operations', such as regional organisations or authorised multinational forces, and 'the shift towards "robust peacekeeping"', symbolised by the decision to reinforce the mission in Sierra Leone in 1999 in response to renewed hostilities and to give it 'provisions in its

³⁰¹ See, for example, S/RES/1265 (1999), 17 September 1999, pars. 4-8; S/PRST/2000/1, 13 January 2000, 1-2 (IDPs); S/RES/1296 (2000), 19 April 2000, pars. 2, 8, and 12; S/PRST/2003/27, 15 December 2003, 1; S/PRST/2004/18, 25 May 2004, 1-2 (Sudan); S/PRST/2004/46, 14 December 2004, 1-2; S/PRST/2005/25, 21 June 2005, 1; S/RES/1653 (2006), 27 January 2006, par. 10 (Great Lakes region); S/RES/1674 (2006), 28 April 2006, preamble and pars. 3, 5, 6, 8, 12 and 14; S/PRST/2007/49, 19 December 2007, 1-2 (Somalia); S/RES/1794 (2007), 21 December 2007, preamble (DRC); S/PRST/2008/18, 27 May 2008, 1; S/PRST/2008/40, 29 October 2008, 1 (DRC); S/PRST/2009/1, 14 January 2009, 1; S/RES/1889 (2009), 5 October 2009, par. 12; S/RES/1894 (2009), 11 November 2009, preamble and pars. 1, 2, and 10; S/RES/1906 (2009), 23 December 2009, preamble (DRC); S/RES/1923 (2010), 25 May 2010, pars. 2 and 22 (Chad); S/PRST/2010/11, 29 June 2010, 1-2; S/PRST/2010/25, 22 November 2010, 1-2; S/RES/1964 (2010), 22 December 2010, par. 15 (Somalia); S/RES/1970 (2011), 26 February 2011, preamble (Libya); S/RES/1973 (2011), 17 March 2011, preamble (Libya); S/RES/1975 (2011), 30 March 2011, preamble (Côte d'Ivoire); S/RES/1998 (2011), 12 July 2011, preamble (children in armed conflict); S/RES/2014 (2011), 21 October 2011, preamble (Yemen); S/RES/2053 (2012), 27 June 2012, preamble (DRC); S/RES/2062 (2012), 26 July 2012, preamble (Côte d'Ivoire); S/RES/2071 (2012), 12 October 2012, preamble (Mali); S/RES/2076 (2012), 20 November 2012, preamble (DRC); S/RES/2078 (2012), 28 November 2012, preamble (DRC); S/PRST/2012/28, 19 December 2012, 2 (Central African region); S/RES/2088 (2013), 24 January 2013, par. 10 (CAR); S/PRST/2013/2, 12 February 2013, 1; S/PRST/2013/6, 29 May 2013, 2 (Central African region); S/PRST/2013/8, 17 June 2013, 1 and 3 (children in armed conflict); S/RES/2109 (2013), 11 July 2013, preamble (Sudan); S/PRST/2013/11, 25 July 2013, 2 (DRC);. See also the resolutions and presidential statements on the protection of humanitarian, UN and associated personnel.

mandate that it could act against hostile elements in defence of the mandate and, “within the limits of its capacity”, protect civilians under imminent threat of attack.’³⁰²

Attention to protection by UN bodies was already present throughout the 1990s, but it was mostly limited to the mandates of peacekeeping operations in terms of physical protection—of humanitarian convoys, infrastructure essential for the delivery of humanitarian assistance, civilians in safe areas, UN personnel—in addition to a special emphasis on States’ responsibility to protect refugees and IDPs (emerged with Rwanda and the Great Lakes refugee crisis) and UN personnel.³⁰³

At the end of the 1990s and the beginning of the 21st century, this narrow focus on physical protection was expanded to the broader concept of POC in armed conflict, whose meaning and scope were gradually clarified to comprise a clear role for humanitarian assistance. POC encompasses both physical and legal protection,³⁰⁴ and includes: peacetime activities, such as training on IHL and IHRL for the armed forces; measures to be adopted in case of conflict, such as recommendations to the Parties to respect international law (regulating the conduct of hostilities, but also on humanitarian access and the safety and security of humanitarian workers), sanctions, and mandates for UN or multinational missions much wider than physical protection only; and post-conflict measures, such as demining, disarmament, and security sector reform.³⁰⁵ To be implemented, such a wide concept of protection engages not only peacekeepers, but also Parties to the conflict, other States, IGOs, the various components of the UN family, and humanitarian organisations.

Humanitarian assistance has thus become part of a wider effort and humanitarian workers have found themselves comprised in this holistic approach. While the UNSC has not addressed any call or request to humanitarian workers directly, they have been the object of calls and mandates addressed by the UNSC to Parties to the conflict, other States, and the UNSG, and in 2009 the UNSG clarified that ‘improving the protection of civilians is not a purely humanitarian task; rather, it is a task that requires focus and action in

³⁰² Corinna Kuhl, “The Evolution of Peace Operations, from Interposition to Integrated Missions,” in *International Humanitarian Law, Human Rights and Peace Operations*, Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008, ed. Gian Luca Beruto (Sanremo: International Institute of Humanitarian Law, 2009), 72-73.

³⁰³ See, Section 4.2.1.1. and, for example, S/PRST/1994/21, 30 April 1994, 2; S/PRST/1998/13, 20 May 1998, 2; A/RES/53/1 L, 7 December 1998 (without vote), par. 4 (on DRC).

An exception was UNGA res. 1970 on the principles for the protection of civilians in armed conflict, which included references to the applicability of IHRL in situations of conflict, as well as to the need not to attack objects essential to the survival of the civilian population and to allow the provision of humanitarian relief. Resolution 2675 (XXV), 9 December 1970, pars. 1, 5, and 8.

³⁰⁴ See, for example, S/PRST/1999/6, 12 February 1999, 2; S/PRST/2002/41, 20 December 2002, 2.

³⁰⁵ See, for example, S/PRST/2010/25, 22 November 2010, Annex.

the peacekeeping, human rights, rule of law, political, security, development and disarmament fields'.³⁰⁶ Therefore, humanitarian workers have had to define their role and position in POC.

As mentioned, the starting point of the focus on POC in peacekeeping mandates was the authorisation under Chapter VII to UNAMSIL in Sierra Leone in 1999 to 'take the necessary action ..., within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG'.³⁰⁷ An analogous mandate was given in 2000 in the DRC to the UN Organization Mission in the Democratic Republic of the Congo (MONUC), which was authorised under Chapter VII to 'take the necessary action, in the areas of deployment of its infantry battalions and as it deem[ed] it within its capabilities, to ... protect civilians under imminent threat of physical violence',³⁰⁸ in addition to protecting humanitarian workers under imminent threat of physical violence,³⁰⁹ and to 'contribut[ing] to the improvement of the security conditions in which humanitarian assistance [wa]s provided'.³¹⁰

In 2007, the UNSC emphasised that the protection of civilians, encompassing both protection from physical violence for civilians (including humanitarian workers) and facilitation of the provision of humanitarian assistance to civilians through the creation of the necessary security conditions, had to 'be given priority in decisions about the use of available capacity and resources',³¹¹ then it underlined 'the importance of MONUC implementing its mandate in full, including through robust rules of engagement',³¹² and highlighted that 'the protection of civilians require[d] a coordinated response from all relevant mission components and *encourage[d]* MONUC to enhance interaction, under the authority of the [SRSG], between its civil and military components at all levels *and humanitarian actors*, in order to consolidate expertise on the protection of civilians'.³¹³

³⁰⁶ S/2009/277, 29 May 2009, par. 8.

³⁰⁷ S/RES/1270 (1999), 22 October 1999, par. 14.

³⁰⁸ S/RES/1291 (2000), 24 February 2000, pars. 7(g) and 8. MONUC was established with S/RES/1258 (1999), 6 August 1999. See also S/RES/1341 (2001), 22 February 2001, par. 19; S/RES/1493 (2003), 28 July 2003, par. 25; S/RES/1565 (2004), 1 October 2004, pars. 4(b) and 6; S/RES/1592 (2005), 30 March 2005, par. 7; S/RES/1756 (2007), 15 May 2007, pars. 2(a) and 4; S/RES/1794 (2007), 21 December 2007, pars. 5 and 8; S/RES/1856 (2008), 22 December 2008, pars. 3(a) and 5.

³⁰⁹ See S/RES/1493 (2003), 28 July 2003, par. 25; S/RES/1565 (2004), 1 October 2004, pars. 4(b) and 6; S/RES/1756 (2007), 15 May 2007, pars. 2(a) and 4; S/RES/1856 (2008), 22 December 2008, pars. 3(a) and 5.

³¹⁰ S/RES/1493 (2003), 28 July 2003, par. 25; S/RES/1565 (2004), 1 October 2004, pars. 5(b) and 6; S/RES/1756 (2007), 15 May 2007, pars. 2(b) and 4; S/RES/1856 (2008), 22 December 2008, pars. 3(b) and 5. Similarly, see S/RES/1291 (2000), 24 February 2000, par. 7(g).

³¹¹ S/RES/1794 (2007), 21 December 2007, par. 5. Similarly, see S/RES/1856 (2008), 22 December 2008, par. 6; S/RES/1906 (2009), 23 December 2009, par. 7.

³¹² S/RES/1843 (2008), 20 November 2008, par. 4; see also S/RES/1856 (2008), 22 December 2008, par. 8.

³¹³ S/RES/1906 (2009), 23 December 2009, par. 8. Emphasis added. Moreover, the UNSC '[r]equest[ed] MONUC to build on best practices and extend successful protection measures on protection piloted in North Kivu, in particular the establishment of Joint

The focus on POC in the DRC has remained constant. In May 2003 the UNSC authorised under Chapter VII the temporary deployment (until the beginning of September 2003) of an Interim Emergency Multinational Force in Bunia, Operation Artemis, under France's guidance and under the aegis of the EU, 'to contribute to ... the improvement of the humanitarian situation in Bunia, ... and, if the situation require[d] it, to contribute to the safety of the civilian population, United Nations personnel and the humanitarian presence in the town.'³¹⁴ In 2010, when the UN Organization Stabilization Mission in the DRC (MONUSCO) succeeded MONUC, it was again tasked with giving priority to POC 'in decisions about the use of available capacity and resources' and authorised to use all necessary means to implement its POC mandate, which comprised '[e]nsur[ing] the effective protection of civilians, including humanitarian personnel and human rights defenders, under imminent threat of physical violence', and '[i]mplement[ing] the United Nations system-wide protection strategy in the Democratic Republic of the Congo, operationalizing it with MONUSCO's protection strategy built on best practices and extend[ing] useful protection measures, such as the Joint Protection Teams, Community Liaison Interpreters'.³¹⁵

POC and the guarantee of the security and freedom of movement of humanitarian workers, with authorization under Chapter VII to take the necessary action to implement these tasks, as well as the facilitation of humanitarian assistance, have been part of the mandate both of the UN Mission in Sudan (UNMIS), deployed in 2005 in connection with the ceasefire signed between the Government of Sudan and the SPLM and ended in 2011,³¹⁶ and of the AU/UN Hybrid operation in Darfur (UNAMID), deployed since 2007 in Darfur.³¹⁷ In addition, the UNSC 'underlined the need' for both missions 'to make full use' of their mandate and capabilities to protect civilians and, in the case of UNAMID, to facilitate humanitarian access;³¹⁸ and requested the formulation and implementation by both missions of a comprehensive strategy

Protection Teams, Early Warning Centres, communications liaisons with local villages and other measures, to other areas, particularly South Kivu' and '[e]ncourage[d] MONUC to enhance its interaction with the civilian population to raise awareness and understanding about its mandate and activities and to collect reliable information on violations of international humanitarian law and human rights abuses perpetrated against civilians'. Ibid. pars. 9 and 14.

³¹⁴ S/RES/1484 (2003), 30 May 2003, par. 1. See also Council of the EU, *Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo*, OJ L 143, 11 June 2003, 50-52; Council of the EU, *Council Decision 2003/432/CFSP of 12 June 2003 on the launching of the European Union military operation in the Democratic Republic of Congo*, OJ L 147, 14 June 2003, 42.

³¹⁵ S/RES/1925 (2010), 28 May 2010, pars. 1, 11 and 12(a) and (f). See also S/RES/1991 (2011), 28 June 2011, par. 1.

³¹⁶ See S/RES/1590 (2005), 24 March 2005, pars. 4(b) and 16(i); S/RES/1706 (2006), 31 August 2006 (12-0-3), pars. 9(a) and 12(a) (expansion of UNMIS in Darfur, never implemented).

³¹⁷ See S/RES/1769 (2007), 31 July 2007, par. 1 (making reference to S/2007/307/Rev.1, see in particular pars. 54(a) and (b) and 55(b)(vi), (b)(vii) and (d)) and par. 15(a)(i) and (ii); S/RES/2003 (2011), 29 July 2011, par. 5.

³¹⁸ For UNMIS, see S/RES/1870 (2009), 30 April 2009, par. 14; S/RES/1919 (2010), 29 April 2010, par. 4.

For UNAMID, see S/RES/1828 (2008), 31 July 2008 (14-0-1), par. 7; S/RES/1881 (2009), 6 August 2009, par. 2; S/RES/1935 (2010), 30 July 2010, par. 2; S/RES/2003 (2011), 29 July 2011, par. 3.

for the protection of civilians.³¹⁹ Also the two missions established after the end of UNMIS, the UN Mission in the Republic of South Sudan (UNMISS) and the UN Interim Security Force for Abyei (UNISFA), have been both mandated to protect civilians, provide security for humanitarian workers and contribute to security conditions conducive to the safe provision of humanitarian assistance, and authorised under Chapter VII to take the necessary actions to do this.³²⁰

In connection to the conflicts in Chad and the CAR, the UNSC authorised the temporary deployment of an EU operation (EUFOR Tchad/RCA), and the deployment of the UN Mission in the CAR and Chad (MINURCAT), both mandated *inter alia* to protect civilians, facilitate the delivery of humanitarian aid and the free movement of humanitarian personnel by helping to improve security in the area of operations, and in the case of MINURCAT also to execute operations of a limited character in order to extract civilians and humanitarian workers in danger.³²¹ Similarly, the UN Interim Force in Lebanon (UNIFIL) after 2006 and the United Nations Operation in Burundi (ONUB) have had mandates comprising the authorisation to take all necessary measures, within their capabilities and in their areas of deployment, to protect civilians under imminent threat of physical violence (without prejudice to the responsibilities of the national governments).³²²

The United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), established in 2013, has been authorised under Chapter VII to use all necessary means to support the re-

³¹⁹ For UNMIS, see S/RES/1870 (2009), 30 April 2009, par. 15; S/RES/1919 (2010), 29 April 2010, par. 6. For UNAMID, see S/RES/1935 (2010), 30 July 2010, par. 4; S/RES/2003 (2011), 29 July 2011, par. 3.

³²⁰ See S/RES/1996 (2011), 8 July 2011, pars. 3(b)(v) and (vi) and 4; S/RES/1990 (2011), 27 June 2011, pars. 2(d) and 3(c) and (d).

³²¹ For EUFOR Tchad/RCA, see S/RES/1778 (2007), 25 September 2007, par. 6(a)(i) and (ii); S/RES/1861 (2009), 14 January 2009, par. 3.

For MINURCAT's Chapter VII authorisation, see S/RES/1861 (2009), 14 January 2009, par. 7(a)(i) and (ii) and (b)(ii); S/RES/1923 (2010), 25 May 2010, pars. 9(iv), 10 and 11(2).

In addition, the UNSC endorsed the creation within Chad of the 'Police tchadienne pour la protection humanitaire (PTPH)', then renamed 'Détachement intégré de sécurité (DIS)', a police corp 'dedicated exclusively to maintaining law and order in refugee camps, sites with concentrations of internally displaced persons and key towns in neighbouring areas and to assisting in securing humanitarian activities in eastern Chad'. S/RES/1778 (2007), 25 September 2007, par. 5; S/RES/1861 (2009), 14 January 2009, par. 5.

MINURCAT was mandated to 'select, train, advise and facilitate support to' elements of the PTPH. S/RES/1778 (2007), 25 September 2007, par. 2(a); S/RES/1861 (2009), 14 January 2009, par. 6(a); S/RES/1923 (2010), 25 May 2010, par. 8(1).

³²² On UNIFIL, whose authorisation covered also 'to protect [UN] personnel, facilities, installations and equipment, ensure the security and freedom of movement of [UN] personnel, humanitarian workers', see S/RES/1701 (2006), 11 August 2006, pars. 11(d) and 12. According to Wills, 'Resolution 1701 ... authorized UNIFIL's transformation to an "almost" Chapter VII mission. The resolution does not refer to Chapter VII and does not use the words "all necessary means." However, it does recognize the crisis in Lebanon as a threat to international peace and security and authorizes UNIFIL "to take all necessary action ... to ensure that its area of operation is not utilized for hostile activities of any kind."' Siobhán Wills, *Protecting Civilians: The Obligations of Peacekeepers* (Oxford [etc.]: Oxford University Press, 2009), 15-16.

On ONUB, who was also authorised 'in coordination with humanitarian and development communities ... to contribute to the creation of the necessary security conditions for the provision of humanitarian assistance, and facilitate the voluntary return of refugees and internally displaced persons', see S/RES/1545 (2004), 21 May 2004, preamble and par. 5. ONUB completed its mandate at the end of 2006.

establishment of State authority throughout the country, protect civilians under imminent threat of physical violence, and contribute to the creation of ‘a secure environment for the safe, *civilian-led* delivery of humanitarian assistance, *in accordance with humanitarian principles*’.³²³ In May 2013 the UNSC decided to establish the United Nations Assistance Mission in Somalia (UNSOM), an integrated political mission mandated *inter alia* to support and assist the Somali Federal Government, monitor IHL and IHRL violations, help investigate and report to the UNSC.³²⁴ Finally, the AU International Support Mission in Central Africa (AFISM-CAR), authorised to deploy by the AU Peace and Security Council in July 2013, has been also mandated *inter alia* to protect civilians and restore security and public order; stabilise the country and restore the authority of the central Government; and create conditions conducive for the provision of humanitarian assistance to population in need.³²⁵

POC and POC mandates have reached new levels in Côte d’Ivoire, DRC, and Libya. Since its establishment in 2004, the UN Operation in Côte d’Ivoire (UNOCI) has been authorised under Chapter VII to use all the necessary means to carry out its mandate, which includes ‘facilitat[ing] the free flow of people, goods and humanitarian assistance, *inter alia*, by helping to establish the necessary security conditions’,³²⁶ and protecting civilians under imminent threat of physical violence,³²⁷ also by ‘work[ing] closely with humanitarian agencies, particularly in relation to areas of tensions and of return of displaced persons, to exchange information on possible outbreaks of violence and other threats against civilians in order to respond thereto in a timely and appropriate manner’.³²⁸ Support to UNOCI in POC also came from French forces deployed in the country, authorised in 2007 to ‘use all necessary means in order to support UNOCI in accordance with the agreement reached between UNOCI and the French authorities, and in particular to ... [h]elp to protect civilians, in the deployment areas of their units’. With the eruption of conflict in 2011, the UNSC strengthened UNOCI’s mandate in POC, authorising it ‘while impartially implementing its mandate, to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical

³²³ S/RES/2100 (2013), 25 April 2013, pars. 7, 16, and 17. Emphasis added. MINUSMA on 1 July 2013 succeeded ECOWAS African-led International Support Mission to Mali (AFISMA), authorized by the UNSC in S/RES/2085 (2012), 20 December 2012 (par. 9), and deployed in January 2013.

³²⁴ S/RES/2102 (2013), 2 May 2013, pars. 1-2 and 5.

³²⁵ AU Peace and Security Council, 385th Meeting, PSC/PR/Comm.2(CCCLXXXV), 19 July 2013, par. 6.

³²⁶ S/RES/1528 (2004), 27 February 2004, par. 6(k); S/RES/1609 (2005), 24 June 2005, par. 2(o); S/RES/1739 (2007), 10 January 2007, par. 2(h); S/RES/1933 (2010), 30 June 2010, par. 16(f); S/RES/2000 (2011), 27 July 2011, par. 7(h).

³²⁷ See S/RES/1528 (2004), 27 February 2004, par. 6(i); S/RES/1609 (2005), 24 June 2005, par. 2(k); S/RES/1739 (2007), 10 January 2007, par. 2(f); S/RES/1933 (2010), 30 June 2010, par. 16(b); S/RES/2000 (2011), 27 July 2011, par. 7(a).

³²⁸ S/RES/1933 (2010), 30 June 2010, par. 16(b). Similarly, see S/RES/1880 (2009), 30 July 2009, par. 28; S/RES/2000 (2011), 27 July 2011, par. 7(a).

violence, within its capabilities and its areas of deployment, *including to prevent the use of heavy weapons against the civilian population*’.³²⁹

In DRC, in March 2013 the UNSC has decided under Chapter VII that an ‘Intervention Brigade’ should be deployed ‘on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping,’ under direct command of the MONUSCO Force Commander, and mandated to ‘carry out targeted *offensive operations* ..., either unilaterally or jointly with the FARDC, in a robust, highly mobile and versatile manner and in strict compliance with international law, ... to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities.’³³⁰

Finally, the armed conflict in Libya ‘marked the first time the Council [] authorized the use of force for human protection purposes against the wishes of a functioning state.’³³¹ First, ‘*[r]ecalling* the Libyan authorities’ responsibility to protect its population’, the UNSC, acting under Chapter VII, ‘*[c]all[ed] upon* all Member States, working together and acting in cooperation with the Secretary General, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya, and request[ed] the States concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to this paragraph, and expresse[d] its readiness to consider taking additional appropriate measures, as necessary, to achieve this’.³³²

Afterwards, this readiness was recalled when the UNSC, ‘*[e]xpressing its determination* to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel,’ and ‘*[c]onsidering* that the establishment of a ban on all flights in the airspace of the Libyan Arab Jamahiriya constitute[d] an important element for the protection of civilians as well as the safety of the delivery of humanitarian assistance and a decisive step for the cessation of hostilities in Libya’, ‘*[d]emand[ed]* that the Libyan authorities compl[ied] with their obligations under international law, including international humanitarian law, human rights and refugee law and t[oo]k all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage

³²⁹ S/RES/1975 (2011), 30 March 2011, par. 6.

³³⁰ S/RES/2098 (2013), 28 March 2013, pars. 9 and 12(b). Emphasis added.

³³¹ Alex J. Bellamy and Paul D. Williams, “The New Politics of Protection? Côte d’Ivoire, Libya and the Responsibility to Protect,” *International Affairs* 87, no 4 (July 2011), 825.

³³² S/RES/1970 (2011), 26 February 2011, preamble and par. 26.

of humanitarian assistance’, and, again under Chapter VII, ‘[a]uthorize[d] Member States ... to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory’.³³³ In addition, the UNSC ‘[a]uthorize[d] Member States ..., acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights ..., as necessary’.³³⁴

In the case of Libya, POC and the provision of humanitarian assistance to civilians have thus given rise to an authorisation to the use of force by UN Member States, as had happened for example in Somalia with UNITAF, in BiH, and in Rwanda with Operation Turquoise. Libya was not classifiable as a so-called failed State, and the government was openly opposed to the foreign intervention, so that this case has been considered an example of implementation of the R2P doctrine,³³⁵ highlighting the unclear relationship between this concept and the concept of POC. The UNSG has clarified in his May 2012 report on POC that the two concepts ‘share some common elements, particularly with regard to prevention and support to national authorities in discharging their responsibilities towards civilians,’ but they are different to the extent that POC ‘is a legal concept based on international humanitarian, human rights and refugee law, while [R2P] is a political concept, set out in the 2005 World Summit Outcome’; also, in terms of scope, POC ‘relates to violations of international humanitarian and human rights law in situations of armed conflict’, while R2P ‘is limited to violations that constitute war crimes or crimes against humanity or that would be considered acts of genocide or ethnic cleansing’, and three out of four of these conducts do not necessarily take place in situations of armed conflict.³³⁶

The protection of civilians (including humanitarian workers), with the facilitation of the provision of humanitarian assistance often being part of it or added to it, has become a constant element in the mandate of peacekeeping missions with Chapter VII authorisation, operating also in areas plagued by hostilities, as was

³³³ S/RES/1973 (2011), 17 March 2011 (10-0-5), preamble and pars. 3-4.

³³⁴ S/RES/1973 (2011), 17 March 2011 (10-0-5), par. 8.

³³⁵ Bellamy and Williams (2011), *supra* fn. 331, 825.

³³⁶ S/2012/376, 22 May 2012, par. 21. On the limited endorsement of R2P by the UNGA, in the World Summit outcome, and by the UNSC, see A/RES/60/1, 16 September 2005 (without vote); S/RES/1674 (2006), 28 April 2006. On R2P and peacekeeping, see also Lise Morjé Howard, *UN Peacekeeping in Civil Wars* (Cambridge [etc.]: Cambridge University Press, 2008), 338-339.

the case for the aforementioned missions, and not just in post-conflict (albeit fragile) scenarios.³³⁷ In its thematic resolution on POC of April 2006, the UNSC

[r]eaffirm[ed] its practice of ensuring that the mandates of United Nations peacekeeping, political and peacebuilding missions include, where appropriate and on a case-by-case basis, provisions regarding (i) the protection of civilians, particularly those under imminent threat of physical danger within their zones of operation, (ii) the facilitation of the provision of humanitarian assistance, and (iii) the creation of conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons, and *expresse[d]* its *intention* of ensuring that (i) such mandates include clear guidelines as to what missions can and should do to achieve those goals, (ii) the protection of civilians is given priority in decisions about the use of available capacity and resources, including information and intelligence resources, in the implementation of the mandates, and (iii) that protection mandates are implemented.³³⁸

As an annex to four of its presidential statements on POC, the UNSC adopted a corresponding number of versions of an ‘Aide Memoire for the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict’, prepared by the UN Secretariat (the two latest versions by UN OCHA, more precisely) to assist the UNSC in dealing with this topic and provide it with a collection of options of agreed language, taken from previous resolutions and presidential statements. The first two versions, adopted in 2002 and 2003 respectively, focused on the possible components of peacekeeping missions’ mandates in the field of POC,³³⁹ and they both included the suggestion that peacekeeping missions could contribute to ensuring the safety and security of humanitarian, UN and associated personnel by helping guarantee respect by Parties to the conflict of the impartiality and neutrality of humanitarian operations, and by ensuring a safe and secure environment for humanitarian workers.³⁴⁰ The two most recent versions are much more comprehensive and refer, among the issues of concern of the UNSC for the protection of civilians, to humanitarian access and the safety and security of humanitarian workers, including various points for the UNSC to consider in order to achieve the two main objectives of having ‘Parties to armed conflict to agree to and facilitate relief operations that are humanitarian and impartial in character and to allow and facilitate rapid and unimpeded passage of relief consignments, equipment and personnel,’ and having ‘Parties to armed conflict to respect and protect humanitarian workers and facilities.’³⁴¹

³³⁷ For example, the UN Mission in Liberia (UNMIL), deployed in 2003 (see S/RES/1509 (2003), 19 September 2003, par. 3(j) and 3(k)); and ONUB between 2004 and 2006 (see S/RES/1545 (2004), 21 May 2004, par. 5).

³³⁸ S/RES/1674 (2006), 28 April 2006, par. 16. Similarly, see S/PRST/2013/2, 12 February 2013, 4-5.

³³⁹ Indeed, the first two versions of the Aide Memoire are entitled ‘Aide Memoire for the Consideration of Issues Pertaining to the Protection of Civilians *during the Security Council’s Deliberation of Peacekeeping Mandates*’ (emphasis added), while the two more recent ones bear the more general title ‘Aide Memoire for the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict’.

³⁴⁰ See S/PRST/2002/6, 15 March 2002, Annex, 6; S/PRST/2003/27, 15 December 2003, Annex, 6.

³⁴¹ S/PRST/2009/1, 14 January 2009, Annex, 7-8, 18, and 22-24; S/PRST/2010/25, 22 November 2010, Annex, 5-6, 17, and 24-26. For a more detailed analysis of the role of humanitarian organisations according to the Aide Memoire, see Section 5.3.2.1.

Humanitarians have been also increasingly expected to cooperate with peacekeeping missions in order to contribute to the wider mission of protecting civilians. The UNSC has acknowledged the multidimensional nature of POC and the need for coordination not only among the components of the mission, but among all the various actors involved (such as ‘the host state, mandated UN protection agencies, non-governmental organizations and the [ICRC]’,³⁴² or ‘the [UN], the [ICRC] and other relevant organisations including regional organisations’).³⁴³ Furthermore, the UNSC has started requesting or welcoming the formulation of comprehensive or integrated strategies for the achievement of the objective of the protection of civilians (or for specific aspects of it, such as the prevention, protection, and response to sexual violence), involving the UN country team concerned and all relevant actors, in addition to the UN peacekeeping mission.³⁴⁴ It has also requested the UNSG ‘to ensure that United Nations missions provide local communities with adequate information with regard to the role of the mission and in this regard *ensure coordination between a United Nations mission and relevant humanitarian agencies*’.³⁴⁵ However, no well-defined guidance exists on the division of responsibilities related to POC among the different components of a UN peacekeeping mission, and this division may be even more problematic for humanitarians if the mission is integrated, since UN humanitarian agencies and their partners would be part of the HCT and gather under an HC that, in case of one foot in-one foot out or two feet in structural integration, would be part of the mission. The perception of these agencies as contributing to the UN effort might thus run against their perception as purely humanitarian and a-political actors, especially in case the military personnel in the UN mission engage in conflict or are perceived as associated with one Party to the conflict, as will be explained in the next Section.

4.2.2.3. *Integration and POC: Challenges and Responses*

Civil-military relations have emerged as problematic not only in the case of humanitarian actors’ relationships with belligerents or other military forces, but also in the interaction between humanitarians,

³⁴² Victoria Holt, Glyn Taylor, and Max Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (New York: UN, 2009), 3.

³⁴³ S/RES/1894 (2009), 11 November 2009, par. 34.

³⁴⁴ See, for example, S/PRST/2002/41, 20 December 2002, 2; S/RES/1794 (2007), 21 December 2007, par. 18 (MONUC); S/RES/1870 (2009), 30 April 2009, par. 15 (UNMIS); S/RES/1894 (2009), 11 November 2009, par. 24; S/RES/1906 (2009), 23 December 2009, par. 8 and 9 (MONUC); S/RES/1919 (2010), 20 April 2010, par. 6 (UNMIS); S/RES/1925 (2010), 28 May 2010, par. 12 (MONUSCO); S/RES/1933 (2010), 30 June 2010, par. 16(b) (UNOCI); S/RES/1935 (2010), 30 July 2010, par. 4 (UNAMID); S/RES/2003 (2011), 29 July 2011, par. 3 (UNAMID). In the Aide Memoire, see S/PRST/2009/1, 14 January 2009, 5 and 15; S/PRST/2010/25, 22 November 2010, Annex, 3 and 14. See also S/PRST/2, 12 February 2013, 5.

³⁴⁵ S/RES/1894 (2009), 11 November 2009, par. 25.

either UN or non-UN, with peacekeepers, especially in the framework of integrated missions. This interaction may be especially sensitive when UN missions lose their impartiality because of being ‘tasked with partnering with host governments involved in human rights abuses at the same time they are responsible for monitoring and reporting on such violations’.³⁴⁶ The reference is here to MONUC, which was an integrated mission characterised by what UN OCHA would identify as ‘one foot in-one foot out approach’, with a triple-hatted DSRSG/RC/HC and an UN OCHA office separated from the mission. On the one hand, MONUC had a mandate comprising POC and the facilitation of the provision of humanitarian assistance, so that it aimed to collaborate closely with humanitarian actors, for instance through joint assessments and the provision of logistical support and escorts, and to negotiate with armed groups,³⁴⁷ in order to improve humanitarian access and facilitate the provision of humanitarian assistance to civilians in need.

On the other hand, MONUC was ‘[e]ncourage[d] ..., in accordance with its mandate ..., to use all necessary means, within the limits of its capacity and in the areas where its units [we]re deployed, to support the FARDC [Forces Armées de la République Démocratique du Congo] integrated brigades with a view to disarming the recalcitrant foreign and Congolese armed groups’.³⁴⁸ Not only were governmental armed forces a Party to the conflict, they were also responsible of human rights violations against civilians.³⁴⁹ MONUC was thus perceived as a participant in the conflict and not impartial, as it also got involved in the use of armed force in order to protect civilians under imminent threat of violence.³⁵⁰ Moreover, despite being mandated to facilitate the provision of humanitarian assistance and not to directly provide it, MONUC tried to enhance its visibility and acceptance among the local populations by implementing QIPs.³⁵¹

³⁴⁶ Holt, Taylor, and Kelly (2009), supra fn. 342, 70.

³⁴⁷ See, for example, S/2003/2011, 21 February 2003, par. 43; S/2003/566, 27 May 2003, par. 64; S/2003/1098, 17 November 2003, par. 48; S/2005/506, 2 August 2005, pars. 51 and 66; S/2005/832, 28 December 2005, par. 60; S/2006/390, 13 June 2006, par. 43; S/2008/218, 2 April 2008, pars. 33 and 45; S/2008/728, 21 November 2008, par. 48; S/2009/335, 30 June 2009, par. 24.

³⁴⁸ S/RES/1794 (2007), 21 December 2007, par. 5. See also S/RES/1856 (2008), 22 December 2008, pars. 3(g) and 5; S/RES/1906 (2009), 23 December 2009, pars. 22-23.

³⁴⁹ See, for example, Major General (ret) Patrick Cammaert, “A Military Perspective on Protecting Human Dignity in Armed Conflict,” in *Protecting Human Dignity in Armed Conflict*, eds. Sanne Boswijk and the Netherlands Red Cross (Nijmegen: Wolf Publishers, 2008), 26-32.

³⁵⁰ UNSG reports noted from the end of 2008 onwards an increase in attacks against humanitarian workers, with a one-time suggestion that ‘[t]he support of MONUC to FARDC [Forces Armées de la République Démocratique du Congo, the governmental armed forces] also seem[ed] to have led to negative perceptions of United Nations humanitarian organizations’. S/2010/369, 9 July 2010, par. 47. See also S/2008/693, 10 November 2008, pars. 50-57; S/2008/728, 21 November 2008, par. 42; S/2009/335, 30 June 2009, par. 24.

³⁵¹ QIPs realised by MONUC included ‘the rehabilitation of bridges, roads, schools and hospitals, the provision of school and medical supplies, the provision of fuel for the three humanitarian boat convoys, the restoration of electricity and water supplies and the construction or rehabilitation of shelters for internally displaced persons’; and ‘high visibility projects in the areas of restoration or enhancement of water services and water purification; provision of public sanitation; provision of basic medical equipment and medical supplies; repairs to school buildings and provision of basic school furniture/materiel; repairs to hospital/medical facilities; and repairs to basic community infrastructure’. S/2002/621, 5 June 2002, par. 54; S/2002/1180, 18 October 2002, par. 66.

A similar perception characterises MONUSCO, the current UN mission in the DRC, again mandated under Chapter VII to protect civilians, including humanitarian workers, under imminent threat of violence, but also support the Congolese Government in ‘bring[ing] the ongoing military operations against the FDLR, the Lord’s Resistance Army (LRA) and other armed groups, to a completion, in compliance with international humanitarian, human rights and refugee law and the need to protect civilians, *including through the support of the FARDC in jointly planned operations*’.³⁵² The situation has become even more complex with the deployment of the Intervention Brigade. Being mandated, as already mentioned, to carry out targeted offensive operations, unilaterally or with Congolese armed forces, to prevent the expansion of non-State armed groups, neutralize them, and disarm them,³⁵³ the Brigade is likely to become a Party to the conflict, bound to respect IHL,³⁵⁴ raising the question whether the whole mission should be qualified as such and could be considered a legitimate target, or only the Brigade or those elements taking part in the hostilities.³⁵⁵

More in general, humanitarians’ relationships with a peacekeeping mission might be controversial when the latter is endowed with a mandate comprising both the provision of humanitarian protection and political goals such as overseeing and contributing to the implementation of a peace agreement, or when it has the protection task to ‘collect information on potential threats against the civilian population as well as reliable information on violations of international humanitarian and human rights law, and bring them to the attention of the authorities as appropriate’, as was or has been the case for MONUC, MONUSCO, and UNOCI.³⁵⁶

UNOCI was perceived, similarly to MONUC, as having taken sides in the conflict in Côte d’Ivoire in 2011, when its POC mandate was strengthened to include the prevention of the use of heavy weapons against the civilian population, and it ‘fired at ex-president Laurent Gbagbo’s military units when the latter shelled the Golf Hotel, where President Alassane Ouattara was based’, justifying it by ‘saying it had to

³⁵² S/RES/1925 (2010), 28 May 2010, par. 12(a) and 12(h).

³⁵³ See S/RES/2098 (2013), 28 March 2013, par. 12(b). See also Section 4.2.2.2.

³⁵⁴ On the applicability of IHL to peacekeepers, see Sections 4.2.1.2. (fn. 263) and 6.2.4.2.. On the Brigade having already engaged in military action, see Kenny Katombe, “U.N. Intervention Brigade fires on Congo rebel positions,” Reuters, August 23, 2013, available at <http://www.reuters.com/article/2013/08/23/us-congo-democratic-fighting-idUSBRE97M0WA20130823> (accessed September 15, 2013).

³⁵⁵ See Bruce “Ossie” Oswald, “The Security Council and the Intervention Brigade: Some Legal Issues,” *ASIL Insights* 17, no. 15 (6 June 2013). Available at <http://www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues-0> (accessed September 15, 2013). The author further highlights the unclear meaning of the term ‘neutralise’ as part of the Brigade’s mandate.

³⁵⁶ S/RES/1925 (2010), 28 May 2010, par. 17 (MONUSCO). Similarly, S/RES/1906 (2009), 23 December 2009, par. 14 (MONUC); S/RES/1880 (2009), 30 July 2009, par. 28 (UNOCI); S/RES/1933 (2010), 30 June 2010, par. 16 (b) (UNOCI).

respond, following direct attacks on civilians and peacekeepers, including on UNOCI headquarters.³⁵⁷ It was reported that ‘[f]ollowing the battle for power in Abidjan in a bid to separate themselves from military units, [UN OCHA] stopped using UN cars, hiring local ones instead’.³⁵⁸

MONUSCO and UNOCI are also both characterised by a ‘one foot in-one foot out’ approach, just like UNAMA in Afghanistan (which is a political mission, without a military component, but is led by UN DPKO), UNAMSIL in Sierra Leone, UNMIS in Sudan and then UNMISS in South Sudan, UNMIL in Liberia, ONUB in Burundi,³⁵⁹ MINUSMA in Mali and UNSOM in Somalia.³⁶⁰ On the other hand, UNAMID and MINURCAT were not integrated, structured along a ‘two feet out’ approach, and UNIFIL has remained outside the integrated mission concept completely, being a traditional peacekeeping operation, not multidimensional.³⁶¹ Regarding UNAMID, the decision to leave control of the humanitarian sector in Darfur to the UNMIS DSRSG/RC/HC was recommended by the UNSG himself, considering that ‘[t]he humanitarian response must be separate and distinct from any peacekeeping operation to ensure that the provision of assistance is strictly guided by humanitarian imperatives.’³⁶² This was crucial, taking into account that UNAMID’s mandate also includes ‘tak[ing] the necessary action ... in order to ... support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, ... without prejudice to the responsibility of the Government of Sudan’.³⁶³

In Somalia, difficulties for humanitarian actors due to attacks against humanitarian workers and insecurity,³⁶⁴ administrative restrictions,³⁶⁵ and the perception of humanitarian actors as part of political efforts to tackle the crisis by foreign actors, and thus as not neutral and independent,³⁶⁶ have been further complicated by the fact that the AU mission AMISOM has been in charge on the one hand, of facilitating

³⁵⁷ UN Humanitarian Information Unit – IRIN, “Côte d’Ivoire: Aid agencies fighting to remain impartial.” April 22, 2011. Available at <http://www.irinnews.org/Report/92557/COTE-D-IVOIRE-Aid-agencies-fighting-to-remain-impartial> (accessed April 25, 2011).

³⁵⁸ Ibid.

³⁵⁹ See UN OCHA (2009), *supra* fn. 295, 4.

³⁶⁰ For MINUSMA, see S/RES/2100 (2013), 25 April 2013, par. 11. For UNSOM, see S/RES/2102 (2013), 2 May 2013, pars. 1 and 6.

³⁶¹ See UN OCHA (2009), *supra* fn. 295, 4. UNAMI is a political missions, lacking a military component and led by UN DPA rather than UN DPKO.

³⁶² S/2006/591, 28 July 2006, par. 106. See also Holt, Taylor, and Kelly (2009), *supra* fn. 342, 359.

³⁶³ S/RES/1769 (2007), 31 July 2007, par. 15(a)(ii).

³⁶⁴ See, for example, S/2000/1211, 19 December 2000, pars. 36-38 and 51; S/2002/709, 27 June 2002, pars. 9-10 and 14; S/2002/1201, 25 October 2002, pars. 17 and 23; S/2003/231, 26 February 2003, pars. 10 and 58; S/2003/636, 10 June 2003, pars. 26-28; S/2003/987, 13 October 2003, pars. 40-42; S/2004/115, 12 February 2004, pars. 24-33 and 41; S/2004/469, 9 June 2004, pars. 24-26; S/2005/392, 16 June 2005, par. 40 and 46; S/2006/122, 21 February 2006, par. 20; S/2007/658, 7 November 2007, pars. 39-40 and 43; S/2008/178, 14 March 2008, par. 48; S/2008/352, 30 May 2008, pars. 45-54; S/2008/466, 16 July 2008, pars. 21 and 51; S/2008/709, 17 November 2008, pars. 25 and 71; S/2009/132, 9 March 2009, pars. 21-22 and 74-75; S/2009/373, 20 July 2009, pars. 46-47; S/2009/503, 2 October 2009, pars. 18; S/2009/684, 8 January 2010, pars. 24-25; S/2010/234, 11 May 2010, par. 83; S/2010/577, 9 November 2010, pars. 49-53.

³⁶⁵ See, for example, S/2007/381, 25 June 2007, pars. 49-52.

³⁶⁶ See, for example, S/2007/259, 7 May 2007, par. 23; S/2010/577, 9 November 2010, par. 57.

humanitarian assistance and ‘facilitat[ing], as may be required and within capabilities, humanitarian operations’ and, on the other hand, of ‘provid[ing] support to the TFIs [Transitional Federal Institutions] in their efforts towards the stabilization of the situation in the country and the furtherance of dialogue and reconciliation’, ‘provid[ing], as appropriate, protection to the TFIs and their key infrastructure, to enable them to carry out their functions,’ and ‘assist[ing] in the implementation of the National Security and Stabilization Plan of Somalia’.³⁶⁷ In the discussions about the possible deployment of a UN mission, in 2007 humanitarian agencies were vocal on the need to avoid integration of the humanitarian component in the mission, ‘safeguarding ... an impartial and independent humanitarian space and humanitarian principles’.³⁶⁸

In 2009, the UNSG reported that while it was essential that ‘humanitarian, political, security and recovery efforts [be] coordinated in an integrated manner’, at the same time regarding ‘the provision of humanitarian assistance, all humanitarian actors [] stressed the need for particular care to ensure the provision of humanitarian assistance based on need, and the principles of neutrality and impartiality ... to avoid the politicization of aid delivery, and to prevent humanitarian efforts from being drawn into the conflict’, so that a possible peacekeeping mission should be tasked with ‘a responsibility to facilitate humanitarian assistance through the promotion of a secure environment in which aid can be more freely delivered.’³⁶⁹ Even in the absence of an integrated mission, concerns about the impact of the UN political branch on humanitarian space followed the statement in 2009 by the then SRSG that ‘those who claim neutrality can also be complicit. The Somali Government needs support – moral and financial – and Somalis ... as well as the international community, have an obligation to provide both’.³⁷⁰ Furthermore, in March 2013 the UNSC, reauthorizing the deployment of AMISOM until the end of February 2013, envisaged the creation of a UN mission, what would be UNSOM, with a structurally integrated DSRSG/RC/HC and, in the meantime, requested the UNSG to ensure coordination between the UNCT activities and the activities of the UN mission, ‘including through joint teams and joint strategies, *while ensuring the humanity, impartiality,*

³⁶⁷ AU Peace and Security Council, 69th Meeting, PSC/PR/Comm(LXIX), 19 January 2007, par. 8. See also S/RES/1744 (2007), 21 February 2007, par. 4(d), 4(b) and 4(c); S/RES/1772 (2007), 20 August 2007, par. 9. Mr. Ramtane Lamamra, Commissioner for Peace and Security for the African Union, reported to the Security Council on 20 March 2007 that ‘AMISOM continue[d] to provide basic humanitarian relief to local communities’, in the sense that ‘[t]he AMISOM Level I hospital provide[d] medical care to a considerable number of Somalis, while AMISOM water tankers suppl[ied] portable water to communities around the camps and beyond.’ S/PV.6095, 20 March 2009, 8.

³⁶⁸ S/2007/204, 20 April 2007, pars. 64 and 79.

³⁶⁹ S/2009/210, 16 April 2009, par. 46; see also Ibid., par. 41, and S/2009/132, 9 March 2009, par. 56.

³⁷⁰ Ould-Abdallah quoted in Victoria Metcalfe, Alison Giffen, and Samir Elhawary, *UN Integration and Humanitarian Space: An Independent Study Commissioned by the UN Integration Steering Group* (London/Washington DC: Overseas Development Institute/Stimson Center, December 2011), 31.

*neutrality, and independence of humanitarian assistance’.*³⁷¹ Deciding on the establishment of UNSOM, the UNSC provided that ‘all appropriate activities of the [UN] Country Team should be fully coordinated with the SRSRG, including through establishing joint teams and joint strategies, while ensuring the humanity, impartiality, neutrality, and independence of humanitarian assistance’.³⁷²

Also in Afghanistan, despite the absence of a military component in the integrated mission, vocal criticism on integration were voiced by humanitarian actors, due to risks deriving from association with the wider UN and the political component of the mission. UNAMA was established in 2002 as a two-feet-in integrated mission and was mandated by the UNSC to act both in the political sphere, thus being perceived as supporting the Afghan government, ISAF and more in general the U.S. intervention, and in the areas of relief and development.³⁷³ UN OCHA was integrated within the mission structure until the beginning of 2009, when a separate UN OCHA office in the country was re-established, following the complaints by the humanitarian community (one-foot-in-one-foot-out approach).³⁷⁴ Still in 2011, Afghanistan was judged ‘the only complex emergency where the UN is politically fully aligned with one set of belligerents and does not act as an honest broker in “talking peace” to the other side’ and it was highlighted that, since the UN HC acts as RC and DSRSG in charge of assistance, ‘[t]his conflation underscores the consequences of integration from a humanitarian perspective: it is difficult, if not impossible, for the same person to be an advocate for humanitarian principles and impartial humanitarian action and at the same time act as the main interlocutor on reconstruction and development issues with the government and the Coalition forces.’³⁷⁵ This could apply to all missions with a one foot in-one foot out structure.

In response to these challenges connected to integration, multidimensional mandates, and the overarching POC concept, some initiatives have been undertaken to safeguard the specific identity of humanitarian actors and their safety (as well as the safety of beneficiaries). In addition to the development of

³⁷¹ S/RES/2093 (2013), 6 March 2013, par. 21.

³⁷² S/RES/2102 (2013), 2 May 2013, par. 7.

³⁷³ See S/RES/1401 (2002), 28 March 2002, par. 1 (making reference to A/56/875 – S2002/278, 18 March 2002, especially pars. 94-108). On subsequent positions adopted by UN organs leading to the perception of the UN as supporting ISAF and the Afghan Government, see Antonio Donini, “Between a Rock and a Hard Place: Integration or Independence of Humanitarian Action?,” *International Review of the Red Cross* 93, no. 881 (March 2011), 151-153.

³⁷⁴ See Antonio Donini, *Humanitarian Agenda 2015: Afghanistan Country Study*, Feinstein International Center Briefing Paper (June 2006), 31. Available at <https://wikis.uit.tufts.edu/confluence/download/attachments/14553470/Donini--Humanitarian+Agenda+2015--Afghanistan+Country+Study.pdf?version=1> (accessed October 27, 2009). Antonio Donini, *Afghanistan: Humanitarianism under Threat*, Feinstein International Center Briefing Paper (March 2009), 2. Available at <https://wikis.uit.tufts.edu/confluence/download/attachments/22520580/Donini-Afghanistan.pdf?version=1> (accessed October 27, 2009).

³⁷⁵ Donini (2011), *supra* fn. 373, 151-152.

the different mission structural approaches, in some cases humanitarians have elaborated guidelines to regulate their relationships with UN missions. Clearly inspired by the MCDA Guidelines and the IASC Reference paper, these guidelines have sometimes featured interesting details tailored on the specific country situation. In any case, they remain non-binding documents.

For example, in 2006 MONUC with UN OCHA and other humanitarian agencies developed *Guidelines for Interaction between MONUC Military and Humanitarian Organizations*, which affirmed the centrality of the principles of humanity, impartiality, and neutrality, and of the principle of distinction, and advised against performing some activities, such as joint assessment missions, if not as a last resort.³⁷⁶ ‘Winning Hearts and Minds Activities’ (WHAMs) were allowed, but if consisting of ‘activities of indirect relief such as rehabilitation of infrastructure’ rather than ‘activities of direct relief or assistance’ and if carried out not ‘in situations where there are ongoing hostilities with one or more factions’, but rather ideally after the end of the conflict.³⁷⁷ Principles on the use of armed escorts, on military or armed protection of humanitarian personnel or premises, and on use of military assets mirrored those spelt out in guidelines on civil-military relations outside peacekeeping missions.³⁷⁸ Finally, indications on what information to share reflected the IASC Reference Paper and added further details, clarifying for instance the technical information to share in the context of the performance by MONUC of military operations, and offering examples of sensitive information that humanitarian actors might not share because they might compromise their respect for the principles and their security (‘certain information relating to political or military positions of armed groups or other entities’) or because they related to victims and if transmitted might lead to risks for these or other individuals, such as reprisals.³⁷⁹

The Guidelines further tried to clarify the different roles that humanitarian organisations and the military component of the mission should play in protection and assistance. In protection, armed forces might engage in ‘securing or control of areas, deterrence of violence, removal of threats, escorts to populations or establishment of buffer zones or protected areas’, while humanitarians would be active ‘in the monitoring of protection risks, in securing returns of displaced or refugee population, in advocacy and support action to vulnerable groups such as women or children associated with armed groups and in various

³⁷⁶ MONUC, *Guidelines for Interaction between MONUC Military and Humanitarian Organizations*, 8 June 2006, pars. A.3, A.4, and B.4.6. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1158649> (accessed July 20, 2011).

³⁷⁷ Ibid., par. B.7.2.

³⁷⁸ See Ibid., pars. B.4-B.5.

³⁷⁹ Ibid., pars. B.3.

other activities such as mediation.³⁸⁰ In the field of assistance, the military should primarily ‘secur[e] an environment conducive for assistance to populations’, but also provide military escorts in case of ‘too high’ security risks and be present in areas not reached by humanitarians due to logistic problems.³⁸¹

All other guidelines adopted similarly centred on the principles of humanity, impartiality, neutrality, as well as operational independence for humanitarian action and distinction between humanitarian actors and the military, and focused on issues such as the use of military assets and escorts provided by peacekeepers, and the exchange of information.³⁸² Mention can be made of the 2003 UN OCHA’s *General Guidance for the Interaction between Humanitarian Organizations and Military Forces Operating in Liberia*, reaffirming the principles of humanitarian action and the principle of distinction as guidance for humanitarians’ relations also with armed forces operating in the country other than peacekeepers;³⁸³ and the 2008 *United Nations Civil Military-Coordination Guidelines for Sudan*, which applied in respect to both UNMIS and UNAMID and contained detailed guidance on QIPs for UNAMID, since the mission has been quite active in the implementation of QIPs, as well as in the provision of escorts to humanitarian agencies.³⁸⁴ According to the Guidelines, QIPs, together with Troop Contributing Country (TCC) Self Help Projects, are one way of implementing civil assistance activities, meaning support activities undertaken by the military component of a UN integrated mission either in response to requests for assistance from humanitarian or development actors, or in support of the local population (Community Support Projects).³⁸⁵ It was stressed that UNAMID should implement relief projects in areas and activities not already targeted by humanitarians, focusing

³⁸⁰ Ibid., par. A.2.

³⁸¹ Ibid., par. A.2.

³⁸² Even if no guidelines were adopted, the MCDA Guidelines and the IASC Reference paper on Civil-Military Relationship in Complex Emergencies were central to the arrangements put in place by EUFOR Tchad/RCA and the humanitarian community in 2007-2009. See UN Humanitarian Coordinator Chad and Force Commander EUFOR TCHAD/RCA, *Reference Document: Humanitarian Civil-Military Liaison Arrangements and Coordination Mechanisms during the Mandate of EUFOR Tchad/RCA*, 2009, available at <http://ochanet.unocha.org/p/Documents/CivMil%20Ref%20Doc%20EUFOR%20TCHAD-RCA.pdf> (accessed August 30, 2012).

³⁸³ UN OCHA, *General Guidance for the Interaction between Humanitarian Organizations and Military Forces Operating in Liberia*, 29 October 2003. On the other hand, the 2006 *Guidance for Civil-Military Coordination in Liberia*, noting that ‘the mission of the military transition[ed] from combat to peace’, highlighted the specific circumstances in which the mission was operating, namely those of a transition to development, with most of the aid agencies working as multi-mandated agencies, and envisaged a role for the military in assisting in humanitarian and recovery efforts, guided by the ‘do no harm principle’. UNMIL, *Guidance for Civil-Military Coordination in Liberia*, December 2006.

³⁸⁴ See, for example, S/2011/643, 12 October 2011, par. 54; S/2012/771, 6 October 2012, par. 59; S/2013/22, 10 January 2013, par. 54; S/2013/225, 10 April 2013, pars. 58 and 63; S/2013/420, 12 July 2013, pars. 36, 38, 54, and 59. Also, on QIPs by UNMISS, see S/2013/140, 8 March 2013, par. 43; S/2013/366, 20 June 2013, par. 65.

³⁸⁵ UN RC/HC Sudan, *United Nations Civil Military-Coordination Guidelines for Sudan*, 23 April 2008, 10, Annex A.

mainly on protection, choosing beneficiaries on the basis of needs and coordinating with humanitarian actors.³⁸⁶

The Guidance adopted in Liberia in 2003 was significant because UNMIL soon became a ‘two feet in’ mission, where not only there was a DSRSG/RC/HC, but UN OCHA did not have a separate office in the country. While Taylor had left the country in August 2003, the government still did not have full control, and demobilisation of armed factions had not started: for example, it was reported that ‘between October and December 2003 WFP food rations could not be delivered outside Monrovia without military escort because the food items would have been looted and the trucks vandalised.’³⁸⁷ While it seems that the interaction between humanitarian and military components in the mission functioned pretty well, ‘the cooperation and coordination between the agencies and UNMIL [] generated considerable criticism within and outside the mission area’ because of the perception of humanitarian agencies as compromising the principles and aligning with peacekeepers having a Chapter VII mandate.³⁸⁸ Concerns were also expressed with reference to the implementation of QIPs by UNMIL, amounting to a direct provision of humanitarian assistance (but not based exclusively on the principles of humanitarian action) by peacekeepers in the absence of a mandate in this sense from the UNSC.³⁸⁹ Another mission which repeatedly reported to have provided humanitarian assistance to the civilian population, in particular through QIPs, has been UNIFIL in Lebanon.³⁹⁰

In addition to civil-military coordination guidelines, other innovations have been introduced by UN peacekeeping missions and humanitarian actors to try and safeguard respect for the principles of humanitarian action and at the same time implement POC mandates, ensuring a unified UN effort. The protection cluster established in 2006 in the DRC features the participation of a liaison officer from the

³⁸⁶ Ibid., in particular Appendix I to Annex E.

³⁸⁷ Albert Fiawosime, “An Integrated Approach to Peace Support Operations: Overview of UN and International Humanitarian Agencies in Liberia,” in *A Tortuous Road to Peace: The Dynamics of Regional, UN and International Humanitarian Interventions in Liberia*, ed. Festus Aboagye and Alhaji M S Bah (Pretoria: Institute for Security Studies, 2005), 174.

³⁸⁸ Ibid., 175-176.

³⁸⁹ See Raj Rana, “Contemporary Challenges in the Civil-Military Relationship: Complementarity or Incompatibility?,” *International Review of the Red Cross* 86, no. 855 (September 2004), 575-576; Lewis Sida, “Challenges to Humanitarian Space: A Review of Humanitarian Issues Related to the UN Integrated Mission in Liberia and to the Relationship between Humanitarian and Military Actors in Liberia,” April 2005, 15. Available at <http://reliefweb.int/sites/reliefweb.int/files/resources/BC75B030FE472FF5C125700D004DBAA1-msg-lbr-30apr.pdf> (accessed April 20, 2012). However, the Special Committee on Peacekeeping Operations has repeatedly stressed in its reports the importance of QIPs for peacekeeping missions: see, for example, A/64/19, 2010 substantive session (22 February-19 March 2010), pars. 137-142; A/65/19, 2011 substantive session (22 February-18 March and 9 May 2011), pars. 166-171.

³⁹⁰ See, for example, S/2006/670, 18 August 2006, par. 47-49; S/2007/641, 30 October 2007, par. 26; S/2008/135, 28 February 2008, par. 33; S/2009/119, 3 March 2009, par. 21; S/2009/330, 29 June 2009, par. 24; S/2009/566, 2 November 2009, par. 26; S/2013/120, 27 February 2013, par. 21; S/2013/381, 26 June 2013, par. 21. UNIFIL is mandated under S/RES/1701 (2006) to ‘[e]xtend its assistance to help ensure humanitarian access to civilian populations and the voluntary and safe return of displaced persons’. S/RES/1701 (2006), 11 August 2006, par. 11(d).

mission's military component, and a joint planning initiative was adopted in the country to implement a joint protection concept, even if humanitarians have voiced concern 'about the use of information provided via Protection Clusters for offensive operations and the potential consequences for their access to populations'.³⁹¹ Furthermore, the UNSC has encouraged UN integrated missions to adopt mission-wide or comprehensive strategies for protecting civilians,³⁹² and such strategies have been formulated by MONUSCO, UNMIS, UNAMID, and UNOCI, featuring as one component the '[p]rovision of humanitarian assistance'.³⁹³ For example, the UN system-wide strategy for POC in the DRC has been 'developed collaboratively by the peacekeeping mission in the country (now MONUSCO) and the protection cluster' and it entails that '[b]ased on its monitoring activities, the protection cluster informs MONUSCO of situations where an urgent or increased security presence or patrolling is required for humanitarian operations'.³⁹⁴

UNAMID has established a Humanitarian, Protection Strategy Coordination Division (HPS), as a link with the humanitarian community, while UNAMIS had a section explicitly devoted to POC, 'mandated to coordinate international efforts towards the protection of civilians, with particular attention to vulnerable groups, including internally displaced persons (IDPs), returning refugees and women and children'.³⁹⁵

On the other hand, the adoption of stabilisation strategies in theatres of deployment of peacekeeping missions has generated tensions with humanitarian actors. For example, in 2008-2009 the International Security and Stabilisation Support Strategy (ISSSS) was developed in DRC, becoming since 2009 the main instrument of international support to the Stabilisation and Reconstruction Plan for War-Affected Areas (STAREC) launched by the Congolese government.³⁹⁶ Out of the five core ISSSS' objectives of security, political dialogue, State authority, sexual violence, and return, reintegration and recovery,³⁹⁷ the last two 'relate to the role and programmes of humanitarian actors', and tensions between stabilisation priorities and

³⁹¹ Holt, Taylor, and Kelly (2009), *supra* fn. 342, 267. Other innovations implemented by MONUC for POC were protection planning matrices by MONUC Civil Affairs section and Joint Protection Teams (JPTs) composed of military and civilian (civil affairs, human rights political affairs, public information, and child protection) components. See *Ibid.*, 185-186; see also, for example, S/2008/218, 2 April 2008, par. 45.

³⁹² See S/RES/1894 (2009), 11 November 2009, par. 24. See also S/2009/277, 29 May 2009, par. 53.

³⁹³ See Alison C. Giffen, "Enhancing the Protection of Civilians in Peace Operations: From Policy to Practice," Background Paper Prepared for the Australian Government's Asia Pacific Civil-Military Centre of Excellence, 24-26 May 2011, Queanbeyan, Australia, 12. Available at <http://civmilcoe.gov.au/wp-content/uploads/2011/10/Giffen-CMAC.pdf> (accessed June 2, 2012).

³⁹⁴ A/66/321, 24 August 2011, par. 51.

³⁹⁵ UNMIS, "Protection of Civilians (PoC): Fact Sheet," July 9, 2009, 1. Available at <http://unmis.unmissions.org/LinkClick.aspx?fileticket=z%2fVZ3LOOXUc%3d&tabid=4379> (accessed June 2, 2012).

³⁹⁶ MONUSCO, "The ISSSS," MONUSCO website, available at <http://monusco.unmissions.org/Default.aspx?tabid=10831&language=en-US> (accessed June 4, 2012).

³⁹⁷ *Ibid.*

the principles of humanitarian action led to the decision that ‘UN agencies ... [would] undertak[e] programmes under the stabilisation rubric only where the stabilisation geographical and programme priorities match[ed] humanitarian geographical and programme priorities’ while if ‘stabilisation priorities did not match [their] analysis of humanitarian needs, they did not engage in the stabilisation programme.’³⁹⁸

In sum, POC as a mission-wide strategy and an area of shared responsibility for military actors and humanitarians is still a field for experiments and frequent tensions, even more so in integrated missions. To increase clarity, UN DPKO and UN DFS finalised in 2010 a *DPKO/DFS Lessons Learned Note on the Protection of Civilians in UN Peacekeeping Operations: Dilemmas, Emerging Practices, and Lessons Learned*, and a *DPKO/DFS Operational Concept on the Protection of Civilians in UN Peacekeeping Operations*, followed in 2011 by a *Framework for Drafting Comprehensive Protection of Civilian Strategies in United Nations Peacekeeping Operations*.³⁹⁹ The Operational Concept envisages ‘a three-tiered approach to protection’ for UN peacekeeping missions: protection through a political process, protection from physical violence, and contribution to a protective environment.⁴⁰⁰ While contributing to the clarification of POC, the Operational Concept does not offer any definition and ‘does not discuss the dilemmas and trade-offs that are likely to arise during planning and implementation of the three tiers.’⁴⁰¹

The development of mission-wide strategies for the protection of civilians confirms, as noted by the 2009 independent study *Protecting Civilians in the Context of UN Peacekeeping Operations* commissioned by UN DPKO and UN OCHA,⁴⁰² the lack of a unified interpretation of POC in peacekeeping operations: while it is generally associated to the protection of civilians from imminent threat of physical violence,⁴⁰³ thus apparently amounting to a task for the military, POC in reality engages all mission, ‘including police, humanitarian affairs, human rights, child protection, mine action, gender, political and civil affairs, public

³⁹⁸ Metcalfe, Giffen, and Elhawary (2011), supra fn. 370, 22.

³⁹⁹ See Giffen (2011), supra fn. 393, 5-6.

⁴⁰⁰ See Ibid., 7.

⁴⁰¹ Ibid.

⁴⁰² S/2009/277, 29 May 2009, par. 53.

⁴⁰³ See Holt, Taylor, and Kelly (2009), supra fn. 342, 4-5. See, for example, S/RES/1291 (2000), 24 February 2000, par. 8 (MONUC); S/RES/1296 (2000), 19 April 2000, par. 13; S/RES/1493 (2003), 28 July 2003, Par. 25 (MONUC); S/RES/1509 (2003), 19 September 2003, par. 3 (UNMIL); S/RES/1542 (2004), 30 April 2004, par. 7 (MINUSTAH); S/RES/1565 (2004), 1 October 2004, par. 4 (MONUC); S/PRST/2004/46, 14 December 2004, 3; S/RES/1590 (2005), 24 March 2005, par. 16 (UNMIS); S/RES/1609 (2005), 24 June 2005, par. 2 (UNOCI); S/RES/1674 (2006), 28 April 2006, par. 16; S/RES/1701 (2006), 11 August 2006, par. 12 (UNIFIL); S/RES/1706 (2006), 31 August 2006 (12-0-3), par. 12 (UNMIS); S/RES/1739 (2007), 23 January 2007, par. 2 (UNOCI); S/RES/1756 (2007), 15 May 2007, par. 2 (MONUC); S/PRST/2007/28, 23 July 2007, 2 (MONUC); S/RES/1769 (2007), 31 July 2007, par. 15 (UNAMID); S/RES/1778 (2007), 25 September 2007, par. 6 (EU operation in Chad/CAR: EUFOR TCHAD/RCA); S/RES/1856 (2008), 22 December 2008, par. 3 (MONUC); S/RES/1861 (2009), 14 January 2009, par. 7 (MINURCAT); S/RES/1881 (2009), 6 August 2009, par. 2 (UNAMID); S/RES/1894 (2009), 11 November 2009, par. 19; S/RES/1906 (2009), 23 December 2009, par. 5 and 7 (MONUC); S/RES/1925 (2010), 28 May 2010, par. 12 (MONUSCO); S/RES/1933 (2010), 30 June 2010, par. 16 (UNOCI); S/RES/1935 (2010), 30 July 2010, par. 2 (UNAMID).

information, rule of law and security sector reform.⁴⁰⁴ For example, in 2009 the Security Council ‘[r]ecall[ed] that the protection of civilians requires a coordinated response from all relevant mission components and encourage[d] MONUC to enhance interaction, under the authority of the [SRSG], between its civil and military components at all levels and humanitarian actors, in order to consolidate expertise on the protection of civilians’.⁴⁰⁵ Modalities and limits for the interaction between peacekeepers and humanitarians need to be further clarified: according to the 2009 study, while coordination in protection activities by humanitarian actors has increased, ‘gaps remain in policy coherence, understanding roles and responsibilities and coordination between humanitarian actors and the civilian and military components of peacekeeping missions responsible for protection.’⁴⁰⁶ The two UN DPKO/UN DFS publications, to which the present author has not succeeded in having access, seem possibly too generic to adequately respond to this need for clarification.

To find answers in past practice, the UN Integration Steering Group commissioned an independent study on UN integration and humanitarian space.⁴⁰⁷ The authors, after reviewing experiences in the DRC, Afghanistan, and Somalia, and conducting a limited analysis of the cases of Liberia, the CAR, and Darfur, concluded that ‘[a]lmost two decades after the search for greater coherence and integration began, the debate on its impact on humanitarian space remains polarised’.⁴⁰⁸ On the one hand, ‘the research team was not able to find examples where there was a clear link between UN integration arrangements and attacks on humanitarian personnel of UN or non-UN entities’; on the other hand, they highlighted that in cases where peacekeepers get involved in conflict (e.g. MONUC) or where ‘the UN mission mandate and activities are strongly contested by one or more of the conflict parties’ (e.g. Afghanistan and Iraq), ‘UN integration arrangements that increase the visible association of the political or peacekeeping mission with UN humanitarian agencies may ... pose an additional risk to the security of humanitarian personnel.’⁴⁰⁹ In such

⁴⁰⁴ S/2009/277, 29 May 2009, par. 53.

⁴⁰⁵ S/RES/1906 (2009), 23 December 2009, par. 8.

⁴⁰⁶ Holt, Taylor, and Kelly (2009), *supra* fn. 342, 64, 66 and 69. Both ‘literature on how humanitarian agencies can interact with the political and military components of UN peacekeeping missions’ and a ‘concrete policy framework to place the work of UN peacekeeping operations and their role in protection in relation to that of humanitarian actors’ are still missing and needed. *Ibid.*, 71-72. Similarly, see Victoria Wheeler and Adele Harmer, *Resetting the Rules of Engagement: Trends and Issues in Military–Humanitarian Relations*, Humanitarian Policy Group Research Report no. 21, March 2006 (London: Overseas Development Institute, 2006), 65.

⁴⁰⁷ Metcalfe, Giffen, and Elhawary (2011), *supra* fn. 370.

⁴⁰⁸ *Ibid.*, 45.

⁴⁰⁹ *Ibid.*, 47.

circumstances, ‘the integration of OCHA into the mission *or* the creation of the triple-hat DSRSG/RC/HC function, are not likely to be appropriate’.⁴¹⁰

In sum, tensions regarding the relationships between humanitarian and military actors have emerged in the framework of UN peacekeeping missions, and they have been sometimes similar to those between humanitarians and military forces other than peacekeepers, as in the case of QIPs and the use of humanitarian relief projects to win support for the armed forces from the local population. The position of peacekeepers, which are supposed to be deployed with consent from the Parties and be impartial, should be different from that of belligerents, but current deployments have challenged this assumption, arguably contributing to the adoption of similar guidelines for the relationships of humanitarian actors with all military actors, be they peacekeepers or not.

The point of view of humanitarians, as has been seen in the first part of this Chapter, has been taken into account to a certain extent by national and supranational military doctrines, and the same is true for UN doctrines on integrated missions. While UN integration, differently from stabilisation strategies, ‘is focused on peace consolidation, a process which the UN, in policy terms at least, no longer sees as incorporating life-saving humanitarian activities’ and does not consider humanitarian action ‘a conflict management tool, but rather ... a wholly separate sphere of action, governed by the principles of humanity, impartiality, neutrality and independence, and with separate resources and structures’,⁴¹¹ it may pose problems in particular for humanitarian agencies belonging to the UN family (and their implementing partners), which are likely to encounter difficulties in being perceived as independent from the overall UN structure and position in a given scenario.

From the point of view of IHL, the key remains the status of peacekeepers as military forces not engaged in hostilities as combatants.⁴¹² Clearly, should the military component of a mission become involved in the conflict, any cooperation, co-location, or transmission of information would put humanitarian organisations at risk of being caught in an attack as collateral damage (which may be lawful if the principle of proportionality is respected) or becoming direct participants in hostilities (or being perceived as such).

⁴¹⁰ Ibid., 48. Emphasis added.

⁴¹¹ Metcalfe, Haysom, and Gordon (2012), *supra* fn. 222, 8.

⁴¹² The term ‘combatants’ is used both because it is used in the UN Safety Convention and the 1999 UNSG Bulletin on the observance of IHL by UN forces, and because the present author shares the view that if peacekeepers engage in conflict against a Party to a NIAC, the hostilities between the former and the latter are ruled by IHL applicable to IAC. In this sense, see Eric David, *Principes de Droit des Conflits Armés*, 4th ed. (Brussels: Bruylant, 2008), 179-183. On the different views by scholars and on relevant practice, see Kolb (2006), *supra* fn. 263, 57-64.

The situation is thus analogous to relations with any other belligerent, and might pose particular challenges to NGOs with limited resources, which may decide to rely on the support and assets of the UN mission in case of security deterioration and evacuation. This also applies to humanitarian agencies belonging to the UN family, which have limited choice in this respect, and more in general run the risk of being ‘guilty by association’.

One might wonder whether UN humanitarian agencies, such as UNHCR, WFP or UNICEF, might be entitled to the qualification of ‘impartial humanitarian organisation’ under IHL, and whether their position in this sense would change in case of the existence of a UN integrated mission whose military component has engaged in conflict. The status of UN agencies as ‘impartial humanitarian organisation’ seems to be questioned by some authors,⁴¹³ and endorsed by some others,⁴¹⁴ and agencies and funds such as UNHCR, UNICEF, and WFP have either qualified themselves as such or, at least, adopted the principles of humanity, impartiality and neutrality as internal guiding principles.⁴¹⁵ Accepting that these agencies might invoke the right of humanitarian initiative under Articles 3 and 10 GC IV, integration would arguably not lead to their automatic loss of such a right, since they would always be outside the mission structure (unlike UN OCHA, in case of a two-feet-in approach), even if part of the integrated UN presence in the country, under the

⁴¹³ ‘Cette protection des Conventions de Genève [arts. 142 GC IV and 71 AP I] peut s’appliquer à l’ensemble des ONG humanitaires. Par contre, il est clair que le personnel des Nations Unies n’est jamais mentionné dans ces textes. S’il devait bénéficier des dispositions du droit humanitaire, il faudrait que les Nations Unies puissent être qualifiées de société de secours volontaire ou d’organisation humanitaire impartiale, ce qui n’est pas aujourd’hui envisagé.’ Françoise Bouchet-Saulnier, ‘Point de Vue d’Une Juriste Appartenant au Monde des ONG,’ in *Aide Humanitaire Internationale: un Consensus Conflictuel?*, ed. Marie-José Domestici-Met (Paris: Economica, 1996), 199.

⁴¹⁴ Referring to UNHCR, UNICEF, and WFP, see Michaela Schneider-Enk, *Der völkerrechtliche Schutz humanitärer Helfer in bewaffneten Konflikten: die Sicherheit des Hilfspersonals und die "neuen" Konflikte* (Hamburg: Kovac, 2008), 88. She refers to Christopher Greenwood, ‘International Humanitarian Law and United Nations Military Operations,’ *Yearbook of International Humanitarian Law* 1 (1998), 31. However, it should be noted that Greenwood only mentions the applicability of arts. 69-71 AP I to UN personnel as relief personnel.

⁴¹⁵ Par. 2 of the Statute of the UNHCR provides that ‘The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.’ *Statute of the Office of the United Nations High Commissioner for Refugees*, annexed to General Assembly Resolution 428 (V) of 14 December 1950. See also *Ibid.*, preamble. In its mission statement, UNHCR affirms: ‘UNHCR is an impartial organization, offering protection and assistance to refugees and others on the basis of their needs and irrespective of their race, religion, political opinion or gender.’ UNHCR, *UNHCR Global Appeal 2012-2013: Challenging Times, Dangerous World* (Geneva: UNHCR, 2011), 3. Available at <http://www.unhcr.org/ga12/index.xml> (accessed July 19, 2012).

The Executive Board of the WFP in 2004 added to the Consolidated Framework of WFP Policies the principles, *inter alia*, of humanity, impartiality, and neutrality (including ideological neutrality). WFP, ‘Consolidated Framework of WFP Policies – An Updated Version (November 2010),’ WFP/EB.2/2010/4-E, 4 October 2010, 22. Available at <http://one.wfp.org/eb/docs/2010/wfp225108~1.pdf> (accessed July 19, 2012). See also *Ibid.*, 5-6.

Furthermore, ‘WFP said the agency was an impartial, non-political humanitarian agency that has been working in partnership with the people of Somalia for more than 40 years’. Chinaview, ‘WFP suspends operations in southern Somalia over insecurity’ January 05, 2010, available at http://news.xinhuanet.com/english/2010-01/05/content_12759809.htm (accessed June 25, 2012).

According to UNICEF’s mission statement, ‘UNICEF is non-partisan and its cooperation is free of discrimination. In everything it does, the most disadvantaged children and the countries in greatest need have priority.’ UNICEF, ‘UNICEF’s Mission Statement,’ available at http://www.unicef.org/about/who/index_mission.html (accessed July 19, 2012). UNICEF’s publication *Core Commitments for Children in Humanitarian Action* further specifies that ‘UNICEF is committed to applying humanitarian principles in its humanitarian action’ and that these principles include humanity, impartiality, and neutrality (including ideological neutrality). UNICEF, *Core Commitments for Children in Humanitarian Action* (New York: UNICEF, Division of Communication, 2010), 6 (par. 1.6).

leadership of the HC.⁴¹⁶ However, already their membership in the HCT might lead to their perception as part of the wider UN political effort and thus entitled to protection as civilians and as UN agencies, but not to the status of impartial humanitarian organisations. This perception might be very difficult to avoid, but it should be taken into account by agencies when deciding how to relate with the military—whether to operate side by side with the military, share information with them, and resort to armed escorts provided by UN peacekeepers (even if UN agencies have limited choice in this field, having to follow instructions by the UN Department of Safety and Security, UNDSS). Notwithstanding the principle of option of last resort for the use of such escorts, spelt out in all the guidelines and guidance on civil-military relations, they have been frequently used in settings such as Liberia, Darfur,⁴¹⁷ Somalia,⁴¹⁸ and Chad,⁴¹⁹ to the extent that ‘UN security management processes have tended to result in an automatic recourse to UN armed escorts by UN humanitarian agencies and their partners.’⁴²⁰

4.2.3. Conclusion

The practice of the UNSC has revealed increased attention since the 1990s for humanitarian assistance, seen as a crucial element in UN intervention in conflict or post-conflict situations. Authorisation under Chapter VII to peacekeepers under UN command or UN-authorized forces under national command to take the necessary measures to create a safe environment for the provision of humanitarian assistance has been gradually supplemented by authorisation to protect civilians (including humanitarian workers) under imminent threat of physical violence, in the framework of the focus on POC. The military component of these missions has been also mandated to collaborate with other mission components, developing comprehensive strategies, and with humanitarian organisations, to ensure the protection of civilians. In the case of Libya, POC has encountered the R2P doctrine, with obstacles to humanitarian assistance being at the basis of a Chapter VII authorisation to Member States to enforce a no-fly zone, mirroring decisions adopted in the first half of the 1990s. Finally, the Intervention Brigade established within MONUSCO in 2013 has

⁴¹⁶ See UN OCHA (2009), *supra* fn. 295, 6-7.

⁴¹⁷ See, for example, S/2011/422, 8 July 2011, par. 56; S/2011/643, 12 October 2011, par. 54; S/2011/814, 30 December 2011, pars. 45 and 61; S/2012/231, 17 April 2012, par. 58; S/2012/548, 16 July 2012, par. 56.

⁴¹⁸ See, for example, S/2008/352, 30 May 2008, par. 46.

⁴¹⁹ On the role of DIS and MINURCAT as providers of escorts to humanitarians, see, for example, S/2009/359, 14 July 2009, par. 31; S/2010/217, 29 April 2010, par. 15; S/RES/1923 (2010), 25 May 2010, preamble; S/2010/409, 30 July 2010, pars. 17-18; S/2010/611, 1 December 2010, par. 11; S/2011/64, 9 February 2011, pars. 40-41; S/2011/278, 29 April 2011, par. 20.

⁴²⁰ Metcalfe, Haysom, and Gordon (2012), *supra* fn. 222, 9.

confirmed the trend towards robust mandates, which might raise also complex legal problems in terms of legal qualification and regime applicable to the mission and to actors collaborating with it.

This practice has led to increasing relationships between humanitarian actors and the military component of a peacekeeping mission, which have presented and may present some problematic aspects analogous to those highlighted in the context of interaction between humanitarians and belligerents. The traditional model of impartial peacekeeping mission deployed in a post-conflict situation, with consent from the Parties and authorisation to use force only in self-defence, does not fit current and recent practice.

On the one hand, the evolution of peacekeeping missions towards integration and the development of the almost all-encompassing concept of POC have led to more frequent interactions among the various components of the mission and also between the mission and other actors operating in the same area, such as humanitarian organisations, including in the form of military escorts. On the other hand, the sometimes multidimensional and politically charged mandates of peacekeeping missions have increased the perception of humanitarian organisations as part of the wider UN political and military intervention. This perception is all the more problematic in the framework of a practice by the UNSC towards robust mandates to peacekeeping missions, which has found its apex in the reviewed POC mandate assigned to UNOCI and in the creation of the Intervention Brigade within MONUSCO.

4.3. The Involvement of the Private Sector: Private Military and Security Companies (PMSCs) and Humanitarian assistance

A final category of armed actors that have been operating in the same theatre as humanitarians and interacting with them, thus calling for a reflection on the limits and modalities of interaction, are so-called ‘contractors’. While there is no commonly agreed definition of private military companies (PMCs), private security companies (PSCs), or private military and security companies (PMSCs), these actors have undoubtedly gained prominence in contexts of armed conflict, becoming notorious in particular in connection to the occupation of Iraq after 2003.⁴²¹ Their relationships with humanitarians have been

⁴²¹ For example, U.S. company Xe/Blackwater ‘had its licence revoked in Iraq following the shooting by its personnel of innocent civilians in Nisour square in Baghdad which killed 17 civilians and severely injured more than 20 others on 16 September 2007’ (but it was reported as still operating in Iraq until September 2009 at least), and two U.S.-based companies, CACI and L-3 Services (formerly Titan Corporation), were allegedly involved ‘in the torture of Iraqi detainees at Abu Ghraib prison, Iraq.’ A/HRC/15/25, 5 July 2010, pars. 19-20.

identified as an issue characterising current operational environments and still not sufficiently regulated, for example in the framework of existing civil-military guidelines.⁴²²

As defined by the 2008 Montreux Document, an intergovernmental document (non-binding *per se*) containing a list of existing international obligations and good practices related to the presence of PMSCs in armed conflict, PMSCs are ‘private business entities that provide military and/or security services, irrespective of how they describe themselves’, and these services ‘include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.’⁴²³ Some scholars rather refer to private security providers (PSPs), to cover not only the aforementioned ‘hard security/protection activities’, but also softer activities, such as ‘training, vetting and analysis’.⁴²⁴ What characterises PMSCs is that they are private, for-profit entities.

The growing role of PMSCs on the international scene is connected, in general, to the trend towards cuts in public spending and the corresponding provision of services by private companies,⁴²⁵ and, more specifically, to the trend towards privatising security that has followed the end of the Cold War.⁴²⁶ Furthermore, this sector has expanded in particular after the interventions in Afghanistan and Iraq, with the

⁴²² See Metcalfe, Haysom, and Gordon (2012), *supra* fn. 222, 11.

⁴²³ *The Montreux Document – On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict*, Montreux, September 17, 2008, par. 9(a). The 2010 (non-binding) *International Code of Conduct for Private Security Service Providers*, developed by the private military and security industry with the support of the Government of Switzerland, and to which companies themselves are signatories, defines ‘Private Security Companies and Private Security Service Providers (collectively “PSCs”) – any Company (as defined in this Code) whose business activities include the provision of Security Services either on its own behalf or on behalf of another, irrespective of how such Company describes itself’; and ‘Security Services – guarding and protection of persons and objects, such as convoys, facilities, designated sites, property or other places (whether armed or unarmed), or any other activity for which the Personnel of Companies are required to carry or operate a weapon in the performance of their duties.’ *International Code of Conduct for Private Security Service Providers*, Geneva, November 9, 2010.

The *Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council*, presented to the Human Rights Council by its Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (hereinafter Working Group on the use of mercenaries) in July 2010, defines ‘Private Military and/or Security Company (PMSC)’ as ‘a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities’; ‘[m]ilitary services’ as ‘specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities’; and ‘[s]ecurity services’ as ‘armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities’. A/HRC/15/25, 5 July 2010, Annex, art. 2(a)-2(c).

⁴²⁴ Max P. Glaser, “Engaging Private Security Providers: A Guideline for Non-Governmental Organisations,” European Interagency Security Forum (EISF) Briefing Paper, 2011, 2. Available at <http://www.eisf.eu/resources/item.asp?d=6561> (accessed June 5, 2012). Similarly, see Abby Stoddard, Adele Harmer and Victoria DiDomenico, *The Use of Private Security Providers and Services in Humanitarian Operations*, HPG Report 27 (London: Overseas Development Institute, October 2008), 4.

⁴²⁵ See, for example, Gilles Carbonnier, “Privatisation and Outsourcing in Wartime: The Humanitarian Challenges,” *Disasters* 30, no. 4 (2006), 402-407.

⁴²⁶ See, for example, Daniel Hellinger, “Humanitarian Action, NGOs and the Privatization of the Military,” *Refugee Survey Quarterly* 23, no. 4 (December 2004), 197-199.

current involvement of PMSCs in a range of activities that include ‘private policing; protection of diplomatic, military, business, and humanitarian personnel in conflict zones; provision of detention services; military training and reform services; counternarcotics; ... counterinsurgency and intelligence operations ... security sector reform and the training of indigenous security forces.’⁴²⁷ According to 2010 estimates, ‘American PMSCs dominate this new industry, estimated to earn US\$ 20 to 100 billion annually’ and ‘[p]rivate forces constitute about half the total United States force deployed in Afghanistan and Iraq.’⁴²⁸

From the perspective of the provision of humanitarian assistance, PMSCs pose challenges from at least three points of view. A first complex profile concerns humanitarian organisations’ interaction in the field with PMSCs and their position in IHL: as has been highlighted by several scholars,⁴²⁹ personnel of PMSCs generally do not fall in the category of mercenaries as defined by Article 47 AP I and by Article 1 of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*,⁴³⁰ since they should fulfil six cumulative conditions including being ‘specially recruited locally or abroad in order to fight in an armed conflict’, actually taking part in hostilities, and being ‘neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict’.⁴³¹ Also, often they are not members of the armed forces of a Party to the conflict (under Articles 43(1) AP I or 4(A)(1) GC III)⁴³² or of a militia or volunteer force that belongs to a Party to the conflict and satisfies the criteria listed in Article 4(A)(2) GC III,⁴³³ and thus are not combatants. If they are neither mercenaries nor combatants, personnel of PMSCs are civilians, entitled to be protected from attack unless and for such time as they take a direct part in hostilities.⁴³⁴

⁴²⁷ James Cockayne et al., *Beyond Market Forces: Regulating the Global Security Industry* (New York: International Peace Institute, 2009), 16-17.

