Pat Gibbons · Hans-Joachim Heintze
Editors

The Humanitarian Challenge

20 Years European Network on Humanitarian Action (NOHA)

Springer

The Humanitarian Challenge

Pat Gibbons • Hans-Joachim Heintze
Editors

The Humanitarian Challenge

20 Years European Network on Humanitarian Action (NOHA)

Université catholique de Louvain, Belgium

Aix-Marseille University, France

Ruhr-Universität Bochum, Germany

University College Dublin, Ireland

Vilnius University, Lithuania

Warsaw University, Poland

University of Deusto, Spain

University of Groningen, Netherlands

University of Copenhagen, Denmark

Uppsala Universitet, Sweden

University of Malta, Malta

University of Pavia, Italy

Springer

noha

Editors
Pat Gibbons
Agriculture and Food Science
School of Agriculture & Food Science
Dublin 4
Ireland

Hans-Joachim Heintze
Institute for International Law of Peace and
Armed Conflict
Bochum
Germany

ISBN 978-3-319-13469-7 ISBN 978-3-319-13470-3 (eBook)
DOI 10.1007/978-3-319-13470-3

Library of Congress Control Number: 2015934927

Springer Cham Heidelberg New York Dordrecht London

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media (www.springer.com)

Preface

Two-thousand thirteen marked the 20th anniversary of the Network on Humanitarian Action (NOHA). It was a time to celebrate and to reflect on the achievements over the past two decades and a time to look forward and to consider the future. It was also an opportunity to thank all of those who laid the foundations of the NOHA educational institution and who facilitated its growth and maturity.

The idea of NOHA, or more precisely, of the potential for higher education institutions to play their part in enhancing professionalism in the delivery of humanitarian aid through education came from five European universities in the early 1990s: Aix-Marseille Université, University of Bochum, University of Deusto, Université Catholique du Louvain and Oxford University, four of whom are currently partners of NOHA. They set on board the pioneering task of finding space for universities among the then limited humanitarian stakeholder mix.

The approach that they employed was so innovative that some might say it was verging on the insane: universities networking across Europe, in a pre-Ryanair and pre-Internet era, delivering a multidisciplinary Masters that would be managed and administered by academics from a range of related disciplines. This meant getting lawyers, medics, sociologists, logisticians, anthropologists, managers and political scientists to discuss, coordinate and agree on a subject with a very limited track record. On reflection, while President Obama might have popularised the slogan "Yes, we can!", its underlying philosophy far outdates its popular usage.

From its very onset, NOHA was designed to be a marathon rather than a 100-m sprint. Central to its growth and evolution was a core set of principles that places NOHA in a space equally shared by universities and humanitarian organisations; these are values such as academic rigour, shared learning, respect for peer institutions and humility together with the humanitarian principles of neutrality, impartiality, independence and humanity. The strength of NOHA has thus been the ability of its partner institutions to respect the diversity of its members, while at the same time coming together as a cohesive and coherent network, with common principles and values. It has been its ability to keep pace with the changes and complexities in

and of the sector, guided by a strong vision on how education can effectively contribute to relieve the suffering of populations affected by crises and disasters.

From its inception in 1993 to-date, the number of member universities has more than doubled and links with universities outside Europe, as well as with a broad range of humanitarian stakeholders in and outside Europe, have been established and consolidated. The relationships established with the Directorate General for Humanitarian Aid and Civil Protection (DG ECHO) and the Directorate General for Education and Culture (DG EAC) have been particularly rich. The origins of NOHA and DG ECHO date back to the same period, and the support provided over these many years by DG ECHO rests on a common vision of how education can contribute to the sector. The political pressure from within the DG and from sister DGs was also a struggle, as a few visionaries succeeded in securing the space and resources to support humanitarian education. Far beyond the funding that has been provided by DG ECHO over the years, it was this vision, the exchanges in terms of shared learning and the mutual respect that have been invaluable. While allowing NOHA to maintain its independence, the relationship with DG ECHO has provided tremendous opportunities to engage when mutually beneficial and further the thinking and practice of humanitarian action. The same can be said for the Red Cross, NGOs and other stakeholders with whom NOHA has grown and whose representatives have been faithful, thought-provoking and committed contributors over the past 20 years to the provision of humanitarian education within the NOHA framework.

NOHA is very much different in 2014 than it was in 1993, but so too is the humanitarian context. Unfortunately, humanitarians have not put themselves out of a job and all indicators would suggest an increase in demand for humanitarian professionals in the future, brought about by a range of factors, including new and on-going conflicts, urbanisation and climate change to mention a few. The humanitarian space is also very different for many reasons, not least the proliferation of actors. In 1993, the United Nations had limited direct involvement in humanitarian crises and had a relatively limited role in comparison with its mandate in 2014. The number and range of NGOs have increased exponentially, while the introduction of relatively new actors including the media, the military, the private sector and higher education has contributed to a crowding of this humanitarian space. It is estimated that the global humanitarian budget in 2014 is approximately 150 times greater than what it was in 1990, yet the deficit between the forecasted humanitarian need and supply is growing.

The NOHA educational and research product base has expanded in scope and scale in response to the increased demand over these 20 years. NOHA's archetypal Masters programme in International humanitarian action remains its flagship educational programme. However, NOHA has added a wide range of educational projects at all levels, from undergraduate to PhD, to its portfolio. The NOHA alumni, the majority of whom stem from the pool of 3,000 humanitarian professionals who successfully graduated from the Masters programme, now hold places in the vast majority of humanitarian organisations including the NOHA organisation itself and its partner universities. In addition, NOHA has a rich

network of non-European universities, including Colombia University in New York, the University of Javeriana in Bogota, the University of Western Cape in Cape Town, Monash University in Melbourne, University of Gadjah Mada in Yogyakarta, Université Saint-Joseph in Beirut and the University of Bangalore in Bangalore. They are ready to take on the challenge to grow the NOHA philosophy beyond Europe.

In contemplating and imagining what NOHA is going to be like in the future, the imperative of academic excellence and rigour and of alleviating suffering remains intact. There is a need for the NOHA leaders of today to be as visionary—some might say as insane—as their founding members, to develop new and creative approaches and strategies to bridge the growing gap between humanitarian need and supply. Education has a key role to play. As Nelson Mandela clearly articulated, "Education is the most powerful weapon you can use to change the world".

There have been several requests in recent years from Erasmus Mundus partner institutions to formalise the relationship to allow for them to become full members of the Network. These requests have always received serious consideration. However, it is generally agreed that representation from one university from any global region could never provide the required equity in the partnership arrangement, and policy and power would inevitably be skewed in Western/European favour. With this in mind, the concept of global regional NOHA networks was framed, that is, that existing NOHA Mundus Universities would consider establishing a NOHA Network in their own global regions and that the NOHA philosophy could be shared with these regions, beyond Europe. The potential of such a network would have great value for both, the global North and South, and contribute tremendously to the global humanitarian action project.

In Europe, humanitarian education is a work in progress. Europeans are becoming immune to statistics concerning global suffering being thrown at them. NOHA universities and universities in general need to look at innovative ways to reach out to students, not just those who have chosen humanitarian action as a field of study—or careers in humanitarian action—but to all higher education students and beyond to enhance the European humanitarian value system. Would it be over-ambitious to imagine that a significant percentage, maybe 10 or 15 %, of every third level students in Europe had completed an elective module in humanitarian action as part of his or her third level education?

NOHA is committed to building on the foundations established over the past generation. During the 20th anniversary celebrations, we called on our respective universities to share this commitment. The NOHA Directors, the NOHA Faculty and the NOHA Coordinators are the nucleus of the NOHA programme in each partner institution. It is their determination and commitment that has made NOHA what it is today and which gives the impetus to push for generation two. NOHA now has a team of alumni whose dedication to progress and evolve the NOHA philosophy can be described as admirable. The ingredients for further success are in place, the need is there, now we need to move from the "yes, we can!" philosophy of generation one to a "yes, we will!" philosophy of generation two.

This first edition of the NOHA "The Humanitarian Challenge – 20 Years European Network on Humanitarian Action" is a symbol of the 20 years of NOHA and a reflection of what NOHA is today. It provides a series of articles addressing contemporary humanitarian issues written by members of the NOHA family and friends, as a substantive contribution to the humanitarian sector. It reflects the diversity in the disciplines, schools of thought, cultures and backgrounds that make up the NOHA corpus and that have forged, and continue to forge, the NOHA identity and, concomitantly, education and research in humanitarian action.

Dublin, Ireland — Pat Gibbons
Brussels, Belgium — Sophie Borel

Contents

Contributors

Joana Abrisketa Uriarte Faculty of International Law and International Relations, Pedro Arrupe Institute of Human Rights at Deusto University, Bilbao, Spain

Agnieszka Bieńczyk-Missala NOHA Faculty, University of Warsaw, Warsaw, Poland

Magdalena Bjerneld International Health, Uppsala, Sweden

Sophie Borel General Manager, Network on Humanitarian Action, Brussels, Belgium

Catherine Bragg Centre for Humanitarian Action, University College Dublin, Dublin, Ireland

Cristina Churucca Muguruza Pedro Arrupe Institute of Human Rights, Deusto University, Bilbao, Spain

Aaron Clark-Ginsberg Centre for Humanitarian Action, School of Agriculture and Food Science, University College Dublin, Dublin, Ireland

Dominic Crowley Concern Worldwide, Dublin, Ireland

Cecile de Milliano University of Groningen, Groningen, The Netherlands

Marie-José Domestici-Met Université d'Aix-Marseille, Aix-en-Provence, France

Marijn Faling Wageningen University, Wageningen, The Netherlands

Public Administration and Policy Group, Wageningen University, The Netherlands

Pat Gibbons Director of Centre for Humanitarian Action, University College Dublin, Ireland

Gabija Grigaitė Law Faculty, International and EU Law Institute, Vilnius University, Vilnius, Lithuania

Patrycja Grzebyk NOHA, University of Warsaw, Warsaw, Poland

Hans-Joachim Heintze Ruhr University Bochum, Bochum, Germany

Katarzyna Kot-Majewska Office of the United Nations High Commissioner for Refugees in Juba, Juba, South Sudan

Polish Ministry of Foreign Affairs, Warsaw, Poland

Raimonda Miglinaitė Institute of International Relations and Political Studies, Vilnius University, Vilnius, Lithuania

Markus Moke Ruhr University Bochum, Bochum, Germany

Valérie Rosoux Université catholique de Louvain, Belgium

Maria Rüther Aktion Deutschland Hilft, Bonn, Germany

Heike Spieker Centre for Humanitarian Action, School of Agriculture and Food Science, University College Dublin, Dublin, Ireland

International Services/National Relief Division, German Red Cross, Berlin, Germany

Renata Vaišvilienė Law Faculty, International and EU Law Institute, Vilnius University, Vilnius, Lithuania

Chapter 1
Disaster Management and Multilateral Humanitarian Aid: Parallelism vs. Combined Forces

Catherine Bragg

1.1 Introduction

This chapter provides a "practitioner's perspective"[1] on an aspect of the changing dynamics among the actors engaged in humanitarian response, namely disaster management actors and multilateral humanitarian aid actors. How these two groups relate to each other is symptomatic of the challenges in the international humanitarian system today, and harbinger of the changes that will take place in the next few years. A fuller understanding will be important for developing and training future humanitarian actors.

A traditional view (ALNAP 2012)[2] of humanitarian actors places "core actors" of the humanitarian system into three categories:

- the providers: donor governments, foundations
- the recipients: host governments, affected population
- the implementers: the Red Cross/Crescent Movement, international non-governmental organizations (INGOs), national non-governmental organizations (NNGOs) and United Nations agencies.

[1] It is called a "practitioner's perspective" as it is based on the observation of the author in her interaction with Members States of the United Nations and with policy makers, and in her involvement in responding to the major humanitarian crises during her tenure as Deputy Emergency Relief Coordinator.

[2] ALNAP, the Active Learning Network for Accountability and Performance in Humanitarian Action, is a learning and research network. Its members are key humanitarian organizations and experts from across the humanitarian sector: donors, NGOs, the Red Cross/Crescent, the UN, independents and academics.

C. Bragg (✉)
Centre for Humanitarian Action, University College Dublin, Ireland
e-mail: cbragg1178@gmail.com

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_1

This traditional view is largely a legacy of the post-Cold War conceptualization of international humanitarian aid. Simplistically put, it envisioned a world in which rich countries funded multilateral organizations, and their sub-contractors, to work in poor and fragile states with humanitarian situations. It formed the basis of an attempt to establish an "international humanitarian system" through a UN General Assembly Resolution (46/182), which, in 1991, created a coordinating department within the United Nations Secretariat, established a senior position of the Emergency Relief Coordinator, and formed an umbrella inter-agency coordinating and policy-making body of the Inter-Agency Standing Committee (IASC). The IASC is inclusive of the UN agencies and major international NGOs through their consortia, while coordinating with the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC) who have standing invitees status. National and community-based non-governmental organizations, while increasingly more involved with IASC in the 20 years since, still operate largely at the periphery of the system.

The role of states is clearly recognized in UN General Assembly Resolution 46/182. Affected states have "the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory." Their role is also increasingly codified in a body of law, under the rubric of international disaster response laws. However, it could be noted that the traditional view sees governments as only donors/providers and hosts/recipients, and not as implementers. It is somewhat surprising that this subtext has endured even into recent reports and writing, even as the same authors note that national governments are increasingly adopting more active roles in responding to humanitarian disasters, ones that go beyond acting as "hosts" and inviting international assistance.[3]

From the point of view of many countries, the important development is the strengthening of their own disaster management capabilities. It is therefore well observed[4] that many countries are strengthening their national disaster management structures, including central and decentralized agencies, legislative frameworks and overall governance. Even some of the smallest countries (from Botswana to Bhutan) now have national disaster management agencies or departments and national legislation, with varying degrees of effectiveness. When disasters strike, many disaster-prone countries, especially those who in the last two decades have joined the ranks of middle-income countries, wish to lead, control and be responsible for the "initiation, organization, coordination and implementation" of disaster response. This response, may or may not involve the use of international assistance, and may or may not involve the multilateral system.

[3] In fairness to ALNAP, in 2010, it hosted its 26th Annual Meeting (ALNAP 2010). However, its meeting report, which drew from Harvey (2009) still puts the first role of a national government as "responsible for 'calling' a crisis and inviting international aid".

[4] Of the 37 countries covered by the UN Office for the Coordination of Humanitarian Affairs (OCHA) Asia-Pacific Regional Office, 36 have established national disaster management authorities.

In developing disaster management capabilities, state authorities generally engage civil protection, even civil defense, personnel and precepts. From the traditionalist point of view, it raises concerns regarding adherence to humanitarian principles, sovereignty and access, and capacity. Given the different points of departure, an important questions for the future evolution of the international humanitarian system is how to engage state authorities in working towards common humanitarian objectives.

1.2 Contrasting Interests

A cursory review of the topics and themes of interest to the major humanitarian policy and research institutions and think tanks[5] in the last decade reveals an unsurprising list of topics, very much related to the traditional conceptualization of the humanitarian aid architecture.

On the providers, one finds discussion under the rubric of "humanitarian financing" topics such as funding mechanisms (e.g. pool funds), funding according to need (impartiality), sufficiency of funding against need, and donorship of so-called emerging donors.

On the recipients, much is written about (weaknesses in) communication with, and accountability to, affected population and needs assessments. Recent interest in cash transfers has given better recognition to recipients' self-help aspirations. As to host governments, the coverage seldom veers outside of issues of sovereignty, and government's role in access (including invitation for outside intervention) and humanitarian space.

Not unexpectedly, there is more published on issues related to the implementers than either the providers or the recipients. There is continuing discussion and debate on the accountability, competence and coordination of the implementing actors, and indeed, whether they use or take advantage of research, evaluation and other evidence-based information. Since the so-called War on Terror, there is heightened interest in the security of humanitarian workers. Interest in the humanitarian system architecture and system effectiveness generally centres around the implementers.[6] In the last few years, there is increasing pre-occupation with the ever widening cast of actors who work in, or near, the humanitarian sphere, but who are not part of the "core actors" group. All policy and research institutions are paying more attention to the growing presence of Islamic players, whether governments, aid providers, funders, or host cultures, in an attempt to foster deeper understanding. It is probably

[5] Including, among others, Humanitarian Policy Group of the Overseas Development Institute (UK), the Feinstein International Center (US), DARA (Spain), and ALNAP (international network).

[6] As can be seen in the reaction to the coordination aspects, especially on clusters and humanitarian coordinators, of the Humanitarian Reform Initiative (which started in 2005) and the Transformative Agenda (started in 2010), both initiative by then Emergency Relief Coordinator.

not inaccurate to say that the current revival in debate on the relevance and salience of the humanitarian principles is derived directly from observation of this increasing diversity in actors (whether military, peacekeepers, private sectors, or governmental or non-governmental groups from regionally significant countries) and from the involvement of Islamic players. This debate is not only academic, but actively pursued within the traditional implementers circles themselves.

The major (and mostly Western) donors fund and support these areas of research and policy discussions.

Contrast this to the interests of state authorities of countries in managing disasters, including those with humanitarian consequences, and features of "civil protection" as an overall approach, pervades discussions.

Interestingly, there is no common, globally accepted definition of the term "civil protection" [just as there is no globally accepted definition of "humanitarianism" (Davies 2012)]. It is generally accepted as being derived from the Cold War concept of "civil defense"[7] and is covered under Article 61 of Additional Protocol I of the Geneva Convention. The Article refers to the "humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival".[8] For many, "civil defense", "civil protection", "civil safety" and "emergency management" all involve state entities and assets established to prevent and mitigate the effect of disasters on persons, property and environmental structures, though "crisis management" emphasizes the political and security dimension rather than measures to address the immediate needs of the population. The common denominator is that response mechanisms include civilian first responders, military and paramilitary personnel and assets and are, generally, under civilian lead.

[7] Civil defense generally refers to an effort to protect the citizens of a state from military attack and became widespread during the Cold War with the threat of nuclear weapons. Since the end of the Cold War, the focus of civil defense has largely shifted from military attack to emergencies and disasters in general.

[8] These tasks include: (1) warning; (2) evacuation; (3) management of shelters; (4) management of blackout measures; (5) rescue; (6) medical services, including first aid, and religious assistance; (7) fire-fighting; (8) detection and marking of danger areas; (9) decontamination and similar protective measures; (10) provision of emergency accommodation and supplies; (11) emergency assistance in the restoration and maintenance of order in distressed areas; (12) emergency repair of indispensable public utilities; (13) emergency disposal of the dead; (14) assistance in the preservation of objects essential for survival; (15) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization. (Article 61, Additional Protocol I (1997), Geneva Conventions.)

The increasing strength of national disaster management, especially in Asia and Latin America in the past decade, has drawn heavily from the world of civil protection. This has included strengthened national disaster management agencies (NDMA) usually headed by someone with a civil protection or military background.[9]

Unlike humanitarian action, there are few non-governmental institutions or think tanks with policy or research focus on civil protection. Academic institutions at the tertiary level offer courses and degree or certification programs, usually under the rubric of disaster or emergency management rather than civil protection. Individual contributing professions, such as engineers or medical or paramedical personnel, also have specialization in emergency response and management. Governmental bodies and practitioners in civil protection organize conferences, trade shows and workshops aimed at sharing of ideas and reaching commonalities amongst players. The thematic focus of academic courses and practitioners' gatherings emphasizes:

- policies and procedures for maximization of availability and utilization of first responders' resources
- common standards and methodology of resources, in particular, of equipment, deployment of personnel and central emergency centres
- personal preparedness of citizens
- business and community continuity
- training and readiness.

While the Additional Protocol of the Geneva Conventions referred to civil defense as involving *humanitarian* tasks, within the civil protection circle, humanitarian principles are very rarely a topic *per se*.[10] It becomes an issue of concern only when the discussion turns to the use of (national) civil protection and civil defense assets in international response deemed to be of a humanitarian nature (e.g. Protezione Civile and Cooperazione Italiana allo Sviluppo 2011; MCDA 2012). When raised, it is usually by the humanitarian traditionalists.

1.3 The Role of Governments

A fundamental canon of international humanitarian assistance is that it is called on if and when State authorities are unable or unwilling to address the needs of those affected in times of (large scale) humanitarian emergencies within its borders. In addition to the recognition of the primary role of state authorities in "the initiation,

[9] The European Union integrated the EU Civil Protection Mechanism into the European Commission's humanitarian aid department while keeping its acronym ECHO, formerly the European Community Humanitarian Office.

[10] In European Commissions documents, e.g. Directorate General for Humanitarian Aid and Civil Protection Management Plan of December 2012, the two respective mandates—humanitarian assistance and civil protection—are treated as distinct. Adherence to humanitarian principles is referenced only in the case of humanitarian assistance.

organization, coordination, and implementation of humanitarian assistance" in United Nations General Assembly Resolution 46/182 (1991), the resolution also states that, "Inter-governmental and non-governmental organizations working impartially and with strictly humanitarian motives should continue to make significant contribution in *supplementing* [italics added] national efforts."[11] Yet studies after studies have shown that the oft-repeated mantra of "there only to support the Government" by the multilateral aid system is seldom manifested in reality, and usually awkwardly implemented when attempted.

The role of governments as an issue of interest for the international humanitarian community began to emerge in the past few years, in part because of events such as the Myanmar Nargis Cyclone, the development of a body of law on disaster response (commonly known as international disaster response laws) spearheaded by the International Federation of Red Cross and Red Crescent Societies (IFRC), and an increasing number of evaluation citing difficult relationship as one of the impediments to effective humanitarian disaster response.

In 2010, ALNAP devoted its annual meeting to the role of national governments in international humanitarian response. In 2011, the Swiss Agency for Development and Cooperation (SDC), the IFRC, the International Council of Voluntary Agencies (ICVA) and the UN Office for the Coordination of Humanitarian Affairs (OCHA) convened an "International dialogue on Strengthening Partnership in Disaster Response", with one of the main themes on bridging national and international support. The background papers and reports make for interesting reading (ALNAP 2010; Harvey and Harmer 2011).

The ALNAP meeting referred to four main roles and responsibilities of governments regarding humanitarian aid:

- they are responsible for 'calling' a crisis and inviting international aid
- they provide assistance and protection
- they are responsible for monitoring and coordinating external assistance
- they set the regulatory and legal framework governing relief assistance.

It acknowledged that, in practice, international relief effort had often been criticized for ignoring, sidelining or actively undermining local capacities, with the problems leading to tense and dysfunctional relationship between states and international agencies. Examples were brought forward from the response to the 2004 Asia Tsunami (Telford et al. 2006), in Indonesia (Willitts-King 2009), in Afghanistan (Ghani et al. 2005) and in the 2010 Haiti earthquake (Grunewald and Binder 2010), amongst others. Glaring problems included exclusion from humanitarian coordination and decision making, lack of use of local language or knowledge of local culture, influx of international personnel to displace local ones or create staffing vacuum in local structures, dual bureaucracy, and general lack of respect for the authority of those in the government. An IFRC survey (IFRC 2007)

[11] United Nation General Assembly Resolution 46/182 (1991) Strengthening of the coordination of humanitarian emergency assistance of the United Nations. Annex para 5.

indicated that a high proportion of respondents reported that some international agencies failed to inform the authorities of their activities. A major evaluation of the clusters approach concluded that "clusters largely exclude national and local actors and often fail to link with, build on, or support existing coordination and response mechanisms" (Streets et al. 2010).

One of the best documented recent examples of the contentious relationship between a government and the international humanitarian community is the response to the 2010 Pakistan floods, in part thanks to reviews by both the international humanitarian community and the Government itself (NDMA 2011a, b; DARA 2011). Pakistan has developed a strong, though under-resourced, National Disaster Management Agency (NDMA) following the 2005 Pakistan earthquake. As in most Asian countries, it also used military actors extensively as first responders and as part of the relief efforts. While the Pakistan Government was quick to appeal for international assistance, and the eventual Floods and Emergency Response Plan was the UN's largest ever appeal, the Government was clear that it was in the lead. According to DARA,[12] there existed a "love-hate" relationship. Some key response decisions were made in ways which were not conducive to working relationships. In the Government's view, the UN "overstepped their mandate" when OCHA advised the North Atlantic Treaty Organization not to establish an air bridge after the Government had invited it. OCHA insisted on a dozen clusters when the Pakistan Government wanted seven (in accordance with NDMA criteria). Separate UN appeal for conflict-displaced persons was launched initially against he will of the Government. In Punjab the UN opened a humanitarian hub in Multan rather than in the provincial capital of Lahore, thus creating a parallel structure. The transition between relief to recovery was substantially impacted by the Pakistan Government's insistence that all recovery programs came under its purview.

Participants of both meetings noted that the existing literature seldom went beyond critique of aid agencies as undermining national capacities, and the discussion cautioned against knee-jerk or blame-driven changes that might "alienate humanitarian practitioners". A more nuanced understanding of the dynamics between the two parties and a "re-appraisal" of the role(s) of the Government was deemed needed. Practical and systemic solutions proposed ranged from translation equipment for cluster leads, to regulation of influx of aid agencies, to a new model for appealing for assistance, and more. Harvey and Harmer (2011, p. 40) urged avoidance of "a confusing proliferation of solutions".

A concluding statement in the ALNAP meeting report, however, is revealing,

> The governments of many developing countries are becoming more assertive in wanting their sovereign primacy in responding to disaster to be respected and more capable in leading disaster responses. This does not mean that principled independent and neutral international humanitarian action is no longer needed, and substitution for the state will

[12] DARA is an independent international organization based in Spain that, amongst its activities, conducts humanitarian evaluations.

> sometimes still be appropriate, particularly in situations of civil conflict. But international humanitarian agencies do need to be more consistent in fulfilling their stated commitments to encourage and support states to meet their responsibilities to assist and protect their own citizens. International agencies should more systematically assess state capacities, invest more in joint contingency planning with governments and link better with the disaster risk reduction agenda, which does recognize the primary role of governments in disaster risk management. The trend will be to move from delivering aid in ways that substitute for the state to supporting states to meet their own responsibilities and advocating for them to address gaps in response (ALNAP 2010, p. 30).

The conclusion acknowledges that States are "more capable". Yet, when the first role attributed to governments is their responsibility "for 'calling' a crisis and inviting international aid", one inevitably senses an assumption of the necessity of outside intervention. There is also a subtext that at once assumes the international community is in a better position to determine when such a "call" is needed, and a lack of confidence in the authorities. Indeed, the fundamental issue of mutual lack of trust and confidence was highlighted in the International Dialogue. It is not surprising that much of the discussion dealt with the issue of state authorities' capacity, and "capacity building" as a way to bridge the authorities and international actors. There is a certain irony in the bulk of literature not going beyond critique of aid agencies undermining the authorities, when at the same time capacity building is seen as a way forward.

1.4 An Alternative View

While the sensitivities of governments on sovereignty are real and need to be acknowledged, the changing dynamics in the humanitarian world is not only about political prickliness. Neither should the perceived divide between the government and international humanitarian actors be seen only as a matter of who knows how to get the job done, and who does not (yet).

There is no doubt that the system created by the UN GA resolution 46/182, born of a desire to get more help to victims of disasters, has led to countless lives saved. It is also continuing to improve on its effectiveness. At the same time, there is increasing concern regarding the overall relevance and appropriateness of its efforts.

ALNAP's 2012 *State of the Humanitarian System Report* recalled that out of six members of the Association of Southeast Asia Nations (ASEAN) recently hit by hydrological or meteorological disasters, none had requested Consolidated Appeals Process (CAP) or flash financing through regular channels (ALNAP 2012, p. 69). The field surveys done for the Report (ALNAP 2012, p. 49) found that two-thirds of the respondents said that they were dissatisfied or only partly satisfied with the amount and quality of the overall package of assistance that they had received (from international responders.). The most common reasons cited in the evaluation synthesis for failing to meet community expectations were: inability to meet the

full spectrum of need, weak understanding of local context, inability to understand the changing nature of need, inadequate information-gathering techniques or an inflexible response approach.

Those who are counted as the traditional humanitarian implementers are increasingly finding that they could operate in crisis situations only through reliance on parties who are not the "core actors/implementers". In the Cyclone Nargis response in Myanmar in 2008, UN agencies had to rely on the cover provided by ASEAN, through a tripartite government-UN–ASEAN coordination body. In the first year or so of the Syrian crisis, UN agencies and (a few) international NGOs operated solely through the Syrian Arab Red Crescent (SARC) Society. The SARC, until the current conflict erupted in Syria, was considered an extension of the Government. (In this crisis response, by all accounts, it has acted independently though.) Throughout 2012, humanitarian access in the border states of South Kordofan and Blue Nile between Sudan and south Sudan was negotiated, until it failed, under the auspices of the Tripartite Plan of Action sponsors—the United Nations, the African Union and the League of Arab States.

The humanitarian world is witnessing an upsurge in diversity of players who operate outside of their own domestic arena. Many include humanitarian objectives amongst their own multiple mandates. These could be the military, private sector companies, state-funded personnel and teams deployed outside domestic jurisdiction, non-governmental or quasi-governmental organizations which are funded by state-sponsored foundations, in addition to a proliferation of multiple mandated non-governmental organizations. Increasingly, regional political and economic organizations have developed humanitarian centres or departments for the coordination of the humanitarian efforts of their member states. Examples include ASEAN, the African Union and some of its regional commissions (e.g. ECOWAS and SADC), and the Organization of Islamic Cooperation (OIC), They now operate in the same theatre as the traditional humanitarian implementers—United Nations agencies, the international NGOs, and the Red Cross Movement. The reach of some of these players can sometime exceed that of the traditional ones. For example, during the response to the Horn of Africa famine in Somalia in 2011, organizations coordinated under OIC had broader geographic reach in South and Central Somalia than those coordinated by the IASC.

In this rapidly changing landscape in the humanitarian world, where the previously dominant players are rubbing against those they perceive as "new-comers" or "emerging actors", there is now increasing discussion and debate on the fundamental issues of what is the meaning of humanitarianism, who is a humanitarian actor, how to accommodate each other, and what should be the shape of the future humanitarian system (Labbe 2012; Davies 2012). In this context it is surprising that governmental authorities, with their material and personnel assets, are not

sufficiently acknowledged as "implementers" of response to disasters, either within their own border or outside.[13] This is in addition to their primacy role as lead and coordinator of any disaster and humanitarian response, within their jurisdiction, whether involving international responder or not.

1.5 Civil Protection Multilateralism

For most of the two decades since the adoption of the UN GA Resolution 46/182, multilateral humanitarianism has been taken to refer to the make-up of the UN with its Inter-agency Standing Committee (IASC), including as partners OCHA, UN agencies, NGOs and the Red Cross/Red Crescent Movement. Yet UN GA Resolution 46/182 also called for a pooling of rapid disaster response capabilities of specialized personnel and technical specialists, including from Member States.[14] In fact, there are currently three inter-locking multilateral networks that underpin international humanitarian cooperation (as distinguished from the multilateral inter-agency notion of international humanitarian assistance) in rapid-onset disasters. They are the United Nations Disaster Assessment and Coordination (UNDAC) system, the International Search and Rescue Advisory Group (INSARAG) and the Global Disaster Alert and Coordination System (GDACS) supported by its on-line platform the Virtual On-Site Operations Coordination Centres (Virtual OSOCC). All have membership and participation involving a broad spectrum of country governments, regional organizations and international agencies/organizations, and all include active participation of civil protection personnel and assets.

The United Nations Disaster Assessment and Coordination concept was a direct response to the call of UN GA Resolution 46/182 (1991). It emerged in the aftermath of the 1988 Armenia Earthquake on the recommendation of the International Search and Rescue Advisory Group (INSARAG). The international urban search and rescue community needed an internationally-accepted operational coordination system which could bring order to humanitarian response in the early hours and days following sudden onset natural disasters. INSARAG itself was established in 1991. It is a global network of now more than 80 countries and organizations under the United Nations umbrella. INSARAG deals with urban search and rescue

[13] The lack of recognition is primarily an issue for the international humanitarian actors. It is seldom an issue within the countries' own jurisdiction or by their national structures. The attachment to the humanitarian principles of independence and neutrality, for the international humanitarian actor, and the concern that they would not be respected in conflict situations by the authorities, might be a possible explanation.

[14] "The United Nations should continue to make appropriate arrangements with interested Governments and intergovernmental and non-governmental organizations to enable it to have more expeditious access, when necessary, to their emergency relief capacities, including food reserves, emergency stockpiles and personnel, as well as logistic support." UN GA Resolution 48/182 (1991) Annex para 28.

(USAR) related issues, aiming to establish minimum international standards for USAR teams and methodology for international coordination in earthquake response based on the INSARAG Guidelines endorsed by the United Nations General Assembly Resolution 57/150 (2002), on "Strengthening the Effectiveness and Coordination of International Urban Search and Rescue Assistance".

The United Nations Disaster Assessment and Coordination (UNDAC) system was created in 1993. It was designed to help the United Nations and governments of disaster-affected countries during the first phase of a sudden-onset emergency, including assisting in the coordination of incoming international relief at national level and/or at the site of the emergency. UNDAC teams can deploy at short notice (12–48 h) anywhere in the world with core mission mandates of assessment, coordination and information management and are self-sufficient in personal and mission equipment. The UNDAC teams follow a pre-defined methodology based on the collective experience of sudden-onset disaster response from the full spectrum of emergency responders. The UNDAC methodology, captured in the UNDAC Handbook, is used extensively by many responders and governments as the basis of their own training. When responding to earthquakes, UNDAC teams set up and manage the On-Site Operations Coordination Centre (OSOCC) to help coordinate international Urban Search and Rescue (USAR) teams responding to the disaster. In the past decade, UNDAC Disaster Response Preparedness Missions have evolved to help disaster prone countries evaluate and improve their national disaster response plans.

In the beginning, UNDAC was supported by a few countries, with team members mostly from the field of urban search and rescue. Today, it consists of almost 255 team members from 79 countries, many of whom are members of G77, and 16 international, regional and non-governmental organizations. Team members are drawn from the full spectrum of humanitarian expertise, but they have also continued to come from the communities of first responders. Their deployments are supported by their home authorities and organizations. Many UNDAC members have domestic disaster management experience. Some have experience being deployed to neighbouring countries under mutual assistance agreement, or under the aegis of regional organizations.

The Global Disaster Alert and Coordination System (GDACS) is another cooperation framework under the United Nations umbrella (with the European Union). It includes disaster managers and disaster information systems worldwide and provides real-time access to web-based disaster information systems and related coordination tools. It aims at filling the information and coordination gap in real-time in the first phase after major disasters. It provides alerts and impact estimations after major disasters through a multi-hazard disaster impact assessment service, gained from scientific partnerships with global hazard monitoring organizations. Real-time coordination is provided through its "VirtualOSOCC" platform. The creation and dissemination of disaster maps, satellite images, and detailed

weather forecast and other related information are integrated automatically in VirtualOSOCC disaster discussions. Many governments and disaster response organizations rely on GDACS alerts and automatic impact estimations to plan international assistance. Some 14,000 disaster managers from governmental and non-governmental organizations have subscribed to the VirtualOSOCC and use the tool for information exchange and coordination in the first disaster phase. Many governments and organizations have formalized the use of GDACS tools and services in their national disaster response plans.

These humanitarian cooperation networks have been in existence for over 20 years, yet in the past decade, they are seldom mentioned in discussion on the international humanitarian system, despite periods of intense interest in the system's reform or effectiveness-strengthening efforts. A Humanitarian Policy Group/ODI (2011) Research Report on the role of networks in the humanitarian system did not mention them, even in its list of acronyms (Collinson 2011). These networks do not have a formalized role in the humanitarian inter-agency mechanisms. Yet they are significant operational partners and contributors to international humanitarian and emergency response. The parallelism between the inter-agency humanitarianism and multilateral civil protection is quite stark.

It has been noted that the past few years have seen a definite trend by all Governments, with almost no exception, to become actors in humanitarian cooperation (OCHA 2011),[15] and wanting to be recognized as such. The trend has also led to a rapidly growing and active membership of these countries in the humanitarian cooperation networks, indicating a continuing support of multilateralism. Instead of "capacity building" as an approach, participants in the networks—be they Members States, intergovernmental organizations, NGOs or private sector entities—are:

– the drafters, not the addressees of norms
– the experts, not the recipients of expertise
– peers cooperating with each other, not "doctors curing their patients", and
– the *actors*, not the recipients of assistance.

These humanitarian cooperation networks afford "a largely underestimated opportunity" for reaching out, for humanitarian advocacy and for building trust within the membership and partners in an international and multilateral forum (OCHA 2013).

[15] It noted that "The increasing preference of developing countries to respond to disasters as much as possible using national capacities and to seek support, if necessary, only from neighbouring countries within their regions may have far-reaching implications for the international humanitarian system. If this trend continues, there is a possibility that international assistance may come to be considered as a last resort . . ."

1.6 Joining Forces, Not Parallelism: A Case Study[16]

The preparedness for, and response to, Typhoon Bopha in the Philippines in late 2012 illustrate the invaluable contribution of the humanitarian cooperation networks and their rapid response mechanisms.

OCHA has over many years worked closely with the Government of the Philippines in strengthening the national preparedness level to respond to disasters. Several large scale simulation exercises have been carried out with the goal of ensuring that the Government will be in the lead when a major disaster strikes. An UNDAC preparedness mission, requested by the President of the Philippines in 2005 and later follow-up missions became instrumental in the Government's efforts strengthening the national disaster management system. The Government of the Philippines was one of the first to adopt the cluster system into its own national disaster management structures. UNDAC members from the Philippines have taken an active role in UNDAC deployments in Asia, including during the Indian Ocean Tsunami, the cyclone Nargis in Myanmar and in nearly all UNDAC disaster preparedness missions in Asia since 2004. The trust created through this close cooperation was an important element when the Government of the Philippines agreed to let OCHA take an active role in the coordination of humanitarian efforts in support of displaced people in Mindanao.

At the request of the UN Resident Coordinator/Humanitarian Coordinator (UN RC/HC), and with the agreement of the National Disaster Risk Reduction and Management Council (NDRRMC) leadership, a nine-member UNDAC team was pre-deployed to Manila by 4 December, 2012 to support the response preparedness efforts of OCHA Philippines, the Humanitarian Country Team (HCT), and the NDRRMC. The team members, with one exception, came from the Asia/Pacific region and included persons who were also members of the ASEAN Emergency Response and Assessment Team (ERAT).

The timely pre-deployment of the UNDAC team was achieved as a result of the real-time analysis (including on VirtualOSOCC[17]) of the weather system as it entered the Philippines. A dialogue took place between OCHA (Geneva Office, Philippines Country Office, Regional Office in Bangkok, New York Office) the UN HC/RC and the Government of the Philippines to discern potential scenarios of the cyclone path using different projection models. Typhoon Bopha made landfall on 4 December, 2012 at around 4.30 am.

Once on the ground, the UNDAC team played a key role providing direct support to OCHA-Philippines Country Office, the HCT with operating agencies

[16] The author is grateful to the staff of Emergency Service Branch of Geneva Office, the Philippines Country Office and the Asia-Pacific Regional Office of OCHA for providing the case description.

[17] OCHA and the UNDAC team provided real-time information on VirtualOSOCC. The emergency discussion was followed by emergency managers from 105 countries and organizations, 60 of whom were Governments.

under the IASC umbrella, and the Government of the Philippines in their own response efforts. This included supporting the inter-agency, Government-led needs assessment, supporting ongoing information management efforts during the preparedness and response phase, and working with the Government and HCT to establish coordination mechanisms, including the cluster system, in the affected areas.

Traditional thinking would applaud the close link between the government and multilateral system in this instance as illustrative of the importance of partnership-building with host governments for the calling for international assistance and for access.[18] This would be too limiting a view. The Government of the Philippines was not just the host country; in this situation, it was the lead and a key implementer. The mutual trust was built through a humanitarian cooperation mechanism that is not steeped in the language of traditional humanitarian action—sovereignty, humanitarian principles or access—but aligned with the Government's own civil protection mandate and orientation. UNDAC did not seek to supplement the capacity of the Government. Instead, it became a bridge between the Government and the international community.

1.7 The Future

OCHA recently hosted a policy forum on future policy and research needs, and its conclusion could be summed up in three words—people, technology and governments. Governments must be seen in their own rights as key actors in disaster and emergency preparedness and response, and are factored in, in the multi-actor humanitarian world of the future.

Humanitarian cooperation networks such as UNDAC, INSARAG and GDACS have been cast too narrowly as communities of technical experts, or as deployment mechanisms. Instead, in a multi-actor world, with states desiring to be active humanitarian actors, these networks should be more fully exploited as strategic tools for bridging the national and international/multilateral spheres. Their already wide membership provides an entry point for Governments and organizations weary of top-down, UN centric approaches, and helps foster commitment to multilateralism. They also provide government officials of these countries with a familiarity of language, methodology and culture that aligns with their own civil protection background. Traditional inter-agency humanitarian actors, might take comfort in the fact that these networks are under the United Nations umbrella and can trace their remit to United Nations General Assembly resolutions. They are served, or managed and coordinated, by OCHA, the coordinator of the IASC system. They also draw their membership from traditional donors and operating agencies. Cumulatively, these networks should and could help reach out and create

[18] The typhoon-stricken area was in Mindanao, an area still considered to be under internal armed conflict.

new linkages. In so doing, they will help build trust between different parts of the international humanitarian system, which is of critical importance in times of emergency when there is no or little time to establish new relationship.

One might question whether this view of the future only applies to preparedness and response to natural disasters. UNDAC, INSARAG or GDACS are not activated during conflict situations. At the same time, it could be argued that the trust and good-will generated through a mutual affinity for civil protection in "peace time", in regards to natural disasters, might make the authorities more willing to work with the international humanitarian community during times of strife. While this proposition still remains to be proven, if true, then an investment in these networks would be doubly positive.

A caveat often lurking in the background of any discussion of the role of governments is whether they could be trusted to provide principled humanitarian aid if they are a party to the conflict. In the multi-actor humanitarian world, where there is an increasing number of actors with multiple mandates and objectives in addition to humanitarian ones, there is now a vigorous debate on what constitutes "humanitarian action", what should be the fundamental principles that guide it, and what purpose these principles serve. Within the theatre of conflicts, governments are already active players. They are involved, one way or another, in the delivery of aid, whether judged to be "humanitarian" or otherwise.[19] In order to maximize the chances of someone caught in a humanitarian disaster receiving the help that is needed, it is incumbent on national and international arrangements to draw on the best combination of assets from all sources.

For too long, the parallelism between the civil protection and humanitarian worlds has precluded the necessary inclusiveness. More efforts should be made to foster understanding between the two worlds, and more efforts must be made to further develop these and future humanitarian cooperation networks to help bridge the two.

References

ALNAP (2010) The role of national governments in international humanitarian response. Meeting paper, 26th annual meeting, Kuala Lumpur

ALNAP (2012) The state of the humanitarian system report. ALNAP, London

Collinson S (2011) The role of networks in the international humanitarian system. Humanitarian Policy Group. Overseas Development Institute, London

DARA (2011) Focus on Pakistan: lessons from the floods. The Humanitarian Response Index, DARA, Madrid

[19] In remarks to an International Peace Institute workshop on "the Future of Humanitarian Engagement in Complex Emergencies" (New York, April 2013), the author argued that humanitarian principles are there for the self-identification of the deliverers of aid, and should not be imposed as a requirement on others, or as an evaluative standard.

Davies K (2012) Continuity, change and contest: meanings of 'Humanitarian' from the 'Religion of Humanity' to the Kosovo War. Overseas Development Institute, London

Ghani A, Lockhart C, Carnahan M (2005) Closing the sovereignty gap: an approach to state building. Overseas Development Institute, London

Grunewald F, Binder A (2010) Inter-agency real-time evaluation in Haiti: 3 months after the earthquake. Groupe URD and Global Public Policy Institute, Berlin

Harvey P (2009) Towards good humanitarian government: the role of the affected state in disaster response. Humanitarian Policy Group, Policy Brief 37. Overseas Development Institute, London

Harvey P, Harmer A (2011) International dialogue on strengthening partnership in disaster response: bridging national and international support. Humanitarian Outcomes, London

IFRC (2007) Annotation to the draft guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance. International Federation of the Red Cross and Red Crescent Societies, Geneva

Labbe J (2012) Rethinking humanitarianism: adapting to 21st century challenges. International Peace Institute, New York

MCDA (2012) Consultative group on the use of military and civil defence assets. Meeting, New York

NDMA (2011a) A review of the Pakistan flood relief and early recovery response plan. National Disaster Management Authority, Prime Minister's Secretariat, Islamabad

NDMA (2011b) Pakistan 2010 flood relief – learning from experience: opportunities and observations. National Disaster Management Authority, Prime Minister's Secretariat, Islamabad

OCHA (2011) Humanitarian reform in the twenty years since GA resolution 46/182. Background paper for the 2011 Montreux Retreat on the Consolidated Appeal Process and Humanitarian Financing Mechanisms, Office for the Coordination of Humanitarian Affairs, United Nations, Geneva

OCHA (2013) Partnership through ownership. Internal Note to Senior Management Team. OCHA Emergency Service Branch

Protezione Civile, Cooperazione Italiana allo Sviluppo (2011) Civil protection and humanitarian aid facing disasters and crisis together. Conference, Rome

Streets J et al (2010) Cluster approach evaluation 2: Synthesis report. IASC cluster approach evaluation 2nd phase. Groupe URD and the Global Public Policy Institute, Berlin, Plaisians

Telford J et al (2006) Joint evaluation of the international response to the Indian Ocean Tsunami. Synthesis Report, Tsunami Evaluation Coalition, London

Willitts-King B (2009) Indonesia: a case study in the role of the affected state in humanitarian action. Humanitarian Policy Group Working Paper. Overseas Development Institute, London

Chapter 2
Resilience: The Holy Grail or Yet Another Hype?

Cecile de Milliano, Marijn Faling, Aaron Clark-Ginsberg, Dominic Crowley, and Pat Gibbons

2.1 Introduction

Disaster risk is globally on the rise, mainly as a result of the complex interplay of environmental, demographic, technological, political and socioeconomic conditions that are expanding hazard and vulnerability profiles (Peek 2008). The inevitability of climatic change at both the global and the local level is generally accepted to be a fact, and various sources predict its dramatic impact on the planet and on humankind (Jones et al. 2010; UNICEF 2007; UNISDR 2004; Save the Children 2007). The field of disaster studies has consequently experienced a significant shift concerning both the nature of disasters, and ways to contend with them. Over the past few decades it has become accepted that disasters occur at the intersection of a natural hazard and people's vulnerabilities, i.e. the organisation of society, with implications for the activities undertaken under the denominator of disaster management. That is, if disasters are inevitable, measures could only be directed at preparing people for a possible disaster to come—disaster preparedness—and assist them once a disaster had hit—disaster response. Approaching disasters as an intersection between nature and humankind on the other hand implies targeting underlying factors equally, including enduring vulnerability and

C. de Milliano
University of Groningen, Groningen, The Netherlands

M. Faling
Wageningen University, Wageningen, The Netherlands
e-mail: marijn.faling@student.uva.nl

A. Clark-Ginsberg • P. Gibbons (✉)
Centre for Humanitarian Action, School of Agriculture and Food Science, University College Dublin, Dublin, Ireland
e-mail: pat.f.gibbons@ucd.ie

D. Crowley
Concern Worldwide, Dublin, Ireland

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_2

people's capacities. Following this trend, resilience thinking currently tops the agenda of disaster risk reduction, and yet the challenge in the coming period is to overcome the teething troubles of this approach. Indeed, resilience has the potential to become the next battleground for on-going debates on the purpose of humanitarian aid; i.e. whether it should be provided solely on the basis of identified needs, linked with development objectives, as part of broader coherence/whole of government agendas for wider change, or simply be a means of preserving the status quo—what Walker and Maxwell (2009) label as the '3 Cs', compassion, containment, and change. To establish resilience as a useful approach to interventions rather than a political tool or point for debate, it is consequently valuable to pursue a mapping of the current discussions with regard to its promises and pitfalls. This chapter therefore provides an examination of the approach, without claiming to present an exhaustive list of issues. Rather, it is a careful exploration of experiences, both in theory as in practice of a resilience approach. The next section starts by discussing in more detail the shift that has taken place in thinking on disasters and their management.

2.2 What Has Been Going On in the Field of Disaster Studies

Over the past century, a twofold shift has taken place, concerning both the nature of disasters, and the way to contend with them. Within academia and practice for many years, 'natural disasters' were explained as unexpected events predominantly exogenous to society, catastrophic products of powerful geophysical systems (Hewitt 1983). Core disaster response activities focused mainly on the provision of outside assistance to restore what had been destroyed in the wake of disasters. In line with this approach, disaster actions and activities were a showdown between powerful forces of nature and a state-led technocratic and militarised counterforce. They had several characteristics: first, the scientific understanding and monitoring of geophysical processes was central, with the main goal of predicting hazards and suppressing and controlling geophysical processes through planning and managerial activities (dikes, water pumps and flood control works are such examples). Second, if not suppressible, human activities were often controlled to separate people from risk through, for example, building codes and so-called 'fail safe' measures. Finally, emergency measures were undertaken to reduce human suffering. Disaster plans were developed, and relief and rehabilitation bodies were established. These were inspired by geophysical study and research, but were subsidiary to emergency actions (Hewitt 1983) and were mostly state-led, and military or quasi-military in character.

Slowly, however, in the 1970s this approach started to transform due to several contingencies in the international sphere, including the increased globalisation of risks, the declining role of the state, and the de-legitimisation of pure scientific

knowledge. This validated the role of disaster management towards non-state actors and enlarged activities to include mitigation and other development-oriented activities. Initially, reductions in time and space resulting from globalisation increased the connections between different actors, connecting everyone in a global 'risk web' with catastrophic potential. The subsequent increases in complexity threw into question the capacity of science/government alone to understand and manage risk. An eroding belief in science as a panacea to all problems created room for more complex and integrated approaches to difficulties society faced, hence the field of disaster management was increasingly taking economic, social and political issues into account. Risk became everyone's product and responsibility, and due to the potential for catastrophe, a majoring organising facet of contemporary society. International understanding of disasters mirrored these orientations, and efforts shifted towards managing disasters using multiple stakeholders, forms of knowledge, sectors, and approaches, and addressing both causes and consequences through emergency response, prevention and mitigation, and social and political change. Indeed, this led to a growing convergence between developmentalists focused on longer term change and disaster managers including humanitarian actors (Lavell 2012). Table 2.1 displays how development and disaster paradigms have been moving closer over the past decades. In both fields, increasingly similar themes and topics surface, bridging the (theoretical) gap between development and disaster. In practice, however, the moving closer of the two fields did not evolve as neatly as presented in Table 2.1 (Manyena 2012).

Table 2.1 Disaster and development moving closer (Faling 2012, based on Manyena 2012 and Ellis and Biggs 2001)

	Development	Disaster
1950s–1970s	**Modernization** Technical approach Redistribution through growth State-led Dependency Trickle-down	**Technocratic approach** Natural disasters Cost-benefit analysis State-led Satisfying risk Quantifying risk
1970s–1990s	**Market liberalisation** Structural adjustment Free markets NGOs Decentralisation Gender Good governance	**Vulnerability** Construction of risk Complex emergencies NGOs Risk assessment Resilience development
1990s–2010s	**Sustainable development** Participatory approaches Livelihoods Vulnerability Climate change adaptation Environment and sustainability Resilience	**Resilience** Participatory approaches Livelihoods Vulnerability Climate change adaptation Environment and sustainability Disaster risk reduction (DRR) Gender Good governance

Roughly from the 1970s onwards, it became increasingly accepted that disasters are a combination of nature's forces (the hazard event) and (political, social, economic, cultural) vulnerabilities, endogenous to society (Cannon 1994). A disaster in this view can be defined as "*the outcome of a physically uncompensated interaction between a natural unleashing event and a social system*" (Albala-Bertrand2000, p. 188). This has serious implications for the activities covered by the field of disaster management. Since, if disasters are inevitable, measures could only be directed at preparing people for a possible disaster to come. Hence, along with prevention and response, disaster management now also covers mitigation, adaptation, transformation, and livelihood support.

This trajectory poses problems for humanitarian actors operating within disaster management spheres. As codified in the humanitarian principles, humanitarian action seeks to deliver aid on the basis of need alone. When taken to their logical conclusions, vulnerability and resilience paradigms that acknowledge the human causes of disasters can provide justification for using emergency aid either in a way that reduces disaster risk or in a way that does not increase disaster risk. This argument gained traction in the 1990s following a number of incidents where aid was viewed as leading to dependency and reducing capacity, or contributing to or prolonging conflict, including, most notably, the displacement of populations following the genocide in Rwanda (Storey 1997; Uvin 1998; Macrae and Leader 2001; Eriksson 1996). It is associated with a number of concepts such as 'new' humanitarian approaches, among others exemplified by Anderson (1999), who reviewed '*how aid can support peace – or war*' to argue that aid should be used towards longer-term peace and stability. While some have argued that humanitarian aid should contribute to longer-term positive change and acknowledge and act on the larger web of risk within which it operates, traditional humanitarian approaches suggest that this would risk subsuming needs-based humanitarian action into a political agenda, so threatening humanitarian principles and, consequently, space and access in the process.

2.3 Resilience as the Answer?

As a continuation of the above-mentioned trends, resilience currently tops the agendas of disaster academics and practitioners. Indeed, it has become a common feature in humanitarian and development arenas since the adoption of the 2005–2015 UN *Hyogo Framework for Action: Building the Resilience of Nations and Communities to Disasters*, a policy framework that sets out a country-level DRR agenda for signatories.

The term resilience stems from the Latin word *resilio*, which means '*to bounce back*' (Klein et al. 2004). The Oxford English Dictionary defines resilience as (1) *the act of rebounding or springing back* and (2) *elasticity*. It is unclear from where exactly the field of disaster management derived the concept (Manyena

2006), however, in the sciences the notion of resilience is historically believed to originate from applied physics and engineering (Alexander 2013). From this purely mechanical point of view, the resilience of materials refers to the quality of being able to store strain energy and deflect elastically under a load without breaking or being deformed (Boyden and Cooper 2007; Klein et al. 2004). In the 1940s, the study of the concept evolved in the disciplines of psychology and psychiatry and, since the 1970s, the term has been employed in a more metaphorical sense. In this line, resilience refers to structurally enhancing the adaptability and capacity of individuals, communities and/or structures to bounce back, and/or transform and move forward in reaction to adverse conditions following a hazard (Gaillard 2010; Levine et al. 2012; Manyena 2006; Plummer 2011).

In using this broad definition of resilience, it bears the following features. First, echoing DRR thinking that has evolved over the past decades, resilience adopts a holistic understanding of risk and disaster. It views disaster as a combination of a hazard event and risks embedded in local economic, political and social institutions. Resilience approaches seek an integrated assessment, combining different fields of expertise. Activities are increasingly multi-sectoral, with communities bearing responsibility for risk reduction, with help and assistance from (local) governments and stakeholders, meaning the governance of disasters is increasingly organised bottom-up. The latter implies that communities bear ownership, and local stakeholders are expected to jointly contribute to risk reduction. This builds on the assumption that the best possible results are achieved through the pooling of knowledge and experience and the inclusion of all stakeholders, many of whom have different viewpoints and needs (Frerks et al. 2011; Manyena 2006; McEntire et al. 2002).

While a resilience orientation offers a number of promising features, there is a danger that it can become subsumed as a means of maintaining the *status quo* or furthering coherence discourses. As a means of maintaining the *status quo*, the concept of 'bouncing back' from a disaster can be used to advocate for a return to the previous structural conditions that caused the disaster in the first place; Manyena (2006) suggests resilience should instead be thought of as 'bouncing forward', a view that implies building adaptive capacity for positive change. When it comes to enactive positive change, however, the question must be asked: change for whom? Positive change can sometimes be a zero-sum game, meaning that certain actors benefit at the expense of others. From a governance perspective, the potentially contentious nature of this change can be disguised by the vagueness of resilience terminology. Brand and Jax (2007) argue the term is a powerful 'boundary object' to foster communication across sciences and disciplines and bring them together towards a common outcome. Similarly, the term might also function as a boundary object for aid actors—including governments and humanitarian organisations—as has occurred with community-based DRR rhetoric (Heijmans 2009), and new humanitarianism that fostered coherence arguments in the 1990s (Macrae and Leader 2001). Indeed, resilience offers a number of benefits but must be used carefully to ensure it does not get politicised in a harmful manner.

The previous approach towards resilience usually refers to the resilience of communities, societies, organisations or systems. A resilience approach which orients the term to support individual agency can offer a counter to the potential of resilience as an excuse for the *status quo*. Throughout time and place, societies have been fascinated with how individuals overcame adversity and succeeded in life, or human (individual) resilience. Three general 'waves' of resilience research can be identified in psychology, social and behavioural sciences, that form the basis of a human perspective to resilience. The first wave included research in the behavioural sciences, which sought to understand and prevent the development of psychopathology (Masten 2011). Studies focused on individual and individually mediated factors associated with positive outcomes. To gain basic descriptive data, scholars focused on fundamental issues of defining and operationalising concepts. Later, the focus shifted when scholars set out to understand process and change, test emerging theories, and develop strategies to actively promote resilience (Masten and Obradovic 2008). The second wave focused on research that emphasised the temporal and relational aspect of positive development under stress (Ungar et al. 2007; Masten 2011). Masten explains that the work attempted to move beyond description and to probe the processes that might account for differences observed in the first wave. Finally, the third and more recent wave of research has taken a more ecological interpretation of resilience, which includes perceiving resilience as an outcome of processes influenced by one's context and culture. Moreover, researchers began designing and implementing experimental research and more frequently started offering suggestions for practice and policy, with warnings concerning the limited state of the knowledge at any given time (Ungar et al. 2007; Masten 2011). Although resilience research in the field of social and behavioural sciences has been common practice, the focus in relation to natural hazards is limited. Resilience from a human perspective could be helpful for the field of disasters, since it can benefit from the insights gained through previous research. Moreover, it provides a more tangible and applied understanding of the concept. But what does human resilience actually entail?

2.3.1 Human Resilience

Human resilience requires focusing on the extent to which individuals navigate their way through the tensions and stresses caused by adversity. This includes personal capabilities and psychological resources (internal level) as well as wider capitals and resources made available to individuals by their environment (external level). When exploring the concept from an individual perspective, the focus lies on understanding risk and protective factors that moderate outcomes and impacts of hazards on individual people. These moderating factors are variables that strengthen or weaken the effects of stressors on humans (Boyden and Cooper 2007). Risk and protective factors are characterised as internal and external (ecological) in which the first refers to the combination of characteristics that make up

an individual, and the second refers to the outcome of environmental factors, which affect an individual's well-being (Montgomery et al. 2003; Boyden and Cooper 2007). The interplay between the internal and the external factors, according to Boyden and Cooper (2007), is dependent on how each of the factors is transmitted and to what extent the options are accessible. In addition, the effects of adversity are highly influenced by both individual and collective (familial, communal, institutional, etc.) processes and therefore it is important to identify how these different mechanisms correlate and reinforce one another. It is believed that the greater the number of risks humans face (internal and external), the greater their vulnerability.[1] On the other hand, Montgomery et al. (2003) explain that human resilience tends to increase with the presence of protective factors that help the individual to cope with misfortune. In other words, the way individuals cope with, and even in some cases respond positively to, adversity is seen as a combination of positive personality traits as well as a supportive environment.

Although the scope of this chapter does not allow for in-depth discussion on possible factors that enable human resilience, research shows that resilience is multifactorial and thus that interventions should focus on multiple factors rather than single ones (de Milliano 2012; Ungar 2008). Resilience enabling factors modify the effects of risk in a positive direction and include resources, strategies, and power relations that are helpful or beneficial to 'bounce forward'. Although different for each individual, internal factors that can have an enabling function include cognition, behaviour, and spirituality. Specifically this includes one's level of intelligence, personal attributes and sociability, hazard related behaviour, participation, and a relationship with a 'higher being' (de Milliano 2012). External factors include relational, socio-political, economic, and physical/environmental resources. Perceived and/or received support from intimate (e.g. family and friends) and more distant relations (e.g. political leaders), access to and possession of economic, political and material resources, financial and physical environmental capital, together with the previously mentioned internal factors, can all be important for individuals to cope with a stressor. Understanding which and how these factors enable individuals to overcome adversity per age-group, gender and context is a helpful starting point for enabling resilience (de Milliano 2012).

2.4 Pros and Cons of the Resilience Approach

Donor and host governments, intergovernmental organisations, NGOs and academics are increasingly focusing on the language and practice of resilience in their day-to-day proceedings. Indeed, the concept is being introduced as an organising principle to prevent unacceptable levels of human vulnerability, reduce

[1] Related to natural hazards this also includes the number of hazards, their frequency, severity and potential, the degree of preparedness of the individual.

the costs of emergency response, and bring disaster risk reduction, climate change adaptation, and other risk management measures into mainstream development practises (Levine et al. 2012). However, many actors find themselves struggling with putting flesh on (sometimes abstract and ambiguous) resilience as an approach. Moreover, the attempt to enhance the resilience of individuals or communities gives the impression that it requires a wholly new approach for organisations and actors. This subsequently requires an amalgam of skills, expertise and knowledge, of which it can be questioned whether actors have the resources to develop and deploy them. Lastly, there is a danger that, improperly oriented, resilience discourse can end up being a hype or be used to maintain *status quo*. On the other hand, the resilience approach offers a wide set of promises, and various arguments are being put forward in defence of the concept. Hence, a set of challenges and opportunities can be identified.

2.4.1 Conceptual Discussion

With resilience widely appearing in policies, papers and discussions throughout disaster studies and practice, a conceptual discussion is manifesting itself in a number of ways.

First, notwithstanding the enthusiasm with which resilience is embraced among scholars, practitioners and policymakers, it remains widely disputed as to exactly what the term refers to. Indeed, resilience may either relate to (groups of) people or (ecological or infrastructural) systems (Levine et al. 2012). This can be explained from the different backgrounds of the concept. In the field of social and behavioural sciences, including psychology, resilience is used in reference to people, and their ability to recover following a disturbance, most particularly in relation to children and their family situation and traumatic stressors (Manyena 2006). In the field of ecology, resilience is commonly applied with regard to ecosystems, and their capacity to withstand or recover from a disturbance in nature (Folke 2004). What contributes to confusion over the concept is that resilience is either process-oriented or outcome-oriented. When viewing resilience as an outcome, it reinforces the reactive stance—bouncing back as maintaining the *status quo*—as deployed in more conventional practices in DRR. That is, if resilience is an outcome, disaster management naturally focuses more on supply, and *ad-hoc* temporary involvement, whereas viewing resilience as a process implies a more sustainable, comprehensive, and continuous endeavour—bouncing forward to change the *status quo* (Manyena 2006). However, approaches such as 'Build Back Better' tend to constitute a challenge in terms of affordability, hence are often discussed, but seldom (successfully) implemented (Khasalamwa 2009). Moreover, it is not always possible to make a neat distinction between communities' or individuals' resilience, and the risk or threat external to the community. Some people's resilience might actually increase due to opportunities occurring during and after the shock event. Partly due

to the confusion over the concept of resilience, there is currently often little comprehension on how to translate the concept into a workable approach.

Second, the approach varies depending on its scale of focus. It is often overlooked that resilience enabling factors and processes differ for individuals as compared to household, communities, systems or society. The lack of scale-based clarity creates a threat that resilience becomes a convenient hype, hiding blurry policies and programmes and politicised aid agendas. To make sure that the approach does not become so vague that it cannot be categorised or measured, it needs to be scale-specifically operationalised. Thus, based on a common understanding of the concept of resilience, its meaning has to be redefined for each level and translated into concrete, specific indicators.

Third, as Fox et al. (2012) also point out, communities currently live in a multi-risk environment. This implies facing slow and rapid onset emergencies, violent conflict, climate change and other global challenges such as pandemics and biodiversity loss, as well as chronic political, economic and societal fragility. These environments are changing fast and are becoming increasingly uncertain and unpredictable. Many previous approaches have failed to adequately address the multiple challenges of these evolving contexts. One of the advantages of the resilience approach is the dynamic nature of the concept and the recognition that things are not static, but change, adapt and evolve. This is in itself a progression with respect to previous conceptions of the world which might have relied too heavily on an assumption of equilibrium and immobility.

Fourth, Levine et al. (2012) emphasise the frustration with the need for repeated massive aid efforts in the same parts of the world. This has led to increasing pressure and acknowledgment of the need to address the underlying vulnerabilities which are embedded in the resilience approach. The widespread adoption of resilience has allowed communities of practice the opportunity to work across the 'silos' of humanitarian action, disaster risk reduction, climate change adaptation, and international development. It is perceived as a common denominator under which different realms can meet, develop a common language and share their experience without losing their original meaning and intrinsic strength (CARE et al. 2013). It often implies a systemic approach which entails that it works across levels, and acknowledges that these levels are interrelated, and affect people and their environments across scales. This has enriched the diversity of the lenses used to examine situations of adversity. It also means that instead of only responding to symptoms, resilience approaches address underlying causes and build on current capacities, making a long-term approach in policy and practise inevitable.

Fifth, authors such as Cannon and Müller-Mahn (2010) place caution towards a system approach. They warn that the ability of ecosystems to absorb shock and to recover from any disturbance are empirical matters. Although the analogies for these qualities can be applied to human 'systems' and lessons can be learned, it can be dangerous to be seduced by this 'scientistic' approach. Since there is no consensus framework for resilience, authors such as Levine et al. (2012) warn against modular analyses as they undermine inter-connectedness of material, political and institutional factors in creating resilience. It should be impossible to

separate one component from another or from their context. The authors emphasise that if the resilience approach does not incorporate real-life dynamics it is a step backwards.

2.4.2 Practical Issues

Apart from conceptual issues there are also a number of practical issues related to the approach, which should not be overlooked.

First, political and security implications aside, diverging interpretations lie at the heart of the process of translating words into 'action'. Inevitably, much of the direct programme intervention in relation to this is mostly done by local partner organisations in the country of implementation. Resilience as an approach requires the involvement of a variety of stakeholders, recipients, local governments and organisations, and every actor involved in the process of implementation often has their own interpretation, inspired by a combination of backgrounds, interests and experience. In fact, interpretations of resilience might even differ within organisations. Since resilience assembles a wide variety of different fields, from disaster risk reduction to climate change adaptation and livelihoods approaches, these interpretations may diverge significantly. Differing understandings may lead to activities that may not always meet expectations. For example in Manila, the capital city of the Philippines, a Dutch-based organisation's resilience programme is being implemented by a group of local organisations. Although recipients are living in dire situations in slums where they are deprived from both services and safety nets and that are flooded heavily on a regular basis, local organisations consider recipients to already be resilient as they are able to return to their pre-disaster situation without much external assistance. The interpretation of resilience of the Dutch-based organisation, and as laid down in the programme description, aims to target the wider socio-economic environment. However, from the notion of local partner organisations, additional measures are rather superfluous (Faling 2012). Moreover, the resilience approach for some people may be like 'old wine in new bottles'. That is, existing strategies, approaches and routines of organisations could be categorised under the umbrella of resilience leading to a situation in which organisations transform their speech while continuing to work in the same 'conventional' manner, as is often the case when new concepts and approaches are introduced to organisations (Meyer and Rowan 1977). While lip service may provide organisational benefits, it can leave local communities excluded from the potential alleviation the resilience approach has to offer.

Second, resilience acknowledges the complexity of the realities of risk, and hence promises to integrate a variety of fields in a holistic approach. Simultaneously targeting disaster risk, climatic and environmental issues, and economic and political features requires a wide range of competencies on the side of implementing organisations. One of the issues with putting flesh on a resilience approach is that implementing partners lack the resources to deploy an integrated

and holistic approach, which targets a variety of issues and aspects of disaster risk. This includes human, material and financial resources. Moreover, the approach requires that proper risk analysis is carried out. It can be questioned as to how well organisations do this and with which criteria. Often, limited time and financial resources are made available for thorough assessment, analysis and design preceding interventions. Finally, the segregated policy, funding and organisational infrastructure and architecture often do not facilitate bridging silos and taking integrated approaches.

Third, the width of the notion enables the clustering of a vast variety of activities under the resilience umbrella. The local Philippine partners implementing the Dutch resilience programme find themselves struggling to interpret the approach and translate it into concrete activities to enhance the resilience of local communities. The background of staff members is in emergency response, which further complicates the understanding of the complexity that resilience aims to address, since staff have not been trained on approaching disasters from a developmental or holistic perspective. These organisations find themselves continuing the activities they are familiar with, while paying 'lip service' to the resilience approach. However, the activities undertaken only cover a small range of issues linked to people's resilience, thereby obstructing the enhancement of people's capacities in a sustainable manner. In theory, partnerships are supposed to overcome these gaps, but reality often demonstrates that this falls short of expectations (Faling 2012).

Fourth, the approach is novel in the sense that it brings the notions of dynamic change, risk, and uncertainty options into development planning and implementation, alongside rights, needs and vulnerability (Fox et al. 2012). This enables programmes and interventions to be developed differently according to risk and vulnerability analysis. In this sense, as emphasised by Fox et al. (2012), building resilience is more about "*changing how we programme, rather than what we programme*". Through the approach, people are urged to be ready for change, and the ability to undertake comprehensive monitoring and analysis, and to actively learn is underpinned. As an approach it encourages full use of available knowledge and encourages disciplines to share approaches and work together to enhance resilience. It requires implementing organisations to, on the one hand, take a systems approach and, on the other hand, think holistically about governance, livelihoods, hazards, stresses and future uncertainty (Fox et al. 2012; CARE et al. 2013). In addition, different timescales need to be recognised since it requires considering past activities and future projections for climate and society.

Fifth, the real test for resilience, however, may be in situations of complex political crises. Here the question arises as to how to practically include disaster response and, following that, realise the bouncing back better after a crisis, thereby neglecting the very nature of emergency aid (Levine et al. 2012). To deliver aid to those in need, organisations often make great efforts to distance themselves from actors involved in conflict, relying on the humanitarian principles as a means of guidance. Resilience, with its holistic and systemic orientation, provides a justification to instrumentalise aid as part of broader foreign policy objectives. That said, resilience promotes and encourages non siloed thinking and, if oriented toward a

human perspective, can promote agency and forward change. A question remains whether resilience in any form is a viable option for aid in these situations and if it can be separated from broader coherence agendas.

Finally, until there is agreement as to what it means and what the approach is trying to achieve, it is challenging to develop helpful manuals on how to implement a resilience approach. The wide variety of actors involved all have their own unique interpretations of resilience and, as mentioned above, every context needs a particular approach, based on individual and communal needs. Hence, communications and relations should strive to be as specific as possible, thereby being receptive for other interpretations, while always seeking to bring differences to the surface, and identify and tackle gaps and misunderstandings among different stakeholders working together. Moreover, it is imperative to acknowledge the time it takes to internalise new thoughts, visions and insights and to train practitioners.

2.5 Conclusion

This chapter has argued that resilience is neither a Holy Grail nor yet another hype. Resilience currently tops the agendas of disaster academics and practitioners and has become a common feature in humanitarian and development arenas since the adoption of the 2005–2015 UN *Hyogo Framework for Action*. This approach followed from transformations in the field of DRR, concerning both the nature of disasters and the way to contend with them. In the 1970s disasters were understood as unexpected and exogenous events, to be contended with by state-led interventions based on scientific knowledge and through bodies with a quasi-military character. Slowly, however, this approach started to transform due to several contingencies in the international sphere, including the increased globalisation of risks, the declining role of the state, and the de-legitimisation of pure scientific knowledge. Currently, the resilience approach is applauded because it is found to encompass a broader understanding of disaster and risk, thereby promoting a holistic and integrative approach and being more sensitive towards the local economic, political and social environment. It requires a bottom-up approach, empowerment of local communities, and the inclusion of multiple stakeholders. Resilience approaches usually refer to the resilience of communities, societies, organisations or systems. It is argued however, that human (individual) resilience could also be helpful for the field of disasters. The individual approach provides a more specific and applied understanding of the concept and can offer a counter to the potential of resilience an excuse for the *status quo*. Moreover, the field of disasters can benefit from the insights gained through previous research in the field of social and behavioural science.

Whereas the resilience approach is taking centre stage in the field of disaster risk reduction, this chapter argues that for resilience to be valuable, there should be continuous awareness of its pros and cons. This entails: addressing conceptual confusion; acknowledging the complexity of multi-risk environments; including

multiple stakeholders; deploying sufficient resources; and acknowledging the challenges for humanitarian actors. The approach should constantly be adapted to new insights and fully integrated into both humanitarian and development policies and practice. It should be remembered that it is not possible for any single actor or intervention to build resilience to everything, for everyone and forever. By decreasing conceptual confusion, increasing analysis and working together to ensure that resilience building programmes support community-driven processes, political traps can be avoided and the breadth and sustainability of impact will be improved. The latter is best reached by taking dynamic and scale- and context-specific approaches, and can enable reaching the goal of further enhancing the capacity of humans and systems to deal with disaster.

References

Albala-Bertrand JM (2000) Complex emergencies versus natural disasters: an analytical comparison of causes and effects. Oxford Dev Stud 28(2):187–204

Alexander D (2013) Resilience and disaster risk reduction: an etymological journey. Nat Hazards Earth Syst Sci Discuss 1:1257–1284

Anderson MB (1999) Do no harm: how aid CAN support peace-or war. Lynne Rienner, London

Boyden J, Cooper E (2007) Questioning the power of resilience: are children up to the task of disrupting the transmission of poverty? Young lives. Department of International Development, University of Oxford, Oxford

Brand FS, Jax K (2007) Focusing the meaning(s) of resilience: resilience as a descriptive concept and a boundary object. Ecol Soc 12:23

Cannon T (1994) Vulnerability analysis and the explanation of 'Natural Disasters'. In: Varley A (ed) Disaster, development and environment. Wiley, London, pp 13–30

Cannon T, Müller-Mahn D (2010) Vulnerability, resilience and development discourses in context of climate change. Nat Hazards 55:621–635

CARE Netherlands (2013) Reaching resilience: handbook resilience 2.0 for aid practitioners and policymakers in disaster risk reduction, climate change adaptation and poverty reduction. Care Netherlands, Wageningen University, The Hague

de Milliano CWJ (2012) Powerful streams. Exploring enabling factors for adolescent resilience to flooding. Dissertation, University of Groningen

Ellis F, Biggs S (2001) Evolving themes in rural development 1950s–2000s. Dev Policy Rev 19 (4):437–448

Eriksson J (1996) Synthesis report: joint evaluation of emergency assistance to Rwanda. Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, Danida, Copenhagen

Faling M (2012) Interpretations and negotiations of resilience. Politics and power in the governance of disaster management in the flood-prone National Capital Region of the Philippines. Dissertation, University of Amsterdam

Folke C (2004) Regime shifts, resilience, and biodiversity in ecosystems management. Annu Rev Ecol Evol Syst 35:557–581

Fox R et al (2012) The characteristics of resilience building, interagency resilience working group. http://community.eldis.org/resiliencewg. Accessed 6 Oct 2014

Frerks G, Warner J, Weijs B (2011) The politics of vulnerability and resilience. Ambiente Sociedade 14(2):105–122

Gaillard J (2010) Policy arena. Vulnerability, capacity and resilience: perspectives for climate and development policy. J Int Dev 22:218–232

Heijmans A (2009) The social life of community-based disaster risk reduction: origins, politics and framing. Disaster Studies Working Paper. Aon Benfield UCL Hazard Research Centre
Hewitt K (1983) The idea of calamity in a technocratic age. In: Hewitt K (ed) Interpretations of calamity, from the viewpoint of human ecology. Allen & Unwin Inc., Winchester, pp 3–32
Jones L et al (2010) Responding to a changing climate. Overseas Development Studies, London
Khasalamwa S (2009) Is 'Build Back Better' a response to vulnerability? Analysis of the post-tsunami humanitarian interventions in Sri Lanka. Norwegian J Geogr 63(1):73–88
Klein RJT, Nicholls RJ, Thomalla F (2004) Resilience to natural hazards: how useful is this concept? Glob Environ Change Part B Environ Hazards 5(1–2):35–45
Lavell A (2012) Reflections: advancing development-based interpretations and interventions in disaster risk: some conceptual and contextual stumbling blocks. Environ Hazards 11(3):242–246
Levine S, Pain AB, Fan L (2012) The relevance of 'Resilience'? HPG policy brief 49. Overseas Development Institute, London
Macrae J, Leader N (2001) Apples, pears and porridge: the origins and impact of the search for coherence between humanitarian and political responses to chronic and political emergencies. Disasters 25:290–307
Manyena SB (2006) The concept of resilience revisited. Disasters 30(4):433–450
Manyena SB (2012) Disaster and development paradigms: too close for comfort? Dev Policy Rev 30(3):327–345
Masten AS (2011) Resilience in children threatened by extreme adversity: frameworks for research, practice, and translational synergy. Dev Psychopathol 23(2):493–506
Masten AS, Obradovic J (2008) Disaster preparation and recovery: lessons from research on resilience in human development. Ecol Soc 13(1):9
McEntire DA, Fuller C, Johnston CW, Weber R (2002) A comparison of disaster paradigms: the search for a holistic policy guide. Public Adm Rev 62(3):267–281
Meyer JW, Rowan B (1977) Institutionalized organizations: formal structure as myth and ceremony. Am J Sociol 83:340–363
Montgomery H, Burr R, Woodhead M (2003) Changing childhoods, local and global. Wiley, Chichester
Peek L (2008) Children and disasters: understanding vulnerability, developing capacities, and promoting resilience – an introduction. Child Youth Environ 18(1):1–29
Plummer R (2011) Social-ecological resilience and environmental education: synopsis, application, implications. Environ Educ Res 16(5–6):493–509
Save the Children (2007) Legacy of disasters. The impact of climate change on children. Save the Children, London
Storey A (1997) Non-neutral humanitarianism: NGOs and the Rwanda crisis'. Dev Pract 7(4):384–394
Ungar M (2008) Resilience across cultures. Br J Soc Work 38(2):218–235
Ungar M et al (2007) Unique pathways to resilience across cultures. Adolescence 42(166):287–310
UNICEF (2007) Children and conflict in a changing world: Machel study 10-year strategic review. United Nations, New York
UNISDR (2004) Living with risk, a global review of disaster reduction initiatives, UN international strategy for disaster reduction. UN Publications, Geneva
Uvin P (1998) Aiding violence: the development enterprise in Rwanda. Kumarian Press, West Hartford
Walker P, Maxwell D (2009) Shaping the humanitarian world. Routledge, New York

Chapter 3
Human Security as the Link Between Humanitarian Action and Peacebuilding

Cristina Churruca Muguruza

3.1 Introduction

Humanitarian action is a needs-based emergency response aimed at preserving life, preventing and alleviating human suffering and maintaining human dignity, wherever the need arises, if governments and local actors are overwhelmed, unable or unwilling to act (Council of the European Union 2008).[1] Peacebuilding, on the other hand, is to be understood, according to the United Nations, as a comprehensive and integrated strategy that encompasses a wide range of political, developmental, humanitarian and human rights programmes and mechanisms. This requires short- and long-term actions tailored to address the particular needs of societies sliding into conflict or emerging from it (United Nations Security Council 2001). This chapter seeks to underline the connection between humanitarian action and peace building, starting from the premise that in armed conflict and post-conflict settings the goal of each should be human security: the protection and empowerment of people.

Human security is commonly understood as priotising the security of people, especially their welfare, safety and well-being. The human security perspective is reproached for wanting to be policy-relevant and problem-solving. In response to this assertion, this paper argues that human security provides a critical perspective and an emancipatory agenda. It suggests that the importance of the concept of human security lies in recognising that, when it comes to successfully protecting

[1] This is how, for example, the purpose of humanitarian aid is defined in the European Consensus on Humanitarian Aid adopted by European Union member States at the end of 2007. The statement forms part of an international global approach involving the United Nations, the International Red Cross and Red Crescent Movement, humanitarian NGOs and other actors.

C.C. Muguruza (✉)
Pedro Arrupe Institute of Human Rights, Deusto University, Bilbao, Spain
e-mail: cristina.churruca@deusto.es

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_3

and empowering people, there is an interconnection between security, development and human rights. It is not a question of whether security comes before development and/or human rights but of how people's security and wellbeing are ensured and what an expanded notion of security means in their everyday lives (Newman 2011, p. 1751).

This paper maintains that humanitarian action should aspire to ensure survival and protect people's fundamental rights and dignity. Seen from that perspective, humanitarian action becomes part of a broader and more holistic peacebuilding strategy. The interrelationship between humanitarian action and peacebuilding is therefore posited in light of the changes that occurred in the post-Cold War period when sovereignty was re-evaluated as meaning that the State had an obligation to take responsibility for the wellbeing and protection of its people and, if it failed to do so, the international community had a duty to take appropriate measures in that respect. The emergence of the concept of the responsibility to protect, known as R2P, emphasises the international community's responsibility to place all the means at its disposal in the service of human security. It should be noted that the original core idea of R2P was not to promote the humanitarian imperative or political regime change as suggested by NATO's recent armed intervention in Libya, but rather a comprehensive peacebuilding agenda. Against that background this paper highlights one aspect of humanitarian action's contribution to peacebuilding which has been largely overlooked: the development of the protection agenda.

