HUMANITARIAN ACTION
AND STATE SOVEREIGNTY

~

REFUGEES:
A CONTINUING CHALLENGE

~ PROCEEDINGS ~

DRAGAN EUROPEAN FOUNDATION

EDIZIONI NAGARD
HUMANITARIAN ACTION
AND STATE SOVEREIGNTY

INTERNATIONAL CONGRESS
ON THE OCCASION OF ITS XXXth ANNIVERSARY

San Remo, 31 August - 2 September 2000

REFUGEES:
A CONTINUING CHALLENGE

25th ROUND TABLE ON CURRENT PROBLEMS
OF INTERNATIONAL HUMANITARIAN LAW

within the Global Consultations on International Protection of Refugees
launched by the United Nations High Commissioner for Refugees
San Remo, 6 - 8 September 2001

~ PROCEEDINGS ~

edited by
Stefania Baldini - Guido Ravasi

DRAGAN EUROPEAN FOUNDATION

EDIZIONI NAGARD
The International Institute of Humanitarian Law (IIHL) is a private, independent and non-profit organisation created in 1970. Its prime objective is to promote the development, application and dissemination of international humanitarian law in all its dimensions, and thus contribute to the safeguard and respect of human rights and fundamental freedoms throughout the world.

The Institute is officially recognised by the United Nations as a non-governmental organisation having consultative status with the Economic and Social Council and the High Commissioner for Refugees. It also has operational relations with UNESCO.

For more than thirty years now, the Institute has acted as a forum favouring reflection, discussion, exchanges of views and experiences, and promoting research into new approaches in this field. As an independent organisation, the Institute especially encourages dialogue among governments, organisations and institutions concerned with humanitarian issues, as well as individual experts. Since its creation, the Institute has dealt with a broad range of subjects regarding humanitarian law and action. It has also shown how the law of human rights, humanitarian law and refugee law are all interrelated.

DRAGAN EUROPEAN FOUNDATION

The Dragan European Foundation is an institution at European level, operative since 1950 and legally constituted in Palma de Mallorca in 1968 by Prof. J. Constantin Dragan, a man of a profound and wide culture, a literary man, a history of civilization scholar, a businessman and a management and marketing expert.

The aim of the Foundation is to promote learning, through the spreading and circulation of ideas and through research, in order to develop a spirit of collaboration among the nations, aiming at the formation of a real European consciousness.

To carry out its by-law aims, the Dragan European Foundation has given birth to various international activities such as private universities (the Dragan European University in Romania and the Golden Age University in Milan), postgraduate specialization courses (Superior Centre for Advanced Business Management), publishing, radio and television activities, the Cybernetics Academy Odobleja, the European Association for Bioeconomic Studies, the creation of specialized issues, among which the Bulletin européen, published since 1950, the participation in the programmes of the United Nations Educational, Scientific and Cultural Organization through the establishment of the UNESCO Centre in Milan, the creation of the European Centre for Thracian Studies and of CERMA, European Applied Medical Research Centre, a series of lectures and international symposia.

The Dragan European Foundation believes that a real European unity is not only a political and economic event, which should be necessarily achieved through the creation of a European cultural community.
Thanks to the generosity and friendship of the Dragan European Foundation, particularly of its founder, Professor Constantino Dragan, we have had the opportunity to publish the proceedings of our International Congress on Humanitarian Action and State Sovereignty and the 25th Round Table on Current Problems of International Humanitarian Law held from 31 August to 2 September 2000 and from 6 to 8 September 2001, respectively, in San Remo.

We would also like to thank all rapporteurs and chairmen of sessions for their contribution. The participants benefited from the well-prepared reports and discussion papers presented at the two Round Tables. Moreover, the Chairmanship of both Round Tables very much appreciated the interventions and constructive discussions of the participants, who contributed to the successful results and well-elaborated conclusions and recommendations which they then adopted.

The open and friendly humanitarian dialogue, which is a great tradition of our Institute, was fully respected during all meetings.

It is our sincere wish that this publication be a useful document and tool for all concerned for and involved in humanitarian action, particularly, in respect of international conventions and instruments protecting human beings in different conflict situations, especially armed conflicts.

This publication has been supervised by Dr. Stefania Baldini, Secretary-General of the International Institute of Humanitarian Law, and Dr. Guido Ravasi, Secretary-General of the Dragan European Foundation. Special thanks should be given to Dr. Stefania Tripodi, from the University of Turin, who compiled and edited the text, to Dr. Gian Luca Beruto, Research Officer at the Institute, and to Shirley Morren, Librarian of the Institute, who checked the final proof.

Prof. Jovan Patrnogic
President, IIHL
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UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
FONDAZIONE CASSA DI RISPARMIO DI GENOVA E IMPERIA
COMITÉ INTERNATIONAL DE LA CROIX-ROUGE
INTERNATIONAL ORGANIZATION FOR MIGRATION
THE REPUBLIC OF KOREA NATIONAL RED CROSS
CROIX-ROUGE MONÉGASQUE
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FÉDÉRATION INTERNATIONALE DES SOCIÉTÉS DE LA CROIX-ROUGE ET DU CROISSANT-ROUGE
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San Remo, 31 August - 2 September 2000

ON THE OCCASION OF ITS XXXth ANNIVERSARY
INTERNATIONAL CONGRESS
HUMANITARIAN ACTION AND STATE SOVEREIGNTY

IN OCCASIONE DEL XXX ANNIVERSARIO
CONGRESSO INTERNAZIONALE
AZIONE UMANITARIA E SOVRANITÀ DEGLI STATI

À L'OCCASION DU XXXème ANNIVERSAIRE
CONGRÉS INTERNATIONAL
ACTION HUMANITAIRE ET SOUVERAINETÉ DES ETATS

Under the auspices of / Sous les auspices des / Sotto gli auspici di

International Committee of the Red Cross
UN High Commissioner for Refugees
UN High Commissioner for Human Rights
International Organization for Migration
International Federation of Red Cross and Red Crescent Societies
OPENING SESSION
MESSAGGIO

Carlo Azeglio CIAMPI
Presidente della Repubblica

Sono lieto di rivolgere un caloroso saluto agli organizzatori e ai partecipanti al Convegno per il trentesimo anniversario della fondazione dell’Istituto Internazionale di Diritto Umanitario. Ad esso rivolgo un vivo apprezzamento per la costante azione volta a promuovere l’applicazione delle norme internazionali a tutela dei diritti fondamentali della persona. Il Congresso focalizza la sua attenzione su “Azione Umanitaria e Sovranità degli Stati”. Condivido pienamente questa scelta. L’attuale fase storica, ancora caratterizzata da conflitti armati e da ripetuti episodi di violazione dei diritti umani, richiede ogni possibile impegno, nazionale e multilaterale, per consentire all’intervento umanitario di operare con sempre maggiore rapidità ed efficacia. La tutela della persona e della dignità umana è per l’Istituto Internazionale di Diritto Umanitario il principio ispiratore delle sue iniziative; per l’Italia costituisce una costante della propria azione internazionale.

