

Humanitarian Use of Force?

The Right to Afford Humanitarian Assistance in Internal Armed Conflicts

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Résumé

La présente étude traite du conflit d'intérêts qui constitue les situations où l'assistance humanitaire se voit empêchée d'être fournie dans un conflit armé de caractère non-international à une population civile en détresse puisque l'Etat sur le territoire duquel se trouve cette population refuse une telle livraison en invoquant sa souveraineté.

En cherchant de l'orientation aux sources du droit international humanitaire, cet essai fait face au fait que celles-ci n'offrent aucune réponse claire à propos de cet enjeu. D'un côté, les termes de l'article 18 du Protocole II stipulent clairement que l'aide ne puisse pas être distribuée contre le gré des belligérants. Ceci est promu par le fait que des Etats semblent tenir à la notion de souveraineté. De l'autre côté, d'après l'interprétation de cet article par la CIRC, une autorité responsable ne peut pas arbitrairement refuser d'octroyer la distribution de l'aide sur son territoire. En plus, la communauté internationale a réagi pour que l'on fournisse de l'assistance humanitaire. Il est clair, cependant, qu'un refus à l'assistance humanitaire puisse faire partie de l'actus reus d'un acte criminel international, comme par exemple, le crime contre l'humanité que constitue l'extermination.

Ayant analysé l'état du droit international humanitaire en cette matière de façon critique, cet essai est plutôt attiré par l'enforcement de l'aide humanitaire, tenant compte que cette dernière constitue l'aspect réel du conflit d'intérêts présenté ci-haut.

En traitant de l'implémentation de l'aide humanitaire de deux angles différents, l'un d'agents et l'autre de manières potentielles pour l'effectuer, l'avis est soutenu qu'il importe de ne pas laisser tomber la souveraineté étatique à la légère, mais plutôt de la garder sous des formes d'aujourd'hui, soumise aux organismes pacifiques internationaux concernant certains domaines. Car l'enforcement de l'assistance humanitaire comporte, en dernier recours, l'usage de la force, sous forme de sanctions ou de force armée. Ceci, conjointement au fait que les pouvoirs majeurs militaires, économiques et politiques ne semblent pas hésiter à exploiter les incertitudes au sein du droit international décrites ci-haut, résulte au risque que l'aide humanitaire voile la promotion des intérêts nationaux.

Afin d'éviter l'abus de l'assistance humanitaire à des fins clandestines, il est impératif que des règles claires soient élaborées et qu'une révision des provisions applicables au Conseil de Sécurité soit mise en œuvre en ce qui concerne par qui et sous quelles circonstances l'aide peut être enforcée en absence du consentement de l'Etat

affecté. Il est suggéré de considérer un rôle consultatif de la Cour Pénale Internationale auprès du Conseil de Sécurité en entreprenant ce processus. Cette dernière proposition aboutirait à une clarté légale qui, à son tour, diminuera les possibilités d'abuser de l'assistance humanitaire.

Cet essai soutient l'opinion que le Conseil de Sécurité devrait garder la responsabilité ultime de prendre toutes les décisions portant à l'emploi de force. En ayant épuisé tous les moyens non-violents pour distribuer l'aide humanitaire, la première mesure de force ainsi considérée devrait être des sanctions ciblées, c'est-à-dire adaptées spécifiquement pour affecter exclusivement l'autorité responsable et élaborées pour être moins nuisibles à la population civile.

List of abbreviations

API	Protocol Additional to the Geneva conventions of the 12 th August 1949, and relating to the protection of victims of international armed conflicts, Protocol I, of the 8 th June 1977
APII	Protocol Additional to the Geneva conventions of the 12 th August 1949, and relating to the protection of victims of non-international armed conflicts, Protocol II, of the 8 th June 1977
CICR	Comité international de la Croix-Rouge
ECOWAS	Economic Community of West African States
EU	European Union
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
GCI	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of the 12 th August 1949
GCII	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, of the 12 th August 1949
GCIII	Geneva Convention Relative to the Treatment of Prisoners of War, of the 12 th August 1949
GCIV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of the 12 th August 1949
GRL	Goods Review List (S/2002/515)
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia (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)

ICTR	International Criminal Tribunal for Rwanda (International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994)
IHL	International Humanitarian Law
ILC	International Law Commission
JNA	Yugoslav People's Army
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OCHA	Office for the Coordination of Humanitarian Affairs
ONUMOZ	Opération des Nations Unies au Mozambique
OR	Official Record of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts
OSCE	Organization for Security and Cooperation in Europe
Rome Statute	Rome Statute of the International Criminal Court, of the 17 th July 1998
SNA	Somali National Alliance
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	The United Nations Children's Fund
UNPROFOR	United Nations Protection Force (Bosnia-Herzegovina)
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
USA	United States of America
USC	United Somali Congress
USD	United States Dollar

Scope of essay

The fundamental question upon which the argumentation in the present study is based is that of State sovereignty versus the relief of civilian people necessary for their survival in cases of non-international armed conflict. Are authorities in such conflicts free to refuse humanitarian assistance to be delivered on their territory?

Subject to the limitations of this matter presented below, this paper will elaborate on the question primarily from two angles: Part One will give a theoretical overview of provisions of international humanitarian law (IHL) relevant to the subject; and Part Two will treat the issue practically by the way of a critical discussion on the enforcement of humanitarian assistance.

i) When examining the different sources of IHL, the body of rules concerning international armed conflicts appears very elaborate in contrast to its equivalent for non-international armed conflicts. Generally, the protection afforded by Art 3 common to the Geneva Conventions¹ (GCI, GCII, GCII and GCIV or GCs together) cannot be compared with that given by the imposing body of rules applicable to international armed conflicts², (the GCs with Additional Protocols contain close to 600 articles of which only 29 apply to internal conflicts³). As for the Rome Statute of the International Criminal Court⁴ (the Rome Statute), it refers to the GCs. Particularly, Art 70 of Additional Protocol I⁵ (API) questions States' absolute discretion in approving humanitarian assistance in a far more pronounced manner

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces on the Field, August 12, 1949 (GCI); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (GCII); Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (GCIII) and; Geneva Convention Relative to the Protection of Civilian Persons on Time of War, August 12, 1949, (GCIV), UNTS, vol.75 no.970-973

² Denise Plattner, "Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law?", *Int'l Review of the Red Cross*, no.288, p.249-263, 1992 at p.257.

³ S. Boelaert-Suominen, "Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards A Uniform Enforcement Mechanism for all Armed Conflicts?", *Journal of Conflict and Security Law*, Vol. 5, No.63, 2000, at section 5, footnote 31

⁴ Rome Statute of the International Criminal Court, July 17, 1998, (in force July 1, 2002).

⁵ 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, UNTS vol.1125 no.17512

than its equivalent for non-international conflicts, namely Art 18 of Additional Protocol II⁶ (APII). Neither the Genocide Convention⁷ nor Art 7 of the Rome Statute codifying crimes against humanity distinguishes between international and non-international conflicts.

An evaluation of the state of IHL concerning humanitarian assistance in non-international armed conflicts thus appears legally challenging. All the more, this becomes true when considering the increasing number of civil wars at the end of the last century.

ii) A general right for people in dire need to receive humanitarian assistance is naturally a sympathetic notion. However, its actual realization in all situations where it would emerge seems very distant in today's state of world affairs. In any case, a pursuit of its existence would be better placed within a discussion on economical and social human rights, than through interpretation of IHL. A right to give humanitarian assistance or an obligation for a State to receive it, on the other hand, appears better suited for a humanitarian law approach.

Being predominantly concerned with IHL, this paper will avoid when possible the discussion of a potential human right to humanitarian assistance. Still, adjacent paradigms of international law will be considered when it serves the purpose of this study.

iii) For a right to give humanitarian assistance, and an obligation upon an affected State to accept that it be distributed on its territory, not to be a hypothetical utopia, manners of enforcing the delivery of the aid come into play. Different incitements ranging from purely pacific means, *e.g.* international diplomatic pressure, over the imposing of sanctions, to ultimately the use of force may be deployed in order to extract consent to the distribution of humanitarian aid from the concerned State. In this context, especially as concerns armed enforcement of humanitarian assistance, issues similar to those in connection with the concept of humanitarian intervention could emerge. However, one would have to proceed with caution within the borderline between the enforcement of humanitarian assistance and humanitarian intervention: whereas the former solely aims at the physical distribution of

⁶ 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, UNTS vol.1125 no.17513

⁷ Convention on the Prevention and Punishment of the Crime of Genocide, December 8, 1948, UNTS vol.78 no.277.

medicines, foodstuffs and other materials essential for the survival of individuals, the latter may also constitute a reaction to serious human rights abuses and thus in a more pronounced manner come to target also the political power of a territory as such. It is nevertheless clear that the enforcement of humanitarian aid and humanitarian intervention entail similar questions, *e.g.* the one of misuse.

While the issue of enforcement of humanitarian assistance thus is essential, considerable emphasis will be put into the different aspects of it, as well as into different routes of enforcement. However, the present study will not embark on the long-discussed issue of right to humanitarian intervention as such, but merely focus on the enforcement of humanitarian aid. Nevertheless, it would be rather pusillanimous to dodge the evident proximity between or the inter-twining of the two subjects, as well as the lessons that can be learned by one from the other in relevant parts.

Introduction

*If there had been enough assistance to collect the wounded in the plains of Medola and from the bottom of the ravines of San Martino, on the sharp slopes of Mount Fontana, or on the low hills above Solferino, how different things would have been! There would have been none of those long hours of waiting on June 24, hours of poignant anguish and bitter helplessness, during which those poor men of the Bersagliere, Uhlans and Zouaves struggled to rise, despite their fearful pain, and beckoned vainly for a letter to be brought over to them, and there would never have been the terrible possibility of what only too probably happened the next day – living men being buried among the dead!*⁸

*

In 1960, the independent State of Somalia emerged from colonial rule as British and Italian Somali territories joined. From the 21st of October 1969, when he seized power through a *coup d'état*, up until 1991, General Mohamed Siad Barre ruled the country as a dictator. Somalia sides with other numerous third-world countries as a hot spot of the Cold War. In the 1970s, having formerly backed Mogadishu, the Soviet Union switched its support to the revolutionaries who had overthrown Haile Selassie in Ethiopia⁹. From November 1977 to February 1978 Soviet and Cuba provided military support to evict Barre's troops from the Ogaden region in Ethiopia which Somalia had invaded in late summer 1977¹⁰. In response to this support, the USA tacitly put Somalia in the Western camp as the Carter administration charged the Soviet Union with employing Cuban proxy forces to expand its interests in Africa¹¹.

⁸ Henry Dunant, *A Memory of Solferino*, 1862. Dunant, the founding father of the International Committee of the Red Cross (ICRC), appalled by the atrocities embedding the soldiers of the clash of Austrian and Franco-Sardinian forces during the War of Italian Unification in 1859, wrote this book in which he called for what was later to become the International Red Cross. Although his pity in this instance was for the suffering of the combatants, it still bears on the mayhem of human lives as such, and the call is one for human pathos in times of war in general.

⁹ Martin Walker, *The Cold War: A History*, New York, 1995, p.238

¹⁰ James G. Hershberg, *Anatomy of a Third World Cold War Crisis: New East-Bloc Evidence on the Horn of Africa, 1977-1978*, available at: www.gwu.edu/~nsarchiv/CWIHP/BULLETINS/b8-9a5.htm , visited on 10 January 2004.

¹¹ *Ibid.*

Barre's military dictatorial rule provoked armed opposition movements and in 1990 internal hostilities began in the country, driving Barre out of power but not from the thus ignited civil war. From the United Somali Congress (USC) fractioned the Somali National Alliance (SNA), the former led by Ali Mahdi Mohamed and the latter by Mohamed Farah Aideed. There were then three parties to the internal conflict. They all pursued the scorched earth policy¹². The country descended into total anarchy, a human disaster was a fact and by 1992 the famine peaked. The U.S. Center for Disease Control and Prevention verified that mortality rates were "among the highest ever documented by a population survey among famine-affected civilians"¹³. Canadian photo journalist Philip Maher describes a fragment of the human tragedy:

*"But Somalia, I don't know if people really understand how bad Somalia was. I remember, there was a school bus, they took out all the seats, and each morning, the bus drove through the streets of Bidoa, picking up the dead bodies off the street. And then they'd go outside of town, and there were guys digging holes, and they would bury the bodies. Somalia was a horrible, horrible situation. You would leave the compound, and there would be dead people, ten feet from the compound. My first time into Somalia, I watched somebody die nearly every day."*¹⁴

Humanitarian assistance was offered by numerous humanitarian organizations, but its delivery was hindered by the looting of humanitarian aid and even direct attacks on aid workers.

¹² Russia offers the two classical examples of the successfulness of this strategy. The evicting of both Napoleon and Hitler from its territory (surely at the cost of great human suffering) owes a lot to this tactic. It must be noted, however, that neither one of the Russians' adversaries had planned, nor were they equipped for a lengthy expedition and the temperature was to the advantage of the Russians. They were also both international armed conflicts. Without diminishing the human anguish that the scorched earth strategy resulted in, it might still be argued from a strictly legal viewpoint that starvation was not as expressly prohibited then as it is today, see Art 54(2) of API, see however the provision in Art 54(5) of that Protocol on imperative military necessity. It is noteworthy that the equivalent as concerns internal armed conflicts, Art 14 APII, does not offer any exemptions for military necessity.

¹³ Walter Clarke, *Learning From Somalia*, Boulder: Westview Press, 1997, p.47

¹⁴ Quotation from interview with Philip Maher 5 February 2003 on World Vision's homepage: http://www.worldvision.org.nz/news/archive2003/March2003/20030131_05.asp . Visited on 2 October 2003.

On the 3rd December 1992, the United Nations Security Council (UNSC) classified the tragedy, “further exacerbated by the obstacles being created to the distribution of humanitarian assistance”, as a threat to international peace and security¹⁵. Determined, then, “to establish as soon as possible the necessary conditions for the delivery of humanitarian assistance wherever needed in Somalia”¹⁶, the UNSC used the powers invested in it by Chapter VII of the UN Charter to authorize and call for “all necessary means to establish a secure environment for humanitarian relief operations in Somalia.”¹⁷ The call was heeded by 22 countries who all in all deployed about 31 500 troops and led by the United States which sent approximately 20 000 troops¹⁸, under the name ‘Operation Restore Hope’. Initially, the operation experienced some success in the delivery of relief aid. Soon, however, the UN mission degenerated into a battle with warlords of local clans. The confidence of the Somali population in general and the tribal belligerents in particular for the mission plunged¹⁹. There were allegations of soldiers under UN command committing numerous atrocities on the Somali population, which were amplified following the publication of several photographs showing Belgian paratroopers dangling a Somali boy over an open fire and urinating in the face of an injured or dead Somali²⁰. There were direct attacks on UN personnel by SNA, and an actual bounty hunt for Aideed was commenced. The unsuccessful attempt to capture him took the lives of 300 Somalis and 40 UN troops. Naturally, this questioned the neutrality of the operation, since the UN effectively had taken sides in the internal conflict. The Somali malcontent was shown to the world by the pictures of the battered body of a dead American soldier being dragged through the streets of Mogadishu. On the 2nd of March 1995 the last UN forces left Somalia, following U.S. withdrawal a year earlier. The Somali conflict was, as pronounced by the then Secretary-General Boutros-Boutros Ghali, the first time the UNSC

¹⁵ S/RES/794 (1992), op.3

¹⁶ *Ibid.* op.10

¹⁷ *Ibid.* operative part para.10 and 11

¹⁸ Daniel Williams, David Lancaster, ”Continuing Somali Violence May Delay U.S. Withdrawal”, in *The Washington Post*, February 26, 1993, (Vol. 113, No. 9), p.2

¹⁹ It has been argued that some grave mistakes on behalf of the U.S and UN troops were made during their efforts to bridge the cultural gap that existed when they first intervened. For example, when U.S military forces distributed a leaflet as part of a psychological campaign to convince Somalis of the military's good intentions, there were a number of translation errors in the text. For example, the word “adoonka” in the text literally translates to mean, “slave.” It should have been translated to mean “United Nations.” So, instead of reading “United Nations,” the brochure read, “slave nations”. The Somalis interpreted this to mean the intervening nations thought of the Somalis as slaves. See Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, New York: Transnational Publishers, 1997, p. 22.

²⁰ *Het Laatste Nieuws*, April 16, 1997. The pictures also circulate the net, e.g. at <http://www.cnn.com/WORLD/9704/17/belgium.somalia/> . Visited on 2 October 2003.

had used force for “exclusively humanitarian internal reasons”²¹. In 2002, the non-governmental organization (NGO) Médecins Sans Frontières (MSF) estimated that 72% of the Somali population had no access to healthcare and 77% had no access to clean, potable water; that an estimated two million people had been displaced or killed since the civil war started in 1990; that infant and maternal mortality rates were the tenth and third highest in the world respectively; that around 500,000 people were currently threatened by severe food shortages; and that life expectancy was 44 years for men and 47 years for women²².

‘Operation Restore Hope’ might have had some initial success, and it might well be argued that the humanitarian situation in Somalia was better after 1995 than it was in 1992²³. Others are of the opinion that delivering humanitarian assistance was harder after the troops had been in Somalia, because they had worsened the hostile environment²⁴. It is noted in this context that there was a ratio of one to ten between humanitarian and military costs²⁵.

Notwithstanding these arguments, the Somali case is illustrative for the risks and issues inevitably connected with the enforcement of distribution of humanitarian assistance without the consent of the belligerent parties of a conflict. Firstly, impartiality might prove unsustainable when the enforcing mission finds itself forced to choose side when one belligerent party is obstructing the relief actions. This fosters local mistrust of the enforcing mission, which evidently will be catalyzed into malice in the eventuality of any atrocities committed by soldiers of that mission. Such misbehavior, as well as the *lacunae* of delicacy on behalf of the enforcing agents, will naturally also trigger the spite of an otherwise friendly population. These factors taken together might even worsen the war situation, the

²¹ Mary Ellen O’Connell, “Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy”, 336 *Columbia Journal of Transnational Law* (1997), p.487.

²² Médecins Sans Frontières, *Bare Bone Facts About Somalia – an MSF briefing document*, published December 9, 2002. Available at: <http://www.msf.org/countries/page.cfm?articleid=EBA330D0-5A01-4054-BF01154541756AD4>. Visited on 2 October 2003.

²³ Chester A. Crocker, “The Lessons of Somalia: Not Everything Went Wrong”, in *Foreign Affairs*, May/June 1995

²⁴ Thomas Weiss “Overcoming the Somalia Syndrome—’Operation Rekindle Hope?’” *Global Governance: A Review of Multilateralism and International Organizations* vol.1 no.2, 1995, p.13

²⁵ This was noted by former UN Coordinator for Humanitarian Assistance Jan Eliasson in several public speeches in late 1993, referenced in Antonio Donini, “Beyond Neutrality: On the Compatibility of Military Intervention and Humanitarian Assistance”, *The Fletcher Forum*, Summer/Fall 1995, p.34

consequences of which the action was aimed to improve²⁶. Secondly, other reasons for engaging in a relief action always lurk behind the curtain: strategic geographical positioning (in the case of Somalia, control of the southern entry to the Red Sea and the Suez Canal); the maintenance of a military budget (especially in the USA, a pressure factor for the government); and the control of natural resources have been seen to boost conflicts all over Africa, attracting foreign interests at the cost of civilian sufferance. The motives of misuse of the enforcement of humanitarian assistance as a veil for security policy, imperial ambitions or economic preying are numerous. Thus – whether the enforcing powers are drawn into it by necessity of circumstances, or for selfish reasons have envisaged a partial role from the beginning – distributing humanitarian assistance by force inexorably border political goals.

²⁶ See to this, *e.g.* Weiss, *op.cit.*, who on the Somali situation states: "Two years and four billion dollars later, the warring parties are rested, better armed, and ready to resume civil war".

Part One – Humanitarian Assistance Law

Chapter I – Fundamental issues

This chapter will elaborate on the necessary initial definitions that need to be made within the limits of the essay, chiefly concerning the concept of humanitarian assistance as such.

Primarily, in order to better comprehend the magnitude of the conflict of interests between State sovereignty and humanitarian assistance, it may prove utile to make a brief historical review on its origin. This outlook serves to highlight the profoundness of State sovereignty and the reluctance to yield it to whatever end, even humanitarian purposes.

Historical perspective

The notion of State sovereignty can be traced back to the Peace of Augsburg of 1555 and the recognition of the princely State. The supremacy of the State within its sovereignty was implicit in the basis of the Peace of Augsburg – *cuius regio eius religio* (“he who rules, his is the religion”). That constitutional principle, apart from ending Charles VIII ambitions for *Respublica Christiana*, entailed that the religion of a State was its internal affair. In its extension, it effectively had the consequence of excluding any outside interference in the relations with the prince and his subjects²⁷. Albeit formally only applicable to the Holy Roman Empire, this practice spread to neighboring Christian European States, and it “carried as a corollary, another principle which rulers readily acknowledged and proclaimed though they did not always scrupulously observe it: non-interference by one State in the

²⁷ Philip Bobbitt, *The Shield of Achilles – War, Peace and the Course of History*, London, 2002, p.487

affairs of another.”²⁸ The *cuius regio eius religio* principle was subsequently reaffirmed and ameliorated in the treaties of the Peace of Westphalia in 1648 to embrace not only religious but also political matters²⁹, thus incorporating the State sovereignty of its internal affairs into the Grotian foundation of the system of international law, in principle existing to date.

Attempts to convene consensus on issues susceptible to affect the principle of non-interference – as it grew to be – in the internal affairs of a State were made after the Congress of Vienna in 1815. At the initiative of Tsar Alexander I, Russia, Austria and Prussia entered into the Treaty of the Holy Alliance which subsequently all European States except for the Ottoman Empire joined³⁰. On a base of common Christian, conservative and autocratic values³¹, the State parties would intervene if a revolution occurred within the territory of anyone of them. Certainly, the authors of the Holy Alliance had the extroverted revolutionary enterprise of Napoleon fresh in mind. It cannot be ignored that the Holy Alliance indeed provided an international guarantee of the powers of the incumbent rulers; a façade for suppressing any internal resistance towards what might have been unjust regimes. In relation to this, it must be noted that interference in a State’s internal affairs according to the Holy Alliance was reserved for the enhancement of the strength of the challenged government, not – as was feared when provisions on delivery of humanitarian assistance surfaced in 1949 – interference to help whatever party to the internal conflict, including government adversaries. Towards the end of the nineteenth century, the Lieber Code of 1863³² was elaborated. It was subsequently used as the principal basis for the development of the Hague Conventions of 1899 and 1907 which in turn influenced later developments in IHL³³. Although the Lieber Code contains some provisions that could be accorded in civil

²⁸ Adam Watson, “European International Society and Its Expansion,” in *The Expansion of International Society*, H. Bull and A. Watson ed., Oxford, 1984, p.15

²⁹ Bobbitt, *op.cit.* p.506

³⁰ Treaty between Austria, Prussia and Russia, Paris 18-26 September 1815, re-printed in Michael Hurst, ed., *Key Treaties for the Great Powers, 1815-1914*, vol I, Newton Abbot, 1972, pp.96-97; Per Cramér, *Neutralitet och Europeisk Integration*, Stockholm, 1998, p.157

³¹ Cramér, *ibid.*

³² *Instructions for the Government of Armies in the Field*, 24 April 1863, prepared by Francis Lieber during the American Civil War, and promulgated by President Lincoln as General Orders No 100. Reproduced in Schindler and Toman, eds., *The Laws of Armed Conflicts*, Henry Dunant Institute, Geneva, 1998.

³³ Louise Doswald-Beck and Sylvain Vité, “International Humanitarian Law and Human Rights Law” *International Review of the Red Cross* no. 293, 1993, p.94-119 p.98

wars, these instruments avoid any reference to the relations between a State and its own nationals and solely applies to international warfare³⁴.

During the first half of the 20th century, the principle of sovereignty was enshrined in Art 2(1) of the Charter of the United Nations³⁵ (the Charter) as the principle on which that organization is based as well as in Art 8 of the Convention of Rights and Duties of States (the Montevideo Convention)³⁶. However, through Arts 2(7) and 25 together with Chapter VII of the Charter, the member States of the UN agreed to subject their sovereignty to the Security Council in matters that threaten international peace and security. This was a basis, and a reason, for the international community to intervene in a State's internal affairs. Having experienced the terrifying events of another World War, the international community turned to natural law thoughts first initiated by, amongst others, John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1778). Human rights thus made an entrance on the world scene, through the 1948 Universal Declaration on Human Rights, as well as the preamble of the UN Charter. In the sense of the proclaimed universality of human rights, the international community at least expressed an intention to be concerned about a State's internal affairs with its nationals. During the 1968 Tehran International Conference on Human Rights, the United Nations considered for the first time the application of human rights in armed conflict³⁷.

During the negotiations leading up to the 1949 Geneva Conventions, in spite of the horrific experiences of the non-international aspects of the world wars, as well as the Spanish Civil War³⁸, the concern was still that extension of international law protections to armed

³⁴ G. Aldrich, "The laws of War on Land", *American Journal of International Law*, Vol. 94, 2000, p.54

³⁵ San Francisco, June 26 1945, 1 UNTS XVI as amended.

³⁶ Montevideo, December 26 1933, 165 LNTS 19, not in force, however considered representing of customary international law, see D.J. Harris, *Cases and Materials on International Law*, Sweet and Maxwell, London 1991, p.102-104.

³⁷ In its Resolution XXIII, the Conference defined humanitarian law as the expression of human rights in times of armed conflict, see René Jean Dupuy, "L'assistance humanitaire comme droit de l'homme contre la souveraineté de l'Etat", *Assisting the Victims of Armed Conflicts and Other Disasters*, ed. Frits Kalshoven, p.27-34, at p.30.

³⁸ Which surely "contributed to a political willingness to at least superficially regulate some aspects of civil war", James G. Stewart, "Towards A Single Definition of Armed Conflict in International Law: A Critique of Internationalized Armed Conflict", *International Review of the Red Cross*, Vol. 85, No.850, p.317

opponents of a government would enhance the status of those opponents³⁹. Nevertheless, the conference succeeded in moving the *a priori* internal situation of a non-international armed conflict from the exclusive jurisdiction of the State concerned to a matter of international concern through treaty law, by the inclusion of Art 3, common to the four GC⁴⁰. This established a keystone of humanitarian law applicable in non-international armed conflicts⁴¹.

It can be argued that the diplomatic conference 1974-1977 leading up to the adoption of the two Protocols additional to the 1949 Geneva Conventions was, in a certain sense, influenced by the human rights law discussions in Tehran nine years earlier. What is certain, though, is that the dreadful events in Nigeria 1967-1970 (the 'Biafra conflict') did not leave the international community unaffected. Moreover, the conflict served as one of the first examples of the complexity and issues arising from the distribution of humanitarian aid in internal disputes, *inter alia* the question of access to the territory of the civilian victims⁴². The denial of access for humanitarian organizations to territories controlled by federal forces as well as those held by Biafran separatist rebels, contributed to the death of between two and three million persons, mostly from hunger and disease⁴³. The Nigerian government had placed a total blockade on the region of eastern Nigeria (Biafra), inspecting all humanitarian aid and personnel, and the Biafran forces refused to accept humanitarian assistance that had been thus inspected as an interference with its independence⁴⁴.