The inclusion of protection as one of the pillars of humanitarian action means that humanitarian work should focus on those particularly vulnerable, such as internally displaced persons (IDPs). Ultimately, protecting IDPs means ensuring the realisation of their rights. The search for dignified, lasting solutions for IDPs is recognised as being one of the crucial elements required for peacebuilding and achieving sustainable and lasting peace. However, as will be shown, peacebuilding and the liberal peace project do not prioritise human security. This paper suggests that protection and the search for lasting solutions for IDPs should be a central issue on an international agenda that is at the service of human security. Lastly, it seeks to demonstrate that the relationship between humanitarian action and peacebuilding is not without tensions and challenges. Recognising the need to develop comprehensive or integrated approaches in order to secure stable and lasting solutions to crises and conflicts, and the fact that humanitarian action may be hijacked by political and security objectives, is problematic for humanitarian actors. Furthermore, the current tendency for crises to be manipulated and humanitarian action used for political and security ends in places such as Afghanistan and Iraq raises questions about the community's commitment to peacebuilding while at the same time jeopardising the independence and impartiality of humanitarian aid.

3.2 Human Security as a Goal of Humanitarian Action and Peacebuilding

Human security, as mentioned in the introduction, is generally understood to mean prioritising the security of human beings, especially their welfare safety and well-being over that of state. It is accepted as being an overall approach to protect people from whatever is threatening them—extreme poverty, deadly diseases, and environmental degradation—as well as immediate violence. The spread of the use of this term shows that the challenges in the field of international security today include protecting individuals from increasingly complex global threats and not just defending State interests by military means. The strength and appeal of the concept of human security lies not only in the fact that it challenges traditional ideas and studies of security by taking the individual as its point of reference but also in the fact that those ideas have become increasingly incapable of generating adequate responses to the new security environment.

Proponents of human security argue that poverty, population displacement, hunger, disease, environmental degradation and social exclusion, for example, all bear directly on human and hence global security. These kill far more people than war, genocide and terrorism combined. Therefore the recognition that development, peace and security and human rights are interlinked and mutually reinforcing is considered as being encapsulated in the concept of human security. Since the end of the Cold War a consensus has emerged at international level around the central messages of human security (Tschirgi 2006). The fact is that, despite significant differences in interests and perspectives, all member states of the United Nations General Assembly (UNGA) endorsed the inclusion in the 2005 *World Summit Outcome Document* of the dual aim of human security, recognising freedom from want and freedom from fear as being core values for international relations in the twenty-first century. In particular, this means "the right of people to live in freedom and dignity, free from poverty and despair" and has implications for the State: the responsibility to protect (UNGA 2005). Although by the end of the decade the term 'human security' seem to had fallen in disuse (Martin and Owen 2010) in 2012, the UNGA adopted Resolution 66/290 entitled 'Follow up to paragraph 143 on human security of the 2005 World Summit Outcome'. In this Resolution, the UNGA confirmed human security 'as an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people'. paras. 138 and 143).

Although the concept of human security has been gradually incorporated into international relations, its use as a policy instrument and its operationalisation as well as its academic value have been questioned (Churruca 2007). Academics interested in human security have been viewed as insufficiently critical and reflective (Newman 2010). Conceptual critiques of its practical and theoretical use are

grounded in the same arguments: the absence of a commonly accepted definition of human security and the weakness of its analysis.[2]

The notion of human security has been questioned first of all because of the absence of a commonly accepted definition. Most definitions concur in recognising the existence of a vital core of people's rights and safety. However, the consensus breaks down when considering the threats from which individuals should be protected. Depending on what "people's rights and safety" is deemed to mean, the scope of the definition is either broad or narrow. The concept of human security therefore remains a subject of debate between the so-called "broad" and "narrow" approaches, as if the two were separable. Each emphasise one aspect of human security. The broad approach focuses on "freedom from want", namely, the satisfaction of human development and a minimum level of wellbeing (food, health and environmental security, etc.).[3] The narrow approach, on the other hand, focuses on "freedom from fear", namely, protection from physical violence in conflict settings.[4] Nevertheless, the advocates of both approaches agree that the main goal of human security is the protection of people.

Beyond discussion of the absence of theoretical and political agreement on its definition and content, human security is best understood as being a goal to be attained. The Commission on Human Security (CHS), in its important report *Human Security Now*, published in 2003, offers a dynamic definition of human security based on the initial formulation used by the UNDP in its 1994 *Human Development Report*, namely protection of "the vital core of all human lives in ways that enhance human freedoms and human fulfilment" (CHS 2003, p. 4). This definition is broad enough to encompass the various concerns and narrow enough to have technical credibility as an analytical framework. More important than the broad meaning of human security is what people living in situations of insecurity want. The imperfect but operational response is therefore to maintain a self-consciously vague, wide working definition of human security (CHS 2003, p. 3). The CHS definition does not specify which rights, capabilities and needs belong to the above-mentioned vital core other than identifying the basic elements of survival, dignity and livelihood. The task of prioritising between rights, capabilities and needs is both a value judgment and an exploratory exercise, and something that depends on both governments and international agencies and the people affected.

[2] Analysis of the concept of human security has been extensively addressed in many publications, for example, in the monograph entitled "Seguridad humana: conceptos, experiencias y propuestas" in the *Revista CIDOB d'Afers Internacionals*, No 76, coordinated by Grasa and Morillas (2007); the monograph on the subject in *Security Dialogue*, vol. 35, No 3, September 2004, and on the origin of the concept and critiques of the same in Churruca (2007, pp. 15–35).

[3] This corresponds to the initial formulation of human security made by the UNDP in its 1994 *Human Development Report*, upheld also by the Commission on Human Security, headed by Japan, and in its report *Human Security Now*, published in 2003.

[4] This was championed by Canada, which launched the Human Security Network made up of several countries, and by the *Human Security Report* published by the Center on Human Security.

The fact that prioritising between rights, capabilities and needs relies on the making of a value judgment means that the concept of human security has been seen as analytically weak, since if there is no agreement about what should or should not be prioritised, how can it be a useful concept for decision-makers? How can it be reliably measured? The criticism made by Mack in the prologue to the *Human Security Report* is that seeing anything that presents a threat to survival, dignity and livelihood as a threat to human security has limited utility for policy analysis (Mack 2005, p. viii). However, the question is whether trying to create a hierarchy and prioritise among human security goals is the right approach to human security. As Shahrbanou Tadjbakhsh rightly points out, "the fallacy is in assuming that viable policies are to be made by top "political actors", who sift through competing demands in order to choose one or two suitable targets for attention and resources; their decisions ignore that reality may in fact be many-faceted, involving a host of interconnected factors. Policy-making should not be a vertical process but a networked, flexible and horizontal coalition of approaches corresponding to a complex paradigm" (Tadjbakhsh 2005, p. 8).

Indeed, to try to create a hierarchy and prioritise among human security goals is the wrong approach to human security. It is not only that the concept is based on the assumption that all threats are interdependent and should be addressed comprehensively. It is also that human security focuses on the human being, not on the threats. This means that the threats should be viewed as challenges. Rather than prioritising between competing goals, policy makers should focus on identifying thresholds of survival, livelihood and dignity. A threshold-based approach to human security requires choosing policies based on the specific effect they have on people's wellbeing and dignity (Alkire 2003, pp. 35–36).

Human security is normative; it argues that there is an ethical responsibility to re-orient security around the individual in line with recognised standards of human rights and governance (Newman 2010, p. 78). This means assuming that the protection of people has become an international problem and a crucial element of not only humanitarian action but also peacebuilding. Humanitarian agencies throw themselves into humanitarian action by following their most important guiding principle: *the principle of humanity*. The principle of humanity recognises that human beings are more than physical organisms in need of the means to survive. In the classic formulation of the humanitarian principle, Jean Pictet pins down the essence of humanitarian action when he defines its purpose as being "to protect life and health and to ensure respect for the human being" (Pictet 1979, p. 12). Humanitarian work therefore goes beyond providing physical assistance; it seeks to protect the human being as a whole. Understanding humanitarian action in this way makes it clear that preserving people's dignity and wholeness is just as valid a goal of humanitarian work as ensuring their physical safety and resolving their material needs Seen in this way, the goal of humanitarian action is simply to ensure and safeguard human security. Peacebuilding, for its part, as Goodhand emphasises, based on his experiences in Afghanistan and other conflicts, is ultimately "the construction of human security" in the sense of democratic governance,

human rights, the rule of law, sustainable development and fair access to resources (Goodhand 2006, p. 12).

3.3 The Responsibility to Protect

The increasing incidence of gross human rights violations and human suffering caused by mainly internal armed conflicts and the growing acceptance in international policy circles of the responsibility to protect meant that humanitarian action and peacebuilding were high on the international agenda during the 1990s and the first decade of the twentieth century. This coincided with more long-term trends which, from the perspective of international law and international relations, development and security, began to prioritise people (their rights, development and security) over States and put them at the centre of debates and, therefore, to question the principle and traditional conception of sovereignty.

In the face of the massive population movements and refugee flows caused by the conflicts in Iraq, the Former Yugoslavia and Rwanda during the 1990s, States were reminded of their responsibility for protecting their populations and this led to humanitarian crises being increasingly seen as a question of international peace and security. In a series of resolutions adopted after 1991, the Security Council began to demand international access to populations affected by conflict and mass human rights abuses, sometimes authorising the use of force to ensure that help could be provided. For the first time the Security Council showed a willingness to authorise the use of armed force to ensure the distribution of humanitarian aid, but this fell short of a readiness to directly protect the population that was being targeted or who were the victims of the conflict. The endeavour to support survival "in situ" is posited by some as a covert means to avoid or 'prevent' mass cross-border displacement, seen by neighbouring States as a threat to their security (Peral 2001). Despite the selective nature of what are questionably termed humanitarian interventions, this development paved the way for seeing State sovereignty as a matter of responsibility and not just of power.

The approach developed by Francis M. Deng for addressing the IDP issue was key to moving forward with the idea of viewing sovereignty as responsibility. Deng argued that, in order to be legitimate, sovereignty has to show responsibility, which means at least ensuring a certain degree of protection and providing for people's basic needs, and if governments are unable to do so because they lack the capacity, then the international community will have to take the necessary remedial action (Deng 1995; Deng et al. 1996). The idea of sovereignty as responsibility would have implications beyond the protection of IDPs. In the Secretary General's reports of 13 April 1998 on "The causes of conflict and the promotion of lasting peace and sustainable development in Africa" (S/1998/318), 22 September 1998 on "Protection for humanitarian assistance to refugees and others in conflict situations" (S/1998/883) and 8 September 1999 on "the protection of civilians in armed conflicts" (S/1999/957), concern for the protection of the civilian population and

the particular vulnerability of refugees and IDPs is evident and the primary responsibility incumbent on states to guarantee their protection is reaffirmed.

In this context, and in response to the controversy sparked both by the military interventions supposedly carried out for the purposes of protection in Somalia, Bosnia and Kosovo as well as by the failure to respond to the genocide in Rwanda and the massacre in Srebrenica, Secretary-General Kofi Annan appealed to the international community to try to reach a new consensus on how to reconcile respect for the sovereign rights of states with the need to take action in the face of mass violations of human rights and humanitarian law (Annan 1999). In response to this challenge, the report of the International Commission on Intervention and State Sovereignty (ICISS) adopted the concept of the "responsibility to protect", known as R2P (ICISS 2001; on the adoption of this concept and its institutionalisation, see: Thakur 2009, pp. 308–340). In line with the principle of state sovereignty, that responsibility rests, in the first instance, with the interested state and only if the state in question is unwilling or unable to halt such suffering, the principle of non-intervention yields to the international responsibility to protect (ICISS 2001, p. xi). According to the report, that duty comprises three kinds of responsibility: to prevent, to react and to rebuild (ICISS 2001, pp. 38–45). Seen in this way, the responsibility to protect is tantamount to a comprehensive peacebuilding agenda. The core idea of R2P is not the right of humanitarian intervention but the state's obligation to take responsibility for the wellbeing and protection of its population and, in the event that it fails to do so, the international community's duty to take the necessary appropriate measures. In other words, the idea is that sovereignty, rather than being an absolute right, is an instrumental and contingent notion, the validity of which relies on it being a state tool that serves the interests of the population.

In paragraphs 138 and 139 of the final document from the United Nations World Summit in 2005, the governments of the member states agreed that they had a "responsibility to protect" their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In doing so they underlined that their main concern should be to ensure people's safety (human security). They also recognised that the international community has a responsibility to use humanitarian as well as diplomatic and other appropriate means to help do so. Although R2P is confined to the four crimes mentioned and can be interpreted in a regressive manner by just emphasising the possibility of military intervention, it can also be interpreted more broadly to include all issues related to the protection of civilians and with a focus on prevention (United Nations General Assembly 2009). The Secretary General's report from January 2009 on implementing the responsibility to protect suggests "broadening" the concept to include international aid and capacity-building with regard to a range of development areas and good governance (a competent and independent judiciary, human rights, security sector reform, a robust civil society…) that may also help to serve objectives relating to the responsibility to protect (United Nations General Assembly 2009, para. 44). In this regard the emphasis on capacity-building echoes the peacebuilding initiatives suggested in the ICISS report (ICISS 2001, pp. 25–26).

3.4 The Protection of Persons as an Essential Component of Humanitarian Action and Peacebuilding

A heightened awareness of the suffering of millions of civilians in armed conflict situations during the first half of the 1990s forced humanitarian and human rights agencies to examine aspects that went beyond people's immediate material needs and to ask wider questions about personal safety and people's dignity. It led many humanitarian actors to question the role of humanitarian aid in conflicts and to consider the need to incorporate human rights protection into the humanitarian response. Incorporating a rights approach into humanitarian action meant recognising the victims as rights holders with the right to assistance and protection. Unlike an approach based solely on needs, an approach based also on rights generates responsibilities and seeks to ensure people's protection and wellbeing (for a discussion of new humanitarianism, see Macrae 2002; Pérez De Armiño 2002; Darcy 2004; Lages 2006, pp. 15–36).[5]

The realisation that for many people the reality of war, over and above their paramount right to life, means the utter mass violation of all of their civil, political, economic, social and cultural rights led to consideration of the concept of protection. The challenge from a human security perspective remains how such violations and suffering can be prevented, alleviated and redressed beyond offering "aid only" or "physical protection only", understood as restricting the use of force in accordance with the provisions of international humanitarian law (Slim and Bonwick 2006, p. 14).

The response was the development in 1999 of a very clearly summarised concept of protection based on rights, after a consensus was reached by a wide range of humanitarian and human rights agencies that are regularly brought together in Geneva by the ICRC. That consensus resulted in the definition of protection that is widely accepted today and which has been adopted by the Inter-Agency Standing Committee, made up of United Nations agencies and the main international NGOs, as well as the Protection Cluster Working Group. According to the latter, protection is:

> all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law. (Giossi Caverzasio 2001, p. 19).

This definition, rather than focusing on the threats facing civilians (*protection from what*?), focuses on the fundamental rights of civilians from a human security perspective. Protection is thus perceived as being a comprehensive and integrated framework beyond what is strictly humanitarian. The rights-based approach to protection places the emphasis on people's security, dignity, integrity and empowerment (Hughes et al. 2005). It focuses on realising the rights of excluded and marginalised populations, and of those whose rights are at risk of being infringed.

[5] The change from an approach based on the satisfaction of needs to one based on the fulfilment of rights is considered to be a key feature of what has been called the "new humanitarianism".

The aim is to ensure that protection is not merely "a legal and programming conversation between agencies, states and armed groups that takes place over the heads of protected persons" (Slim and Bonwick 2006, p. 33).

Rights-based protection has to do with developing and strengthening people's capabilities. It is therefore "important that people in need of protection are not seen just as the objects of state power but also as the subjects of their own protective capabilities" (Slim and Bonwick 2006, p. 53). In this context the community-based approach aims to develop the capacity of individuals and communities to make "informed" decisions and to take action on their own behalf in order to realise their rights to security, assistance, reparation, recuperation and compensation (UNHCR 2008). As Lederach points out, local participation, capacity-building and accountability have the potential to transform societies (Lederach 1997).

The concept of rights-based protection has been extensively developed in manuals and guides on protection in general as well as protection for specific population groups such as IDPs. Protection is thus defined as any activity that is directed towards effectively realising people's rights. Protection therefore can be seen as having a triple role: as an objective, as a legal responsibility and as an activity. Protection is an objective that requires full equal respect for the rights of all individuals, without discrimination, in accordance with national and international law. Protection is also a legal responsibility, mainly of the state and its agents. As we pointed out, the approach developed by Francis M. Deng for addressing the problem of IDPs was crucial for furthering understanding of states' responsibility to protect. When national authorities have neither the capacity nor the will to provide such protection, international humanitarian organisations and other relevant actors also have the responsibility to protect and provide assistance. Especially in situations of internal armed conflict, governments are often indifferent or even hostile to providing protection and assistance. In such cases, protection and assistance from the international community are required, often as a matter of urgency, but are frequently hard to provide (Deng 2007, p. 1).

However, protection is mainly an activity because steps need to be taken to make sure that rights are enjoyed. Humanitarian agencies identify three kinds of protection activity which, starting within the personal environment and moving outwards to the institutional environment, can be carried out simultaneously. These are, firstly, response actions that seek to halt, prevent or alleviate the worst effects of abuses; corrective actions to ensure redress for the violations and restore people's dignity, including access to justice and reparation; and environment-building action that support political, social, cultural and institutional norms that are conducive to the protection of human rights (Giossi Caverzasio 2001, pp. 19–21).

In questioning the relationship between people and institutions, the rights-based approach to protection has the potential to pose important challenges for the existing power structures and may result in significant changes to the established order. Viewed in this way, protection thus becomes a peacebuilding agenda in the service of human security.

3.5 The Protection of Internally Displaced Persons and Peacebuilding

The alarming gradual rise in the number of displaced persons has led the international community to focus growing attention on the issue. Supporting and protecting displaced persons are not seen solely as a humanitarian and human rights imperative but also as a regional and international security problem and an essential component of peacebuilding (Newman and Van Selm 2003; United Nations General Assembly 2010).

IDPs are, "essentially, 'internal refugees', people who would be considered refugees were they to cross an international border" (Mooney 2003, p. 159). There are many reasons why IDPs remain in their country and they vary from situation to situation and from person to person. In conflict situations, for example, displaced persons may be unable to reach the border safely. Sometimes IDPs cannot leave their country because they have no transport. Geographical obstacles, such as mountains or rivers, and factors such as age, disability and health may stand in their way.

IDPs may have their freedom of movement denied by their own government or face restrictions on their right to asylum from foreign governments. This was the case with Turkey when the Iraqi Kurds fled from the repression in Iraq in 1991. Ten years later, in the wake of the 11 September 2001 terrorist attacks on the United States, while the Taliban were preventing Afghans from moving freely within their country, neighbouring countries were closing their borders. As a result, in neither case did the mass refugee flows that were anticipated materialise. However, unlike the refugee population, which has an established system of international protection and assistance, people who are displaced within their national borders remain under domestic jurisdiction and state sovereignty, and the international community does not have the necessary legal or institutional grounds to come to their aid (Mooney 2003, 2005; Puong 2004).

According to the Internal Displacement Monitoring Centre (IDMC) operated by the Norwegian Refugee Council (NRC), at the end of 2010 the number of people displaced from their homes because of armed conflict, generalised violence or human rights violations was 27.5 million (IDMC 2010, pp. 8–9). This figure represented an increase of almost one million by comparison with the estimates for 2007 and 2008. Over half of IDPs are located in five countries: Sudan, Colombia, Iraq, the Democratic Republic of Congo and Somalia. The region with the most displaced persons is Africa, with 11.1 million, or 40 % of the world's IDPs. Around 2.4 million people remain displaced in Europe, most of them having fled their homes over 15 years ago as a consequence of armed conflict, violence and human rights violations in Turkey, the Balkans and the Caucasus.

The rights-based approach to protection recognises the particular protection needs of specific groups of people, such as IDPs using a rights approach, the Guiding Principles on Internal Displacement have created a single, comprehensive protection framework which, by linking to the different provisions of humanitarian,

human rights and refugee law, determines how IDPs should be protected at every stage of their displacement. They protect them from arbitrary displacement, determine the grounds on which they should be protected and helped and establish guarantees for their safe return, resettlement and reintegration (Kälin 2008; Puong 2004, pp. 39–74). From the framework established by the Guidelines, three fundamental and interdependent areas for protecting the rights of displaced persons can be inferred as being crucial for peace building: prevention of displacement; effective reparation for the victims of displacement; and their integration into society.

The protection of IDPs ultimately means ensuring that they can resume a normal life as a result of having secured a lasting solution (IASC 2010, p. 5). Lasting solutions are understood to mean achieving the voluntary, safe and dignified return of the internally displaced to their homes or place of habitual residence, or their sustainable integration in the place where they had sought refuge (local integration) or in another part of the country. According to the *Framework on Durable Solutions for Internally Displaced Persons*, IDPs achieve a lasting solution when they no longer require specific assistance or have protection needs related to their displacement and can enjoy their human rights without suffering discrimination because of it. Those rights include the right to security, property, housing, education, health and a livelihood. It is possible that they will have to assert their rights to reparation, justice, the truth and the rectification of earlier injustices by resorting to transitional justice or other appropriate measures. The search for lasting solutions for IDPs should be seen as a gradual and often prolonged process, a complex one which addresses any difficulties that may arise with regard to human rights, humanitarian, development, reconstruction and peacebuilding issues.

Despite their existence being acknowledged in virtually all transition and post-conflict situations, IDPs are the forgotten and marginalised ones in peacebuilding processes. Although there have been some normative and conceptual advances with regard to finding durable solutions (IASC 2010) the fact that at least 40 countries have people living in situations of protracted displacement suggests that no actual progress has been made and that these people are living in marginalised conditions. However, unresolved displacement problems can cause instability and thus jeopardise peace processes as well as peacebuilding efforts.

Peacebuilding is supposedly intended to address the particular needs of societies that are emerging or have emerged from conflict. Nevertheless, in peace operations and conflict zones in general following the end of the Cold War, the focus of what has been called "liberal peace" has not been local actors and communities or, of course, the most marginalised groups such as IDPs.[6] Critical peace research studies

[6] The liberal peace consensus is characterised by the widespread belief among political leaders and "peacebuilders" that the promotion of democracy, the market economy and the raft of institutions associated with the modern state are the motor for peace building. This refers to a combination of theory and policy. Underlying the liberal peace consensus is a liberal peace idea. The idea that certain kinds of state, those with a liberal constitution based on liberal democracy and a market economy, tend to be more peaceful.

have shown that liberal peace has been directed at states, elites, international actors, security issues, liberal institutions and laws (Newman et al. 2009).

The few studies that have looked at the involvement of IDPs in peace processes and peacebuilding have found that the internally displaced are not usually consulted. Their particular circumstances are often overlooked in the language of peace accords, and they are often forgotten or marginalised in peacebuilding initiatives (Koser 2007). At best they are only recognised rhetorically. People become the "means" to political stability as opposed to being the "end" of peacebuilding (Conteh-Morgan 2005). Human security has been relegated to a secondary role.

The Report of the United Nations Secretary-General on peacebuilding in the immediate aftermath of conflict recognises that, in too many cases, the international community has failed to catalyse a response that offers immediate, tangible results. Capacities and resources have been insufficient to meet demands on the ground in several recurring areas where international assistance is frequently requested as a priority in the immediate aftermath of conflict like "the support to the provision of basic services, such as water and sanitation, health and primary education, and support to the safe and sustainable return and reintegration of internally displaced persons and refugees" (UNGA Security Council 2009).

Protracted displacement is often the result of "political indifference on the part of national authorities, development actors and donors" (UNGA 2010, para. 78). In many cases, the internally displaced, after having received generous humanitarian assistance during the worst moments of the crisis, are forgotten once the armed violence ends. With no help to rebuild their lives, IDPs enter into a vicious circle of aid dependency and protracted displacement. They are also often encouraged or forced to return to their places of origin before it is safe or sustainable for them to do so. Although both options, return or reintegration, are equally valid, most agencies focus on return, often against the will of those concerned, because it is the option for which they have had the most operational experience and the one generally preferred by governments (IDMC 2011, p. 47).

As part of the humanitarian response, the role of the Early Recovery Cluster/Network is widely recognised as setting the foundations for future efforts "by protecting and investing in people's livelihoods and developing the capacity of community leaders, civil society organisations and local government in pockets of peace" (United Nations General Assembly Security Council 2009, para. 47). It is during transition when outside aid is most crucial for creating the conditions required for ensuring political stability, security, justice and social equality, in other words, the foundations of peacebuilding. Early recuperation activities, for their part, aim to build on humanitarian assistance, support spontaneous community recovery initiatives and lay the foundations for longer-term recovery (Bailey et al. 2009). The lack of assistance for transition situations and recuperation activities is therefore particularly worrying.

3.6 Final Observations

This chapter has sought to stress the potential of humanitarian action for peacebuilding, starting from the common goal of achieving human security and fulfilling the protection agenda. Incorporating protection as one of the pillars of humanitarian action means that humanitarian work should focus on those most at risk, for example, IDPs. Protection ultimately involves fully realising human rights and, therefore, people's rights to a just and sustainable peace. However, despite international recognition of the problem of protecting the civilian population in conflict and post-conflict situations and that the normative changes that have taken place in the system of sovereignty and non-intervention have created new opportunities for international action, the protection of people is still not a priority for peacebuilding. As well as showing that in practice humanitarian responses are still not linked with a recuperation process that allows the foundations of sustainable peace to be set, the case of IDPs is a clear example that people, or human security, are not a priority for peacebuilding processes.

The tendency over the past 10 years to instrumentalise humanitarian action in places such as Iraq, Afghanistan, Colombia and Haiti has linked humanitarian action to peacebuilding not in the interest of human security but of stabilisation and the containment of what are deemed to be threats to international security from weak or fragile states. As pointed out in many reports, since 9/11 certain trends have emerged resulting in civilians being even more vulnerable than they were before: direct attacks on civilians are continuing in most conflicts and the military operations to stabilise Iraq and Afghanistan[7] have had an enormous negative impact on civilians. This has resulted in a shrinking of humanitarian space: humanitarian actors are less able to reach the populations affected and vulnerable groups have less access to assistance and protection. Military personnel are increasingly involved in humanitarian action, thereby compromising its principles and aims.

At the same time, recognition that comprehensive, integrated approaches need to be developed to find stable and lasting solutions to crises and conflicts and concern that humanitarian action may be hijacked for political and security objectives raises tensions and dilemmas that are difficult to resolve. One of the crucial components of humanitarian action is its apolitical nature, in the sense that it is supposed to be outside of politics and its aims. Humanitarian action therefore needs a *humanitarian space* to ensure access to vulnerable populations, based on respect for the principles of the neutrality, impartiality, humanity and independence of humanitarian action. Respect for independence refers, in particular, to the need for humanitarian objectives to be separate from political and other objectives, and serves to ensure that the purpose of humanitarian aid is only ever to alleviate and prevent the suffering of the victims of humanitarian catastrophes. However, although humanitarian action is based on these principles, the humanitarian agenda is not apolitical. Humanitarian

[7] See the joint briefing sent by 29 NGOs working in Afghanistan to the Heads of State and Government gathered at the NATO summit in Lisbon in November 2010.

actors do not do their work in a political vacuum but in politically complex settings. Incorporating a rights approach into humanitarian action means that it inevitably becomes politicised to some degree (Hughes et al. 2005). Humanitarian actors have to assume that they form part of, and are participating in, the power relations dynamic and recognise that the objective shared with the peacebuilding agenda is human security if they genuinely want people to be protected. As long as humanitarian agencies at both the organisational and individual level fail to come to terms with this "politicisation", their ability to respond to attempts at instrumentalisation and their contribution to peacebuilding will continue to be very limited.

References

Alkire S (2003) A conceptual framework for human security. CRISE Working Paper 2, Centre for Research on Inequality, Human Security and Ethnicity (CRISE). Queen Elizabeth House, University of Oxford

Annan K (1999) Two concepts of sovereignty. The Economist, 18 September 1999

Bailey S, Pavanello S, Elhaway S, O'callaghan S (2009) Early recovery: an overview of policy debates and operational challenges. HPG Working Paper. Overseas Development Institute, London

Churruca C (2007) Human security as a policy framework: critics and challenges in Anuario de Acción Humanitaria y Derechos Humanos/Yearbook on Humanitarian Action and Human Rights 2007. Universidad de Deusto, Bilbao, pp 15–35

Commission on Human Security (2003) Human security now: protecting and empowering people. Report of the Commission on Human Security. United Nations, New York

Conteh-Morgan E (2005) Peacebuilding and human security: a constructivist perspective. Int J Peace Stud 10(1):69–86

Council of the European Union (2008) Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the European Commission. 2008/C 25/1, 30 January 2008

Darcy J (2004) Human rights and humanitarian action: a review of the issues. HPG Background Paper. Overseas Development Institute, London

Deng FM (1995) Frontiers of sovereignty: a framework of protection, assistance, and development for the internally displaced. Leiden J Int Law 8:249–286

Deng FM (2007) Internally displaced populations: the paradox of national responsibility. MIT Center for International Studies Audit of the Conventional Wisdom

Deng FM et al (1996) Sovereignty as responsibility: conflict management in Africa. Brookings Institution Press, Washington, DC, pp 27–33

Giossi Caverzasio S (2001) Strengthening protection in war: a search for professional standards. ICRC, Geneva

Goodhand J (2006) Aiding peace? The role of NGOs in armed conflict. Intermediate Technology Publications, Rugby

Grasa R, Morillas P (coords) (2007) Seguridad humana: conceptos, experiencias y propuestas. Revista CIDOB d'Afers Internacionals 76

Hughes A, Wheeler J, Eyben R (2005) Rights and power: the challenge for international development agencies. Developing rights? IDS Bull 36(1):63

IASC (2010) IASC framework on durable solutions for internally displaced persons. The Brookings Institution, University of Bern Project on Internal Displacement. Washington, DC

IDMC (2010) Internal displacement global overview of trends and developments in 2009. IDMC, Geneva

IDMC (2011) Internal displacement global overview of trends and developments in 2010. IDMC, Geneva
International Commission on Intervention and State Sovereignty (ICISS) (2001) The responsibility to protect. International Development Research Centre, Ottawa
Kälin W (2008) Guiding principles on internal displacement. Annotations. The American Society of International Law and the Brookings Institution, Washington
Koser K (2007) Addressing internal displacement in peace processes, peace agreements and peace-building. Brookings Institution, University of Bern Project on Internal Displacement, Washington, DC
Lages A (2006) Hacia una acción humanitaria más humana. La protección de los derechos por organizaciones humanitarias en situaciones de conflicto. In: Anuario de Acción Humanitaria y Derechos Humanos, Universidad de Deusto, Bilbao, pp 15–36
Lederach JP (1997) Building peace. Sustainable reconciliation in divided societies. US Institute of Peace Press, Washington, DC
Mack A (2005) What is human security? Human Security Report. In: Human security report 2005: war and peace in the 21st century, Oxford University Press, London
Macrae J (ed) (2002) The new humanitarianisms: a review of trends in global humanitarian action. HPG Report 11. Overseas Development Institute, London
Martin M, Owen T (2010) The second generation of human security: lessons from the UN and EU experiences. Int Aff 86(1):211–224
Mooney E (2003) Towards a protection regime for internally displaced persons. In: Newman E, Van Selm J (eds) Refugees and forced displacement. International security, human vulnerability, and the state. The United Nations University, Hong-Kong, pp 159–180
Mooney E (2005) The concept of internal displacement and the case for internally displaced persons as a category of concern. Refug Surv Q 24(3):9–26
Newman E (2010) Critical human security studies. Rev Int Stud 36:77–94
Newman E (2011) A human security peace-building agenda. Third World Q 32(10):1737–1756
Newman E, Van Selm J (eds) (2003) Refugees and forced displacement International security, human vulnerability, and the state. The United Nations University, Hong-Kong
Newman E, Paris R, Richmond OP (eds) (2009) New perspectives on liberal peace. United Nations University Press, Tokyo/New York/Paris
Peral L (2001) Éxodos masivos, supervivencia y mantenimiento de la paz. Trotta, Madrid
Pérez De Armiño K (2002) La vinculación emergencia-desarrollo en el marco del "nuevo humanitarismo". Reflexiones y propuestas, Temas de Cooperación 13, Coordinadora de ONGD España, Madrid
Pictet J (1979) The fundamental principles of the red cross: a commentary. Henry Dunant Institute, Geneva
Puong C (2004) The international protection of internally displaced persons. Cambridge University Press, Cambridge
Slim H, Bonwick A (2006) Protection. An ALNAP guide for humanitarian agencies. Overseas Development Institute, London
Tadjbakhsh S (2005) Human security: the seven challenges of operationalizing the concept. Paper presented as part of the UNESCO discussion "Human Security: 60 Minutes to Convince", Paris, 13 September 2005
Thakur R (2009) The responsibility to protect after 2001. In: Weiss TG, Thakur R (eds) The United Nations and global governance: an unfinished journey. Indiana University Press, Bloomington, pp 308–340
Tschirgi N (2006) Security and development policies: untangling the relationship. In: Klingebiel S (ed) New interfaces between security and development: changing concepts and approaches. German Development Institute, Bonn, pp 39–67
UNGA 60/1. 2005 World Summit Outcome. 24 October 2005. A/RES/60/1
UNGA (2009) Implementing the responsibility to protect. Report of the Secretary-General. 12 January 2009. A/63/677

UNGA (2010) Report of the representative of the secretary-general on the human rights of internally displaced persons. 5 January 2010. A/HRC/13/21
UNGA (2012) Follow up to Paragraph 143 on Human Security of the 2005 World Summit Outcome. RES/66/290, 12 September 2012. RES/66/290
UNGA-Security Council (2009) Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict. 11 June 2009. A/63/881–S/2009/304
UNHCR (2008) A community-based approach in UNHCR operations. UNHCR, Geneva
United Nations Security Council (2001) Statement by the President of the Security Council. 25 February 2001. S/PRST/2001/5

Chapter 4
Post-Conflict Reconciliation: A Humanitarian Myth?

Valérie Rosoux

4.1 Introduction

Over the last 15 years, research was carried out on memory and conflict resolution in a variety of contexts in Europe, the Balkans, and the Great Lakes Region of Africa. This research has emphasized the existence of two contrasting and even contradictory attitudes regarding reconciliation. On the one hand, official representatives steadily call for reconciliation before, during, or after conflicts. Similarly, NGO workers in the field of conflict resolution often consider reconciliation as the ultimate achievement while more and more scholars determine reconciliation to be "probably the most important condition" for maintaining a stable peace (Bar-Siman-Tov 2000, p. 237). Thus, official representatives, practitioners and scholars often present reconciliation as both possible and essential to promote post-conflict stability. On the other hand, in the immediate aftermath of a violent conflict, victims or their relatives largely distrust the notion of reconciliation. Many of them feel animosity and bitterness towards what they perceive as an "indecent" injunction (Brudholm and Rosoux 2013) to reconcile with their enemies. Rather than seeing it as a strategy to move forward, reconciliation is perceived as a mere rhetoric that diminishes the sufferings endured in the past.

The gap between these two attitudes is the origin of the key question this paper seeks to address: how can we understand that the same notion of reconciliation is often presented as a panacea by policymakers, practitioners and scholars while it is much of the time stigmatized and rejected on the ground? The main hypothesis underlying the analysis is that both attitudes need to be taken seriously into account

V. Rosoux (✉)
Université catholique de Louvain, Belgium
e-mail: valerie.rosoux@uclouvain.be

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_4

to determine the scope and, above all, the limits of reconciliation as an effective peace-building process.

The aim of the paper is neither to adopt a cynical position that would categorically belittle efforts in favour of a rapprochement between former adversaries, nor to consider reconciliation as *the* medicine to be systematically prescribed for 'healing' individual and social wounds after a conflict. The purpose is to question reconciliation as an agreed upon norm of conflict resolution. It is to problematize a notion that is too often taken for granted and to contribute to the understanding of the dynamics that take place between former enemies, and between various groups of actors on each side (be they survivors, policy-makers, perpetrators or outsiders such as international donors, practitioners, diplomats and scholars). To understand these dynamics, it seems fundamental to question the normative frame of reconciliation after wars and mass atrocities. Is reconciliation *per se* indeed a natural, legitimate and highly desirable purpose? Is it an ethical demand and unequivocal goal to be pursued whatever the circumstances?

Beyond a theoretical interest, this question has a direct impact for practitioners; a better understanding of the issue is actually a *sine qua non* condition for more efficient interventions. From that perspective, the issue is a crucial policy question everywhere and at all levels. Calling for reconciliation whatever the circumstances, particularly when the concept is poorly defined, can be futile or even counterproductive.

In terms of methodology, the analysis is largely devoted to the Rwandan case since this case illustrates a general problem that is raised in other parts of the world of how to promote coexistence after crimes "that one can neither punish, nor forgive" (Arendt 1961, p. 307). Two main kinds of data are combined to dissect the attempts of rapprochement between the Rwandan national components. First, a systematic corpus of official speeches allows for a description of the evolution of the Rwandan authorities since the end of the hostilities. Second, a comprehensive gathering of narratives depicts the reactions of specific individuals directly affected by a violent past.

The paper is divided into three parts. The first emphasizes the major conceptions of reconciliation as a peace-building process. The second stresses the attitude of the reconciliation advocates in Rwanda. Beside the official authorities, most peace builders called for reconciliation and forgiveness. The third and final part serves as a reminder that some survivors decided to resist this call for reconciliation. By attending to their voices, this article attempts to challenge reconciliation rhetoric, given—and often stereotypical—conceptions of unforgiving victims. In doing so, it does not pretend to represent 'the victims' as a general category, but rather to illustrate the possibility of an often-neglected normative stance.

4.2 Three Major Pieces of the Puzzle

A certain conceptual vagueness forces us to raise a basic question to avoid any confusion: what are we talking about when we talk about reconciliation? Beyond the flourishing and sometimes competing theoretical classifications, three main approaches to political reconciliation can be distinguished: structural, psychosocial and spiritual. However, this concept is so rich that any classification system could be easily challenged.[1] Since the aim of this chapter is not to settle the issue from a theoretical point of view we will not get involved in an academic debate about labels and categorizations.

The first approach prioritizes security, economic interdependence and political cooperation between parties (Kacowicz et al. 2000). The second underlines the cognitive and emotional aspects of the process of rapprochement between former adversaries (Bar-Siman-Tov 2004). The third accentuates a process of collective healing based on the rehabilitation of both victims and offenders (Tutu 1999). In short, the structural approach generally deals with the interests and the issues at stake, whereas the two others concentrate on the relationships between the parties.

4.2.1 Structures and Institutions

After the cessation of violent acts, parties in conflict can establish mutually accepted structural and institutional mechanisms to reduce the general perception of threat and to resolve any possible and critical disagreement. When the former belligerents live in different states, these mechanisms can take the form of confidence-building measures like exchanging representatives in various political, economic, and cultural spheres; maintaining formal and regular channels of communication and consultation between public officials; developing joint institutions and organizations to stimulate economic and political interdependence; and reducing tensions by disarmament, demobilization of military forces and the demilitarization of territories. The Franco-German case illustrates the effectiveness of such structural measures. Six years after the end of World War II, an economic union for coal and steel production was created; in 1963, Charles de Gaulle and Konrad Adenauer signed the Élysée Treaty which institutionalized regular meetings between foreign, defence and education ministers; in 1988, the Franco-German Council was established and in 1995, joint military units were formed (Ackermann 1994). When adversaries live

[1] Gardner-Feldman (1999) distinguishes philosophical-emotional and practical-material components of reconciliation. In the same line, Long and Brecke (2003) analyse two main models of reconciliation: a signalling model and a forgiveness model. Hermann (2004) discerns cognitive, emotional-spiritual and procedural aspects of reconciliation. Nadler (2002) puts an emphasis on socio-emotional and instrumental reconciliation. Schaap (2005) emphasizes restorative and political reconciliation approaches. Galtung (2001) refers to no less than 12 different conceptions of reconciliation.

together in one single state, structural measures mainly concern institutional reforms. Their purpose is to integrate all the groups in a democratic system, restore human and civil rights and favour a fair redistribution of wealth. The negotiations that made the South African transition possible exemplify the complexity of this process.

4.2.2 Relationships

Although some structural changes can be implemented relatively quickly after the end of a conflict, the transformation of relationships does not occur in the same way. Many studies are dedicated to this slow and arduous process between former belligerents or between victims and perpetrators. They are often interconnected but their vision of the transformation process is diverging. Cognitive and psychosocial approaches analyse what they call a "deep change" in the public's psychological repertoire. This evolution results from a reciprocal process of adjustments of beliefs, attitudes, motivations and emotions shared by the majority of society members (Bar-Tal and Bennink 2004, p. 17; Stover and Weinstein 2004, p. 202). From that perspective, the goal pursued by the reconciliation process is to forge a *new* relationship between the parties.

By contrast, the so-called spiritual approaches attempt to understand how parties can *restore* a broken harmonious relationship between the parties. They go a step further by asserting that reconciliation attempts should lead to forgiveness for the adversary's misdeeds (Shriver 1995; Lederach 1998; Staub 2000; Philpott 2006). The reference to the "spirit of reconciliation"[2] is not only made by theologians and scholars, but also by policy-makers. German Foreign Minister, Guido Westerwelle, for instance frequently mentioned this "spirit" as being at the origin of the mutual trust, which made European integration possible (Pristina, August 27, 2010; Zagreb, August 25, 2010; Berlin, October 29, 2010). Former Australian Prime minister, Kevin Rudd, went even further in emphasizing the "sacrament of reconciliation" (Sydney, February 11, 2011). Figure 4.1 presents the three main approaches to political reconciliation, the focus of each approach and their ultimate aim.

Facing this plurality of interpretations of reconciliation, two main strategies can be adopted. The first consists in combining them in order to encompass the whole picture of reconciliation efforts. This attitude makes sense particularly if one realizes that each of these conceptions focuses on a specific piece of the puzzle to be understood. Accordingly, the approaches can be conceived as successive stages of a long-term process. It can indeed be argued that in some specific cases, the rapprochement that took place between former adversaries started by a pragmatic deal between parties, leading to common projects and institutions; that these confidence-building measures created conditions for a progressive transformation

[2] Herman Van Rompuy, 1 July 2013, Zagreb.

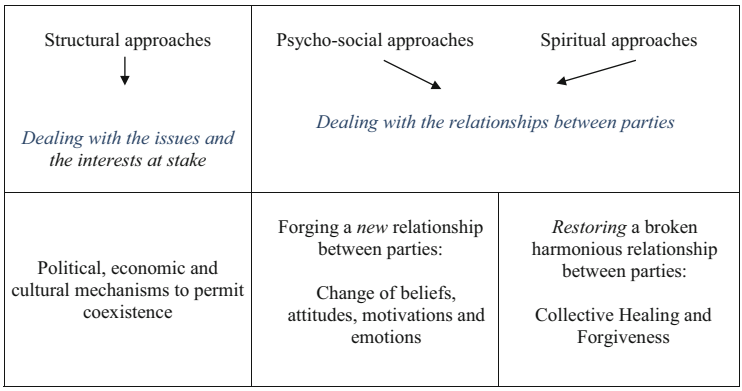

Fig. 4.1 Approaches to political reconciliation

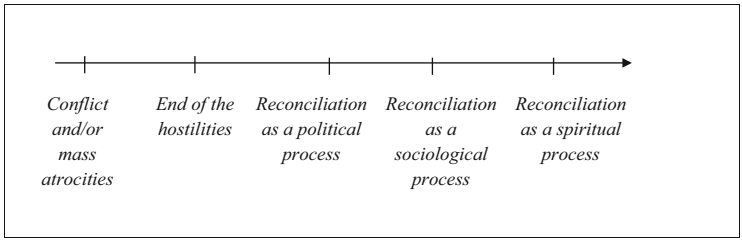

Fig. 4.2 Timeline of reconciliation

of relationships; and, lastly, that this process impacted every single individual affected by the violence in one way or another (Fig. 4.2).

Framing reconciliation in terms of a timeline is illuminating. However, it rapidly reaches its limits when it is used in a prescriptive way. On the ground, practitioners involved in conflict transformation face major difficulties if they present reconciliation as a "kit for stabilizing peace" (Rosoux 2014). Indeed, how can strict sequencing be pertinent when the phenomenon actually requires a simultaneous change at different levels?

The second way to consider the approaches to reconciliation is to contrast them and to question their respective premises. Does a rapprochement between former adversaries depend more on institutional, psycho-social *or* spiritual changes? Is each of the approaches totally relevant to the field of international and/or intercommunity relations? The advocates of a realist stance denounce the risk of sentimentalizing and depoliticizing the processes, while others claim that a substantial change cannot be imagined in emphasizing only institutional and legal instruments. This debate can be illustrated by the following spectrum between a minimalist conception, according to which reconciliation can actually be synonymous with conflict management, and a maximalist conception, which would support the idea of reconciliation as a transcendent process (Fig. 4.3).

Fig. 4.3 Spectrum between minimalist and maximalist conception

If we keep this spectrum in mind, at least three distinct goals can be emphasized: coexistence, respect and harmony. Some peace builders conceive their objective in terms of coexistence between parties. Their aim is that former enemies live together non-violently, even though they still hate each other. The progress lies in the ability of the parties to comply with the law instead of killing each other. From that viewpoint, they tolerate each other because they have to: they stop fighting each other because it is in their own interests. This *modus vivendi* is certainly more satisfactory than violent conflict. However, the situation remains explosive. In order to prevent any potential recurrence of the violence, other voices consider that parties should attempt to do more than simply coexist in respecting each other as fellow citizens. In this view, former enemies may continue to strongly disagree and even to be adversaries, but they should be able to enter into a give and take about matters of public policy and progressively build on areas of common concern. This intermediary conception is based on the perception that some mutual interests exist and allow the parties to forge compromises. Last, more robust conceptions of reconciliation conceive a goal in terms of mercy (rather than justice), harmony and shared comprehensive vision (Crocker 1999). The Rwandan case presented in the next section manifests the rapid limits, and the potential detrimental character, of the maximalist approach in the aftermath of grave human rights violations.

4.3 Rwanda: Forgiveness as a Panacea

In Rwanda, between April and July 1994, all Tutsis, from babies to old men, were tracked. The machete also systematically fell on those among the Hutu designated as traitors. Within weeks, unprecedented violence was unleashed. Some Rwandans were forced to kill their spouse or their children. Unthinkable crimes. Unspeakable pain. The genocide was stopped at the time of the military victory of the Rwandan Patriotic Front (RPF) on July 18, 1994. In the aftermath of genocide, three million people were forced into exile. They fled into neighbouring Democratic Republic of Congo where violence continues to this day. The RPF forcibly dismantled the camps of Hutu exiles who they felt continued to pose a threat to Rwandan security. Reports from the Commission on Human Rights of the United Nations (UN) and international NGOs such as Human Rights Watch (HRW), the International Federation of Human Rights (IFDH) and Amnesty International (AI) reported on abuses allegedly committed in these camps by the Rwandan Patriotic Army (RPA),

military wing of the RPF in 1994. The next year was particularly marked by the massacre of thousands of civilians in the camp of Kibeho.

Prior to 1994, violent episodes regularly broke the peaceful coexistence of the population. Far from being reduced to "collective murderous craze" (Sémelin 2005, p. 248), genocide is part of a historical context that, for decades, ate away at the thick social ties. In 1990, a civil war between government forces and the RPF broke out, itself the remnant of killings and subsequent exile of Tutsis that has repeated itself since independence (1959, 1963, 1965, 1966, and 1973). According to most observers, the seeds of strife were deposited during the colonial period that prioritized and froze in time the socio-economic characteristics of the population into ethnic groups, arbitrarily distinguished. The discourse made by the colonizers, whether pro-Tutsi or pro-Hutu (particularly the case after the so-called social revolution of 1959), gave a systematically biased and stereotypical view of intercommunity relations.

This brief overview makes it possible to take measure of the depth of the memories at the heart of the population. It is within this context that calls for national reconciliation are continuing to multiply in Rwanda. Regardless of whom the appeals are from—whether official authorities, nongovernmental organizations (NGOs), churches or outside observers—all declare the same goal: to (re)build links between two communities torn apart. To do so, many protagonists do not hesitate to explicitly call for forgiveness. In doing so, they show how ambitious their expectations are.

4.3.1 An Official Shift

In Rwanda, after the genocide, the South African case was immediately pointed to as one of the potential models to imitate. Desmond Tutu visited the country a year after the genocide and warned that retributive justice would lead to a vicious circle of reprisals and counter-reprisals. He instead urged Rwandans to move restorative justice forward (Graybill 2002). However, the Rwandan president, Paul Kagame, responded that the severity of the crimes—the genocide of 800,000 Tutsis and political opponents (one-tenth of the population of Rwanda) implied imperative prosecutions. The option of a TRC was therefore rapidly dismissed. According to Charles Murigande, the former Rwandan minister of transport and telecommunication, Rwandans did not really need truth—"We know who did what. Unlike in South Africa where there were secret death squads – people here know what has happened. So simply telling Rwandans the truth and then giving people amnesty – that would not be very helpful" (quoted by Goodman 1997). Thus, Rwandan authorities chose a different way to deal with their past. Besides the International Criminal Tribunal for Rwanda (ICTR) established in 1994 to pursue the planners of the genocide, they passed legislation in 1996 authorizing prosecutions in state courts of those who had followed the orders. As Mahmood Mamdani explains: "If South Africa exemplifies the dilemma involved in the pursuit of reconciliation

without justice, Rwanda exemplifies the opposite: the pursuit of justice without reconciliation" (1997). The one sentence we heard everywhere at that time was that Rwanda had to erase the culture of impunity that lasted for too long and that was partly at the origin of the genocide.

Yet, in 1999, a National Unity and Reconciliation Commission (NURC) was set up with a mandate that can be summarized as 'promoting unity and reconciliation', most visible through the organization of the *Ingando* solidarity camps for re-integration and re-education. Six years later, the *gacaca* courts were installed to prosecute and try the perpetrators of the crime of genocide and other crimes against humanity committed between 1 October 1990 and 31 December 1994. Originally designed for minor offences, the *gacaca* courts were adapted—with limited success—to handle many thousands of *genocidaires*. The new *gacaca* courts were based on participatory justice that uses the wisdom of respected leaders in the community to settle disputes. The principle was to gather the protagonists of the crime (survivors, witnesses, suspects) at the scene of the crimes and discuss what happened, discover the truth, make a list of victims, and designate the guilty.

In this line, a discourse of reconciliation has begun to surface. The shift is such that now every socio-political initiative is framed in terms of reconciliation. Two major reasons can be considered to understand this complete change. First, justice was *de facto* impossible—the number of people who had to be tried and sentenced was unmanageable (the judiciary system being totally ruined after the genocide). Second, justice was somehow embarrassing since it meant dealing with crimes committed on each side. Without making any slippery comparison between the genocide and what happened in the Congo after 1994, it is hard to deny the responsibility of the Rwandan Patriotic Army regarding the massacres of civilians that succeeded one another. When justice is seen as unrealistic and compromising, reconciliation appears as a legitimate and consensual objective.

As a result, Paul Kagame repeatedly presented reconciliation as a fundamental basis to rebuild the country (5 December 2006). His point went much further than arguing in favour of a structural rapprochement between the components of his nation. His approach to reconciliation is undeniably maximalist. At least two main elements demonstrate it. First, the goal stressed by Paul Kagame is not simply the *coexistence* of all Rwandan citizens, but rather a form of *harmony* within the whole society. Second, the Rwandan president put a constant emphasis on the notion of forgiveness. In 2002, he did not hesitate to encourage forgiveness on a national level: "The committed sins have to be repressed and punished, but also forgiven. I invite the perpetrators to show courage and to confess, to repent, and to ask forgiveness" (18 June 2002), and later: "It is important that culprits confess their crimes and ask forgiveness to victims. On the one hand, the confession appeases their conscience, but above all these avowals comfort the survivors who can then learn, even though it is painful, how their close relatives were killed and where their bodies where abandoned" (quoted by Braeckman 2004, p. 417). In April 2006, at the 12th commemoration of the Rwandan genocide, Paul Kagame emphasized again the notion of forgiveness in underlining the need to "confront the truth, to

tolerate and to forgive for the sake of our future, to give the Rwandans their dignity" (7 April 2006).

Moreover, the notion of forgiveness is not only highlighted in the official speeches made in Rwanda. It is also a core issue of many statements abroad. Thus, in 2010, Paul Kagame addressed the Rwandan diaspora in Brussels in defining the "new Rwanda" as a place for "debate", "compromise" and "forgiveness" (4 December 2010). The idea is quite similar when the representatives of an association called *Unity Is Strength Foundation* explained the necessity to "let the world see that the country is different from what is sometimes written in the media" (Belfior 2011). Speaking to the Press after meeting President Paul Kagame, the Dutch director of this association said: "We have been to the north, south, east and west of Rwanda and we have to share that special thing that this country has and bring it across. The process of reconciliation in this country is incredible. There is still a lot to be done, but the country is preparing itself for its future based on unity and forgiveness, a thing that even us Europeans have failed to do. It's difficult to tell someone who killed your father and mother that you forgive him but this has happened here".[3] These words summarize what we could call a moral lesson to the entire world—and particularly to those who dare criticize the Rwandan regime.

4.3.2 The Peace Builders' Hope

This official emphasis on reconciliation and forgiveness highly resonates with the hope expressed by many practitioners. On the ground, several non-governmental organizations (NGOs) organize seminars that specifically tend to lead to forgiveness. Four documentaries are particularly emblematic in this regard: *Icyizere Hope*, *As we forgive*, *Ingando – when enemies return*, and *Raindrop over Rwanda*.[4] These reportages differ from each other, but they all concern the transformation of relationships between survivors and liberated prisoners. All of them confirm in a striking way the interviews made in Washington and in Brussels. Rather than explaining in detail each of these documentaries, it is worth underlining the major

[3] *Ibidem*.

[4] Filmed over the course of 3 years, *Icyizere Hope* is a documentary by filmmaker Patrick Mureithi about a reconciliation workshop in Rwanda that brings together ten survivors and ten perpetrators of the 1994 genocide (2009, 1 h 35, Josiah Film). *As We Forgive* is the 2008 student documentary film by Laura Waters Hinson (53 min, produced by Stephen Maceevety). The film tells the story of two Rwandan women who come face-to-face with the neighbours who slaughtered their families during the 1994 genocide. The documentary *Ingando – when enemies return* (2007, 33 min, Safari Gaspard) tells the story of the troublesome relationship between ex-combatants and genocide survivors. The film by Martin Bush Larsen and Jesper Houborg follows two former soldiers' lives in the *Ingando*, and gives a voice to their thoughts and dreams of a positive return. In *Raindrop over Rwanda*, the American philanthropist Charles Annenberg Weingarten tours Rwanda with host Honore Gatera to uncover the tragedy of the 1994 genocide (2010, 23 min, Annenberg Foundation).

common features that characterize them. Five of them constitute what is conceived here as the reconciliation invariant elements.

a) The films' directors and the vast majority of the interviewed practitioners share a *maximalist* conception of reconciliation. In this regard at least, they seem to be in line with the official discourse, considering that "there is no limit to reconciliation" (United States Institute of Peace, Washington, 21 March 2011). The *As We Forgive Initiative* is presented as an effort "to transform communities by inspiring a grassroots movement of repentance, forgiveness, and reconciliation nationwide". The spiritual dimension of the initiative is explicitly mentioned. The foundation of their work is "rooted in the Biblical values of forgiveness, repentance, and reconciliation based on the teachings of Jesus Christ". According to them, "authentic transformation" in post-conflict societies can only occur "through the radical decision to repent and forgive".[5] Beside this initiative, numerous religious leaders recommend *unconditional* forgiveness.

During my interviews, a unique scenario appeared as being both the structuring element and the aim of all narratives: a repentant perpetrator apologizes to a forgiving victim. The question is not *if* but *when*. The *World Vision* workshops are particularly telling as regards this scenario. Believing that reconciliation is a "prerequisite to the development process", *World Vision* supports community initiatives that promote "community harmony". During reconciliation workshops, genocide survivors, released prisoners, students or teachers are given forums to share their stories and, as they explain, learn about "the power of forgiveness". Among all the stories emphasized by *World Vision* the story of Alice perfectly corresponds to the invariant scenario of reconciliation.

In 1994, Alice was holding her 9-month-old baby girl, when a mob of soldiers and *interahamwe* militias came and surrounded the swamp where she was hidden. They were armed with guns and machetes. One of them took her baby out of her hands and killed her. Then, a man named Emmanuel cut off Alice's hand and slashed her face. She lost consciousness and was eventually rescued by Rwandan Patriotic Front (RPF) soldiers. Almost 20 years after the genocide, Alice's memories are still fresh. She has a scar on her jaw and is missing a hand. However, with the help of *World Vision* workshops, as it is explained, she found the strength to forgive Emmanuel and the men who killed her baby: "In fact, Alice lost 100 members of her extended family, and yet she forgave". The process is presented as almost miraculous: Emmanuel confessed, took full responsibility for his crimes and attended one of *World Vision*'s workshops where he met Alice for the first time since the attack. Alice forgave him and they both preach reconciliation in their community. At workshops, Emmanuel and Alice teach that "forgiveness and repentance benefit both the offender and the victim". The attitude of Alice is presented as absolutely fruitful since *World Vision* discloses that "after forgiving Emmanuel, Alice and her husband were

[5] See the website of *As We Forgive*.

able to conceive again, and they now have five children". To sum up the whole story, it is said that Alice "survived the unthinkable, forgave her attackers, and now works to bring peace and reconciliation to her country".

b) The encouraged rapprochement is based on a *therapeutic* conception of reconciliation. The notion of trauma is essential since all the protagonists are described as "traumatized": survivors of course, perpetrators—depicted as fearful and ashamed, and descendants of both victims and perpetrators. In these conditions, it does not come as a surprise that the whole society requires a form of "authentic healing". Therefore third parties are perceived as playing a critical role in curing and rescuing the whole society. The documentary *As we forgive* illustrates particularly well this dynamic. As the film's director explains: "More and more Rwandans are discovering hope through reconciliation as perpetrators repent of their crimes and survivors find the strength to forgive. Our goal is to play a healing part in that process".[6]

   One of the consequences of this view is the risk of putting victims and perpetrators on the same level, somehow gathered under a common 'trauma' label. As mentioned by the voice-over of the documentary *Icyizere, Hope*: "They are all more similar than different. They are all, victims and aggressors, suffering from trauma. The most effective way to overcome their trauma is by making an effort to forgive each other". The argument is similar in the documentary *Ingando* where a former combatant confirms: "We have to forgive each other, to forget the bad story and be focused on the future". Thus, the whole picture seems to be reduced to a collective healing process, no matter of the responsibility to take on.

c) A third major element concerns the outcome of the narrative. Third parties systematically emphasize stories that lead to a *happy end*. The chosen protagonists overcome a tragic reality. After an initiatory journey, those who were almost broken stand up and move forward. The pattern is similar at the collective level. The finality, which is pursued, is to transform a devastated society into an energetic one. The dynamic allows the passage "from hopelessness to optimism" (Steward 2009, p. 187). The metaphor of the fairy-tale is enlightening in this regard. Interestingly far from the tragic dimension of all post-conflict realities, the depicted horizon is wide and bright. All characters are presented as evolving "beyond violence, beyond fear, beyond anger, beyond vengeance".[7]

   In the films, this transformation is often incarnated by an enthusiastic Rwandan pupil, born after 1994. In the documentary *Ingando*, for instance, the selected Rwandan youth express their happiness to live what they call a "new national momentum" in the history of their country. The tone is identical in the film *As we forgive*, which gives the floor to an optimistic orphan of the genocide: "We are

[6] See the of *As We Forgive* documentary film.

[7] See the documentary *Beyond Right and wrong: Stories of Justice and Forgiveness*, The Forgiveness Project.

brothers and sisters, there is no ethnic division here. I want to build my country". Her testimony stresses the importance of forgiveness in presenting it as both a trigger mechanism ("Before I forgave, I felt anger and I felt lonely") and an inspiring lesson ("People from other countries also need reconciliation. Rwandans forgive each other"). According to the film director, who became the director of the NGO *As we forgive*, the happy end, which is detectable in the reportage, is currently confirmed on the ground. She indeed announces that more than 90 % of the participants in their workshop qualify the impact of the program as "positive and tangible" in their life (Washington, 25 May 2011). Little explanation was given regarding the surveys that led to this impressive figure. However, the most critical point is probably to convince the audience of the "power of radical reconciliation".

d) Accordingly, most projects emphasize the *resilience* of the Rwandan individuals—be they survivors, ex-*genocidaires* or returnees. The emphasis is deliberately put on edifying examples that the population can identify with. This dynamic is at the core of the numerous screenings of the film *As we forgive*. During each presentation, hundreds of genocide orphans and children of genocide survivors and perpetrators meet to watch the movie. Zainabo explains: "As a genocide orphan, I never thought murder could be forgiven. In the film, Chantale [survivor who struggled hard with herself in order to forgive the killer of his father] touched my heart and taught me forgiveness. I have decided that I, too, will forgive the person who has killed my father" (Washington, 25 May 2011). Like Chantale in the film, Immaculée Ilibagiza seemed like a hero. After surviving the genocide, Immaculée left the country and went to United States. In her book *Left to Tell: Discovering God Amidst the Rwandan Holocaust*, she depicts her journey to forgiveness (Ilibagiza 2007). The promotion of her book, which became a best-seller, is telling: "Her story of faith and forgiveness will change *your* life". These words indicate that her message is not only intended for Rwandan survivors, but also for any potential reader.

Beyond the notion of forgiveness—which is far from being an automatic reaction as we will see, the concept of resilience is systematically highlighted by Western practitioners. Several survivors underline it as well. Berthe Kayitesi, for instance, refers to Boris Cyrulnik—who popularized the notion of resilience in France—in order to describe her fight as both a child and a head of family in the aftermath of the genocide (Kayitesi 2009, p. 62). In narrating the tragic fate of those who are overlooked and almost forgotten ("*les oubliés des oubliés*"), Berthe refuses to be locked up by the label of victim. To overcome the weight of a past that is more present than the present itself, she counts on education and wants to move forward. The profile of the Rwandan singer Corneille is similar in this regard. He was 16 years old when he witnessed the massacre of his family. As a refugee in Germany and then in Canada, he started writing songs that repeat that one can survive, go beyond the worst situation and still be happy.

Let us add that the accentuation of a much needed resilience confirms the official discourse on both sides of the Atlantic. In Rwanda, almost every single speech pronounced by Paul Kagame underlines the resilience of the Rwandan

population.[8] The recurrence of the term is similarly striking in Barack Obama's speeches.[9]

e) A last feature is essential to understand the approach adopted by third parties involved in post-conflict situations: the *direct link* between the program of reconciliation which is advocated on the ground and the personal life of practitioners who we met. Most of them spontaneously evoked the "crucial" dimension of reconciliation in their own life.[10] Likewise, Laura Waters, director of the documentary film *As we forgive*, explained that forgiveness was "decisive" in her private life (see Oppenheim 2008). The passage from the individual level (her own experience) to the collective level (the post-genocide context) is audacious. One can indeed wonder to what extent the fact that Laura Waters saved her couple thanks to her ability to forgive her fiancé can enlighten the way to deal with genocide.

The link between private life and national reconciliation is also apparent in the messages intended for the international audience—and not only the local one in Rwanda. The trailers of the selected documentary films are emblematic in this regard. If we take the example of *As we forgive*, the link is explicitly made. The final sequence is made of a succession of stunning images on the pattern of a thriller. Reaching its highest point, the suspense led to the crucial question: "Could *you* forgive?"

4.4 Transgression of the Norm

In Rwanda, the attitude of many survivors arouses admiration and even sometimes fascination. Those who stand up and move forward are qualified as "exemplary". On the international scene, this posture is unanimously celebrated. CNN reportages, International Awards and Doctorates Honoris Causa all over the world reward those who demonstrate that one can survive in a constructive and dignified way despite the most horrendous adversity.[11] However, it is worth thinking about the ultimate

[8] In 2012 only, see the speeches made on 7 February, 30 March, 9 and 13 April, 16 May, 3 et 9 July. See the website http://www.presidency.gov.rw/, accessed 6 October 2014. The notion of resilience has also been chosen to celebrate the 50th anniversary of the independence of Rwanda. See in this regard the event "A journey of Resilience" organized on 30 June 2012 the Embassy of Rwanda in Washington.

[9] In 2012, see among others the speeches pronounced on 31 January, 1st and 21 May, 13 June, 31 August, 3 and 11 September.

[10] Interviews made in Washington between February and June 2011.

[11] See, for instance, the radio series produced by the Belgian NGO RCN—Justice et démocratie, "Si c'est là, c'est ici", the impressive number of prizes won by the documentary film *As we forgive* or even the TV success of Immaculée Ilibagiza on CNN and CBS. The development of a real market in this field is also significant. See, for instance, the possibility to buy the '*As we forgive* movie event kit' or the '4give T-shirt' (during the screenings of the film and on line), the possibility to register for a conference, a retreat or even a pilgrimage (in Kibeho in Rwanda or

consequences of this phenomenon. What does happen when the unanimously honoured scenario is not only an inspiring example but becomes a model to which all protagonists have to correspond? What if this model is perceived as *the* panacea to be applied in any circumstance? In other words, how can people resist this norm? There is much at stake. In stigmatizing—even implicitly—the victims who don't fit the reconciliation heroes' ideal, peace builders mean that some victims are desirable and some not. The good ones are forgiving and resilient ones, while the bad ones wrestle with their resentments.

This perspective forces us to take a closer look at some of the voices of resistance, Esther Mujawayo's in particular.[12] Born in Rwanda in 1958, she is a sociologist and a psychotherapist. In 1994, she lost hundreds of relatives—including her mother, father and husband—during the genocide. She now lives in Düsseldorf, Germany, and works in the field of trauma therapy with refugees. She wrote about her experience in two books entitled *Survivantes* (2004) and *La fleur de Stéphanie* (2006). What one finds in these writings is not the often-praised voice of the forgiving and conciliatory victim. To the contrary, even though Mujawayo endorses a gradual rapprochement between Rwandans in the long run, she clearly expresses her refusal to forgive, and talks of the inclination to forgive as a temptation. More than that, she talks about the interest in post-atrocity forgiveness as an "obsession"—not on behalf of the survivors, but on behalf of the authorities, NGOs, and other agents of reconciliation (Mujawayo and Belhaddad 2006, pp. 17 and 127). What accounts for such "negative" attitudes to the advocacy of forgiveness? Of course, a comprehensive exploration is impossible here, but focusing on three different and partly successive reactions depicted by most of the Rwandan survivors will to some extent illuminate what lies behind this kind of resistance. The first is summarized by a single word: silence. The second is a strong refusal to forgive. The third, more global, one is a distancing from any 'politics of reconciliation'. Each of these reactions indicates the limits of a reconciliation that would be presented as a miraculous formula.

4.4.1 Silence

Although questions of forgiveness loom large in current discourse on reconciliation, the issues faced most urgently by genocide survivors do not always or necessarily involve either forgiveness, anger, or its overcoming. Instead, the response to past atrocity can engage deep sadness, fear, loss of trust and hope, and other emotions that might lead to silence rather than to calls for justice and accountability. In her first book, Esther Mujawayo depicts the initial reaction of

in Banneux in Belgium) with Immaculée Ilibagiza. In 2012, the fees to participate in the Kibeho's trip were 2,950$ (the price of the flight being not included). See http://www.immaculee.com, accessed 6 October 2014.

[12] This part of the chapter is based on a research carried out with Brudholm and Rosoux.

most of the survivors after the genocide: "No one... explicitly asked us to be quiet, [but] we have immediately felt that we had to [be]" (Mujawayo and Belhaddad 2004, p. 20).

The sheer difficulty of finding proper words, as well as listeners, is not the only reason for this first reaction. Many survivors decided to be silent because they felt guilty, ashamed, or afraid. The paradoxical guilt experienced by many of the other survivors around Esther Mujawayo resulted from the fact that they—and not the others—survived, that they could not save their loved ones, or that they could not find their loved ones' bones. As for the shame, this feeling is often linked with the violence, especially sexual violence that they suffered. Even though 80 % of the women who survived were raped, the reality of this specific violence is still a taboo (Mujawayo and Belhaddad 2004, p. 196). According to the representatives of the Association *Avega* (Association of the Widows of the Genocide), "[T]he rape, you bear it silently, in such a shame that no one could even imagine. But you, you always feel like a stink inside your body and a grime that itches your skin" (Mujawayo and Belhaddad 2004, p. 201). This shame and constant humiliation—reinforced by the stigmatization of any one Tutsi, systematically identified with a cockroach during the genocide—are so deep that the roles seem reversed: "The survivor is ashamed to meet the killer of his close relatives; he [the survivor] is the one who is afraid, who feels humiliated to see the perpetrator walking like that. He feels so guilty" (Mukayiranga 2004, p. 783).

This sense of the survivor's guilt and shame can be associated with another cruel inversion of the roles during the genocide—when the victims themselves asked for forgiveness from their perpetrators. Several witnesses explained that, in front of the *Interahamwe*, victims were indeed asking for forgiveness in order not to be tortured for too long (Hatzfeld 2007, pp. 135–137). The fear expressed by the survivors can be explained by various elements: angst about not being believed, anxiety in front of recently liberated perpetrators, and a general feeling that they would be bothering everybody. With the 'un-listenable' mingling with the unspeakable, both tendencies imply a loss of confidence in the world and the loss of any sense of personal safety. Facing these extreme difficulties, the Rwandan victims have to make an immense effort to testify in front of a sometimes-hostile gathering, to express publicly tragic facts (above all sexual violence), to denounce neighbours, or even members of their own family. As Mujawayo noticed, in these circumstances forgiveness is not the primary concern of the survivor (Mujawayo and Belhaddad 2006, p. 127).

Arguably, this kind of 'distancing' from the entire issue of forgiveness is not an example of *resistance* to forgiveness in the sense of active and focused opposition. But the situation is prone to feed into a kind of loathing and disdain that is as significant as the more-explicit forms of opposition. Consider for example this remark by Innocent Rwililiza, as quoted in one of Jean Hatzfeld's books on post-genocide Rwanda: "Actually, who is speaking about forgiveness? Tutsis, Hutus, liberated prisoners, their families? None of them, it is the humanitarian organizations. They import forgiveness in Rwanda, and they wrap it in dollars to convince us. There is a Forgiveness Plan as there is an Aids Plan, with meetings of popularization, posters, little local presidents, very polite Whites in cross-country and turbo

vehicles. . . .We, we speak about forgiveness to be well considered and because subsidies can be lucrative. But in our intimate talks, the word 'forgiveness' is strange, I mean constraining (Hatzfeld 2007, p. 25).

4.4.2 Clear Refusal to Forgive

Beyond this first reaction, Mujawayo insists on her resistance to any kind of forgiveness toward perpetrators. She says, "the more I think about that, the more I ignore what forgiving means, except this mini-settlement that I make with myself to hold out[] for a pretended moral appeasement, to 'win' against hatred. . . . Today, as the years go, I accept better, I finally accept that, no, I will not forgive" (Mujawayo and Belhaddad 2006, p. 126). This position relies on two main reasons: on the one hand, the lack of energy to adopt an empathetic view of perpetrators, and, on the other, a deep discontent with what might be called a "cheap" repentance. Speaking about the killers, Mujawayo explains that empathy must follow a return of her energy: "I don't want to understand them, at least, not yet. I want to proceed step by step: within ten years maybe. I don't want to understand. . . . I say to myself that some people are paid for that, for understanding the killers—politicians, humanitarian staff, right-thinking people. . . . all those whose work is to get into contact with criminals. Myself, I don't need that. I don't want to understand them and I don't want to excuse them. They did it. . . . and I want them to pay for that and not to sleep soundly" (Mujawayo and Belhaddad 2004, p. 87).

This refusal to understand the 'other' to some extent results from the immense fatigue felt by survivors who have so many other priorities in the current Rwandan context. Before thinking about the potential scope of empathy, Mujawayo wants "some bread for those who survived" (Mujawayo and Belhaddad 2006, p. 189). However, apart from the inappropriate character of any "duty to understand", she does not deny the humanity of each Rwandan, including perpetrators: "Yes, there is a human touch in each of us, and therefore in each of them, and who knows what we could have done in their place" (Mujawayo and Belhaddad 2004, p. 120).

Mujawayo's attitude seems to be characterized by a constant effort to take into consideration the ambivalence and complexity of the situation. Underlining the *loneliness* that goes with the experience of victims, she does not expect any kind of revenge in order to appease this feeling. Nonetheless, she maintains that victims have the right not to be *above* resentment. Being a psychotherapist, she does not feel any guilt when she faces her own resentment. Taking lucid account of the limits of her powers, she knows and she accepts that, for most survivors, full empathy would be unattainable and even counterproductive.

The second reason for survivors' resistance to forgiveness is that forgiveness does not make sense when perpetrators do not express any remorse. According to Mujawayo, "most of the killers do not ask forgiveness, they say sorry. Or they ask it with the certainty that this request inherently merits a positive answer" (2006, p. 125). To her, the notion of forgiveness is not the same for the killer and the

survivor. For the perpetrator, it represents a potential reduction of sentence, whereas for the victim it appears either as something beyond reach or as a sacrifice. Against this background, Mujawayo wonders, "To forgive whom in fact? The one who writes you his letter of repentance?" This question denounces the quasi-administrative letters written by perpetrators in order to be liberated as soon as possible. To Mujawayo, these documents at best mimic a true acknowledgment of responsibility and a genuine address to the survivors. In *La Fleur de Stéphanie*, she gives an example of the hundreds of similar letters sent to survivors:

> Musange, province of Gitarama
>
> Object: [T]o ask forgiveness [of] Nyirakanyana Madalina's family
>
> "I, N.V., son of K., I am writing to Nyirakanyana Madalina's family, asking them forgiveness because I was one member of the group that took her from M.P.'s house (a neighbour).... This group was directed by M.F.... [a list of 11 members follows]. These are those with whom we took her together to the river Nyabarongo but I, at that moment, I stopped on the riverside. Then, I ask you, the members of Nyirakanyana's family, forgiveness; to the State, I also ask to forgive me, to God too I ask forgiveness, and I hope that you will forgive me as well. Peace of God with you".
>
> [Following is a signature, a name, and fingerprints.] A last sentence specifies: "This letter is notified to the gacaca coordinator of M Muhanga." (Mujawayo and Belhaddad 2004, pp. 128–129).

To Mujawayo, this kind of statement, always identical (same phrases, same structure) is almost indecent because it does not express any regret or any personal responsibility: everyone is hiding his own behaviour behind "the group as such" (Mujawayo and Belhaddad 2004, p. 127). Many survivors confirm that not a single prisoner came and expressed remorse for what he did. In some cases, prisoners decided to confess their crimes, but they did it in a mechanical way, and even required the victims' forgiveness—most often taken for granted. There are pressures in favour of forgiveness all around (from official authorities, churches, and NGOs); survivors discredit mainly what they consider as only pretence of forgiveness.

The absence of authenticity is apparent in many gestures leading theoretically to forgiveness: "Humanitarian organizations.... spend millions of dollars in order to make us forgiv[e] and bind each other by friendship. But survivors do not want to bargain their word against little compensations" (Hatzfeld 2007, p. 101). This account likewise illustrated the hollowness of the victim's forgiveness in response to the hollowness of the perpetrator's request for the same: "Two people came at home to ask me for forgiveness. They did not come willingly, but in order to avoid the prison. It is difficult to explain to a father how one has cut his daughter or for the father to ask these people how they have cut her. Then, we did not say anything but polite phrases.... To listen to them or not to listen to them was the same[.] I listened to them in order [for] them to go away quicker[,] letting me alone with my grief. When they left, the persons added that they had been kind with me since they missed me in the marshes. Me, I pretended to thank them" (Hatzfeld 2007, p. 104).

This strategy, used largely by criminals to avoid too many years in prison, creates an overwhelming sense of injustice in the victims. In some cases, as the former prisoner Elie Mizinge explains, perpetrators even regret not having "finished their job. They blame themselves for negligence, more than for spitefulness. . . . Waiting to start again" (Hatzfeld 2003, p. 198). However, the external pressure is perceived as so intense that some survivors tend to internalize a certain obligation to forgive. As another victim said to her former perpetrator, "The government forgave you and I cannot refuse it to you" (Penal Reform International 2005). Similarly, several other survivors explain that they agreed to forgive because the "power"—the State or the Church—asked them to do so (Hatzfeld 2007, p. 19).

4.4.3 A Global Distance from Any 'Politics of Reconciliation'

In Rwanda, as well as in other places, like South Africa, forgiveness has been publicly encouraged as the only, or at least as the most important, condition for reconciliation. Unsurprisingly, the resistance of many victims to public pleas for forgiveness can seep into a more general animosity against the process of reconciliation. Many survivors denounce the so-called "politics" or "ideology" of reconciliation: "Reconciliation. This word became unbearable to me and to most of the survivors who[m] I know. To me, it is even perfectly indecent after a genocide . . . . "To reconcile," as it is written in the dictionary, consists in making people at odds agree again. . . . Do I have to consider that what happened in Rwanda between April and July 1994 is the product of a dispute, a quarrel, a disagreement[,] and therefore that it would not be understandable not to reconcile? Do the people who use this word all the time realize that its meaning is fundamentally simplistic?" (quoted by Braeckman 2004).

Moreover, the public advocacy of forgiveness and reconciliation is permeated with promises of healing, peace, and harmony. At this juncture, forgiveness and reconciliation can take on the quality of a temptation, a lure of redemption. The words of Mujawayo on this point are univocal: "I really hope that I will not give in to in the "national reconciliation" camp. . . . To have a grudge against somebody requires an important mental resistance: you are thinking about it all the time and this feeling consumes you so much that, just to appease it a little bit, you sometimes find yourself having the temptation to forgive. If, furthermore, governmental politics presents forgiveness as a national priority. . . , I do fear the easiness of such project: all of us would be beautiful, we would finally have become nice, everything would be well cleaned and then, that would start again! But what would start again in fact?" (Mujawayo and Belhaddad 2006, p. 17).

Beyond this general resistance to any official 'politics of reconciliation,' Mujawayo is ready to conceive a gradual *rapprochement*, on a people-to-people level, among Rwandans. If she refuses to forgive, literally, she does not totally reject the concept of reconciliation "because there is no other possible choice": "All those I met in Rwanda, until the survivors working on the field, . . . never think

about forgiveness... However, all of them work in favour of reconciliation. Because to reconcile does not mean to forgive. To take up with neighbours again, starting with the ability to greet each other, is important for all the reasons that I have already emphasized: our culture cannot be conceived without these traditions, these rituals" (Mujawayo and Belhaddad 2006, pp. 130–131).

The record of Esther Mujawayo manifests the unavoidable tension between the need to look forward and the absolute necessity of respecting the intimate experience and personal pace of each survivor. In this regard, the challenge is paramount. As Mujawayo emphasizes, "[T]his is not the end of the genocide that really stops a genocide, because inwardly genocide never stops" (2004, p. 197). The same experience is echoed in the words of another survivor: "The survivor remains inconsolable. He resigns himself but he remains in revolt and powerless. He does not know what to do, the social environment does not understand him, and he does not understand himself either" (Mukayiranga 2004, p. 777).

4.5 Conclusion

As each of these voices reminds us, there is a strong need for a sustained and extensive ethical reflection on the advocacy and practice of reconciliation in the aftermath of mass atrocities. This article intended to address just one small part of this more-comprehensive undertaking. Its objective was to bring more nuances to common conceptions of unforgiving victims. As we have seen, forgiveness is not an absolute virtue but a personal choice. That means that 'unforgiving-ness' is not systematically the sign of some kind of moral failure (Brudholm 2008). Knowing that, how can we understand the triumph of the 'resilience – reconciliation – redemption' triptych among Western donors, practitioners and even scholars? Three main reasons can be mentioned to understand this phenomenon. First, the 'reconciliation narrative' is an uncomplicated story line. The simplicity and clarity of its message makes it particularly effective in a 5 min discussion in the corridors of the American Congress or in a 2 min presentation on CNN (Autesserre 2012). The plot is well known. It nicely resonates with the Christian precepts, as well as with the personal development market that preaches the constant reinvention of one-self, whatever the horrors of the past.