Per questo mi è ancora più gradito formulare un caloroso incoraggiamento a proseguire la vostra trentennale attività, unitamente ai migliori auguri per il successo dei lavori del convegno.
MESSAGE

Kofi ANNAN
United Nations Secretary-General

I am delighted to extend my warmest congratulations to the International Institute of Humanitarian Law on its 30th Anniversary. It is highly appropriate that the Institute, which has made such important contributions to developments in the field of humanitarian law, should mark this milestone with an international Congress on the theme of “Humanitarian Action and State Sovereignty”.

Events over the past few years - some of them tragic - have taught us that we must learn more effective ways of protecting the innocent where we can, and alleviating their suffering where we cannot. We must develop the understanding, the legal instruments, the methods and the means that will enable us to do so. We must find the tools to provide humanitarian assistance where, in the past, we have sometimes experienced difficulties or even failure. You are no doubt aware of the efforts the United Nations is making in this regard. The reports on Srebenica and Rwanda published last year, and the Report by the Panel on Peace Operations issued last week, are all intended to help us develop the United Nations into a truly credible force for peace in the 21st century. It is crucial that all actors in the humanitarian field - inside and outside the UN family - continue to be engaged in efforts to protect innocent civilians, wherever they may live. In this context, I commend the Institute on its important work over many years. On behalf of the United Nations, I extend to you my best wishes for a successful Congress on a theme that is of crucial importance to our Organization. I look forward to hearing about the outcome of your deliberations.
Gentile Professore,
La ringrazio per la Sua cortese lettera del 31 maggio con la quale ha voluto invitarmi a partecipare al Congresso Internazionale su “Azione Umanitaria e Sovranità degli Stati”, che si terrà a Sanremo tra il 31 agosto e il 2 settembre prossimi.

Desidero esprimere tutto il mio plauso per l’interessante iniziativa; sono tuttavia rammaricato di doverLe comunicare che un’agenda eccessivamente densa di impegni istituzionali mi impedisce di rispondere positivamente al Suo invito.

Nell’augurarLe il pieno successo dell’incontro, mi è gradita l’occasione per inviarLe distinti saluti.

Con molta amicizia.
MESSAGGIO

Lamberto DINI
Ministro degli Affari Esteri, Italia

Egregio Presidente,

Mi riferisco alla Sua cortese comunicazione d’invito, del 31 maggio scorso, al Congresso Internazionale su “Azione Umanitaria e Sovranità degli Stati” promosso dall’Istituto Internazionale di Diritto Umanitario in occasione del Trentennale della sua fondazione, di cui La ringrazio. Sono dolente che impegni previamente assunti non mi consentano di partecipare all’inaugurazione del Congresso su una tematica di grande rilevanza ed attualità cui interverranno insigni relatori ed eminenti personalità. Vorrei nondimeno esprimere un vivissimo plauso all’Istituto Internazionale di Diritto Umanitario, in occasione dell’apertura del Congresso, per l’azione incessantemente condotta, in collaborazione con i Governi, i fori internazionali, le sedi accademiche e la società civile, per la promozione e la diffusione dei valori universalì che l’Istituto ha inteso perseguire per una sempre più incisiva applicazione del diritto umanitario. In questo spirito rivolgo a Lei, chiarissimo Presidente, ai competenti del Consiglio dell’Istituto, ai relatori ed agli astanti tutti il più fervido auspicio per il successo del simposio, formulando i migliori auguri per un proficuo proseguo delle attività dell’Istituto.

Con distinti e cordiali saluti.
MESSAGE

Princess MARGRIET of The Netherlands
Chairman of the Standing Commission of the Red Cross and Red Crescent Movement

presented by

Mohamed AL-HADID
Vice-Chairman of the Standing Commission of
the Red Cross and Red Crescent Movement

Your Royal Highness,
Mr. President of the International Institute of Humanitarian Law,
Mr. Mayor of the City of San Remo,
Your Excellencies,
Distinguished Guests,
Ladies and Gentlemen,

Let me start by congratulating, on behalf of the Standing Commission of the Red Cross and Red Crescent, the International Institute of Humanitarian Law for its 30th Anniversary, 30 years in which the Institute has played an important role in the development and dissemination of International Humanitarian Law. An International Congress such as this one is certainly an excellent way to celebrate 30 years of involvement in humanitarian dialogue. For those of you who are less familiar with the international structures of the Red Cross and Red Crescent Movement, I would like to underline the role of the Standing Commission of the Red Cross and Red Crescent.

The Standing Commission, as the trustee of the International Conference of the Red Cross and Red Crescent, encourages the implementation of resolutions of the Conference and promotes harmony and co-ordination among the components of the Red Cross and Red Crescent Movement (176 National Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies).

So I’m sure you will understand that the Standing Commission shows a great interest for initiatives contributing to the development and dissemination of International Humanitarian Law (IHL). IHL, as any other law, is subject to discussion and evolution. This is normal: lawmakers should be a formal expression of the changes in our society. Many debates have been held over the last 10 years and papers written with regard to important themes of IHL, making it a dynamic concept. Because of the rapid changes in our society I think your Congress comes at the right time, focusing on one of the most important elements of the ongoing debate on humanitarian action and how it relates to State Sovereignty.

This is very much a time for concern and for reflection in general, but certainly also in the area of International Humanitarian Law, and I am happy to see that the Institute continues to be an important forum for reflection, discussion and exchange of ideas in the humanitarian field. The Red Cross and Red Crescent Movement itself reinforced its collective commitment to IHL at its 27th Internatio-
nal Conference in 1999 through a Plan of Action for the years 2000-2003. You will have a special session on the outcome of the 27th International Conference of the Red Cross and Red Crescent tomorrow morning, so I will not go into any detail. Suffice to say now that this Plan of Action has three major themes: the protection of victims of armed conflict through the respect of International Humanitarian Law, humanitarian action in times of armed conflict and other disasters, and strategic partnerships to improve the lives of vulnerable people. Under these three themes one can find 12 specific goals and 50 proposed actions, so it is an ambitious undertaking indeed. One of the goals is to develop innovative ways to promote the acceptance of international humanitarian law by all relevant actors in armed conflict situations and to explain and communicate the International Conference, inside the Movement and externally, to local authorities and the community.