⁴²⁸ A/HRC/15/25, 5 July 2010, par. 16.

⁴²⁹ See, for example, Lyndsey Cameron, “Private Military Companies: Their Status Under International Humanitarian Law and Its Impact on their Regulation,” *International Review of the Red Cross* 88, no. 863 (September 2006): 573-598; Emanuela-Chiara Gillard, “Business Goes to War: Private Military/Security Companies and International Humanitarian Law,” *International Review of the Red Cross* 88, no. 863 (September 2006): 525-572; Alexandre Faite, “Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law,” *Defence Studies* 4, no. 2 (Summer 2004): 166-183.

⁴³⁰ *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, December 4, 1989, A/RES/44/34, entered into force 20 October 2001.

⁴³¹ Art. 47 AP I. The other three conditions are being motivated to take part in the hostilities essentially by the desire for private gain and being promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; not being a member of the armed forces of a Party to the conflict; and not having been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

⁴³² See Section 2.1.1.2. (fn. 26).

⁴³³ The four cumulative conditions are: being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. See Section 2.1.1.2. (fn. 26).

⁴³⁴ In some cases, personnel of PMSCs may be civilian accompanying the armed forces of a Party to the conflict under art. 4(A)(4) GC III, thus being civilians but entitled to POW status if captured (art. 4(A)(4) GC III reads: ‘Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: ...

While, as already mentioned, the concept of direct participation in hostilities is not well defined, the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* notes that private contractors and civilian employees of a Party to the conflict are more exposed to the dangers of the hostilities and to the risk of being hurt in an attack due to the fact that they operate close to combatants.⁴³⁵ Furthermore '[i]n some cases ... it may be extremely difficult to determine the civilian or military nature of contractor activity', since '[f]or example, the line between the defence of military personnel and other military objectives against enemy attacks (direct participation in hostilities) and the protection of those same persons and objects against crime or violence unrelated to the hostilities (law enforcement / defence of self or others) may be thin.'⁴³⁶

In case (and as long as) PMSCs personnel are classifiable as civilians taking direct part in hostilities, they might be attacked, and if humanitarians work alongside them, they might risk being involved in the attack (as collateral damage) or in any case becoming associated with the Party to the conflict in support of which the personnel of the PMSCs are fighting. This is even more relevant if these personnel are qualifiable as combatants. Similarly to relationships with military personnel, the principle guiding relationships between PMSCs and humanitarians should be that of distinction, especially taking into account that in places like Afghanistan or Iraq, confusion over the role of PMSCs has been far from hypothetical.⁴³⁷

Secondly, PMSCs have been increasingly contracted by humanitarian organisations themselves in insecure and highly volatile contexts, for a plurality of services, even if these organisations are generally reluctant to acknowledge and provide details on their resort to private security.⁴³⁸ According to a research

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.'). See, for example, Gillard, (2006), *supra* fn. 429, 536-539.

⁴³⁵ Melzer (ICRC) (2009), *supra* fn. 60, 43 and 46.

⁴³⁶ *Ibid.*, 43 and 46.

⁴³⁷ For example, in August 2010 the Working Group on the use of mercenaries reported that 'in conflict situations, like in Afghanistan or Iraq, ... often victims [of human rights abuses allegedly perpetrated by employees of PMSCs] were unable to identify the perpetrators of the abuses owing to difficulties in distinguishing between the many military actors, be they national forces, international forces or private military and security companies. Private military and security company personnel are not always wearing distinctive uniforms and identification badges and often drive unmarked sport utility vehicles with tinted glasses and no plates, which add to the confusion.' A/65/325, 25 August 2010, par. 18.

⁴³⁸ According to Singer, '[h]umanitarian actors make greater use of private military agents than is generally recognised; ... Contracts between humanitarian actors and PMFs have taken place in nearly every notable war zone, including Afghanistan, Bosnia, the DRC, East Timor, Haiti, Iraq, Kosovo, Mozambique, Sierra Leone, Somalia and Sudan.' P. W. Singer, 'Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community,' in *Resetting the Rules of Engagement: Trends and Issues in Military-Humanitarian Relations*, eds. Victoria Wheeler and Adele Harmer, HPG Research Report no. 21 (London: Overseas Development Institute, March 2006), 68.

In an interview, Andrew Bearpark, 'Director General of the British Association of Private Security Companies (BAPSC), an independent trade association representing the leading companies in the specialist private security and risk management sector in the United Kingdom', and 'aim[ing] to raise the standards of its members and the emergent industry as a whole and ensure compliance

conducted by the Overseas Development Institute in 2008, the previous five years had witnessed an increase in contracting of security and security-related services from commercial companies by humanitarian organisations, but contracting of armed protection still remained exceptional, while the most common contracted security service was unarmed guarding of facilities or premises by local private security providers, and international companies were mostly contracted for ‘security training for staff, security management consulting and risk assessments.’⁴³⁹ Decision to conclude a contract with a PMSC was identified as related to the general context in which the humanitarian actors were operating, including their sense of growing insecurity and the possible sources of private security available.⁴⁴⁰ Finally, even if the choice of armed private security remained the exception, the report noted that ‘[n]o major humanitarian provider – UN, NGO or Red Cross – can claim that it has never paid for armed security.’⁴⁴¹

The (non-binding) documents adopted until now, in particular the Montreux Document and the 2010 *International Code of Conduct for Private Security Service Providers*, as well as the *Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council*, prepared by the Human Rights Council’s Working Group on the use of mercenaries,⁴⁴² focus on issues of regulation and responsibility of States and PMSCs for violations of international law, in particular IHRL and IHL. On the other hand, no general guidelines have been adopted regarding the relationships between humanitarian actors and PMSCs, and it seems that not even humanitarian organisations themselves have formulated internal guidance in this sense.⁴⁴³ However, humanitarians might look at the good practices proposed by the Montreux document for contracting States (as it is suggested in

with the rules and principles of international humanitarian law and human rights’, explicitly connected the increase in the number of PMSCs at the beginning of the 21st century to the perception of aid workers as no longer neutral, so that ‘the need for security arose.’ He further affirmed that ‘[a]rmed private actors provide an increased range of activities, from protecting buildings and installations to supporting humanitarian aid and state-building and performing purely military activities that used to be the prerogative of states alone.’ Toni Pfanner, “Interview with Andrew Bearpark,” *International Review of the Red Cross* 88, no. 863 (September 2006), 449-450.

⁴³⁹ Stoddard, Harmer and DiDomenico (2008), *supra* fn. 424, 8-9.

⁴⁴⁰ *Ibid.*, 10-12.

⁴⁴¹ *Ibid.*, 12.

⁴⁴² See *supra* fn. 423.

⁴⁴³ See, for example, Stoddard, Harmer and DiDomenico (2008), *supra* fn. 424, 24: ‘the study found that policies regarding PSPs are generally notable for their absence. Exceptions to the rule include the ICRC’s 2006 guidelines, and guidelines developed by the NGO Oxfam.’ Similarly, see Glaser (2011), *supra* fn. 424, 11. Regarding the UN, the Human Rights Council’s Working Group on the use of mercenary reported in July 2011 that ‘the [UN] currently lacks a firm system-wide policy governing the hiring of [private military and security] companies’ and it noted that ‘the problem of accountability for their conduct becomes more complex in cases where international organizations rather than States employ private military and security companies.’ Therefore, it considered that, ‘[w]hile the [UN] is in the process of developing its policy regarding the use of private military and security companies... an international convention would be invaluable in strengthening and clarifying the institutional responsibility of international organizations, such as the [UN], for the conduct of private military and security companies’, since it would ‘ensure the establishment of formal, system-wide policies for registration and oversight of companies and vetting and human rights training requirements for employees.’ A/HRC/18/32, 4 July 2011, par. 68.

the document itself), such as determining what services might be contracted to a PMSC based on ‘whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities’; collect information on past record on a PMSC before deciding whether to contract it; adopt specific criteria for the selection of PMSCs, such as the absence of ‘reliably attested record of involvement in serious crime’ and of ‘not [having] previously been rejected from a contract due to misconduct’, providing adequate training to its personnel, having and applying policies related to IHL and IHRL, ‘especially on the use of force and firearms’, and having internal monitoring and accountability mechanisms.⁴⁴⁴ Moreover, clauses to ensure respect for the aforementioned criteria might be included in contracts.⁴⁴⁵

The decision to hire PMSCs as armed guards or armed escorts, in particular, may risk leading to an escalation of violence, and/or tainting the perception and reputation of the contracting humanitarian agency and of the humanitarian community in the country more in general.⁴⁴⁶ Inspiration in this field may be drawn from the IASC *Non-Binding Guidelines on When to Use Military or Armed Escorts*, including the four criteria of unwillingness or inability of local authorities to provide a secure environment, level of humanitarian need, safety, and sustainability.⁴⁴⁷

Clearly, military escorts by PMSCs carry with them a lesser risk for humanitarians to be perceived as allied with a Party to the conflict than escorts by a Party itself and, sometimes, even escorts by UN peacekeepers. Moreover, it has been argued that guards or escorts provided by a foreign PMSC should be less likely ‘to offend the principle of neutrality’ than the performance of these services by local armed guards or national armed forces.⁴⁴⁸ In any case, in terms of loss of protection by PMSCs escorting humanitarian actors, the concept of direct participation in hostilities will again be crucial. Being humanitarian actors civilians, it follows that, as highlighted by Perrin, ‘neither the private security contractor nor the humanitarian personnel they are protecting would be taking a direct part in hostilities, which would entail a

⁴⁴⁴ *International Code of Conduct for Private Security Service Providers*, Geneva, November 9, 2010, part 2, section A, pars. 1-13. Similar criteria for the engagement with PMSCs, specifically addressed to humanitarian organisations, are proposed also by Glaser: see Glaser (2011), *supra* fn. 424, 11-14.

⁴⁴⁵ See *International Code of Conduct for Private Security Service Providers*, Geneva, November 9, 2010, part 2, section A, pars. 14-18.

⁴⁴⁶ See Glaser (2011), *supra* fn. 424, 15-17.

⁴⁴⁷ On these Guidelines and the explanation of the four criteria, see Section 4.1.1.1.

⁴⁴⁸ Benjamin Perrin, “Private Security Companies and Humanitarian Organizations: Implications for International Humanitarian Law,” in *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, ed. Benjamin Perrin (Vancouver, Toronto: UBC Press, 2012), 144.

loss of protected status, if they use reasonable, necessary, and proportionate force to defend themselves against illegal intentional targeting by any individual or group, including parties to the conflict.⁴⁴⁹

Finally, a possible area of concern related to PMSCs and the provision of humanitarian assistance that has been highlighted by scholars is the intention of PMSCs to start competing with humanitarian non-profit organisations for the direct provision of humanitarian services. In reality, according to some authors, '[w]ith relatively little publicity to date, [private military and security] companies have received contracts to directly deliver humanitarian assistance, based on their capability to rapidly deploy and provide their own security.'⁴⁵⁰ Moreover, in terms of PMSCs' interest in this field, in 2008 it was reported, for instance, that officials from Blackwater, one of the most well-known PMSCs, 's[aw] additional business prospects in humanitarian operations, arguing that the company could be used to help alleviate the [] crisis in Darfur.'⁴⁵¹ The motivations behind this seem to include the efforts to 'further distance PSCs from the pejorative image of the mercenary and grant the industry a higher level of acceptance' and to exploit a 'potential for lucrative opportunities', as well as possibly a need to find alternative fields of activity after the diminished opportunities for contracts in Iraq.⁴⁵² According to results of a research presented in 2012, the analysis of 'over 200 PMSCs with an online representation' revealed that 'about 25 percent either directly refer to themselves as humanitarians or emphasise their humanitarian qualities and services', and they 'use the humanitarian frame advanced by "traditional" humanitarians, emphasising those elements that fit their interests and needs: a broad understanding of humanitarian assistance (a) including the delivery of human rights, democracy and development, (b) by a variety of means, including peacebuilding.'⁴⁵³

As emerged from the analysis of IHL in Section 2.1.5.1.2., impartial humanitarian organisations covered by provisions related to relief and protection to civilians in need are non-profit organisations, according to the authoritative ICRC Commentary. In this sense, PMSCs would not enjoy a right of humanitarian initiative, and while nothing prevents them from being used (for example by States) to carry out relief actions humanitarian and impartial in character, and conducted without any adverse distinction,

⁴⁴⁹ Ibid., 143. Similarly, see Mirko Sossai, "Status of Private Military and Security Company Personnel in the Law of International Armed Conflict," in *War by Contract*, eds. Francesco Francioni and Natalino Ronzitti (Oxford [etc.]: Oxford University Press, 2011), 207-209.

⁴⁵⁰ Perrin (2012), *supra* fn. 448, 143.

⁴⁵¹ Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity* (New York, Washington DC: Human Rights First, 2008), 7.

⁴⁵² Christopher Spearin, "Private, Armed and Humanitarian?: States, NGOs, International Private Security Companies and Shifting Humanitarianism," *Security Dialogue* 39, no. 4 (August 2008), 368-369.

⁴⁵³ Jutta Joachim and Andrea Schneider, "New Humanitarians? Frame Appropriation through Private Military and Security Companies," *Millennium: Journal of International Studies* 40, no. 2 (2012), 377-378.

their involvement in the direct provision of relief might contribute to weakening the principle of distinction, especially if the same company engaged both in armed security activities or the collection of intelligence, possibly entailing direct participation in hostilities, and in relief activities in the same theatre. Furthermore, while the military is under direct control of a State, the choice to use a PMSC to carry out relief actions might be more complicated in terms of control and responsibilities.

Analogous concern may be voiced in relation to another way chosen by PMSCs to show themselves as committed to humanitarian action—the creation of their own charities.⁴⁵⁴ For example, the Aegis Foundation presents itself as ‘a UK registered charity which aims to bring immediate relief to communities in post-conflict environments, currently Iraq and Afghanistan, through small, grass roots, community projects which are low cost and high impact – our unique hallmark.’⁴⁵⁵ Created in 2004, the Aegis Foundation prides itself of spending 0% of donations on administrative costs and its trustees declare themselves ‘privileged to have the support of the Board of Aegis Defence Services Limited’, a link to whose website is offered on the Foundation’s homepage.⁴⁵⁶ Aegis Defence Services Ltd. is ‘a leading private security and risk management company with offices in the UK, USA, Iraq, Afghanistan and Bahrain’, which has among its founders Lt Col Tim Spicer,⁴⁵⁷ ‘whose firm Sandline has been involved in controversial contracts in Africa and Papua New Guinea.’⁴⁵⁸ Moreover, Aegis Defence Services Ltd. was awarded a ‘three-year, \$293 million U.S. Army contract in 2004’ in Iraq, comprising intelligence collection.⁴⁵⁹

As results from the Aegis Foundation’s website, local Aegis teams in Afghanistan and Iraq request money from the Foundation to implement project where they are operating.⁴⁶⁰ In 2007, it was reported that

⁴⁵⁴ See Stoddard, Harmer and DiDomenico (2008), *supra* fn. 424, 19; Joachim and Schneiker (2012), *supra* fn. 453, 381-382. Joachim and Schneiker also mention the provision of support to charitable organisations by PMSCs.

⁴⁵⁵ Aegis Foundation, “About the Aegis Foundation,” Aegis Foundation website, available at <http://www.aegis-foundation.org/index.php/?page=mision-ethos-aim> (accessed June 18, 2012).

⁴⁵⁶ Aegis Foundation, “AEGIS Foundation: Frequently Asked Questions,” Aegis Foundation website, available at <http://www.aegis-foundation.org/index.php/?page=faq> (accessed June 18, 2012).

⁴⁵⁷ Aegis, “About Us,” Aegis website, available at <http://www.aegisworld.com/index.php/about-us-2> (accessed June 18, 2012). Aegis, “About Us: History,” Aegis website, available at <http://www.aegisworld.com/index.php/history-2> (accessed June 18, 2012).

⁴⁵⁸ Singer (2006), *supra* fn. 438, 73.

⁴⁵⁹ Steve Fainaru and Alec Klein, “In Iraq, a Private Realm of Intelligence-Gathering: Firm Extends U.S. Government’s Reach,” *The Washington Post*, July 1, 2007. Available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/30/AR2007063001075.html> (accessed June 18, 2012). Aegis website reports of new contracts in Afghanistan and Iraq awarded by the U.S. Government to Aegis in 2010 and 2011 respectively ‘to provide Facility Protective Services’. Available at <http://www.aegisworld.com/index.php/news/21/152/Contract-Award> and <http://www.aegisworld.com/index.php/news/33/152/Aegis-awarded-US-Government-Contract-in-Iraq> (accessed June 18, 2012).

⁴⁶⁰ See, for example, Aegis Foundation, “Basra youth enjoy improvements, new equipment at local stadium,” May 2009: ‘The Aegis team in Basra and GRS recently completed a \$450,000 refurbishment of the facility. The local Aegis crew requested funds from Aegis Foundation to provide the stadium members with a generator, soccer kits, martial arts equipment and training shoes. All the equipment was purchased locally, which helps bolster the local economy.’ Available at <http://www.aegis-foundation.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=38&cntnt01origid=55&cntnt01dateformat=%25b%20%25Y&cntnt01returnid=62> (accessed June 18, 2012).

Aegis ‘r[an] more than a dozen Reconstruction Liaison Teams in which contractors armed with assault rifles and traveling in armored SUVs visit[ed] reconstruction projects to assess their progress *and the levels of insurgent activity*.’⁴⁶¹ Moreover, by spending ‘about \$425,000 in company money and private donations on more than 100 small charity projects such as soccer fields and vaccination programs’, Aegis managed to ‘build relationships in the communities in which it operate[d] and gather information at the same time’, even if David Cooper, who directed the programme, was reported as arguing that such information was ‘not intelligence as [he] underst[ood] it; it [wa]s understanding the water in which [they] sw[am]’.⁴⁶²

The instrumental use of relief projects to collect intelligence may render the contractors performing these activities direct participants in hostilities, endangering the beneficiaries of the programmes by subjecting them to the risk of attack. In addition, if local or foreign NGOs were contracted to work with PMSC personnel in implementing the relief projects, they may also be exposed to the risk of being caught in an attack, and they may lose their military neutrality and exceed their mission, thus losing their special status of relief workers. In extreme cases, they might even lose their protection as civilians, if their conduct fulfils the constitutive criteria for direct participation in hostilities.

These kinds of emerging interactions, with all these possible consequences, suggest the appropriateness of reflecting on guidelines similar to existing ones on civil-military relationships regarding humanitarian-PMSCs relationships, possibly even improved in terms of a higher relevance of specificity and of relevance at the operational level.

4.4. Conclusion

The provision of humanitarian assistance in armed conflict has gained increased relevance in military strategies, with armed forces getting involved in this activity both when they are national armed forces of a Party to a conflict and when they are part of UN-commanded peacekeeping missions or UN-authorised forces under national command. COIN strategies and comprehensive approaches have been developed by States and regional organisations; the UN has witnessed a trend towards integrated missions, with military components tasked with broad and robust POC mandates, called to protect civilians under imminent threat of physical violence, contribute to the creation of a safe environment for the provision of humanitarian

⁴⁶¹ Fainaru and Klein (2007), supra fn. 459. Emphasis added.

⁴⁶² Ibid.

assistance, collaborate with other mission components and humanitarian organisations to improve the protection of civilians, and sometimes required at the same time to support the government, a Party to the conflict, including through offensive operations against non-State armed groups.

As a consequence, armed actors have increasingly interacted with relief personnel over the past decades. Practice has highlighted the risks deriving from association of humanitarian actors with military forces, be they belligerents or even forces not engaged in hostilities or peacekeepers. In the last two cases, the risks for humanitarians (and for the civilians they help) to be caught in attack due to co-location with the military should be lower, given that they would not be collaborating with combatants. Still, developments in the mandates and practice of UN peacekeeping missions have tended towards the adoption of multi-dimensional mandates, often implying association of the mission with one Party to the conflict, and robust mandates, with the risk of use of force by the military component of the mission beyond self-defence and participation in the hostilities. At the same time, multi-dimensional mandates have started including a constant focus on POC, implying the performance of activities by the mission together or in support of humanitarian workers and thus increasing the occasions and level of interaction.

The provision of relief by belligerents is not prohibited under IHL, but soldiers (except medical or religious personnel, or military components of civilian civil defence organisations) are not entitled to special protection when undertaking this task, even in case they prioritise only on the basis of needs, without using relief to achieve political or military goals or to collect intelligence. Also, they are bound to respect the principle of distinction, and respect for this principle can be ensured only if the distinction between them and civilians is not blurred: in IAC, this implies wearing of uniforms or other distinctive signs to distinguish themselves from civilians while engaged in an attack or in a military operation prior to an attack, being liable otherwise to loss of POW status; both in IAC and NIAC, treacherous killing can lead to prosecution for perfidy, a war crime. Arguably, respect for the principle of distinction should extend also to the use of vehicles different from those traditionally operated by humanitarian organisations, and possibly to respect for the specific identity of humanitarian work in military doctrines and discourses. Developments in military doctrines, at the national and regional organization's level, as well as within the UN peacekeeping framework, have taken into account some of the concern and complaints voiced by humanitarians against the instrumentalisation of relief and of the discourse on 'humanitarian assistance', and the ensuing risks of

jeopardising the specific identity of this activity and the rationale behind its special protection and the protection of those undertaking it during conflict.

Another form of interaction between armed actors and humanitarian personnel takes place in case armed escorts are used: they can be imposed by the territorial State for security reasons, a possibility foreseen by IHL treaties for IAC, or resorted to by humanitarian organisations themselves, sometimes contracting PMSCs. While PMSCs are in principle civilians under IHL, in case they get involved in the conflict they clearly risk being targeted and the actors they protect risk being attacked as well. More in general, the use of armed escorts for the delivery of humanitarian assistance may have important negative consequences in terms of the perception of the escorted humanitarian organisation, so that these organisations should avoid using them except as a last resort, as recommended by the (non-binding) guidelines adopted by the ICRC and the IASC.

In terms of collaboration by relief workers with a Party to the conflict, they might have their mission terminated, be expelled or prosecuted because of having exceeded their mission, and they might even become or be perceived as direct participants in hostilities, not only in case of hosting combatants in their headquarter or vehicles, but also in case of transmission of tactical intelligence. Collaboration with peacekeepers should be less problematic, since according to the traditional concept of peacekeeping they should not be a Party to the conflict, but robust mandates have increased the possibility of them getting involved in hostilities, so that problem analogous to relationships with belligerents have emerged. Humanitarians have adopted civil-military guidelines on their interaction with military actors and the use of armed escorts, rightly centred on the need to respect the principle of distinction and maintain a perception in this sense by Parties to the conflict, but they remain non-binding and sometimes overly general. Moreover, issues that should be further clarified are resort to PMSCs by humanitarian organisations and the interaction between these organisations and the local armed forces of a Party to the conflict. IHL provides the main reference for regulating these relationships, but more detailed guidance may be developed to guide operational practice, for example illustrating the possible consequences following from certain choices and thus enabling informed decision-making.

5. Stretching the Boundaries of Humanitarian Assistance?

Humanitarian Assistance and Protection

In addition to the involvement of armed actors in the provision of relief to civilians in armed conflict, a second area that has gained increased relevance and has posed complex challenges has been the engagement in protection by organisations traditionally active in humanitarian assistance. This Chapter will analyse the activities presented as protection by humanitarian actors, including denunciations of IHL and IHRL violations and transmission of information to judicial or political bodies, the extent to which they correspond to humanitarian protection as envisaged and regulated in IHL treaties (analysed in Section 2.1.5.2.), and the possible implications for relief actors due to involvement in these activities, in terms of practical consequences and of applicable protection regime under IHL.

5.1. Limits to Humanitarian Action and Advocacy during the Cold War

The Cold War did not only witness the questioning of the need for State's consent by NGOs and the birth of the *sans frontiérisme* movement, but also challenges to States by NGOs engaged in humanitarian assistance in terms of denunciation of alleged violations of international law. Against the principle of sovereignty and the right of States to expel relief organisations in case of outspoken criticism or support to non-governmental armed groups,¹ some of these organisations claimed a role in advocacy, helped by the international attention gained by humanitarian aid through initiatives like Band Aid and Live Aid.²

The split with the approach of the ICRC by the co-founder of MSF Kouchner and his colleagues was triggered by ICRC's policy of confidentiality and its choice not to denounce the alleged human rights abuses perpetrated by the Nigerian government. Within MSF, the right (and moral duty) of humanitarian actors to speak out and publicise the grave human rights violations they witnessed in the course of their work in favour of victims in need gradually took a central role.³ In 1999, at the Nobel Lecture on behalf of MSF, James Orbinski affirmed:

¹ See African Rights, *Humanitarianism Unbound? Current Dilemmas Facing Multi-Mandate Relief Operations in Political Emergencies* (African Rights Discussion Paper No. 5. London: African Rights, November 1994), 3-4.

² See, for example, Alex De Waal, "The Humanitarian Carnival: A Celebrity Vogue," *World Affairs* 171, no. 2 (Fall 2008): 43-56.

³ The 1971 MSF Charter prohibited to the members of the organisation 'toute immixtion dans les affaires intérieures des États' and required an abstention from 'porter un jugement ou d'exprimer publiquement une opinion – favorable ou hostile – à l'égard des événements, des forces et des dirigeants qui ont accepté leur concours'. Only in 1978, in connection with the Vietnamese invasion of Cambodia and the exodus of Cambodian refugees to Thailand, MSF leaders decided that volunteers working for the organisation

Silence has long been confused with neutrality, and has been presented as a necessary condition for humanitarian action. From its beginning, MSF was created in opposition to this assumption. We are not sure that words can always save lives, but we know that silence can certainly kill.⁴

MSF thus stimulated debate on whether publicly denouncing IHRL and IHL violations committed by Parties to the conflict is one of the tasks of humanitarian organisations, and whether these organisations have the right to speak out publicly about international law violations committed by belligerents and still be entitled to continue to carry out their mission and move freely through the territory controlled by the belligerents, or if public denunciation entails exceeding the mission of relief personnel and is a legitimate reason for a belligerent to expel the organisation. A similar dilemma had been experienced during WWII by the ICRC, which had chosen not to talk publicly about the genocide and make an appeal in favour of the people in concentration camps because it estimated it would not have led to the desired results but to loss of access to POWs.⁵ The organisation underwent harsh criticism for its choice, and in 2006 the ICRC Assembly affirmed that ‘the ICRC today regrets its past errors and omissions’, acknowledging that the ICRC did not do everything it could have done in favour of the victims and adhered too strictly to its traditional procedures and legal framework.⁶ The error was not necessarily that the ICRC decided not to proceed with public denunciation, but that, for its bilateral confidential representations to the German authorities, it relied on delegates, which ‘had no access to the corridors of power’, and only when the war was ending it undertook high-level representations.⁷

When MSF-France denounced the manipulation of aid and the policy of relocation implemented by the Ethiopian government,⁸ it was expelled from the country in 1985,⁹ and other members of the humanitarian community as well as States did not offer it any support, rather condemned it for having interfered in the internal political affairs of Ethiopia.¹⁰ Notwithstanding claims by MSF of a responsibility

‘rendront compte au bureau des violations des droits de l’homme et des faits inacceptables dont ils auront été témoins [...]. Le bureau décidera alors souverainement d’en informer l’opinion dans le cas où MSF aura été le seul témoin’. Fabrice Weissman, “Silence, on soigne... Un aperçu des prises de positions publiques de MSF, de la guerre froide à la guerre contre le terrorisme,” in *Agir à tout prix? Négociations humanitaires: l’expérience de Médecins Sans Frontières*, eds. Claire Magone, Michaël Neuman, and Fabrice Weissman (Paris : Editions La Découverte, 2011), 235.

⁴ MSF, *The Nobel Lecture on behalf of MSF by James Orbinski, Oslo, December 10, 1999* (Stockholm: The Nobel Foundation, 1999). Available at http://nobelpeaceprize.org/en_GB/laureates/laureates-1999/msf-lecture/ (accessed March 29, 2009).

⁵ See ICRC, “The Nazi Genocide and Other Persecutions. Document adopted by the ICRC Assembly on 27 April 2006,” Statement, October 25, 2007. Available at <http://www.icrc.org/eng/resources/documents/misc/holocaust-position-27042006.htm> (accessed April 29, 2012); Jean-Claude Favez, *The Red Cross and the Holocaust* (Cambridge: Cambridge University Press, 1999).

⁶ See ICRC (2007), *supra* fn. 5.

⁷ *Ibid.*

⁸ See Section 3.1.1.

⁹ See Judith Soussan, *MSF and Protection: Pending or Closed? Discourse and Practice Surrounding the “Protection of Civilian.”* (Paris: CRASH/Fondation – Médecins Sans Frontières, 2008), 15-16.

¹⁰ See Denis Kennedy, “Humanitarian NGOs and the Norm of Neutrality: A Community Approach,” University of Minnesota, Working Paper, February 2008, 16-25. Available at http://www.humansecuritygateway.com/documents/ISA_humanitarianNGOSnormneutrality.pdf (accessed November 15, 2011).

and right to speak out, the Ethiopian episode arguably confirmed the right of a State to expel humanitarian organisations that engage in advocacy and denunciation. Practice in the 1990s again questioned this right, with the birth of so-called ‘new humanitarianism’.

5.2. The Emergence of New Humanitarianism in the 1990s

Challenges and experiences in the 1990s highlighted the limits of humanitarian action and its possible negative effects, leading the humanitarian community to re-examine their role in conflict. Part of the community came to openly question the traditional principles and stance even more radically than MSF, considering apolitical humanitarian action, abiding by the requirement that it should not interfere in the conflict and it should tackle only its most immediate consequences for civilians, as an illusion and often a counterproductive activity.¹¹ The second half of the 1990s and then the beginning of the 21st century appeared marked by the emergence of a new form of humanitarianism, advocated by some scholars and practitioners and just observed by others, where humanitarian actors would not pretend to be neutral but rather acknowledge the impact of relief on the conflict and thus try to minimise the negative consequences of relief, focus on respect for human rights of civilians in need rather than only on their immediate needs, be ready to use political conditionality, and operate in collaboration with political and/or development actors.¹²

5.2.1. Humanitarian Actors, Advocacy and Denunciations

Throughout the 1990s, the advocacy dilemma experienced by the ICRC during WWII and paid with expulsion by MSF in Ethiopia did no longer seem to result in a trade-off between speaking out and losing access to victims. Some NGOs in the conflicts in Somalia, BiH and Rwanda chose to denounce violations of IHL committed by the belligerents and/or to call for international political or military intervention, without

¹¹ See, for example, Paul O’Brien, “Politicized Humanitarianism: A Response to Nicolas de Torrente,” *Harvard Human Rights Journal* 17 (2004): 31-39; Sarah Kenyon Lischer, “Military Intervention and the Humanitarian “Force Multiplier”,” *Global Governance* 13 (2007): 99-118. On this debate, see Section 1.2.3.

¹² See, for example, Andy Storey, “Non-Neutral Humanitarianism: NGOs and the Rwanda Crisis,” *Development in Practice* 7, no. 4 (November 1997): 384-394; Thomas George Weiss, *Humanitarian Intervention: Ideas in Action* (Cambridge: Polity, 2007); Thomas G. Weiss, “Principles, Politics, and Humanitarian Action,” *Ethics and International Affairs* 13, no. 1 (March 1999): 1-22; Fiona Fox, “New Humanitarianism: Does It Provide a Moral Banner for the 21st Century?,” *Disasters* 25, no. 4 (2001), 275-289; David Chandler, “The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda,” *Human Rights Quarterly* 23, no. 3 (August 2001): 678-700; Michael Barnett, “Humanitarianism Transformed,” *Perspectives on Politics* 3, no. 4 (December 2005): 723-740; Roberto Belloni, “The Trouble with Humanitarianism,” *Review of International Studies* 33, no. 3 (2007): 451-474.

being condemned for this by the Parties to the conflict or by other members of the international community, and without being expelled.

In Somalia, first CARE-US in September 1992 and later CARE-US, Oxfam US and IRC in November 1992 advocated international intervention.¹³ As summarised by Alex De Waal, Somalia ‘was the first time that relief agencies such as the Save the Children Fund took such publicly outspoken positions criticizing the absence of the United Nations ... the first time that international agencies successfully called for Western military intervention.’¹⁴ Similarly, during the genocide in Rwanda, MSF, the only humanitarian organisation active in the country together with the ICRC, called in June 1994 for military intervention, but still as ‘a last resort’ and an exception.¹⁵ Oxfam explicitly referred to ‘genocide’ already in April 1994 and it subsequently called for UN military intervention, and joined ‘the UN and most international agencies ... calling for a ceasefire’, an act that has been classified by commentators as ‘a political act, which charitable organisations are not required, legally or morally, to make.’¹⁶

Sometimes agencies chose not only to denounce but to go further and withdraw from the country, in case their calls for military intervention and/or political action went unheard and relief was judged as contributing to the conflict or anyway doing harm. For instance, in BiH in 1992 MSF-France made repeated calls to the international community to find a political solution to the conflict, instead of hiding behind the alibi of humanitarian assistance.¹⁷ In addition to this criticism of the “humanitarian alibi” and of the co-optation of humanitarian action,¹⁸ the organisation took the stance that, given that it believed crimes against humanity were perpetrated in the detention camps in Bosnia, ‘action made no sense under such conditions’, since ‘delivering humanitarian aid would have somehow involved [MSF] in the crimes perpetrated by the Serbian militias, ... it would have made [MSF] passively complicit with the murderers.’¹⁹

¹³ See Alex De Waal, *Famine Crimes: Politics & the Disaster Relief Industry in Africa* (African Rights and The International African Institute in association with Oxford: James Currey; Bloomington & Indianapolis: Indiana University Press, 1997), 181 and 184. John G. Sommer, *Hope Restored? Humanitarian Aid in Somalia 1990-1994* (Refugee Policy Group, 1994), 28-29.

¹⁴ Alex De Waal, “African Encounters,” *Index on Censorship* 23, no. 6 (November-December 1994), 19.

¹⁵ James Orbinski quoted in Metta Spencer, “A Doctor Without Borders: James Orbinski,” *Peace Magazine* 3, no. 2 (March-April 1997), 20. See also Soussan (2008), *supra* fn. 9, 23-24. Rony Brauman, “Rwanda: L’esprit humanitaire contre le devoir d’humanité. Tribune parue dans Le Monde le 30 juin 1994.” Available at <http://www.msf.fr/drive/1994-06-30-Brauman.pdf> (accessed April 20, 2011).

¹⁶ African Rights (1994), *supra* fn. 1, 32-33. Agreeing on the political nature of such a conduct, see Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge [etc.]: Cambridge University Press, 2011), 166. See also De Waal (1994), *supra* fn. 14, 26-30.

¹⁷ See Soussan (2008), *supra* fn. 9, 21-22.

¹⁸ The then-President of MSF-France, Rony Brauman, has later come to question this position. Rony Brauman, “Learning from Dilemmas,” in *Nongovernmental Politics*, ed. Michel Feher, Gaelle Krikorian, and Yates McKee (New York: Zone Books, 2007), 135.

¹⁹ *Ibid.*, 136-137.

This dilemma reappeared with the flight of many Rwandans, mostly Hutus, into the refugee camps in Zaire (but also Tanzania, Burundi, and Uganda) after the genocide. The presence in the camps of *génocidaires* who were able to control and divert part of the relief distributed, and even to be employed by NGOs, meant that the camps were exploited by the faction defeated by the RPF to reorganise itself and fight again.²⁰ Some NGOs denounced these problems already in 1994, but no real solution was found and the situation lasted until 1997.²¹ In particular, political actors did not intervene to separate civilian refugees from soldiers, members of militia, and criminals allegedly responsible for war crimes and crimes against humanity. Humanitarian organisations had thus to choose whether to continue distributing relief, although they knew that a substantial part of it was in fact favouring one faction responsible for the genocide, which was still carrying out incursions in Rwanda and was allegedly involved also in the conflict that had erupted in 1996 in Zaire.²² In the alternative, humanitarians could opt for suspending their operations and leave the refugee camps, in this case denying aid also to civilians in need who had not participated in the hostilities.

Some organisations, such as MSF-France and CARE, withdrew from the camps in 1994, after having called in vain for the UN to intervene and separate civilians from armed elements.²³ Other relief agencies, including other MSF sections, chose to remain.²⁴ The fears regarding a renovation of violence found confirmation in November 1996, when the Alliance des Forces Démocratiques pour la Libération du Congo (AFDL) (allegedly supported by the Rwandan Government) attacked the refugee camps in eastern Zaire and villages nearby, and the calls for armed intervention by NGOs such as MSF went unheard.²⁵ Many refugees and villagers fled and tried to go back to Rwanda, hid in the forest or moved to other camps, in all cases enduring suffering and sometimes death in a crisis that persisted well through the first months of 1997.²⁶

The experiences and dilemmas faced in the aforementioned conflicts generated a broad reflection by humanitarians on the impact and limits of their work, and on ways to minimise as much as possible negative consequences and protect civilians. As a result, some agencies and scholars considered that the traditional approach to humanitarian action was not adequate, so that the post-Cold War period would have been

²⁰ See, for example, the UNSG reports on security in the Rwandese refugee camps: S/1994/1308, 18 November 1994; S/1995/65, 25 January 1995; S/1995/304, 14 April 1995.

²¹ See, for example, Doctors Without Borders, "Special Report: Breaking the Cycle: Calls for Action in the Rwandese Refugee Camps in Tanzania and Zaire," November 10, 1994. Available at <http://www.doctorswithoutborders.org/publications/article.cfm?id=1465> (accessed April 20, 2011).

²² See *Report of the joint mission charged with investigating allegations of massacres and other human rights violations occurring in eastern Zaire (now Democratic Republic of the Congo) since September 1996*, A/51/942, 2 July 1997, in particular par. 95.

²³ See Fox (2001), *supra* fn. 12, 286.

²⁴ However, other MSF sections withdrew in late 1995. See Soussan (2008), *supra* fn. 9, 25.

²⁵ See *Ibid.*, 58-60.

²⁶ See *Ibid.*, 62-83.

marked by the emergence of a ‘rights-based “new humanitarianism” and reject[ion] [of] the post-1945 humanitarian aid framework of ICRC neutrality and needs-based emergency relief, which was tied to respect for state sovereignty rather than human rights protection’, with the ICRC remaining ‘[t]he major exception to this shift’.²⁷

While calls for political initiatives by humanitarian organisations in the 1990s did not always achieve their goal, it is nonetheless noteworthy that agencies chose to make these calls and were not condemned by Parties to the conflict or other States as interfering in the conflict and as exceeding their mission as relief workers (but condemnation came from scholars and practitioners). After Somalia and BiH, the general feeling was that humanitarian NGOs could play a bigger role in the post-Cold War scenario, denouncing human rights abuses and possibly even renouncing neutrality as interpreted by the ICRC and calling for military intervention.²⁸ For example, in the case of Kosovo, it was reported that ‘[w]orking through their professional association InterAction, a group of U.S. NGOs [wrote] to the U.S. National Security Council as early as June 1998, encouraging a military response to the threats against Kosovar civilians’ and that ‘[i]n early April 1999 NGO executives met with President and Mrs. Clinton to press their concerns.’²⁹ In addition to this focus on the political aspect of conflicts and the human rights of individuals they were providing assistance to, humanitarian organisations in the 1990s had their first experiences with contributing to international criminal justice in the form of testimony before international criminal institutions, entailing further reflection on the role of humanitarian actors in the collection of potential evidence for trial, as well as the impact that being potential or actual witnesses in criminal proceedings might have on respect (or perceived respect) for the principles of humanitarian action and on humanitarian access.

5.2.2. Humanitarian Actors and Judicial Proceedings

The establishment of the two *ad hoc* tribunals for the FRY and Rwanda and then the adoption of the Rome Statute in 1998 contributed to complicating the balance between humanitarian organisations’ desire to bear witness to the violations they observed and the risks of losing access to victims. According to MSF, these developments implied that ‘[t]estimony was no longer a matter of free choice demonstrating the

²⁷ Chandler (2001), *supra* fn. 12, 692.

²⁸ See De Waal (1994), *supra* fn. 14, 21-25.

²⁹ Larry Minear, Ted van Baarda, and Marc Sommers, “NATO and Humanitarian Action in the Kosovo Crisis,” Occasional Paper no. 36, Thomas J. Watson Jr. Institute for International Studies, Brown University, Providence, 2000, 63. Available at <http://reliefweb.int/sites/reliefweb.int/files/resources/6619C68702463E01C1256C2200249CF7-natokosovo36.pdf> (accessed April 28, 2012).

organisation's independence with regard to the perpetrators of violence; rather, it became a legal obligation that undermined the independence of relief organisations and required them to submit to the requirements of the judicial process.³⁰

States are obliged to cooperate with the ICTY and ICTR,³¹ thus shall 'adopt domestic measures establishing a system for the purpose of obtaining, by force if necessary, any evidence requested by the tribunals from natural or legal persons'.³² States Parties to the ICC Statute, or non-Parties that have concluded a specific agreement with the ICC, are similarly obliged to cooperate.³³ The special position of the ICRC was acknowledged by the Trial Chamber of the ICTY in 1999, ruling that it has a right under customary international law to 'non-disclosure of information relating to the ICRC's activities in the possession of its employees in judicial proceedings'.³⁴ This right is 'necessary for the effective discharge by the ICRC of its mandate', conferred to it by the GCs and APs.³⁵ Through ratification of these treaties, the States Parties 'must be taken as having accepted the fundamental principles on which the ICRC operates, that is impartiality, neutrality and confidentiality, and in particular as having accepted that confidentiality is necessary for the effective performance by the ICRC of its functions'.³⁶ This right has been acknowledged by Rule 73(4) of the ICC Rules of Procedure and Evidence (ICC RPE), according to which '[t]he Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement'.³⁷

³⁰ Françoise Bouchet-Saulnier and Fabien Dubuet, *Legal or Humanitarian Testimony? History of MSF's Interactions with Investigations and Judicial Proceedings* (Paris: CRASH/Fondation - Médecins Sans Frontières, 2007), 6.

³¹ See art. 29 ICTY Statute and art. 28 ICTR Statute. See also S/RES/827 (1993), par. 4, and S/RES/955 (1994), par. 2; rule 54 ICTY Rules of Procedure and Evidence (ICTY RPE) and ICTR Rules of Procedure and Evidence (ICTR RPE). Similarly, for Sierra Leone's duty to cooperate with the SCSL, see art. 17 *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone*, Freetown, 16 January 2002, available at <http://www.scs-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176> (accessed January 25, 2013).

³² Anne-Marie La Rosa, "Humanitarian Organizations and International Criminal Tribunals, or Trying to Square the Circle," *International Review of the Red Cross* 88, no. 861 (March 2006), 172.

³³ See arts. 86-87 ICCSt.

³⁴ ICTY, Trial Chamber, *Prosecutor v. Simic et al.*, case no. ICTY-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, pars. 73-74.

³⁵ *Ibid.*, par. 73.

³⁶ *Ibid.*, par. 73. Furthermore, 'The ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio juris* of these State Parties, which, in addition to the general practice of States in relation to the ICRC [], leads the Trial Chamber to conclude that the ICRC has a right under customary international law to non-disclosure of the Information.' *Ibid.*, par. 74.

³⁷ This provision seems to contradict the view of Judge David Hunt in his separate opinion in the *Simic* case: 'I am assured that such a ruling is intended to be limited to the evidence which the prosecution seeks to call from this particular witness – a limitation which is confirmed elsewhere in the joint decision – and that it is not intended to reflect the reasoning of the joint decision itself, that no evidence could ever be given by former officials of the ICRC where the facts came to their knowledge by virtue of their

On the other hand, such a right to non-disclosure was not recognised for other humanitarian organisations. They may nonetheless resort to the provisions in the ICTY RPE and ICTR RPE that allow for information to be given to the Prosecutor (and to the Defence, in the case of the ICTY) on a confidential basis and not to be disclosed in court without the consent of the provider; the Rome Statute contains a similar provision, covering only documents or information obtained ‘solely for the purpose of generating new evidence’.³⁸ Moreover, humanitarian organisations called to provide evidence might request the application of the protective measures for victims and witnesses, of the provisions on privileged information, or of the provisions on evidence in the form of written statements contained in the statutes and RPE of the three courts.³⁹ MSF, for example, adopted in 1995 an internal policy of cooperation with the ICTY and ICTR and decided that:

- MSF would continue to make public its reports on the events it witnessed. These documents would thus be accessible to the court.
- MSF would limit its obligation to co-operate via the procedures established for this purpose in the Statute of the tribunal, particularly as regards the procedure for confidential provision of documents [Rule 70 ICTY RPE].
- For field volunteer workers who did not wish to testify in person, MSF would try to obviate their obligation to testify before the court.⁴⁰

employment.’ ICTY, Trial Chamber, *Prosecutor v. Simic et al.*, case no. ICTY-95-9, Separate Opinion of Judge David Hunt on Prosecutor’s Motion for a Ruling Concerning the Testimony of a Witness, 27 July 1999, par. 42. Emphasis in the original.

However, pursuant to Rule 73(4) ICC RPE an exception can be made if:

- (a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or
- (b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

Furthermore, under Rule 73(5) and 73(6) ICC RPE:

5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees.

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court’s and ICRC’s functions.

³⁸ See rule 70 ICTY RPE and ICTR RPE; art. 54(3)(e) ICCSt. and rule 82 ICC RPE. Similarly, see rule 70 SCSL RPE. For a detailed analysis of these provisions, see Kate Mackintosh, “Note for Humanitarian Organizations on Cooperation with International Tribunals,” *International Review of the Red Cross* 86, no. 853 (March 2004): 131-146.

³⁹ See *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, adopted by S/RES/827 (1993), 25 May 1993, art. 22; *Statute of the International Criminal Tribunal for Rwanda*, adopted by S/RES/955 (1994), 8 November 1994, art. 21, and rules 75 and 92 bis ICTY and ICTR RPE; art. 64(6)(e) and 68 ICC Statute, and rules 73 and 87 ICC RPE. Similarly, see art. 16(4) SCSLSt. and rules 75 and 92bis SCSL RPE. In particular, as far as confidential information in possession of humanitarian organisations is concerned, rule 73 of the ICC RPE could be invoked, to the extent that it regards as privileged and subject to non-disclosure communication ‘made in the context of the professional relationship between a person and his or her legal counsel’, unless the person either ‘consents in writing to such disclosure’ or ‘voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure’. The same two conditions apply to ‘communications made in the context of a class of professional or other confidential relationships’, if according to the Chamber those communications ‘are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure’, ‘[c]onfidentiality is essential to the nature and type of relationship between the person and the confidant’, and ‘[r]ecognition of the privilege would further the objectives of the Statute and the Rules.’ In particular, ‘the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, ... or between a person and a member of a religious clergy’.

⁴⁰ Bouchet-Saulnier and Dubuet (2007), see *supra* fn. 30, 12.

Furthermore, MSF decided that it ‘would not forbid one of its members to testify in legal proceedings in an individual capacity, but in that case, MSF could request that neither its name nor its internal documents be used’ and that it would ‘offer legal support to volunteers who decided to testify without compromising the organisation’s need for discretion.’⁴¹ On the basis of these guidelines, MSF’s volunteers participated in proceedings before the ICTY and ICTR.⁴²

The acknowledgment of a right to non-disclosure for the ICRC only can be seen as implying that the principles of impartiality and neutrality bind the ICRC, given its specific mandate under the GCs and APs, and not other impartial humanitarian organisations. However, even if ‘the ICRC, an independent humanitarian organisation, enjoys a special status in international law, based on the mandate conferred upon it by the international community’,⁴³ still it has been seen that some of the protective functions of the ICRC in favour of civilians can be carried out also by other impartial humanitarian organisations. In addition, in the case of MSF, it should be noted that its decisions on whether and how to testify were generally respected, and its requests for protective measures accepted.⁴⁴ In any case, no evidence has been found of obstacles to the performance of relief provision because of the involvement of an agency in international judicial proceedings, so that such problems seemed to remain hypothetical. Still, it cannot be excluded that the mere possibility of humanitarian personnel being called to contribute evidence before international courts might influence the conduct of Parties to armed conflicts towards humanitarian organisations in the field.

5.2.3. Transmission of Information to the Security Council

No negative reactions seemed to derive also from another innovation related to humanitarians as witnesses and implemented by the UNSC before creating the ICTY and the ICTR. The UNSC called on the UNSG and then on an impartial Commission of Experts in the case of BiH and directly on an impartial Commission of Experts in the case of Rwanda to collect information on violations of IHL committed and ‘provid[e] the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the Former Yugoslavia’ and of ‘grave violations of international humanitarian law committed in the territory of Rwanda, including the

⁴¹ Ibid., 13.

⁴² See Ibid., 13-14 and 22-24. MSF also participated in national non judicial proceedings on the FRY (Dutch and French proceedings) and Rwanda (Belgian and French proceedings): see Ibid., 16-20 and 25-27.

⁴³ ICTY, Trial Chamber, *Prosecutor v. Simic et al.* (1999), supra fn. 34, par. 46. The corresponding fn. in the decision makes reference to the general agreement on the fact that the ICRC has international legal personality.

⁴⁴ See Bouchet-Saulnier Dubuet (2007), fn. 30, 13-14 and 22-24.

evidence of possible acts of genocide'.⁴⁵ In both cases, the UNSC '*call[ed] upon States and, as appropriate, international humanitarian organizations to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law*' committed in the context of the two conflicts, 'and to make this information available.'⁴⁶

In addition, in 1995 the UNSC requested the UNSG to establish two more International Commissions of Inquiry. The first, related to the situation in the Great Lakes region, was charged with collecting information on the supply of arms to former Rwandan government forces in the region, in violation of the arms embargo.⁴⁷ Again, 'States, relevant United Nations bodies, ... and *as appropriate, international humanitarian organizations, and non-governmental organizations,*' were called upon to 'collate information in their possession relating to the mandate of the [Commission of Inquiry]' and make such information available.⁴⁸ The second Commission of Inquiry was mandated to 'establish the facts relating to the assassination of the President of Burundi on 21 October 1993, the massacres and other related serious acts of violence which followed' and to recommend legal, political or administrative measures to prevent any repetition of similar facts, fight impunity and promote reconciliation in Burundi.⁴⁹ Also in this case, the UNSC called upon 'States, relevant United Nations bodies and, *as appropriate, international humanitarian organizations* to collate substantiated information in their possession relating to acts' covered by the mandate and to make such information available to the Commission.⁵⁰

The UNSC limited itself to *call*, 'as appropriate', on international humanitarian organisations to collaborate, so that in terms of powers of the UNSC vis-à-vis humanitarian organisation, this practice does not seem to contradict the traditional position of these organisation as not being addressees of international

⁴⁵ See S/RES/771 (1992), 13 August 1992, par.6; S/RES/780 (1992), 6 October 1992, pars. 1-2; S/RES/935 (1994), 1 July 1994, pars. 1 and 3. Previously, the UNSG had been called to collect information from humanitarian organisations in connection with the sanctions regime imposed against Iraq in 1990. In S/RES/666 (1990), 13 September 1990 (13-2-0), the UNSC:

Emphasizing that it is for the Security Council, alone or acting through the Committee, to determine whether humanitarian circumstances have arisen,

3. *Requests*, for the purposes of paragraphs 1 and 2 above, that the Secretary-General seek urgently, and on a continuing basis, information from relevant United Nations and other appropriate humanitarian agencies and all other sources on the availability of food in Iraq and Kuwait, such information to be communicated by the Secretary-General to the Committee regularly;

5. *Decides* that if the Committee, after receiving the reports from the Secretary-General, determines that circumstances have arisen in which there is an urgent humanitarian need to supply foodstuffs to Iraq or Kuwait in order to relieve human suffering, it will report promptly to the Council its decision as to how such need should be met;

⁴⁶ S/RES/771 (1992), 13 August 1992, par. 5; similarly, see S/RES/935 (1994), 1 July 1994, par. 2. *Emphasis added.*

⁴⁷ S/RES/1013 (1995), 7 September 1995, pars. 1 and 4.

⁴⁸ S/RES/1013 (1995), 7 September 1995, par. 3. *Emphasis added.*

⁴⁹ S/RES/1012 (1995), 28 August 1995, par. 1.

⁵⁰ S/RES/1012 (1995), 28 August 1995, par. 3. *Emphasis added.*

legal obligations established by the UNSC.⁵¹ However, these requests, even if addressed to international humanitarian organisations and NGOs only ‘as appropriate’, pose the delicate question of the possible risks and consequences following the provision of information by humanitarian actors to a political body, and of the implications if this information is then used in criminal proceedings. More in general, they raise the crucial issue of the boundaries that may be lawfully invoked and imposed (under threat of expulsion, for example) by Parties to armed conflicts upon humanitarian actors in terms of speaking out and transmitting information to non-humanitarian actors.

It might be argued that the aforementioned decisions demonstrate that, according to the UNSC, the transmission of information on violations of IHL or of an arms embargo to the UNSC (albeit indirectly) cannot be a reason for the loss of the qualification and status of relief personnel or humanitarian actor. Nonetheless, the qualifier ‘as appropriate’ and the fact that no similar demand for information was made again to humanitarian organisations in the following 15 years,⁵² might suggest a more careful interpretation. Furthermore, it should be highlighted that the then President of the ICRC, Cornelio Sommaruga, made reference to the establishment of the Commission of Experts for BiH and stated: ‘a *clear distinction must be drawn between justice and humanitarian assistance*. Although the ICRC and other humanitarian organisations are ready to take considerable risks - some might even say too many - in order to bring the victims assistance and protection, their role is not to act as judge and even less as prosecutor.’⁵³

The increased role of relief organisations in advocacy and in monitoring respect for the rights of civilians and for violations of IHL, both claimed by organisations themselves and implied in decisions by the UNSC, led some authors and practitioners to identify at the end of the 1990s a shift in traditional humanitarian action, with the emergence of new humanitarianism and, in terms of legal framework, the creation, especially in NIAC, of ‘rights and duties for non-governmental organizations (NGOs), including a right of access without prior consent, a right to forcibly protect aid, but also a new duty to do no harm’, as

⁵¹ On this, see Anne Peters, “Article 25,” in *The Charter of the United Nations: A Commentary* 3rd ed. Vol. II, ed. Bruno Simma et. al. (Oxford: Oxford University Press, 2012), 800-804 (pars. 34-44). However, the author notes that the ICJ in its *Kosovo* Advisory Opinion noted that the UNSC has sometimes made demands to actors other than UN MSs and intergovernmental organizations, for example repeatedly addressing the ‘Kosovo Albanian leadership’, and did not exclude that non-State actors might be bound by UNSC resolutions, rather affirming that it is called to determine on a case-by-case basis, ‘considering all relevant circumstances, for whom the [UNSC] intended to create binding legal obligations’ with a certain resolution. In the specific case, the ICJ concluded that UNSC res. 1244 (1999) ‘did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia.’ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 22 July 2010 at 403, para. 117 and 119.

⁵² A similar request was made again only in 2010 in relation to Somalia. See Section 5.3.3.3.

⁵³ Cornelio Sommaruga, “Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations Organization: Statement by Mr. Cornelio Sommaruga, President of the International Committee of the Red Cross at the United Nations General Assembly (New York, 20 November 1992),” *International Review of the Red Cross* 33, no. 292 (January-February 1993), 53. Emphasis in the original.

well as the development of '[l]imitations on the requirement of neutrality', and the growth of '[t]he scope of legitimate assistance.'⁵⁴ However, this trend seems to have been questioned at times, especially through the reassertion of the principles of sovereignty and the limits of humanitarian action, as shown next.

5.2.4. Parties to the Conflict and Reactions to the Practice of Humanitarian Organisations

While the practice regarding advocacy by relief agencies in conflicts like Somalia, BiH, and Rwanda-Zaire has been interpreted as implying a wider freedom of action for these agencies in terms of engaging in monitoring the human rights of civilians and in advocacy, there were cases when humanitarians operated in strong States, and the latter restated their rights and control over humanitarian action. In addition to the arrest of CARE Australia staff in the former Yugoslavia,⁵⁵ the government of Rwanda reacted to the presence of camps for IDPs in its territory, to whose existence humanitarian organisations were contributing, since it perceived them as security threats. While the genocide in the country was over, there were still episodes of violence and attempts by armed elements to reorganise in IDP camps and refugee camps (especially in Zaire). The Rwandan government did not react against Opération Turquoise,⁵⁶ but in 1995 closed all IDP camps in the country, and the closure of the camp in Kibeho escalated in violence, with NGOs such as MSF denouncing the killing of civilians by government forces.⁵⁷ The government later expelled 38 NGOs from the

⁵⁴ Mary Ellen O'Connell, "Humanitarian Assistance in Non-International Armed Conflict: The Fourth Wave of Rights, Duties and Remedies," *Israel Yearbook on Human Rights* 31 (2001): 208-209, see also 210.

⁵⁵ See Section 4.1.1.

⁵⁶ See Section 4.2.1.1.

⁵⁷ See Soussan (2008), *supra* fn. 9, 25-26. According to De Waal, the closure of the camp in Kibeho had been planned and organised by the Rwandan government in agreement with the UN peacekeeping mission, and relief agencies themselves contributed to the mounting of the pressure that led to the attack. See De Waal (1997), *supra* fn. 13, 199-202. The UNSG in his report on Rwanda affirms:

On 18 April, the Rwandan Government took action to cordon off and close the eight remaining camps for internally displaced persons in the Gikongoro region, of which Kibeho was by far the largest. The Government considered that since these camps were being used as sanctuaries by elements of the former Rwandese government forces and militia, they were a destabilizing factor and represented a security threat. *Negotiations were taking place between the Government and United Nations for the voluntary closure of the camps when the decision to act was taken without notice or consultation.* Seven of the camps were nevertheless closed without serious incident. However, at Kibeho an estimated 80,000 internally displaced persons attempted to break out on 22 April, after spending 5 days on a single hill without adequate space, shelter food or sanitation. A large number of deaths occurred from firing by government forces, trampling and crushing during the stampede and machete attacks by hard-liners in the camp, who assaulted and intimidated those who wished to leave.

S/1995/457, 4 June 1995, par. 10. Emphasis added.

On the other hand, the Independent International Commission of Inquiry established by the Rwandan authorities with UN and other international participation to investigate the events at Kibeho notes in its report that 'at the 3 April 1995 meeting [of the Integrated Operations Centre working group, which included government authorities, UN agencies and NGOs and had the aim to develop strategies for the return of IDPs], [...] [i]t was also agreed that all members of the working group were ready to launch the operation.' The Commission concludes that '*the operation of the Government of Rwanda to close the internally displaced persons camps was well planned, but that failures occurred in the implementation and ensuing panic*'; in addition it finds that '[t]here are credible indications that some NGOs actively contradicted the policies of the Government of Rwanda by encouraging internally displaced persons to remain in Kibeho camp and by pursuing discriminatory hiring practices' and that '*the decision of a number of NGOs not to cooperate with the closure operation once it began exacerbated the humanitarian crisis.*' S/1995/411, 23 May 1995, Annex, pars. 29, 15, 49, and 51. Emphasis added. Questioning the independence of the Commission, see Bouchet-Saulnier Dubuet (2007), *supra* fn. 30, 25.

country in December 1995,⁵⁸ including MSF, justifying its decision on the grounds of ‘involvement of non-governmental organizations in activities incompatible with their mandate, which affected the security of the country, and unethical behaviour such as selling of relief goods.’⁵⁹ MSF argued that the expulsion was also a reaction to its denunciation of the Kibeho episode and more in general to its position on *témoignage*.⁶⁰ For sure, the act represented a strong reaffirmation of the sovereignty of the government of Rwanda, and of the need for humanitarian action to respect certain boundaries.

5.2.5. Attempts at Self-Regulation

Partly in response to the dilemmas and controversial practices analysed in the previous Sections, as well as because of the growth of the humanitarian sector and the increase in the number and diversity of actors claiming a role in it, humanitarian organisations in the course of the 1990s felt the need to self-regulate their activities through (non-binding) codes of conducts and guidelines, often elaborated to be applicable in situations of both armed conflict and natural disaster. The most well-known are undoubtedly the *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief* (so-called Red Cross Code of Conduct) and the *Humanitarian Charter and Minimum Standards in Humanitarian Response* (so-called Sphere Handbook), the latter elaborated in the framework of the Sphere Project.⁶¹

The Red Cross Code of Conduct was ‘developed and agreed upon by eight of the world’s largest disaster response agencies in the summer of 1994’,⁶² it is a voluntary code, and it counts 515 signatories at

⁵⁸ See S/1996/149, 29 February 1996, par. 29.

⁵⁹ S/1996/149, par. 29. See also Reuters, “Rwandan Defends Ouster of Aid Agencies,” *The New York Times*, December 20, 1995. Available at <http://www.nytimes.com/1995/12/20/world/rwandan-defends-ouster-of-aid-agencies.html> (accessed April 20, 2011).

⁶⁰ See Sarah Stroup, “Getting to Relief: Private Humanitarians and Public Authorities,” Paper prepared for the Annual Conference of the International Studies Association, February 15-18, 2009, New York, NY, 25-26. Available at http://research.allacademic.com/one/isa/isa09/index.php?cmd=Download+Document&key=unpublished_manuscript&file_index=4&pop_up=true&no_click_key=true&attachment_style=attachment&PHPSESSID=chkc1ffcjmodmtnjrf6hbr35i2 (accessed October 01, 2013).

⁶¹ International Movement of the Red Cross and Red Crescent, Twenty-sixth International Conference, Geneva, 1995. “Annex VI – Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief.” Reproduced in *International Review of the Red Cross* 36, no. 310 (January-February 1996): 119-127. The Sphere Project, launched in 1997 by a group of humanitarian NGOs together with the International Red Cross and Red Crescent Movement with the aim to improve the quality of their actions during disaster response and to be held accountable for them, published a first version of the Sphere Handbook in 2000, followed by two further renewed editions in 2004 and in 2011. The 2000 edition is available at <http://helid.digicollection.org/en/d/Jh0226e/>, the 2004 edition at <http://www.unhcr.org/refworld/publisher,SPHERE,,3d64ad7b1,0.html>, and the 2011 edition at http://www.sphereproject.org/component/option,com_docman/task,cat_view/gid,17/Itemid,203/lang,english/ (all accessed August 15, 2011).

⁶² IFRC, “Code of Conduct,” available at <http://www.ifrc.org/en/publications-and-reports/code-of-conduct/> (accessed August 15, 2011). The eight organisations sponsoring the Code were Caritas Internationalis, Catholic Relief Services, IFRC, International Save the Children Alliance, Lutheran World Federation, Oxfam, World Council of Churches, and ICRC. See International Movement of the Red Cross and Red Crescent (1996), *supra* fn. 61, 119, fn. 1.

the beginning of October 2013.⁶³ The Code applies also to situations of armed conflict, in which it should ‘be interpreted and applied in conformity with’ IHL,⁶⁴ and it contains ten principles to which the humanitarian organisations signatories commit themselves, as well as recommendations addressed to the governments of disaster-affected countries, to donor governments, and to IGOs. Among the principles listed, the first four can be partly identified with the traditional principles of humanitarian action: humanity is reflected in the principle that ‘[t]he humanitarian imperative comes first’; impartiality as non-discrimination in the principle that ‘[a]id is given regardless of the race, creed or nationality of the recipients and without adverse distinction of any kind’ and ‘[a]id priorities are calculated on the basis of need alone’; neutrality (in part) in the principle that ‘[a]id will not be used to further a particular political or religious standpoint’; and, independence (in part) in the principle that the signatories ‘shall endeavour not to act as instruments of government foreign policy’.⁶⁵

The *Humanitarian Charter*, as developed in its original version at the end of the 1990s, reaffirmed the principle of humanity by stating the belief of its signatories in ‘the humanitarian imperative and its primacy’, based on humanity and IHL.⁶⁶ Furthermore, it contained an explicit commitment to ‘act in accordance with the principles of humanity and impartiality, and with the other principles set out in the *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief* (1994)’, and proceeded to identify as the three main principles in humanitarian response the ‘right to life with dignity’, the ‘distinction between combatants and non-combatants’, and the ‘principle of non-refoulement’.⁶⁷ The primary role of the affected State in providing assistance to people in need was acknowledged, and the subsidiary role of humanitarian organisation was inscribed in the framework provided by international law, in particular IHL, IHRL, and refugee law.⁶⁸ Finally, the signatories committed to minimise as much as possible the negative impact of humanitarian

⁶³ IFRC, “Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief – List of signatories”, updated on 12/07/2013, available at http://www.ifrc.org/Global/Publications/disasters/code-of-conduct/codeconduct_signatories.pdf (accessed October 08, 2013).

⁶⁴ International Movement of the Red Cross and Red Crescent (1996), *supra* fn. 61, 119.

⁶⁵ International Movement of the Red Cross and Red Crescent (1996), *supra* fn. 61, 120-121. The other six principles are: the signatories ‘shall respect culture and custom’; they ‘shall attempt to build disaster response on local capacities’; ‘[w]ays shall be found to involve programme beneficiaries in the management of relief aid’; ‘[r]elief aid must strive to reduce future vulnerabilities to disaster as well as meeting basic needs’; the signatories ‘hold [them]selves accountable to both those [they] seek to assist and those from whom [they] accept resources’; and, the signatories ‘[i]n [their] information, publicity and advertising activities, ... shall recognize disaster victims as dignified humans, not hopeless objects’. *Ibid.*, 122-123.

⁶⁶ Available at <http://helid.digicollection.org/en/d/Jh0226/> (accessed August 15, 2011).

⁶⁷ Available at <http://helid.digicollection.org/en/d/Jh0226/> (accessed August 15, 2011).

⁶⁸ Available at <http://helid.digicollection.org/en/d/Jh0226/> (accessed August 15, 2011).

relief, especially during conflict, and recognised the special mandates in assistance and protection given under international law to the ICRC and UNHCR.⁶⁹

Similar principles and guidelines were included in codes of conduct elaborated by humanitarian organisations in the context of specific conflicts,⁷⁰ and mention can be made also of the various resolutions adopted by the Council of Delegates of the Red Cross Movement, composed of representatives of the National Societies, the ICRC and the IFRC. For example, in 1993 it adopted a resolution in which it ‘remind[ed] States, in particular, of the basis for and the nature of humanitarian assistance, as established by international humanitarian law, the Fundamental Principles and the Statutes of the International Red Cross and Red Crescent Movement’, articulated in three components: the right of victims to be recognised as victims and to receive assistance; the duty of States to assist people under their authority and, if they fail to do this, to authorise humanitarian organisations to provide such assistance, grant them access to victims and protect their action; and, the right of humanitarian organisations to have access to victims and bring them assistance, ‘provided that the agencies respect the basic principles of humanitarian work - *humanity, neutrality, impartiality, independence*’.⁷¹ Furthermore, access to victims was defined as ‘the indispensable condition for humanitarian work’ and ‘the ultimate aim of the four principles mentioned above’, and

⁶⁹ Available at <http://helid.digicollection.org/en/d/Jh0226/> (accessed August 15, 2011).

⁷⁰ For example, the 1999 *Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo*, developed by the humanitarian community in response to the frequent difficulties experienced due to logistical and security problems (see, for example, S/2001/572, 8 June 2001, par. 54; S/2002/621, 5 June 2002, par. 49; S/2002/1180, 18 October 2002, par. 61; S/2003/1098, 17 November 2003, par. 48; S/2004/650, 16 August 2004, par. 39; S/2008/218, 2 April 2008, par. 33; S/2008/693, 10 November 2008, pars. 50-57; S/2008/728, 21 November 2008, par. 42; S/2009/335, 30 June 2009, par. 24; S/2010/369, 9 July 2010, par. 47; E/CN.4/1999/31, 8 February 1999, par. 61; E/CN.4/2003/43, 15 April 2003, par. 26), presented themselves as supplementary to the Red Cross Code of Conduct, and included impartiality (‘[a]id w[ould] be delivered without discrimination as to ethnicity, religious beliefs or political opinion’ and ‘[h]umanitarian assistance should be provided solely on the basis of needs’), neutrality (‘[a]id agencies w[ould] be neutral in providing humanitarian assistance and [had to] stress the apolitical nature of humanitarian assistance’ and ‘[t]he action of aid agencies w[ould] not imply recognition of or confer legitimacy of the authority in control of the area in which humanitarian assistance is provided’), and independence (‘[t]he assistance provided w[ould] be depended solely on needs, giving priority to the most urgent and stressing situations, and w[ould] not be influenced by political, economic or military considerations’), as well as the principle of ‘Human Rights’ (‘[t]he promotion of human rights [wa]s an essential part of humanitarian assistance and m[ight] range from passive monitoring of respect for human rights to pro-active human rights advocacy’ and ‘[t]hese activities w[ould] be guided by International Human Law and by the mandates given by International Instruments to various humanitarian organisations such as OHCHR, UNHCR and ICRC’). Annex II to the *United Nations Consolidated Inter-Agency Appeal for the Democratic Republic of the Congo January – December 2000* (Geneva: UN, November 1999), 65-66. Other guidelines adopted by humanitarian organisations (sometimes with other actors) in conflicts in the 1990s, which this author could not get a hold of, would include: *Agreement destined to outline the responsibilities and basic principles governing the activities and relationships between UN operational agencies, its partners and de facto local authorities*, Somalia, 1998; *Déclaration pour des normes de comportement humanitaire – un minimum d’humanité en situation de violence interne*, Burundi, 1994; *Operational criteria for the implementation of humanitarian assistance programmes*, Angola, 1999. All cited in Jean-Daniel Vigny and Cecilia Thompson, “Standards Fondamentaux d’Humanité: Quel Avenir?,” *International Review of the Red Cross* 82, no. 840 (December 2000), 927-928.

⁷¹ International Movement of the Red Cross and Red Crescent, Council of Delegates, “Resolution 11: Principles of Humanitarian Assistance, Birmingham, 29-30 October 1993,” par. 1. Reproduced in *International Review of the Red Cross*, 33, no. 297 (November-December 1993), 500.

therefore ‘humanitarian relief operations which are in conformity with these principles cannot ... be regarded as constituting unlawful intervention in the internal affairs of a State’.⁷²

This resolution was then recalled in a resolution adopted by the 26th International Conference of the Red Cross and Red Crescent in 1995, which comprises delegates of the States Parties to the Geneva Conventions who can participate in debates and vote following instructions from their governments.⁷³ The International Conference resolution further called upon States ‘*to ensure efficient and adequate access to internally displaced persons and refugees for neutral, impartial and independent humanitarian organizations*, in particular National Red Cross and Red Crescent Societies (National Societies), the ICRC and the International Federation, as well as other international organizations, in particular the United Nations High Commissioner for Refugees (UNHCR), according to their respective mandates, so that they may provide protection and humanitarian assistance to these persons’.⁷⁴

5.2.6. Conclusion: What Limits for Humanitarian Assistance?

While the room for advocacy by relief organisations seemed to be narrow during the Cold War, the following decade saw humanitarian assistance and relief workers gaining increased importance and claiming an enlargement of the legitimate scope of their operations. In this sense, while the principles of humanitarian action were constantly restated not only by Parties to conflicts and UN bodies but also by humanitarian actors, the latter adopted conducts arguably contrary to the principles as traditionally interpreted, calling for military intervention and publicly denouncing violations of international law witnessed in the field (or transmitting such information for use in judicial proceedings, sometimes upon request by the UNSC). The absence of reactions to these conducts by Parties to the conflict or the international community in general seemed to indicate possible changes in the IHL regulating humanitarian workers (especially in NIACs), with the development of new rights and of a limited form of neutrality applicable to them. However, while in some cases NGOs freely acted outside the traditional limits, in other cases Parties to the conflict, in particular State governments (such as the Governments of Rwanda and of the FRY) clearly reaffirmed their

⁷² Ibid. par. 2.

⁷³ International Movement of the Red Cross and Red Crescent, Twenty-sixth International Conference of the Red Cross and Red Crescent, Geneva, 1995, “Resolution 4: Principles and Action in International Humanitarian Assistance and Protection,” preamble. Reproduced in *International Review of the Red Cross* 36, no. 310 (January-February 1996), 70.

⁷⁴ Ibid., 71 (par. 1(d)). Emphasis added.

sovereignty and right of control, which were confirmed also by agreements and practice analysed in the previous Chapters (such as agreements adopted by the Parties in Sudan).⁷⁵

The practice of the 1990s led some scholars at the end of the decade to identify (and some to argue in favour of) the emergence of a new kind of humanitarian engagement in conflict, a ‘new humanitarianism’, free from the limits imposed by traditional principles. According to Leader, in the 1990s NGOs and organisations engaged in humanitarian relief widened the scope of their interventions in armed conflict and weakened their respect for the principles as traditionally interpreted, to the point that the principles of humanitarian action ‘shifted from being conditions imposed on agencies by elites to condition agencies [we]re trying to impose on the belligerents’, and ‘[n]eutrality in the sense of non-interference [wa]s not accepted by any position, with the possible exception of ICRC.’⁷⁶ To influence belligerents, humanitarian agencies ‘developed a new range of approaches, such as human rights advocacy, humanitarian conditionality, and critical engagement, which [went] beyond the strictly defined role of the ICRC and which c[a]me close to coercion.’⁷⁷ The underlying assumption seems to be that the special status offered by IHL to principled humanitarian actions and actors, and restated by the UN and Parties to the conflict, would apply to these (unprincipled) relief organisations, thus modifying the applicable legal regime.

Still, the overview of the evolution of practice throughout the Cold War and the 1990s does not seem to offer unequivocal support to such a change in the legal regime, reducing the possibility for Parties to the conflict to impose limits upon humanitarian organisations and guarantee the non-political nature of their activity. The 20th century ended with an ongoing debate on the limits of humanitarian assistance and its principles and on ‘new humanitarianism’:⁷⁸ the analysis of subsequent practice might help clarify whether this search for a new form of humanitarianism has actually translated into changes in State practice and *opinio juris* in the 21st century.

⁷⁵ See Section 3.2.2.4.

⁷⁶ Nicholas Leader, *The Politics of Principle: The Principles of Humanitarian Action in Practice*, HPG Report 2, March 2000 (London: Overseas Development Institute, 2000), 21.

⁷⁷ Ibid., 48.

⁷⁸ See, for example, Sarah Collinson and Samir Elhawary, *Humanitarian Space: A Review of Trends and Issues*, HPG Report 32, April 2012 (London: Overseas Development Institute, 2012), 14. Available at <http://www.odi.org.uk/resources/docs/7643.pdf> (accessed May 8, 2012).

5.3. The 21st Century and the Protection Discourse: The Triumph of New Humanitarianism?

Debates on the boundaries of legitimate action by relief organisations continued in the 21st century in the framework of the discourse on protection, a term increasingly associated with humanitarian assistance since the end of the 1990s.⁷⁹ In addition to humanitarians' growing dissatisfaction with simply supplying goods and services to keep people alive, leaving them vulnerable to mistreatment in the absence of (physical) protection (the so-called paradox of the 'well fed dead'),⁸⁰ the UN has been focusing on POC since the late 1990s, with the associated changes in the mandates and structures of UN peacekeeping missions.⁸¹

These developments have raised questions regarding the meaning and operational content of the concept of protection of civilians,⁸² and more specifically the role of humanitarians in it. This Section will therefore examine the limits of humanitarian assistance by looking at the evolution in the practice with regards to the protection of civilians in armed conflict, the protection activities that humanitarian actors have performed or may choose to perform, the extent to which they correspond to protection as envisaged in IHL treaties, and the possible impact of these activities on the principles of humanitarian action and on the position of humanitarian actors under IHL. The main actor traditionally involved in protection of civilians in conflict is the ICRC, which has then been joined by a plurality of other actors.

⁷⁹ For example, the launch of the new edition of *The Sphere Project: Humanitarian Charter and Minimum Standards in Humanitarian Response*, on 14 April 2011, was covered in an article entitled "AID POLICY: Protection takes centre stage in new Sphere guidelines." See UN Humanitarian Information Unit – IRIN, "AID POLICY: Protection takes centre stage in new Sphere guidelines," April 14, 2011, available at <http://www.irinnews.org/report.aspx?reportid=92478> (accessed April 15, 2011). Also, publications on protection by the humanitarian community include: Sylvie Giossi Caverzasio, ed., *Strengthening Protection in War – A Search for Professional Standards: Summary of Discussions among Human Right and Humanitarian Organizations* (Geneva: ICRC, 2001); Inter-Agency Standing Committee (IASC), *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action* (Geneva: UNICEF on behalf of the IASC, 2002); Hugo Slim and Andrew Bonwick, *Protection: An ALNAP Guide for Humanitarian Agencies* (London: Overseas development Institute, 2005); ICRC, *Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence* (Geneva: ICRC, 2009); ICRC, *Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*, 2013 ed. (Geneva: ICRC, 2013). See also Elizabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action* (Washington, D.C.: Brookings Institution Press, 2011).

⁸⁰ Marc DuBois, "Protection: The New Humanitarian Fig-Leaf," *Humanitarian Aid on the Move (URD Newsletter)* no. 2 (April 2009), 2. Available at http://www.urd.org/IMG/pdf/Protection_Fig-Leaf_DuBois.pdf.

⁸¹ See Section 4.2.2..

⁸² For example, an independent study on 'Protecting Civilians in the Context of UN Peacekeeping Operations' was jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs and published in November 2009. See Victoria Holt, Glyn Taylor, and Max Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (New York: UN, 2009).

5.3.1. The Traditional Humanitarian Protection Actor in Armed Conflict: The ICRC

Based both on the specific provisions contained in the GCs and APs, and on the Statutes of the Movement,⁸³ the ICRC has traditionally carried out a range of protective activities in favour of civilians, including reminding Parties to the conflict about applicable IHL, visiting detainees, and providing family tracing services. ICRC protection includes ‘all the activities undertaken by the ICRC to safeguard the rights of victims and to preserve them from death, attack and the anguish resulting from the insecurity of their situation.’⁸⁴ The first and primary aim of these actions is to ensure that the Parties to the conflict respect their obligations under IHL, since the State is primarily responsible to guarantee the rights of individuals and the ICRC or other humanitarian organisations intervene when States and/or other Parties to an armed conflict are unable or unwilling to fulfil their tasks.⁸⁵

Within the International Red Cross and Red Crescent Movement itself, the term ‘protection’ can be used to refer to at least three different categories of activities:⁸⁶ ‘contributing to the development of IHL; contributing to the application of IHL; ad hoc diplomacy on humanitarian grounds.’⁸⁷ Sandoz has identified the provision of relief in favour of civilians in need as a fourth kind of protection, which he has labelled *direct protection*.⁸⁸ However, since this type of protection is referred to as ‘relief’ or ‘assistance’ in the relevant treaties,⁸⁹ it should be differentiated from protection activities in a narrow sense, even if the two are strictly related.

This distinction between assistance and protection as Red Cross activities has been criticised sometimes as artificial, because providing assistance contributes to protecting the life and dignity of civilians

⁸³ Art. 5(2)(d) provides as part of the role of the ICRC ‘to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results’. Art. 5(3) states that the ICRC ‘may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.’ Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006. Available at <http://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf> (accessed March 15, 2011).

⁸⁴ Jean-Luc Blondel, ‘Assistance to Protected Persons,’ *International Review of the Red Cross* 27, no. 260 (September-October 1987), 463. For a historical overview of the role of the ICRC in the protection of civilians, see François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Oxford/Geneva: Macmillan/ICRC, 2003).

⁸⁵ Blondel (1987), supra ftn. 84, 464.

⁸⁶ Yves Sandoz, ‘La notion de protection dans le droit international humanitaire et au sein du Mouvement de la Croix-Rouge,’ in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Christophe Swinarski (Geneva: ICRC; The Hague: Nijhoff, 1984), 987.

⁸⁷ D.D. Tansley (Rapport Final: Un Ordre du Jour pour la Croix-Rouge (July 1975), 22), quoted in Sandoz (1984), supra ftn. 86, 986. Own translation.

⁸⁸ Ibid., 983.

⁸⁹ Ibid., 983.

in need:⁹⁰ assistance would thus be part of protection, and the difference would rather be between ‘traditional-protection’ and ‘relief-protection’.⁹¹ However, as Sandoz clarified as early as 1984, the ICRC acknowledges this difference between a broad and a narrow meaning of ‘protection’, with the former including assistance and the latter being different from it.⁹² Protection in its narrow sense and assistance are strictly connected and ‘often go hand in hand, since effective assistance presupposes timely securing of rights, while the protection of certain rights involves the provision of goods and services which constitute the essence of assistance’, so that it is ‘not always possible to make a clear distinction between the two.’⁹³

The institutional policy on protection issued in 2008 by the ICRC follows the approach that distinguishes between a broad and a narrow meaning of protection, clarifying that the term ‘protection’ covers activities that ‘are unambiguously definable as “protection”’ and thus are different from, on the one hand, ‘other activities carried out within a protection framework or those that aim to have an indirect protection impact, particularly assistance activities that seek to alleviate or to overcome the consequences of violations’ and, on the other hand, ‘the permanent concern of the ICRC to ensure that its action does not have an adverse impact on, or create new risks for, individuals or populations (the precept to “do no harm”).’⁹⁴

The ICRC approach to protection, illustrated in its policy on the issue, has been the reference point for most of the other humanitarian actors that have started engaging in such activity. The policy defines protection as ‘aim[ing] to ensure that authorities and other actors respect their obligations and the rights of individuals in order to preserve the safety, physical integrity and dignity of those affected by armed conflict and other situations of violence.’⁹⁵ Protection thus ‘includes efforts to prevent or put a stop to actual or potential violations of IHL and other relevant bodies of law or norms’ and ‘relates firstly to the causes of, or the circumstances that lead to, violations – mainly by addressing those responsible for the violations and

⁹⁰ See David P. Forsythe, “UNHCR’s Mandate: The Politics of Being Non-Political,” *New Issues in Refugee Research*, Working Paper No. 33, March 2001, 4. Available at <http://www.unhcr.org/3ae6a0d08.pdf> (accessed February 28, 2011).

⁹¹ David P. Forsythe, “Humanitarian Protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees,” *International Review of the Red Cross* 83, no. 843 (September 2001), 681.

⁹² Sandoz (1984), *supra* fn. 86, 987.

⁹³ Boško Jakovljević, “The Right to Humanitarian Assistance – Legal Aspects,” *International Review of the Red Cross* 27, no. 260 (September-October 1987), 471. Similarly, according to Blondel, protection comes primarily from the law, in particular IHL, and IHL ‘give[s] considerable emphasis to relief, a way of saying that the protection of the victims of a conflict requires that they be given assistance.’ Blondel (1987), *supra* fn. 84, 452.

⁹⁴ ICRC, “ICRC Protection Policy: Institutional Policy,” *International Review of the Red Cross* 90, no. 871 (September 2008), 753. Similarly and referring to the activities of humanitarian organisations in general, a distinction between a ‘broad concept of “protection”’, ‘[p]rotection in humanitarian situations’, and ‘[t]he “do no harm” principle’ is contained, for example in a document by ECHO containing its funding guidelines for humanitarian protection activities. European Commission, DG Humanitarian Aid, *Humanitarian Protection: DG ECHO’s Funding Guidelines*, Brussels, April 21, 2009, ECHO 0/1/ML D(2009), 3-5. Available at http://ec.europa.eu/echo/files/policies/sectoral/Prot_Funding_Guidelines.pdf (accessed February 24, 2011).

⁹⁵ ICRC (2008), *supra* fn. 94, 752.

those who may have influence over the latter – and secondly to their consequences.’⁹⁶ Finally, protection ‘also includes activities that seek to make individuals more secure and to limit the threats they face, by reducing their vulnerability and/or their exposure to risks, particularly those arising from armed hostilities or acts of violence.’⁹⁷

The principles guiding the ICRC in its protection activity are the adoption of a ‘[n]eutral and independent approach’, the choice to rely on ‘[d]ialogue and confidentiality’ and to undertake a ‘[h]olistic and multidisciplinary’ action, and the ‘[s]earch for results and impact’.⁹⁸ More specifically, protection activities carried out by the ICRC are addressed to three categories of persons, and they can be implemented at three levels of intervention and through five different modes of action.