Second, the 'reconciliation narrative' reassures *us*. Like in a fairy tale, its characters overcome violence, turn the dark page and move on. Far from being stuck and oppressed by festering wounds, survivors and perpetrators are actively involved in their common healing process. In doing so, they implicitly make the promise that such a level of violence will never happen again. The success of the stories emphasized by the Forgiveness Project, a UK based charity, is symptomatic.

The purpose of this project is to use real stories of victims and perpetrators in order to "encourage people to consider alternatives to resentment, retaliation and revenge".[13] The *Forgiveness Project* website visitors are simply fascinated: "I am just overwhelmed. . .thank you so much for this wonderful page! I can't stop reading and reading and reading"; "I have been reading your extraordinary website over several months and find the stories a marvellous reflection on how amazing the human spirit can be"; "This site cracked open my heart, and made me look at the world in general and my life in particular in a new way. Brace yourself. It may haunt you. The issue addressed here – forgiveness – could save our world. I am rarely as moved by a single site as I was by this one"; "I have spoken passionately about how I've been moved and inspired by the *Forgiveness Project*, and its challenging exploration – and celebration – of amazing personal stories of reconciliation and renewal from around the world" (The Forgiveness Project, Supporters).

These examples could easily be multiplied. Each of them indicates the attraction of testimonials "vibrating with humanity" (The Forgiveness Project, Supporters). The direct link between the specific context of each story (Rwanda, Northern Ireland, South Africa, to name a few) and the visitors' private life is striking. The following testimony illustrates it very well: "I want to thank the project for sharing, for being available. I am going through something very difficult in my life right now. It's as though I'm walking a mountain's ridge; to one side lies the barren valley of anger, and to the other runs the river of forgiveness and inspiration. Through the on line stories, the project has helped my journey. Thank you" (The Forgiveness Project). These words of gratitude show that the reconciliation narrative is not only effective in the present but also useful regarding the future.

Third, the maximalist conception of reconciliation is much appreciated to deal with the past. It indeed relieves our need for closure. The vast majorities of the cases show that some consequences of mass atrocities are not only devastating, but also irreversible. However, the irrevocable is probably one of the most difficult realities to apprehend. It can therefore be tempting to diffuse the norm of reconciliation in an attempt to make the irreversible aspect of the criminal past reversible again. The recurrence of the notion of 'redemption' in the framework of the interviews made in Brussels and Washington undeniably confirms this trend.

These three reasons—need for efficiency, hope and closure—explain why the reconciliation narrative is so central. What is its impact? It is likely to be stimulating in the short term. Nonetheless, it can be vain and even counterproductive if people adapt it *at all costs*. In the long term, maximalist reconciliation advocates raise the victims' expectations and take the risk of a backlash in terms of disillusion and bitterness (Backer 2010). Expecting full justice, complete truth and social harmony in the aftermath of mass atrocities inevitably provokes a high level of disappointment.

[13] All the stories can be read on the website of The Forgiveness Project.

For a while, the stakeholders can play their role in the reconciliation scenario: criminals and accomplices are rehabilitated, bystanders are relieved, resilient victims become heroes, third parties mediate and gratifyingly 'save' the entire population. Like in a *comedia dell'arte*, all characters have a good reason to enthusiastically participate in the play. All characters but one: the unforgiving victim. In resisting, this voice disturbs the entire melody. The temptation to erase it is real. Left in the dark, the voice becomes weaker and weaker. However, this temptation is illusionary. In transforming post-conflict situations into a smooth process of redemption, this scenario does not grasp the complexity of the reality. Like the fool in Shakespeare's pieces, the resisting voices allow the audience to keep in touch with reality, instead of hanging on to a fiction.

The metaphor of the *comedia dell'arte* does not cynically deny all the reconciliation efforts. On the contrary, it shows how decisive these efforts are if—*and only if*—they are realistic in terms of aims and in terms of timing. Research shows the possibility to work on the painful memories of the past in order to move forward (Rosoux 2004). The transformation of relationships between former enemies is imaginable, but it is not plausible in any circumstances and at any pace. Above all, it can never be imposed from outside. Mediation is by nature an extremely delicate exercise. Mediation after a war is a far more demanding challenge. To succeed, humanitarian workers need an extraordinary amount of determination *and* modesty. One distinction might be useful in order to adopt a just attitude: being doggedly optimistic does imply falling into the mythical and often mystical waters of reconciliation. In the aftermath of mass atrocities, the humanitarian task is a necessity—and not a myth.

References

Ackermann A (1994) Reconciliation as a peace-building process in postwar Europe. Peace Change 19(3):229–250

Arendt H (1961) Condition de l'homme moderne. Calmann-Lévy, Paris

Autesserre S (2012) Dangerous tales: dominant narratives on the Congo and their unintended consequences. Afr Aff 111(443):202–222

Backer D (2010) Watching a bargain unravel? A panel study of victims' attitudes about transitional justice in Cape Town, South Africa. Int J Transit Justice 4:443–456

Bar-Siman-Tov Y (2000) Israel–Egypt peace: stable peace? In: Kacowicz A et al (eds) Stable peace among nations. Rowman and Littlefield, Boulder, pp 220–238

Bar-Siman-Tov Y (ed) (2004) From conflict resolution to reconciliation. Oxford University Press, Oxford

Bar-Tal D, Bennink G (2004) The nature of reconciliation as an outcome and as a process. In: Bar-Siman-Tov Y (ed) From conflict resolution to reconciliation. Oxford University Press, Oxford, pp 11–38

Belfior S (2011) Declaration made in Kigali, 1st April 2011, http://www.presidency.gov.rw/home/1-latest-news/428-unity-is-strength-foundation-to-organize-international-peace-conference-in-rwanda. Accessed 6 Oct 2014

Braeckman C (2004) Rwanda, dix ans après. Politique Internationale 103:417

Brudholm T (2008) Resentment's virtue: Jean Amery and the refusal to forgive. Temple University Press, Philadelphia, Philadelphia
Brudholm T, Rosoux V (2013) The unforgiving. Reflections on the resistance to forgiveness after atrocity. In: Hirsch A (ed) Theorizing post-conflict reconciliation: agonism, restitution and repair. Routledge, New York, pp 115–130
Crocker DA (1999) Reckoning with past wrongs: a normative framework. Ethics Int Aff 13(1): 43–64
Galtung J (2001) After violence, reconstruction, reconciliation, and resolution. In: Abu-Nimer M (ed) Reconciliation, justice and coexistence. Theory and practice. Lexington Books, Lanham, pp 3–23
Gardner-Feldman L (1999) The principle and practice of 'Reconciliation' in German Foreign Policy: relations with France, Israel, Poland, and the Czech Republic. Int Aff 75(2):333–356
Goodman D (1997) Justice drowns in political quagmire. Mail and Guardian, 31/01
Graybill LS (2002) Truth and reconciliation in South Africa: miracle or model? Lynne Rienner, Boulder
Hatzfeld J (2003) Une saison de machettes. Seuil, Paris
Hatzfeld J (2007) La stratégie des antilopes. Seuil, Paris
Hermann TS (2004) Reconciliation: reflections on the theoretical and practical utility of the term. In: Bar-Siman-Tov Y (ed) From conflict resolution to reconciliation. Oxford University Press, Oxford, pp 39–60
Ilibagiza I (2007) Left to tell: discovering god amidst the Rwandan holocaust. Hay House, New York
Kacowicz A et al (eds) (2000) Stable peace among nations. Rowman & Littlefield, Lanham
Kayitesi B (2009) Demain ma vie. Enfants chefs de famille dans le Rwanda d'après. Editions Laurence Teper, Paris
Lederach JP (1998) Beyond violence: building sustainable peace. In: Weiner E (ed) The handbook of interethnic coexistence. Continuum, New York, pp 236–245
Long WJ, Brecke PB (2003) War and reconciliation. Reason and emotion in conflict resolution. The MIT Press, Cambridge
Mamdani, M. (1997) When victims become killers: Colonialism, Nativism, and the Genocide in Rwanda. Princeton University Press, Princeton
Mujawayo E, Belhaddad S (2004) Survivantes. Rwanda, histoire d'un génocide. Éditions de l'Aube, La Tour-d'Aigues
Mujawayo E, Belhaddad S (2006) La fleur de Stéphanie. Entre réconciliation et déni. Flammarion, Paris
Mukayiranga S (2004) Sentiments de rescapés. In: Coquio C (ed) L'Histoire trouée. Négation et témoignage. L'Atalante, Nantes, pp 776–785
Nadler A (2002) Post resolution processes: an instrumental and socio-emotional routes to reconciliation. In: Salomon G, Nevo B (eds) Peace education: the concept, principles and practices around the world. Lawrence Erlbaum, Mahwah, pp 127–143
Oppenheim G (2008) Acts of Reconciliation. Washington Post, 05/07
Penal Reform International (2005) Rapport de synthèse de monitoring et de recherche sur la gacaca, phase pilote janvier 2002 - décembre 2004, http://www.penalreform.org/wp-content/uploads/2013/06/rep-ga7-2005-pilot-phase-fr_0.pdf
Philpott D (ed) (2006) Politics of past evil: religion, reconciliation, and the dilemmas of transitional justice. University of Notre-Dame Press, Chicago
Rosoux V (2004) Human rights and the 'Work of Memory' in international relations. Int J Hum Rights 3(2):159–170
Rosoux V (2014) Réconciliation: les limites d'un conte de fée. In: Andrieu K, Lauvau G (eds) Quelle justice pour les peuples en transition? Presses universitaires de Paris Sorbonne, Paris, pp 113–126
Schaap A (2005) Political reconciliation. Routledge, London
Sémelin J (2005) Purifier et détruire. Usages politiques des massacres et génocides. Seuil, Paris

Shriver DW (1995) An ethic for enemies: forgiveness in politics. Oxford University Press, New York

Staub E (2000) Genocide and mass killing: origins, prevention, healing and reconciliation. Polit Psychol 21:367–362

Steward J (2009) Only healing heals: concepts and methods of psycho-social healing in post-genocide Rwanda. In: Clark P, Kaufman Z (eds) After genocide. Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond. Columbia University Press, New York, pp 171–189

Stover E, Weinstein HM (eds) (2004) My neighbor, my enemy: justice and community in the aftermath of mass atrocity. Cambridge University Press, Cambridge

The Forgiveness Project. http://theforgivenessproject.com/. Accessed 6 Oct 2014

Tutu D (1999) No Future without Forgiveness. Doubleday, New York

Chapter 5
Global Civil Society as a Humanitarian Actor: Constituting a Right of Humanitarian Assistance

Raimonda Miglinaitė

5.1 Introduction

The transformation of humanitarianism since the end of the Cold War has raised heated debates about the intersection between the principles of impartiality, neutrality and the politicization of relief efforts which increasingly defines humanitarian action today. This debate is partially fuelled by the traditional understanding of humanitarian assistance as an act of empathy and compassion, i.e. as an inherently moral and apolitical activity, which, in the context of contemporary armed conflicts and the expansion of the humanitarian enterprise, is increasingly difficult to sustain. An alternative approach to this debate is to conceptualize humanitarian action as a matter of rights. Such an approach is implied by Alex De Waal who suggests that in the context of contemporary humanitarian crises the question is no longer the existence of humanitarian response as such but rather its quality, which signifies that "a right to humanitarian assistance, which would have been a fantasy several decades ago, is now within reach" (De Waal 2010, p. 134). In this article I intend to follow this idea further and suggest that a right to humanitarian assistance already exists, albeit not in international legal frameworks, but by virtue of contemporary humanitarian practices as well as the framework of the responsibility to protect. Furthermore, I will argue that the existence of a right to humanitarian assistance is largely dependent on the functioning of the global civil society that constitutes this right through its political and normative potential. As such the global civil society re-affirms its position as a significant humanitarian actor. To make the argument I will firstly outline the transformation of humanitarianism that has taken place since the end of the Cold War and overview the existing political frameworks that allow speaking of a right to humanitarian assistance as such. I will then proceed to analyze the concept of the global civil society in empirical, political and normative terms to

R. Miglinaitė (✉)
Institute of International Relations and Political Studies, Vilnius University, Vilnius, Lithuania
e-mail: miglinaite.raimonda@gmail.com

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_5

demonstrate its role in constituting a right to humanitarian assistance. I will conclude this article with several remarks regarding the implications of constituting humanitarian assistance as a matter of right, both for the global civil society and those who are seen as holders of such a right.

5.2 Transformation of Humanitarian Action

Humanitarianism has been transformed. Since the end of the Cold War the number of humanitarian actors and the scope of their activity increased dramatically with humanitarians reaching almost every part of the world afflicted by natural or man-made crises and states providing generous assistance for such activities (Barnett 2005, p. 723). All the while the ambition driving humanitarian action expanded as well: humanitarians are no longer content with providing immediate relief from suffering only to watch the victims die later as crises continue. Rather, the aim now is to eliminate the root causes of human misery by changing political and societal structures prone to war and instability. Hence the principles of neutrality and impartiality that defined humanitarianism since the creation of the International Red Cross and Red Crescent Movement (ICRC) are no longer sacrosanct. Increasingly, they are giving way to the appreciation of nuanced political contexts wherein humanitarian crises take place and where protection of victims often requires flexibility as well as political and moral compromises (Weiss 1999, p. 6). Humanitarian action is thus becoming a politicized as well as an institutionalized and professionalized field of activity that can no longer be defined in opposition to politics and has to be recognized as a part of a broader global agenda of economic development and conflict management (Barnett 2005, p. 7, also Macrae 2002, p. 3). Indeed the transformation of humanitarian action is so profound that its founding principles seem to have been created for a different world—one where there is a clear distinction between civilians and combatants, and where armed forces adhere to rules of combat (Weiss 1999, p. 2). And, arguably it is upon the reflection on the changing world and nature of humanitarian crises that humanitarianism has been transforming.

The changes that swept the globe at the end of the Cold War were as wide as they were profound, affecting virtually every aspect of political and economic life. Humanitarian action was no exception and the immediacy with which humanitarian issues captured the world's attention in the early 1990s is a reflection of shifting global politics. Arguably, the rising prominence of humanitarian actors was all but inevitable given the changing nature of armed conflict and the rise of the New Wars within which violence directed at civilians became a purposely and routinely adopted military strategy (Kaldor 2007). The New Wars multiplied a number of humanitarian crises (the majority of which were now man-made) that had to be and, importantly, could be addressed as the all-consuming great power rivalry no longer gripped the attention and resources of societies and decision-makers across the globe. The end of the Cold War at least nominally resulted in the victory of western

liberalism and the expansion of "liberal hegemonic order" (Ikenberry 2011) whose proponents—mainly liberal democracies in the global North—promptly believe, if not in protection of human rights, then at least in the prevention of "human wrongs" (Brown 1999, p. 48). According to some pundits though, the increasing prominence of humanitarian actors and states' willingness to support them had a more sinister side as states began treating humanitarian assistance as an easy way out of politically inconvenient situations generated by crises abroad. Instead of dealing with refugee flows or making costly strategic decisions that could resolve on-going crises it became easier for states to support humanitarian action this way keeping asylum seekers away while appeasing the general public (Roberts 1999, p. 24). In this context states' attention to humanitarian emergencies was started to be seen as emerging from their strategic and foreign policy calculations rather than genuine concern of the flight of crises-affected populations. Meanwhile the role of numerous humanitarian actors, especially those coming from the non-governmental sector, also became a subject of a debate about the merits and danger of intersection between humanitarian action and politics (Weiss 1999, p. 5). On the one hand, states' increasing attention to humanitarian crises and willingness to fund humanitarian NGOs reflects the changing reality of global politics and corresponds to the practical, if not the moral necessity to deal with multiplying humanitarian crises. On the other hand, states' preoccupation with "saving the strangers" (Wheeler 2000) and humanitarian actors' dependency on state funding poses a danger that humanitarianism has become primarily a state instrument for the pursuit of foreign policy goals, while humanitarian agencies' urgency to act is fuelled by financial needs rather than genuine concern for the well-being of crises-affected populations (Fox 2001, p. 82).

Compounding the questions of state—humanitarian actors dependency are the issues raised by the transformation of humanitarianism as such: one of the key features of transformed, "new" humanitarianism is that it aims to address underlying, long term causes of violent conflict rather than just providing relief to those suffering. Hence aid conditionality that goes against the principles of neutrality and impartiality becomes inevitable (Weiss 1999, p. 17). The debate thus acquires an ideological nature. The proponents of transformed humanitarian effort see neutral humanitarian relief as morally questionable, as instead of stopping human suffering it creates "well-fed dead" (NYT 1992). Their opponents, however, note that politicized humanitarian action fuels war economies and increases the risk of losing humanitarian space. Furthermore, the introduction of aid conditionality deems some victims as undeserving of relief—thus violating the core moral principle of helping those in need (Fox 2001, p. 282). Such a debate fuelled by two different understandings of moral principles underlying humanitarian action is unlikely to be easily or definitely resolved. The best that humanitarians can hope for in the near future is to learn to manage the connection between humanitarian action and politics, ensuring "more humanized politics and more effective humanitarian action" (Weiss 1999, p. 22). Nevertheless, if any broad conclusions from the transformation of humanitarianism and the ensuing debate can be made is that the intensifying presence of humanitarian NGOs around the globe, media coverage and

the prominence of humanitarian issues on the international agenda creates a set of expectations that every humanitarian crisis has to be addressed in an immediate and comprehensive way. While this is not the claim that humanitarian crises should not be addressed, it is an observation that humanitarianism is no longer a question of compassion and charity, but, possibly, a matter of right. To quote Alex de Waal again: "The idea of a *right* which would have been a fantasy several decades ago is now within reach" (De Waal 2010, p. 134).

What Alex de Waal refers to here is that in the past few decades the transformation and expansion of humanitarian activities (coupled possibly with the changing normative context of global politics) created a situation, where every crisis resulting in human suffering elicits a reaction from the global public. This reaction often leads to substantial action—humanitarian aid, or in exceptional cases, military involvement, although sometimes it remains confined to demands for national governments "to act" and stop human suffering. But the main point here is that just as the multiplying humanitarian crises, a global outcry and subsequent action in regard to them have become a routine practice in international relations (even though that by no means "routinizes" the suffering of the affected populations). In this sense, de Waal refers to an important development that has occurred in the post—Cold War era (albeit mainly in Western liberal societies): human suffering, even in far—away places has become unacceptable. A prominent example of such development was NATO's campaign in the Balkans in late 1990s which coincidently was labeled to be the first war fought for human rights values, rather than state interests (Blair 1999). The public on both sides of the Atlantic not only expected to fight a war without sustaining casualties but was equally averse to the idea of inflicting casualties as well (Brown 1999, p. 49). It appears that violence, especially when inflicted upon civilians became morally repulsive no matter the circumstances, creating the urge for members of the international community to do something "*anything* [. . .] in the face of unspeakable acts" (such as war crimes and crimes against humanity) (Chesterman 2011, p. 11). Arguably, it is because of this urge that, according to de Waal: "the question [in context of humanitarian crisis – R.M.] is no longer response as such but the quality of response" (De Waal 2010, p. 134), which signifies the emergence of the idea of a right to humanitarian assistance. The concept of such a right would suggest then, that there is an emerging imperative to stop human suffering which is not simply a summary of the elevated expectations of the efficiency of humanitarian relief, but rather a different understanding of global reality and the nature of rights and responsibilities connecting individuals across nation-state borders.

The emergence of such an understanding (which is by no means uncontroversial or straightforward) can be attributed to multiple factors: the spirit of the "new internationalism" (Blair 1999) that swept across the Western states in the 1990s prompting them to pursue ethical foreign policy, as famously proclaimed by former UK foreign secretary Robin Cook (Guardian 1997). Or perhaps, human ability to learn to avoid "heinous types of moral error" and progress morally over time (examples of such learning being women's emancipation and the prohibition of slavery) (Nussbaum 2007, p. 940), or, possibly, the capacity of contemporary media

to create moral relations between strangers using emotion-invoking images (Ignatieff 1998, p. 10), or, probably, some combination of all the above.

Nevertheless, in this article I will explore the idea that such a different understanding of global reality and hence the emergence of the idea of a right to humanitarian assistance is related to the increasing prominence of global civil society. Its role in that regard seems almost intuitive—after all the changes in global politics and transformation of humanitarianism broadly coincided with civil society being no longer confined to nation-state borders because of the intensifying processes of globalization (Kaldor 2003, p. 1). However, I intend to look further than such a temporal coincidence at the political and normative capacity of the global civil society to shape international norms and state practices in the humanitarian realm, and the consequences thereof. Before I proceed though, the concept of a right to humanitarian assistance must be clarified. While Alex de Waal was prompted to consider a possibility of such a right bearing in mind the transformation and expansion of humanitarian efforts, it is necessary to ask how such a right could be conceived in the existing global political and normative framework or, to put it differently, how can we think of humanitarian assistance as a matter of right, and what would that mean in practical terms?

5.3 Humanitarian Assistance as a Matter of Right?

It is important to note here that the discourse of rights in context of humanitarian crises is by no means new. The "right to intervene" (*droit d'ingérence*) has been a part of global humanitarian vernacular at least since late 1960s', signifying a commitment to provide relief irrespective of whether the involved states acquiesce to that or not (Allen and Styan 2000). This sentiment became even clearer with the increasing frequency of humanitarian interventions and growing prominence of the protection of human rights at the end of the Cold War. This arguably demonstrated a normative shift in favor of the rights of individuals rather than states, as Western countries began to interpret the enforcement of global humanitarian norms as one of their responsibilities (Wheeler 2000, p. 289). Nevertheless both the right to intervene and the practice of humanitarian intervention remained highly controversial, partly because the right to intervene did not equal a duty: the focus on the victims of humanitarian emergencies and idea of a right to intervene enabled a practice of humanitarian interventions but did not determine them (Wheeler 2000, p. 299). This resulted in inconsistency regarding the cases that drew international community's humanitarian attention (Bellamy 2003, p. 19) and fuelled a range of criticism about the practice of humanitarian intervention, not least among which was the understanding that a "right to intervene" focused more on the rights and needs of interveners, rather than those who they were aimed to protect (ICISS 2001, p. 16).

However the debate concerning rights of crises-affected populations and states comprising international society has shifted. In 2001 the high-profile International Commission on Intervention and State Sovereignty formulated a principle of

Responsibility to Protect (RtoP) in an attempt to change the terms of international debate regarding the questions of state sovereignty and intervention. Tension between the principle of state sovereignty and increasing necessity of humanitarian interventions would often lead to an impasse in the face of humanitarian emergencies. The Commission sought to re-evaluate these questions "from the point of view of those seeking or needing support, rather than those who may be considering intervention" (ICISS 2001, p. 17). It attempted to do that by re-conceptualizing sovereignty as state's responsibility to protect its population "from genocide, war crimes, ethnic cleansing and crimes against humanity" (ICISS 2001, p. xi). In cases where a state manifestly fails to do so, such responsibility lies with the international community who has to be prepared to use appropriate diplomatic, humanitarian means, or, should they be inadequate, collective actions falling under Chapter VII of the UN Charter to protect the affected populations (UN 2005, p. 31). The work of the Commission was largely driven by the need to reconcile contending norms of state sovereignty and intervention in such a way that in a case of a particular crisis the language of intervention would not trump state sovereignty at the very outset, and that those advocating non-intervention would not be cast as anti-humanitarian. Hence the commission aimed to re-affirm the primacy and importance of the state in preventing conflicts and dealing with humanitarian crises (ICISS 2001, p. 17) and assuage fears of those who saw international politics as overly interventionist.

The efforts of the Commission to reassure the states demonstrate that the responsibility to protect is an inherently statist principle. Nevertheless, it is important to note that its central moral tenet is the understanding that state sovereignty is contingent upon state's willingness and ability to protect its populations from genocide and mass atrocities which conceptually results in two important developments. Firstly, it suggests that national political authorities are responsible not only to their citizens, but also to the international community over the way they treat their citizens (ICISS 2001, p. 13). Secondly, it re-affirms the population living within the state as the ultimate moral referent. Hence, by constituting crises-affected populations as owners of a right to protection from genocide, ethnic cleansing, war crimes and crimes against humanity, i.e. disasters that generate the most extreme humanitarian emergencies, and locating responsibility associated with these rights not only within a state, but also to a large degree within the international community, the responsibility to protect echoes Alex de Waal's understanding of the right to humanitarian assistance. From this perspective the right to humanitarian assistance gains substance as it becomes embedded in an international normative and political framework.

In other words, my argument here is that the right to humanitarian assistance whose possibility Alex de Waal considers to be "within reach" already exists. Although it is not explicitly articulated in international treaties, the idea behind it—that populations affected by humanitarian emergencies have a right (rather than a hope) to relief—is firmly grounded within the expanded humanitarian efforts and the principle of the responsibility to protect. Furthermore, conceptually linking the idea of the right to humanitarian assistance to the principle of the responsibility to protect helps to grasp the importance of multiple international actors in terms of

realizing such a right. In his report, "Implementing the Responsibility to Protect," the Secretary General describes three pillars of the responsibility to protect: a state's responsibility to protect its population (1st pillar), the international community's responsibility to aid the state to realize its responsibility (2nd pillar) and the international community's responsibility to act when state manifestly fails to uphold its primary responsibility (3rd pillar). Moreover, in the same report he also discusses the roles that states, the UN, regional organizations and the global civil society have to play with regard to these three pillars (UN 2009). The Secretary General thus demonstrates the importance of the involvement of the international community, which, as he notes, is not limited to states and intergovernmental organizations. Transnational civil society has a significant role to play as well, in advocacy, early warning, monitoring and otherwise shaping the international response to violation of the principle of the responsibility to protect (UN 2009, p. 26). As such it is officially recognized as an important humanitarian actor that has important functions in influencing international and state practices in the humanitarian realm.

Nevertheless, that still leaves the question of how global civil society could be conceptualized as a humanitarian actor open. Its potential to advocate support and provide relief to those in need seems to be taken for granted not only by the UN Secretary General, but also by pundits, who see global civil society as bringing the normative theory about the "good society" to the international relations (Grugel 2003, p. 275). The global civil society is given credit for empowering individuals, extending democracy and, even, providing an answer to war (Kaldor 2003). However, bearing in mind the popularity and "fuzziness" of the term (Anheier et al. 2001, p. 15) and the fact that it has been subjected to "considerable overtheorisation in the post-1989 era" the concept of global civil society as well as its scope and ability to influence politics on a global scale has become increasingly elusive (Chandhoke 2002, p. 45). Even though global civil society is recognized as a humanitarian actor—according to Kaldor, "civil society has an important humanitarian role to play in conflicts" (Kaldor 2003, p. 135), its humanitarian endeavors are neither self-evident nor straightforward. Hence, it is necessary to ask in what particular ways global civil society can provide hope and relief to those suffering and, in the context of this article, what is its role in constituting humanitarian assistance as a matter of right.

5.4 Global Civil Society: Empirical, Political and Normative Potential for Humanitarian Action

The question of global civil society's humanitarian role inevitably requires describing, at least in broad sketches, the nature of such a society at first. However, that is a difficult, if not an impossible task. The problem lies in multiple meanings that the concept of global civil society acquires in different contexts. As it is used by

politicians, activists and academia, its meaning, much like the proverbial beauty, seems to lie in the "eye of the beholder" and thus becomes obscure. For some, global civil society explains the collapse of communist regimes in Eastern Europe and thus offers a hope of dealing with remaining totalitarian regimes. For others, especially many activists around the globe, it is an instrument of managing the contradictions of globalization and the global economy, as well as a new possibility of expanded political representation in the globalized world (Kenny and Germain 2005, p. 3). For the rest it might signify a sum of non-governmental organizations operating across national borders which compose a dynamic multiorganizational field with a "transformative purpose" (Taylor 2002, p. 345). Potentially such a multiplicity of meanings is one of the assets of the concept as it provides space for a dialogue between the enthusiasts and critics of global civil society about its merits and inherent dangers (Anheier et al. 2001, p. 12). Nevertheless, it is equally true that without some common points of reference a meaningful discussion is impossible (Chandhoke 2002, p. 45). One way of discovering such common points of reference is to recognize that global civil society is an empirical as much as a political and normative category (Anheier et al. 2001, p. 15).

Empirically, global civil society refers to a social space "*between* the family, the state and the market" that stretches "*beyond* the confines of national societies, polities and economies" (Anheier et al.2001, p. 17). Given that the increasing attention to global civil society from both academic and political circles broadly coincided with proliferation of non-governmental, non-profit organizations operating across nation-state borders at the end of the twentieth century (Keane 2003, p. 4), one can presume that it is international NGOs that fill this space. Of course, the sum of non-governmental organizations does not equal global civil society, nor does it exhaust its scope: as Anheier and Themudo note, global civil society is a vast and diverse network of organizations, associations, networks, movements and groups that include large-scale charities, volunteer-run networks, single-issue campaign groups, voluntary organizations offering humanitarian assistance, democratically-run organizations and autocratic sects, philanthropic foundations, migrant self-help groups and everything in between (Anheier and Themudo 2002, p. 191). Nevertheless, it is necessary to acknowledge the substantial presence of non-governmental organizations within global civil society both in terms of the reach and impact of their activities. Indeed their significance is such that the shifts of distribution of power among states, markets and civil society that occurred at the end of the Cold War (with the latter two taking up an increasing share of political, social and security functions that traditionally belonged to sovereign states) is commonly linked to an increasing number of civil, non-governmental organizations (Mathews 1997, p. 50). Today non-governmental organizations operate in all continents providing health, education, housing, legal and other services, offering charity, doing advocacy and monitoring work, employing several millions of people and channeling the majority of development and relief aid provided by states (Keane 2003, p. 5).

An empirical sketch of global civil society also helps to grasp its humanitarian role. Non-governmental organizations, such as the Anti-Slavery Society and the

International Red Cross and Red Crescent Movement that were created as early as the nineteenth century were instrumental in creating international treaties and institutions which continue to influence international politics today, especially in humanitarian terms (Kaldor 2003, p. 87). In fact their influence seems to be so profound that, as Marlies Glasius notes: "almost every significant treaty in international humanitarian law originates with the International Committee of the Red Cross" (Glasius 2006, p. 3). The fact that one of the earliest-established international non-governmental organizations happens to be one of the world's most prominent humanitarian actors is no coincidence, nor is the fact that some of today's biggest non-governmental organizations in terms of their budgets and global reach are doing humanitarian work, most notable examples being Oxfam, Amnesty International and Save the Children (Kaldor 2003, p. 89). Rather this suggests that global civil society holds within itself a humanitarian potential, i.e. that there is a link between the workings of global civil society and the expansion humanitarian endeavors.

In some of its aspects this link seems to be pretty straightforward: a number of non-governmental organizations that are recognized as a part of global civil society also do important humanitarian work providing relief and advocating for those who need it. Médecins sans Frontières (MSF) is a good example in this regard. MSF not-only provided humanitarian relief in Biafra in 1968 in what now has become one of the defining moments in humanitarian field, but it was also instrumental in advocating its approach to provide humanitarian assistance regardless of states' wishes (which, as noted before, became known as the "right to intervene") on behalf of those who needed such assistance the most (Allen and Styan 2000). The example of MSF demonstrates an important humanitarian function of global civil society—its capacity to not only provide necessary relief but also to speak out for those who, because of their subjection to humanitarian emergencies or oppressive power structures, are silenced. The observation that global civil society performs an important role in advocacy is, perhaps, self-evident (after all, such organizations as Amnesty International and Human Rights Watch has put advocacy high up on global civil society's "to do" list). However, it is necessary to stress that this role should not be understood in a narrow functional sense. Indeed it is the capacity to provide avenues for speaking out that allows us to consider the humanitarian potential of global civil society as such, rather than simply acknowledging important humanitarian work done by some of its members. As Mary Kaldor suggests, instead of thinking of global civil society in terms of its members and functions that they perform, we should consider it as a medium through which contracts or agreements between individuals and the centers of economic and political power are negotiated at global, national and local levels (Kaldor 2003, p. 107).

Nevertheless such an understanding of global civil society inevitably requires us to consider it not only as an empirical but also as a political category. In fact much of its popularity in academic and political circles seems to stem from the perceived potential of global civil society to extend the limits of political community beyond nation-state borders and offer political emancipation. John Keane captures these expectations well, asserting the capacity of global civil society to enable

> individuals, groups and organizations to organize and to deploy their powers across borders despite remaining barriers of time and distance. This society provides non-governmental structures and rules which enable individuals and groups to move and to decide things, to follow their inclinations, to bring governmental power-holders to heel [. . .] to work for socialisation of market economies so that production for social need rather than profit prevails (Keane 2003, p. 139).

Such an observation of Keane is especially illustrative, as it demonstrates that global civil society's separation from the state and the market transforms it into a medium through which political and economic processes can be impacted, especially by those who are unable to do so through state structures. Moreover, it enables to address these processes not only at the state, but also at the global level, thus creating potential avenues to deal with inequalities brought about by the process of globalization. According to Jan Scholte, global civil society helps to deal with citizen ignorance about the global affairs, improves access to institutional processes governing globalization, addresses structural inequalities undertaking projects to empower subjected groups, and gives recognition to marginalized identities in global politics, i.e. those not defined by the nation-state (Scholte 2007, p. 23). Importantly, a lot of such "democratising" activities are done through "ethical advocacy" (Baker 2002, p. 393) endowing the political category of the global civil society with normative connotations.

Hence, besides referring to the empirical and the political, the category of global civil society is also normative, i.e. it contains within itself ethical aspirations. Much of them are rooted in the perception that civil society constitutes a sphere separate from those of the state and the market and as such is "uncontaminated" by their logic (Chandhoke 2002, p. 36). Because of that it is able to put forward a set of values different than those of power and profit, values "from below" that challenge the existing power structures of nation-states and their system. Such capacity of global civil society is especially relevant in terms of human rights law and human justice that originate at the individual rather than the state level and that, in the context of humanitarian emergencies, have to be asserted against the rights of states. In fact, according to Glasius, it can even be argued that "those parts of international law that intend to protect the interests of humanity, rather than the interests of states, do not come about without the involvement of the global civil society" (Glasius 2006, p. 3). Implicit in Glasius' observation is an understanding that the global civil society plays an important ethical role of a moral entrepreneur and is instrumental in the expansion of the human rights regime. Indeed, such an understanding of global civil society's role is substantiated by its historical legacy: as Keane notes, the Anti-Slavery society, which led the campaign of abolishing slave trade was "the first moral entrepreneur to emerge out of the structures of civil society and play a prominent role in world politics by pressing for new anti-slavery laws that would apply globally" (Keane 2003, p. 153). Furthermore Tsutsui and Wotipka following the trends of citizen participation in international non-governmental human rights organizations in 1978–1988 and 1988–1998, find "that non-governmental actors have been playing the leading role in the expansion of global human rights in the last few decades" (Tsutsui and Wotipka 2004).

Therefore it is possible to assume an intrinsic link between the global civil society and human rights. Such a link rests on the idea that participants within global civil society "recognize one another as individuals rather than as merely members of states" (Frost 2005, p. 122) which echoes the underlying principle of human rights—that individuals are the owners of the rights by virtue of their humanity regardless to which political community they belong. Hence, following Frost: "in [global civil society] people recognize one another as the holders of individual human rights" and are able to put such rights claims of individuals to the global audience (Frost 2005, p. 122). This is the ethical promise that the global civil society rests on. Furthermore, because of its intrinsic link to human rights and its capacity to connect individuals across time, space and state borders, the global civil society practically re-affirms our commonness that goes beyond separations created by states and the market. It thus extends the limits of political and normative community beyond nation state borders (Kenny and Germain 2005, p. 6) and explains why, for members of the global civil society, human suffering even in remote places is unacceptable.

5.5 Constituting a Right to Humanitarian Assistance

Considering the above it is necessary to clarify the ways in which the global civil society's political and normative potential can be translated into humanitarian work and linked to the right to humanitarian assistance. Global civil society, whose role as a moral entrepreneur rests on its capacity to link individuals across nation-states by virtue of human rights, is best able to notice and problematize instances where those rights are lacking or infringed upon. Unlike other international actors such as sovereign states, private businesses, and inter-governmental organizations, it recognizes the equality of human beings in terms of their rights and thus generates a feeling of responsibility to protect those rights and prevent their breach (Kaldor 2001, p. 110). As such it does important humanitarian work by first of all drawing the international community's attention to those parts of the globe where human rights are either systematically abused or are under such threat. Furthermore providing an access to centers of political power both locally and globally it provides "spaces of hope" (Keane 2003, p. 139) that human rights' issues will be addressed. This was arguably the role that global civil society played in the context of the Darfur crisis where individuals as well as non-governmental organizations and advocacy groups organized transnational campaigns, helping to draw states' attention to violence against civilians and pushing the international community to take action (UN 2009, p. 26).

Importantly, global civil society not only watches over the rights that already exist in legal documents but also translates its values into new claims of rights. As Gideon Baker notes, the political action of global civil society consists of making demands for rights (Baker 2002, pp. 938–939). However, the precise nature of values that get translated into the rights claims is a matter of controversy. For

example, when Mervyn Frost defines global civil society as a society within which people recognize each other as holders of individual human rights, he specifically refers to first-generation rights, i.e. negative rights, such as the right not to be killed or tortured, freedom of speech, assembly and religion (Frost 2005, p. 126). Without denying the importance of such rights it is nevertheless not clear why social and economic, i.e. positive rights receive much less attention. This controversy opens a door to a number of criticisms regarding the concept of the global civil society and its political and normative potential.

Both its critics and proponents agree that global civil society is deeply contested. Because it includes so many diverse actors, pluralism and a strong potential for conflict, especially in the socio-economic domain, seems inevitable (Keane 2003, p. 14). That by itself does not constitute a threat to global civil society's political and normative potential as one could suppose that through the contestation and search for like-minded individuals people acquire political agency and are enabled to voice their demands. As Chandhoke notes, it is through freely linking with others for a common cause that gives an impetus for associational and political life (Chandhoke 2002, p. 46). However, the fact that global civil society is dominated by international NGOs, many of whom operate in the so-called developing world from their headquarters in the global North, poses a threat that the political potential of global civil society will be devalued for those who are on the receiving end of the political ideas and agendas created elsewhere (Chandhoke 2002, pp. 46–47). Furthermore, by tracing the historical process of the emergence of global civil society Chandhoke demonstrates that instead of being separate from the state and the market, it is permeated by the same logic and power equations that govern those two spheres (Chandhoke 2002, p. 49). What this implies is that within global civil society positive socioeconomic rights are contested and, to an extent, sidelined, not because of the inherent plurality of its members, but because global civil society is dominated by global NGOs that uphold and streamline a particular set of socioeconomic values. This casts a doubt about global civil society's capacity to deal with the contradictions of globalization (a theme that is recurrent in the international development literature), but in this context it also demonstrates that global civil society's normative claims are dependent on power distributions with in. A similar argument is made by David Chandler, who notes an often made assumption that the practices of Western states, such as an increasing attention to human rights issues, are a direct result of demands posed to them by global civil society. However the question of how those normative demands relate to the state interests is rarely asked (Chandler 2004, p. 84). Hence, what Chandler's argument suggests is that the prominence of negative human rights is less the expression of global civil society values and more a result of Western states' dominance in the international arena. The arguments advanced by Chandhoke and Chandler do not by themselves negate the importance of individual human rights nor conclusively deny global civil society's normative potential. However, they suggest that the idea of universal values espoused by the global civil society should be taken with caution.

In a similar vein, Keane suggests that although global civil society has plenty of moral impulse, the only norms that bound it are "strongly procedural", such as

commitment to due process of law, democracy, social pluralism as well as norms of civility and non-violence (Keane 2003, p. 142). While the procedural and universal nature of such norms as rule of law and democracy can certainly be questioned (much in the same manner as done by Chandhoke and Chandler), Keane notices something important about the nature of global civil society when he emphasizes norms of civility and non-violence. Risking a tautological argument it is necessary to note that global *civil* society is defined by civility, i.e. a non-violent approach to social relations (Keane 2003, p. 12 also Kaldor 2003, p. 7). It manages human interactions through reason and deliberation, rather than intimidation, and as such it has a tendency to minimize violence in social relations (Kaldor 2003, p. 3). Furthermore, the link between civil society and non-violence is fundamental as only in the absence of violence, i.e. in the absence of pain, fear and threat of death, individuals are able to nurture social relationships that form the basis of (global) civil society. Hence civil society both espouses non-violence and is constituted by it; the tendency towards non-violence is both its value and most prominent feature. Therefore, while Chandhoke's and Chandler's arguments reveal important dynamics of power within the global civil society, they do not diminish its normative and humanitarian potential. Furthermore, bearing in mind its ability to link individuals across the nation-state borders by recognizing one another as owners of fundamental human rights, its aversion to violence and capacity to make rights claims for individuals, it is possible to see global civil society making a claim for the right to humanitarian assistance. And while such a right is not (yet?) formulated as a legal principle in the international law, it exists both embedded in the framework of the responsibility to protect and, more importantly, in global civil society's immediate outcry whenever individuals and their human rights are threatened by violence.

5.6 A Right to Humanitarian Assistance: Implications

Thinking about humanitarian assistance in terms of rights has far reaching consequences both for humanitarian actors and those who would claim it. Alex de Waal who presumes a possibility of such a right notes that it immediately creates problems of double standards and equal treatment (De Waal 2010, p. 133). The reality of global politics has repeatedly demonstrated that humanitarian crises evoke highly variable responses from the international community both in terms of response measures and their reach. Strategic, geopolitical and financial calculations have as much significance in determining the type and scale of a response as the fact of human suffering itself, if not more. Hence thinking of a response as a matter of right immediately becomes highly problematic in political as well as moral terms. Conceptualization of humanitarian assistance as a matter of right also generates what de Wall calls "institutional cruelties" as humanitarian work by making war less inhumane also makes it less intolerable (De Waal 2010, p. 133). Such a right also exacerbates a problem of "moral hazard" as it potentially encourages armed groups to take up violence in order to provoke political change all the

while using the involvement of international community as leverage (Kuperman 2005).

Such issues are further compounded by the fact that the right to humanitarian assistance inevitably raises the question against whom such a right can be claimed? In other words, who has the responsibility to provide such assistance? Unlike the case of the responsibility to protect that clearly locates the responsibility for the well-being of its citizens within a sovereign state, the right to humanitarian assistance poses a more complex problem given that humanitarian crises often originate because of the failure of the state. Hence it would follow that such a responsibility lies with the international community and, by extension, global civil society. Since its establishment the ICRC and, later, other numerous civil society organizations stepped up when states failed in terms of immediate relief provision. However, global civil society is incapable of guaranteeing the structures that would sustain peace and prosperity. Nor it can ensure discontinuation of violence. Its humanitarian potential is only realized with the help of states and such help often implies the use of military means. This creates a paradox that the imperative to stop violence requires using violence (Keane 2003, p. 157), which actualizes the questions that have already been asked regarding the practice of humanitarian interventions. It is not unlikely that the right to humanitarian assistance and the imperative to act that it generates might exacerbate the dilemma of the place of violence in securing global civil society's non-violent goals.

Another important aspect of the right to humanitarian assistance is that it constitutes the owners of such right, i.e. individuals affected by humanitarian crises, rather than those who provide relief as the ultimate moral referent. Of course, it is possible to argue that such was already the case at least since the Universal Declaration of Human Rights, but the point made here is that conceptualizing humanitarian assistance as a right reaffirms international responsibility and re-draws attention to the victims in the same way that the responsibility to protect did in terms of humanitarian intervention. To put this differently: conceptually the spotlight is now cast on the victims of humanitarian emergencies and their needs, rather than those individuals and organizations that provide relief. This logic seems to re-affirm one of the fundamental principles of humanitarianism—that of deep-caring for the human being that emerged together with the creation of the International Red Cross and Red Crescent Movement (ICRC 1996, p. 2). However the situation becomes more complicated if the transformation of humanitarianism that has taken place since the creation of the ICRC is taken into an account.

As noted at the beginning of this article, the transformation of humanitarian efforts means that the goal of humanitarian activity is no longer solely to provide immediate relief but rather to address the root causes of human suffering as such. This subsequently implies the transformation of socio-political processes and structures that are deemed to constitute such causes by tying humanitarian assistance to the promotion of human rights and long-term development goals (Fox 2001, pp. 278–280). As a consequence, humanitarianism has become much more interventionist (thus exacerbating the concerns of those who see it as becoming an instrument of states' foreign policy), while the emergence of a right to humanitarian

assistance has created an imperative to act. However, the action under such circumstances is no longer limited to tending to the wounded. Rather, it implies transforming whole societies, which poses a danger that those undergoing such a transformation will become "consumers of choices made elsewhere" (Chandhoke 2002, p. 48).

It was noted before that the aversion to violence and hence, an imperative to protect individuals threatened by it is the core feature of global civil society. As such the value of non-violence, like few others is arguably not "tainted" by the power relations inherent in global civil society. Such value exists regardless of the historical and cultural context or the operation of large scale Western NGOs' by virtue of the existence of global civil society itself. However the same cannot be said about other values and norms, even the "procedural" ones such as democracy or the rule of law, that inevitably are invoked if humanitarian efforts are understood in their expanded sense. The issue is not so much the origin of such norms themselves (whether they originate within global civil society or the Western states), but the origins of desirability of such norms. Without denying the possible merits of democracy or rule of law, the point made here is that under the circumstances of expanded humanitarian efforts and the imperative to act created by the right to humanitarian assistance the impulse of institutionalizing such norms often comes from global civil society rather than those whose lives such norms are supposed to improve. This is consistent with global civil society's role of a moral entrepreneur. However the question remains whether under such circumstances this role is not taken away from those to whom it should belong, i.e. the affected populations, thus limiting their prospects of political emancipation.

The moral impulse of global civil society to protect those whose human rights are undermined by violence reveals its potential as a humanitarian actor. The same impulse also underlines the right to humanitarian assistance, the emergence of which can be directly linked to the increasing prominence of global civil society. Nevertheless it is necessary to acknowledge that the concept of a right to humanitarian assistance poses more political and normative questions than it provides answers. The imperative to stop violence against civilians poses a distant although ever-present threat of more violence itself. Furthermore under the circumstances of the transformation of humanitarian endeavors global civil society's political and normative potential paradoxically is threatened by the very right that it generates. And while this by no means diminishes global civil society's importance as a humanitarian actor nor denies its achievements in the humanitarian field, it certainly creates one more paradox for global civil society to resolve.

References

Allen T, Styan D (2000) A right to interfere? Bernard Kouchner and the new humanitarianism. J Int Dev 12:825–842

Anheier H, Themudo N (2002) Organisational forms of global civil society: implications of going global. In: Anheier H, Glasius M, Kaldor M (eds) Global civil society. Sage, London, pp 191–216

Anheier H, Glasius M, Kaldor M (2001) Introducing global civil society. In: Anheier H, Glasius M, Kaldor M (eds) Global civil society. Sage, London, pp 3–22

Baker G (2002) Problems in the theorisation of global civil society. Polit Stud 50(5):928–943

Barnett M (2005) Humanitarianism transformed. Perspect Polit 3(4):723–740

Bellamy AJ (2003) Humanitarian intervention and the three traditions. Global Soc 17(1):3–20

Blair T (1999) A new generation draws the line. Newsweek. http://newimperialism.wordpress.com/2010/03/01/speech-tony-blair-a-new-generation-draws-the-line. Accessed 1 May 2013

Brown C (1999) History ends, worlds collide. Rev Int Stud 25(5):41–57

Chandhoke N (2002) The limits of global civil society. In: Anheier H, Glasius M, Kaldor M (eds) Global civil society. Sage, London, pp 35–53

Chandler D (2004) Constructing global civil society. Morality and power in international relations. Palgrave Macmillan, Basingstoke

Chesterman S (2011) Leading from behind: the responsibility to protect, the Obama Doctrine and humanitarian intervention after Libya. Ethics Int Aff 25(3):11–35

De Waal A (2010) The humanitarians' tragedy: escapable and inescapable cruelties. Disasters 34(2):130–137

Fox F (2001) New humanitarianism: does it provide a moral banner for the 21st century? Disasters 25(4):275–289

Frost M (2005) Global civil society, civilians and citizens. In: Kenny M, Germain R (eds) The idea of global civil society: politics and ethics in a globalizing era. Routledge, Oxfordshire, pp 122–138

Glasius M (2006) The international criminal court: a global civil society achievement. Routledge, London

Grugel J (2003) Democratisation studies globalisation: the coming of age of a paradigm. Br J Polit Int Relat 5(2):258–283

Guardian (1997) Robin Cook's speech on the government's ethical foreign policy. 12 May. http://www.guardian.co.uk/world/1997/may/12/indonesia.ethicalforeignpolicy. Accessed 1 May 2013

ICISS (2001) International commission on intervention and state sovereignty "The Responsibility to Protect". International Development Research, Ottawa

ICRC (1996) The fundamental principles of the red cross and red crescent. http://www.icrc.org/eng/assets/files/other/icrc_002_0513.pdf. Accessed 1 May 2013

Ignatieff M (1998) The Warrior's Honor: ethnic war and the modern conscience. Holt Paperbacks, New York

Ikenberry J (2011) Liberal leviathan: the origins, crisis, and transformation of the American world order. Princeton University Press, Princeton

Kaldor M (2001) A decade of humanitarian intervention: the role of global civil society. In: Anheier H, Glasius M, Kaldor M (eds) Global civil society. Sage, London, pp 109–143

Kaldor M (2003) Global civil society: an answer to war. Cambridge Polity Press, Cambridge

Kaldor M (2007) New and old wars. Stanford University Press, Stanford

Keane J (2003) Global civil society? Cambridge University Press, Cambridge

Kenny M, Germain R (2005) The idea (l) of global civil society. In: Kenny M, Germain R (eds) The idea of global civil society: politics and ethics in a globalizing era. Routledge, Oxfordshire, pp 1–15

Kuperman AJ (2005) Suicidal rebellions and the moral hazard of humanitarian intervention. Ethnopolitics 4(2):149–173

Macrae J (ed) (2002) The new humanitarianism: a review of trends in global humanitarian action. Humanitarian Policy Group Report 11
Mathews JT (1997) Power shift. Foreign Aff 76:50–66
Nussbaum M (2007) On moral progress: a response to Richard Rorty. Univ Chic Law Rev 74: 939–960
NYT (1992) The well-fed dead in Bosnia. http://www.nytimes.com/1992/07/15/opinion/the-well-fed-dead-in-bosnia.html. Accessed 05 May 2013
Roberts A (1999) The role of humanitarian issues in international politics in the 1990s. Int Rev – Red Cross 81:19–44
Scholte JA (2007) Global civil society–opportunity or obstacle for democracy? Dev Dialogue 49: 15–28
Taylor R (2002) Interpreting global civil society. Volunt: Int J Volunt Nonprofit Org 13(4): 339–347
Tsutsui K, Wotipka CM (2004) Global civil society and the international human rights movement: citizen participation in human rights international nongovernmental organizations. Soc Forces 83(2):587–620
UN (2005) World summit outcome, A/60/L.1, 15 September
UN (2009) Implementing the responsibility to protect. Report of the Secretary-General, A/63/677. 12 January
Weiss TG (1999) Principles, politics, and humanitarian action. Ethics Int Aff 13(1):1–22
Wheeler NJ (2000) Saving strangers: humanitarian intervention in international society: humanitarian intervention in international society. Oxford University Press, Oxford

Chapter 6
The Challenge Posed by Migration to European Crisis Management: Some Thoughts in Light of the 'Arab Spring'

Marie-José Domestici-Met

6.1 Introduction

It may seem difficult to reconcile the very positive image carried by the EU, as a major donor for humanitarian aid as well as for development, with the too often negative one evoked by human rights activists, when it comes to migration.

The issue is a difficult one, and may be considered as spoiled by preconceived ideas, crystallised in expressions such as "fortress Europe" (Rumford 2006, pp. 155–169) or "Europe as a sieve".[1] Therefore, this paper will avoid too sharp judgements and enlarge its scope well beyond the events of 2011, before coming back to them.

First, 'migration' is a word which covers a wealth of situations: voluntary or forced, agreed with the State of destination or not. Furthermore, Europe has a long history of migration, from migrations which have brought new populations to Europe—in the early Middle Ages—to migrations of Europeans—which have built America and Australia. However, recent decades show Europe dealing with migration, firstly as a donor to forced migrants, and subsequently as a potential host area. Going back in time, but also with a wider approach, will enable us to envisage the European attitude concerning migration in a scientific way.

The hypothesis of the paper is the following: Europe could have a positive attitude towards migrants, just as it shows a structural trend of mercy towards people in need. However, new circumstances have brought Europe to care about its own security much more than before, and no longer to predominantly care about human security.

[1] Expression used in House of Commons during debate following the first use of "Fortress Europe".

M.-J. Domestici-Met (✉)
Université d'Aix-Marseille, Aix-en-Provence, France
e-mail: marie.domesticimet@univ-amu.fr

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_6

This short paper is not the place to give a comprehensive survey on topics such as networks of traffickers, the fate of those undocumented after their arrival in Europe, percentages of regularisations, percentages of return, either forced or voluntary, the way in which the Directive on Return is practised, but it can help to go beyond the first appearance and beyond pure facts, towards what is truly at stake. The truth is that Europe is not only uncomfortable with unskilled migrants breaking its border; it is also at risk of losing the moral and political benefit it could derive from its huge international commitment to the poor and those in distress. Herein lies the problem.

The methodology consists in describing in their chronological order the successive contexts in which the different legal solutions have been introduced, giving to history, geopolitics and ideology the consideration they deserve when explaining the content of the rule of law. The paper will unfold through four stages. The first one traces back European activities in favour of forced migrants to the 1980s and 1990s: they were deployed among so many human being-centred activities. The second stage shows the young and radiant Union, at the turn of the century, developing an ideological approach to sharing the Area of Freedom, Justice and Security with migrants. During the third stage, in the early millennium, a larger Europe is faced with a globalised world characterised by mixed flows. Hence, Europe turns to being strategic, in order to sort out 'true' refugees and skilled migrants, through partnerships with neighbours. . .and perhaps at the expense of some principles. The fourth stage, the one of the Arab uprisings commonly called 'Arab Spring', brings the European asylum and migrations system close to collapsing, before giving a new impetus.

6.2 The 1980s and 1990s Epic

Forced migration was of concern for the EU as an element in a bunch of human being-centred European policies developed in the last years of the Cold War and its immediate aftermath. A new way seemed possible for crisis management.

6.2.1 A Human Being-Centred European Activism

First, development has been on the 'EU's agenda'—if one may speak so-far before the 'EU' legal entity was born, and well before humanitarian action was identified as a specific activity. Since the onset of the European Economic Community, the overseas territories of European States benefited from specific treatment. As early as 1963, the Yaoundé Treaty was signed with the newly formed African States,[2]

[2] According to the official title "African and Malagasy States".

setting up rules for the development of the latter. It was followed by the more sophisticated schemes of the Lomé I (1975), II (1979), III (1985) and IV (1990) Conventions. A full range of devices for development through legal regulation, rather than through the market, was thus established.

The ideology of 'preferences' and 'non-reciprocity' put forward by the promoters of the New International Economic Order[3] mirrors the ideology of the 'preference for the poor' which European States have been knowing for centuries when their social services were in the hands of religious Christian people.[4] Thus, in the Europe–ACP Countries system, being economically disadvantaged leads to being legally preferred, to positive discrimination. And the latter Lomé system enshrined some major aspects of the New International Economic Order. Indeed, it was one of the very few positive translations of the above referred to 'soft law' norms.

In the meantime, acting for development is not very far from the concept of crisis; since it is perceived as acting for peace and stability, as aiming at avoiding crisis for the middle and/or long term. With time, European integrated institutions have taken advantage of their economic power to put pressure on some states. Cooperation with conditionality has been meant as a tool for promoting human rights and democracy. Economic 'sanctions',[5] for years, have resulted in a powerful tool for crisis management. They often target regimes which are deemed dangerous not only for peace, but namely for the respect of human rights and dignity. Therefore, in 1991 the European Community was the first to sanction former Yugoslavia, followed by the UN Security Council Resolution 713.

However, the European institutions have gone beyond. With the setting up of the Union—by the Maastricht Treaty in 1992—'political cooperation' between States was succeeded by 'common policies', later on transformed by the Amsterdam and Lisbon treaties. However, the current Common Security Defence Policy is heir to the 1992 policy, born under the aegis of the so-called 'Petersberg tasks'. The latter are built around the idea of resorting to force in favour of the human being's rights and dignity. They draw the picture of a 'soft power': humanitarian and rescue tasks; conflict prevention and peace-keeping tasks; joint disarmament operations; military advice and assistance tasks, post-conflict stabilisation tasks. However, one last task is that of combat in crisis management, including peacemaking.

Up to now it has always been about acting in favour of the human being at every stage of a crisis by prevention—through development and aid to governance, mitigation, rehabilitation and reconstruction. The EU crisis management activity

[3] Cf. UN General Assembly Resolutions S3201 (1974) Declaration on the New International Economic Order, S 3202 (1974) Action Plan for the New International Economic Order and 3281(XXIX) 1974, Charter of Economic Rights and Duties of States.

[4] The above mentioned resolutions (upon the New International Economic Order) were fuelled by the works of some key authors: Raul Prebbish and Father Joseph Lebret who introduced the essential elements of the Christian social doctrine as the core of the developmental thought.

[5] Even if the wording is not quite correct, and is not used by the famous article 41 of the UN Charter.

is very rich and not aimed at gaining favour for the EU. Instead, it expresses the EU's common humanist ideology. If the "*European Security Strategy*" adopted in December 2003 seemed to look for hard security, not too far from a defence of Europe's own interests, the follow-up has reinforced the human being-centred approach, with two reports (Human Security Study Group 2007; Study Group on Europe's Security Capabilities 2004), and the introduction of a 'human security' dimension. The 2008 revision of the European Security Strategy was thus closer to the concept of human security.

When it came to dealing with migration, the European Union was primarily interested in forced migration, be it due to persecutions, voluntary deportation, war, famine, or other disasters. This compassionate activity was, later, enshrined in law.

6.2.2 *A Compassional European Activism for Forced Migrants*

Since the beginning of the post-Berlin wall era, humanitarian assistance has become part of crisis management. Since it alleviates human beings' suffering, it is usually analysed as a means of mitigation that reduces the impact of a given crisis, thus making it less difficult to undergo the conflict or disaster. From another angle, and concerning certain crises, humanitarian assistance can be analysed as a means of imposing a standstill, a kind of provisional measure, which keeps people resorting to one belligerent alive. Wars being more and more often waged by civilians—people who do not belong to a state army—and against civilians, keeping civilians alive matters, even politically. It is not only a means of bringing relief to civilians, but this kind of action has also a meaning in terms of a future for the belligerents. Indeed, suffering induces anger and, later on, revenge, creating a cycle of violence and suffering bringing relief today entails less violence tomorrow.

Since ECHO's creation in 1992, Europe—the supranational institutions together with Member States—has become the first donor in the humanitarian field, sometimes reaching the level of 50 % of all that is given. At the peak of crisis, Europe has a very powerful tool in order to bring "*caritas inter armas*".[6] In most crises, Europe (i.e. the Union plus its Member States) is the first donor for humanitarian assistance: namely in former Yugoslavia, Palestine, Libya, and Syria. ECHO's activities are not purely quantitative. Regulation 1257/96[7] details the principles of what is considered a partnership with operative humanitarian agencies. The stress is put upon the principles: impartiality, which entails helping according to needs—but also apolitical stance and independence *vis-à-vis* political activities. ECHO's principled activities bring quality besides quantity and the presence of more than a

[6] Once the motto of ICRC.

[7] Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid OJ L 163 of 2.7.1996.

hundred ECHO experts in the field brings even more quality to the funded humanitarian activities.

6.2.3 *Activism in Favour of Forced Migrants and Crisis Management*

However, funding these kinds of issues may amount to crisis management. Hence, the EU played such a role in former Yugoslavia through funding assistance to the uprooted. Some elements about ethnic cleansing, its origins and operative process are necessary prior to a deeper analysis. The Yugoslavian State—first a Kingdom, then a Socialist Republic—was created after the First World War and reformed after the Second. It was, in the last years of socialism in the 1980s, composed of six Federated Republics, each of them encompassing several different populations. This heterogeneity was supposed to be transcended by the common socialist ideology. However, after Tito's death in 1980, and with the decay of the socialist world, the ideological cement receded before nationalist ideologies. Milosevic highlighted the Serb heritage with a huge celebration of the Kosovo Polje battle of 1389 on its 600th anniversary. Together with Croats reaffirming the Croatian national tradition and Alija Izetbegovic taking into account the belonging of Muslim Bosniacs to the Umma,[8] Yugoslavia fell apart. Yet, each of the different Republics was mixed and the separation was challenging. Ethnic cleansing came in to play. The rationale for ethnic cleansing is to compel minority groups to leave a territory, giving way to an ethnically pure territory. The Serb militias acted in order to implement an ethnic cleansing plan through different means: creating fear through presence, threat, rape or killing the ones who belonged to minorities. However, ethnic cleansing was not absent from other groups' strategies. This ethnic component of the crisis, crossed with some purely geographic features of the country,[9] and with the high level of armament, gave way to one of the most structured and heavy conflicts of the last decades. In many places, urban Bosniac[10] Muslims of the city were surrounded and besieged by rural Serbs firing from above, with the JNA—the former Yugoslavian army[11]—guns and sometimes tanks.

Thus the way humanitarian aid was delivered mattered and played a dramatically important role in the survival of besieged cities. While Europe, acting first as a

[8] He was the President of Bosnia–Herzegovina during the war. Before the fall of Yugoslavia, he promised to make Bosnia an Islamic Republic as soon as the Muslims would represent the majority.

[9] A large number of valleys, the location of the biggest cities in valleys alongside the river, facilities for firing upon some cities (Sarajevo, the capital, and Gorazde) from the slopes of the valleys.

[10] "Bosniac" is used for Muslims living in Bosnia. "Bosnian" is used for all those living in Bosnia.

[11] Largely made of Serbs.

Community, then as a Union, dedicated two thirds of its total assistance to the former Yugoslavia. It set up for the Sava Valley the only humanitarian field Task Force that Europe has ever established. The device of six Security Zones created for six main besieged cities by the UN Security Council[12] found its relative efficiency due to both the European funding for a large amount of assistance—led on the field by the UNHCR but implemented by European NGOs—and the military protection of the European soldiers from UNPROFOR.[13] The strongest point of this device was the Sarajevo airlift—the longest in history—which for 46 months had thoroughly upheld a city with its hundreds of thousands of inhabitants, providing food, non-food emergency items,[14] but also seeds for small urban agriculture and even paper for keeping the local newspaper *Oslobodenje* alive.

The first lesson to be drawn from this case is the strategic impact of humanitarian assistance upon forced migration. It had helped put a halt to ethnic cleansing. From September 1992 on, the war changed. A front line settled between areas dominated by the belligerents and no further major forced displacement occurred. Being helped to survive, the besieged did not give in. The fall of Srebrenica is a major exception due to very specific failures in the concept[15] and system[16] of a security zone. One may conclude that humanitarian action was used as a crisis management tool during the conflict, with a globally positive result. Bearing in mind the role played by the Europeans, it is obvious that the EU strongly, even if not totally successfully, acted against forced migration and in favour of its victims. The events pursuing to the Dayton peace agreements confirm and complement this first lesson learnt. The new Bosnia–Herzegovina was built upon the idea—or the myth—of ethnic reconciliation. The power sharing system gave each ethnic group a strong representation and the power of veto.[17] Yet at the same time, the international community set to reverse ethnic cleansing, and humanitarian action was part of the game. ECHO funding reconstruction corresponded to minority returns rather than returns of people belonging to the main group in a given area. Two interpretations can be given. On the one hand, ethnic cleansing is equated with a crime—which has been, since then, confirmed by jurisprudence and by the Rome Statute of the

[12] Resolutions 819 (March 1993) for Srebrenica, and 824 for Sarajevo, Gorazde, Tuzla, Zepa and Bihac.

[13] United Nations Protection Force, first created in February 1992 for supervising the cease-fire in Croatia and, then, reinforced for Bosnia–Herzegovina in August–September 1993. All battalions were seconded by European countries, namely France, the UK, Spain, the Nederland, Germany, and Italy. American troops guarded the strategic bridge of Bosanski Brod.

[14] Plastic sheeting for the replacement of broken windows, sanitary items.

[15] Security zones, according to humanitarian law, should be zones without any stake in the conflict, whereas the Bosniac army used Srebrenica as a rear basis for its fighting. When it suddenly retreated from the city, it seemed to the Serb militias to be a signal for an attack.

[16] This specific zone had been created without a precise topographic definition, which made it impossible to identify the very edge of it and the beginning of infringement.

[17] Two entities have been created: Republika Srpska and the Croato-Muslim Republic of Bosnia–Herzegovina.

ICC—and something has to be done in order to cancel its effect. It is the rationale of international public policy. On the other hand, those who have experienced suffering have a right to more help. A kind of moralism is behind the priority given to those previously victims of ethnic cleansing and potential future victims.[18] The footprint of Europe cannot be discussed, since its position as a major donor made it possible for it to refuse being associated to the later policies.

A second lesson to be learnt from the Bosnian case relates to the fact that Europe has proven its generosity by granting asylum to the greater part of some 800,000 people who have fled from Croatia and Bosnia between 1991 and 1995. Prior to envisaging the role of (European) humanitarian assistance in the post-conflict period, it is necessary to look at the protection aspect. Refugee law has been drafted in order to prevent misunderstandings about a State granting asylum to someone persecuted by another State. However, the main provision of refugee law is the non-refoulement principle, which is recognised as customary by UNHCR[19]: no one should be pushed back towards the State from which he/she is escaping. All systems of refugee law recognise this principle. The African system is well known for being more generous, in that it provides for asylum being also granted without personal persecution, in case of "*events seriously disturbing public order* in either part or the whole of [a person's] country of origin or nationality".[20] Between 1991 and 1995, several Member States granted protection on their own will, giving response to the requests they were receiving. Most requests went to Germany, since many Yugoslavians had been working there since the 1980s. Then they went to Austria, Denmark, Sweden and France (Fitzpatrick 2000, p. 280). And protection was granted irrespective of the personal persecution experienced or not (Boutruche 2000). However individual the decisions for temporary protection were, they were commonly reviewed by the Council of Ministers. On 25 September 1995, the Council adopted a Resolution on burden-sharing (OJ C 1995, p. 1) with regard to the admission and residence of displaced persons on a temporary basis and, on 4 March 1996, adopted Decision 96/198/JHA (OJ L 1996, p. 10) on a future alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis.

[18] Indeed, the minority returns were not always easy. The UNHCR has a process for checking security conditions of return and it did activate this process in Bosnia–Herzegovina. Security incidents have been seriously taken into account in Bosnia–Herzegovina, including through a military protection of houses rebuilt for people belonging to minority (for instance, in Stolac, near Mostar a Spanish tank watching beside a Muslim-owned rebuilt house, in 1998).

[19] UNHCR Declaration of states parties to the 1951 convention and or its 1967 protocol relating to the status of refugees, 16 January 2002, HCR/MMSP/2001/09.

[20] Article 1, § 2.

6.2.4 From Activism to Law Making

Europe has chosen to build upon its practice in adopting common instruments under the CFSP to overarch individual behaviours: first a Common position relating to a common approach to the word "refugee" (OJ L 1996, p. 10), and, then, a proposition for Common Action.[21] The Action Plan of the Council and the Commission of 3 December 1998[22] provides for the rapid adoption, in accordance with the Treaty of Amsterdam, of minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin, as well as the adoption of measures promoting a balance of efforts between Member States in receiving and bearing the consequences of welcoming displaced persons. All this was to lead to a Directive for Temporary Protection (Van Selm-Thorburn 1998). The latter was to introduce Europe in the small group of international actors having an extended approach to protection, as will be discussed later on.

Yet, the Kosovo crisis burst out before the Directive was adopted. The European Member States adopted a more political approach, aimed at keeping the Albanophons in Albania and in Albanophon areas of Macedonia, such as to allow them to go back to Kosovo as soon as the air strikes would be over, in view of enabling them to take the reins together with the international administration. Italy, for instance, decided to provide the logistics and the resources for a refugee camp in Albania hosting 3,000 Albanophone Kosovars, not to forget the much greater effort made by ECHO. European Member States, nevertheless, admitted specific cases onto their territories, amounting to some 10 % of the 900,000 refugees, with more than 12,000 welcome in Germany and nearly 10,000 in France (Van Selm 2000).

On 27 May 1999 the Council adopted conclusions on displaced persons from Kosovo.[23] These conclusions call on the Commission and the Member States to learn the lessons of their response to the Kosovo crisis in order to establish the measures in accordance with the Treaty. Hereby, the European Union was in line with what UNHCR High Commissioner Sadako Ogata expressed, when thinking of innovative solutions: "*Temporary protection is an instrument which balances the protection of the need of people with the interest of the States receiving them*".[24]

It was time to enshrine it in law.

[21] COM (98) 372 final JO C 268 27 August 1998.

[22] Action plan on how to best implement the provisions of the Treaty of Amsterdam on the area of Freedom, Justice and Security (J.O. C 19/1 23 January 1999).

[23] C 19, 20.1.1999, p. 1.

[24] Statement at the inter-governmental consultations on asylum, refugee and migration policies in Europe, North America and Australia, Washington DC, May 1997.

6.3 The Turn of the Century

6.3.1 The Tampere Ideology: Granting Asylum, an Activity to Be Harmonised in the European Area of Freedom, Justice and Security

There was, then, a slight shift. The way of thinking about migration was still the same, but, the way of dealing with it became the new frontier of integration. Thus, the focus was less on migrants' fate and more on the principle of sharing an area with them.

During the 1990s when the Community, soon substituted by the Union, acted on the global stage as a major player through ECHO, migration was mainly a disaster that other populations underwent in its eyes. It was about helping others outside Europe. It was about helping migrants, and often the host populations, in order to avoid anger in the (sometimes unwilling) populations in the receiving State. With regard to granting asylum, European States acted on their own, according both to the 1951 convention they had individually ratified at different dates, and to their own domestic regulations.

Later on, the issue of asylum first came to the fore for internal European reasons, rather than due to a common crisis management activity. The Schengen system, since it created a global European external border, demanded increased clarity in the roles that European States had to play in front of foreigners. This was the purpose of the 1990 Dublin Convention.

With the 1997 Amsterdam Treaty, visas, asylum and immigration had been "communitarised". When the European Council convened in Tampere on the 15th and 16th October 1999 and set up a programme for 2000–2004, its spirit could be summarised as such:

> the European Union should not only be a single market and an economic and monetary Union but also an "area" of freedom, security and justice – an area where everyone can enjoy his or her freedoms, can live and work where he/she wishes in safety, and where disagreements and disputes can be sorted out fairly and justly[25]

The Presidency conclusions add: "*this freedom should not (...) be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory*".[26]

[25] "*Tampere: kick-start to the EU's policy for justice and home affairs*", introduction on the Commission website (www.ec.europa.eu, accessed 6 October 2014).

[26] Presidency conclusions § 3, European Council, Tempere (www.europarl.europa.eu, accessed 6 October 2014).

This very generous approach called for "*common policies on asylum and immigration…) based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union*".

Although encompassing some elements upon illegal immigration and those who organise it, the text is definitely oriented positively, and draws the picture of a very open Europe, proudly building upon its humanist ideology. Three specific issues have to be highlighted in the Tampere programme.

1. It states there should be "*a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children*".[27]

   This is a fair and positive way to say that populations of states with good governance will not try to flee to Europe, either for asylum, or simply for better living conditions. The sentence also links back to the huge range of human being-centred activities Europe has developed for crisis prevention and management. As mentioned before, Europe (the Commission plus Member States) is the first donor for development, and its practice goes back to the very period of decolonisation. Moreover, for decades Europe has been promoting human rights as a dimension of development, including conditionality in its political dialogue with developing partners. Following Tampere, the 2000 Cotonou ACP–EU agreement enshrines the idea of regulating migrations through development, as stated in article 13, point 4: "*The Parties consider that strategies aiming at reducing poverty, improving living and working conditions, creating employment and developing training contribute in the long term to normalising migratory flows*".

   Europe has developed during the 1990s a strong know-how for helping rebuild institutions after a conflict. It has played a major role in Kosovo's birth.

   Thus, the Tampere programme openly links migration management to what Europe knows best: helping others outside Europe. This does not mean disregarding granting asylum.
2. As to asylum, the Presidency Conclusions go on, stating that the Council "*has agreed to work towards establishing a Common European Asylum System*, including "*a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of*

[27] Ibid § 11.

protection offering an appropriate status to any person in need of such protection".[28]

3. And the last aspect of the programme relates to "*fair treatment of third country nationals*", evoked in the following generous way: "*the legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens.*"[29]

These provisions are echoed by the Cotonou agreement.[30] However, the latter encompasses a readmission clause[31] too. This type of device was to further develop during the next period.

6.3.2 At Last, Law Making

This very far-reaching programme, valid for the following 5 years, was not completed before the adoption of the next one, the Hague programme (2004).

The main achievement was a set of Directives which have been adopted on the asylum issue : "*the Tampere Programme (...) is notable for having produced the first set of legally binding EU-level agreements: temporary protection for persons displaced by conflicts; a common understanding of refugee status and "subsidiary" protection; minimum procedural guarantees; minimum conditions for the reception*

[28] Ibid § 16.

[29] Ibid § 21.

[30] ARTICLE 13 Migration

1. The issue of migration shall be the subject of in depth dialogue in the framework of the ACP–EU Partnership. The Parties reaffirm their existing obligations and commitments in international law to ensure respect for human rights and to eliminate all forms of discrimination based particularly on origin, sex, race, language and religion.
2. The Parties agree to consider that a partnership implies, with relation to migration, fair treatment of third country nationals who reside legally on their territories, integration policy aiming at granting them rights and obligations comparable to those of their citizens, enhancing non-discrimination in economic, social and cultural life and developing measures against racism and xenophobia.

[31] Article 13 point 5 c) The Parties further agree that:

i) – Each Member State of the European Union shall accept the return of and readmission of any of its nationals who are illegally present on the territory of an ACP State, at that State's request and without further formalities;

– Each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities. The Member States and the ACP States will provide their nationals with appropriate identity documents for such purposes.

of asylum seekers; and a regulation on deciding which Member State is responsible for assessing which asylum claim" (van Selm 2005).

The first one adopted was on Temporary Protection (2001/55). It goes far beyond harmonisation, establishing a common regime run by the Council, with a burden sharing principle overarching the distribution of protected people between the European Member States. The decision is collectively taken by the Council of the EU for 1 year, with the possibility of proroguing it for 6 months (Boutruche-Zarevac 2010).[32] The Regulation on Member States' respective jurisdictions, Dublin II,[33] as well as the Directive on Asylum status[34] followed in 2003, and the Directive on Qualification in 2004.[35] The last one, on procedures for asylum request[36] was still to be awaited until 2005. The harmonisation is not very far-reaching, since the topic is difficult and the national traditions unevenly developed.

With regard to the regulation of migration flows, little was done. The main idea was helping development, namely institutional development, and supporting human rights in developing countries. This did not exclude one hint towards "*readmission agreements*" between the European Community and third countries in the Tampere programme. Yet, this approach was to develop more during the next stage, at a moment when European instruments became less idealistic.

6.4 The Early Millennium Era

If the Tampere programme can be considered idealistic, the Hague programme can be considered more strategic. It was tailored with regard to then current events.

[32] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (O J of the European Communities 7.8.2001 L 212/12).

[33] Dublin II; Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

[34] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

[35] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

[36] Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status.

6.4.1 Migration as a Phenomenon Regarding Europe

The early millennium was a time of great challenges and interrogations in geopolitics with the 9/11 attacks and the subsequent Afghanistan campaign, as well as with the war in Iraq. In the management of world affairs, the impression of entering a new era seemed to cast a new deal in development with the Millennium goals. And in crisis management, the search for a new balance between protection and respect for sovereignty pushed R2P to the forefront. The same was occurring for forced migrations. The 1980s and 1990s had been the time of emergency rescue for refugees; could the next decades become, with the end of many conflicts,[37] the time for sustainable solutions? In the meantime, with the number of internally displaced persons on the rise, and growing flows of persons in search of a new life in a peaceful country, the turmoil of the global South partly transferred to the North.

During the early part of the new millennium, Europe enlarged, wiping off the internal divide that spoiled the continent during bipolarisation; but at the same time, Europe faced new challenges: how to adapt and how to adapt its international role to the new conditions?

6.4.1.1 Immigration, a New Concept for Old Europe

As a major donor Europe had to think of "*the emerging serious imbalances*" when "*Member States were spending significant amounts on processing asylum claims in the EU where the majority of applicants did not qualify for international protection while the majority of refugees including the most vulnerable groups*"[38] remained unprotected in the vicinity of their State of origin. As a progressively integrating entity,[39] it was getting much bigger, but also suddenly quite different with its biggest ever enlargement, 10 countries at once joining 15, while the Schengen system with its unique external border was still a work in progress.[40]

As a human group, Europe was considering the results of the huge change in its demography: "*Europe needs migration. Our populations are getting smaller and growing older*".[41] However, unlike the traditional countries of immigration—the United States, Australia, Canada—that have, for decades, received and integrated former refugees, together with people attracted by a possible better future and

[37] The Balkanic wars, Angola, Sierra Leone, Liberia, the international phase of the Congolese case (where agreements were brokered in 2002).

[38] The Commission Communication "On the common asylum policy and the Agenda for protection" of 26 March 2003 (COM (2003) 152 final).

[39] Even if still in search of its institutions, during the Intergovernmental Conference and, even more, after the rejection of the Constitutional Treaty by France and the Netherlands.

[40] Namely with some European States not belonging to the space and non-European States belonging to it.

[41] European Parliament Analysis. Recommendations no DT/61933.doc, 8 June 2006.

chosen for their capacities, Europe was not used to immigration and reinstallation of refugees.

Meanwhile, on Europe's southern shores and in the eastern mountains of Greece, quite another phenomenon was appearing: that of massive mixed migration. People were approaching the external border, often without documents showing their origins, no matter what the reasons were for fleeing their country of origin. Most of the time grouped by smugglers or traffickers, sometimes on their own, forced to migrate or not, pushed by a family in quest of some remittances or making their own way towards a mythic El Dorado. According to the conditions of travel they go unnoticed[42] or are seen in dire need of assistance. Some of them are eligible for protection, not always the ones who claim it.

6.4.1.2 Chosen Immigration

> (. . .) we are trying to manage migration better: welcoming those migrants we need for our economic and social well-being, while clamping down on illegal immigration[43]

Thus, was set up a *summa divisio:* legal (and fruitful) *versus* illegal (and to be fought) migration.

For Europe, an important parameter of the device relates to "readmission" agreements. The latter mean that the non-European State acknowledges its obligation to admit its own nationals. And some such agreements encompass the obligation to admit third country nationals having transited through their territory.[44] Such agreements are often balanced by facilitation of visas, but not always. Since 2002 (with Hong Kong), the EU has concluded approximately two dozen readmission agreements, half of them complemented by a visa facilitation procedure.

[42] Such as many Iraqis and Afghanis wanting to reach the UK, who had entered unnoticed into the European space and only appeared when they stopped in Sangatte in their protracted attempts to cross the Channel.

[43] Benita Ferrero-Waldner, Commissioner for External Relations, Speech (06/149) in Stockholm (Swedish Institute for International Affairs 7 March 2006).

[44] T Strik Parlementary Assembly of the Council of Europe's rapporteur "Les accords de réadmission, un mécanisme de renvoi des migrants en situation irrégulière" doc no 12168 17 mars 2010.

6.4.2 *Recognition of Immigration into Europe as an Issue for External Policy*

6.4.2.1 Two Conceptual Innovations

Two key expressions appear. One relates to temporality: circular migration. The other one relates to geography and geopolitics: externalisation of asylum. Both concepts are meant to meet the challenges posed by the context.

On the 1st of May 2004, ten States entered the European Union: Poland, Slovakia, Hungary, Slovenia, Estonia, Latvia, Lithuania, Cyprus, Malta and the Czech Republic. Only the latter did not become part of the external border of the EU. Together with the Spanish Canaries Island, the Ceuta and Melilla Spanish enclaves in Morocco, Greece, and Southern Italy (namely the Bari area and the Lampedusa Island) they became the Gate of Europe. For years already there was mounting pressure around the ancient points of the Gate and this new landscape gave an opportunity for rearranging.