We hope of course that this Institute can help the Red Cross and Red Crescent Movement in studying and researching these new ways of developing IHL. “Understanding of the respective roles of political, military and humanitarian actors, and protection of humanitarian personnel” is another example of where you can contribute.

The overall concern of the Red Cross and Red Crescent when it comes to humanitarian action has remained what it was before: to ensure that all victims should be able to receive protection and assistance. This concern is of course based on the first of the Red Cross and Red Crescent fundamental principles, the principle of Humanity which calls for prevention and alleviation of human suffering, wherever it may be found and on the Code of Conduct in Disaster Relief stating that the right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries. But it means also that there is a lot of hard work to do to restore respect for the protective Red Cross and Red Crescent emblems. It is one of our most important challenges of today.

The 27th International Conference (1999) adopted a Resolution on Emblems, inviting the Standing Commission to “establish a joint working group from the Movement and States on the emblems with a mandate to find a comprehensive solution, as rapidly as possible, which is acceptable to all parties in terms of substance and procedure.”

Since then, through various consultations and meetings of the Joint Working Group, the Standing Commission concluded that the time was ripe to suggest the adoption of a Third Additional Protocol to the 1949 Geneva Conventions relating to the emblems, and consequential amendments to the Statutes and the Rules of Procedure of the International Red Cross and Red Crescent Movement. Accordingly there will be two major conferences in the coming months in Geneva: a Diplomatic Conference that will consider the proposed Third Additional Protocol to the Geneva Conventions, and the International Conference of the Red Cross and Red Crescent that will consider proposed amendments to the Movement’s Statutes consequential upon the adoption of the Protocol.

The Standing Commission believes that such a Protocol will resolve the problems the Movement faces in achieving the universality it must offer to humanity at the outset of the new millennium.

The Standing Commission is grateful that the Institute and all the experts
present here are ready to take on this delicate relationship of Humanitarian Action and State Sovereignty, in a world where the State itself is often in crisis or falling apart.

Yes, many questions are still unanswered and problems unsolved, but I’m confident that a forum like this can contribute greatly to finding appropriate answers and solutions to the issues at stake. We are all looking forward to learning from the results of your Congress. May I wish you, on behalf of the Standing Commission and its Chairman, H.R.H. Princess Margriet, a very successful meeting.

Good luck and thank you for your attention.
À l’occasion du 30ème anniversaire de la création de l’Institut International de Droit Humanitaire, il m’est particulièrement agréable de relever le rôle fondamental qu’a joué cette institution en faveur du développement et de la diffusion du droit international humanitaire.

La reconnaissance universelle acquise par l’Institut au sein des instances internationales en trente années d’activité témoigne largement de la valeur de ses prestations au bénéfice de la cause humanitaire.

Il est bon de rappeler que l’Institut International de Droit Humanitaire est né d’une volonté: la volonté d’attirer l’attention des principaux acteurs de la scène internationale sur les problèmes de caractère humanitaire causés par le recours de plus en plus fréquent à la force pour résoudre les différends. Il faut savoir gré à quelques pionniers de l’action humanitaire d’avoir pris conscience que les problèmes humanitaires méritaient qu’on leur accorde la plus grande priorité et d’avoir contribué à la faire partager au sein de la communauté internationale. La volonté est importante; elle ne suffit pas. Encore y faut-il du savoir-faire, de la méthode. Et c’est là où l’Institut a fait preuve d’originalité et de clairvoyance en encourageant le dialogue entre les divers protagonistes de grandes questions de notre temps, décideurs politiques, hommes de loi, théoriciens et praticiens de l’action humanitaire. De nombreux universitaires, des diplomates se sont ainsi mêlés aux représentants d’organisations intergouvernementales – dont celle du système des Nations Unies – et non gouvernementales, sans oublier les représentants du Mouvement International de la Croix-Rouge et du Croissant-Rouge, non pas tant pour résoudre les questions humanitaires complexes dont sont naturellement chargés les organismes compétents, que pour cerner et définir les problèmes, diagnostiquer les situations litigieuses, analyser les arguments, étudier les instruments juridiques pertinents. Leurs efforts ont permis de dégager nombre de propositions reprises par les organismes internationaux compétents ainsi que de nouvelles idées susceptibles de faire progresser le droit et défendre les valeurs humanitaires.

L’anniversaire que nous célébrons aujourd’hui nous permet, avec le recul du temps, de constater combien l’Institut, en conduisant le dialogue humanitaire avec objectivité et souplesse, en privilégiant une démarche pluridisciplinaire adaptée aux problèmes d’actualité, a permis des avancées notables dans le domaine du droit humanitaire, non seulement au niveau des principes et règles, mais aussi dans le domaine important de l’éducation et de la diffusion. Il faut à ce sujet affirmer l’utilité et la valeur de l’enseignement, aux représentants des forces armées de nombreux pays, des règles fondamentales du droit de la guerre.

Ainsi l’Institut a-t-il joué un véritable rôle de précurseur, contribuant à renforcer le droit des conflits armés, à rendre l’action humanitaire plus efficace, à diffuser le message fondamental du respect de la personne humaine et de sa dignité en période de conflits armés et de troubles graves. L’Institut a, à sa manière,

Une excellente collaboration a été entretenu par l’Institut avec la Commission Médico-Juridique de Monaco. Crée en 1934 par mon aïeul, le Prince Louis II, dans le but d’œuvrer à l’amélioration du droit de la guerre, la Commission, lors de ses diverses sessions au sein desquelles les représentants de l’Institut ont joué un rôle majeur, a contribué au développement de règles concernant la protection des populations civiles en temps de conflit armé tout en concevant les normes d’un droit international médical visant à assurer l’efficacité des secours aux victimes de ces conflits. Les dirigeants de l’Institut, également membres de la Commission, n’ont pas ménagé leurs efforts pour assurer le succès des travaux de la Commission.