The addressees of the activities are ‘persons deprived of their liberty’, ‘the civilian population and other affected persons not in detention’, and ‘separated family members or persons listed as missing’.⁹⁹ The three levels of intervention, which ‘are interdependent and mutually reinforcing’, are: responsive action, which ‘deal[s] with an emerging or established protection problem (mainly violations), and ... is aimed at preventing its recurrence, ending it, and/or alleviating its immediate effects’; remedial action, which has the objective to ‘restore people’s dignity and to ensure adequate living conditions after they have suffered abuse’; and, environment-building action, which aims to ‘establish or foster a social, cultural, institutional and legal environment in which the rights of individuals might be respected’.¹⁰⁰

Finally, the five different modes of action that can be used in order to reach a certain protection goal are persuasion, mobilisation, denunciation, support, and substitution. The first three modes (persuasion, mobilisation, and denunciation) aim to try and obtain from the relevant actors respect for IHL.¹⁰¹ Persuasion—in other words bilateral confidential representations, either written or oral—is ICRC’s preferred mode of action.¹⁰² Mobilisation implies the involvement of influential third parties to try and obtain compliance with the law, while denunciation, considered a last resort by the ICRC, is the ‘public exposure of specific imminent or established violations of IHL or other norms protecting individuals.’¹⁰³ Denunciation of

⁹⁶ Ibid., 752.

⁹⁷ Ibid., 752.

⁹⁸ Ibid., 758-760.

⁹⁹ Ibid., 765.

¹⁰⁰ Ibid., 759.

¹⁰¹ Ibid., 760.

¹⁰² Ibid., 766.

¹⁰³ Ibid., 760.

specific violations of IHL is considered by the ICRC an exceptional measure of last resort, to be undertaken only when four cumulative criteria are satisfied:

1. The violations are ‘major and repeated or likely to be repeated’;
2. The violations have been personally witnessed by ICRC delegates, or their existence and extent ‘have been established on the basis of reliable and verifiable sources’;
3. Other modes of action have failed, in other words, ‘bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations’;
4. The publicity connected to the denunciation is ‘in the interest of the persons or populations affected or threatened.’¹⁰⁴

Support is addressed to authorities and other relevant actors who control a territory, and its goal is to ‘reinforce the capacity of the authorities and existing structures so that they are able to assume their responsibilities and fulfil their functions.’¹⁰⁵ If the Parties to the conflict, who have the primary responsibility to provide protection, still do not fulfil their obligations, a final mode of action is substitution (or direct action), which amounts to ‘the direct provision by the ICRC of services that the authorities are unable to provide (owing to lack of means, or unwillingness, or when no such authorities exist),’¹⁰⁶ to ‘acting wholly or partially in lieu of the defaulting authorities, who are incapable of fulfilling their obligations to end violations or to rescue the victims of these violations’.¹⁰⁷

Additionally, the protective function of the ICRC can be carried out by acting as a neutral intermediary between the Parties to a conflict, and by undertaking actions to decrease the risk that people at risk face and thus help prevent violations. For example, the ICRC may engage in registration and follow-up of individuals at risk, evacuate people, establish protected areas, and provide aid and services aimed at reducing exposure to risk, such as restoring family links and enabling correspondence between separated family members. Sometimes it is the presence itself of the ICRC members that can help deter abuses and protect communities at risk, since it entails both ‘assessing and observing the situation and, on this basis,

¹⁰⁴ ICRC, “Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or Other Fundamental Rules Protecting Persons in Situations of Violence,” *International Review of the Red Cross* 87, no. 858 (June 2005), 397.

¹⁰⁵ ICRC (2008), *supra* fn. 94, 761. Support can be given, for example, through ‘structural support for the implementation of the law and relevant standards in order to strengthen the capacity of authorities and other actors to integrate IHL provisions and other fundamental rules protecting persons into domestic legislation and national systems.’ Parallel to this, the ICRC can act by ‘developing the law and standards’, ‘reminding the parties concerned of applicable law and relevant standards’, and ‘promoting knowledge of the law and relevant standards with a view to changing attitudes towards them’. *Ibid.*, 767.

¹⁰⁶ *Ibid.*, 761.

¹⁰⁷ ICRC, *Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence*, 2nd ed. (Geneva: ICRC, 2012), 29 (fn. 13).

intervening on behalf of the victims’, and ‘assuring against, forestalling and preventing (harm, suffering or attacks upon them)’.¹⁰⁸

As this rapid overview of the main ‘pure’ protection activities implemented by the ICRC demonstrates,¹⁰⁹ the various categories presented are broad enough to include the supervisory, intermediary and good offices functions entrusted in the ICRC (directly or as a substitute of the Protecting Power) by the GCs and APs. Moreover, in accordance with what emerged from the analysis of IHL treaties, protection in a narrow sense can be identified as a set of actions distinct from the provision of relief and assistance, but still complying with the Fundamental Principles and thus humanitarian and part of humanitarian action (as well as of broad protection strategies). Public denunciation of IHL violations by Parties to an armed conflict is not excluded but is envisioned as an extremely exceptional measure of last resource, given its possible implications for the perception of the ICRC as an impartial and neutral actor and for its access to people in need. While most of the aforementioned protection activities were traditionally the preserve of the ICRC, over the last two decades various actors have increasingly started making reference to protection and protection of civilians, including UN bodies and other actors engaged in humanitarian assistance.

5.3.2. The Increase in Protection Actors

In addition to the ICRC, in the past protection activities (in the strict sense) in favour of civilians in armed conflict were traditionally performed by UNHCR, on the basis of its Statute.¹¹⁰ The protection activity of UNHCR has traditionally been similar to that of the ICRC in the sense that it has been ‘centred on legal obligations, and both agencies [have] worked with national actors to encourage them to abide by these rules: restraint in the conduct of war in the case of ICRC, and non-refoulement in the case of UNHCR.’¹¹¹ Similarly to the ICRC, UNHCR defines protection as ‘includ[ing] a range of concrete activities that ensure that all women, men, girls, and boys of concern to UNHCR have equal access to and enjoyment of their

¹⁰⁸ Blondel (1987), supra fn. 84, 463. See also ICRC (2008), supra fn. 94, 766-767, 772-773, 774-775; ICRC (2012), supra fn. 107, 46-56.

¹⁰⁹ The expression is used in European Commission, DG Humanitarian Aid (2009), supra fn. 94, 4.

¹¹⁰ *Statute of the Office of the United Nations High Commissioner for Refugees*, annexed to General Assembly Resolution 428 (V) of 14 December 1950. See also the preamble and art. 35(2) of the *Convention relating to the Status of Refugees*, Geneva, July 28, 1951, entered into force April 22, 1954 (189 UNTS 137). See also *Protocol relating to the Status of Refugees*, New York, January 31, 1967, entered into force October 4, 1967 (606 UNTS 267). See Sorcha O’Callaghan and Sara Pantuliano, *Protective Action: Incorporating Civilian Protection into Humanitarian Response*, HPG Report 26, December 2007 (London: Overseas Development Institute, 2007), 4-5 and 9-10.

¹¹¹ *Ibid.*, 10. In addition to this primary focus on the conduct of national actors, ‘at times of acute risk, each agency [has] assisted with safe flight options, through evacuation and third-country resettlement.’ *Ibid.*

rights in accordance with international law’ and as having as ‘ultimate goal ... to help them rebuild their lives within a reasonable amount of time.’¹¹²

Other existing organisations, especially NGOs, traditionally tended to engage in humanitarian assistance without getting involved in protection, probably because undertaking sensitive activities such as monitoring respect for the law might lead to negative impacts in terms of access to victims in need of assistance. Advocacy has emerged as a traditional field of action for human rights organisations, which do not need to be present in the field to the same extent as humanitarians. Still, as analysed in the previous Section, during the Cold War MSF gradually set *témoignage* as an essential part of its work,¹¹³ and experiences in the 1990s, with sporadic engagement of relief organisations in denunciation and calls for political or military intervention, generated debate on the role of humanitarian and other actors in advocacy and, since the end of the 1990s, in protection more in general.

Both actors traditionally focused on the provision of humanitarian assistance and the UN have increasingly referred to protection of civilians and tried to define their respective roles in it. Thus, organisations have become involved in both protection and assistance activities—so that the former may have consequences for the latter—, and actors carrying out different activities have found themselves operating in the same context and influencing each other.

It has been seen in Section 2.1.5.2. that protection activities carried out by Protecting Powers or their substitutes, the ICRC and other humanitarian organisations are identified in IHL treaties as a specific range of humanitarian activities, mainly classifiable as tasks of intermediary, supervisory, and good offices nature. However, the lexicon of protection of civilians in armed conflict has gained prominence both within the framework of the UNSC and within debate by humanitarian actors themselves, not necessarily in line with what is provided in the treaties (also in terms of the principles applicable to humanitarian protection activities). Therefore, the rest of this Section examines first the impact of POC on humanitarian actors in terms of their protection activities, and then the protection discourse as adopted by humanitarian organisations. The following Section will look at practice in the field of protection, to verify what activities are classified as such by protection actors, to what extent they correspond to those envisaged in IHL treaties, and how Parties to armed conflicts have reacted. Such analysis will allow clarifying to what extent practice

¹¹² UNHCR, *UNHCR and International Protection: A Protection Induction Programme* (Geneva: UNHCR, 2006), 12.

¹¹³ It has been highlighted that, in its first few years of existence, MSF adhered to the rule of confidentiality and non-interference in the internal affairs of States. Only towards the end of the 1970s members of the organization started questioning this rule, which was deleted from the Charter of MSF in 1992, after the end of the Cold War. See Weissman (2011), *supra* fn. 3, 234-242.

has confirmed the limits under IHL for actors that engage in both assistance and protection, how Parties to armed conflict have interpreted such limits, and what consequences can derive from this engagement, either in accordance with the limits or not.

5.3.2.1. The UN and the Protection of Civilians

As already mentioned in the analysis of UN peacekeeping, POC has emerged as a new and constant element in the mandates of UN peacekeeping missions since the end of the 1990s.¹¹⁴ More in general, since 1999 the ‘Protection of civilians in armed conflict’ has been the focus of UNSG reports and UNSC debates, presidential statements and resolutions, with the adoption and revision of an Aide Memoire on this topic.¹¹⁵ The reference to ‘protection’ by the UNSC has not been always clear or consistent, with the scope of the concept being broad enough to cover both legal and physical protection. The 2001 report by the UNSG defined protection as ‘a complex and multi-layered process, involving a diversity of entities and approaches’ and including activities such as ‘the delivery of humanitarian assistance; the monitoring and recording of violations of international humanitarian and human rights law, and reporting these violations to those responsible and other decision makers; institution-building, governance and development programmes; and, ultimately, the deployment of peacekeeping troops.’¹¹⁶

POC by peacekeeping missions seems to include, but not be limited to, humanitarian protection activities as envisaged by IHL, for example monitoring compliance with IHL by the Parties and reminding them of their obligations, as well as activities connected to the provision of humanitarian assistance such as the negotiation of the necessary agreements between the Parties.¹¹⁷ Indeed, the most recent version of the *Aide Memoire for the consideration of issues pertaining to the protection of civilians in armed conflict*, adopted by the UNSC in 2010, lists a comprehensive series of objectives to implement in the framework of

¹¹⁴ See Section 4.2.2.2.

¹¹⁵ PRST: S/PRST/1999/6, 12 February 1999; S/PRST/2002/6, 15 March 2002 (Annex: Aide Memoire for the Consideration of Issues Pertaining to the Protection of Civilians during the Security Council’s Deliberation of Peacekeeping Mandates); S/PRST/2002/41, 20 December 2002; S/PRST/2003/27, 15 December 2003 (Annex: Protection of Civilians in Armed Conflict: Aide Memoire for the Consideration of Issues Pertaining to the Protection of Civilians during the Security Council’s Deliberation of Peacekeeping Mandates); S/PRST/2004/46, 14 December 2004; S/PRST/2005/25, 21 June 2005; S/PRST/2008/18, 27 May 2008; S/PRST/2009/1, 14 January 2009 (Annex: Protection of Civilians in Armed Conflict: Aide Memoire for the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict); S/PRST/2010/25, 22 November 2010 (Annex: Protection of Civilians in Armed Conflict: Aide Memoire for the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict).

Res: S/RES/1265 (1999), 17 September 1999; S/RES/1296 (2000), 19 April 2000; S/RES/1674 (2006), 28 April 2006; S/RES/1738 (2006), 23 December 2006; S/RES/1894 (2009), 11 November 2009.

UNSG Reports: S/1999/957, 8 September 1999; S/2001/331, 30 March 2001; S/2002/1300, 26 November 2002; S/2004/431, 28 May 2004; S/2005/740, 28 November 2005; S/2007/643, 28 October 2007; S/2009/277, 29 May 2009; S/2010/579, 11 November 2010; S/2011/278, 29 April 2011; S/2012/376, 22 May 2012.

¹¹⁶ S/2001/331, 30 March 2001, par. 6.

¹¹⁷ For instance in the case of MONUC: see Section 4.2.2.3.

POC, and corresponding issues for the UNSC to consider.¹¹⁸ While the Aide Memoire was prepared by the UN Secretariat and simply adopted by the UNSC as an annex to a presidential statement, it lists options of agreed language featured in resolutions and presidential statements previously adopted by the UNSC, gathering them under different objectives. The main objectives are connected to '[p]rotection of, and assistance to, the conflict-affected population', '[d]isplacement'; '[h]umanitarian access and safety and security of humanitarian workers'; '[c]onduct of hostilities'; '[s]mall arms and light weapons, mines and explosive remnants of war'; '[c]ompliance, accountability and the rule of law'; '[m]edia and information'; specific protection concerns related to children and to women affected by armed conflict.¹¹⁹ The issues listed consist of actions that the UNSC may decide to include in its resolutions, such as specific mandates for peacekeeping missions and demands or recommendations addressed to Parties to an armed conflict and/or States. While the Aide Memoire mainly deals with issues to be considered when formulating peacekeeping mandates, it 'may ... also provide guidance in circumstances where the Council may wish to consider action outside the scope of a peacekeeping operation.'¹²⁰

The addressees of the options suggested in the Aide Memoire are peacekeeping missions, States and Parties to armed conflict and the UNSG, while no explicit request or recommendation is made to humanitarian agencies or workers. Moreover, no reference is made to protection *by* humanitarian workers, but only to the provision of humanitarian assistance as part of POC. In this sense, humanitarian access and the protection of humanitarian workers are central to the concept of POC. The 'humanitarian principles of humanity, neutrality, impartiality and independence' do not appear in the list of issues for consideration, but feature in one example of agreed language that has already been used by the UNSC to 'call for compliance with *applicable international humanitarian law*' in order to achieve the objective of '[h]umanitarian access and safety and security of humanitarian workers'.¹²¹ Indeed, in the same presidential statement to which the Aide Memoire is attached, the UNSC 'reiterates the importance for all, within the framework of humanitarian assistance, of upholding and respecting the humanitarian principles of humanity, neutrality, impartiality and independence.'¹²² It is interesting to note that in this case the UNSC does not address just States, Parties to the conflict, peacekeeping missions, or the UNSG, but 'all, within the framework of

¹¹⁸ See S/PRST/2010/25, 22 November 2010, Annex.

¹¹⁹ Ibid., Annex.

¹²⁰ Ibid., Annex, 1.

¹²¹ Ibid., Annex, 24. Emphasis added.

¹²² Ibid., 2.

humanitarian assistance’, so that it may be argued that NGOs and humanitarian actors are included, even if only referring to the importance of respect for the principles, thus without any reference to obligations for them in this sense.

While the Aide Memoire seems to envisage a role for humanitarian actors only in the provision of humanitarian assistance, other requests made by the UN to humanitarian actors in the framework of POC and peacekeeping missions may be related to the field of humanitarian protection activities. For example, as already mentioned in Section 4.2.2.3., the UNSC has sometimes encouraged UN peacekeepers and humanitarian agencies to work closely together and exchange information on threats against civilians, including possible outbreaks of violence, in order to respond appropriately.¹²³ It has been noted that UN humanitarian agencies face particular challenges due to association to a UN peacekeeping mission when such mission has been mandated to perform activities such as publicly reporting on respect for human rights or protection of civilians, supporting elections or peace processes or engaging in hostilities, and integration may enhance these problems.¹²⁴ Moreover, for example, information shared by humanitarian actors through the protection cluster may, if used for political or military purposes, put at risk the security of both those who provided such information and the organisations that collected it.¹²⁵ Similarly, the transmission of information by relief organisations to political bodies created by the UNSC in the framework of sanctions regimes might be delicate, as will be illustrated below.¹²⁶

Nonetheless, monitoring respect for the law and acting to ensure respect for the dignity of civilians is part of humanitarian action and of protection as defined by the ICRC, the impartial humanitarian actor *par excellence*. However, the definition by the ICRC, then adopted also by the IASC,¹²⁷ has not been free from criticisms for its scope, which is so broad that it seems to include both protection and assistance, and that ‘protection becomes indistinguishable from human rights-based development programming.’¹²⁸ The study of practice in the framework of the UN and States’ reactions might thus help clarify State practice and *opinio*

¹²³ S/RES/1880 (2009), 30 July 2009, par. 28; similarly, see S/RES/1933 (2010), 30 June 2010, par. 16.

¹²⁴ See Victoria Metcalfe, Alison Giffen, and Samir Elhawary, *UN Integration and Humanitarian Space: An Independent Study Commissioned by the UN Integration Steering Group* (London/Washington DC: Overseas Development Institute/Stimson Center, December 2011), 33.

¹²⁵ See Marit Glad, “A Partnership at Risk? The UN-NGO Relationship in Light of UN Integration,” Norwegian Refugee Council (NRC) Discussion Paper, December 2011, 7. Available at <http://www.nrc.no/?did=9608295> (accessed December 22, 2011).

¹²⁶ See Section 5.3.3.3.

¹²⁷ See IASC, “Protection of Internally Displaced Persons,” IASC Policy Paper, New York, December 1999, 4. Available at <http://www.humanitarianinfo.org/iasc/pagelader.aspx?page=content-products-products&productcatid=10> (accessed October 01, 2013).

¹²⁸ Urban Reichhold and Andrea Binder, “Scoping Study: What Works in Protection and How Do We Know?,” GPPi Report, March 2013, 20. Available at http://www.gppi.net/fileadmin/media/pub/2013/GPPi_2013_DFID_scoping-study-protection.pdf (accessed October 01, 2013). Similarly, see O’Callaghan and Pantuliano (2007), *supra* fn. 110, 11-12.

juris on the limits of legitimate action by humanitarian organisations. Therefore, after a presentation of the approaches and policies on protection adopted by relief actors other than the ICRC and UNHCR, the following Section will examine instances of practice by organisations engaged in the provision of humanitarian assistance and (what they have interpreted as) protection, and reactions by States and other Parties to armed conflicts.

5.3.2.2. *Humanitarian Actors as Protection Actors*

The protection discourse has been increasingly present in strategies and programmes by so-called non-mandated humanitarian organisations, meaning humanitarian organisations (mainly NGOs) that do not have a specific mandate to carry out protection activities and that have traditionally focused on the provision of assistance. Since the end of the 1990s, in particular after the vocal debate generated by the problems that emerged in the refugee camps in Zaire, scholars and practitioners have advocated the adoption by all humanitarian actors of a ‘do no harm’ approach.¹²⁹ The idea is that humanitarians cannot avoid taking into account the scenario in which they provide assistance and the consequences that such assistance may have. In programming and implementing their actions, aid agencies should try to anticipate and minimise possible negative impacts stemming from such actions.

Moreover, reference to protection has sometimes been connected to the duty to monitor respect for the human rights of the victims with whom agencies get in contact, and if necessary to denounce violations of these rights. This so-called ‘rights-based humanitarianism’, a label used to highlight one facet of new humanitarianism, adopts the language of human rights as the framework of humanitarian action, and as a substitute for the more traditional philanthropic approach based on responding to the needs of the victims.¹³⁰ According to Slim, an important characteristic of a focus on rights is that rights ‘dignify rather than victimise or patronise people’, and thus ‘make people more powerful as claimants rather than beggars’.¹³¹ On the contrary, Chandler criticised the human-rights based approach since ‘[t]he campaigning human rights-based

¹²⁹ Anderson, Mary B. *Do No Harm: How Aid Can Support Peace, or War* (Boulder, CO [etc.]: Rienner, 1999).

¹³⁰ Hugo Slim, “Not Philanthropy But Rights: Rights-Based Humanitarianism and the Proper Politicisation of Humanitarian Philosophy in War,” Centre for Development and Emergency Practice, Oxford Brookes University, May 2001, 10. Available at <http://www.odi.org.uk/events/documents/2103-rights-based-humanitarianism-proper-politicisation-humanitarian-philosophy-hugo-slim-revised-may-2001.pdf> (accessed March 10, 2011).

¹³¹ *Ibid.*, 22.

NGOs did much to denigrate the non-Western state and legitimize Western activism through the creation of the incapable human rights victim.’¹³²

In any case, these developments, in particular the shift towards a human rights-based approach, have strengthened humanitarian organisations’ focus on protection rather than only on assistance.¹³³ ‘Protection’ as part of humanitarian action has appeared in the humanitarian discourse and in the activities of NGOs and humanitarian organisations, thus drawing their approaches closer to those of the ICRC and of UNHCR,¹³⁴ and this concept is still in evolution.¹³⁵ If, on the one hand, engagement in protection can be interpreted as an approximation to the ICRC way of working, on the other hand, the human rights-based new humanitarianism ‘rejected the post-1945 humanitarian aid framework of ICRC neutrality and needs-based emergency relief, which was tied to respect for state sovereignty rather than human rights protection.’¹³⁶ It has been argued that, as a consequence of their involvement in protection, work by humanitarian organisations has come closer to that by human rights organisations, involving activities such as monitoring and reporting of human rights violations.¹³⁷

Indeed, protection, mainly in the form of denunciation of violations of human rights, has been a traditional activity of other non-governmental actors, with origins and objectives different from humanitarian organisations—human rights organisations. The primary concern of human rights actors is not to provide assistance to the victims of a conflict and thus act in direct proximity to them. Rather, they aim first and foremost to guarantee respect for human rights by denouncing violations by States in fulfilling their IHRL obligations and obtaining justice for these violations.

For example, Amnesty International defines itself as ‘a worldwide movement of people who campaign for internationally recognized human rights to be respected and protected for everyone’. Its mission, as a reaction to human rights abuses, consists of ‘work[ing] to improve people’s lives through campaigning and international solidarity.’¹³⁸ Similarly, Human Rights Watch is ‘dedicated to protecting the

¹³² Chandler (2001), *supra* fn. 12, 691.

¹³³ See DuBois (2009), *supra* fn. 80, 1. Slim (2001), *supra* fn. 130, 19.

¹³⁴ *Ibid.*, 19.

¹³⁵ See, for example, Holt, Taylor, and Kelly (2009), *supra* fn. 82, 66.

¹³⁶ Chandler (2001), *supra* fn. 12, 692.

¹³⁷ See Slim (2001), *supra* fn. 130, 19.

¹³⁸ Amnesty International, “About Amnesty International,” available at <http://www.amnesty.org/en/who-we-are/about-amnesty-international> (accessed March 17, 2011). Moreover, to protect their autonomy, they are ‘[i]ndependent of any government, political ideology, economic interest or religion’; ‘[d]emocratic and self-governing’; and ‘[f]inancially self-sufficient, thanks to the generous support of donations provided by individual members and supporters.’ They ‘do not support or oppose any government or political system and neither do [they] necessarily support or oppose the views of the victims/survivors or human rights defenders whose rights [they] seek to protect.’ *Ibid.*

human rights of people around the world’ by ‘stand[ing] with victims and activists’; ‘investigat[ing] and expos[ing] human rights violations and hold[ing] abusers accountable’; ‘challeng[ing] governments and those who hold power to end abusive practices and respect international human rights law’; and, ‘enlist[ing] the public and the international community to support the cause of human rights for all.’¹³⁹ The UN Office of the High Commissioner for Human Rights (OHCHR) defines its mission as ‘work[ing] for the protection of all human rights for all people; [] help[ing] empower people to realize their rights; and [] assist[ing] those responsible for upholding such rights in ensuring that they are implemented.’¹⁴⁰ At the operational level, OHCHR ‘works with governments, legislatures, courts, national institutions, civil society, regional and international organizations, and the [UN] system to develop and strengthen capacity, particularly at the national level, for the protection of human rights in accordance with international norms.’¹⁴¹ At the institutional level, it mainly focuses on strengthening and supporting the UN human rights program.¹⁴²

As emerges from these mission statements, human rights organisations do not claim to be humanitarian actors, they frame their discourse around IHRL rather than IHL and focus more on denouncing violations and pushing for respect for the law at the national and international levels, rather than protecting people and assisting them first and foremost by having access to them and being present on the ground.¹⁴³ In addition, while humanitarians tend not to address the root causes of a conflict and deal with justice, human rights organisations are concerned with both issues.¹⁴⁴ Therefore, the engagement in protection does not involve for human rights NGOs some of the complex challenges it presents to humanitarians, especially in terms of possible loss of access to people in need. Indeed, it is not clear whether and to what extent public denunciation of IHL and IHRL violations, as well as the transmission of information for use in criminal proceedings, can influence the entitlement of relief personnel to special protection under IHL, overstepping the limits of their mission.

¹³⁹ Human Rights Watch, “About Us: Mission Statement,” available at <http://www.hrw.org/en/about> (accessed March 17, 2011). ‘Human Rights Watch is known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy, often in partnership with local human rights groups.’ Human Rights Watch, “About Us: Who We Are,” available at <http://www.hrw.org/en/node/75136> (accessed March 17, 2011).

¹⁴⁰ UN OHCHR, “Who We Are: Mission Statement.” Available at <http://www.ohchr.org/EN/ABOUTUS/Pages/MissionStatement.aspx> (accessed March 17, 2011).

¹⁴¹ Ibid.

¹⁴² See Ibid.

¹⁴³ It should be noted that human rights NGOs have traditionally focused on IHRL, but have increasingly made reference also to IHL in their reports concerned with countries affected by armed conflict.

¹⁴⁴ See James Darcy, “Human Rights and Humanitarian Action: A Review of the Issues,” HPG Background Paper prepared for the workshop on Human Rights and Humanitarian Action convened by the IASC Sub-Working Group and co-hosted by UNICEF, the UN High Commissioner for Human Rights and ICVA. Geneva, April 2004, 6-7. Available at <http://www.odi.org.uk/resources/download/1558.pdf> (accessed March 16, 2011).

In general, NGOs acknowledge the risk that denouncing violations committed by Parties to an armed conflict might lead to expulsion or restrictions to access to people in need, but no legal analysis is provided on whether such measures are in contrast with international law or are legitimate. For example, as illustrated in Section 2.1.5.2., IHL treaties envisage a role for Protecting Powers and their substitutes in monitoring respect for IHL by Parties to the conflict, but always respecting the principles of humanitarian action and not with the objective of public denunciation or acting as a prosecutor. The MSF alliance has developed one of the most elaborated positions on advocacy and bearing witness while carrying out humanitarian activities, since the organisation considers *témoignage* as a necessary counterpart to its medical services. Notwithstanding its original bold position regarding public denunciations, MSF has revealed a growing awareness of the delicate balance it needs to maintain in order to respect the principles of neutrality and impartiality, which are contained (but not defined) in its Charter.¹⁴⁵ In its 1995 Chantilly Principles, MSF clarifies that ‘[t]émoignage is done with the intention of improving the situation for populations in danger’, and it does not amount merely to speaking out, but rather its three main forms of expression are ‘the presence of volunteers with people in danger as they provide medical care which implies being near and listening’; ‘a duty to raise public awareness about these people’; and, finally, ‘the possibility to openly criticize or denounce breaches of international conventions’, which is expressly defined as ‘a last resort used when MSF volunteers witness mass violations of human rights, including forced displacement of populations, *refoulement* or forced return of refugees, genocide, crimes against humanity and war crimes.’¹⁴⁶

The Chantilly Principles also envisage the possibility that ‘[i]n exceptional cases, it may be in the best interests of the victims for MSF volunteers to provide assistance without speaking out publicly or to denounce without providing assistance, for example when humanitarian aid is “manipulated”.’¹⁴⁷ The 2006 La Mancha Agreement, a reference document elaborated by MSF sections as complementary to the Charter and the Chantilly Principles to outline key aspects of their action and identify current and future challenges,

¹⁴⁵ MSF, “MSF Charter and Principles,” January 03, 2011, available at <http://www.msf.org/msf/articles/2011/03/the-medecins-sans-frontieres-charter.cfm> (accessed May 15, 2012). A 2011 description of MSF principles provided on its website defines ‘[i]mpartiality and neutrality’ by explaining that ‘MSF offers assistance to people based on need and irrespective of race, religion, gender or political affiliation’, it ‘give[s] priority to those in the most serious and immediate danger’, takes decisions ‘not based on political, economic or religious interests’, and ‘does not take sides or intervene according to the demands of governments or warring parties.’ Furthermore, ‘[b]earing witness’ entails that ‘[t]he principle of impartiality and neutrality are not synonymous with silence’ and that MSF may speak out publicly when it ‘witnesses extreme acts of violence against individuals or groups’ in order to ‘seek to bring attention to extreme need and unacceptable suffering: when access to lifesaving medical care is hindered, when medical facilities come under threat, when crises are neglected, or when the provision of aid is inadequate or abused.’ Ibid..

¹⁴⁶ MSF, Chantilly Principles (1995), section I.2. Available at <http://association.msf.org/sites/default/files/documents/Principles%20Chantilly%20EN.pdf> (accessed May 10, 2012).

¹⁴⁷ Ibid.

reaffirms the key role of *témoignage*.¹⁴⁸ However, it clarifies that, by speaking out, MSF ‘do[es] not profess to ensure the physical protection of people that [it] assist[s].’¹⁴⁹ The document acknowledges that ‘MSF actions coincide with some of the goals of human rights organizations’, but specifies that ‘[MSF’s] goal is medical-humanitarian action rather than the promotion of such rights.’¹⁵⁰ Finally, MSF has elaborated criteria to enhance the ‘defensibility’ of advocacy for respect for the human rights of victims of conflict, including the fact that public advocacy should follow bilateral lobbying and it ‘must remain not only consistent with the neutrality, impartiality and independence of the organisation, but the analysis must also anticipate and counter effects upon the *perception* of these core principles.’¹⁵¹ While ‘confront[ing] political actors with their responsibility’, MSF does ‘not propose political solutions’, since the principle of neutrality would otherwise be compromised.¹⁵²

While MSF emerged in direct opposition to the approach followed by the ICRC, their approaches seem to have become increasingly similar, prioritising bilateral lobbying and having recourse to public denunciation only as a last resort and if it does not risk jeopardising the interest of the victims.¹⁵³ For example, in a speech delivered in December 2009, the International President of MSF affirmed:

Confused and manipulated as it has become ..., we believe the humanitarian project is a fairly simple one and very limited one. Our goal is to help people survive the devastations of war. That means finding and caring for those most in need – those caught in the crisis of conflict who are suffering illness, wounds, hunger, grief, and fear. We respond by delivering aid that saves lives and alleviates suffering *here and now*. As I said, our ambition is a limited one. Our purpose is not to bring war to an end. Nor is it humanitarian to build state and government legitimacy or to strengthen governmental structures. It’s not to promote democracy or capitalism or women’s rights. Not to defend human rights or save the environment. Nor does humanitarian action involve the work of economic development, post-conflict reconstruction, or the establishment of functioning health systems. Again, it is about saving lives and alleviating suffering in the immediate term.¹⁵⁴

Speaking out remains an option, but only as a last resort and in any case instrumental to the provision of immediate humanitarian relief. Based on these criteria, during the final phase of the NIAC in Sri Lanka in May 2009, the French and Dutch sections of MSF took the suffered (and internally hotly debated) decision to sign an agreement with the Government under which they renounced to negotiate access to the internment

¹⁴⁸ ‘In the case of massive and neglected acts of violence against individuals and groups, we should speak out publicly, based on our eyewitness accounts, medical data and experience.’ MSF, “La Mancha-aftalen,” 25 June 2006, Athens, par. 1.9. Available at <http://msf.dk/om-os/hvem-er-vi/ideer-og-grundlag/la-mancha-aftalen/> (accessed April 15, 2013).

¹⁴⁹ Ibid.

¹⁵⁰ Ibid., par. 1.13.

¹⁵¹ Marc DuBois, “Civilian Protection and Humanitarian Advocacy: Strategies and (False?) Dilemmas,” *Humanitarian Exchange* no. 39 (June 2008), 13. Emphasis in the original.

¹⁵² Ibid., 13.

¹⁵³ See ICRC (2005), *supra* fn. 104.

¹⁵⁴ MSF, “NATO Speech – Rheindalen, Germany, December 8, 2009,” December 9, 2009. Available at http://www.msf.org/msfinternational/invoke.cfm?objectid=4D960DB3-15C5-F00A-25F3109B1C8DFD0A&component=toolkit.article&method=full_html&mode=view (accessed April 15, 2011). Emphasis in the original.

camps established by the Government for IDPs and to make any comment without governmental approval, in exchange for being allowed to carry out some health programmes for the wounded.¹⁵⁵

The right to speak out has been put forward also by other organisations that claim to respect the principles of humanitarian action, such as Action Contre la Faim International (ACF International), which in its *Charter of Principles* defines neutrality as follows: ‘Action Contre la Faim maintains a strict political and religious neutrality. Nevertheless, *Action Contre la Faim may denounce human rights violations that it has witnessed as well as obstacles put in the way of its humanitarian action.*’¹⁵⁶ Humanitarian organisations have thus claimed a right to engage in protection and speak out, and, in order to deal with the sensitivity of this activity and the dilemmas that it may entail in practice, have elaborated different approaches to protection, corresponding to different levels of engagement in this field.

A first, basic approach can be identified in the ‘do no harm’, in the sense that all humanitarian actors shall, as a minimum, try to avoid jeopardising the safety of people through their programs. A second and related approach has been labelled ‘mainstreaming protection’, which entails ‘ensuring not only that [the agencies’] programmes do not put populations at greater risk, but that they also reduce people’s exposure to that risk or help keep them safe.’¹⁵⁷ Significantly different from these first two ways of incorporating protection into assistance programming are activities specifically aimed at the protection of individuals, in other words those covered by the protection policy of the ICRC. Clearly, these activities can be seen as more politically sensitive, since they risk endangering the perception of actors as impartial and neutral, and they require ‘[s]pecialist knowledge and experience ..., as well as dedicated capacity and funding.’¹⁵⁸

There seems to be now a general agreement that while ‘[n]ot all humanitarian actors implement protection activities per se, ... all need to integrate protection concerns into their practice’, in the sense of ‘ensuring that [their] activities (whether for relief, development, or for other goals) do not contribute to creating or aggravating risks confronting the communities and individuals in whose favour they work.’¹⁵⁹ However, if protection concerns extend to ‘efforts ... to prevent violence through training and awareness,

¹⁵⁵ See Kate Mackintosh, “Reclaiming Protection as a Humanitarian Goal: Fodder for the Faint-Hearted Aid-Worker,” *Journal of International Humanitarian Legal Studies* 1, no. 2 (December 2010), 387-388.

¹⁵⁶ ACF International, *Disaster Risk Management for Communities*, Policy Document, 2011, 24. Available at http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2735.pdf (accessed October 31, 2011). Emphasis added.

¹⁵⁷ O’Callaghan and Pantuliano (2007), *supra* fn. 110, 5.

¹⁵⁸ *Ibid.*, 22.

¹⁵⁹ Such an approach corresponds to ‘concepts such as “doing no harm”, “mainstreaming protection”, or “good quality programming”.’ ICRC (2013), *supra* fn. 79, 14.

documentation and monitoring of violence, reporting on violence, and so on', they may become politically sensitive and controversial.¹⁶⁰

The sensitivity of protective actions by humanitarians and the overlap of these activities with those of human rights organisations seem to explain the emergence in the first decade of the 21st century of a number of guides for humanitarians on protection activities, prepared by scholars and practitioners.¹⁶¹ Still, in some cases, the desire to make these publications applicable to actors with different mandates and to different situations renders them vague and of doubtful operational relevance. For example, the 2002 IASC publication *Growing the Sheltering Tree*, a 'collection of humanitarian practices that protect or promote rights', 'provides some examples of the wide range of actions that can be taken by a variety of actors' in the field of protection.¹⁶² However, no clear picture is presented in terms of what the law entitles humanitarian actors to do, arguably offering them a stronger basis for action and negotiating position. The same is true for the guide prepared by Slim and Bonwick, who have adopted the terminology and framework for protection activities elaborated by the ICRC to classify protection activities by humanitarian agencies more in general.¹⁶³ They have grouped denunciation, persuasion and mobilisation under the broad category of advocacy, while considering humanitarian assistance as central to 'capacity building' (corresponding to the ICRC 'support') and substitution.¹⁶⁴ Advocacy and assistance can be supported by presence and accompaniment, the latter strategy having been traditionally applied by human rights organisations.¹⁶⁵ Slim and Bonwick list some risks that may emerge in protection activities and some good principles to follow when engaging in advocacy, but again the solution to the dilemmas that may emerge is left to the single organisation and to its judgment on what is best in the specific case.¹⁶⁶

¹⁶⁰ DuBois (2009), supra fn. 80, 4-5.

¹⁶¹ See, for example, the publications mentioned in Section 5.3. (fn. 79), as well as Diane Paul, *Protection in Practice: Field-Level Strategies for Protecting Civilians from Deliberate Harm*, RRN Network Paper 30 (London: Overseas Development Institute, July 1999); Oxfam GB, *Improving the Safety of Civilians – A Protection Training Pack* (Oxford: Oxfam GB, 2009); World Vision International, *Minimum Inter-Agency Standards for Protection Mainstreaming* (World Vision, 2012).

¹⁶² IASC (2002), supra fn. 79, xv and 8.

¹⁶³ According to them, responsive action has 'a sense of real urgency (but can last for many years)' and is primarily concerned with 'stopping, preventing or mitigating a pattern of abuse'; remedial action is concerned with 'rehabilitation, restitution, compensation and repair', it aims to 'assist people living with the effects of a particular pattern of abuse', and can consist of 'recuperation of their health, tracing of their families, livelihood support, housing, education, judicial investigation and redress'; environment-building is 'a deep, more structural process' and it 'is likely to involve the establishment of more humane political values, improvements of law and legal practice, the training of security forces, and the development of an increasingly non-violent public culture'. Slim and Bonwick (2005), supra fn. 79, 43.

¹⁶⁴ Ibid., 81 and 88. The authors define 'humanitarian assistance' as 'providing humanitarian services and commodities either directly (substitution), or more indirectly via the supply of advice or resources through a local authority or partner organisation (support to services)', as 'giving aid in the form of material and expertise.' Humanitarian assistance is thus conceptualised as 'intimately linked' to protection, since 'material assistance can be both protective and endangering in certain situations'. Ibid., 88.

¹⁶⁵ Ibid., 92.

¹⁶⁶ See Ibid., 46-47 and 87.

Finally, it has been argued that between the two extremes of do no harm / mainstreaming protection and the ‘pure’ protection activities, humanitarian organisations would have increasingly engaged in so-called ‘protective actions’, meaning ‘[p]rojects or activities that have both assistance and protection objectives, or are a means of addressing protection problems through assistance’ and that ‘can involve activities such as advocacy or assistance activities.’¹⁶⁷ Proponents of this kind of actions (which anyway seem to fall within the spectrum offered by Slim and Bonwick) warn that caution should be exercised in determining the limits of the protective component of these activities, in the sense that the more risks become the determinant of action, supplanting needs, the more impartiality is compromised.¹⁶⁸

In sum, humanitarian actors have increasingly included protection among their activities and envisaged as legitimate options monitoring, advocacy, public denunciation of violations of international law, or even the transmission of information to political bodies and for criminal proceedings, as will be seen shortly. As a confirmation of this, in the 2011 revised edition of the Sphere Handbook the *Humanitarian Charter* has been completely rewritten and a series of ‘protection principles’ introduced.¹⁶⁹ The core basis of the Charter are still the ‘the fundamental moral principle of humanity’, meaning that ‘all human beings are born free and equal in dignity and rights’, and ‘the humanitarian imperative’, meaning that ‘action should be taken to prevent or alleviate human suffering arising out of disaster or conflict, and that nothing should override this principle.’¹⁷⁰ The ensuing cardinal rights of people affected by disaster (including conflict) are the right to life with dignity, the right to receive humanitarian assistance, and the right to protection and security, which, even if ‘not formulated in such terms in international law, ... encapsulate a range of established legal rights and give fuller substance to the humanitarian imperative.’¹⁷¹ The Charter further confirms the principles of non-discrimination and impartiality for the provision of humanitarian assistance, the subsidiary role of humanitarian agencies, and the commitment to minimise as much as possible negative effects deriving from humanitarian action and to act in accordance with the Red Cross Code of Conduct.¹⁷²

Right after the Charter, protection has been assigned a specific chapter in the Handbook, with the list of four protection principles that should inform as much as possible the practical performance of

¹⁶⁷ O’Callaghan and Pantuliano (2007), supra fn. 110, 21-22.

¹⁶⁸ To avoid this problem, risks should be comprised in the analysis of the urgency and gravity of needs used to determine the assistance strategies to be adopted. See Ibid., 18-19.

¹⁶⁹ On the Sphere project and previous editions of the Humanitarian Charter, see Section 5.2.5.

¹⁷⁰ The Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response, 2011 Edition* (Southampton: The Sphere Project, 2011), 20.

¹⁷¹ Ibid., 21.

¹⁷² See Ibid., 20-24.

humanitarian action: '[a]void exposing people to further harm as a result of your actions'; '[e]nsure people's access to impartial assistance – in proportion to need and without discrimination'; '[p]rotect people from physical and psychological harm arising from violence and coercion'; and '[a]ssist people to claim their rights, access available remedies and recover from the effects of abuse.'¹⁷³ The 'guidance notes' complementing the first principle comprise considerations on the management of sensitive information, such as the suggestions that information on human rights violations should be collected by protection-mandated organisations or anyway agencies with the necessary capacity, and that possible reactions by the authorities should always be taken into consideration: the need to continue operations may have to be balanced with the need to use the information, and that different organisations may make different choices.¹⁷⁴ One of the guidance notes related to the third principle, thus on protection of people from harm, provides that humanitarian agencies should consider their responsibility in terms of monitoring and reporting on human rights violations, and possibly undertake advocacy with the relevant actors by reminding them of their obligations, through modes of action that include 'diplomacy, lobbying and public advocacy, keeping in mind the guidance on managing sensitive information.'¹⁷⁵

The cautious guidance contained in the Handbook is arguably connected to the fact that protective action in the sense of providing assistance in a way that minimises its adverse effects or tries to diminish the risks people face does not seem to contradict the principles of humanitarian action, the terms of mission of relief personnel, or the qualification as impartial humanitarian actor, while activities such as monitoring respect for international law, advocating respect for the law, and possibly denouncing violations are more sensitive. The central question is then: 'At what point ... does an [*sic*] humanitarian agency lose this right of access if its essential aim is to replicate the work of a human rights organization?'¹⁷⁶

The ICRC, acknowledging the involvement of a growing number of actors in protection activities, many of them with different mandates, published in 2009 a compilation of professional standards applicable to both *human rights and humanitarian* actors engaged in protection in situations of armed conflict or

¹⁷³ Ibid., 29.

¹⁷⁴ See Ibid., 35.

¹⁷⁵ Ibid., 38. More specifically, in situations of armed conflict, 'humanitarian agencies should consider monitoring the institutions that are specifically protected under international humanitarian law, such as schools and hospitals, and reporting any attacks on them. Agencies should also make efforts to reduce the risks and threats of abductions or forced recruitment that may happen in these locations.' Ibid., 39.

¹⁷⁶ DuBois (2009), *supra* fn. 80, 9. Rather than a right of access, it is arguably more correct to talk about a right not to be arbitrarily refused access.

violence, with a second edition following in 2013.¹⁷⁷ The compilation aims to ‘encourage diversity of approach and activity at both organizational and collective levels, while providing a baseline to ensure the safest, and most effective response in addressing the critical needs of persons at risk’,¹⁷⁸ and it affirms the need for all to respect the principles of humanity, impartiality, and non-discrimination. This means that ‘priority [shall] be given to protecting life and health, alleviating suffering, and ensuring respect for the rights, dignity and mental and physical integrity of all individuals in situations of risk’; no ‘adverse distinction [shall be made] in the treatment of different groups or individuals’; and, ‘a protection activity [shall] address[] the specific and most urgent protection needs of affected communities and individuals’, after having assessed such needs in an objective way.¹⁷⁹ Impartiality should be observed ‘when making reference to, or urging respect for the letter or spirit of relevant law, as applied to various parties to an armed conflict’, and when ‘gather[ing] and subsequently process[ing] protection information in an objective and impartial manner, to avoid discrimination.’¹⁸⁰

Also when dealing with armed non-State actors or UN peacekeeping missions and other internationally-mandated military and police forces engaged in protection (the latter meaning those forces ‘operated by an international or regional organization other than the UN, but still acting in accordance with a [UNSC] Council mandate’), protection actors who choose to engage in a dialogue with these forces, to remind them of their obligations and increase the protection of civilians, should do it in a way that does not put civilians at greater risk and ‘does not undermine the ability of humanitarian actors to operate, and be seen to operate, in accordance with humanitarian principles’, in particular independence and impartiality.¹⁸¹ Also, carefulness should be exercised not to reveal information that Parties to the conflict could consider as military intelligence, ‘in order not to raise suspicion of spying in favour of one or another party engaged in the violence’.¹⁸²

¹⁷⁷ ICRC (2009), *supra* fn. 79; ICRC (2013), *supra* fn. 79. The second ed. includes a new focus on three areas: data management and new technologies, interaction with UN peacekeeping missions and other internationally-mandated military and police forces, and the management of protection strategies.

¹⁷⁸ ICRC (2013), *supra* fn. 79, 13.

¹⁷⁹ *Ibid.*, 22.

¹⁸⁰ *Ibid.*, 61 and 90.

¹⁸¹ *Ibid.*, 46, 49, 52 and 54. Also, in relation to the development of mission-wide POC strategies by UN peacekeeping mission in consultation with humanitarian and human rights organisations, the publication suggests that protection actors should proactively engage with these missions, since this ‘should facilitate the safe sharing of non-confidential information and analysis of protection risks, which in turn ‘will inform more appropriate prioritization of mission capabilities, to identify areas of complementarity and to facilitate appropriate coordination on particular subjects such as child protection, DDR, prevention and response to sexual violence, detention and correctional facilities, and humanitarian demining.’ *Ibid.*, 53.

¹⁸² *Ibid.*, 28.

Neutrality and independence are presented by the ICRC compilation as operational principles that only certain organisations choose to follow in their operations. All other actors are merely called ‘not to publicly implicate others in their actions’, if they ‘are not, or are not perceived to be neutral in a crisis, through their actions or associations.’¹⁸³ In sum, according to the ICRC, protection actions should be humanitarian and impartial, while the actors undertaking them *may* choose to be neutral and independent.¹⁸⁴ This perspective corresponds to the usual ICRC’s point of view, according to which humanity and impartiality are principles generally followed by humanitarian actors, while neutrality and independence (as defined by the International Red Cross and Red Crescent Movement) are adopted and respected by some organisations only.

The requirement for protective actions to be humanitarian and impartial reflects the provisions of the GCs and APs and their interpretation offered by the ICRC Commentaries and presented in Section 2.1.5.2. As already mentioned, the treaties reserve the performance of protective activities to organisations that are humanitarian and impartial, thus organisations that do not have a political character, focus on the condition of man solely as a human being, and respect the Red Cross principle of impartiality. Human rights organisations, with their strong emphasis on advocacy, have been traditionally classified as different from impartial humanitarian ones, as emerges from the crucial question mentioned above, which underlines that the right of humanitarian initiative is reserved to the latter. The ICRC standards themselves address ‘humanitarian and human rights actors’, thus implicitly acknowledging the difference between the two groups, and identifying the humanitarian and impartial character of the action as the minimum common criteria to be applied by both when engaging in protection.

A third principle of humanitarian action that emerges from IHL treaties, applicable both to assistance and protection activities, is military neutrality, meaning that humanitarian action shall not favour any of the Parties to the conflict. From the whole framework of the Protecting Powers regime it can be deduced that monitoring respect for IHL and working with the Parties to ensure that they apply it is not contrary to neutrality, as confirmed also by the role assigned to the ICRC in this area. However, various authors have

¹⁸³ Ibid., 72.

¹⁸⁴ In particular:

although both neutrality and independence are often crucial to gaining access to, and maintaining proximity with all victims in a situation of conflict, these are not principles to which all protection actors must necessarily subscribe. With the changing nature of conflicts and of approaches to humanitarian action, such principles cannot be considered to apply to all protection actors. Indeed, ever fewer actors outside the Red Cross and Red Crescent Movement apply them as a method of working. *Some human rights actors implement meaningful protection activities while choosing not to remain neutral.*

Ibid., 21. Emphasis added.

underlined that ‘it was never the function of Protecting Powers to act as a sort of public prosecutors, investigating and exposing violations of the Conventions’,¹⁸⁵ and that the role of Protecting Powers and their substitutes both in 1949 and 1977 was ‘not extended to include supervision of the conduct of hostilities or formal investigative and reporting functions’.¹⁸⁶ In this sense, the boundaries for engagement by humanitarian actors in protective actions, in particular in advocacy and monitoring in connection to investigative proceedings, are not straightforward. To try and clarify them, the next Section investigates relevant practice by NGOs in the field of protection, in particular advocacy and contribution to criminal proceedings, together with States’ reactions to it.

5.3.3. Humanitarian Assistance and Humanitarian Protection: Compatible to What Extent?

The difficulties in clarifying the boundaries of humanitarian agencies’ legitimate engagement in activities such as advocacy on the humanitarian and political situation of a certain territory, up to calls for military intervention, denunciation of IHL and IHRL violations, and collaboration with international judicial proceedings, are not straightforward and were probably not foreseen by the drafters of the GCs and APs. Practice related to these areas has been identified already throughout the Cold War and the 1990s, even if at the beginning of the 21st century humanitarians themselves have increasingly focused and reflected on the topic, with the development of the ‘protection’ discourse. Reactions from States have followed, arguably more numerous than in the 1990s (probably also due to the higher number of organisations present in the field) and justified through reference to the law, so that a clarification of the legal framework might be offered. In addition, arguments in favour of or against certain limits to unregulated activities of international humanitarian actors might be found in the existing legal regime and in particular in principles of humanitarian action.

The limits of humanitarians’ engagement in advocacy and the distinction between politically motivated and humanitarian action were discussed by States in relation to the practice of flotillas, emerged to react against the blockade imposed by Israel on Gaza. Furthermore, some of the trends already identified in the 1990s generated further debate and States’ practice. On the one hand, the expulsions of some organisations based on their alleged collaboration with the ICC led to discussion on the legitimate

¹⁸⁵ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War. An Introduction to International Humanitarian Law* (Geneva: ICRC, 2001, 3rd ed.), 72.

¹⁸⁶ George A.B. Peirce, “Humanitarian Protection for the Victims of War: the System of Protecting Powers and the Role of the ICRC,” *Military Law Review* 90 (1980), 144.

engagement by relief organisations with this actor; on the other hand, requests for information by the UNSC stimulated reflection on the implications of transmitting information to political bodies. Indeed, more in general, States or non-State Parties to armed conflicts have repeatedly come to the spotlight for expelling organisations engaged in the provision of humanitarian assistance, accused of having exceeded their mission and engaged in prohibited activities such as proselytising, spying, or meddling in internal political affairs.

5.3.3.1. Humanitarian Assistance and Advocacy as Protection: Flotillas to Gaza

As already mentioned, the delicate balance between engaging in public advocacy and having access to victims in need is acknowledged by guidance on protection, but always leaving to actors in specific cases to find such balance and referring to potential risks in practice, without clarifying the possible legal consequences deriving from certain operational choices. Like in the 1990s, some relief organisations have engaged in a few cases in calls for political and/or military solutions, but no specific reaction to this conduct by the Parties has been traced.¹⁸⁷ On the other hand, relevant practice in the UN framework can be found in the debate generated by the case of flotillas heading towards Gaza in 2008-2010 loaded with humanitarian goods, defying Israel's prohibition and triggering Israel's reaction.¹⁸⁸ The debate has focused on the boundaries of protected humanitarian action, in particular from the point of view of the relationship between the provision of humanitarian assistance to civilians in situation of occupation and the denunciation of the humanitarian and political situation, as well as of the alleged violations of IHL committed by the Occupying Power.

In December 2008, the Libyan representative to the UNSC reported that a Libyan ship 'headed for the port of Gaza loaded with humanitarian aid — specifically, flour, rice, vegetable oil, dairy products and medicine — destined for the population of the Gaza Strip' was obliged by Israeli ships to turn back and not

¹⁸⁷ According to Soussan, the UNSC authorisation in September 2003 for the deployment of Operation Artemis in Bunia was at least partly the result of calls coming from NGOs such as Oxfam, Merlin, and Human Rights Watch 'for the rapid deployment of troops to protect civilians'. Soussan (2008), *supra* fn. 9, 116. Wheeler and Harmer reported that '[t]he International Rescue Committee [] called for military action to protect civilians in Ituri in the DRC [in 2005], and [] suggested what the optimal size and structure of such a force might be'. Victoria Wheeler and Adele Harmer, *Resetting the Rules of Engagement: Trends and Issues in Military-Humanitarian Relations*, HPG Research Report no. 21 (London: Overseas Development Institute, March 2006), 15. See also Oxfam France, "RD Congo/Conseil Européen: La France Doit Montrer l'Exemple," December 10, 2008, available at <http://www.oxfamfrance.org/RD-Congo-Conseil-europeen-La,088> (accessed February 28, 2013). Similarly, for the deployment of an EU force in Chad in 2007, see Oxfam International, "Tchad: Les Etats Membres de l'Union Européenne Tardent à Prendre une Décision sur l'Envoi d'une Force au Tchad alors que 400 000 Vies Sont en Jeu," December 09, 2007, available at <http://www.oxfamfrance.org/TCHAD-Les-Etats-membres-de-l-Union,149> (accessed February 28, 2013). On practice in the 1990s, see Section 5.2.1.

¹⁸⁸ Israel has constantly argued that all organisations should either coordinate with the ICRC and/or the Palestinian Red Cross, and have their relief distributed through these organisations, or send ships to the Israeli port of Ashdod, where the goods can be unloaded and (those allowed under the Israeli rules regarding items permitted to enter Gaza) transported into Gaza by land.

to reach Gaza, in spite of the fact that Libya had ‘made it clear that [it] would accept inspection of the ship by the United Nations or by any humanitarian organization, such as the Red Crescent or the Red Cross, to verify that it did not hold anything but a crew, foodstuffs and medicine’.¹⁸⁹ During the debate, several States in the UNSC underlined the obligations of Israel in terms of humanitarian access to Gaza and called for an immediate lift of the siege,¹⁹⁰ and some of them criticised the politicisation of the provision of assistance deriving from recourse to confrontational acts.¹⁹¹

Later, in May 2010, when a flotilla of six ships heading to Gaza was intercepted by Israeli forces, nine activists died and some Israeli soldiers were injured. The UNSC reacted with a statement in which it ‘deeply regret[ed] the loss of life and injuries resulting from the use of force during the Israeli military operation in international waters against the convoy sailing to Gaza’ and ‘urge[d] Israel ... to ensure the delivery of humanitarian assistance from the convoy to its destination’.¹⁹² In addition, the UNSC ‘stresse[d] that the situation in Gaza is not sustainable’, ‘reiterate[d] its grave concern at the humanitarian situation in Gaza and stresse[d] the need for sustained and regular flow of goods and people to Gaza as well as unimpeded provision and distribution of humanitarian assistance throughout Gaza’.¹⁹³

There was general agreement among the States intervening in the UNSC meeting that Israel’s use of force against the activists raised doubts on its legality or was clearly disproportionate, and that the blockade of Gaza was to be condemned.¹⁹⁴ Israel justified its reaction by arguing that ‘[a]lthough portrayed in the media as a humanitarian mission delivering aid to Gaza, *this flotilla was anything but a genuine humanitarian-only mission*’, since in the planning phase the organisers had refused Israel’s offer ‘to transfer the aid to Gaza through the port of Ashdod, via the existing overland crossings, in accordance with

¹⁸⁹ S/PV.6030, 3 December 2008, 2. On the other hand, Israel underlined the existence of mechanisms for providing humanitarian assistance to Gaza, which should be used by those willing to provide such assistance.

¹⁹⁰ See the statements by the representatives of the UK, the Russian Federation, Belgium, South Africa, Costa Rica, France, Panama, China, Viet Nam, Indonesia, Burkina Faso, S/PV.6030, 3 December 2008, 8-13.

¹⁹¹ See the statements by the representatives of the United States, the UK, Belgium, Costa Rica, Italy, Croatia, S/PV.6030, 3 December 2008, 7-9, 11, 14.

¹⁹² S/PRST/2010/9, 1 June 2010, 1.

¹⁹³ S/PRST/2010/9, 1 June 2010, 1. It further ‘re-emphasize[d] the importance of the full implementation of Resolutions 1850 and 1860’. S/RES/1850 (2008), 16 December 2008 (14-0-1), contained calls on the Parties regarding peace negotiations; in S/RES/1860 (2009), 8 January 2009 (14-0-1), the UNSC had called for a ceasefire in Gaza, ‘call[ed] for the unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel and medical treatment’, and ‘[w]elcomed the initiatives aimed at creating and opening humanitarian corridors and other mechanisms for the sustained delivery of humanitarian aid’ (pars. 1-3).

¹⁹⁴ See the statements by the representatives of Turkey, the UK, Mexico, Brazil, Austria, Japan, Nigeria, the Russian Federation, Uganda, China, France, Gabon, Bosnia and Herzegovina, Lebanon, Palestine, S/PV.6325, 31 May 2010, 4-13. A notable exception to this general trend was the U.S., which urged an investigation of the incident and stated: ‘mechanisms exist for the transfer of humanitarian assistance to Gaza by Member States and groups that want to do so. These non-provocative and non-confrontational mechanisms should be the ones used for the benefit of all those in Gaza. Direct delivery by sea is neither appropriate nor responsible and is certainly not effective under the circumstances.’

established procedures.’¹⁹⁵ The non-humanitarian character of the activists would have been proven by the fact that they ‘use[d] knives and clubs and fire[d] from weapons stolen from soldiers and other weapons’ against the Israeli soldiers, who acted in self-defence, and that some of them ‘[we]re linked to terrorist organizations.’¹⁹⁶ However, the majority of the other States condemned the attack, at the same time underlining the purely humanitarian character of the flotilla.¹⁹⁷

The episode gave rise to a number of reports, including by a fact-finding mission dispatched by the Human Rights Council,¹⁹⁸ a commission established by Israel, the so-called Turkel Commission,¹⁹⁹ a commission established by Turkey,²⁰⁰ and a Panel of Inquiry appointed by the UNSG (Palmer Report).²⁰¹ The four reports differ on the classification of Gaza as occupied or not,²⁰² and on the legality and proportionality of the blockade,²⁰³ especially on the basis of a different evaluation of the actual respect by Israel of its obligations connected to the satisfaction of the humanitarian needs of the civilian population. As far as the provision of humanitarian assistance and the principles of humanitarian action are concerned, the Mission appointed by the Human Rights Council noted ‘*a certain tension between the political objectives of the flotilla and its humanitarian objectives*’, highlighted by the refusal of the offer to dock in an Israeli port and transfer the goods by land ‘under the supervision of a neutral organization’.²⁰⁴ Thus, the experts considered that ‘it seem[ed] clear that the primary objective was political, as indeed demonstrated by the

¹⁹⁵ S/PV.6325, 31 May 2010, 13. Emphasis added. In addition, the representative of Israel denied the existence of a humanitarian crisis in Gaza, affirmed the legality of the blockade, and claimed that an organiser of the flotilla had publicly acknowledged that their objective was not to provide humanitarian assistance but to break the siege. See S/PV.6325, 31 May 2010, 14.

¹⁹⁶ S/PV.6325, 31 May 2010, 14-15.

¹⁹⁷ See the statements by the representatives of Turkey, Mexico, Brazil, Japan, Nigeria, the Russian Federation, Uganda, China, Gabon, Bosnia and Herzegovina, Lebanon, Palestine, S/PV.6325, 31 May 2010, 4-13.

The Human Rights Council adopted a resolution in which it ‘[c]ondemn[ed] in the strongest terms the outrageous attack by the Israeli forces against the *humanitarian flotilla* of ships which resulted in the killing and injuring of many innocent civilians from different countries’, in addition to ‘[c]all[ing] upon the occupying Power Israel to immediately lift the siege on occupied Gaza and other occupied Territories’ and ‘ensure the unimpeded provision of humanitarian assistance, including of food, fuel and medical treatment to the occupied Gaza strip’. A/HRC/RES/14/1, 2 June 2010 (32-3-9), pars. 1, 5, and 6. Emphasis added.

¹⁹⁸ *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, A/HRC/15/21, 27 September 2010. Hereinafter A/HRC/15/21. The mission was created by A/HRC/RES/14/1, 2 June 2010 (32-3-9), par. 8.

¹⁹⁹ The Public Commission to Examine the Maritime Incident of 31 May 2010 – The Turkel Commission, *Report – Part one*, January 2011. Available at <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> (accessed May 31, 2011). Hereinafter Turkel Report.

²⁰⁰ Turkish National Commission of Inquiry, *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, Ankara, February 2011. Available at <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf> (accessed September 10, 2011). Hereinafter Turkish Commission Report.

²⁰¹ *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011. Available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf (accessed June 20, 2012). Hereinafter Palmer Report. It should be highlighted that ‘The Panel’s Method of Work provided that the Panel was to operate by consensus, but where, despite best efforts, it was not possible to achieve consensus, the Chair and Vice-Chair could agree on any procedural issue, finding or recommendation. *This report has been adopted on the agreement of the Chair and Vice-Chair* under that procedure.’ Ibid., 3. Emphasis added.

²⁰² Gaza as still occupied: A/HRC/15/21, *supra* fn. 198, par. 63; Turkish Commission Report, *supra* fn. 200, 81-83. Gaza as no longer occupied: Turkel Report, *supra* fn. 199, pars. 37-47.

²⁰³ See Section 3.2.1.3.

²⁰⁴ A/HRC/15/21, *supra* fn. 198, par. 80. Emphasis added.

decision of those on board the Rachel Corrie to reject a Government of Ireland-sponsored proposal that the cargo in that ship to be allowed through Ashdod intact.’²⁰⁵

However, the Mission did not take into consideration the IHL provisions on external relief actions but focused on the interception, referring to the law of naval warfare and determining that ‘the blockade was inflicting disproportionate damage upon the civilian population in the Gaza strip and that as such the interception could not be justified and therefore has to be considered illegal’, also because it was not ‘purely motivated by concerns as to the vessels’ contribution to the war effort’,²⁰⁶ therefore, the observation on the political objective of the flotilla was not relevant to its legal analysis. Simply, the experts underlined that, on the one hand, humanitarian organisations intervening in forgotten humanitarian crises are ‘[t]oo often ... accused as being meddlesome and at worst as terrorists or enemy agents’, and, on the other hand, ‘[a] distinction must be made between activities taken to alleviate crises and action to address the causes creating the crisis’, in the sense that ‘[t]he latter action is characterized as political action and therefore *inappropriate for groups that wish to be classified as humanitarian*’.²⁰⁷ It was thus recommended that ‘[a]n examination should be made to clearly define humanitarianism, as distinct from humanitarian action, so that there can be an agreed form of intervention and jurisdiction when humanitarian crises occur.’²⁰⁸

Similarly, the Palmer Report noted that there is a right of civilians subject to a naval blockade to receive basic supplies if needed, but in any case ‘humanitarian missions must respect the security arrangements put in place by Israel ... seek prior approval from Israel and make the necessary arrangements with it ... includ[ing] meeting certain conditions such as permitting Israel to search the humanitarian vessels in question.’²⁰⁹ In addition, while considering that genuine concern for the people in Gaza motivated the majority of the participants in the flotilla, the Panel ‘question[ed] the true nature and objectives of the flotilla organizers, a coalition of non-governmental organizations’, to the extent that ‘as much as their expressed purpose of providing humanitarian aid, one of the primary objectives of the flotilla organizers was to generate publicity about the situation in Gaza by attempting to breach Israel’s naval blockade’, and that ‘[t]he actions of the flotilla needlessly carried the potential for escalation’.²¹⁰

²⁰⁵ Ibid., par. 80.

²⁰⁶ Ibid., pars. 53 and 56.

²⁰⁷ Ibid., pars. 276-277. Emphasis added.

²⁰⁸ Ibid., par. 277. Indeed, ‘while some of the passengers were solely interested in delivering supplies to the people in Gaza, for others the main purpose was raising awareness of the blockade with a view to its removal, as the only way to solve the crisis.’ Ibid.

²⁰⁹ Palmer Report, supra fn. 201, par. 80

²¹⁰ Ibid., pars. 86-87 and 95. More in general, see pars. 83-95.

To avoid similar incidents in the future, the Palmer Report recommended that Israel ease restrictions on movement of goods and persons to and from Gaza, and that humanitarian missions willing to assist Gaza population make use of established procedures and the designated land crossings in consultation with Israeli and Palestinian authorities: indeed, while ‘the blockading power has an obligation to allow for [humanitarian] assistance to be provided where necessary’, under IHL humanitarian missions shall respect security requirements, ‘allow inspection and stop or change course when requested’.²¹¹ In sum, ‘[i]t is important that humanitarian missions act consistently with the principles of neutrality, impartiality and humanity recognized by the UN General Assembly’ and avoid any attempt to breach a blockade.²¹²

The Turkel Commission, for its part, classified some of the passengers of the flotilla as civilians taking direct part in hostilities, based on their stated (political) motivation for participating in the flotilla and their actual behaviour during the interception.²¹³ In spite of the different legal qualification of the facts drawn by the three reports, the need to maintain a clear distinction between humanitarian missions and missions focused on human rights and political advocacy emerges as a common theme, together with the duty of a Blockading Power to ensure that the civilian population is adequately supplied and to allow the provision of humanitarian assistance to civilians in need (even if subject to the right to impose specific controls and technical arrangements). When the issue of flotillas to Gaza was subsequently mentioned by UN personnel and State representatives in the UNSC,²¹⁴ the majority of the interventions called upon Israel to completely lift the blockade and the closure, but some also highlighted that ‘such convoys are not helpful in resolving the basic economic problems in Gaza, and they needlessly carry the potential for escalation’ and encouraged those willing to provide humanitarian aid to civilians in Gaza to make use of the established channels

²¹¹ Ibid., pars. 150-156 and 161.

²¹² Ibid., par. 161.

²¹³ See Turkel Report, supra fn. 199, pars. 164-169, 184-189, 192-201, and 239. For a criticism of this classification, see Amichai Cohen and Yuval Shany, “The Turkel Commission’s Flotilla Report (Part One): Some Critical Remarks”, EJIL: Talk! – Blog of the European Journal of International Law, January 28, 2011. Available at <http://www.ejiltalk.org/the-turkel-commissions-flotilla-report-part-one-some-critical-remarks/> (accessed May 31, 2011).

²¹⁴ In June-July 2010, Israel adopted measures to ease the closure on Gaza, by issuing a list of items to be banned from entry into Gaza (arms, munitions, and dual-use goods and items) and a list of *Construction Items and Materials to be Allowed Entry into Gaza only for PA-authorized [Palestinian Authority-authorized] Projects Implemented by the International Community*, while all the rest would be allowed (on the contrary, before this decision Israel used to publish a periodic list of items admitted for entry into Gaza, while all the rest was prohibited). However, the measures adopted did not include permission of exports from Gaza, easing of the restrictions on the movement of persons or a lift of the naval blockade. See Israel Ministry of Foreign Affairs, “Gaza: Lists of Controlled Entry Items,” July 4, 2010. Available at http://www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Lists_Controlled_Entry_Items_4-Jul-2010.htm (accessed May 31, 2011). Israel Ministry of Foreign Affairs, “Prime Minister’s Office statement following the Israeli Security Cabinet meeting,” June 20, 2010. Available at http://www.mfa.gov.il/MFA/Government/Communiques/2010/Prime_Minister_Office_statement_20-Jun-2010.htm (accessed May 3, 2011). BBC News, “Israel confirms easing of Gaza blockade,” BBC News Website, July 5, 2010. Available at <http://www.bbc.co.uk/news/10513004> (accessed May 31, 2011).

available.²¹⁵ Engagement with international judicial bodies, more specifically the ICC, has given rise to similar discussions on State's control over relief organisations and the limits of the latter's legitimate mission.

5.3.3.2. Protection and Relations with the ICC

The issuance of a warrant of arrest against the Sudanese President Al Bashir by the ICC in March 2009 was followed by the expulsion of 13 international NGOs and the closure of three national ones.²¹⁶ A vocal debate at the international level ensued, both because whole organisations were expelled, rather than just some staff, and because estimates by the humanitarian community warned that 'devastating implications for the citizens of Darfur' would follow the departure of the NGOs.²¹⁷

The Sudan's Humanitarian Aid Commission took action against the NGOs 'for allegedly collaborating with International Criminal Court investigations', and subsequently 'high-ranking officials, including President al-Bashir and the Commissioner of Humanitarian Aid, confirmed the expulsion of the NGOs on the grounds that they had acted outside their mandate.'²¹⁸ The representative of Sudan in the UNSC defended the decision 'to expel a number of non-governmental organizations that ha[d] crossed every red line and dared to prejudice the sovereignty of the country and take advantage of the kindness of the Sudanese people' and he explicitly argued that the issue at stake was 'the extent to which those non-governmental organizations [had] violated the resolutions of the General Assembly that regulate humanitarian work, most notably resolution 46/182 of 19 December 1991.'²¹⁹ In addition, Sudan did not

²¹⁵ Statement by Mr. Lynn Pascoe, USG for Political Affairs, S/PV.6363, 21 July 2010, 3. Similarly, see the statements by the representatives of the U.S. and Mexico, S/PV.6363, 21 July 2010, 10 and 14; Nigeria, S/PV.6470, 19 January 2011, 21; Mr. Lynn Pascoe, USG for Political Affairs, Israel, the U.S., the UK, Nigeria, Germany, the Russia Federation, India, Gabon, S/PV.6520, 21 April 2011, 3-4, 10, 12, 15-16, 19, 23, 26-29; Japan and Mr. Pedro Serrano, Acting Head of the delegation of the EU to the UN, S/PV.6520 (Resumption 1), 21 April 2011, 6 and 10; Mr. Robert Serry, Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General, S/PV.6540, 19 May 2011, 4; Mr. Lynn Pascoe, USG for Political Affairs, S/PV.6562, 23 June 2011, 3; the U.S., Nigeria, S/PV.6590, 26 July 2011, 12-13.

²¹⁶ The international NGOs expelled 'include[d] Oxfam, CARE, MSF-Netherlands, Mercy Corps, Save the Children, the Norwegian Refugee Council, the International Rescue Committee, Action contre la faim, Solidarités and CHF International.' UN Humanitarian Information Unit – IRIN, "Sudan: Aid Agencies React to Expulsions," March 5, 2009. Available at <http://www.irinnews.org/report.aspx?ReportId=83311> (accessed January 8, 2010).

²¹⁷ UNICEF, UNHCR, UNJLC, WFP, WHO, and UN OCHA, "Joint Statement on the Humanitarian Situation in Sudan by UN Agencies," March 06, 2009, available at <http://reliefweb.int/node/300299> (accessed May 31, 2012). See also UN OCHA, "Sudan: OCHA Situation Report No. 1, 08 Mar 2009," March 08, 2009, available at <http://reliefweb.int/node/300479> (accessed May 31, 2012); Human Rights Watch, "Sudan: Expelling Aid Agencies Harms Victims," March 5, 2009, available at <http://www.hrw.org/en/news/2009/03/05/sudan-expelling-aid-agencies-harms-victims> (accessed May 13, 2011).

²¹⁸ S/2009/201, 14 April 2009, par. 26.

²¹⁹ S/PV.6096, 20 March 2009, 4 and 15. The Government argued that its decision was motivated by the fact that the foreign NGOs 'were involved in collaboration with the ICC investigation in Darfur crimes' and thus, according to the Sudanese Vice President, '[w]henver an organization takes humanitarian aid as a cover to achieve a political agenda that affects the security of the county and its stability, measures are to be taken by law to protect the country and its interests.' Similarly, the decision to dissolve the two local NGOs was justified on the basis that they 'violated its [sic] mission as humanitarian organizations'. Sudan Tribune, "Sudan expels 10

deny its responsibility for providing humanitarian assistance to civilians in need in Darfur, rather it affirmed that it had decided to “‘Sudanize” volunteer work in the country’, a decision ‘based on the premise that the State should assume its full responsibility in this matter.’²²⁰

Most of the States intervening in the UNSC condemned the decision, mainly arguing that it had been taken as a reaction to the warrant of arrest against President al-Bashir and stressing the likely consequences that it would have for civilians in Darfur, where the NGOs had been operating.²²¹ The decision was condemned by the UK representative as ‘violat[ing] both the humanitarian communiqués signed by the Sudan with the United Nations and the provisions of the recent Doha agreement’,²²² and by the representative of Japan as contrary to Security Council resolution 1828 of 31 July 2008,²²³ in which the Council ‘[d]emand[ed] the full implementation of the Communiqué between the Government of Sudan and the United Nations on Facilitation of Humanitarian Activities in Darfur, and that the Government of Sudan, all militias, armed groups and all other stakeholders ensure the full, safe and unhindered access of humanitarian organizations and relief personnel’.²²⁴ The representative of Costa Rica warned that ‘[p]reventing [many] people’s access to humanitarian assistance could result in their deaths, which could constitute *another* violation of international humanitarian law.’²²⁵ Other States mentioned in general terms the need for all

aid NGOs and dissolves 2 local groups,” March 5, 2009, available at <http://www.sudantribune.com/Sudan-expels-10-aid-NGOs-and,30382> (accessed February 13, 2011). Some of the expelled agencies were later allowed to re-enter the country ‘with new names and new logos’. Statement by the USG/ERC John Holmes at the UNSC: S/PV.6139, 11 June 2009, 2.

²²⁰ S/PV.6096, 20 March 2009, 4.

²²¹ See the statements by the representatives of the UK, Mexico, the U.S., France, Japan, Austria, Uganda, Croatia, Costa Rica, Czech Republic on behalf of the EU. Other States, on the other hand, underlined the clear connection between the expulsions and the warrant of arrest, but with the aim to underline the need to find a solution to the political situation more in general: see the statements by the representatives of Burkina Faso, Turkey, Viet Nam, Libya. S/PV.6096, 20 March 2009.

In any case, as noted by Brauman at the end of August 2009: ‘à l’heure où ces lignes sont écrites, la situation semble stable, d’autres ONG arrivent et, surtout, des structures sanitaires et sociales publiques, relayant la plus grande opération de secours de l’histoire récente, ont été mises en place. Ce dernier point ne semble intéresser personne, comme s’il était gênant alors qu’il s’agit, s’il s’avère que cet engagement étatique est durable, de l’essentiel. Il n’y a pas lieu de victimiser les ONG expulsées, sauf à considérer que leur présence est un bien en soi, mais de prendre acte de cette réalité, si c’est le sort des Darfouriens qui nous occupe.’ Rony Brauman, “La fin de l’humanitaire sans frontières?,” Grotius International website, August 26, 2009, available at <http://www.grotius.fr/debat-la-fin-de-l%E2%80%99humanitaire-sans-frontieres/> (accessed April 22, 2012).

Also, it was reported that Sudan some months later started negotiations with some of the expelled NGOs to allow them to resume their work, but under different names and logos. See Sudan Tribune, “Sudan in talks with expelled groups to resume Darfur work,” June 09, 2009, available at <http://www.sudantribune.com/spip.php?article31448> (accessed April 22, 2012).

²²² S/PV.6096, 20 March 2009, 5. On the two GoS-UN Joint Communiqués, see Section 3.2.2.4. Doha agreement refers to the *Agreement of Good Will and Confidence Building for the Settlement of the Problem in Darfur*, signed by the Government of National Unity of the Republic of Sudan (GNU) and the Justice and Equality Movement Sudan (JEM) on 17 February 2009 in Doha and providing *inter alia* that the Parties ‘[a]gree to take all necessary measures to create a conducive environment for reaching a lasting settlement of the conflict, including: ... (b) Guarantee the smooth and unobstructed flow of relief assistance to the needy people without any obstacles or constraints.’

²²³ S/PV.6096, 20 March 2009, 8-9.

²²⁴ S/RES/1828 (2008), 31 July 2008 (14-0-1), par. 13. Emphasis in the original.

²²⁵ S/PV.6096, 20 March 2009, 13. Emphasis added.

Parties to the conflict to respect IHL, in particular regarding access of civilians in need to humanitarian assistance and protection of relief personnel.²²⁶

While general references to a violation of the duty to guarantee full and unimpeded humanitarian access might be interpreted as implying an acknowledgment of the lawfulness for humanitarian actors to contribute to international criminal proceedings, it should be highlighted that no State made any reference to possible relationships between the expelled NGOs and the ICC or to a right of humanitarian organisations to provide evidence to the ICC and maintain their special protection under IHL.²²⁷ Rather, France for example underlined that the expelled international NGOs had ‘an international reputation for seriousness and impartiality’.²²⁸

No condemnation of the expulsions was included in the resolution on Sudan adopted on 30 April 2009,²²⁹ in which the UNSC in the preamble ‘[s]tress[ed] the importance of providing humanitarian assistance to the civilian populations throughout Sudan, in particular in the Three Areas after the events of March 4 and 5 2009, and for implementation of the CPA [Comprehensive Peace Agreement], and t[ook] note of the joint assessment being conducted in the Three Areas and the need for continued cooperation between the Government of Sudan, the United Nations and humanitarian organizations’.²³⁰ In the only operative paragraph of the resolution on humanitarian assistance, the UNSC ‘[e]xpress[ed] its concern for the health and welfare of the civilian populations in Sudan; call[ed] upon the parties to the CPA and the communiqué signed between the [UN] and the GNU [Government of National Unity] in Khartoum on 28 March 2007 to support, protect and facilitate all humanitarian operations and personnel in the Sudan; and urge[d] the Government of Sudan to continue working with the [UN] to support the three track approach delineated by the Secretary-General to ensure continuity of humanitarian assistance’.²³¹ Finally, the UNSG in his report on the Sudan affirmed that ‘[w]hile the Government of National Unity ha[d] the right to take measures it m[ight] consider necessary to protect its sovereignty and security, ... no evidence ha[d] been

²²⁶ See the statements by the representatives of Mexico, France, Austria, Russian Federation, Czech Republic on behalf of the EU. S/PV.6096, 20 March 2009.

²²⁷ The USG/ERC Holmes, for his part, being asked ‘for a reaction to charges that non-governmental organizations were providing information to the International Criminal Court, ... said that whatever relationship those organizations had with the Court was entirely up to them’ and that ‘[t]here was no need for OCHA to take a view on that.’ Holmes further specified that ‘[n]on-governmental organizations working in Sudan were engaged in the distribution of humanitarian aid’ and ‘[t]hat also included protection of civilians, including prevention of sexual violence.’ UN Department of Public Information (UN DPI), “Press Conference on Expulsion of Non-Governmental Organizations from Darfur,” March 16, 2009, available at http://www.un.org/News/briefings/docs/2009/090316_Holmes.doc.htm (accessed March 20, 2012).

²²⁸ S/PV.6096, 20 March 2009, 7.

²²⁹ S/RES/1870 (2009), 30 April 2009. The condemnation was present in the draft version of the resolution, but was then removed: see the statement by the representative of Costa Rica: S/PV.6116, 30 April 2009, 3.

²³⁰ S/RES/1870 (2009), 30 April 2009, preamble par. 9. Emphasis in the original.

²³¹ S/RES/1870 (2009), 30 April 2009, par. 13. Emphasis in the original.

provided to support the expulsions.²³² No condemnation was thus expressed in principle; rather, the absence of evidence was underlined.

Even among humanitarian organisations themselves, the appropriateness of contributing to international criminal proceedings and its compatibility with the principles of humanitarian action have been a source of controversy. Reacting to expulsion by the GoS, some NGOs ‘sa[id] they ha[d] refused to assist the ICC because it would [have] undermine[d] their humanitarian goals’, and ‘denied straying from a purely humanitarian mandate, according to which they assist[ed] the various U.N. agencies coordinating the distribution of aid across Darfur without getting involved in political activity.’²³³ On the other hand, a then MSF employee was critical of this kind of reaction, noting that ‘[s]ome organisations [in Darfur, following the March 2009 expulsions] were found not only denying that they had worked with the ICC in that instance, but almost suggesting that it would be anti-humanitarian to do so in general (even though the Court seeks compliance with IHL!), involuntarily echoing the Government rhetoric, which had sought to delegitimize the Court by equating cooperation with proselytising and spying.’²³⁴ In any case, allusions that ‘[t]here are humanitarian organizations who expend a great deal of effort essentially conducting investigations for the ICC’ and ‘donors who willingly fund this sort of activity’ call for a clarification of the possible legitimate consequences of such a conduct.²³⁵

A distinction should arguably be made between transmitting information, for example to the ICC Prosecutor, in the course of investigation then possibly leading to the opening of a case, and testifying as witness in the course of a trial. Regarding the first profile, the one that came under criticism in Sudan, MSF for example clarified that ‘all MSF sections have adopted a binding internal policy refraining from any cooperation with the ICC ... based on the recognition that humanitarian activities must remain independent from risk of political and judicial pressure in order to be able to give medical and relief assistance to populations in situations of trouble and violence.’²³⁶ While confirming that MSF does ‘not hesitate to go public about the crisis or the violence inflicted on the people [it] treat[s], particularly when their situation is unknown or not addressed, and always in full transparency with all stakeholders’, it ‘did not cooperate or

²³² S/2009/211, 17 April 2009, par. 88. Emphasis added.

²³³ Louis Charbonneau, “NGO expelled from Darfur considered ICC cooperation,” Reuters website, March 16, 2009. Available at <http://www.reuters.com/article/2009/03/16/idUSN16528406> (accessed May 12, 2011).

²³⁴ Mackintosh (2010), *supra* fn. 155, 387.

²³⁵ DuBois (2009), *supra* fn. 80, 8.

²³⁶ Christophe Fournier, “Doctors Without Borders/Médecins Sans Frontières’ (MSF) position regarding the International Criminal Court’s prosecutor’s case against the President of Sudan,” MSF Open Letter: MSF Official Statement, July 29, 2008. Available at <http://www.doctorswithoutborders.org/publications/article.cfm?id=2868&cat=open-letters> (accessed November 20, 2011).

send any information to the ICC [in relation to Sudan] and [it] do[es] not as a rule comment on judicial decisions,²³⁷ thus reclaiming a difference between ‘humanitarian testimony and legal testimony.’²³⁸

Similarly, if the ICRC witnesses grave violations of IHL, as a last resort it may engage in ‘a public denunciation, in general terms, of the practices involved’, but it ‘does not ... include the tracing and exposure of those individually responsible for such violations among its tasks, *as irreconcilable with its humanitarian mandate of protection and assistance*.’²³⁹ Not only is ‘[t]he purpose of humanitarian action ..., above all else, to save lives, not to establish criminal responsibility’, but ‘those working for humanitarian organizations are generally ill-equipped to collect evidence in accordance with the technical standards required for judicial proceedings.’²⁴⁰ Moreover, it is arguable that, in the case of the ICC at least, the Prosecutor has a broad discretion in choosing the investigation to start *proprio motu* and then the cases and charges to bring,²⁴¹ so that his choices may be perceived as highly political, tainting as political also contributions to his endeavour. If a certain situation is referred to the ICC by the UNSC, as in the cases of Darfur and Libya,²⁴² the ICC investigation also risks assuming a political dimension.

Partly different is the case of humanitarian organisations testifying before international judicial bodies. As already mentioned when discussing practice in the 1990s in Section 5.2.2., the ICRC has been granted a privilege of non-disclosure, while other humanitarian organisations may in theory be summoned to testify. On the one hand, for example, MSF explained to the ICC its internal policy of no cooperation with the Court ‘so as to make sure that MSF will not be compelled or summoned to give information and witnessing to such judicial bodies.’²⁴³

On the other hand, in case this should happen, help may be found in recent ICTY case-law, more precisely a 2002 decision by the Appeals Chamber of the ICTY in the *Brdjanin* case, according to which a war correspondent might be entitled to the privilege of not being called to testify even on material that he/she

²³⁷ Ibid.

²³⁸ Bouchet-Saulnier and Dubuet (2007), *supra* fn. 30, 47.

²³⁹ Kalshoven and Zegveld (2001), *supra* fn. 185, 73-74. ICRC’s position on ‘[r]elations with judicial, quasi-judicial or investigating authorities’ is presented as part of its guidelines on ‘Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence’. ICRC (2005), *supra* fn. 104, 398.