The system was tailored with regard to both the Central and Eastern enlargement and a unique convergence between European institutions and UNHCR, headed up at the time by a former Dutch Prime Minister. In 2002, when this enlargement was being prepared, the European Council of Sevilla echoed a UNHCR declaration calling refugees to be kept in the vicinity of their country of origin. Accordingly, the next European Council adopted the principle of having Southern countries preventing departures to Europe.[45] In 2003, the High Commissioner put forward the so-called "three-pronged working proposal",[46] offering the perspective of two new ways for a European country to protect people in need of protection. The traditional one is granting asylum on its territory. One new "prong" would be "regional" protection, made possible by an action of capacity building in the South with European aid to strengthen protection capacity. The second new prong would be that of "European" protection aimed at protecting those having filed "manifestly unfounded" asylum request, but however in need of protection. The latter persons would be distributed among European States. To make it short: there would be fewer refugees coming to Europe, but people not eligible for refugee status would be welcomed to benefit from extended protection.

"*Europe is a unique model of an emerging "common asylum space". If burden sharing and responsibility sharing cannot be successfully applied within this space, then how can we possibly expect it to be applied globally? Indeed, I would say that Europe has no choice but to work on both fronts if it is to effectively address both the phenomenon of irregular movements of asylum seekers to Europe and the phenomenon of economic migrants abusing and clogging up its asylum systems.*

[45] Concl. of the Presidency 21 and 22 June 2002.

[46] Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an Informal Meeting of the European Union Justice and Home Affairs Council, Veria, Greece, 28 March 2003.

(…) With the accession in 2004 of ten new EU member States, there is an opportunity to be seized (…) If we want to move ahead, we will have to engage these new countries without delay in exploring the issue, since much of the joint processing may take place on their territories".[47] In 2004, the time seemed to have come for a huge re-arrangement. After tough negotiations, the Hague programme adopted by the European Council in November for 2004–2009 was less generous than Tampere, but deliberately innovative.

Innovation lies first in a geographical shift. The most prominent aspect of the Hague programme is asylum externalisation. The EU cares about asylum seekers and pays for them, but it manages to have them protected outside Europe. This innovation was welcome by some authors (van Selm 2005),[48] and strongly criticised by others (Rodier 2004).

A second innovation relates to temporality. Following the Hague program, the EU invented the pioneer[49] concept of "circular migration", first put forward in a Communication of the Commission dated 1st September 2005,[50] and considered "development-friendly". Soon after, the European Council of 15th and 16th December 2005 ended with Conclusions of the Presidency stating, *inter alia*

> GLOBAL APPROACH TO MIGRATION. The European Council notes the increasing importance of migration issues for the EU and its Member States and the fact that recent developments have led to mounting public concern in some Member States. It underlines the need for a balanced, global and coherent approach, covering policies to combat illegal immigration and, in cooperation with third countries, harnessing the benefits of legal migration. It recalls that migration issues are a central element in the EU's relations with a broad range of third countries, including, in particular, the regions neighbouring the Union, namely the eastern, south eastern and Mediterranean regions.[51]

6.4.2.2 The Way for Implementation

In order to implement the three-pronged system, the EU was to draw on diverse partnerships. The oldest is the ACP. The second is the Euro-Mediterranean partnership, once named the Barcelona process. And the latest refers to the concept of 'Neighbourhood', which is not exempt of some overlaps with other groups of States.

---

[47] Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at an Informal Meeting of the European Union Justice and Home Affairs Council, Veria, Greece, 28 March 2003.

[48] Rather than focusing on somewhat nebulous "partnerships" with countries of origin, the new programme recognises the "external dimension" to asylum and migration policy. In other words, the Hague Programme envisions promoting refugee protection beyond the European Union and incorporates migration management within broader foreign policy concerns."

[49] According to MEMO 1549.

[50] COM (2005) 390 final (Communication from the Commission to the Council the European Parliament, the European Economic and Social Committee and the Committee of the Regions).

[51] Council of the European Union—Presidency Conclusions 15914/1/05 REV 1 § 8.

The Council drew the first lines for implementation by annexing a document with the title "*Global approach to migration: Priority actions focusing on Africa and the Mediterranean*", listing some very practical measures[52] and foreseeing the use of the ACP–EU political dialogue, namely on the basis of Article 13 of the Cotonou Agreement,[53] "*covering a broad range of issues from institution and capacity building and effective integration of legal migrants to return and the effective implementation of readmission obligations, in order to establish a mutually beneficial cooperation in this field.*"[54]

For other non-member States the period of the Hague document was very specific, since 2004, together with marking a huge enlargement, was drawing the scheme of enlargement to a halt. Europe began acknowledging the need for cooperation with the States left just outside its borders, which formed the basis of the idea of a 'Neighbourhood' partnership with some Eastern as well as Mediterranean countries. In order to avoid a visible line between prosperity and those left outside, it was decided to develop an area of prosperity and close cooperation involving the European Union and the neighbouring countries, the list of which has no purely geographic rationale.[55] The corresponding financial instrument[56] is a merger of MEDA[57] and TACIS[58] instruments, and the Partnership has to be

[52] – Explore the feasibility of a migration routes initiative for operational cooperation between countries of origin, transit and destination.
– Establish and implement a pilot Regional Protection Programme (RPP) involving Tanzania as early as possible in 2006, with a steering group to oversee the programme. Based on findings from the pilot, develop plans for further programmes in Africa.
– Engage Mediterranean third countries in the feasibility study of a Mediterranean Coastal Patrols Network, Mediterranean surveillance system and related pilot projects.
– Consider supporting efforts of African states to facilitate members of diasporas to contribute to their home countries, including through co-development actions, and explore options to mitigate the impact of skill losses in vulnerable sectors.
– Establish information campaigns targeting potential migrants to highlight the risks associated with illegal migration and raise awareness about available legal channels for migration.
– Explore how best to share information on legal migration and labour market opportunities, for example through the development of migration profiles and through strengthening sub-regional fora.

[53] See text *supra* note 31.

[54] Text of the above-mentioned Annex.

[55] "List includes the neighbouring countries which do not currently have an accession perspective (...) Assistance to neighbouring countries with accession prospects, such as Turkey or the countries of the Western Balkans, is covered under a separate Pre-Accession Instrument" (Introduction of the Communication of the Proposition of the Commission for a Regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood Partnership Instrument).

[56] Regulation 1638/2006—24 October 2006, based upon a proposal of the Commission dated 29 September 2004 (COM (2004) 628 final).

[57] The financial aspect of the Euro-Mediterranean policy.

[58] One of the financial instruments for support to the States of CEI.

activated on a case by case basis through an Action Plan.[59] The link between this Neighbourhood Partnership and the asylum externalisation does exist even though only a minority of the Neighbour States have entered the system conceived from 2004 (all Mobility Partnerships came later). More agreements have been concluded by European Member States on a bilateral basis.[60] A multilateral process successfully initiated could be identified with the follow-up of the Euro-African Strategy from 2007, as well as the "Processus de Rabat".[61]

In short, the Neighbourhood Partnership is not, or not yet, a privileged area for cooperation about migration. Four years after the adoption of The Hague programme, as well as after the first decisions upon the Neighbourhood Partnership, the instruments in force for readmission were mainly inter-State ones or arrangements based upon another partnership contiguous with the Neighbourhood one.[62] Thus, the implementation of the European device for having undesired migrants leaving Europe (either after an illegal entry or after the period of their legal employment has come to an end) was relatively difficult. Moreover, on the European side, as well on the migrants' side, facts were disappointing. Illegal migrations and their related human sufferings were, nevertheless, on-going.

6.4.2.3 The Practical Tools: Institutionalisation and Programmes

The FRONTEX Agency[63] was created just before The Hague programme, with an obvious view to enhancing security in the general framework of the Schengen architecture. It aims at managing operational cooperation between member states, especially, but not only, when it comes to organising joint return operations of third-country nationals, illegally present on the territory of the member States. FRONTEX is also in charge of analysing risks of organising training, and disseminating knowledge. It was completed with the FRAN (Frontex Risk Analysis Network).[64]

More specific are the RABITs—Rapid Border Intervention teams. Their founding regulation explicitly evokes "*the critical situations which Member States from time to time have to deal with at their external borders, in particular the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of the Member States illegally*". Their deployment is

[59] Action Plans, for example, have not been signed by Libya, Syria as well as Belarus.

[60] Spain and Morocco, Italy and Libya, the UK and Libya.

[61] Created in 2006 (http://www.processusderabat.net/web/, accessed 6 October 2014).

[62] For instance, its thanks to MEDA that Morocco negotiated with the EU its behaviour with regard to Moroccans illegally present in Europe.

[63] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[64] Creating a cooperation upon information with some non-European States' services.

conceived as an *ad hoc* and temporary aid.[65] Some programmes complemented the device: AENEAS[66] was meant for helping the partner States to manage migrations and asylum by capacity building, and the CCC (Common Core Curriculum) was to improve border guard training and thus transfer the FRONTEX standards to other States' services.

However, the most important type of programmes are the "situation specific and protection oriented" RPP—Regional Protection Programmes, according to "a distinction (...) drawn between the differing needs of countries in regions of transit and countries in regions of origin".[67] The latter category, since it refers to the regions of origin of refugees, often face huge difficulties, and has to be assisted in order "to comply with international obligations under the Geneva Convention and other relevant international instruments, to enhance protection capacity, better access to registration and local integration and assistance for improving the local infrastructure and migration management". Whereas in the former countries, roughly corresponding to "the southern and eastern borders of the EU", the programme was about enabling them to better manage migration and to provide adequate protection for refugees. RPPs are developed in partnership with the countries concerned and "in close consultation (...) with UNHCR and, where relevant, other international organisations"[68] (point 3).

6.4.3 Migrations into Europe, Still a Domain for Protection?

As early as 2004, the UNHCR, during the process of drafting the Hague programme, was explaining that its proposal was aimed at protecting the rights of those eligible for refugee status—if necessary through a determination of their status and a protection in the region of their own country—and of those at risk,

[65] "Rapid Border Intervention Teams comprise specially trained experts from other Member States on its territory to assist its national border guards on a temporary basis. The deployment of the Rapid Border Intervention Teams will contribute to increasing solidarity and mutual assistance between Member States (7) The deployment of Rapid Border Intervention Teams to provide support for a limited period of time should take place in exceptional and urgent situations." (§§ 6 and 7, Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004)".

[66] AENEAS: a programme with general objective to provide third countries with technical and financial assistance in order to help them manage migrations in a better way migrations: development of their legislation regarding protection as well as legal immigration, promotion of the respect of principle of non-refoulement and respect of the readmission. The AENEAS programme has supported 107 projects in different regions from 2004 to 2006. It has been created by Regulation (EC) n. 491/2004 of 10 March 2004.

[67] Point 2 of the "Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes" 1.9. 2005 COM (2005) 388 final.

[68] Idem, Point 3.

even though not eligible to the status. Europe was highlighted as a major actor for direct or indirect protection. Does Europe play this role?

6.4.3.1 Immigration and Human Rights: An Indivisible Package?

The concept of indivisibility comes from human rights law, since many legal instruments[69] proclaim that human rights are indivisible, meaning that no right can be safe if other ones are violated. With regard to the present topic, indivisibility means that a fair treatment of asylum seekers is not sufficient; whereas only the full respect of all migrants' rights means compliance with human rights. The complex device set up with, on the one hand, externalisation of protection and on the other hand, acceptation in Europe of some people in need even though not entitled to asylum went to be checked against indivisibility. When the EU adopted the Return Directive (2008/115 EC OJ L348/98 24 December 2008), establishing common standards for Member States it was highly "*controversial among NGOs and the academic world, because of a perception that it took an unduly harsh approach on these issues*" (Peers 2014).

However, in spite of its promises and of the efforts forward (European Commission 2006),[70] the externalisation mechanism did not easily work. Both efforts failed. While migrants were waiting for asylum, they had to stay in their region of origin. To this end, camps have been created, or reused, such as the camps in southern Libya for Chadian refugees. They were supposed to allow vetting of those in need of protection in the bigger group of economic migrants. Due to a lack of culture of asylum for people from another civilisation, or to racism in their population or simply to poor governance, the partners, namely the southern ones, have not yet reached the required level of reception. Quests for asylum in Morocco, Algeria, not to mention Libya, are all too often dangerous and disappointing. When migrants are approaching Europe in a mixed flow, the status determination of the ones eligible for refugee status offers fewer chances than on an individual basis.

Europe had hope for this mechanism; and it was also disappointed. None of the situations were compatible with the principles it proclaims. Little evolution was perceivable towards the most important principle in its eyes: circular migration programmes and "effective mechanisms for readmission" (European Commission 2006).[71] The image of Europe in other countries became increasingly blurred.

[69] The International Covenant on Civil and Politic Human Rights.

[70] European Commission, *The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, COM (2006) 735 final, 30.11.2006.

[71] European Commission, *The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, COM (2006) 735 final, 30.11.2006.

6.4.3.2 Events Blurring the European Image

On the external borders of Europe, pressure was rising, mainly due to the Ceuta and Melilla crisis of 2005. These Spanish territories are landlocked in the North Moroccan territory. In September 2005, African migrants attempted to enter the 'European area' by climbing the barbed wire fences around the enclaves. Those climbing the walls of Ceuta were shot by the Spanish police; 11 died. The so-called 'externalisation' policy began being strongly combated by NGOs after the Ceuta and Melilla troubles. Moreover, this was the beginning of mediatisation, not of the phenomenon. The deadliest are not the Ceuta and Melilla barriers by far, but the sea. Groups of sub-Saharan migrants became more and more visible and many deaths at sea occurred and still occur. Even though there is no certainty about figures, the death toll is heavy.[72] These incidents have provoked strong criticism.[73]

6.4.3.3 Better Harnessing the Challenge at the Turn of the Decade?

In spite of harsh criticisms, the protagonists went on, with a view of handling both human rights and security. The year 2008 brought a reaffirmation of principles and an acceleration of implementation. In 2008, the UNHCR opened an office in Morocco, so as to offer, at the forefront of the contact with migrants, the corresponding capacity. In October, the French Presidency of the EU brought the Member States to solemnly adopt the "European Pact on Immigration and on Asylum", a comprehensive document aiming at recalling the European commitment to people in need of protection, and through which the Member States pledged to adopt a more global and flexible migration policy, including the issue of return to the State of origin. A major piece of the Pact relates to a "Common European asylum regime", once again, in order to go beyond the above mentioned Directives.

At the turn of the Decade, the efforts seemed to begin paying off. Bilateral agreements named "Mobility Partnerships" or MPs were supposed to help implement this device, encompassing issues ranging from development aid to the fight against unauthorised migration and temporary entry visa facilitation. During the period under review, Moldova (2008), Cape Verde (2008), Georgia (2009) and Armenia (2011) signed with the EU. Negotiations were opened with Ghana and Senegal. The legal device was reinforced when, in December 2008, the Directive on

[72] According to United for Intercultural Action, a NGO, 16,000 migrants were dead between 1988 and 2012. Another one, Fortress Europe states that more than 12,000 clandestine migrants are dead and more than 5,000 have disappeared in their attempt to cross the Sicilia Canal or the Gibraltar straight, or in the Aegean or Adriatic seas, or between Africa and the Canaries islands.

[73] For example, *Des centaines de morts et disparus aux portes de l'Europe*, Médecins du monde, 1er juillet 2008, Michel Agier, *Vent mauvais sur la Méditerranée: La fin de l'asile, c'est le déni de la vie même*, *Mediapart*, 7 avril 2009.

return of illegal migrants[74] was adopted, the aim of which is to ensure Member States use common standards.

The Stockholm programme (2010–2014) can be considered as setting concrete objectives for the realisation of the European Pact for Asylum and Migration, itself followed by an Action Plan. This pragmatism was needed due to the crisis striking Europe: "*The vision set out in Tampere and to a lesser extent, Hague, has disappeared.* (. . .) *the shift in focus toward the needs of European labor markets suggests that migration is no longer just simply a Justice, Liberty, and Security policy, but an integral part of foreign policy, employment and social affairs, and a host of other policy areas, such as trade, education, and finance*" (Collett 2010).

6.5 The 'Arab Spring': New Hopes or Even Tougher Challenges?

An even more specific situation arose when the so-called Arab Spring broke out. For the EU, it seemed to be the dawn of a new era, the fall of another dividing wall. Yet the new situation induced a more visible flow from Tunisia and Libya to Lampedusa in early 2011. Europe was distracted from its dreams of reinforced cooperation on various topics, even the most democratically far-reaching ones,[75] and those of new Mobility Partnerships.

Globally, in humanitarian crises, Europe (i.e. the Union plus its Member States) is the most generous donor of humanitarian assistance. With the Arab Spring, the EU stands, once again, at the forefront. In Libya, the total amount spent (for purely humanitarian activities) was 80 million euros; in Syria, it is to date (August 2014) 2.88 billions euros.[76] Moreover, Libya gave the EU the opportunity to involve both aspects of ECHO, civil protection as well as humanitarian aid. The European Civil Protection Mechanism was active with the "Pegasus" operation, one of the biggest evacuations ever. Pegasus I evacuated European workers from Libya; and Pegasus II evacuated third country nationals, mainly Egyptians and Tunisians who had their jobs in Libya. Both operations were airlifts, operated by planes of different Member States,[77] coordinated by ECHO. The EU has set up the first military operation ever totally devoted to humanitarian logistics, EUFOR Libya, created on 1st April 2011. According to principles of humanity and independence which are highlighted by Regulation 1257/96, this force was conceived as a pure tool, available for

[74] 2008/115/EC of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals.

[75] Communication of the European Commission "A *partnership for Democracy and shared prosperity*" COM (2011) 200 final, 8 mars 2011.

[76] Consilium.europa.eu consulted on June 2nd 2013. It is a integrated amount (ECHO plus Member States plus External Action).

[77] Germany, Denmark, Belgium.

humanitarians. The strongest element in the device was that its activation was subject to OCHA's will: "*EUFOR Libya, if requested by OCHA, shall (...) contribute to the safe movement and evacuation of displaced persons*".[78]

Besides the fact that OCHA never asked for EUFOR Libya's activation, the Libyan case, together with the Tunisian one, were strongly disappointing for the EU. With regard to migrations, the EU was faced with a twofold challenge. Not only was Libya no longer in a position to play its role in readmission, but, instead, thousands of people were arriving from Libya on European shores or were left to die at sea.

6.5.1 *Facing Migratory Emergency*

In 2011, due to the 'Arab Spring', the EU received what was considered a 'massive influx' of some 40,000–60,000 people. Although small in comparison to intra-African displacements, it nonetheless was a dilemma for the Europeans:

> The EU's celebration of its neighbours' fight for democracy put the Union in a delicate position. On the one hand, the EU had a moral duty to open up to those whose freedom has been denied (...). On the other, the constant concern regarding irregular migration intensified.[79]

It could have been time for granting temporary protection, for the first time since the Directive had been adopted. Migrants would have been accepted without a status determination and they would have been sent to different Member States for 1 year. However, such was not the case, partly because the flow from Tunisia seemed linked to disorders in a specific way: not due to generalised violence, rather due to the temporary inefficiency of the security services, which had, up to then, prevented people from fleeing. This type of nexus could be discussed also in regards sub-Saharan Africans coming from Libya. Nevertheless, in the absence of temporary protection, the migratory crisis management was State-security oriented. In spite of the Hermes Operation deployed by FRONTEX,[80] there was a mess in Malta

[78] Article 1, § 2, Council Decision 2011/210/CFSP.

[79] Marie Martin "Extension of Mobility Partnerships with Euro-Mediterranean Partners" Culture and Society. Migrations (Statewatch.org).

[80] Frontex received a formal request for assistance on February 15th from the Italian Ministry of Interior regarding the extraordinary migratory situation in the Pelagic Islands. The Italian Government requested assistance in strengthening the surveillance of the EU's external borders in the form of a Joint Operation. Additionally, Italy requested a targeted risk analysis on the possible future scenarios of the increased migratory pressure in the region in the light of recent political developments in North Africa and the possibility of the opening up of a further migratory front in the Central Mediterranean area. In a statement issued by the EU Commissioner for Home Affairs, Cecilia Malmström, it was stated that Hermes will be "deployed to assist the Italian authorities in managing the inflow of migrants from North Africa, particularly arrivals from Tunisia, on the island of Lampedusa" (www.frontex.europa.eu).

and much more in Lampedusa. The local facilities were quickly overwhelmed, even though the Italian Red Cross and Civil Protection showed true efficiency and the Lampedusa inhabitants showed great generosity. The island, normally inhabited by 5,000 people received up to 25,000 people at the same time. Italian ships also saved a lot of lives that were endangered at sea.

However, the general impression resulting from European behaviour was not a positive one. The crisis put a halt to solidarity and a halt to the welcoming of mixed migration. Primarily Italy complained, demanding for "burden sharing", and faced with the lack of response, opened the Schengen path to the migrants, which France considered a danger to itself. The welcome offered by locals was hidden from the public by the mid-term political issue. After the rescue offered by the Italian authorities,[81] attention was drawn to the flux spilling over to other European countries thanks to the Schengen system. France, the next neighbour, after a few days, closed the borders, with little success due to clandestine cross-over. After a short dispute, France and Italy agreed upon commonly asking for a reform of the Schengen System. Rumours circulated of worrying examples, such as the *left-to-die* case.[82] The UNHCR speaks of 1,500 dead during the first semester of 2011 in the central Mediterranean, due to overcrowded unseaworthy boats deprived of help. The Arab Spring was followed by the Syrian civil war and exile by sea continues. After 3 years, more than 250,000 have arrived on the sole Italian shores, coming from North Africa, Middle East, the Horn of Africa. . .. The whole system has thus been put at risk of collapse.

6.5.2 After the Arab Spring, a New Impetus

In the wake of the 'Arab spring' and of the turbulence it has created on the southern border of Europe, many decisions were made. After 3 years, one may consider that the events gave a strong impetus to European migratory crisis management. Two different levels may be distinguished.

[81] There is often confusion between a case of 2009, relating to a lack of relief, condemned in 2011 by the European Court of Human Rights and the very efficient aid given in 2011 by the Italian authorities.

[82] According to Amnesty international, in March 2011 one small boat fleeing from Libya was short of food and of fuel. The surrounding fishing ships gave no help. It sent a Mayday call received by the Italian rescue centre, which sent some food from a helicopter. The story ended with the boat landing again in Libya. The survivors were sent to jail. The Libyan State did not take up its responsibility. However, was it reasonable to expect such behaviour from Libya? (T Strik, (Rapporteur of the Commission for migrations, Council of Europe), Lives lost in Mediterranean sea: Who is responsible?).

In the Hirsi Jamaa and others case, the European Court of Human Rights has condemned Italy in 2012 for having, in 2009, intercepted a boat in the Maltese zone for rescue and research, and for having sent him back to Libya, pursuing to the Italy–Libya agreement for readmission.

6.5.2.1 The Overall Level: A New EU Global Approach to Migration and Mobility or Gamm

As early as June 2011, the European Council's Conclusions invited the Commission to evaluate the General approach set up previously and to "*set a path towards a more consistent, systematic and strategic policy framework for the EU's relations with all relevant non-EU countries*", adding that "*This should include specific proposals for developing the Union's key partnerships, giving priority to the Union's neighbourhood as a whole*." The Commission was in a position to work on the basis of a public online consultation and of statistics.[83]

The results of these investigations were the following proposals, included in a Communication of the Commission, dated 18 November 2011[84]:

- To expand the scope of the General Approach from "Migrations" to "Migrations and Mobility";
- To keep to the principles of mutual benefit and dialogue with third countries;
- To consider the global approach as overarching all European activities relating to migrations, and to have it implemented by EEAS as well as the Commission and the Member States.

The GAMM puts forward four major *principles*. The first two principles are intertwined: acceptation of the existence of legal immigration into Europe and the link between migration and development. Thus, migration, since it helps migrants to help their country, is under the aegis of human security. Thus, through the acceptance of the very idea of legal migration, Europe indirectly acts in favour of human security. This is an extra contribution, added to the funds handled by DG DEVCO. In order to strengthen this action, the European Commission has issued an eloquent communication: *Maximising the Development Impact of Migration. The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus*.[85]

Another set of twin principles put forward by the Global Approach cites the refusal of illegal migration, which includes struggle against it, and the establishment of a device against human trafficking. The latter is possible thanks to

[83] According to the UN (UNDP (2009) *Overcoming barriers: Human mobility and development*, Human Development Report; UNHCR (2011) *Global Trends* 2010), "there are 214 million international migrants worldwide and another 740 million internal migrants. There are 44 million forcibly displaced people. An estimated 50 million people are living and working abroad with irregular status. Long-term population ageing in Europe is expected to halve the ratio between persons of working age (20–64) and persons aged 65 and above in the next 50 years. Migration is already of key importance in the EU, with net migration contributing 0.9 million people or 62 % of total population growth in 2010" (Communication SEC (2011) 1353 final).

[84] Communication from the Commission to the European Parliament, the Council, the European Economic and Social committee and the Committee of the Regions "The Global Approach to Migrations and Mobility" (SEC (2011) 1353 final).

[85] COM (2013) 292 final.

EUROSUR, a cooperative surveillance device which has, since then, been agreed upon (see *below*). Thus, Europe insists upon the fact that it helps the victims of trafficking and it helps people who are at risk at sea on their clandestine route to Europe, which is all too frequent.

The Global Approach also encompasses a fifth principle: advancing the common European asylum policy, which at last has come to life.

Two main types of tools are designed for implementation. On the one hand, there are agreements, with different degrees of binding power: migration partnerships, proposed to the Neighbours and simple Common Agendas on Migrations and Mobility for other States. On the other hand, communication tools have been set up: Migrations and Mobility Resource Centres, and one EU immigration portal.

6.5.2.2 More Specific Elements

We shall deal with some more specific elements in an orderly way, from the country of origin to the heart of the Schengen area.

In the Region of the Country of Origin

a) The EU has developed its Regional Protection Programmes. The system had begun with two areas only: Eastern Europe as a region of transit[86] and the African Great Lakes Region (particularly Tanzania) as a region of origin.[87] In 2010, the Horn of Africa[88] as a region of origin and eastern North Africa were added.[89] Previously a region of transit, the latter was endangered in 2011. Nevertheless, the possible creation of a RPP for Syria came to the fore in 2012. During its Presidency, Cyprus has pushed strongly in that direction, putting the topic on the European Council's Agenda. The programme has been decided en 16 December 2013, as "Regional Development and Protection Programme for refugees and host communities in Lebanon, Jordan, and Iraq" to cope with Syrian refugees.
b) In March 2012, the EU decided[90] to accept refugees waiting for resettlement in different regions with a heavy load of refugees. Even though resettlement is a voluntary activity depending on a sovereign decision, the EU proposed a Joint

[86] Belarus, the Republic of Moldova and Ukraine.

[87] With a focus upon Tanzania, were protection seemed possible.

[88] Kenya, Yemen and Djibouti.

[89] Egypt, Libya and Tunisia.

[90] Decision of the Parliament and the Council 29 March 2012 (281/2012) (O.J. L92/1, 30.30.2012).

Resettlement Programme, following on from the one initiated in 2009, in order to improve the funding. The programme prioritises some origins[91] and some types of vulnerable persons.[92] European Member States freely decide to accept settlers, and receive financial aid for doing so, with special incentives for those who had not previously accepted reinstallation. UNHCR has welcomed this programme.

In the Region of Transit

As early as May 2011, the Commission undertook launching dialogues with Morocco, Tunisia, and Egypt with a view to adopting Mobility Partnerships. The first Mobility Partnerships has been concluded on 8 April 2013 with Morocco. In the specific case of Libya, the EU has offered its technical cooperation on the topic of borders. EUBAM Libya (EU Border Assistance Mission) has been created in order to help Libya control its thousands of kilometres of borders through the desert. But the number of police and custom officers is not sufficient.

As seen before, some RPP are conceived to benefit to regions of transit. However, with times, the South and Eastern shores of the Mediterranean—as well as, possibly, now, Ukraine- become regions of origin, which—once again!—puts the system at risk.

On the External Schengen Borders

The overall spirit is for a better protection of fundamental rights including, first and foremost, the non-refoulement principle.

a) The EU has organised the systematisation of the RABITs deployment. Regulation 1168/2011, adopted 25 October 2011, and modifying Regulation 2007/2004, highlights in its preamble that "*[t]he mandate of the Agency should therefore be revised in order to strengthen in particular its operational capabilities while ensuring that all measures taken are proportionate to the objectives pursued, are effective and fully respect fundamental rights and the rights of*

[91] Congolese refugees in the Great Lakes Region (Burundi, Malawi, Rwanda, Zambia);

- Refugees from Iraq in Turkey, Syria, Lebanon, Jordan;
- Afghan refugees in Turkey, Pakistan, Iran;
- Somali refugees in Ethiopia;
- Burmese refugees in Bangladesh, Malaysia and Thailand;
- Eritrean refugees in Eastern Sudan.

[92] Main characteristics of the persons eligible to the Programme: women and children at risk, unaccompanied minors, survivors of violence and torture, persons having serious medical needs that can be addressed only through resettlement, persons in need of emergency resettlement or urgent resettlement for legal or physical protection needs.

refugees and asylum seekers, including in particular the prohibition of refoulement". Thus, the regulation is placed under the aegis of the preservation of fundamental rights.

b) A new cooperation mechanism has been decided, *EUROSUR*.[93] The latter regulation seems to bring a better balance between States' security and migrants' rights and security. The regulation highlights the principle of non-refoulement and organises the respect of this principle.[94] With regard to the cooperation with neighbouring third countries, the EUROSUR Regulation stipulates that any "*cooperation of Member States with neighbouring third countries (…) must be based on agreements*". "*Before concluding such agreements, Member States must notify them to the Commission*", and the latter will verify "*their compliance with the provisions of the EUROSUR Regulation*", in particular concerning "*fundamental rights and the non-refoulement principle*".[95] This provisions aims at ensuring the pre-eminence of the non-refoulement principle, close to the rationale of international public policy. This rule, together with the signature of new Mobility Partnership should put an end to the inter-State North–South agreements, one of them having led to the *Hirsi* case.[96]

In the Schengen Area

a) The Common European Asylum System initiated in 2001 has finally been fully renovated. On 1 June 2011, the Commission proposed revised Directives on Asylum Procedures and on Reception conditions. After an intense period, on 12 June 2013, the proposal was endorsed by the European Parliament.[97] Within 2 years, the whole system had been revised, as follows:

- "*The revised Asylum Procedures Directive aims at fairer, quicker and better quality asylum decisions. Asylum seekers with special needs will receive the necessary support to explain their claim and in particular there will be greater protection of unaccompanied minors and victims of torture*.
- *The revised Reception Conditions Directive ensures that there are humane material reception conditions (such as housing) for asylum seekers across the EU and that the fundamental rights of the concerned persons are fully respected. It also ensures that detention is only applied as a measure of last resort*.

[93] Proposal of the Commission for a Regulation establishing the European Border Surveillance System (COM (2011) 873 final) 12 December 2012 and Regulation UE no 1052/2013 (European Parliament and Council of European Union) 22 October 2013 OJ L 295, 6 November 2013.

[94] Article 22.

[95] Text of the Memo 13/578, 19 June 2013.

[96] See footnote 83.

[97] Which ECRE (European Council for Refugee and Exile) considers showing a decreased level of ambition.

- *The revised Qualification Directive clarifies the grounds for granting international protection and therefore will make asylum decisions more robust. It will also improve the access to rights and integration measures for beneficiaries of international protection.*
- *The revised Dublin Regulation enhances the protection of asylum seekers during the process of establishing the State responsible for examining the application, and clarifies the rules governing the relations between states. It creates a system to detect early problems in national asylum, or reception systems*",[98]
- The revised EURODAC Regulation will allow law enforcement access to the EU database of the fingerprints of asylum seekers under strictly limited circumstances in order to prevent, detect or investigate the most serious crimes, such as murder and terrorism.[99]

b) The burden sharing issue, which was so problematic at the peak of the crisis, is linked to the Schengen area without borders. Indeed, mutual trust between Schengen States was lacking in front of the "massive inflow" of March 2011, hence fears and closures of borders. Even worse, some States are permanently deemed unable to stop migrants—as well as to treat them with dignity. Hence this "great *Acquis*" (Fabre 2013) went under review, with two propositions from the Commission. The first one foresees an annual report of the Commission. The second one foresees the reintroduction of border controls in three types of circumstances: "*in case of foreseeable events which constitute a threat*" to public order, such as Olympic Games, "*in case of unforeseen events such as a terrorist attack and in case of (...) serious persistent deficiencies in the management of external borders*". The last case could, alas, be that of Greece. In the beginning, there was less debate on the merits of these propositions, than on the legal basis, which entails a debate about "supranationalisation of the management of Schengen". With the inflow becoming permanent, the Italian presidency calls for a European Task force at sea.

6.6 Conclusion

Coming back to migration and the EU, and in order to summarise, the review of European policies over the last two decades has shown that:

1. Europe being faced with global flows, a global approach was necessary and it has been set up. The GAMM is global in that it covers all types of movements, as well as in that it envisages a range of different geographic situations.

[98] Taking into account the case M.S.S v. Belgium and Greece (ECHR) ruling that Dublin II should not be respected if the asylum seeker is at risk of being exposed to degrading treatment.

[99] www.ec.europa.eu (2013_ceas_factsheet.pdf).

2. Fundamental principles have been reaffirmed, especially in texts dealing with operational activities. The non-refoulement principle (regulations RABIT and EUROSUR), has been reaffirmed, even against free bargaining power of a European Member State negotiating with a Third country (regulation EUROSUR). The right of the asylum seeker to be treated with dignity has been reaffirmed and is protected even against the regular devolution rules for asylum requests (confirmation of jurisprudence *MMS* by the new Dublin regulation).
3. Improvement of protection is at the core centre of the device: promotion of protection in the region of origin and the region of transit, extension of protection to people non eligible to refugee status (Directive on Temporary protection), resettlement in Europe offered to the most vulnerable ones (Joint resettlement programme) even if non-eligible.
4. Regular migrations, preferably but not exclusively circular ones, are now an open option.
5. Readmission is likely to be, from now on, dealt more and more within Mobility Partnerships, rather than in inter-States agreements.

For the time being, the EU seems consistent with its way of crisis management: merciful towards the vulnerable and in search of peaceful relations through development and capacity building. The security it is looking after is a global one, based on human security and State stability. Tragedies should not hide the efforts which are being made in order to offer a better respect of migrants' human rights, neither the fact that since 2005, Europe has spent 800 million euros by funding some 300 migrations-related projects in non-EU countries.

However, no final balance can be set up. In the practice of above-mentioned points 3, 4 and 5, there is clearly place for uncertainty. How will the southern States behave in RPPs? How many will sign MPs? Will the EU grant temporary protection to Syrians or other "European neighbours"? Which profiles will be granted the opportunity to migrate towards Europe? How long will migrations go on fuelling development? And finally, how can it be ensured that present improvements will not be ruined by new events?

References

Boutruche S (2000) Les mouvements de réfugiés entre l'ex YOUGOSLAVIE et le territoire de l'Union européenne: vers l'émergence d'une politique commune en matière d'asile? Master Thesis, Aix-Marseille University

Boutruche-Zarevac S (2010) La protection temporaire des personnes déplacées en droit de l'Union européenne: un nouveau modèle en cas d'afflux massifs? Dissertation, Aix-Marseilles University

Collett E (2010) The European Union's Stockholm Program: less ambition on immigration and asylum, but more detailed plans. MPI Migration Information Source

European Commission (2006) The global approach to migration one year on: towards a comprehensive European migration policy. Brussels

Fabre C (2013) Schengen. A great Acquis Arousing Debates over the Path of European Integration. In: Nouvelle Europe. www.nouvelle-europe.eu/node/1682. Accessed 6 Oct 2014
Fitzpatrick J (2000) Elements of a formalized regime. Am J Int Law 94(2):279–306
Human Security Study Group (2007) A European way of security. The Madrid Report on the Human Security Study Group
OJ C (1995) Council resolution of 25 September 1995. OJ C 262:1
OJ L (1996) Council decision of 4 March 1996. OJ L 63:10
Peers S (2014) The EU's returns directive: does it improve or worsen the lives of irregular migrants? In: EU law analysis. http://eulawanalysis.blogspot.de/2014/03/the-eus-returns-directive-does-it.html. Accessed 6 Oct 2014
Rodier C (2004) Dans des camps hors d'Europe: exilons les réfugiés. Challenge. Liberty & Security
Rumford C (2006) Theorising borders. Eur J Soc Theory 9(2):155–169
Study Group on Europe's Security Capabilities (2004) A human security doctrine for Europe. The Barcelona Report of the Study Group on Europe's Security Capabilities
Van Selm J (ed) (2000) Kosovo's refugees in the European Union. Pinter, London
Van Selm J (2005) The Hague Programme reflects new European realities. MPI Migrations Information Source
Van Selm-Thorburn J (1998) Refugee protection in Europe. Lessons of 1998 Yugoslavian crisis. Martinus Nijhoff, The Hague

Chapter 7
Role of Non-traditional Donors in Humanitarian Action: How Much Can They Achieve?

Katarzyna Kot-Majewska

7.1 Introduction

The global architecture of international humanitarian assistance has been for years dominated by a specific group of donor countries, who started to build up their national aid systems back in the 1950s and 1960s. These highly developed economies, members of the Development Assistance Committee of the Organisation for Economic Co-operation and Development (DAC OECD), associated predominantly with the concepts of 'the First World' or 'the West' is referred to as 'traditional donors'.

However, since the beginning of the 1990s, following the globalisation of international relations and gradual shifting of wealth to emerging economies, new actors have appeared to play an increasingly important role at the scene of humanitarian donor community and to influence the established ways of the provision of humanitarian aid.[1] The first remark that needs to be made about this group of humanitarian donors is that it is highly diverse in terms of geographical location, cultural and religious background, economic and political power and volume of budgets, which they are able to allocate to humanitarian assistance. Some of them have been donors for a long time, with far larger funds dedicated to foreign aid than certain DAC countries. Some have ceased to receive Official Development Assistance (ODA) in recent decades (like Poland), whereas some continue to be

Opinions expressed in this paper are individual opinions of the author.

[1] Kristalina Georgieva: "The world is changing at a pace and a magnitude that we can hardly grasp and all this affects the scale and nature of the humanitarian challenges we face nowadays." in: ICRC (2011): *Discussion: what are the future challenges for humanitarian action.*

K. Kot-Majewska (✉)
Office of the United Nations High Commissioner for Refugees in Juba, Juba, South Sudan

Formerly Polish Ministry of Foreign Affairs, Warsaw, Poland
e-mail: kaskot@gmail.com

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_7

ODA-eligible while at the same time acting more and more frequently as donors, often using their own experience in internal disaster response. It includes the BRICS[2] countries, new EU member states (so called "EU-13"),[3] Turkey, selected Arab states as well as some of the countries in the Caucasus and Central Asia like Kazakhstan or Azerbaijan.

The variety among these donors is, in fact, reflected in a number of different terms attached to them like "non-DAC donors", "non-traditional donors", "non-Western", "new" or "emerging donors". For the purpose of this article we will use these labels interchangeably, however it should be noted that none of them seems to be fully accurate or accepted by all representatives of the group. Poland and other post-communist countries of Central Europe would probably not be satisfied with the title "non-Western donors" due to their Western-oriented political aspirations. For some, which like for example Czech Republic[4] have recently acceded to the DAC OECD, the term "non-DAC donors" will not be ideal. Other countries with a long history of aid donorship like the Gulf States (Cotterrell and Harmer 2005a, p. 7), could easily oppose to such labels as "new", "emerging" or "non-traditional". It is also worth pointing out that the above-mentioned terms were actually coined by the "traditional club" of donors, at the key humanitarian and development policy fora, to which very few "non-traditional" donors belong.[5]

One could ask why is it important to discuss the phenomenon of expanding humanitarian donorship, especially if 'new donors' share in the overall global Official Humanitarian Assistance is fairly limited. The debate is however meaningful as it has a direct bearing on the coordination of the present plethora of humanitarian actors, both at the policy level and operational level in the field. Misunderstanding of each other's values or intentions while engaging in humanitarian action can lead to duplications, gaps or inefficiencies in response, which in turn create risks for the perception of humanitarian actors and their principled approach, not to mention negative consequences for the beneficiaries. Furthermore, better comprehension of "new" donors' agendas seems of particular relevance in connection with other parallel processes influencing humanitarian system nowadays, i.e. reduction of aid budgets by some 'Western' donors due to the global economic downturn of the early 21st century, interaction between counter-terror and aid interests as well as the UN integration and its impact on humanitarian space.

[2] Brazil, Russia, India, China, and South Africa.

[3] EU-12 recognition as 'non-traditional' donors is not universal (e.g. in GPPi (expand acronym and reference) they are not qualified as "non-traditional donors"). For the purpose of this article, the assumption is made that EU-12 member states are still considered as "emerging donors".

[4] The Czech Republic became the 26th DAC member state in May 2013.

[5] Although referred to in some publications about "new donors", in this article South Korea has not been qualified as one due to its more than 3-year DAC OECD membership and extended participation in the multilateral humanitarian system.

Much has already been written about the emergence of new donors, from the Overseas Development Institute Humanitarian Policy Group (ODI HPG) series entitled *Diversity in donorship* (Cotterrell and Harmer 2005b) issued in 2005 and later, to more recent studies, including Development Initiatives' work (e.g. the report *Non-DAC donors and humanitarian aid* (Smith 2011)), Global Public Policy Institute's research summarised in the paper *Humanitarian Assistance: Truly Universal. A Mapping Study of Non-Western Donors* (Binder et al. 2010) or report of the Centre for Strategic and International Studies entitled *Emerging Powers. Emerging Donors* (White 2011). Whereas the primary work on "new" humanitarian donors was mostly based on review of primary sources or existing studies and complemented by interviews with government officials or representatives of international organisations, succeeding publications comprised additional analysis of quantitative data, particularly FTS[6] data on humanitarian funding, or even more advanced econometric methods to verify hypotheses concerning aid allocations of "new" donors (Fuchs and Klann 2012). Furthermore, thanks to the latest HPG ODI reports, the research on the changing landscape of humanitarian donorship was supplemented by two important aspects: field level analysis (Harmer and Martin 2010) and a historical approach (Davey 2012).

Moreover, it should be mentioned that research on "emerging" humanitarian donorship is only a part of wider academic efforts to describe, understand and explain the role of "emerging" foreign aid donors. However, as Fuchs and Klann suggest (Davey 2012, p. 2), it is the humanitarian response where the influence of these "emerging" donors is the most palpable due to the fact that the significant majority of countries provided at least some emergency assistance. The Haiti earthquake in 2010, to which over 100 states responded,[7] was by far the best example of donor proliferation and showed that humanitarian aid giving can be "a common pursuit" for all nations irrespective of their economic status (Harmer and Martin 2010, p. 1).

This article is by no means aimed at presenting the whole picture of changing humanitarian aid architecture. It rather intends to highlight selected findings of the above mentioned research and to add several new observations, notably referring to the international response to the Syrian crisis and other recent developments on the international humanitarian agenda. First, we will focus on the humanitarian policies and motives of "emerging" donors (Sect. 7.2). Later, we will look at the institutional set-up and financial allocations characteristic of their humanitarian aid systems (Sect. 7.3). In the concluding part, taking into account "emerging" donor features described in Sects. 7.2 and 7.3, we will attempt to answer the title question, "How much can new donors achieve?", by assessing opportunities and barriers to their enhanced engagement in humanitarian action. Since the voices coming from

[6] Financial Tracking System—global, real time database on humanitarian funding, managed by UN OCHA, http://fts.unocha.org.

[7] FTS data: http://fts.unocha.org/reports/daily/ocha_R10c_C91_Y2013_asof___1306182204.pdf, accessed 6 October 2014.

traditional donor fora have been prevalent in the current debate about new donors so far, the article is also expected to provide a perspective that originates from a non-traditional donor country's experience.

7.2 Policy Frameworks and Motives for Engagement

As much as the lack of a specific legal basis for humanitarian action is not rare in the donor world (Cotterrell and Harmer 2005c, p. 26), it is quite common that the well-established aid givers define the objectives of their humanitarian action and commit themselves to the four fundamental humanitarian principles of humanity, impartiality, neutrality and independence. Their strategic or planning documents often indicate thematic or geographical priority areas. The very first trend observed in case of "new" donors is that they are active in the provision of humanitarian assistance, however many of them do not possess specific policy frameworks devoted to their understanding of humanitarianism, its principles and priorities. Out of the studied examples only the Czech Republic published two planning documents related specifically to humanitarian aid (Ministry of Foreign Affairs of the Czech Republic), whereas in some cases (e.g. Poland, Hungary) chapters on humanitarian action would be included in the wider development cooperation strategy. According to the available studies, in other "emerging" donor countries humanitarian assistance does not appear to be defined in strategic policy documents. Only a limited number of "new" donors, namely EU-13 donors, Brazil and Mexico, committed themselves to the internationally recognised definition of humanitarian action enshrined in the Good Humanitarian Donorship Principles. This might stem from the will to maintain high flexibility of emergency response, the limited importance attached to humanitarian action within the whole foreign affairs system or simply concentration on operational aspects of humanitarian action instead of its policy dimension.

Due to the lack of policy frameworks, learning about "emerging" donors' understanding of humanitarianism can be quite challenging and requires more complex studies involving interview methods as well as field level analysis. Nevertheless, the researchers have so far presented several examples of how "non-traditional" donor countries perceive humanitarian aid and, to a significant extent, their approach seems to be different in comparison to "Western" donors. First of all, many "emerging" donors tend to understand their engagement in humanitarian action through the prism of their religious orientation, e.g. through the tradition of Islamic principle of *zakat*, which requires all Muslims to share a part of their income with people in need and shapes the functioning of Islamic charity organisations. Another example is India, where the concept of *daan*, present in Hinduism, Buddhism and other *dharmic* religions, exerts influence on humanitarian giving (Meier and Murthy 2011, p. 7). In spite of the formal adherence to the "Western" definition of humanitarian aid (i.e. commitment to the European Consensus on Humanitarian Aid or Good Humanitarian Donorship principles) by Poland, the

distinction between humanitarian aid and support to Christian minorities worldwide might not always be clear to the wider public.

Besides religious interpretations mentioned above, a number of non-traditional donors view humanitarian action as an expression of solidarity, the maintenance of friendly relations or an element of South–South cooperation (Binder and Meier 2011, p. 1138), while putting an emphasis on priorities and sovereignty of affected states as well as avoiding donor-recipient hierarchy, which can be traced back to the Non-Alignment Movement (NAM) founded in the 1950s. Adherence to the rule of non-interference with other countries' domestic affairs could influence the "new" donors' understanding of humanitarian aid. They are often reluctant to fund protection operations (Binder and Meier 2011, p. 1138) and tend to reduce the concept of humanitarian action to short-term disaster response, while more political, long-term response to conflicts and protracted complex emergencies would remain out of scope of their humanitarian operations. India and China are "new" donors, for which disaster management aspects of humanitarian activities seem to be particularly strong (Meier and Murthy 2011, p. 6; Binder and Conrad 2009, p. 12), although in case of China this can be partly explained by the high profile of disaster management in domestic policy rather than its close relations to the NAM, to which China is only an observer country. In many "new" donors countries the distinction between humanitarian assistance and other types of foreign aid (e.g. peacekeeping operations, development assistance) is not entirely clear (Binder et al. 2010, p. 26).

What are the other rationales behind becoming a humanitarian donor? The factors underlying the decision to enter the humanitarian enterprise—as in the case of well-established donors' motivations—are a mixture of availability of resources (Cotterrell and Harmer 2005c, p. 12), genuine desire to help and a set of political, economic and security considerations. Used as a soft power instrument, humanitarian assistance can be seen by aspiring political powers such as India, Turkey or the Gulf States as an expression of their leadership or significance regionally and even globally. It can well be interpreted as a way to build a secure regional environment by peaceful means. Strengthening involvement in humanitarian action might also be a method of manifesting a country's adherence to a particular governmental organisation and its values—this is a factor that could have influenced EU-13 member states to increase their humanitarian funding. In other instances, getting involved in humanitarian response would be perceived as an opportunity to promote "new" donor's expertise and technology transfer in a particular field. China, for example, is a country with a history of multiple types of disaster, where disaster management plays an important role domestically. This background is thus conducive to Chinese participation in the international fora on disaster risk reduction or International Search and Rescue Advisory Group (INSARAG) (Binder et al. 2010, p. 13; Binder and Conrad 2009, p. 12). Last but not least, like in traditional donor countries, domestic politics and media have a bearing on humanitarian decision-making, which can translate the flow of aid from Gulf states' to disaster-prone countries such as Bangladesh, Pakistan or the Philippines, from which many of their migrant populations originate (Binder and Meier 2011, p. 1142).

It is also apparent that some "non-traditional" donors attach importance to the military and political approach to humanitarian assistance, as opposed to the "Western" vision encompassed in the Good Humanitarian Donorship Principles or Oslo Guidelines and MCDA Guidelines (Guidelines on the Use of Military and Civil Defense Assets to Support United Nations Humanitarian Activities in Complex Emergencies 2003). India's government relies to a great extent on its army while providing humanitarian relief domestically and abroad (Meier and Murthy 2011, p. 13). Qatar, Turkey and the Dominican Republic endorsed the so called HOPEFOR Initiative aimed at promotion of use of military and civil defense assets in disaster response, which many traditional donors have seen as a risk for civilian-led humanitarian efforts. Turkey's "aid package" for Somalia in response to the 2011 famine included not only life-saving humanitarian assistance but also parallel development of closer political, business and academic relations (Özerdem 2013). Fuchs and Klann found in their research that "new" donors' emergency aid is more politically motivated than that of "traditional" donors, though both groups provide humanitarian assistance on the basis of a certain balance of needs-approach and self-interest (Fuchs and Klann 2012, pp. 1 and 29).

"Emerging" donors' preference for bilateral engagement, described in more detail in part III, is also reflected at the policy level, as their dialogue with the chief humanitarian organisations at the Geneva, New York and Rome fora is often poorly institutionalised and restricted to the G77 engagement in ECOSOC or the General Assembly. It is frequently the case that "new" donors' Geneva- or New York-based diplomats responsible for humanitarian action deal with a much wider agenda including human rights or peace-building and rarely receive instructions from the capital pertaining to solely humanitarian issues (Binder et al. 2010, p. 25). This way, their involvement in the international humanitarian debate driven by well-prepared humanitarian diplomats from "the West" is rather scarce or limited to several points of friction between the G77 plus China and the EU plus other representatives of the "Western world".

Whereas "new" donors' presence at the well-established UN donor policy debates might be considered inadequate, their rising engagement in alternative coordination fora should not be forgotten. It can be observed that more and more often regional organisations such as the Association of Southeast Asian Nations (ASEAN), the Organisation of Islamic Conference (OIC), the League of Arab States (LAS), and the African Union or the Economic Community of West African States (ECOWAS) become active players in international humanitarian response. To give two examples, OIC's involvement was instrumental in response to the Somalia famine in 2011, whereas the series of Syria Humanitarian Forum in 2012 and 2013, chaired by OCHA, were co-facilitated by OIC, LAS and ECHO (IASC 2013).

7.3 Institutional Set-Up and Aid Allocations

There are two more factors lying behind the difficulty in learning more about "new" donors' engagement in international humanitarian action. The first one is linked to the complex and unclear humanitarian aid management structures in many of these states. Whereas in well-established donor countries and non-DAC EU donor countries the leading, coordinating role of the Ministry of Foreign Affairs in the provision of humanitarian assistance and formulation of humanitarian policy is quite evident, in "new" donor countries many ministries or national agencies are involved in the process of aid decision-making and their actions are not necessarily coordinated. With the exception of Russia, where humanitarian aid is managed by the EMERCOM (*Agency for the Support and Coordination of Russian Participation in International Humanitarian Operations*) and Brazil (Binder et al. 2010, pp. 12 and 17), where Ministry of Foreign Affairs coordinates humanitarian contributions from other ministries, management structures, decision-making and coordination processes seem to be not sufficiently understood in all "non-traditional" donor countries analysed in the GPPi paper series, i.e. in China (Binder et al. 2010, p. 14), India (Meier and Murthy 2011, pp. 9–15), Saudi Arabia (Al-Yahya and Fustier 2011, pp. 11–13), South Africa (Binder et al. 2010, p. 20), Turkey (Binder et al. 2010, p. 21) and UAE (Binder et al. 2010, p. 23). What is more, fragmentation of the humanitarian aid system in the majority of these countries is widespread, with Saudi Arabia featuring as a powerful "new" donor with an extremely complex and fragmented scene of humanitarian actors (Al-Yahya and Fustier 2011, pp. 11–13).

The second factor complicating the understanding of the broader picture of "new" donors' humanitarian action is the incomplete reporting of their humanitarian funding to the Financial Tracking Service (FTS) managed by UN OCHA. It is true that several non-DAC donors (Kuwait, Saudi Arabia, UAE) have been sending information on their aid flows to the OECD DAC since the 1970s, however the majority started to do so only in the 1990s and 2000s (Al-Yahya and Fustier 2011, pp. 11–13). The UAE constitutes quite an outstanding example of aid transparency among "emerging" donor countries. Not only did the UAE's authorities establish the Office for the Coordination of Foreign Aid in 2008, with its major task of collecting and reporting aid flows, but it also became a first non-DAC donor to report the data in the OECD Creditor Reporting System (CRS) format. Russia is the first BRICS country to report its data on ODA to the OECD Development Assistance Committee for 2010 and 2011 flows (DAC OECD Statistics). FTS is much more popular within the remaining BRICS. The EU-13 countries' humanitarian aid transparency standards were significantly ameliorated thanks to their reporting to the EU on-line humanitarian aid database, 14 points, and later EDRIS, from which the data is automatically transmitted to the FTS.

Despite the above mentioned efforts, the OECD and UN statistics do not present a complete picture of "new" donors' engagement in international humanitarian response. This stems from the irregular reporting pattern as well as discrepancies in

the criteria, definitions and timeframes of information supplied to the aid databases. It is also probable, as Smith suggests (Smith 2011, p. 20), that the "real" figures of humanitarian aid flows of "new" donors are higher than the ones reported in the FTS, which stands in contradiction to the value attached by them to the visibility of foreign aid initiatives.

Looking at the geographical distribution of "emerging" donors' humanitarian spending referred to in the studied literature, two major trends are highlighted. Firstly, "non-traditional donors" tend to concentrate their humanitarian resources on a limited number of crises, in particular those located in their region or area of influence (Harmer and Martin 2010, p. 19) as well as high-profile emergencies with extensive media coverage like the Syria crisis, the Pakistan floods or the Haiti earthquake in recent years. At the same time, a gradual departure from the pure humanitarian "neighbourhood policy" towards engagement with a growing number of recipient countries is discernible (Cotterrell and Harmer 2005c, p. 5). The first trend can be observed in Fig. 7.1, in particular in case of Russian allocations to Central Asia and the Democratic People's Republic of Korea (DPRK) in 2012 or the Turkish, Saudi Arabian and UAE's responses to crises taking place in the Muslim world (Somalia, Yemen, Afghanistan, Mali, oPT) or political hotspots (Myanmar and Syria in 2012, Syria and Mali in 2013). None of the "emerging" donor countries presented in Fig. 7.1 has South Sudan or the Democratic Republic of the Congo (DRC), as appeared in 2012 or 2013 among the three priority geographical directions of humanitarian aid flows, whereas these two states rank as top recipients of the major, well-established donors such as ECHO, Sweden, United Kingdom or United States. "New" donors' inclination for visible involvement in large-scale, media-covered emergencies could be best observed in 2010, in which in all top five non-DAC donors (Saudi Arabia, Turkey, China, Russia and UAE) had Haiti and Pakistan among their top three recipient countries (Smith 2011, p. 17).

Analysis of "non-traditional" donors humanitarian flows in a longer time perspective, as undertaken by Development Initiatives (Smith 2011, p. 18), indicates that several countries have a stable position among top recipients of "new" donors' humanitarian aid, however the majority of recipients appear only once or twice in these statistics, which further compounds the irregular pattern of their decision-making. One of the explanations can be that "new" donors predominantly respond to arising or aggravating crisis situations, notably natural disasters, less frequently focusing on protracted crisis, which require multi-year donor engagement. Although the "traditional" and "non-traditional" donors' choices of key recipients of humanitarian aid do not seem to converge, it can be noticed in Fig. 7.1 that in 2012 and 2013 the Syria crisis appears to be of particular interest for many representatives of both donors groups.

It can be also noted that United Nations funding priorities, formulated by means of Consolidated Appeals (CAP), are not necessarily indicative for "emerging" donors' decision making processes, as they tend to provide the bulk of their assistance to recipient countries not covered by the CAP (e.g. Russia's funding to Central Asia or South Africa's funding to Cameroon).

BRAZIL		CHINA		CZECH REPUBLIC		INDIA		POLAND	
2012	2013	2012	2013	2012	2013	2012	2013	2012	2013
Somalia	Ethiopia	Zimbabwe	Syria crisis	Syria crisis	Syria crisis	Yemen	Yemen	Syria crisis	Syria crisis
Niger	*no data*	Syria crisis	*no data*	DRC	Myanmar	Syria crisis	Syria crisis	Afghanistan	Mali
Kenya	*no data*	Lesotho	*no data*	oPT	South Sudan	*no data*	*no data*	oPT	*no data*
RUSSIA		SAUDI ARABIA		SOUTH AFRICA		TURKEY		UAE	
2012	2013	2012	2013	2012	2013	2012	2013	2012	2013
Tajikistan	Syria crisis	Syria crisis	Syria crisis	Cameroon	Haiti	oPT	Syria crisis	Syria crisis	Syria crisis
Kirgizstan	oPT	Somalia	Mali	Somalia	*no data*	Somalia	*no data*	Yemen	Yemen
DPRK/Syria	DPRK	Myanmar	Somalia	DPRK	*no data*	no data	*no data*	Somalia	Afghanistan
ECHO		FRANCE		SWEDEN		UNITED KINGDOM		UNITED STATES	
2012	2013	2012	2013	2012	2013	2012	2013	2012	2013
South Sudan	Syria crisis	Syria crisis	Syria crisis	South Sudan	South Sudan	South Sudan	Syria crisis	Ethiopia	Syria crisis
Syria crisis	DRC	Niger	Mali	DRC	DRC	Syria crisis	South Sudan	Sudan	Sudan
Somalia	South Sudan	oPT	oPT	Somalia	Somalia	DRC	DRC	South Sudan	South Sudan

Fig. 7.1 The top three humanitarian aid recipients of selected "non-traditional" and "traditional" donors in 2012 and 2013. *Source*: Financial Tracking Service, 30.06.2013, *No data*—when less than three recipient countries indicated in FTS. *oPT* occupied Palestinian Territories

The last remark has much to do with another trend of "new" donors' allocations linked to the channels and modalities of aid. In many of the studied articles it is observed that, with the exception of EU-13 donors, who provide a large portion of their aid through contribution to the EU budget or contributions to the UN agencies, and South Africa, "new" donors generally have a preference for bilateral channels using government-to-government and in-kind aid approaches. The reasons cited in the literature are multifold—e.g. higher visibility of bilateral cooperation, strengthening friendly relations with an affected country through humanitarian assistance or insufficient understanding of multilateral funding instruments.

Working with NGOs and the Red Cross and Red Crescent Movements is very much dependent on a particular "non-traditional" donor country humanitarian aid system. There are examples of exclusion of these partners from humanitarian funding abroad like in India (Meier and Murthy 2011, p. 14). Apart from support through multilateral channels, Czech Republic, Poland and Turkey rely to a significant extent on non-governmental organisations operating in crisis-affected regions and obtaining government funding (e.g. Czech People in Need, Polish Humanitarian Action or Turkish IHH Humanitarian Relief Foundation). Furthermore, it is characteristic of Gulf States and Turkey to provide resources to the plethora of Islamic charity organisations, whose achievements and methods of work are mostly unfamiliar to Western actors. Saudi Arabia provides large amounts of funding to the national Red Crescent Society and is capable of mobilising outstanding funds from private sources in Public Campaigns (Al-Yahya and Fustier 2011, pp. 13 and 14).

It is hard to deny that the "new" donors' preference for bilateral channels is being gradually balanced by the increased involvement of some of them in the multilateral humanitarian system. The UAE seem to be the most prominent example of profound engagement in not only bilateral but also multilateral humanitarian action, both at field and policy level. It is one of very few non-DAC donors present in the donor support mechanisms, i.e. one of three non-DAC donors (along with Russia and Poland) participating in the OCHA Donor Support Group and the only one in the UNHCR Donor Support Group. It organised a series of high-level humanitarian conferences called the Dubai International Humanitarian Aid & Development Conference & Exhibition (DIHAD).

Another example of "non-traditional" donors' engagement with multilateral humanitarian aid system is presented by Kuwait, which hosted—in cooperation with the United Nations—the International High-Level Humanitarian Pledging Conference for Syria on 30 January 2013. During the conference, Amir of Kuwait, His Highness Sheikh Sabah Al-Ahmed Al-Jaber Al-Sabah announced Kuwait's pledge of US$300 million, which has been duly committed through multilateral channels (including over 90 % of this sum to UNHCR, UNICEF, WFP, WHO, ICRC, UNRWA and Syria Emergency Response Fund managed by OCHA), making Kuwait the sixth largest humanitarian donor in the first half of 2013 and the largest non-DAC donor within the same period (OCHA Summary Report).

To some "emerging" donors providing humanitarian aid through UN pooled funds appears to be useful way of responding to an emergency, when they do not possess in-depth knowledge, close relations or diplomatic representation in an affected state. It can also be helpful in avoiding administrative burden connected to the bilateral projects. These might be the reasons for the *Haiti Emergency Response Fund* being so popular with non-traditional donors in 2010, when such countries as Saudi Arabia, Brazil, Nigeria, Equatorial Guinea, Gabon, Tunisia, and the Republic of Congo featured among the top donors to the pooled fund.

The trend of growing recognition of multilateralism is taking place not only because some "emerging" donors see it as advantageous, but also because of systematic and increasing outreach efforts by international humanitarian agencies as well as established donors to build partnerships with their aspiring counterparts. Endeavours to involve "new" donors include both fundraising by UN agencies and high-level collaboration and policy dialogue. Promotion of international financing mechanisms, such as OCHA-managed pooled funds, has been one of the outreach strategies (Harmer and Martin 2010, p. 9). In particular, the success of the Central Emergency Response Fund (CERF) established by OCHA in 2006 is worth highlighting, as it received support from an exceptionally numerous group of 126 UN Member States. Other attempts to broaden the donor base comprise the creation of liaison offices (e.g. OCHA Gulf liaison office in Abu Dhabi), the organisation of "partnership seminars" (e.g. UN OCHA outreach meeting in Warsaw in 2010), and giving more visibility to "new" donors' contributions or adjusting geographical representation of the staff.

"Emerging" donors tend to have preferences or prejudices against selected humanitarian organisations, which is not unusual among well-established donor governments either. WFP has succeeded in establishing a very good partnership with Brazil, a "new" donor specialising in food assistance, bringing about a tangible result in the form of *The WFP Center of Excellence against Hunger* opened in Brasilia in 2011 with a view to leveraging WFP and Brazilian expertise in combating malnutrition. Russia is the largest non-DAC supporter of OCHA's work from 2010 to 2012 and a member of the OCHA Donor Support Group (OCHA). On the other hand, in 2010 India was revealing a somewhat sceptical approach towards OCHA (Meier and Murthy 2011, p. 27).

Despite notable examples of "emerging" donors' engagement in the multilateral channels described above, it is evident that gaps in partnership strategies and buy-in of the multilateral system among emerging donors such as China or India still exist, showing why better understanding and mutual dialogue is needed between the "non-traditional" and "traditional" donor world.

7.4 Conclusions: Barriers and Opportunities for Future Engagement

Having analysed different characteristics of non-traditional donors—their policy frameworks, motivations, institutional set-ups and aid allocations—we are now better prepared to address the title question "How much can they achieve?" The question seems vital for "new" donors themselves, just like it is important for a decision-maker, when entering a new business, to know the risks and what is at stake.

It is to be admitted that much more complex research should be conducted in order to answer this question with the selection of criteria of achievement and varied perspectives and including the field perspective to capture "new" donors' impact on delivery of aid to beneficiaries. Nonetheless, based on the analysis in Sects. 7.2 and 7.3, we will attempt to indicate major opportunities and barriers, which can determine the level of achievement of "non-traditional" donors in the international humanitarian system.

Firstly, it should be noted that the increasing humanitarian support from "new" donors has come just in time to complement the limited funding capacity of "traditional donors" suffering the consequences of global economic downturn during the early 21st century. Hence, "emerging" donors can potentially fill the looming funding gap and contribute to maintaining or improving coverage of humanitarian needs.

Secondly, it is evident that "non-traditional" donors can play a role in selected humanitarian crises, where "Western" actors have limited access. In such complex emergencies as Somalia, where humanitarian space is dramatically shrinking and UN actors are under constant pressure, the presence of "non-Western" donors may be more willingly accepted as is the case with Turkish involvement in that country. Similar observations could be made about the protracted crisis in Darfur or cyclone Nargis back in 2008.

"Emerging" donors can also be of importance in responding to crisis situations or in building disaster preparedness in the regions unpopular with the largest "Western" humanitarian donor countries. Russia's support to Central Asia can be given an example in this respect.

Despite the evident opportunities for further "new" donor involvement in the international humanitarian aid system, certain barriers persist. First and foremost, the largest barriers to "non-traditional" donors lie in the system itself. With over 150 years of history, the humanitarian system seems to be utterly congested, which impacts on coordination and effectiveness of assistance to people in need. The emergence of a plethora of new actors from "new" donor countries seems to intensify this phenomenon.

Furthermore, the humanitarian system is monopolised by "Western" donors on many levels and like in the economic theory of monopoly, there are considerable barriers to entry for new-comers. In spite of the undeniable higher profile of "emerging" donors in the international humanitarian system, a significant

imbalance in their representation in crucial governance mechanisms and humanitarian policy debate fora is a fact. A number of CAP projects implemented by actors originating from non-DAC countries is much lower than that of UN agencies or "Western"-based NGOs. There are only a few EU-13 based NGOs that have qualified to sign a Framework Partnership Agreement with DG ECHO, let alone NGOs based away from the EU member states that are not eligible for the granting process (ECHO Framework Partnerships Agreements).

However, it should be underlined that these are not only the inherent features of "Westernised" humanitarian system that prevent "new" donors from better inclusion. Many of their characteristics described in Sects. 7.2 and 7.3 of the article act as impediments to further involvement in multilateral emergency response or reduce their capacity to obtain funding from UN or "Western" donors' resources. Such hindrances as unclear policy frameworks, negligence of policy aspects of humanitarian assistance, a low level of institutionalisation of "new" donors' national aid systems and last but not least shortage of professional humanitarian staff, if not addressed, can slow down the "non-traditional" donors' march into the international humanitarian aid system and produce an alternative system with very few points in common with the previous one.

In order to avoid further fragmentation and divide of the humanitarian scene, greater openness, mutual respect and knowledge about each other is needed on both sides. The rhetoric of "impeccable" performance of "non-Western" donors, which can have an intimidating effect on "new donors" or be perceived as paternalistic, should rather be replaced by frank sharing of experiences and lessons learnt. On the other hand, "new" donors could make more effort to formulate their humanitarian policy with a view to determining what their approach to humanitarianism is, as well as to start influencing the international humanitarian system to a higher degree.

There are more and more crises, during which close interaction of "traditional" and "non-traditional" donors is inevitable, both at the field and policy level. Politically visible crises mobilise high-level attention and create a window of opportunity for strengthened dialogue and concrete actions to improve donor coordination just like the lessons learnt from the 2011 Horn of Africa crisis contributed to reinforcing collaboration between OCHA and OIC.

While looking for common approaches to humanitarian aid, two important notions should be taken into account at all times. First: since both groups of "traditional" and "non-traditional" donors are highly diversified, there is no "one fits all" solution and each partnership requires dedicated preparatory actions and unique methods of implementation. Second: in spite of evident risks of normative clashes, special care should be taken in order not to compromise the fundamental humanitarian principles.

References

Al-Yahya K, Fustier N (2011) Saudi Arabia as a humanitarian donor: high potential, little institutionalization. GPPi Research Paper 14

Binder A, Conrad B (2009) China's potential role in humanitarian assistance. GPPi

Binder A, Meier C (2011) Opportunity knocks: why non-Western donors enter humanitarianism and how to make the best of it. Int Rev Red Cross 93(884)

Binder A, Meier C, Steets J (2010) Humanitarian assistance: truly universal? A mapping study of non-Western donors. GPPi Research Paper 12

Cotterrell L, Harmer A (2005a) Diversity in donorship: the changing landscape of official humanitarian aid. Aid donorship in the Gulf States. HPG ODI, London

Cotterrell L, Harmer A (2005b) Diversity in donorship: the changing landscape of official humanitarian aid. Aid donorship in Asia. HPG ODI, London

Cotterrell L, Harmer A (2005c) Diversity in donorship: the changing landscape of official humanitarian aid. HPG ODI, London

DAC OECD Statistics. http://www.oecd.org/dac/stats/statisticsonresourceflowstodevelopingcountries.htm. Accessed 23 Mar 2013

Davey E (2012) New players through old lenses. Why history matters in engaging with southern actors. HPG ODI Policy Brief 48

ECHO Framework Partnerships Agreements. http://europa.eu/legislation_summaries/humanitarian_aid/r10007_en.htm. Accessed 30 June 2013

Financial Tracking Service (FTS). http://fts.unocha.org/

Fuchs A, Klann NH (2012) Emergency Aid 2.0 (work in progress). https://www.princeton.edu/politics/about/file-repository/public/FUCHS-KLANN-Emergency-Aid.pdf. Accessed 6 May 2013

Guidelines on the Use of Military and Civil Defense Assets to Support United Nations Humanitarian Activities in Complex Emergencies (2003)

Harmer A, Martin E (2010) Diversity in donorship: field lessons. HPG ODI Report 30

IASC (2013) http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-calendar-calendardetails&meetID=2236. Accessed 4 May 2013

ICRC (2011) Discussion: what are the future challenges for humanitarian action. Int Rev Red Cross 93(884,991):13

Meier C, Murthy CSR (2011) India's growing involvement in humanitarian assistance. GPPi Research Paper 13

OCHA Summary Report from the Kuwait Pledging Conference for Syria. http://www.unocha.org/syria-humanitarian-pledging-conference. Accessed 7 May 2013

OECD (2012) Moving towards accession to the DAC. Report on a workshop hosted by The Ministry of Foreign and European Affairs of the Slovak Republic, Bratislava

Özerdem A (2013) How Turkey is emerging as a development partner in Africa. The Guardian. http://www.guardian.co.uk/global-development-professionals-network/2013/apr/10/turkey-development-partner-africa. Accessed 10 Apr 2013

Smith K (2011) Non-DAC donors and humanitarian aid. Shifting structure, changing trends. Development Initiatives Briefing Paper

White S (2011) Emerging powers, emerging donors. Teasing out developing patterns. Center for Strategic and International Studies

Chapter 8
The Legal Framework of Humanitarian Action

Heike Spieker

8.1 Introductory Remarks

8.1.1 Mandatory Legal Regulation

In addition to the differing domestic legal regimes international law also provides a legal regime for humanitarian action. The international community has adopted a set of rights and duties, guarantees, warrants and obligations in particular in the area of humanitarian assistance. States have adopted such regulation both directly and specifically as well as indirectly in a broader sense. By way of example, in the case of providing humanitarian assistance in the situation of an international armed conflict "[t]he Parties to the conflict shall protect relief consignments and facilitate their rapid distribution" (Article 70 para. 4 Additional Protocol I—AP I[1]). In a broader sense, however, the prohibition to make the civilian population as such, as well as individual civilians, the object of attack in an armed conflict[2] is an integral part of the legal framework of humanitarian assistance. Relief workers or

[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; 1125 U.N.T.S. 3; entry into force 7 December 1978.

[2] Article 51 para. 2 AP I: "The civilian population as such, as well as individual civilians, shall not bet he object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

H. Spieker (✉)
Centre for Humanitarian Action, School of Agriculture and Food Science, University College Dublin, Dublin, Ireland

International Services/National Relief Division, German Red Cross - Headquarters, Berlin, Germany
e-mail: Spiekerh@drk.de

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_8

journalists reporting from an area of armed conflict are civilians under international humanitarian law and enjoy protection as civilian persons in armed conflict.

8.1.1.1 International Legal Personality

Norms of international law evolve from two major[3] sources: international treaties and international customary law. In contrast to domestic law, international law does not originate from any form of hierarchically superior sovereign or law-maker. International law is created by those whose behaviour is to be regulated by the law, i.e. States. States create their own law; only those rules which are created by States themselves for themselves are legally binding.

International legal personalities in the humanitarian field form three main traditional groupings. Firstly, States are the only full-fledged subjects of international law (Crawford 2011). They are able to regulate the whole range of their rights and obligations under international law. Statehood criteria as crystallised into customary law are a permanent population; a defined territory; and government together with the capacity to enter into relations with the other States (Crawford 1976, pp. 93–182).[4] International legal personality addresses the capacity to possess rights and obligations which directly result from international law and are not mediated through a domestic legal system (Walter 2007). Secondly, there are inter-governmental entities or international organisations like the United Nations, the Organization of American States or the African Union that do not have a fully-fledged legal personality, but a partial one (Schmalenbach 2006). A third group is formed by so-called atypical or traditional subjects of international law (Walter 2007, MN 7), consisting of the Holy See, the Sovereign Order of Malta and the International Committee of the Red Cross (ICRC). These three atypical subjects of international law are neither States nor international organisations; historically, the international community has equipped them with partial legal personality in terms of limited international rights and obligations. The Holy See, for instance, avails itself of the right to exchange diplomatic personnel—"papal nuncio"—with States, whereas the ICRC has the right to visit prisoners of war and civilian internees according to the Third and Fourth Geneva Conventions of 1949.

Beyond these three traditional subjects of law both the international community of States and academia discuss a limited legal personality of third institutions or

[3] Article 38 para. 1 of the Statute of the International Court of Justice lists the following sources of international law: a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognised by civilized nations; and d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law; http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0, accessed 23 June 2013.

[4] http://www.britannica.com/EBchecked/topic/291011/international-law/233502/Other-sources#toc233505, accessed 6 October 2014.

individuals. This grouping includes a range of stakeholders including: indigenous peoples, insurgents, movements of national liberation, multinational enterprises or individuals (Walter 2007, MN 8–20). The entitlements and obligations of this diverse grouping are the subject of many questions, discussions and debates. Examples of these include whether individuals are actual holders of entitlements under international human rights law or are they able to file a lawsuit on the one hand or whether non-State armed groups like the Taliban or Al Qaeda are bound by international (humanitarian) law. The issues of international rights and duties of private military or security companies or of an international legal right of actors in humanitarian assistance to access to suffering civilian population in a humanitarian situation are further examples. Some clarity has emerged on these issues since the establishment of international criminal law and the institution of international criminal courts from 1993. It is now recognised that individuals do have obligations in terms of crimes against humanity or war crimes. These obligations are derived directly from international law and not imparted by domestic legal systems. In other words, at least in this partial respect, individuals avail themselves of international legal obligations.

8.1.1.2 Sources of International Law

The subjects of international law—generally States—create international law, in particular through concluding international treaties and/or developing international customary law. An *international treaty* is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation", Article 2 para. 1 lit. a VCLT (Vienna Convention on the Law of Treaties). Regardless of a number of specificities, international treaties have similar effects to contracts in many domestic legal systems, namely: parties concluding a treaty are bound by it and its content. In case of an understanding of provisions differing between the treaty parties, provisions are to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, Article 31 para. 1 of the Vienna Convention on the Law of Treaties (VCLT). Supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion, Article 32 VCLT. In result, an international treaty is binding only on those States/subjects of international law which have concluded the treaty and have become parties to them.

In contrast to quite a number of domestic legal systems, *international customary law* is one of the two main sources of international law. It possesses the same legally binding force as treaty law and there is no hierarchy between norms of either source.[5] International custom is evidence of a general practice accepted as law,

[5] See Article 38 para. 1 Statute of the International Court of Justice—ICJ, 1945; http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0, accessed 1 July 2013.

Article 38 para. 1 lit. b ICJ Statute, thus consisting of an objective and a subjective element. First and objectively, the requirement of certain behaviours is to be part of a "general practice" of States and, second and subjectively, has to be "accepted [by States] as law". This second element determines whether a State accepts a behavioural requirement as legally binding—so-called *opinio iuris*—or whether it abides by it out of considerations of courtesy, practicability, pragmatisms or "political correctness" without feeling legally bound. The first, objective, element of general practice may consist of either positive action or negative omission. A practice becomes general when it avails itself of a certain level of uniformity, has a certain amount of extension, and is shown to happen over a certain period of time.[6]

8.1.1.3 Humanitarian Assistance in Armed Conflict and Non-conflict Disasters

The legal regime of humanitarian assistance that emanates from international treaty and customary law differs in its provisions between situations of armed conflict and non-conflict situations. Furthermore, International law distinguishes strictly between humanitarian assistance in international or non-international armed conflicts and in natural or technological disasters. Notwithstanding questions as to whether or to what extent the sovereign equality of States influences and gives distinction to today's international law, providing humanitarian assistance on the territory of a foreign State invariably impacts the sovereign rights of the State on whose territory assistance is provided. Such provision—as a rule—is dependent on the agreement of the receiving State. This rule is being incorporated both in international treaty and customary law. In doing this, States have created different and distinct legal regimes for conflict and non-conflict situations. Interestingly, the legal regime for situations of armed conflicts is more detailed and more comprehensive than the regime for natural or technological disasters.

8.1.2 Non-legally Binding Rules and Commitments

In addition to legal norms there are *non-legally binding regulations and commitments* that contribute to forming the framework for the provision of humanitarian assistance. These non-binding rules and commitments aim to harmonise and standardise humanitarian assistance. The so-called '*principles of humanitarian assistance*' or 'humanitarian principles' are of specific relevance in this context. Humanity is the axiomatic principle, complemented by the principles of

[6] ICJ, North Sea Continental Shelf (Federal Republic of Germany/Netherlands); Proceedings joined with North Sea Continental Shelf (Federal Republic of Germany/Denmark) on 26 April 1968; paras. 60–82.

impartiality, neutrality and independence. As principles, they do not legally bind any actor in humanitarian assistance, but they have emanated from legally binding instruments or have been introduced into legally binding documents. In such cases the principles gain legally binding force through and in the form of the respective instrument, according to the document's scope of applicability and coverage. For example, the United Nations General Assembly Resolution 46/182 on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations[7] is not legally binding. However it contains in its annex "Guiding Principles" for UN humanitarian assistance they consider the implementation of the principles of "humanity", "neutrality" and "impartiality" as being mandatory.[8]

The so-called '*humanitarian space*' results from the respect of these principles by all actors concerned in humanitarian assistance. The more such respect is being challenged or principles are violated, the more fragile and restricted becomes the humanitarian space. It is this humanitarian space which enables relief workers to be granted access to an inadequately supplied civilian population and to deliver a needs-based assistance effectively and without being identified with political connotations. Enacting so-called 'humanitarian corridors' or 'humanitarian protection zones' with a view to enable a civilian population to leave one area and to reach another where they are able to access humanitarian assistance in an environment with minimum guarantees of safety and security for beneficiaries, organisations and relief workers, are examples of measures to secure humanitarian space (von Pilar 2005).[9]

The notion of a '*humanitarian imperative*' addresses the commitment of actors in humanitarian action to recognise the right of an inadequately supplied/resourced civilian population to receive assistance and to provide assistance on the basis of the principles of humanitarian assistance. The 1994 *Code of Conduct* for The International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief (IFRC) explicitly refers to such humanitarian imperative in the first principle of conduct: "The humanitarian imperative comes first". It describes the "right to receive humanitarian assistance, and to offer it" as a "fundamental humanitarian principle which should be enjoyed by all citizens of all countries. As members of the international community, we recognise our obligation to provide humanitarian assistance wherever it is needed." The legally non-binding Code of Conduct comprises nine additional principles of conduct which are designated to be accepted by all actors of humanitarian action actors. The Code is based

[7] A/RES/46/182 of 19 December 1991. http://www.un.org/documents/ga/res/46/a46r182.htm. Accessed 02 November 2012.

[8] A/RES/46/182: "2. Humanitarian Assistance must be provided in accordance with the principles of humanity, neutrality and impartiality."

[9] In a more comprehensive way "humanitarian space" means safeguarding unimpeded access to an inadequately supplied population, unimpeded evaluation of the actual needs of this population, an implementing actor's control of his programmes and projects, as well as independent analysis and assessment of the effects of programmes and projects.

on the principle of impartiality[10] and on the commitments not to use aid to further a particular political or religious standpoint and to endeavour not to act as instruments of government foreign policy, to respect culture and custom, and to attempt to build disaster response on local capacities, as well as the commitment to involve programme beneficiaries in the management of relief aid which strives to reduce future vulnerabilities to disaster and meeting basic needs, to be held accountable to both those sought to assist and to those from whom we accept resources are accepted, and finally to recognise disaster victims as dignified humans instead of hopeless objects in information, publicity and advertising activities. It is in this spirit that the Code describes how actors in humanitarian action should organise their relationships to donors,[11] Governments of States on whose territory assistance is being provided,[12] and International (Governmental) Organisations.[13]

The *Sphere* Project's[14] Humanitarian Charter and Minimum Standards in Humanitarian Response, the Principles and Good Practice of Humanitarian *Donorship*[15] and the *European Consensus* on Humanitarian Aid[16] are further eminent examples of different approaches to standardisation of the principles of humanitarian assistance and commitments of actors.