La Croix-Rouge monégasque également a compris tout ce que l’Institut pouvait apporter au Monde de la Croix-Rouge en accordant une place privilégiée aux problèmes auxquels les Sociétés Nationales de la Croix-Rouge et du Croissant-Rouge étaient confrontées, en cherchant à améliorer leurs prestations et à adapter leurs programmes aux besoins de notre temps. Son soutien amical à l’Institut lui sera toujours acquis.

Je voudrais, en conclusion, formuler des vœux ardents pour que l’Institut International de Droit Humanitaire continue de remplir pleinement son rôle indispensable, pour que, par le dialogue humanitaire, par ce que l’on a justement appelé “l’esprit de San Remo”, il puisse plus que jamais contribuer au respect du droit international humanitaire et des droits fondamentaux de l’homme.
Ladies and Gentlemen,

National civil defence structures should anticipate and foresee disasters, draw up plans for tackling them and develop the practice of learning from experience. Civil defence structures must also play their role of advisor to the full. Indeed, it is up to them to act as the State’s technical counsellor in the field of risk management. Moreover, national civil defence structures must argue in favour of the integration of emergency prevention and preparedness measures into the long-term social and economic development policies.

Finally, national civil defence structures are co-ordinating bodies working in a multi-sectoral framework. As such, it is up to them to co-ordinate the actions of the different State bodies involved in disaster prevention and mitigation. Civil defence must have a global and forward-looking vision of the situations in which it is called upon to intervene.

National civil defence structures are therefore an essential part of the system established by States to face up to disasters. States have, on numerous occasions and during many international forums, indicated their wish to develop common approaches and strategies to face up to disasters. It therefore seems as normal as it is important that their national civil defence structures are able to collaborate and that framework conditions favourable to this collaboration are created.

It is in this context that the ICDO elaborated the Framework Convention on Civil Defence Assistance, which was adopted on the 22nd of May 2000 in Geneva on the occasion of an international conference convened by ICDO. 46 States took part in this Conference. The objective of the Framework Convention on Civil Defence is to encourage and facilitate collaboration between States in the field of civil defence, be it for prevention, preparation, or intervention in the face of natural or man-made disasters. Although bilateral and multilateral agreements on the management of emergency situations already exist, it should be pointed out that there is no universal convention on this question and that administrative constraints linked to the sovereignty of States and to differences in the national definitions of civil defence act as a brake on international co-operation and should be cut, if not done away with altogether.

The adoption of universal principles on which to base disaster assistance in the form of a multilateral treaty can, on the one hand, fill a judicial gap and, on the other, act as a catalyst to the signing of bilateral technical agreements which, as we know, can sometimes be difficult to negotiate during emergency situations.
State Sovereignty and International Law

Until some years ago, the issue of State sovereignty seemed to be fundamental in international law. According to the then prevailing conception, the main purpose of international law was to govern the relations between equal sovereign States and to prohibit the abusive intervention by a State in the domestic affairs of another State.

In response to a request from the International Law Commission in 1970, the Secretary General of the United Nations in a Study on International Law expressed:

“The doctrines of the sovereignty and equality of States have provided the basis of international law since the emergence of a society of independently governed States. These elements have formed the starting point for the development of various fundamental principles of international law relating to the conduct of States. The basic rights and duties of States derived from these principles may thus be said to consist, in essence, in the exercise of sovereignty by individual States and the respect that these States owe in turn to the exercise of sovereignty by others, within an international community governed by international law”.

Many examples can be quoted which highlight the role of sovereignty of a State in the relations between States. Thus, when the United Nations Conference on Trade and Development (UNCTAD) was created in 1964 to lessen the gap between developed and underdeveloped countries which can only be addressed on the basis of interdependence and co-operation, it adopted as its first principle (emphasis added) on “its first principle” - that the economic and trade relations between States had to be based on respect for sovereignty of States, legal equality among them, free determination of peoples and non-intervention in the domestic affairs of other States. The prevalence of international law over State sovereignty is not an issue that was considered at that time. The predominant conception in those times turned the recognition of State sovereignty into the cornerstone of international law. Thus, for example, when in 1967 the United Kingdom of Great Britain and Northern Ireland submitted to the Special Committee charged with examining the principles of international law regulating the relations of friendship and co-operation among States - whose duty would later give rise to Resolution 2625 (XXV) - a proposal by virtue of which the sovereignty of each State is subordinate to the prevalence of international law, such proposal was not admitted. Many other examples could be quoted. Perhaps a significant one concerning the value that in those times was attached to the principle of non-intervention is that when in the 1980s the International Law Commission retook the issue of the Statute of the International Criminal Court, the Special Rapporteur included intervention in the domestic affairs of States as one of the crimes against peace and security of
mankind. This criterion of placing the safeguard of sovereignty in the status of cornerstone of international law has experienced a dramatic change in the past few years. As an example, the United Nations Secretary-General, Kofi Annan, in his Annual Report to the General Assembly, stated: “State sovereignty, in its most basic sense, is being redefined by the forces of globalisation and international co-operation”.

But it is not the elements derived from globalisation or from the need for greater international co-operation nor from technological progress creating an actual interdependence among States that have contributed to a redefinition of State sovereignty delimiting its role in contemporary international law. In my view, the main cause for this change is due to the awareness reached by all governments, members of civilian society, representatives from international community agencies on the universality of human rights. Today we are, on the one hand, convinced that there are imperative rules, of conventional or customary sources which compel all States to respect the human rights of their citizens, and that they cannot claim sovereignty as an excuse for violating such rights and, on the other hand, these rules imply that violations of human rights, wherever they take place - in Africa, Europe or Latin America - affect us all and require that the international community reacts vis-à-vis such violations.

Under contemporary international law, there is no doubt that human rights issues do not belong exclusively to the domestic jurisdiction of States. In reality, very few topics are as regulated by treaties and international conventions, as well as by customary international law, as are human rights. In order to protect these rights, several organs have been created in the framework of both the United Nations and regional organisations. The International Law Commission, while reiterating the importance of non-intervention as a fundamental principle of contemporary international law, when it decided not to include intervention as a crime against peace and security of mankind, has nonetheless indicated its limited scope, especially due to “the decline in the number of situations qualifying as internal affairs and to the emergence of situations, affecting human rights in particular, in which the internal jurisdiction exception was unwarranted”.

For its part, doctrine has, in a practically uniform manner, confirmed this view, which means that, on the one hand, States may not invoke as an internal affair the manner in which they treat people under their jurisdiction and, on the other, that States and international organisations do not cease to respect the principle of non-intervention when they adopt measures against States that violate human rights.