²⁴⁰ La Rosa (2006), *supra* fn. 32, 183. Emphasis added.

²⁴¹ See, for example, Annalisa Ciampi, “The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute,” *Journal of International Criminal Justice* 6, no. 5 (2008): 885-897; Fabrice Weissman, “Humanitarian Aid and the International Criminal Court: Grounds for Divorce,” CRASH Paper, 2009, originally posted on the blog Making Sense of Sudan, July 20 and 21, 2009, available at http://www.msf-crash.org/drive/7d9b-fw-2009-humanitarian-aid-and-international-criminal-court-grounds-for-divorce.-fr-art-p_.pdf (accessed May 12, 2011); Alex de Waal, “Sudan and the International Criminal Court: A Guide to the Controversy,” *Open Democracy*, July 14, 2008.

²⁴² See S/RES/1593 (2005), 31 March 2005, and S/RES/1970 (2011), 26 February 2011, respectively.

²⁴³ Fournier (2008), see *supra* fn. 236. See also Bouchet-Saulnier and Dubuet (2007), *supra* fn. 30, 35-40.

has already published (thus not just in case of confidential sources).²⁴⁴ The test to decide whether to grant this privilege in a specific case should be based on a balancing of the two different interests at stake: ‘society’s interest in protecting the integrity of the newsgathering process’, connected to the right of the public to receive information embodied in the right to freedom of expression, and ‘the interest of justice in having all relevant evidence put before the Trial Chambers for a proper assessment of the culpability of the individual on trial’.²⁴⁵ The Chamber acknowledged that, even if not related to confidential sources, the fact that war correspondents might be called to testify before international tribunals would have an impact on how they are perceived, possibly leading to ‘difficulties in gathering significant information’ and to a shift in their position ‘from being observers of those committing human rights violations to being their targets’.²⁴⁶ Therefore, the judges formulated a two-pronged test to decide whether a subpoena should be issued to a war correspondent: ‘the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case’; and ‘it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere’.²⁴⁷

By analogy, it has been argued that a similar reasoning and the same test should be applied to humanitarian organisations (that have possibly published reports denouncing grave violations of IHL and IHRL), taking into account the ‘public interest in the victims of conflicts receiving food, shelter and medical treatment from humanitarian players’ and the problems that might emerge for humanitarian organisations in case they were called to testify — ‘loss of perceived neutrality, leading to lack of access and security threats’.²⁴⁸ Furthermore, in 2006, the Special Court for Sierra Leone (SCSL) decided in the *Brima* case that a former human rights officer who had worked in the country for the UN mission (and for whom the UN had waived immunity from legal process) enjoyed protection from disclosure for the information it had provided to the Prosecutor on a confidential basis and, in case he testified, protection from being compelled to answer questions relating to the information or its origin.²⁴⁹ To balance this privilege with the right of the accused to

²⁴⁴ ICTY, Appeals Chamber, *Prosecutor v. Brdjanin and Talic*, case no. ICTY-99-36, Decision on Interlocutory Appeal, 11 December 2002.

²⁴⁵ *Ibid.*, pars. 36-37 and 46.

²⁴⁶ *Ibid.*, pars. 42-43.

²⁴⁷ *Ibid.*, par. 50.

²⁴⁸ Mackintosh (2004), *supra* fn. 38, 137.

²⁴⁹ SCSL, Appeals Chamber, *Prosecutor v. Brima, Kamara and Kanu*, case no. SCSL-04016, Decision on Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006, par. 33. Based on rule 70(B) and 70(D) SCSL RPE (analogous to rule 70(B) and 70(D) ICTY RPE). The corresponding provisions for the ICC are art. 54(3) ICCSt. and rule 82 ICC RPE. For a comparison, see Mackintosh (2004), *supra* fn. 38, 139-144.

a fair trial, the Trial Chamber was entitled to exclude any evidence ‘if its admission would bring the administration of justice into serious disrepute.’²⁵⁰

In sum, in addition to the avenues offered to humanitarian organisations by the Statutes and RPEs of international tribunals in terms of protection of privileged information and protective measures for victims and witnesses,²⁵¹ other ways exist for them to try and protect their identity and information before international criminal courts, including advocating a non-disclosure privilege similar to that established by the ICTY in the *Brdjanin* case and by the SCSL in the *Brima* case.²⁵² On the other hand, transmitting information to the Prosecutor of the ICC, and more in general contributing to criminal investigations by spontaneously providing information and evidence, cannot be excluded as a legitimate reason for expulsion, exceeding the limits of the mission of relief personnel (and arguably also the scope of legitimate action of impartial humanitarian organisations).

5.3.3.3. *UNSC Sanctions and Humanitarian Agencies as Sources of Information*

Analogously to the dilemma on transmitting information to the ICC Prosecutor, relief actors have faced a parallel challenge in relation to the financial and travel sanctions adopted by the UNSC in Somalia and DRC against individuals and entities designated by the competent Sanctions Committees as obstructing the delivery of, access to, or distribution of humanitarian assistance.

In the case of Somalia, the UNSC acting under Chapter VII has ‘[r]equest[ed] the United Nations Humanitarian Aid Coordinator for Somalia to report every 120 days to the Security Council’ on the mitigation of the politicisation and misuse of humanitarian assistance and on the implementation of the exemption from the freezing of funds in favour of humanitarian organisations, as well as on impediments to the delivery of humanitarian assistance in Somalia.²⁵³ It has further ‘request[ed] relevant United Nations agencies and humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance to assist the United Nations Humanitarian Aid Coordinator for Somalia in the preparation of such report by providing information’ on the aforementioned issues.²⁵⁴ In 2012 and 2013, the UNSC again acting under Chapter VII specifically ‘request[ed] relevant United Nations agencies

²⁵⁰ SCSL, Appeals Chamber, *Prosecutor v. Brima, Kamara and Kanu*, supra fn. 249, pars 34-35, quoting the then rule 70(G) SCSL RPE, now amended (and analogous to rule 70(G) ICTY RPE).

²⁵¹ Such as rule 73 ICC RPE: see Section 5.2.2. (fn. 39).

²⁵² See La Rosa (2006), supra fn. 32, especially 184-185.

²⁵³ S/RES/1916 (2010), 19 March 2010, par. 11. Similarly, see S/RES/1972 (2011), 17 March 2011, par. 5.

²⁵⁴ S/RES/1916 (2010), 19 March 2010, par. 11. Similarly, see S/RES/1972 (2011), 17 March 2011, par. 5.

and humanitarian organizations having observer status with the United Nations General Assembly and their implementing partners that provide humanitarian assistance in Somalia *to increase their cooperation and willingness to share information with the United Nations Humanitarian Aid Coordinator for Somalia* in the preparation of such report and in the interests of increasing transparency and accountability *by providing information* relevant to paragraphs 5, 6 and 7 above’ and ‘[r]equest[ed] enhanced cooperation, coordination and *information sharing between the Monitoring Group and the humanitarian organizations* operating in Somalia and neighbouring countries’.²⁵⁵ While this practice is insufficient to draw any generalised conclusion on possible developments in the position of non-State actors, more specifically humanitarian organisations, as addressees of UNSC resolutions, it is worth noting that, compared to analogous practice in the 1990s, the UNSC has resorted to ‘requests’ rather than calls and has insisted on compliance with them.

No analogous request has been made by the UNSC in relation to DRC, but the Group of Experts mandated to provide the Sanctions Committee with a list of designated individuals ‘consider[ed] that citing specific incidents [against humanitarian assistance] would not serve a dissuasive purpose, but might conflict with *the need for the humanitarian organizations concerned to maintain their neutrality, independence and impartiality*’.²⁵⁶ This passage reveals the sensitivity of the provision of information by humanitarian organisations to bodies created by the UNSC and mandated to identify individuals to be targeted with sanctions (even if, in other parts of its reports, the Group of Experts clearly acknowledges receiving information from humanitarian organisations).²⁵⁷

The same concern emerged in the case of Somalia, with the Monitoring Group reporting that it collected information ‘through a plurality of sources, most of which wanted to remain anonymous, and it should be noted that the RC/HC for Somalia highlighted that “several members of the humanitarian community raised concerns that the reporting requirement created in resolution 1916 (2010), undertaken pursuant to a sanctions regime targeting one side of the conflict, undermines the perception of neutrality and independence of humanitarian agencies in Somalia.”’²⁵⁸ The fact that the UNSC in 2012 and 2013 felt the need to strengthen its call upon relief organisations to provide information to the HC and thus to the

²⁵⁵ S/RES/2060 (2012), 25 July 2012, pars. 8-9; S/RES/2111 (2013), 24 July 2013, preamble and pars. 23-24.

²⁵⁶ S/2010/596, 29 November 2010, par. 149. Emphasis added.

²⁵⁷ See, for example, S/2009/253, 18 May 2009, par. 74; S/2010/596, 29 November 2010, par. 223. Again, in its June 2012 report, the Group of Experts affirmed that it would ‘revisit this question [of whether there is intent on the part of individuals to systematically prevent the distribution of humanitarian assistance], in close consultation with humanitarian agencies and local authorities, *as appropriate*’. S/2012/348, 21 June 2012, par. 178. Emphasis added.

²⁵⁸ S/2011/125, 14 March 2011, Enclosure to the Annex, par. 27. Similarly, see also S/2012/546, 16 July 2012, Enclosure to the Annex, par. 23; S/2012/856, 20 November 2012, Enclosure to the Annex, par. 15.

Monitoring Group confirms the sensitivity of this task and the reluctance of humanitarian organisations to fulfil it, but at the same time supports the argument that the UNSC considers it to be compatible with the status of impartial humanitarian organisation, arguably in contradiction with a strict interpretation of IHL.

5.3.3.4. *Parties to the Conflict and Reactions to the Practice of Humanitarian Organisations*

Reluctance of relief organisations to engage in activities that might be considered political or amounting to an interference in the internal affairs of a State is arguably related to the fact that, while throughout the 1990s NGOs seemed to be able to engage in advocacy and policy without relevant consequences, over the past decade several cases of expulsions of humanitarian organisations or some of their staff for having exceeded their mandate have taken place, particularly in Sudan, Somalia, and Afghanistan.

The expulsions in Sudan following the warrant of arrest against Al-Bashir in 2009 have been mentioned, but already in 2004 Sudan had expelled ‘the heads of two respected international NGOs’,²⁵⁹ justifying the decision by arguing that the organisations had ‘ma[de] public declarations, instead of discussing complaints with the government’, so that the ministry reportedly affirmed that it “‘s[aw] in these statements indications for supporting rebels and arms holders to continue the war and that such practice constitute[d] violation for voluntary work laws.’”²⁶⁰

The UNSG in his following report criticised the decision because it ‘not only impede[d] vital humanitarian assistance but also constitute[d] an unjustified attempt to interfere with the independence of [the two organisations’] work’.²⁶¹ He then strongly criticised delays in granting visas to humanitarian workers,²⁶² as well as arrest and detention of NGOs staff on the basis of ‘arbitrary and unsubstantiated charges’,²⁶³ such as “‘crimes against the State” or “aiding rebellion””,²⁶⁴ because ‘[t]he authorities in Southern Darfur claim[ed] that “protection activities” constitute[d] inappropriate political interference’,²⁶⁵ or because of ‘attempts by non-governmental organizations to document the rapes of internally displaced

²⁵⁹ S/2005/10, 7 January 2005, par. 32.

²⁶⁰ Somini Sengupta, “Sudan Orders the Expulsion of Aid Officials from 2 Groups,” *The New York Times*, November 30, 2004. Available at <http://query.nytimes.com/gst/fullpage.html?res=9C07E6DE113EF933A05752C1A9629C8B63> (accessed April 15, 2011).

²⁶¹ S/2005/10, 7 January 2005, par. 32. However, the report then specifies that ‘the decision was subsequently suspended’, but ‘the head of one of the organizations was once again requested to leave the country on 2 December citing an irregular visa application process.’ Ibid.

²⁶² See, for example, S/2005/240, 12 April 2005, par. 30; S/2006/148, 9 March 2006, par. 19.

²⁶³ S/2005/378, 9 June 2005, par. 14.

²⁶⁴ S/2005/240, 12 April 2005, par. 30.

²⁶⁵ S/2005/378, 9 June 2005, par. 14. Emphasis added.

persons, to follow up on protection incidents, or provide humanitarian assistance in SLA areas’,²⁶⁶ suggesting ‘a deliberate targeting and intimidation of non-governmental organizations in Southern Darfur by some local authorities’, a practice judged ‘unacceptable.’²⁶⁷ This vehement statement seems to contrast, at least partly, with O’Connell’s view that, in spite of the protest of the UN and of the NGOs against the expulsions, ‘[n]one of the protests questioned Sudan’s right to exclude aid workers. Rather, the protests indicated Sudan’s government has full discretion regarding whom it allows in its country.’²⁶⁸

Other expulsions took place in 2006 and 2007, targeting either organisations or some of their members, for alleged violations of the national laws on humanitarian activities,²⁶⁹ and the GoS made clear in 2008 that “[a]ny organization that d[id] not adhere to its mandate w[ould] face accountability measures and any that refuse[d] to sign an agreement [would have to] leave”, since “[t]he governments want[ed] aid and not for these organizations to play around”.²⁷⁰ Some staff from UN agencies and from the ICRC (the latter declared that its staff ‘had been “recalled with the agreement of authorities”’) were expelled from Sudan in 2010 because of having allegedly ‘made mistakes “beyond their mandate”,’²⁷¹ the NGO Médecins du Monde in 2011, on grounds of alleged ‘involvement in activities in support of armed movements’,²⁷² and four international NGOs from Eastern Sudan in 2012, allegedly for not having performed well in their projects in the area.²⁷³ Also, in 2011 an NGO had to suspend its humanitarian activities in Darfur after accusation that it

²⁶⁶ SLA is Sudan Liberation Army, one of the factions opposing the Government of Sudan. S/2005/240, 12 April 2005, par. 30.

²⁶⁷ S/2005/240, 12 April 2005, par. 30. See also, for example, Human Rights Watch, “Darfur: Humanitarian Aid under Siege,” May 2006, available at <http://www.hrw.org/en/reports/2006/05/08/darfur-humanitarian-aid-under-siege> (accessed July 27, 2011).

²⁶⁸ See Mary Ellen O’Connell, “Enhancing the Status of Non-State Actors Through a Global War on Terror?,” *Columbia Journal of Transnational Law* 43, no. 2 (2005), 444.

²⁶⁹ See Rebecca Barber, “Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law,” *International Review of the Red Cross* 91, no. 874 (June 2009), 378.

²⁷⁰ Salah Gosh, the head of Sudan’s National Security and Intelligence Services, quoted in Sudan Tribune, “Sudan warns humanitarian organizations of facing expulsion,” August 29, 2008. Available at <http://www.sudantribune.com/Sudan-warns-humanitarian,28454> (accessed May 13, 2011).

²⁷¹ ICRC and Abdallah al-Fadil, head of UNAMID in West Darfur, both quoted in Reuters, “Sudan Expels Five UN/ICRC Staff from West Darfur,” AlertNet website, August 16, 2010. Available at <http://www.alertnet.org/thenews/newsdesk/MCD653573.htm> (accessed September 15, 2010).

²⁷² S/2011/244, 14 April 2011, par. 30. More in general, on constant restriction to humanitarian work in Sudan, due not only to the fighting, but also to specific restrictions and administrative burdens imposed by the belligerent and instances of violence against and kidnapping of humanitarian workers, as well as of stealing and looting of their assets, see the following UNSG reports: S/2004/881, 2 November 2004, pars. 24-26; S/2004/947, 3 December 2004, pars. 26-29; S/2005/68, 4 February 2005, pars. 18-21; S/2005/140, 4 March 2005, pars. 30 and 36-38; S/2005/719, 16 November 2005, par. 24; S/2006/430, 21 June 2006, pars. 9, 15-16, and 32; S/2006/764, 26 September 2006, pars. 8-9 and 24-25; S/2006/870, 8 November 2006, pars. 13-14 and 25-26; S/2006/1041, 28 December 2006, pars. 10 and 32; S/2007/104, 23 February 2007, pars. 9-12 and 19-22; S/2007/462, 27 July 2007, pars. 7 and 24; S/2007/213, 17 April 2007, par. 52; S/2007/520, 29 August 2007, pars. 33-35; S/2007/759, 24 December 2007, par. 29; S/2008/196, 25 March 2008, par. 11; S/2008/249, 14 April 2008, pars. 13-14 and 18; S/2008/400, 17 June 2008, pars. 9 and 42; S/2008/443, 7 July 2008, pars. 16-19; S/2008/659, 17 October 2008, pars. 60-64; S/2008/781, 12 December 2008, pars. 39-42; S/2009/83, 10 February 2009, pars. 48-51; S/2009/84, 10 February 2009, pars. 38-46; S/2009/201, 14 April 2009, pars. 22-31; S/2009/297, 9 June 2009, pars. 19-23; S/2010/528, 14 October 2010, par. 50; S/2010/50, 29 January 2010, pars. 59-61; S/2010/382, 14 July 2010, pars. 33 and 36-37; S/2010/543, 18 October 2010, pars. 35-36; S/2011/22, 18 January 2011, pars. 38-44; S/2011/244, 14 April 2011, pars. 25-32; S/2011/413, 5 July 2011, pars. 46-51.

²⁷³ See BBC News, “Khartoum expels foreign aid agencies from eastern Sudan,” BBC News Website, June 01, 2012, available at <http://www.bbc.co.uk/news/world-africa-18296430> (accessed February 28, 2013). The UN HC/RC reacted by stating: “While I

would have distributed bibles, but the organisation denied such charges and was later allowed to resume its work.²⁷⁴

Indeed, a further ground of suspension of activities or expulsion of NGOs in the past years, often connected to human rights, has been respect for local laws and customs and for the principle that humanitarians should not, for example, get involved in proselytising. Since 1997, as already mentioned, the UNGA itself has repeatedly stressed the duty of humanitarian actors to ‘observe and respect the national laws of the country in which they are operating, in accordance with international law and the Charter of the United Nations’ and, since 2004, the importance for them to ‘remain sensitive to national and local customs and traditions in their countries of assignment and communicate clearly their purpose and objectives to local populations’.²⁷⁵

In Afghanistan, in 2001 international members of an NGOs were arrested on accusation of ‘spreading Christianity in Afghanistan under the guise of providing humanitarian assistance’,²⁷⁶ and similar episodes repeated in 2010, when the Afghan Government suspended the activity of two international NGOs pending investigations on the allegation that they would have violated national laws prohibiting proselytising.²⁷⁷ It is worth noting that the NGOs did not advocate respect for the human right of freedom of religion; rather, they denied proselytising, and one of them even stated that ‘[s]uch activities are contrary to [their] mandate as a humanitarian organization’.²⁷⁸ Similarly, when the Taliban claimed responsibility for the killing of ten medical aid workers in Afghanistan in August 2010 and justified it on grounds that the workers

appreciate the efforts being made by the Government to build national capacities, I was hoping that there would be much greater consultation between the government and concerned parties such as the UN and humanitarian organizations on such a critical decision”. UN Office of the Resident and Humanitarian Coordinator in Sudan, “Statement attributable to the United Nations Resident and Humanitarian Coordinator and UNDP Resident Representative in Sudan, Mr. Ali Al-Za’tari,” June 14, 2012. Available at <http://reliefweb.int/report/sudan/statement-attributable-united-nations-resident-and-humanitarian-coordinator-and-undp> (accessed February 28, 2013).

²⁷⁴ See Opheera McDoom, “Sudan suspends Catholic aid group’s work in Darfur,” AlertNet website, February 26, 2011. Available at <http://www.trust.org/alertnet/news/sudan-suspends-catholic-aid-groups-work-in-darfur/> (accessed February 28, 2011). Deepa Babington, “Aid agency allowed to resume Darfur operations,” AlertNet website, March 29, 2011. Available at <http://www.trust.org/alertnet/news/aid-agency-allowed-to-resume-operations-in-darfur/> (accessed May 13, 2011). See also S/2011/244, 14 April 2011, par. 31.

²⁷⁵ See Section 3.2.1.1.4. See also the following UNGA resolutions on emergency assistance to the Sudan, all adopted without vote: A/RES/53/1 O, 17 December 1998, par. 10; A/RES/54/96 J, 17 December 1999, par. 9; A/RES/56/112, 14 December 2001, par. 10. Finally, see also, on the OP UN Safety Convention, A/RES/60/42, 8 December 2005 (without vote), preamble; and ECOSOC Resolution 2004/50, 23 July 2004, par. 14.

²⁷⁶ A/55/1028-S/2001/789, 17 August 2001, par. 20. Some local staff of the same NGO were also arrested and ‘investigated about their possible conversion from Islam to Christianity, an offence that, if proved, carried the death sentence.’ Ibid.

²⁷⁷ Nita Bhalla, “Afghanistan suspends two aid groups for preaching Christianity,” AlertNet website, May 31, 2010, Available at http://www.alertnet.org/db/an_art/55867/2010/04/31-125504-1.htm (accessed July 3, 2010).

²⁷⁸ UN Humanitarian Information Unit – IRIN, “Afghanistan: Proselytizing charges ‘need fair investigation’,” June 02, 2010. Available at <http://www.irinnews.org/Report.aspx?Reportid=89334> (accessed May 07, 2010). See also Bhalla (2010), supra fn. 277.

would have engaged in proselytising,²⁷⁹ the ‘international Christian aid group’ to which the workers belonged denied the accusations.²⁸⁰

In April 2010, three Italian and six Afghan staff of the Italian NGO Emergency were arrested in Afghanistan over their alleged involvement in a plot to kill the governor of Helmand, the region where they were operating a hospital, and in killings in the hospital.²⁸¹ The charges were later dropped and the workers freed, but the Health Ministry specified that ‘it support[ed] “impartial and neutral” health services but warned that the government would not allow the exploitation of health work for political, military or other illegal purposes.’²⁸²

In Somalia, the TFG in 2007-2008 limited humanitarian activities by claiming its right to control the flow of humanitarian aid, for example stating the need to inspect trucks of food aid to verify that it was not expired, even if it lacked the capacity to do it in practice, and more in general seemed to show distrust towards organisations engaged in the provision of humanitarian assistance, according to commentators because it considered them ‘*dangerous critics, watchdogs and potential political rivals*.’²⁸³ Al Shabaab banned some INGOs, including World Vision, Adventist Development and Relief Agency (ADRA) and Diakonia, because they would have ‘[a]ct[ed] as missionaries under the guise of humanitarian work’ and spread Christianity and ‘their corrupted ideologies’.²⁸⁴ Again, World Vision’s reply was that it ‘has specific policies that prohibit proselytizing and is a signatory to the Red Cross Code of Conduct, guaranteeing impartiality in the distribution of aid’, and ADRA similarly denied proselytising.²⁸⁵ Al Shabaab warned of expulsion all other organisations promoting the Christian faith,²⁸⁶ but it then removed this ban against non-

²⁷⁹ Paul Tait, “Group denies Afghan Taliban claims over dead workers,” Reuters AlertNet, August 08, 2010. Available at <http://www.alertnet.org/thenews/newsdesk/SGE677010.htm> (accessed August 11, 2010).

²⁸⁰ Ibid. In any case, clearly the killings were a violations of IHL, since proselytising *per se* would not have rendered the workers direct participant in hostilities.

²⁸¹ UN Humanitarian Information Unit – IRIN, “Afghanistan: Helmand Arrests Shock Aid Workers,” April 12, 2010. Available at <http://www.irinnews.org/Report.aspx?Reportid=88778> (accessed April 13, 2010).

²⁸² Ibid. Allegations were made that the arrest might have been connected to the previous involvement of the humanitarian NGOs in the mediation for the release of an Italian journalist kidnapped in Afghanistan, who was freed after a swap with five Taliban prisoners, while his Afghan driver was kept prisoner and then killed by the Taliban. UN Humanitarian Information Unit – IRIN, “Afghanistan: Italian NGO Saga Continues to Make Waves,” May 04, 2010. Available at <http://www.irinnews.org/Report.aspx?Reportid=89011> (accessed May 07, 2010). In September 2013, the UNSG reported that ‘[a] statement purportedly by Mullah Mohammad Omar published on the official Taliban website to mark the occasion of Eid al-Fitr allowed organizations working impartially in the health, refugee or food distribution sectors in areas under Taliban control to carry out “selfless activities” subject to compliance with conditions.’ A/67/981–S/2013/535, 6 September 2013, par. 43.

²⁸³ Ken Menkhaus, “Stabilisation and Humanitarian Access in a Collapsed State: the Somali Case,” *Disasters* 34, S3 (2010), S333–S334. Emphasis added.

²⁸⁴ Statement by Al Shabaab quoted in Reuters, “Somalia’s al Shabaab Rebels Expel Three Aid Groups,” AlertNet website, August 09, 2010. Available at <http://www.alertnet.org/thenews/newsdesk/LDE678130.htm> (accessed August 11, 2010).

²⁸⁵ See UN Humanitarian Information Unit – IRIN, “Somalia: Ban on aid agencies condemned,” August 10, 2010. Available at <http://www.irinnews.org/Report.aspx?Reportid=90120> (accessed August 11, 2010).

²⁸⁶ See Reuters (2010), *supra* fn. 284.

Muslim organizations in 2011 when Somalia was hit by famine and it allowed ‘all charities, whether “Muslims or non-Muslims”, [to] give emergency aid as long as they ha[d] “no hidden agenda”’.²⁸⁷

Later in 2011, after Kenya started undertaking military activities in Somalia in support of the TFG, Al Shabaab banned 16 international organisations from operating in territory under its control, including UNHCR, WHO, UNICEF, UNFPA, UNOPS, Norwegian Refugee Council, Danish Refugee Council, and Action Contre la Faim, seizing their compounds.²⁸⁸ Accusations at the basis of the decision were the involvement of the agencies in ““financing, aiding and abetting subversive groups seeking to destroy the basic tenets of Islamic penal system”,’ in ““persistently galvanizing the local population against the full establishment of Islamic Sharia system””, and in ‘misappropriating funds and using corruption and bribery in their operations’, and their lack of ““political detachment and neutrality with regard to the conflicting parties in Somalia, thereby intensifying the instability and insecurity gripping the nation as a whole”’.²⁸⁹ The USG/ERC Amos warned that any disruption to humanitarian work would risk bringing back famine conditions in several areas and, calling upon Al Shabaab to reverse its decision ‘and to desist from any further actions which would threaten humanitarian operations and the safety of humanitarian workers’, highlighted that ‘[h]umanitarian organizations working in Somalia remain strictly neutral, and their only task is to save lives’ and called on the Parties to respect IHL.²⁹⁰ Similar calls for a reversal of the seizure, defined as a ‘brazen act’, and of the ban on agencies, as well as for respect for IHL, were voiced by the UNSG, while some of the banned agencies warned of an impending disaster in the country following the decision.²⁹¹

All the aforementioned practice demonstrates that the traditional principles of humanitarian action have been invoked and used not only to support access, safety and freedom of movement of humanitarian

²⁸⁷ BBC News, “Somalia Islamists lift aid ban to help drought victims,” BBC News Website, July 06, 2011. Available at <http://www.bbc.co.uk/news/world-africa-14046267> (accessed July 07, 2011).

²⁸⁸ See, for example, UN Humanitarian Information Unit – IRIN, “Somalia: Al-Shabab ban on agencies threatens aid,” November 28, 2011. Available at <http://www.irinnews.org/Report/94321/SOMALIA-Al-Shabab-ban-on-agencies-threatens-aid> (accessed May 31, 2012). On the other hand, it was reported that the ICRC and MSF were not affected by the decision. In February 2012, the ICRC announced that the Office for Supervising the Affairs of Foreign Agencies of the Harakat Al-Shabaab Al Mujahideen had decided ‘to terminate the agreement under which the ICRC was allowed to deliver emergency food aid in Al-Shabaab administered areas of Somalia.’ ICRC, “Somalia: ICRC remains fully committed to helping Somalis,” News Release 12/22, February 02, 2012, available at <http://www.icrc.org/eng/resources/documents/news-release/2012/somalia-news-2012-02-02.htm> (accessed May 31, 2012). The UNSG in May 2012 reported: ‘The ban imposed by Al-Shabaab on 6 United Nations agencies and 10 non-governmental organizations in areas under its control in November 2011 continues. Since the end of January, two more humanitarian organizations have been banned by Al-Shabaab from operating in areas under its control.’ S/2012/283, 1 May 2012, par. 54.

²⁸⁹ Statement by Al Shabaab, quoted and reported in UN Humanitarian Information Unit – IRIN (2011), *supra* fn. 288.

²⁹⁰ UN OCHA, “Statement on Somalia - Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Valerie Amos, 28 November 2011,” November 28, 2011. Available at <http://reliefweb.int/node/461686> (accessed May 31, 2012).

²⁹¹ UNSG, “Statement Attributable to the Spokesperson for the Secretary-General on Somalia,” November 28, 2011. Available at <http://www.un.org/sg/statements/?nid=5711> (accessed May 31, 2012). Associated Press, “Banned Aid Agencies Warn of Disaster in Somalia,” FoxNews, November 29, 2011, available at <http://www.foxnews.com/world/2011/11/29/banned-aid-agencies-warn-disaster-in-somalia/> (accessed May 31, 2012).

actors in conflict, but also to highlight the limits that these actors shall respect when acting and the consequences that exceeding those limits might imply. Reactions by States and UN bodies to some of these episodes, in particular in case of expulsions of aid agencies, were generally based on the unfounded nature of the accusation and the strictly humanitarian and neutral character of the organisations and their activities.

On the other hand, UN members have adopted a more decisive stance following the expulsion by the Sri Lankan government of the UNICEF spokesperson in September 2009.²⁹² Sri Lanka's permanent representative to the UN argued: 'I do not think it is the role of a UN official to make statements that are one-sided which might help the propaganda line of terrorist organisations and he went beyond the limit to which a UN official could be expected to go' and 'UNICEF's role is to assist children and women. I do not think it's UNICEF's role to advocate anything. They are an aid agency. They are an agency that provides relief. It is not for them to go out making statements that could embarrass a host government.'²⁹³ However, the UNSG vocally reacted, 'strongly regret[ed] the decision' and 'expresse[d] his full confidence in the work of the United Nations in Sri Lanka, which includes making public statements when necessary in an effort to save lives and prevent grave humanitarian problems', adding that '[t]he United Nations [wa]s working impartially to assist the people of Sri Lanka, and the Government should [have] be[en] supporting and cooperating with its efforts.'²⁹⁴ Similarly the then UNICEF Executive Director argued that 'UNICEF ha[d] always upheld the principle of impartial advocacy and communication on behalf of children as a fundamental part of its global mandate', that it 'unequivocally reject[ed] any allegation of bias' and that it would 'continue to uphold its mandate in Sri Lanka, and elsewhere, to advocate and speak out on behalf of vulnerable children and women.'²⁹⁵

The right to speak out in an impartial manner as part of legitimate humanitarian action was clearly claimed, and in this sense, it is arguable a certain degree of change can be detected compared to the (absence of) reactions to the expulsion of MSF from Ethiopia in the 1980s.²⁹⁶ Still, the extent of this change does not seem to coincide with the affirmation of new humanitarianism, as some scholars and practitioners advocated

²⁹² See, for example, Randeep Ramesh, "Sri Lanka expels UN official who criticised camps," *The Guardian*, September 06, 2009. Available at <http://www.guardian.co.uk/world/2009/sep/06/sri-lanka-un-official-camps> (accessed November 19, 2011).

²⁹³ Lateline, Australian Broadcasting Corporation, "Sri Lanka's UN Representative Joins Lateline," November 11, 2009. Available at <http://www.abc.net.au/lateline/content/2008/s2740297.htm> (accessed November 19, 2011).

²⁹⁴ UNSG, "Statement attributable to the Spokesperson for the Secretary-General on Sri Lanka," September 08, 2009, New York. Available at <http://www.un.org/apps/sg/sgstats.asp?nid=4053> (accessed November 19, 2011).

²⁹⁵ UNICEF Executive Director Ann M. Veneman quoted in UN News Centre, "Expulsion of UNICEF staff member in Sri Lanka brings dismay from UN," September 9, 2009, available at <http://www.un.org/apps/news/story.asp?NewsID=31974&Cr=sri+lanka&Cr1> (accessed November 19, 2011).

²⁹⁶ See Section 4.1.1.

or foresaw at the end of the 1990s. While the Parties expelling aid agencies have felt the need to justify their decision (thus confirming that international law allows this conduct only in specific cases, also in NIACs) and the majority of the States do not (or no longer) openly condemn as not-neutral humanitarian actors in case they speak out against violations of human rights (and they have even required these actors to report on violations to bodies created by the UNSC or to the UNSG), still the principle of sovereignty remains present, so that, for example, no clear condemnation of the expulsions was adopted by States within the UNSC. In general, there is agreement that actors who find themselves in a country to undertake humanitarian activity should respect certain limits, but the emphasis on protection seems to be stretching these limits and some countries affected by armed conflict have become particularly sensitive, possibly also as due to fears of external interference.

This shift towards speaking out as a prominent component of humanitarian action seems to have been endorsed only to a certain extent also by some of the major humanitarian agencies themselves. While it is true that the ICRC has proposed a definition of protection that comprises environment-building actions, this definition has been subject to criticism, and the organisation still remains faithful to its Fundamental Principles and considers denunciation as an exceptional measure of last resort. Similarly, MSF seems to have re-focused first and foremost on the needs of people, refusing to involve in debate on political solutions and resorting to speaking out only in a careful way and in exceptional cases. It appears that other actors have engaged in what has been labelled “relative” or “pragmatic” neutrality, sufficient to maintain the appearance of general non-involvement in the politics of war, thereby retaining access to affected populations in order to provide relief, but flexible enough to allow different forms of advocacy to respond to life-threatening situations.²⁹⁷ Such an approach would confirm the idea that humanitarians shall not get involved in politics and risk otherwise being expelled, with negative consequences for people in need.

5.4. Conclusion: What Room for a Principled Approach?

The evolution of the role of humanitarian actors in monitoring respect for international law, in activities aimed at ensuring respect for the human rights of individuals, and in advocacy – in other words, in all those activities referred to as protection – has undoubtedly marked changes in the practice of these actors and in

²⁹⁷ Humanitarian Policy Group, *Humanitarian Advocacy in Darfur: The Challenge of Neutrality*, HPG Policy Brief 28 (London: Overseas Development Institute, 2007), 7.

States' reactions to this practice. The condemnation of MSF's denunciation of the Ethiopian government's conduct in the 1980s, or at least indifference against the following expulsion of MSF, implied recognition that humanitarian workers that went beyond a focus on the provision of relief could be legitimately expelled. This view has arguably changed, with humanitarian organisations claiming the right and moral duty to engage in advocacy in favour of the victims for whom they work, and States not generally condemning this claim and the corresponding practice.

During the 1990s it seemed that the legitimate role in advocacy by relief actors might be developing to comprise also calls for political or military intervention and the proposal of political solutions to a crisis, contrary to ideological neutrality but possibly also to military neutrality and to the humanitarian (a-political) nature itself of the actor.²⁹⁸ Such a broad right does not appear as having been confirmed by recent practice. Already in the 1990s, in some instances States asserted their right to control the work of relief personnel and organise it, and prosecuted these personnel if they overstepped their mission and/or directly participated in hostilities, for example in Rwanda and BiH. The discourse on protection elaborated since the beginning of the 21st century by humanitarian actors, as well as the development of the concept of POC by the UNSC, with a role for humanitarians both in the provision of relief and in monitoring respect for international law and sanctions regimes by Parties to the conflict, have confirmed that the mere provision of items and services to civilians in need is only one part of the work of humanitarian actors. However, State and non-State Parties to armed conflicts have reasserted the existence of clear boundaries for humanitarian action in order for it to be entitled to special protection, and other States have not contested the existence of these limits in principle, rather sometimes the facts of the case.

In other words, even if humanitarian action comprises both assistance and protection, and impartial humanitarian organisations have a right under IHL treaties to offer their services to Parties to armed conflicts for assistance to and protection of civilians, the balance between humanitarian considerations and military necessity enshrined in the treaties still stands. Recent practice suggests that if actors involved in the provision of assistance do not respect the principles of humanitarian action, if their action is considered as trespassing into the political or military sphere, their mission might be terminated and the staff or the organisation itself might be expelled. In order to be entitled to special protection, humanitarian actors shall stay clear of

²⁹⁸ On humanitarian agencies becoming political, see, for example, Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Ithaca and London: Cornell University Press, 2011), 195-198.

political positions. Still, the ongoing tensions around these boundaries and the latter's contested nature are once again demonstrated by initiatives such as those adopted by the UNSC in the field of sanctions, inviting agencies to indirectly share information for it to be used as the basis of political decisions.

6. The Current Legal Framework Regulating Humanitarian Action in Conflict: Rules and Limits for the Actors Involved

The analysis developed in the previous Chapters has revealed that the legal regime provided by IHL treaties for the provision of humanitarian assistance to civilians in the course of armed conflict has been reaffirmed in declaration and statements, but also challenged in various ways in practice. Problems have emerged, to which pragmatic solutions have been often proposed, and for which this research has tried and identified answers offered by international law, in particular IHL (but also IHRL).

The aim of this Chapter is thus to summarise the results emerging from this study by providing a systemic picture of the current legal regime on the provision of humanitarian assistance to civilians in conflict, clarifying the rights and duties of the various actors involved in this activity, and the consequences that they might face if they overstep the limits imposed upon them by the law. The central focus of all humanitarian activities shall be the civilians in need of assistance, who have an important role themselves in responding to crises. Moreover, other subjects involved in the provision of this assistance can influence, through their operational choices, the position and security of these civilians. In this sense, it is important to clarify the rights and limits of each kind of subject in the field of humanitarian action, also in terms of interaction with each other, and illustrate the possible legal and practical consequences of their choices, including unintentional negative impacts upon beneficiaries.

Starting from the meaning itself of the concept of humanitarian assistance, State practice is univocal in differentiating between humanitarian and development assistance, with the former focusing on the provision of goods and services essential for the survival of people in need. Having purely live-saving purposes, thus a non-political nature, humanitarian assistance does not represent an interference with hostilities. Practice confirms that humanitarian assistance comprises goods and services; while food, medicine and shelter are undoubtedly components of humanitarian assistance, objects for religious worship and education are more controversial. Objects for religious worship are explicitly listed as relief in IHL treaties,¹ but no such reference has been found in the practice analysed, which has on the other hand revealed a trend towards considering proselytising as exceeding the legitimate boundaries of humanitarian action.²

¹ See arts. 23, 38, and 58 GC IV; arts. 69 and 70 AP I.

² See Section 5.3.3.4.

Indeed, nothing in IHL treaties allows proselytising by relief agencies.³ Regarding education, the UNSC has repeatedly classified it as a component of humanitarian assistance for children,⁴ it features in the definition of humanitarian assistance in the Kampala Convention,⁵ and it may be argued that it should indeed be considered as responding to basic needs of children, at least in protracted emergencies, also taking into account that IHL contains special provision on the protection of children that include, for example, obligations for the Occupying Power related to education.⁶

Much of the practice connects humanitarian assistance to the principles of humanity, impartiality, neutrality (and independence). However, it seems that these instances of practice usually refer to external humanitarian assistance, even if some examples were found where it appeared that respect for the principles was required also from Parties to the conflict providing relief to civilians in the territory under their control and from local relief actors, as in the case of the Guiding Principles on IDPs and the Kampala Convention.⁷ This would be confirmed for example by measures adopted by the U.S. and NATO in their military doctrines following complaints about the labelling of ‘hearts and minds’ strategies as humanitarian.

While humanitarian assistance is mostly associated with *external* relief actions, concerned civilians, as mentioned, are the first and central actors in the response. Furthermore, situations like Afghanistan and Iraq at the beginning of the 21st century have brought into the spotlight the role of the Parties to the conflict in the provision of relief to civilians, and, especially in NIACs, increasing attention has been given to the position of locally recruited staff and the risks they run.⁸ To illustrate the position of all these categories of actors under IHL when engaging in the provision of relief to civilians, possible interactions among them and ensuing practical and legal implications, the Chapter starts by clarifying the role of Parties to the conflict and local actors, focusing then on external subjects, and in all cases distinguishing among the different types of subjects concerned, including the military.

³ See arts. 23, 38, and 58 GC IV; arts. 69 and 70 AP I.

⁴ See Section 3.2.1.1.

⁵ Art. 9(2)(b); see Section 3.2.2.1.

⁶ See art. 50 GC IV. See also art. 24, 94 GC IV. For detained people, see arts. 108 and 142 GC IV.

⁷ See Sections 3.2.1.1.1. and 3.2.2.2.

⁸ For example, Annex I to the 2011 UN OCHA-commissioned report *To Stay and Deliver* is devoted to ‘safety and security for national humanitarian workers’, defined as ‘paid personnel working on assistance programming in their home countries’, including ‘both the national staff of international organisations and the personnel of local or national aid organisations.’ Abby Stoddard, Adele Harmer, and Katherine Haver, *Safety and Security for National Humanitarian Workers – Annex I to: To Stay and Deliver – Good Practice for Humanitarians in Complex Security Environments* (New York: UN, 2011), 3. Jan Egeland, Adele Harmer and Abby Stoddard, *To Stay and Deliver – Good Practice for Humanitarians in Complex Security Environments* (New York: UN, 2011).

6.1. The Role of Parties to the Conflict and Local Actors

6.1.1. The Primary Responsibility of Parties to the Conflict

6.1.1.1. *Satisfying the Basic Needs of Civilians*

While not explicitly affirmed in IHL treaties except for occupation, subsequent international practice has affirmed the primary responsibility of the Parties to the conflict to satisfy the basic needs of civilians in territory under their control, as part and parcel of the more general responsibility of these Parties to protect civilians (constantly reasserted in UN practice and in other instances of State practice since the late 1990s).

As seen in Chapter 2, IHL spells out such a duty only with reference to occupation, first in Article 55 GC IV and then in Article 69 AP I, the latter imposing this obligation upon the Occupying Power ‘to the fullest extent of the means available to it and without any adverse distinction’. The adoption of these clauses responds to the need to ensure the well-being of civilians under the control of a Party different from their State of nationality. Similarly, protected persons under GC IV are specifically entitled under IHL treaties to receive medical care to the same extent as nationals of the State in whose control they find themselves and, if they are deprived of their liberty, to receive the necessary medical attention, adequate food and clothing, and be interned in premises that are adequate from the point of view of hygiene and health.⁹

On the other hand, the relationship of a State with its own nationals was left mostly unregulated by GC IV, and even in AP I the proposal to impose a duty on each Party to satisfy the basic needs of civilians in its territory without any adverse discrimination was rejected. Such a choice was due both to the view that IHL should not deal with the relationships between a State and its own nationals, which were traditionally a matter of domestic jurisdiction, and that a State should be allowed in IAC to discriminate among its own nationals in terms of satisfaction of their basic needs, so as to guarantee, for example, the continuation of the industrial production necessary to sustain the war effort.¹⁰ Similarly, no explicit duty is imposed in NIAC on State and/or non-State Parties to satisfy the basic necessities of civilians under their control.

This lack of regulation clearly reflects the will of States, so that it is arguable that IHL in this instance can be considered as *lex specialis* vis-à-vis IHRL.¹¹ However, some limits to the freedom of action

⁹ See arts. 38 and 81, 85, 89, 91 GC IV; on detained persons, see also art. 11 AP I.

¹⁰ See Section 2.1.4.1.

¹¹ On *lex specialis*, see Section 1.3.1. Confirming the gaps in IHL regulation in this area, the ICRC Study notes: ‘It would make sense, although practice does not yet clarify this, to require all parties to a conflict to ensure their populations have access to the basic necessities, and if sufficient supplies are unavailable, to appeal for international assistance and not wait until such assistance is offered.’ ICRC Study – Rules, 197 (commentary to rule 56, on access for humanitarian relief to civilians in need).

of States may derive from their non-derogable obligations under IHRL.¹² States continue to be bound by customary and treaty IHRL obligations in the course of armed conflict, unless they resort to the derogation clauses explicitly provided in human rights treaties. They will thus have to guarantee the right to life of all those subject to their jurisdiction, which is non-derogable at least in terms of the right not to be arbitrarily deprived of one's own life; the right to be free from torture (also non-derogable); and, to the fullest of the resources available to them, the rights to an adequate standard of living, including the right to food, and the right to the highest attainable standard of physical and mental health. Arguably, the core content of these rights, such as the right to be free from hunger, is also non-derogable in nature.¹³

It should be underlined that these obligations might be violated by a State not just towards those who find themselves within its boundaries, but also those who, outside this territory, are within the jurisdiction of that State. While in case-law different views exist in terms of the extraterritorial applicability of human rights treaties, there seems to be a certain level of agreement that at least with respect to individuals that are under the full control of a State, for example in detention, fundamental rights shall be guaranteed, thus confirming the specific IHL provisions on the satisfaction of the basic needs of persons deprived of their liberty in IAC and NIAC. More controversial is the duty of a State to respect IHRL obligations towards civilians in occupied territory, since actual control over such territory might vary. In the area subject of this study, however, IHL has taken into account the situation of dependence of the civilian population of the occupied territory from the Occupying Power, and explicitly provided for specific guarantees for the satisfaction of their basic needs, as already seen.¹⁴ Finally, in case of invasion of a territory, while the extraterritorial applicability of IHRL treaties might be contested due to the limited control over the population possibly exercised by the invader, civilians of the invaded territory will most probably be protected persons under GC IV, thus entitled to specific guarantees.

For a discrimination in the enjoyment of human rights among individuals under its jurisdiction to be legitimate, a State might be required to prove not only that it does not have enough resources to adequately

¹² On the other hand, the applicability of IHRL obligations to non-State armed groups is still contested.

¹³ See Section 1.3.1. Respect for these non-derogable rights is arguably also embodied in the guarantees of humane treatment under Common Article 3 and Articles 75 AP I and 4 AP II. The customary nature of Common art. 3 is widely agreed, and Greenwood argues that art. 75 AP I is 'regarded as declaratory of customary international law', and the guarantees listed in art. 4 AP II are arguably 'declarations of customary law'. The same would be true for guarantees for persons whose liberty has been restricted under art. 5 AP II. Christopher Greenwood, "Protection of Peacekeepers: The Legal Regime," *Duke Journal of Comparative & International Law* 7, no. 1 (1996), 190-192.

¹⁴ For example, according to Yutaka-Arai, 'the right to food and adequate standard of living under Article 11 ICESCR can be given much more specific meaning in the context of armed conflict and occupation by reference to the provisions on humanitarian relief.' Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2009), 412 (fn. 47).

satisfy the basic needs of all those in its jurisdiction, so that priorities among them need to be established, but also that the necessary resources could not be obtained through international cooperation and assistance, as clarified by human rights treaty bodies.¹⁵ Indeed, one way available to States to fulfil their duties related to the satisfaction of the basic needs of civilians under their control (and the way that has been most regulated under IHL) is to call for, or at least accept, humanitarian assistance provided by local organisations or external actors.

6.1.1.2. Parties to the Conflict and Relief Actions and Actors

Not only do IHL treaties contain several provisions in this sense, but calls upon Parties to the conflict to accept and facilitate the work of humanitarian actors in favour of civilians in need have also constantly featured in UN organs' resolutions, statements by States, and other instances of practice analysed in this study.¹⁶ In this sense, a duty to accept relief, meaning not to arbitrarily refuse it if offered, seems to have emerged, while explicit statements of the responsibility of a State to call for outside assistance, following from the responsibility of Parties to a conflict to protect civilians in territory under their control, have been far less present in State practice.¹⁷

6.1.1.2.1. Parties to the Conflict and Local Relief Actors

IHL embodies a balance between humanitarian considerations and the military concerns of belligerents, granting Parties to an armed conflict specific rights in terms of regulation of and control over the provision of relief in favour of civilians. Authorisation by the State is required for local relief societies, which are thus subject first and foremost to national law. Moreover, for example, State Parties to IAC shall grant all necessary facilities to organisations assisting protected persons under GC IV, but 'within the bounds set by military or security considerations.'¹⁸ The ICRC Commentary recommends that such exception should be interpreted restrictively by belligerents, with limitations being imposed only exceptionally and temporarily, and only when really necessary.¹⁹ The Detaining Power has the right to limit the number of relief

¹⁵ See Section 1.3.1.

¹⁶ In particular, see Sections 3.2.1.1.2., 3.2.1.2.1., and 3.2.2.3.

¹⁷ Mention can be made of the Kampala Convention (Section 3.2.2.2.); according to A/RES/46/182, humanitarian assistance should be provided 'in principle on the basis of an appeal by the affected country' (Section 3.2.1.1.2.).

¹⁸ Art. 30 GC IV.

¹⁹ ICRC Commentary GC IV, 218-219. The Commentary draws an analogy with art. 9(3) GC IV, dealing with limits to the operations of the Protecting Powers, with refers to '*imperative necessities of security*' (emphasis added). Regarding the concept of

organisations working in favour of persons deprived of their liberty, provided that ‘the supply of effective and adequate relief to all protected persons’ is guaranteed.²⁰ The same applies in case of occupation, when the Occupying Power also has the right, but only on a temporary and exceptional basis, for urgent reasons of security, to limit the continuation of their usual activities by National Red Cross Societies, other relief societies, and special organisations of a non-military character and to require changes in their personnel or structure.²¹

Parties to IAC shall also allow the civilian population and aid societies to exercise their right of initiative but limited to the provision of medical care, in terms of collection and care for the wounded, sick and shipwrecked, ‘even in invaded or occupied areas’; they shall grant local National Red Cross Societies all necessary facilities to carry out humanitarian activities in accordance with IHL treaties and Red Cross Fundamental Principles, and similar facilities only ‘as far as possible’ to other ‘duly authorised’ humanitarian organisations performing in accordance with IHL treaties.²² Finally, in NIAC, local relief societies may offer their services in favour of victims of the conflict and the civilian population may offer to collect and care for the wounded and sick and, even if this offer can be refused, it has been argued that it cannot be refused on arbitrary grounds.²³ While AP II does not specify who is entitled to accept or refuse such offers, it is arguable that it is up to the Party controlling the territory where the relief society or the population making the offer find themselves.

The practice analysed in this study does not seem to have challenged or altered the discretion of States in regulating and authorising local relief societies devoted to the care of victims of conflict. Increased attention has been given to the risks run by local relief workers, but the rights of Parties to the conflict in terms of authorising them and requiring them to respect local laws have not been questioned. For example, in general, the closure of local organisations for violation of national laws has not been met with condemnation as illegitimate.²⁴ Still, Parties are bound to protect personnel of local relief organisations, even if not duly

‘imperative military necessity’ (see, for example, art. 71 AP I), it can be defined as ‘rendered absolutely necessary by military operations’. See ICRC Commentary APs, 659 (pars. 2120-2121) (commentary to art. 54(5) AP I). Similarly, see ICRC Commentary GC IV, 576-577 and 601 (commentary to arts. 143 and 147 GC IV)

²⁰ Art. 142 GC IV.

²¹ See art. 63 GC IV.

²² Arts. 17 and 81 AP I.

²³ See art. 18(1) AP II and ICRC Commentary APs, 1478 (par. 4876).

²⁴ For example, the Afghan Government revoked the licenses of 172 (including 20 foreign) and 149 (of which four international) NGOs in May and in November 2010 respectively, based on their failure to submit six-monthly reports to the Ministry of Economy. See UN Humanitarian Information Unit – IRIN, “Afghanistan: Umbrella bodies deem NGO clean-up ‘fair’,” May 13, 2010. Available at <http://www.irinnews.org/Report.aspx?ReportId=89112> (accessed April 25, 2011). UN Humanitarian Information Unit –

authorised, as civilians as long as they do not take part in hostilities. UNSC and UNGA resolutions might hint towards additional protection of local relief personnel, in case they are considered to be covered by references to ‘humanitarian personnel’: if so, in particular, their freedom of movement shall be arguably guaranteed in IAC and NIAC.²⁵ Local relief personnel should enjoy freedom of movement also under IHRL,²⁶ but the latter might allow for restrictions arguably broader than those permitted under IHL (at least) in IAC, where limitations can be justified only by reasons of imperative military necessity under Article 71 AP I.²⁷ Also, the possibility of opposing obligations under IHRL to non-State actors might be controversial.

6.1.1.2.2. Parties to the Conflict and External Relief Actions

The rights and duties of Parties to the conflict towards external actors implementing relief actions are more clearly regulated in IHL treaties: while these treaties provide a very scarce regulation of the relations between a State and its own nationals, the intervention of external actors exceeds this domestic sphere. IHL features an unconditional duty for a State to agree to external relief actions in favour of the civilian population, if the latter is inadequately supplied, only in case of occupation.²⁸ Such a duty has been confirmed by the practice analysed in this study, especially in statements and resolutions regarding the occupied Palestinian territory and the duties of Israel as an Occupying Power. Furthermore, as already seen, with reference to Iraq, the UNSC noted the Occupying Powers’ obligations under Article 55 GC IV, called on ‘the international community ... to provide immediate humanitarian assistance to the people of Iraq, both

IRIN, “Afghanistan: NGOs under pressure in government anti-corruption drive,” November 12, 2010. Available at <http://www.irinnews.org/Report.aspx?ReportID=91066> (accessed April 25, 2011).

Again, at the beginning of 2012 ‘[a]lmost 10 percent of NGOs in Afghanistan -- 175 in number -- were ordered shut ... by the Economy Ministry after they failed to submit annual reports due to inefficiency, corruption and oversight.’ Miriam Arghandiwal, “As foreign aid dries up, Afghan NGOs fight to survive,” Reuters website, July 5, 2012. Available at <http://www.reuters.com/article/2012/07/05/us-afghanistan-aid-tokyo-idUSBRE8640G720120705> (accessed July 20, 2012).

In 2007, Sudan ‘temporarily suspended 52 local non-governmental organizations (NGOs) working in South Darfur state after an investigation found they did not comply with regulations’. Reuters, “Sudan temporarily suspends 52 local NGOs in Darfur,” Reuters website, March 22, 2007. Available at <http://www.reuters.com/article/2007/03/22/us-sudan-darfur-suspension-idUSMCD22824620070322> (accessed July 20, 2012).

See, more in general, Section 5.3.1.3.1.

²⁵ On this, see Sections 6.1.3. and 6.2.

²⁶ See, for example, art. 12 ICCPR.

²⁷ Art. 12(3) ICCPR envisages the possibility of restrictions to freedom of movement, as long as they ‘are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.’ On restrictions, see also Human Rights Committee (HRC), General Comment 27: Freedom of movement (Art.12), 11 February 1999, CCPR/C/21/Rev.1/Add.9, pars. 11-18.

Similarly, on the right to freedom of movement and legitimate restrictions, see arts. 22 ACHR, 2 Protocol No. 4 to ECHR, 12 AfCHPR. See also *Internally displaced persons-Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57 – Compilation and analysis of legal norms*, E/CN.4/1996/52/Add.2, 5 December 1995, pars. 222-235; *Report of the Representative of the Secretary-General Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1997/39 – Addendum: Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, E/CN.4/1998/53/Add.1, 11 February 1998, pars. 34-45.

²⁸ See art. 59 GC IV.

inside and outside Iraq in consultation with relevant States’, and urged ‘all parties concerned, *consistent with the Geneva Conventions and the Hague Regulations*, to allow full unimpeded access by international humanitarian organizations to all people of Iraq in need of assistance and to make available all necessary facilities for their operations and to promote the safety, security and freedom of movement of United Nations and associated personnel and their assets, as well as personnel of humanitarian organizations in Iraq in meeting such needs’.²⁹ It is interesting to note that, while the duties of the Occupying Power to accept relief actions in case the civilian population of the occupied territory is inadequately supplied (‘in need of assistance’, in the words of the UNSC) and to allow the passage of relief actions are indeed provided in GC IV, the UNSC mentioned also safety, security and freedom of movement of relief personnel, enshrined in Article 71 AP I.

Occupying Powers themselves have not questioned the existence of duties for them in relation to the civilian population of the occupied territory, rather insisted (in the case of Israel in particular) on the strictly essential character of the needs whose satisfaction shall be guaranteed, on the criteria that external relief schemes shall satisfy and on the safeguards established under IHL to guarantee the a-political nature of these schemes.³⁰ Even when violations of the applicable legal framework have been lamented at the international level, justifications have been centred on the relevant rules of IHL treaties, confirming their validity. For example, when complaining against the denial of access to Gaza by its ship, Libya underlined that it had agreed to inspection by a humanitarian organisation, to verify the purely humanitarian nature of the cargo.³¹ The margin of discretion inherent in the rules has sometimes also emerged, for example when the authors of the Goldstone report criticised the vagueness of the standard of ‘basic humanitarian needs’ of the civilian population.³² In other words, the threshold of when a population is ‘inadequately supplied’ in occupation, and analogously of when it is ‘not adequately provided’ with supplies essential to its survival in IAC and ‘suffering undue hardship owing to a lack of the supplies essential for its survival’ in NIAC is open to

²⁹ S/RES/1472 (2003), 28 March 2003, preamble and pars. 2 and 8. Emphasis added.

³⁰ See Section 3.2.2.2., as well as Spieker: ‘The right of humanitarian actors to offer assistance has at no point been challenged by the occupying powers in Iraq after the armed conflict in 2003.’ Heike Spieker, “Humanitarian Assistance, Access in Armed Conflict and Occupation,” in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2008), par. 33. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012).

³¹ See Section 5.3.3.1.

³² See Section 3.2.1.3.

interpretation.³³ In any case, it should be acknowledged that needs assessments and reports by humanitarian actors might significantly contribute to appraisals in this field.

In IAC and NIAC, IHL treaties do not contain a clear obligation for Parties to the conflict to agree to relief actions, they only oblige them in IAC to allow passage of specific kinds of relief for certain categories of persons, even if directed towards the enemy territory.³⁴ This obligation is subject to a series of conditions, including guarantees that the relief will not be diverted or will provide an advantage to the military effort to the enemy, the possibility to condition the passage to distribution under the supervision of the Protecting Powers (or its substitute or, in case of absence, the ICRC or an impartial humanitarian organisation, as seen in Section 2.1.5.2.), and the right to prescribe technical arrangements for the passage. Article 70 AP I broadens the categories of addressees and of goods whose passage shall be permitted, and limits the discretion of States in refusing such passage, rather allowing them only to impose conditions to make sure that relief benefits only legitimate addressees.³⁵

As mentioned in Section 2.1.4.2.1., already during the negotiations of the two APs there was agreement that relief actions under Articles 70 AP I and 18 AP II could not be refused for arbitrary reasons. In particular, through a combined reading of the two aforementioned articles and the two provisions prohibiting starvation of civilians as a method of warfare (Articles 54 AP I and 14 AP II), if relief actions fulfilling all the criteria provided in Articles 70 AP I and 18 AP II are available and the population is threatened by starvation in the absence of such action, no refusal could be arguably opposed. In other words, the discretion left to the Parties in evaluating when civilians are inadequately supplied or suffering undue hardship would find a limit in duties imposed on Parties to IAC and NIAC through the prohibition of starvation: ‘basic humanitarian needs’ would be all these needs that have to be satisfied in order for civilians to avoid starvation. Within this limits, the Parties would be obliged both to permit the transit of relief for civilians (beyond the narrow hypothesis in Article 23 GC IV), for example to a besieged or blockaded area, or to an area controlled by rebels in NIAC, and arguably to allow access of relief for the fulfilment of the basic needs of civilians in the territory (other than occupied territory) under their control.

6.1.1.2.3. The Limit of Starvation

³³ See Section 3.1.2.3.

³⁴ See art. 23 GC IV.

³⁵ See also ICRC Commentary APs, 827-828 (pars. 2848-2856).

Clearly, the exact scope of these obligations depends on the meaning of ‘starvation’, and it would be wider if the customary nature of Articles 54 AP I and 14 AP II was acknowledged, given that the APs do not enjoy universal participation and starvation of civilians as a method of warfare is included as a war crime in the ICC Statute only for IAC, possibly implying that when the Statute was negotiated a customary rule prohibiting starvation in NIAC did not exist, according to States. Both Articles 54 AP I and 14 AP II prohibit starvation of civilians as a method of warfare and the attack, destruction, removal or rendering useless of objects indispensable to the survival of the civilian population.³⁶ Article 54 AP I then provides for some exceptions, in the sense that it prohibits the aforementioned conducts against objects indispensable to the survival of civilians only if performed ‘for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party,’³⁷ and makes an exception to the prohibition in case the objects are used *solely* to sustain the armed forces, or to directly support military action. In any case, a safeguard clause is provided to the extent that no action can be undertaken against these objects ‘which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement’ and such objects shall not be targeted by way of reprisals. Finally, an explicit exception is made for the right of a Party to adopt a so-called ‘scorched earth policy’, to defend its national territory (under its control) against invasion and due to imperative military necessity.

State practice has revealed that Israel, which is not a Party to AP I, has acknowledged the applicability of Article 54 AP I to its own conduct, while U.S military manuals make reference to the prohibition to destroy objects indispensable to the survival of the civilian population, for the specific purpose of denying the population of their use, but not to the more general prohibition of starvation as a method of warfare.³⁸ The customary nature of Articles 54 AP I and 14 AP II, and of the corresponding paragraphs regulating naval blockades in the San Remo Manual, has been supported by rapporteurs and commissions of inquiry, and by scholars more in general.³⁹ Still, the threshold of starvation prohibited by IHL and the criteria under which such starvation is prohibited, especially in cases of naval blockade and siege warfare, have been

³⁶ Examples of indispensable objects are ‘food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works’.

³⁷ However, the prohibition is valid whatever the motive for adopting the conduct, ‘whether in order to starve out civilians, to cause them to move away, or for any other motive.’

³⁸ See Section 3.2.2.3.

³⁹ See Section 3.2.1.3. See also, on art. 14 AP II, Ruth Abril Stoffels, *La Asistencia Humanitaria en los Conflictos Armados: Configuración Jurídica, Principios Rectores y Mecanismos de Garantía* (Valencia: Tirant lo Blanch, 2001), 185-186.

subject to different interpretations, so that an interpretation that broadens protection of civilians further than what is provided in the APs does not seem to have emerged in customary law.

The ICRC Study affirms the existence of two customary rules, applicable both in IAC and NIAC, prohibiting the use of starvation of the civilian population as a method of warfare and ‘[a]ttacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population’.⁴⁰ The rules are quite broad, broader than Article 54 AP I itself. However, the commentaries in the ICRC Study seem to narrow the scope of the rules, specifying that siege warfare and the imposition of naval blockades would remain allowed ‘as long as the purpose is to achieve a military objective and not to starve a civilian population’, so that in case civilians are inadequately supplied the besieging or blockading Party shall allow the passage of relief.⁴¹

Stoffels argues that it would be admissible also to offer civilians to leave the besieged area, since this conduct would find an express legal basis in Article 17 GC IV, which obliges the Parties to an IAC to ‘endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases’.⁴² Furthermore, it would not violate Article 54(2) AP I, prohibiting the destruction of objects indispensable to the survival of civilians to force the latter to move away, since the civilian population would be displaced only temporarily, to avoid that military operations affect them.⁴³ On the contrary, Dinstein more convincingly interprets the prohibition under Article 54(2) AP I as implying that a simple offer to civilians to leave a besieged locality would amount to a violation of the prohibition of starvation.⁴⁴ Indeed, Article 54(3) AP I provides that the prohibition in Article 54(2) shall not apply to objects used by the adverse Party in direct support of military action, but ‘in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate

⁴⁰ ICRC Study – Rules, 186 and 189, rules 53-54.

⁴¹ ICRC Study – Rules, 188-189. In this sense, see also, for example, Yoram Dinstein, “The Right to Humanitarian Assistance,” in *Karel Vasak Amicorum Liber: Les Droits de l’Homme à l’Aube du XXI^e Siècle / Los Derechos Humanos ante el Siglo XXI / Human Rights at the Dawn of the Twenty-First Century*, by Karel Vasak et al. (Brussels: Bruylant, 1999), 187-191. In relation to art. 70 AP I, France and the UK declared that the article ‘n’a pas d’implication sur les règles existantes dans le domaine de la guerre navale en ce qui concerne le blocus maritime, la guerre sous-marine ou la guerre des mines’ and that the article ‘does not affect the existing rules of naval warfare regarding naval blockade, submarine warfare or mine warfare.’ However, the exact scope of these declarations is not clear, also considering that the French military manual confirms the obligations to permit the passage of relief for civilians in need in case of naval blockade. See Julie Gaudreau, “Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre,” *International Review of the Red Cross* 85, no. 849 (March 2003), 174-175. The texts of the French and British declarations are available at <http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument> and <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> respectively (accessed July 12, 2012).

⁴² Abril Stoffels (2001), *supra* fn. 39, 181-182. In this sense, see also UK military doctrine, Section 3.2.2.3.

⁴³ See Abril Stoffels (2001), *supra* fn. 39, 182-183.

⁴⁴ See Yoram Dinstein, “Siege Warfare and the Starvation of Civilians,” in *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven*, ed. Astrid. J.M. Delissen and Gerard J. Tanja (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991): 145-152.

food or water as to cause its starvation or force its movement.’ A starvation policy causing displacement of civilians is thus prohibited even if does not aim to cause such displacement.

The exceptions of the attack of objects indispensable to the survival of the civilian population if they qualify as military objectives and of the scorched earth policy are confirmed in the ICRC Study for IAC, while their applicability to NIAC is considered doubtful.⁴⁵ It has thus been argued that a scorched earth policy, even if only for imperative military necessity, would be permissible also in case one’s own population is threatened by starvation, applying as *lex specialis* with respect to the right to adequate food.⁴⁶ However, it should be noted that the ICRC Commentary to Article 54 argues that ‘a belligerent Power, *while preserving the interests of its own population*, may carry out destructions in that part of its own territory where it exercises authority’.⁴⁷ Similarly, the Canadian Manual admits scorched earth policy in one Party’s own territory, but arguing that the ensuing destruction ‘should not leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.’⁴⁸ In any case, IHL allows scorched earth policies only as a strict exception, absolutely required by military operations and on a temporary basis, and the Parties remain bound by their obligation to accept impartial humanitarian relief actions in case civilians risk starvation.

Practice analysed in this study reveals that sieges and blockades have been generally met with calls to allow the passage of humanitarian relief, as in the cases of BiH, Afghanistan, Gaza (and other occupied Palestinian territory), and the civil conflict in Libya.⁴⁹ No example of scorched earth policy was found to clarify its interpretation and limits to its implementation. More in general, the analysis of the practice has revealed that calls on the Parties to both NIACs and IACs to allow the access of humanitarian assistance to civilians in need have been constant throughout the past decades. These calls were not explicitly based on the risk of starvation for the civilian population, so that, according to Barber, recent years have witnessed an expansion in relation to the position adopted by the ICRC Study, according to which the duty to consent to

⁴⁵ ICRC Study – Rules, 192-193. However, according to the ICRC Study, practice confirms that ‘when such objects are not used as sustenance solely for combatants but nevertheless in direct support of military action, the prohibition of starvation prohibits the attack of such objects if the attack may be expected to cause starvation among the civilian population’. Ibid.

⁴⁶ See Arne Willy Dahl, “The Conduct of Hostilities and their Impact on Humanitarian Assistance,” in *The Conduct of Hostilities Revisiting the Law of Armed Conflict: 100 Years after the 1907 Hague Conventions and 20 Years after the 1977 Additional Protocols. Proceedings of the Roundtable on Current Problems of International Humanitarian Law, Sanremo, 6-8 September 2007*, ed. Gian Luca Beruto (Milan: Nagard, 2008), 126-127.

⁴⁷ ICRC Commentary APs, 658 (par. 2119). Regarding the Occupying Power, when withdrawing it may apply a ‘scorched earth’ policy in case of military necessity, but without affecting objects indispensable for the survival of the civilian population. Ibid., 659 (pars. 2121-2122).

⁴⁸ See Section 3.2.2.3.

⁴⁹ See Section 3.2.1.2.1.

relief actions would be a corollary of the prohibition of starvation and thus such consent (to relief actions that satisfy all the necessary criteria) must be given if the civilian population is threatened by starvation.⁵⁰ Barber concludes that

‘[i]t may be argued ... that there is sufficient *opinio juris* and state practice to support the claim that there is an obligation in customary international law to consent to and facilitate humanitarian assistance, in both international and non-international armed conflicts, *whether or not* the denial of that assistance may lead to starvation or otherwise threaten the survival of a civilian population.’⁵¹

The ICRC Commentaries to Articles 70 AP I and 18 AP II when interpreting the condition that relief actions shall be undertaken if the civilian population is respectively ‘not adequately provided with the supplies mentioned in Article 69 [AP I]’ and ‘suffering undue hardship owing to a lack of the supplies essential for its survival’ refer to the *essential character* of relief for the survival of the population, even if the Commentary to Article 18 AP II might seem to adopt a wider approach when mentioning that ‘it is appropriate to take into account the usual standard of living of the population concerned and the needs provoked by hostilities’.⁵² Still, when determining the basis for a duty to consent to such relief actions, reference is made to the prohibition of starvation.⁵³ Some of the instances of State practice analysed explicitly connect the duty to allow the passage of relief or agree to relief actions to the prohibition of starvation of civilians as a method of warfare, especially in cases of siege and blockade, thus confirming the latter as a limit for refusal.⁵⁴ As far as practice by the UNSC is concerned, while it has generally not explicitly referred to the threat of starvation, it has adopted calls and demands for humanitarian access in the context of situations that amount to a threat to international peace and security, also due to the humanitarian situation, so that it may be argued that such situations imply at least a risk for the survival of that population or part of it.

Even when States, the UNSG or UN agencies reacted to the expulsion or the ban of relief organisations by Parties to the conflict, they generally emphasised the tragic consequences for civilians in terms of survival (for example in the cases of Sudan and Somalia).⁵⁵ What might be argued is that the limit of starvation, in the sense of leading the population to suffer hunger, has been expanded to a more general limit of threatening survival of the population, covering also death by lack of medical care or lack of

⁵⁰ See ICRC Study – Rules, 105, 109 and 197 (commentaries to rules 31, 32 and 55).

⁵¹ Rebecca Barber, “Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law,” *International Review of the Red Cross* 91, no. 874 (June 2009), 391. Emphasis added.

⁵² ICRC Commentary APs, 817 and 1479 (pars. 2794 and 4881).

⁵³ See ICRC Commentary APs, 819-820 and 1479 (pars. 2805, 2808 and 4885).

⁵⁴ For example, UK manual and ICC Statute (Section 3.2.2.3.). See also experts’ reports on Gaza, Sri Lanka, Syria (Section 3.2.1.3.).

⁵⁵ See Sections 5.3.3.2. and 5.3.3.4.

essential commodities, such as shelter or fuel for heating in case of cold weather.⁵⁶ This corresponds to the approach followed for humanitarian exemptions to UN sanctions regimes,⁵⁷ as well as to the one adopted for the interpretation of starvation during the negotiations of the ICC Elements of Crimes, when it was acknowledged and agreed that starvation is ‘meant to cover not only the more restrictive meaning of starving as killing by hunger or depriving of nourishment, but also the more general meaning of deprivation or insufficient supply of some essential commodity, of something necessary to live’.⁵⁸

Similarly, while in most cases calls by the UNSC and States did not specifically mention the criteria to be respected by relief actions and actors to be covered by such calls, some of the conflict-specific resolutions and in general most of the relevant thematic resolutions referred at least to the principles of humanity, impartiality, and neutrality (and later independence) to be respected in the framework of the provision of humanitarian assistance,⁵⁹ so that it does not seem that the limits that Parties can impose under IHL treaties have been unequivocally eliminated.

6.1.1.2.4. Consent to Relief Action

The need for consent from the Party or Parties concerned is not spelt out explicitly in the relevant rule of the ICRC Study, which provides that both in IAC and NIAC ‘[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’ (Rule 55).⁶⁰ The commentary to the rule, while noting that most of the practice does not mention the need for consent,

⁵⁶ In this sense, see also art. VII(1) of the 2003 Bruges Resolution on Humanitarian Assistance adopted by the Institute of International Law: ‘Affected States are under the obligation not arbitrarily and unjustifiably to reject a bona fide offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.’ Institute of International Law, *Sixteenth Commission: Humanitarian Assistance: Resolution*, Bruges Session, September 2, 2003. Available at http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF (accessed February 2, 2011). On the other hand, principle 3 of the 1993 San Remo Guiding Principles provide more broadly:

The right to humanitarian assistance may be invoked:

- (a) when essential humanitarian needs of human beings in an emergency are not being met, so that the abandonment of victims without assistance would constitute a threat to human life or a grave offence to human dignity;
- (b) when all local possibilities and domestic procedures have been exhausted within a reasonable time, and vital needs are not satisfied or are not fully satisfied, so that there is no other possibility to ensure the prompt provision of supplies and services essential for the persons affected.

International Institute of Humanitarian Law, “Guiding Principles on the Right to Humanitarian Assistance,” *International Review of the Red Cross* 33, no. 297 (November-December 1993), 522.

⁵⁷ See Section 3.2.1.2.4.

⁵⁸ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge [etc.]: Cambridge University Press, 2003), 363. Similarly, see Michael Cottier, “Article 8 para. 2 (b) (xxv),” in *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, ed. Otto Triffterer (Munich: C.H.Beck-Hart-Nomos, 2008, 2nd ed.), 460-461.

⁵⁹ See Section 3.2.1.2.2.

⁶⁰ ICRC Study – Rules, 193.

acknowledges that it is necessary in practice for relief personnel to be able to operate effectively, and that it must not be refused on arbitrary grounds.⁶¹ This is explained in terms that '[i]f it is established that a civilian population is threatened with starvation and a humanitarian organisation which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent.'⁶² Starvation is confirmed as the limit to denial of access, and the right of the Party giving consent to control the relief action is also confirmed.⁶³

In IAC, consent needs to be given by the Party in whose territory the relief action is to be carried out, but, as mentioned in Section 2.1.4.2.1., according to the ICRC Commentary also by the Parties 'from whose territory an action is undertaken or from which relief has been sent' (while those through whose territory relief consignments pass are covered by Article 70(2) AP I, imposing the obligation to allow passage of relief).⁶⁴ However, no reference to such a need for the State from which the relief action has origin to consent to it has been found in the practice analysed in this study,⁶⁵ so that it may be argued that, while it cannot be excluded that such an obligation exists under national law or other branches of international law, it is not imposed upon the actors undertaking the relief action under IHL.

In NIAC, a clear difference regarding the subjects called to provide consent emerges between Common Article 3(2), which grants impartial humanitarian bodies the right to offer their services to all Parties, and Article 18(2) AP II, which requires consent from the State concerned for the undertaking of relief actions. As far as impartial humanitarian organisations are concerned, as will be analysed more in detail in Section 6.2.2.1.1. below, scholars have underlined the fact that AP II supplements and integrates GC IV, so that the right of humanitarian initiative under Common Article 3 remains valid. Both tried to argue, more in general, that consent from the State under Article 18(2) AP II would be necessary only in case the State is 'concerned', in the sense that relief actions need to pass through territory under its control in order to

⁶¹ See ICRC Study – Rules, 196-197. Similarly, according to the Bruges Resolution, 'States and organizations have the right to provide humanitarian assistance to victims in the affected States, *subject to the consent of these States*.' Institute of International Law (2003), *supra* fn. 56, art. VI(2). Emphasis added. However, it should be kept in mind that the Resolution was formulated so as to cover all emergency situations, not just armed conflict, and contains a saving clause safeguarding the applicability of IHL (see *Ibid.*, art. X(a)).

⁶² See ICRC Study – Rules, 197.

⁶³ See ICRC Study – Rules, 197.

⁶⁴ ICRC Commentary APs, 819-820 (pars. 2806-2807). On third States and consent, see Section 6.2.3.

⁶⁵ See in particular the practice examined in Sections 3.2.1.1.2., 3.2.1.2.1., and 3.2.2.3.

reach an area controlled by a non-State Party.⁶⁶ However, he himself acknowledged, referring to the episode involving India and Sri Lanka towards the end of the 1980s:

where the territory controlled by the insurgents is accessible from the sea or directly from another country, it seems to be a reasonable interpretation of Article 18 not to require the consent of the established government. Looking into State practice, however, I have some doubts whether this interpretation is really going to be accepted. It seems that certain States indeed object to any relief being shipped directly to territories controlled by insurgents.⁶⁷

Indeed, State consent to relief actions undertaken in NIAC by actors other than impartial humanitarian organisations is arguably required under IHL treaties and subsequent practice.⁶⁸ Nothing in the practice analysed throughout the study contradicts this interpretation.⁶⁹

Finally, in case of States where the government has collapsed and it is not possible to identify the relevant national authorities, according to the ICRC Commentary ‘consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay.’⁷⁰ In practice, in case different non-State armed groups control parts of the State, it seems advisable for impartial humanitarian organisations to apply Common Article 3(2) and negotiate with all these different Parties, so as to achieve safe access, and for other actors to verify the risks deriving for a presumption of consent for personnel of relief actions.

Once consent to a relief action has been granted, the Parties to the conflict are obliged in IAC to allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel, even if such assistance is destined for the civilian population of the adversary, protect relief consignments and

⁶⁶ See Michael Bothe, “Article 18 – Relief Societies and Relief Actions,” in *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, by Michael Bothe, Karl Joseph Partsch, and Waldemar A. Solf (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982), 696-697; similarly, see Michael Bothe, “Relief Actions,” in *Encyclopedia of Public International Law*, ed. Rudolph Bernhardt, Vol. 4 (Amsterdam [etc.]: North-Holland, 1981-1990), 176.

Bugnion argues that ‘High Contracting Party concerned’ in art. 18(2) AP II should be intended as referring to each Party to the conflict, see François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Oxford/Geneva: Macmillan/ICRC, 2003), 451-456.

On the other hand, Abril Stoffels underlines that the change from a duty for the Parties to the conflict to allow passage and facilitate entry of relief (without any explicit requirement for agreement), as proposed by the original ICRC draft, to ‘consent of the High Contracting Party concerned’, cannot be considered just a stylistic change. See Abril Stoffels (2001), *supra* fn. 39, 304-307. For the ICRC draft of AP II, see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. I, Part Three – Draft Additional Protocols to the Geneva Conventions of 12 August, 1949 – International Committee of the Red Cross, 43 (art. 33).

⁶⁷ Michael Bothe, “Relief Actions: The Position of the Recipient State,” in *Assisting the Victims of Armed Conflict and Other Disasters: Papers Delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22-24 June 1988*, ed. Frits Kalshoven (Dordrecht [etc.]: Kluwer Academic Publishers, 1989), 94.

⁶⁸ In this sense, see Olivier Paye, *Sauve Qui Veut? Le Droit International Face aux Crises Humanitaires* (Brussels: Bruylant, 1996), 92; Flavia Zorzi Giustiniani, *Le Nazioni Unite e l'Assistenza Umanitaria* (Naples: Editoriale Scientifica, 2008), 89-90. Lattanzi argues that IGOs and national governmental organisations would always have to ask for consent of the State concerned, in accordance with AP II, while NGOs can avoid doing it if they can have access to rebel-held territory directly. Flavia Lattanzi, “Assistenza umanitaria e consenso del sovrano territoriale,” in *Studi in ricordo di Antonio Filippo Panzera* vol. 1 (Bari: Cacucci, 1995), 426-428.

⁶⁹ See Sections 3.2.1.1.2., 3.2.1.4., and 3.2.2.3.

⁷⁰ ICRC Commentary APs, 1479 (pars. 4884).

facilitate their rapid distribution.⁷¹ At the same time, the obligation to allow the passage is subject to the right to prescribe technical arrangements, including search, and make such passage conditional on supervision by a Protecting Power over the distribution of relief. No diversion of relief is admitted ‘except in cases of urgent necessity in the interest of the civilian population concerned’, which may be envisaged for example if ‘there is a delay in the transport of perishable foodstuffs, always provided that they are replaced by fresh provisions as soon as normal conditions are restored’, or if ‘a disaster -- such as an earthquake, epidemic etc. -- affected the Party through whose territory the relief consignment was passing, so that the provisions were even more necessary for the victims of this disaster than for those for whom they had initially been intended’.⁷² It is arguable that the practice analysed, especially within UN bodies, supports a trend towards the emergence of similar duty in NIAC to facilitate relief actions to which consent has been given, possibly within limits due to security and military operations.

6.1.1.2.5. Relief Personnel

In case it is necessary that relief personnel form part of a relief action in IAC, again the Party in whose territory they will operate is entitled to approve their participation:⁷³ the lack of the requirement of consent in the relevant rule of the ICRC Study (Rule 31), which is deemed to be applicable to both IAC and NIAC,⁷⁴ has been explicitly criticised by the U.S., which has also underlined the scarcity of the practice presented to support the applicability of the rule on the duty to respect and protect humanitarian relief personnel in NIAC.⁷⁵ Indeed, under AP I, once given its approval, the Party concerned is obliged not just to respect these personnel, but also to protect them and to assist them ‘to the fullest extent practicable’ in carrying out their

⁷¹ See arts. 23 and 59-61 GC IV, and art. 70 AP I. Relief consignments for civilians in the occupied territory and for internees shall be granted passage and access free of charges. See arts. 61 and 110 GC IV, art. 69(2) AP I.

⁷² ICRC Commentary APs, 826 (par. 2847).

⁷³ Meyer has underlined that the various requirements and limits imposed on relief personnel by art. 71 AP I ‘help to illustrate that protected status under IHL is the result of governmental authorisation and control.’ Michael A. Meyer, “Humanitarian Action: A Delicate Balancing Act,” *International Review of the Red Cross* 27, no. 260 (September-October 1987), 495.

⁷⁴ See ICRC Study – Rules, 105. The commentary to the rule notes the absence in much of the practice of the requirement of relief personnel to be authorised by the Party that controls the territory where they operate in order to be protected. See *Ibid.*, 109.

⁷⁵ See John B. Bellinger III and William J. Haynes II, “A US Government Response to the International Committee of the Red Cross study Customary International Humanitarian Law,” *International Review of the Red Cross* 89, no. 866 (June 2007), 451-452 and 454:

Although the Study asserts that Rule 31 applies in both international and non-international armed conflict, the Study provides very thin practice to support the extension of Rule 31 to non-international armed conflicts, citing only two military manuals of States Parties to AP II and several broad statements made by countries such as the United Kingdom and United States to the effect that killing ICRC medical workers in a non-international armed conflict was “barbarous” and contrary to the provisions of the laws and customs of war. The Study contains little discussion of actual operational practice in this area, with citations to a handful of ICRC archive documents in which non-state actors guaranteed the safety of ICRC personnel. Although AP II and customary international law rules that apply to civilians may provide protections for humanitarian relief personnel in non-international armed conflicts, the Study offers almost no evidence that Rule 31 as such properly describes the customary international law applicable in such conflicts.

relief mission.⁷⁶ The right to limit the activities or the movements of relief personnel in IAC is restricted by Article 71 AP I to cases of ‘imperative military necessity’, and in case these personnel exceed their mission or do not take account of the security requirement of the Party in whose territory they are operating, such Party can terminate their mission.⁷⁷ If a Party captures relief personnel operating in favour of its enemy, it will be equally obliged to respect and protect them and, according to the ICRC Commentary, despite the absence of an explicit provision in this sense, it should not detain these individuals but ‘put [them] in a position to return to their own country as soon as possible’.⁷⁸

The requirement of consent or authorisation for humanitarian relief personnel does not seem to have been questioned in State practice, in accordance with the view proposed by the U.S.⁷⁹ Furthermore, the right for the Party to the conflict receiving relief destined for civilians in its territory to impose technical arrangements upon the relief action and relief personnel, both in IAC and NIAC, and the right of a State affected by a NIAC in relation to relief destined for civilians in rebel-held territory have been never really disputed by States in their practice. Concerns have been expressed for example regarding delays in the issuance of visas for relief personnel or burdensome administrative procedures, in that they might amount to impediments to the provision of relief, but negotiated solutions have been always sought, and States in the UNSC or UNGA have merely called upon the Parties to ensure humanitarian access or to respect and implement agreements regulating the provision of relief already concluded.⁸⁰ The only way to provide humanitarian assistance against the will of the concerned State remains the adoption of measures under Chapter VII by the UNSC, in particular the authorisation to Member States to take all necessary measures to ensure humanitarian access, as in Somalia and Libya.⁸¹

On the other hand, contrary to U.S. view, the duty of State and non-State Parties to NIAC to respect and protect humanitarian workers seems to be supported by practice, both in terms of UNSC resolutions (including adopted under Chapter VII) *demanding* that the Parties guarantee the safety and security of

⁷⁶ Art. 71(1)-71(3) AP I.

⁷⁷ Art. 71(3)-71(4) AP I. For a detailed analysis of the meaning of exceeding the mission, see Section 6.2.2.1.3.