³⁹ Mary Ellen O'Connell, *Humanitarian Assistance in Non-International Armed Conflict: The fourth Wave of Rights, Duties and Remedies*, A Report prepared for the Third Meeting of Experts on Humanitarian Protection in Non-International Armed Conflict, International Institute on Humanitarian Law, Stockholm, September 19-23, 2001, p.4

⁴⁰ However, Common Art 3 fell far short of the ICRC drafts, see Jean S. Pictet, ed, *Commentary on the Fourth Geneva Convention*, published under the general editorship of ICRC, Geneva, 1958, p.34. In this context it also has to be borne in mind that the ICRC "...was venturing on much less solid ground than in the past. Care had to be taken not to undermine the validity of Geneva Law or the credit attaching to it by introducing rules whose observance could not be assured." Jean S. Pictet, ed., *Commentary on the Second Geneva Convention*, p.32-34, 1960.

⁴¹ See Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.1324, para.4359 and e.g. Pictet, *Commentary on the Fourth Geneva Convention*, p.25-44

⁴² Nathaniel H. Goetz, "Humanitarian Issues in the Biafran Conflict", *Journal of Humanitarian Assistance*, April 2001, <http://www.jha.ac/articles/u036.htm>, p.1.

⁴³ Dan Jacobs, *The Brutality of Nations*, Knopf, 1987, p.4

⁴⁴ Mary Ellen O'Connell, *op.cit.*, p.8.

However, States took care to include in APII – which treats internal conflicts – a safeguard of their sovereignty in Art 3:

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

Significantly, it was the Nigerian delegation that suggested Art 4(2) of the Draft Protocol II (Art 3(2) APII) on the prohibition of using the Protocol as a façade for intervention by other States be interpreted in a broad sense and that it be amended to include intervention by “all other organizations”⁴⁵. That proposal naturally gave rise to criticism from other delegations, as it could comprise also the United Nations. Nigeria therefore proposed to efface the reference in the Draft Art 4 to intervention by “other States”, and leave it as it was adopted, “justification for intervening”⁴⁶.

Nevertheless, and notwithstanding this safeguard, the fact remains that APII “develops and supplements”⁴⁷ the Common Art 3 of the GC, and in doing so, it manifested the status of the principles founding the latter by confirming the (albeit limited) intrusion on State sovereignty stipulated in that Article.

In more recent time, it would seem that States linger on the notion of sovereignty, although expressing their deepest concern for the sufferings of victims of conflicts and in some cases also a will to respond to such emergencies. Some say that such response has created a doctrine of humanitarian intervention, subjecting State sovereignty to human rights. Just as the Holy Alliance had a common base of values supporting intervention in its State parties’ internal affairs (Christianity, conservatism and autocracy), humanitarian intervention would

⁴⁵ OR/I/239 (Official Record of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts)

⁴⁶ *Ibid.* See also Rosemary Abi-Saab, *Droit Humanitaire et Conflicts Internes, Origines et évolution de la réglementation internationale*, Institut Henry-Dunant, Genève, 1986, p.161.

⁴⁷ APII Art 1

also take place on the grounds of common values, namely universal human rights. In its Guiding Principles on the strengthening of the coordination of humanitarian emergency assistance of the United Nations, the UN General Assembly (UNGA), states that “the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations”⁴⁸, and it calls upon States to “facilitate the work”⁴⁹ of humanitarian organizations.

Without claiming to be exhaustive, it would seem that the situations where the conflict between State sovereignty and the access of humanitarian assistance would emerge, essentially could be narrowed down to the following: 1) the warring party possesses the essential provisions along with possibilities to distribute them, yet pursues a deliberate policy of denying these provisions to the civilian population; 2) the warring party has the essential provisions and is eager to distribute them, but that is hampered by its enemy⁵⁰ and; 3) the warring party does not possess the essential provisions but still denies the distribution of the essential provisions to its civilian population, or hampers the passage of aid destined for its adversary’s territory.

Criteria defining humanitarian assistance

In order to be labeled ‘humanitarian’, the relief actions offered to a civilian population in distress by international organizations or State agencies must be “provided in accordance with the principles of humanity, neutrality and impartiality”⁵¹. These principles are enshrined in the GCs Common Art 3, as well as in the Additional Protocols; concerning non-international conflicts, Art 18 (2) of APII reads as follows:

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

⁴⁸ A/RES/46/182 of 19 December 1991, Annex, para.3

⁴⁹ *Ibid.* para.6. This same pattern of reaffirming State sovereignty and desiring speedy response to the need for humanitarian assistance can also be found in UNGA’s resolution A/RES/45/100 of 14 December 1990.

⁵⁰ First and second point from: Yoram Dinstein, “The Right to Humanitarian Assistance”, in *Naval War College Review*, vol.47, 2000

⁵¹ A/RES/46/182 of 19 December 1991

The principles are also found in the Statutes of many NGOs as well as in the Statutes of the International Red Cross and Red Crescent Movement⁵² and in the Guiding Principles on the Right to Humanitarian Assistance elaborated by the International Institute of Humanitarian Law in 1993⁵³.

Materially, the relief actions comprise all supplies that are essential for the survival of the civilian population, such as foodstuffs and water, medical supplies, clothing, fuel, shelter, bedding, hospital equipment, *etc.*

Humanity

In a strictly legal context, the exigency that the aid be ‘humanitarian’ signifies that the only criterion for the distribution of relief is the need of the suffering. Consequently, the assistance will not contribute to either side of the conflict in which it operates, but its solemn goal is to, as expressed in the Fundamental Principles of the International Federation of Red Cross and Red Crescent Societies, “to prevent and alleviate human suffering wherever it may be found”.

The principle of humanity has also been said to imply that humanitarian assistance can never be imposed “*contre le gré des populations, des groupes, ou de la communauté qui souffrent*”⁵⁴. Given the evident anguish of the population in the situations at hand, such a conclusion appears superfluous. Surely, there will be situations where people seemingly refuse aid, but given the basic level of humanitarian need on which this issue would occur, it seems highly probable that the pure denial by a civilian population of aid essential to its existence would in fact be caused by elements suppressing or controlling that population, in one way or the other. Therefore, in cases where a denial on behalf of the civilian population is noticeable, inquiries ought to be made as to the real reason for the refusal and the actual living conditions of the population.

⁵² See, *e.g.* Art 5(2)(d) and 5(3) of the Statutes.

⁵³ See para.5 of the preamble.

⁵⁴ Bernard Kouchner, *Le mouvement humanitaire*, *Le Débat*, No. 84, March/April 1995, p.30-39

Impartiality

Humanitarian assistance must be impartial meaning that the aid cannot be distributed on a discriminatory basis. Accordingly, no preference or disadvantage founded upon nationality, race, religious beliefs, class or political opinions must be given by the humanitarian organization.

In its ruling in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*⁵⁵, the International Court of Justice (ICJ) stated that

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 Nicaragua, not merely to the *contras* and its dependents.⁵⁶

This does not entail, however, that all must be treated equal or that age or even sex may not be decisive factors for who is granted relief since those two attributes might very well affect the need for help of a certain group of people or individuals. As mentioned above, the level of need is the sole criterion for the distribution of humanitarian assistance. In fact, the principle of impartiality does not necessarily prohibit even unilateral actions undertaken for the benefit of only one Party to the conflict if the circumstances prove to be such – *e.g.* the geographical situation – that this is the only feasible way in which a certain humanitarian actor could provide the assistance; otherwise “it would be stupid to wish to force [the actor] to abandon the action”⁵⁷.

It must be noted that, read *e contrario*, the judgment of the ICJ implies that had the provision of humanitarian assistance been given without discrimination, it would not have been condemned as an intervention in the internal affairs of Nicaragua. Earlier in its ruling, the Court had already stated that “provision of strictly humanitarian aid to persons of forces in

⁵⁵ *Nicaragua v. The United States of America*, ICJ 27 June 1986

⁵⁶ *Ibid.* Para. 243

⁵⁷ Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.818, para.2803. This commentary on Art 70 API concerns the concept of neutrality and would thus have equal bearing on non-international conflicts.

another country [...] cannot be regarded as unlawful intervention or as in any other way contrary to international law”⁵⁸.

It would seem logical to require that the delivery of humanitarian assistance be subject to reasonable conditions of proportionality. Without neglecting the suffering of all civilian populations experiencing the hardships of civil war, the limited resources allotted to humanitarian actors should be allocated so as to provide the basic needs for as many victims as possible. In this context, voices have been raised that the humanitarian aid is being distributed partly on grounds other than the sole criterion of need; especially the role of mass media (the ‘CNN Factor’) has been highlighted in this discussion⁵⁹. This would entail what can be called ‘indirect impartiality’. In this sense, the impartiality principle does not only apply individually to each relief organization, but also to the ‘humanitarian community’ as a whole, and imposes a duty of co-operation between humanitarian actors.

A factor which in a stealthier way is susceptible to menace the impartiality is the financing of a humanitarian venture. In reality, humanitarian organizations may see themselves forced to prioritize one disaster at the cost of another, since donors might have preferences as to the allocation of the aid.

In some conflicts, *e.g.* Bosnia-Herzegovina⁶⁰ or Rwanda, a policy of so called ethnic cleansing was pursued, including *inter alia* massive forced deportation, detention and/or killing and raping of members of certain ethnic groups. The outrages on human dignity and freedom that the realization of ethnic cleansing entails may constitute genocide and crimes against humanity, as well as serious violations of the GCs and the laws or customs of war. It has been suggested that, for the instigators and planners of such a policy, the provision of humanitarian aid to the civilian population they seek to evict will, from their point of view, be discriminate *per se* because their policy of ethnic cleansing is⁶¹. However, as will be shown

⁵⁸ Para.242

⁵⁹ See *e.g.* *Ignorerade kriser, bortglömda människor: Enligt vilka kriterier fördelas humanitært bistånd?*, Swedish Médecins Sans Frontières, May 2003, http://www.lakareutangranser.org/files/ignorerade_kriser.pdf, visited on 2 October 2003.

⁶⁰ As to the distinction between international and non-international conflicts, see below.

⁶¹ See Noëlle Quéniévet, “Humanitarian Assistance: a right or a policy?”, *The Journal of Humanitarian Assistance*, www.jha.ac/articles/a030.htm, p.13.

further below, this is not so much a legal problem as it is a practical one since it will have serious implications on the possibilities to obtain the warring parties' consent to receive humanitarian aid. It would however be absurd if the illegal nature of the conduct of hostilities could also imbrue the intent and actions of the humanitarian organizations.

Neutrality

The third pillar of humanitarian assistance is closely associated with the foregoing principle of impartiality and stipulates that the relief action must be neutral in that it may never be integrated into a political process or linked to the use of military means. It has been categorically said that assistance imposed by armed force as a part of a unilateral action is interference in the conflict and therefore does not meet the criterion of neutrality⁶². Conversely, it has been argued that the armed protection of the assistance would not divest it of its neutral character, provided that the affected States have fully approved the principles and procedures of the armed escort and that the protection is solely aimed at bandits and common criminals⁶³. It would seem clear that the fact that an affected State has arbitrarily refused the humanitarian assistance would not menace the neutrality of the aid, as long as it is not accompanied by the use of armed force (*cf.* above on ethnic cleansing). When the relief action is undertaken by a third-party State after persistent arbitrary refusal and fruitless negotiations, some are of the opinion that it would constitute a legitimate countermeasure, and thus not amount to interference⁶⁴, (see however below on reciprocity under non-international armed conflicts and also on enforcement).

The International Committee of the Red Cross (ICRC) along with many authors is of the opinion that Art 18 APII confers a right on organizations fulfilling the above mentioned principles to provide humanitarian assistance; the affected State is not entitled to give its arbitrary refusal to such assistance⁶⁵. Supporting that view, the question of enforcement of humanitarian assistance becomes perhaps less controversial than if advocating a strict

⁶² O. Corten and P. Klein, *Droit d'ingérence ou obligation de réaction?*, University of Brussels, 1992, p.220

⁶³ Conclusions of a joint working group of the ICRC and the Federation of the Red Cross and Red Crescent Societies and the ICRC: "Resolutions of the Council of Delegates", *International Review of the Red Cross*, No. 297, Nov-Dec 1993, p.477-478.

⁶⁴ O. Corten and P. Klein, *op.cit.* p.144

⁶⁵ Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.1479, para.4885

exigency of State consent, since the enforcement in the former case would *met en œuvre* an action which is in accordance with international humanitarian law. According to a more pragmatic view, however, and notwithstanding opinions taken on the consent issue, it is not unlikely – lacking the affected State’s approval and having exhausted other remedies – that the required aid can only be delivered by way of force. In such cases, it is important that also the actor enforcing humanitarian aid be neutral. The United Nations Protection Force (UNPROFOR) in Bosnia-Herzegovina shows how this was at least formally achieved whereas the NATO intervention in Kosovo illustrates an example to the contrary.

The United Nations Protection Force (UNPROFOR), was initially established as a peace-keeping force with the consent of the warring parties Croatia and Yugoslavia⁶⁶. Albeit thus deployed in Croatia it was envisaged that UNPROFOR continue its peacekeeping activities also in Bosnia-Herzegovina⁶⁷, where it was mandated to ensure the delivery of humanitarian aid, especially to the besieged city of Sarajevo⁶⁸. In its resolution 770, acting under Chapter VII of the UN Charter, the UNSC called on States to take “all measures necessary” to facilitate the delivery of humanitarian aid to Sarajevo and other parts of Bosnia-Herzegovina⁶⁹. In further discussions, it was however decided that this task should be entrusted to UNPROFOR⁷⁰. UNPROFOR was to also support the United Nation High Commissioner for Refugees (UNHCR) in its delivery of humanitarian aid, especially through protection of convoys⁷¹. UNPROFOR was thus a peacekeeper, and as such it had no Chapter VII mandate, but it was at the same time an enforcer of humanitarian assistance in which capacity it did have such mandate. Any confusion as to the role of UNPROFOR would thus have concerned when it was acting as an enforcing agent of humanitarian aid and when it was not. But seeing that in the latter cases it would still have been under an

⁶⁶ UNPROFOR was established under S/RES/743 of 21 February 1992 following the signing by representatives from the Croatian forces and the JNA of a cease-fire accord on 2 January 1992. The deployment of UNPROFOR followed the established principles of consent from the warring parties, see John R. Snider, *War In Bosnia: The Evolution of the United Nations and Air Power in Peace Operations*, CSC 1997, at www.globalsecurity.org/military/library/report/1997/Snider.htm visited on 10 January 2004.

⁶⁷ United Nations Department of Public Information, *Former Yugoslavia – UNPROFOR*, prepared September 1996, available at www.un.org/Depts/dpko/dpko/co_mission/unprof_b.htm visited on 10 January 2004

⁶⁸ Following S/RES/761 of 29 June 1992, para.1ss, the UNSG was authorized to use UNPROFOR to deliver humanitarian assistance.

⁶⁹ S/RES/770 of 13 August 1992, op.2.

⁷⁰ United Nations Department of Public Information, *ibid.*

⁷¹ This was mandated through S/RES/776 of 14 September 1992, op.2, which notably did not made any reference to Chapter VII of the UN Charter.

obligation to stay neutral, UNPROFOR would seem susceptible to remain so also in its capacity of enforcer of humanitarian aid.

The Kosovo crisis on the other hand offers an example of neutrality put in question. On the 24th of March 1999 the North Atlantic Treaty Organization (NATO) began its air strikes against targets in the Federal Republic of Yugoslavia (FRY), without any authorization from the UNSC to do so. Subsequently, the UNHCR itself made a public request to NATO for assistance with the humanitarian aid operation⁷². From a neutrality point of view, this created the awkward situation that “the dominant humanitarian player was a party to the conflict, the very antithesis of an impartial actor”⁷³, and the request certainly put the neutrality (and perhaps confidence) of UNHCR into question. Allegedly, the consequences were *inter alia* that refugees in Albania and the Former Yugoslav Republic Of Macedonia (FYROM) were benefiting from aid at the expense of refugees in the FRY⁷⁴.

There is, however, a common problem for both UNPROFOR and NATO pertaining to their roles as enforcers of humanitarian assistance, which is equally relevant to any actor in that position. That problem is that these agents may very likely find themselves in a situation where they cannot stay neutral to the relevant armed conflict as they would have to take action (militarily or economically) against the subject(s) hindering the aid. When these subjects are not just common criminals, but have a self-perception of being parties to the armed internal conflict, how could enforcing agents solve their task of ensuring the delivery of humanitarian aid by force, when it becomes critical, without engaging these parties? In these cases, the mission of the enforcers is flawed with an inherent lack of neutrality. The risks of this non-neutrality to spill over⁷⁵ to the humanitarian agents must be minimized because lack of neutrality divests a relief organization of its humanitarian character for a good reason, namely in order to close the gates to exploitation of relief actions for other than purely humanitarian ends⁷⁶. If it is accepted that humanitarian assistance in certain cases

⁷² Toby Porter, “The partiality of humanitarian assistance – Kosovo in comparative perspective”, *Journal of Humanitarian Assistance*, www.jha.ac/articles/a057.htm, p.4.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, p.6-7, see the *Report of the Inter-Agency Needs Assessment Mission dispatched by the United Nations Secretary General to the Federal Republic of Yugoslavia*, Letter of the UN Secretary General S/1999/662 of 9 June 1999.

⁷⁵ How this can happen will be discussed more detailed below under the Introductory remarks to Part Two.

⁷⁶ The potential misuse of humanitarian actions which will be discussed further in Part Two.

must be forcibly delivered, it is thus imperative to sustain a clear-cut distinction between the agents providing the humanitarian assistance and the agents enforcing it. It is equally important to prudently elaborate a set of clear rules regulating when, how and by who humanitarian aid could be enforced.

Perhaps neutrality lies in the eyes of the beholder. A humanitarian enterprise may be perceived as neutral by some whilst it is rejected by others as taking sides in the armed conflict. Arguably, the opinion of an outside, disinterested person concerning the neutrality might be of particular relevance for the legality of a decision to enforce humanitarian relief (*cf.* below on an Alternative procedure for enforcement decision-making) whereas the attitudes of the victims and warring parties on the ground will affect the efficiency of such an action.

Right of initiative

An organization or relief action that fulfills the criteria of humanity, impartiality and neutrality is defined as humanitarian. Conversely, should it subsequently prove to be lacking any of these three conditions, it will cease to be humanitarian. The offer of services by a humanitarian organization, as defined above, benefits from the presumption that it “shall not be regarded as interference in the armed conflict or as unfriendly acts”⁷⁷. Common Art 3 and Art 18 APII give to such organizations what usually is referred to as a ‘right of initiative’, in the sense that the belligerents retain complete freedom to refuse or accept an offer of humanitarian assistance, but the aid may not in itself be considered as a hostile act or as intervention⁷⁸. The extent of the right of initiative as well as the bordering of the enforcement of humanitarian assistance to humanitarian intervention has been hinted above and will be discussed in detail further below.

⁷⁷ This principle, pronounced concerning international armed conflicts in Art 70 API, seems to apply generally to relief actions, Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.1345, para.4445

⁷⁸ *Ibid.*

The contents of denial of humanitarian assistance

For the purposes of this essay, it is understood that a decision by a responsible authority to deny humanitarian assistance will be backed up by actions on its part to realize the denial. Naturally, the manners in which humanitarian assistance can be impeded are numerous and diverse. The obstruction can be carried out by numerous different actors, such as government agents, paramilitary groups, bandits or even members of the civilian population who are not the intended beneficiaries of the aid. In addition, especially in the case of civil wars between different paramilitary factions and militias, it may from time to time be difficult to distinguish people in their capacity of civilians and combatants. There are also various means of hindering aid from reaching its beneficiaries, for example by excessive supervision, blockades, taxes or intimidation of aid workers. A statement from the responsible authority that the security of humanitarian organizations cannot be guaranteed is often a very effective method of hampering the humanitarian work⁷⁹. The purposes behind a denial of humanitarian assistance can also be multiple. In cases when a policy of ethnic cleansing is pursued, the starvation of a civilian population may further that policy. Furthermore, belligerents may confiscate supplies in order to nourish their troops, instead of feeding ‘useless mouths’⁸⁰. However, one cannot accept the simplistic view that all obstruction is done with a purely cruel intent; often the reason for not accepting the relief action is that the latter is not deemed impartial or neutral to the conflict. Reasons are often multifaceted and may include legitimate military considerations twinned with clandestine ones.

⁷⁹ Christa Rottensteiner, “The denial of humanitarian assistance as a crime under international law”, *International Review of the Red Cross*, Vol. 81, 1999, p.555-582, at p.557

⁸⁰ *Ibid.*

Chapter II – Provisions of international law

The present chapter will first seek the existence of an obligation to receive humanitarian assistance within the main legal instrument on the area, namely the Geneva Conventions with Additional Protocols. Then, the denial of humanitarian aid as an international crime under other provisions of international law will be discussed.

Non-international armed conflicts

If an elucidation to the conflict of interests between relief actions and State sovereignty is to be pursued within the conventional sources of IHL, it will first be necessary to verify the existence of an armed conflict. For the purposes of this essay, that conflict would be of a non-international character. These two characteristics are rudimentary conditions of Common Art 3 and Art 1 APII.

A general particularity of the GCs and APs is that once ascertained applicable, they impose obligations upon the High Contracting Parties regardless of the ‘justness’ of the war or reciprocity, see Art 1 common to the four GCs, which reads:

The High Contracting Parties undertake to respect and to ensure respect for the present Convention *in all circumstances*. (Emphasis added)

This means that one warring State cannot avoid the application of the GCs on the basis that its adversary State does not respect them. The ordinary practice of reciprocal obligations, as stipulated in Art 60 of the Vienna Convention on the Law of Treaties⁸¹, is not suited for this field of international law, seeing that the original beneficiaries (*i.e.* the civilian populations) are not legal parties to the conventions. The International Criminal Tribunal for the former Yugoslavia (ICTY) has ascertained that the bulk of humanitarian law lays down obligations

⁸¹ UNTS, vol. 1155, p.331, adopted on 22 May 1969, entered into force on 27 January 1980.

which are not based on reciprocity⁸², but that these rules are of an *erga omnes* nature. However, some immediate reciprocity is advocated by certain authors⁸³.

This ‘universality’ of the GCs and subsequently the Common Art 3⁸⁴, also applies to the insurgent party of a non-international armed conflict: “the dissident armed group may reasonably be expected to apply the rules” of the APII⁸⁵. To this see, also further below on the different parties to an international armed conflict.

Armed conflict

Common Art 3 does not contain a definition of what is an armed conflict and in the absence of clarity, it gave rise to a variety of interpretations and in practice its applicability was often denied⁸⁶. Seeking to overcome these issues, Art 1 APII stipulates the following conditions in order to determine whether an armed conflict is present thus leading to the application of the Protocol:

1. This Protocol, which develops and supplements Article 3 common to [the GCs] without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of [API] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This 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.

The threshold where APII becomes applicable is thus intended to be at a certain degree of intensity of the material conflict⁸⁷. Moreover, one of the belligerents must be the armed

⁸² The Trial Chamber in *Prosecutor v. Kupreskić*, Case No. IT-95-16-T, Judgement 14 January 2000, para. 517.

⁸³ René Provost, *International Human Rights and Humanitarian Law*, Cambridge Studies in International and Comparative Law, 2002, p.139-140.

⁸⁴ Jean Pictet *et al.* *Commentary on the Fourth Geneva Convention*, p.36-37

⁸⁵ Provost, *op.cit.*, p.157

⁸⁶ Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.1348, para.4448

⁸⁷ *Ibid.*, p.1343, para.4438

forces of the State Party, which entails that the Protocol will not apply to conflicts between two warring dissident groups. Thus, not all cases of non-international armed conflict are covered by APII, as is the case in Common Art 3; the scope of the former is narrower.

As envisaged by the second paragraph of Art 1 APII, internal sporadic acts of violence do not constitute armed conflict in a legal sense, even if the government should find itself forced to resort to police or military action in order to restore law and order⁸⁸.

An interesting point worth mentioning in this context and linked to the principles of humanitarian assistance is the recognition by third-party States (or other international actors, for that matter) of a situation of belligerency under APII. It may be argued that, in situations where the *de facto* circumstances are not such as to fulfill the pre-requisites of Art 1 APII, such a recognition could constitute an act interfering with the internal affairs of the affected State. The last paragraph of Common Art 3 offers partly a solution to this by stating that the application of that Article does not affect the legal status of the parties to the conflict. Since all references to 'Parties to the conflict' had been removed from the original Draft of APII, the proposal of a similar provision was dropped from the Draft⁸⁹.

Non-international character

I will be useful for the purposes of the present study to dwell awhile on the boundaries between international and non-international armed conflicts, because their distinction is not always clear, nor is it exempt of dispute. The delimitation is, nevertheless, an important one, since it may be critical to the application of the vastly elaborate body of rules applicable in international conflicts, or leave the civilian population with recourse only to Common Art 3 and APII.

As a mutual starting point, both Common Art 3 and Art 1(1) APII (see quotation above), define the non-international character of an armed conflict – as its appellation suggests –

⁸⁸ *Ibid.*, p.1319, para.4341

⁸⁹ *Ibid.*, p.1344, para.4439

negatively: an armed conflict that is not of an international character. However, as mentioned above, Art 1(2) APII leaves the application of APII more restrained.

Noteworthy is Art 1(4) API which places peoples fight against colonial domination and alien occupation and against racist regimes in their exercise of self-determination, as enshrined in the UN Charter in the realm of international conflicts. Thus, the concept of international conflict far from always equals inter-State warfare and does not presuppose that the belligerents must be States. The right of self-determination falls however outside the framework of this paper.

There might be cases when an insurgent has such control over a territory and the people living there, that it amounts to Statehood according to Art 1 of the Convention on the Rights and Duties of States⁹⁰. In these cases, the body of rules applicable to international armed conflicts should apply. But there are less clear-cut situations when the boundaries of an internal conflict are obscured by the ‘internationalization’ of the conflict. As is well known, many hot clashes during the Cold War were in fact ‘proxy wars’, sustained to a greater or lesser extent by the superpowers and/or their allies, (Korea, Vietnam and Angola to name only a few). Thus, a *prima facie* internal conflict may, at least in a legal context, be considered international.

In the aforementioned *Nicaragua Case*, the ICJ stipulated what has come to be known as an ‘effective control’ test in order to determine whether the involvement of another State amounts to a degree that will render the armed conflict ‘internationalized’ or not. If there was “dependence on the one side and control on the other” it would be right to equate, for legal purposes, the *contras* with an organ of the United States Government, or as acting on behalf of that government⁹¹. The ICJ did not consider the *contras* a State agent of the United States, since the violations of humanitarian law perpetrated by the *contras* “could be committed by members of the *contras* without the control of the United States”⁹². When

⁹⁰ This was perhaps the case of the Serbian province of Bosnia-Herzegovina, *Republika Srpska*, during the Bosnian war 1992-1995. It is important to keep in mind in this context that the acquiring of Statehood is independent of recognition from other States, Art 3 of the Montevideo Convention.