The practice of the United Nations organs is eloquent as far as the priority given to the task of promoting respect for human rights and fundamental freedoms is concerned. All of its organs have been striving in this direction, starting with the General Assembly which has, on a yearly basis, adopted significant resolutions on general or specific human rights items or has called the attention of certain States to their lack of respect for human rights. At the United Nations, progress has been made during the last few years towards a certain consensus that serious, massive or systematic violations of human rights have not only ceased to be a matter of exclusive concern to the States that commit them, but also that the international community has the obligation of contributing to prevent, suppress and sanction such human rights violations.
Thus, the former Secretary-General of the United Nations, Javier Pérez de Cuéllar, indicated in his 1991 Annual Report to the General Assembly that the principle of non-intervention could not be used as a protective barrier which would allow massive or systematic violations of human rights to be perpetrated with impunity. He stated, on that occasion:

“It is now increasingly felt that the principles of non-interference with the essential domestic jurisdiction of States cannot be regarded as a prospective barrier behind which human rights could be massively or systematically violated with impunity. The fact that, in diverse situations, the United Nations has not been able to prevent atrocities cannot be cited as an argument, legal or moral, against the necessary corrective action, especially where peace is also threatened... We need not impale ourselves on the horns of a dilemma between respect for sovereignty and the protection of human rights... What is involved is not the right of intervention but the collective obligation of States to bring relief and redress in human rights emergencies”.

United Nations activities in the field of human rights have not been limited to the General Assembly, the Commission on Human Rights, the Economic and Social Council and relevant subsidiary organs. The High Commissioner for Human Rights has begun to carry out important tasks and the Secretary-General has been increasingly involved in this area. Moreover, the Security Council has determined in important resolutions that certain situations that affect human rights constitute a threat to peace, thus calling for action under Chapter VII of the Charter.

In the post-Cold War era, the Security Council has taken action in crises involving human rights violations or situations having affected such rights, adopting in some cases economic or diplomatic sanctions and even authorising the use of force in accordance with the powers conferred upon it by Chapter VII of the Charter. United Nations practice is unequivocal proof of the validity of the methods employed to protect and even restore respect for human rights.

The discussion which dates back to three decades as to whether the actions to protect human rights would affect State sovereignty or the principle of non-intervention seems to have lost effectiveness nowadays. There is no doubt now that no State can claim its law, its internal jurisdiction or its sovereignty as a cause for failing to comply with its obligation to respect human rights under international law. Therefore, the issue of humanitarian action cannot be subjected to State sovereignty but to the terms or conditions prescribed by international law for the conduct of such humanitarian actions.

**Humanitarian Action and International Law**

Generally speaking, humanitarian action takes place when a State, a group of States or an international organisation enters into the territory of another State with the objective of aiding that State’s inhabitants when their fundamental human rights, including those of survival, have been severely affected. Humanitarian action involves humanitarian intervention as such and humanitarian assistance. These are two different concepts although they share some common elements. Humanitarian intervention applies to a situation where a State or a group of States enters into the territory of another State by using force, with the objective of aiding that State’s inhabitants when their fundamental human rights have been
affected by an internal conflict or by the actions of their Government. This is a long-lasting international law concept which classical authors like Grotius and Vattel had already addressed\(^5\). Even the definition of humanitarian intervention given by Rougier ninety years ago, is still in full force: \("La théorie de l’intervention d’humanité est proprement celle qui reconnait pour un droit l’exercice du contrôle international d’un État sur les actes de souveraineté intérieure d’un autre État contraires aux lois de l’humanité\)\(^6\). Humanitarian assistance is, in turn, a relatively new concept in international law which still has some elements of *lege ferenda* - and of human rights of third generation, as stated by Gros Espiell\(^7\) - and to which this International Institute of Humanitarian Law has made quite a significant contribution. The objective of humanitarian assistance or aid is to help all the victims, without distinction or discrimination and without resorting to the use of armed force against any sector of the population, although there is a possibility of employing military elements in order to provide logistic support. On the contrary, in the case of humanitarian intervention, the use of force has as its objective the protection of a segment of the population whose human rights have been disregarded either by a rival group or by the Government.

There is not a general conventional instrument which explicitly regulates humanitarian assistance, although important elements being part of humanitarian assistance are contained in the four Geneva Conventions of 12 August, 1949 on international humanitarian law and its two Additional Protocols of 12 December, 1977; and in the Convention on the Statute of Refugees of 28 July, 1951 and in the Protocol on the Statute of Refugees of 16 December, 1966. Some draft conventions on the subject until now have failed to be adopted. However, there are a number of resolutions both of the General Assembly and of the United Nations Security Council, which relate to humanitarian assistance. In that respect, it is worth recalling that Resolution 43/131 of the UN General Assembly of 1988 stated. \("The abandonment of victims without humanitarian assistance constitutes a threat to human life and an offence to human dignity\)\(^8\).

As so well noted by Jovan Patrnogic, \("the term humanitarian assistance is used very broadly and there is no generally acceptable definition. It certainly includes the provision of goods essential for the preservation of life and the health of those persons who would become victims if they did not receive timely and adequate humanitarian assistance. The term covers essential foodstuffs, water, clothing and minimum shelter, including heating in cold weather. It also covers certain basic medical supplies and medical equipment. In addition, the preservation of the lives of the victims necessarily includes certain basic services such as medical and social services, civil defence, tracing of close relatives and the provision of spiritual comfort, among possibly other services\)\(^9\). This distinction between humanitarian intervention and humanitarian aid is implicit in the Judgement of the International Court of Justice in the case concerning the Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), where the Court, on the one hand, specifically rejected the use of force on the part of a State as an \("appropriate method to monitor or ensure respect for human rights\)\(^10\)\(^\text{a}\), while, on the other hand, it accepted \("humanitarian aid\)\(^11\)\(^\text{a}\) as lawfully declaring that \("there can be no doubt that the provision of strictly huma-
nitarian aid to persons or forces in another country, whatever their political affiliation or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.” The issue of humanitarian actions has gained importance under current international law. The generalised awareness existing today of the universality of human rights and the need to adopt actions where gross violations of such rights occur, as well as the post-Cold War environment, have paved the way for the international community to seek to protect, save or aid people gravely affected by certain situations.

Currently, humanitarian actions should be analysed in the context of certain guiding principles of contemporary international law, especially those of non-intervention, the prohibition of the use or threat of force in international relations and respect for human rights. Sometimes, the harmonisation of these principles is not easy. It is precisely when armed action, either individual or collective, takes place that the contradictions among these principles become most evident.