The *Sphere*[17] Project is designated to enhance quality control and accountability in the humanitarian system. The Humanitarian Charter is an integral part of this

[10] "Aid is given regardless of the race, creed or nationality of the recipients and without adverse distinction of any kind. Aid priorities are calculated on the basis of need alone."

[11] "1. Donor governments should recognise and respect the independent, humanitarian and impartial actions of Non-Governmental Humanitarian Agencies (NGHAs); 2. Donor governments should provide funding with a guarantee of operational independence; 3. Donor governments should use their good offices to assist NGHAs in obtaining access to disaster victims."

[12] "1. Governments should recognise and respect the independent, humanitarian and impartial actions of Non-Governmental Humanitarian Agencies (NGHAs); 2. Host governments should facilitate rapid access to victims for (NGHAs); 3. Governments should facilitate the timely flow of relief goods and information during disasters; 4. Governments should seek to provide a coordinated disaster information and planning service; 5. Disaster relief in the event of armed conflict."

[13] "1. Inter-Governmental Organisations (IGOs) should recognise Non-Governmental Humanitarian Agencies (NGHAs), local and foreign, as valuable partners; 2. IGOs should assist host governments in providing an overall coordinating framework for international and local disaster relief; 3. IGOs should extend security protection provided for UN organisations to NGHAs; 4. IGOs should provide NGHAs with the same access to relevant information as is granted to UN organisations."

[14] http://www.sphereproject.org/, accessed 20 October 2012.

[15] http://www.goodhumanitariandonorship.org/gns/principles-good-practice-ghd/overview.aspx. Accessed 29 October 2012.

[16] Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission (2008/C 25/01); http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:025:0001:0012:EN:PDF, accessed 27 July 2013.

[17] 'Sphere' was initiated in 1997 by a group of NGOs and the International Red Cross and Red Crescent Movement to develop a set of universal minimum standards in core areas of humanitarian response and first published in 2000, revised in 2003 and 2009–2010. The aim of the Handbook is

project. It contains the ethical-legal background of protection principles as well as core and minimum standards for the provision of humanitarian assistance. The Charter takes a rights-based approach in that it is based on the right to life with dignity and, therefore, a right to assistance, as well as the right to protection and security. It identifies the following protection principles: "All humanitarian agencies should ensure that their actions do not bring further harm to affected people (1); that their activities benefit in particular those who are most affected and vulnerable (2); that they contribute to protecting affected people from violence and other human rights abuses (3) and that they help affected people recover from abuses (4)". Core and minimum standards address quality and accountability in the areas of water supply, sanitation and hygiene promotion; food security and nutrition; shelter, settlement and non-food items; and health action. They do so with a view to increase capacity and active participation of those being affected by a disasters, to establish comprehensive analyses and a comprehensive understanding of needs and the context of the disaster, to ensure effective coordination among actors in humanitarian action, to strive for continued improvement of the provision of assistance, as well as to give adequate education and support to relief personnel.

The Principles and Good Practice of Humanitarian *Donorship* focus on donor institutions. In 2003, Governments of 16 donors as well as the European Commission, OECD, the International Red Cross and Red Crescent Movement, relief organisations and academia adopted a framework of 23 principles and examples of good practice for providing official humanitarian assistance and furthering enhanced accountability of donor institutions to recipients of assistance, implementing organisations and domestic constituencies. The Principles and Good Practice of Humanitarian Donorship explicitly reiterate the "humanitarian principles of humanity, (. . .); impartiality, (. . .); neutrality, (. . .); and independence, (. . .)" (Principle 2). On the basis of the "primary responsibility of States for the victims of humanitarian emergencies within their own borders" (Principle 5) the authors of the document commit, in particular, to the principles to strive to ensure flexible and timely funding on the basis of the collective obligation to meet humanitarian needs (Principle 5), to allocate humanitarian funding in proportion to needs and on the basis of needs assessment (Principle 6), to strive to ensure that funding in new crises does not adversely affect meeting the humanitarian needs in on-going crises (Principle 11), to request that humanitarian organisations fully adhere to good practice and to promoting accountability, efficiency and effectiveness in implementation (Principle 15), and to support learning and accountability initiatives for the effect and efficient implementation of humanitarian action (Principle 21).

On 18 December 2007, the Presidents of the European Commission, the European Parliament and the Council of the European Union on behalf of the 27 European Union Member States signed the *European Consensus* on Humanitarian Aid

---

to improve the quality of humanitarian response in situations of disaster and conflict, and to enhance the accountability of the humanitarian system to disaster-affected people.

as the first joint political statement of the EU on humanitarian aid. The Consensus aims to improve coordination within the EU, emphasises the aspect of responsible practice of donors, and at the same time highlights the various roles of different actors in humanitarian action. It reiterates that "the 'humanitarian space' that is needed to ensure access to vulnerable populations and the safety and security of humanitarian workers must be preserved as essential preconditions for the delivery of humanitarian aid" (para. 3). Member States, the European Commission, the European Parliament and Council affirm their commitment "to upholding and promoting the fundamental humanitarian principles of humanity, neutrality, impartiality and independence" in the context of "humanitarian aid" (para. 10) and is adamant that "EU humanitarian aid is not a crisis management tool" (para. 15). It is to be noted that this determination applies to humanitarian assistance; it does neither apply to development cooperation nor to EU civil protection which on the one hand explicitly is a political tool and on the other hand quite often is deployed in the same contexts and environments as humanitarian assistance.

8.2 The Legal Framework in Armed Conflicts

The legal regime of humanitarian assistance is not only different with regard to humanitarian assistance provision in armed conflict and in natural or technological disasters—it also differentiates between situations of international and non-international armed conflicts. The distinction is particularly evident from treaty law which provides for a rather modest degree of protection and detail in non-international armed conflicts compared to the regime for international ones.

The concept of protecting humanitarian assistance *operations* on the one hand and *personnel* on the other hand evolved following different avenues and different logics in international humanitarian law. Whereas the desire to protect relief personnel developed from the idea to equip certain civilian personnel designated to assist the regular medical service of armed forces with respect and protection,[18] the concept of a legal obligation to provide an inadequately supplied civilian population with humanitarian assistance results from the legal obligations of an occupying power. The occupation regime under international humanitarian law is based on the recognition of appropriateness that a State, when occupying another State and placing the latter's territory under its [legal] authority, does not only

[18] Geneva Convention (I)—GC I—for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Article 24: "Medical personnel exclusively engaged in the (...) treatment of the wounded or sick, (...) shall be respected and protected in all circumstances" and Article 26 para. 1: "The staff of National Red Cross Societies and that of other voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations."

receive additional powers, but is also faced with additional legal obligations. It is on this basis that the Geneva Conventions of 1949 prescribe these duties to encompass the obligation to ensure "the food and medical supplies of the population" (Article 55 para. 1 GC IV[19]). The text of GC IV—which is not only universally binding treaty law, but also customary law—qualifies this responsibility as a legal obligation incumbent on the occupying power and broadens it with the duty to agree to and to facilitate relief schemes by third actors in case it is not in a position to bring in the necessary supplies (Article 59 para. 1 GC IV).

The *exceptionality* of this regulation is underpinned by the fact that the prohibition of starvation of the civilian population has been introduced in treaty law only in 1977 (Article 54 Additional Protocol I—AP I[20]). So-called hunger blockades were not only common, but also not prohibited by treaty law. Whereas Article 11 of the Convention Relative to the Treatment of Prisoners of War of 1929 already contained a legal obligation of a detaining power to provide prisoners of war with food and water, the first protection for civilian persons was introduced by GC IV in 1949. The recognition of an occupying power's legal obligation to provide an inadequately supplied civilian population on occupied territory was complemented by AP I, recognising that humanitarian assistance was actually increasingly provided by non-governmental organisations and in situations of international armed conflict beyond and outside occupied territory. Article 70 AP I contains a balanced system of rights and duties of parties to an international armed conflict, actors of humanitarian assistance and the civilian populations.

8.2.1 The Provision of Humanitarian Assistance in International Armed Conflicts Outside Occupied Territory

In terms of treaty law, the legal framework for humanitarian assistance in international armed conflict on other than occupied territory is generally set by Article 70 AP I on protection of the operation and Article 71 AP I on protection of personnel.

Article 70 para. 1 lists three requirements for ensuing obligations: the civilian population has to be "not adequately provided", relief actions need to be "humanitarian" and they must be "impartial in character and conducted without any adverse distinction".[21] The legal description of an *adequate provision* of the civilian population is vague, if not non-existent. The wording of Article 70 para. 1 is

[19] Geneva Convention (IV)—GC IV—Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

[20] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Armed Conflicts (Protocol I), 8 June 1977.

[21] Article 70 AP I.

quite limited and only refers to "food and medical supplies" as well as "clothing, bedding means of shelter" and "other supplies essential to the survival of the civilian population (. . .) and objects necessary for religious worship".[22] It is agreed in both State practice and academia that this restriction is irrelevant in today's legal regime.[23] The 'list of humanitarian goods' is not closed. The real question is how to assess what level of provision is "not adequate" for the civilian population.

There is unanimous agreement that the legal framework only applies to '*humanitarian*' assistance and thus presupposes some kind of 'humanitarian situation', and that such a humanitarian situation is to be qualified on the basis of a factual assessment of needs and urgency. The wording of Article 70 para. 1 itself requires relief actions to be "humanitarian"; i.e. to be designated only for the survival of the civilian population or its facilitation. Humanitarian assistance is intended to assist the civilian population in need: "The 'humanitarian' character of the action is fulfilled once it is clear that the action is aimed at bringing relief to victims, i.e., in the present case, the civilian population lacking essential supplies. What matters most of all is to avoid deception, that is to say, using the relief action for other purposes."[24]

The requirement of impartiality of the assistance is twofold: Article 70 para. 1 requires assistance to be "impartial in character and conducted without any adverse distinction". *Impartiality* of humanitarian assistance in international humanitarian law is defined as prohibition and imperative: the prohibition to distinguish with regard to nationality, race, religious belief, social state, and political conviction on the one hand; and the imperative to assist human beings on the basis of need alone on the other hand. The operation is to be conducted in an impartial manner, in other words to be guided by humanitarian needs alone. It is further to be conducted without any adverse distinction, i.e. not diverted or proved in a way favouring certain groups or individuals out of political discriminatory or personal preferences. The criterion "without any adverse distinction" is referred to as the principle of *non-discrimination* and results from the philosophical concept of the equality of human beings, which is actually a basic consequence of the principle

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mention in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts (. . .).

See also, Rule 55 CIL Study.

The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.

[22] Article 70 para. 1 and Article 69 para. 1 AP I.

[23] See Sandoz et al. (1987) Article 70 No 2794.

[24] *Ibid*. No 2798.

of humanity.[25] Whereas impartiality looks at the person or institution providing the assistance, non-discrimination focuses on the one receiving it. The principle of non-discrimination removes objective distinctions between individuals, while impartiality removes the subjective distinctions.[26] Relief operations need to address the humanitarian need only and are neither diverted nor implemented in a way which disadvantages a person on reasons other than humanitarian need and urgency.

For the law of armed conflict, Article 70 AP I is the legal embodiment of *two out of four* of the so-called "humanitarian principles". For international humanitarian law, "humanitarian" and "impartial" are mandatory criteria for humanitarian assistance operations to be protected by humanitarian law. The principles of neutrality and independence are—consequently—not mentioned as prerequisites for the legal obligation to respect and protect a relief operation. 'Neutrality' is a distinct principle in the context of the laws of war (Bothe 2011), entailing very specific rights and duties in the context of international armed conflicts and being applicable to States only. 'Independence' is somewhat irrelevant in the legal framework of armed conflict, as international humanitarian law looks at States as being the first and 'natural' actors of humanitarian action in armed conflict (Spieker 2010). Consequently, the ideal of non-governmental humanitarian actors to be independent from Governments is not at the forefront of legal regulation and not a precondition for protection provided by the laws of war.

Article 70 para. 1 provides that in situations where these three criteria are fulfilled, "relief actions (. . .) shall be undertaken". Since the adoption of Additional Protocol I and in particular since the 1990s, the degree to which this regulation is mandatory is regularly discussed both in state practice and in academia. The wording emphasises the sovereign rights of the State on whose territory the operation is being conducted[27] in that it maintains its agreement as precondition for lawfulness: "(. . .) shall be undertaken, subject to the agreement of the Parties concerned in such relief actions". Unlike the occupation regime where the provision of a civilian population that is inadequately supplied/resourced is a straight legal obligation, in international armed conflicts outside occupied territory the provision of humanitarian assistance is subject to the *agreement* of the party to the conflict on whose territory the population is in need. The precondition of agreement of the recipient State is reiterated in customary law: "The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control."[28] Today it seems to be generally accepted that the State on whose territory the assistance is to be provided is legally obliged to give the

[25] *Ibid*. No 2800.

[26] *Ibid*.

[27] In the following referred to as 'recipient State'.

[28] Rule 55 CILS (Customary International Law Study; http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55. Accessed 29 July 2013.

agreement—regardless of who is going to assist—provided the above mentioned criteria are fulfilled. This regulation balances the interests of a suffering civilian population on the one hand and those of the recipient State on the other. Once the receiving State has given its agreement, it is legally obliged to protect relief actions and to facilitate rapid distribution of items, Article 70 para. 4 AP I and Rule 55 CILS.

It is still a matter of debate whether an agreement which is lacking or withheld may be substituted or overcome in any way. The question is whether the existing international—treaty or customary—law provides for a "*right to access*" to an inadequately supplied civilian population.[29] Such a right to access could allow providing humanitarian assistance without the agreement, possibly against the explicit will of the recipient State (Spieker 2010).[30] This discussion has been reinforced by the debate on the concept of human security and the development of a concept of responsibility to protect. In sum, to date treaty and customary law remain adamant on the requirement for agreement and have not been changed; existing international law does not provide for a 'right to access' without or against the will of the recipient State.

Upon agreement to humanitarian assistance being provided to a civilian population, the recipient State is legally obliged to *protect* the relief operation and to *facilitate* the rapid distribution of goods (Article 70 para. 4 AP I and Rule 55 CILS). All States concerned, including States which are not Parties to the conflict, are obliged to allow and facilitate rapid and unimpeded *passage* of goods, equipment and personnel (Article 70 para. 2 AP I and Rule 55 CILS). As within the regime for assistance on occupied territory, these legal obligations of both the recipient State and all States concerned are balanced by *control rights*, as e. g. in terms of schedules, routes, packaging or security regulations (Article 70 para. 3 and Rule 55 CILS).

In international humanitarian law relief, *personnel* are protected as the civilian population and individual civilians. As a rule and as such—and surprising to quite a number of relief workers—privileges and immunities are not part of this protection unless they are agreed with the States concerned on a *quasi* bilateral basis. Such agreement may be done either in more general terms, as e.g. for delegates of the International Committee of the Red Cross and Red Crescent or personnel of missions of the United Nations, or on an *ad hoc* basis. In international armed conflicts, relief personnel are protected by Article 71 AP I which has crystallised into customary law.[31] According to Article 71, para. 1, relief personnel "may form part of the assistance" "where necessary". Both the regulation as such and the

[29] See the equivalent discussion on a 'right to humanitarian intervention', 'droit d'intervention' and 'droit d'ingérence'.

[30] On debates of a right to access as well as on a 'right to receive' assistance and a legal obligation to provide assistance.

[31] Rule 31 CILS: "Humanitarian relief personnel must be respected and protected"; ICRC Customary Law Study.

restriction on the basis of necessity are due to the general and often apparent reluctance of States in accepting foreign individuals on their territory, particularly those individuals having the legal status of tourists, but not acting like tourists. The wording of paragraph 1 explicitly reiterates the precondition of consent of the State on whose territory the personnel is to be deployed.[32]

Paragraph 2 of Article 71 contains the legal obligation of Parties concerned to respect and protect relief personnel. Parties are obliged to exempt relief personnel from attacks and to ensure that personnel are not particularly exposed to the effects of armed conflict. This duty generally extends to actively protect personnel in general terms; protection from specific circumstances or behaviour is not specified. Such specification is neither contained in treaty nor in customary law. In addition to the obligation to respect and protect, a State receiving assistance has the duty to "assist the relief personnel (. . .) in carrying out their relief mission".[33] This duty is limited by "the fullest extent practicable"; yet, on the other hand, activities of personnel and their freedom of movement are generally guaranteed and may only be restricted by "imperative military necessity". Any restriction itself is limited to temporary measures. In the practice of humanitarian action it is often difficult to distinguish between a lawful restriction of the activities of relief personnel on the one hand and unlawful impediment on the other hand. A distinction may only be made with regard to the actual relevant circumstances on a case-by-case basis.

Article 71, para. 4, addresses individual relief workers. Relief personnel may "under no circumstances (. . .) exceed the terms of their mission" under international humanitarian law. In conclusion, relief personnel have to conduct a humanitarian assistance operation impartially and without discrimination and upon consent of the receiving State in order to be enjoy the guarantee of activity and freedom of movement, respect and protection. This results in an obligation to ensure that relief is designated for a suffering civilian population, which is not adequately supplied. It further implies a requirement to observe local laws and customs of the receiving State and of communities being affected by the relief operation. As a final precondition for entitlement to respect and protection, they have to take into account security interests of the State on whose territory they are operating and are liable to expulsion in case they disregard such interests. In practice, this may result, for example, in the requirement to follow or avoid certain routes, to safeguard that sensitive information a relief worker may have acquired during the mission, ensure that it is kept confidential, or to accept and implement the requirement to mark or not to identify, e.g. certain vehicles being used by relief workers.

[32] "(. . .); the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties."

[33] See also Rule 56 CILS: "The parties to the conflict must ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted."

8.2.2 *Humanitarian Assistance in Non-international Armed Conflicts*

Compared to the legal regime of international conflicts, treaty law protection in non-international armed conflicts is considerably weaker. Common Article 3 GC does not go beyond clarifying that "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". This implies both governmental and non-governmental parties to the conflict, and such offer to a non-governmental party would not affect the legal status of either party.[34] Regulation under Article 18, para. 2 of Additional Protocol II[35] (AP II) is similar to the one contained in Article 70, para. 1 AP I on international armed conflicts: "If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, (. . .), relief actions for the civilian population 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." The humanitarian character of an action is as much as a precondition for legal protection as impartial and non-discriminatory implementation. Similar to international armed conflicts, Article 18, para. 2 AP II requires the consent of the State on whose territory the action is to be taken. The legal provision focuses consistently on consent of the State only, whereas in practice the agreement of the non-state party or parties is as essential as the one of the Government. Again, similar to international conflicts, the inadequately supplied civilian population is entitled to receive assistance and both the governmental and the non-governmental party to the conflict have a legal obligation to give their consent provided the action is humanitarian and conducted impartially and non-discriminatorily. The relative weakness of the regime is demonstrated by the fact that Article 18 does neither extend to any pronunciation on a duty to protect or to support the relief operation nor to the obligation to protect relief personnel. Moreover, the threshold of applicability of Additional Protocol II is considerably high (Sandoz et al. 1987, pp. 4460–4470),[36] thus limiting the practical application of the treaty law regime in non-international armed conflict situations.

However, humanitarian assistance in non-international conflicts is one of the areas where *customary* law has progressed and resulted in a broader and more comprehensive legal regime compared to treaty law. Customary law is more

[34] "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict".

[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[36] Article 1 para. 1 AP II: "This Protocol (. . .) 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."

comprehensive in terms of legal obligations to protect the relief operation and with regard to the duty to protect relief personnel.

According to Rule 32 of the Customary International Law Study (CILS), "objects used for humanitarian relief *operations* must be respected and protected." This duty implies the prohibition to make the operation and relief goods the object of attack.[37] Likewise prohibited are, for example, the destruction, misappropriation, looting or pillaging of relief goods. Parties to the conflict are further obliged to "allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, (. . .)", Rule 55 CILS. Derived from treaty law, customary law reiterates the requirement of impartiality of the operation and its conduct "without any adverse distinction", Rule 55. Again, similar to treaty law, these obligations are balanced by control rights of the obligated party, as for instance the right to search relief consignments or the right to technical prescriptions.

Whereas neither Article 3 GC nor Article 18 AP II contain any provision on protection of relief *personnel* in non-international armed conflicts, Rule 31 CILS takes it for granted that expatriate personnel may form part of a relief operation. It further provides that "humanitarian relief personnel must be respected and protected", reiterating the general rule that "civilians are protected against attack, unless and for such time as they take a direct part in hostilities", Rule 6 CILS. State practice and *opinio iuris* specify that the obligation to respect and protect contains, beyond the prohibition to attack, the prohibition of harassment, intimidation and arbitrary detention, as well as of mistreatment, physical and psychological violence, murder, beating, abduction, hostage-taking and illegal arrest and detention. Rule 56 CILS obliges both governmental and non-governmental parties to an armed conflict to "ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions." The comprehensiveness of this protection is emphasised by the second sentence of Rule 56, stating that movements may be restricted temporarily and only in case of imperative military necessity.

8.3 The Legal Framework in Non-conflict Situations

In contrast to the legal regime of humanitarian action in armed conflicts, international law does not provide for an equivalent legal framework for humanitarian action in non-conflict situations, in particular natural and technological disasters. As far as international legal regulation at all exist, it is dispersed and inconsistent. Existing regulation is mostly incorporated in bilateral and regional, sometimes multilateral agreements, usually not focussing on humanitarian action but on other sectors of

[37] Cf. Rule 10 CILS: "Civilian objects are protected against attack, unless and for such time as they are military objectives."

international law.[38] Such sectors include, for example, the use of telecommunication,[39] nuclear accidents[40] and recognition of professional qualifications.[41]

8.3.1 Humanitarian Action in Non-conflict Disasters

The idea of humanitarian action in non-conflict disasters is not new (International Federation of Red Cross and Red Crescent Societies 2007, p. 19),[42] However, the international community has not yet considered a comprehensive international legal regulation to be necessary or even desirable (Spieker 2011, pp. 18–28). The Guiding Principles incorporated in Resolution 46/182 of the General Assembly of the United Nations on Strengthening Coordination in Humanitarian Emergencies (1991) explicitly comprise humanitarian assistance to victims of natural disasters and other calamities in their first paragraph. The resolution further maintains the principles of "humanity", "neutrality" and "impartiality"—not independence—as mandatory for humanitarian assistance to be provided in non-conflict situations and in the framework of the United Nations.[43] The Guiding Principles also reiterate the requirement of consent of the State on whose territory the humanitarian action is to be taken and introduce it into the regime for non-conflict disasters: "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country".[44] It is a State's "first and foremost" responsibility "to take care of the victims of natural disasters and other emergencies occurring on its territory", and therefore the State concerned has the "primary role" in determining the initiation, coordination and implementation of humanitarian action on its territory.[45]

[38] See the list of items contained in the IDRL Database.

[39] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations; 18 June 1998; http://www.itu.int/ITU-D/emergencytelecoms/Tampere_convention.pdf; accessed 31 October 2012.

[40] Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency of 26 September 1986; http://www.iaea.org/Publications/Documents/Conventions/cacnare.html, accessed 2 November 2012.

[41] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:255:0022:0142:en:PDF, accessed 2 November 2012.

[42] Already the second International Conference of the Red Cross in 1869 appealed to National Red Cross Societies to provide assistance "in case of public calamity which, like war, demands immediate and organized assistance"; The first Statues of the International Red Cross and Red Crescent Movement in 1928 codified such assistance as part of the mandate of National Societies.

[43] A/RES/46/182: "2. Humanitarian Assistance must be provided in accordance with the principles of humanity, neutrality and impartiality."

[44] *Ibid*. para. 3.

[45] *Ibid*. para. 4.

As such, the resolution strives to balance the sovereign rights of a State concerned with the humanitarian needs of a civilian population that is inadequately supplied. On the one hand, access to such population is qualified as being "essential",[46] on the other hand States are called upon to facilitate the work of relief organisations on the basis[47] that these act impartially and on strictly humanitarian motives.[48] Neighbouring States are "urged to participate closely with the affected countries in international efforts, with a view to facilitating, to the extent possible, the transit of humanitarian assistance".[49]

8.3.2 The IDRL Guidelines

To date there is neither treaty nor customary law providing for a general and comprehensive framework on rights and obligation of actors of humanitarian action in non-conflict disasters. The regulatory scope of even the most general international treaties[50] is limited, focusing on State sovereignty and on an encouragement to invite actors to provide assistance in case of an emergency. Regulatory gaps as well as inconsistencies in the practice of humanitarian action have triggered discussion on an improved international legal regime for humanitarian action in non-conflict situations in 2001. Whereas the original idea conceptualised a regime similar to the provision of Articles 70 and 71 API (International Federation of Red Cross and Red Crescent Societies 2007, p. 19), States Parties to the Geneva Conventions of 1949 made it clear in 2003 that they favour a different route.[51] Research and analysis of the existing legal and normative framework of international disaster law resulted in the Guidelines on the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance—the so-called IDRL Guidelines—which were unanimously adopted in 2007.[52]

---

[46] *Ibid*. para. 6.

[47] *Ibid*. para. 5.

[48] *Ibid*. para. 6.

[49] *Ibid*. para. 7.

[50] Framework Convention on Civil Defence Assistance of 22 May 2000; Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations; 18 June 1998; http://www.itu.int/ITU-D/emergencytelecoms/Tampere_convention.pdf, accessed 31 October 2012; Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency of 26 September 1986; http://www.iaea.org/Publications/Documents/Conventions/cacnare.html, accessed 2 November 2012.

[51] 28th International Conference of the Red Cross and Red Crescent, 2003; Resolution 1. Agenda for Humanitarian Action. Final Goal 3.2. http://www.icrc.org/eng/resources/documents/resolution/28-international-conference-resolution-1-2003.htm. Accessed 3 November 2012.

[52] 30th International Conference of the Red Cross and Red Crescent, 2007; Resolution 4 and Annex. http://www.icrc.org/eng/resources/documents/resolution/30-international-conference-resolution-4-2007.htm, accessed 03 November 2012.

As guidelines, the IDRL Guidelines are legally non-binding and have the effect of recommendations. As such, they have no direct impact on existing or non-existing rights and obligations deriving from domestic or international law.[53] Their scope of application is explicitly limited to natural disasters and similar situations and excludes armed conflicts of any type (1.1 and 1.4). In accordance with resolution 46/182 of the UN General Assembly they emphasise the principal role of domestic authorities and actors in humanitarian action. They invite and encourage the international community to grant minimum legal facilities to be provided to assisting States and to assist humanitarian organisations being willing and able to comply with minimum standards of coordination, quality and accountability on the basis of their respective responsibilities (1.3).

8.3.2.1 Responsibilities of Actors in Humanitarian Action

The IDRL Guidelines are founded on the axiom of the *primary responsibility* of the affected State to ensure disaster risk reduction, humanitarian relief and recovery assistance (3.1). This comprises the responsibility to seek international and/or regional assistance "if an affected State determines that a disaster exceeds national coping capacities" (3.2) in implementing its sovereign right to coordinate, regulate and monitor disaster relief and recovery assistance (3.3).

The Guidelines introduce the notion of "*assisting actors*" and describe their responsibilities. Assisting actors comprise: assisting humanitarian organisations, assisting States, foreign individuals, foreign private companies providing charitable relief and other foreign entities which are either responding to a disaster on the territory of the affected State or sending in-kind or cash donations (2.14). All such actors are responsible for abiding by the laws of the affected State and by applicable international law, for coordinating with domestic authorities and for respecting the human dignity of disaster-affected persons at all times (4.1).[54] States and humanitarian organisations are further expected to cooperate in order to prevent unlawful diversion, misappropriate, or fraud with a view to goods, equipment or resources (6.1). Affected States who have accepted funds and/or goods should use them "in a manner consistent with the expressed intent with which they were given" (6.2).

Responsibilities of assisting actors imply providing assistance "in accordance with the principles of humanity, neutrality and impartiality". Assisting actors are expected to ensure that aid priorities are calculated on the basis of need alone; that relief is provided "without any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age and political

[53] "These Guidelines are non-binding. (...) the Guidelines do not have a direct effect on any existing rights or obligations under domestic law".

[54] Reversely it is the responsibility of the affected State to make available adequate information about domestic laws and regulations of particular relevance to the entry and operation of disaster relief and initial recovery assistance (10.3).

opinions)"; that it is provided "without seeking to further a particular political or religious standpoint, intervene in the internal affairs of the affected State, or obtain commercial gain from charitable assistance"; and finally that aid is not used as a means to gather sensitive information of a political, economic or military nature (4.2). *Additional Standards* to be met comprise appropriateness and adequateness of relief in relation to need in accordance with applicable quality standards; coordination with other relevant domestic and assisting actors; adequate involvement of affected persons in design, implementation, monitoring and evaluation of assistance; strengthening of local disaster risk reduction, relief and recovery capacities; and minimisation of negative impacts on the local community, economy, job markets, development objectives and the environment (4.3).

8.3.2.2 Initiation and Termination of Assistance

The IDRL Guidelines confirm the condition of consent of the affected State for the legal regime regarding natural and technological disasters (10.1). This condition of consent includes, as a matter of fact, the right to terminate such consent and the assistance operation (12). The Guidelines explicitly refer to the option of affected States to deploy military assets for disaster relief or initial recovery assistance (11).[55] They reiterate the precondition of consent in this specific context, consent not only to the provision of assistance, but in particular to the deployment of military assets. States are encouraged to consider "comparable civilian alternatives" and to agree on terms and conditions of deployment such as duration, arming, use of national uniforms and mechanisms for cooperation with civilian actors.

8.3.2.3 Eligibility for Legal Facilities

The concept of eligibility for legal facilities as contained in the IDRL Guidelines derives from the design of the Framework Partnership Agreement in the context of the European Union. It comprises two steps: the first one consists of criteria which originating, transit and affected States are to establish and which humanitarian organisations[56] have to fulfil in order to receive the legal facilities with regard to their humanitarian action (14.1 and 14.2); in the second step, originating, transit and

[55] Guideline 2.9 defines an "assisting State" as a State providing disaster relief or initial recovery assistance, "whether through civil or military components".

[56] With a view to assisting States, originating, transit and affected State are simply encouraged to grant those facilities: "It is recommended that transit and affected States grant, at a minimum, the legal facilities described in Part V [i.e. Guidelines 16–24] to assisting States with respect to their disaster relief or initial recovery assistance" (Guideline 13).

affected States determine which legal facilities are being granted under which circumstances (14.1).

The Guidelines list a minimum of legal facilities which States are invited to grant; they do not pronounce criteria for the *eligibility* of, in particular, humanitarian organisations. States are encouraged to develop such criteria (14.2), preferentially including an organisation's willingness and capacity to act in accordance with the responsibilities of an assisting actor—particularly willingness and capacity to comply with minimum standards of coordination, quality and accountability (1.3). Any additional requirements "should not unduly burden the provision of appropriate disaster relief and initial recovery assistance" (14.3). In addition, the Guidelines provide for the option of establishing eligibility criteria before or as soon as possible after the onset of a disaster, designing procedures and mechanisms "as simple and expeditious as possible" and to communicate them clearly and freely. Using national rosters, bilateral agreements or reliance upon international or regional systems of accreditation are recommended (14.4). Entitlement to legal facilities should not be changed arbitrarily retroactively or without notice (14.5). Whether and, possibly, which legal facilities are being granted is subject to the discretion of originating, transit or affected State, including particularly considerations of "national security, public order, public and environmental health, and public morals".[57] Measure to protect such considerations "should be tailored to the exigencies of the specific disaster and be consistent with the humanitarian imperative of addressing the needs of affected communities".

As emphasised above, the IDRL Guidelines are not legally binding and have the quality of recommendations. Their prospective added value lies in the fact that States will contribute to the development of respective international customary law on humanitarian action in non-conflict disasters if and when they actually make use of the Guidelines, apply them in natural or technological disasters and state that such application is based on *opinio iuris*.

8.4 Effects of Legal Regulation

Practitioners in humanitarian action often—justifiably—question whether a legal framework in general and the existing one in particular are actually able to facilitate enhance or even improve humanitarian action. The premise for this question is frequently framed in the view that law is *irrelevant*, that at least it constitutes an obstacle to effective and timely humanitarian action, that in most cases it impedes the operation, and that it simply renders action impossible in situations that lack consent from a receiving State. As legitimate as such allegations might be in the individual case, the function and value of a legal framework are best clarified by considering the consequences if they did not exist. Allegations that a legal

[57] IDRL Guidelines, preambula to Part V.

framework is useless and redundant are often based on the expectation that the mere existence of legal regulation could guarantee its adherence or even prevent violations. The preventative effects of legal norms is generally highly discussed and in fact open to doubt, both in national and in international law. In practice, it is improbable that a rule is being observed merely because it exists. It is only an option that a Government may grant access to actors in humanitarian assistance to provide assistance to an inadequately supplied civilian population simply because it is aware of the legal obligation to give its consent to the provision of humanitarian assistance or that it protects relief personnel against unlawful attacks from non-state armed groups only because it is aware of the duty to protect relief personnel.

8.4.1 The Purpose of Legal Regulation in Humanitarian Action

An existing legal framework serves *two purposes*. Firstly, a legal framework qualifies certain behaviour as lawful or unlawful. In case of an absence of a prohibition to divert relief consignments or a duty to respect relief personnel, it would simply be lawful—and to be accepted—to divert relief consignments or to arrest relief personnel simply to impede a humanitarian assistance operation. The second purpose of existing legal rules, prohibitions and imperatives, is as essential as the first. A legal framework increases the chance to convince an actor of humanitarian action that is insecure of legal regulation and/or hesitant in its decision-making. For example, in situations where a Government is reluctant to grant access to relief organisations its decision-making process might be informed and directed by the legal obligation to give its consent, provided the population is not adequately supplied and the operation is conducted according to the humanitarian principles. In such situations legal provisions may provide the impetus to give room to the rule of law and provide the incentive to abide by the law.

An additional question is whether a broader, a more elaborate, a technically improved legal framework would be able to *facilitate, enhance or even improve* humanitarian action.

8.4.2 Changes in the Legal Environment of Humanitarian Action

Actors in humanitarian assistance have to accept that being engaged in humanitarian action and providing humanitarian assistance is *increasingly regulated by domestic* legal frameworks. Governmental and non-governmental actors, relief organisations and relief workers act within a legal framework which is generally growing. A trivial example from practice is the prohibition on the use of certain cars

in a relief operation. Cars need to be licensed and display a valid licence plate and more and more authorities worldwide require valid technical surveillance certificates. Another and sometimes sensitive issue is the assignment of radio channels to actors in humanitarian action which often involves differing procedures for governmental and non-governmental, as well as for foreign and in-country actors.

In humanitarian emergency contexts, increasingly States refuse to accept *unsolicited goods* and general indiscriminate assistance which is offered or simply brought into the country. An excellent example is the reaction of the Government of Pakistan during the floods emergency in 2010 when it refused to accept a number of goods, in particular perishable goods which, upon entry, were unable to be delivered due to the inaccessibility of regions caused by the floods. Additional examples are legal requirements in terms of language and letters for labelling of and inscriptions on medication packages, technical configuration of relief equipment or professional qualifications and certification in particular of medical, but also other technical personnel like engineers or architects. In the beginning of 2013, the Government of Mali pronounced quite specific criteria for expatriate personnel being allowed to form part of humanitarian relief operations on its territory.

More *general phenomena* include the evolving taxation and social security systems in States on whose territory humanitarian action is taking place. Actors in humanitarian action are increasingly confronted with taxes, fees and customs for goods, services and activities related to their operation. Medical equipment, even for basic health care stations and referral hospitals as well as transport vehicles are being qualified as *import goods* by a growing number of authorities, thus entailing charges, taxes and customs to be borne by relief organisations and their donors. Such phenomena may be considered to be particularly interesting and possibly challenging in situations where goods and equipment remain within the country for further perusal after the end of the humanitarian operation. More comprehensive frameworks of labour law and systems of *social security* cover a growing number of persons across a range of activities that can impacts on employment and discharge procedures as well as insurance and maintenance of local staff. Authorities increasingly implement the prerequisite of *work permits* for relief workers in addition to visa requirements. Whereas this usually is a lesser issue in the immediate relief phase of an emergency, it becomes more of an issue in rehabilitation and reconstruction operations. Work permits encompass additional administrative procedures, time and administration as well as financial resources. In an increasing number of cases authorities are in a position to accept expatriate relief personnel during the 'hot' phase of an emergency, but are much more restrictive in terms of colour, religious belief or nationality in mid or longer-term operations. This has an immediate effect not only on the logistics of an activity, but also on the philosophy and concepts of operations, in particular for example for LRRD[58] approaches. The more complex administrative and legal requirements become the higher the

[58] Linking relief, rehabilitation, and development.

demands of actors of humanitarian action become to justify the sustainability of their actions towards donors and, in particular, the general public.

The above issues are typical in today's humanitarian action operations. It is not a question of whether referenced legal requirements are justified or unjustified, appropriate or inappropriate, helpful or a hindrance or whether actors of humanitarian action and individual relief workers perceive such requirements as restrictive or even rendering humanitarian action impossible in a specific situation. It is not a question of whether this is a 'good' or a 'bad' development. These phenomena are something that actors in humanitarian action, whether governmental or non-governmental, whether international or domestic, whether Red Cross/Red Crescent or other, experience, have to take into account and something that they have to accept. We have to take it as a fact that unlegislated areas in receiving States are shrinking.

8.4.3 Effectiveness of a Legal Regime on Humanitarian Action

It is an interesting question whether an improved legal framework could enhance or facilitate improved humanitarian action and, if so, what would this improved legal framework look like. Would a more refined and more detailed domestic legal regime constitute an improvement or an increased obstacle to effective humanitarian action? Could an international legal regime pronouncing on an explicit right to access, for example, in the form of a further development of the responsibility to protect or in the form of a right to humanitarian intervention, render humanitarian action more effective? Could military enforcement of access increase effectiveness? Who would or should have the authority to decide on a military enforcement on the basis of which criteria? Could an international legal regime pronouncing on a more detailed obligation to protect humanitarian operations and personnel render humanitarian action more effective?

The existing *international* legal framework does not provide for a legal obligation of any actor in humanitarian action to offer assistance. It does oblige States or non-state armed groups to accept offers which are being made in that it obliges them to give their necessary consent to offers of assistance in situations where the respective population is inadequately supplied. The right of an inadequately supplied population to receive assistance is not enforceable without a decision of the UN Security Council.[59]

Today's humanitarian action faces an exploding *number and diversification* of actors in humanitarian assistance. The Kosovo operation 1999, had a reported 250 international and 45 local non-governmental organisations in June 2000, and 2,292 registered non-governmental organisations in 2003; including

[59] See above point 8.2.1 para. 7.

381 international non-governmental organisations. From the perspective of a State on whose territory assistance is expected to be provided, the number and nature of humanitarian actors under its authority and jurisdiction often appear to be neither controllable nor supervisable. Since there is no supervising body for actors of humanitarian action except and beyond territorial authorities, it does not seem to be too unacceptable that an authority and a Government are legally expected to respect and protect only those actors within their control. The humanitarian community widely expects actors that conduct other operations under the premise of humanitarian action or that do not implement the humanitarian principles in assistance to be sanctioned. Under the global system of international law it is the domestic State only that is capable of supervising such actors, by way of its agreement to operation and personnel and by exercising its rights of control.

Moreover, no actor in humanitarian action except States, as the case may be, has the potential to avail itself of *democratic legitimisation* and *rule of law* characteristics. Humanitarian organisations or components of the International Red Cross and Red Crescent Movement may implement democratic features and procedures in their statutes and constitutions, and their decision-making processes may be characterised by democratic and rule of law principles. However, in terms of rule of law criteria it is only States that have the potential to represent a general and broad democratic legitimacy. To minimise the impact and effect of decisions, which are based on rule of law and democratic principles, by rendering agreements to humanitarian action redundant, in itself fails to comply with the demands of the rule of law. It is in this sense that a renunciation of the precondition of consent would jeopardise the axiomatic criterion of 'humanitarian' action.

A *further development* of the legal framework could only provide such duties, probably under specific conditions. This could enhance the effectiveness of humanitarian assistance provided that conditions would be substantial, measurable and verifiable, and ideally that an accepted and competent supervision body would exist which would be equipped with an enforcement authority. Conditions on an obligation to accept would probably have to result in a determination of the adequateness of supply of a population and/or the seriousness of a humanitarian situation. In terms of legal technique, it is of course possible to legally define undetermined and *per se* indeterminable terms like '(in) adequateness' or 'seriousness'. Legal definitions would have recourse to auxiliary criteria as, e.g., the number of people affected (possible in relation to the number of inhabitants, etc.), the extent of effects on health and physical integrity of persons, child mortality and the like. The problem is that such criteria only provide putative certainty and alleged clarity. A holistic approach as the goal that is, for example, the basis of the definition of health as propagated by the World Health Organisation[60] and that must necessarily be

[60] "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"; Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19–22 June 1946; http://www.who.int/about/definition/en/print.html, accessed 21 August 2013.

taken into account, e.g., the actual practical access of persons to health care in a given situation and, ultimately, the judgement on what kind and degree of supply of a population is acceptable or unacceptable, cannot be provided by such auxiliary criteria. Any attempt to define more clearly the notion of 'adequate supply' of a population would entail more language and more legal handcraft, but would not be able to provide more clarity and a more legally binding force beyond the existing law.

A legal *obligation to offer* assistance would encounter the same false clarity and, in addition, would simply ignore framework conditions of political considerations or financial resources. It is not the question of political conditionality or instrumentalisation of aid. Take for example a situation where assistance is offered and accepted but then used in order to oppress certain parts of the population for political reasons. This presents an essential dilemma where easy answers and solutions, even 'humanitarian' answers and solutions simply do not exist. In order to take such imponderables into account, international legislators almost automatically would feel compelled to introduce criteria such as "to the extent practicable" or "as appropriate", which in essence involves developing new and additional legal language to enhance legal regulation. A potential legal obligation of actors to offer assistance without the option of considering secondary and tertiary effects of the aid being delivered might at first sight appear to constitute progress in the legal doctrine on humanitarian action however it would lead to additional uncertainty, space for discretion and dilemmas.

Neither the existing international law of armed conflict nor the existing legal framework for non-conflict disasters provide for a lawful means to overcome consent which is not being given by the State on whose territory the action is to be taken. In particular the accepted 'responsibility to protect' is not able to overcome a potential refusal to accept an offer of humanitarian assistance, except by a respective decision of the UN Security Council.

According to existing international law, a State which has given its consent to the provision of humanitarian assistance is legally *obliged to respect and protect* operation and personnel, on the basis of certain control rights. It goes without saying that a more detailed regulation on the obligations to respect and to protect may be helpful in certain situations where actors would feel comfortable to be inspired and guided by more explicit and more sectoral rules. In general, though, the issue as such does not seem to be the existing legal regulation or the lack of it, but the challenge of how to prevent misuse of legal regulation for the wrong purposes or non-use at all. In cases where the failure to protect relief personnel from attacks by armed groups or by governmental authorities acting *ultra vires* is due to lacking means, knowledge, skills or authority of those concerned, more voluminous and more refined legal regulation would not overcome deficiencies. In cases where failures based on a rather determined decision not to fulfil existing legal obligations, for whatever reason, more voluminous and more refined legal regulation would be likewise useless. Additional or different international legal regulation is, for instance, not able to convince an authority not to divert relief goods or not to accept them only under very disadvantageous conditions if the authority's decision is

based on the determination to pursue certain, possible illegitimate, economic or political policies. Using required work permits or excluding certain nationalities of relief personnel or similar as pretexts for implementing discriminatory political ambitions or furthering criminal goals is unlawful under existing international law and cannot be prevented by additional regulation.

The humanitarian *principle of impartiality* is widely seen as guaranteeing a certain adequate humanitarian space. *Vice versa*, the principle of impartiality is being violated in situations where humanitarian space is denied or restricted. In 2012 and 2013 in Syria, for instance, nearly all actors of humanitarian action were essentially restricted in their access to inadequately supplied populations. In discussions on the humanitarian prospective for Afghanistan after 2013 all parties concerned testify their concern that present and future humanitarian actors are taking sides and furthering the goals of the one or the other party. Perceptions of some or all parts of the international community as party/parties to an armed conflict on the territory of Afghanistan have a direct impact on such concerns. The more a State is perceived to be a party to the conflict and the more a humanitarian organisation is perceived as being close to this party (or even belonging to it), the more likely it becomes that adversary conflicting parties perceive the humanitarian organisation as becoming party to the conflict and that its impartiality is jeopardised. The question remains of how to legally design the principle of impartiality differently in order to facilitate access and in order to reduce perceptions on all sides that humanitarian actors are taking sides and selecting partially.

Existing *domestic* legal frameworks pertaining to humanitarian action are diverse, inconsistent and generally developing in completely different directions. In terms of the efficiency of a humanitarian operation, they often appear to be cumbersome and more of an obstacle to efficiency than facilitating the running of the operation. Yet, 'the humanitarian community' often promotes principles of good governance, the rule of law, and possibly, democracy. In this respect, it is simply a consequence of globalisation and an integral part of the sovereignty of States that they engage in further development of their domestic legal systems. In a way, it is often easier to conduct humanitarian assistance operations in non-regulated environments, but there cannot be any surprise that even in acute emergency phases more and more States insist on external actors abiding by existing legal frameworks.

It is a fact that there is a tendency to look at evolving domestic legal frameworks as a means and yardstick of quality control and quality management for actors in humanitarian assistance. This is totally justified and appropriate. What is to be avoided is an over-exaggeration by States; that authorities do not use or misuse an elaborate domestic legal system to complicate, hinder and eventually render humanitarian action impossible. Given the lack of both a treaty and a customary law regime for humanitarian action in non-conflict situations, the risk of such misuse is considerably higher than in international humanitarian law.

8.5 Concluding Observations

There is no doubt that there are certain *lacunae* in the existing legal regulation of humanitarian action: this is especially true for humanitarian action in non-conflict scenarios where the legal regime is not regulated. The legal framework on humanitarian assistance in non-international armed conflict is widely under-regulated, in particular in treaty law. The legal protection of humanitarian personnel in all humanitarian contexts would benefit from further refinement especially in non-international armed conflicts.

Issues arising in the context of a 'right to access' or a 'right to humanitarian intervention' culminate in the question of how to legally design such legal rights while on the one hand balancing all rights and interests of all parties concerned and on the other hand minimising the danger of misuse. The fact that the concept of 'responsibility to protect' has not crystallised into a legal concept legitimising the provision of humanitarian assistance without the agreement of the receiving State, and the requirement for a respective resolution of the UN Security Council—is not a deficiency of the present legal environment, but it is actually strengthening humanitarian action.

Beyond this room for improvement, the much higher challenge is not the further development of the existing legal framework, but the enhancement of understanding, acceptance and perception of the legally binding force of the existing legal framework. What is needed more than an increased number of legal provisions or refinements towards an improved legal system, is a significant increase in the global social acceptance of the existing law. There is no guarantee that there is room for existing law to become globally socially accepted. The potential for such acceptance is building global common understanding and building consensus—consensus on the appropriateness of the regulation and consensus on the need for the regulation to be perceived and accepted as binding. To build such consensus among States, Governments and authorities is a challenge which cannot be underestimated—a fact which is impressively demonstrated by the process of debate on legal regulation on humanitarian action in non-conflict disasters. Yet, efforts to build consensus among non-state armed groups in situations of armed conflict is challenging for a number of reasons not least the absence of institutional memory and the general morale of non-state armed groups. However, hardly any alternatives are available to this line of action. Strengthening observance, sanctioning and enforcing existing law presupposes existing and functioning enforcement mechanisms. And these will only be created in case the regulation as such is socially accepted as legally binding—not the other way round. Enforcement mechanisms are thus only one means of accepting the legally binding force of a legal regulation.

The international legal framework for humanitarian action—where it exists—is filigree, sophisticated and is constituted by a delicate system of checks and balances of mutual rights and duties. Only provided all actors involved; parties to armed conflicts, States, humanitarian agencies, individual relief workers—observe their

legal obligations and responsibilities can the legal framework for humanitarian action facilitate and improve humanitarian action. Only then does it have a chance to become globally socially accepted and be observed. Only then will the present ambiguities be clarified and *lacunae* be filled.

References

Bothe M (2011) Neutrality, concept and general rules. In: Max Planck Encyclopedia of Public International Law. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e349?rskey=xY982t&result=4&q=neutrality&prd=EPIL. Accessed 21 Aug 2013

Crawford J (1976) The criteria for statehood under international law. Br Yearbook Int Law 48 (1):93–182. http://bybil.oxfordjournals.org/content/47/1/1.short?rss=1&amp%3bssource=mfr. Accessed 23 Jun 2013

Crawford JR (2011) State. In: Max Planck Encyclopedia of Public International Law. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1473?rskey=ZCUwsn&result=29&q=&prd=EPIL. Accessed 21 Aug 2013

IFRC. The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief. http://www.ifrc.org/Global/Publications/disasters/code-of-conduct/code-english.pdf. Accessed 29 Oct 2012

International Federation of Red Cross and Red Crescent Societies (2007) Law and legal issues in international disaster response: a desk study. Geneva. http://www.ifrc.org/PageFiles/41194/113600-idrl-deskstudy-low-en.pdf. Accessed 2 Nov 2012

Sandoz Y, Swinarski C, Zimmermann B (1987) Commentary on the additional protocols of 8 June 1977 to the Geneva conventions of 12 August 1949. ICRC. Martinus Nijhoff, Geneva, pp 4460–4470

Schmalenbach K (2006) International organizations or institutions, general aspects. In: Max Planck Encyclopedia of Public International Law. http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e499&recno=9&searchType=Quick&query=Legal+Personality. Accessed 23 Jun 2013

Spieker H (2010) Humanitarian assistance, access in armed conflict and occupation. In: Max Planck Encyclopedia of Public International Law. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1701?rskey=gqH4IW&result=2&q=humanitarian assistance&prd=EPIL. Accessed 21 Aug 2013

Spieker H (2011) The right to give and receive humanitarian assistance. In: Heintze HJ, Zwitter A (eds) International law and humanitarian assistance. Springer, Berlin, Heidelberg, pp 7–31. doi:10.1007/978-3-642-16455-2_2

Von Pilar U (2005) Von Ärzten und Grenzen. Dilemmata der humanitären Hilfe. http://www.aerzte-ohne-grenzen.de/kennenlernen/veroeffentlichungen/dokumente-zumherunterladen/humaitaere-debatte/index.html. Accessed 5 November 2012

Walter C (2007) Subject of international law. In: Max Planck Encyclopedia of Public International Law. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1476?rskey=px6qFB&result=1&prd=EPIL. Accessed 23 Jun 2013

Chapter 9
The ILC Codification Project on the "Protection of Persons in the Event of Disasters"

Hans-Joachim Heintze

9.1 Introduction

Disasters frequently occur in all regions of the world and affect large numbers of individuals. They may have a disruptive impact on people, infrastructure and economies. Disasters in times of peace or war endanger life, health, and the physical integrity of human beings. They have disproportional consequences in vulnerable poorer societies because they deepen their poverty. In 2006, the UN counted 227 natural disasters resulting in over 23,000 deaths worldwide.[1] The 2004 Indian Ocean Tsunami was one of the worst disasters of the last century. It manifested the shortcomings of the international reaction concerning international protection of persons in critical situations. Disasters like cyclone Nargis that struck Myanmar in 2008 or the earthquake in Haiti in 2010 exposed a range of problems relating to domestic and international response. The legal dimension depends on the severity of the humanitarian crises that the disaster has caused. However, there is no international consensus "on how great a catastrophe has to be in order to be considered a disaster for legal purposes, nor is there any agreement on what criteria should be used to measure its scale" (Focarelli 2013, para. 7). This has important consequences because the question arises whether there is an obligation or entitlement for the international community to have access to the victims and to offer or even enforce humanitarian assistance. Some authors argue that humanitarian assistance is "nowadays ... a necessary element to reach, in the words of the UN Secretary General, 'Global Peace', which requires the solution of social, economic, cultural and humanitarian problems. Therefore, any obstacle to the delivery of aid is

[1] UN Doc. A/62/323, para. 3.

H.-J. Heintze (✉)
Ruhr University Bochum, Bochum, Germany
e-mail: Hans-Joachim.Heintze@rub.de

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_9

correctly considered a danger to international peace and security" (Giuffrida 2013, p. 294).

Even if one does not share the far reaching interpretation of the UN practice concerning obstacles to the delivery of humanitarian assistance by Giuffrida, there is no doubt that the victims of natural and man-made disasters need immediate help. Thus, their protection has been a subject of concern since time immemorial. De Vattel observed as early as 1758 that all those who have provisions to spare should assist nations suffering from famine as an instinctive "act of humanity" (de Vattel 1758, paras. 4–5). This humanitarian assistance covers both the help provided from the affected State itself as well as the assistance coming from abroad. The non-action of states can, in such emergency situations, amount to a violation of international law, the principle of humanity and fundamental human rights. Therefore, very often the question of an international involvement arises which entails fundamental legal problems. The assistance to victims of disasters occurs according to the principle of humanity and the lack of a major multilateral treaty on this issue is somehow contradictory since there is an extensive body of international humanitarian law applicable to victims of armed conflicts. Several codification attempts have been made in the 1980s without success. In 1990 the UN assessed that donors, recipient governments and international organisations have expressed their opinion "on the desirability of new legal instruments in order to overcome the obstacles in the way of humanitarian assistance."[2] However, some non-governmental organisations argued that such an initiative carries the risk of weakening the progress already achieved over the years in providing humanitarian assistance. These organisations assumed that some governments would reinforce the insistence on the concept of national sovereignty and thus render a codification counterproductive.[3] The proposal of a convention on the deployment and utilisation of urban search and rescue teams was subsequently drafted, but in 2002 it was replaced by the General Assembly Resolution A/57/150 which contains the Guidelines for the International Search and Rescue Advisory Group. Thus, the entire discussion on the issue has been dominated by the insistence of some governments on the principle of non-interference in their internal affairs. The work of the private International Law Association, too, in the 1980s did not tackle the big problems of sovereignty, especially the question as to whether States have a duty to undertake or accept relief (International Law Association 1980, p. 530). Recent developments in the field of human rights law like R2P pose challenges to the principles of State sovereignty and non-interference and raise the question as to whether States are entitled to refuse to admit and facilitate international assistance despite severe human suffering.

Against this background the Codification Division of the Office of Legal Affairs of the United Nations Secretariat submitted proposals on 'International Disaster Relief Law' (IDRL) to the International Law Commission (ILC) in 2006. The UN

[2] UN Doc. A/45/587, para. 41.

[3] Ibidem para. 44.

identified the need for the systematisation of international law in the context of disaster relief for responding to such tragic calamities and to overcome obstacles to the provision of effective assistance. The ILC is an organ of the UN General Assembly and its Statute provides that the "Commission shall have for its object the promotion of the *progressive development* of international law and its codification."[4] Progressive development means the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States, and codification includes the more precise formulation and systematisation of rules of international law, in fields where there already has been extensive State practice, precedent and doctrine. The ILC represents the latest attempt to define the obligations of States "to accept disaster relief without going so far as to justify forced humanitarian intervention" (Benton Heath 2011, p. 423).

9.2 Framework of the Codification by the International Law Commission (ILC)

The ILC decided in 2007 to include the topic in its current program of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.[5] Upon his appointment, the Special Rapporteur undertook efforts to establish contacts with interested governmental and non-governmental organisations, including the Representative of the Secretary-General on the human rights of internally displaced persons, the Assistant Secretary-General for Humanitarian Affairs and Deputy Emergency Relief Coordinator, Office for the Coordination of Humanitarian Affairs, and officials of what is now called the Disaster Law Programme of the International Federation of Red Cross and Red Crescent Societies (IFRC).

The Commission requested the UN-Secretariat to prepare a background study, initially limited to natural disasters, on the topic, "Protection of persons in the event of disasters".[6] The detailed study provides an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance. Furthermore, the study analyses the rules on the protection of persons in the event of disasters and confirms that no generalised multilateral treaty exists on the topic. The only universal multilateral treaty directly related to disaster response was the Statute of the International Relief Organization of 1927 which is no longer in force.[7] However, a number of relevant rules have been codified in some specialised multilateral treaties as well as in over 150 bilateral treaties and memorandums of understanding. Among them the "Tampere Convention on the

[4] UN Doc. A/CN.4/325, para. 102. Author's italics.

[5] UN-Doc. A/62/10, para. 375.

[6] UN Doc. A/CN.4/590 and 1–3.

[7] UN Doc. ECOSOC Res. 1268 (XLIII) of 4 August 1967.

Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations" of 18 June 1998[8], this is significant because it provides legal rules on the use of telecommunication for humanitarian assistance activities during disasters. The Convention deals with the coordination of the assistance and especially with the overcoming of bureaucratic restrictions. The second treaty to be mentioned in that connection is the "Framework Convention on Civil Defence Assistance" which entered into force in 2001. From other sources of law, there are over 100 national laws directly concerning the topic.[9]

Humanitarian assistance was often addressed by the UN. In 1971 the Secretary-General emphasised in a report on Assistance in Cases of Natural Disaster that the primary responsibility of the affected government was to protect the life, health and property of people within the frontiers and to maintain essential public services. Humanitarian assistance from the international community can only be supplementary. The concept of 'primary responsibility' was endorsed in several UN General Assembly Resolutions.[10] The UN General Assembly discussed the issue again in 1991 and adopted the Resolution 46/182, which reflects the conservative approach of the world organisation.

The document underlines that:

- Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality;
- The sovereignty, territorial integrity and national unity of States must be fully respected. Thus humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country;
- Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organisation, coordination, and implementation of humanitarian assistance within its territory; and
- The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws.

The UN resolution concludes by emphasising its central and unique role in providing leadership and coordination of the efforts of the international community to support the affected countries.

Other documents deal with measures to expedite international relief. The body of these instruments justifies the assessment of an expanding regulatory framework. At the centre are the principles of sovereignty and non-intervention. Therefore, any

[8] UNTS 2296, No. 40906.

[9] See the list of these documents in the annex of UN Doc. A/CN.4/590/Add.2.

[10] Res. A/36/225 of 17 December 1981.

disaster relief carried out by assisting actors is subject to the consent of the receiving State and that the receiving State has the primary responsibility for the protection of persons on its territory or subject to its jurisdiction or control during a disaster. A relatively recent development is the recognition of the need for disaster prevention, mitigation and preparedness.

9.3 Challenge of the 'Sovereignty' Concept and Politicisation

Sovereignty is a cornerstone of international law. The sovereign State exercises exclusive jurisdiction over matters within its territory. Other States are not allowed to interfere in the internal affairs of sovereign States. If they intervene they commit a violation of international law and the affected State can react by proportional sanctions. However, the intervention to protect human beings in emergencies from their sovereign is an old concept first mentioned by the father of modern international law, Hugo Grotius (Valek 2005, p. 1223). The recent discussions about humanitarian interventions and the concept of the Responsibility to Protect (R2P) seek to offer a solution in cases of massive human rights violations and the sovereignty claim of a State. The access to victims in disasters may also involve conflicts with the sovereignty entitlements of the affected State because the respect for State sovereignty is a central principle applicable to relief actions. However, sovereignty is subject to the obligation to comply with international law. Therefore the principle of sovereignty does not constitute a legal barrier which inhibits international humanitarian assistance, but "a necessary pre-condition for the exercise of meaningful cooperation within the community of States" (Macalister-Smith 1985, p. 56). Indeed, international humanitarian assistance describes the new law of cooperation and solidarity among nations which means also a kind of rediscovery of the ethical and religious foundations of public international law. Solidarity is a value-driven principle with a strong ethical underpinning (Wellens 2010, p. 5). Human rights as well as humanitarian assistance are parts of that ethical underpinning. Thus, the questions arise in which way these rights can be implemented in the event of natural disasters. Practice and theory offer different answers.

In the 1980s some French health practitioners who founded Médecins Sans Frontiers in 1971 and other experts introduced the concept of the *droit d'ingé rence* (right of interference) or even the duty of interference. The central tenet was that humanitarian actors have a right of access to victims of humanitarian emergencies, whether man-made or natural, including a right to innocent passage through humanitarian corridors. The duty of interference was understood as a moral obligation of third parties to provide assistance to victims. The duty should be applied if the affected State proves unable or unwilling to supply adequate protection to its own people: "It was assumed that in humanitarian crises the focus should shift from classical reciprocal inter-State obligations to the right of the victims

themselves to be assisted, from within or from without if need be" (Focarelli 2013, para. 2).

However, this new approach was only reflecting a concept of some non-governmental organisations with some support of the French government. The international community was reluctant as Resolution 43/131 proves. The UN General Assembly adopted Resolution 43/131 on 8 December 1988 upon a proposal by France. The Resolution on humanitarian assistance to victims of natural disasters and similar emergency situations repeats the sovereignty-friendly approach that the first and foremost obligation of the State is to take care of the victims of natural disasters occurring on its territory. The original French draft went much further by mentioning the right to assistance as a right of any individual. This approach was not accepted by the majority of States because of its neo-colonialist implications. Thus, the final text of the resolution only mentioned that "the abandonment of the victims of natural disasters . . . without humanitarian assistance constitutes a threat to human life and an offence to human dignity".

This statement allows different interpretations and some uncertainty in legal terms. Nevertheless, some commentators argue that the primary role of the affected State amounts to an obligation to respect and protect certain fundamental rights, such as the right to life and to implement other basic needs. Focarelli argues that the failure of the affected State to do so has been assumed to entitle third parties to exercise their right of interference and of access to victims and he supports his argument with reference to the practice of the UN Security Council (Focarelli 2013, para. 3). Paragraph 3 of Resolution 688 (1991) reads: "The Security Council . . . insists that Iraq allows immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations."

The UN Security Council followed suit, but exclusively in respect to armed conflict situations because humanitarian assistance in armed conflicts is guided by the so-called humanitarian principles of impartiality and neutrality, which have their legal basis in Art. 70 of Additional Protocol I to the Geneva Conventions (1977)[11] and respective customary international law (Spieker 2013). This legal basis is only applicable in armed conflicts and not in cases of natural or man-made disasters. Therefore, it is at least controversial for one to use this obligation in armed conflicts as a justification to enforce humanitarian assistance in situations other than armed conflicts. In the case of the cyclone Nargis that struck the southern part of Myanmar with devastating force on 2 May 2008, the UN Security Council failed to take action under Chapter VII of the UN Charter, despite a French proposal for a resolution authorising the delivery of aid to the people in Myanmar without the government's consent (Focarelli 2013, para. 28). Frustrated by the government of Myanmar's the refusal to accept international assistance, the French government invoked R2P as the basis to impose the delivery of aid. However, the international

[11] 1125 United Nations Treaty Series, p. 3.

community was able to find non-coercive ways for a co-ordinated humanitarian response (Barber 2009, p. 4).

The example of cyclone Nargis and the French attempt to enforce humanitarian assistance reflects that aid is not divorced from politics. After all, besides the humanitarian organisations, a range of other actors such as government representatives, UN organisations or multinational forces are also involved in the provision of aid, all of whom pursue political interests.

A key factor in the politicisation of humanitarian aid is that when major disasters occur, cooperation between the aid agencies and assisting countries is unavoidable. In such cases, the mandate governing the operation, which is decided at political level, invariably clashes with the principles of independence, impartiality and neutrality that govern the work of humanitarian non-governmental organisations.

Furthermore, the mass media also have a politicising effect, since politicians and non-governmental organisations are keen to show themselves in a good light. Aid agencies are heavily dependent on donations to carry out their relief operations and rely on the media to broadcast their appeals and reach their target audience. Indeed, humanitarian assistance is popular with the general public in countries that provide relief, and the public offers generous emotional and financial support for "humanitarian" operations. When it comes to securing a share of the available funds, however, there are no holds barred: all the humanitarian agencies attempt to exert influence and compete to raise their profile via the mass media. This makes it almost impossible to present a more detailed, critical and nuanced picture.

Natural disasters in States governed by military dictatorships should not be seen as an opportunity to voice criticism of conditions in these countries. The cyclone which caused devastation in Myanmar (USAID 2008, p. 1), for example, became a vehicle for a political campaign against the country's leaders, who had brutally crushed opposition to the regime the previous year. After the cyclone, the country's military leaders refused to allow international aid organisations to operate freely in the country. This prompted sharp criticism from the Western countries, with French Foreign Minister Bernard Kouchner even calling for the R2P to be invoked as the basis for the delivery of humanitarian aid, if necessary against the will of the military government. As a consequence of this campaign, the real issue, namely the relief operation itself, largely faded from view. In fact, humanitarian organisations were able to deliver their aid as far as the—albeit completely overstretched—airport in Rangoon. From there, it was transported into the affected areas by local staff, with whom the aid agencies had been cooperating very effectively for many years (IFRC 2011). Humanitarian aid workers from Australia said that local staff in Myanmar were getting some aid through to people but complained that western specialists and cargo planes had been unable to land and to unload supplies (McLachlan-Bent and Langmore 2011, p. 41).

The Western political approach did not encourage the Myanmar military leaders to warm to the idea of external assistance. Moreover, the colonial history of the West and their intervention in Iraq did not improve its credibility in the eyes of the paranoid dictators (Selth 2008, p. 385). The politically motivated campaign against Myanmar's leaders tended to disrupt the provision of aid. The fact that the country's

leaders used the relief operation to gain the goodwill of the people and therefore concealed the actual origin of the goods by re-labelling them (International Crisis Group 2008, p. 8) did not alter the fact that aid did arrive in the country and that it was inappropriate to use the crisis as an opportunity to voice criticism of its leaders. The outcome of the political campaign against the military leaders was a regrettable decline in the willingness to donate on the part of the public in the donor States, who had gained the impression that the aid was not reaching the victims.

Politicians must resist the temptation to link humanitarian aid for victims of a natural disaster with political demands for regime change or improvements in the human rights situation. Access to the media must be used solely to draw attention to the humanitarian crisis and thus encourage the general public to give the requisite support to the relief operation. However, besides the issue of politicisation, one has also to take in consideration that a natural disaster like Nargis would be extremely difficult for even the most prepared States to respond to effectively (McLachlan-Bent and Langmore 2011, p. 38).

9.4 Right to Humanitarian Assistance

Disasters have a human rights dimension because their consequences can influence the enjoyment of rights by those affected. Disasters have effects on the right to life and on social and cultural rights. Issues like access to assistance, relocation and property restitution arises. The most important question is that of the right to humanitarian assistance.

The UN considers the right to humanitarian assistance to be part of a new international humanitarian order.[12] The authors of a UN study argue that reference to the right to humanitarian assistance is made in Article 25 of the Universal Declaration of Human Rights of 1948 (UDHR) as well as in Article 11 of the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).[13] Moreover a number of human rights treaty norms apply to natural disaster situations, especially those protecting the right to life, the right to food, the right to health services and, more generally, the right to meet the victims' basic needs.

According to the UDHR everyone has the right to a standard of living adequate for the health and well-being of the person and the family. The ICESCR recognises the right of everyone to an adequate level of living, including food, clothing and housing and the continuous improvement of living conditions. The General Comment 12 of the Committee on Economic, Social and Cultural Rights (CESCR) expressly stipulates that "this obligation also applies for persons who are victims of natural or other disasters" (para. 15).

[12] UN Doc. A/61/224, para. 5.

[13] 993 UNTS 3.

States are obliged under Article 2 ICESCR to take appropriate measures to ensure the realisation of this right. Basically, three different kinds of obligations concerning economic, social and cultural human rights can be identified: duties to avoid depriving, duties to protect from deprivation and duties to aid the deprived. The duty to respect requires States not to take measures which are incompatible with human rights. In contrast, the duty to protect requires positive measures by States to ensure that individuals or groups behave consistently with human rights. The duty to fulfil requires States to proactively engage in activities intended to strengthen compliance. This demands an active role of the State in the form of administrative, judicial, budgetary and other measures (Riedel 2009, p. 133). The implementation may be resource related, however the State has to utilise all appropriate means and is entitled to international cooperation on a voluntary basis: "The right to humanitarian assistance depends entirely on the timely and careful identification and evaluation of actual needs. The assistance itself should be designed and monitored regularly, following a thorough assessment of needs, which should be comprehensive and multi-sectoral, and must be based on the participation of all involved parties as well as external experts recruited from the global research."[14]

As yet there is no general human rights instrument devoted specifically to the protection of victims of natural disasters. An exceptional universal provision constitutes Article 11 of the Convention on the Rights of Persons with Disabilities of 30 March 2007 stipulating that contracting States shall take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including the occurrence of natural disasters.[15] The regional African Charter on the Rights and Welfare of the Child of 11 July 1990[16] provides that contracting States shall take all appropriate measures to ensure that internally displaced children, including in situations of natural disaster, shall receive appropriate protection and humanitarian assistance.

Without doubt, States are under the obligation in cases of disaster to take care of the victims. They have in particular a duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses (Institute de Droit International 2004, p. 263). This raises the question of whether third States or organisations may provide assistance to prevent gross violations of human rights in cases in which the affected State is not going to protect victims of natural disasters. A way out of this impasse is offered by the 2001 R2P concept of the International Commission on Intervention and State Sovereignty. The concept applies also in a "situation of overwhelming natural or environmental catastrophes, where the State concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened" (at para. 4.20). This is the only

[14] UN Doc. A/61/224, para. 6.

[15] Available under: http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx, accessed 6 October 2014.

[16] OAU Doc. CAB/LEG/24.9/49 (1990).

reference where R2P deals with natural disasters. However this reference is doubtlessly important, because the concept allows military intervention on the part of the international community to protect human beings, should the affected State be unwilling or unable to prevent and to protect its own people.

This constitutes quite a far reaching consequence. Thus, many States were reluctant to accept the concept of R2P although it is referred to as an emerging guiding principle and not a legal norm.[17] China and Russia have always been afraid of giving too much power to the international community (Evans 2012, p. 17). This becomes obvious in the 2005 World Summit Outcome Document. The R2P doctrine indeed appears, but only in relation to genocide, war crimes, ethnic cleansing and crimes against humanity. Natural disasters are left out. The Secretary-General gave the explanation that "[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity" since "[t]o try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility".[18]

Nevertheless, some authors argue that R2P should apply to natural disasters, because its approach is in line with the ICJ judgment in the *Corfu Channel Case* of 1949. The Court identified a duty to warn of an impending disaster in order to mitigate its consequences.[19] Other authors consider that refusing to let international humanitarian aid enter in cases of natural disasters, like the cyclone Nargis that resulted in the death of 140,000 people, as a crime against humanity and plead that the R2P principle is applicable. They understand the reluctance of the Myanmar government's fear of foreign intervention, but do not accept it as an excuse for denying foreign presence: "this should not be accepted as an excuse for denying lifesaving foreign aid in the critical days following the cyclone" (McLachlan-Bent and Langmore 2011, p. 59).

This argument constitutes little more than wishful thinking, since there is hope involved that R2P can be used to enforce humanitarian assistance. However, foreign humanitarian assistance cannot be executed within 'days' after a natural disaster that brought absolute devastation to a State with an underdeveloped and destroyed infrastructure. The first aid has to be provided by local actors and the international community has no other choice than to support them. The example proves that it is an unfair expectation to enforce humanitarian assistance by recourse to R2P. Thus, the reluctance of States to apply the R2P concept with respect to natural disasters is no surprise. The 2005 Hyogo Declaration of the World Conference on Disaster Reduction underlined that "States have the primary responsibility to protect the people and property on their territory from hazards". Thus they should conduct a national policy consistent with their capacities and the

[17] International Commission on Intervention and State Sovereignty (ICISS), fn. 18, p. 15.

[18] UN-Doc. A/63/677, para. 10.

[19] ICJ Rep. 1949, The Hague 1949, p. 23.

resources available to them. The issue of an intervention by other States on behalf of the international community in case of unwillingness or inability to ensure protection is not mentioned in this document. It seems the document does reflect the state of the art of the discussion of the right to humanitarian assistance.

9.5 Humanitarian Assistance and Failed States

The earthquake which befell Haiti on 12 January 2010 was caused by one of the natural events which are by no means uncommon in this region of the world. However, its appalling impacts were exacerbated by Haiti's status as what the literature commonly terms a "failed State." Throughout its history, Haiti has been beset by political instability. The last unrest before the earthquake took place after President Aristide rigged the vote in the 2000 elections. By 2004, almost half the country was under rebel control, and Aristide was forced into exile. In order to support Haiti's reconstruction, the UN Security Council voted to deploy various (military) missions. The United Nations Stabilization Mission in Haiti (MINUSTAH), established by Security Council Resolution 1542 on 30 April 2004, should be mentioned in particular. MINUSTAH was deployed after Aristide's departure, because the Security Council deemed the situation in Haiti to be a threat to peace and security in the region. It was also responding to an official request from acting President Boniface Alexandre asking for a multinational peacekeeping force for Haiti. MINUSTAH's mandate was to restore a secure and stable environment, to promote the political process (democratic elections, decentralisation), and to monitor the human rights situation. At operational level, all the activities of the various UN agencies were coordinated by MINUSTAH (Langholtz et al. 2007, pp. 404 et seq.). In the early days, this innovative mission faced great difficulties in stabilising the situation.

It was only after coercive measures were taken to create a secure and stable environment that improvements were achieved. Nonetheless, the security situation remained fragile, and attempts to disarm the militias and criminal gangs were unsuccessful. Measures to set up a functioning police force and establish the rule of law also faltered (Leininger 2006, p. 517). The Security Council has regularly extended MINUSTAH's mandate, most recently with the adoption of Resolution 2012 on 14 October 2011. While welcoming the fact that some progress has been achieved after the earthquake, the Security Council has determined on each occasion that the situation in Haiti still constitutes a threat to international peace, and it therefore continues to act under Chapter VII of the United Nations Charter.

Natural and man-made disasters can endanger or claim human lives and do not stop at national borders. A theoretical and practical distinction is often made between the provision of emergency relief in response to natural disasters, and humanitarian assistance in the context of wars and conflicts (Vukas 2013). In Haiti's case, however, this distinction does not apply. Here, both forms of assistance are required, for the natural disaster has simply exacerbated—albeit dramatically—the

existing conflicts. In such a situation, the humanitarian dimension must, as a matter of principle, be the priority. This raises the question of the obligations of the affected country and the international community under international law (Wellens 2010, p. 17). A key issue to be addressed is to what extent the sovereignty of a failed State poses an obstacle to international engagement: "By its very nature, cooperation is likely to appear in conflict with the sovereign prerogatives in the recipient State."[20] Therefore, Article 9 of the ILC draft on the protection of persons in the event of disasters places the affected State, by virtue of its sovereignty, at the forefront of all assistance and limits other actors to a complementary role.

In the case of Haiti, for example, President René Garcia Préval expressed frustration that the Haitian government had been bypassed in the coordination of the relief effort, while Ecuador's President Rafael Correa lambasted what he saw as "imperialism among the donors" (ZEIT Online Zeitgeschehen 2010). A particular criticism was that most of the money donated goes back to the donor countries. This criticism raises further questions: to what extent can and should the government of a failed State be involved in humanitarian relief operations? And where should the goods distributed as part of the relief effort come from? Legally, even failed States are sovereign States. Thus the UN Security Council, in the preamble to its Resolution 1892 (2009) states explicitly that it reaffirms "its strong commitment to the sovereignty, independence, territorial integrity and unity of Haiti. . .".

This implies that aid must be coordinated, as a matter of principle, with the (national) government of the failed State concerned. However, this responsibility is likely to overwhelm the government, since it does not exert effective control over the entire national territory. Furthermore, the country's rudimentary government institutions are invariably discredited in the eyes of the populace due to mismanagement, corruption and criminal associations. Therefore the strengthening of the institutions was one of the most urgent tasks of the international community (International Crisis Group 2010, p. 18). A further factor undermining the State's capacities to deal with the aftermath of the earthquake was that large numbers of Haiti's local police were victims of the disaster. Therefore, one of the most serious problems affecting the relief effort, besides the collapse of Haiti's infrastructure, proved to be the total absence of public security.

Against this background the traditional UN approach of cooperation with the Haitian government and donor conferences did not meet the challenges. It was estimated that the country needs around 11.5 billion US dollars in aid for comprehensive reconstruction and development over the next 10 years. The donor conference in March 2010 secured pledges of around 9.9 billion US dollars, far surpassing expectations. The EU is the largest donor to Haiti and intends to contribute 1.6 billion US dollars. Motivated by a desire to exert political influence, countries such as Venezuela have pledged substantial sums as well. However, pledges are all very well, but the actual provision of funds is quite another matter. Furthermore, the willingness to donate invariably wanes once the disaster and its tragic individual

[20] UN-Doc. A/CN.4/652, para. 21.

fates have vanished from the headlines. This happens in all natural disasters once the initial shock has abated and in Haiti's case, is reinforced by the public's mistrust of the government agencies supposedly responsible for reconstruction. In that sense, even the financing of emergency relief could pose problems in Haiti. A further concern is that some potential donors will argue that the Haitian government is not a partner who can be trusted to make appropriate use of donated funds.

The international community's emergency relief operation in Haiti moved into the reconstruction phase in 2010, which required close cooperation with the government and other local agencies. In view of the massive extent of human suffering, there was no time available to test whether this cooperation worked. Therefore, one of the lessons of the Haiti disaster is that other forms of international assistance must be considered.

There are various possible options. Haiti faced a crisis comparable to the situation in East Timor in 1999. The UN had established a mission in East Timor in June 1999 whose mandate was to organise and monitor a referendum on the future of this former Portuguese colony, which was occupied by Indonesia. When the referendum produced a clear majority in favour of independence, pro-Indonesian militias embarked on a campaign of violence and terror, murdering and displacing the people of East Timor. The East Timorese elite in particular fell victim to the massacres.

There was a complete collapse of law and order, and infrastructure was destroyed. The UN mission was also attacked, forcing staff to flee. The Indonesian armed forces, which the government was powerless to control, not only tolerated the situation, which was in effect a civil war; it was apparent that they were implicated from the start. Finally, after lengthy prevarication, the Indonesian government agreed to the deployment of an international peacekeeping force for East Timor in September 1999.

One persistent criticism levelled at the UN was that this deployment came far too late, as the violence perpetrated by the Indonesian militias had been predicted well in advance. After Indonesia renounced all its claims to East Timor in October 1999, its officials were withdrawn, leaving the country without any civil administration. The UN Security Council then adopted Resolution 1272 (1999), establishing a United Nations Transitional Administration in East Timor (UNTAET). It was endowed with overall responsibility for the administration of East Timor and was empowered to exercise all legislative and executive authority.

It was mandated to provide security and maintain law and order, to establish an effective administration, to assist in the development of civil and social services, and to ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance. The mission was headed by a Special Representative, who was empowered to amend and repeal laws. The original 16-month mandate was extended twice. Thus for the first time, a new State was born under the UN's administration. Without the UN to act as 'midwife', this State-building process would have been impossible. Some authors evaluated the role of the UN as an agent for a *sui generis* self-determination unit for of East Timor (Wilde 2008, p. 188). The question is whether this example could provide some useful ideas to

help consolidate the situation in Haiti as well. The scale of the complex emergency in Haiti is such that it exceeded the Haitian government's capacities. Already a failed State prior to the disaster, Haiti needed intensive support from the international community in order to stabilise the situation. In particular, after such a crisis in a failed State, security and protection must be provided for the local population and international aid workers. The economy must also be rebuilt. With a view to facilitating the requisite coordination and to establish the administration on a secure footing, it would be helpful to consider whether, with the consent of the Haitian government, a temporary international administration for such a fragile State like Haiti should be put in place. Thus one can argue that an international administration should act as the UN in East Timor: as the self-determination unit for the people of Haiti. This would be an expression of international solidarity (Boisson de Chazournes 2010, p. 109).

9.6 ILC Draft Articles

Against the background of the experiences of the international community in cases like Myanmar or Haiti, the ILC codification project inspired expectations. The title of the codification calls for a rights-based approach concerning the treatment to which the victim of a disaster is entitled: "The rights based approach deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed."[21] This point of origin enables 'victims' to become rights holders and respects the dignity of the individual which is a customary rule of international law (Patnaik 2011, pp. 129–141).