⁹¹ *Nicaragua v. The United States of America*, ICJ 27 June 1986, para.109

⁹² *Ibid.* para.115

pronouncing itself on this issue in the *Tadić Appeal Judgment*⁹³, the Appeals Chamber of the ICTY disagreed on the level of State control required and found the ‘effective control’ test unpersuasive⁹⁴. Firstly, because a condition of strict control in all situations would not be consonant with the rules governing State responsibility⁹⁵, especially Art 8 of the Draft on State Responsibility and the same rules as provisionally adopted in 1998 by the ILC Drafting Committee⁹⁶. The very purpose of this rule is to see to it that the States cannot avoid responsibility simply by ordering the acts entailing liability to a non-State individual or party. Secondly, the ICTY Appeals Chamber argued that the ‘effective control’ test was at variance with judicial and State practice⁹⁷. The Appeals Chamber endorsed a less strict view in favor of flexibility seeing that situations of this kind will not be static.

Adding to the complexity, armed conflicts may also be ‘mixed’ in composition, that is, partly showing characteristics of internal armed conflicts, but at the same time presenting features of international armed conflicts. As confirmed by the ICTY Appeals Chamber, this was the case in the war in Bosnia-Herzegovina⁹⁸. However, this ‘mixed’ approach embraced by the Appeals Chamber is not without issues, and it did not follow the tendencies in the doctrine to treat an armed conflict as one entity and let it be either international or non-international in its entirety⁹⁹.

The ICTY Appeals Chamber based its reasoning for supporting this ‘mixed’ view in the *Tadić* Case on the following *reductio ad absurdum* argument¹⁰⁰. If the conflict between the Bosnian Government and Bosnian Serb forces (including the Yugoslav National Army, JNA, and Bosnian Serb action on behalf of the JNA) was regarded as international in its entirety, atrocities committed by the Bosnian Government towards the Bosnian Serb civilians would

⁹³ *Prosecutor v. Duško Tadić*, IT-94-1, Judgment of 15 July 1999

⁹⁴ *Ibid.* para.115

⁹⁵ *Ibid.* para.117

⁹⁶ Draft Articles on Responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 1980, vol. II (2). The Draft Articles are annexed to UNGA resolution A/56/83.

⁹⁷ *Tadić* judgement para.124ss.

⁹⁸ *Prosecutor v. Duško Tadić*, the Appeals Chamber Decision on the Defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para.73(3)

⁹⁹ Christopher Greenwood, “International Humanitarian Law and the Tadic Case, II. The Existence and Nature of the Armed Conflict in Bosnia-Herzegovina”, *European Journal of International Law*, Vol. 7 (1996) No.2

¹⁰⁰ *Prosecutor v. Duško Tadić*, the Appeals Chamber Decision on the Defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para.76

be of an internal character, seeing the Bosnian nationality of the latter who would thus not benefit from the wide protection of GC IV, whereas atrocities committed by the JNA (or, when applicable, the Bosnian Serbs acting as an agent of that army) towards Bosnian civilians would be an international conflict, affording the Bosnian civilians the protection of that convention. This would place the Bosnian Serb civilians at a legal disadvantage *vis-à-vis* the Bosnian central authorities.

The one reasonable way to legally dissect this conflict would seem to be to consider the conflict between the JNA (including the Bosnian Serbs when applicable) and the Bosnian Government as international and the one between the Bosnian Serbs (not on behalf of the JNA) and the Bosnian Government as internal in character. Then, the fact still remains that atrocities committed against the Bosnian Serb civilians by the Bosnian Government would not afford the former the comprehensive protection of GC IV, but merely the much narrower protection of APII. Those attacks would namely be a part of the internal conflict between Bosnian Serbs and the Bosnian Government. If the attacks were upon Bosnian Serbs forming part of the JNA, they would be upon the other warring party (and not a civilian population) of the international conflict¹⁰¹. In neither case could the Bosnian Serbs be afforded the protection of GC IV as the civilian population of the adversary of the Bosnian Government. Thus, the difference in protection remains even after the proposed legal dissection of the conflict¹⁰².

The unfortunate circumstance that a substantial population of enemy ethnicity (for the lack of a better expression) happens to find itself being of the nationality and within the territory of a State that is at war with another State that represents that ethnicity, can hardly be remedied merely through the concept of 'mixed' internal-international armed conflicts. A theoretical solution, it seems to me, would have been to keep the distinction of the parties as suggested above, but to recognize both the conflict between the JNA and the Bosnian Government as well as the one between the Bosnian Serbs and the Bosnian Government as international¹⁰³.

¹⁰¹ And as such, perhaps fall under the protection of GC I or GC III.

¹⁰² As argued by Greenwood, *op.cit.*

¹⁰³ However, recognizing statehood for the *Republika Srpska* was admittedly a rather sensitive issue.

The discussion above serves to illustrate that there may be complex armed conflicts where the GC set of rules will afford different protection to different civilian victims of such a conflict. This reveals a certain lack of neutrality inherent in the GC body.

Refusal of State consent

At the outset, it must be emphasized that, according to the principle of subsidiarity, the responsibility to ensure the proper nourishment and other essentials of the population of a country first and foremost rests upon the State. Relief societies are only called upon to play an auxiliary role by assisting the authorities in this task¹⁰⁴.

Limitations on the right of denial

As mentioned above under the description of the principle of neutrality, humanitarian organizations have a ‘right of initiative’ in offering relief actions. Concerning non-international armed conflicts, this is pronounced in Art 18 (1) APII:

Relief societies located in the territory of the High contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services (...)

Art 18(2) AP II *in fine* stipulates that if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, relief actions “shall be undertaken subject to the consent of the High Contracting Party concerned”.

A strict reading of these provisions clearly necessitates the agreement of the affected State to receive the humanitarian assistance, in order for the humanitarian actors to be able to perform their functions.

¹⁰⁴ Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.1477, para.4871. This principle is equally enshrined *e.g.* in Art 55 GC IV.

Concerning international conflicts, Art 59 GC IV states that when the whole or part of the population of an occupied territory is inadequately supplied the Occupying Power “shall agree to relief schemes” on behalf of that population. This would seem to be the most imperative stipulation of the GC complex with respect to affected States’ lack of possibility to arbitrarily refuse humanitarian aid. Art 70 API asserts that relief actions “shall be undertaken, subject to the agreement of the Parties concerned in such actions”. The consent clause in Art 70 API was included during the diplomatic conference 1974-1977 essentially out of a concern to protect the national sovereignty of the State receiving the relief.¹⁰⁵ However, it was clearly stated that this reservation did not imply that the Contracting Parties could refuse to give their agreement for arbitrary reasons.¹⁰⁶ Thus, the denial of access of humanitarian assistance in international armed conflicts must be founded on valid grounds.

Returning to internal armed conflicts, the ICRC Commentary on Additional Protocol II states that the fact Art 18 APII requires consent “does not mean that the decision is left to the discretion of the parties”¹⁰⁷. The Commentary then goes on to exemplify this by putting forward that denial of access to relief societies would amount to a violation of Art 14 APII prohibiting starvation as a method of warfare¹⁰⁸. It also points to the authoritative in the expression “shall be undertaken”, appearing also in other versions of the text, *e.g.* “*seront entreprises*”.

When the living conditions for the civilian population are such as those described in Art 18(2) APII (“undue hardship owing to a lack of the supplies essential for its survival”) humanitarian aid will indeed make the difference between whether civilians starve or not. However, even accepting the Commentary’s assumption that starvation in all circumstances would be used as a method of warfare¹⁰⁹ (but emphasizing that it indeed could be), its argumentation deserves a few comments. Firstly, it is contradictory to a clear and express provision of the Article that does not appear to be open to interpretation, at least not to the

¹⁰⁵ Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.819, para.2805

¹⁰⁶ OR/II/SR.87, para.27

¹⁰⁷ Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.1479, para.4885

¹⁰⁸ *Ibid.*

¹⁰⁹ The State might even believe that it is rendering its inhabitants a service by excluding help from the enemy. “Method of combat” is a vague term and could certainly be interpreted as including many measures, perhaps even defensive ones, but it would have to be directly connected to the conduct of hostilities and not merely to the general fact that a war is raging.

extent suggested. As indicated by the Commentary, this leads to a contradiction within the APII: a State could be in breach of Art 14 but in compliance with Art 18(2) if it refused to give its consent to the delivery of humanitarian aid essential to the survival of the civilian population on the insurgent's territory with the purpose of weakening the rebellion. That State would starve civilians as a method of warfare in violation of Art 14, but have the right to refuse the aid under Art 18(2). Secondly, the analysis of Art 18(2) *in fine* which this contradiction entails evidently would have to be carried out in the light of the humanitarian concerns underlying the whole GC complex, but in order to be fair and truly *bona fide* an interpretation must also beware of the fact that the Contracting States did envisage a difference between the rules applicable in international and non-international armed conflicts (see the historical perspective above). Moreover, States still appear to sustain this distinction: drawing on the same subject as the commentary's example, it is not accidental that the Rome Statute does not treat the willful impeding of relief supplies as the war crime of starvation concerning non-international conflicts¹¹⁰ (see further below under starvation as an international crime).

There are some indications with differing merits pointing towards the ICRC interpretation of Art 18 APII that States are not free to deny humanitarian assistance. Firstly, being one of the most important actors on the humanitarian scene and one of the initiators of the APs, the ICRC could hardly endorse any other standpoint, which they moreover share with many other actors on the international scene¹¹¹. In this capacity, the opinion of the ICRC is naturally also of value for the legal *status quo* of the APs. Secondly, in its ruling in the aforementioned *Nicaragua* case, the ICJ stated that the "provision of strictly humanitarian aid to persons of forces in another country [...] cannot be regarded as unlawful intervention or as in any other way contrary to international law"¹¹², which is in line with the presumption according to Common Art 3 and Art 18 APII (see above under 'Right of initiative') that the aid as such is not to be regarded as interference in the armed conflict or as unfriendly acts.

¹¹⁰ Art 8(2)(b)(iii) and (xxv) compared to Art 8(2)(e)(iii) of the Rome Statute. See Rottensteiner, *op.cit.*, p.568.

¹¹¹ A fairly recent example of the opinion that sovereignty should yield in certain cases, pertaining also to the discussion on humanitarian intervention below, is the Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, sponsored by the Canadian government. The Commission endorses the view that the primary responsibility of State sovereignty is to protect its people, the disregard of which entails a responsibility for others to intervene.

¹¹² Para.242

The finding that the provision of ‘pure’ relief would not be “contrary to international law” hints to that anyone delivering humanitarian aid in the absence of State consent does not engage in an illegal act. However, it cannot equally be deducted from the ruling that the State refusing its consent to the aid thus legally delivered engages in an illegal act on its part. Moreover, it would seem very bold to conclude that the ICJ referred to more than the delivery of relief as such, *i.e.* not including all the measures to be undertaken to implement it, which might very well entail the use of force. The authors of the GCs certainly did not envisage an enforcement action. Nevertheless – and thirdly – the UNSC has taken such enforcement action on several occasions (see below under ‘Enforcement’) in cases where the responsible authority has refused the aid to be delivered. However, such action was not necessarily altogether in accordance with the rules governing the UNSC. Furthermore, even if the Council should be considered a reliable interpreter of international law despite its highly political nature, its basis for interference was that a threat to international peace and security was at hand. Nevertheless, this does not extinguish the fact that there have been cases where sovereign rights have been subjected to humanitarian assistance. This is further supported by the cases where States have acted unilaterally in response to the obstruction of humanitarian aid, or at least under that pretext, albeit very doubtfully adhering to international law in doing so. The question may be asked, however, if the UNSC or individual States would be prepared to take such action in all potential cases, notwithstanding the country in which they were to intervene, *e.g.* a permanent Member of the Council.

Another important aspect of the consent issue in a non-international context is who shall give the consent to humanitarian assistance being delivered. The diction of Art 18(2) *in fine* APII requires the consent only of the “High Contracting Party concerned” (*i.e.* the legal government responsible for foreign affairs) and not that of its internal adversary. It would thus seem that a certain inequality between the belligerent parties is inherent in the text of Art 18 APII (and consequently in Common Art 3), potentially threatening the principle of neutrality. In the light of the historical preservation of State sovereignty, this provision is nevertheless not surprising since a requirement to obtain approval also from a rebellious political or military entity exercising the effective control over a territory within the (former) boundaries of the affected State Party, would be to *a priori* recognize the opponents of that

government. However, as noted above, an insurgent party falling under the application of APII according to its Art 1 is determined on the basis of whether that belligerent has, to a certain extent, the *de facto* control over a territory. It would then be rational to consider such an insurgent also a party “concerned” in the sense of Art 18 (2) *in fine*. Consequently, a High Contracting State would only be “concerned” and its consent thus required if the aid would have to pass over the territory that it itself controlled¹¹³ and not when taking the tour over land controlled exclusively by an insurgent. For example, the consent of the Sri Lankan government was thus in theory not needed for the Indian operation in 1987 to provide aid to the Tamils under attack in the Jaffna region by Sri Lankan government forces. Seeing that the food and medical supplies had to be accompanied by Indian military jets into Sri Lankan airspace in order to reach the Tamil population¹¹⁴, this example shows the implications of the enforcement of humanitarian assistance in reality. Therefore, approval of all parties to an internal armed conflict may indeed prove essential to deliver the aid in real life (which is illustrated also *e.g.* by the Biafran conflict) because both governments and insurgents will consider themselves “concerned”, and they both will possess means to physically impede any unwanted assistance.

An issue in relation to the question treated in the preceding paragraph, is the one of burden of argumentation. Following documents from the UNGA and UNSC, the burden of argumentation rests upon the party refusing humanitarian aid¹¹⁵.

In cases where a civil war has raged for a long time, it might prove difficult to categorize any of the warring factions under Art 1 APII. In such events, the ICRC Commentary suggests that consent could be presumed, because the salvage of the civilian population from any further anguish is then of “paramount importance and should not suffer any delay”¹¹⁶.

¹¹³ Michael Bothe, Relief Actions: “The position of the Recipient State”, *Assisting the Victims of Armed Conflicts and Other Disasters*, ed. Frits Kalshoven, p.91-97, at p.94

¹¹⁴ Sri Lanka prevented the boats that would ferry Red Cross supplies were to enter its waters.

¹¹⁵ This was expressed by Swedish authorities on public international law, Pål Wrangé and Göran Melander, during the Seminar on Humanitarian Assistance held by the Swedish government’s reference group for issues of public international law in cooperation with the Swedish Institute of International Affairs the 2nd December 1999.

¹¹⁶ Jean Pictet *et al.*, *Commentary on the Additional Protocols*, p.1479, para.4884

Notwithstanding any affirmations that Art 18 TPII has achieved status as customary international law¹¹⁷, it would appear dubious to equally assert that the substance of such a rule is in accordance with the ICRC interpretation, especially in the light of Art 2(4) and 2(7) of the United Nations Charter and lacking any explicit decisions on the issue¹¹⁸. Even though States rapidly condemn other States for not granting access to humanitarian aid¹¹⁹ and even though States have taken actions to enforce humanitarian aid when impeded, it deserves to be reiterated that it remains uncertain if they would not uphold their own sovereignty when faced with a similar situation themselves. The *usus* and *opinio juris* elements of an international customary rule are after all the State's own acts and legal convictions, not what they believe should be applicable to all other States but themselves.

It would certainly be desirable that States be encouraged to give interpretative declarations to the APs and/or enter into treaties with the UN to the effect that they clearly give up their (potential) sovereign rights to deny humanitarian assistance other than for clearly specified reasons. The mentioned Guiding Principles on the Right to Humanitarian Assistance, elaborated by the International Institute of Humanitarian Law could in relevant parts stand model for such declarations or treaties, at least insofar as they deal with a right to provide humanitarian aid. Principle 10 states that "all authorities will grant the facilities necessary for humanitarian assistance to be provided" and Principle 6 gives the States and organizations concerned a right to undertake "all necessary means" to ensure access to the aid in situations where that is being refused (see further below on the issue of enforcement). This would naturally require that States have confidence in the neutrality of the humanitarian operation, which is also a prerequisite stated in the preamble of the mentioned Guiding Principles.

¹¹⁷ The ICTY Appeals Chamber found in *Tadić*, (Decision 2 October 1995) that "the Additional Protocol II [...] can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law", para.117.

¹¹⁸ The ICTY Trial Chamber I concluded in *Prosecutor v. Pale Strugar et.al.*, Case No. IT-01-42-PT, Decision on Defence Preliminary Motion Challenging Jurisdiction (7 June 2002) that Art 13 APII doubtlessly represented customary international law in that it prohibits attacks on civilians, para.21. Seeing that Art 13 is the portal to Part IV of APII in which Art 18 is also found, some relevance of this decision upon the status of Art 18 could perhaps be drawn by way of interpretation. Still, it explicitly refers to direct attacks on civilians.

¹¹⁹ To mention only one example, condemnation of the refusal of both sides in the Biafra conflict for not agreeing on the delivery of relief was universal, George A. Mudge, "Starvation as a Means of Warfare", *International Law*, vol.4 1970, p.255-264

In conclusion, APII does not give any clear guidance on whether there exists a right to provide humanitarian assistance according to international humanitarian law. Surely, the notion of such a right is pleasant and profitable for mankind. In its attempt to approach the problem pragmatically, the present paper will save any conclusions on a right to deliver humanitarian aid until several other aspects of the issue have been discussed, especially the enforcement of such a potential right.

Illegality of a State's refusal to give consent

Even if we accept the notion that Art 18 APII does contain a right to provide humanitarian assistance, the potentially vast and blurry scope of what are 'valid reasons' for the denial will still provide a loophole for States to deny the access of humanitarian assistance in reality. It is clear that refusals that would entail violations of the Common Art 3 and APII (*e.g.* the prohibition of starvation in Art 14 APII) would not be valid. The principle of proportionality might also be of some assistance as to determine the validity of the denial.

There may also be cases when the subjective element on the part of the individuals in the refusing authority amounts to the *mens rea* of certain international crimes. Below, an examination will be conducted of some breaches of international law applicable in internal armed conflicts that may be constituted by a denial to accept humanitarian aid. It must be noted that in the jurisprudence of the international tribunals, international crimes have been perpetrated by individuals, not by States¹²⁰. These individuals might have used their States as tools for committing the crimes, but the States as such have not been on trial¹²¹. The Rome Statute explicitly states that official capacity of an alleged criminal is without any relevance for the jurisdiction of the Court (Art 27). Thus, Heads of State and government or parliament and other State officials are not exempt from criminal responsibility under the Rome Statute.

¹²⁰ See *e.g.* articles 1-5 of the ICTY Statute (S/RES/827 of 25 May 1993 as amended) and articles 1-4 of the ICTR Statute (S/RES/955 of 8 November 1994 as amended) which all mention "persons". In Art 6 of the ICTY Statute and Art 5 of the ICTR Statute it then clarified that the Tribunals "shall have jurisdiction over natural persons pursuant to the provisions of the present Statute."

¹²¹ See however below on Serbia and Montenegro pursuing several of the NATO countries before the ICJ for alleged crimes committed through NATO's 1999 bombing campaign against the Federal Republic of Yugoslavia.

With this individual perspective in mind, the war crimes¹²² of starvation, torture, cruel treatment and collective punishments will be treated, followed by a dealing with crimes against humanity and genocide. *Nota bene* that the impeding of the relief, depending on the circumstances in each case, may form several crimes at the same time. It must also be noted that crimes against humanity¹²³ and genocide¹²⁴ can be committed irrespectively of the international character of the conflict. Furthermore, the commission of these crimes does not even require an armed conflict to be established, but they may equally be perpetrated in times of peace.¹²⁵

Starvation

Art 14 APII prohibits the starvation of civilians as a method of combat. This article specifies the Common Art 3(1)(a) *in fine*¹²⁶ as well as the general principle laid down in Art 13 APII protecting civilians against the dangers arising from military operations. It is noteworthy that Art 14 APII does not make any exception in case of imperative military necessity, as opposed to its equivalent concerning international armed conflicts, Art 54 API. Art 14 APII is intertwined with Art 18¹²⁷, and when the intent¹²⁸ of the individuals in the refusing authority covers a proven fact that the impeding of the aid in fact was used as a method of combat, the denial of humanitarian assistance would constitute the war crime of starvation.

The Rome Statute clearly differs between international and non-international conflicts with respect to the hindrance of humanitarian assistance. As concerns international armed conflicts, Art 8(b)(xxv) prohibits the intentional use of starvation of civilians as a method of warfare, “including willfully impeding relief supplies as provided for under the Geneva Conventions”. The wording of the equivalent concerning non-international armed conflicts, Art 8(e)(iii), is more confined as it prohibits “attacks against [...] humanitarian assistance”.

¹²² The fact that war crimes can be committed also in the context of internal conflicts is confirmed, *inter alia*, by the ICTR Statute Art 4 and by the Appeals Chamber of the ICTY in *Tadić*, (Decision 2 October 1995).

¹²³ See the ICTY Appeals Chamber in *Tadić*, (Decision 2 October 1995), para.141

¹²⁴ Art 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, UNTS 1951, p.278

¹²⁵ *Prosecutor v. Duško Tadić*, IT-94-1, Judgment of 15 July 1999, para. 251

¹²⁶ Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.1456, para.4794

¹²⁷ *Ibid.*, pp.1457 and 1479, paras.4798 and 4885

¹²⁸ Not being a set of criminal rules in the strict sense and being aimed more at States than individuals (as opposed to the Rome Statute) APII does not specifically mention intent to breach its provisions. As mentioned, this has been solved by the Statutes of the international tribunals by them referring to violations of the GCs, APs and other crimes as being committed by persons. See *supra* note 107.

Furthermore, that provision does not express such attacks as a means of starvation. Thus, the mere denial of humanitarian aid, implemented via other means than direct attacks, in a non-international armed conflict would not be a violation of the Rome Statute. However, once asserted that such an attack is at hand, Art 8(e)(iii) of the Rome Statute will apply to a broader range of situations than Art 14 APII, since internal disturbances has not been excluded from the former provision¹²⁹.

Torture and cruel treatment

Art 4(2)(a) APII and Common Art 3(1)(a) prohibit cruel treatment and torture. Torture is defined in the Torture Convention of 1984¹³⁰. That definition has been considered by the ICTY and the International Criminal Tribunal for Rwanda (ICTR) as representing customary international law¹³¹ and the ICTY has also confirmed that both torture and cruel treatment carry the same meaning regardless of the international or non-international character of the conflict in which these crimes are committed¹³². Without quoting the definition of the Torture Convention, it suffices to note that severe pain or suffering must be intentionally inflicted upon the victim for certain purposes, *e.g.* obtaining information from him or punishing him. However, such purposes need only be part of the motivation behind the conduct; it is not necessary that the acts are solely perpetrated for a prohibited purpose¹³³. If the pre-requisites of the Torture Convention are satisfied, nothing in that text or subsequent jurisprudence hampers the denial of humanitarian assistance as being a possible form of torture. However, it would probably meet with less practical obstacles to establish torture thus committed on a small scale, for example within a detention camp, rather than in the context of a State's actions within the whole of its territory.

Concerning cruel treatment, the purpose of the act is not an element of the offence. That entails that the threshold for this crime is lower than is the case with torture. This leads to

¹²⁹ Whereas Art 8(c) of the Rome Statute, which refers to Common Art 3, is expressly limited in the same way as the portal of APII, *i.e.* its Art 1(2) in that it excludes riots and other similar conflicts.

¹³⁰ Art 1(1), UN Convention against Torture and Other Cruel, Inhuman and Degrading treatment or Punishment, 10 December 1984, A/RES/39/46 entered into force 26 June 1987

¹³¹ ICTY: *Prosecutor v. Zejnil Delalić et al.*, Judgement 16 November 1998, Case No. IT-96-21, para.459; ICTR: *Prosecutor v. Jean Paul Akayesu*, Judgement 2 September 1998, Case No. ICTR-96-4-T, para.593

¹³² *Delalić et al. op.cit.*, para.443

¹³³ *Ibid.*, para.470

that all acts or omissions constituting torture would also qualify as cruel treatment¹³⁴. The deprivation of adequate water, sleeping and toilet facilities and medical care are examples of things that have been found to be especially contributive in amounting acts to cruel treatment¹³⁵. A crime of cruel treatment could thus be perpetrated by the means of denying humanitarian assistance.

Collective punishments

Art 4(2)(b) APII bans collective punishments, and its status as a war crime is confirmed *inter alia* by the ICTR Statute¹³⁶. This prohibition was included in Art 4 APII by consensus and the provision should, according to the ICRC commentary, be understood in its widest sense as including any kind of sanction¹³⁷. It was inspired by Art 33 GC IV¹³⁸, in relation to which the ICRC commentary defines collective punishment as “penalties of any kind inflicted on persons or entire groups of persons in defiance of the most elementary principles of humanity, for acts that these persons have not committed”¹³⁹. This crime seems well fitted for an application with respect to the denial of humanitarian assistance.

Crimes against humanity

Having previously been under a certain debate, it would seem that the issue of definition of crimes against humanity has been settled through the Rome Statute since it is expressed in the Art 7 of that instrument by and large as it is acknowledged in customary international law¹⁴⁰:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

¹³⁴ *Ibid.*, para.442

¹³⁵ *Ibid.*, para.1119

¹³⁶ Art 4(b)

¹³⁷ Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.1374, para.4536

¹³⁸ *Ibid.*, p.1374, para.4535

¹³⁹ Jean Pictet *et al.*, *ICRC Commentary on the Fourth Geneva Convention*, p.225

¹⁴⁰ Cassese in Cassese, Gaeta, Jones, ed. *The Rome Statute of the International Criminal Court: A commentary*, vol.I, Oxford, 2002, p.373.

According to customary international law, the widespread or systematic attack must be based on a policy by a State, an organization or a group¹⁴¹. The Trial Chamber of the ICTY has confirmed, however, that such a policy does not necessarily need to be adopted formally by the perpetrating actor and can be deduced from the way it occurs¹⁴². This excludes random acts hindering the delivery of humanitarian aid provided that such acts are not aimed at having widespread consequences: targeting of strategic objects may very well affect a vast group of people¹⁴³. Concerning humanitarian assistance, this can be the case if the security of only a few aid workers is menaced (*c.f.* above on the content of denial of humanitarian aid).

Apart from murder, the obstruction of relief actions might constitute several crimes against humanity as defined in the Rome Statute, *e.g.*: extermination (Art 7(1)(b)); torture (Art 7(1)(f)); persecution (Art 7(1)(h)) and; inhumane acts (Art 7(1)(k). It must be noted that the definition of the Rome Statute requires – in addition to normal intent of the underlying crime as such – knowledge of the larger context as described above in which that crime is committed¹⁴⁴.

Representing customary international law¹⁴⁵, the crime against humanity of extermination is further specified in Art 7(2)(b) of the Rome Statute as including the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine. Such deprivation must be calculated by the perpetrator to bring about the destruction of a part of a population. As concerns the *mens rea* covering that consequence, Art 30(2)(b) of the Rome Statute stipulates that the person behind the crime must mean to cause the destruction of a part of the population or that the person is “aware that it will occur in the ordinary course of events”.

In its judgment in *Krstić*, the Trial Chamber of the ICTY found that the “creation of a humanitarian crisis” was the “prelude to the forcible transfer of the Bosnian Muslim

¹⁴¹ The Trial Chamber in *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Opinion and Judgement 7 May 1997, para. 654. This part of the Trial Chamber’s judgement was not subject to appeal.

¹⁴² *Ibid.*, para. 653. See also Cassese *op.cit.*, p.361.