⁷⁸ ICRC Commentary APs, 834 (par. 2890). This is explicitly provided by art. 32 GC I for personnel of a recognised Society of a neutral country lending assistance to a Party to the conflict, and extended by art. 9(2) AP I to personnel medical units and transports made available to a Party to the conflict for humanitarian purposes: by a neutral or other State not Party to that conflict; by a recognised and authorised aid society of such a State; or by an impartial international humanitarian organisation.

⁷⁹ See Sections 3.2.1.1.2., 3.2.1.4., 3.2.2.3., 5.2.4. and 5.3.3.4.

⁸⁰ This was the case for Sudan-South Sudan and Myanmar: see Section 3.2.1.2.1.

⁸¹ See S/RES/1973 (2011), (10-0-5), and Section 4.2.2.2. In Somalia in 1992, UNITAF was authorized to take all necessary measures to establish a secure environment for humanitarian relief operations. However, it is not clear that at the time there was an effective government in Somalia opposing such decision, or the access of humanitarian relief. See S/RES/794 (1992), 3 December 1992, and Section 4.2.1.1.

humanitarian personnel, guarantee their freedom of movement, and facilitate their operations, in a few instances (e.g. Iraq and Mali) adding a reference to IHL obligations;⁸² and of States' commitments in the form of ceasefires and peace agreements, for example in Sierra Leone and Sudan.⁸³ In particular, no difference between IAC and NIAC was made by the UNSC in 2009 regarding its intention to '[c]all on parties to armed conflict to comply with the *obligations applicable to them under international humanitarian law* to take all required steps ... to facilitate the rapid and unimpeded passage of relief consignments, equipment *and personnel*'.⁸⁴ A development of applicable IHL has thus arguably taken place through customary law, regarding not just respect and protection but also freedom of movement, since reference is usually made to full, safe and unhindered access.⁸⁵ However, as will be examined more in detail below, practice supporting such development has focused primarily on humanitarian personnel, thus it may be argued that personnel covered would be those belonging to humanitarian organisations, not other kinds.⁸⁶

6.1.1.2.6. Humanitarian Assistance and Workers under ICL

As mentioned above, duties of States in relation to the protection of relief personnel can be based also in IHRL, in terms of guaranteeing respect for their right to life, and possibly their right to movement, but restrictions to the latter allowed under IHRL may be arguably broader than those allowed under IHL in IAC (imperative military necessity). For members of non-State armed groups, duties in the field of humanitarian assistance can arguably be inferred from ICL, and this can be considered evidence of States' position, when negotiating the ICC Statute, on the existence of an IHL customary rule in this sense. ICL provides individual criminal responsibility for acts related to the deprivation of basic goods and services for civilians, independently of the official qualification held by the individual perpetrator in question. While the ICC Statute classifies as a war crime applicable only in IAC '[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions',⁸⁷ it criminalises as a war crime applicable

⁸² See Sections 3.2.1.1.4. and 3.2.1.2.2. For State practice outside the UN framework, see Section 3.2.2.5.

⁸³ See Section 3.2.2.5.

⁸⁴ S/RES/1894 (2009), 11 November 2009, par. 15. Emphases added.

⁸⁵ See Sections 3.2.1.1.4. and 3.2.1.2.2., and 3.2.2.5. See also rules 31 and 56 of the ICRC Study. ICRC Study – Rules, 105 and 197. Practice mentioned by the ICRC Study in support of rule 56, related to the freedom of movement of humanitarian relief personnel, include the fact that art. 71 AP I was adopted by consensus, as well as the Spanish military manual, Irish and Norwegian national laws punishing violations of art. 71 AP I, statements by Parties to the conflict in FRY, and UNSC res. and PRST, as well as UNGA res. See ICRC Study – Practice I, 1236-1243.

⁸⁶ On this, see below Section 6.2.2.

⁸⁷ Art. 8(2)(b)(xxv).

both in IAC and NIAC ‘[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance ... mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects’ under IHL.⁸⁸ This provision, confirming the protection of relief personnel and objects as civilians, is significant to the extent that intentional attacks against civilian objects are not criminalised as a war crime applicable in NIAC under the ICC Statute.⁸⁹ In this sense, according to the ICRC Study, a customary rule applicable to both IAC and NIAC exists providing that ‘[o]bjects used for humanitarian relief operations must be respected and protected.’⁹⁰ Indeed, the duty of the Parties to an armed conflict to allow the passage of relief objects, even if directed to the civilian population of the enemy, and to consent to relief actions in favour of the civilian population whose survival is at risk, would be nullified if relief objects, including relief supplies, could then be attacked.

The deprivation of food and other goods and services necessary for the survival of civilians may also amount to another war crime, a crime against humanity, or possibly even genocide.⁹¹ As seen in Chapter 2, the blockade of Gaza, including the restrictions imposed by Israel to humanitarian relief to civilians in need, has been repeatedly classified by the Human Rights Council as collective punishment, prohibited under Articles 33 GC IV, 75 AP I, and 4 AP II and classified as a war crime under the ICTR Statute and the SCSL Statute (but not under the ICC Statute).⁹²

Furthermore, even if not related to war crimes and thus not necessarily connected to armed conflict and IHL, it is worth recalling that the ICTY, in its jurisprudence on the crime against humanity of extermination, has stated that ‘[a]n act amounting to extermination may include the killing of a victim as such as well as conduct which creates conditions provoking the victim’s death and ultimately mass killings, *such as the deprivation of food and medicine*, calculated to cause the destruction of part of the population.’⁹³ Similarly, the ICC Statute defines the crime against humanity of extermination as including ‘the intentional

⁸⁸ Art. 8(2)(b)(iii) and Article 8(2)(e)(iii) ICCSt. Similarly, see art. 4(b) SCSLSt.

⁸⁹ On the other hand, art. 8(2)(b)(ii) lists as a war crime in IAC ‘[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives’.

⁹⁰ Rule 32. ICRC Study – Rules, 109. Among the practice cited as the basis of this rule, there are the UN Safety Convention, the ICCSt. and SCSLSt., the 1999 UNSG Bulletin on the observance of IHL by UN forces, Kenya and U.S. military manuals, several national laws, UNSC and UNGA res., and practice by the Council of Europe and the EU. See ICRC Study – Practice I, 628-639.

⁹¹ On this, see, for example, Christa Rottensteiner, “The Denial of Humanitarian Assistance as a Crime under International Law,” *International Review of the Red Cross* 81, no. 835 (September 1999): 555-582.

⁹² *Statute of the International Criminal Tribunal for Rwanda*, adopted by S/RES/955 (1994), 8 November 1994, art. 4(b), and art. 3(b) SCSLSt. See also rules 103 and 156 ICRC Study. ICRC Study – Rules, 374-375, 568 and 587. See also Shane Darcy, “Prosecuting the War Crime of Collective Punishment: Is It Time to Amend the Rome Statute?,” *Journal of International Criminal Justice* 8, no. 1 (2010): 29-51.

⁹³ ICTY, Trial Chamber II, *Prosecutor v. Radoslav Brađnin*, case no. ICTY-99-36, Judgment, 1 September 2004, par. 389.

infliction of conditions of life, *inter alia the deprivation of access to food and medicine*, calculated to bring about the destruction of part of a population'.⁹⁴

Regarding the possibility that the starvation of a group by cutting off humanitarian aid may constitute an act amounting to genocide, the ICJ has not taken a clear position in the *Genocide* case. BiH claimed in its memorial that the Serbs had created 'destructive living conditions' aiming to 'create ethnically pure Serbian areas,' including by 'deliberately block[ing], and in some cases destroy[ing] international aid supplies,'⁹⁵ and these acts, leading together with other conducts to 'the killing, and indeed mass killing, of many Muslims' would 'fall squarely within the definition of genocide.'⁹⁶ The Court in its judgment, having examined the alleged conducts of 'encirclement, shelling and starvation,' did not take a position on whether such conducts 'are in principle capable of falling within the scope of Article II, paragraph (c), of the [Genocide] Convention' and simply determined that there was not sufficient evidence to prove that 'the alleged acts were committed with the specific intent to destroy the protected group in whole or in part' and thus the crime of genocide could not be proven.⁹⁷

New case-law on the relationship between the denial of access to humanitarian aid and the crime of genocide may come from the ICC. The Prosecutor has substantiated the charges of genocide, crimes against humanity and war crimes against Sudan's president Al Bashir on the basis of the fact that he 'forced the displacement of a substantial part of the target groups and then continued to target them in the camps for internally displaced persons [...], causing serious bodily and mental harm – through rapes, tortures and forced displacement in traumatising conditions – and deliberately inflicting on a substantial part of those groups conditions of life calculated to bring about their physical destruction, *in particular by obstructing the*

⁹⁴ Art. 7(2)(b) ICCSt. Emphasis added.

⁹⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Memorial of the Government of the Republic of Bosnia and Herzegovina, 15 April 1994, pars. 2.2.6.1 and 2.2.6.5.

⁹⁶ *Ibid.*, pars. 3.4.0.1 and 3.4.0.2.

⁹⁷ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007 at 43, pars. 322 and 328. Art. II of the Genocide Convention provides a list of the conducts that may amount to genocide, *if committed with the necessary specific intent*, and in particular art. II(c) reads: 'In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: ... (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'. *Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, December 9, 1948, entered into force January 12, 1951 (78 UNTS 277).

*delivery of humanitarian assistance.*⁹⁸ However, again, proving the specific intent for genocide might be difficult.⁹⁹

In sum, the rights granted to and obligations imposed on Parties to the conflict by IHL treaties have been confirmed in subsequent practice, and some of the areas left unregulated in NIAC have been subjected to rules similar to those provided for IAC, imposing duties but also arguably granting rights of control and limitation to Parties to the conflict.¹⁰⁰ The bottom limit of not starving the population as a method of warfare has been acknowledged as customary in IAC and arguably also in NIAC. ICL may contribute to the deterrence of violations of IHL not only through provisions on war crimes related to humanitarian assistance, which, in the absence of primary rules in treaties, also arguably support the existence of customary IHL rules at the time of negotiation of ICL instruments, but also possibly through provisions on crimes against humanity and genocide.

While much of the practice neither explicitly mentions the need for consent of the Parties concerned for the access of relief action, nor spells out the criteria and limits to be respected by humanitarian actions and actors, it should be acknowledged that the absence of the need for consent for access, as an exception to the principle of sovereignty, has never been claimed by States, neither for States themselves (the so-called *droit d'ingérence*) nor for humanitarian organisations. Furthermore, when Parties to conflict have asserted their right to regulate and limit humanitarian activities and actors, discussions have revolved around the extent of these limits (which will be analysed in the Section on external actors) and their practical consequences, not the existence of the right itself.

6.1.2. The Armed Forces of Belligerents

Once established the obligations of Parties to a conflict, it is likely that their armed forces (used here to include not only State armed forces, but also dissident State armed forces and members of organised non-

⁹⁸ ICC, Pre-Trial Chamber I, Situation in Darfur, the Sudan, ICC-02/05, Public Redacted Version of the Prosecutor's Application under Article 58: Annex A, 14 July 2008, pars. 10-11. Emphasis added.

⁹⁹ See, for example, Kai Ambos, "What Does 'Intent to Destroy' in Genocide Mean?," *International Review of the Red Cross* 91, no. 876 (December 2009): 833-858; Rottensteiner (1999), *supra* fn. 91, 576-580; William A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge [etc.]: Cambridge University Press, 2000).

¹⁰⁰ In this sense, see International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict with Commentary*, Sanremo, 2006, 61-62, art. 5.1. Available at <http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf> (accessed February 15, 2011). Heike Spieker, "Twenty-five Years after the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection?," *Yearbook of International Humanitarian Law* 4 (December 2001), 150-151.

State armed groups in NIAC)¹⁰¹ will play a key role in the implementation of these obligations. They might be involved in the efforts of the Party to which they belong to fulfil its duties under IHL and IHRL related to the satisfaction of the essential needs of civilians under its control. Furthermore, regarding the duty to respect and protect relief objects and personnel, for example, the armed forces of the Parties will be called not only not to attack them (and will need to be instructed in this sense), but possibly also to facilitate them, for example through the provision of security and possibly, as seen in some of the cases analysed in the practice, of armed escorts.

IHL does not limit the choice of each Party regarding the means to reach the result of satisfying the basic needs of civilians under their control, so it does not prohibit military actors from engaging in relief activities in favour of civilians. However, the Occupying Power under AP I is bound to satisfy these needs of the civilian population of the occupied territory in a non-discriminatory way, so that any strategy of prioritising among civilians based on military or political priorities would be in violation of IHL.¹⁰² The same reasoning might apply by analogy to the armed forces of a Party invading a territory but not occupying it, in case one subscribes to the more restrictive interpretation of occupation as beginning only once the Party exercises the necessary level of authority over the territory to implement the law of occupation fully.¹⁰³ In any case, the involvement of the armed forces in the provision of relief, even respecting the principle of non-discrimination, does not entitle them to any specific protection under IHL, so that they remain combatants and legitimate targets of attacks.¹⁰⁴ The only possibility for members of the armed forces of a Party to

¹⁰¹ See Niels Melzer (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009), 27-30. The aforementioned categories of actors labelled in this section as ‘armed forces’ are not necessarily entitled to the same protection under IHL, depending on whether they fulfil the necessary criteria to be entitled to combatant and POW status (or are instead so-called ‘unlawful combatants’) in IAC; in NIAC, members of organised non-State armed groups are considered civilians taking direct part in hostilities, just like civilians temporarily taking direct part in hostilities outside such groups. What matters for this study is that all the categories labelled here as ‘armed forces’ can be more realistically expected to respect the principle of distinction also in terms of distinguishing themselves from civilians, possibly through the use of uniforms. On the concept of direct participation in hostilities and the protection reserved to different categories of participants in hostilities, as well as for further references on this debate, see, for example, Knut Dörmann, “Unlawful Combatants,” in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2011). Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012). Nils Melzer, “Civilian Participation in Armed Conflict,” in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2010). Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012).

¹⁰² The ICRC Commentary to art. 69 AP I explicitly suggests that only distinctions based on medical or humanitarian criteria are admissible. See ICRC Commentary APs, 813 (par. 2785).

¹⁰³ See for example, Raj Rana, “Contemporary Challenges in the Civil-Military Relationship: Complementarity or Incompatibility?,” *International Review of the Red Cross* 86, no. 855 (September 2004), 571: IHL does not ‘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. *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.*’ Emphasis added. On the beginning of occupation, see Section 2.1.1.1.

¹⁰⁴ In this sense, see also the commentary to rule 31 of the ICRC Study, on respect and protection of humanitarian relief personnel: ‘members of armed forces delivering humanitarian aid are not covered by this rule.’ ICRC Study – Rules, 105.

undertake humanitarian tasks in favour of the civilian population and be entitled to special protection (including from attack) is for them to be medical or religious personnel, or be part of a civil defence organisation, respecting all the necessary criteria (such as identification, no engagement in military operations, and no commission of acts harmful to the enemy) and operate on their national territory.¹⁰⁵

Furthermore, when engaging in relief activities, members of the armed forces in IAC are bound to respect the principle of distinction, not adopting outfits or conducts that might lead to confusion between combatants and civilians. In terms of uniforms, as explained in Section 5.3.2.1.1., nothing in IHL binds combatants to wear a uniform, but if they are caught while not complying with the minimum requirements of carrying their arms openly during each military engagement and in preparation of each attack, they lose their status as combatants, being liable to criminal prosecution according to the national criminal law of the State that captured them, and their right to POW status.¹⁰⁶ If they are caught in enemy territory collecting information without any fixed visible sign to recognise them as combatants, not only do they lose entitlement to POW status, but they might also be tried as spies. Finally, if their action in enemy territory involves perfidy, in other words they kill or wound treacherously someone belonging to the adverse Party, their conduct may amount to a war crime, and this crime applies also in NIAC.¹⁰⁷

Based on the rationale of the principle of distinction, which aims to prevent attacks against civilians and civilian objects, conducts by the Parties that blur this distinction should be avoided as much as possible, not only in terms personal outfit, but also, for example, in case of use of white vehicles or white helicopters, traditionally used by humanitarian organisations.¹⁰⁸ Developing the reasoning even further, one might take into consideration the discourse or propaganda by Parties to the conflict complementing the actual role of their armed forces in the provision of relief to civilians. Indeed, discourses by the armed forces, for example in occupied territory, that depict their engagement in the provision of relief to civilians as ‘humanitarian’ even if it is based on military and political considerations and does not prioritise among civilians only on the

¹⁰⁵ See Sections 2.1.4.2.2. and 2.1.4.3.

¹⁰⁶ However, they are entitled to equivalent guarantees in practice, pursuant to Article 44(4) AP I.

¹⁰⁷ See Section 4.1.2.1.

¹⁰⁸ Furthermore, specific rules exist in IAC that prohibit the improper use of emblems recognized by the GCs/APs and other internationally recognized protective emblems (such as the white flag of truce), to use the UN protective emblem without authorisation, to use the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict, and to use the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations, even if such use does not amount to perfidy. See arts. 38-39 AP I. Prohibiting improper use of the distinctive emblem of the red cross, see art. 12 AP II. See also art. 8(2)(b)(vii) ICCSt., applicable in IAC (‘Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury’) See also Rules 58-63 ICRC Study, which are applicable both in IAC and NIAC, except for rule 62, prohibiting Improper use of the flags or military emblems, insignia or uniforms of the adversary, even if ‘[i]t can be argued that it should also apply in non-international armed conflicts when the parties to the conflict do in fact wear uniforms.’ ICRC Study – Rules, 205-219.

basis of needs, contrary to the principle of non-discrimination, might lead to confusion on the nature of humanitarian work more in general. In case such confusion (just like that created by the use of white vehicles) leads to increased difficulties and security risks for humanitarian organisations in carrying out their work, the armed forces might be accused of jeopardising respect for the principle of distinction and of not complying with their obligations under AP I to ‘allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel’ and to assist authorised relief personnel ‘to the fullest extent practicable, ... in carrying out their relief mission.’¹⁰⁹ As mentioned above, a customary obligation to respect and protect relief personnel is arguably applicable to Parties to both IAC and NIAC.

6.1.2.1. Armed Escorts

The issue of armed escorts provides a further controversial aspect of the involvement of the armed forces of Parties to the conflict in the provision of humanitarian relief and of their relationships with humanitarian organisations. The duty of each Party to protect relief supplies implies the duty to ‘do its utmost to prevent such relief from being diverted from its legitimate destination, particularly by strictly punishing looting and any other diversion of relief and by providing clear and strict directives to the armed forces’, since otherwise ‘the whole question whether the relief action can continue is obviously put in jeopardy, first from the point of view of the donors, then the Parties allowing the passage over their territory, and finally, and most of all, the adverse Parties of the receiving Party.’¹¹⁰ Each Party is responsible for the safety and security of relief personnel operating in its territory, as repeatedly affirmed by UN bodies in both IACs and NIACs, and, in addition to restrict these personnel’s movements in case of imperative military necessity, it might decide to guarantee their safety and security through the provision of armed guards to their premises and/or armed escorts to their convoys.¹¹¹

The use of armed guards or escorts is explicitly provided by AP I as a conduct not constituting an act harmful to the enemy with regards to personnel of civilian medical units,¹¹² and this might apply by analogy to relief actions and convoys. However, the ICRC Commentary underlines that ‘[t]he use of weapons by the members of this guard detailed to a medical unit is subject to the same conditions as the use of arms by

¹⁰⁹ Arts. 70(2) and 71(3) AP I.

¹¹⁰ ICRC Commentary APs, 828 (pars. 2858-2859).

¹¹¹ On the safety and security of relief personnel, see Sections 3.2.1.1.4., 3.2.1.2.2., and 3.2.2.5.; on armed escorts, see Section 4.1.1.1.

¹¹² See art. 13(2) AP I.

medical personnel’ and that ‘[t]he guards are there to prevent looting and violence, but they should not attempt to oppose the capture or control of the medical unit by the adverse Party.’¹¹³ As far as the status of members of these military guards is concerned, by analogy with military guards to medical units under GC I, they would have the status of ‘ordinary members of the armed forces, although the mere fact of their presence with a medical unit will shelter them from attack’: on the one hand, ‘[t]his practical immunity is, after all, only reasonable, since they have no offensive role to play and are there only to protect the wounded and sick’ and, on the other hand, ‘in case of capture they will be prisoners of war.’¹¹⁴

On the decision of whether to provide armed escorts to relief actions and personnel, the ICRC Commentary suggests that, while armed escorts should be excluded for relief actions and personnel displaying the red cross emblem, which should already provide the necessary protection, other convoys might be accompanied by an armed escort, but it should be decided by ‘the instigators of the action, the Protecting Power (or its substitute) responsible for its supervision, and the receiving Party to the conflict’.¹¹⁵

Such escorts, at least in theory, would not jeopardise the humanitarian and impartial nature of a relief action, but the perception of the action and the actors performing it as associated to the Party providing the escort might be difficult to avoid. As seen in Chapter 4, humanitarian organisations have adopted (non-binding) guidelines to regulate their resort to armed guards and escorts, but they do not imply that a Party to the conflict is prevented from making movement to and within a certain area subject to such escorts, and, in case of a refusal of these escorts by humanitarians, simply deny access to the area due to security reasons.¹¹⁶ Negotiated solutions should always be sought, based on the guiding principles of distinction and of safeguarding both the neutrality and the perception of neutrality of humanitarian actors.

6.1.3. Local Population and Relief Organisations

As part of or in addition to the efforts of the Party in control of a territory to satisfy the basic needs of civilians in such territory, the local population itself and local relief societies are envisaged under IHL as playing a role, also as a way of implementing the rights granted to protected persons to receive relief and

¹¹³ ICRC Commentary APs, 179 (par. 567).

¹¹⁴ ICRC Commentary GC I, 204 (commentary art. 22 GC I), quoted in ICRC Commentary APs, 179 (par. 568).

¹¹⁵ See ICRC Commentary APs, 828 (pars. 2860-2862) and 834 (pars. 2886-2888).

¹¹⁶ Under art. 71(4) AP I, relief personnel ‘shall take account of the security requirements of the Party in whose territory they are carrying out their duties.’

relief consignments, and to make application to relief organisations that might assist them.¹¹⁷ Some scholars have also argued in favour of the existence of a right of civilians in need more in general to receive humanitarian assistance, first of all from territorial authorities and in a subsidiary fashion from external actors, based on IHRL and in particular the core non-derogable and *erga omnes* right to life.¹¹⁸ On the contrary, others have argued that such a right would exist only in IACs and occupation (but not in NIACs),¹¹⁹ or that no proper right would exist, since the consent of the Parties concerned is necessary.¹²⁰ State practice has revealed a focus usually on the duties of Parties to the conflict, and sometimes other Parties, rather than on the rights of civilians. Indeed, such a right would require an answer to the issue of the subjects called to provide such assistance, in case of failure by the territorial authorities, and in general there is agreement that no duty exists under IHL for external States and actors to provide, or even to offer assistance. Thus, while an individual right to receive assistance can be construed on the basis of IHRL provision, it seems that States have been extremely reluctant to acknowledge the existence of such a right, and in any case the centrality of consent for external assistance has not been questioned.

Regarding the regulation of the possible contribution of local actors to relief efforts, in case of efforts by a Party in favour of civilians in its national territory, this regulation is mostly (albeit not completely) left to national law, while in case of invasion or occupation the rights and limits of local relief actors are more clearly regulated, since the activities of these subjects might not necessarily correspond to the strategies of the Party in control of the territory.

¹¹⁷ See Section 2.1.4.2.

¹¹⁸ See, for example, Abril Stoffels (2001), *supra* fn. 39; Ruth Abril Stoffels, “Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps,” *International Review of the Red Cross* 86, no. 855 (September 2004): 515-545; Rosario Ojinaga Ruiz, *Emergencias Humanitarias y Derecho Internacional: la Asistencia a las Víctimas* (Valencia: Tirant lo Blanch, 2005), particularly 179-183; Monika Sandvik-Nylund, *Caught in Conflicts: Civilian Victims, Humanitarian Assistance and International Law*, 2nd rev. ed. (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2003), 82; Marie-José Domestici-Met, “Aspects Juridiques Récents de l’Assistance Humanitaire,” *Annuaire Français de Droit International* 35 (1989), 122; Chan Leng Sun, “Humanitarian Assistance by International Organisations: A Question of Compulsory Access to Victims,” *Singapore Journal of Legal Studies* (1991): 320-347; International Institute of Humanitarian Law (1993), *supra* fn. 56, 521-522. Arguing in favour of a general right to humanitarian assistance, applicable both in armed conflicts and natural disasters, as a right *in statu nascendi*, or *de lege ferenda*, see, for example, Marie-José Domestici-Met, in *Le Droit à l’Assistance Humanitaire: Actes du Colloque International Organisé par l’UNESCO, Paris 23-27 Janvier 1995*, ed. UNESCO (Paris : UNESCO, 1996), 82; Dietrich Schindler, in *Le Droit à l’Assistance Humanitaire: Actes du Colloque International Organisé par l’UNESCO, Paris 23-27 Janvier 1995*, ed. UNESCO (Paris : UNESCO, 1996), 157-158; Héctor Gros Espiell, in *Le Droit à l’Assistance Humanitaire: Actes du Colloque International Organisé par l’UNESCO, Paris 23-27 Janvier 1995*, ed. UNESCO (Paris : UNESCO, 1996), 11-12 and 112; Jovica Patrnogic, *New Issues for International Humanitarian Law regarding Humanitarian Assistance* (Milano [etc.]: Nagard, 2004), 28-30; Juan Antonio Carrillo Salcedo, “La Asistencia Humanitaria en Derecho Internacional Contemporáneo,” in *La Asistencia Humanitaria en Derecho Internacional Contemporáneo*, by Joaquín Alcaide Fernández, María del Carmen Márquez Carrasco, and Juan Antonio Carrillo Salcedo (Seville: Universidad de Sevilla, 1997), 127-159.

¹¹⁹ See Boško Jakovljević, “The Right to Humanitarian Assistance – Legal Aspects,” *International Review of the Red Cross* 27, no. 260 (September-October 1987), 476 and 478.

¹²⁰ See Dinstein (1999), see *supra* fn. 41, 185 and 193.

The analysis of State practice has highlighted the increased attention given to the safety and security of local relief workers (also working for the UN and other international humanitarian organisations) and to their role in responding to humanitarian crises, with emphasis on capacity-building of local actors.¹²¹ In any case, it does not seem that the position of these personnel has changed significantly under IHL in terms of rights and duties, confirming the limits to the regulation of domestic realities at the international level.

In this sense, both in IAC and NIAC medical and religious personnel exclusively assigned to medical and religious duties respectively have the right to be respected and protected, losing this protection only ‘if they commit, outside their humanitarian function, acts harmful to the enemy’, and after a warning; an analogous right to respect and protection, and an analogous limit in terms of loss of protection, apply to medical units and transports.¹²² Also, medical duties are protected both in IAC and NIAC, in the sense that nobody can be punished for performing medical duties compatible with medical ethics or compelled to perform acts contrary to medical ethics while engaged in medical activities.¹²³ Finally, protection of medical and religious services is facilitated by the display of the distinctive emblem of the red cross, whose improper use is prohibited (possibly amounting to perfidy and a grave breach of AP I, a war crime in IAC) and which grants protection from to attack persons and objects displaying it, such attacks constituting a war crime both in IAC and NIAC.¹²⁴

For relief personnel and civilians, the broadest provision for engagement in the care of victims of the conflict remains Article 17 AP I: it obliges the civilian population and aid societies to respect the wounded, sick and shipwrecked,¹²⁵ and allows them to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas, without being harmed, prosecuted, convicted or punished for that. If they do that upon appeal by a Party to the conflict, they are also entitled to protection and to the necessary facilities, both by the Party making such appeal and by the adverse Party, in case the latter regains control of the area.¹²⁶

The analysis of the practice has not revealed the emergence of new rules or rules different from the aforementioned ones and from the other provisions granting protection and rights, especially in case of

¹²¹ See Section 3.2.1.1.1.

¹²² For a detailed description of the provisions of GC IV and the APs on medical and religious personnel, as well as medical units and transports, see Section 2.1.4.2.2., as well as rules 25 and 27-29 ICRC Study. ICRC Study – Rules, 79, 88, 91, and 98.

¹²³ See Section 2.1.4.2.2. See also rule 26 ICRC Study. ICRC Study – Rules, 86. Still, as stressed by Meyer, ‘unlike authorised medical personnel, civilian or military, medical personnel without an official authorisation from a Party to a conflict will not be respected and protected in all circumstances, and the Parties to a conflict are not required to help and facilitate their humanitarian functions (e.g. see Art. 15 AP I).’ Meyer (1987), *supra* fn. 73, 487, fn. 7.

¹²⁴ See Sections 2.1.4.2.2. and *supra* fn. 108. See also rules 30 and 59 ICRC Study. ICRC Study – Rules, 102 and 207.

¹²⁵ On the customary nature of such a provision, see also the commentary to rule 111 ICRC Study: ICRC Study – Rules, 404.

¹²⁶ The ICRC Study notes that no reservation has been made to art. 17(1) AP I and that the whole provision is considered customary by the Swedish military manual. See ICRC Study – Rules, 398 and 404.

occupation, to local relief societies, in particular in favour of protected persons under GC IV, and to civil defence organisations.¹²⁷ In other words, relief societies in IAC (including occupation) are subject to the national laws of the Party to which they belong. These societies need to be authorised by such Party to perform their humanitarian functions in favour of victims of the conflict, including persons deprived of their liberty due to reasons connected to the conflict. Once authorised, these organisations may invoke some rights under IHL, such as the right to receive all the necessary facilities to carry out their humanitarian tasks in an impartial way and without any adverse discrimination (in accordance with Article 81 AP I). It is also arguable that in case of relief societies devoted to the provision of relief to detained protected persons under GC IV, they can claim the right to have their visits facilitated, and not to have their number limited by the Detaining Power unless effective and adequate relief to detained persons can be guaranteed.¹²⁸ According to the ICRC Commentary, these organisations in any case ‘whether national or international, must likewise strictly avoid, in their humanitarian activities, any action hostile to the Power in whose territory they are working or to the Occupying Power’ and the possibility for the Detaining Power to limit their number would represent a way of enforcing this obligation.¹²⁹

Civilian civil defence organisations, once authorised or established by their Party to the conflict, as well as civilians that are not members of such organisations but respond to an appeal from the authorities and perform civil defence tasks under their control, shall be respected and protected according to AP I, and entitled to perform their civil defence tasks except in case of imperative military necessity; in situations of occupation, they are granted special protection.¹³⁰ Similarly to medical personnel and units, civil defence personnel, buildings and material lose their special protection, after a warning, in case ‘they commit or are used to commit, outside their proper tasks, acts harmful to the enemy.’¹³¹

While this regulation, and the limited rights provided to authorised relief societies, are applicable in IAC, it seems that in NIAC the local civilian population and local relief societies remain only entitled *to offer* to perform their functions in favour of victims of the conflict and to collect and care for the wounded, sick,

¹²⁷ See Sections 2.1.4.2.2. and 2.1.4.3.

¹²⁸ See Section 2.1.4.2. and arts. 30 and 142 GC IV. See, for example, Meyer: ‘Generally, authorised aid societies do not have an unlimited right to provide humanitarian assistance under the Geneva Conventions or Protocols: they are subject to regulation by the Party to the conflict to which they belong or by the Occupying Power or Detaining Power. But when authorised societies are able to act, they do so with the support of the relevant authorities and may be able to achieve much.’ Meyer (1987), *supra* fn. 73, 487, 489. In case of occupation, see arts. 56, 58, and 63 GC IV.

¹²⁹ ICRC Commentary GC IV, 218 (Commentary to art. 30 GC IV).

¹³⁰ See arts. 61-63 AP I and Section 2.1.4.3.

¹³¹ Art. 65 AP I. On the meaning of ‘acts harmful to the enemy’, see Section 6.2.2.1.3.

and shipwrecked respectively, but they do not have any right to perform such activities under IHL.¹³² The duty for local relief organisations to subject themselves to national law has also been confirmed by instances of suspension of the activities or closure of local organisations by States, for example Afghanistan and Sudan,¹³³ for violation of local laws, and absence of significant international protest to these decisions.

In 1987, Meyer wrote that ‘in most cases under the Geneva Conventions and the Additional Protocols, relief organisations are only able to operate if they have some form of governmental authorisation, abstain from political or military activity, and maintain impartiality in their humanitarian work’ and that at the time ‘it seem[ed] that the balance achieved in the Geneva Conventions and the Additional Protocols [wa]s the best that c[ould] be agreed.’¹³⁴

It appears that no substantive change has emerged with reference to the rights and duties of local relief organisations in IAC and NIAC. Still, one might at least interpret calls by UN bodies upon all in the framework of the provision of the humanitarian assistance to respect the principles of humanity, impartiality, neutrality, and independence, and upon the Parties to armed conflicts to ensure the safety and security of humanitarian personnel, as including also local humanitarian personnel and local humanitarian organisations, at least those working for external humanitarian organisations or as their implementing partners.¹³⁵ Furthermore, for example, State Parties to the Kampala Convention explicitly commit to enable and facilitate the role of local organisations in the provision of protection and assistance to IDPs.¹³⁶ In other words, while nationals of a Party to the conflict in the territory controlled by that Party are protected by IHL as civilians, thus entitled at least to the fundamental guarantees under Common Article 3, Article 75 AP I, and Article 4 AP II, they might try and claim the right, if not to have their humanitarian activities facilitated, to be granted the necessary freedom of movement to carry out their humanitarian tasks, as mentioned in Section 6.1.1.2.1. above, at least if they act as staff or implementing partners of impartial humanitarian organisations.

Outside the realm of IHL, local relief workers may fall under the category of UN or associated personnel and thus benefit of ratification and implementation by the States of the UN Safety Convention and its Optional Protocol. The deterrent effect of ICL might lead to further improvement of the protection of

¹³² Art. 18(1) AP II.

¹³³ See Section 6.1.1.2.1. fn. 24.

¹³⁴ Meyer (1987), *supra* fn. 73, 487, 494 and 500.

¹³⁵ Local humanitarian organisations will thus be bound to respect the principles of humanity, impartiality, neutrality, and independence of humanitarian action either if they work as implementing partners of the UN or if they are funded by States who have committed to the GHD principles.

¹³⁶ Art. 5(7) Kampala Convention.

local relief workers, in particular the provisions in the ICC Statute regarding intentional attacks against participants in a humanitarian assistance mission in accordance with the UN Charter. Furthermore, local relief personnel will be entitled to respect and protection by the State of their relevant rights under IHRL, at a minimum non-derogable ones.

In sum, while the position of local relief workers is less regulated and protected than that of external ones in IHL treaties, some improvements might be emerging in customary law, connected to the growing acknowledgement of the risks run by these workers, so that once authorised they might claim a right to be respected and protected, as well as to be granted freedom of movement subject to certain limitations, by Parties to both IAC and NIAC.¹³⁷ On the other hand, the position of external relief workers is subject to a more detailed regulation under IHL, especially in IAC. Developments in this field, in relation to both IAC and NIAC, are examined in the next Section.

6.2. The Role of External Actors

As emerged from practice, the humanitarian situation in armed conflict is often so critical that the efforts and means available for humanitarian assistance to civilians from Parties to the conflict, which sometimes are even unwilling to devote resources to these activities, and from local relief organisations are not sufficient, so that external support is needed.¹³⁸ Such support takes the form of relief actions including sometimes not only goods but also personnel providing specific services. The role of external actors has become so pre-eminent, that general discourses on humanitarian assistance to civilians in armed conflict usually refer to external relief actions. Moreover, given the sensitive nature of these actions and their potential unbalancing effect in the conflict, they have been the object of special regulation and of most international attention.

6.2.1. Relief Actions

Independently from the actor that undertakes an external relief action in favour of victims of an armed conflict, according to IHL treaties and subsequent practice, the action itself has to satisfy specific criteria, aimed at guaranteeing that the introduction of goods and services essential for the survival of civilians

¹³⁷ See Section 6.2. Another category local actors that might be involved in the provision of humanitarian assistance is local security firms. However, they have not been dealt with in this Section because of their quality as private actors that usually bear arms: they will be analysed in Section 6.2.4.3.

¹³⁸ This reason is at the basis of the whole UN system for humanitarian assistance and practice by UN bodies on humanitarian access.

benefits only these civilians, without favouring any of the Parties to the conflict. These requirements appear in both APs in the article devoted to relief actions in favour of inadequately supplied civilians; they are not explicitly provided for relief schemes in situations of occupation, mentioned in Article 59 GC IV,¹³⁹ but Article 61 GC IV requires distribution of these consignments to be made under the supervision of an actor able to guarantee that they will benefit only the intended beneficiaries, on the basis of their needs.

The need for external humanitarian assistance to be humanitarian, impartial and provided without any adverse distinction, in other words to respect the principles of humanity and impartiality, as well as to be militarily neutral, not favouring any of the Parties to the conflict,¹⁴⁰ has been clearly and constantly affirmed in State practice and *opinio juris*, through treaties, resolutions by UN bodies, statements by States prior to or following the adoption of these resolutions, and some military manuals, but also with reference to episodes such as the attempts to provide relief to civilians in Gaza through flotillas.¹⁴¹

In other words, State Practice and *opinio juris* confirm that the principles of humanitarian action, corresponding to the regulation provided in IHL treaties and derivable from the object and scope of such treaties,¹⁴² need to be fulfilled by relief actions in order for the latter not to be considered interference in the conflict and be legitimate.¹⁴³ If so, such actions shall not be arbitrarily refused, if the civilian population would otherwise risk starvation. Respect for the principle of independence of humanitarian assistance (rather than of the actor), proclaimed by UN organs since 2003, can be derived from the need for humanitarian relief actions to be humanitarian, impartial, and neutral, emphasising the duty not to instrumentalise assistance for reasons of political or military strategy. The possibility for relief action to be truly neutral in the sense of not

¹³⁹ But, according to the ICRC Commentary, the assistance provided shall ‘not [be] used for purposes of political propaganda’, the ‘consignments ... must have the character of relief supplies’, and ‘the Occupying Power would be justified in refusing to accept any consignments not urgently needed to feed the population.’ ICRC Commentary GC IV, 321.

¹⁴⁰ In this sense, neutrality encompasses the principles of humanity and impartiality (meaning that that the sole aim of the action must be to preserve the life and dignity of civilians in need, and that it must prioritise only on the basis of the urgency of needs, without any other discrimination) in order to be fulfilled: see, for example, Denise Plattner, ‘ICRC Neutrality and Neutrality in Humanitarian Assistance,’ *International Review of the Red Cross* 36, no. 311 (April 1996), 175-177. See also Institute of International Law, *The Humanitarian Assistance: Bruges Resolution 2003* (Paris: Pedone, 2006), 26.

¹⁴¹ See Sections 3.2.1.1.3., 3.2.1.2.1., 3.2.2.4, and 5.3.3.1.

¹⁴² See Section 2.1.5.1.

¹⁴³ For example, the foreword to the San Remo Guiding Principles affirms that ‘[o]ne of [the cardinal principles of international humanitarian law] is the maintenance of absolute neutrality when humanitarian action involves aid to victims of armed conflict. This means neutrality and impartiality vis-a-vis the parties to the conflict and the avoidance of any political bias’; the preamble to the Guiding Principles then ‘[s]tress[es] that humanitarian assistance, both as regards those granting and those receiving it, should always be provided in conformity with the principles inherent in all humanitarian activities, namely the principles of humanity, neutrality and impartiality, so that political considerations should not prevail over these principles’. International Institute of Humanitarian Law (1993), *supra* fn. 56, 520-521. According to the Bruges Resolution, ‘States and organizations have the right to offer humanitarian assistance to the affected State’ and ‘[s]uch an offer shall not be considered unlawful interference in the internal affairs of the affected State, to the extent that it has an exclusively humanitarian character; [h]umanitarian assistance shall be offered and, if accepted, distributed without any discrimination on prohibited grounds, while taking into account the needs of the most vulnerable groups’; and, ‘[t]he assisting State or organization may not interfere, in any manner whatsoever in the internal affairs of the affected State.’ Institute of International Law (2003), *supra* fn. 56, arts. VI(1) and V(3).

interfering with the conflict has been debated, since introducing goods into the theatre of an armed conflict would always and inevitably have an impact on the economic situation of the Parties.¹⁴⁴ However, it is arguable that IHL embodies a balance between military necessity and humanitarian considerations, to the point that the introduction of goods (and personnel) with the sole aim of saving the lives of victims of the conflict is considered acceptable, within the limit that these goods shall not be used to favour any of the Parties in its war effort, for example by diverting them to belligerents or using them for propaganda in favour of one Party. Respect for this limit is ensured by the right of control granted to Parties to the conflict concerned and transit States, as will be explained below.

The relief must be ‘not political’¹⁴⁵ and it must not be diverted and used for purposes different from the relief of civilians in need. The ICRC Commentary argues that the necessary assessment must be carried out ‘on a factual basis, and the humanitarian character of an action could not be contested merely on the basis of its intention: the only ground for refusing an action would be the failure to comply with the required criteria.’¹⁴⁶ This should arguably not be understood as implying that an action undertaken with the explicit intention to benefit, for example, the armed forces of a belligerent should be able to claim legitimate access. Indeed, it is arguable that it is legitimate to deny access to such an action, while in case of denial of access to relief that in the intention of the senders is to be purely humanitarian, the belligerent denying access should demonstrate good grounds for fearing its non-humanitarian nature.

It should be highlighted that these criteria need to be respected for the relief action not to be legitimately considered interference in armed conflict and rejected. In other words, relief actions not satisfying these criteria might be undertaken, but these actions would not be entitled to consent under IHL and would run the risk of being considered an unfriendly act by the adverse Party. On the other hand, in case of inadequately supplied civilians, the Party concerned has the duty not to reject actions that satisfy the necessary criteria, unless it demonstrates that it can satisfy their needs through other sources.

Consent thus remains a key principle for the performance of relief actions in cases of both IAC, including occupation, and NIAC. Even the judgement of the ICJ in the *Nicaragua* case, which at first sight might be interpreted as discarding the need for consent for the provision of impartial humanitarian relief by a

¹⁴⁴ See Section 1.2.3.

¹⁴⁵ Michael Bothe, “Article 70 – Relief Actions,” in *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, by Michael Bothe, Karl Joseph Partsch, and Waldemar A. Solf (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982), 435.

¹⁴⁶ ICRC Commentary APs, 817-818 (par. 2798).

State in NIAC, should arguably be interpreted as simply excluding the automatic qualification of such a conduct as a violation of the *jus ad bellum*, without entering in the realm (and without denying the existence) of the specific rules and criteria provided in IHL.¹⁴⁷

A legitimate reason to deny consent would be the lack of compliance of a relief action with the principles of humanity, impartiality, and military neutrality, since the offer in this case might legitimately be interpreted as interference, for example if the humanitarian situation is used as an excuse for an intervention with political aims, or if the distribution of aid does not respect the principle of non-discrimination.¹⁴⁸ Clearly, a Party would also be justified in refusing access to a relief action in case civilians were already adequately supplied (by the Party itself or through the acceptance of other relief actions). Opposite views exist on the validity of reasons of military necessity to deny consent to a relief action.¹⁴⁹ When there is a risk of starvation, it can be argued that Article 54 AP I provide as only possible exception to the prohibition of starvation, applicable in case of imperative military necessity, the adoption of a scorched policy. It can thus be deduced that no other exception to the prohibition is admissible, not even in case of imperative military necessity. Also, Article 70(3) AP I entitles Parties allowing the passage of relief consignments to divert them from their intended purpose or delay their forwarding only ‘in cases of urgent necessity *in the interest of the civilian population concerned*.’ All exceptions on the basis of military necessity shall be exceptional and be temporary in nature.¹⁵⁰ On the other hand, in case there is no risk of starvation, in the sense of risk for the survival more broadly, as explained above, offers of relief actions and access to relief personnel can arguably be refused, since the prohibition, applicable both in IAC and NIAC, of starvation of civilians as a method of warfare remains the limit to denial of consent. Unjustified denial of available relief actions if the survival of civilians is threatened would amount to a violation of this prohibition (as well as to a violation of non-derogable provisions of applicable IHRL, including the right to life and to be free from hunger).

In addition to be legitimately entitled to consent from the Party controlling the territory of destination, if civilians in such territory are inadequately supplied, meaning that their survival is threatened,

¹⁴⁷ See Section 3.1.2.

¹⁴⁸ See Robert Kolb, “De l’Assistance Humanitaire: la Résolution sur l’Assistance Humanitaire Adoptée par l’Institut de Droit International à sa Session de Bruges en 2003,” *International Review of the Red Cross* 86, no. 856 (December 2004), 865 and 868-870; Institute of International Law (2006), *supra* fn. 140, 32 and 40-41.

¹⁴⁹ In favour of the validity of this reason, see Bothe (1989), *supra* fn. 67, 95. Denying or questioning such validity, see Sandvik-Nylund (2003), *supra* fn. 118, 35; Ojinaga Ruiz (2005), *supra* fn. 118, 120 and 239; Zorzi Giustiniani (2008), *supra* fn. 68, 84. Sandvik-Nylund and Zorzi Giustiniani refer to the *travaux préparatoires*: reasons of security were proposed as an exception for the Occupying Power to refuse acceptance of relief actions under art. 59 GC IV but in the end such a clause was adopted only for individual relief: see ICRC Commentary GC IV, 329 (commentary to art. 62 GV IV).

¹⁵⁰ On the limits of restrictions for imperative military necessity, see Commentary GC IV, 577 (commentary to art. 143(3) GC IV).

according to Article 70 AP I relief consignments, equipment and personnel composing relief actions in IAC shall be facilitated by all High Contracting Parties in terms of rapid and unimpeded passage and not be diverted, subject to the right to prescribe technical arrangements (including search) and to make passage conditional on the distribution of the assistance being made under the supervision of a Protecting Power.¹⁵¹ Relief consignment shall also be protected by the Parties to the conflict, and their rapid distribution facilitated. Analogous obligations are not provided by IHL treaties for NIAC, but the attitude adopted in particular by the UNSC, calling for access and facilitation of humanitarian assistance by Parties to the conflict in both IACs and NIACs, support the existence of customary rules in this sense applicable to NIAC. In addition, as suggested by Sandvik-Nylund, based on the duty for the Parties to treaties to apply treaty obligations in good faith, ‘the duty to allow humanitarian assistance is quite meaningless if the States Parties are not automatically required to actively facilitate these operations.’¹⁵² Relief consignments for civilians in the occupied territory and for internees shall be granted passage and access free of charges.¹⁵³

Protection for relief actions in armed conflict is ensured also by ICL, through both the provisions criminalising intentional attacks against personnel and objects participating in a humanitarian assistance mission in accordance with the UN Charter, in NIAC and IAC, and the provision in IAC criminalising starvation of civilians as a method of warfare, including ‘wilfully impeding relief supplies’,¹⁵⁴ which according to Werle has a corresponding rule of customary law applicable to NIAC.¹⁵⁵ What can be argued is that support for a customary rule applicable in NIAC prohibiting impediments to humanitarian assistance and workers can be found in consistent UN practice in this sense.¹⁵⁶

A final issue deserving clarification in connection to external relief actions in IAC and NIAC and their regulation is the relationship between these relief actions and protection activities. In other words, the regulation in IHL treaties, as well as in ICL, focuses on relief actions in terms of the delivery of goods necessary for the survival of the civilian population, possibly comprising also personnel and equipment. The regulation in IHL treaties regarding humanitarian protection activities is contained in different provisions, but the two areas of intervention (relief and protection) are both covered by the articles devoted to the right

¹⁵¹ On the differences between arts. 23 GC IV and 70 AP I, see Section 6.1.1.2.2.

¹⁵² Sandvik-Nylund (2003), *supra* fn. 118, 32.

¹⁵³ See arts. 61 and 110 GC IV, art. 69(2) AP I.

¹⁵⁴ See art. 8(2)(b)(iii), 8(2)(b)(xxv), and 8(2)(e)(iii) ICCSt.

¹⁵⁵ See Gerhard Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005), 365.

¹⁵⁶ See Section 3.2.1.2.3.; on impediments to humanitarian assistance as a basis for the imposition of targeted sanctions, see Section 3.2.1.2.4.

of humanitarian initiative, explicitly in the case of Article 9 GC IV, and implicitly through the general reference to the ‘services’ of impartial humanitarian organisations in Common Article 3.

Since the same personnel forming part of relief actions to which the Parties concerned have given consent might also engage in protection activities, this sum of activities might risk leading to a refusal of relief actions in order to avoid the undertaking of protection activities. It should be underlined that, while State practice has constantly restated and strengthened the rules on the access and facilitation of humanitarian assistance, similar attention has not been devoted to protection activities by relief personnel,¹⁵⁷ so that the aforementioned rules seem to apply exclusively to relief actions aimed at ensuring the survival of the civilian population through basic goods and services.

The rules and limits connected to the performance of protective actions, meaning actions aimed at ensuring respect for the human rights of the victims of armed conflict more in general, will be examined in the next Sections, with reference to impartial humanitarian organisations, other organisations, and third States respectively.

6.2.2. Impartial Humanitarian Organisations and Other Organisations

External relief actions in favour of civilians in need have been specifically regulated under IHL, and the State practice analysed has confirmed that such actions shall be humanitarian, impartial, provided without any adverse distinction, and militarily neutral. No duty exists for States or other Parties to an armed conflict to give their consent to relief actions in favour of the civilian population that do not comply with these principles and the rules of conduct they embody. In terms of actors entitled to perform such actions, IHL treaties are quite open. For example, Article 59 GC IV refers to both States and ‘impartial humanitarian organizations such as the International Committee of the Red Cross’. Moreover, the origin of the relief supplies, in other words the identity of the donors, does not matter, as long as the implementing actor respects the necessary principles mentioned in the previous Section for relief actions to be entitled to special protection.¹⁵⁸

Notwithstanding this open character regarding external relief actors in IHL treaties, the characteristics of these actors and the boundaries of their intervention are crucial due to the sensitivity of the

¹⁵⁷ As an exception, as mentioned in Section 3.2.1.1., ECOSOC for the first time in 2013 has mentioned protection among the ‘basic humanitarian needs of affected populations,’ together with ‘food, shelter, health, clean water’. E/RES/2013/6, 17 July 2013, par. 27.

¹⁵⁸ See ICRC Commentary GC IV, 321.

activity they undertake. From this follow, on the one hand, the existence of provisions to guarantee that the actors concerned respect the fine balance between humanitarian considerations and military necessity embodied in IHL, and, on the other hand, the emergence of a specific role and status under IHL for external organisations that satisfy the requirements of being humanitarian and impartial.

Under GC IV, all States Parties have the duty to allow the passage of certain kinds of relief supplies for specific categories of civilians in IAC, but it is not specified whether relief personnel might participate in these actions or what kind of actors might undertake them.¹⁵⁹ In any case, the Party allowing the passage is entitled to make such permission conditional on the distribution being made under the local supervision of the Protecting Powers, to guarantee that the relief consignments do indeed benefit only civilians in need. In accordance with the Protecting Power regime under GC IV, such a supervisory function, as well as other functions entrusted to the Protecting Powers, might be carried out by an organisation offering guarantees of impartiality, acting as a substitute of the Protecting Power, or by a humanitarian organisation, performing the humanitarian functions of the Protecting Power in the absence of the latter.

In situations of occupation, in addition to the applicability of Article 23 GC IV, the Occupying Power is obliged to agree to relief schemes if it cannot adequately supply the civilian population of the occupied territory. As mentioned, States and impartial humanitarian organisations are cited as potential actors to undertake these relief schemes; the ICRC Commentary suggests that reference to impartial humanitarian organisation ‘is general enough to cover any institutions or organizations capable of acting effectively and worthy of trust’, and that relevant States would be only neutral States, able to offer adequate guarantees of impartiality.¹⁶⁰ Distribution of the relief consignments *shall* then be carried out ‘with the cooperation and under the supervision of the Protecting Power’ or of a neutral Power, the ICRC or another impartial humanitarian body (upon agreement between the Occupying Power and the Protecting Power).¹⁶¹ The idea is thus that both Parties allowing the passage of relief and the Party opposed to the one controlling the area where the relief is delivered shall have guarantees that no interference in the conflict takes place, both through performance of relief actions by subjects offering guarantees of impartiality and through the possible supervision of relief distribution by such actors.

¹⁵⁹ See art. 23 GC IV.

¹⁶⁰ ICRC Commentary GC IV, 321.

¹⁶¹ Art. 61 GC IV.

Relief societies operating in favour of protected persons are entitled under GC IV (Articles 30 and 142) to be contacted by protected persons, be granted all facilities by the authorities to assist them, within the limits of military and security considerations, and get their visits to protected persons deprived of their freedom or in occupied territory facilitated, to give these persons spiritual aid or material relief and assist them in organising their leisure time within the places of internment. The Detaining Power is entitled to limit the number of these organisations but safeguarding the provision of adequate relief to all protected persons. It is arguable that organisations benefitting from these provisions include those that engage not only in humanitarian activities but also in development or that support the political cause of a Party to an armed conflict. Still, the ICRC Commentary underlines that while these organisations might be bodies focusing on humanitarian assistance on a temporary basis, in connection with the existence of an armed conflict, ‘mere sporadic activities on the part of an organization could not be considered as conferring on it the standing and privileges of a relief society’, and that organisations covered by these provisions ‘whether national or international, must likewise strictly avoid, in their humanitarian activities, any action hostile to the Power in whose territory they are working or to the Occupying Power’, since such criterion guides all relief activities under GC IV (and can be enforced by the Detaining Power by limiting the number of societies allowed to visit detained protected persons).¹⁶²

Similarly, the regulation of relief actions in Article 70 AP I does not specify the characteristics of actors entitled to offer to perform them and to actually undertake them, being given all the necessary facilities by the Party to the conflict receiving the relief, so that organisations with a political or commercial character have a right to make similar offers and not to have them regarded as interference in the conflict or an unfriendly act.¹⁶³ Still, concerned Parties might require the distribution of relief to be supervised by Protecting Powers (or their substitutes).¹⁶⁴ Moreover, offers covered by Article 70 AP I comprise only the provision of assistance, while it seems, as analysed in Section 2.1.5.2., that in the field of protection and of

¹⁶² ICRC Commentary GC IV, 560 and 218.

¹⁶³ The San Remo Guiding Principles and the Bruges Resolution seem to adopt a narrower approach, providing that ‘[n]ational authorities, national and international organizations whose statutory mandates provide for the possibility of rendering humanitarian assistance, such as the ICRC, UNHCR, other organizations of the UN system, and professional humanitarian organizations, have the right to offer such assistance’ and that “[a]ssisting State or organization” means the State or intergovernmental organization, or impartial international or national non-governmental organization which organizes, provides or distributes humanitarian assistance’ respectively. International Institute of Humanitarian Law (1993), *supra* fn. 56, 522-523 (principle 5); Institute of International Law (2003), *supra* fn. 56, art. I(5).

¹⁶⁴ All necessary facilities shall also be given to the actors that carry out such supervision. See ICRC Commentary APs, 829 (par. 2865).

monitoring respect for the treaties, States were careful to envisage a role only for organisations offering guarantees of impartiality and trustworthiness.

Finally, in IAC and occupation, organisations covered by Articles 30 and 142 AP I may also invoke from State Parties, pursuant to Article 81(4) AP I, as far as possible, facilities necessary to carry out their humanitarian activities (such as ‘permits for persons and goods, transport facilities for goods and other equipment, exemptions from import taxes and customs duties etc.’),¹⁶⁵ as long as they are authorised by the Parties to the conflict and carry out activities that are ‘impartial and [do] not compromise military operations ... submit themselves to any security rules imposed upon them, and [do] not use their privileged situation to collect and transmit political or military information’.¹⁶⁶

In NIAC, AP II does not specify the kind of actor that may undertake relief actions under Article 18(2), but the ICRC Commentary argues that ‘[w]hat is meant in particular is relief actions which may be undertaken by the ICRC or any other impartial humanitarian organization.’¹⁶⁷ The system of the Protecting Powers does not apply in NIAC and no explicit provision is included in IHL treaties as to the possibility for a Party allowing passage of relief to require its distribution under the supervision of a third actor, such as an impartial humanitarian organisation. In any case, such an arrangement is not excluded, so that it should be accepted and possibly even encouraged, with a view to favouring the provision of all necessary relief to civilians in need.

6.2.2.1. Impartial Humanitarian Organisations

In addition to these provisions covering all actors providing relief to civilians in need, impartial humanitarian organisations are attributed a specific role in protection activities in both IAC and NIAC, differently from other kinds of organisations. In IAC, not only impartial humanitarian organisations play a role in the Protecting Powers regime,¹⁶⁸ but also more in general in the framework of protective activities such as the

¹⁶⁵ ICRC Commentary APs, 944 (par. 3331).

¹⁶⁶ See ICRC Commentary APs, 944-945 (pars. 3335-3338). In the words of Partsch, with reference to the organisations mentioned in art. 81(4) AP I, ‘there was no reason to mention also the fundamental principles of the Red Cross, which cannot be binding upon bodies of an entirely different origin. The reference to the Conventions, mainly to Arts. 9/9/10 implies, however, that these organizations are permitted to carry out humanitarian functions only if they are impartial and do not distinguish on the base of nationality, race, religion, social conditions or political orientation. That is the main requirement.’ Karl Josef Partsch, “Article 81 – Activities of the Red Cross and Other Humanitarian Organizations,” in *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, by Michael Bothe, Karl Joseph Partsch, and Waldemar A. Solf (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982), 498.

¹⁶⁷ ICRC Commentary APs, 1479 (par. 4879).

¹⁶⁸ See art. 11 GC IV and art. 5 AP I.

conclusion of agreements on demilitarised zones,¹⁶⁹ and they are listed as a possible source of permanent medical units and transports and hospital ships, as well as personnel, to be made available to a Party to the conflict for humanitarian purposes and entitled to protection analogous to units and personnel of the Red Cross Society of a neutral country put at the disposal of a Party and to hospital ships used by National Red Cross Societies respectively.¹⁷⁰

6.2.2.1.1. The Right of Humanitarian Initiative

Furthermore, both in IAC and NIAC, differently from other organisations, impartial humanitarian ones, such as the ICRC, have a so-called right of humanitarian initiative, enshrined in Common Article 3 and in Article 10 GC IV (corresponding to Article 9 GC I, II, and III). This right of humanitarian initiative covers the right to offer services related to both humanitarian assistance and protection of civilians, and the fact that only a specific category of actors has been granted it can be probably explained with the need to guarantee that, on the one hand, humanitarian actions do not alter the balance of the hostilities and, on the other hand, civilians are assisted as much as possible.¹⁷¹ The ICRC Commentary to Article 9 GC IV argues that humanitarian activities ‘are not necessarily concerned directly with the provision of protection or relief’ and ‘may be of any kind and carried out in any manner, even indirect, compatible with the sovereignty and security of the State in question’: it is not exactly clear what such position would imply, in any case the practice analysed throughout this dissertation has consistently connected humanitarian activities to the provision of humanitarian assistance or protection.¹⁷²

Impartial humanitarian organisations have the right to offer their services to all Parties to the conflict in both IACs and NIACs, and in the fields of both assistance and protection (as it is explicitly specified in Article 10 GC IV), without such an offer being considered an unfriendly act. The ICRC Commentary notes that ‘[i]t is obvious that any organization can “offer its services” to the Parties to the conflict at any time, just as any individual can’, but then highlights the significance of the provision, since ‘an impartial humanitarian

¹⁶⁹ See art. 60 AP I.

¹⁷⁰ This protection of medical units and transports entails that the assistance provided shall never be considered interference in the conflict and that their personnel, if captured, shall not be detained but sent back to their country of origin or to the Party in whose service they were. See art. 9(2)(c) AP I, referring to arts. 27 and 32 GC I. The protection of hospital ships is equivalent to that of military hospital ships and comprises exemption from capture (provided that the necessary conditions regarding control and notification have been met). See art. 22(2)(b) AP I, referring to art. 25 GC II.

¹⁷¹ Under art. 70 AP I, other kind of actors are explicitly entitled to offer relief.

¹⁷² See ICRC Commentary GC IV, 98. On the difference between humanitarian activities and actors on the one hand, and human rights or development ones on the other, see Section 5.3.2.2. and below in this Section.

organization [is] now [] legally entitled to offer its services'.¹⁷³ In the words of Bugnion on the right of initiative of the ICRC, which can be extended to all other impartial humanitarian organisations: 'whereas other international organizations are obliged to wait – often in vain – for government to request their help, the ICRC has the right to make the first move and offer its services to the parties to a conflict.'¹⁷⁴ Furthermore, such an offer cannot be considered as an unfriendly act, and must be evaluated in good faith.¹⁷⁵ According to Stoffels, it shall also not be arbitrarily refused;¹⁷⁶ however, nothing in the text of the article seems to support such an interpretation, and the ICRC Commentary seems to attribute complete discretion to the Parties,¹⁷⁷ even if it then states that Parties to the conflict 'may, of course, decline the offer *if they can do without it*'.¹⁷⁸

For offers of relief, the duty not to refuse them arbitrarily does emerge from the *travaux préparatoires* and has been restated in State practice. However, regarding offer of humanitarian protection services by impartial humanitarian organisations, in particular other than the ICRC (which can invoke specific legal bases, such as Article 143 GC IV for visiting detained people),¹⁷⁹ an analogous duty does not seem to have clearly emerged. In IAC, such a duty not to arbitrarily refuse offer of humanitarian services may be supported by Article 30 GC IV, which gives the right to protected persons to apply to the ICRC or other organisations that might assist them, and imposes the obligation upon the authorities to give these organisations all necessary facilities, within the limits of military and security considerations. Also, in both IAC and NIAC it may be argued is that, in case of refusal, due to the duty to consider the offer in good faith, the reasons for such refusal should be communicated, also given that the presumption is that such offers are limited to humanitarian activities in favour of civilians in need.

While it is true that other types of organisations, as already mentioned, are entitled under AP I to offer relief actions without such offers being considered an unlawful interference, this right does not cover offers in the field of protection. Also, a similar right is not explicitly provided in AP II and, following a strict interpretation of Article 18(2) AP II, it is arguable that consent of the State concerned is necessary for relief actions in NIAC. As mentioned in Section 6.1.1.2.4., such an interpretation is generally supported by

¹⁷³ ICRC Commentary GC IV, 41. Emphasis added.

¹⁷⁴ Bugnion (2003), *supra* fn. 66, 408.

¹⁷⁵ See Yves Sandoz, "Le droit d'initiative du Comité International de la Croix-Rouge," *German Yearbook of International Law* 22 (1979), 361-362; Bugnion (2003), *supra* fn. 66, 424.

¹⁷⁶ See Abril Stoffels (2001), *supra* fn. 39, 163.

¹⁷⁷ See ICRC Commentary GC IV, 41-42.

¹⁷⁸ ICRC Commentary GC IV, 41. Emphasis added.

¹⁷⁹ See Section 2.1.5.2.1.

scholars and practice for relief actions undertaken by States and other actors different from impartial humanitarian organisations. On the other hand, scholars have argued that, given that AP II complements GC IV, Common Article 3 would remain valid, and the right of humanitarian initiative it enshrines would provide a legal basis for impartial humanitarian organisations to offer their services to a non-State Party and carry them out without need for consent from the State.¹⁸⁰ This is especially relevant because, while a State Party to a conflict can allow whatever kind of actor to have access to the territory it controls and provide relief to victims (as long as Parties controlling territory where relief need to transit consent to the passage), it is often the case that the basic needs of victims cannot be met, and one of the reasons is the lack of actors able and ready to assist them.

In general, it seems that State practice has not questioned the need for consent for relief actions, so that a proper right to access for relief actions has arguably not emerged under customary law,¹⁸¹ as provided in IHL treaties, only a right to offer relief exists, arguably supplemented by a right to have this offer considered in good faith (and not as an unlawful interference) both in IAC and NIAC. What remains to be determined is whether practice confirms that, in case of NIAC, consent is not always needed from the State, rather impartial humanitarian organisations are entitled to operate in rebel-controlled territory with the exclusive agreement of the rebels under Common Article 3, provided that they do not need to transit through territory under governmental control.

During the Cold War, for example in the cases of Cambodia and Eritrea, humanitarian organisations seemed to affirm through their practice an interpretation of Common Article 3 as allowing cross-border relief actions to be undertaken into territory controlled by non-State armed groups even without consent or against the express will of the State.¹⁸² However, States at the time did not openly accept nor endorse such a practice. Recent practice by States (and the UN) in Syria, as well as in South Kordofan and Blue Nile,¹⁸³ arguably confirms that, notwithstanding the interpretation proposed by organisations such as MSF and other

¹⁸⁰ See ICRC Commentary APs, 1480 (pars. 4891-4892); Maurice Torrelli, "From Humanitarian Assistance to 'Intervention on Humanitarian Grounds'?", *International Review of the Red Cross* 32, no. 288 (May-June 1992), 233-234; Paye (1996), *supra* fn. 68, 92; Zorzi Giustiniani (2008), *supra* fn. 68, 89-90; Dietrich Schindler, "Humanitarian Assistance, Humanitarian Interference and International Law," in *Essays in Honour of Wang Tieya*, ed. Ronald St. J. Macdonald (Dordrecht [etc.]: Nijhoff, 1994), 700; Bugnion (2003), *supra* fn. 66, 447-451 and 808-809; Raphaël van Steenberghe, "Non-State Actors from the Perspective of the International Committee of the Red Cross," in *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, ed. Jean d'Aspremont (London and New York: Routledge, 2011), 206.

Flavia Lattanzi distinguishes more in general between ICRC and NGOs, on the one hand, and States, governmental organisations and IGOs, on the other hand. See Lattanzi (1995), *supra* fn. 68, 426-428.

¹⁸¹ In this sense, see Spieker (2008), *supra* fn. 30, par. 36.

¹⁸² See Section 3.1.1.

¹⁸³ See Section 3.2.2.3.

organisations performing or advocating cross-border actions, States seem to interpret Common Article 3 in accordance with Article 18(2) AP II, always requiring consent from the State for relief operations in NIAC.¹⁸⁴ It should also be taken into account that acting against the consent of the Government would almost automatically imply loss of access to civilians in territories controlled by the Government.

Moreover, even if one was to espouse the thesis that the duty of non-intervention binds only States and IGOs,¹⁸⁵ NGOs operating in rebel-held territory without consent from the State would not violate international law, but might be judged for violation of national laws if control of the territory where they operate is then gained again by the State in question. Also, they would not be entitled to the specific protection granted to relief actions and personnel in terms of facilitation, protection, freedom of transit, and freedom of movement, but only to protection as civilian objects and civilians, as long as they do not take direct part in hostilities.¹⁸⁶

However, in case of *impartial humanitarian* organisations, it has been argued that they have a right under international law, based in Articles 3, 10, and 59 GC IV (but also Article 9(2) AP I), to bring relief to population in need, and that they can oppose such right to State arbitrarily refusing their services and invoke it in front of ‘all judicial or administrative authority that intends to obstruct them on the basis of domestic

¹⁸⁴ More in general, States seem to be reluctant to authorise any kind of engagement of humanitarian actors with certain non-State armed groups, classified as terrorists. In any case, humanitarian actors have constantly claimed, supported for example by the UNGA, the need for them to talk to all Parties to armed conflicts, in order to achieve full access to all victims in need. For example, on counter-terrorism legislation and its impact on the ability of humanitarian organisations to negotiate with non-State actors listed as terrorist organisations, see Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Independent Study Commissioned by UN OCHA and NRC, July 2013, available at https://docs.unocha.org/sites/dms/Documents/CT_Study_Full_Report.pdf (accessed September 10, 2013); Sara Pantuliano, Kate Mackintosh and Samir Elhawary, with Victoria Metcalfe, *Counter-Terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*, HPG Policy Brief 43 (London: Overseas Development Institute, 2011); Naz K. Modirzadeh, Dustin A. Lewis, and Claude Bruderlein, “Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape,” *International Review of the Red Cross* 93, no. 883 (September 2011): 623-647.

¹⁸⁵ In this sense, see, for example, See Mario Bettati, *Le Droit d'ingérence: mutation de l'ordre international* (Paris, Odile Jacob, 1996), 12; Cedric Ryngaert, “Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective,” *Amsterdam Law Forum* 5, no. 2 (Spring 2013), 12. Ryngaert makes reference to the ICJ Advisory on Kosovo as supporting the position that non-State actors are not bound by the principle of territorial integrity of States, since the Court similarly held that the authors of the declaration of independence of Kosovo were not bound by the constitutional framework created during the interim phase (which arguably had an international character): ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 22 July 2010 at 403, para. 105.

However, this position seems to be discarded by the negotiating history of AP II, as explained in the ICRC Commentary:

The ICRC draft was concerned only with prohibiting intervention by third States. In Committee a proposal was submitted orally to include “any other organization” in addition to States. This proposal was based on the allegation that in the past private organizations had been guilty of abuses in the name of humanitarian activities. It did not meet with the agreement of the delegates. Some expressed the fear, which was unfounded, that it could result in the competence of the United Nations being called into question, particularly that of the Security Council, to take appropriate measures in the event that international peace and security were endangered. On the other hand, an amendment to the effect that the reference to States in the text should be deleted, was adopted. The prohibition is therefore addressed not only to States, but also to other bodies, international or non-governmental organizations, which might use the Protocol as a pretext for interfering in the affairs of the State in whose territory the armed conflict is taking place.

ICRC Commentary APs, 1363 (par. 4503).

¹⁸⁶ See Abril Stoffels (2001), supra fn. 39, 292 and 314-316; Schindler (1994), supra fn. 180, 700.

law.’¹⁸⁷ No State practice in this sense, in particular national case-law, has been found, and it should be acknowledged that opposite views exist on whether impartial humanitarian organisations, and the ICRC itself, are granted rights under IHL,¹⁸⁸ or simply benefit from the fulfilment by Parties to a conflict of obligations that these Parties have vis-à-vis the State Parties to the GCs and APs.¹⁸⁹

In sum, practice does not seem to support an interpretation of Common Article 3 as a legal basis for unauthorised cross-border operations in NIAC, but still its relevance cannot be discarded. Indeed, not only it arguably provides a basis that impartial humanitarian organisations can invoke when offering to provide relief (and for this offer not to be judged an unlawful interference in the internal affairs and to be considered in good faith) also in situations where AP II is not applicable, but also it provides these organisations with a basis to make offers in the field of protection, analogously to Article 10 GC IV for IAC.

6.2.2.1.2. What is an Impartial Humanitarian Organisation

State practice seems to have confirmed and strengthened the position of *humanitarian* workers or *humanitarian relief personnel* vis-à-vis States and other non-humanitarian actors, since statements regarding the duty of Parties to armed conflicts to guarantee access, safety, security and freedom of movement for the provision of relief have constantly focused on the first kind of actors, sometimes explicitly referring to ‘international humanitarian organisations’.¹⁹⁰ *A contrario*, analogous duties in relation to the access, for instance, of development actors or human rights workers have not been affirmed. The right to humanitarian initiative for impartial humanitarian organisations in the field of protection activities has not been the subject of similar instances of state practice, thus neither contradicted nor arguably enlarged to other kind of actors.

As analysed in Section 2.1.5.1.2., according to the ICRC Commentaries to GC IV and the APs, the category of impartial humanitarian organisations covers organisations ‘concerned with the condition of man, considered solely as a human being, regardless of his value as a military, political, professional or other unit’, and respecting the principle of impartiality as defined by the Red Cross, in the sense of operating in

¹⁸⁷ Eric David, *Principes de Droit des Conflits Armés*, 4th ed. (Brussels: Bruylant, 2008), 529 (par. 2.375) and 525 (par. 2.372). Own translation.

¹⁸⁸ On the ICRC being given a specific mandate by States in IHL treaties, and thus the rights necessary to carry out such mandate and the entitlement to demand respect for such rights, see Bugnion (2003), *supra* fn. 66, 958-962 and 966.

¹⁸⁹ In this sense, see Tarcisio Gazzini, “A Unique Non-State Actor: the International Committee of the Red Cross,” Provisional draft, ILA Committee on non-state actors – Leuven 26-28 March 2009, available at: http://ghum.kuleuven.be/ggs/projects/non_state_actors/publications/gazzini_bis.pdf (accessed January 2, 2013).

¹⁹⁰ See, in particular, Section 3.2.1.1.4 and 3.2.1.2.2. Confirming that the UNSC considers humanitarian workers and human rights workers as two different groups, see for example the mandate of MONUSCO: as seen in Section 4.2.2.2., it includes ‘[e]nsur[ing] the effective protection of civilians, including humanitarian personnel and human rights defenders, under imminent threat of physical violence’: S/RES/1925 (2010), 28 May 2010, par. 12(a).

accordance with the principle of non-discrimination.¹⁹¹ Both governmental and non-governmental organisations may be covered, while the requirement of humanitarian nature would exclude ‘organizations with a political or commercial character.’¹⁹²

While no instance of State practice has been found clarifying the concept of ‘impartial humanitarian organisation’, its centrality for the right of humanitarian initiative, enshrined in the universally ratified GCs, makes an interpretation of this term all the more important. Based on the interpretation of the impartial and humanitarian qualifications of an organisation given by the ICRC Commentaries, it is arguable that, in addition to the ICRC, the IFRC,¹⁹³ National Red Cross Societies,¹⁹⁴ NGOs and intergovernmental organisations might be qualified as such. As mentioned in the previous Chapter, some authors express doubts about the possibility for UN agencies to enjoy the qualification of impartial humanitarian organisations, and doubts have also been expressed regarding organisations engaged both in humanitarian and development work, since ‘the UN and some of its agencies ... are bound by official recognition by national authorities and can hardly provide relief in an impartial way to victims dependent on rebel movements’, and ‘some organisations or governments [are] engaged in cooperation or development actions that suppose strict links with national authorities not always compatible with the impartiality and independence necessary for humanitarian action.’¹⁹⁵

Still, as just analysed, State practice seems to require governmental authorisation also for impartial humanitarian organisations operating in rebel-controlled areas. The ICRC, the impartial humanitarian body *par excellence*, traditionally negotiates with all Parties to the conflict. Similarly, UN agencies will be responsible for negotiating with the government the possibility of carrying out their tasks in an impartial way, possibly operating also in rebel-held territory and discriminating among victims only on the basis of needs. Agencies and funds such as UNHCR, UNICEF, and WFP have adopted the principles of humanity,

¹⁹¹ ICRC Commentary GC IV, 96; ICRC Commentary APs, 143 (par. 439).

¹⁹² ICRC Commentary APs, 143 (pars. 437 and 440).

¹⁹³ According to the IFRC website: ‘The International Federation of Red Cross and Red Crescent Societies (IFRC) is the world’s largest humanitarian organization, providing assistance without discrimination as to nationality, race, religious beliefs, class or political opinions.’ IFRC, “Who we are – Our vision and mission,” available at <http://www.ifrc.org/en/who-we-are/vision-and-mission/> (accessed July 20, 2012). In any case, according to the 1997 Seville Agreement, it is up to the ICRC to act as lead agency in situations of armed conflict, while the IFRC does it in natural or technological disasters and other emergency and disaster situations in peace time which require resources exceeding those of the operating National Society. International Movement of the Red Cross and Red Crescent, Council of Delegates, “Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement - The Seville Agreement, Sevilla, 25-27 November 1997,” art. 5.3. Reproduced in *International Review of the Red Cross*, 38, no. 322 (March 1998), 166.

¹⁹⁴ See ICRC Commentary GC IV, 326 (commentary to art. 61 GC IV).

¹⁹⁵ Françoise Bouchet-Saulnier, “L’Accès aux Victimes: Principe Humanitaire ou Slogan Politique?,” Published for MSF, December 2000, 1 (ftn. 1). Own translation. Available at <http://www.msf.fr/sites/www.msf.fr/files/2000-12-01-Saulnier.pdf> (accessed July 19, 2012). See Sections 4.1.2.1. and 4.2.2.3.

impartiality and neutrality as guiding principles for their work,¹⁹⁶ supporting their qualification as impartial humanitarian organisations.

In sum, and as affirmed in the ICRC Commentary to the APs, both governmental and intergovernmental organisations may qualify as impartial humanitarian organisations, provided that they retain independence on their operational decisions and, even if their governing bodies comprise State representatives (as in the cases of WFP and UNHCR, for example), guarantees are present that their work will adhere to the principles of humanitarian action, without being influenced by governments' political and military strategies (for instance, UNHCR and WFP are required to follow UNGA policies, thus the resolutions regulating humanitarian assistance). In this context, the sources of funds for both governmental/intergovernmental and non-governmental organisations can be seen as a key element, since dependence from governmental entities for funds is likely to imply a limitation in the freedom of choice on where and how to operate, and might also lead to the perception of humanitarian organisation as associated with a Party to the conflict, if donors are engaged in the hostilities. Even in this case, despite being maybe difficult in practice, the impartial humanitarian nature of an organisation might be safeguarded, especially if the donors are committed and follow the principles of Good Humanitarian Donorship.¹⁹⁷

On the other hand, the qualification as impartial humanitarian organisations of so-called multi-mandated organisations, meaning organisations engaged not only in humanitarian but also in development activities, might be more problematic, in the sense that engagement in development implies working with and allegedly supporting the government, thus one Party to the conflict, and '[t]he reconstruction of society requires a politics, and choices about all matters in society—political, economic, cultural—which, by their nature, *are* contestable.'¹⁹⁸ In this sense, the purely humanitarian and a-political nature of the work of an organisation, and of the organisation itself, is likely to be jeopardised.

According to Ranganathan, the qualification as impartial and humanitarian shall be extended to organisations engaged in 'political analysis, rights based advocacy, or long term development work', as long as they have a victim-centred approach, 'based on what is the best way to meet the needs of the victims in

¹⁹⁶ See Section 4.2.2.3.

¹⁹⁷ See Section 5.2.2. In any case, it should be underlined that also the ICRC, impartial humanitarian organisation by definition, receives funds from Governments, mostly Western ones. See David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge [etc.]: Cambridge University Press, 2005), 28, 182-183, and 233-237.

¹⁹⁸ Kenneth Anderson, "Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts," *Harvard Human Rights Journal* 17 (2004), 57. Emphasis in the original. See also, for example, Michiel Hofman and Sophie Delaunay (MSF), "Afghanistan: A Return to Humanitarian Action," MSF Report, March 2010, 6. Available at http://www.doctorswithoutborders.org/publications/reports/2010/MSF-Return-to-Humanitarian-Action_4311.pdf (accessed April 25, 2011).

any given conflict situation.¹⁹⁹ Still, such an approach would lead to the loss of a specific identity for humanitarian work and impartial humanitarian organisations as different, for example, from development organisations and human rights NGOs. Moreover, such a broadening of the category of impartial humanitarian organisations might entail a weakening of the status and prerogatives of strictly impartial humanitarian organisations in practice, since Parties to the conflict might become suspicious of the nature of their activities and of their impact on the balance of conflict. It is argued that a narrower interpretation of ‘impartial humanitarian organisations’, focusing on the meaning that can be derived from IHL treaties and their Commentaries, also keeping in mind that the example of impartial humanitarian body is always the ICRC, would favour the protection and the space for action of these subjects. Also, this interpretation is arguably supported by State practice, thus acceptable to States.

The principles of humanity, impartiality, and neutrality draw inspiration from the Fundamental Principles of the Red Cross,²⁰⁰ which comprise rules also regarding the behaviour of the actor, but the application of similar rules more in general to impartial humanitarian organisations and/or actors engaged in relief actions has been debated.²⁰¹ In particular, as seen in the analysis, neutrality in terms of not taking side in controversies, which leads the ICRC especially to privilege confidentiality as its way of working,²⁰² has been subject to criticisms and challenges. Furthermore, the principles of humanity, impartiality, neutrality and independence have been invoked by many humanitarian organisations, but sometimes with different interpretations.²⁰³

The principle of humanity does not seem to have been questioned as the original inspiration of humanitarian action, since it has been constantly restated as, when defined, consistent reference has been made to the definition adopted by the Red Cross Movement.²⁰⁴ It might be argued that the principle of humanity is the declination, in relation to humanitarian action, of the general principle of international law of

¹⁹⁹ Surabhi Ranganathan, “Reconceptualizing the Boundaries of ‘Humanitarian’ Assistance: ‘What’s in a Name’ or ‘The Importance of Being Earnest’?,” *The John Marshall Law Review* 40, no. 1 (2006), 229. See also, for example, Paul O’Brien, “Politicized Humanitarianism: A Response to Nicolas de Torrente,” *Harvard Human Rights Journal* 17 (2004): 31-39.

²⁰⁰ On the binding nature of the Fundamental Principles for the components of the Movement (and on legal effects for States Parties to the GCs and APs), see François Bugnion, “Red Cross Law,” *International Review of the Red Cross* 35, no. 308 (September-October 1995), 506-511.

²⁰¹ See Sections 1.1., 1.2.3., and 5.2.

²⁰² Some changes have arguably taken place over time on how neutrality has been operationalised in practice by the ICRC, for example in terms of ‘speaking out’ on IHL violations. See Bugnion (2003), *supra* fn. 66, 939-943.

²⁰³ ‘Si à l’origine les Principes fondamentaux d’humanité, d’impartialité, de neutralité et d’indépendance étaient vus comme propres à la Croix Rouge, ils sont souvent utilisés par d’autres (notamment des organisations non gouvernementales, voire des gouvernements) pour justifier leur action. Mais, dans tous les cas, sans y attacher la même signification, ni la même rigueur dans leur mise en œuvre.’ Jean-Luc Blondel, “L’humanitaire appartient-il à tout le monde? Réflexions autour d’un concept (trop?) largement utilisé,” *International Review of the Red Cross* 82, no. 838 (June 2000), 327-337.

²⁰⁴ See in particular Sections 3.2.1.1.2., 3.2.1.1.3., 3.2.1.2.2., 3.2.2.4., 4.1.2.4., 4.2.2.3., and 5.2.5.

‘elementary considerations of humanity’: this general principle in the field of relief for and protection of civilians translates in the primacy of (impartially) alleviating the suffering of victims in need, as illustrated by the ICJ in the *Nicaragua* case.²⁰⁵ Humanity would thus guide the interpretation of the other principles, being the primary and ultimate reference for humanitarian actors when determining their conduct. Moreover, as affirmed by the ICJ and confirmed by provisions in IHL treaties, impartiality is strictly connected to the humanitarian nature of a relief action: again such principle has been constantly restated and consistently defined.²⁰⁶ Apart from this, the possibility of interpreting and operationalising the principles in different ways seems to be supported by the ICRC itself, affirming its own unique position in the international scenario, due to its mandate under IHL. In this sense, ‘[w]hile recognizing that *there are other approaches to humanitarian action*, [the ICRC] believe[s] that neutral and independent humanitarian action has a clear added value for the protection of civilians in times of armed conflict and that it is essential to avoid the misperception that political, military and humanitarian actors all pursue the same objectives.’²⁰⁷

According to Blondel, impartiality in distributing relief is a constitutive element of humanitarian action, while neutrality is not, in the sense that ‘it is possible to make a partisan choice, to support a specific cause and to undertake a humanitarian action.’²⁰⁸ However, he focuses on ideological neutrality, affirming that IHL does not require a humanitarian organisation to be neutral or independent, while it requires humanitarian action not to favour a Party, not to actively contribute to the hostilities, to be impartial.²⁰⁹ Clearly, Blondel subsumes military neutrality under the heading of impartiality, while he underlines the possibility for humanitarian organisations not to be ideologically neutral or independent according to the Red Cross interpretation of the term. In this sense, an organisation taking sides in favour of a Party and providing assistance to this Party only would act in a non-neutral way but still carry out a humanitarian action, if it

²⁰⁵ In the words of Dupuy, ‘D’une façon générale, en effet, les “considérations” sont bel et bien toujours traitées comme des sources d’obligations juridiques. Elles incorporent elles-mêmes des règles de droit international général dont le dénominateur commun est l’obligation de respecter la dignité de la personne humaine, mais dont les implications concrètes, généralement définies en relation avec d’autres règles de droit international général (principes ou coutumes), peuvent être définies cas par cas, en fonction des circonstances de chaque espèce.’ Pierre-Marie Dupuy, ‘Les “Considérations Élémentaires d’Humanité” dans la Jurisprudence de la Cour Internationale de Justice,’ in *Mélanges en l’Honneur de Nicolas Valticos: Droit et Justice*, ed. René-Jean Dupuy (Paris: Éditions A. Pedone, 1999), 125. On general considerations of humanity, see Section 1.3.2.

²⁰⁶ See in particular Sections 3.2.1.1.2., 3.2.1.1.3., 3.2.1.2.2., 3.2.2.4., 4.1.2.4., 4.2.2.3., and 5.2.5.