The ILC project was able to build on the activities of the International Federation of Red Cross and Red Crescent Societies (IFRC) which undertook an evaluation of the existing international and national norms relating to disaster relief by implementing its International Disaster Response Laws (IDRL) project.[22] This project dealt with the legal basis of the laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response activities in times of non-conflict related to disasters.

[21] UN-Doc. A/CN.4/598, para. 12.

[22] International Federation of the Red Cross and Red Crescent Societies (ed.), Law and legal issues in international disaster response: a desk study, Geneva 2007.

9.6.1 The R2P Issue

The preliminary report of 2008 dealt with the limitations of the scope of the project *ratione materiae* and the ILC agreed to exclude armed conflicts from the subject matter.[23] The idea was put forward of limiting the topic to two phases: the disaster response and the post disaster phase. The ILC gave also attention to the concept of R2P (Winkelmann 2010). However, the relevance in the context of disasters remained unclear for some members. Therefore the Rapporteur decided, in the light of the approach of the UN Secretary-General, to omit this issue. In paras 138 and 139 of the 2005 World Summit Outcome the report of Secretary-General explains that "the responsibility to protect applies ... only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility".[24] Therefore natural disasters were not included in the 2005 World Summit decision. However, if the treatment of the people in connection with natural disasters meets the criteria of a crime against humanity as defined in the 1998 ICC statute, R2P applies again (Thakur and Weiss 2009, p. 48). Against this background it is hard to understand the ILC decision to eliminate any discussion of the R2P.

9.6.2 Definition

After reviewing several definitions of disasters, the Special Rapporteur came to the conclusion that the definition of the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations constitutes a good point of departure for a broader definition of a disaster. His draft definition in article 2 adopts a basic characterisation and reads:

> 'Disasters' means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss.[25]

The advantage of this definition is that it does not distinguish between natural and man-made events and does not demand that the event overwhelm a society's response capacity. Otherwise the definition would shift the attention from the persons in need of protection. The definition applies in natural and man-made disasters because disasters often arise from complex sets of causes. They include

[23] UN-Doc. A/CN.4/615, para. 6.
[24] UN-Doc. A/63/677, para. 10 (b).
[25] UN-Doc. A/CN.4/615, para. 45.

natural and man-made elements. Therefore it is very often impossible to identify a single cause. This broad definition was well received by States.[26]

9.6.3 Cooperation

The moral and legal fundament of international humanitarian assistance is the principle of cooperation. The UN Secretary-General argued that "the belief in the dignity and value of human beings as expressed in the preamble of the Charter of the United Nations is and must be the prime motive for the international community to give humanitarian assistance."[27] Rudi Muhammad Rizki, the UN nominated independent expert on human rights and international solidarity held that "international assistance and cooperation . . . must be oriented, as a matter of priority, toward the realization of all human rights, in particular economic, social and cultural rights, and . . . must respond swiftly and effectively to grave situations such as natural disasters."[28]

The duty to cooperate is one of the basic principles of international law and can be found in the UN-Charter Art. 1(3). According to Art. 55 the UN shall promote "solutions of international economic, social, health, and related problems; and international cultural and educational cooperation" with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations. Cooperation consecrates the solidarity among nations. Solidarity is a value driven principle and according to Macdonald it constitutes an international legal principle distinct from charity (Macdonald 1993). Solidarity has a legal dimension "because it is increasingly ensuring the cohesion and consistency of the legal order across various branches" (Wellens 2010, p. 36). Therefore it is gradually becoming a cornerstone of international law.[29] Against this background the ILC draft art. 3 determines a "duty" to cooperate:

> For the purposes of the present draft articles, States shall cooperate among themselves and, as appropriate, with:
> a) competent international organizations, in particular the United Nations;
> b) the International Federation of Red Cross and Red Crescent Societies; and
> c) civil society.

The existence of such obligations means a restriction of the sovereignty of States. Thus, on the one hand the viewpoint of China that cooperation is "a moral value only" does not surprise.[30] Poland on the other hand argued that the duty to cooperate refers to a formal framework of protection of persons, solidarity refers to its substance.[31]

---

[26] UN-Doc. A/CN.4/629, para. 10.
[27] UN-Doc. A/45/587, para. 5.
[28] UN-Doc. A/HRC/9/10, para. 7.
[29] UN-Doc. A/CN.4/629, para. 11.
[30] UN-Doc. A/C.6/64/SR.20, para. 24.
[31] UN-Doc. A/C.6/64/SR.21, para. 77.

9.6.4 Principles of Protection

The principles that inspire the protection of persons in response to disasters must comply with the interests of the affected State and the assisting actors. The humanitarian principles of humanity, neutrality and impartiality meet these requirements. These principles are critical to ensuring the distinction of humanitarian action from other activities, "thereby preserving the space and integrity needed to deliver humanitarian assistance effectively to all people in need.[32] The principles were first codified in international humanitarian law and are now accepted in many international instruments on disasters (Zwitter 2011, p. 60). The International Disaster Response Law Guidelines of the IFRC (Mehring 2010, para. 3) refer to the principles and underline that aid priorities are only calculated on the basis of need alone. In Nicaragua v. United States[33] the ICJ stated that the activities of the Red Cross based on the principles are only aimed to protect life and health and to ensure respect for the human being.

Neutrality is being described as non-engagement in hostilities or taking sides in the controversies of a political, religious or ideological nature. Valencia-Ospina argues that such an approach applies not only in armed conflicts but also in other disasters in a modified manner. Humanitarian actors should abstain from any activity which might be considered as interference in the interests of the affected State.[34] It is an operational instrument to implement the idea of humanity. All in all it means that humanitarian assistance must not be guided by, or subject to, political considerations.[35]

Impartiality means that the humanitarian assistance is guided only by the needs of the victims. The rights of the affected persons are respected and priority is given to the most urgent cases of distress. Therefore the principle includes the observation of the norms of non-discrimination and proportionality.

Humanity means that human suffering must be addressed wherever it is found. Particular attention must be given to the vulnerable groups and the dignity and rights of all victims must be respected.

In the light of the forgoing draft article 6 reads:

> Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality.

It goes without saying that the principle of humanity is intimately linked to human dignity. Therefore the ILC draft article 7 claims that the competent international organisations and other relevant actors shall respect and protect human dignity. For the first time, human dignity appears as an autonomous provision in the body of an ILC draft convention.

---

[32] UN-Doc. A/64/84.

[33] ICJ Rep. 1986, para. 243.

[34] UN-Doc. A/CN.4/629, para. 29.

[35] Regulation (EC) No. 1257/96.

9.6.5 Responsibility of the Affected State

States are sovereign entities. Sovereignty covers the whole body of rights and attributes which a State possesses in its territory to the exclusion of all other States, and also in its relations with other States.[36] Disasters do not abolish sovereignty, thus, other actors are not entitled to interfere into the domestic affairs of the affected State. The primary responsibility to organise humanitarian assistance in the event of a disaster is borne by the affected State. It is responsible for protecting disaster victims and has to facilitate, coordinate and oversee the relief operations in its territory. Any external assistance is therefore subject to the consent of government of the affected State. Draft article 8 reads:

1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.
2. External assistance may be provided only with the consent of the affected State.

Many States praised the ILC for striking the proper balance between the protection of victims of disasters and the respect of State sovereignty and non-interference. China underlined that the ILC activities should always be based on full respect for the sovereignty of the affected State and should not allow humanitarian assistance to be politicised or be made an excuse for interfering in internal affairs.[37] However, Finland argues that the responsibility of the affected State should not remain exclusive.[38] Therefore additional consideration should be given to the affected State's duty towards the international community since inaction could have effects on the territories of its neighbours.

9.6.6 Duty to Seek Assistance

The affected State has doubtless the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. Nevertheless the question arises when the magnitude or duration of a disaster overwhelms its national response capacity. By way of example an analysis of human rights implicated in the context of a disaster is helpful. Attention is warranted in this regard to the human right to food which is codified in the International Covenant on Economic, Social and Cultural Rights (CESCR) of 1966.[39] The CESCR-Committee notes in General Comment No. 12 that if a State party maintains that resource constraints

[36] Corfu Channel Case, ICJ Rep. 1949, p. 43.
[37] UN-Doc. A/CN.4/652, para. 13.
[38] UN-Doc. A/C.6/66/SR.21, para. 60.
[39] UNTS 993, No. 14531, p. 3.

make it impossible to provide access to food to those in need: "the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. ... A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food."[40]

This comment of the CESCR-treaty body underlines that recourse to international help may be an element in the implementation of the obligations of a State party to persons under their jurisdiction where it considers that its own resources are inadequate to meet protection needs.[41]

The International Disaster Response Law Guidelines of the IFRC share that approach by stating: "If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons."[42] The ILC Draft article 10 reads:

> The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations if the disaster exceeds its national response capacity.

9.6.7 External Assistance

There is, in general, in cases of disasters a willingness of the affected States to invite external assistance. They agree that international actors have access to the victims, particularly if the authorities are unable to cope with the disaster situation. Even if there are many such cases, one cannot conclude that this practice can be considered as a legal obligation to allow external assistance. Such cases cannot overrule the power of State sovereignty and therefore the consent of the affected State is still needed. According to the sovereignty principle the State is free to refuse the offer of humanitarian assistance.

However, sovereignty is not unlimited because it includes also obligations *vis-à-vis* the victim of such disasters. It has to be exercised in the way that best contributes to the protection of persons under the jurisdiction of that state. In conclusion, the rule on consent to humanitarian assistance must be seen in line with human rights obligations of the affected state. Therefore humanitarian assistance should not be rejected arbitrarily. Art. 11 reads:

---

[40] UN-Doc. E/C.12/1995/5, para. 17.

[41] UN-Doc. A/CN.4/643, para. 33.

[42] International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance 2007, guideline 3(2).

1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.
2. When an offer of assistance is extended pursuant to draft article 12, paragraph 1, of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer.

9.7 Conclusion

Literature and State practice offers evidence of the international community's great interest in the topic of humanitarian assistance in the event of disasters. Therefore one has to welcome the attempt of the ILC to codify legal principles applicable in natural and man-made disasters. The undertaking will help to improve the efficiency and quality of humanitarian assistance and mitigate the damages of the disasters. Many States praised the ILC draft for striking the proper balance between the protection of the victims and the respect of State sovereignty and non-interference. The importance of international solidarity was also emphasised by many States. Indeed, the draft convention does reflect the viewpoints of the States and does not meet all the demands of non-State actors being involved in humanitarian assistance. However, the topic is now on the agenda and the draft articles are a starting point for further discussion and new interpretations of the obligations of affected States, the right to offer assistance and the duty of the affected State not to arbitrarily withhold its consent to external help.

References

Barber R (2009) The responsibility to protect the survivors of natural disasters: cyclone Nargis, a case study. J Confl Secur Law 14:3–34

Benton Heath J (2011) Disaster relief, and neglect: the duty to accept humanitarian assistance and the work of the International Law Commission. Int Law Polit 43:419–477

de Chazournes LB (2010) Responsibility to protect: reflecting solidarity? In: Wolfrum R, Kojima C (eds) Solidarity: a structural principle of international law. Springer, Berlin, Heidelberg

de Vattel E (1758) Le droit des gens ou principes de la loi naturelle. Paris (reprinted by Carnegie Institution) Washington 1916, Book II, Chapter I, paras. 4–5

Evans G (2012) Responding to atrocities: the new geopolitics of intervention. In: SIPRI Yearbook 2012. Oxford University Press, Oxford

Focarelli C (2013) Duty to protect in cases of natural disasters. In: Max Planck Encyclopedia of Public International Law, para. 2

Giuffrida R (2013) Humanitarian assistance to protect human rights and International Humanitarian Law. In: Kolb R, Gaggioli G (eds) Research handbook on human rights and humanitarian law. Edward Elgar, Cheltenham, pp 294–319

IFRC (2011) Cyclone Nargis 2008, facts and figures. http://www.ifrc.org/en/news-and-media/news-stories/asia-pacific/myanmar/myanmar-cyclone-nargis-2008-facts-and-figures/. Accessed 6 Oct 2014

Institute de Droit International (2004) Resolution on humanitarian assistance, 2 September 2003. Annuaire de Droit International. Geneva

International Crisis Group (2008) Burma/Myanmar after Nargis: time to normalise aid relations, Asia Report No 161, Washington
International Crisis Group (2010) Haiti: the stakes of the post-quake election. Report No 35, Washington
International Law Association (1980) Report of the fifty-ninth conference, Belgrade, London, p 530
Langholtz H, Kondoch B, Wells A (eds) (2007) International peacekeeping, the yearbook of international peace operations, vol 2. Brill, Nijhoff, Leiden
Leininger J (2006) Democracy and UN peace-keeping – conflict resolution through state-building and democracy promotion in Haiti. In: von Bogdandy A, Wolfrum R (eds) Max Planck Yearbook of United Nations Law 10. Brill, Nijhoff, Leiden
Macalister-Smith P (1985) International humanitarian assistance. Nijhoff, Dordrecht
Macdonald RS (1993) Solidarity in the practice and discourse of public international law. In: Dominice C, Patry R, Reymond C (eds) Etudes de Droit International en l'honneur de Pierre Lalive. Helbing & Lichtenhahn, Paris
McLachlan-Bent A, Langmore J (2011) A crime against humanity? Implications and prospects of the responsibility to protect in the wake of cyclone Nargis. Global Responsibility Prot 3:37–60
Mehring S (2010) International Federation of Red Cross and Red Crescent Societies. In: Max Planck Encyclopedia of Public International Law, para. 3
Patnaik DS (2011) Towards an International Legal Framework for the protection of individuals in the event of disasters: an initial inquiry. In: Heintze HJ, Zwitter A (eds) International law and humanitarian assistance. Springer, Berlin, pp 129–141
Riedel E (2009) Economic, social and cultural rights. In: Krause C, Scheinin M (eds) International protection of human rights: a textbook. Institute for Human Rights, Abo, Turku
Selth A (2008) Even paranoids have enemies: cyclone Nargis and Myanmar's fears of invasion. Contemp Southeast Asia 30:379–403
Spieker H (2013) Humanitarian assistance, access in armed conflict and occupation. In: Max Planck Encyclopedia of Public International Law
Thakur R, Weiss TG (2009) R2P: from idea to norm – and action? Global Responsibility Prot 1:22–53
USAID (2008) Burma cyclone – facts sheet number two. Washington 2008
Valek P (2005) Is unilateral humanitarian intervention compatible with the U.N. Charter? Mich J Int Law 26:1223
Vukas B (2013) Humanitarian assistance in cases of emergency. In: Online Max Planck Encyclopedia of Public International Law
Wellens K (2010) Revisiting solidarity as a (re-) emerging constitutional principle: some further reflections. In: Wolfrum R, Kojima C (eds) Solidarity: a structural principle of international law. Springer, Berlin, Heidelberg
Wilde R (2008) International Territorial Administration. Oxford University Press, Oxford
Winkelmann I (2010) Responsibility to protect. In: Max Planck Encyclopedia of Public International Law
ZEIT Online Zeitgeschehen (2010) Haitis Präsident fühlt sich übergangen. http://www.zeit.de/gesellschaft/zeitgeschehen/2010-01/haiti-gewalt-beziehungen-schule
Zwitter A (2011) United Nations' legal framework of humanitarian assistance. In: Heintze HJ, Zwitter A (eds) International law and humanitarian assistance. Springer, Berlin, pp 51–70

Chapter 10
European Efforts in Transitional Justice While Implementing Universal Jurisdiction: ICJ Belgium v. Senegal Case

Gabija Grigaitė and Renata Vaišvilienė

10.1 Introduction

On 20th July 2012 the International Court of Justice ruled that Senegal must submit the case of Chad's former leader Mr. Hissène Habré to its competent authorities for the purpose of prosecution if it does not extradite him to Belgium. The international consensus that the perpetrators of international crimes should not go unpunished is being advanced by established international criminal tribunals, treaty obligations and a growing number of countries that recognise universal jurisdiction for their national courts, which may have an important role to play in balancing justice and peace, accountability and stability in transitional societies as in Mr. Habré's case. Despite the fact that universal jurisdiction (International Law Association 2000, p. 2)[1] is being accepted by States while trying to comply with their international obligations, difficulties arise when it comes to the implementation of universal jurisdiction because of its concurrency with existing judicial mechanisms. The authors of this article argue that internationally recognised values and reparatory justice for victims of the conflict must be placed on a State's power to choose which cases involving core international crimes are the objects of the exercising of its criminal jurisdiction, including universal jurisdiction and universal jurisdiction *in absentia*, after taking the principle of subsidiarity into account.

[1] 'Under the principle of universal jurisdiction, a State is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator of the victim.'

G. Grigaitė • R. Vaišvilienė (✉)
Institute of International and European Union Law, Law Faculty, Vilnius University, Vilnius, Lithuania
e-mail: gabija.grigaite@gmail.com; renata.vaisviliene@gmail.com

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_10

10.2 Universal Jurisdiction as a Comprehensible Remedy

Universal jurisdiction, being accepted widely as a tool to fight international impunity, is still one of international law's more controversial topics (O'Keefe 2004, p. 736). Despite the positive effect of filling the impunity gap, the risk of possible negative consequences should be kept in mind when exercising universal jurisdiction. Unbridled universal jurisdiction can challenge the world order and deprive individuals of their rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, resulting in: unnecessary frictions between States, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory (Bassiouni 2008, p. 153). Consequently, it is of the utmost importance firstly, to understand the essence of the doctrine of universal jurisdiction and, secondly, to implement universal jurisdiction with clear awareness of its risks.

The assertion of universal jurisdiction originated in 1927 when the Permanent Court of International Justice in *The Case of S.S. 'Lotus' (France v. Turkey)*, (the Lotus case) Stated that 'in all systems of law the principle of the territorial character of criminal law is fundamental', although it also added that '[t]he territoriality of criminal law (. . .) is not an absolute principle of international law and by no means coincides with territorial sovereignty' (Lotus case, p. 20). It further added:

> (. . .) jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law (. . .) Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable (Lotus case, pp. 18–19).

An argument to prove the utility of the universal jurisdiction concept as a comprehensive and widely accepted framework requires it to be situated within recognised international treaties, international customary law and national law.

There are a number of international treaties that impose an obligation to prosecute and punish criminal perpetrators.[2] Starting with the UN Convention on the

[2] See, e.g., Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 4 Sept. 1956, 266 UNTS 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 Nov. 1973, 1015 UNTS 244; Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 Dec. 1970, 10 ILM 133; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature 23 Sept. 1971, 10 ILM 1151; International Convention against the Taking of Hostages, adopted 12 Dec. 1979, G.A. Res. 34/146, UN GAOR, 34th Sess., Supp. No. 99, UN Doc. A/34/819, 18 ILM 1456 (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, S. Treaty Doc. N. 100-20, 1465 UNTS 85.

Prevention and Punishment of the Crime of Genocide (further referred to as the Genocide Convention) where States parties were obliged to take national actions in order to prevent and punish the crime of genocide as a 'crime under international law' (Genocide Convention, Art. I). Notwithstanding the fact that the Genocide Convention has provided only territorial jurisdiction, the customary law evolved towards the application of universal jurisdiction covering the crime of genocide, as Stated by the International Court of Justice (ICJ) in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (further referred to as the Genocide case):

> (...) the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.

Furthermore, universal jurisdiction was first explicitly embodied in the Geneva Conventions together with the obligation of the States Parties 'to enact any legislation necessary to provide effective penal sanctions'.[3]

Customary international law, while providing a basic right for universal jurisdiction, does not elaborate a mechanism of implementation and does not provide obligations to be taken at the national level (Henckaerts 2005, pp. 604 and 568–621).[4] To illustrate this, the Hague Court of Appeal in its judgements against two Afghan military officials refused to apply customary international law on the ground that Article 94 of the Dutch Constitution prohibits Dutch judges from reviewing statutes in light of unwritten international law. Even though this decision of the court could be criticised, national initiatives to include universal jurisdiction among other national legal provisions largely dependent on certain international treaties. As a consequence this can create an asymmetrical obligation for some States (Philippe 2008, p. 387).

The application of the normative legal framework of international law as it relates to universal jurisdiction is not elaborated in such a manner as to impose sufficiently clear obligations on States to exercise universal jurisdiction and to have explicit mechanism to do this. If international law were to make progress in

[3] Common articles GC I, Art 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the *grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also*, if it prefers, and in accordance with the provisions of its own legislation, *hand such persons over for trial to another High Contracting Party concerned*, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article (...) (emphasis added).

[4] 'Rule 157: States have the right to vest universal jurisdiction in their national courts over war crimes'.

formulating a concrete definition of those obligations, the discretionary power consubstantial with State sovereignty would still leave when it comes to the final implementation of the provision (Philippe 2008, p. 387).

Despite the acknowledgement of its existence, there is no consensus concerning the definition of the concept of universal jurisdiction. This problem was evident in the ICJ *Arrest Warrant case* between Congo and Belgium (hereinafter referred to as the Yerodia case) in which none of the judges made an effort to provide a definition of or clarify the concept of universal jurisdiction despite its importance for the case.[5]

Nevertheless, doctrinal agreement on certain well established features allows a definition of universal jurisdiction to exist. Universal jurisdiction according to O'Keefe amounts to the assertion of jurisdiction in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct (O'Keefe 2004, p. 745). Bassiouni elaborates further, that as an *actio popularis* universal jurisdiction may be exercised by a State without any jurisdictional connection or link between the place of commission, the perpetrator's nationality, the victim's nationality, and the enforcing State. The basis is, therefore, exclusively the nature of the crime and the purpose is exclusively to enhance world order by ensuring accountability for the perpetration of certain crimes (Bassiouni 2008, p. 153).

The rationale for validating the existence of universal jurisdiction is that international crimes affect the international legal order as a whole. This means that after being affected by disruptive international crimes, territorially or nationally, States are not always able or willing to react effectively and therefore States that do not have any jurisdictional connection or link to the international crimes that have been committed are granted a right to prosecute. The main controversy this raises is whether in such cases States can or should do so. Indeed, there is no real evidence that States are obliged to implement universal jurisdiction outside of treaty obligations (Cryer et al. 2010, p. 44; Yerodia case, p. 51).

The discussion on the right to exercise universal jurisdiction by a State leads to 'absolute' or 'pure' universal jurisdiction, more often referred to as 'universal jurisdiction *in absentia*'. Absolute universal jurisdiction comprises of actions when a State implements its jurisdiction over an international crime when the suspect is not present in the territory of the investigating State. Such exercise of universal jurisdiction could be argued as being convenient in cases where the impunity gap occurs because of the unavailability of the suspect due to the lack of political will to cooperate or the suspect has absconded. In comparison, the 'conditional' universal jurisdiction or otherwise referred to as universal jurisdiction with presence' is exercised when the suspect is already in the State asserting universal jurisdiction.

[5] ICJ *Yerodia* case, Dissenting opinion of Judge ad hoc Van den Wyngaert, paras. 44–45: 'There is no generally accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the principle in their domestic legislation have done so in very different ways. [. . .] Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning and its legal status under international law'.

While such a distinction made is approved for the academic purposes, in the conceptual level it seems to be non-existent (O'Keefe 2004; Kreß 2006). The controversy lies in the legality of trials *in absentia*, especially under human rights law. Therefore, many States still do not exercise universal jurisdiction when the person is present on their territory. One of the latest examples that could be considered as one of the setbacks in the fight against impunity through universal jurisdiction is the decision by the Paris Prosecutor to dismiss a complaint by an association of victims in Morocco against President Bashar Al-Assad of Syria in 2012 because the suspect was not present in France (as cited in Amnesty International Report 2012, p. 50).

The rationale for limited action in this area can be partly explained by the Statement made in the *Yerodia* case, that the adoption of pure universal jurisdiction 'may show a lack of international courtesy' (Yerodia case, 2002, Separate Opinion of Judge ad hoc Van den Wyngaert, para. 3). One might argue that the distinction of universal jurisdiction *in absentia* as a separate issue as it necessitates proof of legality to a separate head of jurisdiction. However, according to Cassese, it should be treated as a 'different version' (Cassese 2001, p. 261). Considering universal jurisdiction as a jurisdiction to prescribe, it can be extra-territorial. However, jurisdiction to enforce is strictly territorial, since a State may not enforce its criminal law in the territory of another State without that State's consent ('Lotus' case, 1927, pp. 18–19; O'Keefe 2004, pp. 740 and 750).[6] While prescription is logically independent of enforcement, one has limited influence over the legality of another. However, if universal jurisdiction is permissible then its exercise *in absentia* is also permissible. (O'Keefe 2004, p. 750)

The comprehensiveness of the universal jurisdiction concept is limited. Despite existing specific legal grounds for assertion of universal jurisdiction, there are no clear obligations established by legal instruments to identify the duties of States, particularly concerning implementation.

10.3 Universal Jurisdiction as an Obstacle Race

The recognition of universal jurisdiction by the State as a principle is not sufficient to make it an operative legal norm. There are three necessary steps to operationalise the principle of universal jurisdiction: the existence of specific grounds for universal jurisdiction; a sufficiently clear definition of the offence and its constitutive elements; and national means of enforcement allowing the national judiciary to exercise their jurisdiction over international crimes (Philippe 2008, p. 379). While

[6] Where it is Stated (cit. 18), that general international law admits of only rare exceptions to the territoriality of criminal jurisdiction to enforce, all of them pertaining to armed conflict (etc.). Also as further (cit. 19) O'Keefe elaborates, consent to the extraterritorial exercise of police powers and (cit. 20) the consent to the extraterritorial sitting of a criminal court can be possible.

the first two have been outlined in the previous part of this article, the enforcement obstacles will be introduced below.

Implementation of universal jurisdiction is directly related to the practical aspects of a national judicial process including evidence gathering, questioning of witnesses, interpreting and applying the *ne bis in idem* principle, overcoming immunities and finally, more or less ensuring international cooperation. Ensuring the availability of witnesses as well as the collecting of evidence, can be complicated and cannot be presumed. A number of cases based on universal jurisdiction have failed to achieve the standard of proof for a criminal conviction (Cryer et al. 2010, p. 60).[7]

One of the major problems when undertaking prosecutions on the basis of universal jurisdiction is that the existence of jurisdiction *per se* does not give rise to any obligations on behalf of the territorial or nationality State to assist in any investigation, provide evidence or extradite suspects (see Broomhall 2003, pp. 119–123). This problem was evident in the trial of two Rwandan nuns in Belgium. The jury's ability to sort truth from fiction was particularly important because much of the most damning evidence against the nuns, in particular against Sister Kizito, came in the form of witness testimony and no forensic or ballistic evidence was available (Rettig 2012, p. 390). In 2007, the District Court of The Hague acquitted Afghan military official Abdullah F. due to lack of proof, because 'the question of whether the defendant had effective control over his subordinates' acts of violence and torture against the victims could not be answered affirmatively with a sufficient degree of certainty'.

For these reasons, national implementation of universal jurisdiction cannot be executed disregarding more affected countries and coexistence of the concurrent jurisdictions—either national or international. Therefore it is obvious that international law, by providing States with the competence to exercise universal jurisdiction, not only allows for an overlap of jurisdictions but even aims at such overlapping (Jessberger 2009, p. 557).

In order to resolve such an overlap of jurisdictions, the question that has to be answered is which court national or international, based on links with territory, person or without any link—can claim primacy. The exercise of universal jurisdiction should be understood as a fall back mechanism activated only if no primary jurisdiction is willing and able to genuinely prosecute the crime (Jessberger 2009, p. 557). In this context, noticeable similarities can be found between The International Criminal Court (ICC) complementarity system and the concept of universal jurisdiction. One might think that the complementarity regime could be accepted by the States while implementing universal jurisdiction for the purpose of strengthening national prosecutions and introducing more coordination among national legal processes. This could be seen as a possible solution for dealing with coexisting jurisdictions and the means by which the principle of subsidiary universality may be brought into practice.

[7] E.g. Dusko Cvetković prosecution in Austria and *In re Gabrez* in Switzerland.

10.4 Subsidiary Universality?

States have largely failed to establish any comprehensive regime for allocating cases between States with competing jurisdictions. In addition, it should be noted that the right of States to exercise universal jurisdiction still remains controversial (Stigen 2010, p. 134). To date the international community has agreed on several jurisdictional principles for solving coexistence of jurisdictions: The principle of exclusive jurisdiction regulated the work of the Nuremberg and Tokyo Military Tribunals; primary concurrent jurisdiction is embodied in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (Statute of ICTY, art. 9) and Rwanda (Statute of ICTR, art. 8), concurrent complementary jurisdiction governs relationships of national jurisdictions and jurisdiction of International Criminal Court (Rome Statute, art. 1). The complementarity regime established in the Rome Statute has conceptual similarities with universal jurisdiction and might contribute to the implementation of universal jurisdiction. Both mechanisms have an influence on the reduction of impunity for core international crimes by letting an alternative judicial mechanism to be activated when States having primary duty to prosecute are inefficient.

The central tenet of the complementarity principle is that the primary responsibility to prosecute for international crimes (genocide, war crimes and crimes against humanity) is within the State, but if it fails to exercise its national judicial accountability measures, the ICC exercising its jurisdiction shall intervene to hold perpetrators of massive human rights violations accountable. The horizontal dimension of complementarity allows for complementary prosecutorial role to be played by 'bystander' States that do not have a strong nexus with international crime situation and are exercising universal jurisdiction *vis-à-vis* States that are directly concerned with such a situation (territorial/national State) (Ryngaert 2010, p. 165).

Concerning the horizontal dimension of complementarity, similarities with subsidiary universal jurisdiction can be found: the jurisdictional priority for the territorial State and the suspect's home State is conditioned on the existence of genuine criminal proceedings. One important difference between the complementarity principle and a subsidiarity criterion for universal jurisdiction, as usually understood, is that while the former gives priority to any State with jurisdiction [Rome Statute art. 17(1) and 19(2)(b)], the latter only gives priority to the States affected by the crime, typically the territorial State and the suspect's home State (Ryngaert 2010, p. 148).

Nevertheless, currently there is insufficient State practice to conclude that international law attaches a subsidiarity principle to universal jurisdiction (Stigen 2010, p. 141). The ICJ has not pronounced on the existence of a subsidiarity criterion, but in the *Yerodia* case it was Stated:

> a State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned (Yerodia case, 2002, p. 80, para. 59).

However, it is obvious that a subsidiarity principle attached to universal jurisdiction could give a sufficiently well established criterion aimed at the effective

implementation of universal jurisdiction. Moreover, considering the lack of existing regulation and State practice, it is wiser to rely on the ICC's principle of complementarity in order to ensure the best balance among impunity and sovereignty of the State directly affected. Complementarity and universal jurisdiction could even act as catalysts, especially through positive complementarity and the investigations in early universal jurisdiction proceedings. A subsidiarity criterion would limit the interference into a State's sovereignty and the main rationale behind universal jurisdiction would be better reflected. It would give the forum State a subsidiary right to prosecute when necessary to prevent impunity, but not an unconditional right to prosecute on the grounds of the seriousness of the crime (Stigen 2010, p. 134).

Considering all the drawbacks of universal jurisdiction and its implementation, as Rastan argues, the expectation that national authorities would be able to engage significant resources routinely into costly trials for crimes committed abroad, and which may have little connection to the forum State, appears misplaced (Rastan 2010, p. 125). Nevertheless, Belgium, in the case discussed later on in this article, chose the costly trial for the vital benefit of retributive justice that exercise of its universal jurisdiction could have ensured for victims of massive and systematic fundamental human rights violations. If victims seek justice in national courts of residence, and in so doing depend on the State to exercise its universal jurisdiction *ab absentia*, this State has an important role to play in strengthening the responsible sovereignty of the country in transition.

10.5 Importance of Subsidiary Universality in the Transitional Justice

Transitional justice is made up of processes of trials, purges, and reparations that take place after the transition from one political regime to another (Elster 2004, p. 1; Teitel 2000, p. 22). Transitional justice is by its nature a heavily politicised process (McEvoy and McGregor 2008, p. 6). Therefore it is not surprising that transnational trials associated with transitional justice can sometimes raise doubts about the political agenda behind them (Rettig 2012). However, even though there are other transitional justice mechanisms that could be used to fight against impunity for international crimes,[8] in cases where victims of the conflict are not provided with retributive justice, universal jurisdiction can be the only effective and essential tool for international justice.

It is the duty of every State to exercise its jurisdiction over crimes under international law such as war crimes, crimes against humanity, genocide and other international crimes. The UN Security Council has emphasised this responsibility of States to prosecute persons responsible for committing international crimes

[8] International Criminal Court, international criminal tribunals and etc.

in a number of UN Security Council resolutions.[9] For example, at least 97 States have vested their national courts with universal jurisdiction to a certain degree over serious violations of international humanitarian law (Report of UN Secretary General 2011, para. 134).

However, a transitional-justice approach to past atrocities is faced, quite inevitably, with a number of conflicting priorities (Dukić 2007, p. 693). It is for this reason that impunity is chosen, frequently in the name of reconciliation (Human Rights Watch 2005) and amnesties,[10] as the pivotal legal means by which to 'close the book' on the past (McGregor 2008, p. 57). Yet impunity does not automatically lead to national reconciliation (Dieng 2002, p. 2) and empirical support for the claim that amnesties are accompanied by peace is tenuous and context specific (Aloyo 2010, p. 11). We live in an age of accountability in which there is an ever-growing emphasis on the responsibility of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes and other egregious crimes (UN Secretary General Ban Ki-moon's Remarks to the Security Council's Debate 2012).

Despite this rhetoric, universal jurisdiction is broadly understood to represent a reserve tool in the fight against gross violations of human rights. Courts that preside for example within the territorial State and which are able and willing to prosecute individuals for international crimes should have priority in exercising jurisdiction. Firstly, this means that a State is required either to exercise jurisdiction which would necessarily include exercising universal jurisdiction and only then to extradite the person to a State able and willing to do so, or to surrender the person to an international court (such as the International Criminal Court) with jurisdiction over the suspect and the crime.

This multi-dimensional State obligation related to the commitment to universal jurisdiction reflects the idea of responsible sovereignty which conditions State sovereignty and governmental legitimacy on compliance with fundamental human rights (International Commission of Intervention and State Sovereignty 2001, para. 1.35). Even though there are international law theorists who assert that universal jurisdiction gives powerful nations a means of politically influencing less powerful ones (White 2000, p. 224) or appears inconsistent with the notion of sovereign equality among States (Bottini 2004, p. 555), the most important thing is that it gives real sense to the idea of responsible sovereignty. Different countries and cultures adhere to different ideas about justice (Rettig 2012, p. 402). However, the evolution of the human rights regime and the emergence of international conventions impose an obligation to prosecute and punish those who have committed international crimes.[11] This obligation reflects the commitment of the

[9] 1325 (para. 11); 1960 (2010), 1889 (2009).

[10] Amnesties excuse individuals for crimes that would otherwise be punishable by law.

[11] For example, UN Convention on the Prevention and Punishment of the Crime of Genocide, Geneva Conventions, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

international community that the enjoyment of State sovereignty includes obligations in the field of human rights and international justice.[12]

Territorial jurisdiction is a fundamental feature of sovereignty (Dixon 2007, p. 143). However, the exercising of jurisdiction does not entail that any State can employ it without any respect for international law, which in cases of international crimes obliges the State to regulate exercise of universal jurisdiction in its national laws and exercise it in cases of international crimes. 'Purposefully sidestepping national courts' (Rettig 2012, p. 404) is not and should not be the idea of universal jurisdiction, because the main idea is to fight against impunity for international crimes and to protect internationally recognised values in cases of States' inability or unwillingness to do so themselves. Criminal impunity for international crimes cannot be reconciled with democratic principles and for this reason, in a period of transition, international law and, more specifically, universal jurisdiction, should be invoked as a way to bridge shifting understandings of legality (Teitel 2000, p. 20).

Bridging understandings of legality has a significant role in providing retributive justice for victims of the conflict. Reparatory approaches should be an important feature of transitional justice, because in the longer-term, putting victims and victims' rights firmly on the post-conflict agenda is essential to building trust in the State (Winterbotham 2010, p. 30).

When national courts do not provide justice for victims, the primary problem of international law is that mechanisms designed to enforce justice can be considered weak when compared with the domestic sphere. The initial establishment of the ICC was intended to promote international justice (Broomhall 2003). However, it had a negative influence on the enthusiasm of the international community to support mechanisms which have become emblematic of transitional justice, such as the *ad hoc* international criminal tribunals (McGregor 2008, p. 57). The ICC mechanism and politics of the complementarity principle in practice keep raising doubts about the 'warped priorities and institutional self-interest' (Clarke 2012, p. 65) of the ICC, the perceived selectivity of cases (deGuzman 2012, pp. 265–320) and the whole idea of international justice. Furthermore, the jurisdiction of the ICC is non-retroactive.[13] For these reasons, even though the exercising of universal jurisdiction could be interpreted as a political means of achieving the purposes of international justice by giving powerful nations the capacity to influence less powerful ones, universal jurisdiction may be not merely the only tool left to fight impunity, but, more importantly, the only tool to meet the demand of justice for victims.

[12] UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of the year 1970 States that in their interpretation and application international law principles are interrelated and each principle should be construed in the context of the other principles.

[13] The Rome Statute entered into force on the 1st of July 2002 and, as such, the Court cannot exercise its jurisdiction over crimes alleged to have been committed before that date. When a State joins the statute after that date, the Court may only exercise its jurisdiction over crimes committed after the date the statute entered into force for that State, but there is the possibility for a State to plug the gap in time if it so chooses.

In negotiations to end conflicts as well as in post-conflict agendas, victims' needs are often low on the priority list (Winterbotham 2010, p. 30). Universal jurisdiction aims to strengthen international human rights law by enabling politically independent domestic courts to protect international values against impunity for international crimes and could be the most effective road to justice for victims who have nowhere else to go. Furthermore, there is no compelling evidence that national authorities conducting prosecutions based on universal jurisdiction have 'abused' such jurisdiction (Amnesty International Report 2012, p. 9). That means that national authorities exercising universal jurisdiction rely on the principle of achieving justice, and do not intend to promote the destabilisation of an already fragile State of internal affairs in the period of transition. As the case at the ICJ concerning *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)* (further referred as Belgium v. Senegal case) suggests, domestic courts do apply the principle of subsidiarity while exercising universal jurisdiction.

10.6 Subsidiary Universality in the ICJ Belgium v. Senegal Case

On the 20th July, 2012, the International Court of Justice issued its judgment in the *Belgium v. Senegal* case and held that Senegal, being a party to the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (further—Convention against Torture), had violated its obligation under the treaty to submit the case of Hissène Habré, the former President of Chad, who had been given refuge in Senegal for more than two decades, to its authorities for the purpose of prosecution (Belgium v. Senegal case, para. 102). The Court unanimously found that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him to Belgium (Belgium v. Senegal case, para. 6).

This decision of the International Court of Justice is considered to be an important victory for Habré victims (FIDH 2012). Prior to this in 2000, complaints made by Chadian nationals residing in Chad were dismissed in the Chamber of the Court of Appeal in Senegal on the grounds that the investigating judge lacked jurisdiction because crimes were committed outside the territory of Senegal by a foreign national against foreign nationals and that they would involve the exercise of universal jurisdiction that national laws did not provide at that time. In the same year Belgian nationals of Chadian origin and Chadians living in Belgium filed complaints against Mr. Habré for serious violations of international humanitarian law, crimes of torture and the crime of genocide and in 2009 the Belgian investigating judge issued an international warrant *in absentia* for the arrest of Mr. Habré. Belgium transmitted the international arrest warrant to Senegal and requested the extradition of Mr. Habré.

The Dakar Court of Appeal ruled on Belgium's first extradition request, holding that Mr. Habré should be given jurisdictional immunity which is intended to survive the cessation of his duties as President of the Republic. Senegal explained that this judgment put an end to the judicial stage of proceedings and that it had taken the decision to refer the case to the African Union. By means of issuing a number of notes to Senegal, Belgium made it clear that the decision to refer Mr. Habré's case to the African Union could not relieve Senegal of its obligation to either prosecute or extradite the person accused of international crimes. Belgium transmitted three more extradition requests to Senegalese authorities in the years 2011 and 2012. Two of them were found inadmissible because, according to the Dakar Court of Appeal, it was not accompanied by the necessary documents and the copy of the international arrest warrant placed on the file was not authentic (Belgium v. Senegal case, paras. 37–40).

Senegal asserted that the only impediment to opening the Mr. Habré trial in Senegal was a financial one (Belgium v. Senegal case, para. 33). The ICJ Stated that financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré (Belgium v. Senegal case, para. 112). Furthermore, the Court concluded that extradition is an option offered by the Convention against Torture, whereas prosecution is an international obligation under this international treaty, the violation of which is a wrongful act that engages the responsibility of the State (Belgium v. Senegal case, paras. 94–95).

According to this conclusion of the International Court of Justice, it can be argued that the State has the duty to extradite the person accused only if for one reason or another it does not prosecute him or her. It could be interpreted that if the State concerned is unable or unwilling to carry out its proceedings, the Forum State should not be required to defer, regardless of the reason for the domestic inability. As Stigen argues, the somewhat exaggerated sovereignty concerns which dictated the high threshold in the Rome Statute at this point should not be the standard to follow (Stigen 2010, pp. 145–146). The decision delivered by the ICJ seemingly did not take that standard of inability and unwillingness to follow. It did not deal with the legality of Belgium's exercise of universal jurisdiction in the context of the principle of subsidiarity.

Sometimes it is argued that subsidiarity should also cover the victim's home State (Stigen 2010, p. 148) and in this case Belgium as well could be considered as one of the States affected by international crime together with the territorial State and the suspect's home State. This notwithstanding, Belgium inquired several times about Senegal's intention to prosecute Mr. Habré and the timeframe that would be needed in order to ensure respect for the principle of subsidiarity.

Belgium's reliance on universal jurisdiction and Senegal's agreement to create a special court within its domestic criminal justice system[14] has set an important precedent for the exercise of universal jurisdiction and the achievement of

[14] Following the judgement of the ICJ, Senegal agreed to an African Union plan to try Mr. Habré before a special court in the Senegalese justice system, the Extraordinary African Chambers.

international justice for victims. The impunity issue and the reparations issue are undoubtedly interrelated, certainly from the perspective of transitional justice in societies emerging from dark episodes of violence, persecution and repression (Van Boven 2010, p. 1). Reparations can take many forms to compensate for harm and to rehabilitate the mind, body and status—property restitutions, monetary payments, education vouchers, memorials, legislation rehabilitation, apologies, or even the return of a loved one's body for burial (Teitel 2000, p. 137). Besides that, as the ICJ decision in the *Belgium v. Senegal* case suggests, the exercise of universal jurisdiction by the Bystander State on the basis of victims' complaints can be an important step in upholding a reparatory approach to transitional justice and ensuring a place for victims to be heard.

10.7 Conclusions

Defence attorney Vanderbeck in the trial of sisters Gertrude and Kizito convicted for their role in genocide in Rwanda argued that 'it is hard to export justice' (as cited in Rettig 2012, p. 413), but impunity for international crimes has political, judicial and moral implications for the future of transitional society and responsible sovereignty of the country confronting transition.

Despite the fact that national courts of many countries are enabled to apply universal jurisdiction in compliance with international obligations, few States have engaged the universal jurisdiction concept. It appears that States tend to look to international legal mechanisms to punish perpetrators of serious crimes, many of whom seek refuge in so-called friendly States. States are either unaware or they care to reject or ignore the concept of universal jurisdiction. However, the *Belgium v. Senegal* case reflects the inevitability of the alternative measures for seeking justice in transitional societies, especially bearing in mind the priority of the fight against impunity and ensuring retributive justice for victims.

Belgium had to step in as victims of human rights violations related to crimes committed by Mr. Habré were left without justice and reparations because of Senegal's lack of effort to prosecute Mr. Habré for 20 years. Belgium asked Senegal several times about its intention to prosecute the accused person and even offered judicial cooperation. That means that the country exercising universal jurisdiction, in this case Belgium, made an effort to establish good communication with the affected States so that any subsidiarity issue could be resolved at the earliest stage and reparative justice could be provided for victims in the bystander State if the territorial State does not exercise jurisdiction even after being urged to do so and comply with international obligations.

Exercising universal jurisdiction with regard to the principle of subsidiarity enables members of the international community, which have acknowledged the significance of transitional justice in other countries, to enforce internationally protected human rights values, end impunity and provide reparations to victims of the conflict that probably do not have any other arena in which to raise their

complaints. As the principle of subsidiarity ensures and practice of the ICJ in the case of *Belgium v. Senegal* suggests, if transitional societies confront their past effectively, there should be no need for the international community and individual States to step in on the basis of universal jurisdiction aimed at the protection of internationally recognised values and reparative justice for victims.

References

Aloyo E (2010) Transitional tradeoffs and vital victims: a partially democratic theory of transitional justice one earth future foundation. Discussion paper

Amnesty International Report 2012. Available from http://files.amnesty.org/air12/air_2012_full_en.pdf. Accessed 3 May 2013

Bassiouni MC (2008) Universal jurisdiction for international crimes: historical perspectives and contemporary practice, vol II. Martinus Nijhoff, Leiden

Bottini G (2004) Universal jurisdiction after the creation of the International Criminal Court. Int Law Polit 36:503–562

Broomhall B (2003) International justice and the International Criminal Court: between state sovereignty and the rule of law. Oxford University Press, Oxford

Case of S.S. 'Lotus' (France v. Turkey), Judgment (Permanent Court of International Justice September 7, 1927), P 20

Case of Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ Judgment, I.C.J. Reports 2002. P 3 [Yerodia case 2002]

Cassese A (2001) International law. Oxford University Press, Oxford

Clarke L (2012) Complementarity as politics. St John's J Int Comp Law 2(2):38–65

Cryer R, Friman H, Robinson D, Wilmshurst E (2010) An introduction to international criminal law and procedure, 2nd edn. Cambridge University Press, Cambridge

deGuzman MM (2012) Choosing to prosecute: expressive selection at the International Criminal Court. Mich J Int Law 33:265–320

Dieng A (2002) Clarification of concepts: justice, reconciliation and impunity. UN Under-Secretary General, Registrar of the International Criminal Tribunal for Rwanda

Dixon M (2007) Textbook on international law. Oxford University Press, Oxford

Dukić D (2007) Transitional justice and the International Criminal Court – in 'the interests of justice'? Int Rev Red Cross 89(867):691–718

Elster J (2004) Closing the books: transitional justice in historical perspective. Cambridge University Press, Cambridge

FIDH (2012) World court: important victory for Habré victims. http://www.fidh.org/World-Court-Important-Victory-for. Accessed 2 May 2013

Henckaerts JM (2005) Customary international humanitarian law. Vol. 1: rules. Cambridge University Press, Cambridge

Human Rights Watch (2005) Impunity in the name of reconciliation. Algerian President's Peace Plan Faces National Vote, September 29. www.hrw.org. Accessed 6 Oct 2014

International Commission of Intervention and State Sovereignty (2001) Responsibility to protect report. http://responsibilitytoprotect.org/ICISS%20Report.pdf. Accessed 3 May 2013

International Law Association (2000) Final report on the exercise of Universal Jurisdiction in respect of gross human rights violations. Committee on International Human Rights Law and Practice, London Conference

Jessberger F (2009) Universal jurisdiction. In: Cassese A et al (eds) The Oxford companion to international criminal justice. Oxford University Press, Oxford, pp 555–557

Kreß C (2006) Universal jurisdiction over international crimes and the Institute de Droit International. J Int Criminal Justice 4:56

McEvoy K, McGregor L (2008) Transitional justice from below: an agenda for research, policy and praxis. In: McEvoy K, McGregor L (eds) Human rights law in perspective. Transitional Justice from below. Hart, Portland, pp 1–13

McGregor L (2008) International law as a 'Tiered Process': transitional justice at the local, national and international level. In: McEvoy K, McGregor L (eds) Human rights law in perspective. Transitional Justice from below. Hart, Portland, pp 47–73

O'Keefe R (2004) Universal jurisdiction. Clarifying the basic concept. J Int Crim Justice 2: 735–760

Philippe X (2008) The principles of universal jurisdiction and complementarity: how do the two principles intermesh? Int Rev Red Cross 88(862):375–398

Report of UN Secretary General (2011) A/66/93. The scope and application of the principle of universal jurisdiction. https://www.un.org/en/documents/. Accessed 4 May 2013

Rastan R (2010) Complementarity: Complementarity: contest or collaboration? In: Bergsmo M (ed) Complementarity and the exercise of universal jurisdiction for core international crimes. Torkel Opsahl Academic EPublisher and Peace Research Institute Oslo (PRIO), Oslo, pp 133-159

Rettig ML (2012) Transnational trials as transitional justice: lessons from the trial of two Rwandan nuns in Belgium. Wash Univ Glob Stud Rev 11:365–414

Ryngaert C (2010) Complementarity in universality cases: legal-systemic and legal policy considerations. In: Bergsmo M (ed) Complementarity and the exercise of universal jurisdiction for core international crimes. Torkel Opsahl Academic EPublisher and Peace Research Institute Oslo (PRIO), Oslo, pp 165–200

Stigen J (2010) The relationship between the principle of complementarity and the exercise of universal jurisdiction for core international crimes. In: Bergsmo M (ed) Complementarity and the exercise of universal jurisdiction for core international crimes. Torkel Opsahl Academic EPublisher and Peace Research Institute Oslo (PRIO), Oslo, pp 133–159

Teitel RG (2000) Transitional justice. Oxford University Press, New York

UN Secretary General Ban Ki-moon's Remarks to the Security Council's Debate (2012) In: New age of accountability No. SG/SM/14589. http://www.un.org/News/Press/docs/2012/sgsm14589.doc.htm. Accessed 3 May 2013

Van Boven T (2010) The United Nations basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law United Nations Audiovisual Library of International Law

White M (2000) Pinochet, universal jurisdiction and impunity. South-Western J Law Trade Am 7: 209

Winterbotham E (2010) The state of transitional justice in Afghanistan. Actors, approaches and challenges. Discussion paper, Afghanistan Research and Evaluation Unit, Kabul

Chapter 11
The Problems the European Court of Human Rights Faces in Applying International Humanitarian Law

Joana Abrisketa Uriarte

11.1 Introduction

The European Court of Human Rights (ECtHR) is increasingly receiving applications relating to armed conflict or other types of situations of violence. In the past, the most notable cases concerned Northern Ireland or the conflict between Cyprus and Turkey that led to the issuing of several judgments during the 1980s and 1990s. At the moment, one of the most difficult issues for the Court is the involvement of troops belonging to member States of the Council of Europe in foreign countries. The problems stem mainly from the scenario left by the war in Former Yugoslavia and from the conflict in Iraq. A number of cases arising from Russia's disputes with Chechnya and Turkey's differences with the PKK (Kurdistan Workers' Party) have also been examined by the Court recently. In order to deal with these cases, the Strasbourg Court relies almost exclusively on interpreting the European Convention on Human Rights and Fundamental Freedoms (ECHR) and it has therefore become the applicable legal instrument for those types of violent situation.

However, in cases where armed force has clearly been used, the Strasbourg Court could also turn to other sources of international law, such as international humanitarian law (IHL). Nevertheless, it hardly ever does, or at least not obertly. Rather than turning to IHL explicitly, the Court uses what some have called "its own approach" (Guellali 2007, pp. 539–575; Forowicz 2010, pp. 313–351). Namely, it examines armed conflicts in the light of the ECHR, on the understanding

This contribution is an updated version of the Spanish language article Abrisketa Uriarte J (2012) Los problemas del Tribunal Europeo de Derechos Humanos para aplicar el Derecho Internacional Humanitario. Revista de Derecho Comunitario Europeo 43:875–899.

J.A. Uriarte (✉)
Faculty of International Law and International Relations, Pedro Arrupe Institute of Human Rights at Deusto University, Bilbao, Spain
e-mail: joana.abrisketa@deusto.es

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_11

that this remains applicable, and so avoids having to deal directly with IHL, which remains lurking in the background to some of its rulings. While this approach is promising approach inasmuch as in that it provides case law on the conduct of hostilities, it does prompt the question: But However, why is the ECtHR resistant reluctant to interpreting IHL when there is no legal obstacle whatsoever to using it as a means of interpreting the provisions of the ECHR?

More specifically this article poses the following questions:

- To what extent is the ECHR applicable in cases of armed conflicts and violence, and what techniques does the Strasbourg Court employ for interpreting it?
- What are the constraints preventing the ECHR from being read in light of the standards relating to armed conflicts?

To answer these questions, it is necessary first of all to move away from the idea that IHL has the status of *lex specialis* with regard to international human rights law (IHRL) in armed conflict situations. That is not how the Court understands *lex specialis*. As will be seen, none of the variants put forward by the International Law Commission (ILC) (International Law Commission 2006, pp. 37–72) on the relations between different applicable laws are clearly used in Strasbourg case law. Secondly, ECtHR case law must obviously be examined.

11.2 Rationale

This study makes sense for a number of reasons. Firstly, because it incorporates an issue that the Strasbourg Court is yet to resolve, namely the relationship between different *corpora iuris* (in this case, IHL and IHRL). Two aspects in particular are highlighted in this analysis: the potential interpretative function of IHL, which would be used in line with the recommendations made by the ILC in its report on the *Fragmentation of International Law*; and the rare and subliminal use made of it by the Strasbourg Court.

Moreover, one of the concerns of the International Committee of the Red Cross (ICRC) is precisely the fact that it is not yet equipped with any judicial mechanism for monitoring the implementation of IHL. It is bodies outside of the organisation itself (not only the Strasbourg Court but also the *ad hoc* Tribunals for the former Yugoslavia and Rwanda, the International Criminal Court, and even domestic courts established in the context of peace processes[1]) that interpret IHL. In time this will lead to differences of opinion between the judicial bodies in question. In fact, the International Committee of the Red Cross (ICRC) is trying to find a way of submitting the international obligations assumed under IHL to effective judicial

[1] The case of *Maktouf and Damjanovic v. Bosnia Herzegovina*, concerning convictions for war crimes handed down by a domestic court, is still awaiting settlement by the ECtHR, N° 2312/08 and N° 34179/08 respectively.

review, but it has yet to establish its own adjudicatory system. It is therefore useful to examine the contribution that bodies outside of the ICRC make to IHL. When exercising its adjudicatory function, the Strasbourg Court becomes, albeit covertly, an interpreter of IHL.

In addition, the Strasbourg Court's function is to examine individual applications. However, given that the context in which the cases under examination are presented is one of armed conflict, the applications submitted may result in the Court having to contend with rendering judgment on mass human rights violations (Heintze 2002, pp. 60–77). Indirectly, the Court is opened up to issues that go beyond delivering an individual judgment, such as the provision of compensation and reparation to war victims.[2]

Furthermore, the European Union (EU), which through the Lisbon Treaty established a duty to respect human rights both inside and outside of the organisation, and whose Common European Security Policy is structured around those rights, is not oblivious to the hermeneutic value of the verdicts of the Strasbourg Court. Any future peace missions designed by the EU will be legally framed around the principles and categories of both IHRL and IHL. It is clear that trends in the case law developed by this Court affect both the EU as an organisation and its Member States. The challenge is to uncover what the Strasbourg Court does not mention, namely, the IHL rules which it could use but does not, a task which is certainly more complicated than identifying what the Court does say.

This article therefore examines the scope of ECtHR case law when it has to address issues involving the use of armed force. To that end, the first part of the article provides a summary of the general characteristics of the complementarity between IHL and IHRL, which is generally accepted as being the most orthodox way of understanding the relationship between the two (Gioia 2011, pp. 200–249). This is followed by an examination of that relationship, conducted through the prism of the case law developed by the Strasbourg Court. It focuses on a series of cases stemming from three types of situation: occupations; situations in which the State exercises effective control over part of a foreign territory in the context of an international mission; and, lastly, internal armed conflicts of varying severity. Categorising them in this way makes it possible to assess the different techniques the Court uses when dealing with settings involving armed violence.

[2] Very recently, among other cases, the Court was already confronted with this issue in the case known as the Katyn massacre, *Janowiec et al. v. Russia*, N° 55508/07 and N° 29520/09, of 19 April 2012.

11.3 The Complementarity Between International Humanitarian Law and International Human Rights Law

Prior to the adoption of the ECHR, the principle assumed by the international community was that in time of armed conflict only IHL would apply. Other norms of general international law would be set aside. With the idea of retaining that general approach, the ECHR of 1950 was drafted to be applied mainly in peacetime. However, Article 15 of the ECHR,[3] with its system of allowing derogation from certain rights, brings what Draper calls "a new philosophy" of the relationship between the law of armed conflict and human rights, a philosophy which marked the beginning of their complementarity (Draper 1972, pp. 326–338).

Article 15 demonstrates two features to the relationship between IHL and IHRL. The first is that IHL is incorporated *by reference*, when it refers to "other obligations under international law". Secondly, it stresses that, in the event of derogation, both IHRL and IHL are applicable *simultaneously*, thereby producing a material interaction between the two. If a State derogates from certain provisions of the ECHR, it must do so in a way that is consistent with the remaining norms of international law. That is where the two bodies of law coincide.

Furthermore, Article 15 (2) states that no derogation may be made from certain provisions of the ECHR. These derogation clauses, says Pérez González, are where IHL and IHRL converge, since the irreducible core of non-derogable rights corresponds to the minimum protection sought in Common Article 3 to the 1949 Geneva Conventions and Protocol I (Pérez González 2006, pp. 13–35) of 1977. With regard to the right to life, in particular, derogation from Article 2 of the ECHR is only authorised in the case of deaths resulting from *lawful acts of war*. This is a way of saying that, given that the ECHR does not provide criteria for conflict situations, it will make use of those established by IHL in its capacity as *lex specialis*. In other words, in peacetime the general stipulations of human rights shall apply, and in wartime, when the right to life is concerned, IHL will be used as an interpretational source.

However, aside from the provisions of Article 15, interest in the relationship between IHRL and IHL emerged mainly during the 1970s (Cáceres Brun 2009, pp. 953–969; Meron 2003, pp. 157–178; Pérez González 1998, pp. 315–393). Following a process of convergence extensively set out in legal doctrine and also reflected by various United Nations bodies and even in Protocol I of 1977, today the complementarity between the two bodies of laws is unquestionable. It is just worth

[3] Article 15 (1): "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with *its other obligations under international law*". (2): "No derogation from Article 2, except in respect of deaths resulting from *lawful acts of war*, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision." (emphasis added).

noting that IHRL and IHL, though not exhaustive, are generally accepted as being complementary, in the sense that both can apply simultaneously in situations of internal and international armed conflict and each can be used to interpret the other (Sassòli 2007, pp. 375–395; Orakhelashvili 2008, pp. 161–182).

However, neither the intense doctrinal debate on the complementarity between IHL and IHRL nor the contributions made by the International Court of Justice (ICJ) and the Inter-American Court of Human Rights (Gardan 2001, pp. 349–365; Burgorgue-Larsen and Úbeda de Torres 2011, pp. 148–174) have been matched by a similar discussion at the level of Strasbourg case law, which has preferred to avoid making any explicit references to either complementarity or IHL itself.

11.4 Case Law from the European Court of Human Rights Related to Armed Conflict

Against a background in which both doctrine and case law have established the convergence between the two bodies of law, the fact that this has had so little influence on the case law of the Strasbourg Court is striking. There are several different reasons, some legal and some political, why the ECtHR has almost never explicitly referred to elements of complementarity between the ECHR and IHL. The first legal reason for not applying IHL stems from the differences between the two bodies of law and the fact that the Court may consider, *stricto sensu*, that it does not have subject-matter jurisdiction in the area of IHL because its reference and structural framework is exclusively the ECHR. The second reason is that the clause in Article 15 of the ECHR relating to the derogation of rights has hardly ever been used. If Article 15 is not invoked, then the Court applies the ECHR as a whole. Whether (or not) it is a case of armed conflict is not a matter of law for the Court. It does not engage (at least directly) in classifying situations. *Ea res facti, non juris est*. The Court therefore manages to elude IHL by not classifying situations. Both of these reasons are certainly correct, legally and formally speaking. However, if the State has not made use of the derogation clause but the context in which the events are taking place is one of armed conflict, could the Court decide *motu propio* that such a conflict exists and use IHL? I believe that there are grounds for saying that it could. Without losing sight of the mainstay of its reasoning, which has to be the ECHR, it may be useful for the Court to turn to other norms of international law such as IHL (it already, in fact, refers to the International Covenant on Civil and Political Rights, the Convention against Torture and the Convention relating to the Status of Refugees, among others).

The reasons why the Court refrains from applying IHL are mainly political. Applying IHL would mean recognising that a State is incapable of dealing with the armed violence taking place in its country. Expressly alluding to it would stigmatise and undermine the State concerned, causing the latter to show hostility to the Court's work. That being the case, the following question arises: Is there any

kind of procedural technique, within the ECHR system, that could prevent the loss of IHL's remit?

As indicated in the introduction, the study focuses on three specific problems the Court faced: the first relating to classification of a situation as an occupation; the second relating to the exercise of overall and/or effective control over part of a foreign territory; and thirdly, cases of internal armed conflict. These three categories have been chosen because in each situation different problems arise, therefore also requiring different solutions.

11.4.1 Classification of a Situation as an Occupation

An occupation is defined as being a situation in which a hostile army exercises *control* over a territory.[4] It is common knowledge that in international law an occupation is classed as an international armed conflict, thus giving rise to a particular regime: the occupying State has an obligation to comply with IHL, in particular, the Fourth Hague Convention of 1907 and the Geneva Conventions of 1949.

11.4.1.1 Loizidou v. Turkey[5]

In the case of *Loizidou v. Turkey*, the applicant claimed to have lost part of the land belonging to her in Northern Cyprus. *Loizidou* alleged that, as a consequence of the ongoing occupation of the territory by the Turkish Army and the control the latter exercised over it, it was impossible for her to enter plots of land, thus constituting a violation of both her right to private and family life and her right to peacefully enjoy her property.[6] In its defence, the Turkish Government denied responsibility, claiming that the events had taken place in the independent State of the Turkish Republic of Northern Cyprus, a territory over which it did not exercise jurisdiction in the sense meant by Article 1 of the Convention.[7] The Court referred to the non-recognition of the Turkish Republic of Northern Cyprus but what is interesting to note for the purposes of this study is that it clearly emphasised that Article 1 of the ECHR is not limited to the national territory of States. It thus rejected Turkey's

[4] The ICJ recalled that "under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army", ICJ, Judgment concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 December 2005, § 172.

[5] ECtHR Judgment of 18 December 1996, Loizidou v. Turkey, N° 15318/89, §12.

[6] *Ibidem*, § 26.

[7] *Ibidem*, § 31.

arguments relating to the territorial nature of the Convention and attributed responsibility to the Turkish State.[8]

The Court determined that the State is responsible when, as a consequence of military action, be it legitimate or illegitimate, it exercises *effective control* (including outside of national territory). This criterion sufficed to attribute the acts in question to Turkey and find it responsible for violating the rights alleged.[9] The same criterion could have also been used to claim that the acts in question were associated with Turkey's occupation of Cyprus. If, as the Court said, Turkey was carrying out a military action and exercised control, why did it not call it an occupation *expressis verbis*? One might think that the Court evaded classifying Northern Cyprus as an "occupied territory" in order to avoid referring to IHL.[10]

11.4.1.2 Varnava v. Turkey[11]

Of the cases covered in this study, the judgment in *Varnava v. Turkey* is the one that comes closest to IHL since, for the first time, the Court expressly referred to IHL as being an instrument with which the ECHR could be interpreted. Being one of the most recent judgments (2009), it may indicate a slight change in the position of the Strasbourg Court.

The case concerned the disappearance of nine people after they had been arrested by the Turkish Army during the military operation in Northern Cyprus in 1974. The region was expressly described by the Court as being in "a time of international armed conflict".[12] The Court also said that Article 2 of the ECHR should be interpreted in light of international law, especially IHL. Without spelling it out, it makes (subliminal) reference to the complementarity between IHL and the ECHR.[13]

---

[8] *Ibidem*, § 52.

[9] *Ibidem*, § 56.

[10] Only Judge Pettiti argued that IHL should have been considered in the judgment. He maintained that an overall assessment of the situation would have made it possible to review the criteria relating to the occupation and the application of the 1949 Geneva Conventions in Northern Cyprus. Indeed, if Mrs *Loizidou* was expelled from the area occupied by Turkey in Northern Cyprus, then there is no reason to disregard article 49 of the Fourth Geneva Convention concerning the forced displacement of the population of occupied territories and the Hague Rules of 1907 (articles 42 and 43), which are clearly applicable. Dissenting Opinion of Judge Pettiti, *ibidem*, pp. 39–40.

[11] ECtHR Judgment of 18 September 2009, *Varnava and others v. Turkey*, N° 16064/90, N° 16065/90, N° 16066/90, N° 16068/90, N° 16069/90, N° 16070/90, N° 16071/90, N° 16072/90 and N° 16073/90.

[12] *Ibidem*, § 178.

[13] "Article 2 must be interpreted in so far as possible in light of the general principles of international law, *including the rules of international humanitarian law* which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict. The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities", *ibidem*, § 185.

In particular, the Court based its reasoning on Article 2 of the Convention and from there arrived at IHL, an approach which marks a step forward in bringing the ECHR and IHL closer together. The *Varnava* case therefore represents a turning point in the direction of the Court's case law insofar as in the judgment it attempts to capture and bring together IHL standards, on the one hand, and, on the other, those established by the ECtHR itself concerning the positive obligation to investigate disappearances in light of Article 2 of the ECHR. It could have adhered to a more restrictive normative framework but it did not do so, thus perhaps implying an attempt to start employing a new interpretative framework for the ECHR.

11.4.2 The Exercise of Effective Control Over Part of a Foreign Territory

The notion of "State jurisdiction" as used in Article 1 of the ECHR is one of the most complex in treaty law and also one of the cornerstones of the ECHR as a whole. Since the beginning of the twenty-first century in particular, Article 1 of the Convention has prompted substantive developments in cases where one or several States are operating on foreign territory as multinational forces. Below are three significant cases in which the Court was faced with the question of the extraterritorial applicability of the ECHR.

11.4.2.1 Banković v. Belgium and Others[14]

The *Banković* case stemmed from a complaint brought by six inhabitants of Belgrade (Serbia) against seventeen NATO member States who are also members of the ECHR. The applicants alleged that the aerial bombardment of the headquarters of Serbian radio and television by NATO forces in April 1999 constituted a violation of the rights to life (16 people died) and freedom of expression by the defendant States. The application was based on the argument that the States involved had "jurisdiction" over the victims as a result of the criterion of "effective control",[15] as had been determined in the *Loizidou* judgment. However, the arguments contained in the application did not convince the Court and it unanimously declared it inadmissible *ratione personae*, since it considered that there was no jurisdictional link between the victims and the defendant States. In the words of the Court, the territory in which the bombing took place was not in the "legal space" of the member States insofar as NATO did not exercise "effective control" over the

[14] ECtHR judgment of 19 December 2001, *Banković and others v. Belgium*, N° 52207/99.
[15] *Ibidem*, § 47, 52, 75 and 80.

territory that was bombed.[16] The Court thus stressed the *essentially territorial nature of State jurisdiction*, with extraterritorial applicability of the Convention being acceptable only in *exceptional* circumstances, something which it underlined emphatically.[17]

The Court adopted a restrictive interpretation of effective control, showing extreme caution when applying the ECHR to the actions of a State outside of its territory. In *Banković* it interprets the notion of jurisdiction as being inextricably tied to territoriality. The criticisms made of the decision stem from this extremely restrictive interpretation (Rüth and Trilsch 2003, pp. 170–171). However, *Banković* also represented the starting point for a debate around the following questions posed by Judge Jean Paul Costa: Can effective control really be deemed to exist when State troops are acting outside of their national territory? How does this relate to the concept of occupation contained in the 1907 Hague rules and the Fourth Geneva Convention of 1949? Does the Court have "jurisdiction" to examine crimes committed by State air forces that are participating in peace operations (Costa and O'Boyle 2011, pp. 107–129)? Having chosen not to enter into these issues, the Court "territorialized" the Convention's jurisdiction (Cohen-Jonathan 2002, p. 1073) and consequently declared the application inadmissible.[18]

The curious thing about the *Banković* judgment, as far as this study is concerned, is that, in its reasoning, the Court used the 1949 Geneva Conventions to argue that if the drafters of the ECHR had wanted to grant jurisdiction that was as far-reaching as that proposed by the applicants, then they could have adopted a wording that was the same or similar to Article 1 of the 1949 Geneva Conventions, which requires the Contracting Parties to respect and ensure respect for the conventions "in all circumstances".[19] It is paradoxical that reference to the 1949 Geneva Conventions is made only to say that the ECHR is not the same as them, given that it is a case that could have been interpreted on the basis of the principles related to the prohibition

[16] *Ibidem*, § 71.

[17] *Ibidem*, § 37.

[18] In the Issa v. Turkey case, the Court applied a broader criterion for interpreting article 1 of the Convention. It unambiguously recognised the applicability of the ECHR to the military operations conducted by the Turkish Army in Northern Iraq in 1995. The driving force behind its response was the same as in the Loizidou judgment in that it combined two criteria: it first referred to the theory concerning effective control and, secondly, accepted that the concept is applicable outside of the legal space of the member States of the Convention, even with regard to temporary military operations, whether or not they are legitimate. ECtHR judgment of 16 November 2004, Issa and others v. Turkey, N°. 31821/96. In more recent cases, such as those of Al-Saadoon v. The United Kingdom and Medvedyev v. France, among others, the Court again adopted a broad interpretation of the concept of jurisdiction. In the former it condemned the United Kingdom for violations of the ECHR committed in Iraqi territory occupied by British forces and, in the latter, it condemned France for violations committed during the boarding of a ship by the French Army (ECtHR judgment of 2 March 2009, Al-Saadoon v. The United Kingdom, N° 61498/08, and ECtHR judgment of 29 March 2010, Medvedyev v. France, N° 3394/03).

[19] ECtHr judgment of 19 December 2001, Banković and others v. Belgium, op.cit., § 75.

of indiscriminate attacks and the principle of distinction between combatants and civilians, for which both the ECHR and IHL are relevant.

11.4.2.2 Behrami and Behrami v. France and Saramati v. France, Germany and Norway[20]

The *Behrami* and *Saramati* cases concern violations committed on territory under the administration of the United Nations. They were the first cases of the kind submitted to the Court. The Grand Chamber declared the applications inadmissible on the grounds that they were incompatible *ratione personae* with the provisions of the ECHR. In the case of *Behrami and Behrami v. France*, the applicant accused French troops from NATO's Kosovo Force (KFOR), who were responsible for mine clearing operations in the Mitrovica region, of violating the right to life of his son, who died as a result of a cluster bomb explosion. In *Saramati v. France and Norway*, the applicant complained about the conditions of his detention, initially by the United Nations Interim Administration Mission in Kosovo (UNMIK) and later by KFOR.

There are many different points which could be examined but they go beyond the scope of this article, the purpose of which is to highlight the extent to which the ECtHR considers the applicability of IHL when making its decisions. As is well known, the Grand Chamber concluded that the conduct complained of *was not attributable to the States in question, but to the UN*, given that the Security Council retained ultimate authority and control over the mission.[21] The Court stressed that, at the time of the events under examination, Kosovo was under the effective control of international forces, who were exercising elements of governmental authority. The case speaks volumes because it shows how eager the Court is to dismiss any application related to peacekeeping missions. It did not concern itself with considering anything to do with determining the nature of the conflict or, as a consequence, the possible applicability of IHL.

When Kosovo declared independence, the EU sent the European Union Rule of Law Mission in Kosovo (EULEX) to take over law enforcement duties from UNMIK. Even if the legal basis for deploying the EULEX operation is taken to be Resolution 1244 (1999), as the EU purports, it would be difficult to argue that the Security Council only "delegated" its functions to the new mission, with the UN retaining control over the operation. If the Strasbourg Court were to receive a case involving a violation of human rights by EULEX, could it use the argument it used in *Behrami* to declare it inadmissible? Or would the Court be obliged to address the question of the responsibility of EU States for acts committed by the organisation,

[20] ECtHR judgment of 2 May 2007, Behrami and Behrami v. France, N° 71412/01, and Saramati v. France, Germany and Norway, N° 78166/01.

[21] *Ibidem*, § 132–143.

given that in this hypothetical case jurisdiction is attributed in a different way (Milanovic and Papic 2008, pp. 267–296)?

11.4.2.3 Al-Jedda v. The United Kingdom[22]

In contrast to the aforementioned decisions, in its ruling on *Al-Jedda v. The United Kingdom*, the Court turned to IHL, in particular the Fourth Geneva Convention of 1949, to construct its judgment. However, the Court's approach to and interpretation of IHL did not comply with the spirit or letter of this body of rules (Pejic 2011, pp. 837–851).

Al-Jedda, who was interned for 3 years in a detention facility in Basrah (Iraq) run by British forces, complained of a violation of Article 5 (1) of the ECHR. The United Kingdom presented two arguments in its defence: first, that the detention was attributable to the UN, and not to the State, and that, therefore, *Al-Jedda* was not under the jurisdiction of the Court; and, secondly, that the detention of *Al-Jedda* was carried out in compliance with Security Council Resolution 1546 (2004), which established the obligation to take all necessary measures to contribute to the maintenance of security in Iraq. These measures included, according to the United Kingdom, the need to detain *Al-Jedda* on security grounds as a preventive measure.

It is worth highlighting two of the Grand Chamber's conclusions. First, it determined that the conduct of the British troops was *attributable to the United Kingdom*, and not the UN, since the latter did not exercise effective control or authority over the State.[23] Secondly, the Court concluded that *the detention of civilians is not permitted* unless a Security Council resolution expressly allows it. The Court was therefore implicitly inviting the Security Council to draft clear resolutions on matters relating to internment measures (Pejic 2011, p. 842). It suggested that the Security Council could "legislate" on this matter, thereby disregarding the fact that IHL, as *lex specialis*, constitutes a solid legal base for determining the validity of detentions. As if the Security Council is in a better position to regulate detention in armed conflict than the 194 States parties to the 1949 Geneva Conventions, each of whom has already agreed to be bound by their provisions.

The problem was not that the Court failed to take account of IHL but rather the way in which the latter was interpreted. It referred to IHL to say that it did not impose an obligation on the occupying power to use internment. However, the judgment's ultimate argument was that Resolution 1546 (2004) did not authorise internment. IHL featured in it, but only as a secondary consideration. In addition, the *Al-Jedda*

[22] ECtHR judgment of 7 July 2011, Al-Jedda v. The United Kingdom, N° 27021/08, § 42–44.

[23] ECtHR judgment of 7 July 2011, *Al-Jedda v. The United Kingdom*, *op.cit.*, § 80–84.

judgment concentrated on looking for compatibility between the Security Council resolutions and the obligations established by the ECHR (Abrisketa 2012).

11.4.3 Non-international Armed Conflicts

It is hard for a State to admit that armed conflict exists within its territory since it would mean acknowledging that it is unable to deal with armed violence in the country and, something which would be regarded as even more sensitive, it would confer a certain degree of legitimacy on the dissident party. In fact, no State has ever invoked Article 15 of the ECHR claiming that it is engaged in armed conflict. There is therefore very little chance that Article 15 of the ECHR will apply and as long as it is not invoked, the Court is obliged to take account of all provisions of the ECHR.

As a consequence, Article 2 (2) (a) of the ECHR (right to life)[24] forms the core of the Court's reasoning. So rather than treating IHL as *lex specialis*, the Strasbourg Court has constructed a "special law" derived from European human rights law. Thus it has introduced the principle that article 2 of the ECHR has the status of *lex specialis* for situations that it terms "law enforcement operations" (which could very well also be termed internal armed conflicts). Some have called this doctrine developed by the Court "the human rights law of internal armed conflicts" (Abresch 2005, pp. 741–767; Chevalier-Watts 2010, pp. 584–602). Article 2 (2) (a) of the ECHR is the key to this since it allows force to be used if "absolutely necessary". It will therefore be applied and vary according to how the risks of each situation are assessed. States have a considerable degree of latitude in this respect because the State authority is better placed than the Court to interpret what is "absolutely necessary" in the territory under its jurisdiction.

In any event, the Court uses the principle of proportionality, which has been a deeply-entrenched tenet of different areas of general international law, as well as, of course, IHL, since the nineteenth century, to interpret what is "absolutely necessary". It argues that the force used by the State must be strictly proportional to the objectives to be achieved. Proportionality requires checking whether the means used to confront unlawful violence are in keeping with its positive responsibility to protect the lives of individuals under its jurisdiction. The Court has thus constructed, around Article 2 (2) (a) of the ECHR, the requirement to prove that *the planning and organisation of operations* in which force is used complies with the provisions of that article. There is therefore a sequence of three connected elements: the deprivation of life must be absolutely necessary, it must be

[24] Article 2 states: "Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than *absolutely necessary: (a) in defence of any person from unlawful violence*…" (emphasis added).

proportional to the objectives to be achieved, and in the planning of the operation the first two criteria must be taken into account.

It was the judgment in *McCann v. The United Kingdom*[25] which marked the beginning of the development of new case law centred on Article 2 (2) of the ECHR. The judgment stemmed from the deaths of three members of the IRA at the hands of the UK's Special Air Service in Gibraltar. The applicants argued that the operation carried out by the UK was neither planned nor executed in accordance with Article 2 (2) (a) of the ECHR and that therefore the deaths were not "absolutely necessary", as required in the article. The UK, on the other hand, claimed that the operation was justified under the terms of Article 2 (2) (a) of the ECHR on the grounds that the use of force was no more than "absolutely necessary" to defend the people of Gibraltar from violence.[26]

The content of Article 2 (2) (a) as established by the Court is conveyed in the *McCann v. The United Kingdom* judgment by what it calls "careful scrutiny": in determining whether the terms of Article 2 (2) (a) of the ECHR had been met, the Court considered the degree of planning and control that went into the police operations which, to the fullest extent possible, had to avoid resorting to lethal force.[27] It thus extended the stipulations relating to protection of the right to life and found against the United Kingdom on the grounds that the police operation was not properly prepared and controlled (Barcelona Llop 2009, pp. 79–108). Starting with the *McCann* judgment, the Court developed a technique for applying Article 2 (2) (a) of the ECHR to law enforcement operations in which armed force is used.[28]

11.4.3.1 Ergi v. Turkey

In *Ergi v. Turkey*, the applicant, of Kurdish origin, accused the Turkish security forces of having fired indiscriminately on several civilian homes during an operation against several PKK members, causing the death of Mrs. *Ergi*. The Turkish Government claimed that the shots were not fired by military forces. Given the inadequacy of the evidence, the Court demonstrated legitimate hesitation in concluding that Mrs. *Ergi* had been intentionally killed by the security forces.[29] However, it believed that the Turkish authorities had failed to protect *Ergi*'s right to life on account of defects in the planning of the operation and the lack of an

[25] ECtHR judgment of 5 September 1995, *McCann v. The United Kingdom*, N° 18984/91.

[26] *Ibidem*, § 143–144.

[27] *Ibidem*, §194.

[28] As shown in ECtHR judgment of 28 July 1998, Ergi v. Turkey, N° 23818/94; ECtHR judgment of 24 February 2005, Isayeva v. Russia, N° 57950/00; ECtHR judgment of 15 September 2011, Kerimova and others v. Russia, Nos. 17170/04, 20792/04, 23360/04, 5681/05 and 5684/05; and ECtHR judgment of 3 May 2011, Khamzayev and others v. Russia, N° 1503/02.

[29] ECtHR judgment of 28 July 1998, Ergi v. Turkey, op. cit., § 1.

adequate and effective investigation after the event.[30] The Court found that Turkey had violated Article 2 of the ECHR because the Turkish authorities had failed to provide any evidence concerning the planning of the operation or the subsequent investigation. It concluded that the precautions taken to protect the civilian population had been inadequate.[31]

Furthermore, although in his claim the applicant referred to a series of violent armed clashes, he did not argue that the case took place in a situation of internal armed conflict, and this enabled the Court to avoid determining the nature of the circumstances. However, although there is no mention at all of IHL in the judgment, the Court, when interpreting Articles 1 and 2 of the ECHR, makes indirect, implicit and sometimes clear references to several of its provisions. In fact, its allusion to the choice of means and methods of the operation and the duty to minimise the loss of civilian lives are references to IHL (Bruscoli 2002, pp. 45–60). The Court's reasoning when referring to the proper precautions Turkey should have taken in attack takes inspiration from Protocol I of 1977.[32] The Court not only makes subliminal allusions to IHL, it transposes the principle concerning the precautions States should take in the case of an international armed conflict to a situation of internal armed conflict. Two observations can thus be made, the first being that although the principle in question had not been included in the case of situations of internal armed conflict (it does not appear in Protocol II), the Court nevertheless picks up on it. The second is that, at the time the judgment was delivered, this principle was not even deemed to be a customary norm (Forowicz 2010, p. 329) (the compilation of norms of customary IHL was published in 2005 and the judgment dates from 1998).