¹⁴³ *Prosecutor v. Mile Mrksić, et al.* Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-13-R61, (Trial Chamber), 3 April 1996, para. 30

¹⁴⁴ Cassese, *op.cit.* p.363

¹⁴⁵ *Ibid.* p. 373; as opposed to other parts of the Rome Statute, *e.g.* Art 7(1)(g) and 7(1)(i), see p.376.

civilians¹⁴⁶, and that it, combined with crimes of terror and forcible transfers, incurred individual responsibility for inhumane acts and persecution as crimes against humanity under Article 5(h) and (i) together with Article 7 of the Statute of the ICTY¹⁴⁷. The ICTY found evidence for this through *inter alia* the ‘Directive 7’ of 8 March 1995 issued by the Supreme Command of the forces of the *Republika Srpska*, (the Serbian province of Bosnia-Herzegovina) in which its President, Radovan Karadžić, instructed that the Bosnian Serb Army was to:

[B]y planned and well-thought out combat operations, create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica¹⁴⁸.

This included blocking aid convoys:

The relevant State and military organs responsible for work with UNPROFOR and humanitarian organizations shall, through planned and unobtrusively restrictive issuing of permits, reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population, making them dependent on our good will while at the same time avoiding condemnation by the international community and international public opinion¹⁴⁹.

The impeding of humanitarian assistance has thus formed part of perpetrations of crimes against humanity¹⁵⁰.

Genocide

Codified in 1948 through the Genocide Convention¹⁵¹ and found *verbatim* in the Rome Statute, the crime of genocide is regarded as the most atrocious international crime. Care should therefore be taken not to dilute its gist by applying it to situations which do not amount to the required threshold.

¹⁴⁶ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Judgement 2 August 2001, para.615

¹⁴⁷ *Ibid.* para.653

¹⁴⁸ *Ibid.* para.28

¹⁴⁹ *Ibid.*

¹⁵⁰ The obstruction of humanitarian aid is also part of the Prosecutor’s allegations on persecutions in the Milošević case, see para.35(k) of the indictment concerning Bosnia and Herzegovina, 22 November 2001, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54.

¹⁵¹ Convention on the Prevention and Punishment of the Crime of Genocide, approved by the UNGA 9 December 1948 (resolution 260 A (III)) and entered into force 12 January 1951.

According to Art II of the Genocide Convention, genocide is any of the acts enumerated in that convention committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. This provision stipulates a special intent, *dolus specialis*, to the effect that the perpetrator must have the clear intent to cause the offence charged¹⁵², and that this *mens rea* must cover the will to destroy the group or a distinct part thereof as such, as opposed to an accumulation of isolated individuals within it¹⁵³. The ICTR has pronounced that this special intent can be inferred in the view of the factual circumstances under which the alleged crimes took place.¹⁵⁴

The particular offences in Art II of the Genocide Convention by which genocide could be committed through the impediment of humanitarian aid seem to be the “causing of serious bodily or mental harm to members of the group” and the “deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part”. As for the latter alternative, which seems to be the one closest to the hindering of relief actions, the ICTR has given the example of subjecting a group of people to a subsistence diet and the reduction of essential medical services below minimum requirement¹⁵⁵.

In sum, the obstruction of humanitarian assistance could certainly constitute the *actus reus* of several crimes against international law, also in non-international situations. Thus, in those of these situations where the impediment is undertaken with the required intent, the responsible agents of the relevant authorities are clearly under an individual obligation not to refuse the delivery of humanitarian aid.

¹⁵² *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement 2 September 1998, para.518

¹⁵³ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Judgement 2 August 2001, para.590

¹⁵⁴ *Akayesu*, *op.cit.*, para.523

¹⁵⁵ *Ibid.*, para. 506

Chapter III – Rights and obligations

This, third chapter, will elaborate on the rights and obligations of the different actors in the situations relevant to this paper.

So far, two cases have been discerned where the denial to receive relief actions is not permitted in non-international armed conflicts, namely: 1) when the denial constitutes an arbitrary refusal, contrary to a certain interpretation of Art 18 APII and; 2) when the denial forms part of the perpetration of an international crime.

Before moving on to specific rights and obligations, the different actors in the cases to which this paper pertains must be distinguished. These cases inherently include at least three parties: one party suffering from the lack of provisions essential to its survival, another one withholding its consent to the delivery of humanitarian aid aimed to ease the first party's distress and a third party offering such relief, but being hindered in pursuing its objective by the second party. Two additional actors may also be discerned, namely a second belligerent and a party enforcing the relief action. Occasionally – some might say unfortunately – the borders between these actors may be blurry, especially the one differing humanitarian organizations offering aid from actors willing to enforce it. The evident questions relevant to all these parties in relation to the delivery of humanitarian assistance are: what are their respective obligations; in relation to whom and; when do these obligations emerge?

Actors and their rights and obligations

Both situations 1) and 2) above would entail that a negative obligation rests upon a belligerent party or its individual representative: an obligation to allow for humanitarian aid to be distributed when reasonable. As for breaches of APII, that responsibility applies as mentioned according to Art 1 APII “in all circumstances”, notwithstanding reciprocity.

Naturally, the ultimate beneficiary of this negative obligation is the civilian population in need. However, before letting this lead to the pinpointing of a right to humanitarian

assistance for civilian populations in the two mentioned cases according to humanitarian law, some caution must be observed. In general terms, Provost argues that, in contrast to human rights law, humanitarian law does not confer rights upon individuals, but rather obligations¹⁵⁶. He bases this primarily on the fact that humanitarian law applies in extraordinary circumstances in which the vast majority of human rights may be suspended and in which the individual rights-holders are powerless and vulnerable¹⁵⁷. According to him, humanitarian law is therefore not well suited for an individual rights-based approach. On the other hand, it might firstly be said that the existence of an obligation by definition requires the existence of a corresponding right. Secondly, and more specifically concerning relief actions, a right to access to humanitarian assistance derived from humanitarian law would not be 'universal' in the same sense as a human right. The former would namely be dependent on that a number of factual circumstances – specific to the individuals concerned – could be shown, *e.g.* that they are being persecuted or that other illegal reasons are at hand causing them to starve. Consequently, other civilians in other situations could starve because of their State's denial to accept humanitarian aid without enjoying a right to such aid according to humanitarian law, because their State's refusal had been in compliance with that law under the circumstances in their specific case. Perhaps it will meet with fewer obstacles to argue for a right of the civilian population in cases where the denial in fact constitutes an international crime as described above rather than a non-compliance with a more or less well-founded interpretation of Art 18 APII. Thirdly, it might be generally argued that individuals can merely initiate their rights whereas other actors must be invested with the powers to enforce these rights; any other way would lead to anarchy. Finally, as for humanitarian law, the jurisprudence and really the mere establishment of the international criminal tribunals – the International Criminal Court (ICC)¹⁵⁸, ICTY, ICTR, the Special

¹⁵⁶ Provost *op.cit.*, p. 97-98. Provost also argues that this difference is inherent in "the vastly different realities which human rights and humanitarian law norms seek to address", p.116. His differentiation for the purpose of a discussion of rights and obligations seems to be based on pragmatic considerations, rather than formal ones. Other authors advocate the contrary view that a general difference between humanitarian law and human rights law "s'établit sur des considérations formelles plutôt que sur des raisons de fond", see Dupuy *op.cit.*, at p.29. It is true that the GCs are written in a manner that prohibits States from undertaking certain actions, as opposed to granting individuals certain rights which in turn would result in the illegality of State actions violating these rights.

¹⁵⁷ Provost *op.cit.*, p.116. It is worth noticing that human rights are still applicable in armed conflicts (if not suspended), as ruled by the ICJ in the case *Legality of the Threat or Use of Nuclear Weapons* (ICJ Reports 1996, p.240).

¹⁵⁸ Out of the international criminal tribunals, the ICC is the most important representative of what many call a step towards a new international legal system, out of reach for State sovereignty. That system would be more of

Court for Sierra Leone¹⁵⁹ and the Special Tribunal for Cambodia¹⁶⁰ – testifies to the fact that individuals can bear responsibility under humanitarian law. Persons convicted by these institutions have been so due to their non-compliance with rules protecting other individuals.

The principal question of the existence of a right to humanitarian assistance for civilian populations may as such be of less interest in a practical context¹⁶¹, seeing that the pressing part of the problem is the enforcement of adherence to the above mentioned obligation to accept the aid (and, indeed, that is rarely a task for which the civilian population in need is well suited). Although it is generally true that in international law, many rights are lacking a proper remedy and that only a few can be forcibly implemented¹⁶², it remains that in cases of provision of humanitarian aid, relief *has* been enforced. Thus, the maxim ‘no right without remedy’ in its reverse supports an individual right to humanitarian assistance according to international humanitarian law. Then again, the actions where such remedy has been undertaken may prove to have been more or less in accordance with international law; the fact that a right has been illegally remedied cannot sustain its legality. Furthermore, it must be said that States may prove less hesitant in advocating a right to humanitarian assistance as long they themselves are not likely to be the subjects of its corresponding obligation.

a Kantian model as opposed to the classical, Grotius one, as Antonio Cassese argues in "A Big Step Forward for International Justice", *Crimes of War project*, at http://www.crimesofwar.org/icc_magazine/icc-cassese.html, and be more based on individual rights than on States.

¹⁵⁹ Contrary to the ICTY and ICTR which were established pursuant to UNSC resolutions (ICTY by S/RES/827 of 25 May 1993 and ICTR by S/RES/955 of 8 November 1994), this court was put in place through an agreement between the UN and the government of Sierra Leone in Freetown 16 January 2002. It is invested with the power to bring to justice those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, Art 1 of the agreement.

¹⁶⁰ This tribunal was established through an agreement between the UN and the Cambodian government 17 March 2003 to try former Khmer Rouge leaders. Due to the tensions between the Indonesian government and UN's Serious Crimes Investigation Unit (SCIU) as well as and allegations of partiality on behalf of the *ad hoc* human rights court set up by that government, the judicial procedures for East Timor has been left out of this comparison.

¹⁶¹ Nevertheless, the issue of a general right to humanitarian assistance is surely of great principal value, especially in a long term perspective, and as such it may also be of practical interest, but a discussion upon it seems better placed within the field of human rights. Efforts with great value and importance have been made to codify a right to humanitarian assistance, *e.g.* by the San Remo Institute through its Guiding Principles on the Right to Humanitarian Assistance (see above under Principles).

¹⁶² As argued by Nico Krisch "Review Essay: Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo", in *European Journal of International Law*, vol.13, no.1, February 2002 (a European-American Dialogue Co-sponsored by the University of Michigan Law School and the EJIL), p.326-327.

In this context, and in the light of the *erga omnes* nature of humanitarian law, the belligerents' obligations might be seen as one pertaining to the international community as a whole. This may not be interpreted to the effect that each and every State is under an obligation to provide relief aid to civilians embroiled in any armed conflict wherever it is raging¹⁶³, but rather so as to be part of a justification for States of the international community to take measures to deliver humanitarian aid; the rationale perhaps gives the States a possibility (which will be discussed below), not an obligation in law.

This leads us to the rights of the humanitarian organizations, that is, the party providing the aid. Art 18 APII confers upon these actors a 'right of initiative'. One interpretation of that article entails, as shown, that the belligerents cannot arbitrarily refuse the assistance of these organizations. In line with that argument, in their capacity of possessors of the element critical to the whole problem – the aid – Art 18 APII in fact gives humanitarian organizations an auxiliary right to access the victims in need. In any case, it follows from the *Nicaragua* case that these organizations would not engage in an illegal act by providing the aid in these situations¹⁶⁴. This right to access would differ from that of the civilian individuals (discussed above) in that it is not the beneficiary right of the belligerents' negative obligation, but the link through which the latter can meet their duties.

It has been concluded above when discussing the criteria defining humanitarian assistance that a humanitarian organization is defined by its human, impartial and neutral qualities. Moreover, it was argued that the assuming of a non-humanitarian organization of the role and rights of a humanitarian organization for the purpose of enforcing a relief action is almost certain to breach the principle of neutrality and impartiality since the enforcer would have to take sides in the conflict, at least to the extent that one of the belligerents refuses the aid being delivered. Although this has not always been the case in reality (*e.g.* UNHCR and NATO in Kosovo), a distinction between enforcers and providers of humanitarian aid would thus seem vital for both legal reasons in order to minimize possibilities for non-humanitarian players to act under humanitarian flag in pursuing strategic goals as well as for

¹⁶³ Dinstein, *op.cit.* mentions this in relation to civilians' rights to demand relief and he contends that such an obligation upon every State would be absurd. Notwithstanding any irrationality of such an obligation, it does not seem probable that States would accept it, seeing the cost of risk assessment it would entail.

¹⁶⁴ Para.242

practical reasons in order not to impair the confidence of humanitarian organizations on the ground.

As concerns the belligerent parties' obligations between themselves, this is obviously the core of the problem and often the ultimate reason why access to humanitarian assistance is denied. APII lacks any provisions on free passage, equivalent to Art 23 GC IV. Seeing that the warring factions in non-international conflicts 'share' the civilian population and that Art 18 APII applies to both the State party and the insurgent, a provision on free passage seems to be superfluous in this context.

Now turning to the question from which point in time belligerents would find themselves under an obligation to accept humanitarian assistance, the negative nature of the obligation must be appreciated: an obligation *to accept*, not to undertake. Logically, the obligation could thus not emerge before the time the aid is offered. Equally logical, the pre-requisites for any of the point 1) or 2) above would have to be fulfilled.

The humanitarian imperative

The 'humanitarian imperative' is a very broad notion which is often mentioned with respect to the delivery of humanitarian assistance and the rights and obligations linked to it. It finds its base in natural law, from where it claims universality and classic scholars have derived it from the 'pity' or compassion of humans for their fellow men, especially the weaker ones¹⁶⁵. It is frequently expressed through the medium of human rights. Unfortunately, history and today's world prove empathy and other virtues to be rare qualities in men. In fact voracious preying to achieve egoistical aspirations and the 'survival of the fittest' seems to be the predominant instinct of humans as well as States. Agreeing, nevertheless, that the humanitarian imperative is profitable for mankind, durable, functional and realistic solutions

¹⁶⁵ See J.J. Rousseau, *Discours sur l'origine de l'inégalité parmi les hommes*, 1753, part I: "En effet, qu'est-ce que la générosité, la clémence, l'humanité, sinon la pitié appliquée aux faibles, aux coupables, ou à l'espèce humaine en général?" He argues that nature has given this quality to man, from which "découlent toutes les vertues sociales". Another view holds, in contrast to this, that all human relations are founded on egoism. What Rousseau calls 'pity' is then in fact only a fear of what could happen to oneself, and help is only given to the weaker when the stronger finds that it serves his own purposes or when compelled by someone even stronger to do so, who in his turn has something to gain from it.

for its integration in an 'evil world'¹⁶⁶, as opposed to a naïve reliance on human pity, must be found: as concerns humanitarian assistance, these include first and foremost finding compelling reasons for States to accept it. This fitting of humanitarian aid in the present system of world affairs will be treated in the following Chapters.

¹⁶⁶ This is an ancient task with which religion to a great extent is concerned, (for example, the Ten Commandments would be superfluous if man was good), but which has been viciously abused and misused for the purposes of the very greedy instincts it was set out to hamper. As will be argued below, enforcement of humanitarian assistance also unleashes great powers, and extra-ordinary care must be taken in order for it not to be abused for other purposes than easing urgent human suffering.

Part Two – Enforcement

Introductory remarks

A frequently quoted observation of the relations between the members of the ‘global village’ is that:

Almost all nations observe almost all principles of international law, and almost all of their obligations almost all of the time¹⁶⁷.

There are different factors pulling States towards such compliance. Naturally, it is important that States perceive the rules of international law as legitimate. But many decisions on whether to comply with these rules or not are made by States on the basis of a pragmatic estimate of their international political, economic and military ‘balance sheets’. The State will ask itself if would be worth the costs (*e.g.* bad reputation and diminished trade) of not complying with a certain rule¹⁶⁸. In an increasingly inter-dependent world the costs for non-compliance can be high, although the outcome of the assessment will differ between States and depend on the relevant State’s political, economic and military strength relatively other States. Even though it is thus true that compliance with the rules of international law is high, the robustness of a specific rule would only be truly appraised when the rule was not respected. In situations where an antisocial player on the international arena does not follow the rules or takes advantage of them (a ‘free rider’), the need for means and rules of enforcement becomes evident. That is, the question of what measures can be taken and by

¹⁶⁷ Louis Henkin, *How Nations Behave*, New York, 1979, p.47

¹⁶⁸ Henkin himself embraces this pragmatic view, *ibid.* p.51. See also generally on factors entailing compliance Cramér, *op.cit.*, pp.36-38

whom in order to increase the costs for a State violating a legitimate international rule will be posed.

As implied on several occasions above, the delivery of humanitarian assistance is an intrinsically practical issue. In fact, the very existence of a right to provide relief, or to receive it, might be regarded as void without any means to implement it¹⁶⁹. This is not to say that rules in general necessarily are null without a real possibility to enforce them, since that is the case concerning a large number of provisions under international law in general and humanitarian law rules which are not subject to reciprocity in particular¹⁷⁰. However, the means and level of enforcement of rules can vary, and range from moral sensations of obligation to comply with a certain rule, over imposed motivation (*e.g.* through political pressure), to outright force (*e.g.* through sanctions or armed persuasions). The proving of a possibility that action can be put behind words would seem important especially when a right to receive or to provide humanitarian assistance is deducted from a relatively broad interpretation of Art 18 APII, as opposed to a proposed right according to the relatively clear and accepted rules on the international crimes discussed above. Individual rights conferred by the latter are naturally strengthened by firm implementation.

Furthermore, it might be much more difficult for a belligerent to gather political international support for its withholding access to humanitarian organizations if it is apparent that the refusal is part of the perpetration of a 'clear' crime against the civilian population. Conversely, that belligerent might find itself in a more favorable situation should the denying of access 'only' be illegal because it did not qualify as valid reasons for refusal according to an interpretation Art 18 APII, the consensus on which is uncertain.

Thus, the area in which the issue of enforcement would seem to be of special interest is the one within which the only prohibition of the refusal to accept the humanitarian aid is Art 18 APII, out of reach for the 'clear' international crimes. Seeing that a right within this zone still

¹⁶⁹ The aforementioned Guiding Principles on the Right to Humanitarian Assistance clearly accounts for a possible enforcement of humanitarian aid when it states in Principle 6 that "States and organizations concerned may undertake all necessary steps" to ensure access to victims if an offer of relief is refused.

¹⁷⁰ Luigi Condorelli, "Intervention humanitaire et/ou assistance humanitaire? Quelques certitudes et beaucoup d'interrogations" in *International Legal Issues Arising Under the United Nations Decade of International Law*, Al-Naumi and Meese, ed., p.1009.

would prevail over State sovereignty and entail the use of force if necessary, some actors might find other than purely humanitarian reasons to invoke it. The enforcement of that right would thus be very attractive to abuse. However, also an implementation action undertaken for purely humanitarian reasons would meet with obstacles because it by necessity implies the possibility of use of force against one or more parties to the armed conflict.

An implementation action of humanitarian assistance would first and foremost include measures for a secure passage of humanitarian organizations to access the victims and, once in place – be it within ‘human corridors’ or ‘safe havens’ – protective measures in order for the relief to be satisfactorily carried out. In order to retain whatever neutrality and confidence that can be saved, even after a non-abused enforcement action, the aid as such should be distributed by the humanitarian organizations in clear distinction from the enforcing agents. In certain situations, for example if the convoys or distribution *in situ* of assistance to the victims on the ground experience constant and/or heavy military attacks, such distinction will naturally be very hard to uphold. Furthermore, a certain ‘spill-over’ effect on the ground would also seem close to inevitable whenever relief would have to be enforced as the presence of the humanitarian organizations would be associated with the forcible measures taken to implement the aid. But the point made is that the distribution of the aid should not, to the greatest extent possible, be overtaken and carried out by the armed forces used to implement it; these should instead abide by their task of making way for the humanitarian agents. In fact, the use of the humanitarian efforts for any other reasons than distributing the aid should not be envisaged in order not to stain the reputation of humanitarian agents as others than pure helpers¹⁷¹.

In circumstances like those above, the adjacent problem of refugees and in some cases forcible deportations must be mentioned. For practical reasons and the safety of all parties, it might seem advisable to transport the victims to the aid and out of reach for its adversaries, instead of continuing a hazardous and costly enterprise of bringing the aid to the victims. In

¹⁷¹ Donini, *op.cit.*, p.41 suggests that the negotiations of humanitarian organizations – humanitarian diplomacy – could successfully be used to open up areas to a political or peace process. But if it becomes known that talks with humanitarian agents might have political consequences, many insurgents might be reluctant to even enter into negotiations on the distribution of assistance.

response to such a suggestion some remarks can be made. Firstly, it may serve the objectives of an authority pursuing a policy of ethnic cleansing or other strategy involving forcible deportation. Such authority would then have achieved its goal of deporting civilians from its territory by persistently impeding humanitarian aid; this is certainly an easier and less burdening enterprise for it to undertake than that of removing the relevant parts of the population by its own means. Secondly, notwithstanding any deportation policy, such a suggestion might menace the confidence on the ground for the humanitarian action, at least inasmuch as the victims are reluctant to leave. Finally, the hosting of the civilians thus removed out of harms way may meet with some hesitance from receiving countries who might consider themselves having fulfilled their quota of an already existing exodus of refugees due to a civil war.

It must be noted that enforcement consisting of only ‘protective forces’ accompanying the relief action is equally relevant to the present study since such implementation still would entail the use of force when necessary for the access.

For the purposes of the present essay, the enforcement of delivery of humanitarian aid must be seen in the light of the debate on humanitarian intervention¹⁷². In fact, as Condorelli elegantly points out: humanitarian needs entail obligations of humanitarian assistance (‘primary norms’) whereas humanitarian intervention, in its capacity of a reaction to violations of these obligations, stems from a paradigm of norms (‘secondary norms’) regulating the enforcement of those obligations¹⁷³. The implementation of a right to humanitarian assistance according to international humanitarian law could surely form part of an action of humanitarian intervention. Part One of this paper was thus concerned with ‘primary norms’, whereas the present Part will evaluate the ‘secondary’ ones, of which humanitarian intervention constitutes a centre piece.

Humanitarian intervention

¹⁷² Condorelli *op.cit.*, p.1008 frames it well when noting that in situations where the affected State does give its consent to the humanitarian assistance one needs only talk about “assistance” whereas it makes sense to discuss “intervention humanitaire” lorsqu’il s’agit de définir quelles sont les mesures pouvant être adoptées afin de réagir contre l’impossibilité d’apporter l’assistance, causées par des obstacles venant de l’Etat affecté”.

¹⁷³ Condorelli, *op.cit.*, at p.1002.

L'obligation de non-ingérence s'arrête à l'endroit précis où naît le risque de non-assistance¹⁷⁴.

The concept of what has become known as 'humanitarian intervention' (*intervention humanitaire* or *ingérence humanitaire*) has, especially during the re-awakening of the UNSC after the end of the Cold War, been the subject of considerable academic and political debate but its exact scope of application remains uncertain and in all cases of humanitarian intervention its rules and principles have been improvised¹⁷⁵. This holds true both as far as on what basis intervention should be undertaken and by whom is concerned¹⁷⁶. However, there is a relative certitude in saying that humanitarian intervention comprises interference by an outside actor in the internal affairs of a State in order to alleviate human suffering of that State's own nationals, without its consent and by the unilateral use of force if necessary. Humanitarian intervention thus stands in direct contrast to the *jus cogens* rule¹⁷⁷ – embodied in Art 2(4) of the Charter of the United Nations and in Principle 1 of the Declaration on Friendly Relations¹⁷⁸ – on the prohibition of the use of armed force, unless deployed for self-defense according to Art 51 of the UN Charter or authorized by the UNSC under Chapter VII of that Charter. Humanitarian intervention is seen a basis for the use force additional to these provisions. Its supporters find ground for this derogation primarily in moral considerations; according to them, there are situations of human suffering that so profoundly chock the conscience of mankind that action must be taken without delay and that human lives in such cases cannot be sacrificed on the altar of State sovereignty¹⁷⁹. Albeit not pertaining exclusively to the obstruction of humanitarian aid, the horrible tragedies of the 1995

¹⁷⁴ François Mitterand, 30 May 1989, quoted in Mario Bettati, "Ingérence, Intervention ou Assistance Humanitaire?" in *International Legal Issues Arising Under the United Nations Decade of International Law*, Al-Naumi and Meese, ed., p.941

¹⁷⁵ Jovica Patrnoć, "Humanitarian Assistance – Humanitarian Intervention" in *International Legal Issues Arising Under the United Nations Decade of International Law*, Al-Naumi and Meese, ed., p.1027

¹⁷⁶ Human Rights Watch – an NGO in principle supporting humanitarian intervention as being justified in the face of an ongoing or imminent genocide or comparable mass slaughter – looks to five factors when faced with such a situation in order to determine whether the use of force can be characterized as humanitarian: 1) the use of force should be the very last reasonable option to stop the slaughter; 2) humanitarianism should be the dominant reason for the intervention; 3) the means used must respect humanitarian law and human rights law; 4) it must be reasonably likely that military action will do more good than harm; and 5) UNSC endorsement of the humanitarian intervention is preferable, but not mandatory, see Ken Roth, "War in Iraq: Not a Humanitarian Intervention", in *Human Rights Watch World Report 2004*.

¹⁷⁷ See e.g. Yoram Dinstein, *War, Aggression and Self-Defense*, Cambridge, 1988, pp.98-103.

¹⁷⁸ General Assembly Resolution 2625 (XXV) of 24 October 1970, UN Doc. A/8018 (1970).

¹⁷⁹ See e.g. Tesón who argues that governments who violate basic human rights undermine the one reason that justifies their political power; State sovereignty is an instrumental, not an intrinsic, value. See Fernando R. Tesón "The liberal case for humanitarian intervention" in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, J.L. Holzgrefe and Robert O. Keohane, ed., Cambridge 2003, p.93

massacre in Srebrenica and the 1994 genocide in Rwanda are all too recent reminders of catastrophes that might have been prevented had the international community not failed to react when faced with compelling warnings of imminent human disasters.

Seeing the complexity of conflicts such as those in Bosnia and Rwanda, some might argue that the situation when civilian victims of war are starving on one side of a border and foodstuffs are offered to them on the other but being refused delivery is a relatively basic example of when a State should not be able to hide behind sovereign rights. As will be seen, however, even this, on the surface uncomplicated, situation might be a gate to wider, and sometimes more ambitious, consequences beyond the mere distribution of humanitarian assistance if the enforcement of the aid is not subject to clear rules.

Below, a few examples of humanitarian intervention will be given, including a brief analysis of the Kosovo crisis, and the alleged inconsistency between State sovereignty and morality will be discussed.

Examples of humanitarian intervention

There are old examples of the substance of and reasoning behind humanitarian intervention:

I approve [...] decidedly of the opinion of those who say that the cause of the Spaniards is just when they make war upon the Indians, who practiced abominable lewdness even with beasts, and who ate human flesh, slaying men for that purpose. For such sins are contrary to human nature¹⁸⁰.

These were words of justification for the Spanish conquest of the New World and illustrate well the dilemma facing the notion of humanitarian intervention.

During the 20th century, there are several cases which have been used as examples of more or less legitimate intervention on humanitarian grounds *e.g.*: USA. in Lebanon 1958; Belgium in Congo 1964; USA in the Dominican Republic 1965; India in East Pakistan 1978 and;

¹⁸⁰ A. Gentili, *De iure belli libri tres* (J.C. Rolfe trans., 1933) 122, quoted in Krisch *op.cit.*, p.324.