²⁰⁷ Statement by Mr. Jacques Forster, Vice-President of the ICRC, before the Security Council: S/PV.5319, 9 December 2005, 7-8. Similarly, see the statement by Mr. Stillhart, Deputy Director of Operations of the ICRC, before ECOSOC: ‘While humanity and impartiality were values shared by many humanitarian organizations, neutrality and independence were characteristic features of the ICRC as an institution.’ E/2009/SR.29, 20 July 2009, 2.

²⁰⁸ Jean-Luc Blondel, ‘Neutralité et Action Humanitaire,’ *Refugee Survey Quarterly* 26, no. 4 (2007), 189. Own translation.

²⁰⁹ See Ibid. 189. Own translation.

respects the principle of impartiality (and military neutrality);²¹⁰ in a similar way, a non-independent organisation that depends on a single donor or on a single Party can provide useful relief, whatever its margin of political manoeuvring is, if again the principle of impartiality is upheld.²¹¹

However, a first observation is that an action conducted (by whatever kind of actor) in the territory controlled by one Party only can be conducted impartially, but an impartial humanitarian organisation, to be defined as such, should arguably assess needs on all sides and decide whether to offer its services to one side only exclusively on the basis of existing needs.²¹² Also, the practice examined, in particular in the framework of the consideration accorded to humanitarian action by UN bodies, has revealed not just a constant reference to the principles of humanitarian action, but also a focus on *humanitarian* workers and organisations, or on ‘[i]ntergovernmental and non-governmental organizations working impartially and with strictly humanitarian motives’,²¹³ so that the possibility envisaged by IHL treaties for non-humanitarian organisations (with a political or commercial character) to undertake relief actions, while still possible, seems to be assigned a minor role in practice, also because it might even be debatable whether the applicability of the calls for access, safety, security and freedom of movement of humanitarian personnel by UN bodies would cover personnel of these organisations. This might have a significant impact in terms of the IHL applicable to NIACs, since rules on relief personnel are absent from treaty law. While it seems that there has been a development in this field through practice, it is doubtful that this broader protection in NIAC would cover personnel of organisations with a political or commercial character.

The same reasoning might apply to multi-mandated organisations, meaning organisations that are not strictly humanitarian but engage both in humanitarian activities and development ones in a same context. While humanitarian assistance shall be needs-based, development aid can be made conditional, for example

²¹⁰ In this sense, the German military manual, states, *in relation to neutral states*: ‘Humanitarian relief to victims of the conflict, even where such relief is rendered only to the victims of one party, is no breach of neutrality (Art. 14 HC V).’ The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, ed., *Humanitarian Law in Armed Conflicts - Manual*, DSK VV207320067 (August 1992) (English translation of ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch*, August 1992), par. 1110.

²¹¹ Blondel (2000), *supra* fn. 203, 327-337. Own translation.

²¹² In this sense, see ICRC Commentary GC IV, Section 2.1.5.1.1.

²¹³ See Sections 4.2.1.1. and 5.1.1.1. On the other hand, for instance, the UNGA in its annual thematic resolution on ‘International cooperation on humanitarian assistance in the field of natural disasters, from relief to development’, has made reference to ‘development organizations’, ‘humanitarian and development actors’, and ‘emergency humanitarian assistance and development assistance’. See, for example, A/RES/66/227, 23 December 2011, preamble and pars. 4, 16, and 32. Similarly, the UNSC has sometimes referred in its resolutions to ‘humanitarian and development’ assistance or actors, thus differentiating between the two types. See, for example, on Somalia: S/PRST/2001/30, 31 October 2001, 3; S/PRST/2002/8, 28 March 2002, 4; S/PRST/2002/35, 13 December 2002, par. 8; on Burundi, S/RES/1545 (2004), 21 May 2004, pars. 5 and 11; on Iraq, S/RES/1723 (2006), 28 November 2006, preamble; on Sudan, S/RES/1812 (2008), 30 April 2008, par. 21; S/RES/1870 (2009), 30 April 2009, par. 14; S/RES/1919 (2010), 20 April 2010, preamble and par. 4; on the Central African region, S/PRST/2011/21, 14 November 2011, 3; S/PRST/2012/18, 29 June 2012, 2.

upon respect for human rights, and it is generally implemented together with the authorities. For instance, in a resolution on Afghanistan the UNSC *stressed* that ‘while humanitarian assistance should be provided wherever there is a need, recovery or reconstruction assistance ought to be provided, through the Afghan Interim Administration and its successors, and implemented effectively, where local authorities contribute to the maintenance of a secure environment and demonstrate respect for human rights’.²¹⁴

Involving cooperation with the authorities, development activities in NIAC can easily be perceived as supporting the governmental Party. Non-State armed groups opposing the government might perceive an organisation that performs development activities as allied to the government and as supporting the war effort, and thus not extend to its personnel (even those personnel possibly engaged only in relief actions consented to by the government, humanitarian, impartial, and carried out without any adverse distinction) the respect, protection and freedom of movement granted to humanitarian relief personnel under customary IHL (and to relief personnel under AP I). This risk explains the calls by MSF on multi-mandated organisations in Afghanistan and in war zones more in general to ‘make a choice between relief and development assistance, a choice between saving lives today or saving societies tomorrow.’²¹⁵

6.2.2.1.3. Relief Personnel and the Limits of Their Mission

If a relief action (also in occupied territory) comprises personnel, they are entitled to respect and protection (including by the adverse Party, if they fall under its control),²¹⁶ as well as to assistance and freedom of movement except in case of imperative military necessity, always within the limits of their mission, in accordance with Article 71 AP I. Still, as highlighted by Spieker, relief workers do not have ‘an individual legal right ... to carry out a particular task’.²¹⁷ Also, if they exceed their mission, such mission can be terminated (and these personnel can be invited to leave the country). Relief personnel protected under Article

²¹⁴ S/RES/1401 (2002), 28 March 2002, par. 4. Humanity and impartiality do not appear among the principles guiding the provision of development aid (such as ownership, alignment, harmonisation, results, and mutual accountability), even if some scholars have suggested that ‘[a]pplying humanitarian principles to development aid *should in theory* be uncontroversial. Humanity, defined as saving lives and alleviating suffering, and impartiality, defined as the provision of aid according to need and without discrimination, are surely principles that *should be* shared by developmental actors.’ Paul Harvey, *Towards Good Humanitarian Government: The Role of the Affected State in Disaster Response*, HPG Report 29 (London: Overseas Development Institute, September 2009), 23. Emphasis added. On principles of development aid, see Organisation for Economic Co-operation and Development (OECD), “The Paris Declaration on Aid Effectiveness (2005) and the Accra Agenda for Action (2008),” available at <http://www.oecd.org/dataoecd/30/63/43911948.pdf> (accessed July 23, 2012).

²¹⁵ Hofman and Delaunay (MSF) (2010), *supra* fn. 198, 6. For similar calls by an MSF member in relation to Pakistan, see *supra* Section 4.1.2.4. (fn 216).

²¹⁶ As already mentioned, according to the ICRC Commentary, in this case they should not be detained but put in the conditions to return to their country of origin as soon as possible. See *supra* fn. 78.

²¹⁷ Spieker (2008), *supra* fn. 30, par. 15.

71 AP I are workers instrumental to the transportation and distribution of relief, so that the ICRC Commentary mentions ‘experts in transport, in relief administration, in organization -- to allow the relief to be forwarded to its destination in good condition, and to be distributed efficiently’, and possibly medical or paramedical personnel.²¹⁸ More in general, since relief actions include humanitarian services, it is arguable that relief workers are all the personnel necessary to perform those life-saving services (different from pure protection activities).

No specific regulation analogous to Article 71 AP I applicable in NIAC is included in IHL treaties, and the existence of a customary rule in this sense affirmed by the ICRC Study has been questioned by the U.S.²¹⁹ Still, calls regarding the access, safety, security, and freedom of movement of *humanitarian relief* workers and *humanitarian* workers have been constantly restated by UN bodies and States upon Parties to NIACs, sometimes making explicit reference to IHL, and *demands* in this sense have been issued by the UNSC under Chapter VII; the criteria of the ‘terms of mission’ limit may be derived from the reference to *humanitarian* or *humanitarian relief* personnel. Practice by Parties to NIACs, justifying the expulsion or ban of relief actors on the basis of their nature and limits of their role, also confirms the underlying existence of a general duty to allow access to the personnel who satisfy the necessary conditions, if civilians are inadequately supplied.

Still, the boundaries of the legitimate mission of relief personnel and of impartial humanitarian organisations, as well as possible consequences of overstepping these boundaries, are not entirely clear. Apart from Red Cross personnel and medical and religious personnel, who are entitled to use the emblem of the red cross and enjoy specific protection,²²⁰ personnel participating in authorised relief actions in IAC enjoy the protection under Article 71 AP I, but within the limits of their mission of providing relief. Otherwise, they will be simply protected as civilians, in general nationals of a State not Party to the conflict.²²¹ On the basis of the practice analysed and the reactions by States, it seems that Parties to armed conflicts have considered that humanitarian workers in IAC and NIAC exceed their mandate not only if they pass relief to combatants, transmit information of a military nature or fail to comply with the technical requirements imposed by the authorities (which, of course, should not be used to obstruct the relief action),

²¹⁸ ICRC Commentary APs, 833 (par. 2879-2880).

²¹⁹ See Bellinger and Haynes (2007), *supra* fn. 75, 454.

²²⁰ See Section 2.1.4.2.2.

²²¹ It should be noted that, in case they are nationals of neutral or co-belligerent States with normal diplomatic relationship with the Party controlling the territory where they operate, their protection under GC IV will be quite limited, while under AP I they will be entitled at least to the guarantees under art. 75. See Section 2.1.1.2.

as foreseen by the ICRC Commentary,²²² but also in case they do not respect more in general the national law of the State where they are operating, for example by engaging in proselytising, or get involved in activities exceeding the provision of relief and perceived as contrary to neutrality, such as public advocacy on respect for human rights. Even impartial humanitarian organisations, which can invoke a legal basis for engaging in protection activities, can arguably be required by States to respect the limit of non engagement in politics; therefore, they should keep this into account when deciding on the modes of action to adopt when doing protection. A participant in a relief action who exceeds his mission can be expelled by the Party in whose territory he has been operating, and he might also be prosecuted.²²³ Comments by the U.S. to the ICRC Study's rule on the duty to respect and protect humanitarian relief personnel in IAC and NIAC criticise not only the absence of the requirement of consent and the scarcity of the practice supporting the applicability of the rule in situations of NIAC, but also the absence of a 'terms of mission' limitation for the protection of these personnel.²²⁴ According to the U.S., 'States' obligations in this area extend only to humanitarian relief personnel who are acting within the terms of their mission – that is, providing humanitarian relief.'²²⁵

Interpretation by the U.S. of the 'terms of mission' limit seems quite broad, in the sense that 'humanitarian relief personnel who commit *acts that amount to direct participation in the conflict* are acting inconsistent with their mission and civilian status and thus may forfeit protection'.²²⁶ No reference is made to the possibility of having one's mission terminated in case of commission of acts not amounting to direct participation in hostilities, but amounting to acts incompatible with the strictly humanitarian (non-political) nature of the mission and/or to the status of impartial humanitarian organisation. On the contrary, some scholar suggests that exceeding the mission, also through acts not amounting to direct participation, might lead to a loss of protected status entailing not just termination of such mission and expulsion from the country, but also loss of protection from attack.²²⁷ Such an interpretation clearly runs contrary to a literal interpretation of Article 71 (4) AP I, which explicitly provides termination of the mission for acts exceeding such mission as different from loss of protection from attack for acts amounting to direct participation in

²²² See ICRC Commentary APs, 835-836 (pars. 2898-2902).

²²³ See ICRC Commentary APs, 836 (pars. 2903-2907).

²²⁴ See Bellinger and William (2007), *supra* fn. 75, 448-454.

²²⁵ *Ibid.*, 454.

²²⁶ *Ibid.*, 452. Emphasis added.

²²⁷ Dinstein seems to interpret the commission of acts exceeding the mission for relief personnel, as well as the commission of acts harmful to the enemy for civilian medical units and civil defence personnel, as a reason for losing protection from attack. Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge [etc.]: Cambridge University Press, 2004), 150-151.

hostilities.²²⁸ The practice analysed supports the fact that no automatic status as civilian taking direct part in hostilities can be derived from the performance of acts exceeding the mission of relief personnel. Rather, States and non-State Parties to armed conflicts have claimed their right to expel members of humanitarian relief organisations due to acts exceeding the limits of their mission, to detain them, or to ban entire organisations from operating in the territory under their control.²²⁹ The loss of civilian status due to direct participation in hostilities applies to relief personnel in the same way as to other civilians.

Acts that do not amount to direct participation in hostilities but exceed a relief worker's missions, which would entail a loss of protected status as relief workers and the possibility of having one's mission terminated, but not to be attacked, would include, for example, the failure of relief workers 'to allow only legitimate beneficiaries to benefit from relief consignments' and not to transmit information of military nature they may get access to through the mission.²³⁰ One might also mention other acts that violate neutrality and support the war effort, without amounting to direct participation in hostilities, such as spreading political propaganda in favour of one party. In any case, as underlined by Engdahl, IHL 'does not provide immunity from the exercise of criminal jurisdiction of the receiving state if any of the personnel have committed a criminal offence.'²³¹

Engdahl ventures the possibility that the loss of protection for relief personnel might derive not only from direct participation in hostilities, but also from the commission of acts harmful to the enemy, similarly to medical personnel and personnel of civil defence organisations.²³² In other words, a parallel may be drawn between civilian medical units, regulated by Article 13 AP I, and relief convoys, in the sense that if these convoys 'are used to commit, outside their humanitarian function, acts harmful to the enemy' become a military target and may be attacked, but (continuing the analogy) *only after a warning has been given*. Article 13(2) AP I specifies that carrying light individual weapons for self-defence or defence of the wounded and sick in their charge, being guarded by a picket or by sentries or by an escort, having small arms and ammunition taken from the wounded and sick and not yet handed to the proper service, and having

²²⁸ The same reasoning applies to the case of the regulation in the treaties on attack against medical unit and civil defence personnel having committed acts harmful to the enemy. See below.

²²⁹ See Sections 4.1.1., 5.2.4. 5.3.3.2., and 5.3.3.4.

²³⁰ See ICRC Commentary APs, 835-836 (pars. 2897-2907).

²³¹ Ola Engdahl, *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2007), 112.

²³² Ibid.

members of the armed forces or other combatants in the unit for medical reasons shall not be considered acts harmful to the enemy.

The concept of acts harmful to the enemy is not defined in IHL treaties. According to what is reported in the ICRC Commentary to AP I on the loss of protection for medical units, the concept may seem to include a wider range of conducts than direct participation in hostilities: a definition prepared by the ICRC in 1949 of acts harmful to the enemy defined them as ‘[a]cts the purpose *or* effect of which is to harm the adverse Party, by facilitating or impeding military operations’, so that ‘the definition of harmful is very broad ... refer[ring] not only to direct harm inflicted on the enemy, for example, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever.’²³³ Medical ships lose protection in case, for example, of ‘firing at a warship, transporting able-bodied soldiers or weaponry, or transmitting military information’.²³⁴ Similarly, according to the ICRC Commentary to GC IV, acts harmful to the enemy in the case of civilian hospitals would include ‘the use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition store, as a military observation post, or as a centre for liaison with fighting troops’,²³⁵ and, more in general, acts that violate the neutrality of civilian hospitals and amount to interference, direct or indirect, in military operations.²³⁶

The ICRC’s *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* vaguely notes that ‘[w]here IHL provides persons other than civilians with immunity from direct attack, the loss and restoration of protection is governed by criteria similar to, *but not necessarily identical with*, direct participation in hostilities’ and provides as an example the case of medical and religious personnel of the armed forces, which ‘lose their protection in case of “hostile” or “harmful”

²³³ ICRC Commentary APs, 174-175 (pars. 550-551). Emphasis added. A preliminary consideration is that ‘if the medical unit were systematically used for purposes other than medical purposes, even if no acts harmful to the enemy were committed, it would lose its status as a medical unit within the meaning of the Protocol which *defines* these units as being *exclusively* dedicated to medical purposes’. Furthermore, ‘in order to be classified as being prohibited, these acts which are harmful to the enemy must be committed *outside the humanitarian function* of the medical units, which implies that certain acts that are harmful to the enemy may be compatible with this humanitarian function, and as such may be lawfully committed.’ In this sense, a distinction should be drawn ‘between those acts that are committed without the intention of being harmful, but which could accidentally have an unfavourable effect on the enemy, and those acts which are deliberately committed in order to harm the enemy.’ Ibid., 174-175 (pars. 549 and 552-553). Emphasis in the original.

²³⁴ ICRC Commentary APs, 270 (par. 925) (commentary to art. 23 AP I). The suggestion by the ICRC Commentary to art. 71 AP I (reported above) that the transmission of military information might lead to termination of the mission of relief personnel might be interpreted as implicitly excluding that such a conduct might be qualified as an act harmful to the enemy and thus possibly a reason for loss of protection from attack. Still, this seems to be open to interpretation, given that a similar conduct is considered as act harmful to the enemy by the ICRC Commentary itself, if performed by an hospital ship, and might be judged as an ‘attempt[] at deliberately hindering his military operations in any way whatsoever’.

²³⁵ ICRC Commentary GC IV, 154 (commentary art. 19 GC IV).

²³⁶ ICRC Commentary GC IV, 154-155 (commentary art. 19 GC IV). However, ‘[i]t is possible for a humane act to be harmful to the enemy or for it to be wrongly interpreted as such by an enemy lacking in generosity. Thus the presence or activities of a hospital might interfere with tactical operations. By introducing the phrase “outside their humanitarian duties”, the Diplomatic Conference emphasized explicitly that the accomplishment of a humanitarian duty can never under any circumstances be described as an act harmful to the enemy.’ Ibid., 155.

acts outside their privileged function'.²³⁷ The ICRC Study similarly vaguely states that '[i]n general, taking a direct part in hostilities, in violation of the principle of strict neutrality and outside the humanitarian function of medical personnel, is considered an act harmful to the enemy.'²³⁸

Nothing in the practice analysed clarifies whether relief personnel lose protection from attack only if they directly participate in hostilities or also if they commit acts harmful to the enemy, and what exactly the difference between these two categories of acts is. Cottier, in his commentary to the provisions of the ICC Statute criminalising as a war crime intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance mission in accordance with the UN Charter, 'as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict',²³⁹ argues that '[a] *humanitarian assistance* mission must not be used outside the humanitarian function to conduct hostilities or "to commit acts harmful to the enemy"'.²⁴⁰ Protection would not be lost in case of equipment with light weapons or use of armed guards or escorts in self-defence, as happens for personnel of civilian medical units in accordance with Article 13 AP I.²⁴¹ Finally, Cottier also argues that, analogously to what is provided by Article 13 AP I, '[i]n the case of *hostile acts* beyond self-defence, ... at least in cases where the mission in general remains within its humanitarian mission, the protection ceases only after a warning has remained unheeded, unless such warning was impossible under the circumstances.'²⁴² This final observation highlights the significance of applying by analogy to relief personnel provisions related to medical/religious personnel and civil defence personnel, in general for acts amounting to direct participation in hostilities. Their protection would be clearly improved, but an objection

²³⁷ Melzer (ICRC) (2009), *supra* fn. 101, 20. Emphasis added. The Guidance makes reference to arts. 21 GC I and 11(2) AP II. See *Ibid.*

²³⁸ ICRC Study – Rules, 85 (commentary to rule 25).

²³⁹ Art. 8(2)(b)(iii) and 8(2)(e)(iii) ICCSt.

²⁴⁰ Michael Cottier, "Article 8 para. 2 (b) (iii)," in *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 2nd ed., ed. Otto Triffterer (Munich: C.H.Beck-Hart-Nomos, 2008), 335. Emphasis in the original.

²⁴¹ See *Ibid.*, 335.

²⁴² *Ibid.*, 335. Emphasis added. The same approach is adopted by Dörmann: 'In sum, the personnel of humanitarian assistance missions lose their protection if they *commit, outside their humanitarian function, acts harmful to the enemy* (see especially Art. 13(2) AP I). Installations, material, units or vehicles of humanitarian assistance missions lose their protection *if they are used to commit, outside the missions' humanitarian function, acts harmful to the enemy* (see, for example, Arts. 21 GC I, 34 GC II, 19 GC IV, 13 AP I).' Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge [etc.]: Cambridge University Press, 2003), 159-160. Emphasis in the original. On the contrary, Kittichaisaree relates the loss of protection from attack (and under the provisions in question of the ICC Statute) of a humanitarian assistance mission to direct participation in hostilities. See Kriangsak Kittichaisaree, *International Criminal Law* (Oxford [etc.]: Oxford University Press, 2001), 161-162. Similarly, as far as objects involved in a humanitarian assistance mission are concerned, 'civilian objects become military objectives when they by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the prevailing circumstances at the relevant time, offers a definite military advantage.' *Ibid.*, 162.

to such application by analogy would be the fact that States, had they wanted such a regulation for relief personnel, would have introduced it in the treaties.

In relation to the risk of being perceived as not neutral or even as taking direct part in hostilities, as analysed in Chapter 4, collaboration with belligerents and the use of military escorts provided by belligerents or by peacekeeping forces shall be evaluated with extreme carefulness.²⁴³ The MCDA Guidelines, adopted by relief agencies themselves, exclude in principle the use of belligerents' assets by humanitarians. Even if transmission of intelligence to belligerents by a humanitarian worker amounting to direct participation in hostilities seems to be unlikely to take place in the absence of a specific intent in this sense,²⁴⁴ the transmission more in general of information of a military nature exceeds the mission of relief personnel, as argued by the ICRC Commentary,²⁴⁵ and might risk being considered an act harmful to the enemy, as envisaged by the ICRC Commentary for medical units and just mentioned. The 2004 IASC Reference Paper, for instance, includes among information that may be shared that on the general security situation, on humanitarian location and activities (for de-confliction), and on population movements.²⁴⁶ However, information on population movements might be exploited for military purposes, and any request to the military (possibly even peacekeepers) to deploy in certain areas due to the needs of the population, as some organisations did in Afghanistan, DRC, and Chad,²⁴⁷ may be clearly viewed as interfering in the political and military aspects of the conflict.

The use of armed guards and escorts has been mentioned as a conduct explicitly envisaged as not constituting an act harmful to the enemy if undertaken by civilian medical units, provided that components of the escorts respect the necessary criteria on the use of force, and act against looting and violence, but not against capture of the medical unit by the opposite Party.²⁴⁸ In any case, the use of armed escorts provided by one Party to the conflict will risk leading to an association of relief personnel and of the relief action with that Party, and thus possibly increase the risk of attack for those personnel. IHL treaties do not refer to escorts provided by PMSCs, which, as again analysed in Section 4.3., would usually be composed of

²⁴³ See Sections 4.1.1.1., 4.1.2.4., and 4.2.2.3.

²⁴⁴ See Section 4.1.2.1.

²⁴⁵ See ICRC Commentary APs, 836 (par. 2901).

²⁴⁶ IASC, "Civil-Military Relationship in Complex Emergencies - An IASC Reference Paper," 28 June 2004, pars. 35-36. Available at http://reliefweb.int/sites/reliefweb.int/files/resources/BF9A102F314266F1C125740F004C00A9-iasc_jun2004.pdf (accessed June 2, 2012). Emphasis added.

²⁴⁷ See O'Brien (2004), supra fn. 199, 35. On DRC and Chad, see Section 5.3.3. (fn. 187).

²⁴⁸ See Section 6.1.2.1.

civilians, who would not directly participate in hostilities if they were to use force in self-defence, and in defence of relief personnel, in a necessary and proportionate way.

Furthermore, the State practice examined, in particular in relation to the role of humanitarian actors in protection activities, seems to support an interpretation of the humanitarian character of an action in the sense of non-political as comprising also no (perceived) political support to any Party to the conflict by the actors undertaking such action.²⁴⁹ In other words, even if organisations that are not impartial and humanitarian may undertake relief actions under IHL, still practice has arguably strengthened the role of humanitarian organisations and workers, which do not engage in other kinds of activities in that same context at least. The limits of the mission would thus imply a strict focus on the provision of relief and possibly on protection, at least in the sense of ‘doing no harm’, but without any meddling in politics (or internal affairs more in general, e.g. violating laws on proselytising). This would be a condition also for being entitled, for example, to freedom of movement in NIAC (which will be arguably subject also to limitations analogous to those provided by Article 71 AP I – imperative military necessity – or limitations due to security and military considerations).²⁵⁰ This limit has been especially relevant in NIACs, where either the government has posed limits to the work of humanitarian actors, or problems have emerged with non-State actors, demonstrating that the agreement of the government is not sufficient if it does not fully control the whole territory where humanitarians operate. Offering assistance to one Party only is not prohibited, but it is argued that to be acceptable assistance shall at least be given impartially to all those in need within the territory of the Party to which assistance is provided, independently from their affiliation. Moreover, such a one-sided offer might be interpreted by the adverse Party not only as disproving the impartial humanitarian nature of an organisation, but possibly as taking side in the conflict in support of the enemy.

Regarding the hypothesis ventured by Arnold that ‘an NGO which provides help to one party only, may be considered – with some legal construction – as a group of civilians “directly participating in hostilities”’,²⁵¹ it is argued that this might be the case if the NGO consciously provides relief to combatants. Furthermore, if an organisation does not respect the principle of impartiality in the satisfaction of needs of civilians, helping civilians belonging to one Party only or prioritising among civilians on the basis of the

²⁴⁹ Among the instances of State practice containing definition of the principles, even if non-binding, several of them defined neutrality as the Red Cross, thus including ideological neutrality.

²⁵⁰ Lawful limits to freedom of movement in NIAC have not been spelt out clearly in practice, so it cannot be excluded that military and security considerations, more broadly than imperative military necessity, might be invoked.

²⁵¹ Roberta Arnold, “The Legal Implications of the Military’s ‘Humanitarisation,’” *Revue de Droit Militaire et de Droit de la Guerre* 43, no. 3-4 (2004), 28.

political or military strategy of the Party in whose territory it is operating, it might be classified as exceeding its mission and might even be perceived as performing an act harmful to the enemy, possibly leading not just to expulsion but also to the loss of protection from attack. Again, this is of special relevance in NIAC.

Finally, it appears that States, especially in NIAC, have taken the view that they are entitled to require organisations carrying out relief actions to respect neutrality, in the sense of not getting involved into sensitive political issues (which anyway is easily interpreted as interfering in the balance of hostilities) and these claims have not been opposed as contrary to international law. Such requests have emerged in particular in relation to protection activities, which are especially sensitive when they imply collecting information on respect for IHL and IHRL by Parties to the conflict and the subsequent use of this information for various purposes. In this sense, reacting to growing claims by humanitarian organisations that protection is a necessary component of their action, States through their practice have highlighted limits to be respected by humanitarian organisations engaged in the provision of assistance, which have no specific legal basis to get involved in protection actions, but also by impartial humanitarian organisations. Indeed, impartial humanitarian organisations have no explicit right to carry out protection activities, but they are entitled to make offers in this sense to Parties to the conflict (including non-State actors in NIAC), to have these offers not considered as unlawful interference in the conflict, and to have them evaluated in good faith (and any refusal duly justified). Thus, performance by their personnel of activities, as explained in Chapter 5, aimed at ensuring respect for the human rights of the victims by the Parties to the conflict, through the modes of action of persuasion, mobilisation, denunciation, support, and substitution, finds a legal basis in Articles 3 and 10 GC IV.²⁵²

However, practice has revealed that protection activities can be sensitive and lead to suspension of all activities, if they are perceived as overstepping a strictly humanitarian mandate and amounting to interference in internal political affairs or security. The question has emerged of the limits that humanitarian organisations should respect (or might be lawfully required by Parties to the conflict to respect), especially in order to be able to continue performing their functions in the field of the provision of humanitarian assistance. The analysis of State practice has revealed that not only violations of national law, for example by engaging in proselytising, have been a reason for expelling organisations or banning them from operating in

²⁵² See, for example, Kate Mackintosh, “Reclaiming Protection as a Humanitarian Goal: Fodder for the Faint-Hearted Aid-Worker,” *Journal of International Humanitarian Legal Studies* 1, no. 2 (December 2010): 382-396.

a certain area, but the transmission of information to the Prosecutor of the ICC has been also invoked as a reason to suspend operations and invite organisations to leave.²⁵³ It is argued that the transmission of information in the course of investigations by the Prosecutor, who will then be responsible for deciding whether to start a case or not and what charges to press, might indeed be reasonably interpreted as an act having political nature, given the discretion of the Prosecutor.²⁵⁴

On the other hand, transmitting public information to international judicial organs in the course of legal proceedings, or possibly giving testimony in the course of these proceedings, are less controversial activities, even if impartial humanitarian organisations might want to resort to the options available to them to avoid publicity and negative consequences for access in future armed conflicts.²⁵⁵ In any case, in order to restate their status as separate from international criminal courts and to diminish the risk of being denied access to victims by actors fearing prosecution, impartial humanitarian organisations should formulate clear policies on the extent and modalities of their collaboration with these institutions, as already done by the ICRC and MSF.²⁵⁶

Analogous carefulness should be exercised by humanitarian organisations when deciding whether to respond to the invitation by the UNSC to provide information to political bodies it has created in the framework of sanctions regimes: clearly, if the information transmitted refers to specific episodes and to the conduct of a Party, this might be considered interference in the hostilities or even an act harmful to the Party, since the information contributes to reports that form the basis for the adoption of political decisions by the UNSC.²⁵⁷ The UNSC felt the need to *request* relevant UN agencies and humanitarian organisations with observer status with the UNGA and their implementing partners that provide humanitarian assistance in Somalia ‘to *increase* their cooperation and willingness to share information with the United Nations Humanitarian Aid Coordinator for Somalia’ in the preparation of its report on obstacles to delivery of humanitarian assistance in the country and to *request* ‘*enhanced* cooperation, coordination and information sharing between the Monitoring Group [for the implementation of the sanctions regime on Somalia] and the

²⁵³ See Sections 5.2.4., 5.3.3.2. and 5.3.3.4.

²⁵⁴ See Section 5.3.3.2.

²⁵⁵ See Section 5.3.3.2.

²⁵⁶ See Section 5.3.3.2. See also Anne-Marie La Rosa, “Humanitarian Organizations and International Criminal Tribunals, or Trying to Square the Circle,” *International Review of the Red Cross* 88, no. 861 (March 2006), 182.

²⁵⁷ See Section 5.2.3. and 5.3.3.3.

humanitarian organizations operating in Somalia and neighbouring countries'.²⁵⁸ It seems to suggest that humanitarian organisations themselves are reluctant to engage in this kind of information transmission.

In terms of public advocacy in the form of denunciations of violations of IHL and/or IHRL, in 1987 Meyer wrote:

From legal and operational viewpoints it is likely that under current rules and practices, it will be unacceptable for NGOs or their personnel to make a public denunciation and then to be allowed to continue their humanitarian mission. However, there are occasions when the provision of soup may be less important than bringing the attention of the media to violations of human rights. [...] IHL including its provisions on relief actions, has proved successful over the years because it reflects a largely acceptable balance between humanitarian interests and the realities of combat or occupation. An NGO cannot have the privileges of authorised aid societies without also having the restrictions. [...] To date it seems that the balance achieved in the Geneva Conventions and the Additional Protocols is the best that can be agreed. This may not be ideal from a purely humanitarian viewpoint but given the realities of situations when relief is required, especially perhaps during an armed conflict, it may be the only way at this time to attain any humanitarian objectives.²⁵⁹

Meyer was writing at the time of MSF's expulsion from Ethiopia. The practice analysed in this study leads to argue that there has been a certain degree of change and that the moral duty of humanitarian organisations not to merely distribute relief but to act for the safeguard of respect for the life and dignity of civilians has been strongly affirmed.²⁶⁰ Still, modes of action to implement this moral obligation are hotly debated.

Arguably reflecting the developments that have taken place over the past two decades in the approach regarding public denunciations by the ICRC and impartial humanitarian organisations more in general,²⁶¹ Stoffels has correctly affirmed that denouncing violations of human rights obligations, as *erga omnes* obligations, does not represent interference in the internal affairs of a State nor an hostile act and it does not imply taking side in the conflict and thus is lawful under IHL, but she has also acknowledged that in practice such denunciation may be often perceived as implying taking sides in the conflict and thus a loss of neutrality of the actor.²⁶² According to her, (military) neutrality 'requires that humanitarians refrain from engaging in hostile activities' and '[h]ostile conduct by humanitarian organizations and personnel would include '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.'²⁶³ It might be inferred from this that conducting an attack against combatants, which would render relief

²⁵⁸ S/RES/2060 (2012), 25 July 2012, pars. 8-9. See Section 5.3.3.3.

²⁵⁹ Meyer (1987), *supra* fn. 73, 487, 499-500. See also *Ibid.*, 495-499.

²⁶⁰ See Section 1.2.3. and Chapter 5.

²⁶¹ On the ICRC, see *supra* fn. 202.

²⁶² See Abril Stoffels (2001), *supra* fn. 39, 376-380. Similarly, affirming that in practice such denunciation will be perceived by States as an act exceeding the mission of relief personnel, see Ojinaga Ruiz (2005), *supra* fn. 118, 273-274.

²⁶³ Abril Stoffels (2004), *supra* fn. 118, 542-543.

personnel direct participants in hostilities, would be equivalent to ‘spreading propaganda among the civilian population’. However, involvement in propaganda, such as distributing leaflets in favour of one Party, is generally considered as amounting to indirect participation in hostilities,²⁶⁴ therefore possibly leading to termination of the mission of impartial humanitarian organisations and relief personnel in general, but not to attacks against them.

What Stoffels classifies as violations of ideological neutrality, such as ‘mak[ing] public [one’s] opinion as to the reasons for a conflict, [] support[ing] the cause of one of the parties or [] exploit[ing] humanitarian issues to win support for one of the parties’,²⁶⁵ seems to have emerged in practice as criteria that might be legitimately invoked to terminate the mission of humanitarian workers, thus as exceeding a humanitarian assistance mission and/or the legitimate involvement in protection by (impartial) humanitarian organisations. Calling for military intervention or proposing political solutions might be added as examples of violations of military neutrality. Fiona Terry has stated explicitly:

neutrality does not only need to be asserted, it needs to be proved by aid organisations, and believed by parties to the conflict. Thus a claim of neutrality, if it has any sense, must be accompanied by a rigorous adherence to the principle and its application to practices in the field. If MSF decides to embrace neutrality, then it should logically renounce speaking publicly about any issue that could be perceived as engaging in controversies of a political, ideological, racial or religious nature.²⁶⁶

While it is not prohibited under IHL for relief personnel, especially belonging to impartial humanitarian organisations, to denounce violations of IHL committed by belligerents, the need for them to fulfil the criterion of being impartial at least requires that they carry out such denunciations impartially and without taking a stand in the conflict. In addition, even if carried out in this way, such an activity can be clearly problematic in terms of access to the victims, since it is likely not to be perceived as impartial by the Party subject to the denunciation, which may consider that the humanitarian organisation is interfering in hostilities, thus being non-neutral, and terminate the mission of its personnel or some of them. Denunciations of violations may be interpreted as taking side in favour of the opposite Party, or even as a hostile act, contrary to the letter of the IHL treaties.²⁶⁷ The practice analysed does not seem to confirm the interpretation of such denunciations, or of other public advocacy by humanitarian, as necessarily hostile acts, but clearly as a violation of neutrality and of humanitarian workers’ mission. The boundaries between military and

²⁶⁴ See the *Targeted Killings* case and the ICRC Interpretive Guidance on direct participation in hostilities, *supra* Section 4.1.2.1.

²⁶⁵ Abril Stoffels (2004), *supra* fn. 118, 543.

²⁶⁶ Fiona Terry, “The Principle of Neutrality: Is It Relevant to MSF?,” Discussion Paper for 2001 Mini-AGS, December 2000, 6. Available at <http://www.msf.fr/actualite/publications/principle-neutrality-it-relevant-msf> (accessed September 01, 2011).

²⁶⁷ See, for example, Abril Stoffels (2001), *supra* fn. 39, 377 and 380; Ojinaga Ruiz (2005), *supra* fn. 118, 273-274.

ideological neutrality become very thin, as statements that violate ideological neutrality have been for example interpreted in Sri Lanka as indirect involvement in propaganda, since they could offer support to the propaganda of the opposite Party.²⁶⁸

Impartial humanitarian organisations engaging in protection activities in the form of advocacy in favour of victims of conflict can arguably invoke a legal basis for such engagement but should, at a minimum, take into consideration all the different modes of action available to stimulate compliance with IHL by the relevant actors. In case they decide to proceed with public denunciation, they should be aware of the possible negative consequences, not just for them, but also for the victims they are trying to protect, who might end up being deprived of relief and of the presence of external impartial humanitarian actors. Furthermore, advocacy by impartial humanitarian organisation should never enter into political or military discourses or propose political or military solutions and, as suggested by DuBois, it should be defensible in terms of accuracy but also of attention to ‘local sensitivities’ and possible prevention or reduction of negative impact.²⁶⁹ For sure, advocacy by humanitarian actors must not be (and humanitarians shall do everything possible to avoid its perception as being) ‘away from its original people-and-their-suffering-centered orientation, largely interpreted in political terms, widely used with a “speaking out” approach intended to publicly denounce rights-violating governments and increasingly associated with initiatives aiming at pure visibility goals.’²⁷⁰

In any case, if members of an impartial humanitarian organisation adopt conducts exceeding the limits imposed by its own nature, and other humanitarian workers exceed their humanitarian assistance mission, they will still be entitled to be protected as civilians, as long as the conduct they have adopted does not amount to direct participation in hostilities, in which case they might risk being attacked. Clearly, GC IV does not protect equally all civilians in IAC, and relief personnel will likely not be entitled to the status of protected persons.²⁷¹ The situation has been improved by AP I, with the bottom line being the applicability of the fundamental guarantees of Article 75 AP I. In NIAC, these personnel will be entitled to humane

²⁶⁸ See Section 5.3.3.4.

²⁶⁹ See Marc DuBois, “Civilian Protection and Humanitarian Advocacy: Strategies and (False?) Dilemmas,” *Humanitarian Exchange* no. 39 (June 2008), 12-13.

²⁷⁰ Carlo Piccinini, “Advocacy: A Good Word Gone Bad,” *The Journal of Humanitarian Assistance* (February 21, 2010), available at <http://sites.tufts.edu/jha/archives/654> (accessed November 13, 2011).

²⁷¹ See Kate Mackintosh, “Beyond the Red Cross: The Protection of Independent Humanitarian Organizations and their Staff in International Humanitarian Law,” *International Review of the Red Cross* 89, no. 865 (March 2007), 118-120.

treatment as all persons not taking part in hostilities under Common Article 3 and, if applicable, to the additional regulation offered by AP II.

6.2.2.1.4. Other Sources of Protection

Further protection for humanitarian personnel might derive, if applicable, from the UN Safety Convention and its Optional Protocol in terms of the duty of State Parties to ensure the safety, security, and transit of personnel, to release them in case of capture or detention while performing their duties, and to criminalise attacks against them, as well as to prosecute or extradite alleged offenders. However, these instruments apply only if relief personnel belong to UN organisations or organisations that have a clear contractual link with the UN, as already mentioned, and if they are part of an operation under UN authority and control aimed at the maintenance and restoration of peace and security (with the exception of UN operations authorised by the UNSC ‘as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies’), declared by the UNSC or UNGA as entailing an exceptional risk to the safety of participating personnel, or aimed at delivering ‘humanitarian, political or development assistance in peacebuilding’, or at delivering ‘emergency humanitarian assistance.’²⁷²

Protection under ICL might also work as a deterrent, supplementing the prohibition under IHL to attack humanitarian workers and civilians more in general with the establishment of individual criminal responsibility, as mentioned above, for attacks against civilians and civilian objects, and for intentional attacks against personnel and objects involved in a humanitarian assistance mission in accordance with the UN Charter, as long as they are entitled to protection as civilian and civilian objects. This provision partly compensates for the absence of the war crime of attacking civilian objects in NIAC in the ICC Statute, and it might cover attacks against humanitarian workers, as long as they are linked to the conflict and the perpetrators belong to one of the Parties.²⁷³

After an analysis of the practice, it appears that the concept of humanitarian assistance mission in accordance with the UN Charter might be interpreted, as suggested by some commentators, as encompassing

²⁷² For additional privileges and immunities applicable to UN personnel, including humanitarian personnel, see, for example, Andrej Zwitter, “United Nations’ Legal Framework of Humanitarian Assistance,” in *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*, ed. Hans-Joachim Heintze and Andrej Zwitter (Heidelberg [etc.]: Springer, 2011), 61-62.

²⁷³ See Dörmann (2003), *supra* fn. 58, 26-29.

not only those humanitarian actors covered by the UN Safety Convention and its Optional Protocol, but also other impartial humanitarian organisations participating in humanitarian relief efforts in accordance with IHL and, sometimes, upon invitation by or with the support of UN bodies.²⁷⁴ The latter have, over the past two decades, almost constantly referred to the duties of Parties to armed conflicts with regards to humanitarian assistance, thus implicitly (and sometimes explicitly) reinforcing the role of humanitarian organisations working impartially in this field.

The fact that the ICC Statute refers to humanitarian assistance and not humanitarian action more in general, as well as the fact that commentators make reference to IHL provisions on relief actions and on medical and religious personnel, rather than to the more general right of humanitarian initiative of impartial humanitarian organisations, seem to lead to the conclusion that only humanitarian assistance activities are covered, not humanitarian protection ones. However, as mentioned in Section 3.2.1.1.4., during the negotiations of the Optional Protocol to the UN Safety Convention it was agreed that UN missions established for the purpose of delivering *emergency humanitarian assistance* would cover the work by the UN in emergency prevention and response, covering inter alia operations established by UNHCR, which is an agency clearly active in the field of protection. In this sense, it will be up to the judges of the ICC to decide whether to concentrate on the aim of the mission, following a narrow interpretation of the legal basis for the crime in IHL, or on its connection with the UN Charter.

In sum, impartial humanitarian organisations enjoy a privileged status, even if space in the provision of relief to civilians in conflict is left by treaties also for other organisations (having a political or commercial character, or with multiple mandates). Subsequent practice has confirmed and strengthened this protection for humanitarian assistance and humanitarian workers, arguably reinforcing the position of humanitarian organisations engaging only in impartial humanitarian activities (at least in the same context), and not enlarging this protection to cover organisations active in other areas, such as human rights monitoring or development. In this sense, the duty of Parties to NIAC to respect and protect humanitarian workers, as well as grant them freedom of movement (subject to limits due to imperative military necessity and possibly to security and military considerations more broadly), so as to allow them to provide humanitarian assistance to civilians in need, has been affirmed. Also, impartial humanitarian organisations can claim a legal basis to undertake protection activities. In all cases, consent by the Parties, which according

²⁷⁴ See Section 3.2.2.1.

to the analysed practice always include the State in NIAC, and respect for the principles of humanitarian action, thus for the limits of humanitarian action, are central. As summarised by Krähenbühl, while the ICRC chooses to stick to neutrality and independence, '[t]his is not the only way to engage in humanitarian action but aid agencies cannot have it both ways: asking for armed escorts to reach populations in need one day and criticizing those same military forces for blurring the lines the next cannot be a solution.'²⁷⁵

6.2.3. Third States

In addition to the important role of IGOs and NGOs in the provision of relief to civilians in conflict, third States intervene in various forms. First, as already mentioned, these States will have duties and rights regarding the passage of relief; second, they might offer relief or other contributions for assisting civilians; third, States not participating in the conflict might be appointed as Protecting Powers in IAC, even if the system seems to have become obsolete;²⁷⁶ fourth, they might contribute to the enforcement of IHL on the basis of their obligation under Common Article 1 GCs; finally, they may be involved as donors, not directly offering relief to the Parties to the conflict but funding other actors to do that.²⁷⁷

As far as the passage of relief is concerned, it is explicitly regulated in IHL treaties only in IAC. Legitimate reasons for refusing the passage of such relief will be the non-humanitarian or impartial nature of the relief action. In any case, rather than refusing the passage, States might choose under GC IV to require supervision of the distribution by an impartial humanitarian organisation, and to prescribe technical arrangements for the passage (not to be used to obstruct or delay the passage). As mentioned, the regulation under Article 70 AP I is, in this regard, more advanced than that in Article 23 GC IV, both because it broadens the range of objects entitled to passage and of the categories of civilians receiving such relief, and because it leaves less discretion to States to refuse the passage completely.²⁷⁸ The existence of an analogous

²⁷⁵ Pierre Krähenbühl, "The Militarization of Aid and Its Perils," ICRC Article, February 22, 2011. Available at <http://www.icrc.org/eng/resources/documents/article/editorial/humanitarians-danger-article-2011-02-01.htm> (accessed June 5, 2012).

²⁷⁶ It will not be analysed in detail in this Section, since the absence of relevant practice would imply a simple restatement of the legal framework illustrated in Section 3.2.1.2.1.

²⁷⁷ As already mentioned, no practice was found regarding a role for third States in giving consent to relief actions that leave from their territory.

²⁷⁸ Art. 23 GC IV was adopted primarily with reference to a situation of blockade, thus addressing belligerents and their duty to allow passage of relief, but its broader applicability can be inferred from the general formulation imposing on each High Contracting Party to allow the passage of the enumerated relief consignments 'intended only for civilians of another High Contracting Party, even if the latter is its adversary.'

regulation applicable in NIAC, where the system of the Protecting Powers does not apply, cannot be affirmed with certainty, also given the scarcity of calls by the UNSC regarding passage in NIAC.²⁷⁹

In terms of contributing to the provision of relief, under AP I a neutral State or a State not Party to the conflict can put medical units or transports, as well as personnel, at the disposal of a Party to the conflict for humanitarian purposes.²⁸⁰ Personnel might qualify as medical and religious personnel and be entitled to the specific protection under AP I.²⁸¹ These personnel and material of civilian civil defence organisations of a neutral State or a State not Party to the conflict may also be used to perform civil defence tasks in the territory of one of the Parties to the conflict, with the consent and under the control of such Party, and with notification being given to the adverse one.²⁸²

Article 59 GC IV explicitly foresees that States might undertake relief actions in favour of the civilian population in occupied territory, even if the ICRC Commentary suggests that ‘[o]nly those States which are neutral -- in particular the Protecting Power -- are capable of providing the essential guarantees of impartiality’,²⁸³ and some national military manuals, as highlighted in Section 3.2.2.3., adopt this view. Relief actions under Articles 70 AP I and 18(2) AP II might also arguably be undertaken by States, if the actions fulfil the necessary criteria of humanity, impartiality, absence of adverse discrimination, and military neutrality. Article 70 clarifies that ‘[o]ffers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.’ According to Spieker, Article 70 AP I actually addresses primarily States, but then ‘customary law has broadened this “right to offer” to all humanitarian actors, international or national, governmental or non-governmental.’²⁸⁴ In any case, third States are not under a legal obligation to make offers of relief.²⁸⁵

Personnel part of these missions will be protected as relief personnel under Article 71 AP I in IAC; in NIAC, provided that they obtain consent by the State pursuant to Article 18(2) AP II,²⁸⁶ they might be protected by the corresponding rules that arguably emerged as customary law, but only if they are humanitarian workers, thus subject to the same right of control and limit that States have claimed *vis-à-vis* humanitarian organisations—no interference in the conflict and in internal politics beyond their relief

²⁷⁹ It called for such passage, for example, in the cases of Somalia and Mali. See Section 3.2.1.2.1.

²⁸⁰ See art. 9(2) AP I.

²⁸¹ See arts. 8(c), 8(d) and 9(2) AP I.

²⁸² See art. 64 AP I.

²⁸³ ICRC Commentary GC IV, 321.

²⁸⁴ Spieker (2008), *supra* fn. 30, par. 33.

²⁸⁵ See ICRC Commentary APs, 814 (par. 2788).

²⁸⁶ See Section 6.1.1.2.4.

mission. The possibility for States to choose to undertake relief actions through their armed forces will be analysed in the next Section. For the time being, suffice it to say that it is not explicitly prohibited IHL treaties.

The issue of how a State could react to an arbitrary refusal of an offer of relief action has raised controversy, with supporters of a *droit d'ingérence* opposed to authors defending the principle of sovereignty.²⁸⁷ As already explained, the interpretation of the judgement by the ICJ in the *Nicaragua* case as implying the absence of a requirement of consent for the provision of relief in conflict is not convincing, and it does not seem to be supported by subsequent State practice and *opinio juris*.²⁸⁸ In any case, the judgement would endorse the lawfulness of making relief goods available to (all) Parties to a NIAC without consent by the State, not necessarily of entering the territory of the State to deliver such relief.²⁸⁹

There is general agreement that the provision of relief through the use of armed force, without consent of the concerned State and outside a mandate by the UNSC, amounts to a violation of international law.²⁹⁰ The concept of R2P does not question this position, confirming the centrality of the UN system in deciding on military intervention.²⁹¹ Several scholars however support the lawfulness of a unilateral action conducted by a State without the use of armed force in reaction to an illegitimate refusal, since it would amount not to illegal intervention, but to a legitimate countermeasure.²⁹² The only instances of State practice that seem to offer support to such a view are the case of India and Sri Lanka, and possibly operation Provide Comfort in Iraq. However, in the former case such a ground was not explicitly invoked, and in the latter the States involved based their action on a resolution by the UNSC.²⁹³ Stoffels underlines how the lawfulness of entry by a State without consent as a countermeasure remains in-between the categories of *de lege ferenda* and *de lege lata*,²⁹⁴ while Bothe supports its lawfulness even if performed by 'military personnel, vehicles or

²⁸⁷ See Section 1.2.2.

²⁸⁸ See Section 3.1.2.

²⁸⁹ See Schindler (1994), *supra* fn. 180, 168-169.

²⁹⁰ See, for example, Olivier Corten and Pierre Klein, *Droit d'Ingerence ou Obligation de Reaction?*, 2nd ed. (Brussels: Bruylant, 1996); Robert Kolb, "Note on Humanitarian Intervention," *International Review of the Red Cross* 85, no. 849 (March 2003): 119-134; Ojinaga Ruiz (2005), *supra* fn. 118, 337-368; Pietro Gargiulo, "Dall'Intervento Umanitario alla Responsabilità di Proteggere: Riflessioni sull'Uso della Forza e la Tutela dei Diritti Umani," *La Comunità Internazionale* 42, no. 4 (2007): 639-669.

²⁹¹ See Section 1.2.2.

²⁹² See Olivier Corten and Pierre Klein, "L'Assistance Humanitaire Face à la Souveraineté des Etats," *Revue Trimestrielle des Droits de l'Homme* 3, no. 11 (July 1992), in particular 354-363; Plattner (1996), *supra* fn. 140, 175-176; Schindler (1994), *supra* fn. 180, 699; Abril Stoffels (2001), *supra* fn. 39, 317-331.

²⁹³ See Sections 3.1.1. and 4.1.1.

²⁹⁴ See Abril Stoffels (2001), 322-324.

aircraft’, as long as they are unarmed and do not use armed force, since it would be a legitimate measure for ensuring respect of IHL, based on Common Article 1 GCs.²⁹⁵

Pursuant to this provision, which appears also in Article 1(1) AP I, State Parties ‘undertake to respect and ensure respect’ for the GCs and AP I ‘in all circumstances’. While not appearing in AP II, still Common Article 1 encompasses respect for Common Article 3,²⁹⁶ so that NIACs are covered. According to the ICRC Commentaries, Common Article 1 implies that ‘in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention’ and ‘the Contracting Parties should not be content merely to apply its provisions themselves, but *should do everything in their power* to ensure that the humanitarian principles underlying the Conventions are applied universally.’²⁹⁷ This interpretation has not been contested and the ICRC has operated on this basis when engaging in its ‘mobilisation’ mode of action, confidentially contacting third States that have the potential to influence respect for IHL by Parties to the conflict.²⁹⁸

In any case, even if Common Article 1 highlights the nature of the obligations deriving from IHL as *erga omnes*, the limits on the use of force in international relations apply.²⁹⁹ No example of State practice has been found where States have made explicit reference to Common Article 1 and the *erga omnes* nature of the obligations under IHL treaties. For example, in case of protests against the expulsions of NGOs from Sudan in 2009, the focus was simply on the responsibilities and duties of Sudan, without any elaboration on the legal basis for States to intervene on the issue. Given the insistence by some State representatives on the predictable grave consequences for the survival of civilians following the expulsions and the fact that the situation was already on the UNSC agenda as a threat to international peace and security, the most immediate legal basis would arguably be the responsibility of the UNSC and/or the *erga omnes* right to life of civilians.

Finally, if third States act as donors, providing funds to organisations helping civilians in need, they are indirectly required to avoid jeopardising respect for the principles of humanitarian action by these organisations, for example through the earmarking of funds in ways contrary to impartiality. In this respect,

²⁹⁵ Bothe (1989), *supra* fn. 67, 95-96.

²⁹⁶ In this sense, see also ICRC Commentary GC IV, 16.

²⁹⁷ ICRC Commentary GC IV, 16. Emphasis added. Paye identifies this duty as another basis in international law for the obligation of Parties to armed conflicts to allow the access of humanitarian relief for civilians. See Paye (1996), *supra* fn. 68, 104-106.

²⁹⁸ See ICRC Commentary APs, 36 (par. 43).

²⁹⁹ See ICRC Commentary APs, 36-37 (par. 45-46). See also Luigi Condorelli and Laurence Boisson de Chazournes, “Quelques remarques à propos de l’obligation des Etats de ‘respecter et faire respecter’ le droit international humanitaire en toutes circonstances,” in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Christophe Swinarski (Geneva: ICRC; The Hague: Nijhoff, 1984), in particular 26-32.

while being non-binding, the *Principles and Good Practice of Good Humanitarian Donorship* represent a useful guide for States.³⁰⁰

6.2.4. External Armed Forces

While IHL treaties do not provide anything explicit regarding the possible involvement of armed forces of States not Parties to the conflict in the provision of relief to civilians, recent practice has revealed increased attention by the military to the provision of relief not only as belligerents, to win the ‘hearts and minds’ of the population, but also as actors implementing external relief actions, without a specific UN mandate, or in the framework of peacekeeping missions and more in general of UN-authorised peace support operations.

6.2.4.1. International Armed Forces Not Involved in the Conflict

As already mentioned, IHL provisions on relief actions either explicitly or implicitly allow States to undertake such actions, and nothing excludes that they choose to implement them through their armed forces. In this case, the military will be involved in the direct provision of relief, but without being involved at the same time in the conflict. As long as the action that these personnel perform is humanitarian, impartial, and conducted without any adverse distinction, it will be protected under Article 70 AP I.³⁰¹

It may also be argued that military forces participating in an authorised relief action might be covered by Article 71 AP I, as long as they do not exceed the terms of their mission and are not armed with anything else than light weapons for self-defence, as it is allowed for medical personnel (without being considered an act harmful to the enemy). Still, being military actors, it is probably more realistic to argue that they might claim a more general status as civilians, since AP I defines as civilian everybody who is not a POW or a member of the armed forces of a Party to the conflict.³⁰²

³⁰⁰ See Section 3.2.2.4.

³⁰¹ For example: ‘According to [Prof. Spieker], “humanitarian” qualification must be focused on the type of operation rather than on the type of actor which carries it out. The starting point is to say that the military per se is not a non-humanitarian actor. Provided that the action is humanitarian, neutral, impartial and maybe independent, it must be qualified as “humanitarian”. Prof. Spieker notes that this is the approach that the German Government and German relief organisations, including the German Red Cross, are following.’ *Collegium, Special Edition: Current Challenges to the Law of Occupation Proceedings of the Bruges Colloquium 20th-21st October 2005*, 34 (Autumn 2006), 90. Similarly, see Heike Spieker, “The International Red Cross and Red Crescent and Military-Humanitarian Relationships,” in *Between Force and Mercy: Military Action and Humanitarian Aid*, ed. Dennis Dijkzeul (Berlin: Berliner Wissenschafts-Verlag, 2004), 206 and 221.

³⁰² See art. 50(1) AP I. The ICRC Study states that the rule ‘[h]umanitarian relief personnel must be respected and protected’ does not apply to ‘members of armed forces delivering humanitarian aid’ (ICRC Study – Rules, 105, rule 31 and commentary). However, the term ‘armed forces’ in the Study arguably refers only to the armed forces of the Parties to the conflict (rule 4, ‘definition of armed forces’, reads: ‘The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.’ ICRC Study – Rules, 14), thus it would be implied that

The MCDA Guidelines provide that the UN humanitarian wing should resort to the use of assets of military forces not engaged in the conflict only as a last resort, that military organisations should not engage in the direct provision of assistance (rather in transport of relief goods or personnel or in infrastructure support), and that ‘[c]ountries providing military personnel to support humanitarian operations should ensure that they respect the UN Codes of Conduct and the humanitarian principles.’³⁰³ Furthermore, the Guidelines try to suggest a special protection for these military personnel, adopting a practical approach rather than resorting to IHL and recommending that ‘[m]ilitary and civil defence personnel employed exclusively in the support of UN humanitarian activities should be clearly distinguished from those forces engaged in other military missions ... and accorded the appropriate protection by the affected State and any combatants’, and such distinction might be ensured by displaying ‘the appropriate white markings and UN symbols’.³⁰⁴ Differently even from medical personnel under IHL, military personnel who provide direct assistance ‘should not be armed’, relying only on the security measures of the humanitarian agency they support, while those who provide indirect assistance or infrastructure support may be armed, if necessary ‘for their security and/or the safeguarding of their equipment’, but will then have to operate under ‘strict rules of engagement’ based on IHL.³⁰⁵

Still, the MCDA Guidelines do not clarify the qualification of the military personnel supporting humanitarian operations under IHL. In this sense, for example, it may be wondered whether NATO personnel operating the air bridge in Pakistan after the floods in 2010, when humanitarians were working in the Swat Valley in a context of NIAC, were to be classified as civilians or, in the alternative, whether they should be classified as allied to the government of Pakistan, which had consented to the action, and thus a Party to the conflict and legitimate targets for non-State actors in the Swat Valley. As mentioned above, a literal interpretation of AP I would seem to support a classification of third-Party armed forces involved exclusively in humanitarian operations with the consent of the Parties concerned in IAC as civilians. By analogy, the same reasoning might be applied to NIAC, where consent by the State will be necessary and protection acknowledged within respect for the limits of the relief mission.

belligerents are not protected from attack if they engage in the provision of relief to civilians, since they maintain their status as combatants. The possibility that military forces of a State not Party to the conflict may obtain consent to deliver impartial humanitarian relief does not seem to have been specifically taken into account into the ICRC Study

³⁰³ UN, *Guidelines on the Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies (the ‘MCDA Guidelines’)*, March 2003 (Revision I: January 2006), par. 26. Hereinafter MCDA Guidelines.

³⁰⁴ Ibid., pars. 39-40.

³⁰⁵ Ibid., par. 41.

In any case, to safeguard the protected status of relief personnel, the principle of distinction is central, in the sense that if military personnel supporting humanitarian are or become combatants, they will be legitimate targets and will put at risk the life of humanitarian civilian personnel operating with them, and possibly of civilians receiving assistance as well. According to the principle of distinction, as suggested by the MCDA Guidelines, military personnel unarmed (or armed only for self-defence), not engaged in the conflict, and working in a relief operation under civilian control, should be clearly marked as associated to that operation, to avoid attacks against them. In other words, the approach adopted by IHL treaties for military personnel part of civil defence organisations would be applied by analogy.³⁰⁶

6.2.4.2. *UN Peacekeepers*

The situation of the military component of a UN peacekeeping mission (under UN command and control), or of forces deployed (under national command and control) pursuant to UNSC authorisation in a situation of armed conflict or fragile peace, but in principle not involved in the hostilities (such as ISAF, at the time it was established, but also UNITAF), is different from that of military personnel implementing external relief actions.

The so-called Capstone Doctrine defines peacekeeping as ‘a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers.’³⁰⁷ It further acknowledges that ‘[o]ver the years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace.’³⁰⁸ As emerges from the ICC Statute, and as is confirmed by practice, peacekeepers deployed with a classical peacekeeping mandate, and with consent from the Parties, despite being military personnel, are protected in the same way as civilians,³⁰⁹ as long as they do not take part in hostilities, in which case they become combatants.

³⁰⁶ On the MCDA Guidelines and civil defence regulation under IHL treaties, see Sections 4.1.2.4. and 2.1.4.3. respectively.

³⁰⁷ UN DPKO/UN DFS, *United Nations Peacekeeping Operations: Principles and Guidelines (so-called Capstone Doctrine)* (New York: UN, 2008), 18.

³⁰⁸ Ibid..

³⁰⁹ Like international armed forces not involved in the conflict, they might actually be classified as civilians under art. 50 AP I, but some scholars question such a position. See Robert Kolb, Gabriele Porretto, and Sylvain Vit  , *L'Application du Droit International Humanitaire et des Droits de l'Homme aux Organisations Internationales: Forces de Paix et Administrations Civiles Transitoires* (Brussels: Bruylant, 2005), 182.

On the other hand, military personnel deployed by the UN without consent from the Parties in so-called peace-enforcement missions might be assumed to be combatants.³¹⁰ Indeed, peace-enforcement ‘involves the application, with the authorization of the Security Council, of a range of coercive measures, including the use of military force’ in the framework of ‘actions ... authorized to restore international peace and security in situations where the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression.’³¹¹ The UN Safety Convention thus grants specific protection to peacekeepers but does not apply to enforcement actions authorised by the UNSC under Chapter VII in which any of the personnel are engaged as combatants and to which IHL applies.³¹² Even in case of peacekeepers deployed with a traditional mandate, if their mandate is then enhanced (in particular in terms of authorisation to the use of force), IHL will become applicable as soon as they get involved in the conflict by using armed force exceeding self-defence.

The threshold for the applicability of IHL to peacekeepers, in other words the use of force qualifiable as exceeding self-defence, is complicated by the fact that the meaning of self-defence for peacekeeping missions has been broadened by the UNSC resolutions establishing the mandate of these missions, often to encompass the use of force by peacekeepers to defend not only themselves and civilians under imminent threat of attack, but also the possibility to carry out their mandate.³¹³ If, as some commentators have submitted, ‘personnel involved in peacekeeping missions are entitled to *self-defence* to the extent protected persons are permitted to use self-defence under humanitarian law without forgoing the protection they are

³¹⁰ Arnold distinguishes between peacekeepers deployed under Chapter VI of the UN Charter and not engaged in hostilities, which should be protected in the same way as civilians and ‘may also get involved in humanitarian assistance’, and ‘peace-enforcers under Chapter VII’, which ‘may resort to force and ... are often viewed as a third party to the conflict, i.e. as combatants and legitimate military targets,’ so that they should not get involved in humanitarian assistance. Arnold, (2004), *supra* fn. 251, 35. Still, today almost all of the missions deployed by the UNSC, and all of those that feature a POC component in their mandate, are authorised under Chapter VII to use force, so that the actual conduct of each mission in practice, as well as its RoE, will be key in determining its status under IHL.

³¹¹ UN DPKO/UN DFS, *supra* fn. 307, 18. Furthermore, the UNSC ‘may utilize, where appropriate, regional organizations and agencies for enforcement action under its authority.’ *Ibid.*

³¹² A problematic aspect in the application of IHL to peacekeepers regards the relationship between the Safety Convention and IHL, in the sense that different interpretations of article 2(2) of the Convention have been proposed: some authors have argued that in case of engagement of peacekeepers in armed conflict IHL (and only IHL) should apply, while others have affirmed that in case of NIAC both the Safety Convention and IHL would be applicable. The present author shares the first position. See, on the one hand, Antoine Bouvier, “‘Convention on the Safety of United Nations and Associated Personnel’: Presentation and Analysis,” *International Review of the Red Cross* 35, no 309 (November-December 1995), 661-662; Marco Sassoli, “International Humanitarian Law and Peace Operations, Scope of Application *Ratione Materiae*,” in *International Humanitarian Law, Human Rights and Peace Operations: Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008*, ed. Gian Luca Beruto (Sanremo: International Institute of Humanitarian Law, 2009), 102; Jakob Kellenberger, “Keynote Address,” in *International Humanitarian Law, Human Rights and Peace Operations: Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008*, ed. Gian Luca Beruto (Sanremo: International Institute of Humanitarian Law, 2009), 36. On the other hand, see Engdahl (2007), *supra* fn. 231, 238; Greenwood (1996), *supra* fn. 13, 199.

³¹³ On this evolution, see Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford [etc.]: Oxford University Press, 2002).

entitled to as civilians’,³¹⁴ the use of force to defend the mission’s mandate arguably does not amount to self-defence under IHL. The latter is limited to ‘individual self-defence or defence of others against violence prohibited under IHL,’ as for example ‘the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers,’ always considering that the use of force must be ‘necessary and proportionate.’³¹⁵

As far as the provision of relief is concerned, relations between the military component of a peacekeeping mission and humanitarian actors, both UN and non-UN ones, have emerged as tense and controversial in certain situations, in particular where conflict is still ongoing in the theatre of deployment of the mission and peacekeepers have multi-dimensional and partly conflicting mandates, such as cooperating with humanitarian actors to support the provision of humanitarian assistance and protect civilians, on the one hand, and supporting the political process and/or the government, on the other hand, as in the case of DRC.³¹⁶

If peacekeepers or UN-mandated forces do not engage in hostilities, they deserve protection similar to that of civilians and their cooperation with humanitarian actors should be less problematic. The direct provision of relief by peacekeepers might also be acceptable, following the rules on quick impact projects (QIPs) and the principles of humanitarian action. They will be protected like civilians, as well as by the UN Safety Convention and by the ICC Statute’s provisions on international attacks against a peacekeeping mission, if applicable.

However, obviously, in case peacekeepers or UN-authorised forces engage in hostilities, as well as in unstable situations where there is a high risk that peacekeepers might engage in hostilities or where they are perceived as allied with one Party to the conflict due to their political mandate, the principle of distinction should guide their relationships with humanitarian actors. Carefulness should be exercised by humanitarians in deciding whether to share information with peacekeepers, for example in case of sensitive information on population movements that might be used for planning military actions. Armed escorts should be used as a last resort, and peacekeepers should refrain as much as possible from directly providing relief to civilians, since it would contribute to a blurring of the distinction between combatants and civilians

³¹⁴ Cottier (2008), *supra* fn. 240, 336. Emphasis in the original. For a less strict interpretation, see Engdahl (2007), *supra* fn. 231, 98 and 103.

³¹⁵ Melzer (ICRC) (2009), *supra* fn. 60, 61.

³¹⁶ See Section 4.2.2.2.

providing humanitarian assistance.³¹⁷ In terms of relief directly provided by peacekeepers in the form of QIPs, the rules adopted by UN DPKO to minimise the risk of prejudices to the activities of humanitarian actors should be strictly followed.³¹⁸ It should also be noted that the rules refer to peacekeeping and never mention conflict, so that nothing excludes an interpretation discouraging any performance of QIPs by peacekeepers participating in hostilities, in other words peace-enforcers.

Finally, it should be kept in mind that peacekeepers, once they engage in conflict, are bound to respect, as a minimum, the fundamental principles and rules of IHL listed in the UNSG Bulletin, which include the obligation to respect and protect medical and relief personnel.³¹⁹ Members of peacekeeping missions authorised by the UNSC but under national command and control clearly become combatants bound by customary IHL and by the IHL treaties to which their State of nationality is a Party if they engage in hostilities. For instance, ISAF was established by the UNSC in 2001 with a traditional peacekeeping mandate, but in 2006 started undertaking combat functions, so that it became a Party to the conflict.³²⁰

In case UN-authorised forces under national command and control also occupy portions of territory, it has been argued that they should be bound by the applicable IHL regulating occupation.³²¹ The applicability of IHL on occupation to forces under UN command, on the other hand, has been debated,³²² even if the adoption of such a regulatory framework would increase clarity on the applicable legal framework. While the applicability of occupation law would impose direct duties on UN forces in terms of satisfaction of the essential needs of the population and of acceptance of relief actions, at a minimum the provisions of the UNSG's Bulletin will impose on UN forces operating under UN command and control to respect and protect wounded or sick persons in their power, as well as medical personnel, units, and transports; respect the Red Cross and Red Crescent emblems; and 'facilitate the work of relief operations

³¹⁷ See Section 4.1.1.1. and 4.2.2.3.

³¹⁸ See Section 4.2.2.3.

³¹⁹ UNSG, *Secretary-General's Bulletin: Observance by United Nations forces of international humanitarian law*, 6 August 1999, ST/SGB/1999/13. On the applicability of IHL to peacekeepers, see Section 4.2.1.2. (ftn. 263).

³²⁰ See Adam Roberts, "Afghanistan and International Security," in *The War in Afghanistan: A Legal Analysis*, International Law Studies, Volume 85, ed. Michael N. Schmitt, (Newport, Rhode Island: Naval War College, 2009), 9-10 and 20-21. For an evolution of ISAF's mandate, see in particular S/RES/1386 (2001), 20 December 2001, par. 1; S/RES/1413 (2002), 23 May 2002, par. 2; S/RES/1510 (2003), 13 October 2003, pars. 1 and 4.

³²¹ See, for example, Siobhán Wills, "Occupation Law and Multi-National Operations: Problems and Perspectives," *British Yearbook of International Law* 77, no. 1 (2006), 274-301. The author examines the cases of UNITAF in Somalia, Operation Provide Comfort in Iraq in 1991 and the following enforcement of no fly zones, as well as the intervention in Iraq in 2003. Sassoli reports that in the 1990s 'Australia considered that IHL of military occupation applied *de jure* to its UN operation in Somalia, which did not meet armed resistance by the territorial sovereign.' Marco Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers," *European Journal of International Law* 16, no. 4 (September 2005), 688

³²² See Kolb, Porretto, and Vité (2005), *supra* fn. 309, 216-220. In particular, in case of international transitional administrations undertaken by the UN, such as UNMIK in Kosovo and UNTAET in Timor-Leste, there seems to be agreement that the IHL on occupation did not apply, also due to the consent of the sovereign to these administrations. *Ibid.* 220-232. See also Wills (2006), *supra* fn. 321, 301-325.

which are humanitarian and impartial in character and conducted without any adverse distinction,' respecting personnel, vehicles and premises involved in such operations.³²³

6.2.4.3. Private Military and Security Companies (PMSCs)

As emerged from the analysis of the practice, a final category of armed actors involved at various levels in the provision of relief to civilians is that of PMSCs, local or international.³²⁴ PMSCs operating in conflict settings in general qualify as civilians, and they lose protection from attack if and as long as they take direct part in hostilities, thus if they use force exceeding the limits of self-defence in connection with the conflict.

On this basis, even if PMSCs and humanitarians just share the same theatre of operations, without working together, the principle of distinction should be central to the relationships between the two groups, notwithstanding the fact that they are all civilians. If PMSCs are contracted by humanitarians to provide armed escorts or guards, it is advisable for humanitarian actors to try and avoid the risk of being caught in attacks by screening the company they choose in terms of previous records and to limit the services they employ it for, so as to prevent as much as possible any use of force amounting to direct participation in hostilities by such company.³²⁵ In this sense, hiring foreign PMSCs might safeguard respect (and perception of respect) for the principle of neutrality better than hiring local ones, which may be connected to Parties to the conflict.

If PMSCs directly engage in the provision of relief to civilians, either as a PMSC or through the establishment of a charity operated by the same components of the PMSC, they will not be qualifiable as impartial humanitarian organisations and thus not enjoy a right of humanitarian initiative. The possibility for relief actions carried out by PMSC's members to be covered by Articles 70 AP I or 18(2) AP II cannot be excluded, but there might be a strong presumption against the strictly impartial and humanitarian nature of the action if the PMSC is contracted at the same time by one of the Parties to the conflict to carry out security services. Especially in case these are contracted by a Party to the conflict to conduct activities amounting to direct participation in hostilities (such as the collection of tactical intelligence), it is advisable that PMSCs avoid engaging in the provision of relief, or at least try and ensure respect for the principle of

³²³ See Section 4.2.1.2.

³²⁴ See Section 4.3.

³²⁵ See Section 4.3.

distinction, in order to avoid NGOs possibly working with them or implementing projects financed by them, as well as civilians receiving assistance, being caught in attacks.

6.3. Conclusion

As summarised in this Chapter, an important development that emerges from the analysis of State practice is a trend towards an analogous regulation for humanitarian relief workers in both IACs and NIACs, in terms of duties for Parties to the conflict to respect and protect them, and grant them freedom of movement. Still, no right of access for relief workers has arguably emerged, since the need for consent from the Parties concerned has not been questioned, and States have rather insisted on the duty of these Parties to allow access to humanitarian assistance and workers.

The duty of Parties to respect, protect and grant freedom of movement has been always limited to humanitarian personnel engaged in the provision of humanitarian assistance, thus not to workers belonging to organisations active, for example, in human rights advocacy, political advocacy, or even development cooperation. Furthermore, especially in NIAC, States have claimed entitlement to require respect by these humanitarian workers for the principles of humanity and impartiality, but also neutrality in the sense of not favouring the opposite Party in the conflict and not getting involved in sensitive political issues.

This is very much related to protection, which has come to be identified by humanitarians as the second and essential component of humanitarian action, inseparable from assistance. In this sense, it is argued that protection activities can be very sensitive in terms of respect (and perceived respect) for the principles of humanitarian assistance, and thus if an actor engages in protection this might have an impact on its ability to provide assistance in the same context. All relief actors should incorporate protection considerations in the designing of relief projects, following the ‘do no harm’ principle. Pure protection activities, on the other hand, are more sensitive and more likely to be perceived by Parties as an interference with the political dimension of the conflict, and they have been entrusted by States under IHL treaties to a specific categories of actors—impartial humanitarian organisations. Humanitarian organisation has claimed their moral duty to engage not merely in the provision of relief but also in protection, but State practice, which has not revealed a specific focus on these activities if not to limit them, does not seem to have extended the right of humanitarian initiative, with the possibility of offering services in the fields of both relief and protection to all Parties in IACs and NIACs, without the offer being considered interference in the

conflict and with a corresponding right to have the offer considered in good faith, to organisations other than impartial humanitarian ones.

To be qualified as such in accordance with IHL treaties and subsequent State practice, impartial humanitarian organisations shall arguably respect in their activities the principles of humanity, impartiality, and neutrality as interpreted by the Red Cross Movement. Indeed, a violation of ideological neutrality is often understood as a violation of military neutrality, by supporting the opposite Party, especially in today's world where information and advocacy are rapidly spread globally and can generate significant political impact. It has been claimed by scholars and practitioners that these principles can be interpreted by agencies in different ways, in terms of rules to be followed by humanitarian actors; especially in the 1990s, some humanitarian organisations seemed to be able and willing to stretch their boundaries at the expenses of States' prerogatives. Still, it seems now that States have generally maintained quite a restrictive interpretation of the principles, either based on their own will and interest or under pressure by humanitarian organisations themselves.

On the one hand, attempts such as those by the U.S. to politicise the provision of humanitarian aid and integrate this activity in the array of available tools to prevail in an armed conflict have been firmly opposed by part of the humanitarian community, leading to responses by UN organs and to changes in U.S. and NATO military manuals and documents. Neither the U.S. nor NATO has claimed a right to use humanitarian aid for political goals, even if some of the practice analysed gives rise to concern on a possible shift in this direction. On the other hand, when some humanitarian organisations have allegedly tried and expanded their field of action into politically sensitive areas, such as the transmission of information to the prosecutor of international criminal institutions or proselytising, local authorities have vehemently restated their prerogatives and opposed such conduct, which would thus exceed the mission of providing humanitarian assistance, as well as the limits of legitimate protection activities by (impartial) humanitarian organisations.

In the framework of the constant assertion of the primary responsibility of Parties to the conflict for the satisfaction of the basic needs of all civilians under their control, the armed forces of belligerents have been acknowledged as having a potential role to play in the provision of relief, but without any special protection connected to the performance of this activity, unless they are part of civil defence organisations as provided in AP I. The principle of distinction has emerged as the key criterion under IHL for the

involvement of military actors in general (be they engaged in the conflict or not) in the provision of humanitarian assistance to civilians and their relations with humanitarian relief actors. In order for belligerents to be able to spare civilians and civilian objectives from attack, they shall first of all be able to recognise them. Any act that leads to a blurring of the distinction between civilians and combatants or fighters risks jeopardising the principle of distinction, endangering civilians, and should thus be avoided.

Finally, in terms of enforcement of the aforementioned rights, State practice has shown a focus mostly on duties of Parties to IACs and NIACs, for example to allow access to humanitarian assistance and actors, rather than on rights of civilians (to receive humanitarian assistance) or of relief workers (to have access to victims). In this sense, debates on the existence of a proper individual right of civilians to receive humanitarian assistance, and the related issues of determining the subjects obliged to provide such assistance (except for territorial authorities) and of combining such a right with the requirement for consent by the Parties concerned under IHL treaties, have been largely avoided by States. Rather, they have focused, albeit inconsistently, on enforcing the duties of Parties to the conflict with different means.

The UNSC has adopted specific sanctions against individuals identified as responsible for obstacles to humanitarian assistance and it has referred to humanitarian access as a ground for sanctions more in general and in some cases (most notably Libya) for armed intervention. Scholars have ventured the possibility of having national judges acknowledging a right under international law for impartial humanitarian organisations to have access to victims without consent from the concerned State, even if no instances of such practice have been found. Relevant ICL provisions and the risk of prosecution before the ICC might contribute to enhancing humanitarian access by deterring Parties to the conflict from conducts that might constitute a war crime, crime against humanity or possibly even genocide, such as attacking humanitarian assistance missions or using starvation as a method of combat. Finally, reactions by States in the form of diplomatic protests, for example following the expulsions of organizations engaged in the provision of relief, have sometimes been effective in putting international pressure on the Parties to the conflict in question: in Sudan, some of the NGOs expelled in March 2009 were then allowed to re-enter the country under different names; in Somalia, Al Shabaab lifted the ban against a number of NGOs following the declaration of famine by the UN.³²⁶ Still, States have justified their protests by focusing on the practical consequences for civilians of a reduction of the available humanitarian assistance, rather than on their legal

³²⁶ See Sections 5.3.3.2. and 5.3.3.4.

basis for intervening: it is thus not clear whether States have based their reactions on common Article 1 GCs, an alleged *erga omnes* right of access of relief workers, or an alleged *erga omnes* right to humanitarian assistance of civilians.

7. Conclusion: Principles Matter

The analysis of the evolution of State practice in this study has revealed that the provision of humanitarian assistance to civilians has acquired increased importance since the Cold War among the forms of intervention by the international community in situations of armed conflicts. Due to such attention, as well as to the growing size of the phenomenon and the involvement of an increasing number of different subjects in this activity, debates have emerged around its boundaries, the actors entitled to perform it, the protection granted to these actors, and the limits they shall respect to enjoy such protection.

While the main focus should always remain on victims and the need to safeguard their basic needs and dignity, the role of different actors in this field and their interaction have emerged as controversial. The involvement of the military – either belligerent armed forces or components of peace-support missions – has given rise to debate by scholars and practitioners since the end of the 1990s. In the same period, NGOs started enlarging their focus from the mere provision of relief to human rights and protection, and this led to questioning and reflecting on the limits and rights of humanitarian organisations, and on the need to define a clear legal framework for their engagement in these two fields of activities and for managing the possible tensions emerging between the two. Complaints about an increasing politicisation and militarisation of humanitarian assistance have been voiced, as well as concerns regarding the limits of a principled approach or the practical feasibility of implementing such an approach at all in the current context.

These trends and the desire to complement existing debates with appropriate legal analysis have led to the choice to undertake a study of the legal framework applicable to the provision of humanitarian assistance to civilians in armed conflict, focusing on the rights, limits, and protection of the actors that have been involved in this area and on their relationships. The present research has thus analysed the challenges that have emerged in practice and the responses offered by IHL (but also IHRL and ICL). The legal value of the principles traditionally associated to humanitarian assistance—humanity, impartiality, neutrality, independence—has been central to the analysis, also in relation to their questioning by advocates of so-called ‘new humanitarianism’ or ‘human rights-based humanitarianism’, who have interpreted the principles as guidelines that can either be followed or disregarded by relief organisations without any necessary legal, if not practical, consequence. Given this increasing focus on human rights and protection by actors engaged in the provision of relief to civilians, the analysis has also included the study of the second component of

humanitarian action—protection: the role of humanitarian actors in this activity under IHL treaties and in subsequent practice has been explored, so as to clarify the legal framework regulating this activity, as well as the limits to be respected and the implications due to engagement by a same actor in both humanitarian assistance and protection.

The research has revealed that the principles traditionally associated to humanitarian assistance and the rules they embody remain central to the international regulation of the provision of both relief and protection to civilians in situations of armed conflict. The use of the term ‘humanitarian’ has been broadened to cover activities of very different nature, ranging from interventions implying the use of armed force to actions aimed at influencing the political situation. However, under IHL, humanitarian assistance remains a well-defined concept: it refers to acts, activities and the human and material resources for the provision, based on needs and devoid of political or military goals, of goods and services indispensable for the survival and the fulfilment of the essential needs of the victims of armed conflict. Sovereignty continues to be a central concept, also in the field of the provision of humanitarian assistance and protection to civilians in armed conflict: not only State practice reveals that no right of access or right to provide humanitarian assistance to civilians without consent by the Parties concerned has developed in international law, but it does not even offer support to views affirming the existence of a right to provide relief in NIAC in territory controlled by non-State armed groups without State’s consent.

Furthermore, the rules enshrined in the principles of humanity, impartiality, and neutrality, as well as independence of humanitarian action (as interpreted by the UNGA in Resolution 58/114 of December 2003), continue to represent the balance acceptable to States between military necessity and humanitarian considerations for the provision of relief and protection to civilians. On the one hand, the principles have been repeatedly invoked to justify the special position of humanitarian assistance in conflict and recalled when calling upon Parties to allow and facilitate humanitarian access, with a consistent practice in the sense by UN bodies. On the other hand, they have been used to delineate the limits of the action that humanitarian relief personnel may lawfully undertake, thus as a guarantee of State sovereignty and of non-interference in the hostilities: they have featured in agreements on humanitarian assistance concluded between Parties to armed conflicts or between these Parties and the UN, and conducts contrary to the rules embodied in the principles have been invoked by belligerents to take measures against organisations engaged in the provision of relief.

Conflicts in the 1990s led some scholars to identify an evolution towards an expanded role for relief organisations in conflict, in particular NGOs, which had not be foreseen by the drafters of the GCs and APs and featured interventions going beyond the provision of life-saving assistance and the performance of activities aiming to protect civilians without interfering in the hostilities or taking a position in political or other disputes. However, the analysis developed in this research has demonstrated that the protection offered by IHL treaties to relief actions that comply with the principles of humanitarian action and the special rights granted to impartial humanitarian organisations have not been extended to these broader interventions and to actors engaged in them. Not only humanitarian action as conceived by new humanitarianism has not succeeded in becoming the new model of humanitarian action promoted by States and protected under IHL, but even in the 1990s States' right of control and sovereignty were never really radically questioned. As shown by experiences in Rwanda and BiH, when States reacted to actions by relief organisations that they perceived as a violation of these organisations' mandate, their reaction did not trigger condemnation as contrary to international law.

In relation to the growing number and different types of actors that have become involved in the provision of humanitarian assistance to civilians in armed conflict, this study has concluded that while both local and external actors, including military ones, can lawfully participate in the provision of relief, they are accorded different levels of protection based on their position under IHL. Participation of members of local armed forces in humanitarian activities is envisaged and protected by the treaties only under strict conditions. In all other hypotheses of involvement by armed actors, respect for the principle of distinction is central, and they are entitled to different levels of protection according to their position under IHL, also depending on whether they are local or foreign, belligerents or not, member of armed forces or of private security companies.

Special protection under IHL is again related to the ability of an actor to fulfil the principles of humanitarian action, as arguably confirmed also by the consistent practice within the UN framework, which seems to have led to a progressive development in the protection of humanitarian relief actors in NIAC in the form of duty of Parties to the conflict to respect, protect and grant freedom of movement to these workers. Also, practice of States and other Parties to armed conflicts in response to the increasing engagement of humanitarian organisations in activities classified as protection has shown that these Parties, both State and non-State actors, have claimed the right to ensure respect for the limit of their mission by humanitarian

organisations. More specifically, they have required these organisations to respect the most contested principle, which is generally not considered applicable to humanitarian organisations *tout court*—neutrality, in the sense of not interfering in hostilities and abstaining from involvement in politics, since also such an involvement has been perceived as potentially favouring the opposite Party in conflict and contrary to a purely humanitarian focus.