Moreover, by reading Articles 1 and 2 of the ECHR together, the Court took the view that the government should protect the civilian population not only from its own attacks, but also from attacks by the PKK.[33] However, the judgment does not contain a single reference to Article 58 of Protocol I which specifically includes that requirement. Of course, it was already a step forward that the Court required the horizontal applicability of norms.

Lastly, the Court was unanimous in its view that the Turkish Government had failed to carry out an effective official *investigation* into the killings.[34] Once again,

[30] Ibidem, § 2.

[31] "Under Article 2 of the Convention, read in conjunction with Article 1, the State may be required to take certain measures in order to "secure" an effective enjoyment of the right to life. In light of the above considerations, the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimizing, incidental loss of civilian life" (emphasis added), ibidem, § 79.

[32] Articles 57 (2) (a) (ii) and 58 of Protocol I of 1977.

[33] ECtHR judgment of 28 July 1998, *Ergi v. Turkey, op.cit.*, § 79.

[34] *Ibidem*, § 82.

the combined reading of Articles 1 and 2 of the ECHR imposes a positive obligation to launch an investigation if an individual has died as a consequence of the use of force.[35] It is the responsibility of the authorities (and not the victims) to launch an investigation. In this regard, the Court goes further than IHL, in which no equivalent obligation exists. IHL only includes the obligation to investigate when prisoners of war and civilians are detained in international armed conflicts, but not in internal conflicts (Forowicz 2010, p. 330; Gaggioli and Kolb 2007, pp. 3–11) The case law developed in relation to Article 2 of the ECHR has therefore turned it into a *lex specialis* that goes beyond the provisions of IHL.

11.4.3.2 Isayeva v. Russia[36]

The conflict affecting the Russian Republic of Chechnya broke out in 1994. However, until 2005 no international court had delivered any kind of judgment on the issue (Blanc Artemir 2006, pp. 67–148). Three judgments handed down by the Strasbourg Court in 2005[37] and two in 2011[38] show that it was the Court's intention to apply the ECHR in situations of internal armed conflict without referring to IHL norms. It is sufficient to focus on one of them, the judgment in *Isayeva v. Russia*, since it is the model followed in all the others.

The case concerned aerial bombing by the Russian Army of the Chechen village of *Katyr–Yurt*, which was occupied by rebel forces. The applicant and her family were fleeing from there, across a pass apparently seen by the Russian Army as a humanitarian corridor, when their vehicles were bombed. Several members of her family died and others were injured as a result of the attack. She alleged a violation of the right to life of her relatives and lack of access to a remedy. In its defence, the Russian Government argued that its use of force was consistent with Article 2 (2) (a) of the ECHR, given the presence of a large number of Chechen combatants in *Katyr–Yurt* at the time of the events. According to Russia, the operation was "absolutely necessary". However, the Court found that a violation of the right to life was attributable to the armed forces of the Federal Russian Government in Chechnya because they had failed to either protect the lives of the applicants or carry out effective investigations to identify those responsible.[39]

The application included evidence of breaches of Common Article 3 to the 1949 Geneva Conventions and of Protocol II of 1977. One could even take the view that the context in which the events occurred transcends common Article 3 to the 1949

[35] ECtHR judgment of 18 February 1998, *Kaya v. Turkey*, N° 22729/93.

[36] ECtHR judgment of 24 February 2005, *Isayeva v. Russia, op.cit.*

[37] ECtHR judgment of 24 February 2005, *Isayeva v. Russia, op.cit.*, and ECtHR judgments of 24 February 2005, *Khashiyev and Akayeva v. Russia*, N° 57942/00, and *Isayeva, Yusupova and Bazayeva v. Russia*, N° 57947/00, N° 57948/00 and N° 57949/00.

[38] *Kerimova and others v. Russia, op.cit.*, and *Khamzayev and others v. Russia, op.cit.*

[39] ECtHR judgment of 24 February 2005, *Isayeva v. Russia, op.cit.*, § 224.

Geneva Conventions and of Protocol II of 1977, both of which apply in time of internal armed conflict. However, the Court did not clearly address the question of whether or not armed conflict existed in the region but rather considered the case by framing it as the work of Russian Government "law enforcement bodies".[40]

In fact, given that Russia did not make use of the derogation clause in Article 15 of the ECHR, the Court examined the case by applying the ECHR as a whole.[41] In addition, the Court had no need to refer to IHL because Russia justified the measures it took solely on the basis of its anti-terrorist legislation (Weckel 2005, pp. 465–477). From a perspective in which it has treated the conflict in question as a law enforcement operation against terrorists, the Court has developed a methodology that encompasses two distinct terms[42]: "armed conflict (IHL) *versus* law enforcement operations (IHRL)". In a context of law enforcement, the applicable body of law is the ECHR, which places emphasis on protecting life, thus requiring terrorists to be captured unless they represent an immediate threat. When this is the case, then the use of force becomes "absolutely necessary" and thus justified.

The ECHR and IHL differ significantly in how they approach the issue of the legitimate use of force: the ECHR authorises the use of force when it is "absolutely necessary" to achieve certain objectives (to defend the civilian population, carry out an arrest or halt an insurrection); however, from the perspective of IHL, the approach is different, since the main objective is to take whatever action is required to help secure military advantage, the main issue being that force should only be used for "military objectives".[43] The Court used the first model, namely that of the ECHR, and argued that the Russian Army's duty was to protect the lives of the population from unlawful violence. The Court therefore concluded that the Russian Army's action was "absolutely necessary".[44]

It is worth highlighting how hard the Court found it to maintain that it was not a situation of armed conflict. It is extremely confused in this respect. In some instances, it refers to the conflict while in others, by contrast, it refers to resistance to the law enforcement bodies.[45] On the one hand, it alludes to armed combatants and the need for Russia to deploy its military aircraft and artillery while, on the

[40] *Ibidem*, § 150, 153, 180 and 191.

[41] *Ibidem*.

[42] *Ibidem*.

[43] Protocol I of 1977 states: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." (Article 48).

[44] ECtHR judgment of 24 February 2005, Isayeva v. Russia, ibidem, § 173 and 191.

[45] "Given the context of the conflict in Chechnya at the relevant time, those measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group of armed fighters in Katyr–Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2" (emphasis added), § 180.

other, it justifies applying Article 2 (2) (a) of the ECHR on the grounds that the rebels were offering active resistance to law-enforcement bodies.

The Court resolutely applied its case law concerning Article 2 of the ECHR. It argued that, given the importance of the protection afforded by Article 2, any deprivation of life must be subjected to the *most careful scrutiny*, taking into consideration not only *the actions* of State agents, but also all *the surrounding circumstances*.[46] The greatest innovation is that the Court extended the test used for *law enforcement bodies* in the *McCann* case to *military authorities* inside the State in the *Isayeva* case.

Finally, the Court concluded that the operations had not been planned or executed in compliance with the requirement to safeguard the civilian population. The Court's considerations therefore include several points based on IHL norms, the obligation to: (a) take all feasible precautions to avoid or minimise loss of life or injury among the civilian population; (b) assess whether an attack could cause incidental loss of life or injury among the civilian population; and (c) give effective advance warning of any attack that may affect the civilian population (Henckaerts and Doswald-Beck 2007, pp. 65–67 and pp. 71–74).[47] The Court used the language of IHL but did not expressly refer to it. It also refrained from using the *lex specialis* principle vis-à-vis IHRL or mentioning the possible interaction between the two.

In 2011, the Court delivered two judgments in relation to Russian military flights over the Chechen town of *Urus-Martan* by pursuing exactly the same line of argument. Once again, it based its reasoning on the strict test of necessity specified in Article 2 (2) of the ECHR. Both the *Isayeva* case and the others mentioned here therefore show that, although IHL and IHRL can be jointly applied to situations of armed conflict, the Court did not consider that option.

To sum up, in this analysis of internal armed conflict situations, it has been demonstrated that the Court applied the same reasoning to three different situations, the first being an anti-terrorist operation intended to prevent an attack (*McCann)*, the second an armed attack on a town in which armed PKK soldiers were hiding (*Ergi*), and the third the conduct of hostilities during an internal armed conflict (*Isayeva*).

11.5 Conclusions

A number of conclusions can be drawn from the analysis provided in this article. The most noteworthy of which is that cases originating from areas affected by armed conflict pose many difficulties for the Strasbourg Court, especially with regard to matters relating to the applicability of the ECHR and its relationship with

[46] Ibidem, § 173–175.

[47] These obligations are established in article 57 (2) of Protocol I and are also considered to be customary norms.

IHL. At the moment, no uniform technique or integrated model is to be found in its case law. The only certainty is that it is an issue that has not been addressed openly by the Court, which tends to avoid classifying the situation in question as an armed conflict and thus to rule out the applicability of IHL. The issue is, firstly, one of classification, and then of application: the Court is reluctant to classify the situation as a conflict and thus to apply IHL as the criterion for interpretation, and therefore constructs its reasoning solely on the basis of the ECHR, thereby evading the norms established in IHL which could strengthen its arguments.

In particular, the Court lays down two distinct legal standards: a) the effective control test for conflicts that have an international component; and b) the test relating to Article 2 (2) (a) of the ECHR (the right to life) if it is a case of internal conflict. With regard to the *effective control test*, the Court first determines whether the respondent State effectively controls the territory affected. If it does not, it declares the application inadmissible on the understanding that the State does not have jurisdiction over the territory and there can therefore be no violation of the Convention. *Banković*, *Behrami* and *Saramati* are the most striking examples in this regard but others, such as *Isa* or *Varnava*, in which the Court admits jurisdiction and even alludes to IHL, should also not be forgotten. In the case of conflicts of an internal nature, the Court focuses its analysis on a *broad interpretation of the right to life contained in Article 2 (2) (a) of the ECHR* and on the case law developed with regard to it, thereby avoiding any express reference to IHL. Read in this way, the right to life entails both the State obligation to *plan* any action involving the use of force and the obligation to *carry out an effective investigation* afterwards. The judgments in *Ergi* and *Isayeva*, in which the Court found against Turkey and Russia respectively and certain IHL principles were only implicitly hinted at, are clear examples of reasoning based on Article 2 (2) (a) of the Convention.

Neither of the two standards is entirely satisfactory because they fail to include certain interpretative criteria that have been widely established both in legal doctrine and by other international judicial bodies. Furthermore, the Court has already demonstrated in the *Varnava* case that its judgments can be imbued with principles and categories taken from IHL, and hopefully the trend will be to embrace it further. Including IHL as an interpretative resource would, therefore, be a useful way of addressing the issues raised.

In addition, there are a number of other directly related issues currently facing the Court and for which even applying IHL as an interpretative criterion would not suffice. The Strasbourg Court also has to deal with applications involving mass human rights violations. In such cases, the type of reparation applicable and issues around how to reconcile the responsibility established in the ECHR, which provided for cases of individual criminal responsibility, remain unresolved. Hopefully this article will be of help in finding some much needed answers to these questions.

References

Abresch W (2005) A human rights law of internal armed conflicts: the ECHR in Chechnya. Eur J Int Law 16(4):741–767

Abrisketa J (2012) La presunción de armonía entre las resoluciones del Consejo de Seguridad y el Convenio Europeo de Derechos Humanos y la responsabilidad conjunta de organizaciones y Estados: nuevas interpretaciones en la sentencia *Al-Jedda* contra el Reino Unido del Tribunal Europeo de Derechos Humanos de 7 de julio de 2011. Revista General de Derecho Europeo 26

Barcelona Llop J (2009) El derecho a la vida en la Carta Europea de los Derechos Fundamentales. Las enseñanzas del Tribunal Europeo de Derechos Humanos. In: Arranz De Andrés C, Serna Vallejo M (coords) Estudios de Derecho español y europeo. Universidad de Cantabria, Santander, pp 79–108

Blanc Artemir A (2006) El conflicto de Chechenia: implicaciones en el ámbito del Derecho Internacional Humanitario y de los Derechos humanos. In: Soroeta Liceras J (ed) Conflictos y protección de derechos humanos en el orden internacional. Cursos de Derechos Humanos de Donostia-San Sebastián, pp 67–148

Bruscoli F (2002) The rights of individuals in times of armed conflict. Int J Hum Rights 6:45–60

Burgorgue-Larsen L, Úbeda De Torres A (2011) War in the jurisprudence of the interAmerican court of human rights. Hum Rights Q 33:148–174

Cáceres Brun J (2009) El Derecho Internacional Humanitario y el Derecho Internacional de los Derechos Humanos. In: Rodríguez-Villasante Y Prieto JL (coords) Derecho internacional humanitario, 2nd edn. Tirant Monografías, Cruz Roja Española and Centro de Estudios de Derecho Internacional Humanitario, Valencia, pp 953–969

Chevalier-Watts J (2010) Has human rights become lex specialis for the European Court of Human Rights in right to life cases arising from internal armed conflicts? Int J Hum Rights 14 (4):584–602

Cohen-Jonathan G (2002) Observations: la territorialisation de la jurisdiction de la Cour européene des droits de l'homme. Revue trimestrielle des droits de l'homme 52:1073

Costa JP, O'Boyle M (2011) The European court of human rights and international humanitarian law. In: Spielman D, Tsirli M, Voyatzis P (eds) The European convention on human rights, a living instrument. Essays in honour of Christos L. Rozakis. Bruylant, Brussels, pp 107–129

Draper G (1972) Human rights and the law of war. Virginia J Int Law 12:326–338

Forowicz M (2010) The reception of international law in the European court of human rights. Oxford University Press, Oxford, pp 313–351

Gaggioli G, Kolb R (2007) L'apport de la Cour Européenne des droits de l'homme au droit international humanitaire en matière de droit à la vie. Schweizerische Zeitschrift für Internationales und Europäisches Recht 17(1):3–11

Gardan J (2001) The contribution of the international court of justice to international humanitarian law. Leiden J Int Law 14:349–365

Gioia A (2011) The role of the European court of human rights in monitoring compliance with humanitarian law in armed conflict. In: Ben-Naftali O (ed) International humanitarian law and international human rights law. Oxford University Press, Oxford, pp 200–249

Guellali A (2007) Lex specialis, droit international humanitaire et droits de l'homme: Leur interaction dans les nouveaux conflits armés. Revue Générale de Droit International Public 111(3):539–575

Heintze HJ (2002) The European court of human rights and the implementation of human rights standards during armed conflicts. In: German yearbook of international law, vol. 45. Duncker & Humblot, Berlin, pp 60–77

Henckaerts JM, Doswald-Beck L (2007) El derecho internacional humanitario consuetudinario, Vol. I: Normas. Comité Internacional de la Cruz Roja, Buenos Aires

International Law Commission (2006) Fragmentation of International Law: difficulties arising from the diversification and expansion of International Law, United Nations Organization, Geneva

Meron T (2003) How do human rights humanize the law of war? In: Bergsmo M (ed) Human rights and criminal justice for the downtrodden, essays in honour of Asbjorn Eide. Nijhoff, The Hague, pp 157–178

Milanovic M, Papic T (2008) As bad as it gets: the European court of human right's Behrami and Saramati decision and general international law. Int Comp Law Q 58:267–296

Orakhelashvili A (2008) The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence? Eur J Int Law 19(1):161–182

Pejic J (2011) The European court of human rights' *Al-Jedda* judgment: the oversight of international humanitarian law. Int Rev Red Cross 93(883):837–851

Pérez González M (1998) Las relaciones entre el Derecho internacional de los derechos humanos y el Derecho internacional humanitario. Cursos Euromediterráneos Bancaja de Derecho Internacional, vol I. Ed. Aranzadi, Pamplona, pp 315–393

Pérez González M (2006) La protección de los derechos humanos en situaciones de conflicto: el parámetro del Derecho internacional humanitario. Nueva Época 4:13–35

Rüth A, Trilsch M (2003) International decisions: Banković v. Belgium Am J Int Law 97:170–171

Sassòli M (2007) Le droit international humanitaire, une lex specialis par rapport aux droits humaines? In: Auer A, Flückinger A, Hottelier M (eds) Les droits de l'homme et la constitution: Études en l'honneur du Professeur Giorgio Malinverni, Collection Genovoise. Schultess, Geneva, pp 375–395

Weckel P (2005) Chronique de jurisprudence international. Revue Générale de Droit Int 2:465–477

Chapter 12
Safety and Protection of Humanitarian Workers

Agnieszka Bieńczyk-Missala and Patrycja Grzebyk

12.1 Introduction

Systematically, the numbers of incidents involving humanitarian workers as victims grow larger. In the past, such attacks tended to be quite random in nature, but with time they have become more organized and more purposeful. Humanitarian workers fall victim to bombings, direct attacks, kidnapping, thefts, as well as collateral damage security incidents. Such workers have always been vulnerable, considering that they operate in a dangerous environment. The conditions are most precarious during international and internal armed conflicts, yet violence also erupts during humanitarian activity in response to natural disasters.

The international community was horrified when six workers of the International Red Cross were killed in their sleep in Chechnya on 17 December 1996 (BBC, 17 December 1996). On 19 August 2003 in Iraq, 24 workers, including UN Special Representative Sergio Viera de Mello (BBC, 19 August 2003), were killed in a bomb attack. On 7 August 2010 the Taliban in Afghanistan admitted to having killed ten aid workers on charges of espionage (The Associated Press, 7 August 2010). The list of the killed and wounded goes on and on (Aid Worker Security Report 2011, p. 2).[1] The most dangerous states are Afghanistan, Syria, Sudan (Darfur), Somalia, and Pakistan. In several cases, the untenable security situation forced aid institutions to reduce or withdraw the aid they offer, e.g. in Chechnya, Iraq, and Afghanistan (Aid Workers Security Reports).

The increase in attacks against humanitarian workers in recent years raises once again the question concerning the scope of their protection, as well as ways to

[1] **Victims of attacks against humanitarian personnel: in 2005—173, in 2006—240, in 2007—220, in 2008—278, in 2009—295, in 2010—245, in 2011—308, and in 2012—274.**

A. Bieńczyk-Missala • P. Grzebyk (✉)
NOHA Faculty, University of Warsaw, Warsaw, Poland
e-mail: patrycjagrenich@wp.pl

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_12

improve it. A significant part of international law, in particular international humanitarian law and human rights law, has as its objective the protection of potential victims of armed conflicts and of human rights violations, especially civilians. The issue is also widely discussed in the academic literature on the subject (Humanitarian Debate, International Review of the Red Cross 2013; Primoratz 2007, 2012; Ramcharan 2006; Carpenter 2006; Siobhan 2009). What is missing, however, is systematic research into the scope of protection of humanitarian workers, and a debate as to what further measures should be adopted in order to limit the attacks against those who bring humanitarian aid, and to ensure their safety. A response to the following question is necessary: how do we achieve the right balance between the needs of victims of humanitarian crises and ensuring safety to humanitarian workers?

The objective of this paper is to analyse the factors that have a negative impact on the humanitarian space, i.e. the space where humanitarian workers are able to carry out their work effectively, and to consider the limitations resulting from international law and its implementation. The paper also proposes an assessment of the response measures that are undertaken to improve the security conditions of humanitarian workers.

The paper focuses on the safety of humanitarian workers in terms of protecting their life and health. As far as the definition of a humanitarian worker is concerned, the authors assume the term to denote workers, both international (i.e. persons who are not citizens of the state where the humanitarian assistance is provided) and national (citizens of the state in which the assistance is provided), who are involved in humanitarian assistance. Humanitarian assistance is understood as short-term emergency assistance under conditions of humanitarian crisis, consisting of actions aimed at ensuring that the basic needs of the affected population are being met.

12.2 Factors Impacting on the Safety of Humanitarian Personnel

The factors that impact negatively on the safety conditions of humanitarian workers may be divided into two groups. The first group includes the adverse effects of what occurs externally, beyond the control of the humanitarian workers themselves. The second group pertains to a shift in the concept and practice of humanitarian aid, and may therefore be modified by those involved in humanitarian assistance.

A useful notion in an analysis of the external factors that contribute to security incidents involving humanitarian personnel is that of humanitarian space, often defined as a ‘conducive humanitarian operating environment’ (UN Office for the Coordination of Humanitarian Affairs 2003) or ‘scope for neutral and impartial humanitarian action in the midst of conflict (Studer 2001, pp. 367–391). It is crucial for effective activity of the International Committee of the Red Cross, other humanitarian organizations, as well as for inter-governmental organizations like

UNICEF or the Office of the United Nations High Commissioner for Refugees (UNHCR). In recent years, increasingly worse security conditions have been noted, spurring reports on the shrinking of humanitarian space, reduction of humanitarian space, or erosion of humanitarian space (Beauchamp 2008; Abild 2009; Inter-Agency Standing Committee 2008; Khambatta 2009; Wagner 2005), in particular with reference to the areas with active military conflicts.

A principal reason behind the negative trends in security conditions with regard to humanitarian workers has been the shift in the nature of conflicts (Strachan and Scheipers 2011). For a number of years, internal conflicts have been prevalent. Such conflicts often play out against a background of weak state structures, with their resultant absence of territorial control hindering the operations of humanitarian organizations. The level of trust among the organizations providing aid and the state tends to be very low under such conditions.

Non-state participants of armed conflicts often refuse to perceive themselves as parties to the instruments of international law. They believe to be involved in an unequal fight, and thus to be forced to make use of illegal measures in order to achieve their goals. They can be rather cunning, and for many of them war is a way of life, and also a money-making endeavour. Criminal groups often have a vested interest in maintaining a certain level of violence, and humanitarian personnel in many instances provide the most easily available target. Moreover, disintegration of chains of command is typical of such groups, making it more difficult to establish contact and offer information on the plans regarding the supply of humanitarian aid (First Periodical Meeting on International Humanitarian Law, International Review of the Red Cross 1998, pp. 366–394; Ewumbue-Monroe 2006, pp. 905–924).[2]

Where the nature of the conflicts is ethnic, and the target is a civilian group, the presence of humanitarian personnel is hardly desirable to the assailants. In fact, it makes operations difficult and becomes an obstacle in attaining their objectives, besides often bearing witness to the crimes and thus becoming an enemy. The cultural aspect has also been pointed out: with regard to the recent conflicts in Afghanistan, Iraq, and Sudan, the ICRC former president Jakob Kellenberger has noted the trend towards "polarization" and "radicalization", which he found to be among the results of the 'war on terrorism' (ICRC Annual Report 2004, p. 4; Hazan and Berger 2004). Humanitarian workers have often been perceived as representatives of a foreign Western world, and treated with suspicion, as if they had an agenda that included implementing foreign or hostile values besides doing their ostensible work. Humanitarian personnel who are involved in the promotion of human rights and thus who criticize either the authorities or the living conditions of the local communities are particularly vulnerable to attacks. In Iraq for example the Western aid organizations were perceived as an outpost of the international occupant forces (Carle and Chkam 2006, p. 9).

[2] Report dated 19 January 1998: *Respect for and Protection of the Personnel of Humanitarian Organizations*, Preparatory document drafted by the International Committee of the Red Cross for the first periodical meeting on international humanitarian law Geneva, 19–23 January 1998.

Also important is the unique nature of the problem of disrespect for international humanitarian law and human rights law. No other area of international public law is subject to violations on such a massive scale. The rights of individuals and the respect thereof tend to suffer due to the enormous power disproportion between the individual and the state and other actors in wars who have the responsibility for observing the law. The situation is exacerbated by the fact that the sanctions for violations of this type are often rather ineffective.

In this respect, the authority of international law has been undermined when the United States, along with its allies in the 'war on terror', essentially took a stance against its fundamental standards. The return of the debate on torture, holding individuals suspected of connections with terrorism, and difficulties in cooperation between the representatives of the International Red Cross and the leaders of the superpower might be interpreted as justifying disrespect of international law (Samuel and White 2012; Gaston 2012).

Principal factors aggravating the poor safety conditions of humanitarian workers that rest on the part of the humanitarian aid organizations include the lack of transparency and the increasing politicization of humanitarian action. Clearly, humanitarian actors vary widely (Beigbeder 1991). Aid is offered by United Nations institutions, Red Cross and Red Crescent institutions, local and international NGOs, private institutions, and states. For many of them, humanitarian aid is only one aspect of their involvement. Parties to the conflicts in general, and local communities in particular, often find it difficult to distinguish those who bring aid from those who are in pursuit of political, ideological, or other objectives (Carle and Chkam 2006, pp. 2–5). More and more often, states provide humanitarian aid while working to satisfy their own political or security-related interests. The aid is directed to countries with which the aid-providing states have historical, political, or cultural ties, which gives rise to questions regarding the impartiality of the decisions on its allocation. Furthermore, armed forces are with increasing frequency required to carry out humanitarian work. United Nations institutions rely on the support of international armed forces with presence in the region of conflict (Bessler and Karouko 2006, pp. 4–10; Studer 2001, pp. 374–377). Providing safe operating conditions to humanitarian workers is also within the remit of EU-mandated troops.[3] Civil-military cooperation certainly improves the potential for reaching those in need of aid, and in a short-term perspective may boost the safety of both humanitarian workers and the civilian population to whom the aid is directed. Yet the same model of cooperation leads to the disintegration of the civilian nature of humanitarian work (Pommier 2011, pp. 24–25). The International Committee of the Red Cross has pointed out that it leads to erosion of the separation between humanitarian and military spaces, and consequently to the disruption of perceptions of the status and role of humanitarian personnel (Mc Hugh and Bessler 2006, p. 7).

[3] Inter alia: European Union Force Chad/CAR, European Union Force–Libya.

Furthermore, as noted for example by the former ICRC President Cornelio Sommaruga, the term "humanitarian" is used indiscriminately; a large part of the overall international response to a conflict is labelled "humanitarian". This broad application of the term distorts the perception of the unique nature of actual humanitarian work, which requires the observance of the fundamental principles of humanity, impartiality, neutrality, and independence (Sommaruga 1997).

Statistically, members of NGOs fall victim to attacks most frequently. They often operate in difficult security conditions, without adequate background research and without proper preparation. Many NGOs cannot afford to hire highly qualified personnel (Stoddard and Harmer 2010, p. 8). Often, they rely on volunteers, and these volunteers receive no basic training either with regard to safety or to methods of communication with the local population (Aid Workers Security Report 2011, p. 1). The abundance of NGOs hinders organized cooperation in terms of exchanging crucial safety-related information: instead of cooperating, NGOs very often compete with one another and thus become more vulnerable to manipulation by local decision-makers.

12.3 Legal Protection of Humanitarian Workers

A comprehensive assessment of the situation of humanitarian workers requires an analysis of their legal protection. In situations outside of armed conflict, the scope of that protection is determined by human rights law, as well as specific regimes such as international disaster response law and the Convention on the Safety of United Nations and Associated Personnel (CSUNAP) of 1996 and its Optional Protocol of 2005. In situations of armed conflict, further protection is provided by international humanitarian law and the provisions of international criminal law on war crimes. In each case, full assessment of the scope of legal protection requires a review of national laws.

12.3.1 Outside of Times of Armed Conflict

Situations which do not qualify as armed conflict but that necessitate humanitarian aid range from natural disasters, through unilateral violence against civilians and unrest that has not yet reached the stage of armed conflict, to post-conflict situations where sporadic acts of violence continue to occur. Across this variety of scenarios, in terms of protection of humanitarian workers, only one fundamental legal regime applies, i.e. human rights law.

Human rights protect the life and safety of every human being, which naturally pertains also to humanitarian workers, whether or not they are members of armed forces. Even under conditions of a "public emergency which threatens the life of nation", when states are allowed to limit certain human rights, there nonetheless

remain rights and liberties, such as the right to life, the ban on torture and slavery, or the ban on punishing for an act or omission which were not criminal offence at the time they occurred, from which no derogation can be made.[4] These regulations are crucial in the context of humanitarian aid because they guarantee the protection of life and health of humanitarian workers and ensure their authorisation to offer humanitarian aid and not be subject to abuse for that reason. Operations of humanitarian workers may have, and often do have, immense impact on the preservation of life and safety of those in need of humanitarian aid. Not only are the states obliged to respect human rights (which in essence is a ban on state authorities infringing these rights), but they also have the positive obligation to ensure that human rights are observed, which requires actual action on their behalf. In the case of alien humanitarian workers, the protection arising out of (universal) human rights are augmented by the right to diplomatic care vested in their state of citizenship (Sandurski 2000, p. 13). This right means that the state of citizenship is authorized to represent its citizens against the host state if the host state violates their rights or fails to prevent and punish violations directed at them.[5]

The responsibility of the state to ensure the safety of humanitarian workers is also the focus of the *Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance* (IDRL Guidelines) which were unanimously adopted on 30 November 2007 by the state parties to the Geneva Conventions and the International Red Cross Red and Crescent Movement at the 30th International Conference of the Movement.[6] The IDRL Guidelines are not binding, yet they are invaluable in effecting a shift in national laws pertaining to disaster response and facilitation of disaster relief.[7]

Point 22 of the IDRL Guidelines, entitled Security, reads as follows:

> Affected States should take appropriate measures to address the safety and security of disaster relief and initial recovery personnel of assisting States and eligible assisting humanitarian organizations and of the premises, facilities, means of transport, equipment and goods used in connection with their disaster relief or initial recovery assistance.

[4] See Article 4 International Covenant on Civil and Political Rights of 16 Dec. 1966, UNTS vol. 999, p. 171. Compare with Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov. 1950, UNTS vol. 213, p. 221.

[5] See Draft Articles on Diplomatic Protection of 2006 (A/61/10). It is interesting to remember in this context that in the initial stages of work of the International Law Commission on the issues of state responsibility, the special rapporteur F.V. Garcia Amador in his reports focused specifically on the question of the responsibility of the State for injuries caused in its territory to the person or property of aliens. See e.g. UN Doc. A/CN.4/96, A/CN.4/106, A/CN.4/111.

[6] The text of IDRL Guidelines is available on http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/ (31.05.2013). According to definitions included in the IDRL Guidelines, "disaster" means "a serious disruption of the functioning of society, which poses a significant, widespread threat to human life, health, property or the environment, whether arising from accident, nature or human activity, whether developing suddenly or as the result of long-term processes, but excluding armed conflict."

[7] See also A/RES/63/139, A/RES/63/141, A/RES/63/137 (2008) in which UN General Assembly encouraged states to make use of IDRL Guidelines.

> Assisting States and assisting humanitarian organizations should also take appropriate steps in their own planning and operations to mitigate security risks.

The above essentially re-states the general duty of states to ensure the security of those under their jurisdiction. Yet in contrast to documents focusing on overall human rights protection, the IDRL Guidelines distinguish a separate class of "disaster relief and initial recovery personnel" that is at risk of attacks, and to whose protection the state should therefore pay particular attention.[8] Importantly, the IDRL Guidelines emphasize the duty of the helpers to take measures to mitigate risks to their safety. The fact of providing humanitarian aid gives nobody the right to recklessly risk their life at the expense of the host state.

A particular regime of protection applies to humanitarian workers providing aid within the framework of United Nations operations. Protection of personnel serving on peacekeeping missions as well as other UN-mandated missions has been a concern of the Secretary-General,[9] the General Assembly,[10] and the Security Council[11] since the 1990s. In 1994, the General Assembly adopted the Convention on the Safety of United Nations and Associated Personnel that has, as of 13 January 2015, gathered 92 signatories (Christianebo Urloyannis-Vrailas 2005, pp. 561 ff.; Bouvier 1995, pp. 638 ff.; Bloom 1995, pp. 621 ff.; Engdahl 2002, pp. 205 ff.).[12] The purpose behind the Convention is to enhance the protection of UN and associated personnel who, as noted in the preamble to the Convention, make an important contribution in respect of United Nations efforts in the field of humanitarian operations.

The Convention prohibits attacks on UN and associated personnel and any actions that prevent them from discharging their mandate, and imposes on the states the duty to take all appropriate measures to ensure the safety and security of United Nations and associated personnel.[13] It provides that in principle, if UN or

---

[8] According to definitions included in the IDRL Guidelines, "Disaster relief" means goods and services provided to meet the immediate needs of disaster-affected communities; "Initial recovery assistance" means goods and services intended to restore or improve the pre-disaster living conditions of disaster-affected communities, including initiatives to increase resilience and reduce risk, provided for an initial period of time, as determined by the affected State, after the immediate needs of disaster-affected communities have been met. IDRL Guidelines uses terms like "humanitarian relief", "humanitarian organization" but they do not provide definitions of these notions.

[9] See e.g. Boutros Boutros-Ghali, *An Agenda for Peace* (A/47/277—S/24111) of 17 June 1992. See also S/1999/957 of 8 Sept. 1998, pp. 21–22.

[10] See e.g. GA resolutions A/RES/52/167 (1997), A/RES/53/87 (1998), A/RES/54/192 (1999), A/RES/55/175 (2000), A/RES/56/89 (2001), A/RES/56/217 (2001), A/RES/57/28 (2002), A/RES/57/155 (2002), A/RES/58/122 (2003), A/RES/59/211 (2004), A/RES/60/123 (2005), A/RES/61/133 (2006), A/RES/62/95 (2007), A/RES/63/138 (2008), A/RES/64/77 (2009), A/RES/65/132 (2010), A/RES/66/117 (2011), A/RES/67/85 (2012).

[11] See e.g. S/RES/1296 (2000), S/RES/1265 (1999), S/RES/1502 (2003); S/RES/1674 (2006), S/RES/1894 (2009).

[12] A/RES/49/59, 9 Dec. 1994. Convention entered into force on 15 Jan. 1999. As to the circumstances surrounding the work towards the Convention.

[13] Article 7.

associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they may not be subjected to interrogation and they are to be promptly released and returned to United Nations or other appropriate authorities, and until the time of their release, are to be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.[14] However, the core regulations of the Convention serve to criminalize certain offences targeted at the personnel protected under the Convention[15] and to determine how the perpetrators of such offences are to be handled, including international cooperation in bringing them to justice.[16]

From the moment of commencement of negotiations of the Convention, the most problematic issue was the scope of the application of the Convention. The determination of that scope in turn required agreement as to, firstly, the definition of protected personnel, and secondly, of the type of operations to which the Convention was to apply. The only classes of persons protected under the Convention are "United Nations personnel" and "Associated Personnel."[17] Under the definition adopted in the Convention, UN personnel means:

(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;
(ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted.

For example, representatives of UNOCHA or UNHCR, if they are present in an official capacity in the area where a United Nations operation is being conducted, fall into the category of UN personnel. The need to extend to UN employees the same protection that is granted to peacekeepers was quite clear. Employees of various UN agencies are involved in peacebuilding operations as well as humanitarian assistance within peace missions, and when they work in the area where the operation is conducted, they face the same risks as the blue helmets.

Controversies arose however with regard to the category of "Associated Personnel". Certain states were unwilling to define the category in broad terms, mainly due to their distrust of NGOs and their unwillingness to bear the responsibility for ensuring their protection. Ultimately the definition reads as follows:

(i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;

[14] Article 8.
[15] Article 9.
[16] Articles 10–18.
[17] Article 1.

(ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;
(iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency to carry out activities in support of the fulfilment of the mandate of a United Nations operation.

For the purposes of this paper, the third sub-category above is of particular interest. Protection under the Convention does not apply to all humanitarian workers; it only applies to those who work for organizations who have an agreement with the Secretary-General of the United Nations, a specialized agency, or the IAEA. Moreover, these workers are only protected when they carry out activities in support of the fulfilment of the mandate of a UN operation.

It is rather difficult to determine whether there is a formal connection between the United Nations and a given organization. The Convention does not require the United Nations to control the organization (different opinion: Bloom 1995, p. 624). In order for the Convention to apply, it is sufficient to demonstrate (as emphasized by the Secretary-General) "any contractual link or a treaty arrangement institutionalizing the cooperation between the United Nations and a non-governmental organization in support of a United Nations operation or in the implementation of its mandate."[18] The practice of the United Nations so far indicates that two types of agreements have been prevalent: "partnership agreements" between UNHCR, UNDP, UNICEF, WFP or other UN bodies executing humanitarian programmes and non-governmental organizations whose role consists in the implementation of specific projects, and "security agreements" between the Office of the United Nations Security Coordinator and non-governmental organizations participating in the implementation of assistance activities of the UN (Engdahl 2002, pp. 223–224).[19] However, it is the position of the sub-contractors of the organizations that have formal ties to the UN that makes the solution problematic. Local workers of local NGOs that may lack a formal agreement with the UN are more vulnerable to attacks, yet beyond the scope of protection offered by the Convention. It is hardly an acceptable situation (Ecroth 2010, p. 19).

Further limitations of the applicability of the Convention are connected to the types of operations listed by the Convention. An operation must meet three requirements conjunctively. Firstly, it must be established by the competent organ of the United Nations in accordance with the Charter of the United Nations. Secondly, it must be conducted under United Nations authority and control. There is no stipulation as to the degree of UN control required, i.e. whether the duty to report on the proceedings is sufficient, or whether the UN must have full control of the operation (not only overall political control but also command in the field). The issue is

[18] A/55/637 (2002), para. 15.
[19] Ibidem.

crucial in that experts disagree whether, in the light of these questions, operations authorized by the Security Council but conducted by a given state or a coalition of states fall under the Convention's definition (Cf. Christianebo Urloyannis-Vrailas 2005, pp. 566–567 with Commentary of Mahnoush Aransjani, available on http://untreaty.un.org/cod/avl/ha/csunap/csunap.html). It must be noted that the Security Council increasingly often encourages regional organizations to conduct specific operations when it finds itself unable to muster sufficient resources on tight deadlines. This efficiency issue on the part of the Security Council should not deprive the forces that are acting on the Security Council's recommendation of the protection under the special regime, be it as UN personnel or as associated personnel.

Thirdly, the operation must be either established for the purpose of maintaining or restoring international peace and security, or it should be declared by the Security Council or the General Assembly for the purposes of the Convention that there exists an exceptional risk to the safety of the personnel participating in the operation. Application of the Convention has been excluded with regard to operations "authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies." This is a very strict limitation. It is understandable why members of UN enforcement missions engaged in combat actions may not be granted immunity against attacks from the opponent (Bouvier 1995; Engdahl 2002, p. 233).[20] Yet it is hard to grasp why civilian workers offering humanitarian aid should lose protection just because one component of the mission involves participation in hostilities (cf. Christianebo Urloyannis-Vrailas 2005, p. 568). Furthermore, it is extremely difficult to determine whether an operation has an exclusively peacekeeping character, whether its character is exclusively peace-enforcement, of whether it is mixed. These terms lack definitions, and the Security Council rarely offers this type of information about the missions it authorizes (Bloom 1995, p. 625). It appears therefore that in the absence of a formal determination of a given operation by the Security Council as falling into the category of enforcement, the operation is within the scope of application of the Convention. Regrettably, the states have decided not to extend the protection under the Convention to humanitarian operations (not to be mistaken with humanitarian interventions), despite proposals to this effect.

The Convention applies automatically only with regard to operations authorized by the Security Council (which by definition is responsible for the maintenance of peace and security, and thus there is little need to rely on the legal basis of the resolution in Chapter VII or VI of the UN Charter) or by the General Assembly acting pursuant to the resolution Uniting for Peace.[21] In any other case, a declaration regarding an exceptional risk (a triggering declaration) is required (Llewellyn

[20] Experts point out that the purpose of this reservation was to preclude the application of the Convention in situations in which international humanitarian law applies.

[21] A/RES/377 (V) (1950).

2006, p. 719), which has proved to be most challenging. Firstly, there are no clear criteria for assessing that risk. Furthermore, declarations of this nature are considered political, and thus there is reluctance amongst the members of the United Nations to issue them. This continues to mean that members of a whole range of United Nations operations remain beyond the protection of the Convention. The Secretary-General argued that it was necessary to adopt a protocol to the Convention, and by means of that protocol to extend protection to all humanitarian organizations, regardless of their affiliation with the UN, and to all UN operations, regardless of whether the declaration on exceptional risk with regard to their personnel has been passed.[22] His appeal was effective. On 8 December 2005, the General Assembly adopted an optional protocol, which—regrettably, only to a limited degree—extends the scope of protection under the Convention.[23] The application of the Convention under the protocol is only extended to UN operations established for the purposes of:

(a) Delivering humanitarian, political or development assistance in peacebuilding, or
(b) Delivering emergency humanitarian assistance.

However, a restriction stipulates that the provisions of the protocol do not allow the application of the Convention to any permanent United Nations office, established under an agreement with the United Nations. Not all humanitarian workers are under the protection either, because the requirement of formal connection between the organization and the UN is still in force. Further doubts may arise out of the wording "emergency humanitarian assistance": all humanitarian assistance is of an emergency nature as it is one of the criteria that distinguish it from development assistance. Another controversial point is that the protocol allows a host state to make a declaration to the Secretary-General of the United Nations that it is not going to apply the provisions of the protocol with respect to an operation whose purpose is delivering emergency humanitarian assistance and which is conducted for the sole purpose of responding to a natural disaster. Such a declaration must be made prior to the deployment of the operation. This opt-out clause was implemented at the request of China and other developing countries, because they argued that in a situation of a natural disaster there is no risk to the life of helpers, as opposed to a peacebuilding operation. The option of making such a declaration is somewhat surprising. The role of it is either to reinforce the obvious principle of no responsibility of a state in the case of *force majeure*, if due diligence was observed (which would make it superfluous, but that is frequent in international law), or to offer the state full freedom with regard to the safety of humanitarian workers, which would constitute a complete departure from the general principles of human rights

[22] See A/55/637, S/1999/957 (1999), A/54/619, S/1999/957 (1999). See also World Summit Outcome 2005, A/RES/60/1, para. 167.

[23] Protocol (A/RES/60/42, 2005) entered into force on 19 Aug. 2010. There are 28 states parties to the Protocol (as of 31 May 2013).

protection. Nonetheless, the wording "for the sole purpose" may support the argumentation that in the cases where both humanitarian and development aid is offered (and it is very difficult to draw a sharp line between the two), the state may not opt out of the applying the Convention.

12.3.2 In Times of Armed Conflict

In times of armed conflict, humanitarian workers continue to be protected by the above-mentioned human rights documents and the special regime of the CSUNAP.[24] However, further protection under provisions of international humanitarian law (IHL) also comes into play. These provisions differentiate between international and non-international conflicts, and between various categories of persons offering aid.

In situations of international conflicts, apart from customary law (Henckaerts and Doswald-Beck 2005, pp. 3 ff.),[25] the following regulations apply: the four Geneva Conventions of 1949 for the protection of war victims (GC)[26] and the first Additional Protocol of 1977 (AP I).[27] These legal acts define the category of relief (humanitarian) action, understood as providing food and medical supplies, clothing, bedding, means of shelter or other supplies essential to the survival of the civilian population of a territory under the control of a party to a conflict and objects necessary for religious worship.[28] Relief action may be targeted only at protected persons (civilians, but also the sick and wounded, the shipwrecked, prisoners of war) (Stoffels 2004, p. 516)[29] and must be conducted in accordance with the following principles. Firstly, it must be humanitarian, i.e. aimed at bringing relief to victims (Pillod et al. 1987, p. 817). There is no differentiation between humanitarian assistance and development assistance in IHL but specific provisions clearly specify that the aid in question must be of a short-term nature and intended to provide emergency relief (Mikos-Skuza 2013, pp. 235 ff.). Thus an organization that implements developmental programmes, e.g. road or school construction, may not obtain consent to operate in the state where aid is being provided, its workers will not be treated as relief staff, and protection awarded to relief personnel will not be extended to them.

[24] However, the IDRL Guidelines will not apply: the option of their applicability in situations of armed conflict has been barred in advance. See note 7.

[25] See List of Customary Rules of International Humanitarian Law based on the International Committee of the Red Cross study on customary international humanitarian law (CIHL).

[26] UNTS, vol. 1975, pp. 31 ff.

[27] UNTS, vol. 1125, pp. 3 ff.

[28] Article 69, para. 1 and Article 70, para. 1 AP I.

[29] See e.g. Article 9 of the GC I, GC II, GC III, Article 10 GC IV.

Secondly, relief action must be impartial in character and conducted without any adverse distinction. As noted in the ICRC Commentary of 1987, "[t]he 'impartial' character of the action may be assumed on the basis of fulfilling the obligation (. . .) to conduct the action 'without any adverse distinction'" (Pillod et al. 1987, p. 818). Aid must be provided to the persons who are suffering, and the decision concerning whom to serve first should be based on purely objective criteria, expressed in terms of the needs of the intended recipients of the aid. As the ICRC Commentary points out, "the principle of non-discrimination removes objective distinctions between individuals, while impartiality removes the subjective distinctions."[30]

Thirdly, relief actions must be undertaken subject to the agreement of the parties concerned in such relief actions. While the state is essentially obliged to allow relief aid if it is unable to satisfy the basic needs of its population, the aid organizations must nonetheless obtain permission to conduct operations. It is not a requirement under IHL that the entities conduction relief operations must be independent or neutral (Durham and Wynn-Pope 2011, pp. 330–331). Naturally, maintaining an independent or neutral position facilitates access to the victims, but it is a prerequisite neither of the ability to offer and conduct relief action, nor of protection granted to relief personnel. What is more, even if the principles of humanitarianism, impartiality and consent of parties, clearly specified in IHL, are not observed, the persons engaged in relief action do not forfeit the general protection granted to them as civilians, as long as they do not take part in hostilities (Cottier 1999, p. 333).

Relief action typically also involves health care and religious assistance, but IHL treats this type of aid as a separate category, and consequently, more specific provisions (discussed in more detail below) apply to medical and religious personnel than to relief staff.

Health care must be provided without discrimination or adverse distinction.[31] Offering medical aid (in line with regulations on relief aid) is not to be considered as interference in the conflict,[32] and thus clearly cannot be perceived as taking part in hostilities. Importantly, the fact that personnel of the medical unit can be equipped with light individual weapons for their own defence, or for that of the wounded and sick in their charge, may not be considered harmful to an enemy state.[33] Given the above, it must be concluded—in light of the fact that personnel of the medical units may carry light weapons—that they may also definitely use means of protection such as bullet-proof vests or armoured vehicles (ICRC 1998). The first Additional Protocol of 1977 notes that a unit can be guarded by a picket or by sentries or by an escort, and the fact that small arms and ammunition taken from the wounded and sick and not yet handed to the proper service are found in the units, cannot be considered as an act harmful to the enemy.[34] A unit may not be deprived

[30] Ibidem.

[31] See e.g. Article 12 GC I.

[32] Article 27 GC I.

[33] Article 13 AP I.

[34] Article 13, para. 2 AP I.

of protection solely due to the fact that members of the armed forces or other combatants are in the unit for medical reasons. Even if the personnel engage in actions beyond their humanitarian function which are in fact harmful to the enemy, protection may cease only after a warning has been given, setting (when appropriate) a reasonable time-limit, and after such warning has remained unheeded.[35] Under no circumstances may a person carrying out medical activities compatible with medical ethics be punished for such activities, even if those who benefited from those actions were on the adverse side.[36]

IHL contains no explicit principles that should be observed in offering religious and spiritual assistance (and it is actually difficult even to apply to such assistance the same terminology as to other types of aid). What are the methods of effective verification of whether religious personnel offers assistance without any adverse distinction and impartially, solely for the purpose of providing relief to the victims and being guided only by their needs, without investigating the principles of a specific religion? However, the provisions that require religious personnel to be assigned to either armed forces, medical units, or civil defence organizations indirectly points to the conclusion that also in the case of religious assistance it is necessary to obtain prior permission of the state in whose territory the aid is to be provided.

Under IHL, the following categories can be distinguished among those offering humanitarian assistance (i.e. among the personnel offering health care and spiritual aid, as well as the more broadly understood relief aid):

- medical personnel (proper medical personnel and administrative personnel);
- auxiliary personnel;
- hospital ship personnel;
- medical aircraft crew (and crews of other medical transport);
- religious personnel;
- other relief personnel (including of the International Committee of the Red Cross, national Red Cross societies and other humanitarian or voluntary aid organizations).

The category of medical personnel includes primarily the so-called proper medical personnel exclusively engaged, either on a permanent or a temporary basis, in search for, the collection, transport, or treatment of the wounded and sick, including first-aid treatment, or in the prevention of disease (e.g. doctors, surgeons, dentists, chemists, orderlies, nurses, stretcher-bearers, etc., who give direct care to the wounded and sick).[37] The category of medical personnel also includes staff exclusively engaged in the administration of medical units and establishments, i.e. the so-called administrative staff (e.g. office staff, ambulance drivers, cooks, cleaners).[38] The status of medical personnel, and thus the protection

[35] Article 13, para. 1 AP I.

[36] Article 16 and 17 AP I. See also Rule 26 CIHL.

[37] Article 24 GC I and Article 8 (c) AP I.

[38] Ibidem.

granted thereto, may also apply to the staff of national Red Cross societies and that of any other voluntary aid societies, provided that they are duly recognized and authorized by their governments, and their staff are subject to military laws and regulations.[39] Similarly, the status may be granted to medical personnel made available to a party to the conflict for humanitarian purposes by any other state which is not a party to the conflict, as well as a recognized society of neutral or any other country which is not a party to the conflict (on the condition that it obtains the consent of its own government and the authorisation of the party to the conflict concerned) and permanent medical personnel of an impartial humanitarian organization.[40] The adversary state is to be notified about this consent by neutral government and the adverse party before making any use of this medical staff. The medical staff are to be "respected and protected in all circumstances."[41] This means firstly, that they should be spared and not attacked, so attempts upon their lives, or violence to their persons, are be strictly prohibited, and secondly, that the parties should take all feasible measures in order to ensure their protection, e.g. by means of properly training their armed forces and not conducting armed operations in the immediate vicinity of protected personnel.

Within the group of personnel providing health care, IHL recognizes a separate category of auxiliary personnel, i.e. members of the armed forces specially trained for employment as hospital orderlies, nurses or auxiliary stretcher-bearers in the search for or the collection, transport or treatment of the wounded and sick.[42] There is however a significant difference in the scope of protection granted to medical and auxiliary personnel. While medical personnel are to be respected and protected always and everywhere, auxiliary personnel are only protected if they are carrying out medical duties at the time when they come into contact with the enemy or fall into their hands. Moreover, if medical personnel fall into the hands of an adverse party, they "shall be retained only in so far as the state of health and the number of prisoners of war require."[43] If there is no such need, they should be released immediately. Medical personnel of neutral governments (and of other states not party to the conflict, or of aid society of such states, or of humanitarian organizations) may not be detained.[44] Medical personnel are not to be deemed prisoners of war but are granted the entirety of rights vested in prisoners of war, and—importantly—do not have to perform any work outside their medical duties. On the other hand, when auxiliary personnel fall into the hands of the enemy, they obtain the status of prisoners of war but should be employed in their medical duties in so far as the need arises.[45]

[39] Article 26 GC I.

[40] Article 27 GC I and Article 9, para. 2 AP I.

[41] Article 24 GC I. See also Rule 25 CIHL.

[42] Article 25 GC I.

[43] Article 28 GC I.

[44] Article 32 GC I.

[45] Article 29 GC I.

With regard to medical and hospital personnel of hospital ships and their crews,[46] IHL stipulates that they should be respected and protected, and that they may not be captured during the time they are in the service of the hospital ship.[47] The stipulation pertains also to the period when the ship has not yet accepted the wounded aboard, as well as the period when they leave the ship to go onshore, albeit only temporarily (Pictet 1960, p. 204). With regard to medical personnel serving not on a hospital ship, but on a navy or merchant vessel, if such personnel fall into the hands of enemy, they do not obtain the status of prisoners of war, but are to be respected and protected. They may continue to carry out their duties as long as this is necessary for the care of wounded and sick, but as soon as the need dissipates, they should be released. This principle only applies to medical and hospital personnel assigned to the medical care of the wounded, sick and shipwrecked, and not to the entire crew of the ship, as is the case with hospital ships.

Additional Protocol I of 1977 expanded the protection to cover also civilian medical personnel.[48] Previously, the Fourth Geneva Convention of 1949 ensured respect and protection for hospital staff (meaning persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases).[49] Interestingly, civilian population which is entitled on their own initiative to collect and care for the wounded, sick and shipwrecked[50] cannot be considered civilian medical personnel (Kleffner 2008, p. 345), and IHL only guarantees them protection if the parties to the conflict appealed to the civilian population to collect and care for the wounded. Thus for example the parties to a conflict should protect the civilian medical personnel from the armed operations, e.g. refrain from conducting such operations nearby, yet such a restriction is not necessary with regard to the civilian population who "only" collect and care for the wounded.

Another separate category is that of medical aircraft, which is defined as "aircraft exclusively employed for the removal of wounded, sick and shipwrecked and for the transport of medical personnel and equipment."[51] This category of personnel too should be respected, which means that they cannot be the object of attack while flying at heights, at times and on routes specifically agreed upon between the parties to the conflict, and they must be clearly marked. Importantly, it is stipulated that they are to be respected, but not protected; it was decided that for

[46] It is immaterial whether the ships are military hospital ships, National Red Cross hospital ships, or ships of recognized relief societies or private persons of neutral countries, on condition that they have placed themselves under the control of one of the parties to the conflict, with previous consent of their own governments and with authorization of the party to the conflict concerned, Article 22–25 GC II.

[47] Article 36 GC II.

[48] Article 15 AP I.

[49] Article 20 GC IV.

[50] Article 17 AP I.

[51] Article 39 GC II.

military reasons it is impracticable to accord protection to that group of personnel. In the case of involuntarily landing, the crew of the aircraft become prisoners of war. The status of the personnel of medical aircraft is therefore not similar to that of personnel of hospital ships. Rather, they are treated in a manner similar to medical transport personnel (as is the case with land medical mobile units). Such differentiation in treatment is difficult to understand. Naturally, there is the argument of military security and the risk that the crew of the aircraft might be engaged in espionage. However, should that prove to be the case, their actions would go far beyond medical duties, and would thus result in a loss of protection. The less benign treatment, in comparison to crews of hospital ships, may also be the result of the assumption that there are no typical medical aircraft. The assumption is incorrect, considering for example rescue helicopters and other similar units. If a hospital ship crew may not be detained while serving on a hospital ship, similar principles should apply to a typical, purpose-specific medical aircraft—yet presently that is not the case.

As far as religious personnel are concerned, this category includes military or civilian persons who are exclusively (!) engaged in the work of their ministry and are attached (temporarily or permanently) to the armed forces of a party to the conflict, or to medical units or medical transports or to civil defence organizations of a party to the conflict.[52] They are to be respected and protected; with regard to chaplains attached to the armed forces it is further stressed that they should be protected in all circumstances.[53] When religious personnel fall in enemy hands, the applicable principles are the same as with regard to medical personnel. They are not to be deemed prisoners of war, and should be retained only in so far as the spiritual needs and the number of prisoners of war require.[54]

All the above-discussed categories of personnel must be identifiable.[55] In this context, it is noteworthy that the option of medical and religious personnel using the distinctive emblem of the Red Cross or Red Crescent (and also Red Crystal) and the protection it grants is available to workers of the ICRC or national Red Cross societies and the medical service of armed forces. Other medical and religious personnel may use it only with the consent of military authorities.[56] Considering that members of NGOs who are not covered by the protection of the emblem of the Red Cross, Red Crescent or Red Crystal fall victim to attacks most frequently, it appears advisable to encourage the above-mentioned authorities to approve to as great an extent as possible the requests to use the emblem by a variety of organizations who provide professional health care.

The Geneva Conventions make a reference to relief action, but in terms of personnel of relief/humanitarian societies they only go so far as to guarantee that

[52] Article 8 (d) AP I.

[53] Article 24 GC I. See also Rule 27 CIHL.

[54] Article 28 GC I.

[55] Article 17, para. 2 AP I.

[56] See e.g. Articles 38–44 GC I.

the occupying power may not make any changes in the personnel or structure of these societies that would affect their humanitarian activities, provided there is no need for the occupying powers to implement temporary and exceptional measures imposed for urgent reasons of security.[57] Additional Protocol I provides a clear definition of relief personnel and granted special protection thereto. Under the Protocol's definition, relief personnel consist of persons engaged in assistance provided in relief action, in particular for the transportation and distribution of relief consignments.[58] Importantly, Additional Protocol I makes no distinction between international and national workers. It does however read: "the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties."[59] Such personnel are to be respected and protected,[60] meaning not only that they are to be "spared, not attacked" (respect), but also that others should "come to their defence, lend help and support" (Pillod et al. 1987, p. 834). Under Additional Protocol I, relief personnel "shall not exceed the terms of their mission" and "shall take account of the security requirements of the Party in whose territory they are carrying out their duties." Violating these provisions does not automatically deprive the relief personnel of their protection, but the mission of any of the personnel who do not respect them may be terminated. [61] Naturally, civilians (including those who are involved in relief action) are protected as such from the consequences of the war, and may not be attacked, as long as they do not take part in hostilities.[62]

In conflicts of a non-international nature, Article 3 that is included in all Geneva Conventions of 1949, as well as Additional Protocol II of 1977 are applied. Under these regulations, also in the cases of non-international armed conflict medical and religious personnel are to be respected and protected.[63] The definition of such personnel does not substantially differ from that adopted with reference to international conflicts. It is clearly stipulated that the personnel may not be punished for carrying out their duties and may only lose their protection in their capacity of medical or religious personnel if they act beyond their humanitarian duties, and in their capacity of civilians solely when they take directly part in hostilities (and solely for the duration of doing so). In the context of non-international conflicts, IHL makes no use of the terms 'relief personnel' or 'humanitarian personnel', although it does use the notion of relief action. Characteristically, both the provisions of common Article 3 and the provisions of Additional Protocol II are

[57] Article 63 GC IV.

[58] Article 71, para. 1 AP I.

[59] Article 71, para. 1 AP I. Compare also with Article 142 GC IV (duly accredited agents).

[60] Article 71, para. 2 AP I. See also Rule 31 CIHL.

[61] Article 71, para. 4 AP I.

[62] However, it is important to note that protection under GC IV is not granted to every civilian, but only to those caught up in occupied territory or those who found themselves in the territory of the enemy. Geneva Conventions therefore give no protection to local (national) humanitarian workers.

[63] Article 9 AP II.

worded so as to only include the option of offering assistance by impartial humanitarian body and relief societies, but not to include a reference to the need to provide protection to relief personnel. The duty of protection nonetheless arises out of the provisions allowing relief aid to be provided as well as from customary law.[64] Last but not least, relief personnel typically remain under protection simply as civilians.

Protection of humanitarian workers during an armed conflict is also reinforced by the provisions of international criminal law. Beginning with the first attempts to catalogue war crimes and the principles of responsibility for them, attacks against humanitarian workers have been penalized: the category of war crimes has been conceived as including attacks against protected persons, including civilians, and destruction of relief ships, deliberate bombardment of hospitals, attack on and destruction of hospital ships, and breach of other rules relating to the Red Cross—all of these encompassing situations where typically humanitarian and medical personnel would be present (Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1919, pp. 114–115).[65] In the Rome Statute of the International Criminal Court, acts against persons protected under the provisions of the relevant Geneva Convention (i.e. also civilians and medical personnel) are treated as war crimes,[66] and so is intentionally directing attacks against personnel using the distinctive emblems of the Geneva Conventions[67] and, in the case of an armed conflict not of an international character, acts committed against persons taking no active part in the hostilities.[68] Furthermore, it must be stressed that the Rome Statute is the first document of this nature that establishes a separate category of war crimes directed at workers engaged in humanitarian assistance. Article 8(2)(b) and (e)(iii) defines it in the following manner:

> Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a *humanitarian assistance* or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[69]

The wording was implemented under the influence of the Draft Code of Crimes against Peace and Security of Mankind of 1996 (Article 19) and the United Nations Convention on the Safety of United Nations and Associated Personnel of 1994 (Article 9) (Venturini 2001, p. 100 compare with Frank 2001, p. 145). However, the

[64] Rule 31 CIHL which states: "Humanitarian relief personnel must be respected and protected [IAC/NIAC]".

[65] Compare Article 6 International Military Tribunal Charter and articles 50/51/130/147 GC and Article 85 AP I, and Rule 30 CIHL.

[66] Article 8 (a) (i–iii) and (v–viii), Article 8 (b) (i) (iv) of the Rome Statute of the International Criminal Court of 17 July 1998, UNTS, vol. 2187, pp. 3 ff.

[67] Article 8 (b) (xxiv), ibidem.

[68] Article 8 (c) (e).

[69] See also S/Res/1502 (2003) in which SC reaffirmed that killing humanitarian aid workers is a war crime.

UN Convention contains significant restrictions with regard to the scope of protection, and these restrictions were to a large degree left out of the wording of the Rome Statute. Protection is extended, apart from peacekeeping mission personnel, to personnel involved in humanitarian assistance, regardless of whether the organization responsible for conducting the mission has a formal connection to the United Nations. Interestingly, there have been suggestions to the effect that the parallel character of the Rome Statute provisions with regard to the UN Convention means that the restrictions of the UN Convention apply to this provision too (Bothe 2002, p. 411). This seems to be rather incorrect, given that the Statute neither makes a reference to the Convention nor literally copies its wording.

The only restriction placed by the Rome Statute on the protection of humanitarian workers is the stipulation that it applies to those who are protected as civilians. The definition of war crimes thus excludes attacks against members of the armed forces who are supplying or protecting the supply of humanitarian aid unless they are a part of a peace mission (and therefore not participants of armed operations).

Under the above-discussed provisions of the Rome Statute, it is a war crime to attack a humanitarian worker (although this term itself in not used in the Statute) if that worker is actually engaged in offering humanitarian assistance, the conduct took place in the context of and was associated with an armed conflict, and the perpetrator was aware of factual circumstances that established the existence of an armed conflict (Frank 2001).

Stating explicitly that attacks against persons providing humanitarian assistance constitute war crimes may theoretically contribute to the prevention of such attacks, and to have an educational effect, by means of signalling clearly that humanitarian workers are protected, and may not be attacked. Furthermore, the introduction of this provision will likely inspire states to expand national legislation to include similar regulations (Burundi's Law on Genocide, Crimes against Humanity and War Crimes 2003). Yet the provision is essentially superfluous. Possibly a clear indication that participants of peace operations, who are often members of armed forces, may not be attacked, and attacks against them are considered war crimes, may have been necessary due to doubts as to their status. However, civilian humanitarian workers are undoubtedly protected as civilians, which qualifies any attacks against them as war crimes. Michael Cottier goes so far as to point to the risk inherent in specifying such crimes, namely that it may detract attention from the general protection of civilians (Cottier 1999, p. 411).

Establishing a separate category of war crimes against humanitarian workers would only be reasonable if such crimes were punishable more severely than crimes against "regular" civilians. *Ratio legis* of such a solution would consist in that killing a humanitarian worker, especially one that offers medical assistance, has greater secondary effects in terms of general population safety (Durham and Wynnpope 2011, p. 328). However, no stipulation to this effect is included in the legislation, the above considerations should be treated as a suggestion *de lege ferenda*, or a proposal with regard to sentencing. As of 13 January 2015, there are no rulings of the International Criminal Court with regard to crimes against humanitarian workers. A judgment in a relevant case could have enormous

significance, if only by improving the precision of the definition of humanitarian assistance. It must be noted here that provisions on war crimes in the form of attacks against humanitarian workers pertain solely to situations occurring during an armed conflict and in association with it. In the absence of armed conflict, crimes against humanitarian workers are only subject to the Court's jurisdiction if they qualify as genocide (e.g. if humanitarian workers are killed for the purpose of deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part) or as a crime against humanity (which requires demonstrating that the attacks were directed against civilian humanitarian workers as a part of a widespread or systematic attack).

It is noteworthy in this context that at the 31st International Conference of the Red Cross and Red Crescent, the Resolution 2: '4-Year Action Plan for the Implementation of International Humanitarian Law was adopted, imposing on the states the responsibility to

> ensure that perpetrators of attacks against humanitarian personnel, including personnel using the distinctive emblems in accordance with the Geneva Conventions and their Additional Protocols, are held accountable, by encouraging disciplinary measures and criminal prosecutions (ICRC 2011).

12.4 Response to Security Challenges

If the provisions of international law were observed, humanitarian institutions would not need to invest their resources in ensuring the safety of their personnel. It is for that reason that all efforts, both on a national and on an international scale, geared towards improving the observance of the law, are an important contribution to a better humanitarian space.

Nonetheless, risk remains inherent in offering humanitarian aid, which is why humanitarian actors should always (and in particular in situations of armed conflict or destabilization) evaluate that risk, and make a conscious decision as to whether the results of the action they are planning are worth that level of risk. Risk awareness, developed mainly through regular training, is of key importance for all actions aimed at increasing the safety of providing humanitarian assistance.

In recent years, attempts have been made to propose rules and procedures that lower the risk to an acceptable level, and to design the best possible response to threats.

12.4.1 ICRC

The response of the International Committee of the Red Cross consist of four elements: defining risk; prevention; reducing the risk; limiting the consequences (Krähenbühl 2004a). In each specific case, the ICRC recommendation is to determine

what kind of risk can be expected. Does it pertain to the personnel or to the goods provided? What is the likelihood of it materializing? As prevention, humanitarian personnel should make relevant key decisions, such as which transport route or time of delivery to choose. Reducing risk is crucial. It is achieved mainly by means of access to shelters, using security services, as well as observing ICRC's principles (pillars) of security policy for field operations. The personnel should always be ready to limit the consequences of security incidents by having evacuation routes at the ready, having options for communication open, having insurance, etc.

ICRC Director of Operations Pierre Krähenbühl has noted on numerous occasions that for ICRC 'security—long before it becomes an issue of technical or physical protection—is a matter of acceptance, perception of the organization, individual behaviour of delegates, the ability to listen and to communicate and project a consistent and coherent image of the organization to all parties involved in a conflict situation' (Krähenbühl 2004b). This quote makes a reference to all seven pillars of security policy: acceptance—ICRC's mission in the field should be accepted by the parties to the conflict, including non-state groups, as neutral, impartial and independent, operating under the International Humanitarian Law of Armed Conflicts; identification—the Red Cross emblem should be applied correctly; information—field staff are responsible for regularly collecting information on security conditions, sharing such information, and cooperating in that respect with other organizations active in the area; security regulations drawn up by individual delegations—each delegation is responsible for designing and observing procedures that fit with the local safety situation, and update them regularly (and the head of the delegation is responsible for organizing briefings on the subject, and ensuring that all personnel observe the procedures); personality—individual qualifications and predispositions of the personnel members to work under difficult conditions, a sense of responsibility and solidarity towards the other team members impact the safety of ICRC's delegations; telecommunications—ensure efficient communication of incidents or degenerating security situation, and allows for faster help; protective measures—many humanitarian workers die as a result of bombings or fire exchange between parties to the conflict, which makes protective measures such as shelters, security services and alarming systems so important (Roberts 2006; Dind 1998; Grombach-Wagner 2007; Bruger 2009; Hazan and Berger 2004).

12.4.2 UN

In response to the changing security conditions, and specifically in the aftermath of the shocking attack against the UN headquarters in Baghdad in 2003, the UN introduced a new global security policy (Bruderlein and Gassmann 2006). On 1 January 2005, the United Nations Department of Safety and Security (UNDSS) was established for the purpose of engaging in broad-scale action to promote the safety and security of the UN and its staff worldwide, including humanitarian workers. In January 2006, the United Nations Field Security Handbook was

adopted. It outlines system-wide arrangements for the protection of United Nations personnel and property in the field (United Nations Field Security Handbook 2006); its emphasis is on the primary responsibility of the host government for ensuring the safety of the personnel employed by the UN, by the organizations of the United Nations System, and by staff members.

The following persons are in charge of planning and implementing a safety and security policy: the UN Under-Secretary General for Safety and Security, Executive Heads of Organisations, Headquarters of United Nations Agencies, Programs and Funds, the Designated Officials in the field, the Chief Security Advisors (security professionals), Area Security Coordinators, Wardens and Representatives of Organizations. Security Management Teams are made up of a Designated Official, the head of each agency present at the duty station, and the Chief Security Advisor.

The UN distinguish between five phases of security: Precautionary—in the first phase, the staff are warned of the impending danger and advised to remain cautious; Restricted Movement—in the second phase, limited movement in the territory of the host state is recommended; Relocation and Emergency Operations—the third and fourth phase apply if the situation is significantly degenerating, and leads to partial relocation of staff into a different region of the host state, or outside that state (the first to be moved are the internationally-recruited staff members and/or their spouses and eligible dependants); Emergency Operations—in the fifth and last phase, all personnel are evacuated.

The next dimension of the UN security management system is the Minimum Operating Security Standards (MOSS),[70] a set of recommendations and instructions aimed at lowering the risk for the UN personnel, and for the property and assets of the organizations. The Standards refer e.g. to the equipment of staff, vehicles, and UN offices. For instance, in the first phase, all international staff and the most important national staff must be equipped with handheld radios; in the second phase, all vehicles must be equipped with VHS radio, and in situations of increased risk (phases 3–5), all vehicles should carry body armour. Each specific mission is responsible for designing its own standards on the basis of the Minimum Operating Security Standards, depending on the mission-specific conditions. Designing the standards should be preceded by a Security Risk Assessment.

Personal responsibility and accountability are also assumed. Each worker is expected to be familiar with the UN security management system, to observe safety procedures e.g. while travelling, to take part in briefings on security-related issues, to be properly equipped, and to not contribute to the risk with their own conduct. Training in this respect is mandatory. The policy of the UN also provides for entitlements and benefits in the case of death, injury, theft of property, evacuation, post-traumatic stress disorder, etc.

The UN Office for the Coordination of Humanitarian Affairs (OCHA) is also behind the creation of a number of manuals on the topic. *To Stay and Deliver: Good*

[70] United Nations Security Coordinator (UNSECOORD), *Minimum Operating Security Standards (MOSS)*, Policy Document, 1 July 2004.

Practice for Humanitarians in Complex Security Environments is a collection of rules and good practice models of humanitarian organizations that have been successful in providing humanitarian assistance despite high security risks (OCHA 2011).[71] The rationale behind the publication was to offer practical solutions with regard to safe access to those in need of humanitarian assistance.

In line with the ICRC approach, acceptance is considered a priority. Humanitarian organizations should make all conceivable efforts, and engage in dialogue, in order to be recognizable to, and accepted by, the local population and the parties to the conflict. It is recommended that dialogue be fostered with 'everyone with a gun', in particular representatives of the government, local authorities, and the police, who all are able to have a positive impact on the security conditions. One of the methods of ensuring acceptance among the local population is to employ local workers, in agreement with the local communities.[72] Equipment with laptop computers and communication devices is also considered crucial as it makes it possible to implement a remote management system.

However, a satisfactory level of acceptance is not always achievable, and therefore protective measures and deterrent measures are also recommended. In particular, development of 'smart' measures is advisable; such measures increase the safety of personnel without placing unnecessary barriers between the personnel and the local populations. It is important to avoid 'bunkerisation' as it has a negative impact on mission image. In extreme situations, military protection is an option: when the level of threat to life is very high and violence occurs not due to political reasons but because of banditism, such a provider of protection is acceptable and likely effective as a deterrent.

The manual was followed by another publication, *Safety and security for national humanitarian workers* (Annex 1 to OCHA 2011).[73] Despite the advances in security risk management, it appeared that national workers receive less support in terms of safety compared to international staff. Yet statistically, national workers not only are the majority of the victims, but are also a strong majority of all workers, and often work almost literally in the line of fire.[74] More attacks *per capita* are however directed against international workers, who make up over 10 % of all aid workers.[75]

---

[71] In 2010 an independent research team, led by Jan Egeland, conducted interviews with 255 humanitarian practitioners and policymakers, surveyed over 1,100 national staff members, and carried out a desk-based review of organizational literature and case-based evidence.

[72] Ibidem, p. 2.

[73] The publication was based on anonymous surveys of national aid workers.

[74] According to ICRC's data concerning health-care workers, more than 80 % of the 900 or so security incidents recorded in 22 countries affected local health-care professionals, ICRC, Violent Incidents Affecting Health Care—January to December 2012, 15 May 2013, www.icrc.org/eng/resources/documents/report/2013-05-15-health-care-in-danger-incident-report.htm, accessed 1 September 2014.

[75] Ibidem, p. 3; see also: *Cote d'Ivoire: Local UN Staff Easy Targets in the Crisis*.' IRIN, UNOCHA, 24 January 2011.

National workers should not be left alone; the organization that employs them is responsible to offer them support with regard to security (Clause 2010; Finucane 2011). However, the report noted differences in the approach to staff safety e.g. in terms of equipment and access to security trainings (Stoddard et al. 2006, p. 32).

The report recommends regular audits to eliminate the inequalities in treatment of national staff with regard to training, equipment, insurance, and medical and psychological care. It also proposes that national workers should be included to a much greater extent in security risk management and security coordination, exchange of information and analyses, and maintaining an open dialogue on the risks and on the rules and procedures of offering humanitarian assistance. They also should receive greater financial support (Fawcett and Tanner 2001).

12.4.3 EU: ECHO

The Humanitarian Aid Department of the European Commission (ECHO) provides humanitarian assistance in cooperation with NGOs, UN agencies, international organizations, ICRC, and IFRC. In the European Consensus on Humanitarian Aid,[76] adopted by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission noted the negative impact of disrespect of international law on the humanitarian space. Safety and security of humanitarian workers were deemed 'essential preconditions' for offering humanitarian aid.

The following values were listed as the foundation of offering humanitarian assistance: neutrality, impartiality, humanity, and independence.[77] According to the Consensus, "neutrality means that humanitarian aid must not favour any side in an armed conflict or other dispute", "impartiality denotes that humanitarian aid must be provided solely on the basis of need, without discrimination", and independence is "the autonomy of humanitarian objectives from political, economic, military or other objectives".

The ECHO Generic Security Guide was published in 2004. It is a comprehensive security manual for humanitarian organizations.[78] Its self-professed purpose is to offer humanitarian organizations assistance in security management. The Guide is a collection of recommendations that may be valuable in drafting detailed context-specific safety and security procedures. It was created in cooperation with a number of humanitarian organizations and is therefore based on experiences in the field, presented in a competent and detail-rich manner.

The ECHO Generic Security Guide is composed of 12 parts, with attachments and checklists. It contains recommendations on how to prepare for field work in

[76] In: The European Consensus on Humanitarian Aid - The humanitarian challenge, 2004.

[77] Ibidem, p. 24.

[78] ECHO Generic Security Guide for Humanitarian Organization, 2004.

terms of security, as well as on security management in the field, prevention of and reaction to security incidents, and on deciding on suspension, evacuation and closing the programme. The Guide reflects a "technical approach to security." It is a source of information for teams on humanitarian missions, with advice on how to behave under specific circumstances: how to organize a convoy, how to behave at a checkpoint, how to avoid and prevent bribery and corruption, etc. It is also a review of specific threats, such as land mines, bombs, terrorist attacks, chemical, biological, and radiological attacks, kidnappings, earthquakes, etc. For each scenario, there is a basic instruction on the steps to be taken.

The Guide too stresses the paramount importance of rigorous selection of highly qualified staff members, as well as training, in terms of ensuring safe working conditions.

12.4.4 NGOs: Towards Cooperation

NGOs tend to be aware of the risk in the field, and are often affected by security incidents. Large and credible NGOs have in recent years developed their own rules and procedures that adequately reflect the changes in the humanitarian space. Smaller organizations, however, often have neither a sufficient awareness of the risks nor the funds to invest in the safety and security of their humanitarian workers.

There have been initiatives aimed at improving cooperation among NGOs, with the overall objective of more efficient supply of aid to those in need. InterAction, a USA-based coalition of humanitarian organizations, has established a Security Unit tasked with assisting organizations in preparing for work under difficult security conditions. InterAction has developed its own Minimum Operating Security Standards and Security Standards for National Staff. It has a strong focus on training with regard to security issues. In 1991, it also established the Security Advisory Group (SAG) that has created guidelines on security risk assessment and security risk management.[79]

The European Interagency Security Forum (EISF) was established in 2006. It is a network of Security Focal Points that represents European NGOs with international reach. The objective of EISF is to support NGOs in their risk management and security management efforts, by means of providing information, facilitation of dialogue, pursuing research, and organizing workshops.

Another example of cooperative work is the International NGO Safety and Security Association (INSSA). The membership of INSSA includes security professionals and not NGOs. The Association was established in 2010 on the initiative

[79] A special risk assessment model was developed, based on comparing the likelihood of a security incident and the heaviness of its impact. The model helps identify the acceptable level of risk. Security Risk Management, NGO Approach, InterAction Security Unit, http://www.eisf.eu/resources/library/SRM.pdf, (4 June 2013).

of the USAID's Office of Foreign Disaster Assistance, with the objective of creating a support platform for humanitarian workers with regard to safety and security.

Safety and security of humanitarian workers is also at the heart of the cooperation within the Inter-Agency Standing Committee (IASC), which was created as a follow-up to the United Nations General Assembly Resolution 46/182 in 1992. The IASC is made up of the organizations and agencies of the United Nations. Standing invitations were granted also to the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, the International Organization for Migration, and NGOs of particular significance.

In 2004 the IASC established the Task Force on Collaborative Approaches to Security under the auspices of which in 2006 Saving Lives Together - A Framework for improving Security Arrangements among IGOs, NGOs and UN in the Field was adopted (ICRC and IFRC decided not to take part in the initiative) (Paludan 2002). The report was an updated and revised version of the Menu of Options for UN/NGO/IGO Security Collaboration (MoO) adopted by the IASC in 2001. The rationale behind Saving Lives Together (SLT) was to solidify the rules and procedures of cooperation between the UN and NGOs in order to improve staff safety and security in the field. One of the dimensions of the arrangements was to ensure cooperation in the area of collection, analysis, and dissemination of information.

Several attempts to evaluate the assumptions of SLT followed.[80] Interesting observations were contained in a report of the NGO Christian Aid, published in 2010. The purpose of the report was to check the real level of implementation of the solutions proposed under SLT. The report demonstrated that only 30 % of the respondents (NGOs workers[81] in the field) were actually familiar with SLT. The need to raise awareness of the cooperation framework, and to make cooperation close, was observed primarily with regard to smaller, national organizations.

The report identified the following factors with a negative impact: limited human and financial resources, deficient professionalism, poor information flow (one-sided, from the UN to NGOs), and insufficient engagement of the UN in consultations with NGOs. The report also noted that under conditions that are not extremely difficult, NGOs are reluctant to share information in the belief that it might have a negative impact on their image as independent and neutral organizations and consequently translate into difficulties in their access to populations. The greater the security risks the better the cooperation between the UN and NGOs.

In recent years, reviews of the implementation of the SLT have been conducted by means of research and debates. The most recent updated framework of collaboration was adopted in 2011. It outlines the following areas of cooperation:

[80] *SLT Survey Report*, June 2009.

[81] In the study underlying the report, 205 aid workers completed anonymous questionnaire surveys in the period 1 July—31 August 2009. Out of the total number of questionnaires, 149 were filled in by field-based staff. See: *Saving Lives Together. A Review of Security Collaboration Between the United Nations and Humanitarian Actors on the Ground*, Christian Aid 2010.

convening broad-based forums for field security collaboration and information sharing; meeting common security-related needs and sharing resources, facilitating inter-agency emergency telecommunications; collaborating and consulting on the development and delivery of contextually based security training; identifying minimum security standards and seeking adherence to Common Humanitarian Ground Rules (CHGR).[82]

Inter-agency cooperation within the SLT framework was attempted in Afghanistan, Ethiopia, Darfur, Kenya/Somalia and Pakistan, but its scopes continues to be limited.

In 2011, an NGO under the name of International NGO Safety Organisation (INSO) was established. Its objective is to deliver safety and security services to NGOs working in the field (International NGO Safety Organisation 2011).[83] Upon invitation, the organization appoints NGO Safety Offices (NSO) in high-risk states, serving as cooperation hotspots for NGOs offering humanitarian assistance. The task of the NSOs is to collect and distribute to NGOs information on security situations, training, security meetings, civil/military cooperation and NGO-UN liaison. INSO outposts operate in countries including Afghanistan, Kenya, Mali, the DRC, and in Turkey (to support humanitarian organizations in Syria).

12.5 Concluding Remarks

The complex issues of safety and security of humanitarian aid workers far exceed the modest concept of this paper and certainly requires further research and study.

Humanitarian space is crucial for effective delivery of humanitarian aid. International law guarantees protection to persons engaged in humanitarian action. If the provisions of international law were observed, the problem of shrinking humanitarian space would be non-existent. However, what requires further reflection is the less advantageous legal status and actual situation of national workers, to whom rights e.g. under CSUNAP do not apply on the same terms as they apply to international workers. Most national workers also have no access to security trainings and to equipment comparable to that of international staff. This issue requires attention particularly in light of the tendency towards remote management, i.e. management of the delivery of humanitarian aid from remote locations, with minimal engagement of international workers.

[82] CHGR seek to ensure that humanitarian assistance should not be instrumentalized by political or military agendas. For further information, see: *Saving Lives Together. A Framework for Improving Security Arrangements among IGOs, NGOs and the UN in the Field*, endorsed by the Inter-Agency Security Committee in August 2011.