Vietnam interference against the atrocities of the Khmer Rouge in Cambodia 1979¹⁸¹. More recent examples are, amongst others: the exclusion zone for the Kurds in Iraq in 1991; Somalia in 1992; Yugoslavia from 1992; Albania in 1997¹⁸² and; Kosovo in 1999. It seems that developing countries may be more exposed to such humanitarian intervention than developed countries¹⁸³.

As will be seen below when examining States as enforcers of humanitarian aid, an argument of a right to humanitarian intervention can be one of many invoked by the intervening party, alongside and intertwined with the notions of ‘material breach’ and ‘implied UNSC authorization’. As for the examples given above, it can be said that Vietnam did not justify its invasion as humanitarian and to the extent that India did, its intervention was condemned¹⁸⁴ (Kosovo will be discussed in detail below). In line with this, many authors argue against the use of earlier cases as precedents because of what they were ‘in essence’ rather than what the acting States invoked as justification at the time¹⁸⁵.

The now more or less classical example of unilateral intervention by a coalition of States in contemporary times is the NATO bombing campaign of the Federal Republic of Yugoslavia (FRY) in March 1999, ‘Operation Allied Force’. Just as the no-fly zones in northern Iraq, this action was to a large extent undertaken to enforce humanitarian assistance¹⁸⁶. In its resolution 1199, the UNSC affirmed that the “deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region”, and acted under Chapter VII when it demanded the FRY to *inter alia* “allow free and unimpeded access for humanitarian organizations and supplies to Kosovo”¹⁸⁷, but it never authorized “all necessary means” to ensure these demands. The ongoing war and the impediment of

¹⁸¹ Examples from Bettati, *op.cit.* at p.952, note 33.

¹⁸² S/RES/1080 authorized Member States to use all means necessary to facilitate the return of humanitarian organizations and the delivery of humanitarian aid, but the force was in fact never deployed.

¹⁸³ Jovica Patrnoć, *op.cit.* at p.1019

¹⁸⁴ Mary Ellen O’Connell “The UN, NATO, and International Law After Kosovo” in *Human Rights Quarterly*, vol.22 (2000), no.1, p.71

¹⁸⁵ Krisch, *op.cit.*, p.326 with reference to Simon Chesterman, *Just War of Peace? Humanitarian Intervention and International Law*, (Oxford, New York: Oxford University Press, 2001), p.85 and Christine Gray, *International Law and the Use of Force*, (Oxford, New York: Oxford University Press, 2000), p.18.

¹⁸⁶ The NATO Secretary-General stated the 13th October 1998 that the FRY “has still not complied fully with” S/RES/1199.

¹⁸⁷ S/RES/1199 of 23 September 1998. Preamble, para.14 and op.4(c).

humanitarian assistance indeed had created a disastrous humanitarian situation in Kosovo in 1998, and it would depreciate even more as winter was coming. On the 13th of October 1998, NATO decided to authorize the use of force in Yugoslavia, and on the 24th of March 1999 it began its air strikes, without any authorization from the UNSC. As opposed to a unilateral intervention by only one or two countries, this action was collectively undertaken by the 19 Member States of NATO, at least formally, since the organization's decision-making is based on consensus¹⁸⁸. In this context it may be noted that the 'coalition of the willing' supporting USA and UK in their enterprise in Iraq in March 2003 was far from representing a majority of the world community (in fact, the majority was against the invasion), that the countries of the coalition did not participate in the decision to use armed force and that only a minority of them has actually contributed militarily to that intervention.

The NATO action naturally ignited a fierce debate on its legality¹⁸⁹, and FRY pursued the ten NATO Member States active in the bombing campaign individually before the ICJ for breaches of international law including the use of force, intervention in the internal affairs of another State, the Genocide Convention, API as well as environmental law and human rights¹⁹⁰. At the ICJ, the USA brought forth *inter alia*, "the humanitarian catastrophe" and "the resolutions of the Security Council" taken under Chapter VII as justification for the NATO action¹⁹¹. Belgium argued that not only did the anterior UNSC resolutions provide sound legal basis for the intervention, but that it was obliged to intervene, in order to prevent a humanitarian disaster and to safeguard "des valeurs essentielles" which rank as *ius*

¹⁸⁸ See *NATO Handbook* (2001), Chapter 7, available at www.nato.int/docu/handbook/2001/index.htm visited on 10 December 2003

¹⁸⁹ See e.g. the utterly partial, but (and perhaps because of its partiality) interesting collection of contributions to the International Symposium held in Novi Sad on the 15th-16th of October 1999 by the Association for Legal Theory and Practice Novi Sad, *NATO Aggression on the FR Yugoslavia '99, Proceedings*, Novi Sad, March 2000.

¹⁹⁰ *Legality of Use of Force*, (Yugoslavia v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, UK, USA), 29 April 1999. The cases against USA and Spain were dismissed in June 1999. USA did not consent to the jurisdiction of the ICJ in this case, which is a pre-requisite for the Court to consider a case according to Art 38(5) of the Rules of the Court (which are elaborated pursuant to Art 30 of the ICJ's Statute) and as for FRY's invoking of Art IX of the Genocide Convention, the USA did not give its specific consent to its application, which is a condition according to a reservation made by the USA to that Convention. Under the terms of a reservation, Spain does not recognize the jurisdiction of the ICJ with respect to disputes to which the other party has accepted the jurisdiction of the Court less than 12 months prior to the filing of its application, and Spain has a reservation similar to that of the USA to Art IX of the Genocide Convention.

¹⁹¹ *Legality of Use of Force* (Yugoslavia v. USA), Verbatim records of oral pleadings on the Request for the indication of provisional measures, 11 May 1999, para.1.7

*cogens*¹⁹². The UNSG did not condemn the bombings, but instead contended that “normally a UN Security Council Resolution is needed”¹⁹³. UNHCR, active in Kosovo, made an official request to NATO in April 1999 for assistance with the humanitarian aid operation¹⁹⁴ (see above under Neutrality). Naturally, the ICJ has not rendered any decision on the issue yet, but it has pronounced itself being “profoundly concerned with the use of force in Yugoslavia”, which “under the present circumstances [...] raises very serious issues of international law”¹⁹⁵.

The NATO intervention was clearly in violation of the UN Charter as no UNSC authorization was at hand, and there was no overwhelming support for it from the international community¹⁹⁶, although the humanitarian situation might have engendered understanding for the action, as expressed by the acting of the UNSG and UNHCR. Many of the NATO member governments themselves concluded that the organization’s decision should not be seen as a precedent¹⁹⁷. Moreover, in spring 2000 the Havana Declaration of the Group of 77 made clear that there was no acceptance of humanitarian intervention by the world community¹⁹⁸. Thus, even accepting the notion of ‘instant international custom’ – which as such appears as a contradiction in terms, rendering the *usus* part of any customary international rule unfulfilled¹⁹⁹ – such a rule could not have emerged from the Kosovo 1999

¹⁹² *Legality of Use of Force* (Yugoslavia v. Belgium), Verbatim records of oral pleadings on the Request for the indication of provisional measures, 10 May 1999.

¹⁹³ Mary Ellen O’Connell “The UN, NATO, and International Law After Kosovo” in *Human Rights Quarterly*, vol.22 (2000), no.1, p.82.

¹⁹⁴ Porter, *op.cit.*, p.4

¹⁹⁵ See e.g. *Legality of Use of Force* (Yugoslavia v. Spain) Order on the Request for the Indication of Provisional Measures, 2 June 1999, para.16.

¹⁹⁶ O’Connell, *op.cit.*, p.85

¹⁹⁷ See Bruno Simma, “NATO, the UN and the Use of Force: Legal Aspects”, *European Journal of International Law*, vol.10 (1999), no.1, p.20. Simma argues that “the genie of NATO self-authorization must not be let out of its bottle”. The then Secretary of State Madeleine Albright stated that Kosovo was “a unique situation *sui generis* in the region of the Balkans” and that it is important “not to overdraw the various lessons that come out of it”. Prime Minister Tony Blair emphasized the exceptional nature of the air campaign. See Michael Byers and Simon Chesterman, “Changing the Rules About Rules?: Unilateral Humanitarian Intervention and the Future of International Law” in Holzgrefe and Keohane, *op.cit.*, p.199.

¹⁹⁸ The Group of 77 which has 135 Member States, thus representing a majority of the international community, rejected “the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law”, para.54 of the *Declaration of the Group of 77 South Summit held in Havana from 10 to 14 of April 2000*, available at www.g77.org/Docs/Declaration_G77Summit.htm visited on 1 March 2004.

¹⁹⁹ Without embarking on the debate on instant custom, it must only be mentioned that something which is customary logically and literally implies a repetition of facts; it takes at least two points to draw a line – and preferably one more to confirm that the second dot was not faulty. This is also the classical view of public

action; the international community's response to the US invasion of Afghanistan, conducted in 'pre-emptive self-defense' following the September 11 2001 attacks on the World Trade Center and the Pentagon, gives a better standard of the amount of international support required for the *opinio juris* of a would-be 'instant' rule of customary international law. The September 1999 intervention of the Australian-led coalition INTERFET in East Timor has been mentioned in the debate as a counter-precedent of the international community to the NATO bombings in Kosovo on the grounds that it had the consent of all parties as well as UNSC authorization²⁰⁰. This argument is not convincing since a true counter-precedent would concern a situation in all its relevant parts similar to that of Kosovo, that is not only the fact that human suffering is at hand, which was indeed also the case in East Timor. A counter-precedent would be a situation where State consent to the action (for example the provision of humanitarian aid) is lacking and where the UNSC is unable to act but where the international community still abides by international law. That is when the rules would be put to the test. Albeit not a perfect example for the purposes of this essay since it concerned the deliberate changing of power in a country where no armed conflict was raging nor humanitarian aid hindered²⁰¹, the invasion of Iraq in 2003 still indicates that the world's leading military and political powers will not hesitate to use force unilaterally at their will, notwithstanding international condemnation.

Consistency between State sovereignty and morality

Much of the debate on humanitarian intervention, especially when it is unilateral, has focused on an alleged inconsistency between law and morality. The latter supports forcible relief for victims based on fundamental human values such as the right to life whereas the former rigidly prohibits this through the firmness of State sovereignty²⁰². However, reliance

international law as to the creation of a rule of customary international law, see *e.g.* Claude Emanuelli, *Droit International Public*, University of Ottawa, 1998, p.43ss.

²⁰⁰ O'Connell, *op.cit.*, p.85, S/RES/1264 of 15 September 1999.

²⁰¹ See below on the humanitarian implications of more than a decade of sanctions imposed on Iraq. Seeing that the USA had been particularly in favor of the sanctions regime – which in fact deprived the Iraqi population of also very basic supplies because of the 'dual use' restrictions – its decision to invade Iraq can hardly be justified by the USA as giving free access to humanitarian supplies.

²⁰² See *e.g.* the conclusion of the Independent International Commission on Kosovo, *Kosovo Report* (2000), p.186. The yielding of State sovereignty is treated here in the context of giving access to a State's territory for the delivery of relief. Admittedly, the partial giving up of sovereignty to international organizations (such as the UN or the EU) in reasonable portions can be profitable. However, such submission is made on a voluntary basis

on State sovereignty is not necessarily immoral. If one endorses a short time perspective, it is true that – lacking non-interfering means to imperatively persuade a State to accept humanitarian aid – in certain cases sovereignty will prevail over intervention at the cost of human suffering. But in a long term perspective – lacking clear rules and means eliminating potential and attractive misuse of the instrument of humanitarian intervention – a relaxation of State sovereignty for the benefit of intervention will be at the cost of stability of international relations and ultimately peace²⁰³. States in a position of relative strength will firstly act on the basis of their own moral principles²⁰⁴, in their own interest and seize whatever opportunity to enhance their status. To open the legal gate to intervention on humanitarian grounds without severe control mechanisms would seem extremely dangerous, especially in the current state of world affairs, with one dominant military player who moreover constantly shows aspirations of global reach for its economic, political and moral ambitions. Since the international community is far from demonstrating a will to be united under the same economical, political or moral values (on the contrary), any attempt to achieve such blending would seem to be not only in vain, but also entailing internal armed uprisings and eventually war. The division of Africa between the colonial powers during the Berlin Conference 1885, the disastrous effects of which still linger to this day in the civil wars ravaging the continent, is an illustrative example of how blunt Western interests abroad have resulted in war in a long term perspective. A recent example of an intervention which has been veiled in humanitarian garment as other justifications have proven fruitless which subsequently also entailed persistent internal armed resistance is the US-led invasion of Iraq in March 2003. At the outset, the proponents of its legality (or at least legitimacy) justified the invasion on a variety of grounds, the major one being a threat of weapons of mass

and cannot be forcibly executed. In order for the benefits of this kind of cooperation to be durable, the sovereign rights thus transferred to the international organization should be very clearly defined (the lack of which is presently a defect of the EU).

²⁰³ See also Krisch, *op.cit.*, p.331 who argues that the question of humanitarian intervention is a matter of choice between human rights or peace (and that peace have stronger considerations of justice than State sovereignty which in turn renders it a stronger moral argument); for this, he finds contemporary support *e.g.* in the UN Charter which emphasizes the maintenance of peace and he believes that if people have had the choice, they would have chosen peace over preservation of their human rights at all times. Through this maneuver, he thus lessens the gap between morality and law on the question of unilateral humanitarian intervention: the latter is neither moral nor legal because it menaces peace. The present essay goes one step further in that it argues that also State sovereignty as such, because of the rationale behind it, namely peace, is moral; the upholding of State sovereignty is thus moral and legal (and equally included as a foundation of the UN system).

²⁰⁴ See Hedley Bull, ed., *Intervention in World Politics*, (1984), p.193, who argues that this jeopardizes a peaceful and just international order.

destruction (WMD) in relation to which humanitarian concerns were subordinate. However, as time elapsed and no WMDs were found and no link between Saddam Hussein and international terrorism had been established, the Bush administration was left with the argument of humanitarian intervention: Hussein was a tyrant who deserved to be overthrown²⁰⁵. The tending of national interests by the USA and the UK during the whole chain of events in the region – the Iran-Iraq conflict in the 1980's; the Gulf War in 1991 ('Operation Desert Storm') and subsequently the enforcement of the Kurdish safe areas ('Operation Provide Comfort'); the December 1998 actions to compel Iraq to collaborate with UN weapons inspectors ('Operation Desert Fox'); and the February 2001 forcible upholding of the no-fly zones²⁰⁶ – did certainly not render the March 2003 invasion and subsequent overthrowing of the Saddam Hussein regime unanticipated²⁰⁷. Although it remains to be seen if the armed attacks on the Coalition forces will discontinue after the arrest of the dictator in December 2003, the fact still remains that there was 'a war after the war'²⁰⁸. In fact, as of the 27th of January 2004, there have been 58 American casualties after the capture of Saddam Hussein; after President Bush proclaimed the end of the war in Iraq on the 1st of May 2003, there have been 373 American casualties, of which 242 were combat

²⁰⁵ See Roth, *op.cit.* As pointed out by Roth, there are many factors testifying to the fact that the intervention was not humanitarian in character; for example, had the invading forces been determined to maximize the humanitarian influence of the intervention, "they would have been better prepared to fill the security vacuum that predictably was created after the toppling of the Iraqi government".

²⁰⁶ There are different hypothesis on the influence of all these years of measures against Iraq. One holds for true that the unusually strong coalition that condemned the Iraqi invasion of Kuwait and subsequently imposed sanctions on Iraq indeed changed international law in many areas, *e.g.* the use of force and human rights. A contrary hypothesis is that the nature of the coalition and its fracturing created a number of neither desirable nor sustainable precedents. See "The Impact on International Law of a Decade of Measures against Iraq", *European Journal of International Law*, vol.13, no.1, i-ii.

²⁰⁷ Naturally, the terrorist attack on the World Trade Centre and the Pentagon the 11th September 2001 put things in a new perspective for the USA. *Cf.*, for example, Farer's question in 2002 as to whether the USA would employ coercion not directly connected to 9/11 for wider strategic purposes; subsequently, allegations were effectively made by the Bush administration of links between Al-Qaeda and the Saddam regime, Tom J. Farer, "Humanitarian Intervention Before and After 9/11" Holzgrefe and Keohane, ed., *op.cit.*, p.87. A recent poll by CNN(Gallup) shows that 59 per cent of the American population thinks it 'was worth' commencing the war; analysts believe that, still feeling vulnerable after the September 11 attack, the Americans are not susceptible of questioning the reasons for the Iraq invasion, *Dagens Nyheter*, 22 January 2004, at <http://www.dn.se/DNet/jsp/polopoly.jsp?d=148&a=225778&previousRenderType=1>

²⁰⁸ During the fall of 2003, especially towards its end, reports of the present situation in Iraq made in terms of 'Iraq guerilla' war have been more frequent, see *e.g.* the German *Der Spiegel* at <http://www.spiegel.de/politik/ausland/0,1518,265052,00.html> and the British BBC at http://news.bbc.co.uk/1/hi/world/middle_east/3113417.stm both visited on 22 January 2004. The U.S. Defense Secretary Donald Rumsfeld disagreed during the summer of 2003 that the attacks on the Coalition could be defined as 'guerilla war' under the Pentagon's definition, (see <http://www.cnn.com/TRANSCRIPTS/0306/30/ldt.00.html>) but might during the fall have shown some inclination to the contrary, see http://www.thetip.org/art_Iraq_Guerilla_War_Rumsfeld_487_icle.html both visited on 22 January 2004 (source AP).

casualties²⁰⁹. The American casualties since the war began numbers 513 of which 354 in combat; estimates for the civilian deaths as a cause of the war range between 8041 and 9878²¹⁰. This 'post-war' is the one over the trust, the confidence and mostly the opinions of the population of the territory in which the interference took place²¹¹. In this context, it may very well be argued that "king-making or imposing democratization is no business for outsiders"²¹²; then again, external interests and/or support might equally well hamper any internal strife for freedom, which has been the case in many African States. In any case, people's sense of nationality is deeply rooted and territorial losses are not easily forgotten; the Israel-Palestine conflict suffices as one gruesome example of this. One can only speculate in what armed conflicts future enterprises in disrespect of States' sovereignty will result in, and one can hope that they are not increasing in size and number in spite of the fact that the enlarged actual possibilities for military action in pursuance of national interests after the Cold War to a great extent have been seized by the major military player in the world²¹³ (which might consider itself less concerned by a fear that equal measures will be used against itself²¹⁴). The least to be done in order to curtail this tendency is the continuation of State sovereignty, in some areas subjected to the clear rules of peaceful, non-hierarchical international forums. Wing-clipped through the prohibition of the unilateral use of force other than for self-defense, State sovereignty is therefore not only a pragmatic basis for international relations, but it is also morally justifiable in that its strict upholding prevents war and thus human suffering on a large scale.

²⁰⁹ Source: <http://www.antiwar.com/casualties/> visited on 27 January 2004.

²¹⁰ *Ibid.*, <http://www.iraqbodycount.net/> visited on 27 January 2004.

²¹¹ This is of course a classical problem for the conqueror of a State noted already in 1513 by Niccolò Machiavelli in *The Prince*, Chapter V. Debated as it is, this cynical oeuvre does not necessarily provide a particularly human approach applicable to a discussion on humanitarian assistance; it is here merely used as an example of the long term problems of foreign interference in the internal affairs of a State on the one hand, and as a reminder of the similarities between the political rationales it endorses and the foreign policy of certain powerful contemporary States on the other.

²¹² Donini, *op.cit.*, p.38

²¹³ According to the U.S Defense Department's Annual *Base Structure Report* for the fiscal year of 2003, the Pentagon own or rents 702 overseas bases in about 130 countries, other sources say the number of bases abroad is close to 1000, see Chalmers Johnson, "America's Empire of Bases", *TomDispatch.com*, January 2004, at www.nationinstitute.org/tomdispatch/index.mhtml?mm=1&yr=2004 visited on 15 February 2004.

²¹⁴ To only superficially exemplify this, there are a number of internationally recognized treaties to which the U.S.A is not a party, e.g. the Convention on the Rights of the Child, the International Covenant on Economic, Social, and Cultural Rights and the Rome Statute. It is remarkable that the U.S.A, having signed the latter treaty in December 2000, 'unsigned' it in June 2002. The country is presently exerting pressure on other States to sign bilateral treaties with it exempting U.S. military and government personnel from the jurisdiction of the ICC.

Consummation of State sovereignty

There is the view that international relations should be based on individual rights at least inasmuch as certain basic rights, *e.g.* the right to life, are concerned and that authorities that do not respect such fundamental rights do not amount to statehood and consequently do not profit from sovereignty as concerns those of its acts that menace these rights. Two remarks must be made with respect to this. Firstly, there is the evident question of what organ should decide when sovereign rights have been thus consumed. But secondly, more importantly and notwithstanding the customary stipulations of Art 1 of the Montevideo Convention, non-States can also wage war. Moreover, other, 'real' States may have political, economical or other interests as well as traditional and historical ties to a non-State. Such an eventuality therefore immediately takes any intervention by a third State in the affairs of a non-State to an inter-state level, which eventually very well might lead to an international war involving several States. Thus, a proposed solution to the question of the legality of humanitarian intervention which is based on an assumption that sovereignty has not been acquired, or that it has been 'consummated' if basic human rights are not respected is an academic solution to a practical problem. It does not take into account the rationale behind the concept of State sovereignty, which, for example the Montevideo Convention does in that its exigencies for statehood are strictly pragmatic. Any other way opens the aforementioned gate to misuse of intervention which would risk large scale war and is thus immoral.

Chapter IV – Enforcement agents

The United Nations as well as States, individually or in concert, have both demanded and undertaken implementation of humanitarian aid, invoking different moral and legal grounds for their actions. This Chapter provides a modest overview of the practice of the different actors.

International tribunals may not be seen as enforcing organisms in the sense of the present chapter. They merely conclude that a certain rule of humanitarian law has not been complied with, whereas other institutions see to it that the courts' decisions are carried out in reality, much like the case in national legal systems. What is lacking on the international level, however, is the equivalence of a police acting on the scene of the crime, maybe even preventing the offence from being committed, and functioning in accordance with clear rules of conduct. This is of course in line with the 'flat' structure of the relations between the States within the international community, based on the mutual respect for the sovereignty of each of its members. Nevertheless, as will be argued below, international tribunals may have an advisory role to play in a prelude to a decision on enforcement.

Humanitarian organizations as such do not seem likely to act in order to forcibly implement humanitarian aid since that would menace their neutrality. However, such damage could equally occur should their assistance be enforced by another party, since the latter would act on behalf of the humanitarian organization.

The United Nations

The General Assembly

The United Nations is undoubtedly the world's most important player in the field of humanitarian aid²¹⁵. In his report to the UNSC of the 22nd September 1998, the Secretary-General endorsed that while “full respect must be shown for the sovereignty, independence and territorial integrity” of States, the “international community should ensure” that humanitarian assistance be provided where “States are unable or unwilling to meet their responsibilities towards refugees and others in conflict situations”²¹⁶. In comparison to the UNGA resolutions mentioned above under the historical outlook, this report seems less reluctant to ensure the delivery of humanitarian assistance on dispense of State sovereignty. However, in its resolution Uniting for Peace of 1950, the UNGA decided that in cases where the UNSC “because of lack of unanimity of the permanent members fails to exercise its primary responsibility for the maintenance of international peace and security” the UNGA should “consider the matter immediately with a view to making appropriate recommendations to Members for collective measures [...] including the use of armed force when necessary”²¹⁷. This resolution did not however change the Charter scheme²¹⁸ and seeing the irregular circumstances surrounding it (the resolution was passed in connection with the Korean crisis in an attempt from the UNGA to overcome the problems of vetoes in the UNSC when there was a need for action) which gave it an *ad hoc* nature, it has been seen as and dispossessed of any character as a legal precedent²¹⁹.

The Security Council

At the outset, it must be noted, and always kept in mind when considering the measures taken by the UNSC, that it constitutes a highly political body. It is therefore very hazardous

²¹⁵ According to a report from the European Union on occasion of the EU-US summit in 25 June 2003, the EU is the largest provider of humanitarian aid in the world, see http://europa.eu.int/comm/external_relations/us/sum06_03/aid.pdf visited on 2 November 2003.

²¹⁶ S/1998/883 of 22 September 1998, *Report of the Secretary-General on Protection for Humanitarian Assistance to Refugees and Others in Conflict Situations*, para 16.

²¹⁷ Uniting for Peace, 3 November 1950, G.A. Res. 377(V), op.A1.

²¹⁸ See Dinstein *op.cit.*, at 271 and Mary Ellen O'Connell, "The UN, NATO, and International Law After Kosovo" in *Human Rights Quarterly*, vol.22 (2000), no.1, p.72.

²¹⁹ See Jovica Patnogic, *op.cit.*p.1021. The Uniting for Peace resolution was used for the first time in 1954 upon the British and French vetoing during the Suez crisis; following an UNGA demand to withdraw their troops these countries did so. However, the Soviet Union did not withdraw its troops from Hungary in 1956 despite such a demand, see O'Connell "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy", 336 *Columbia Journal of Transnational Law* (1997), p.482.

to make both assumptions like the ones drawn from the jurisprudence of a court²²⁰, and conclusions concerning prevailing *opinio juris* from the UNSC's practice. Of course, this is not to say that the Council's actions must not be considered in a study such as the present; its weight on the international arena entails the very contrary.

According to Chapter VII of the Charter of the United Nations, the UNSC is invested with the power to deploy the use of force. This is the only manner in which the UN can diverge from the basic stipulations in Art 2(4) and Art 2(7) of the Charter not to intervene in matters essentially within the domestic jurisdiction of the Member States. The measures of force at the disposal of the UNSC are found in Art 41 and Art 42 of the Charter according to which the Council first is to consider using measures not including armed force and then, should it conclude that such measures would or have proved to be inadequate, turn to the alternative of military action. Through Art 25 of the Charter, the Member States agree to accept and carry out the decisions of the UNSC in accordance with the Charter. The imposing of sanctions on a Member State by the Council thus means that all other Member States will restrict their trade with the target State accordingly. When armed force is deployed, the UNSC may, as was the case in *e.g* the Gulf War²²¹ and in Bosnia-Herzegovina²²², authorize Member States or regional organizations (Chapter VIII of the Charter) to pursue its goals of restoring international peace and security. The Council has hardly any other practical alternative to authorization in order to execute its decisions on the use of armed force since no agreements exist under Art 43 of the Charter constituting an international force under the direct auspices of the Council²²³. Still, it has been argued that UNSC measures taken through authorization of Member States have helped blur the line between actions taken by individual States and actions by the international community²²⁴. This might be true in the sense that certain States may find themselves with an additional legal argument for an

²²⁰ See Ove Bring, *FN-stadgan och världspolitikern – Om folkrättens roll i en föränderlig värld*, Stockholm, 2002, p.265.

²²¹ S/RES/678 of 29 November 1990, op.2.

²²² Following S/RES/836 of 4 June 1993, op.10, which was taken under Chapter VII, NATO decided that ten days after the 19th of February 1994 at 24 hours, air strikes were to commence, see *Decision by the North Atlantic Council*, 9 February 1994, Brussels, para.10.

²²³ See *e.g.* Emanuelli, *op.cit.*, p.488. Blokker argues that “it is also clear that the role which is in fact now being played by the Council is limited to legitimizing the use of force, without keeping it under strict control.” Niels Blokker, “Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’”, *European Journal of International Law*, vol.11, no.3, 2000, p.543.