On the one hand, recourse to force might mean endangering the international community’s main objective, i.e., the maintenance of international peace and security; on the other hand, an armed operation destined to protect the lives of people or their fundamental rights might address another essential objective of the contemporary international community such as respect for human rights. Perhaps nobody has faced the challenge of addressing those dilemmas better than the current United Nations Secretary-General, Kofi Annan. Both in his last year’s Annual Report to the General Assembly and in an article published in a British magazine, Secretary-General Annan addressed these issues by using two significant examples. The tragedy of the genocide occurred in Rwanda partly due to the inaction of the international community and to the action taken in Kosovo by a regional organisation using power without the Security Council’s authorisation.

Kofi Annan expressed: “The genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder. But this year’s conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority”. It has cast in stark relief the dilemma of the so-called “humanitarian intervention”. On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked? The inability of the international community to reconcile these two compelling interests in the case of Kosovo can be viewed only as a tragedy.

“To avoid repeating such tragedies - added Secretary-General Annan - it is essential that the international community reach consensus, not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom”.

This paper will attempt to answer those questions and thus to contribute to one of the greatest debates offered by international law in the XXI century. To that effect, humanitarian actions will be analysed both concerning the intervention and assistance that can be undertaken by a State, unilaterally, by a group of States, collectively, or through a regional organisation and by the United Nations.
Unilateral Humanitarian Action

For methodological reasons, humanitarian assistance should be analysed separately from armed intervention as conducted unilaterally by one State into the territory of another.

In principle, humanitarian assistance when provided by one State to another cannot be regarded as unlawful intrusion. However, there is a certain consensus that this assistance cannot be provided without the consent of the competent authorities of the State in which such assistance is to be provided. Practice also shows that the consent of the State involved is required to make possible the provision of humanitarian assistance. So it is prescribed for example, by article 2 of the Inter-American Convention to Facilitate Disaster Assistance adopted in Santiago, Chile on 12 June 1991 during the 21st session of the OAS General Assembly. Even for those who hold that humanitarian assistance is a human right, the existence of this right does not give rise to a correlative one nor to a duty of third States to intrusion in that respect. As Gros Espiell has pointed out: “to uphold the existence of a right and a duty is to incur a gross juridical and conceptual error; it is a violation of the true, actual and valid principle of non-intervention in its most pure and true meaning, thus making it possible for all States - but actually for the most powerful ones - flying the flag of humanitarian reasons, to intervene in the affairs of other States whenever they want, however they want and with whatever procedures they want”.

A complex problem is present where the authorities, without any justifiable reason, refuse to provide or to grant their consent to receive humanitarian aid. In that case, it is possible for the State having offered assistance - and even for a third State - to take measures or countermeasures against the State which without any reasonable grounds refused to receive it, provided such measures or countermeasures are compatible with the requirements of international law. The ground for the adoption of those measures and countermeasures is that a State, by refusing to receive humanitarian aid, is violating an international obligation of respect for the fundamental rights of its inhabitants, both during an armed conflict and during an emergency. In particular, Article 14 of the Second Additional Protocol to the Geneva Conventions of 1977 becomes applicable, which prohibits the use of hunger as a combat method. Although there are only a few precedents on this matter, it should be recalled that Resolution 45/170 of 1990 of the United Nations General Assembly, condemned Iraq for refusing the sending of humanitarian aid offered to the Kuwaiti Government in exile to the occupied Kuwait.

What a State cannot do, under any circumstance, is to use force against the State which refused humanitarian assistance. As Jovan Patrnogic well said: “When international humanitarian action requires coercion, the decision to resort to it can only be taken by an organ authorised by international law. Such an organ, under present circumstances and in conformity with the United Nations Charter, could only be the Security Council. The latter should determine whether there is an alternative to the use of force and whether the necessary internal steps and procedures have been exhausted”. As to humanitarian intervention, some writers have found strong arguments in support of armed intervention as an exception to the prohibition of the threat of the use of force if it is aimed at the protection of fundamental human rights, especially the right to life, endangered by massacres, extra-judicial executions and other atrocities,
or if a despotic tyranny can be overthrown through the use of force. In general, those who favor this type of unilateral armed intervention maintain that no other option exists, that it does not constitute a violation of Article 2, paragraph 4, since such intervention is not intended to affect the territorial integrity or the political independence of the invaded State, and that it is not incompatible with the purposes of the United Nations. On the contrary, the intervention’s objective would be to re-establish respect for human rights, one of the purposes of the Organisation.

The starting point for these positions, especially when presented before the end of the Cold War, is the ineffectiveness of United Nations organs in achieving their purposes. Professor Richard Lillich, for example, referring to India’s intervention in Bangladesh indicated that “the doctrine of humanitarian intervention, whether unilateral or collective, surely deserves the most searching reassessment given the failure of the United Nations to take effective steps to curb the genocidal conduct and alleviate the mass suffering...”

For Professor Michael Reisman from Yale University, Article 2, paragraph 4, of the Charter was never conceived as “an independent ethical imperative of pacifism”, but should be regarded as an element of the collective security system set up by the Charter. This system, according to Reisman, has failed due to the paralysis of the Security Council, which has been unable to accomplish the tasks with which it has been entrusted. In his judgement, the situation of the international order would be similar to that of the “Wild West” of the United States in the nineteenth century, when it became clear that the sheriff was incapable of maintaining order. As it is necessary to maintain a minimum order in the international system, in particular, to ensure respect for the fundamental principle of political legitimacy in contemporary international politics - i.e., “the enhancement of the ongoing right of peoples to determine their own political destinies” - Article 2, paragraph 4, should be interpreted in terms of this key postulate. Although Reisman admits that “all interventions are lamentable,...some may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their Government and political structure”. Nonetheless, this interpretation of the Charter of the United Nations, which would allow the unilateral use of force for humanitarian reasons, does not have the support of the vast majority of publicists, which consider Article 2, paragraph 4, as a fundamental norm of contemporary international law, to which there are no exceptions other than those established by the Charter itself. Furthermore, there is no decision of an international tribunal on a resolution from any organ of the United Nations that has recognised the unilateral right of a State to intervene in another State for humanitarian reasons without the latter’s consent. On the contrary, in many cases, those armed interventions have been condemned by the United Nations General Assembly. Unilateral armed humanitarian interventions, therefore, have no justification in contemporary law. This was confirmed by the International Court of Justice in the Nicaragua case, which stated the following with regard to an intervention based on the ideological or political nature of a certain regime: “The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.”