The analysis of IHL treaties has revealed that States, when negotiating these treaties, agreed to grant special protection to humanitarian action in favour of civilians in armed conflict, but conditioned such protection upon respect of a delicate balance between humanitarian considerations and military necessity, a balance embodied by the principles that guide such action. Subsequent practice analysed in this study leads to argue that, in a world where technology allows information to be spread globally very quickly and to potentially mobilise significant international pressure, States have reaffirmed such balance, as well as the centrality of State sovereignty against external interference. Within the multiplicity of actors present and active in situations of conflict, humanitarian organisations have seen their special position recognised and strengthened, especially in NIAC, but not to the point of being allowed to disregard national laws or State authority, or to expand their activities into politically sensitive areas and adopt ways of working that resemble those of other kinds of organisations, such as the ones focusing on public human rights advocacy. In the best interests of civilians in needs, what can be argued is that these distinct kinds of actors and organisations should, through dialogue, ensure complementarity and (when appropriate) coordination of their respective activities, always safeguarding their respective specific identity and added value.

References

- Abbaszadeh, Nima, et al. *Provincial Reconstruction Teams: Lessons and Recommendations*. Princeton, NJ: Woodrow Wilson School of Public & International Affairs, Princeton University, January 2008.
- Aboagye, Festus, and Alhaji M S Bah, eds. *A Tortuous Road to Peace: The Dynamics of Regional, UN and International Humanitarian Interventions in Liberia*. Pretoria: Institute for Security Studies, 2005.
- Abril Stoffels, Ruth. *La Asistencia Humanitaria en los Conflictos Armados: Configuración Jurídica, Principios Rectores y Mecanismos de Garantía*. Valencia: Tirant lo Blanch, 2001.
- Abril Stoffels, Ruth. "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps." *International Review of the Red Cross* 86, no. 855 (September 2004): 515-545.
- ACF International. *Disaster Risk Management for Communities*, Policy Document, 2011. Available at http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2735.pdf (accessed October 31, 2011).
- Actionaid et al. *Quick Impact, Quick Collapse: The Dangers of Militarized Aid in Afghanistan*. January 2010. Available at <http://www.oxfam.org/en/policy/quick-impact-quick-collapse> (accessed August 06, 2010).
- Aegis. "About Us." Aegis website. Available at <http://www.aegisworld.com/index.php/about-us-2> (accessed June 18, 2012).
- Aegis. "About Us: History." Aegis website. Available at <http://www.aegisworld.com/index.php/history-2> (accessed June 18, 2012).
- Aegis Foundation. "About the Aegis Foundation." Aegis Foundation website. Available at <http://www.aegis-foundation.org/index.php/?page=mission-ethos-aim> (accessed June 18, 2012).
- Aegis Foundation. "Basra youth enjoy improvements, new equipment at local stadium." May 2009. Available at <http://www.aegis-foundation.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=38&cntnt01origid=55&cntnt01dateformat=%25b%20%25Y&cntnt01returnid=62> (accessed June 18, 2012).
- Aegis Foundation. "AEGIS Foundation: Frequently Asked Questions." Aegis Foundation website. Available at <http://www.aegis-foundation.org/index.php/?page=faq> (accessed June 18, 2012).
- African Rights. *Humanitarianism Unbound? Current Dilemmas Facing Multi-Mandate Relief Operations in Political Emergencies*. African Rights Discussion Paper No. 5. London: African Rights, November 1994.
- Akehurst, Michael. "Custom as a Source of International Law." *The British Yearbook of International Law* 47 (1974/1975): 1-53.
- Alabrune, François. "La Pratique des Comités des Sanctions du Conseil de Sécurité depuis 1990." *Annuaire Français de Droit International* 45 (1999): 226-279.
- Alcaide Fernández, Joaquín. "La Asistencia Humanitaria en Situaciones de Conflicto Armado." In *La Asistencia Humanitaria en Derecho Internacional Contemporáneo*, by Joaquín Alcaide Fernández, María del Carmen Márquez Carrasco, and Juan Antonio Carrillo Salcedo, 19-80. Seville: Universidad de Sevilla, 1997.
- Alcaide Fernández, Joaquín, María del Carmen Márquez Carrasco, and Juan Antonio Carrillo Salcedo. *La Asistencia Humanitaria en Derecho Internacional Contemporáneo*. Seville: Universidad de Sevilla, 1997.
- Alexy, Robert. *The Argument from Injustice: A Reply to Legal Positivism*. Oxford: Oxford University Press, 2002.
- Allié, Marie-Pierre, and Fabrice Weissman. "Syrie: soutenons les opérations humanitaires transfrontalières." *Le Monde*, January 29, 2013. Available at http://www.lemonde.fr/idees/article/2013/01/29/syrie-soutenons-les-operations-humanitaires-transfrontaliere_1823949_3232.html (accessed September 10, 2013).

- Al-Nauimi, Najeeb, and Richard Meese, eds. *International Legal Issues Arising under the United Nations Decade of International Law*. The Hague [etc.]: Nijhoff, 1995.
- Alston, Philip. "Commissions of Inquiry as Human Rights Fact-Finding Tools." *Proceedings of the Annual Meeting (American Society of International Law)* 105 (March 23-26, 2011): 81-85.
- Alston, Philip, and Gerard Quinn. "The Nature and the Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights." *Human Rights Quarterly* 9, no. 2 (May 1987): 156-229.
- Ambos, Kai. "What Does 'Intent to Destroy' in Genocide Mean?." *International Review of the Red Cross* 91, no. 876 (December 2009): 833-858.
- Amnesty International. "About Amnesty International." Available at <http://www.amnesty.org/en/who-we-are/about-amnesty-international> (accessed March 17, 2011).
- Amnesty International. "Israel/Lebanon: Deliberate destruction or "collateral damage"? Israeli attacks on civilian infrastructure." Report MDE 18/007/2006. August 2006.
- Amnesty International. "Israel/Lebanon: Out of all proportion - civilians bear the brunt of the war." Report MDE 02/033/2006. November 2006.
- Amnesty International. *The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability*. London: Amnesty International Publications, 2009.
- Anderson, Kenneth. "Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts." *Harvard Human Rights Journal* 17 (2004): 41-74.
- Anderson, Mary B. *Do No Harm: How Aid Can Support Peace, or War*. Boulder, CO [etc.]: Rienner, 1999.
- Arai-Takahashi, Yutaka. "Disentangling Legal Quagmires: The Legal Characterisation of the Armed Conflicts in Afghanistan since 6/7 October 2001 and the Question of Prisoner of War Status." *Yearbook of International Humanitarian Law* 5 (December 2002): 61-105.
- Arai-Takahashi, Yutaka. *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*. Leiden, Boston: Martinus Nijhoff Publishers, 2009.
- Arai-Takahashi, Yutaka. "The Principle of Humanity under International Humanitarian Law in the 'Is/Ought' Dichotomy." *Japanese Yearbook of International Law* 54 (2011): 333-364.
- Arangio-Ruiz, Gaetano. "On the Security Council's 'Law-Making'." *Rivista di Diritto Internazionale* 83, no. 3 (2000): 609-725.
- Arangio-Ruiz, Gaetano. "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations – with an Appendix on the Concept of International Law and the Theory of International Organisation." *Receuil des Cours* 137 (1972-III): 419-731.
- Arghandiwal, Miriam. "As foreign aid dries up, Afghan NGOs fight to survive." Reuters website, July 5, 2012. Available at <http://www.reuters.com/article/2012/07/05/us-afghanistan-aid-tokyo-idUSBRE8640G720120705> (accessed July 20, 2012).
- Arnold, Roberta. "The Legal Implications of the Military's 'Humanitarisation.'" *Revue de Droit Militaire et de Droit de la Guerre* 43, no. 3-4 (2004): 21-54.
- Arnold, Roberta, and Noëlle Quénivet, eds. *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*. Leiden/Boston: Martinus Nijhoff Publishers, 2008.
- Associated Press. "Banned Aid Agencies Warn of Disaster in Somalia." FoxNews, November 29, 2001. Available at <http://www.foxnews.com/world/2011/11/29/banned-aid-agencies-warn-disaster-in-somalia/> (accessed May 31, 2012).
- Atkinson, Philippa, and Nicholas Leader. *The 'Joint Policy of Operation' and the 'Principles and Protocols of Humanitarian Operation' in Liberia*. HPG Report 3. London: Overseas Development Institute, 2000.

- Ayad, Christophe. "L'arme de la famine en Angola." *Libération*, June 28, 2002. Available at <http://www.liberation.fr/monde/0101417880-l-arme-de-la-famine-en-angola> (accessed June 2, 2011).
- Babiker, Mohamed Abdelsalam. *Application of Humanitarian and Human Rights Law to the Armed Conflicts of the Sudan: Complementary or Mutually Exclusive Regimes?*. Antwerp, Oxford: Intersentia, 2007.
- Babington, Deepa. "Aid agency allowed to resume Darfur operations." AlertNet website, March 29, 2011. Available at <http://www.trust.org/alertnet/news/aid-agency-allowed-to-resume-operations-in-darfur/> (accessed May 13, 2011).
- Baitenmann, Helga. "NGOs and the afghan war: The politicisation of humanitarian aid." *Third World Quarterly* 12, no. 1 (1990): 62-85.
- Barakat, Sultan, Seán Deely and Steven A. Zyck. "'A Tradition of Forgetting': Stabilisation and Humanitarian Action in Historical Perspective." *Disasters* 34, S3 (2010): S297-S319.
- Barber, Rebecca. "Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law." *International Review of the Red Cross* 91, no. 874 (June 2009): 371-397.
- Barnett, Michael. *Empire of Humanity: A History of Humanitarianism*. Ithaca and London: Cornell University Press, 2011.
- Barnett, Michael. "Humanitarianism Transformed." *Perspectives on Politics* 3, no. 4 (December 2005): 723-740.
- Barnett, Michael, and Thomas G. Weiss. *Humanitarianism Contested: Where Angels Fear to Tread*. London and New York: Routledge, 2011.
- Barry, Jane, and Anna Jefferys. *A Bridge too Far: Aid Agencies and the Military in Humanitarian Response*. HPN no. 37. London: Overseas Development Institute, January 2002.
- BBC News. "Israel confirms easing of Gaza blockade." BBC News Website, July 5, 2010. Available at <http://www.bbc.co.uk/news/10513004> (accessed May 31, 2011).
- BBC News. "Khartoum expels foreign aid agencies from eastern Sudan." BBC News Website, June 01, 2012. Available at <http://www.bbc.co.uk/news/world-africa-18296430> (accessed February 28, 2013).
- BBC News. "Profile: Gaza Strip." BBC News website, updated January 6, 2009. Available at http://news.bbc.co.uk/2/hi/middle_east/5122404.stm (accessed May 20, 2011).
- BBC News. "Somalia Islamists lift aid ban to help drought victims." BBC News Website, July 06, 2011. Available at <http://www.bbc.co.uk/news/world-africa-14046267> (accessed July 07, 2011).
- BBC News. "Sri Lanka army 'defeats rebels'." BBC News Website, May 16, 2009. Available at http://news.bbc.co.uk/2/hi/south_asia/8053542.stm (accessed May 18, 2011).
- Belgrad, Eric A., and Nitza Nachmias, eds. *The Politics of International Humanitarian Aid Operations*. Wesport (Connecticut), London: Praeger, 1997.
- Belgrad, Eric A. "The Politics of Humanitarian Aid." In *The Politics of International Humanitarian Aid Operations*, edited by Eric A. Belgrad and Nitza Nachmias, 3-17. Wesport (Connecticut), London: Praeger, 1997.
- Bell, Christine. "Peace Agreements: Their Nature and Legal Status." *The American Journal of International Law* 100, no. 2 (April 2006): 373-412.
- Bellamy, Alex J., and Paul D. Williams. "The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect." *International Affairs* 87, no 4 (July 2011): 825-850.
- Bellamy, Alex J., Paul Williams, and Stuart Griffin. *Understanding Peacekeeping*. Cambridge [etc.]: Polity Press, 2004.
- Bellinger, John B., III and William J. Haynes II. "A US Government Response to the International Committee of the Red Cross study Customary International Humanitarian Law." *International Review of the Red Cross* 89, no. 866 (June 2007): 443-471.

- Belloni, Roberto. "The Trouble with Humanitarianism." *Review of International Studies* 33, no. 3 (2007): 451-474.
- Bennett, Nicky. "Civil-Military Principles in the Pakistan Flood Response." *Humanitarian Exchange Magazine* 49 (January 2011): 11-14.
- Benvenisti, Eyal. *The International Law of Occupation* 2nd ed. Oxford [etc.]: Oxford University Press, 2012.
- Benvenisti, Eyal. "The Law on the Unilateral Termination of Occupation." Tel Aviv University Law Faculty Papers, Working Paper 93 (August 2008). Available at <http://law.bepress.com/taulwps/art93/> (accessed June 25, 2012).
- Bernhardt, Rudolph, ed. *Encyclopedia of Public International Law*, Vol. 4. Amsterdam [etc.]: North-Holland, 1981-1990.
- Beruto Gian Luca, ed. *International Humanitarian Law, Human Rights and Peace Operations. Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008*. Sanremo: International Institute of Humanitarian Law, 2009.
- Beruto, Gian Luca, ed. *The Conduct of Hostilities Revisiting the Law of Armed Conflict: 100 Years after the 1907 Hague Conventions and 20 Years after the 1977 Additional Protocols. Proceedings of the Roundtable on Current Problems of International Humanitarian Law, Sanremo, 6-8 September 2007*. Milan: Nagard, 2008.
- Bettati, Mario. "Ingérence, Intervention ou Assistance Humanitaire?." In *International Legal Issues Arising under the United Nations Decade of International Law*, edited by Najeeb Al-Nauimi and Richard Meese, 935-962. The Hague [etc.]: Nijhoff, 1995.
- Bettati, Mario. *Le Droit d'Ingérence: Mutation de l'Ordre International*. Paris: Éditions Odile Jacob, 1996.
- Bettati, Mario, and Bernard Kouchner. *Le devoir d'ingerence, peut-on les laisser mourir?*. Paris: Denoel, 1987.
- Bhalla, Nita. "Afghanistan suspends two aid groups for preaching Christianity." AlertNet website, May 31, 2010. Available at http://www.alertnet.org/db/an_art/55867/2010/04/31-125504-1.htm (accessed July 3, 2010).
- Blair, Tony. "Full statement to the House of Commons, 18 March 2003." Available at <http://www.guardian.co.uk/politics/2003/mar/18/foreignpolicy.iraq1> (accessed March 10, 2012).
- Blishchenko, Igor P. "Les principes du droit international humanitaire." In *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, edited by Christophe Swinarski, 291-300. Geneva: ICRC; The Hague: Nijhoff, 1984.
- Blondel, Jean-Luc. "Assistance to Protected Persons." *International Review of the Red Cross* 27, no. 260 (September-October 1987): 451-468.
- Blondel, Jean-Luc. "L'humanitaire appartient-il à tout le monde? Réflexions autour d'un concept (trop?) largement utilisé." *International Review of the Red Cross* 82, no. 838 (June 2000): 327-337.
- Blondel, Jean-Luc. "Neutralité et Action Humanitaire." *Refugee Survey Quarterly* 26, no. 4 (2007): 189-191.
- Blondel, Jean-Luc. "The Meaning of the Word "Humanitarian" in Relation to the Fundamental Principles of the Red Cross and Red Crescent." *International Review of the Red Cross* 29, no. 273 (November-December 1989): 507-515.
- Boisson de Chazournes, Laurence, and Vera Gowlland-Debbas, eds. *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*. The Hague [etc.]: Nijhoff, 2001.
- Bosch, Shannon. "Relief Workers: The Hazards of Offering Humanitarian Assistance in the Theatre of War." *South African Yearbook of International Law* 35 (2010): 56-79.
- Boswijk, Sanne and the Netherlands Red Cross, eds. *Protecting Human Dignity in Armed Conflict*. Nijmegen: Wolf Publishers, 2008.
- Bothe, Michael. "Article 70 – Relief Actions." In *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, by Michael Bothe, Karl

- Joseph Partsch, and Waldemar A. Solf, 431-437. The Hague/Boston/London: Martinus Nijhoff Publishers, 1982.
- Bothe, Michael. "Customary International Humanitarian Law: Some Reflections on the ICRC Study." *Yearbook of International Humanitarian Law* 8 (2005): 143-178.
- Bothe, Michael. "Relief Actions." In *Encyclopedia of Public International Law*, edited by Rudolph Bernhardt, Vol. 4, 173-178. Amsterdam [etc.]: North-Holland, 1981-1990.
- Bothe, Michael. "Relief Actions: The Position of the Recipient State." In *Assisting the Victims of Armed Conflict and Other Disasters: Papers Delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22-24 June 1988*, edited by Frits Kalshoven, 91-97. Dordrecht [etc.]: Kluwer Academic Publishers, 1989.
- Bothe, Michael. "War Crimes." In *The Rome Statute of the International Criminal Court: A Commentary, Volume I*, edited by Antonio Cassese, Paola Gaeta, and John R. W. D. Jones, 379-426. Oxford [etc.]: Oxford University Press, 2002.
- Bothe, Michael, Karl Joseph Partsch, and Waldemar A. Solf. *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. The Hague/Boston/London: Martinus Nijhoff Publishers, 1982.
- Bouchet-Saulnier, Françoise. "Coutume: Espace de Création et d'Activisme pour le Juge et pour les Organisations Non Gouvernementales." In *Droit International Humanitaire Coutumier: Enjeux et Défis Contemporains*, edited by Paul Tavernier and Jean-Marie Henckaerts, 161-171. Brussels: Bruylant, 2008.
- Bouchet-Saulnier, Françoise. "L'Accès aux Victimes: Principe Humanitaire ou Slogan Politique?." Published for MSF, December 2000. Available at <http://www.msf.fr/sites/www.msf.fr/files/2000-12-01-Saulnier.pdf> (accessed July 19, 2012).
- Bouchet-Saulnier, Françoise. "Point de Vue d'Une Juriste Appartenant au Monde des ONG." In *Aide Humanitaire Internationale: un Consensus Conflictuel?*, edited by Marie-José Domestici-Met, 196-209. Paris: Economica, 1996.
- Bouchet-Saulnier, Françoise, and Fabien Dubuet. *Legal or Humanitarian Testimony? History of MSF's Interactions with Investigations and Judicial Proceedings*. Paris: CRASH/Fondation - Médecins Sans Frontières, 2007.
- Boutruche, Theo. "Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice." *Journal of Conflict and Security Law* 16, no. 1 (2011): 105-140.
- Bouvier, Antoine. "'Convention on the Safety of United Nations and Associated Personnel': Presentation and Analysis." *International Review of the Red Cross* 35, no 309 (November-December 1995): 638-666.
- Bowring, Bill. "Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights." *Journal of Conflict and Security Law* 14, no. 3 (Winter 2009): 485-498.
- Bradbury, Mark, Nicholas Leader, and Kate Mackintosh. *The 'Agreement on Ground Rules' in South Sudan*. HPG Report 4. London: Overseas Development Institute, March 2000.
- Brauman, Rony. "La fin de l'humanitaire sans frontières?." Grotius International website, August 26, 2009. Available at <http://www.grotius.fr/debat-la-fin-de-l%E2%80%99humanitaire-sans-frontieres/> (accessed April 22, 2012).
- Brauman, Rony. "Learning from Dilemmas." In *Nongovernmental Politics*, edited by Michel Feher, Gaele Krikorian, and Yates McKee, 131-147. New York: Zone Books, 2007.
- Brauman, Rony. "Les liaisons dangereuses du témoignage humanitaire et des propagandes politiques Biafra, Cambodge, les mythes fondateurs de Médecins Sans Frontières." CRASH Paper, 2006. Originally published in *Crises extrêmes, Face aux massacres, aux guerres civiles et aux génocides*, edited by Marc Le Pape, Claudine Vidal, Johanna Siméant (Paris : Editions La Découverte, 2006). Available at http://www.msf-crash.org/drive/f723-rb-2006-les-liaisons-dangereuses-du-temoignage-humanitaire-et-des-propagandes-politiques-_fr-p.14_.pdf (accessed May 12, 2011).

- Brauman, Rony. "Rwanda: L'esprit humanitaire contre le devoir d'humanité. Tribune parue dans Le Monde le 30 juin 1994." Available at <http://www.msf.fr/drive/1994-06-30-Brauman.pdf> (accessed April 20, 2011).
- Brett, Rachel. "Non-Governmental Human Rights Organizations and International Humanitarian Law." *International Review of the Red Cross* 38, no 324 (September 1998): 531-536.
- British and Irish Agencies Afghanistan Group (BAAG) and European Network of NGOs in Afghanistan (ENNA). *Aid and Civil-Military Relations in Afghanistan*. BAAG and ENNA Policy Briefing, October 2008. Available at <http://www.baag.org.uk/publications/category/reports> (accessed August 06, 2010).
- Brooke, James. "Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right." *The New York Times*, September 12, 2002. Available at <http://www.nytimes.com/2002/09/12/us/vigilance-memory-kandahar-pentagon-tells-troops-afghanistan-shape-up-dress-right.html?pagewanted=all&src=pm> (accessed June 18, 2012).
- Bugnion, François. "Red Cross Law." *International Review of the Red Cross* 35, no. 308 (September-October 1995): 491-519.
- Bugnion, François. *The International Committee of the Red Cross and the Protection of War Victims*. Oxford/Geneva: Macmillan/ICRC, 2003.
- Burns, Robert. "Envoy Laments Weak US Knowledge about Taliban." Associated Press, April 07, 2009. Available at <http://www.foxnews.com/wires/2009Apr07/0,4670,USAfghanistan,00.html> (accessed September 15, 2010).
- Bush, George W. "Bush Announces Military Strikes in Afghanistan." October 09, 2001. Available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_100801.htm (accessed March 10, 2012).
- Bush, George W. "Message to Saddam." Washington, DC, March 17, 2003. Available at <http://www.presidentialrhetoric.com/speeches/03.17.03.html> (accessed March 10, 2012).
- Byman, Daniel L. "Uncertain Partners: NGOs and the Military." *Survival* 43, no. 2 (Summer 2001): 97-114.
- Cadwalader, George. "The Rules Governing the Conduct of Hostilities in Additional Protocol I to the Geneva Conventions of 1949: A Review of Relevant United States References." *Yearbook of International Humanitarian Law* 14 (2011): 133-171.
- Cahill, Kevin M., ed. *Human Security for All: A Tribute to Sergio Vieira de Mello*. New York: Fordham University Press and The Center for International Health and Cooperation, 2004.
- Cameron, Lyndsey. "Private Military Companies: Their Status Under International Humanitarian Law and Its Impact on their Regulation." *International Review of the Red Cross* 88, no. 863 (September 2006): 573-598.
- Cammaert, Patrick, Major General (ret). "A Military Perspective on Protecting Human Dignity in Armed Conflict." In *Protecting Human Dignity in Armed Conflict*, edited by Sanne Boswijk and the Netherlands Red Cross, 26-32. Nijmegen: Wolf Publishers, 2008.
- Campanelli, Danio. "The Law of Military Occupation Put to the Test of Human Rights Law." *International Review of the Red Cross* 90, no 871 (September 2008): 653-668.
- Canadian National Defence. *Law of Armed Conflict at the Operational and Tactical Levels*. Joint Doctrine Manual B-GJ-005-104/FP-021. August 2001.
- Canadian National Defence. *Civil-Military Cooperation in Peace, Emergencies, Crisis and War*. B-GG-005-004/AF-023. January 1999.
- Canadian National Defence. *Canadian Military Doctrine*. Canadian Forces Joint Publication. B-GJ-005-000/FP-001. April 2009.
- Cannizzaro, Enzo, ed. *The Law of Treaties Beyond the Vienna Convention*. Oxford [etc.]: Oxford University Press, 2011.

- Carbonnier, Gilles. "Privatisation and Outsourcing in Wartime: The Humanitarian Challenges." *Disasters* 30, no. 4 (2006): 402-416.
- Caritas Europa. "Bridging the Gap between Policy & Practice: The European Consensus on Humanitarian Aid and Humanitarian Principles." October 2011. Available at http://www.caritas-europa.org/module/FileLib/BridgingtheGap_ENdefinite.pdf (accessed July 5, 2012).
- Carrillo Salcedo, Juan Antonio. "La Asistencia Humanitaria en Derecho Internacional Contemporáneo." In *La Asistencia Humanitaria en Derecho Internacional Contemporáneo*, by Joaquín Alcaide Fernández, María del Carmen Márquez Carrasco, and Juan Antonio Carrillo Salcedo, 127-159. Seville: Universidad de Sevilla, 1997.
- Cassella, Sarah. *La nécessité en droit international: de l'état de nécessité aux situations de nécessité*. Leiden [etc.]: Nijhoff, 2011.
- Cassese, Antonio. "The Martens Clause: Half a Loaf or Simply Pie in the Sky?." *European Journal of International Law* 11, no. 1 (2000): 187-216.
- Cassese, Antonio, Paola Gaeta, and John R. W. D. Jones, eds. *The Rome Statute of the International Criminal Court: A Commentary, Volume I*. Oxford [etc.]: Oxford University Press, 2002.
- Cerone, John. "Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-international Armed Conflict in an Extraterritorial Context." *Israel Law Review* 40, no. 2 (2007): 396-452.
- Chandler, David. "The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda." *Human Rights Quarterly* 23, no. 3 (August 2001): 678-700.
- Charbonneau, Louis. "NGO expelled from Darfur considered ICC cooperation." Reuters website, March 16, 2009. Available at <http://www.reuters.com/article/2009/03/16/idUSN16528406> (accessed May 12, 2011).
- Charnovitz, Steve. "Nongovernmental Organizations and International Law." *The American Journal of International Law* 100, no. 2 (April 2006): 348-372.
- Chinaview. "WFP suspends operations in southern Somalia over insecurity." January 05, 2010. Available at http://news.xinhuanet.com/english/2010-01/05/content_12759809.htm (accessed June 25, 2012).
- Ciampi, Annalisa. "The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute." *Journal of International Criminal Justice* 6, no. 5 (2008): 885-897.
- Clapham, Andrew. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006.
- Clapham, Andrew. "Human Rights Obligations of Non-state Actors in Conflict Situations." *International Review of the Red Cross* 88, no 863 (September 2006): 491-523.
- Cockayne, James, Christoph Mikulaschek, and Chris Perry. "The United Nations Security Council and Civil War: First Insights from a New Dataset." International Peace Institute, September 2010. Available at http://www.ipinst.org/media/pdf/publications/ipi_rpt_unsc_and_civil_war_epub.pdf (accessed June 22, 2013).
- Cockayne, James, et al. *Beyond Market Forces: Regulating the Global Security Industry*. New York: International Peace Institute, 2009.
- Cohen, Amichai, and Yuval Shany. "The Turkel Commission's Flotilla Report (Part One): Some Critical Remarks." EJIL: Talk! – Blog of the European Journal of International Law. January 28, 2011. Available at <http://www.ejiltalk.org/the-turkel-commissions-flotilla-report-part-one-some-critical-remarks/> (accessed May 31, 2011).
- Cohen-Jonathan, G., and Jean-François Flauss, eds. *Les Organisations Non Gouvernementales et le Droit International des Droits de l'Homme/International Human Rights Law and Non Governmental Organizations*. Brussels: Bruylant, 2005.
- Collins, Joseph J., and Michael J. McNerney. "Security and Humanitarian Assistance: The US Experience in Afghanistan." In *Between Force and Mercy: Military Action and Humanitarian Aid*, edited by Dennis Dijkzeul, 187-200. Berlin: Berliner Wissenschafts-Verlag, 2004.

- Collinson, Sarah, and Samir Elhawary. *Humanitarian Space: A Review of Trends and Issues*. HPG Report 32. London: Overseas Development Institute, April 2012.
- Collinson, Sarah, Samir Elhawary, and Robert Muggah. "States of Fragility: Stabilisation and Its Implications for Humanitarian Action." *Disasters* 34, S3 (2010): S275-S296.
- Condorelli, Luigi. "Les progrès du droit international humanitaire et la circulaire du secrétaire général des Nations Unies du 6 août 1999." In *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, edited by Laurence Boisson de Chazournes and Vera Gowlland-Debbas, 495-505. The Hague [etc.]: Nijhoff, 2001.
- Condorelli, Luigi, and Laurence Boisson de Chazournes. "Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire en toutes circonstances." In *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, edited by Christophe Swinarski, 17-35. Geneva: ICRC; The Hague: Nijhoff, 1984.
- Condorelli, Luigi, Anne-Marie La Rosa and Sylvie Scherrer, eds., *Les Nations Unies et le droit international humanitaire/The United Nations and international humanitarian law, Proceedings of the international symposium held on the occasion of the 50th anniversary of the United Nations* (Geneva, 19, 20 and 21 October 1995). Paris: Éditions Pedone, 1996.
- Conforti, Benedetto. *Diritto Internazionale*. 8th ed. Naples: Editoriale Scientifica, 2010.
- Conforti, Benedetto. *The Law and Practice of the United Nations*. 3rd revised ed. Leiden/Boston: Martinus Nijhoff Publishers, 2005.
- Conlon, Paul. "Legal Problems at the Centre of United Nations Sanctions." *Nordic Journal of International Law* 65, no. 1 (1996): 73-90.
- Conlon, Paul. "The Humanitarian Mitigation of UN Sanctions." *German Yearbook of International Law* 39 (1996): 249-284.
- Coomans, Fons, and Menno T. Kamminga, eds. *Extraterritorial Application of Human Rights Treaties*. Antwerp [etc.]: Intersentia, 2004.
- Cornish, Stephen, and Marit Glad. *Civil-Military Relations: No Room for Humanitarianism in Comprehensive Approaches*. Security Policy Library no. 5-2008. Flekkefjord: Den Norske Atlanterhavskomite / The Norwegian Atlantic Committee, 2008.
- Corten, Olivier. "Les ambiguïtés du droit d'ingérence humanitaire." *Le courrier de l'UNESCO* (July/August 1999): 57-59.
- Corten, Olivier, and Pierre Klein. "Are Agreements between States and Non-State Entities Rooted in the International Legal Order?." In *The Law of Treaties Beyond the Vienna Convention*, edited by Enzo Cannizzaro, 3-24. Oxford [etc.]: Oxford University Press, 2011.
- Corten, Olivier, and Pierre Klein. *Droit d'Ingerence ou Obligation de Reaction?*, 2nd ed. Brussels: Bruylant, 1996.
- Corten, Olivier, and Pierre Klein. "L'Assistance Humanitaire Face à la Souveraineté des Etats." *Revue Trimestrielle des Droits de l'Homme* 3, no. 11 (July 1992): 343-364.
- Cortright, David, and George A. Lopez. *The Sanctions Decade: Assessing UN Strategies in the 1990s*. Boulder, CO [etc.]: Rienner, 2000.
- Cosgrave, John, Riccardo Polastro, and Farwa Zafar. "Inter-Agency Real Time Evaluation (IA RTE) of The Humanitarian Response to Pakistan's 2009 Displacement Crisis Commissioned by the Inter-Agency Standing Committee: Final Report, Version 1.95." August 9, 2010. Available at http://ochanet.unocha.org/p/Documents/IARTE_PK_Displacement_2010_final_report.pdf (accessed July 5, 2012).
- Cot, Jean-Pierre, and Alain Pellet. *La Charte des Nations Unies: Commentaire article par article*. 2nd ed. Paris: Economica, 1991.
- Cottier, Michael. "Article 8 para. 2 (b) (iii)." In *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, edited by Otto Triffterer, 330-338. Munich: C.H.Beck-Hart-Nomos, 2008, 2nd ed.

- Cotula, Lorenzo, and Margaret Vidar. *The Right to Adequate Food in Emergencies*. FAO Legislative Study no. 77. Rome: FAO, 2002.
- Council of Europe. *Explanatory Report to Protocol 12 of the ECHR*. 4 November 2000.
- Crisis Management Initiative, Kristiina Rintakoski, and Mikko Autti, eds. *Seminar Publication on Comprehensive Approach: Trends, Challenges and Possibilities for Cooperation in Crisis Prevention and Management*. Helsinki: Ministry of Defence, 2008. Available at <http://www.finlandnato.org/public/default.aspx?nodeid=31559&contentlan=2&culture=en-US> (accessed July 5, 2012).
- Dahl, Arne Willy. "The Conduct of Hostilities and their Impact on Humanitarian Assistance." In *The Conduct of Hostilities Revisiting the Law of Armed Conflict: 100 Years after the 1907 Hague Conventions and 20 Years after the 1977 Additional Protocols. Proceedings of the Roundtable on Current Problems of International Humanitarian Law, Sanremo, 6-8 September 2007*, edited by Gian Luca Beruto, 123-129. Milan: Nagard, 2008.
- Darcy, James. "Human Rights and Humanitarian Action: A Review of the Issues." HPG Background Paper prepared for the workshop on Human Rights and Humanitarian Action convened by the IASC Sub-Working Group and co-hosted by UNICEF, the UN High Commission for Human Rights and ICVA. Geneva, April 2004. Available at <http://www.odh.org.uk/resources/download/1558.pdf> (accessed March 16, 2011).
- Darcy, Shane. "Prosecuting the War Crime of Collective Punishment: Is It Time to Amend the Rome Statute?." *Journal of International Criminal Justice* 8, no. 1 (2010): 29-51.
- d'Aspremont, Jean. "International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?." In *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers*, edited by Math Noortmann and Cedric Ryngaert, 171-194. Farnham/Burlington: Ashgate, 2010.
- d'Aspremont, Jean, ed. *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*. London and New York: Routledge, 2011.
- Davey, Eleanor "From *Tiers-Mondisme* to *Sans-Frontiérisme*: Revolutionary Idealism in France from the Algerian War to Ethiopian Famine." PhD diss., Queen Mary, University of London, 2011.
- David, Eric. *Principes de Droit des Conflits Armés*. 4th ed. Brussels: Bruylant, 2008.
- Decaux, Emmanuel. "La Contribution des Organisations Non Gouvernementales à l'Elaboration des Regles du Droit International des Droits de l'Homme." In *Les Organisations Non Gouvernementales et le Droit International des Droits de l'Homme/International Human Rights Law and Non Governmental Organizations*, edited by G. Cohen-Jonathan and Jean-François Flauss, 23-39. Brussels : Bruylant, 2005.
- Delissen, Astrid. J.M., and Gerard J. Tanja, eds. *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven*. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991.
- Del Mar, Katherine. "The Requirement of 'Belonging' under International Humanitarian Law." *European Journal of International Law* 21, no. 1 (2010): 105-124.
- de Preux, J. "Protecting Power." *International Review of the Red Cross* 25, no. 245 (March-April 1985): 86-95.
- Desch, Thomas. "Safety Zones." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2013. Online edition, available at <http://www.mpepil.com> (accessed May 01, 2013).
- de Torrente, Nicolas. "Humanitarian Action under Attack: Reflections on the Iraq War." *Harvard Human Rights Journal* 17 (2004): 1-29.
- de Torrente, Nicolas. "The War on Terror's Challenge to Humanitarian Action." *Humanitarian Exchange* no. 22 (November 2002): 44-46.
- De Waal, Alex. "African Encounters." *Index on Censorship* 23, no. 6 (November-December 1994): 13-31.

- De Waal, Alex. *Famine Crimes: Politics & the Disaster Relief Industry in Africa*. African Rights and The International African Institute in association with Oxford: James Currey; Bloomington & Indianapolis: Indiana University Press, 1997.
- De Waal, Alex. *Food and Power in Sudan: A Critique of Humanitarianism*. London: African Rights, 1997.
- De Waal, Alex. "Sudan and the International Criminal Court: A Guide to the Controversy." *Open Democracy*, July 14, 2008.
- De Waal, Alex. "The Humanitarian Carnival: A Celebrity Vogue." *World Affairs* 171, no. 2 (Fall 2008): 43-56.
- Dijkzeul, Dennis, ed. *Between Force and Mercy: Military Action and Humanitarian Aid*. Berlin: Berliner Wissenschafts-Verlag, 2004.
- Dinstein, Yoram. "Siege Warfare and the Starvation of Civilians." In *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven*, edited by Astrid J.M. Delissen and Gerard J. Tanja, 145-152. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991.
- Dinstein, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge [etc.]: Cambridge University Press, 2004.
- Dinstein, Yoram. "The ICRC Customary International Humanitarian Law Study." In *The Law of War in the 21st Century: Weaponry and the Use of Force*, edited by Anthony M. Helm, 99-112. Newport, Rhode Island: Naval War College, 2006.
- Dinstein, Yoram. "The Interaction between Customary International Law and Treaties." *Receuil des Cours* 322 (2006): 243-427.
- Dinstein, Yoram. *The International Law of Belligerent Occupation*. Cambridge: Cambridge University Press, 2009.
- Dinstein, Yoram. "The Right to Humanitarian Assistance." In *Karel Vasak Amicorum Liber: Les Droits de l'Homme à l'Aube du XXIe Siècle / Los Derechos Humanos ante el Siglo XXI / Human Rights at the Dawn of the Twenty-First Century*, by Karel Vasak et al., 183-198. Brussels: Bruylant, 1999.
- Dinstein, Yoram. "The Right to Life, Physical Integrity and Liberty." In *The International Bill of Rights: the Covenant on Civil and Political Rights*, edited by Louis Henkin, 114-137. New York: Columbia University Press, 1981.
- Diskett, Patricia M., Steve Hansch, and Tim Randall. "Civil-Military Relations in Humanitarian Assistance: Where Next in the Aftermath of 11 September?." In *Between Force and Mercy: Military Action and Humanitarian Aid*, edited by Dennis Dijkzeul, 301-340. Berlin: Berliner Wissenschafts-Verlag, 2004.
- Di Stefano, Adriana, and Rosario Sapienza, eds. *La Tutela dei Diritti Umani e il Diritto Internazionale*. Naples: Editoriale Scientifica, 2012.
- Doctors Without Borders. "Special Report: Breaking the Cycle: Calls for Action in the Rwandese Refugee Camps in Tanzania and Zaire." November 10, 1994. Available at <http://www.doctorswithoutborders.org/publications/article.cfm?id=1465> (accessed April 20, 2011).
- Doctors Without Borders website. "About Us: Charter." Available at <http://www.doctorswithoutborders.org/aboutus/charter.cfm> (accessed April 15, 2011).
- Dörmann, Knut. *Elements of War Crimes under the Rome Statute of the International Criminal Court*. Cambridge [etc.]: Cambridge University Press, 2003.
- Dörmann, Knut. "Unlawful Combatants." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2011. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012).
- Domesticci-Met, Marie-José, ed. *Aide Humanitaire Internationale: un Consensus Conflictuel?*. Paris: Economica, 1996.
- Domesticci-Met, Marie-José. "Aspects Juridiques Récents de l'Assistance Humanitaire." *Annuaire Français de Droit International* 35 (1989): 117-148.

- Dominicé, Christian. "La personnalité juridique internationale du CICR." In *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, edited by Christophe Swinarski, 663-673. Geneva: ICRC; The Hauge: Nijhoff, 1984.
- Dominicé, Christian, and Jovića Patrnogic. "Les Protocoles additionnels aux Conventions de Genève et le système des Puissances protectrices." *Annales de droit international médical* 28 (1979): 24-50.
- Donini, Antonio. *Afghanistan: Humanitarianism under Threat*. Feinstein International Center Briefing Paper (March 2009). Available at <https://wikis.uit.tufts.edu/confluence/download/attachments/22520580/Donini-Afghanistan.pdf?version=1> (accessed October 27, 2009).
- Donini, Antonio. "Between a Rock and a Hard Place: Integration or Independence of Humanitarian Action?." *International Review of the Red Cross* 93, no. 881 (March 2011): 141-157.
- Donini, Antonio. *Humanitarian Agenda 2015: Afghanistan Country Study*. Feinstein International Center Briefing Paper (June 2006). Available at <https://wikis.uit.tufts.edu/confluence/download/attachments/14553470/Donini-Humanitarian+Agenda+2015--Afghanistan+Country+Study.pdf?version=1> (accessed October 27, 2009).
- Donini, Antonio, Larry Minear, and Peter Walker. "Between Cooptation and Irrelevance: Humanitarian Action after Iraq." *Journal of Refugees Studies* 17, no. 3 (2004): 260-272.
- Doswald-Beck, Louise. *Human Rights in Times of Conflict and Terrorism*. Oxford [etc.]: Oxford University Press, 2011.
- Doswald-Beck, Louise. "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?." *International Review of the Red Cross* 88, no 864 (December 2006): 881-904.
- Doswald-Beck, Louise, and Sandra Krähenmann. "Incorporating International Human Rights Law." In *National Military Manuals on the Law of Armed Conflict*, 2nd ed., edited by Nobuo Hayashi, 157-171. Oslo: Torkel Opsahl Academic EPublisher, 2010.
- Droege, Cordula. "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict." *Israel Law Review* 40, no. 2 (2007): 310-355.
- DuBois, Marc. "Civilian Protection and Humanitarian Advocacy: Strategies and (False?) Dilemmas." *Humanitarian Exchange* no. 39 (June 2008): 12-15.
- DuBois, Marc. "Protection: The New Humanitarian Fig-Leaf." *Humanitarian Aid on the Move (URD Newsletter)* no. 2 (April 2009). Available at http://www.urd.org/IMG/pdf/Protection_Fig-Leaf_DuBois.pdf.
- Duffield, Mark, Joanna Macrae, and Devon Curtis. "Editorial: Politics and Humanitarian Aid." *Disasters* 25, no. 4 (2001): 269-274.
- Dunant, Henry. *A Memory of Solferino*. Geneva: ICRC, 2007.
- Dupuy, Pierre-Marie. "Les 'Considérations Élémentaires d'Humanité' dans la Jurisprudence de la Cour Internationale de Justice." In *Mélanges en l'Honneur de Nicolas Valticos: Droit et Justice*, edited by René-Jean Dupuy, 117-130. Paris: Éditions A. Pedone, 1999.
- Dupuy, René Jean. "L'Action Humanitaire." In *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven*, edited by Astrid. J.M. Delissen and Gerard J. Tanja, 67-77. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991.
- Dupuy, René-Jean, ed. *Mélanges en l'Honneur de Nicolas Valticos: Droit et Justice*. Paris: Éditions A. Pedone, 1999.
- Durand, André. "Quelques remarques sur l'élaboration des principes de la Croix-Rouge chez Gustave Moynier." In *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, edited by Christophe Swinarski, 861-873. Geneva: ICRC; The Hauge: Nijhoff, 1984.
- Dworkin, Ronald M. "The Model of Rules." *The University of Chicago Law Review* 35, no. 1 (Autumn 1967): 14-46.

- Eboli, Valeria. *La tutela dei diritti umani negli stati d'emergenza*. Milano: Giuffrè, 2010.
- Egeland, Jan, Adele Harmer and Abby Stoddard. *To Stay and Deliver – Good Practice for Humanitarians in Complex Security Environments*. New York: UN, 2011.
- Eide, Espen Barth, Anja Therese Kaspersen, Randolph Kent, and Karen von Hippel. *Report on Integrated Missions: Practical Perspectives and Recommendations*. Independent Study for the Expanded UN ECHA Core Group. May 2005.
- Engdahl, Ola. *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law*. Leiden, Boston: Martinus Nijhoff Publishers, 2007.
- European Commission Humanitarian Office, ed. *Law in Humanitarian Crises – Le Droit Face aux Crises Humanitaires: Volume II: Access to Victims: Right to Intervene or Right to Receive Humanitarian Assistance? – L'Accès aux Victimes: Droit d'Ingérence ou Droit à l'Assistance Humanitaire?*. Luxembourg: Office for Official Publications of the European Communities, 1995.
- Fainaru, Steve, and Alec Klein. "In Iraq, a Private Realm of Intelligence-Gathering: Firm Extends U.S. Government's Reach." *The Washington Post*, July 1, 2007. Available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/30/AR2007063001075.html> (accessed June 18, 2012).
- Faite, Alexandre. "Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law." *Defence Studies* 4, no. 2 (Summer 2004): 166-183.
- Falk, Richard. "Statement by Prof. Richard Falk, United Nations Special Rapporteur for Human Rights in the Occupied Territories." December 27, 2008. UN OHCHR website. Available at <http://www.unhchr.ch/huricane/hurricane.nsf/view01/F1EC67EF7A498A30C125752D005D17F7?op=endocument> (accessed May 23, 2011).
- Favez, Jean-Claude. *The Red Cross and the Holocaust*. Cambridge: Cambridge University Press, 1999.
- Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, ed. *Humanitarian Law in Armed Conflicts - Manual*. DSK VV207320067. August 1992. English translation of ZDv 15/2. *Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch*. August 1992.
- Feher, Michel, Gaelle Krikorian, and Yates McKee, eds. *Nongovernmental Politics*. New York: Zone Books, 2007.
- Fenrick, William J. "Reflections on the Canadian Experience with Law of Armed Conflict Manuals." In *National Military Manuals on the Law of Armed Conflict*, 2nd ed., edited by Nobuo Hayashi, 97-107. Oslo: Torkel Opsahl Academic EPublisher, 2010.
- Ferraro, Tristan. *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*. Geneva: ICRC, 2012.
- Ferris, Elizabeth G. *The Politics of Protection: The Limits of Humanitarian Action*. Washington, D.C.: Brookings Institution Press, 2011.
- Fiawosime, Albert. "An Integrated Approach to Peace Support Operations: Overview of UN and International Humanitarian Agencies in Liberia." In *A Tortuous Road to Peace: The Dynamics of Regional, UN and International Humanitarian Interventions in Liberia*, edited by Festus Aboagye and Alhaji M S Bah, 165-190. Pretoria: Institute for Security Studies, 2005.
- Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I.
- Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II section A.
- Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II section B.
- Findlay, Trevor. *The Use of Force in UN Peace Operations*. Oxford [etc.]: Oxford University Press, 2002.
- Fischer, Horst. "Protection of Prisoners of War." In *The Handbook of International Humanitarian Law*, 2nd ed., edited by Dieter Fleck, 367-417. Oxford: Oxford University Press, 2008.
- Fisher, David. "Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: a Comparative Analysis." *International Review of the Red Cross* 89, no. 866 (June 2007): 345-372.

- Fleck, Dieter. "International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law." *Journal of Conflict & Security Law* 11, no. 2 (Summer 2006): 179-199.
- Fleck, Dieter, ed. *The Handbook of International Humanitarian Law*. 2nd ed. Oxford: Oxford University Press, 2008.
- Flory, Maurice. "A la Recherche d'une Définition." In *Aide Humanitaire Internationale: un Consensus Conflictuel?*, edited by Marie-José Domestici-Met, 27-34. Paris: Economica, 1996.
- Forster, Jacques. "Challenges to Independent Humanitarian Action in Contemporary Conflicts." In *Human Security for All: A Tribute to Sergio Vieira de Mello*, edited by Kevin M. Cahill, 165-182. New York: Fordham University Press and The Center for International Health and Cooperation, 2004.
- Forsythe, David P. "Humanitarian Protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees." *International Review of the Red Cross* 83, no. 843 (September 2001): 675-697.
- Forsythe, David P. *The Humanitarians: The International Committee of the Red Cross*. Cambridge [etc.]: Cambridge University Press, 2005.
- Forsythe, David P. "UNHCR's Mandate: The Politics of Being Non-Political." New Issues in Refugee Research, Working Paper No. 33, March 2001. Available at <http://www.unhcr.org/3ae6a0d08.pdf> (accessed February 28, 2011).
- Fournier, Christophe. "Doctors Without Borders/Médecins Sans Frontières' (MSF) position regarding the International Criminal Court's prosecutor's case against the President of Sudan." MSF Open Letter: MSF Official Statement, July 29, 2008. Available at <http://www.doctorswithoutborders.org/publications/article.cfm?id=2868&cat=open-letters> (accessed November 20, 2011).
- Fox, Fiona. "New Humanitarianism: Does It Provide a Moral Banner for the 21st Century?" *Disasters* 25, no. 4 (2001): 275-289.
- Francioni, Francesco, and Natalino Ronzitti, eds. *War by Contract*. Oxford [etc.]: Oxford University Press, 2011.
- Frulli, Micaela. "Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry." *Journal of International Criminal Justice* 10, no. 5 (2012): 1323-1338.
- Gadler, Alice. "Armed Forces as Carrying both the Stick and the Carrot? Humanitarian Aid in U.S. Counterinsurgency Operations in Afghanistan and Iraq." *Göttingen Journal of International Law* 3, no. 1 (2011): 217-250.
- Gadler, Alice. "The Protection of Peacekeepers and International Criminal Law: Legal Challenges and Broader Protection." *German Law Journal* 11, no. 6 (2010): 585-608.
- Gargiulo, Pietro. "Dall'Intervento Umanitario alla Responsabilità di Proteggere: Riflessioni sull'Uso della Forza e la Tutela dei Diritti Umani." *La Comunità Internazionale* 42, no. 4 (2007): 639-669.
- Garraway, Charles. "The Use and Abuse of Military Manuals." *Yearbook of International Humanitarian Law* 7 (2004): 425-440.
- Gasser, Hans-Peter. "International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion." *German Yearbook of International Law* 45 (2002): 149-162.
- Gasser, Hans-Peter. "Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon." *The American University Law Review* 33 (1983): 145-161.
- Gaja, Giorgio. "General Principles of Law." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2008. Online edition, available at <http://www.mpepil.com> (accessed June 24, 2011).
- Gaudreau, Julie. "Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre." *International Review of the Red Cross* 85, no. 849 (March 2003): 143-184.

- Gazzini, Tarcisio. "A Unique Non-State Actor: the International Committee of the Red Cross." Provisional draft, ILA Committee on non-state actors – Leuven 26-28 March 2009. Available at http://ghum.kuleuven.be/ggs/projects/non_state_actors/publications/gazzini_bis.pdf (accessed January 2, 2013).
- Giffen, Alison C. "Enhancing the Protection of Civilians in Peace Operations: From Policy to Practice." Background Paper Prepared for the Australian Government's Asia Pacific Civil-Military Centre of Excellence, 24–26 May 2011, Queanbeyan, Australia. Available at <http://civmilcoe.gov.au/wp-content/uploads/2011/10/Giffen-CMAC.pdf> (accessed June 2, 2012).
- Gillard, Emanuela-Chiara. "Business Goes to War: Private Military/Security Companies and International Humanitarian Law." *International Review of the Red Cross* 88, no. 863 (September 2006): 525-572.
- Giossi Caverzasio, Sylvie, ed. *Strengthening Protection in War: A Search for Professional Standards: Summary of Discussions Among Human Rights and Humanitarian Organizations, Workshops at the ICRC, 1996-2000*. Geneva: ICRC, 2000.
- Glad, Marit. "A Partnership at Risk? The UN-NGO Relationship in Light of UN Integration." Norwegian Refugee Council (NRC) Discussion Paper, December 2011. Available at <http://www.nrc.no/?did=9608295> (accessed December 22, 2011).
- Glaser, Max P. "Engaging Private Security Providers: A Guideline for Non-Governmental Organisations." European Interagency Security Forum (EISF) Briefing Paper, 2011. Available at <http://www.eisf.eu/resources/item.asp?d=6561> (accessed June 5, 2012).
- Gluck, Kenny. "Coalition Forces Endanger Humanitarian Action in Afghanistan." MSF Article, May 06, 2004. Available at <http://www.msf.org/msf/articles/2004/05/coalition-forces-endanger-humanitarian-action-in-afghanistan.cfm> (accessed April 25, 2011).
- Gnaedinger, Angelo. "Humanitarian Action: 'Today's New Security Environment Has Forced Us Back to Basics.'" ICRC Official Statement. February 27, 2004. Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5X6E5T> (accessed July 12, 2010).
- Gondek, Michal. *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*. Antwerp [etc.]: Intersentia, 2009.
- Goodhand, Jonathan. "Aiding violence or building peace? The role of international aid in Afghanistan." *Third World Quarterly* 23, no. 5 (2002): 837-859.
- Greenwood, Christopher. "Customary Law Status of the 1977 Geneva Protocols." In *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven*, edited by Astrid J.M. Delissen and Gerard J. Tanja, 93-114. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991.
- Greenwood, Christopher. "International Humanitarian Law and United Nations Military Operations." *Yearbook of International Humanitarian Law* 1 (1998): 3-34.
- Greenwood, Christopher. "Protection of Peacekeepers: The Legal Regime." *Duke Journal of Comparative & International Law* 7, no. 1 (1996): 185-207.
- Grombach Wagner, Johanna. "An IHL/ICRC Perspective on 'Humanitarian Space.'" *Humanitarian Exchange* no. 32 (December 2005): 24-26.
- Grossrieder, Paul. "Humanitarian Action in the 21st Century: The Danger of a Setback." *Refugee Survey Quarterly* 21, no. 3 (October 2002): 23-32.
- Hampson, Françoise J. "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body." *International Review of the Red Cross* 90, no. 871 (September 2008): 549-572.
- Hansen, Greg. *Taking Sides or Saving Lives: Existential Choices for the Humanitarian Enterprise in Iraq: Humanitarian Agenda 2015: Iraq Country Study*. Feinstein International Center Briefing Paper (June 2007). Available at <https://wikis.uit.tufts.edu/confluence/download/attachments/14553635/HA2015+Iraq+Country+Study.pdf?version=1> (accessed October 27, 2009).

- Harrington, Michael E. "Operation Provide Comfort: A Perspective in International Law." *Connecticut Journal of International Law* 8, no. 2 (Spring 1993): 635-655.
- Harroff-Tavel, Marion. "Does It Still Make Sense to Be Neutral?." *Humanitarian Exchange* no. 25 (December 2003): 2-4.
- Hart, H.L.A. *The Concept of Law*. 2nd ed. with a new Postscript. Oxford: Oxford University Press, 1994.
- Harvey, Paul. *Towards Good Humanitarian Government: The Role of the Affected State in Disaster Response*. HPG Report 29. London: Overseas Development Institute, September 2009.
- Hayashi, Nobuo, ed. *National Military Manuals on the Law of Armed Conflict*. 2nd ed. Oslo: Torkel Opsahl Academic EPublisher, 2010.
- Heintze, Hans-Joachim. "On the Relationship between Human Rights Law Protection and International Humanitarian Law." *International Review of the Red Cross* 86, no 856 (December 2004): 789-813.
- Heintze, Hans-Joachim, and Andrej Zwitter, eds. *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*. Heidelberg [etc.]: Springer, 2011.
- Hellinger, Daniel. "Humanitarian Action, NGOs and the Privatization of the Military." *Refugee Survey Quarterly* 23, no. 4 (December 2004): 192-220.
- Helm, Anthony M., ed. *The Law of War in the 21st Century: Weaponry and the Use of Force*. Newport, Rhode Island: Naval War College, 2006.
- Henchel von Heinegg, Wolff. "The German Manual." In *National Military Manuals on the Law of Armed Conflict*, 2nd ed., edited by Nobuo Hayashi, 109-117. Oslo: Torkel Opsahl Academic EPublisher, 2010.
- Henckaerts, Jean-Marie. "Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law." *Collegium, Special Edition: Relevance of International Humanitarian Law to Non-State Actors Proceedings of the Bruges Colloquium 25th-26th October 2002*, 27 (Spring 2003): 123-137.
- Henckaerts, Jean-Marie. "Customary International Humanitarian Law: a Response to US Comments." *International Review of the Red Cross* 89, no. 866 (June 2007): 473-488.
- Henckaerts, Jean-Marie. "Non-Defended Towns." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2009. Online edition, available at <http://www.mpepil.com> (accessed May 01, 2013).
- Henckaerts, Jean-Marie, and Louise Doswald-Beck. *Customary International Humanitarian Law, Volume I: Rules*. Cambridge: Cambridge University Press, 2005.
- Henckaerts, Jean-Marie, and Louise Doswald-Beck. *Customary International Humanitarian Law, Volume II: Practice, Part I*. Cambridge: Cambridge University Press, 2005.
- Henkin, Louis, ed. *The International Bill of Rights: the Covenant on Civil and Political Rights*. New York: Columbia University Press, 1981.
- Henry Dunant Centre for Humanitarian Dialogue. *February 2003 Report: Politics and Humanitarianism: Coherence in Crisis?* Geneva: Henry Dunant Centre for Humanitarian Dialogue, 2003.
- Hobe, Stephan. "Non-Governmental Organizations." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2010. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012).
- Hofman, Michiel, and Sophie Delaunay (MSF). "Afghanistan: A Return to Humanitarian Action." MSF Report, March 2010. Available at http://www.doctorswithoutborders.org/publications/reports/2010/MSF-Return-to-Humanitarian-Action_4311.pdf (accessed April 25, 2011).
- Holt, Victoria, Glyn Taylor, and with Max Kelly. *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*. New York: UN, 2009.

- Holzgrefe, J. L. "The Humanitarian Intervention Debate." In *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, edited by J. L. Holzgrefe and Robert O. Keohane, 15-52. Cambridge: Cambridge University Press, 2003.
- Holzgrefe, J. L., and Robert O. Keohane, eds. *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*. Cambridge: Cambridge University Press, 2003.
- Howard, Lise Morjé. *UN Peacekeeping in Civil Wars*. Cambridge [etc.]: Cambridge University Press, 2008.
- Human Rights First. *Private Security Contractors at War: Ending the Culture of Impunity*. New York, Washington DC: Human Rights First, 2008.
- Human Rights Watch. "About Us: Mission Statement." Available at <http://www.hrw.org/en/about> (accessed March 17, 2011).
- Human Rights Watch. "About Us: Who We Are." Available at <http://www.hrw.org/en/node/75136> (accessed March 17, 2011).
- Human Rights Watch. "Darfur: Humanitarian Aid under Siege." May 2006. Available at <http://www.hrw.org/en/reports/2006/05/08/darfur-humanitarian-aid-under-siege> (accessed July 27, 2011).
- Human Rights Watch. "Evil Days – 30 Years of War and Famine in Ethiopia." September 1991. Available at <http://www.hrw.org/sites/default/files/reports/Ethiopia919.pdf> (accessed June 30, 2013).
- Human Rights Watch. "Sudan: Expelling Aid Agencies Harms Victims." March 5, 2009. Available at <http://www.hrw.org/en/news/2009/03/05/sudan-expelling-aid-agencies-harms-victims> (accessed May 13, 2011).
- Human Rights Watch. *World Report 2011: Events of 2010*. New York: Human Rights Watch, 2011.
- Humanitarian Policy Group. *A Clash of Principles? Humanitarian Action and the Search for Stability in Pakistan*. HPG Policy Brief 36. London: Overseas Development Institute, September 2009.
- Humanitarian Policy Group. *Humanitarian Advocacy in Darfur: The Challenge of Neutrality*. HPG Policy Brief 28. London: Overseas Development Institute, October 2007. Available at <http://www.odi.org.uk/resources/download/341.pdf> (accessed August 06, 2010).
- IASC. "Civil-Military Relationship in Complex Emergencies - An IASC Reference Paper." 28 June 2004. Available at http://reliefweb.int/sites/reliefweb.int/files/resources/BF9A102F314266F1C125740F004C00A9-iasc_jun2004.pdf (accessed June 2, 2012).
- IASC. *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action*. Thailand: Inter-Agency Standing Committee (IASC), 2002.
- IASC. *IASC Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys*. Endorsed by the members of the Inter-Agency Standing Committee (IASC). February 27, 2013. Available at <https://docs.unocha.org/sites/dms/Documents/Armed%20Escort%20Guidelines%20-%20Final.pdf> (accessed September 10, 2013).
- IASC. "Protection of Internally Displaced Persons." IASC Policy Paper, New York, December 1999. Available at <http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-products-products&productcatid=10> (accessed October 01, 2013).
- IASC. *Use of Military or Armed Escorts for Humanitarian Convoys: Discussion Paper and Non-Binding Guidelines*. September 14, 2001. Available at <http://www.unhcr.org/refworld/docid/4289f1b54.html> (accessed January 3, 2010).
- ICRC. "Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or Other Fundamental Rules Protecting Persons in Situations of Violence." *International Review of the Red Cross* 87, no. 858 (June 2005): 393-400.
- ICRC. "Afghanistan/Pakistan: put the humanitarian factor on the agenda." Press Briefing, April 1, 2009. Available at <http://www.icrc.org/eng/resources/documents/press-briefing/pakistan-afghanistan-press-briefing-010409.htm> (accessed June 2, 2012).

- ICRC, *Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence*, 2nd ed. Geneva: ICRC, 2012.
- ICRC. "Gaza: no end in sight to hardship and despair." Interview, May 20, 2011. Available at <http://www.icrc.org/eng/resources/documents/interview/2011/palestine-israel-interview-2011-05-19.htm> (accessed May 23, 2011).
- ICRC. "ICRC gravely concerned about humanitarian situation in Gaza." News release 06/77, July 13, 2006. Available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-news-130706> (accessed July 03, 2010).
- ICRC. "ICRC Protection Policy: Institutional Policy." *International Review of the Red Cross* 90, no. 871 (September 2008): 751-775.
- ICRC. "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts." Report prepared by the ICRC, 31IC/11/5.1.2, Geneva, October 2011. Available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> (accessed December 03, 2011).
- ICRC. "Iraq post 28 June 2004: Protecting Persons Deprived of Freedom Remains a Priority." August 5, 2004. Available at <http://www.icrc.org/eng/resources/documents/misc/63kkj8.htm> (accessed June 15, 2012).
- ICRC. "'Now Back in Liberia, ICRC Calls for Fundamental Reappraisal. ICRC Press Release No. 96/15, 22 April 1996." *International Review of the Red Cross* 36, no. 312 (May-June 1996): 351-352.
- ICRC. *Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*. Geneva: ICRC, 2009.
- ICRC. *Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence*, 2013 ed. Geneva: ICRC, 2013.
- ICRC. "Report on the Use of Armed Protection for Humanitarian Assistance: Extract from Working Paper, ICRC and International Federation, Council of delegates, Geneva, 1-2 December 1995." December 01, 1995. Available at <http://www.icrc.org/eng/resources/documents/misc/57jnec.htm> (accessed August 20, 2011).
- ICRC. "Root causes and prevention of internal displacement: the ICRC perspective." Statement by Jakob Kellenberger, President of the ICRC, at the Special summit on refugees, returnees and IDPs in Africa, Kampala, Uganda, 23 October 2009. Available at <http://www.icrc.org/eng/resources/documents/statement/displacement-statement-231009.htm> (accessed June 15, 2012).
- ICRC. "Somalia: ICRC remains fully committed to helping Somalis." News Release 12/22, February 02, 2012. Available at <http://www.icrc.org/eng/resources/documents/news-release/2012/somalia-news-2012-02-02.htm> (accessed May 31, 2012).
- ICRC. "Sri Lanka: Humanitarian Assistance Can No Longer Reach Civilians." News Release 09/103, May 14, 2009. Available at <http://www.icrc.org/eng/resources/documents/news-release/sri-lanka-news-140509.htm> (accessed May 18, 2011).
- ICRC. "Sri Lanka: ICRC Reiterates Concern for Civilians Cut Off by the Fighting." Interview, March 4, 2009. Available at <http://www.icrc.org/eng/resources/documents/interview/sri-lanka-interview-040309.htm> (accessed May 18, 2011).
- ICRC. "Sri Lanka: Thousands of Civilians Still Trapped." Operational Update No 09/03, April 30, 2009. Available at <http://www.icrc.org/eng/resources/documents/update/sri-lanka-update-300409.htm> (accessed May 18, 2011).
- ICRC. "Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting." Operational Update, July 17, 2012. Available at <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm> (accessed January 15, 2013).
- ICRC. *The Fundamental Principles of the Red Cross and Red Crescent*. Geneva: ICRC publication, 1996, ref. 0513. Available at http://www.icrc.org/eng/assets/files/other/icrc_002_0513.pdf (accessed March 11, 2011).

- ICRC. "The ICRC and the use of armed guards." News Release 97/04, January 30, 1997. Available at <http://www.icrc.org/eng/resources/documents/misc/57jncq.htm> (accessed August 20, 2011).
- ICRC. "The Nazi Genocide and Other Persecutions. Document adopted by the ICRC Assembly on 27 April 2006." Statement, October 25, 2007. Available at <http://www.icrc.org/eng/resources/documents/misc/holocaust-position-27042006.htm> (accessed April 29, 2012).
- IFRC. "Code of Conduct." Available at <http://www.ifrc.org/en/publications-and-reports/code-of-conduct/> (accessed August 15, 2011).
- IFRC. "Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief – List of signatories." Updated on 12/07/2013. Available at http://www.ifrc.org/Global/Publications/disasters/code-of-conduct/codeconduct_signatories.pdf (accessed February 15, 2013).
- IFRC. *Law and Legal Issues in International Disaster Response: a Desk Study*. Geneva: IFRC, 2007.
- IFRC. "Who we are – Our vision and mission." Available at <http://www.ifrc.org/en/who-we-are/vision-and-mission/> (accessed July 20, 2012).
- Independent International Commission on Kosovo. *The Kosovo Report: Conflict, International Response, Lessons Learned*. Oxford [etc.]: Oxford University Press, 2000.
- Institute of International Law. *Sixteenth Commission: Humanitarian Assistance: Resolution*. Bruges Session, September 2, 2003. Available at http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF (accessed September 4, 2009).
- Institute of International Law. *The Humanitarian Assistance: Bruges Resolution 2003*. Paris: Pedone, 2006.
- InterAction website. "About InterAction." Available at <http://www.interaction.org/about-interaction> (accessed April 24, 2011).
- InterAction. "Humanitarian Leaders Ask White House to Review Policy Allowing American Soldiers to Conduct Humanitarian Relief Programs in Civilian Clothes." April 2, 2002. Available at <http://reliefweb.int/node/98572> (accessed June 18, 2012).
- International Commission on Intervention and State Sovereignty (ICISS). *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. Ottawa: International Development Research Centre, December 2001.
- International Crisis Group (ICG). "Blurring the Borders: Syrian Spillover Risks for Turkey." Europe Report N°225, 30 April 2013.
- International Crisis Group (ICG). "War Crimes in Sri Lanka." Asia Report N°191, 17 May 2010.
- International Institute of Humanitarian Law. "Guiding Principles on the Right to Humanitarian Assistance." *International Review of the Red Cross* 33, no. 297 (November-December 1993): 519-525.
- International Institute of Humanitarian Law. *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. Sanremo, 12 June 1994. Available at <http://www.icrc.org/IHL.nsf/52d68d14de6160e0c12563da005fdb1b/7694fe2016f347e1c125641f002d49ce!OpenDocument> (accessed February 15, 2013).
- International Institute of Humanitarian Law. *The Manual on the Law of Non-International Armed Conflict with Commentary*. Sanremo, 2006. Available at <http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf> (accessed February 15, 2011).
- International Law Association, Committee on Formation of Customary (General) International Law. "Final Report of the Committee – Statement of Principles Applicable to the Formation of General Customary International Law." London Conference (2000). Available at <http://www.ila-hq.org/en/committees/index.cfm/cid/30> (accessed July 28, 2013).
- International Movement of the Red Cross and Red Crescent, Council of Delegates. "Resolution 11: Principles of Humanitarian Assistance, Birmingham, 29-30 October 1993." Reproduced in *International Review of the Red Cross*, 33, no. 297 (November-December 1993): 499-501.

- International Movement of the Red Cross and Red Crescent, Council of Delegates. "Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement - The Seville Agreement, Sevilla, 25-27 November 1997." Reproduced in *International Review of the Red Cross*, 38, no. 322 (March 1998): 159-176.
- International Movement of the Red Cross and Red Crescent, Council of Delegates. "Resolution 7 and Annex: Relations between the Components of the Movement and Military Bodies, Seoul, 16-18 November 2005." Reproduced in *International Review of the Red Cross* 87, no. 860 (December 2005): 792-800.
- International Movement of the Red Cross and Red Crescent, XXth International Conference, Vienna. "Resolution VIII, Proclamation of the Fundamental Principles of the Red Cross, October 1965." Reproduced in *International Review of the Red Cross* 5, no. 56 (November 1965): 573-574.
- International Movement of the Red Cross and Red Crescent, XXIst International Conference, Istanbul. "Resolution XXVI, Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, September 1969." Reproduced in *International Review of the Red Cross* 9, no. 104 (November 1969): 632-633.
- International Movement of the Red Cross and Red Crescent, Twenty-sixth International Conference, Geneva, 1995. "Resolution 4: Principles and Action in International Humanitarian Assistance and Protection." Reproduced in *International Review of the Red Cross* 36, no. 310 (January-February 1996): 69-75.
- International Movement of the Red Cross and Red Crescent, Twenty-sixth International Conference, Geneva, 1995. "Annex VI – Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief." Reproduced in *International Review of the Red Cross* 36, no. 310 (January-February 1996): 119-127. Hereinafter Red Cross Code of Conduct.
- International Peace Institute. "Understanding Compliance with UN Security Council Resolutions Addressing Civil Wars: Trends in Compliance." Available at <http://public.tableausoftware.com/views/SCCDataBaseWebPortal/TrendsinCompliance?:embed=y> (accessed June 22, 2013)
- ISAF, *ISAF PRT Handbook, Edition 4* (2010).
- ISAF. "PRT Executive Steering Committee Meets." ISAF News Release 2007-124, February 23, 2007. Available at <http://www.nato.int/isaf/docu/pressreleases/2007/02-february/pr070223-124.html> (accessed March 19, 2011).
- Israel Ministry of Foreign Affairs website. "Agreed documents on movement and access from and to Gaza: 15 Nov 2005." November 15, 2005. Available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm> (accessed May 25, 2011).
- Israel Ministry of Foreign Affairs. "Gaza: Lists of Controlled Entry Items." July 4, 2010. Available at http://www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Lists_Controlled_Entry_Items_4-Jul-2010.htm (accessed May 31, 2011).
- Israel Ministry of Foreign Affairs. "Prime Minister's Office statement following the Israeli Security Cabinet meeting." June 20, 2010. Available at http://www.mfa.gov.il/MFA/Government/Communiques/2010/Prime_Minister_Office_statement_20-Jun-2010.htm (accessed May 3, 2011).
- Jachec-Neale, Agnieszka. "Fact-Finding." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2011. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012).
- Jachec Neale, Agnieszka. "Human Rights Fact-Finding into Armed Conflict and Breaches of the Laws of War." *Proceedings of the Annual Meeting (American Society of International Law)* 105 (March 23-26, 2011): 85-89.
- Jakovljević, Boško. "The Right to Humanitarian Assistance – Legal Aspects." *International Review of the Red Cross* 27, no. 260 (September-October 1987): 469-484.

- Jaques, Richard B., ed. *Issues in International Law and Military Operations*. Newport, Rhode Island: Naval War College, 2006.
- Joachim, Jutta and Andrea Schneiker. "New Humanitarians? Frame Appropriation through Private Military and Security Companies." *Millennium: Journal of International Studies* 40, no. 2 (2012): 365-388.
- Johansson, Patrik. "The Humdrum Use of Ultimate Authority: Defining and Analysing Chapter VII Resolutions." *Nordic Journal of International Law* 78, no. 3 (2009), 309-342.
- Kälin, Walter. *Guiding Principles on Internal Displacement: Annotations*. Studies in Transnational Legal Policy no. 38. Washington, DC: The American Society of International Law, 2008.
- Kalshoven, Frits, ed. *Assisting the Victims of Armed Conflict and Other Disasters: Papers Delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22-24 June 1988*. Dordrecht [etc.]: Kluwer Academic Publishers, 1989.
- Kalshoven, Frits. "Impartiality and Neutrality in Humanitarian Law and Practice." *International Review of the Red Cross* 29, no. 273 (November-December 1989): 516-535.
- Kalshoven, Frits, and Liesbeth Zegveld. *Constraints on the Waging of War. An Introduction to International Humanitarian Law*. 3rd ed. Geneva: ICRC, 2001.
- Karim, Ataul, et al. *Operation Lifeline Sudan: A Review*. Geneva: UN, 1996.
- Katombe, Kenny. "U.N. Intervention Brigade fires on Congo rebel positions." Reuters, August 23, 2013. Available at <http://www.reuters.com/article/2013/08/23/us-congo-democratic-fighting-idUSBRE97M0WA20130823> (accessed September 15, 2013).
- Kellenberger, Jakob. "Keynote Address." In *International Humanitarian Law, Human Rights and Peace Operations: Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008*, edited by Gian Luca Beruto, 32-38. Sanremo: International Institute of Humanitarian Law, 2009.
- Kelly, Michelle, and Morten Rostrup. "Identify Yourself: Coalition Soldiers in Afghanistan Are Endangering Aid Workers." *The Guardian*, February 01, 2002. Available at <http://www.guardian.co.uk/world/2002/feb/01/afghanistan.comment> (accessed July 12, 2010).
- Kennedy, Denis. "Humanitarian NGOs and the Norm of Neutrality: A Community Approach." University of Minnesota, Working Paper, February 2008. Available at http://www.humansecuritygateway.com/documents/ISA_humanitarianNGOSnormneutrality.pdf (accessed November 15, 2011).
- Kittichaisaree, Kriangsak. *International Criminal Law*. Oxford [etc.]: Oxford University Press, 2001.
- Kleffner, Jann K. "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference." *Netherlands International Law Review* 54, no. 2 (August 2007): 315-336.
- Kolb, Robert. "De l'Assistance Humanitaire: la Résolution sur l'Assistance Humanitaire Adoptée par l'Institut de Droit International à sa Session de Bruges en 2003." *International Review of the Red Cross* 86, no. 856 (December 2004): 853-878.
- Kolb, Robert. *Droit Humanitaire et Opérations de Paix Internationales: les Modalités d'Application du Droit International Humanitaire dans les Opérations de Maintien ou de Retablissement de la Paix auxquelles Concourt une Organisation Internationale (en particulier les Nations Unies)*. Geneva [etc.]: Helbing & Lichtenhahn; Brussels: Bruylant, 2006.
- Kolb, Robert. "Note on Humanitarian Intervention." *International Review of the Red Cross* 85, no 849 (March 2003): 119-134.
- Kolb, Robert. "The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions." *International Review of the Red Cross* 38, no 324 (September 1998): 409-419.
- Kolb, Robert, and Sylvain Vité. *Le Droit de l'Occupation Militaire: Perspectives Historiques et Enjeux Juridiques Actuels*. Brussels: Bruylant, 2009.

- Kolb, Robert, Gabriele Porretto, and Sylvain Vité. *L'Application du Droit International Humanitaire et des Droits de l'Homme aux Organisations Internationales: Forces de Paix et Administrations Civiles Transitoires*. Brussels: Bruylant, 2005.
- Kouchner, Bernard. "The Future of Humanitarianism: 23rd Annual Morgenthau Memorial Lecture." March 02, 2004, Carnegie Council on Ethics and International Affairs, New York. Available at <http://www.carnegiecouncil.org/resources/transcripts/4425.html> (accessed September 05, 2011).
- Koutroulis, Vaïos. "Appréciation de l'application de certaines règles du droit international humanitaire dans les rapports portant sur l'interception de la flottille naviguant vers Gaza." *Revue Belge de Droit International* 2012/1 (2012) : 90-122.
- Krähenbühl, Pierre. "Conflict in the Balkans: Human Tragedies and the Challenge to Independent Humanitarian Action." *International Review of the Red Cross* 82, no. 837 (March 2000): 11-29.
- Krähenbühl, Pierre. "Humanitarian Security: 'A Matter of Acceptance, Perception, Behaviour...'" ICRC Official Statement, March 31, 2004. Available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/5XSGWE> (accessed July 12, 2010).
- Krähenbühl, Pierre. "The Militarization of Aid and Its Perils." ICRC Article, February 22, 2011. Available at <http://www.icrc.org/eng/resources/documents/article/editorial/humanitarians-danger-article-2011-02-01.htm> (accessed June 5, 2012).
- Krähenbühl, Pierre. "There are no 'good' or 'bad' civilians in Syria – we must help all who need aid." *TheGuardian.com*, March 03, 2013. Available at <http://www.theguardian.com/commentisfree/2013/mar/03/red-cross-aid-inside-syria> (accessed September 10, 2013).
- Krieger, Heike. "A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study." *Journal of Conflict & Security Law* 11, no. 2 (2006): 265–291.
- Krisch, Nico. "Introduction to Chapter VII: The General Framework." In *The Charter of the United Nations: A Commentary* 3rd ed. Vol. II, edited by Bruno Simma et. al., 1237-1271. Oxford: Oxford University Press, 2012.
- Kuhl, Corinna. "The Evolution of Peace Operations, from Interposition to Integrated Missions." In *International Humanitarian Law, Human Rights and Peace Operations: Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008*, edited by Gian Luca Beruto, 70-76. Sanremo: International Institute of Humanitarian Law, 2009.
- La Rosa, Anne-Marie. "Humanitarian Organizations and International Criminal Tribunals, or Trying to Square the Circle." *International Review of the Red Cross* 88, no. 861 (March 2006): 169-186.
- Lateline, Australian Broadcasting Corporation. "Sri Lanka's UN Representative Joins Lateline." November 11, 2009. Available at <http://www.abc.net.au/lateline/content/2008/s2740297.htm> (accessed November 19, 2011).
- Lattanzi, Flavia. "Assistenza umanitaria e consenso del sovrano territoriale." In *Studi in ricordo di Antonio Filippo Panzera* vol. 1, 415-450. Bari: Cacucci, 1995.
- Leader, Nicholas. "Proliferating Principles; Or How to Sup with the Devil without Getting Eaten." *Disasters* 22, no. 4 (1998): 288-308.
- Leader, Nicholas. *The Politics of Principle: The Principles of Humanitarian Action in Practice*. HPG Report 2. London: Overseas Development Institute, March 2000.
- Lema, Luis. "Le CICR justifie sa philosophie d'action en Syrie." *Le Temps*, February 16, 2013. Available at <http://www.letemps.ch/Page/Uuid/081d91b2-77b3-11e2-93eb-d6072136ce26%7C1> (accessed September 10, 2013).
- Le Monde. "Le chef du bureau politique du Hamas demande l'intervention de Paris." October 6, 2008. Available at http://www.lemonde.fr/proche-orient/article/2008/10/06/le-chef-du-bureau-politique-du-hamas-demande-l-intervention-de-paris_1103296_3218.html (accessed June 18, 2012).

- Leng Sun, Chan. "Humanitarian Assistance by International Organisations: A Question of Compulsory Access to Victims." *Singapore Journal of Legal Studies* (1991): 320-347.
- Levine, Iain. "Promoting Humanitarian Principles: The Southern Sudan Experience." RRN Network Paper 21, May 1997. Available at http://kms1.isn.ethz.ch/serviceengine/Files/ISN/97740/ipublicationdocument_singledocument/454517b4-2dc5-44fb-ac20-a79854eb62ed/en/networkpaper021.pdf (accessed April 10, 2011).
- Lijnzaad, Liesbeth, Johanna van Sambeek, and Bahia Tahzib-Lie, eds. *Making the Voice of Humanity Heard: Essays on Humanitarian Assistance and International Humanitarian Law in Honour of HRH Princess Margriet of the Netherlands*. Leiden [etc.]: Nijhoff, 2004.
- Lindblom, Anna-Karin. *Non-Governmental Organisations in International Law*. Cambridge [etc.]: Cambridge University Press, 2005.
- Lindroos, Anja. "Addressing the Norm Conflicts in a Fragmented System: The Doctrine of Lex Specialis." *Nordic Journal of International Law*, 74, no. 1 (2005): 27-66.
- Lischer, Sarah Kenyon. "Collateral Damage: Humanitarian Assistance as a Cause of Conflict." *International Security* 28, no. 1 (Summer 2003): 79-109.
- Lischer, Sarah Kenyon. "Military Intervention and the Humanitarian 'Force Multiplier'." *Global Governance* 13 (2007): 99-118.
- Llewellyn, Huw. "The Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel." *International & Comparative Law Quarterly* 55, no. 3 (2006): 718-728.
- Loane, Geoff. Head of Mission ICRC London. "Barriers to Negotiating Humanitarian Access: The Experience of the ICRC." Opening statement at the Norwegian Refugee Council Conference on Humanitarian Access, Oslo, September 06, 2010, 3. Available at <http://www.nrc.no/?did=9510371> (accessed June 12, 2013).
- Longman English Dictionary Online – LDOCE*. Available at <http://www.ldoceonline.com> (accessed February 15, 2013).
- Lubell, Noam. *Extraterritorial Use of Force against Non-State Actors*. Oxford: Oxford University Press, 2010.
- MacAskill, Ewen. "Pentagon Forced to Withdraw Leaflet Linking Aid to Information on Taliban." *The Guardian*, May 06, 2004. Available at <http://www.guardian.co.uk/world/2004/may/06/afghanistan.usa> (accessed July 12, 2010).
- Macdonald, Ronald St. J., ed. *Essays in Honour of Wang Tieya*. Dordrecht [etc.]: Nijhoff, 1994.
- MacGibbon, I. C. "The Scope of Acquiescence in International Law." *The British Yearbook of International Law* 31 (1954): 143-186.
- MacGibbon, I. C. "Customary International Law and Acquiescence." *The British Yearbook of International Law* 33 (1957): 115-145.
- MacFarlane, S. Neil. "Humanitarian Action and Conflict." *International Journal: Quarterly of the Canadian Institute of International Affairs* 54, no. 4 (1998-1999): 537-561.
- Mackintosh, Kate. "Beyond the Red Cross: The Protection of Independent Humanitarian Organizations and their Staff in International Humanitarian Law." *International Review of the Red Cross* 89, no. 865 (March 2007): 113-130.
- Mackintosh, Kate. "Note for Humanitarian Organizations on Cooperation with International Tribunals." *International Review of the Red Cross* 86, no. 853 (March 2004): 131-146.
- Mackintosh, Kate. "Reclaiming Protection as a Humanitarian Goal: Fodder for the Faint-Hearted Aid-Worker." *Journal of International Humanitarian Legal Studies* 1, no. 2 (December 2010): 382-396.
- Mackintosh, Kate. *The Principles of Humanitarian Action in International Humanitarian Law*. HPG Report 5. London: Overseas Development Institute, March 2000.
- Mackintosh, Kate, and Patrick Duplat. *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*. Independent Study Commissioned by UN OCHA and NRC, July

2013. Available at https://docs.unocha.org/sites/dms/Documents/CT_Study_Full_Report.pdf (accessed September 10, 2013);
- Magone, Claire, Michaël Neuman, and Fabrice Weissman, eds. *Agir à tout prix? Négociations humanitaires: l'expérience de Médecins Sans Frontières*. Paris: Éditions La Découverte, 2011.
- Malanczuk, Peter. *Akehurst's Modern Introduction to International Law*. 7th rev. ed. London and New York: Routledge, 1997.
- Marouda, Maria-Daniella. "Application of International Humanitarian law in Contemporary Armed Conflicts : Is It 'Simply' a Question of Facts?." In *Armed Conflicts and International Humanitarian Law 150 Years after Solferino. Acquis and Prospects*, edited by Stelios Perrakis and Maria-Daniella Marouda, 201-244. Athens: Sakkoulas /Brussels: Bruylant, 2009.
- Marques Antunes, Nuno Sérgio. "Acquiescence." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2008. Online edition, available at <http://www.mpepil.com> (accessed January 14, 2012).
- Martins, Mark. "No Small Change of Soldiering: The Commander's Emergency Response Program in Iraq and Afghanistan." *The Army Lawyer* (February 2004): 1-20.
- Mattli, Karl, and Jörg Gasser. "A Neutral, Impartial and Independent Approach: Key to ICRC's Acceptance in Iraq." *International Review of the Red Cross* 90, no. 869 (March 2008): 153-168.
- McCarthy, Nigel. "Aid Workers, Intelligence Gathering and Media Self-Censorship." *Australian Studies in Journalism* 9 (2000): 30-50.
- McDoom, Opheera. "Sudan suspends Catholic aid group's work in Darfur." AlertNet website, February 26, 2011. Available at <http://www.trust.org/alertnet/news/sudan-suspends-catholic-aid-groups-work-in-darfur/> (accessed February 28, 2011).
- Mc Hugh, Gerard, and Lola Gostelow. *Provincial Reconstruction Teams and Humanitarian-Military Relations in Afghanistan*. London: Save the Children UK, 2004.
- McQueen, Carol. *Humanitarian Intervention and Safety Zones – Iraq, Bosnia and Rwanda*. Basingstoke, Hampshire, and New York, NY: Palgrave Macmillan, 2005.
- Melzer, Nils. "Civilian Participation in Armed Conflict." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2010. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012).
- Melzer, Nils. *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. Geneva: ICRC, 2009.
- Melzer, Nils. "Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities." *New York University Journal of International Law and Politics* 42, no. 3 (2010): 831-916.
- Menkhaus, Ken. "Stabilisation and Humanitarian Access in a Collapsed State: the Somali Case." *Disasters* 34, S3 (2010): S320-S341.
- Meron, Theodor. *The Humanization of International Law*. Leiden [etc.]: Nijhoff, 2006.
- Metcalf, Victoria, and Michelle Berg. *Country-Specific Civil-Military Coordination Guidelines*. HPG Working Paper. London: Overseas Development Institute, August 2012.
- Metcalf, Victoria, Alison Giffen, and Samir Elhawary. *UN Integration and Humanitarian Space: An Independent Study Commissioned by the UN Integration Steering Group*. London/Washington DC: Overseas Development Institute/Stimson Center, December 2011.
- Metcalf, Victoria, Simone Haysom, and Stuart Gordon. *Trends and Challenges in Humanitarian Civil-Military Coordination. A Review of the Literature*. HPG Working Paper. London: Overseas Development Institute, May 2012.
- Meyer, Michael A. "Humanitarian Action: A Delicate Balancing Act." *International Review of the Red Cross* 27, no. 260 (September-October 1987): 485-500.