²²⁴ Chesterman, *op.cit.*, Chapter 5.

envisaged unilateral military action (see below under Implied UNSC authorization). It remains, nevertheless, that the action as such is still decided upon by the Council and that there is also a general acceptance from the international community of the Council's authorization procedure for deploying armed force²²⁵. A modality of UNSC authorization, although not necessarily legal, is when countries take such unilateral measures in the absence of a Council mandate, but their actions are subsequently approved by the UNSC. That was the case when the Economic Community of West African States (ECOWAS) sent what it called a peacekeeping force to Liberia in the summer of 1990²²⁶ and when it intervened in Sierra Leone.

The UNSC may not use its Chapter VII-powers arbitrarily. It is bound by Art 39 of the Charter according to which a pre-requisite of these powers is that a "threat to international peace and security" can be established. According to a pragmatic view it might be argued that the UNSC is solely competent to determine what is a "threat to international peace" and not. According to such a definition, a threat to international peace is whatever the UNSC determines falls under that definition. However, the Council remains a body formed and functioning under the UN Charter which according to its Art 24(2) binds the UNSC to act in accordance with it; the Council is thus "not unfettered in how it behaves and is not legally competent to declare that black is red"²²⁷.

Although the solving of problems of a humanitarian character indeed is one of the purposes of the UN²²⁸, that goal is to be achieved through "international cooperation" and is not mentioned under Art 1(1) which envisages "effective collective measures" to achieve international peace. Therefore, while it is well known that the concept of what is a threat to international peace and security has been given a broad interpretation, it is noteworthy that such a threat is still a condition and that the Charter does not explicitly allow the UNSC to have recourse to force for the sole purpose of implementing humanitarian aid in non-international situations. Some might argue that impediment of humanitarian assistance in

²²⁵ Blokker, *op.cit.*, pp.559-560

²²⁶ David Wippman, "Enforcing the Peace: ECOWAS and the Liberian Civil War", in *Enforcing Restraint: Collective Intervention in Internal Conflicts*, Lori F. Damrosch, ed., New York, 1993, p.157 and 184.

²²⁷ Frederic L. Kirgis, "The Security Council's First Fifty Years, in *89 American Journal of International Law* (1993), p.83s, at p.96

²²⁸ Art 1(3) of the UN Charter

nearly all cases would constitute a threat to international peace and security since individual States and coalitions have shown that they will not hesitate to enforce aid unilaterally lacking UNSC action on the matter. The legality of such unilateral actions is however, to say the least, uncertain which is why it would not be advisable for the Council to subscribe to such an argument of *realpolitik*. This is not to say, of course, that impeding humanitarian assistance in internal armed conflicts could not be one of the constituents of a threat to international peace and security. This may for example be the case when aid is being hindered as a part of the perpetration of genocide²²⁹.

Notwithstanding any illegality of a State's refusal of humanitarian assistance under Art 18 APII, the discussion above thus brings into question if the UNSC is invested with the power to undertake an enforcement action with the sole purpose of distributing humanitarian aid in internal armed conflicts. A similar debate was ignited when the UNSC directed sanctions against Southern Rhodesia in 1966 and South Africa in 1977²³⁰. Doubt was raised if the Council was acting *ultra vires* the Charter when imposing sanctions in response to Ian Smith's rebellion and the apartheid regime, which were both situations of a kind not explicitly mentioned in the Charter²³¹. The very brief resume below of the UNSC's actions to enforce humanitarian aid shows that the Council will not be affected by such concerns when taking humanitarian enforcement measures.

Freed as it was of the strings of superpower tension after the end of the Cold War, the Council has had a renaissance during the 1990's²³². The stipulation of Art 39 of the Charter that a threat against international peace and security must be at hand has not encumbered UNSC action under Chapter VII in the absence of consent from the affected State or *de facto*

²²⁹ The UNSG stated during the Stockholm International Forum on Preventing Genocide in January 2004 that "genocide, whether imminent or ongoing, is practically always, if not by definition, a threat to the peace", UN News Centre, 26 January 2004, at www0.un.org/apps/news/story.asp?NewsID=9569&Cr=Genocide&Cr1 visited on 28 January 2004

²³⁰ S/RES/232 of 16 December 1966 and S/RES/418 of 4 November 1977

²³¹ This holds true although the UNSC stated that both the situation in Southern Rhodesia as well as "the policies and acts of the South African Government" constituted threats to international peace and security, (see op.1 res.232 and the preamble para.7 res.418).

²³² During the Cold War, the UNSC only declared threats to international peace four times: it ordered economic sanctions against Rhodesia and South Africa and ordered troops to Korea and the Congo, see O'Connell, "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy", 336 *Columbia Journal of Transnational Law* (1997), p.481

authority in order to provide humanitarian aid in non-international armed conflicts. In fact, it has done so on several occasions, for example in Somalia, East Timor and Bosnia-Herzegovina²³³. In these cases, humanitarian aid was allowed to be enforced by “all necessary means”, including the use of force. The Council has also restrained itself to the imposition of sanctions, as in Kosovo²³⁴. In the cases of Somalia and East Timor, the UNSC stated in the relevant resolutions that a threat to international peace and security was at hand, whereas this is left out in the resolution 761 for Bosnia-Herzegovina. Concerning the latter, it merely expanded the mandate of the already existing UNPROFOR. In the Somalia resolution (794), the UNSC determined 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”. In many resolutions enforcing humanitarian aid one way or the other in internal armed conflicts, the UNSC has affirmed the sovereignty and territorial integrity of the affected State²³⁵. Also acting under Chapter VII, the UNSC has considered the impediment of humanitarian assistance a serious violation of international humanitarian law²³⁶, and it has condemned it²³⁷.

The UNSC has thus been expansive in its interpretation of Art 39 of the Charter in order to respond to situations of urgent human suffering²³⁸; it has in fact acted to enforce the delivery of humanitarian aid in internal armed conflicts. Notwithstanding the fact that this is not provided for explicitly by the Charter, the goal of distributing humanitarian assistance is still as such certainly in line with a *bona fide* interpretation of the Charter. The Council would therefore hardly be declaring that ‘black is red’ when enforcing humanitarian assistance in internal armed conflicts. Furthermore, as any treaty the UN Charter may be changed pursuant to the practice of its parties according to Art 31(3)(b) of the Vienna Convention on

²³³ S/RES/794 of 3 December 1992, op.10 (Somalia); S/RES/770 of 13 August 1992, op.2 (Bosnia-Herzegovina); and S/RES/1264 of 15 September 1999, op.3 (East Timor).

²³⁴ S/RES/1160 of 31 March 1998, op.8

²³⁵ See *e.g.* the following paragraphs of the preamble of the relevant resolution: Kosovo: S/RES/1160, para.7; Iraqi Kurds: S/RES/688 of 5 April 1991, para.7; Somalia: S/RES/794, para.15 (although reference in this resolution was made to the responsibility of the Somali people); East Timor: S/RES/1264, para.12; and Bosnia-Herzegovina: S/RES/836, para.3.

²³⁶ S/RES/819 of 16 April 1993, op.8

²³⁷ See *e.g.* S/RES/836 of 4 June 1993

²³⁸ Other examples also give proof of this, *e.g.* the UNSC reaction to the situation in Haiti in the 1990s, S/RES/940 of 31 July 1994.

the Law of Treaties²³⁹. At any rate, it must be noted that there is no review mechanism for the actions of the Council²⁴⁰, in light of which the ICJ has found that the organs of the UN are competent to determine in the first place their own jurisdiction²⁴¹. Pragmatically, the answer to the question posed above if the UNSC is invested with the power to enforce humanitarian assistance in internal armed conflicts must thus be in the affirmative.

However, the problem perceived by the present study is not so much whether the UNSC *can* enforce humanitarian aid but rather if the Council is *well suited* to do so. Several observations will be made with respect to this within the framework of a discussion on the advisability of the UN as an enforcement agent of humanitarian assistance.

Advisability on the UN as enforcement agent

A discussion on the advisability of the UN as an enforcer of the implementation of humanitarian aid is naturally ambivalent. On the one hand, it might be argued that the institution lacks the flexibility and rapidity to respond to humanitarian crisis in a satisfactory manner. Furthermore, the inherent political nature of all decisions emanating from the UNSC, menaces almost *per se* the principle of neutrality that applies to all humanitarian assistance²⁴². The Council's decisions ultimately rely on its Members' considerations of their own national interests (such as economic interests or motivation to send their nationals into combat) and result in a randomness of action taken by the UNSC. The Council has for example chosen not to take measures to ensure a safe environment for humanitarian aid in Rwanda, where nothing was done to stop the slaughter in the spring of 1994 or in the conflict in Congo/Zaire where rebels attacked humanitarian aid workers and shipments²⁴³. Nor did the UNSC authorize any action to implement the delivery of humanitarian aid in

²³⁹ Vienna Convention on the Law of Treaties, 22 May 1969, UNTS, vol.1155, p.331, entered into force 27 January 1980

²⁴⁰ Art 36 of the Statute of the ICJ (UNTS XVI, entered into force 24 October 1945) refers only to the "State parties to the Statute".

²⁴¹ *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962.

²⁴² Donini *op.cit.*, p. 39 talks about the "conceptual incompatibility" between the political compromises in the UNSC and the universal humanitarian imperative.

²⁴³ See O'Connell, "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy", 336 *Columbia Journal of Transnational Law* (1997), p.489-490

Kosovo in 1999. This instability and lack of predictability of the Council's decisions hamper the principle that humanitarian aid should only be distributed on the sole basis of need. Moreover, the absence of a review mechanism as well as the secrecy which shades many of the UNSC's 'informal' meetings put in question whether the Council always promotes conflict resolution through dialogue and cooperation²⁴⁴. Indeed, seeing that the UNSC's mandate include both 'legislative', 'prosecuting' and 'executive' functions, the institution does have an inquisitorial scent to it. On the other hand, it must be concluded that the UN is in fact the only international organ which, more or less within the scope of the rules applicable to it and at least without condemnation from the international community, can implement a potential right to humanitarian assistance according to international humanitarian law (as to such a right, see Chapter III). Other organizations may indeed have more resources to do so, but their actions would not enjoy the legitimacy from which benefits the UN. Any decision by the international community to use force should be taken within the framework of a common institution with the aim of achieving peace. Furthermore, it would be advisable that, when armed, also the enforcement action as such is under UN command following agreements under Art 43 of the Charter. UNSC authorization for States to undertake the implementation of humanitarian aid has already been exploited by certain States eager to use military force, (see below under 'Implied UNSC authorization')

The constitution of the UN is a revolutionary step in the course of history and an extraordinary accomplishment inasmuch as States have actually subjected their use of force to a peaceful forum. It is of course true that the lack of transparency and the veto rights of the UNSC are among the built-in defects of this forum that need to be remedied. In order for the UN not to undermine its legitimacy and rigidity by resorting to uncertain or large interpretations of well-intended rules, nor to be paralyzed by outdated provisions, the Organization and particularly its Council seems to be in dire need of a reformation. Such a reformation is thus motivated by a desire to strengthen the UN system and based on the belief that there exists an essential link between the legitimacy and the operational efficiency of that system. As to the task of enforcing humanitarian assistance, very clear rules on the

²⁴⁴ As an example, Sponeck argues that as a consequence of these mentioned defects of the Council, Iraq has rarely had an occasion over the past decade to explain its position and defend legitimate interests in relation to the sanctions regime imposed upon it, see Graf Sponeck, "Sanctions and Humanitarian Exemptions: A Practitioner's Commentary" in *European Journal of International Law* (2002), vol.13, no.1, p.85

conditions in which the assistance could be enforced as well and the powers and manners to do so would have to be among the changes to be carried out. In relation to this, special care should be taken to eliminate Member State's possibilities to advance their own political goals under the auspices of humanitarian aid. For the legality of forcible implementation of humanitarian aid unleashes an immense power in that it includes the use of force and in that it overruns State sovereignty. It would be naïve and dangerous to expect that States would use such a power altruistically on their own initiative and not abuse it for their own interests; the human history of war as well as the present provide too many examples to the contrary²⁴⁵.

States or regional organizations

Absence of UNSC response to humanitarian crises has on several occasions ignited a debate on the lawfulness of uni- or multilateral measures of States presumably undertaken to compensate such inaction by the Council. This has often been labeled humanitarian intervention, a general discussion on which has been conducted above.

In their endeavors to find legal grounds for unilateral humanitarian intervention, States have invoked numerous moral and legal arguments. Many of these would seem to be relevant also for the purposes of the legality of unilateral enforcement of humanitarian assistance by one or several States; the implementation of humanitarian aid may very well form part of a humanitarian intervention. In fact, many of the armed unilateral interventions carried out under humanitarian flag have been initiated by the securing of access for and delivery of humanitarian aid. Moral arguments of humanitarian considerations are often used as justification for humanitarian intervention. Some of the more specifically legal justifications

²⁴⁵ For a view opposing the Hobbesian model of history as a war of all against all, see *e.g.* Anthony D'Amato, "The Moral and Legal Basis for Sanctions", in *The Fletcher Forum*, Summer/Fall 1995, p.24, who takes on a more Lockean view when he argues that international relations are a system of peace which strives to avoid war. He revises Henkin's famous remark and states that "almost all nations are and have been at peace with almost all other nations almost all of the time". In response it can be said that only during the 20th century has the world experienced two global wars, of which the second lasted up until the 1990's and furthermore that the world's mightiest military power seems indifferent to international law on the use of force as long as the latter does not serve its national interests.

of this kind of intervention will be briefly discussed in this section, namely the ones of ‘implied authorization’ and ‘material breach’.

According to established international law, States acting alone or in concert do only have the interim right to unilaterally resort to armed force in an act of self-defense under Art 51 of the UN Charter, until the UNSC can be seized of the matter. In all other cases, they are bound by the peremptory norm stipulated in Art 2(4) and 2(7) of the Charter. Art 53 of the Charter makes clear that also regional organizations need to acquire UNSC authorization before embarking on enforcement actions²⁴⁶. Although it is true that Art 1 common to the GCs does call upon States to respect and make respect the rules of international humanitarian law, this provision does not constitute an exception to the prohibition of the use of force. It must equally be noted that the complex of rules applicable within the World Trade Organization (WTO) extensively restricts member States’ possibility to unilaterally impose economic sanctions upon other members of that organization, as do the International Law Commission’s Draft Articles on State Responsibility²⁴⁷. That Draft is based on reciprocity (as opposed to the GC complex) apart from Art 40 which refers to peremptory norms of international law – *jus cogens*; a threshold to which the denial to accept humanitarian aid may amount when undertaken as part of the perpetration of a serious international crime, *e.g.* genocide, but more doubtfully when being unlawful as the result of a relatively broad interpretation of Art 18 APII.

As has been said, the power balance of the Cold War indeed restrained the actions of the UNSC during the first forty-five years of the latter’s existence; however, *perestrojka*, *glasnost*, the abandon of the Brezhnev doctrine in May 1989 and subsequent events equally unleashed the one remaining superpower from the fetters of ‘equal superpower force’. In the last decade of the second millennium the world thus found itself with one State sufficiently strong to endure any military, political or economic impacts as consequences of its own

²⁴⁶ Different organizations consider themselves being envisaged or not by this article and by Chapter VIII of the Charter. For example, the Organization for Security and Cooperation in Europe (OSCE) considers itself such a regional organization, whereas NATO does not; Art 5 of the North Atlantic Treaty (Washington 4 April 1949, 34 UNTS 243, in force 24 August 1949) states that the organization is one of collective self-defense, and it refers to Art 51 of the Charter.

²⁴⁷ Draft Articles on Responsibility of States for internationally wrongful acts, annexed to the UNGA resolution A/56/83 (2001).

wrongdoing. The vast array of practical implications of this fact must be borne in mind when considering States as enforcement agents of humanitarian assistance.

‘Implied UNSC authorization’ and ‘Material breach’

There are numerous cases where the UNSC has authorized Member States to take action on its behalf, and certain authors have even gone so far as to assert that the original scheme of Chapter VII of the Charter is not workable and that it should no longer be for the UN itself to conduct enforcement actions²⁴⁸. These should instead be for Member States to undertake²⁴⁹. As mentioned above under the discussion on the UNSC, however, the underlying decision on the use of force still remains with the Council which most often emphasizes in its relevant resolutions that it “remains seized of the matter”. This indicates that the decision on any further action remains with the Council.

In some cases, countries – the USA and the UK in particular – have advocated a right to intervene in ways otherwise prohibited by the UN Charter stemming from anterior UNSC resolutions. This trend of ‘implied UNSC authorization’ began with an enforcement action of the delivery of humanitarian assistance to the Kurds, who were subject to Iraqi attacks in February 1991. In its resolution 688, the UNSC found that the attacks constituted a threat to peace and security in the region and called on Iraq to end its repression of the Kurds and to allow for humanitarian assistance to reach northern Iraq²⁵⁰. Protective no-fly zones were then established by three members of the Coalition who were also members of the UNSC, (the action went under the name ‘Operation Provide Comfort’), the creation of which went well beyond distributing humanitarian aid. The UK has argued that the resolution 688, read together with resolution 678 (authorizing the expulsion of Iraq from Kuwait and all

²⁴⁸ See Christine Gray, “From Unity to Polarization: International Law and the Use of Force against Iraq”, in *European Journal of International Law* (2002), vol.13, no.1, p.3 and note 5. She points out (p.4) that the cases after the Gulf War where the Council has authorized Member States to take action – Somalia (1992), Yugoslavia (1992), Haiti (1994), Rwanda (1994), the Great Lakes (1996), Albania (1997), the central African Republic (1997), Sierra Leone (1997), Kosovo (1999) and East Timor (1999) – were all internal conflicts except for Yugoslavia.

²⁴⁹ *Ibid.*, p.6 with reference to the Report of the Panel on UN Peace Operations (The Brahimi Report), A/55/305 set up by the UN Secretary-General in March 2000, which in para.53 states that UN enforcement actions consistently have been entrusted to coalitions of willing States with the authorization of the UNSC.

²⁵⁰ S/RES/688 of 5 April 1991

necessary means to bring peace to the region) provided sufficient authority to create the zones as part of the response to Iraq's violation of international peace²⁵¹.

Concerning the resolutions 688 and 678 as a basis for the unilateral intervention the 'Operation Provide Comfort' constituted, the following may be said. Resolution 678 was specifically tailored for the expulsion of Iraq from Kuwait; in any case the issues entailing 'Operation Provide Comfort' was not at hand yet which is why the resolution could not have been aimed at them. As to resolution 688, which did envisage the Iraqi repression of the Kurdish population in the northern part of the country, it was not passed under Chapter VII, nor did it make any reference to earlier UNSC resolutions on Iraq. Instead, the resolution in its preamble²⁵² made reference to Art 2(7) of the UN Charter, which affirms the sovereignty of all Member States.

Even though Iraq subsequently might have given its consent to the zone, the establishment of the latter serves as a very good example, in addition to *e.g.* those of Somalia and Kosovo, of how the enforcement of humanitarian aid inherently will entail many additional measures other than purely the aid as such if it is going to be actually implemented in the absence of the affected State's consent. These measures will necessarily interfere with the sovereignty of the affected State. Such interference may prove to be rather extensive in time, and will not necessarily be temporarily limited to the enforcement action²⁵³. In the case of the no-fly zones this is highlighted through the 2001 air strikes against Iraq carried out by the USA and the UK in response to an increase in surface-to-air missiles attacks on coalition pilots in the zone during January 2001²⁵⁴. These are of course only some of the links in the chain of Western interference in Iraq.

²⁵¹ Mary Ellen O'Connell, "Continuing Limits on UN Intervention in Civil War", in *67 Indiana Law Journal* (1992), p.903s at p.906-907.

²⁵² Preamble para.2

²⁵³ See to this Donini, *op.cit.*, at p.33ss. Donini argues that many cases falsely have been seen isolated as 'abnormal crisis' that can be solved through time-limited intervention – he mentions the UN operation in Mozambique (ONUMOZ) as an example of this – and he calls for the humanitarian crisis to be seen in a more profound perspective on the background of their historical, social and economic fabric.

²⁵⁴ According to the UK, the legal justification of these strikes did not rest upon 'implied UNSC authorization', but were instead legal by reference to 'humanitarian justification', although resolution 688 (*N.B.* not resolution 678) supported them, see Christine Gray, "From Unity to Polarization: International Law and the Use of Force against Iraq", in *European Journal of International Law* (2002), vol.13, no.1, p.9 and note 37, with reference to a debate in the House of Commons.

In December 1998, the USA and UK undertook 'Operation Desert Fox', which included four days and nights of missile attacks against Iraq, when the country denied co-operation with the UN weapons inspectors. In so doing Iraq did not, however, use any armed force. Along with the argument of 'implied UNSC authorization', the USA and the UK invoked that the withdrawal of co-operation was a breach of Iraq to the ceasefire regime established by resolution 687²⁵⁵ as well as subsequent resolutions on weapons inspections which made it a condition of the ceasefire that Iraq destroy its weapons of mass destruction²⁵⁶. This flagrant violation of UNSC resolutions was a 'material breach' which justified intervention. Such an argument was also among the many more or less well defined legal grounds for the 2003 invasion of Iraq. Somewhat surprisingly, the doctrine of 'material breach' has on one occasion been endorsed by the United Nations Secretary General (UNSG). When commenting on the USA and UK January 1993 operation against Iraqi missile sites in the no-fly zones, he argued that the action was mandated by the UNSC according to its resolution 678, and the cause was the violation by Iraq of the ceasefire resolution²⁵⁷. This argument has not been repeated by the UNSG²⁵⁸, and it has been criticized because it overlooks the fundamental fact that according to the Charter the decision on the use of force lies with the UNSC.

Advisability on States or regional organizations as enforcement agents

The notions of 'implied UNSC authorization' and 'material breach' naturally vastly enlarge States' possibilities to use armed force. It must be noted that, still without any global consensus on the legality of these justifications of the use of force, they have had some factual impact in that they have been used as grounds for intervention. The unilateral use of force to enforce humanitarian aid (at least on the surface of it) also shows, notwithstanding any rules of international law, a will within the international community to react to cases where assistance is being impeded. The problem is that the undertakings to realize such a

²⁵⁵ S/RES/687 of 3 April 1991

²⁵⁶ Christine Gray, "From Unity to Polarization: International Law and the Use of Force against Iraq", in *European Journal of International Law* (2002), vol.13, no.1, p.12

²⁵⁷ M. Weller, ed., *Iraq and Kuwait: The Hostilities and their Aftermath* (1993), at 741

²⁵⁸ Gray, *op.cit.* p.12

will have been fairly concentrated to a small number of States and that humanitarian concerns may not be their only motivation for using armed force²⁵⁹. The aid will thus not always be distributed to those in most dire need of it. Most importantly, however, unilateral acts of this kind undermine the authority of the UN system and the international legal order, in particular when they are undertaken by the most powerful player on the international arena. That is catalyzed when attempts are being made to fit the violation of international law constituted by such unilateral acts into the existing framework of international law; then what is being done might be “to mould that law to accommodate the shifting practices of the powerful”²⁶⁰.

In the case of Iraq the military intervention was clearly of an escalating nature. The reasons for such escalation might be due to the fact that the durable solving of humanitarian problems is never a ‘punctual’ effort, but often profound changes must be done if suffering is to be eliminated on a sustainable basis²⁶¹. However, other reasons may also consist of long and short term strategic and economical concerns of the enforcing States taking use of the humanitarian disaster to achieve such goals. Even acknowledging the existence of altruistic States – a conception contradicted by both classical and contemporary history as well as recent events – it would seem an overwhelming task for one or a small number of States to neutrally be able to consider all the practical, political, ideological, cultural and other national and international implications of an intervention enterprise. Unless, of course, such problems are not realized by the States intervening unilaterally because they are compelled in their actions by a conviction of their own supremacy in such matters and therefore envisage themselves as rendering other nations (embracing other lifestyles, strange to the intervening States), a service. In order to strip good intentions of such potential single-mindedness²⁶², an organization comprised of the vast majority of the international community would instead seem much more suited for the task of enforcing humanitarian assistance. The military or

²⁵⁹ Farer, *op.cit.*, p.75 alleges that the USA have “wrapped particularistic interests of an economic or geo-political character in humanitarian garments” in cases where no authorization of the Organization of American States (OAS) or the UNSC could be secured: the cases of Grenada, Panama and Central America in the 1980s.

²⁶⁰ Michael Byers and Simon Chesterman, *op.cit.*, 203

²⁶¹ It has been argued above under Humanitarian intervention that the coalition’s actions in violation of Iraq’s sovereignty such as they evolved – bypassing the UNSC – might risk long term armed internal resistance.

²⁶² History offers many examples of what Farer, *op.cit.*, p.76 calls “civilizing missions and morally educative vocations”. Religious missionaries in Africa or forcible Western education of samis, inuits and other indigenous peoples may be mentioned as two examples.

economic coalitions of today (NATO, EU, OSCE, African Union, ASEAN, *etc.*) do not amount to the vast political, ideological and cultural diversity required by such an organization.

The enforcement of humanitarian assistance by definition does not aspire beyond the pure alleviation of urgent human suffering. But, as mentioned, it may very well form part of a larger intervening enterprise and, if considered legal, also legally justify such an enterprise. Seeing that the enforcement of humanitarian aid includes the use of force if necessary and that single States or today's coalitions, for the reasons above, are not well suited for neither the task of deciding when enforcement action should be taken, nor be commanding the undertaking, they are not judged competent as enforcing agents of humanitarian aid.

Alternative procedure for enforcement decision-making

A few general conclusions can be drawn from the discussions above on the UN, States and regional organizations as enforcement agents for humanitarian assistance. Firstly, notwithstanding what organ is responsible for an enforcement action, clear rules on under what circumstances humanitarian aid can be forcibly implemented and by what means must be elaborated in addition to existing humanitarian law. Secondly, these rules should be applied by an international peaceful organization stripped of political considerations and representing a diverse majority of the international community, which diligently could make neutral assessments of where humanitarian assistance is being unlawfully refused. Finally, such an organization would have to be able to react quickly to imminent humanitarian crises. With respect to this, in situations where such response necessitates the use of armed force, it would be desirable to have the troops under the command of the international organization.

When elaborating on any suggestions in relation to the issues above it must always be appreciated that the UN, the ICRC, other inter-governmental organizations and NGOs, especially local ones, do a huge work essential in different humanitarian crisis worldwide. Their experience and detailed knowledge must evidently be carefully appraised before

deciding on any kind of measure to enforce humanitarian assistance or any assessment forming the base for such measures.

The International Institute of Humanitarian Law has elaborated 14 Guiding Principles on the Right to Humanitarian Assistance. This document stipulates in which circumstances such a right could be invoked (Principle 3), that humanitarian assistance must be granted access (Principle 6 and 10) and that the aid may be enforced by “all necessary means” failing granted access (Principle 6). The Principles also establish some fundamental criteria concerning character of a forceful implementation enterprise, *e.g.* that it should be set off by the UNSC. It is suggested that these Principles form a platform for international declarations and/or treaties to the effect of achieving the desired clarity of the rules applicable to humanitarian assistance, especially as to when and by whom it could be enforced.