“In any event, while the United States might from its own appraisal of the situation
as to the respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States...”

Collective Humanitarian Action

If intervention by one State in another is prohibited by contemporary international law, even though humanitarian reasons are invoked, said prohibition also extends to a group of States. In this regard, it is significant to note that, on the basis of Article 18 of the OAS Charter, the constituent instruments of the other main regional organisations, as well as Resolutions 2131 (XX) and 2625 (XXV) of the General Assembly of the United Nations categorically state that: “no State or group of States has the right to intervene...”.

However, as stated above, the actions adopted by a group of States or a regional organisation of States in favour of human rights is not regarded as a violation of the intervention principle; therefore, the political, economic or diplomatic measures or sanctions adopted by a regional organisation against a State responsible for violating human rights are entirely lawful. Even one possible field of development for regional organisations can be the provision of humanitarian assistance to those who require such assistance, particularly in case of national catastrophes. In the case of the Organisation of American States, for example, a convention was adopted in 1991 to facilitate assistance in case of disaster. As was so well mentioned by Jovan Patrnogic, “it should be added the right of international organisations to provide humanitarian assistance in accordance with their terms of reference, and also the right of States to offer humanitarian assistance independently. As a corollary there may be a duty of these organisations to offer humanitarian assistance”. But, in any case, no armed intervention may be carried out by a regional organisation unless it has been approved by the Security Council. Even though regional organisations have ample powers to deal with such matters relating to the maintenance of international peace and security as are appropriate for regional action, in accordance with Article 53, paragraph 1, of the Charter, the application of coercive measures by regional arrangements or agencies requires Security Council authorisation.

In practice, armed interventions carried out by regional organisations without the Security Council’s authorisation have set a hazardous precedent and caused greater damage than what they intended to avoid. Such is the case, for example, of the intervention in Dominican Republic in 1965, endorsed by the OAS. This intervention provoked a veritable crisis within the Organisation of American States, which took several years to overcome. In our view, it is not a convincing argument for the use of force by a regional organisation to claim the paralysis of the Security Council due to the use or abuse of veto. Based on that hypothesis, it would seem more lawful to resort to a majority of the United Nations General Assembly to have its authorisation for the use of force, in extremely qualified cases, in a manner similar to that of Resolution 377
of 1950, “Uniting for Peace”.

It should be noted that the Charter of the United Nations provides that the Security Council itself may utilise regional arrangements or agencies for enforcement action. However, the provision contained in Article 53, paragraph 1, has not been used. Yet nothing precludes that, in the future, as effective co-operation between regional organisations and the United Nations is being enhanced, the Security Council may delegate to regional organisations some of its authority with respect to humanitarian crises. In the last years, a close relationship has developed between, on the one hand, the Security Council and the Secretary-General of the United Nations, and on the other, the competent organs of regional organisations, acting in co-ordination with regard to humanitarian emergencies or in situations where basic human rights have been violated. Thus, there are numerous Security Council Resolutions referring to the European Community - and later to the European Union - with respect to the crisis in the former Yugoslavia; to the OAU in connection with Somalia, Liberia and Rwanda; or to the OAS in the case of Haiti. In some of these resolutions, the Security Council has even recognised the importance of co-operation between the United Nations and regional organisations in the context of Chapter VIII of the Charter of the United Nations.

Humanitarian Action by the United Nations

In the United Nations, the possibility of collective action is envisaged in Chapter VII entitled “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”. Article 39 establishes that the Security Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations, or decide what measures shall be taken... to maintain or restore international peace and security”. These measures can be of two kinds: there are those which do not imply the use of armed force which, according to Article 41, “may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communications, and the severance of diplomatic relations”; if these measures are inadequate or have proved to be inadequate, according to Article 42, the Security Council “may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security... including demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations”.

The conditions created by the post-Cold War period have re-established the importance of these provisions, which, although included in the Charter, remained a dead letter for many years. The agreement in 1990 to expel Iraq from Kuwait by force seemed to be an application of the collective security system set up by the Charter in 1945. This was followed by Resolution 688 (1991) of 5 April 1991 in which the Security Council expressed its concern regarding the repression of the Iraqi civilian population in many parts of Iraq, including Kurdish-populated areas, which “threaten[ed] international peace and security in the region”. This resolution opened the door for the Security Council to possibly determine, in the future, that similar situations constitute a threat to international peace and security.

As regards humanitarian assistance and its relations to the re-establishment and consolidation of peace, the Security Council in its Declaration of 26 February
1993, considered humanitarian assistance measures as an essential instrument for the consolidation of peace, while recalling that the humanitarian dimension should be taken into account in planning and sending fact-finding missions. The Security Council, in turn, in its Declaration of 28 May 1993, highlighted the close relationship between humanitarian assistance and peacekeeping operations. In the past 1990s, in the cases of the former Yugoslavia, Somalia, Liberia, Haiti, Rwanda, among other countries, the Security Council made use of the powers conferred upon it by Chapter VII of the Charter, declaring that such situations constituted a threat to international peace and security and, apart from adopting important economic, diplomatic, humanitarian, political and judicial measures, established multilateral military forces to carry out intervention and international humanitarian measures. In both cases, it seems evident that the relevant measures were adopted in the implementation of the general provisions of Article 42 of the Charter.

A significant evolution occurred in practice with respect to these crises: “peace-keeping” operations were initially established and later, as the situation deteriorated, they were transformed into “peace-making” or “peace-enforcement” operations with a multinational military contingent attempting to fulfil its mandate under difficult conditions.

Thus, although in the Haiti and Rwanda cases, peacekeeping operations were established at the outset, the Council, acting under Chapter VII, later authorised Member States to form multinational forces “using all necessary means”. This authorisation, which implies the granting to any State of the discretionary power to use armed force through a multilateral arrangement, marks the beginning of the institutionalisation of collective intervention with humanitarian objectives. Even though collective humanitarian interventions undertaken or authorised by the Security Council are entirely lawful and their basis, which consists in linking respect for human rights to international peace and security, appears to be legitimate, they have, in practice, raised some problems. There are certain lacunae, which it would be worthwhile to address through the adoption of general criteria leading to the consolidation of the legality and legitimacy of such interventions.