- Meyer, Michael. "The Relationship between the Red Cross and the Armed Forces: a Partnership for Humanitarian Purposes." In *Making the Voice of Humanity Heard: Essays on Humanitarian Assistance and International Humanitarian Law in Honour of HRH Princess Margriet of the Netherlands*, edited by Liesbeth Lijnzaad, Johanna van Sambeek, and Bahia Tahzib-Lie, 399-409. Leiden [etc.]: Nijhoff, 2004.
- Milanovic, Marko. "Al-Skeini and Al-Jedda in Strasbourg." *European Journal of International Law* 23, no. 1 (February 2012): 121-139.
- Milanovic, Marko. "A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law." *Journal of Conflict and Security Law* 14, no. 3 (Winter 2009): 459-483.
- Milanovic, Marko. *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*. Oxford: Oxford University Press, 2011.
- Milanovic, Marko. "Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case." *International Review of the Red Cross* 89, no. 866 (June 2007): 373-393.
- Milanovic, Marko, and Vidan Hadzi-Vidanovic. "A Taxonomy of Armed Conflict." In *Research Handbook of International Conflict and Security Law*, edited by Nigel White and Christian Henderson, 256-314. Cheltenham [etc.]: Edward Elgar Publishing, 2013.
- Mills, Kurt. "Neo-Humanitarianism: The Role of International Humanitarian Norms and Organizations in Contemporary Conflict." *Global Governance* 11 (2005): 161-183.
- Minear, Larry. *Humanitarianism under Siege: A Critical Review of Operation Lifeline Sudan*. Trenton, NJ: Red Sea Press; Washington, DC: Bread for the World, Institute on Hunger and Development, 1991.
- Minear, Larry, and Hazel Smith, eds. *Humanitarian Diplomacy: Practitioners and Their Craft*. Tokyo: UN University Press, 2007.
- Minear, Larry, Ted van Baarda, and Marc Sommers. "NATO and Humanitarian Action in the Kosovo Crisis." Occasional Paper no. 36, Thomas J. Watson Jr. Institute for International Studies, Brown University, Providence, 2000. Available at <http://reliefweb.int/sites/reliefweb.int/files/resources/6619C68702463E01C1256C2200249CF7-natokosovo36.pdf> (accessed April 28, 2012).
- Miyazaki, Shigeki. "The Martens Clause and International Humanitarian Law." In *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, edited by Christophe Swinarski, 433-444. Geneva: ICRC; The Hague: Nijhoff, 1984.
- Modirzadeh, Naz K., Dustin A. Lewis, and Claude Bruderlein. "Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape." *International Review of the Red Cross* 93, no. 883 (September 2011): 623-647.
- Moeckli, Daniel. *Human Rights and Non-discrimination in the 'War on Terror'*. Oxford [etc.]: Oxford University Press, 2008.
- Moir, Lindsay. *The Law of Internal Armed Conflict*. Cambridge: Cambridge University Press, 2002.
- MONUSCO. "The ISSSS." MONUSCO website. Available at <http://monusco.unmissions.org/Default.aspx?tabid=10831&language=en-US> (accessed June 4, 2012).
- Mosler, Hermann. "General Principles of Law." In *Encyclopedia of Public International Law*, Vol. 7, edited by Rudolf Bernhardt, 89-105. Amsterdam: North-Holland, 1984.
- MSF. "Angola: Sacrifice of a People." October 2002. Available at http://www.doctorswithoutborders.org/publications/reports/2002/angola1_10-2002.pdf (accessed June 2, 2011).
- MSF. *Chantilly Principles* (1995). Available at <http://association.msf.org/sites/default/files/documents/Principles%20Chantilly%20EN.pdf> (accessed May 10, 2012).

- MSF. "La Mancha-aftalen." 25 June 2006, Athens. Available at <http://msf.dk/om-os/hvem-er-vi/ideer-og-grundlag/la-mancha-aftalen/> (accessed April 15, 2013).
- MSF. "MSF Charter and Principles." January 03, 2011. Available at <http://www.msf.org/msf/articles/2011/03/the-medecins-sans-frontieres-charter.cfm> (accessed May 15, 2012).
- MSF. "MSF Pulls Out of Afghanistan." MSF Press Release, July 28, 2004. Available at <http://www.msf.org/msf/articles/2004/07/msf-pulls-out-of-afghanistan.cfm> (accessed April 25, 2011).
- MSF. "NATO Speech – Rheindalen, Germany, December 8, 2009." MSF Article, December 9, 2009. Available at <http://www.msf.org/msf/articles/2009/12/nato-speech-.cfm> (accessed April 25, 2011).
- MSF. "Syria: MSF Criticises Aid Imbalances." MSF Press Release, January 29, 2013. Available at <http://www.msf.org.uk/article/syria-msf-criticises-aid-imbalances> (accessed September 10, 2013).
- MSF. "Syria: Humanitarian Assistance Deadlocked." March 07, 2013. Available at <http://lb-web1.doctorswithoutborders.org/press/release.cfm?id=6670&cat=press-release> (accessed September 10, 2013).
- MSF. "Syria: MSF treats 44 wounded after bombing in Idlib." January 17, 2013. Available at <http://www.msf.org/article/syria-msf-treats-44-wounded-after-bombing-idlib> (accessed September 10, 2013).
- MSF. *The Nobel Lecture on behalf of MSF by James Orbinski, Oslo, December 10, 1999*. Stockholm: The Nobel Foundation, 1999. Available at http://nobelpeaceprize.org/en_GB/laureates/laureates-1999/msf-lecture/ (accessed March 29, 2009).
- NATO. *Allied Joint Doctrine for Civil-Military Cooperation - Edition A Version 1*. AJP-3.4.9. February 2013.
- NATO. "ARSIC-N and ANA travel outside boundaries to deliver aid." Press release, 23 December 2007. Available at <http://ocha-gwapps1.unog.ch/rw/RWB.NSF/db900SID/PANA-7A7FC7?OpenDocument> (accessed August 06, 2010).
- NATO. *NATO Civil-Military Co-Operation (CIMIC) Doctrine*. AJP-9. June 2003.
- NATO. "Strasbourg / Kehl Summit Declaration – Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg / Kehl." NATO Press Release: (2009) 044. April 4, 2009.
- NATO Standardization Agency (NSA). *NATO Glossary of Terms and Definitions (English and French)*. AAP-06(2012). April 2012.
- NATO/EAPC (Euro-Atlantic Partnership Council). NATO Military Policy on Civil-Military Co-Operation (CIMIC): Note by the Chairman, EAPC/PFP(PCG)N(2001)0004. 9 July 2001.
- Natsios, Andrew S. "Humanitarian Relief Interventions in Somalia: The Economics of Chaos." *International Peacekeeping* 3, no. 1 (Spring 1996): 68-91.
- Natsios, Andrew S. "Remarks by Andrew S. Natsios, Administrator, USAID: InterAction Forum, Closing Plenary Session, May 21, 2003." Available at <http://www.usaid.gov/press/speeches/2003/sp030521.html> (accessed April 24, 2011).
- Neales, Sue, and Andrew Clennell. "CARE aided US agents in Somalia." *Sydney Morning Herald*, February 9, 2000. Available at <http://www.hartford-hwp.com/archives/27e/428.html> (accessed April 20, 2011).
- Nebehay, Stephanie. "Some Syria Violence Qualifies as Civil War-Red Cross." Reuters AlertNet website, May 8, 2012. Available at <http://www.trust.org/alertnet/news/some-syria-violence-qualifies-as-civil-war-red-cross/> (accessed May 8, 2012).
- Neuman, Michaël. "Somalie. Tout est négociable. Entretien avec Benoît Leduc (ancien chef de mission et responsable de programmes de la section française de MSF en Somalie)." In *Agir à tout prix? Négociations humanitaires: l'expérience de Médecins Sans Frontières*, edited by Claire Magone, Michaël Neuman and Fabrice Weissman, 101-123. Paris: Éditions La Découverte, 2011.

- Nicholds, Nigel, and John Borton. *The Changing Role of NGOs in the Provision of Relief and Rehabilitation Assistance: Case Study 1 – Afghanistan/Pakistan*. ODI Working Paper 74. London: Overseas Development Institute, January 1994.
- Nieto Navia, Rafael. “¿Hay o no hay conflicto armado en Colombia?.” *Anuario Colombiano de Derecho Internacional* 1, no. 1 (2008): 139-159.
- Noortmann, Math and Cedric Ryngaert, eds. *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers*. Farnham/Burlington: Ashgate, 2010.
- Novak, Manfred. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. 2nd revised ed. Kehl: N.P. Engel, Publisher, 2005.
- O’Brien, Paul. “Politicized Humanitarianism: A Response to Nicolas de Torrente.” *Harvard Human Rights Journal* 17 (2004): 31-39.
- O’Callaghan, Sorch, and Sara Pantuliano. *Protective Action: Incorporating Civilian Protection into Humanitarian Response*. HPG Report 26. London: Overseas Development Institute, December 2007.
- O’Connell, Mary Ellen. “Enhancing the Status of Non-State Actors Through a Global War on Terror?.” *Columbia Journal of Transnational Law* 43, no. 2 (2005): 435-458.
- O’Connell, Mary Ellen. “Humanitarian Assistance in Non-International Armed Conflict: The Fourth Wave of Rights, Duties and Remedies.” *Israel Yearbook on Human Rights* 31 (2001): 183-217.
- Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. I.
- Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. VII.
- Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, vol. XII.
- Ojeda, Stephane. “The Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects.” *Refugee Survey Quarterly* 29, no. 3 (September 2010): 58-66.
- Ojinaga Ruiz, Rosario. *Emergencias Humanitarias y Derecho Internacional: la Asistencia a las Víctimas*. Valencia: Tirant lo Blanch, 2005.
- Oliker, Olga, et al. *Aid During Conflict: Interaction between Military and Civilian Assistance Providers in Afghanistan, September 2001–June 2002*. Santa Monica [etc.]: RAND Corporation, 2004.
- Olson, Laura M. “Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict.” *Case Western Reserve Journal of International Law* 40 (2009): 437-461.
- Orakhelashvili, Alexander. *Peremptory Norms in International Law*. Oxford: Oxford University Press, 2008.
- Organisation for Economic Co-operation and Development (OECD). “The Paris Declaration on Aid Effectiveness (2005) and the Accra Agenda for Action (2008).” Available at <http://www.oecd.org/dataoecd/30/63/43911948.pdf> (accessed July 23, 2012).
- Oswald, Bruce “Ossie”. “The Security Council and the Intervention Brigade: Some Legal Issues.” *ASIL Insights* 17, no. 15 (6 June 2013). Available at <http://www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues-0> (accessed September 15, 2013).
- Ottermann, Sharon. “Trapped Civilians Now Able to Flee, Sri Lanka Says.” *The New York Times*, May 14, 2009. Available at <http://www.nytimes.com/2009/05/15/world/asia/15lanka.html> (accessed May 18, 2011).
- Oxfam France. “RD Congo/Conseil Européen: La France Doit Montrer l’Exemple.” December 10, 2008. Available at <http://www.oxfamfrance.org/RD-Congo-Conseil-europeen-La,088> (accessed February 28, 2013).
- Oxfam GB. *Improving the Safety of Civilians – A Protection Training Pack*. Oxford: Oxfam GB, 2009.

- Oxfam International. "Tchad: Les Etats Membres de l'Union Européenne Tardent à Prendre une Décision sur l'Envoi d'une Force au Tchad alors que 400 000 Vies Sont en Jeu." December 09, 2007. Available at <http://www.oxfamfrance.org/TCHAD-Les-Etats-membres-de-l-Union,149> (accessed February 28, 2013).
- Oxford English Dictionary (OED) Online*. Available at <http://www.oed.com> (accessed February 15, 2013).
- Pantuliano, Sara, Kate Mackintosh, Samir Elhawary, and Victoria Metcalfe. *Counter-Terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*. HPG Policy Brief 43. London: Overseas Development Institute, October 2011.
- Parks, W. Hays. "Special forces' Wear of Non-Standard Uniforms." *Chicago Journal of International Law* 4, no. 3 (Fall 2003): 493-560.
- Parks, W. Hays. "Special Forces' Wear of Non-Standard Uniforms." In *Issues in International Law and Military Operations*, edited by Richard B. Jaques, 69-119. Newport, Rhode Island: Naval War College, 2006.
- Partsch, Karl Josef. "Article 81 – Activities of the Red Cross and Other Humanitarian Organizations." In *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, by Michael Bothe, Karl Joseph Partsch, and Waldemar A. Solf, 492-498. The Hague/Boston/London: Martinus Nijhoff Publishers, 1982.
- Patnogie, Jovica. *New Issues for International Humanitarian Law regarding Humanitarian Assistance*. Milan [etc.]: Nagard, 2004.
- Paul, Diane. *Protection in Practice: Field-Level Strategies for Protecting Civilians from Deliberate Harm*. RRN Network Paper 30. London: Overseas Development Institute, July 1999.
- Paye, Olivier. *Sauve Qui Veut? Le Droit International Face aux Crises Humanitaires*. Brussels: Bruylant, 1996.
- Pécharre, Marion. *Humanitarian Action in Pakistan 2005-2010: Challenges, Principles, and Politics*. Feinstein International Center Briefing Paper, January 2011. Available at <http://sites.tufts.edu/feinstein/2011/humanitarian-action-in-pakistan-2005-2010> (accessed June 2, 2012).
- Peirce, George A.B. "Humanitarian Protection for the Victims of War: the System of Protecting Powers and the Role of the ICRC." *Military Law Review* 90 (1980): 89-162.
- Pellet, Alain. "Droit d'ingérence ou devoir d'assistance humanitaire? Problèmes politiques et sociaux." *La Documentation française* no. 758-759 (December 1995).
- Perrakis, Stelios, and Maria-Daniella Marouda, eds.. *Armed Conflicts and International Humanitarian Law 150 Years after Solferino. Acquis and Prospects*. Athens: Sakkoulas /Brussels: Bruylant, 2009.
- Perrin, Benjamin, ed. *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*. Vancouver, Toronto: UBC Press, 2012.
- Perrin, Benjamin. "Private Security Companies and Humanitarian Organizations: Implications for International Humanitarian Law." In *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, edited by Benjamin Perrin, 123-156. Vancouver, Toronto: UBC Press, 2012.
- Pertile, Marco. "Il Principio di Proporzionalità nell'Interazione tra Diritto Umanitario e Tutela dei Diritti Umani: Strumento per la Risoluzione delle Antinomie o Mero Argomento Retorico?" In *La Tutela dei Diritti Umani e il Diritto Internazionale*, edited by Adriana Di Stefano and Rosario Sapienza, 159-206. Naples: Editoriale Scientifica, 2012.
- Peters, Anne. "Article 25." In *The Charter of the United Nations: A Commentary* 3rd ed. Vol. II, edited by Bruno Simma et. al., 787-854. Oxford: Oxford University Press, 2012.
- Petraeus, David H., Lieutenant General. "Learning Counterinsurgency: Observations from Soldiering in Iraq." *Military Review* (January-February 2006): 2-12.
- Pfanner, Toni. "Interview with Andrew Bearpark." *International Review of the Red Cross* 88, no. 863 (September 2006): 449-457.

- Pfanner, Toni. "Military Uniforms and the Law of War." *International Review of the Red Cross* 86, no. 853 (March 2004): 93-124.
- Piccinini, Carlo. "Advocacy: A Good Word Gone Bad." *The Journal of Humanitarian Assistance* (February 21, 2010). Available at <http://sites.tufts.edu/jha/archives/654> (accessed November 13, 2011).
- Pictet, Jean S., ed. *Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva: ICRC, 1952.
- Pictet, Jean S., ed. *Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War*. Geneva: ICRC, 1960.
- Pictet, Jean S., ed. *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*. Geneva: ICRC, 1958.
- Pictet, Jean. *Humanitarian Law and the Protection of War Victims*. Leiden: Sijthoff / Geneva: Henry Dunant Institute, 1975.
- Pictet, Jean. *The Fundamental Principles of the Red Cross, Commentary*. Geneva: Henry Dunant Institute, 1979.
- Pictet, Jean. "The Principles of International Humanitarian Law." *International Review of the Red Cross* 6, no. 66 (September 1966): 455-469.
- Pictet, Jean. "The Principles of International Humanitarian Law." *International Review of the Red Cross* 6, no. 67 (October 1966): 511-533.
- Pictet, Jean. "The Principles of International Humanitarian Law." *International Review of the Red Cross* 6, no. 68 (November 1966): 567-581.
- Plattner, Denise. "ICRC Neutrality and Neutrality in Humanitarian Assistance." *International Review of the Red Cross* 36, no. 311 (April 1996): 161-179.
- Plaut, Martin. "1m Sudanese trapped in dire need beyond reach of aid agencies." *TheGuardian.com*, February 11, 2013. Available at <http://www.theguardian.com/global-development/2013/feb/11/sudanese-trapped-beyond-aid-agencies> (accessed September 10, 2013).
- Portmann, Roland. *Legal Personality in International Law*. Cambridge [etc.]: Cambridge University Press, 2010.
- Principles and Good Practice of Humanitarian Donorship*. Endorsed in Stockholm, June 17, 2003, by Germany, Australia, Belgium, Canada, the European Commission, Denmark, the United States, Finland, France, Ireland, Japan, Luxemburg, Norway, the Netherlands, the United Kingdom, Sweden and Switzerland. Available at www.goodhumanitariananddonorship.org/Libraries/Ireland_Doc_Manager/EN-23-Principles-and-Good-Practice-of-Humanitarian-Donorship.sflb.ashx (accessed March 15, 2012).
- PRT Executive Steering Committee. *Policy Note Number 3: PRT Coordination and Intervention in Humanitarian Assistance*. 22 February 2007, updated on 29 January 2009. Available at https://www.cimicweb.org/Documents/PRT%20CONFERENCE%202010/Policy_Note_3_Humanitarian_Assistance.pdf (accessed August 10, 2010).
- Raimondo, Fabián. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Leiden: Martinus Nijhoff Publishers, 2008.
- Ramesh, Randeep. "Sri Lanka expels UN official who criticised camps." *The Guardian*, September 06, 2009. Available at <http://www.guardian.co.uk/world/2009/sep/06/sri-lanka-un-official-camps> (accessed November 19, 2011).
- Rana, Raj. "Contemporary Challenges in the Civil-Military Relationship: Complementarity or Incompatibility?." *International Review of the Red Cross* 86, no. 855 (September 2004): 565-591.
- Ranganathan, Surabhi. "Reconceptualizing the Boundaries of 'Humanitarian' Assistance: 'What's in a Name' or 'The Importance of Being Earnest'?" *The John Marshall Law Review* 40, no. 1 (2006): 195-233.
- Ranjeva, Raymond. "Les Organisations Non Gouvernementales et la Mise en Œuvre du Droit International." *Recueil des Cours* 270 (1997): 9-105.

- Reichhold, Urban, and Andrea Binder, "Scoping Study: What Works in Protection and How Do We Know?." GPPi Report, March 2013. Available at http://www.gppi.net/fileadmin/media/pub/2013/GPPi_2013_DFID_scoping-study-protection.pdf (accessed October 01, 2013).
- Reuters. "Rwandan Defends Ouster of Aid Agencies." *The New York Times*, December 20, 1995. Available at <http://www.nytimes.com/1995/12/20/world/rwandan-defends-ouster-of-aid-agencies.html> (accessed April 20, 2011).
- Reuters. "Somalia's al Shabaab Rebels Expel Three Aid Groups." AlertNet website, August 09, 2010. Available at <http://www.alertnet.org/thenews/newsdesk/LDE678130.htm> (accessed August 11, 2010).
- Reuters. "Sudan Expels Five UN/ICRC Staff from West Darfur." AlertNet website, August 16, 2010. Available at <http://www.alertnet.org/thenews/newsdesk/MCD653573.htm> (accessed September 15, 2010).
- Reuters. "Sudan temporarily suspends 52 local NGOs in Darfur." Reuters website, March 22, 2007. Available at <http://www.reuters.com/article/2007/03/22/us-sudan-darfur-suspension-idUSMCD22824620070322> (accessed July 20, 2012).
- Rey Marcos, Francisco. "Military Participation in Humanitarian Action: Reflections on the Colombia Case." *Humanitarian Exchange* no. 45 (December 2009): 6-9.
- Rieff, David. "Humanitarianism in Crisis." *Foreign Affairs* 81, no. 6 (November/December 2002): 111-121.
- Roberts, Adam. "Afghanistan and International Security." In *The War in Afghanistan: A Legal Analysis*, International Law Studies, Volume 85, edited by Michael N. Schmitt, 3-42. Newport, Rhode Island: Naval War College, 2009.
- Roberts, Adam. "The Role of Humanitarian Issues in International Politics in the 1990s." *International Review of the Red Cross* 81, no. 833 (March 1999): 19-43.
- Roberts, Adam. "What is a Military Occupation?." *British Yearbook of International Law* 55, no. 1 (1984): 249-305.
- Rodrigue, Marie-Noële, and Fabrice Weissman. "Le CICR doit oser briser l'embargo humanitaire en Syrie." *Le Temps*, March 19, 2013. Available at <http://www.letemps.ch/Page/Uuid/90730828-8fe4-11e2-9fca-35dc2edbbea3%7C0#.UjWH3tKriSo> (accessed September 10, 2013).
- Rona, Gabor. "The ICRC's Status: In a Class of Its Own." ICRC website, February 17, 2004. Available at <http://www.icrc.org/eng/resources/documents/misc/5w9fjy.htm> (accessed January 25, 2013).
- Rottensteiner, Christa. "The Denial of Humanitarian Assistance as a Crime under International Law." *International Review of the Red Cross* 81, no. 835 (September 1999): 555-582.
- Rubin, Barnett R., Humayun Hamidzada, and Abby Stoddard. "Afghanistan 2005 and Beyond: Prospects for Improved Stability Reference Document." Netherlands Institute of International Relations 'Clingendael' Conflict Research Unit, April 2005. Available at http://www.clingendael.nl/publications/2005/20050400_cru_paper_barnett.pdf (accessed March 18, 2011).
- Ryfman, Philippe. *Une Histoire de l'Humanitaire*. Paris: La Découverte, 2008.
- Ryngaert, Cedric. "Human Rights Obligations of Armed Groups." *Revue Belge de Droit International* no. 1-2 (2008): 355-381.
- Ryngaert, Cedric. "Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective." *Amsterdam Law Forum* 5, no. 2 (Spring 2013): 5-19.
- Ryniker, Anne. "The ICRC's Position on 'Humanitarian Intervention.'" *International Review of the Red Cross* 83, no. 842 (June 2001): 527-532.
- Sandoz, Yves. "'Droit' ou 'Devoir d'ingérence' and the Right to Assistance: The Issues Involved." *International Review of the Red Cross* 32, no. 288 (May-June 1992): 215-227.

- Sandoz, Yves. "La notion de protection dans le droit international humanitaire et au sein du Mouvement de la Croix-Rouge." In *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, edited by Christophe Swinarski, 975-987. Geneva: ICRC; The Hague: Nijhoff, 1984.
- Sandoz, Yves. "Le droit d'initiative du Comité International de la Croix-Rouge." *German Yearbook of International Law* 22 (1979): 352-373.
- Sandoz, Yves. *The International Committee of the Red Cross as Guardian of International Humanitarian Law*. Geneva: ICRC, 1998.
- Sandoz, Yves, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary to the Additional Protocols of 8 June 1977 of the Geneva Conventions of 12 August 1949*. Geneva: Martinus Nijhoff Publishers, 1987.
- Sandvik-Nylund, Monika. *Caught in Conflicts: Civilian Victims, Humanitarian Assistance and International Law*. 2nd rev. ed. Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2003.
- Sassoli, Marco. "International Humanitarian Law and Peace Operations, Scope of Application *Ratione Materiae*." In *International Humanitarian Law, Human Rights and Peace Operations: Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008*, edited by Gian Luca Beruto, 100-106. Sanremo: International Institute of Humanitarian Law, 2009.
- Sassòli, Marco. "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers." *European Journal of International Law* 16, no. 4 (September 2005): 661-694.
- Sassòli, Marco. "Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian and International Human Rights Law." Paper submitted to the Armed Group Conference, Vancouver, Canada, 13-15 November 2003. Available at <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf> (accessed January 10, 2012).
- Sassòli, Marco, Antoine A. Bouvier, and Anne Quintin. *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Volume I: Outline of International Humanitarian Law*. 3rd ed. Geneva: ICRC, 2011.
- Sassòli, Marco, and Laura M. Olson. "The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts." *International Review of the Red Cross* 90, no 871 (September 2008): 599-627.
- Save the Children. *At a Crossroads: Humanitarianism for the Next Decade*. London: Save the Children UK, 2010.
- Schabas, William A. *Genocide in International Law: The Crimes of Crimes*. Cambridge [etc.]: Cambridge University Press, 2000.
- Schermers, Henry G., and Niels M. Blokker. *International Institutional Law*. 5th revised ed. Leiden/Boston: Martinus Nijhoff Publishers, 2011.
- Schindler, Dietrich. "Humanitarian Assistance, Humanitarian Interference and International Law." In *Essays in Honour of Wang Tieya*, edited by Ronald St. J. Macdonald, 689-701. Dordrecht [etc.]: Nijhoff, 1994.
- Schmitt, Michael N. "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees." *Chicago Journal of International Law* 5, no. 2 (Winter 2004): 511-546.
- Schmitt, Michael N. "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis." *Harvard National Security Journal* 1 (May 2010): 5-44.
- Schmitt, Michael N., ed. *The War in Afghanistan: A Legal Analysis*. International Law Studies, Volume 85. Newport, Rhode Island: Naval War College, 2009.
- Schneider-Enk, Michaela. *Der völkerrechtliche Schutz humanitärer Helfer in bewaffneten Konflikten: die Sicherheit des Hilfspersonals und die "neuen" Konflikte*. Hamburg: Kovac, 2008.

- Schondorf, Roy S. "The *Targeted Killings* Judgment – A Preliminary Assessment." *Journal of International Criminal Justice* 5, no. 2 (May 2007): 301-309.
- Schümer, Tanja. *New Humanitarianism: Britain and Sierra Leone, 1997-2003*. Basingstoke: Palgrave Macmillan, 2008.
- Scobbie, Iain. "The Approach to Customary International Law in the Study." In *Perspectives on the ICRC Study on Customary International Humanitarian Law*, edited by Elizabeth Wilmshurst and Susan Breau, 15-49. Cambridge: Cambridge University Press, 2007.
- Scott, Robert R. LtCol (USMC), and CAPT Jeffrey D. Maclay (USN) with David Sokolow. "NATO and Allied Civil-Military Co-Operation Doctrine, Operations, & Organization of Forces." Center for Strategic & International Studies (January 2009). Available at http://csis.org/files/media/csis/pubs/090128_nato_civil_military_doctrine_and_ops.pdf (accessed July 5, 2012).
- Secretary of State Colin Powell. "Remarks to the National Foreign Policy Conference for Leaders of Nongovernmental Organizations." October 26, 2001. Available at http://avalon.law.yale.edu/sept11/powell_brief31.asp (accessed November 19, 2012).
- Seiple, Chris. *The U.S. Military/NGO Relationship in Humanitarian Interventions*. Carlisle Barracks, PA: U.S. Army War College, Center for Strategic Leadership, Peacekeeping Institute, 1996.
- Sengupta, Somini. "Sudan Orders The Expulsion Of Aid Officials From 2 Groups." *The New York Times*, November 30, 2004. Available at <http://query.nytimes.com/gst/fullpage.html?res=9C07E6DE113EF933A05752C1A9629C8B63> (accessed April 15, 2011).
- Sepúlveda, M. Magdalena. *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*. Antwerp [etc.]: Intersentia, 2003.
- Seybolt, Taylor B. "The Myth of Neutrality." *Peace Review* 8, no. 4 (1996): 521-527.
- Shany, Yuval. "The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. Prime Minister of Israel*." *Israel Law Review* 42, no. 1 (January 2009): 101-116.
- Shapiro, Scott J. "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed." Working Paper no. 77, University of Michigan Law School Public and Legal Theory Working Paper Series, March 2007. Available at http://www.law.yale.edu/documents/pdf/Faculty/Shapiro_Hart_Dworkin_Debate.pdf (accessed June 15, 2011).
- Shraga, Daphna. "The Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law: a Decade Later." *Israel Yearbook on Human Rights* 39 (2009): 357-377.
- Sida, Lewis. "Challenges to Humanitarian Space: A Review of Humanitarian Issues Related to the UN Integrated Mission in Liberia and to the Relationship between Humanitarian and Military Actors in Liberia." April 2005. Available at <http://reliefweb.int/sites/reliefweb.int/files/resources/BC75B030FE472FF5C125700D004DBAA1-msg-lbr-30apr.pdf> (accessed April 20, 2012).
- Simma, Bruno, et al., eds. *The Charter of the United Nations: A Commentary*. 3rd ed. Vol. II. Oxford: Oxford University Press, 2012.
- Singer, P. W. "Humanitarian Principles, Private Military Agents: Some Implications of the Privatised Military Industry for the Humanitarian Community." In *Resetting the Rules of Engagement: Trends and Issues in Military-Humanitarian Relations*, eds. Victoria Wheeler and Adele Harmer, 67-79. HPG Research Report no. 21. London: Overseas Development Institute, March 2006.
- Sivakumaran, Sandesh. "Binding Armed Opposition Groups." *ICLQ* 55, no. 2 (April 2006): 369-394.
- Slim, Hugo. "Not Philanthropy But Rights: Rights-Based Humanitarianism and the Proper Politicisation of Humanitarian Philosophy in War." Centre for Development and Emergency Practice, Oxford Brookes University, May 2001. Available at <http://www.odi.org.uk/events/documents/2103-rights-based-humanitarianism-proper-politicisation-humanitarian-philosophy-hugo-slim-revised-may-2001.pdf> (accessed March 10, 2011).

- Slim, Hugo, and Andrew Bonwick. *Protection: An ALNAP Guide for Humanitarian Agencies*. London: Overseas development Institute, 2005.
- Sommaruga, Cornelio. "Réflexions et Convictions sur l'Humanitaire d'Aujourd'hui et de Demain." *International Review of the Red Cross* 82, no. 838 (June 2000): 295-310.
- Sommaruga, Cornelio. "Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations Organization: Statement by Mr. Cornelio Sommaruga, President of the International Committee of the Red Cross at the United Nations General Assembly (New York, 20 November 1992)." *International Review of the Red Cross* 33, no. 292 (January-February 1993): 49-56.
- Sommer, John G. *Hope Restored? Humanitarian Aid in Somalia 1990-1994*. Refugee Policy Group, 1994.
- Sossai, Mirko. "Status of Private Military and Security Company Personnel in the Law of International Armed Conflict." In *War by Contract*, edited by Francesco Francioni and Natalino Ronzitti, 197-217. Oxford [etc.]: Oxford University Press, 2011.
- Soussan, Judith. *MSF and Protection: Pending or Closed? Discourse and Practice Surrounding the "Protection of Civilians"*. Paris: CRASH/Fondation – Médecins Sans Frontières, 2008.
- Spearin, Christopher. "Humanitarian Non-Governmental Organizations and International Private Security Companies: The 'Humanitarian' Challenges of Moulding a Marketplace." Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper No. 16 (2007). Available at <http://www.dcaf.ch/Publications/Publication-Detail?lng=en&id=32641> (accessed June 5, 2011).
- Spearin, Christopher. "Private, Armed and Humanitarian?: States, NGOs, International Private Security Companies and Shifting Humanitarianism." *Security Dialogue* 39, no. 4 (August 2008): 363-382.
- Special Inspector General for Afghanistan Reconstruction (SIGAR). *Quarterly Report to the United States Congress*. July 30, 2013.
- Special Inspector General for Iraq Reconstruction (SIGIR). *Quarterly Report and Semiannual Report to the United States Congress*. January 30, 2012.
- Special Inspector General for Iraq Reconstruction (SIGIR) *Quarterly Report to the United States Congress*. April 30, 2012.
- Spencer, Metta. "A Doctor Without Borders: James Orbinski." *Peace Magazine* 3, no. 2 (March-April 1997): 20.
- Spieker, Heike. "Humanitarian Assistance, Access in Armed Conflict and Occupation." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2008. Online edition, available at <http://www.mpepil.com> (accessed February 03, 2012).
- Spieker, Heike. "The International Red Cross and Red Crescent and Military-Humanitarian Relationships." In *Between Force and Mercy: Military Action and Humanitarian Aid*, edited by Dennis Dijkzeul, 201-235. Berlin: Berliner Wissenschafts-Verlag, 2004.
- Spieker, Heike. "Twenty-five Years after the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection?." *Yearbook of International Humanitarian Law* 4 (December 2001): 129-166.
- Ssenyonjo, Manisuli. *Economic, Social and Cultural Rights in International Law*. Oxford and Portland, Oregon: Hart Publishing, 2009.
- Steering Committee of Humanitarian Response (SCHR). "SCHR Position Paper on Humanitarian-Military Relations." January 2010. Available at <http://www.actalliance.org/resources/policies-and-guidelines/ghp-principles-of-partnership/153-SCHRPositionPaperonHumanitarianMilitaryRelationsJanuary2010.pdf> (accessed May 02, 2012).
- Stoddard, Abby, Adele Harmer, and Katherine Haver. *Safety and Security for National Humanitarian Workers – Annex I to: To Stay and Deliver – Good Practice for Humanitarians in Complex Security Environments*. New York: UN, 2011.
- Stoddard, Abby, Adele Harmer and Victoria DiDomenico. *The Use of Private Security Providers and Services in Humanitarian Operations*. HPG Report 27. London: Overseas Development Institute, October 2008.

- Stopford, Michael. "Humanitarian Assistance in the Wake of the Persian Gulf War." *Virginia Journal of International Law* 33 (Spring 1993): 491-502.
- Storey, Andy. "Non-Neutral Humanitarianism: NGOs and the Rwanda Crisis." *Development in Practice* 7, no. 4 (November 1997): 384-394.
- Stroup, Sarah. "Getting to Relief: Private Humanitarians and Public Authorities." Paper prepared for the Annual Conference of the International Studies Association, February 15-18, 2009, New York, NY. Available at research.allacademic.com/one/isa/isa09/index.php?cmd=Download+Document&key=unpublished_manuscript&file_index=4&pop_up=true&no_click_key=true&attachment_style=attachment&PHPS_ESSID=chkc1ffcjmodmtnjrf6hbr35i2 (accessed October 01, 2013).
- Studer, Meinrad. "The ICRC and Civil-Military Relations in Armed Conflict." *International Review of the Red Cross* 83, no. 842 (June 2001): 367-390.
- Sudan Tribune. "Sudan expels 10 aid NGOs and dissolves 2 local groups." March 5, 2009. Available at <http://www.sudantribune.com/Sudan-expels-10-aid-NGOs-and,30382> (accessed February 13, 2011).
- Sudan Tribune. "Sudan in talks with expelled groups to resume Darfur work." June 09, 2009. Available at <http://www.sudantribune.com/spip.php?article31448> (accessed April 22, 2012).
- Sudan Tribune. "Sudan warns humanitarian organizations of facing expulsion." August 29, 2008. Available at <http://www.sudantribune.com/Sudan-warns-humanitarian,28454> (accessed May 13, 2011).
- Suhrke, Astri, Michael Barutciski, Peta Sandison, Rick Garlock. *The Kosovo Refugee Crisis: An Independent Evaluation of UNHCR's Emergency Preparedness and Response*. Geneva: UNHCR Evaluation and Policy Analysis Unit, 2000.
- Swinarski, Christophe, ed. *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*. Geneva: ICRC; The Hague: Nijhoff, 1984.
- Tait, Paul. "Group denies Afghan Taliban claims over dead workers." Reuters AlertNet, August 08, 2010. Available at <http://www.alertnet.org/thenews/newsdesk/SGE67701O.htm> (accessed August 11, 2010).
- Tanja, Gerard J. "Humanitarian Intervention and Humanitarian Assistance: An Echo from the Past and a Prospect for the Future." In *Law in Humanitarian Crises – Le Droit Face aux Crises Humanitaires: Volume II: Access to Victims: Right to Intervene or Right to Receive Humanitarian Assistance? – L'Accès aux Victimes: Droit d'Ingérence ou Droit à l'Assistance Humanitaire?*, edited by European Commission Humanitarian Office, 67-96. Luxembourg: Office for Official Publications of the European Communities, 1995.
- Tauxe, Jean-Daniel. "Liberia, Humanitarian Logistics in Question." *International Review of the Red Cross* 36, no. 312 (May-June 1996): 352-354.
- Tavernier, Paul, and Jean-Marie Henckaerts, eds. *Droit Internationale Humanitaire Coutumier: Enjeux et Défis Contemporains*. Brussels: Bruylant, 2008.
- Terry, Fiona. "The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action." *International Review of the Red Cross* 93, no. 881 (March 2011): 173-188.
- Terry, Fiona. "The Principle of Neutrality: Is It Relevant to MSF?" Discussion Paper for 2001 Mini-AGS, December 2000. Available at <http://www.msf.fr/actualite/publications/principle-neutrality-it-relevant-msf> (accessed September 01, 2011).
- The Sphere Project. *Humanitarian Charter and Minimum Standards in Humanitarian Response, 2011 Edition*. Southampton: The Sphere Project, 2011.
- Thürer, Daniel. "Current Challenges to The Law Of Occupation." *Collegium, Special Edition: Current Challenges to the Law of Occupation Proceedings of the Bruges Colloquium 20th-21st October 2005*, 34 (Autumn 2006): 9-25.
- Thürer, Daniel. "International Humanitarian Law: Theory, Practice, Context." *Recueil des Cours* 338 (2008): 9-370.

- Tomuschat, Christian. *Human Rights: Between Idealism and Realism*. 2nd ed. Oxford [etc.]: Oxford University Press, 2008.
- Tomuschat, Christian. "Obligations Arising for States Without or Against Their Will." *Recueil des Cours* 241, no. IV (1993): 195-374.
- Torrelli, Maurice. "From Humanitarian Assistance to 'Intervention on Humanitarian Grounds'?" *International Review of the Red Cross* 32, no. 288 (May-June 1992): 228-248.
- Torrelli, Maurice. "La neutralité en question." *Revue Générale de Droit International Public* 96, no. 1 (1992): 5-43.
- Torroja Mateu, Helena. *La asistencia humanitaria en la Organización de las Naciones Unidas: Fundamentos y perspectivas actuales*. Barcelona: Atelier, 2004.
- Treves, Tullio. "Customary International Law." In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum. Oxford: Oxford University Press, 2008. Online edition, available at <http://www.mpepil.com> (accessed November 29, 2009).
- Tsui, Edward. "Analysis of Normative Developments in Humanitarian Resolutions since the Adoption of 46/182: An Independent Review by Edward Tsui (Consultant)." 2009. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1112151> (accessed March 8, 2012).
- Tyagi, Yogesh K. "The Concept of Humanitarian Intervention Revisited." *Michigan Journal of International Law* 16, no. 3 (Spring 1995): 883-910.
- UK House of Commons, Select Committee on International Development. "Appendices to the Minutes of Evidence: Appendix 8: Letter from the Clerk of the Committee to Philip Spoerri, Legal Adviser, ICRC, and Reply." December 20, 2002. Available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm> (accessed June 15, 2012).
- UK Joint Doctrine and Concepts Centre (JDCC), Ministry of Defence. *The Joint Service Manual of the Law of Armed Conflict*. Joint Service Publication 383 (JSP 383). 2004 Edition.
- UK Ministry of Defence. *Civil-Military Co-Operation (CIMIC)*. Interim Joint Warfare Publication 3-90 (IJWP 3-90). November 2003.
- UK Ministry of Defence. *Civil-Military Co-Operation (CIMIC)*. Joint Doctrine Publication 3-90 (JDP 3-90). April 2006.
- UK Ministry of Defence. *Security and Stabilisation: The Military Contribution*. Joint Doctrine Publication 3-40 (JDP 3-40). November 2009.
- UK Ministry of Defence. *The Joint Service Manual of the Law of Armed Conflict*. Joint Service Publication 383 (2004).
- UN. *Guidelines on the Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies (the 'MCDA Guidelines')*. March 2003 (Revision I: January 2006). Hereinafter MCDA Guidelines.
- UN. *IMPP Guideline --: Role of the Headquarters: Integrated Planning for UN Field Presences*. May 2009. Approved by the UNSG.
- UNAMA. "UN Humanitarian Coordinator Press Conference." February 17, 2010. Available at <http://unama.unmissions.org/Default.aspx?tabid=1761&ctl=Details&mid=1892&ItemID=7810> (accessed March 18, 2011).
- UN Department of Humanitarian Affairs. "Sierra Leone Humanitarian Situation Report 24 - 30 Jun 1997." Available at <http://reliefweb.int/node/31351> (accessed June 5, 2011).
- UN, DHA-Geneva. *Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief – "Oslo Guidelines"*. May 1994.
- UN DPA. *Repertoire of the Practice of the Security Council – Supplement 1989-1992*. New York: UN, 2007.

- UN DPI. "Press Conference on Expulsion of Non-Governmental Organizations from Darfur." March 16, 2009. Available at http://www.un.org/News/briefings/docs/2009/090316_Holmes.doc.htm (accessed March 20, 2012).
- UN DPKO. *DPKO Policy Directive: Quick Impact Projects (QIPs)*. 12 February 2007.
- UN DPKO. *Policy: Civil-Military Coordination in UN Integrated Peacekeeping Missions (UN-CIMIC)*. October 2010.
- UN DPKO, Peacekeeping Best Practices Unit. *Handbook on United Nations Multidimensional Peacekeeping Operations*. New York: UN, December 2003.
- UN DPKO/UN DFS. *United Nations Peacekeeping Operations: Principles and Guidelines (so-called Capstone Doctrine)*. New York: UN, 2008.
- UNESCO. *Le Droit à l'Assistance Humanitaire: Actes du Colloque International Organisé par l'UNESCO, Paris, 23-27 Janvier 1995*. Paris: UNESCO, 1996.
- UNHCR. *UNHCR and International Protection: A Protection Induction Programme*. Geneva: UNHCR, 2006.
- UNHCR. *UNHCR and the Military: A Field Guide*. September 2006. Available at <http://www.unhcr.org/refworld/pdfid/465702372.pdf> (accessed June 25, 2012).
- UNHCR. *UNHCR Global Appeal 2012-2013: Challenging Times, Dangerous World*. Geneva: UNHCR, 2011. Available at <http://www.unhcr.org/ga12/index.xml> (accessed July 19, 2012).
- UN Humanitarian Information Unit – IRIN. "Afghanistan: Aid Agencies Win NATO Concession on Vehicle Markings." June 01, 2009. Available at <http://www.irinnews.org/Report.aspx?ReportId=84634> (accessed April 13, 2010).
- UN Humanitarian Information Unit – IRIN. "Afghanistan: Helmand Arrests Shock Aid Workers." April 12, 2010. Available at <http://www.irinnews.org/Report.aspx?Reportid=88778> (accessed April 13, 2010).
- UN Humanitarian Information Unit – IRIN. "Afghanistan: Italian NGO Saga Continues to Make Waves." May 04, 2010. Available at <http://www.irinnews.org/Report.aspx?Reportid=89011> (accessed May 07, 2010).
- UN Humanitarian Information Unit – IRIN. "Afghanistan: NGOs under pressure in government anti-corruption drive." November 12, 2010. Available at <http://www.irinnews.org/Report.aspx?ReportID=91066> (accessed April 25, 2011).
- UN Humanitarian Information Unit – IRIN. "Afghanistan: Proselytizing charges 'need fair investigation'." June 02, 2010. Available at <http://www.irinnews.org/Report.aspx?Reportid=89334> (accessed May 07, 2010).
- UN Humanitarian Information Unit – IRIN. "Afghanistan: Umbrella bodies deem NGO clean-up 'fair'." May 13, 2010. Available at <http://www.irinnews.org/Report.aspx?ReportId=89112> (accessed April 25, 2011).
- UN Humanitarian Information Unit – IRIN. "Afghanistan: USAID rejects NGO concerns over aid militarization." December 02, 2009. Available at <http://www.irinnews.org/Report.aspx?ReportId=87288> (accessed July 03, 2010).
- UN Humanitarian Information Unit – IRIN. "AID POLICY: Protection takes centre stage in new Sphere guidelines." April 14, 2011. Available at <http://www.irinnews.org/report.aspx?reportid=92478> (accessed April 15, 2011).
- UN Humanitarian Information Unit – IRIN. "Côte d'Ivoire: Aid agencies fighting to remain impartial." April 22, 2011. Available at <http://www.irinnews.org/Report/92557/COTE-D-IVOIRE-Aid-agencies-fighting-to-remain-impartial> (accessed April 25, 2011).
- UN Humanitarian Information Unit – IRIN. "Somalia: Al-Shabab ban on agencies threatens aid." November 28, 2011. Available at <http://www.irinnews.org/Report/94321/SOMALIA-Al-Shabab-ban-on-agencies-threatens-aid> (accessed May 31, 2012).

- UN Humanitarian Information Unit – IRIN. “Somalia: Ban on aid agencies condemned.” August 10, 2010. Available at <http://www.irinnews.org/Report.aspx?Reportid=90120> (accessed August 11, 2010).
- UN Humanitarian Information Unit – IRIN. “Sudan: Aid Agencies React to Expulsions.” March 5, 2009. Available at <http://www.irinnews.org/report.aspx?ReportId=83311> (accessed January 8, 2010).
- UNICEF. “UNICEF’s Mission Statement.” Available at http://www.unicef.org/about/who/index_mission.html (accessed July 19, 2012).
- UNICEF. *Core Commitments for Children in Humanitarian Action*. New York: UNICEF, Division of Communication, 2010.
- UNICEF, UNHCR, UNJLC, WFP, WHO, and UN OCHA. “Joint Statement on the Humanitarian Situation in Sudan by UN Agencies.” March 06, 2009. Available at <http://reliefweb.int/node/300299> (accessed May 31, 2012).
- United Nations Integrated Missions Planning Process (IMPP) Guidelines Endorsed by the Secretary-General on 13 June 2006*. Reproduced in *International Peacekeeping* 15, no. 4 (August 2008): 588-607.
- United States Institute of Peace, InterAction & U.S. Department of Defense. *Guidelines for Relations between U.S. Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments*. July 2007. Available at <http://www.usip.org/resources/guidelines-relations-between-us-armed-forces-and-nghos-hostile-or-potentially-hostile-envi> (accessed March 19, 2011).
- UNMIS. “Protection of Civilians (PoC): Fact Sheet.” July 9, 2009. Available at <http://unmis.unmissions.org/LinkClick.aspx?fileticket=z%2fvZ3LOOXUc%3d&tabid=4379> (accessed June 2, 2012).
- UN News Centre. “Expulsion of UNICEF staff member in Sri Lanka brings dismay from UN.” September 9, 2009. Available at <http://www.un.org/apps/news/story.asp?NewsID=31974&Cr=sri+lanka&Cr1> (accessed November 19, 2011).
- UN OCHA. “Foreign Military and Civil Defence Assets in Support of Humanitarian Emergency Operations: What Is Last Resort?,” April 2012. Available at <http://ochanet.unocha.org/p/Documents/Last%20Resort%20Pamphlet%20-%20FINAL%20April%202012.pdf> (accessed August 31, 2012).
- UN OCHA. *Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict*. New York: UN, 2003. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=100572> (accessed November 5, 2009).
- UN OCHA. “OCHA Operations Director: Humanitarians Must Have Access to Make Sure Aid Reaches Syrians in Desperate Need.” OCHA Press Release, January 29, 2013. Available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Press%20Release%20on%20Syria%20John%20Ging%2029%20January%202013.pdf> (accessed September 10, 2013).
- UN OCHA. “OCHA on Message: Humanitarian Principles.” Version I, April 2010. Available at http://ochanet.unocha.org/p/Documents/OOM_HumPrinciple_English.pdf (accessed March 15, 2012).
- UN OCHA. “OCHA on Message: Inter-Agency Standing Committee.” Version I, December 2011. Available at https://docs.unocha.org/sites/dms/Documents/120229_OOM-IASC_eng.pdf (accessed March 15, 2012).
- UN OCHA. *OCHA Policy Instruction: OCHA’s Structural Relationships within an Integrated UN Presence*. 1 May 2009.
- UN OCHA. “Statement on Somalia - Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Valerie Amos, 28 November 2011.” November 28, 2011. Available at <http://reliefweb.int/node/461686> (accessed May 31, 2012).
- UN OCHA. “Sudan: OCHA Situation Report No. 1, 08 Mar 2009.” March 08, 2009. Available at <http://reliefweb.int/node/300479> (accessed May 31, 2012).

- UN OCHA and IASC. *Civil-Military Guidelines & Reference for Complex Emergencies*. Geneva: UN, 2008.
- UN Office of the Resident and Humanitarian Coordinator in Sudan. “Statement attributable to the United Nations Resident and Humanitarian Coordinator and UNDP Resident Representative in Sudan, Mr. Ali Al-Za’tari.” June 14, 2012. Available at <http://reliefweb.int/report/sudan/statement-attributable-united-nations-resident-and-humanitarian-coordinator-and-undp> (accessed February 28, 2013).
- UN OHCHR. “Who We Are: Mission Statement.” Available at <http://www.ohchr.org/EN/ABOUTUS/Pages/MissionStatement.aspx> (accessed March 17, 2011).
- UN OHCHR and FAO. *The Right to Adequate Food*. Fact Sheet no. 34. Geneva: United Nations, 2010.
- UNSG. *Secretary-General’s Bulletin Observance by United Nations forces of international humanitarian law*, 6 August 1999. ST/SGB/1999/13.
- UNSG. *Decision of the Secretary-General – Decision No. 2008/24 – Integration*. 26 June 2008.
- UNSG. *Note from the Secretary-General: Guidance on Integrated Missions*. 17 January 2006.
- UNSG. *Note from the Secretary-General: Guidance on the Relations between Representatives of the Secretary-General, Resident Coordinators and Humanitarian Coordinators*. 30 October 2000.
- UNSG. “Statement Attributable to the Spokesperson for the Secretary-General on Somalia.” November 28, 2011. Available at <http://www.un.org/sg/statements/?nid=5711> (accessed May 31, 2012).
- UNSG. “Statement attributable to the Spokesperson for the Secretary-General on Sri Lanka.” September 08, 2009, New York. Available at <http://www.un.org/apps/sg/sgstats.asp?nid=4053> (accessed November 19, 2011).
- U.S. Army, Judge Advocate General’s Legal Center and School. *Operational Law Handbook 2012*. Charlottesville, Virginia: International and Operational Law Department, The Judge Advocate General’s Legal Center and School, U.S. Army, 2012.
- U.S. Congress. “Famine Relief in Ethiopia: An Update – Hearing before the International Task Force of the Select Committee of Hunger.” House of Representatives, One Hundred First Congress, Second Session, Washington DC. May 08, 1990, Serial no. 101-19. Available at http://www.developmentgap.org/africa/Famine_relief_Ethiopia_Hearing_before_international_task_force_select_committee_on_hunger_house_of_representatives.pdf (accessed June 30, 2013)
- U.S. Department of Defense. *Directive 3000.05, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations*. 28 November 2005.
- U.S. Department of Defense. *DoD Financial Management Regulation Volume 12, Chapter 27*. January 2009.
- U.S. Department of Defense. *Fiscal Year 2010 Budget Request: Summary Justification*. May 2009.
- U.S. Department of Defense. *Fiscal Year 2014 Budget Request: Overview - Addendum A: Overseas Contingency Operations*. May 2013.
- U.S. Department of Defense. *Instruction Number 3000.05, Stability Operations*. 16 September 2009.
- U.S. Forces, Afghanistan (USFOR-A). *Money As A Weapon System Afghanistan (MAAWS-A)*. December 2009.
- U.S. Government Interagency Counterinsurgency Initiative. *U.S. Government Counterinsurgency Guide*. January 2009.
- U.S. Headquarters Department of the Army. *Civil Affairs Operations*. Field Manual No. 3-05.40 (FM 3-05.40). September 2006.
- U.S. Headquarters Department of the Army. *Counterinsurgency*. Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5. December 2006.
- U.S. Headquarters Department of the Army. *Stability Operations and Support Operations*. Field Manual No. 3-07. February 2003.
- U.S. Headquarters Department of the Army. *Stability Operations*. Field Manual No. 3-07 (FM 3-07). October 2008.

- U.S. Headquarters Department of the Army. *The Law of Land Warfare*. Field Manual No. 27-10 (FM 27-10). July 1956 incorporating Change 1 of July 1976.
- U.S. House of Representatives, Committee on Armed Services, Subcommittee on Oversight & Investigations. *Agency Stovepipes vs Strategic Agility: Lessons We Need to Learn from Provincial Reconstruction Teams in Iraq and Afghanistan*. April 2008.
- U.S. Joint Chiefs of Staff. *Civil-Military Operations*. Joint Publication 3-57 (JP 3-57). July 2008.
- U.S. Joint Chiefs of Staff. *Counterinsurgency Operations*, Joint Publication 3-24 (JP 3-24). October 2009.
- U.S. Joint Chiefs of Staff. *Department of Defense Dictionary of Military and Associated Terms (DOD Dictionary)*. Joint Publication 1-02 (JP 1-02). 8 November 2010, as amended through 15 December 2012.
- U.S. Joint Chiefs of Staff, *Intergovernmental Organization, and Nongovernmental Organization Coordination During Joint Operations Vol I*, Joint Publication 3-08 (JP 3-08). March 2006.
- U.S. Joint Chiefs of Staff. *Joint Doctrine for Civil-Military Operations*. Joint Publication 3-57. February 2001.
- U.S. Joint Chiefs of Staff. *Joint Operations*. Joint Publication 3-0 (JP 3-0). 17 September 2006, Incorporating Change 2, 22 March 2010.
- U.S. Joint Chiefs of Staff. *Stability Operations*. Joint Publication 3-07 (JP 3-07). September 2011.
- U.S. Navy, U.S. Marine Corps & U.S. Coast Guard. *The Commander's Handbook on the Law of Naval Operations*. NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A. July 2007.
- Vallaëys, Anne. "Le paravent humanitaire." *Libération*, May 29, 2007. Available at <http://www.libération.fr/tribune/0101103435-le-paravent-humanitaire> (accessed April 17, 2012).
- van Steenberghe, Raphaël. "Non-State Actors from the Perspective of the International Committee of the Red Cross." In *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, edited by Jean d'Aspremont, 204-232. London and New York: Routledge, 2011.
- Various authors. *Studi in ricordo di Antonio Filippo Panzera* vol. 1. Bari: Cacucci, 1995.
- Vasak, Karel, et al. *Karel Vasak Amicorum Liber: Les Droits de l'Homme à l'Aube du XXIe Siècle / Los Derechos Humanos ante el Siglo XXI / Human Rights at the Dawn of the Twenty-First Century*. Brussels: Bruylant, 1999.
- VENRO. "Armed Forces as Humanitarian Aid Workers? Scope and Limits of Co-operation between Aid Organisations and Armed Forces in Humanitarian Aid." VENRO Position Paper, May 2003. Available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5Q4FPB/\\$file/venro-cimic-2003.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5Q4FPB/$file/venro-cimic-2003.pdf?openelement) (accessed February 15, 2011).
- Verdirame, Guglielmo. *The UN and Human Rights: Who Guards the Guardians?* Cambridge [etc.]: Cambridge University Press, 2011.
- Vigny, Jean-Daniel, and Cecilia Thompson. "Standards Fondamentaux d'Humanité: Quel Avenir?." *International Review of the Red Cross* 82, no. 840 (December 2000): 917-939.
- Vité, Sylvain. "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations." *International Review of the Red Cross* 91, no. 873 (March 2009): 69-94.
- Vukas, Budislav. "L'Assistance Humanitaire / The Humanitarian Assistance: 16ème Commission." *Annuaire de l'Institut de Droit International / Yearbook of the Institute of International Law* 70, part I (2002-2003): 399-576.
- Walker, Brian. "NGOs Break the Cold War Impasse in Cambodia." In *Humanitarian Diplomacy: Practitioners and Their Craft*, edited by Larry Minear and Hazel Smith, 133-152 (Tokyo: UN University Press, 2007).
- Weisman, Steven R. "India Airlifts Aid to Tamil Rebels." *The New York Times*, June 05, 1987. Available at <http://www.nytimes.com/1987/06/05/world/india-airlifts-aid-to-tamil-rebels.html?pagewanted=all&src=pm> (accessed April 18, 2012).

- Weiss, Thomas George. *Humanitarian Intervention: Ideas in Action*. Cambridge: Polity, 2007.
- Weiss, Thomas G. "Principles, Politics, and Humanitarian Action." *Ethics and International Affairs* 13, no. 1 (March 1999): 1-22.
- Weissman, Fabrice. "Humanitarian Aid and the International Criminal Court: Grounds for Divorce." CRASH Paper, 2009. Originally posted on the blog Making Sense of Sudan, July 20 and 21, 2009. Available at http://www.msf-crash.org/drive/7d9b-fw-2009-humanitarian-aid-and-international-criminal-court-grounds-for-divorce.-_fr-art-p._.pdf (accessed May 12, 2011).
- Weissman, Fabrice. "Silence, on soigne... Un aperçu des prises de positions publiques de MSF, de la guerre froide à la guerre contre le terrorisme." In *Agir à tout prix? Négociations humanitaires: l'expérience de Médecins Sans Frontières*, edited by Claire Magone, Michaël Neuman and Fabrice Weissman, 233-262. Paris: Éditions La Découverte, 2011.
- Weller, Marc. "The Relativity of Humanitarian Neutrality and Impartiality." Paper presented at the 1997 Annual Conference of the American Society of International Law, Washington DC. *Journal of Humanitarian Assistance*, February 1998. Available at <http://sites.tufts.edu/jha/archives/119> (accessed August 31, 2012).
- Werle, Gerhard. *Principles of International Criminal Law*. The Hague: T.M.C. Asser Press, 2005.
- West, Katarina. *Agents of Altruism: The Expansion of Humanitarian NGOs in Rwanda and Afghanistan*. Aldershot/Burlington USA/Singapore/Sydney: Ashgate, 2001.
- WFP. "Consolidated Framework of WFP Policies – An Updated Version (November 2010)." WFP/EB.2/2010/4-E, 4 October 2010. Available at <http://one.wfp.org/eb/docs/2010/wfp225108~1.pdf> (accessed July 19, 2012).
- Wheeler, Victoria, and Adele Harmer, eds. *Resetting the Rules of Engagement: Trends and Issues in Military–Humanitarian Relations*. HPG Research Report no. 21. London: Overseas Development Institute, March 2006.
- White, Nigel, and Christian Henderson, eds. *Research Handbook of International Conflict and Security Law*. Cheltenham [etc.]: Edward Elgar Publishing, 2013.
- Whittall, Jonathan. "'We Don't Trust That': Politicised Assistance in North-West Pakistan." *Humanitarian Exchange Magazine* 49 (January 2011): 14-16.
- Wills, Siobhán. "Occupation Law and Multi-National Operations: Problems and Perspectives." *British Yearbook of International Law* 77, no. 1 (2006): 256-332.
- Wills, Siobhán. *Protecting Civilians: The Obligations of Peacekeepers*. Oxford [etc.]: Oxford University Press, 2009.
- Wills, Siobhan. "The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection." *Netherlands International Law Review* 58, no. 2 (2011): 173-208.
- Wilmshurst, Elizabeth, and Susan Breau, eds. *Perspectives on the ICRC Study on Customary International Humanitarian Law*. Cambridge: Cambridge University Press, 2007.
- Wolfrum, Rüdiger, ed. *Max Planck Encyclopedia of Public International Law*. Oxford: Oxford University Press, 2008. Online edition, available at <http://www.mpepil.com> (accessed November 29, 2009).
- World Vision International. *Minimum Inter-Agency Standards for Protection Mainstreaming*. World Vision, 2012.
- Zegveld, Liesbeth. *Accountability of Armed Opposition Groups in International Law*. Cambridge: Cambridge University Press, 2002.
- Zorzi Giustiniani, Flavia. *Le Nazioni Unite e l'Assistenza Umanitaria*. Naples: Editoriale Scientifica, 2008.
- Zwitter, Andrej. "United Nations' Legal Framework of Humanitarian Assistance." In *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*, edited by Hans-Joachim Heintze and Andrej Zwitter, 51-69. Heidelberg [etc.]: Springer, 2011.

Zyberi, Gentian. *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles*. Antwerp [etc.]: Intersentia, 2008.

Treaties and Other Agreements (in chronological order)

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, August 22, 1864, entered into force June 22, 1865.

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Saint Petersburg, November 29-December 11, 1868, entered into force December 11, 1868.

Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, July 29, 1899, entered into force September 4, 1900.

Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, July 29, 1899, entered into force September 4, 1900.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, July 6, 1906, entered into force August 9, 1907.

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, October 18, 1907, entered into force January 26, 1910.

Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, October 18, 1907, entered into force January 26, 1910.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, July 27, 1929, not entered into force.

Convention relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, not entered into force.

Statute of the International Court of Justice, annexed to the *Charter of the United Nations*, San Francisco, October 24, 1945.

Convention on the Prevention and Punishment of the Crime of Genocide, Paris, December 9, 1948, entered into force January 12, 1951 (78 UNTS 277).

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, August 12, 1949, entered into force October 21, 1950 (75 UNTS 31).

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, August 12, 1949, entered into force October 21, 1950 (75 UNTS 85).

Convention (III) relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, entered into force October 21, 1950 (75 UNTS 135).

Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, entered into force October 21, 1950 (75 UNTS 287).

European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively (213 UNTS 222).

Convention relating to the Status of Refugees, Geneva, July 28, 1951, entered into force April 22, 1954 (189 UNTS 137).

International Covenant on Civil and Political Rights, New York, December 16, 1966, A/RES/21/2200A, entered into force March 23, 1976 (999 UNTS 171).

International Covenant on Economic, Social and Cultural Rights, New York, December 16, 1966, A/RES/21/2200A, entered into force January 3, 1976 (993 UNTS 3).

Protocol relating to the Status of Refugees, New York, January 31, 1967, entered into force October 4, 1967 (606 UNTS 267).

American Convention on Human Rights, San José, November 22, 1969, entered into force July 18, 1978 (1144 UNTS 123).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, entered into force December 7, 1978 (1125 UNTS 3).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, June 8, 1977, entered into force December 7, 1978 (1125 UNTS 609).

African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981 (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)), entered into force October 21, 1986.

Arab Cooperation Agreement Regulating and Facilitating Relief Operations, Arab League Decision No. 39, 3 September 1987.

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, November 17, 1988, entered into force November 16, 1999 (O.A.S. Treaty Series No. 69 (1988)).

International Convention against the Recruitment, Use, Financing and Training of Mercenaries, December 4, 1989, A/RES/44/34, entered into force 20 October 2001.

Convention on Temporary Admission, Istanbul, June 26, 1990, entered into force November 27, 1993.

Convention on the Safety of United Nations and Associated Personnel, December 9, 1994, entered into force January 15, 1999 (2051 UNTS 391).

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, May 3, 1996, entered into force December 3, 1998 (2048 UNTS 93).

Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, Tampere, June 18, 1998, entered into force January 8, 2005 (2296 UNTS 5).

Rome Statute of the International Criminal Court, Rome, July 17, 1998, entered into force July 1, 2002 (2187 UNTS 90).

Framework Convention on Civil Defence Assistance, Geneva, May 22, 2000, entered into force September 23, 2001 (2172 UNTS 213).

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, September 04, 2000, entered into force April 01, 2005.

ASEAN Agreement on Disaster Management and Emergency Response, Vientiane, July 26, 2005.

Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, December 8, 2005, entered into force August 19, 2010 (A/60/518).

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Kampala, October 22-23, 2009, entered into force December 06, 2012 (Kampala Convention).

Treaty on the Functioning of the European Union as amended by the Lisbon Treaty. Consolidated version of the Treaty on the functioning of the European Union, OJ C 83, 30 March 2010.

Agreement amending for the second time the Partnership Agreement between the Members of the African, Caribbean and Pacific group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, June 2010.

Other Agreements

Statute of the Office of the United Nations High Commissioner for Refugees, annexed to General Assembly Resolution 428 (V), 14 December 1950.

Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006. Available at <http://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf> (accessed March 15, 2011).

Memorandum of Understanding relating to the arrangements for the deployment of the United Nations guards contingent for the United Nations humanitarian centres, Baghdad April 18, 1991 (1606 UNTS 119) (MoU April 1991).

Memorandum of Understanding on the United Nations humanitarian programme for Iraq, Kuwait and the Iraq/Iran and Iraq/Turkey border areas, Baghdad, November 24, 1991 (1659 UNTS 3).

Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the Socialist Federal Republic of Yugoslavia, Geneva, November 27, 1991.

Agreement between Representatives of Mr. Alija Izetbegović (President of the Republic of Bosnia and Herzegovina and President of the Party of Democratic Action), Representatives of Mr. Radovan Karadžić (President of the Serbian Democratic Party), and Representative of Mr. Miljenko Brkić (President of the Croatian Democratic Community), Geneva, May 22, 1992.

All-Party Meeting on the Somali Humanitarian Issues: The Bahir Dar Agreement, Bahir Dar, June 02, 1991. The Agreement is reproduced in S/24184, 25 June 1992, Annex.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by S/RES/827 (1993), 25 May 1993, and amended by S/RES/1166 (1998), 13 May 1998; S/RES/1329 (2000), 30 November 2000; S/RES/1411 (2002), 17 May 2002; S/RES/1431 (2002), 14 August 2002; S/RES/1481 (2003), 19 May 2003; S/RES/1597 (2005), 20 April 2005; S/RES/1660 (2006), 28 February 2006; S/RES/1837 (2008), 29 September 2008; S/RES/1877 (2009), 7 July 2009.

Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, Arusha, August 4, 1993.

Agreement on a Cease-Fire in the Republic of Yemen (Yemen), Moscow, June 30, 1994. The Agreement is reproduced in S/1994/778, 30 June 1994, Annex.

Statute of the International Criminal Tribunal for Rwanda, adopted by S/RES/955 (1994), 8 November 1994, and amended by S/RES/1165 (1998), 30 April 1998; S/RES/1329 (2000), 30 November 2000; S/RES/1411 (2002), 17 May 2002; S/RES/1431 (2002), 14 August 2002; S/RES/1503 (2003), 28 August 2003; S/RES/1512 (2003), 27 October 2003; S/RES/1534 (2004), 26 March 2004; S/RES/1684 (2006), 13 June 2006; S/RES/1717 (2006), 13 October 2006; S/RES/1824 (2008), 18 July 2008; S/RES/1855 (2008), 19 December 2008; S/RES/1878 (2009), 7 July 2009; S/RES/1901 (2009), 16 December 2009.

Memorandum of Understanding between The Islamic Emirate of Afghanistan and The United Nations, May 13, 1998, reproduced in *International Journal of Refugee Law* 10, no. 3 (1998): 586-592.

Agreement on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affected Civilian Populations, Geneva, December 15, 1999. Available at <http://reliefweb.int/node/57372> (accessed July 27, 2011).

Arusha Peace and Reconciliation Agreement for Burundi, Arusha, August 28, 2000. Available at <http://www.issafrica.org/AF/profiles/Burundi/arusha.pdf> (accessed April 20, 2012).

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Freetown, January 16, 2002, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176> (accessed January 25, 2013).

Statute of the Special Court for Sierra Leone, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone*, Freetown,

January 16, 2002. Available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJEW%3d&tabid=176> (accessed January 25, 2013).

Humanitarian Ceasefire Agreement on the Conflict in Darfur, N'djamena, April 08, 2004. Available at http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_040408_Humanitarian%20Ceasefire%20Agreement%20on%20the%20Conflict%20in%20Darfur.pdf (accessed July 27, 2011).

Joint Communiqué between the Government of Sudan and the United Nations on the occasion of the visit of UN SG to Sudan, 29 Jun - 3 Jul 2004, Khartoum, July 03, 2004. Available at <http://reliefweb.int/node/149718> (accessed July 27, 2011).

Protocol between the Government of the Sudan (GoS), the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) on the Improvement of the Humanitarian Situation in Darfur, Abuja, November 09, 2004.

Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur, Abuja, July 05, 2005.

Darfur Peace Agreement, Abuja, May 05, 2006.

Joint Communiqué between the Government of Sudan and the United Nations on Facilitation of Humanitarian Activities in Darfur, March 28, 2007. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1087655> (accessed July 27, 2011).

Government of National Unity of the Republic of Sudan (GNU) and the Justice and Equality Movement Sudan (JEM), *Agreement of Good Will and Confidence Building for the Settlement of the Problem in Darfur*, Doha, February 17, 2009.

Doha Document for Peace in Darfur (DDPD), Doha, May 2011.

Agreement on the adoption of the Doha Document for Peace in Darfur, Doha, July 14, 2011.

Accord de cessez-le-feu entre le Gouvernement de la République Centrafricaine et la Coalition Seleka, Libreville, January 11, 2013.

Ceasefire Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan (JEM), Doha, February 10, 2013.

Case-Law

International

ICJ

ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, 9 April 1949.

ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Merits, Judgement, 20 February 1969, ICJ Reports 1969 at 3.

ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, 27 June 1986, ICJ Reports 1986 at 14.

ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Memorial of the Government of the Republic of Bosnia and Herzegovina, 15 April 1994.

ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgement, 1 July 1994, ICJ Reports 1994 at 112.

ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996 at 66.

ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004 at 136.

- ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment, 19 December 2005, ICJ Reports 2005 at 168.
- ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007 at 43.
- ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order on Provisional Measures, 15 October 2008, ICJ Reports 2008 at 353.
- ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 22 July 2010 at 403.

Human Rights Committee (HRC)

- HRC, *Lopez Burgos v. Uruguay*, Communication No. R.12/52, A/36/40 at 176 (1981).
- HRC, *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 at 88 (1984).
- HRC, *Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, CCPR/C/OP/1 at 92 (1984).

African Human Rights System

- African Commission on Human and Peoples' Rights, Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 27 May 2002, Fifteenth Annual Activity report 1999-2000, Annex V.

European Human Rights System

- ECtHR, *Lawless v. Ireland* (No. 3), App. No. 332/57, Judgment, 1 July 1961.
- EComHR, *Denmark, Norway, Sweden and the Netherlands v. Greece* (the *Greek case*), App. Nos. 3321/67, 3322/67, 3323/67 and 3344/67, Report of the Commission, 5 November 1969.
- EComHR, *Cyprus v. Turkey*, App. Nos. 6780/74 and 6950/75, Decision, 26 May 1975.
- ECtHR, *Ireland v. the United Kingdom*, App. No. 5310/71, Judgment, 18 January 1978.
- EComHR, *Stocké v. Germany*, App. No. 11755/85, Report of the Commission, 12 October 1989.
- ECtHR, *Brannigan and McBride v. United Kingdom*, App. Nos. 14553/89 and 14554/89, Judgment, 25 May 1993.
- ECtHR, *Loizidou v. Turkey*, App. No. 15318/89, Judgment (Preliminary Objections), 23 March 1995, Series A 310.
- ECtHR, *Loizidou v. Turkey*, App. No. 15318/89, Judgment (Merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI.
- ECtHR, *Cyprus v. Turkey*, App. No. 25781/94, Judgment (Merits), 10 May 2001, ECHR 2001-IV.
- ECtHR, *Al-Adsani v. United Kingdom*, App. No. 35763/97, Judgment (Merits), 21 November 2001, ECHR 2001-XI.
- ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, Decision, 12 December 2001, ECHR 2001-XII.
- ECtHR, *Issa and Others v. Turkey*, App. No. 31821/96, Judgment, 16 November 2004.
- ECtHR, *Isaak and Others v. Turkey*, App. No. 44587/98, Decision, 28 September 2006.
- ECtHR, *A. and Others v. the United Kingdom*, App. No. 3455/05, Judgment, 19 February 2009.
- ECtHR, *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Judgment, 7 July 2011.

Inter-American Human Rights System

- IACtHR, *Proposed Amendments to the Naturalisation Provisions of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984.

IACoHR, *Saldaño v. Argentina*, Report No. 38/99, Annual Report of the IACHR 1998 at 289, OEA/Ser.L/V/II.95 Doc. 7 rev.

IACoHR, *Coard et al. v. United States*, Case 10.951, Report No. 109/99, Annual Report of the IACHR 1999.

IACoHR, *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republica de Cuba ('Brothers to the Rescue')*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999).

IACoHR, *Carlos Florentino Molero Coca Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha v. Peru*, Case 11.182, Report No. 49/00, 13 April 2000.

IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003.

ICTY

ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

ICTY, Trial Chamber, *Prosecutor v. Milan Martić*, case no. IT-95-11, Decision, 8 March 1996.

ICTY, Trial Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Opinion and Judgment, 7 May 1997.

ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, case no. ICTY-94-1, Judgment, 15 July 1999.

ICTY, Trial Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"*, case no. IT-96-21-T, Judgment, 16 November 1998.

ICTY, Trial Chamber, *Prosecutor v. Furundžija*, case no. IT-95-17/1, Judgment, 10 December 1998.

ICTY, Trial Chamber, *Prosecutor v. Simić et al.*, case no. ICTY-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

ICTY, Trial Chamber, *Prosecutor v. Simić et al.*, case no. ICTY-95-9, Separate Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

ICTY, Trial Chamber II, *Prosecutor v. Milorad Krnojelac*, case no. IT-97-25-T, Judgment, 15 March 2002.

ICTY, Appeals Chamber, *Prosecutor v. Brđjanin and Talić*, case no. ICTY-99-36, Decision on Interlocutory Appeal, 11 December 2002.

ICTY, Trial Chamber II, *Prosecutor v. Radoslav Bradnin*, case no. ICTY-99-36, Judgment, 1 September 2004.

ICTR

ICTR, Trial Chamber I, *Prosecutor v. Jean-Paul Akayesu*, case no. ICTR-96-4, Judgement, 2 September 1998.

SCSL

SCSL, Appeals Chamber, *Prosecutor v. Brima, Kamara and Kanu*, case no. SCSL-04016, Decision on Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006.

ICC

ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, in Case of the *Prosecutor v. Thomas Lubanga Dyilo*, case no. ICC-01/04-01/06, Decision on the confirmation of charges, Public Redacted Version with Annex I, 29 January 2007.

ICC, Pre-Trial Chamber I, Situation in Darfur, the Sudan, ICC-02/05, Public Redacted Version of the Prosecutor's Application under Article 58: Annex A, 14 July 2008.

ICC, Trial Chamber I, Situation in the Democratic Republic of the Congo, in the Case of the *Prosecutor v. Thomas Lubanga Dyilo*, case no. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012.

ICC, Trial Chamber III, Situation in Central African Republic, in Case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, case no. ICC-01/05-01/08, Decision on the admission into evidence of items deferred in the Chamber's "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute", 27 June 2013.

Other

Eritrea Ethiopia Claims Commission, Partial Award – Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, between The State of Eritrea and The Federal Democratic Republic of Ethiopia, The Hague, December 19, 2005.

National

Supreme Court of Israel sitting as the High Court of Justice, *The Public Committee against Torture in Israel et al v. The Government of Israel et al*, HCJ 769/02, 11 December 2006.

Supreme Court of Israel sitting as the High Court of Justice, *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence*, HCJ 9132/07, 30 January 2008.

Supreme Court of Israel sitting as the High Court of Justice, *Physicians for Human Rights and others v. Prime Minister of Israel and others*, HCJ 201/09; *Gisha Legal Centre for Freedom of Movement and others v. Minister of Defence*, HCJ 248/09, 19 January 2009.

Supreme Court of Israel sitting as the High Court of Justice, *Anbar et al. v. GOC Southern Command et al.*, HCJ 5268/08; *Adalah, Legal Center for Arab Minority Rights in Israel et al. v. Minister of Defence et al.*, HCJ 5399/08, 9 December 2009.

National Legislation

Spain, *Ley 23/1998, de 7 de julio, de Cooperación Internacional para el Desarrollo*.

Switzerland, *Ordonnance sur l'aide en cas de catastrophe à l'étranger (OACata)*, October 24, 2001.

Switzerland, *Loi fédérale sur la coopération au développement et l'aide humanitaire internationales*, 1976.

EU Documents

Council

Council of the EU. *COUNCIL DECISION 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya)*. OJ L 89, 05 April 2011.

Council of the EU. *Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo*. OJ L 143, 11 June 2003.

Council of the EU. *Council Decision 2003/432/CFSP of 12 June 2003 on the launching of the European Union military operation in the Democratic Republic of Congo*. OJ L 147, 14 June 2003.

Council of the EU. EU Concept for Civil-Military Co-operation (CIMIC) for EU-led Military Operations. 11 July 2008. 11716/1/08 REV 1.

Council of the EU. *Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission: The European Consensus on Humanitarian Aid*. OJ C 25, 30 January 2008.

Council of the European Communities. *Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid*. OJ L 163, 02/07/1996, 0001-0006.

Commission

EU Commission. "Commission Staff Working Paper accompanying the document Report from the Commission to the European Parliament and the Council - Annual report on the European Union's Humanitarian Aid and Civil Protection Policies and their implementation in 2010." SEC(2011) 709 final. 10 June 2011.

European Commission, DG Humanitarian Aid. *Humanitarian Protection: DG ECHO's Funding Guidelines*. Brussels, April 21, 2009. ECHO 0/1/ML D(2009). Available at http://ec.europa.eu/echo/files/policies/sectoral/Prot_Funding_Guidelines.pdf (accessed February 24, 2011).

Other Selected Documents

Office of the United Nations Disaster Relief Co-Ordinator: Report of the Secretary-General: Addendum: Proposed Draft Convention on Expediting the Delivery of Emergency Assistance. A/39/267/Add.2 – E/1984/96/Add.2. 18 June 1984.

Internally displaced persons-Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57 – Compilation and analysis of legal norms, E/CN.4/1996/52/Add.2, 5 December 1995.

Report of the joint mission charged with investigating allegations of massacres and other human rights violations occurring in eastern Zaire (now Democratic Republic of the Congo) since September 1996. A/51/942. 2 July 1997.

Report of the Representative of the Secretary-General Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1997/39 – Addendum: Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement, E/CN.4/1998/53/Add.1, 11 February 1998.

Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39 – Addendum: Guiding Principles on Internal Displacement. E/CN.4/1998/53/Add.2. 11 February 1998.

Report of the Secretary-General pursuant to General Assembly resolution 53/35: The fall of Srebrenica. A/54/549. 15 November 1999.

Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda. S/1999/1257. 16 December 1999.

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General – Pursuant to Security Council Resolution 1564 of 18 September 2004. Geneva, 25 January 2005. Available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (accessed July 20, 2012).

Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1. A/HRC/3/2. 23 November 2006.

The Montreux Document – On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict. Montreux, September 17, 2008.

Report of the United Nations Fact Finding Mission on the Gaza Conflict. A/HRC/12/48. 15 September 2009.

Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council. A/HRC/15/25. 5 July 2010. Annex.

Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance. A/HRC/15/21. 27 September 2010.

International Code of Conduct for Private Security Service Providers. Geneva, November 9, 2010.

- The Public Commission to Examine the Maritime Incident of 31 May 2010 – The Turkel Commission. *Report – Part one*. January 2011. Available at <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> (accessed May 31, 2011).
- Turkish National Commission of Inquiry. *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*. Ankara, February 2011. Available at <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf> (accessed September 10, 2011).
- UN. *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*. 31 March 2011. Available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (accessed May 18, 2011).
- Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*. September 2011. Available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf (accessed June 20, 2012).
- Report of the independent international commission of inquiry on the Syrian Arab Republic*. A/HRC/21/50. 16 August 2012.
- Report of the independent international commission of inquiry on the Syrian Arab Republic*. A/HRC/22/59. 5 February 2013.
- Report of the independent international commission of inquiry on the Syrian Arab Republic*. A/HRC/23/58. 18 July 2013.
- Report of the independent international commission of inquiry on the Syrian Arab Republic*. A/HRC/24/46. 16 August 2013.

Context-Specific Civil-Military Guidelines

- “Code of Conduct for Humanitarian Assistance in Sierra Leone.” Reproduced as Annex I in *United Nations, United Nations Consolidated Inter-Agency Appeal for Sierra Leone: January-December 1999*. New York and Geneva: United Nations, 1998.
- UNAMA/IMTF (Integrated Mission Task Force). *Guidance On Use of Military Aircraft for UN Humanitarian Operations During the Current Conflict in Afghanistan*. 7 November 2001.
- UNAMA DSRSG-RRR and Designated Official for Security. *Relationships with Military Forces in Afghanistan – guidelines for UNAMA Area Coordinators and other UN personnel*. 2002.
- UN OCHA. *General Guidance for Interaction between United Nations Personnel and Military and Civilian Representatives of the Occupying Power in Iraq*, version 3.0. 8 May 2003.
- UN OCHA. *General Guidance for the Interaction between Humanitarian Organizations and Military Forces Operating in Liberia*. 29 October 2003.
- UN OCHA. *Guidelines for Humanitarian Organisations on Interacting With Military and Other Security Actors in Iraq*. 20 October 2004. Available at <http://www.unhcr.org/refworld/docid/4289f2f74.html> (accessed July 25, 2011).
- MONUC. *Guidelines for Interaction between MONUC Military and Humanitarian Organizations*. 8 June 2006. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1158649> (accessed July 20, 2011).
- UNMIL. *Guidance for Civil-Military Coordination in Liberia*. December 2006.
- UN RC/HC Sudan. *United Nations Civil Military-Coordination Guidelines for Sudan*. 23 April 2008.
- Afghanistan Civil Military Working Group. *Guidelines for the Interaction and Coordination of Humanitarian and Military Actors in Afghanistan*, version 1.0. 20 May 2008.
- UN OCHA. *Guidelines for UN and other Humanitarian Organizations on Interacting with Military, Non-State Armed Actors and Other Security Actors in Iraq*. August 2008. Available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1109265> (accessed July 25, 2011).

- UN Humanitarian Coordinator Chad and Force Commander EUFOR TCHAD/RCA. *Reference Document: Humanitarian Civil-Military Liaison Arrangements and Coordination Mechanisms during the Mandate of EUFOR Tchad/RCA*. 2009. Available at <http://ochanet.unocha.org/p/Documents/CivMil%20Ref%20Doc%20EUFOR%20TCHAD-RCA.pdf> (accessed August 30, 2012).
- UN HCT Mali. *Code de Conduite pour l'opérationnalisation de l'Assistance Humanitaire*. July 12, 2012. Available at <https://mali.humanitarianresponse.info/en/system/files/documents/files/Mali%20-%20Code%20de%20Conduite%20pour%20l%27Operationalisation%20de%20l%27Assistance%20Humanitaire.pdf> (accessed September 10, 2013).
- UN HCT Mali. Humanitarian Country Team Position on the Interaction between the Humanitarian Community and Armed Forces Present in Mali. 26 February 2013. Available at [https://docs.unocha.org/sites/dms/Documents/2012%2003%2021%20Position%20Paper%20HCT%20Mali%20-%20Interaction%20with%20Armed%20Forces%20\(EN\)%20Draft%20TE.pdf](https://docs.unocha.org/sites/dms/Documents/2012%2003%2021%20Position%20Paper%20HCT%20Mali%20-%20Interaction%20with%20Armed%20Forces%20(EN)%20Draft%20TE.pdf) (accessed September 10, 2013).
- UN HCT Pakistan. *Guidelines for Civil-Military Coordination*. 5 March 2010.
- UN OCHA. *Guidance on the Use of Foreign Military Assets to Support Humanitarian Operations in the Context of the Current Crisis in North Africa*. 25 March 2011. Available at http://reliefweb.int/sites/reliefweb.int/files/resources/73165994747DBE518525785E0066C2CE-Full_report.pdf (accessed August 20, 2011).
- UN OCHA, *Guidance on the Use of Foreign Military and Civil Defence Assets (MCDA) to Support Humanitarian Operations in the Context of the Current Military Intervention in Mali*, 01 February 2013. Available at <https://docs.unocha.org/sites/dms/Documents/130201%20Guidance%20on%20the%20Use%20of%20MCDA%20in%20Mali%20FINAL.pdf> (accessed September 10, 2013).