An international peaceful organization with considerably less political occupations than – and formally not a part of – the UN is the International Criminal Court. This court represents a broad cultural diversity through the vast array of State Parties to the Rome Statute²⁶³. As has been described in this study, the hindrance of humanitarian assistance can form part of several international crimes under the Rome Statute. The rules of the Rome Statute are relatively clear and inasmuch as they are not, they may be clarified through the jurisprudence of the ICC²⁶⁴. Although international courts are more directly subject to politics than national ones, the ICC’s interpretation of the Rome Statute would still be of a legal nature and thus profit from predictability and certitude, as opposed to the moody practice of the UNSC. It is true that the ICC to date lacks resources, but the court has only started its work, and it will evolve as different questions are referred to it. In order to be able to have a speedy process, a possibility for the ICC to give advisory opinions would seem reasonable²⁶⁵.

²⁶³ As of the 28th of November 2003, 92 countries were State Parties to the Rome Statute. Out of them were 22 African Countries, 11 were from Asia, 15 were from Eastern Europe, 18 were from Latin America and the Caribbean, and 26 were from Western Europe and other States. Source: www.icc-cpi.int/php/statesparties/allregions.php

²⁶⁴ According to Art 21 of the Rome Statute, the ICC shall in the first place apply the rules of the Rome Statute, but have, in second place recourse also to *inter alia* applicable treaties and principles and rules of international law, and failing that even general principles derived from national laws.

²⁶⁵ The Rome Statute does not contain any provisions on advisory opinions.

The ICC thus fulfills all of the criteria suggested above for an international organ responsible for decisions to enforce humanitarian aid except for the one on quick response. The latter would also be failing the ICJ if this court was given a similar responsibility. The ICJ is furthermore not specialized in humanitarian law as opposed to the ICC, and it is a part of the UN. Moreover, the jurisdiction of the ICJ is subject to the consent of the litigating States according to Art 38(5) of its Rules, whereas Art 12 of the Rome Statute gives the ICC jurisdiction over alleged crimes referred to it under Art 14, Art 13(b) or Art 13(c) of the Rome Statute committed within the territory of a State Party or by an alleged perpetrator who is the national of such a State. Admittedly, the ICC's jurisdiction is complimentary to that of national courts according to paragraph 10 of the Preamble, Art 1 and Art 17 of the Rome Statute but the latter article provides safe-guards to ensure a *bona fide* application of the Statute on the national level as well as to uphold the rules of the Statute when the relevant State is unable to apply them (Art 17(1)(a)). It is also noteworthy that the jurisdiction of the ICC is not subject to UNSC approval²⁶⁶. In cases where humanitarian assistance is being unlawfully impeded by an insurgent party the affected State would thus have recourse to the ICC if it could not pursue the perpetrators itself and in cases where the illegal refusal is made on behalf of the State the latter would hardly persecute itself, thus activating the subsidiary jurisdiction of the ICC.

The present argumentation does not suggest that the ICC should be invested with the power to deploy military force in order to enforce humanitarian assistance. It would be unrealistic to expect broad international approval of such a drastic motion²⁶⁷. What is proposed *de lege ferenda* is instead that the described qualities (contrasted to the defects of the UNSC) of the ICC should be taken into account when undertaking a most needed revision of the rules applicable to the UNSC. This would be done to the effect that the ICC – collaborating with humanitarian organizations in fact-finding – be given a significant advisory role with respect to any determination on the unlawfulness of impediment of humanitarian assistance in

²⁶⁶ According to Art 16 of the Rome Statute, the Council can only put investigations of the Prosecutor on hold for a period of 12 months in a resolution taken under Chapter VII of the UN Charter; a procedure that may be renewed under the same conditions.

²⁶⁷ Seeing that the world's only superpower is actively working against the ICC, it could be argued that any suggestion involving that court is unrealistic. Although this essay aims at practical solutions to practical problems, there is a line between pragmatism and simply passively accepting *status quo*. The former may still require some efforts to be undertaken in order to achieve practical, durable, solutions.

internal conflicts. For example, the Council's exercise of a potential express stipulation in the UN Charter giving the former a power to combat humanitarian disasters with force could be subject to obtaining an advisory opinion on the situation at hand by the ICC. This Court would evaluate whether humanitarian aid is being unlawfully refused in the relevant situation. The invaluable ground knowledge of the humanitarian actors mentioned above would then be duly legally assessed by a competent organ, forming a sound, sustainable and legal basis (cleansed of political ambitions) for decisions on eventual measures persuading States to accept humanitarian aid. Keeping in close and constant contact (without losing their individual autonomy) and enjoying mutual confidence, these organs – the humanitarian actors, the ICC and the UNSC – would enable rapid reactions to unlawful refusals of humanitarian aid when they occur. Measures subsequently undertaken by the UNSC to this end would thus to a greater extent “reflect the objectives of the international community [and] not just the national interests of its most powerful members”²⁶⁸. The occurrence of these measures taken on the suggested legal basis would equally profit from an increased predictability. It must be underlined that it is not advisable that the ICC also give advice on matters outside the pure question of legality of a refusal as such. Excluded are thus any opinions as to whether an enforcement action should be undertaken and, in the affirmative, by what means; according to international law these responsibilities still rest upon the UNSC. As argued above, however, their application and scope might have to be defined, but they should as such remain with the Council which would thus not have its mandate diminished. Quite oppositely, it may prove that the proposed advisory role of the ICC would contribute to the strengthening of the UN system as a whole since its assessments will enhance the legitimacy and legality of Council actions to enforce humanitarian aid.

It is true that the ICC has jurisdiction over deeds of individuals and not over those of States. However, States are run by individuals, a fact that the UNSC has taken into consideration in establishing the ICTY and the ICTR. According to Art 27 of the Rome Statute, not even Heads of State can escape the ICC's jurisdiction by reference to their official capacity. Furthermore, as argued above in Chapter III, the rules of humanitarian law might, in certain

²⁶⁸ Graf Sponeck, “Sanctions and Humanitarian Exemptions: A Practitioner's Commentary” in *European Journal of International Law* (2002), vol.13, no.1, p.86. Sponeck hints at similar thoughts when he calls for the UNSC to be guided by the ICJ and the UNHCR. As concerns humanitarian assistance, the inadvisability of the ICJ in the proposed role has been commented upon above in this section.

situations of which some would have to be more elaborately defined *e.g.* Art 18 APII, impose a negative obligation upon belligerents to accept humanitarian assistance. Seeing that the ICJ does not have personal jurisdiction, this is also an argument additional to those of lack of independence and weak jurisdiction on behalf of that court which render the ICC a stronger candidate for the suggested advisory role.

In response to the above proposal the objection might be made that it in fact is contrary to the rationale of State sovereignty that has been put forth throughout this essay. What has been argued with respect to State sovereignty, however, is that it is a legitimate basis for international relations because it prevents war in a long term perspective. Intrusions on it on humanitarian grounds must be clearly defined and regulated lest they will be misused, thus risking war²⁶⁹. Suggesting that an advisory opinion of the ICC – a forum to which sovereign States voluntarily have adhered – could constitute a solid ground for a judgment on the use of force to implement humanitarian assistance would strengthen the rationale behind State sovereignty since this would bring rigidity and stringency into the equation. It would thus diminish the possibilities for power-greedy States to profit from an uncertain state of law. The mere circumstance that the ICC be given the proposed function does not as such menace sovereign rights compared to how they are subjected to international organizations today. In its practice, however, the court may find that State sovereignty is inferior to the delivery of humanitarian assistance in internal armed conflicts. For instance, this could come about through a broad interpretation of “attacks against humanitarian assistance” in Art 8(2)(e)(iii) of the Rome Statute or by using Art 21(1)(b) or (c) of the Statute to take into consideration the ICRC interpretation of Art 18 APII or even the Guiding Principles mentioned above, should they evolve into declarations and/or treaties as suggested. Then, sovereign rights would more definitely be subjected to humanitarian assistance than they are today. But it is not as important *if* the provision of aid would prevail over State sovereignty, as it is *how* this hierarchy would come about, because the dangers to international peace lay in the latter paradigm²⁷⁰. Those threats would be reduced if State sovereignty was to yield

²⁶⁹ See the discussion on ‘post-war’ wars above under Humanitarian Intervention.

²⁷⁰ This reasoning naturally presupposes that the ICC stays reasonably within the boundaries of the Rome Statute, so that it does not experience problems similar to those described above concerning the UNSC acting *ultra vires* the UN Charter, or, even worse, indulge in such vast interpretation of the rules applicable to it as the European Court Justice has done, detrimental to its legitimacy.

following a clear and legal process as opposed to *ad hoc* solutions and/or purely moral arguments.

Chapter IV – Means of enforcement

Whereas the preceding Chapter discussed the legality and legitimacy of any decision to enforce humanitarian assistance, the present one will be concerned with the same aspects of the methods chosen by the enforcing agents to implement such a decision. Although comparing the advisability of different means of enforcement irrespective of the specific details of the armed conflict where they are being deployed might be somewhat hazardous, this Chapter will still so bold as to elaborate on the general advisability of different means of enforcement of humanitarian aid by examination of their use in some summarily described situations.

In the sanctions section, primarily sanctions imposed by the UNSC will be discussed, since they are the ones that will have the greatest effect on the targeted State. Admittedly, smaller States may well be at the economic mercy of a large economy such as the EU or the USA, but since inter-State sanctions are subject to comparatively clear rules outside the immediate realm of humanitarian law, such as State Responsibility/countermeasures law and the WTO, no particular attention will be paid to them.

There have been cases where pacific means have sufficed to compel or trick the concerned State to allow for the humanitarian aid to be delivered. In Somalia, before it asked for military protection, the ICRC had in fact been able to set up a large-scale famine relief program in different communities thanks to complex negotiations with local authorities and without any outside military protection; and during the civil war in Afghanistan, market mechanisms, private transport and unmarked food bags were used to get the aid out to the needy²⁷¹. When present, national NGOs are of course an important factor and they are of valuable assistance in implementing the aid. In the Introductory remarks to Part Two, it was noted that in situations where non-compliance with an international rule is desired by a State, it will decide whether to comply or not after having evaluated the costs of non-compliance; the State will conduct an assessment of the debit and credit of its political, economical and military international 'balance sheet'. There are many possible ways to

²⁷¹ Donini, *op.cit.*, p.37, 41

increase those costs and thus to compel a refusing authority to accept relief actions – including political, diplomatic and media pressure – which are only limited by the minds of clever and experienced negotiators with an understanding of the reasons for the denial and the material conflict. These people would evidently also be alert to any potential unwanted effects of their solutions, for example subjecting humanitarian aid to criminal elements of a black market, from which an incumbent regime very well might profit. Seeing that implementation ultimately may entail aggressive methods, *i.e.* sanctions or armed force, and that these are the ones interfering with sovereign rights²⁷², they will be the chief subject of the following examination.

As a general remark, especially in light of the fact that refusal of humanitarian aid, according to one interpretation of Art 18 APII, is subject to conditions of proportionality, it would seem reasonable to assert that actions enforcing assistance are subject to equal requirements.

United Nations sanctions

When it finds that those sanctions are designed and implemented to systematically affect vulnerable groups, that their impact is so severe that ever-wider sections of the population sink into poverty, that humanitarian aid is totally inadequate and humanitarian agencies are denied the means to operate, then there is a need to ask the Security Council: Where is the balance between politics and humanitarianism?²⁷³

The UNSC used its powers under Art 41 of the UN Charter for the first time in 1966 when it imposed sanctions on Rhodesia²⁷⁴. That was only repeated once before the end of the Cold War with the sanctions against South Africa in 1977²⁷⁵. With the 1990's came a tremendous increase in the use of sanctions as an instrument for the UNSC to attain its goals²⁷⁶; after the

²⁷² In the situations envisaged by this essay, sanctions would force a responsible authority to accept humanitarian aid being delivered on its territory, a decision which *a priori* concerns its internal affairs.

²⁷³ International Federation of Red Cross and Red Crescent Societies, "UN Sanctions and the Humanitarian Crisis", in *World Disasters Report 1995*, Geneva IFRC, 1995, p.19, quoted in *Political Gain and Civilian Pain*, (Conclusion) Thomas Weiss, ed., Oxford, 1997, p.231-232.

²⁷⁴ S/RES/232 of 16 December 1966

²⁷⁵ S/RES/418 of 4 November 1977

²⁷⁶ Sanctions have been directed against Iraq, Libya, the former Yugoslavia, FRY, Haiti, Somalia, Angola, Rwanda, Liberia, the Sudan, Sierra Leone, Cambodia, Afghanistan and Eritrea and Ethiopia, see Matthew

Cold War, the Council imposed nine sanctions regimes in only four years²⁷⁷. Especially after reports from NGOs on the terrible conditions in Haiti and Iraq and that these may indeed be due to the comprehensive mandatory trade sanctions imposed on those countries²⁷⁸, the debate shifted from having been occupied with the effectiveness of sanctions in the beginning of the decade, to being more concerned with their humanitarian impacts²⁷⁹.

Voices have also been raised that sanctions regimes have had devastating effects on the economies of third States. Art 50 of the UN Charter provides for a “right to consult with the Security Council with regard to a solution of” special economic problems confronting third States as a result of UNSC imposed sanctions. Following the sanctions directed against Iraq in response to its invasion of Kuwait in August 1990, 21 governments called for help under that article, claiming a total estimated loss of USD 30 billion²⁸⁰. A collective complaint made by these States in March 1991 merely resulted in a UNSC appeal to governments and international institutions for help which led to some economic compensation (*e.g.* in the form of debt relief, concessional loans or grants) but not to all the affected countries²⁸¹.

Comprehensive versus targeted sanctions

Comprehensive sanctions could be described as a carpet-bombing of the economy of the affected State, as opposed to targeted (or ‘smart’) sanctions which merely aim at specific sectors of the economy, such as arms, diamonds or travel. For example, in its resolution 661 the UNSC decided that:

Craven, “Humanitarianism and the Quest for Smarter Sanctions” in *European Journal of International Law* (2002), vol.13, no.1, p.44

²⁷⁷ O’Connell, *op.cit.*, at p.63

²⁷⁸ The sanctions regime against Iraq commenced with S/RES/661 of 6 August 1990, and the one against Haiti with S/RES/841 of 16 June 1993.

²⁷⁹ O’Connell, *op.cit.*, p.69

²⁸⁰ Margaret P. Doxey, “United Nations Economic Sanctions: Minimizing Adverse Effects on Nontarget States” in David Cortright and George A. Lopez, ed., *Smart Sanctions: Targeting Economic Statecraft*, Oxford, Rowman & Littlefield Publishers, Inc., 2002, p.187

²⁸¹ *Ibid.* p.189; India and Vietnam for example, received nothing.

all States shall prevent the import into their territories of all commodities and products originating from Iraq or Kuwait exported there from after the date of the present resolution;...²⁸²

Looking at statistics, comprehensive sanctions seem to be more susceptible to attain their goal of compelling the pursued State to act in a certain way than targeted ones. Out of the three comprehensive sanctions regimes imposed between 1990 and 2001 – Iraq, FRY and Haiti²⁸³ – the ones directed against Iraq and the FRY were partially effective, whereas only two out of the ten cases with more limited sanctions had partial impact²⁸⁴, namely the ones against Libya and Cambodia²⁸⁵. Investigating the circumstances surrounding these sanctions regimes, however, their success is revealed as being more a consequence of vigorous enforcement of and broad international compliance with the sanctions than corollary to their comprehensive or ‘smart’ character²⁸⁶. In the case of the FRY, the USA and other major powers strongly enforced the sanctions, for example by establishing Sanctions Assistance Missions in neighboring States and in the case of Cambodia the diplomatic and political isolation of the Khmer Rouge was virtually complete. Oppositely, in Haiti the sanctions were lifted and then reapplied and in Sierra Leone the effectiveness of the sanctions was undermined by lax enforcement, especially in neighboring Liberia²⁸⁷. The efficiency of a sanctions regime would thus be depending on the implementation of it, notwithstanding whether the sanctions enforced are comprehensive or targeted.

Turning now from the efficiency of comprehensive sanctions to their humanitarian consequences²⁸⁸, the former UN Humanitarian Coordinator for Iraq Graf Sponeck has brought forth that Iraq, previously a socio-economically progressing country, has become increasingly impoverished and, in economic and social terms, a poorly performing State

²⁸² Op.3(a)

²⁸³ S/RES/757 of 30 May 1992 op.4(a) (FRY) and S/RES/917 of 6 May 1994 op.6(a) (Haiti). Resolution 841 was the first one imposing sanctions on Haiti, but resolution 917 made them comprehensive.

²⁸⁴ Cortright and Lopez, "Introduction: Assessing Smart Sanctions", in *Smart Sanctions: Targeting Economic Statecraft*, p.8

²⁸⁵ S/RES/748 of 31 March 1992 (Libya) and S/RES/792 of 30 November 1992 (Cambodia)

²⁸⁶ Cortright and Lopez, *op.cit.*, p.10

²⁸⁷ *Ibid.*, p.9-10

²⁸⁸ Craven *op.cit.*, p.60, points out that "a concern as to the effect of sanctions is construed less as an argument against sanctions as a practice, and more as an argument as to how sanctions can be improved as a strategic tool".

since 1990²⁸⁹. Sponeck has also concluded that “[i]t is a fact that the comprehensive economic sanctions *are* contributing to civilian suffering” and that the humanitarian exemptions²⁹⁰ that were made to them did not adequately protect the Iraqi population²⁹¹. Exemptions to the comprehensive sanctions regime against Iraq for humanitarian deliveries were further complicated by the Goods Review List²⁹² (GRL) which pointed out goods with so called ‘dual use’ meaning that they could be used *e.g.* both for medical and military purposes and were therefore subject to control and restrictions. Various UN agencies have estimated that comprehensive sanctions have contributed to the death of hundreds of thousands of Iraqi civilians²⁹³. The United Nations Children’s Fund’s (UNICEF) global review of child health 2001 showed an increase in child mortality of 160 per cent in the country which was the highest of all 188 countries examined for the 1990-1999 period²⁹⁴. The comprehensive sanctions regime imposed by resolution 661 (quoted above) against the country was finally – and not surprisingly – lifted following the U.S-led invasion of the country in March 2003²⁹⁵. Concerning the UN sanctions on Haiti it has been said that the wealthy elite and the military command were “waxing rich off the contraband industry the economic sanctions spawned. The rest of the population, which had been deprived of its popularly elected government and whom we were supposed to be helping, was, without exaggeration, starving to death”²⁹⁶. Although the military coup on the 29th of September 1991 had triggered the Haitian crisis a report from Harvard University attributed to sanctions one thousand excess deaths per month among children under five years of age²⁹⁷.

²⁸⁹ Graf Sponeck, “Menschlich katastrophal, politisch wirkungslos – Zehn Jahre Wirtschaftssanktionen gegen den Irak”, *Das Friedensgutachten* 2001, p.162

²⁹⁰ Op. 3(c) and 4 of S/RES/661 exempted from the sanctions regime supplies intended strictly for medical or humanitarian purposes and S/RES/666 of 13 September 1990 requested the Committee responsible for the review of resolution 661 (“the 661 Committee”) to inquire and determine whether there was an urgent humanitarian need in Iraq or Kuwait. S/RES/687 of 3 April 1991 widened the humanitarian exemptions.

²⁹¹ Graf Sponeck, “Sanctions and Humanitarian Exemptions: A Practitioner’s Commentary” in *European Journal of International Law* (2002), vol.13, no.1, p.83

²⁹² S/2002/515, adopted by the UNSG in S/RES/1409 of 14 May 2002

²⁹³ Müller and Müller, “Sanctions of Mass Destruction”, in *Foreign Affairs* (1999), vol.78, no.3 at p.49

²⁹⁴ UNICEF, *The State of the World’s Children* (2001)

²⁹⁵ S/RES/1483 of 22 May 2003, op.10. This resolution left an arms embargo on Iraq.

²⁹⁶ Reisman, “Assessing the Lawfulness of Nonmilitary Enforcement: The Case of Economic Sanctions” in *American Journal of International Law* (1996), vol.89, at p.37

²⁹⁷ Sarah Zaidi, “Humanitarian Effects of the Coup and Sanctions in Haiti” in *Political Gain and Civilian Pain*, Thomas Weiss, ed., *op.cit.*, p.204

Arguably, comprehensive sanctions are tailored for democratic, parliamentary States where the population has the possibility to exercise power and dismiss the incumbent leaders who are provoking action from the international community. That has rarely been the case in the countries against which sanctions have been directed. However, even in democratic States, the problem still remains that sanctions may “defeat their own purpose by provoking a patriotic response against the international community, symbolized by the United Nations, and by rallying the population behind the leaders whose behavior the sanctions are intended to modify”²⁹⁸.

Thus, taking into account the recorded severe humanitarian impact of comprehensive sanctions, it would be counter-productive and heartbreaking to see them be applied as a means of pressuring an authority to accept humanitarian aid. To say the least, it is irrational and ruthless to punish the civilian victim population for the acts of its suppressor. Even presuming that the humanitarian exemptions allowed for by such a sanctions regime would be adequate for the basic needs of the civilian population, comprehensive sanctions would still keep the people on an existential minimum. These practical arguments alone render comprehensive sanctions highly inappropriate as a means of enforcement of humanitarian assistance. However, also purely juridical elements can be raised as to the advisability and even the legality of comprehensive sanctions for this purpose. A smaller excursion on this issue is therefore afforded.

Legality of comprehensive sanctions

An assessment of the legality of comprehensive sanctions must first consider whether the UNSC is bound by international law when upholding international peace and security; as have been noted, a proposal to that effect was actually rejected in San Francisco (see under Enforcement agents: The Security Council). The question here is not whether the Council has the power to impose sanctions as such – that has been discussed at length above – but rather if it has to respect humanitarian law in doing so.

²⁹⁸ Supplement to an Agenda for Peace, (1995), para.70

The practice of the UNSC reflects that it considers itself bound by some humanitarian limits, this is shown *e.g.* by the exemption of humanitarian supplies from sanctions. It has also been argued that more than ten years of measures against Iraq has led to a consensus that the UNSC is bound by some legal standards in its application of Chapter VII and that this is sustained by its own actions²⁹⁹. With the introduction of ‘smart’ sanctions and humanitarian exemptions, the UNSC has indeed revealed a somewhat more humane side, but some have argued that it remains uncertain whether this is a “policy informed by legal principle or simply by a compliant pragmatism”³⁰⁰. The fact that the UN explicitly has acknowledged that it is restrained by general principles of humanitarian law when deploying armed force³⁰¹ would seem reasonable to apply analogously to the Council’s sanctions, seeing that armed force and sanctions are different means with similar goals, roots and consequences.

Assuming that the UNSC perceives itself as bound by international law, there are different schools of thought on what law should apply to its sanctions regimes: human rights law, humanitarian law or perhaps the law on countermeasures. For the purposes of this essay, sanctions will be analyzed in the light of international humanitarian law. Such an approach is supported by the fact that Art 1, 2, 24(2) and 39 of the UN Charter constrain actions taken by the UNSC which thus fall within a predetermined legal framework, and many authors are of the opinion that the Council, when thus defending international peace “is subject to the same laws of war of humanitarian law that have been prescribed for others”³⁰². It seems important to analyze the UNSC’s measures under specific rules of humanitarian law so as to avoid that the Council can clear its conscience merely satisfied that it is operating in accordance with humanitarian principles³⁰³.

²⁹⁹ Mary Ellen O’Connell, “Debating the Law of Sanctions” in *European Journal of International Law* (2002), vol.13, no.1, p.79

³⁰⁰ Craven, *op.cit.*, p.50. Moreover, as will be seen below under the discussion on targeted sanctions, the latter may lead to other legal problems pertaining to the actions of the Council, *e.g.* a diminished legal security of the individual.

³⁰¹ *Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13, of 6 August 1999. See below under the section on Armed force.

³⁰² Reisman and Stevick, “The Applicability of International Law Standards to United Nations Economic Sanctions Programmes”, *European Journal of International Law*, vol. 9 (1998) p.127. See also Brownlie, “The Decisions of Political Organs of the United Nations and the Rule of Law”, in R. MacDonald, ed., *Essays in Honour of Wang Tieya*, The Hague, 1993, p.95-96.

³⁰³ Robert Howse, “The Road to Bagdad is Paved with Good Intentions”, *European Journal of International Law*, vol.13, no.1, p.91

The impeding of humanitarian assistance by States or other responsible authorities can very well contribute to the starvation of civilians. When applied as a method of warfare, this constitutes a breach of Art 14 APII or Art 54 API. With this in mind, turning to the UNSC, it is evidently incorrect to assume that only the military instrument of the Council is destructive. The fact that sanctions contribute to starvation of civilians have been made obvious through the examples and numbers above. With their historical roots in the blockades deployed as strategic measures of war and seeing that they are still used to inflict harm upon an opponent in order to make him act in a certain way sanctions can very well be seen as a method of warfare. That harm inflicted is of course the hardships a comprehensive sanctions regime entails for the affected country as a whole.

Consider the following comparison between the impeding of humanitarian assistance (1) and the imposing of a comprehensive sanctions regime (2):

1. The relevant State and military organs responsible for work with UNPROFOR and humanitarian organizations shall, through planned and unobtrusively restrictive issuing of permits, reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population, making them dependent on our good will while at the same time avoiding condemnation by the international community and international public opinion³⁰⁴.

2. [A]ll States shall prevent the import into their territories of all commodities and products originating from Iraq or Kuwait exported there from after the date of the present resolution;³⁰⁵

Despite UNPROFOR efforts to distribute humanitarian aid in Bosnia-Herzegovina and humanitarian exemptions to the comprehensive sanctions regime against Iraq, both of the quoted provisions have contributed to a massive loss of civilian life and enormous sufferance of innocent people. Both also amount to the *actus reus* of genocide, which has been exemplified by the ICTR as subjecting a group of people to a subsistence diet and reducing essential medical services below minimum requirement³⁰⁶, (see above under Genocide). Naturally, the two cases had different grounds. The first was a part of the

³⁰⁴ 'Directive 7' issued by the Supreme Command of the forces of *Republika Srpska*, see *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Judgement 2 August 2001, para.28

³⁰⁵ S/RES/661 of 6 August 1990, op.3(a)

³⁰⁶ *Akayesu*, *op.cit.*, para.506

perpetration of a crime against humanity whereas the second one was aimed at upholding international law by putting an end to the military invasion of a sovereign State. A common feature between them, however, is their blatant disrespect for human life in their deployment of measures to compel another party.

Another difference between the impeding of humanitarian assistance and UNSC comprehensive sanctions in general is that the former will not automatically constitute a method of warfare as the relief might be refused on grounds other than strategic ones, whereas the latter will constitute a method of warfare as sanctions are an alternative to the use of force as a means of persuasion according to the UN Charter. Comprehensive sanctions are thus in breach of Art 14 APII as they starve civilians as a method of warfare.

As described above, the ICRC has promoted that Art 4(2)(b) APII which prohibits collective punishments should be understood in its widest sense and include any kind of sanction³⁰⁷. Collective punishments are perceived as “penalties of any kind inflicted on a group of persons in defiance of the most elementary principles of humanity, for acts that these persons have not committed”³⁰⁸. Even though comprehensive sanctions are supposedly applied as a means of changing the behavior of a State and not for punishing purposes, they pursue their goal by indiscriminately inflicting harm upon individuals who are not in a position to bring about the sought changes. This punishing character of comprehensive sanctions does therefore by analogy render them in breach of Art 4(2)(b) APII on the prohibition of collective punishments.