[83] INSO was created by the staff of the Afghanistan NGO Safety Office with the support from Welthungerhilfe, ECHO, Swiss Development Cooperation, the Norwegian Ministry of Foreign Affairs, and the Norwegian Refugee Council.

The recent years have seen an increase in risk awareness and in the engagement of aid-providing institutions in ensuring safety and security of humanitarian workers, with a characteristic boom in guidelines and security handbooks. Organizations intensified their efforts towards improving personnel safety. The quality and effectiveness of their attempts often were directly correlated with the funding available for that purpose. The NGOs that are small and local tended to have the most limited options in this regard.

Some differences have come to light in the approaches to protective measures and deterrent measures, e.g. in terms of using security services or using weapons for self-defence. Yet overall, the attempts of cooperation between humanitarian institutions by establishing coalitions and networks, by developing common standards, and by making efforts to specialize in the safety and security of humanitarian workers (e.g. the relatively new initiative of the International NGO Safety Organisation), while not fully satisfactory, deserve a positive assessment.

The safety and security of humanitarian staff improve with every effort to disseminate information on the idea as well as the rules and procedures of humanitarian aid, the human rights in which the delivery of aid is rooted (rights-based approach), international humanitarian law, and other standards discussed above. These efforts should however be accompanied by a practice of bringing to criminal justice the perpetrators of the crimes of which humanitarian aid workers are victims. Positive changes could also result from specific condemnation of each security incident intentionally directed against those who offer humanitarian aid, on the part of local media, pundits, authorities, or religious leaders. It is necessary to build the image of humanitarian assistance as universal, guided by the principles of humanity, neutrality, independence, and impartiality. Contributing to this image is a task for humanitarian organizations, states, the media, and also individuals, as they all are able to influence the quality and the perception of humanitarian aid.

References

Abild E (2009) Creating humanitarian space: a case study of Somalia, New Issues in Refugee Research, Research paper, No. 184

Aid Worker Security Report (2011) Humanitarian Outcomes. https://aidworkersecurity.org/. Accessed 8 June 2013

Beauchamp S (2008) Defining the humanitarian space through public international law. On the Edges of Conflict. Working Paper

Beigbeder Y (1991) The role and status of international humanitarian volunteers and organizations. The right and duty to humanitarian assistance. Martinus Nijhoff, Dordrecht

Bessler M, Karouko S (2006) Civil-military relations in armed conflicts: a humanitarian perspective. J Civil-Military Humanitarian Relief Collab 3:4–10

Bloom ET (1995) Protecting peacekeepers: the convention on the safety of united nations and associated personnel. Am J Int Law 89(3):621 ff

Bothe M (2002) War crimes. In: Cassese A, Gaeta P, Jones JRWD (eds) The Rome statute of the international criminal court. Commentary. Oxford University Press, Oxford

Bouvier A (1995) Convention on the safety of united nations and associated personnel: presentation and analysis. Int Rev Red Cross 309:638 ff
Bruderlein C, Gassmann P (2006) Managing security risks in hazardous missions: the challenges of securing United Nations access to vulnerable groups. Harv Hum Rights J 19:63–93
Bruger P (2009) ICRC operational security: staff safety in armed conflict and internal violence. Int Rev Red Cross 91(874)
Burundi's Law on Genocide, Crimes against Humanity and War Crimes (2003) http://www.icrc.org/customary-ihl/eng/docs/v2_cou_bi_rule31. Accessed 31 May 2013
Carle A, Chkam H (2006) Humanitarian action in the New Security Environment: policy and operational implications in Iraq. An HPG Background Paper
Carpenter RC (2006) Innocent women and children: gender, norms and the protection of civilians. Ashgate, Hampshire
Christianebo Urloyannis-Vrailas M (2005) The convention on the safety of united nations and associated personnel. Int Comp Law Q 44(3):561 ff
Clause L (2010) International assignees at risk: employers have a duty of care for workers around the globe. HR Magazine
Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919) Report Presented to the Preliminary Peace Conference. 29 March 1919
Cottier M (1999) Article 8. In: Triffterer O (ed) Commentary on the Rome Statute of the International Criminal Court. Nomos, Baden-Baden
Dind P (1998) Security in ICRC field operations. Int Rev Red Cross 323:335
Durham H, Wynn-Pope Ph (2011) Protecting the 'Helpers': humanitarians and health care workers during times of armed conflict. Yearbook Int Human Law 14:328, 330–331
Ecroth K (2010) The protection of aid workers. Principled protection and humanitarian security in Darfur. The Norwegian Institute of International Affairs, Oslo, p 19
Engdahl O (2002) Protection of personnel in peace operations: the role of the 'Safety Convention' against the background of general international law. Martinus Nijhoff, Leiden, p 205 ff.
Ewumbue-Monroe C (2006) Respect for international humanitarian law by armed non-state actors in Africa. Int Rev Red Cross 864:905–924
Fawcett J, Tanner V (2001) The security of national staff: towards good practices. InterAction, Washington
Finucane C (2011) Humanitarian safety and security: obligations and responsibilities towards local implementing partners. Background Paper for Policy Recommendation Development
Frank D (2001) The elements of war crimes. In: Lee RS, Friman H (eds) The international criminal court: elements of crimes and rules of procedure and evidence. Ardsley, New York
Gaston EL (ed) (2012) Laws of war and 21st century conflict. International Debate Education Association, New York
Grombach-Wagner J (2007) An IHL/ICRC perspective on humanitarian space. Humanitarian Practice Network, HPG
Hazan P, Berger JF (2004) Humanitarian action: from risk to real danger. The Magazine of the International Red Cross and Red Crescent Movement 1
Henckaerts JM, Doswald-Beck L (2005) Customary international humanitarian law. Volume I: Rules. Cambridge University Press, Cambridge
ICRC (1998) Respect for and Protection of the Personnel of Humanitarian Organizations. Report, Preparatory Document Drafted by the ICRC for the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998
ICRC (2004) International Committee of the Red Cross Annual Report 2004. Message from the President, p 4
ICRC (2011) 31st international conference 2011: resolution 2–4-year action plan. http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-2-2011.htm. Accessed 31 May 2013
Inter-Agency Standing Committee (2008) Preserving humanitarian space, protection and security. In: IASC 70th working group meeting. Background Document

International NGO Safety Organisation (2011) An introduction to the new charity dedicated towards providing safety and security services to humanitarian aid agencies
International Review of the Red Cross (1998) First periodical meeting on international humanitarian law. Int Rev Red Cross 323:366–394
International Review of the Red Cross (2013) Humanitarian debate: law, policy, action. Violence against health care part I: the problem and the law. Int Rev Red Cross 95(889):5–12
Khambatta M (2009), Humanitarian space and stability operations. Edges of Conflict Working Paper
Kleffner JK (2008) Protection of the wounded, sick and shipwrecked. In: Fleck D (ed) The handbook of international humanitarian law, 2nd edn. Oxford University Press, Oxford
Krähenbühl P (2004a) Statement: humanitarian security: "a Matter of Acceptance, Perception, Behaviour. . ." on 31 March. http://www.icrc.org/eng/resources/documents/misc/5xsgwe.htm. Accessed 7 June 2013
Krähenbühl P (2004b) The ICRC's approach to contemporary security challenges: a future for independent and neutral humanitarian action. Int Rev Red Cross 86(855):505–514
Llewellyn H (2006) The optional protocol to the 1994 convention on the safety of united nations and associated personnel. Int Comp Law Q 55:719
Mc Hugh G, Bessler M (2006) Humanitarian negotiations with armed groups. A manual for practitioners. United Nations, p 7
Mikos-Skuza E (2013) Prawo ludności cywilnej do pomocy humanitarnej w świetle międzynarodowego prawa humanitarnego konfliktów zbrojnych. In: Mikos-Skuza E, Myszona-Kostrzewa K, Poczobut J (eds) Prawo międzynarodowe – teraźniejszość, perspektywy, dylematy. Księga Jubileuszowa Profesora Zdzisława Galickiego. Lex Wolters Kluwer Business, Warszawa
OCHA (2011) To stay and deliver: good practice for humanitarians in complex security environments. Policy and Study Series
Paludan A (2002) Final Report to the Inter Agency Standing Committee Working Group Staff Security Task Force
Pictet J (ed) (1960) Commentary on the Geneva Conventions of 12 August 1949, vol II, ICRC, Geneva
Pillod C, Sandoz I, Swinarski C, Zimmermann B (1987) Commentary on the additional protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949. Martinus Nijhoff, Dordrecht
Pommier B (2011) The use of force to protect civilians and humanitarian action: the case of Libya and beyond. Int Rev Red Cross 884:24–25
Primoratz I (2007) Civilian immunity in war. Oxford University Press, New York
Primoratz I (2012) Protecting civilians during violent conflict. Ashgate, Surrey
Ramcharan BG (2006) Human rights in the field. Nijhoff, Leiden
Roberts DL (2006) Staying alive, safety and security guidelines for humanitarian volunteers in conflict areas. ICRC, Geneva
Samuel KLH, White ND (eds) (2012) Counter-terrorism and international law. Ashgate, Farnham
Sandurski J (2000) Opieka dyplomatyczna jako narzędzie ochrony praw człowieka. In: Wiśniewski L (ed) Ochrona praw człowieka w świecie, Bydgoszcz-Poznań
Siobhan W (2009) Protecting civilians: the obligations of peacekeepers. Oxford University Press, New York
Sommaruga C (1997) Humanitarian action and peace-keeping operation. Int Rev Red Cross, 317: 178–186
Stoddard A, Harmer A (2010) Supporting security for humanitarian action. A Review of Critical Issues for Humanitarian Community. Humanitarian Outcomes
Stoddard A, Harmer A, Haver K (2006) Providing aid in insecure environments: trends in policy and operations. HPG Report 23
Stoffels RA (2004) Legal regulation of humanitarian assistance in armed conflict: achievements and gaps. Int Rev Red Cross 855:516
Strachan H, Scheipers S (eds) (2011) The changing character of war. Oxford University Press, Oxford

Studer M (2001) The ICRC and civil-military relations in armed conflict. Int Rev Red Cross 842:367–391, 374–377

UN Office for the Coordination of Humanitarian Affairs (2003) Glossary of humanitarian terms in relation to the protection of civilians in armed conflict. United Nations, New York

United Nations (2006) UN field security handbook – system-wide arrangements for the protection of united nations personnel and property in the field. http://www.unicef.org/paraguay/spanish/Security_Brochure_UNICEF_COUNTRY_OFFICES_-_Local_staff.pdf. Accessed 3 June 2013

Venturini G (2001) War crimes in international armed conflicts. In: Politi M, Nesi G (eds) The Rome statute of the international criminal court. A challenge to impunity. Ashgate, Aldershot

Wagner JG (2005) An IHL/ICRC perspective on 'humanitarian space'. Humanitarian Exch Mag 32:24–26

Chapter 13
Media and Humanitarian Action

Markus Moke and Maria Rüther

13.1 Representation of Disasters in the Media

Whether a disaster is reported in the media and how this is done depends on several criteria, which are rarely revealed to the recipients and especially the persons involved in the disaster. Major disasters such as the tsunami in South East Asia in 2004, the Haiti earthquake of 2010 or the triple catastrophe[1] in Japan in 2011 are events that are picked up by the media worldwide and can create fear, compassion and feelings of powerlessness in the recipient. The media bring images, as well as emotions, to our living rooms. This is important for NGOs because of the power of the media, where competing commercial companies are particularly prominent due to circulation or audience.

13.2 The Agenda-Setting Function of the Media

Before a humanitarian catastrophe even reaches the public, various stakeholders such as the media, organisations and politics have already exercised their influence on the way in which this happens. The NGOs working in the emergency often assume that the media has just as much of an interest in humanitarian crises as they

This article is a translation of an article published in the German Handbook on Humanitarian Action: Moke/Rüther, Humanitäre Hilfe und Medien, in: Lieser/Dijkzeul (eds.), Handbuch Humanitäre Hilfe, Springer Berlin Heidelberg, 2013.

[1] Earthquake, tsunami and the Fukushima nuclear disaster.

M. Moke (✉) • M. Rüther
Aktion Deutschland Hilft, Bonn, Germany
e-mail: moke@aktion-deutschland-hilft.de

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_13

do. However, they often overestimate the work ethic of journalists in selecting the topics independently (Cottle and Nolan 2009).

From a scientific perspective, the news factors set out in news research play a crucial role. Schulz (1976) cites 18 different factors and makes it clear that the more an event gains news value, the more these factors are able to come together (Ruhrmann and Göbbel 2007).[2] For example, the tsunami in South East Asia had huge media attention because the priority factors such as proximity (holiday destinations), identification (German tourists) and suddenness (real-time reports at Christmas time) played a role. As practical experience with editorial offices shows, an additional phenomenon called a topic hole sometimes occurs, whereby journalists pick up on a less interesting topic when there would otherwise hardly be any news to report there—for example the floods in Pakistan in 2010.[3]

Especially in traditional media—i.e. print and audio-visual media—an editor is still a constant. They assume the role of gatekeeper[4] in the creation of messages and decide what 'passes through', in other words, what is published and what is not. There are several factors here, such as the editorial organisation or professional experience. In relation to humanitarian disaster reporting, what follows is the journalistic duty to inform and the degree of personal emotional concern. NGOs are dependent on the audience's empathy with the report—they want to achieve one of their objectives: to generate an altruistic impulse in the recipient and stimulate their willingness to donate. The frequency, that is, how often an event has been reported and through how many media channels, is also a factor.

Experience has shown that natural disasters tend to create a larger media event than violent conflicts or prolonged emergencies. In the 'best case' all conditions are met (large extent, sudden event, destruction, violence, personal reference). In contrast, it is far more difficult to overcome the media barrier regarding man-made disasters such as the civil war in Syria (since 2011). It is true that such crises are widely reported; however the reports primarily cover political, ethnic and religious conflict and much less about the need for humanitarian assistance.

[2] Schulz had to split 18 news factors in six dimensions: The dimension "time" includes the timely evolution of events ("time") and the relationship to other events ("theming"). "Proximity" has different forms ("spatial", "political", "cultural proximity") and refers also to the feeling of affectedness through the events with a ("relevance"). Under the dimension of "status" ("VIPs" "personal influence"), the significance of the place ("regional", "national centrism") and the participants of events are summarised. "Dynamics" includes special peculiarities in the end ("surprise") and content of events ("structure"). The dimension of "valence" recognises negative ("conflict", "crime", "damage") and positive event characteristics ("success"). "Identification" includes reference to personal and social events ("personalisation", "ethnocentrism"). An event has a higher news value the more of the mentioned factors come together.

[3] According to multiple experiences in the press office of Germany's Relief Coalition.

[4] The term "gatekeeper" is from the American social psychologist Kurt Lewin, who originally studied decision-making regarding the use of food in families. David Manning White transferred the approach in the 1950s to news value research. In contrast to research on the gatekeeper theory, the news value theory does not deal with the properties of the journalists or the factors by the organisation, but continues with the media content.

News value also does not seem to be necessarily high when a large number of people are starving, abused or killed in civil wars. The competition between items of 'suffering news' is strong. In the 1990s, there was a much higher awareness of the war in the Balkans than of the genocide in Rwanda. For example, in 2009, just as many people died in Nigeria from HIV/AIDS as in the earthquake in Haiti in 2010 (CIA World Fact Book 2011). These figures are intended to illustrate proportions, although disasters are not comparable in character (slow-onset disaster versus sudden-onset disaster).

According to the evaluation by *Aktion Deutschland Hilft* over the course of reporting on disasters, media interest in Germany within 3–4 weeks after an event of great magnitude such as the earthquake in Haiti follows the same pattern: (1) Initial event and the consequences for those affected; (2) Help and helpers: Logistics and faces of aid, equipment, circumstances, experience reports before departure, on-site and on return; (3) Donations from celebrities, actions of third parties in favour of NGOs; (4) Donation phenomena: Tips for safe donations (crooks and dangers), misuse, and later statistics of who donates most.[5]

Despite considerable efforts, humanitarian NGOs have failed to communicate with the public about clichés regarding emergency clean-ups (allegedly required donations of clothes or the idea that every donated Euro must be used locally for the project) so that the coverage of a disaster relies on these stereotypes and real reasons are not (and cannot be) illuminated. Further questioning of the causes at this point could perhaps have provided a greater opportunity for maximum and improved public perception. Since editors (as a rule) rarely have information from experts on humanitarian assistance, their journalistic skills often lack what is necessary to allow them to provide adequate facts.

The media's portrayal of disasters and their consequences, among other things is characterised in such a way that negative messages have a higher news value. This means that the media spotlight is focused on reports that tend to be negative and critical rather than reports of success from auxiliary activities. Positive news encounters generate a lower resonance. The usual annual reports on disasters are mainly interested in terms of the money that has already been spent. An effort from organisations to make the 'good deeds' of the donor visible is seldom supported by the media.

Economic aspects also play a role here. As a journalistic phrase of wisdom goes "if it bleeds, it leads": violent events cross media barriers rather than topics that do not sell as well. In short, the media prefers to report loud disasters rather than political crises whose backgrounds are rarely transparent to recipients. The tendency to report mainly on conflicts means that crises and conflict reporting is the norm for media consumers (Bratic and Schirch 2007).

[5] Media Impact Analysis Germany's Relief Q3 2010.

13.3 What Is Reported? The Construction of Reality by the Media and Humanitarian Organisations

An immediate presence in the disaster area is of vital importance to humanitarian NGOs. Whoever is on-site quicker gives the impression of effectiveness. The visibility of one's own brand ensures that donations flow to the 'right' account. Munz (2007) has shown, however, that in the rarest of cases, disaster victims wait helplessly for their 'white' saviour. This stereotype, however, fulfils an expectation in recipients of reports on disasters, who want to identify with the helper. This in turn carries the media further with their questions about the German workers' bill. With the dominance of Western media in global world news, reports are thus far most often about disasters that are often adapted to the Western reader's expectations.

Extensively criticised imagery[6] is still widely disseminated. Innocent victims are usually children, women and old people, and help is given to them by 'white heroes'. Dramatisations range up to so-called hunger pornography.[7] With these measures, humanitarian NGOs often follow a predefined logic of the media, not least in their imagery, in order to generate media attention. Phrases like 'images of destruction/neediness', 'images of assistance (from Germany…)' and 'resurgent/self-concerned' constitute a dramatic arc. A questionable tactic is the holding of televised fundraising galas. They reduce complex situations to infotainment formats. The view in the background is not questioned; it is one of a unique fate. In many cases, media-initiated fundraising campaigns are the central theme of reports.

In this interplay of stakeholders, NGOs, the media and donors are trying to be heard and be seen in this variety of global issues. The simplistic and alarmist language of fundraising is in contrast to a (self-) critical information service from humanitarian NGOs. Related to this is the accusation that the credibility of reporting is diminishing (Moeller 1999). The loss of credibility is a threat to media and humanitarian agencies. However, NGOs are striving to change that and to place the potential and the strengths of people affected by disasters in their imagery at the centre of what they present.

Studies at the Free University of Berlin on the 2004 tsunami, Hurricane Katrina in 2005 and the earthquake in Pakistan in 2005, China in 2008 and Haiti in 2010 reveals evidence that when consumers have to put together a piece comprised of a sequence of images, they follow the narrative logic of artistic disaster reports on television or magazines such as "Stern" or "News Week" (Scholz 2012) and thus internalise the imagery. A disaster for the spatially distant recipient 'arrives' and motivates them to take action (donations), thus communication hurdles are

[6] For example, as shown in the movie "White Charity" by Carolin Philipp and Timo Kiesel. It analyses the methods of construction of blackness and whiteness in the image on the basis of advertising billboards of large development organisations.

[7] Portrayed children littered with emaciated bodies, bloated bellies and flies sitting on parched soil should trigger donations by showing shock images.

overcome and the media performs in an emergency. Only when the disaster becomes a media event can it lead to successful donations. That "does not make all recipients and helpers, however, those who help have accessed the media and called in to do so" (Scholz 2012).

Disasters do not generate any donations without media coverage. Oversubscription is not only operated by humanitarian NGOs, but is also of media interest due to high ratings/requirements. These distortions (media bias) are thus supported by the media and humanitarian NGOs. The latter therefore try to influence the gatekeeper role of the journalist, in whose power it is to decide on the 'victim-value' of those affected. According to Knaup (2000), what is missing is the media's professional, sober dealing with the interests of organisations who "exploit the media".

> The donor will have to make the effort, on this subject too, to distinguish between slinging entertainment and factual information. The rules and laws of the media market are aimed at selling the information to the widest possible clientele. This is a reality, with which both the public and humanitarian agencies must learn to deal with, noted Munz (2007 p 137).

13.4 The Importance of the CNN Effect

When talking about the so-called 'CNN effect', this is taken to mean that the media—especially when it is based on the eponymous U.S. television network—not only sets the agenda for this or other humanitarian disasters with their coverage of crises and armed conflicts, but also reinforces other media.

Conversely, it also means that humanitarian disasters that are not perceived in a certain way by the media are not seen this way by the public either. This is particularly evident in the media's so-called 'silence' over secret or forgotten crises such as the on-going needs of the population in the Central African Republic, on which news is reported only in passing, if at all.

Apart from the direct assumed causality between news media reporting and the perception of crises and disasters in the public, a thesis has been discussed as to whether and to what extent the CNN effect could also influence the foreign policy of a country's economy (Robinson 2002). Moreover, the increasing media coverage of crises and conflicts is leading to political action taking place in public. There is public pressure to enforce justice and consequently more action by all stakeholders is encouraged. This pressure is becoming greater than political office holders who wish to be re-elected can ignore (Caritas international – Brennpunkte 2007).

However, it is not only foreign policy chiefs that are subject to operating within media-friendly constraints. Even humanitarian organisations liaise with specific media—especially mainstream media such as 'CNN' or 'Der Spiegel'—in order to have an impact on the public and to emphasise characteristics, events and issues in a certain way so that they are picked up by other media. Thus, they act as an amplifier for events.

13.5 Power and Powerlessness of Humanitarian Organisations: Influence on Reporting

When major natural disasters occur all main factors are usually present, especially the innocent victims, and they become a media event. Creeping disasters (slow-onset disasters) such as famine in East or West Africa in 2011 and 2012 are often presented in the media as a result of drought or other natural events. However, they are usually an expression of grievances caused by people, such as misguided agricultural policies, civil wars, but also the interests of industrialised countries.

13.6 What Do Humanitarian Organisations Do to Attract Media Attention?

On the one hand, humanitarian NGOs simplify crises and disasters in order to gain media attention and raise funds for their work, and on the other hand, they also want to lend the people affected by the disasters a voice. In their role as the early warner voicing concern about impending disasters, humanitarian NGOs often feel that they are not taken seriously enough by the media. This was shown during the hunger crisis in West Africa in the first half of 2012 when NGOs wanted to avoid a situation similar to the famine in East Africa in 2011. The efforts to bring the issue into the media met with little success. NGOs that offered German journalists in early 2012 an opportunity to see the needs of the population in Niger or Mali in order to demonstrate the urgency of early help were dismissed with answers such as: "We have that on the agenda for June", the predicted height of the crisis. The NGOs failed to draw attention to the threat of a scenario in which there could be 18 million people hungry. The dramatic images of hunger were missing.

To counteract the lack of interest in certain humanitarian crises and disasters, aid organisations seek to draw the media's attention to neglected crises. This happens at symposia and with travelling journalists whereby only journalists with special interests can be reached. The involvement of prominent supporters in political or social arenas provides an opportunity, albeit limited, for issues to be highlighted that would otherwise be unknown.

Humanitarian NGOs are, therefore, increasingly going in other directions. They establish their own channels of information and communication strategies (Dijkzeul and Moke 2005). They are employed at organisations as online journalists who take care of versatile content creation, i.e. preparation of editorial content or videos for the website. They also use YouTube to broadcast material, thereby making the information they want to provide readily available.

Humanitarian NGOs might possibly be well positioned—if they act in accordance with international, professional standards—to provide a high level of quality as content suppliers (replacement reporters who produce stories, background reports, (moving-) images, etc.) in a changing media world, where editorial offices

have limited funds to afford dealing with a correspondent or sending an editor on travels.

13.7 Is There a Dependent Relationship Between Aid Organisations and the Media?

Humanitarian NGOs need the media to inform the public about their work and to solicit donations for their activities. The media in turn needs NGOs to be able to access information in areas in which they would have difficulty in accessing themselves without the logistical support and the know-how that humanitarian organisations can provide. In addition, NGOs provide media representatives with background material and interview partners. The intertwining of the media and NGOs is only partially visible to the media user. It can be argued that the organisations finance part of the foreign reporting (the above mentioned trips for journalists). Only large newsrooms under the pressure of competition from other media companies can afford to send correspondents or editors at their own expense. This may lead to conflicts of interest that affect objective reporting and leads to calls for the critical role (independent of commercial or quote-driven interests) of the reporter to be maintained (Knaup 2000).

By providing journalists an insight into their work, on the one hand, aid organisations allow for greater transparency about their activities, and, on the other hand, take a risk of exposing their work to false or tendentious reports. Aid organisations do not fear the critical questions coming from the media, but the widespread negative interpretations of their answers from the public. If the positive image of NGOs is questioned by negative reports, this has a detrimental effect on the acquisition of donations in other disasters. Thus, marketing studies have shown that the extent of a disaster or the number of deaths is less crucial for the mobilisation of donors than the media event itself (Royal 2005), in which either positive or negative reports are made about organisations.

13.8 The New Media: Opportunities and Risks

McLuhan's thesis that "the medium is the message" (McLuhan 1964) has all the more relevance even today, as new media on the internet creates a global space to which people have access around the clock; time zones and geographic distances have become meaningless. People can take part or be informed at any time—even during a disaster or in the midst of a political conflict. Local has gone global, interactive and cross-border. These are tools of which humanitarian NGOs are increasingly making use.

13.9 Humanitarian and Social Networks

With the help of new media and social networks like Twitter, YouTube or Facebook, information cannot only be found worldwide within a short time, but can also make people pay attention to their humanitarian circumstances as well. After the earthquake in Haiti in 2010, social media was used by survivors to tell their story, which in turn influenced the coverage in traditional media (National Consortium for the Study of Terrorism and Responses to Terrorism 2012). This form of digital interaction of users and recipients in which information is collected in different ways, processed and divided is given the term 'crowd-sourcing'. However, these forms of digital communication also involve the risk of spreading false or inaccurate information—deliberately or inadvertently. A new platform that attempts to minimise such risks is Ushahidi (Coyle and Meier 2009). Established by Kenyan bloggers in 2007, users can use various services (including Facebook, Twitter, SMS or blogs) to find information about humanitarian disasters or human rights violations and make them known on this platform, 'map' them and recall them. This information is always checked by a variety of other users for the truthfulness of the published information. This is just one example of the opportunities and risks of using new media as well as the ability to network people in disaster situations (Nelson et al. 2010).

In addition to information from people in disaster-stricken areas, organisations increasingly use new means of communication to communicate faster with their donors. After the 2004 tsunami, mobile communications played a central role as a fundraising tool. In Britain, for example, more than 700,000 people took part in a joint campaign using all mobile phone companies and poured around £1.1 million into the accounts of the British Disaster Emergency Committee (DEC) in just two months (Coyle and Meier 2009).

In addition, new media through the internet enables humanitarian NGOs to prepare background information on wider humanitarian disasters or to describe their work in a more thematically profound way than is possible with traditional media. Through the hyperlink structure, it is possible to provide unlimited space for information in the form of text, pictures or footage.[8] Moreover, humanitarian NGOs also use social networks to get in contact with interested people in a crisis or disaster more quickly and accurately, as well as with potential donors. Journalists and humanitarian workers can also use social networks to report on humanitarian work directly from conflict or disaster regions.

Not only NGOs, but also media companies recognise the opportunities of new media and are increasingly offering online content. As the example of Spiegel Online shows, these versions can in turn advance to key media on the internet, with live tickers, background reports and photo galleries. These offers lead the recipient to using both traditional media (television, print and radio) and online versions of media content in parallel. Media users can further inform themselves on a report

[8] Raw material for further use by the mass media.

they saw on television or an article on humanitarian crises and disasters they read and interactively exchange information and commentary, regardless of time and place.

In addition to social networking and the exchange of new media, people can also interact with life-saving functions. The United Nations (UN) and various international aid organisations now use this to swiftly obtain information on acute crises and disasters and to inform people quickly, for example, about where clean drinking water can be found or where to find medical care stations (Nelson et al. 2010).

13.10 Testing the Veracity of Information

There is the question of the veracity and verifiability of the information distributed by new media. Traditional media channels are hesitant about spreading news through unsafe or non-verifiable sources, especially when they do not have their own local journalists on site. Oriental expert Günter Meyer complained about unsecured location information in regards to the political crisis in Syria 2011: "I've never experienced such a form of disinformation. [...]. Lots of videos are distributed, including completely the wrong information" (Meyer 2012). Even Reuters news agency was tricked by forgery and sold a movie from Lebanon in 2008 as a news update from the Syrian crisis. "At RTL, people use their own material or agency material. Our motto is: "Better safe than sorry", says Peter Klöppel, anchorman of the RTL's main newscast (Klöppel 2012).

The review of sources is difficult, especially when reporting on war events. There remains only the possibility of checking the veracity of the use of different sources. One can just offer valuable support in a crisis or disaster area or local media, insofar as they are on-site and thus able to report adequately. Nevertheless, there is also the risk of local media, particularly those in political crises, delivering instrumentalised news via those in power. In any case, questions must be asked about the inspection of video material or sources from the internet: Who is the author of the material? Has the source already made a public impact, and if so, was it serious and trustworthy? When was the material created? Who is shown there? What is talked about? Does the subject of the material fit with the context? ARD has been maintaining a separate department for this type of processing since April 2011, which also includes local experts in assessment. But in the end, it is also a reflection of reality that "some truth always dies at war." (Ulrich Leidholdt, correspondent of WDR 5, Wallrafplatz, 18 August 2012).

13.11 Conclusion: Quality Journalism: A Serious Concern of Editors and Aid Organisations

Aid organisations are increasingly trying to match media logic. This is reflected in the fact that organisations answer more requests from media professionals now than was the case a few years ago. Many NGOs acquire their own media and PR departments with experts. Their communication strategies also aim to satisfy the hunger for media news and mainstream demand: human interest stories are written and their relief workers are trained as interview partners and shown how rapidly statements can be taken out of context, misinterpreted and abused. This hurts the cause, and leads to a loss of the NGO's credibility. In addition, media training is aimed to train workers in such a way that they look authentic and are able to report briefly and precisely about their work in a disaster.

With all media products, however, the information must not lose its credibility. Therefore, it must be equal to the value and quality of reporting from the media. The disadvantage is when information is increasingly taken as if it were stated by the media in the first instance (Schnedler 2006).

An important contribution to quality and credibility happens when local media are better integrated in to the reporting of a disaster, and the training of local capacity, as well as the support of democratic development, is increased.

References

Bratic V, Schirch L (2007) Why and when to use the media for conflict prevention and peace building. http://www.sfcg.org/articles/media_for_conflict_prevention.pdf. Accessed 14 Jan 2013

Caritas international – Brennpunkte (2007) Barmherzigkeit braucht Qualität. Möglichkeiten und Grenzen der humanitären Hilfe. Lambertus, Freiburg

Cottle S, Nolan D (2009) How the media's codes and rules influence the ways NGOs work. http://www.niemanlab.org/2009/11/simon-cottle-and-david-nolan-how-the-medias-codes-and-rules-influence-the-ways-ngos-work/. Accessed 11 Jan 2013

Coyle D, Meier P (2009) New technologies in emergencies and conflicts: the role of information and social networks. http://www.unfoundation.org/news-and-media/publications-and-speeches/new-technologies-emergencies-conflicts.html. Accessed 14 Jan 2013

Dijkzeul D, Moke M (2005) Public communication strategies of International Humanitarian Organizations. Int Rev Red Cross 860:673–692

Klöppel P (2012) Die Kamera als Waffe. http://m.faz.net/aktuell/feuilleton/medien/bilder-aus-syrien-die-kamera-als-waffe-11860622.html. Accessed 11 Jan 2013

Knaup H (2000) Die Rollenverteilung muss klarbleiben. In: Der Überblick 102

McLuhan HM (1964) Understanding media. The extensions of man. McGraw-Hill, New York

Meyer G (2012) So eine Form von Desinformation habe ich noch nie erlebt. http://www.uni-mainz.de/magazin/544_DEU_HTML.php. Accessed 11 Jan 2013

Moeller S (1999) Compassion fatigue. How the media sell disease, famine, war and death. Routledge, London, New York

Munz R (2007) Im Zentrum der Katastrophe: Was es wirklich bedeutet, vor Ort zu helfen. Campus, Frankfurt, New York

National Consortium for the Study of Terrorism and Responses to Terrorism (2012) Social media use during disasters. A review of the knowledge base and gaps. http://www.start.umd.edu/

Nelson A, Sigal I, Zambrano D (2010) Media, information systems and communities: lessons from Haiti. http://www.knightfoundation.org/media/uploads/publication_pdfs/KF_Haiti_Report_English.pdf. Accessed 14 Jan 2013

Robinson P (2002) The CNN effect: the myth of news, foreign policy and intervention. Routledge, London, New York

Aigle Royal (pseud.) (2005) PolÕmique humanitaire. Available at: http://www.oulala.net/Portail/article.php3?id_article=1602 (5 January 2005)

Ruhrmann G, Göbbel R (2007) Veränderung der Nachrichtenfaktoren und Auswirkungen auf die journalistische Praxis in Deutschland. http://bisher.netzwerkrecherche.de/files/nr-studie-nachrichtenfaktoren.pdf. Accessed 7 Jul 2013

Schnedler T (2006) Getrennte Welten? Journalismus und PR in Deutschland. http://bisher.netzwerkrecherche.de/Publikationen/nr-Werkstatt/20-Journalismus-und-PR. Accessed 30 Nov 2012

Scholz T (2012) Distanziertes Mitleid. Campus Verlag, Frankfurt, New York

Schulz W (1976) Die Konstruktion von Realität in den Nachrichtenmedien. Alber Verlag, Freiburg, München

Chapter 14
Western Health Workers in Humanitarian Aid

Magdalena Bjerneld

14.1 Background

During the last decades more international organisations have been established in an attempt to support those in need of humanitarian assistance. Some of these big actors were the UN organisations, the Red Cross movement, and the Non-Governmental Organisations [NGOs], including *Medicines sans Frontiers* [MSF]. International organisations send thousands of aid workers of different professions to disaster areas. Different types of expertise are required for different stages of disasters and for different aspects of the missions.

Aid workers are normally supposed to leave their ordinary work in their home country at short notice and work for short periods, from some weeks to a year, partly due to the difficult working conditions being hard. Despite this, many people around the world are willing to help others during disasters (Hearns and Deeny 2007). Large recruiting organisations receive thousands of enquiries about job opportunities in the humanitarian field every year. But there is considerable competition for the most qualified and experienced aid workers (DeChaine 2002). One increasingly important method for organisations to present themselves to a wide audience and to attract new applicants is to use the World Wide Web [www] since that is cheaper than advertisements in newspapers and reaches a wider audience. The organisations use the World Wide Web for both presenting their mandate or mission statement and for recruitment purposes (Gatewood et al. 1993).

An organisation's image, including how it is presented online, is important for applicants' decision in making initial contact (Gatewood et al. 1993). As online recruitment is a new phenomenon, little research exists in this field. However, Cober et al. (2000) suggest a model for ideal online recruitment, and emphasise

M. Bjerneld (✉)
International Maternal and Child Health, Department of Women's and Children's Health, Uppsala University, University Hospital, Uppsala S-75185, Sweden
e-mail: Magdalena.Bjerneld@kbh.uu.se

P. Gibbons, H.-J. Heintze (eds.), *The Humanitarian Challenge*,
DOI 10.1007/978-3-319-13470-3_14

the importance of an attractive web page containing a structure with information that is easy to understand and follow. In order to foster the interest of the reader, some kind of a testimony is recommended, for example letters written by people who are currently employed by the organisation, which is seen as a way to build a relationship with the reader (Cober et al. 2000).

It is important for the organisations to find the 'right' people. Different strategies have been tested in order to identify which people are most likely to be successful in the field. More commonly, the focus is on criteria and characteristics of the people; however, there is little research proving their value in humanitarian action. In time of disasters, when time is short, some studies have indicated that priority is often given to filling the post quickly rather than ensuring careful recruitment, including a face-to-face interview (Macnair 1995; Simmonds et al. 1998).

Earlier research by Kealey (1996) identified the ideal expatriate as a so-called "cross-cultural collaborator". This person should ideally have three sets of skills: adaptation skills [positive attitudes, flexibility, stress tolerance, patience, marital/family stability, emotional maturity, and inner security], cross-cultural skills [realism, tolerance, involvement in culture, political astuteness, and cultural sensitivity], and partnership skills [openness to others, professional commitment, perseverance, initiative, relationship building, self-confidence, and problem-solving (Kealey 1996).

For expatriates working in humanitarian action, additional characteristics include: having a sense of humour, ability to admit weaknesses, ability to share emotions, being a team player, having good communication skills, leadership abilities, abilities to motivate others and to stay calm under difficult circumstances, and maturity. In addition, knowledge of more than one language has been identified as important (McCall and Salama 1999). Important characteristics for an effective team leader are flexibility and diplomacy, ability to build teams and capacity, including the clarification of roles and responsibilities as well as being able to coach first time aid workers, command respect, to communicate, and build bridges between groups (Kealey 1990).

There are few studies focussing on aid workers' motivation to volunteer for work in the international humanitarian sector. Research in United States during 1970s on volunteers' motives (Anderson and Moore 1978) and a follow-up during 1990s (Liao-Troth and Dunn 1999) indicated that common motives included a desire to help others, feeling useful and needed, becoming self-fulfilled, improving the community, and personal development, showing that helping others ranked highest.

Most humanitarian organisations require previous field experience from people going to the field. There is an assumption among NGOs that the people who will be most competent are those who have at least one experience from the field. However, the limited research on this question (Kealey 1990) does not reveal any relation between earlier experience and effectiveness.

The methods of preparation for humanitarian work are diverse and not always satisfactory (Macnair 1995; McCall and Salama 1999; ALNAP 2002). Some organisations have unrealistic expectations of their volunteers and neglect to provide adequate preparation and support. In the difficult situations humanitarian workers often find themselves, preparatory training would have been extremely

valuable (Hammock and Lautze 2000). Although some are sceptical about academic education and imply they are surrogates for more specific schooling (Mowafi et al. 2007), there is a demand for high quality training, ideally standardised. Standards in emergency management training should define the minimum qualifications of trainers, and provide guidelines for curriculum and content (Alexander 2003).

Many problems in the area of human resource management [HRM] in humanitarian action are identified. In disasters, the recruitment officer is required at short notice to find qualified persons willing to go to sometimes dangerous and insecure locations (Taylor 1997). It is especially difficult to recruit for contracts that are longer than 3 months, which is considered the minimum period to be effective (Taylor 1997; Simmonds et al. 1998). The reasons for the difficulties in finding personnel for these missions can either be that it is difficult for health professionals to get leave from their permanent work or that the international assignments do not assist their career in their home country. Therefore, many health professionals do not want to risk their future for humanitarian works. In order to solve these problems, some large organisations such as WHO and Oxfam have established task forces of qualified persons who are able to go into the field with short notice. However, this is an expensive solution, as the task force members must be paid, even during the periods they are not on assignment (Taylor 1997; Bugnion 2002).

Another often discussed problem is the high turnover of personnel, meaning they take part only in one mission (Richardson 2006; Loquericio et al. 2006). This is costly for the organisation, as recruitment of a new delegate for ICRC in 2005 was estimated to cost about £ 15.000, including advertisement, selection process, medical checks, debriefing, travel expenses and other administrative procedures (Loquericio et al. 2006). A variety of solutions to this problem has been proposed. For example, training programmes with training grants between assignments to keep volunteers updated, development of career plans, positions in headquarters between posting overseas, and job rotation (Macnair 1995; McCall and Salama 1999; Simmonds et al. 1998; Taylor 1997). The need for a coordinated and cooperative approach to training has been identified (McCall and Salama 1999; Mowafi et al. 2007; Richardson 2006; Schaafstal et al. 2001), but is still not in place.

Another problem is to find certain types of aid workers, especially those with long professional experience, language skills, management skills, and earlier experience of disasters. A possible explanation is that these people are in the phase of their life when they want to settle down with a more secure job in their home country and with a family (Taylor 1997).

Security has become a serious issue, as relief volunteers have to work under extreme circumstances and cope with cultural and climatic differences, sporadic or non-existent electricity, water, and other basic services. Their work involves trying to provide medical and public health assistance to a huge number of people who are stressed due to flight, exhaustion, and privation, and they are subject to many deaths. At the same time, they themselves are exposed to random and organised violence (IHE 1992; Leaning 1999). Solutions that have been suggested include

in-depth discussions of hypothetical field scenarios during briefings and training sessions, more efforts to understand team dynamics, and support to relief workers in the field (Salama 1999).

The evaluation of the international response to the Tsunami in South East Asia in 2004 showed that hundreds of unprepared volunteers called 'well-wishers', working for old and new organisations failed to do a good job. Problems identified include aid workers with inappropriate experience from earlier disasters. Too many were unprepared for the work and were unaware of existing standards and guidelines and did not behave in a culturally correct manner (UN 2005). Unfortunately, one could see the same problems after the earthquake in Haiti (DARA International 2010).

The idea of making a personal contribution to help other people in the field of humanitarian assistance may contrast with growing individualism in modern western societies. Nevertheless, the mass media, the music industry, and the international aid community nurture the concept that it is important to 'stand out' and be someone special, with the frequent use of terms such as 'hero'.

A hero is a symbol that people have used for hundreds of years to summarise what people are thinking. In the Greek mythology, a hero symbolised the two sides of the human nature: the divorce and the conciliation. The hero was often a person of lower class [or a higher class without knowing it]. He or she was tested for his/her strength, fought against evil or temptations, but often lost and was killed. The heroes were generous to their admirers, but merciless to their enemies (Cooper 1986; Nationalencyklopedin 1994). The values of a hero are fearless, applied, instructed, tireless, and humble (Wellman 2004). Lanara (1981) describes heroism as the 'absolute good'—the highest manifest of humanity, being helpful, doing extraordinary acts of bravery, and having high ideals.

Many improvements have been achieved in the humanitarian sector. However, research on aid workers' perception of their experiences in the humanitarian field is sparse and has been carried out mainly with structured questionnaires (Simmonds et al. 1998).

Due to limited research, organisations working in the humanitarian sector lack much of the information required in order to develop better personnel policies and programmes and to strengthen their operations in disasters. This research project aimed to fill parts of this gap.

14.2 Aims and Objectives

The overall aim of this project was to investigate how humanitarian organisations attract, recruit, and prepare expatriate health professionals for fieldwork, and how these professionals are utilised, in order to identify possibilities for improvements.

The specific objectives were as follows:

1) To describe how aid workers returning from humanitarian action missions perceive their experiences in the field, and the preparation and support they received in connection with the assignment.
2) To identify the main motivating factors and perceived problems and obstacles for health professionals planning to volunteer for humanitarian action work.
3) To explore how humanitarian fieldwork is presented through letters written by health professionals working for MSF, and published on MSF home pages to attract new field staff. The objective was to look at both 'what the letters said' and 'how they said it'.
4) To describe how recruitment officers in selected large humanitarian organisations perceive humanitarian aid work, how they recruit, prepare, and support their staff in order to achieve high retention, and what concerns and recommendations they have for future work.

14.3 Theoretical Framework

Many theories exist regarding human behaviour and needs and some have formed the framework for this research project, particularly Herzberg's theory on work satisfaction (Herzberg et al. 1993), Maslow's hierarchy of needs (Maslow 1970), Organisational Socialisation (Flanagin and Waldeck 2004), and Learning Organisations (Britton 2002; Senge 1990).

Herzberg et al. (1993) organised factors that affect how people feel about their work into two primary groupings which were 'satisfiers' and 'dissatisfiers'. According to this theory, motivation, satisfaction, and long-term positive job performance are determined by five factors, which he called 'satisfiers' and include achievement, recognition, the work itself, responsibility, and advancement, all of which relate directly to what people do in their jobs. Other factors, which Herzberg called 'dissatisfiers' do not motivate or create satisfaction, but their absence can lead to job dissatisfaction. These factors all relate to the situation in which work is done and include policy, supervision, interpersonal relations, working conditions, and salary (Herzberg et al. 1993; Gawel 1997).

Maslow (1970) proposed a different theory describing the role of work in satisfying personal needs and proposed that human beings have similar needs they try to satisfy, usually in the same order. According to the concept, people must have one level of need satisfied to a substantial degree, before they will pursue the next higher need (Heylighen 1992; Gawel 1997; Maslow 1970). The needs described by Maslow can be shown as a pyramid. At the base are physiological needs such as food, water, shelter, and sex. This is followed by safety, including security and freedom from fear. The next tier involves social needs—loving, being loved, feeling that one belongs, and not being lonely. Esteem, including self-esteem, is yet higher and involves achievement, mastery, respect, and recognition.

Self-actualisation, fulfilment of personal potential and the pursuit of inner talents, is at the top of the pyramid.

In an analysis of Maslow's work, Heylighen (1992) pointed out that people who have met all the lower needs appear to have everything they need; they are secure, have friends and families, are respected and enjoy high self-esteem. However, if they have not achieved self-actualisation, they may feel that something is lacking. If they experience life as boring and meaningless, they will look for ways to develop their own capacities more fully (Heylighen 1992). A self-actualised person is identified as eager to undergo new experiences, attracted towards the unknown, and can see new things to appreciate in well-known situations. In relation to problems, they are spontaneous and creative, but can have difficulties in making decisions. Even so, they have 'a well-developed system of personal values' and are open-minded and friendly, and they easily feel empathy.

Organisational socialisation is the process through which the individual learns the values, accepted behaviour, and social knowledge within an organisation. The aim is to reduce uncertainties about the organisation and the job, and to help newcomers to build relationships and to feel part of the organisation (Flanagin and Waldeck 2004).

The concept of 'learning organisations' is used in different kinds of organisations. Britton characterises a learning organisation as an organisation that recognises the need for change, provides continuous learning opportunities for its members, and explicitly uses learning to reach its goals. A learning organisation links individual performance to organisational performance, encourages inquiry and dialogue, making it safe for people to share openly and take risks, embraces creative tension as a source of energy and renewal, and is continuously aware of and interacts with its environment. Five forces in learning organisations should be considered. These include: personal mastery, mental models, team learning; shared vision; systems thinking (Senge 1990).

14.4 Material and Methods

The starting point for this research project was personal experience as a course leader and teacher in preparatory courses for health professionals intending to do humanitarian action work and the NOHA modules in Public health in humanitarian action and Disaster management, respectively. The health professionals in these courses often expressed unrealistic expectations of their future humanitarian work and anticipated themselves as mainly performing medical tasks. They appeared unaware that they may supervise and lead others and had difficulty comprehending the complexity of the humanitarian context, including frustrations from non-functioning infrastructure.

In response to these observations, four studies were initiated, with the intention of identifying means for improvement.

In the first study, 20 health professionals (15 women and 5 men) who had returned from humanitarian action work during the last 12 months participated. An interview guide covered the preparation they had received, their work, roles and responsibilities, and how well they felt they had handled the situation, what knowledge they lacked, and how the working conditions affected their performance. Finally, they were asked what recommendations they would give to colleagues contemplating similar work.

In the second study, four focus group interviews with 19 Scandinavian health professionals, who were planning to work in humanitarian action, were performed. The interview guide covered motivation to work in humanitarian action abroad, their expectations about themselves and the organisations recruiting them, and their concerns about their assignments.

The results from the two first studies raised questions regarding applicants' expectations about humanitarian work. In the third study we therefore explored how organisations present themselves and attract potential workers to the field. In total 137 letters written by health professional field workers for the websites of MSF's offices in six European countries (Belgium, Denmark, Norway, Sweden, the Netherlands and the United Kingdom) that were published in August 2007 were collected, together with 129 attached photos.

As a complement to the earlier studies, in the fourth study, recruitment officers in seven large humanitarian organisations, including the World Health Organisation/Health Action in Crisis [WHO/HAC], ICRC, International Federation of the Red Cross and Red Crescent Societies [IFRC]; the Swedish Red Cross; MSF in Sweden and the Netherlands; and the Swedish Lutheran church were interviewed in order to determine their opinions and concerns around the recruitment process in humanitarian action. An interview guide covered the portrayed images of humanitarian work, the standard recruitment procedures, concerns, trends, and implications for future work.

In the analysis of the four studies qualitative content analysis, photo analysis, and discourse analysis were used.

14.4.1 Qualitative Content Analysis

In the four studies conventional qualitative content analysis was used, which is appropriate when theory and research literature on the phenomenon is limited (Hsieh and Shannon 2005).

The text was repeatedly read to obtain a holistic sense of the content and then read sentence by sentence in order to identify codes reflecting the content. Similar or linked codes were sorted into categories and similar categories into themes. A second researcher performed parallel independent analysis of the material, and the two groups of categories and themes were compared and modified after discussion. Representative quotations were selected, and when necessary, translated from Swedish into English (Hsieh and Shannon 2005; Granheim and Lundman 2004).

The photographs attached to the selected letters in study three were numbered and described in words, which were coded and grouped in categories and themes. The result was interpreted both at the denotative level [identification of people, objects and activities] and the connotative level [interpretation of the photograph, and identification of message] (Peterson 1985). Finally, the photographs were compared to the content of the text in the letters in order to check for conformability in messages.

14.4.2 Discourse Analysis

Discourse analysis aims to look at how texts are produced, their functions, and possible contradictions in them. Discourse analysis focuses on words used in the text, how the story is told, and what identities, activities, relationships, and shared meanings are created (van Dijk 2008; Parker 2004). The model developed by Fairclough (1995) was used in this work, and with this model, the representations [things, places people, and events] the text included, and how identities and relationships were constructed and determined. The discourse process [how the text was produced] and the larger socio-cultural context were analysed.

14.4.3 Findings

The analysis of the four studies revealed certain themes related to the expectations and experiences of the aid workers and recruitment officers and the policy of the organisations. From the material five cross cutting themes were identified, which we name motives and realities, images of field work, our basic needs, satisfiers, and dissatisfiers.

14.5 Motives and Realities

The main motivating factors for inexperienced aid workers were a desire to make a contribution, and altruism with a touch of heroism. Relatives, friends, or TV programmes such as ‘The Flying Doctors’ often inspired them to make the decision to work in the humanitarian field.

Another motive for work in humanitarian action was a desire to develop themselves both as people and professionally, and they expected their missions abroad would lead to such development. The chance to grow personally was perceived as being greater during humanitarian work than within routine conditions in the Swedish health care system.

Especially for the doctors, the fact that the bureaucratic system in the home country appeared to ‘take the joy out of being a doctor’, and they looked forward to be working as ‘real doctors’ during the humanitarian missions.

Linked to this was a strong aspiration to work with like-minded people in a group, something they missed in their home country. The presumptive aid workers had high expectations of the employing organisation and expected to be taken care of and never to be left alone.

Some health professionals even wanted to test their limits and to experience adrenaline flushes after particularly difficult achievements. Inexperienced aid workers also looked for an adventure, a new experience, before they became too old. They were also interested in other cultures and looked forward to learning about new countries.

The authors of the field letters and the experienced aid workers confirmed it is possible to grow as a person and feel satisfied doing something worthwhile, despite resource limitations in the work context. They also confirmed that it is possible to develop professionally, including learning new skills, for example managing complicated deliveries or helping the severely malnourished to survive. Experienced aid workers had positive feelings about humanitarian work and were impressed by the strength of the suffering people, and how they could survive, often in terrible situations.

14.6 Images of Field Work

Through the letters from the field, a realistic picture with many stories about very sick patients appeared. However, the dominant image was positive. Considerable teamwork was demonstrated and although local staff were suffering, they were doing a very good job. The writers did not describe themselves as heroes and emphasised how much they learned from the fieldwork.

The photographs attached to the letters strengthened the messages in the letters; however, in the photographs, the beneficiaries were shown as passively receiving assistance from the MSF staff and the local staff, and the beneficiaries were rarely presented by name in the photo text.

Interviews with experienced aid workers indicated that the work context and work content had changed during the last decades. Today, humanitarian work is more complex and aid workers are supposed to do both clinical work in hospitals and work in primary health care. The recruitment officers described the fieldwork in the same terms as the experienced aid workers, and talked about the importance of flexibility and diplomacy in a complex reality.

14.6.1 Our Basic Needs: Safety, Social Belonging and Good Self Esteem

Inexperienced personnel had many worries about the security situation, and some also worried about how to handle their economic situation when they returned.

Others were worried after all the stories they had heard about people coming home to a 'big black hole' and feeling alienated from old friends and colleagues. The inexperienced health professionals did not realise that their life could be in danger from, for example, complex emergencies. When they learned about threats and the risk of death in the field during a course in International health, they became concerned about safety and whether the recruiting organisations would take adequate care of them and keep them safe. On their first mission, they did not want to take big risks, as they understood they would be mentally occupied with concerns about work, and felt that was sufficient to be concerned with. Conversely, some inexperienced doctors were not worried about security and were even willing to go into dangerous situations; they had a feeling that they would be all right. However, they did express concern that an insecure situation might make them afraid and affect their professional performance in the field.

The authors of the letters rarely directly mentioned security. Instead, the political situation was discussed indirectly when describing the local population's suffering due to armed conflict. The few exceptions were stories from the Democratic Republic of Congo [DRC], and Iraq, where aid workers lives were directly threatened, and sometimes even prevented them from working.

Experienced aid workers talked about security and referred to specific threats, including armed hostilities, bombing, and mines, and criminality and rape. These threats had restricted their movements, hindered their work, and resulted in evacuations and even failed missions. Other sources of stress, including difficult physical conditions, work overload, feelings of isolation, and lack of qualified local personnel were also mentioned by this group.

Recruitment officers talked about the importance of being flexible and stress tolerant, and described aid work in terms of big demands and responsibilities. Not all organisations had a system for taking care of distressed people through debriefing sessions. One organisation expected the experts to take care of themselves, and was a reason debriefing sessions were not offered to them.

For the inexperienced health workers, it was important to work in a team with like-minded people and with the same personal and professional goals. They talked about wanting to keep their ties with the humanitarian community after they returned to Sweden. The need to belong was expressed as a fear of losing contacts in their communities at home. Some were afraid that they would repeatedly volunteer and never come back to Sweden, to their own culture, families, and friends.

Through the letters from the field, an overall positive image was presented, where teamwork was something 'fantastic'. However, experienced aid workers considered it the most difficult part of the mission. Teamwork could be a source of both frustration and stress, especially in situations where the teams both worked and lived together with people they had not chosen. Recruitment officers confirmed that teamwork was often a source of frustration and sometimes caused disappointment within the groups of expatriates.

Self-esteem was mentioned by inexperienced aid workers in connection with managing difficult situations. The inexperienced volunteers expressed concern

about recognition from family members, who did not respect the inexperienced health professionals' decision to volunteer. The authors of the letters often told stories about how the beneficiaries appreciated their work and presence, something that is important for self-esteem. Finally, the recruitment officers did not consider the desire for self-satisfaction a problem; as long as aid workers showed respect to the people they serve.

14.6.2 The Satisfiers: Achievements, the Work, Responsibilities and Advancement, and Recognition

The inexperienced doctors and nurses interviewed wanted and expected that future jobs would make a difference and give them a sense of achievement. At the same time, they wanted to develop professionally, but were worried their knowledge would be insufficient and they would not manage difficult patient cases. However, within the group of inexperienced aid workers, they comforted each other and concluded that what was most important was "to do as well as you can".

The authors of the letters described many difficult cases and challenges, but in most situations, they managed to treat the patients or even save their lives. Lack of resources was one of the main obstacles to doing a good professional job. The new professional role was underlined through reflections on the differences between working in humanitarian action and working in their home country. The authors considered the responsibilities as managers, trainers and supervisors as difficult to handle.

The experienced health workers talked about the sense of satisfaction arising from the work. However, they considered it irresponsible to send inexperienced people into the field, as they felt inadequately prepared for the demanding positions they would experience.

Difficult patient cases were only part of their frustrations, more dominating was the challenge as a leader and trainer, something they felt insufficiently prepared for. However, the authors of the letters and the returning health professionals expressed satisfaction with the work they were able to perform.

New volunteers were intensely interested in the work itself and expected it to be challenging and stimulating, in contrast to their jobs in Swedish health care, which they perceived as boring. They hoped that the overseas assignments would provide increased opportunities for taking more responsibility. The authors considered the responsibilities as managers, trainers and supervisors difficult to handle and, as with the returned aid workers, described the work as a mixture of different duties. Some tasks had to be learned, for example how to organise a vaccination campaign. In addition, being responsible for a hospital or a big group of staff was challenging, and it was difficult to mediate in a conflict situation.

The inexperienced personnel did not expect the new work situation to be boring, and the authors did not often write that they were disappointed with their duties in

the field. However, returned aid workers talked about poorly planned, meaningless, and overwhelming tasks. The returned aid workers also considered they experienced many unexpected responsibilities such as leader, manager, and trainer, which they were unprepared for, and requested more knowledge in different areas linked to medicine, for example pedagogy and management. They thought further knowledge in development studies in general would provide a greater understanding of the reality around of the situation and enable them to work more effectively.

New volunteers planning to continue working abroad after one or two humanitarian missions thought more in terms of long-term development assignments. The volunteers, even those who had been out on multiple missions, did not view humanitarian work as an area for career advancement. In these studies, no one discussed the possibilities of advancing in the hierarchy of the organisation or possibilities of working at the headquarters as something positive or as recognition.

The new volunteers discussed how they wanted the recruiting organisations to acknowledge their capabilities as professionals, even if they did not have earlier experiences of fieldwork. The authors wrote about recognition from another perspective. They recognised the organisations as the best option for working in disaster situations. The returned aid workers were sometimes disappointed by the organisations that did not use their fieldwork experiences during the recruitment process.

14.6.3 The Dissatisfiers: Supervision, Interpersonal Relations, Working Conditions, Salary, and Policy

The inexperienced aid workers expected not to be left alone in difficult work situations; however, lack of supervision, or support in the field was considered a problem by the returning aid workers. The authors of the letters did not discuss this, possibly because they did not want to risk the reputation of their organisation. Only one recruitment officer mentioned that the organisation arranged regional meetings for expatriates, which constituted a possibility for colleagues to exchange experiences and to meet representatives from the headquarters. MSF has established links to a research institute (Epicentre) that in collaboration with a helpdesk at the headquarters answers medical questions directly from the field via satellite telephones [personal communication with MSF Sweden].

The expectation, expressed by the presumptive aid workers, that they would be taken care of by the organisation was not confirmed by the experienced aid worker. Instead, they were often disappointed in the organisation and emphasised the importance of being properly briefed before missions, to be supported by the headquarters during difficult missions, and to receive professional debriefing after the field work was completed.

Interpersonal relations were discussed by all groups. Incoming volunteers expressed a desire to develop interpersonal relations as members of a team, as well as maintaining relations with friends and family at home. They wished to “understand

other people", referring to the locals. The authors of the letters and the experienced aid workers expressed admiration of the beneficiaries, especially women who took on huge responsibilities in the hard living conditions. The authors also wrote about the local staff in two respects. One group identified a need for updating the local staff's knowledge and motivating them to do a better job. Others admired the skills and attitudes among the local personnel who in most cases were also victims of the disaster. The recruitment officers emphasised the importance of being able to lead others and to have good communication skills as necessary for successful job performance.

Working conditions are naturally important for aid workers. The inexperienced did not know what to expect, but wanted to have secure working conditions in the field. The authors wrote about many patients, long working days, and lack of resources as the main problems and source of stress during their missions. However, they perceived it as something they could manage as they were in this situation just for a short period, compared to the local staff that both lived and worked under these difficult circumstances. The returned aid workers confirmed the high demands of the work and the hard working conditions in the field. New aid workers wanted to receive sufficient salary to maintain their independent life-styles when they returned. However, this aspect did not appear to worry those with experience.

The organisations' policies for professional development, expressed through the recruitment officers, were diverse; some expected applicants to take responsibility for their own professional preparedness, an important prerequisite for professional development. They did not recommend or support newcomers during special preparatory courses in Public Health for humanitarian action. Other organisations required newcomers to take a special course in this field before their first assignment. To succeed as an aid worker, experienced health professionals considered it important to feel secure in their professional role, to know what to do in a crisis, to have a stable personality, and a capacity to work in teams.

The trend identified by the recruitment officers was escalating demand for specialised staff, most often a person with broad expertise in public health in combination with increased time constraints. Most difficult was to find people who could take responsibility as leaders and trainers. In order to socialise newcomers into the organisation, short courses and briefing sessions were mainly used. Some recruitment officers discussed problems with people who stayed too long in the field of humanitarian action and sometimes become cynical about the difficult situations they worked in.

14.7 Discussion

14.7.1 Perspectives of Humanitarian Work

Although the groups interviewed represented different perspectives of work in humanitarian action, common themes emerged when the four studies were

considered together. The common themes identified were: personal and professional development; preparation and support; teamwork and relationships; security and stress; gender; the image of the perfect aid worker; and retention. Inspired by discourse analysis, expectations and frustrations at three stages of the mission, before, during, and after, were compared in three different groups, the aid workers, the recruitment officers, and the public. The statements about public opinions and frustrations are based on the reflection in the western societies', presented in the background, common knowledge, and personal experiences.

14.7.2 Personal and Professional Development

The inexperienced health professionals wanted to develop themselves professionally. The aid workers writing from the field, as well as those who had returned, confirmed that it was possible. Recruitment officers did not discuss professional development as a motive for doing humanitarian work. However, they should be familiar with Maslow's theory and design their interviews on the assumption that many volunteers for humanitarian work are doing so because of a drive toward self-actualisation, although they may not express this. Both recruiters and field managers should realise that many volunteers want to test themselves and find their own limits, which can lead to security risks.

The findings indicated that aid workers were motivated before they went into the field. However, the image presented to them through mass media and the internet appears simple and excludes the demands expected of them. Alternatively, it is possible the presumptive aid workers' strong conviction they will manage prevents them from understanding the upcoming challenges. However, it is difficult for inexperienced people to realise complex realities without earlier comparative experiences.

According to Herzberg et al. (1993), the 'satisfiers' associated with particular work (achievement, the work itself, responsibility and advancement, and recognition) motivate people to do good work. The findings confirmed the importance of achievement. Although the aid workers described the large demands and frustrations, the majority were motivated to work in the field. The achievements, represented here by surviving patients, probably played an essential role.

The possibility of 'advancement' was identified as an important factor for job satisfaction, but was not the focus for the aid workers. It is possible they are 'doers' and not interested in bureaucracy. Another reason could be that the hierarchy of the organisation does not attract them. If this is the case, the organisations should consider the option of people working in headquarters between missions and making this more attractive. Practical tasks are probably more attractive than policy writing or other kinds of administrative work.

Part of the process towards self-actualisation is a desire for the recognition of professional achievements or for being a good person. Aid workers in the different stages of aid confirmed this. However, it is the responsibility of the organisations to

balance the high expectations on the missions with reality and provide presumptive aid workers additional information and sufficient time for reflections before they decide their future.

14.7.3 Preparation and Support

The gap between the expectations of the applicants, the stories in the letters, and from experienced aid workers raises questions about organisations' preparation of their field workers.

The expectations of the work appear in discordant with reality.

The experienced aid workers requested more multidisciplinary preparatory training. The organisations must either provide relevant preparatory courses themselves or encourage the aid workers to attend courses arranged through other providers, such as university departments. The curriculum of these courses should not only include medical topics, but also psychosocial and cultural aspects of the reality in which they will be functioning.

These findings supported earlier requests for more resources to HRM, especially targeted towards standardised training and agreed with earlier research (McCall and Salama 1999; Richardson 2006; Mowafi et al. 2007), in that there is a need for a coordinated and cooperative approach to training. The universities could play a greater role in this regard.

If recruitment has long-term perspectives, the presumptive aid workers should be encouraged to study at least some of the disciplines included in humanitarian action. The universities could help support the aid workers between the missions. Master's level courses can teach how to systematise experiences, update knowledge, and introduce tools for planning. In addition, increased efforts in public health training during basic medical education could help in the process to convince presumptive aid workers of the importance of the public health perspective in the humanitarian field.

Questions about psychological support in the field were not mentioned in the four studies and earlier studies have identified a lack of support for psychologically distressed relief workers (Hearns and Deeny 2007; McCall and Salama 1999; Salama 1999; Salama et al. 2004). The request for more support can be linked to Herzberg's 'dissatisfiers' (policy, supervision, interpersonal relations, working conditions, and salary), which do not motivate, but lead to dissatisfaction when they are lacking or inadequate. Volunteers returning from the field mentioned the importance of coherent organisational policy and this was in accordance with a study in which aid workers felt disappointment with their employer organisations, as they felt they did not follow the promises in their policies (Hearns and Deeny 2007).

Vast sums of money are spent on humanitarian aid, but small amounts are used for recruiting and training. Lack of training resources is a major problem for organisations, especially the smaller ones (Potter et al. 2002). Donors should

support efforts to increase the quality of the HR system, including training activities. Initial briefing sessions should be scheduled well in advance to allow volunteers an opportunity to acquire the skills they still lack. Briefings should cover practical matters and prepare volunteers psychologically for the extremely stressful work, and for disillusionment and frustration. Some stress factors can be alleviated by the organisations, for example, by making sure that missions are well organised and by providing clear procedural guidelines.

14.7.4 Teamwork and Relationships

One of the key questions in all four studies concerned teams, which were described differently depending on the perspective of the respondents. To be a team player and to build teams is identified as important for expatriates in humanitarian action (Kealey 1990; McCall and Salama 1999). Assessment centres for identifying good team players were mentioned by recruitment officers as a method of selecting people with these skills.

A sense of belonging and recognition of one's worth are among the human needs within Maslow's theory of basic needs. It is therefore important that organisations provide a sense of community and coherence for their volunteers. Some organisations already encouraged their volunteers to maintain ties with friends and family at home while they were on missions. It would be advisable that efforts along these lines are increased, as it would encourage personnel to maintain their sense of community, even under isolated field conditions. A sense of coherence is closely related to well-being (Antonovsky 1987), and organisational theories (Flanagin and Waldeck 2004) also stress the importance of familiarising newcomers with the structure and values of the organisation. For 'learning organisations' team learning is considered important (Senge 1990) both for the individuals and for the organisations to maintain high retention rates.

More attention to the difficult questions of how to cope with these difficult situations and how to help the helpers is needed. Theories in occupational health might be useful, but more discussions on teamwork are also needed during the preparatory phase. Support mechanisms during fieldwork need to be developed, as this would prevent the image that aid workers are always supposed to take care of themselves, even in extraordinary situations, an image close to heroism.

14.7.5 Security and Stress

In aid workers similar symptoms close to those often labelled as 'burned out syndrome' have been identified. These symptoms can be divided into five groups: physical, emotional, behavioural, work related, and interpersonal symptoms (Salama 1999).

Few studies have discussed the mental health of aid workers after traumatic events in the field. Those that exist report the most difficult parts of the work as dealing with many dead bodies, seeing children dying, and handling the bodies of dead children. Common reactions include confusion, sadness, irritability, and intrusive thoughts of the trauma (Robbins 1999; Talbot et al. 1992). Kealey (1990) identified stress tolerance as one of the important characteristics for 'adaptation skills', important for cross-cultural work. Earlier research has tried to alert the organisations about the increasing problem among aid workers in different settings (McCall and Salama 1999; Eriksson et al. 2001; Salama 1999), but only limited research on the long-term psychological effects of aid workers has been done (Eriksson et al. 2001).

Working conditions are among the factors that Hertzberg identifies as 'dissatisfiers', if they are inadequate. Maslow includes security and freedom from fear among the most basic human needs, with only physiological requirements being more fundamental. Thus, humanitarian organisations should be more attentive to working conditions, if they want their volunteers to be satisfied, particularly regarding security.

Recruiters should also understand that potential volunteers need reassurance regarding their safety, but may be inhibited about asking questions about dangers in the field. NGO officials should explain the field security system to all potential volunteers during information sessions and during the interviews. In addition, the administrators determining personnel policies and practices within humanitarian NGOs should recognise that debriefings after missions are an important measure for helping all kinds of aid workers to handle their stress reactions, even if they are supposed to be experts in their medical field including psycho-social care.

This is part of role modelling and can ensure that newcomers are comfortable within the organisation.

14.7.6 Gender

For decades, missionaries, explorers, and researchers have sent letters or reports of their experiences around the world. This material constitutes the background material to books and films and the majority of the authors of these documents have been men, as traditionally women have not been expected to have adventures like these.

Today, it is acceptable from the Western point of view that single women go for missions, even in disasters situations. Most of the letters from the field in this study were written by women. The authors of the field letters reacted strongly against the brutalities against women in DRC, with histories of rape and sexual assaults. Although rape and sexual violence exist in western countries, the extent of the problem is so great in DRC and other countries in conflict that it is overwhelming. Therefore, there is an urgent need for thorough preparation for these situations before departure into the field.

14.7.7 The Image of the Perfect Aid Worker

The letters gave a positive image of what will happen to the volunteers in the field. In the book "Another day in paradise" (Bergman 2003), a volunteer reflects over mass media's reporting:

> The report describes aid workers as tireless, and as always, I groan and wish that they would leave out the heroic description and just call us exhausted.

Not all volunteers are tired all the time, but reflections such as this provide another image about reality. The authors of the letters did not describe themselves as heroes. Instead, they emphasised how much they had learned about themselves, professionally, and about the world. The experienced people thought they had learned more than they had been able to contribute.

Photographs strengthen the image of the fieldwork. The majority of the illustrations in the letters analysed showed a western medical person bending over a patient. However, the majority of aid workers who contributed to the four studies described work where they were mainly trainers and supervisors. Few photographs illustrated active local staff and active beneficiaries. The overwhelming passive image conflicts with the ethical standards relating to respect for beneficiaries.

The recruitment officers were critical of so-called 'Cowboys' or 'Rambos', meaning people who 'want to take risks or like wars'. These descriptions have similarities to the image of heroes. According to historical mythology, a hero was even prepared to risk their lives. Today, the use of the word 'hero' has expanded, anyone doing his/her daily job can be labelled 'hero', for example people working in the health care system (WHO 2008). The different kinds of heroes have the desire to be somebody special or to be recognised in common.

The main problem with the hero concept is that it needs victims to save. In the humanitarian context, beneficiaries become passive and do not participate in planning and implementation of programmes. This conflicts with the Code of Conduct (IFRC 1994) and the philosophy behind humanitarian action and its values of active participation. Hero worship implies that only heroes are recognised as good aid workers. As aid workers try to be self-actualised, reach to the top of Maslow's pyramid, they want to be recognised by their employer, colleagues, friends, and relatives. To be appointed a hero makes it easier.

Although recruitment officers feel that there are a series of questions that can identify the 'right people' for their organisation, the assessments of the candidates is often subjective. For example, it is possible to discuss how to identify flexibility and realism, which both the experienced aid workers and the recruitment officers mentioned as important.

Kealey (1990) described "cross-cultural skills", consisting of realism, tolerance, involvement in culture, political astuteness and cultural sensitivity, and he/she is expected to have less frustration and are 'attuned to power and are not alarmed at it' (Slim 2005). Recruitment officers need to look for such people instead of heroes.

Society has a tendency to request swift solutions to complicated problems. This opinion is supported by the mass media's reporting of disasters. Boring weekdays do not photograph well in the news or in films. The media rarely discusses what kind of education and earlier experiences people have in order to make courageous missions. The basic medical knowledge, irrespective of length, kind, and pedagogic approach, becomes a magic solution appropriate in both western health care and in disasters all over the world.

An important part of the recruitment procedure is to provide applicants the opportunity to discuss expectations and motives for their future work together with experienced personnel. However, the organisations face a dilemma as they need to attract newcomers to their organisations and therefore they present a positive image of the fieldwork. At the same time, they do not want to attract too naive or inexperienced people to this kind of work. The organisations also need role models as an image of the work in order to attract and motivate donors and the public for providing financial support for the work.

14.7.8 Retention

Inexperienced aid workers did not want to lose their roots or spend their whole lives outside their home country. Another fear revealed during the interviews was that they could feel alienated and isolated from society when they returned home. Connections to what Maslow called social needs emerged with fears about becoming restless wanderers, or being alienated or rootless.

Presumptive aid workers wished to be welcomed by the organisation and have their skills, knowledge, and willingness to volunteer valued. Measures should be taken to assure that new aid workers perceive themselves as members of the organisational community. Preparation for the field should include an introduction to the organisation's philosophy, programmes, and structure, so that the volunteers are familiar with the system. Preparation should also include in-depth education about humanitarian aid work, not just as a practical foundation, but also to help the volunteers understand the immense importance and value of aid work for millions of human beings around the world.

The inexperienced volunteers had many questions and worries about the fieldwork.

Therefore, more time should be invested in briefing and social contacts: this is an important part of the socialisation process. Increased communication between newcomers and experienced staff would create a deeper feeling of coherence within the group of staff, while improving the learning within the organisations. Recruiters and those responsible for contacts with aid workers during their missions should remember their need for recognition from the organisations.

The problem with people staying too long in the field and sometimes becoming cynical to the difficult situation they work in contradicts the otherwise frequently

discussed question about the high turnover of personnel in humanitarian action (Loquericio et al. 2006).

However, literature written by experienced aid workers describes old friends are only interested in hearing small parts of the aid workers experiences, before they start talking about something closer to them (Bortolotti 2004).

Humanitarian aid work is too serious to be solved with quick magic solutions. It must be recognised that HRM, including preparation of aid workers, takes time. Recruitment officers must also be given enough working time for the recruitment process, including support to people in the field. When expatriates have invested time in preparation, they probably want to use it for a long time, which motivates to stay in the sector.

References

Alexander D (2003) Towards the development of standards in emergency management training and education. Disasters Prev Manag 12:113–123

ALNAP (2002) Humanitarian action: improving performance through improved learning. Overseas Development Institute, London

Anderson JC, Moore LF (1978) The motivation to volunteer. J Volunt Action Res 7:120–125

Antonovsky A (1987) Unravelling the mystery of health. Jossey-Bass Inc, San Francisco

Bergman C (2003) Another day in paradise. International humanitarian workers tell their stories. Orbis Books, New York

Bortolotti D (2004) Hope in hell. Inside the world of doctors without borders. Firefly Books, New York

Britton B (2002) Learning for change: principles and practices of learning organisations. Swedish Mission Council, Stockholm

Bugnion C (2002) Analysis of "Quality Management" tools in the Humanitarian Sector and their Application by the NGOs. Paper presented at ECHO-partners' annual conference, Brussels, 14–15 October 2002

Cober RT, Brown DJ, Blumental AJ, Doverspike D, Levy P (2000) The quest for the qualified job surfer: it's time the public sector catches the wave. Public Pers Manag 29:479–494

Cooper JC (1986) Symboler [Symbols. An illustrated encyclopedia of traditional symbols]. Thames and Hudson, London

Dara International (2010) Haiti crisis report. In: ALNAP

DeChaine DR (2002) Humanitarian space and the social imagery: Médecins sans Frontières/doctors without borders and the Rhetoric of Global Community. J Commun Inq 26:354–369

Eriksson CB, Kemp HV, Gorsuch R, Khoke S, Foy DW (2001) Trauma exposure and PTSD symptoms in international relief and development personnel. J Trauma Stress 14:205–212

Fairclough N (1995) Media discourse. Edward Arnold, London

Flanagin AJ, Waldeck JH (2004) Technology use and organizational newcomer socialization. J Bus Commun 41:137–165

Gatewood RD, Gowan M, Lautenschlager GJ (1993) Corporate image, recruitment image, and initial job choice decisions. Acad Manage J 36:414–427

Gawel JE (1997) Herzberg's theory of motivation and Maslow's hierarchy of needs. Pract Assess Res Eval 5(11)

Granheim UH, Lundman B (2004) Qualitative content analysis in nursing research: concepts, procedures and measures to achieve trustworthiness. Nurse Educ Today 24:105–112

Hammock J, Lautze S (2000) Relief groups must prepare workers for new realities. Chronicle of philanthropy. http://philanthropy.com. Accessed 31 Mar 2003
Hearns A, Deeny P (2007) The value of support for aid workers in complex emergencies: a phenomenological study. Disaster Manag Response 5:28–35
Herzberg F, Mausner B, Snyderman BB (1993) The motivation to work. Transaction, New York
Heylighen F (1992) A cognitive-systemic reconstruction of Maslow's theory of self-actualization. Behav Sci 37:39–57
Hsieh H, Shannon SE (2005) Three approaches to qualitative content analysis. Qual Health Res 15:1277–1288
IFRC (1994) Code of conduct
IHE (1992) Recruiting health workers for emergencies and disaster relief in developing countries. IHE, London
Kealey DJ (1990) Cross-cultural effectiveness. A study of Canadian Technical Advisors Overseas. CIDA, Hull
Kealey DJ (1996) The challenge of international personnel selection. In: Landis D, Bhagat RS (eds) Handbook of intercultural training, 2nd edn. Sage, Thousand Oaks
Lanara VA (1981) Heroism as a nursing value. A philosophical perspective. Sisterhood EVNIK, Athens
Leaning J (1999) Introduction. In: Leaning J (ed) Humanitarian crisis. The medical and public health response. Harvard University Press, London
Liao-Troth M, Dunn CP (1999) Social constructs and human service: managerial sense making of volunteer motivation. Voluntas 10:345–361
Loquericio D, Hammersley M, Emmens B (2006) Understanding and addressing staff turnover in humanitarian agencies. Humanitarian Practice Network, London
Macnair R (1995) Room for improvement: the management and support of relief and development workers. Relief and Rehabilitation Network, London
Maslow AH (1970) Motivation and personality. Harper and Row, New York
Mccall LM, Salama P (1999) Selection, training and support of relief workers: an occupational health issue. BMJ 318:113–116
Mowafi H, Nowak K, Hein K (2007) Facing the challenges in human resources for humanitarian health. Prehosp Disaster Med 22:360–368
Nationalencyklopedin (ed) (1994) Nationalencyklopedin. Bokförlaget Bra Böcker, Höganäs
Parker I (2004) Discourse analysis. In: Flick U, Kardorff E, Steinke I (eds) The companion to qualitative research. Sage, London
Peterson L (1985) Det köpta språket. Analys av reklambilder [The bought language. Analysis of commercial pictures]. Konsumentverket, Stockholm
Potter J, Pankhurst M, Ruhonen M (2002) Analysis of the human resources management systems applicable to NGOs in the humanitarian sector. ECHO Humanitarian Aid Office, Brussels
Richardson F (2006) Meeting the demand for skilled and experienced humanitarian workers. Dev Pract 16:334–341
Robbins I (1999) The psychological impact of working in emergencies and the role of debriefing. J Clin Nurs 8:263–268
Salama P (1999) The psychological health of relief workers: some practical suggestions. Relief Rehabil Netw Newsl 15:12–14
Salama P, Spiegel P, Talley L, Waldman R (2004) Lessons learned from complex emergencies over past decades. Lancet 364:1801–1813
Schaafstal AM, Johnston JH, Randall LO (2001) Training teams for emergency management. Comput Hum Behav 17:615–626
Senge P (1990) The fifth discipline. The art practice of the learning organisation. Doubleday Currency, London
Simmonds S, Gilbert-Miguet P, Siem H, Carballo M, Zeric D (1998) Occupational health of field personnel in complex emergencies: report of a pilot study. WHO/Division of Emergency Humanitarian Action (EHA), Division of Emergency and Humanitarian Action of World

health Organisation, United Nations Joint Medical Service (UNJMS), International Centre for Migration and Health (ICMH), Geneva
Slim H (2005) Idealism and realism in humanitarian action. Centre for Humanitarian Dialogue, Geneva
Talbot J, Manton M, Dunn PJ (1992) Debriefing the debriefers: an intervention strategy to assist psychologists after a crisis. J Trauma Stress 5:45–62
Taylor F (1997) Preparatory research for an interagency emergency relief personnel seminar. The Emergency Relief Personnel Seminar Working Party, London
UN (2005) Regional workshop on lessons learned and best practices in the response to the Indian Ocean Tsunami. Report and Summary of Main Conclusions, Medan
Van Dijk TA (2008) What do we mean by discourse analysis? Discourse & society. http://www.discourses.org/whatisda.htm. Accessed 20 Jan 2008
Wellman S (2004) Values of heroes. http://www.heroesofhistory.com. Accessed Feb 2004
WHO (2008) Heroes for health. http://www.who.int/features/2006/heroes/en/index.html. Accessed 3 Mar 2008