It would of course be difficult to prove any intent on behalf of the representatives of the Members of the UNSC with respect to the perpetration of an international crime by way of imposing comprehensive sanctions. However, in the light of the enormous civilian suffering that comprehensive sanctions will entail, it would seem relevant to focus on causation³⁰⁹. Higgins has argued that ‘collateral’ injury in respect of weapons has always been accepted as

³⁰⁷ Jean Pictet *et al.*, *ICRC Commentary on the Additional Protocols*, p.1374, para.4536.

³⁰⁸ Jean Pictet *et al.*, *ICRC Commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War*, p.225

³⁰⁹ O’Connell, *op.cit.*, p.73 note 61

not constituting intent, provided always that the requirements of proportionality are met³¹⁰. The principle of proportionality also applies to the UNSC's actions to debilitate threats to international peace and security which cannot be disproportionate to that goal³¹¹. Seeing that comprehensive sanctions punish persons primarily without the power to influence the pursued goal of the sanctions, they are clearly disproportionate – in some cases, *e.g.* that of ten years of comprehensive sanctions against Iraq, they are even beyond that, bordering recklessness. The question can thus be asked if intent on behalf of the people responsible for imposing comprehensive sanctions could not be inferred in some cases. This could certainly be the case if comprehensive sanctions were judged under the Rome Statute, Art 7(2)(b) of which concerns the crime against humanity of extermination, including *inter alia* the deprivation of food and medicine. As to the intent required for this crime, Art 30(2)(b) of the Rome Statute stipulates that it is sufficient that the person behind the crime was “aware that it will occur in the ordinary course of events”. It is very hard to see how the diligent representatives of the Members of the UNSC could not be aware of the devastating consequences of sanctions for civilian populations in States which are subject to their comprehensive sanctions regimes, especially since those States are mostly third world countries.

Targeted sanctions

In order to minimize unwanted civilian suffering of sanctions, the 1990s saw an increasing effort to make sanctions ‘smarter’, that is, to target areas and even persons that are susceptible and in a position to bring about the changes sought by the relevant sanctions. The merits of this are twofold: not only does it make sanctions more effective, but it also renders them less harsh on a civilian population since the latter in principle is exempt from their effects.

³¹⁰ Dissenting Opinion of Judge Higgins in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996) 225, para.22

³¹¹ O'Connell, *op.cit.*, p.75 draws this argument by analogy to countermeasures law. However, as Craven *op.cit.*, p.52 points out, such analogy may be hazardous since the powers of the UNSC under Chapter VII are more extensive than the measures available to individual States under the law of countermeasures. Howse, *op.cit.*, p.90 argues that the the UNSC should be more concerned with answering to threats against international peace and not punishing bad behaviour, which is way analogies from countermeasures law are inappropriate.

The UNSC in its practice has targeted its sanctions in two ways: by introducing humanitarian exemptions and sector-specific measures. For example, sanctions against Sierra Leone were limited to an oil and arms embargo and restrictions on the travel of members of the military junta and in the Sudan a flight ban and restrictions on travel and diplomatic discourse were imposed³¹². The financial sanctions against the Taliban regime in Afghanistan beginning in 1999 aimed at compelling that administration to turn over Osama bin Laden included an obligation for all States to freeze funds and other financial resources controlled directly or indirectly by the Taliban or their undertakings³¹³. Thus, 'tailored' sanctions would seem to be a more appropriate word, since the sanctions are customized so as to hit the targeted authority where it hurts the most, in areas where they may have something to lose. This strategy equally seeks out regimes commanded by individuals indifferent to anything but personal gain. In addition to this, starting with its directing an arms embargo against Ethiopia and Eritrea in 2000³¹⁴, the UNSC has abided by a practice to include time limits when imposing sanctions³¹⁵.

Tailored sanctions would be biased in the case where they target the person(s) responsible for the impeding of humanitarian aid that are also part of a belligerent party. But due to the fact that these sanctions to their character force out an acceptance to that the aid is delivered, as opposed to armed force which merely physically 'pushes the relief in', they would not seem to menace the principle of neutrality in the same obvious way as does armed force (see below).

At the initiative of the Swiss government a dialogue between experts and practitioners on targeted financial sanctions was started in Interlaken in 1998 ('the Interlaken Process') and, following that model, in mid-2000 the German Foreign Office commenced a process focused on arm embargoes, travel bans and aviation sanctions ('the Bonn-Berlin Process'). These two processes presented practical suggestions and models of UN sanctions

³¹² Craven, *op.cit.*, p.48

³¹³ S/RES/1267 of 15 October 1999

³¹⁴ S/RES/1298 of 7 February 2000

³¹⁵ Lutz Oette, "A Decade of Sanctions against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council", in *European Journal of International Law*, vol.13 no.1, p.93-103, at p.94. In the face of a most likely USA and UK veto in the UNSC against easing sanctions against Iraq in 1998, France, Russia and China decided to always demand the inclusion of time limits in future sanction, as a matter of principle, see *ibid.* p.95.

resolutions to the UNSC in October 2001. Finally, in 2001 the Swedish government began a project on how to maximize the effectiveness of targeted sanctions through thorough implementation ('the Stockholm Process'). The Stockholm process delivered its Final Report to the UNSC on the 25th of February, 2003.

The Bonn-Berlin Process suggested a formulation model for UNSC sanctions on arms embargos, containing *inter alia*:

Op 1

Decides that all States shall prevent the direct or indirect sale, supply and transfer, or the promotion of facilitation of such sale, supply or transfer to (target states), by their nationals or from their territories, or using their flag vessels or aircraft of:

(a) arms and related materiel of all types, including weapons and ammunition; military, paramilitary and police vehicles and equipment; and spare parts and components for the aforementioned and equipment specifically designed for military or paramilitary purposes, whether or not originating in their territories;

[...]³¹⁶

Materiel potentially targeted by the resolution, but with humanitarian use was exempted from the sanctions regime, subject to approval:

Op 4

Decides also that the measures imposed by Op 1 above shall not apply to:

[...]

(c) supplies of non-lethal military equipment intended solely for humanitarian use by other organizations, as approved in advance by the (Sanctions) Committee;³¹⁷

As have been noted earlier in this study, the true effectiveness of tailored sanctions will be depending on their proper and consistent implementation. To this effect the Final Report of the Stockholm Process lays down ten recommendations, crucial to an effective implementation, namely: 1) design sanctions resolutions with implementation in mind; 2)

³¹⁶ *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process'*, Bonn International Center for Conversion, Bonn 2001, p.26. Available at www.smartsanctions.de

³¹⁷ *Ibid.*, p.31

maintain international support for the sanctions regime; 3) monitor, follow up and improve the measures throughout the sanctions regime; 4) strengthen the sanctions work of the UN Secretariat; 5) although different, much can be learned from the UN Counter-Terrorism Committee; 6) effective sanctions require capacity-building and training programs; 7) implementation can be enhanced through a model law; 8) implementation will vary depending on the type of sanctions; 9) maintaining accuracy in sanctions targeting is crucial; and 10) reporting on sanctions implementation³¹⁸.

Strictly implemented, tailored sanctions appear rather appealing in comparison to the use of armed force or comprehensive sanctions as a means to enforce humanitarian assistance. A risk, however, when discussing tailored sanctions is that the delight at the combination of effectiveness and humanitarianism of these strategic tools for the Council is blinding to the adverse direct and indirect effects they may still have. Especially as a weapon in the “war against terrorism” targeted sanctions have proven to infringe fundamental legal rights of individuals, such as the presumption of innocence and an accused individual’s right to access to court. For example, this was the case with the three Swedish citizens who – without any possibility to present a defense case or even challenge the decision against them – got their assets frozen pursuant to the financial sanctions targeted against the Taliban administration³¹⁹. Moreover, albeit to a lesser extent than comprehensive ones, targeted sanctions may also have negative impacts on the civilian population at large, *e.g.* by creating economic hardships for individuals on the targeted market, by creating obstacles for medical supplies being delivered because the medicines may also form part of chemical weapons, (‘dual use’) or by boosting criminality and a black market. Finally, it must not be forgotten that international law and the UN Charter still constitute the base for the application of tailored sanctions. They remain a means of force under Art 41 of the Charter and as such

³¹⁸ *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options, Results from the Stockholm Process on the Implementation of Targeted Sanctions*, Department of Peace and Conflict Research, Uppsala University 2003, iv-vii. Available at www.smartsanctions.se

³¹⁹ For a thorough description of this event as well as a discussion on the implications for the international legal system of the fact that targeted sanctions might be in contradiction with fundamental rights of the individual recognized by national law, see Per Cramér, “Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council”, in *Review of the Security Council by the Member States*, Erika de Wet and André Nollkamper, ed., Antwerp/Oxford/New York, 2003. The question of legal safeguards for the targeted individual had to be abandoned by the Stockholm Process due to that it was politically extremely controversial, p.103.

should not be seen as a universal remedy nor be applied in situations other than those envisaged by the Charter.

Inasmuch as any potential adverse effects for the civilian population, notwithstanding their extent, similar to those produced by comprehensive sanctions equally would be the result of a tailored sanctions regime, an assessment of its legality should be conducted in line with what has been suggested above concerning comprehensive sanctions. The grounds for considering comprehensive sanctions illegal are just as applicable to tailored sanctions; as mentioned, the latter are not above international law. High standards of diligence could be required from the Council with respect to its awareness of tailored sanctions' adverse effects for civilians in the light of earlier human disasters caused or worsened by its sanctions. In this context, it is noteworthy that when commenting on its recommendation 3) above (the monitoring of sanctions) the Final Report of the Stockholm Process calls on the UNSC to continue its efforts to improve the design and the management of humanitarian exemptions for third parties, whether States, entities, or individuals³²⁰. Humanitarian agencies and NGOs have recommended that routine pre-assessments and mid-course assessments as to the humanitarian impact of the relevant sanctions should be undertaken as an integral part of all sanctions regimes³²¹. Concerning the first kind of evaluation, one being conducted prior to the imposition of a sanctions regime, the Final Report of the Stockholm Process argues that such undertakings may undermine the imposition of sanctions as they risk extending the period between the announcement of an intention to impose tailored sanctions and their actual imposition, thus providing an opportunity for targets to evade the sanctions³²². It would seem that also the mere announcement as such could result in similar effects, although perhaps not risking as much evasion as tangible preparations to actually impose sanctions (which pre-assessments represent). Conversely, however, it might be argued that measures showing that the UNSC is 'serious' in its endeavors to put concrete action behind its demands might compel the targets without even having to impose the sanctions at all. In any case, pre-assessments would certainly minimize potential adverse humanitarian effects of tailored sanctions; as so often in the debate on sanctions the issue is one of humanitarianism

³²⁰ *Ibid.*, para.32

³²¹ *Ibid.*, para.33

³²² *Ibid.*

versus efficiency. Concerning the second kind of assessment proposed – periodic evaluation of the humanitarian impacts during the course of sanctions implementation – it is endorsed by the Final Report of the Stockholm Process, not only due to its humanitarian benefits, but also seeing that such an assessment would be useful in distinguishing the impacts of sanctions from other causes of humanitarian suffering³²³. This would strengthen the legitimacy of tailored sanctions as they would be accordingly ameliorated and hopefully increasingly accepted by the civilian population of the affected State (*cf.* above under Comprehensive sanctions on the problem of sanctions perceived as unjust and rallying people around targeted leaders against an evil outside world). The Final Report suggests that the periodic monitoring could be conducted by the UN Office for the Coordination of Humanitarian Affairs (OCHA)³²⁴.

Finally, a few remarks must be made in relation to the issues of potential humanitarian effects (and thus illegality) and monitoring of tailored sanctions. It has been discussed above whether the UNSC is bound by humanitarian law when exercising its powers under Chapter VII³²⁵. It was concluded that the Council perceives itself bound by at least some humanitarian norms in so doing (an evidence of which is the introduction of tailored sanctions) and that in any case it is not subject to judicial review. In the light of the human suffering imposed by UNSC sanctions historically, clarification on these matters would of course have to be among the issues considered when undertaking the above urged revision of the rules applicable to the UNSC so as to augment confidence in this institution and thus strengthen it.

In sum, properly implemented and with due regard to the facts that they are neither self-legalizing nor flawless, the potential effectiveness and relatively minor humanitarian impacts of tailored sanctions render them the most appealing alternative of forcible means to convince a responsible authority to accept humanitarian assistance.

³²³ *Ibid.*, para.35

³²⁴ *Ibid.*, para.36

³²⁵ See above under Legality of comprehensive sanctions.

Armed force

According to Art 42 of the UN Charter the use of armed force by the UNSC is a secondary means of persuasion relatively measures not involving military action. This indicates the nature of armed force as being one of last resort when all other possible ways of solving a threat to international peace and security have been exhausted.

The disadvantages of using armed force to implement humanitarian aid are first and foremost linked to the principle of neutrality and confidence for the humanitarian agents on the ground. The case of the forcible delivery of humanitarian aid in Somalia illustrates how it may prove next to impossible for the enforcing agents to stay neutral to the armed conflict in which they operate since they would have to fight the belligerent(s) impeding the assistance³²⁶. Such involvement in the conflict will menace the local and perhaps also the international confidence in the enforcement action, risking to diminish the legitimacy of the entire humanitarian operation. A lack of legitimacy would moreover obstruct the efficiency of the humanitarian operation since the delivery of the relief will be further complicated if the very beneficiaries of the aid do not have trust in it. Should armed force prove to be the only way in which humanitarian assistance can be delivered, extreme care should therefore be taken to distinguish the humanitarian organizations from the enforcing agents so as to avoid that the distrust in the latter spills over to the former.

As opposed to the effect targeted sanctions to some extent might have on affected leaders the use of armed force does not necessarily compel the authorities refusing the aid to revoke their standpoint, as it merely physically puts the assistance in place. Therefore, what was from the beginning envisaged as a 'chirurgical' task may in the end prove to be a lengthy and, both in terms of casualties and funding, costly enterprise for all parties. In order to accomplish their goal enforcers may find themselves forced to enlarge their mission to comprise also the leadership; as argued above, this may in fact be looked upon as a possibility by certain enforcing agents and a motivation for embarking on a 'humanitarian'

³²⁶ In thus executing their task, the armed forces implementing the relief naturally are restrained by international humanitarian law. The UN has explicitly acknowledged that it is restrained by general principles of humanitarian law when acting under Chapter VII in relation to the use of force, see *Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13, of 6 August 1999.

operation. At any rate, the enforcing agent runs the risk of becoming, or at least being perceived by a warring faction, as a party to the armed conflict – thus depriving it of its humanitarian nature – and even boosting a civil war by fighting fire with fire. Finally, the armed enforcement of humanitarian aid entails a violation of the affected authorities' territory by the forces of other States, not explicitly provided for by the UN Charter.

Supporting the use of armed force to implement humanitarian aid, however, is the fact that it may have a rather exclusive impact on the authority responsible for impeding the relief as opposed to at least comprehensive sanctions which predominantly affect the civilian population which is already suffering from that authority's misdeeds.

In conclusion, the use of armed force to implement humanitarian assistance might be considered as a last resort. In order for such an operation not to be illegitimate and thus inefficient, it will be imperative that its enforcing agents are distinguished from its humanitarian actors.

Prevention

It is also necessary to recognize that any armed intervention is itself a result of the failure of prevention³²⁷.

The discussion of the distribution of humanitarian aid in this essay has been limited to the alleviation of urgent human suffering and has thus not been concerned with long-term ameliorations in the country of the victims – resulting in the potential prevention of future disasters – which admittedly often would be the best and most sustainable means to ease their hardships. Addressing these issues of course requires a profound comprehension of the conflict in which an armed conflict is raging, a quality that many NGOs and other organizations conducting long-lasting aid programs possess. However, there is a fine line between on the one hand understanding the “historical, social and economic fabric”³²⁸ of a

³²⁷ SG/SM/7136, 20 September 1999, the UNSG's speech when presenting his Annual Report to the UNGA in September 1999, the fall after the NATO bombings of FRY.

³²⁸ See Donini, *op.cit.* p.33

humanitarian crisis and adjusting one's long-termed relief actions to it with an open mind and, on the other, imposing one's own values and righteous lifestyle upon peoples of other cultures. Historically, the "dictatorship of the virtuous" has led to both inquisitions and witch-hunts³²⁹. The road to imperialism might be paved with good intentions if modern missionaries are acting as moral crusaders.

When thus diligently reconciling potential unstable areas it would also be imperative for the actors undertaking these tasks to be utterly self-critical and to assess its own potential guilt in creating humanitarian hardship around the globe. Many in the West see misfortunes of the Third World as isolated abnormalities far from home, which can be swiftly solved through military force. Observing humanitarian crisis without self-criticism as isolated disasters, 'chirurgical' military actions are easy to publicly justify. From a wider perspective, however, Third World countries have paid a high price for Western prosperity and wealth³³⁰. Prevention measures should therefore be under the auspices of and following negotiations within a multi-cultural organization representing the entire world community, such as the UN.

In sum, seeing that humanitarian law is inherently short-minded and does not propose long term solutions to humanitarian crises (which are often long term problems), the institutions applying it must do so with a long term perspective and the above mentioned considerations in mind.

³²⁹ The expression from para.1 of Henry Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny" in *Foreign Affairs*, July/August, 2001. The present essay does not agree with all of the arguments in Kissinger's article, particularly not with respect to his adverse attitude towards the ICC.

³³⁰ See Tirman, "The New Humanitarianism: How Military Intervention Became the Norm", *Boston Review* December 2003/January 2004, who talks about the "dark side of globalization" and calls for a deeper understanding of the roots of humanitarian crisis which often at the end of the line is caused by Western interests.

Conclusion

The title of this essay poses the question whether there is a right to afford humanitarian assistance in non-international armed conflicts. The problem comes down in two sub-questions: 1) are responsible authorities, which are often equally belligerents to an internal armed conflict, free to refuse humanitarian aid being delivered; and 2) in the negative, what are advisable ways of action to enable the delivery of the aid?

To properly approach these questions, it is essential to understand the three fundamental principles defining humanitarian assistance. According to the principle of humanity, the aid must only be distributed on the sole criterion of need. The principle of impartiality requires that the assistance cannot be distributed on a discriminatory basis, *e.g.* on nationality, race or religious beliefs. The third principle – neutrality – stipulates that a relief action must never be integrated into a political process or linked to the use of military means. All these three principles serve the purpose of limiting the risks that humanitarian assistance is abused for other than humanitarian ends. An organization or relief action that fulfills the criteria of humanity, impartiality and neutrality is thus defined as humanitarian. Conversely, should it subsequently prove to be lacking any of these three conditions, the organization will cease to be humanitarian.

The relevant humanitarian law instrument applicable to the refusal of humanitarian assistance in non-international armed conflicts, the Additional Protocol II to the Geneva Conventions, does not give any clear guidance on whether responsible authorities in these conflicts lawfully can deny humanitarian assistance being provided in all cases. On one hand, Art 18 of Additional Protocol II explicitly subjects the delivery of humanitarian relief to the consent of the warring parties, and States did envisage their sovereignty to be intact when negotiating that Protocol. On the other hand, in its commentary to Additional Protocol II, the International Conference of the Red Cross advocates an interpretation of Art 18 to the effect that responsible authorities must have valid grounds for refusing humanitarian aid. This view is supported by ICRC's authoritative role on the humanitarian law scene and the fact that the international community have reacted to enforce humanitarian aid. The

hindering of or attacks upon humanitarian relief could also constitute the *actus reus* of several international crimes as defined by the Rome Statute, *e.g.* starvation and crimes against humanity. Should an obligation of responsible authorities not to arbitrarily refuse humanitarian aid be affirmed, it would result in a corresponding right for civilians to receive humanitarian assistance. It must be noted, however, that this right – and it is the view of this essay that individuals indeed can possess rights under humanitarian law – would be under humanitarian law, not under human rights law. Seeing that a humanitarian organization per definition would be neutral and according to international law not engaging in unlawful behavior when distributing assistance, it seems reasonable that a right of access to the victims is conferred upon humanitarian organizations as the link through which the responsible authority's obligation and the victims' rights can be realized.

Although the first sub-question is of fundamental principal interest as legitimizing an enforcement action for humanitarian aid, the pressing part of the issue of a right to afford humanitarian aid will be the second sub-question, *i.e.* the procedure for enabling humanitarian assistance to reach the needy when refused. Both the United Nations as well as coalitions of States unilaterally has namely taken forceful measures under humanitarian pretexts but without a clear legal framework for these actions. What has therefore been argued throughout this essay is the need for stringency in defining the cases when humanitarian aid may be forcibly implemented as well as deciding upon what actions should then be taken. Concerning States as enforcement agents, this should be done to the effect that they do not find themselves with arguments for unilateral humanitarian intervention. As far as the UN is concerned, it should be done in order to strengthen the Organization's legitimacy. In light of the current state of world affairs, hosting one superpower that does not show much hesitation before unilaterally bending clear rules of international law to pursue its own national interests (*e.g.* the US invasion of Iraq in March 2003), and because of the fact that enforcement of humanitarian assistance may actually unleash the use of force, it is particularly urgently needed to clarify the legal framework for humanitarian operations.

It has been noted that the enforcement of humanitarian assistance may form part of an enterprise of humanitarian intervention. The present essay does not side with the view that there is an inconsistency between sovereignty and morality that legitimizes unilateral

humanitarian intervention. Instead, it has been argued that State sovereignty – wing-clipped through the prohibition of the unilateral use of force other than for self-defense and subjected in part to peaceful forums – in fact supports the moral value of international peace and stability. This suggestion finds its grounds in a realistic conviction that States do not possess altruistic qualities to outweigh their pursuit of national interests and are thus not well-suited for the task of deciding upon when to use force, as opposed to an organization with the purpose of achieving international peace and which represents the world community such as the UN.

Adding to the problem of enforcing humanitarian assistance is the inherent lack of neutrality in an armed implementation action. As several examples treated in this paper have shown, such an action would be nearly inherently biased in non-international armed conflicts. This is due to the fact that it would take place only when the relevant authority refuses the aid to be delivered and ultimately, the action would necessitate certain forceful measures being directed at that authority in order to compel it to allow for the humanitarian assistance to be delivered. Thus, in cases when it boils down to implementing humanitarian assistance by armed force, such action could almost never be neutral to the internal armed conflict in which the relief was to be given. In order for such non-neutrality not to imbrue the humanitarian organizations, these should be clearly distinguished from the enforcing agents. The reason for this distinction is that a strict upholding of humanitarian organizations' neutrality diminishes the risk that they be exploited for non-humanitarian causes.

The following three core issues pertaining to the right to afford humanitarian assistance have thus been perceived by the present paper: 1) the lack of clear rules on when humanitarian relief is being unlawfully refused (if it indeed can be) combined with the fact that an enforcement action of it could still entail the use of force; 2) the general problem of unilateral humanitarian intervention; and 3) the unavoidable lack of neutrality of an armed enforcement action. Any of these three problems alone would raise concerns of its potential misuse; together and in combination with a possibility to use force they seem combustible to that effect. Unclear rules can and will always be used as legitimizing the actions of the interpreter, in the present case as another argument for unilateral humanitarian intervention, a concept which does not benefit from a general international acceptance and which

endangers international peace. The deployment of non-neutral 'humanitarian'/enforcement agents would open the gate to operations under humanitarian flag for clandestine purposes and it would menace the confidence in humanitarian organizations, not only in the material armed conflict but also on a general, global level.

A few modest suggestions have been made in this study to overcome these issues.

1) and 2): Elaboration of clear rules and UN legitimacy

Firstly, clear rules would have to be elaborated³³¹, and existing ones clarified, on the questions by whom, when and how a forceful action to implement humanitarian aid could be undertaken in situations when it is being refused by the responsible authority in a non-international armed conflict. This would particularly include a revision of the rules applicable to the UNSC when exercising its powers under Chapter VII of the UN Charter (*e.g.* to explicitly clarify whether the Council may deploy force to pursue purely humanitarian ends and desirably that it is bound by humanitarian law in so doing as well as to review the veto-powers). It would be reaffirmed in the revision that the UNSC is the only body with the power to authorize the use of force and this should be reiterated with respect to unilateral humanitarian intervention, *e.g.* by adapting the Charter's rules so as to enable the UN to answer rapidly to crisis of the contemporary world. Such a revision would be undertaken with the view of strengthening the legitimacy of the UN system which would also lessen the arguments for unilateral humanitarian intervention.

In order for the UNSC to have a sound, non-political and legal basis for its decisions on whether an enforcement action should be conducted or not, it has been suggested that the ICC be given an advisory role as to whether humanitarian aid is being unlawfully impeded in a certain situation. This would contribute to a consistent elaboration of the clear rules called for above freed from political concerns, which would thus profit from predictability, stringency and neutrality. It would also enhance the legitimacy of UNSC action.

³³¹ The Guiding Principles on the Right to Humanitarian Assistance elaborated by the International Institute of Humanitarian Law in 1993 is a remarkable effort in this context, and could be the platform for negotiations on a treaty on the issue. Basic regulations on the character on an enforcement enterprise are given in Principles 6-8 and 11, *e.g.* that the UNSC should decide upon such actions (Principle 7).

Subject to their trust in the neutrality of humanitarian assistance, it has been recommended that States be encouraged to give interpretative declarations to Additional Protocol II to clarify their standpoint on the issue of whether delivery of humanitarian aid requires consent from the responsible authority and/or to enter into treaties to the same effect.

Arguably, the best means for sustainable alleviation of the suffering of civilians would be long-term ameliorations in their countries, preventing future armed conflicts. Such measures would however have to be executed with the greatest diligence so as to avoid value-imperialism, which is why a multi-cultural organization such as the UN is well-suited for this task.

3): Targeted sanctions

The use of armed force has been envisaged as the very last means of implementation for humanitarian aid. Instead, and opposed to comprehensive sanctions, the use of tailored sanctions has been embraced as a means to forcefully persuade responsible authorities to accept humanitarian assistance, when other non-forcible measures have failed. Tailored sanctions would be biased in the case where they target the person(s) responsible for the impeding of humanitarian aid that are also part of a belligerent party. But due to the fact that these sanctions to their character force out an acceptance to that the aid is delivered, as opposed to armed force which merely physically 'pushes the relief in', they would not seem to menace the principle of neutrality in the same obvious way as does armed force.

However, it must not be forgotten that targeted sanctions still remain a measure of force activated by the UNSC under Chapter VII of the Charter, and that, in view of the devastating humanitarian consequences UN comprehensive sanctions have had in the past, high standards of diligence should be requested from the Council as to the adverse effects (*e.g.* legal security of the individual) targeted sanctions may still have. Regular monitoring of both their effectiveness and their humanitarian impacts must therefore be made in order to gain legitimacy for their imposition.

It must be borne in mind that a forceful implementation of humanitarian aid may unleash the use of armed force. This is an extremely sensitive subject. One of the greatest accomplishments of the 20th century and the very *raison d'être* of the UN is the submission of the use of force to a peaceful forum based on State sovereignty. Without adjusting and legitimizing them as suggested in the preceding paragraphs, obscurities in existing rules pertaining to the right to afford humanitarian assistance in non-international armed conflicts will continue to offer irresistible opportunities for ambitious States to invoke their side of the truth to exploit the possibility to embark on military enterprises. Certain States have already seized such occasions. The consequences of a continuance of this trend will in the end through war fall back on civilians – the supposed beneficiaries of a right to afford humanitarian assistance.

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