First of all, in our view, there should be a certain consensus as to the determination of the existence, within a State, of a situation characterised by grave violations of human rights, whether by government action, by an internal conflict or by a serious natural disaster, and, moreover, as to the conviction that such situation will persist if the international community does not take action through humanitarian action.

Such a consensus must obviously be reflected by the qualified majority in the Security Council; but an important element for States to take into account, especially if the situation is to be qualified as a threat to international peace and security, might be the position of States which belong to the same region as the State concerned. Regional organisations are called upon to take an active role in dealing with matters regarding the respect of human rights.

They have the means and the experience to do so and they have demonstrated their effectiveness in this area. Therefore, it would seem important to strengthen them in the fulfilment of their tasks. In cases where the Security Council would be seized of the matter, it is important to achieve co-ordination between the United
Nations and the respective regional organisations. The successful initial experience in the Haiti crisis, where a joint United Nations/OAS International Civil Mission was constituted and where the same person - the Former Minister of Foreign Affairs of Argentina, Dante Caputo - was the Special Representative of both the Secretary-General of the United Nations and the Secretary-General of the OAS, may serve as a precedent for similar situations which may arise in the future. In any case, it is important to underline that, before adopting any decision which entails the use of armed force under the terms of Article 42 of the Charter, the Security Council should strive to remedy the situation without resorting to that extreme measure. In this context, recourse to regional arrangements or agencies, foreseen in Article 33 of the Charter in Chapter VI related to the settlement of disputes, is a measure which might be of great usefulness in situations relating to human rights and humanitarian actions.

This possibility is one of the many options open to the Security Council in the framework of Chapter VI, that is, before determining that a situation constitutes a threat to international peace and security. Even if the Security Council, in the light of the failure of other measures, were to so characterise a situation, thus authorising itself to act under Chapter VII of the Charter, use of the means provided for in Article 41, which do not involve the use of armed force, would be preferable. After having exhausted all prior options and having demonstrated that there are no other efficient means available to put an end to a situation characterised by grave human rights violations, the decision to resort to the use of armed force under any of the modalities envisaged in Article 42 or by later United Nations practice should be implemented collectively and not by just one State, irrespective of how important or well-meaning it may be. After all, it is the international community which is reacting, legally and legitimately, to the horror of the suffering people. At any rate, the practice which has developed in recent years in connection with humanitarian action and the confrontations that it has given rise to, indicate that this is an issue that is, by all means, bound to become one of the most important issues of international law of the XXI century.

Thus, it is fundamental that from this debate - to which the International Institute of Humanitarian Law has made such a great contribution - a conciliation can emerge between an ever increasing protection of human rights, including the right to humanitarian assistance, with the full prevalence of the guiding principles of international relations such as the prohibition of the use or threatened use of force.

2 The proposal by the United Kingdom of Great Britain and Northern Ireland is contained in Resolution 2625 (XXV), 1967.
The theory of humanitarian intervention is precisely that which recognizes as a right the exercise of international control by a State over the acts of internal sovereignty of another State which are contrary to the laws of humanity. 


Ibidem, p. 124.


H. GROS ESpIELL, op. cit., p. 313.

J. PATRNOGIC, op. cit., p. 17.


I.C.J. Reports 1986, p. 133.


See for example, Article 8 of the Pact of the League of Arab States and Article 3 of the OAU Charter.

J. PATRNOGIC, op. cit., p. 21.

This Article leads to analyze the NATO intervention in Kosovo. At any rate, the author shares the concerns and apprehensions expressed in that respect by the UN Secretary-General, Kofi Annan.


These measures have included, inter alia, a call for cease-fire; a complete and general embargo in deliveries of weapons and military equipment; economic sanctions; a ban on military flights; the establishment of safe areas; the establishment of a commission of experts to examine and analyze information relating to evidence of serious violations of international humanitarian law, including possible acts of genocide; and the establishment of an international tribunal for the prosecution of persons responsible for serious violations of humanitarian law.


Your Highnesses,
Excellencies,
Ladies and Gentlemen,

Let me first bring greetings from the Secretary-General of the United Nations, Kofi A. Annan. He sends you his warmest congratulations on the occasion of the 30th Anniversary of the Institute and his best wishes for a successful Congress on “Humanitarian Action and State Sovereignty”. No doubt, you will recall that he addressed important aspects of this topic in his 1999 Annual Report on the work of the organization and his statement before the General Assembly in September the same year. This statement triggered an extensive debate on the dilemma that exists when the interests of State sovereignty are confronted with the need for humanitarian intervention.

I have been asked to address the topic “Humanitarian Action and the Charter of the United Nations”. At the outset I should like to make my customary disclaimer when I speak on occasions like the present, that what I will say represents my own views and does not necessarily reflect the opinion of the United Nations. Needless to say, this disclaimer is of particular importance if the topic is of a sensitive nature, as in the present case.

It gives me great pleasure to address you under the Chairmanship of Judge Abdul Koroma of the International Court of Justice, my good friend for many years.

I am also glad to see Professor Edmundo Vargas Carreño on the panel. As a matter of fact, his “Introductory Report” was sent to me a week ago, which gave me the opportunity to study it this past weekend. I found it problematic and helpful; problematic, because it actually covers in a very succinct manner the topic which I am supposed to address; helpful, because it sets out in an excellent manner and in a very limited space the issues that we are discussing here. The “Report” contains a clarification of the concepts with which I very much sympathise; it presents the dilemmas; and it points to the options.

Against this background, I decided to approach the topic from a slightly different angle than I had intended from the outset. Since I agree with Professor Vargas Carreño’s analysis, I will only briefly concentrate on the definition of “humanitarian intervention” and “State sovereignty”. I will then focus on what happened at the United Nations last year, when the matter was discussed. My main focus will be on the ability, politically and practically, of the United Nations to undertake humanitarian intervention and the conclusions that can be drawn at the present juncture. Finally, I will look into what has to be done in the immediate future.

With respect to the two concepts mentioned in the title of this Congress, “hu-
manitarian action” and “State sovereignty”, I agree with Professor Vargas Carreño. By definition, “humanitarian action” must be understood in a very broad sense. Obviously and as it appears from the program of this Congress, humanitarian action can take many forms. In most cases one would assume that such action is welcome and takes place with the consent of, and sometimes at the request of the State concerned.

My intention is not to go into detail in describing these kinds of actions; this is the task of others present here. I would just like to point to the need for a clear distinction between the broader concept “humanitarian action” and “humanitarian intervention”, which carries the notion of an action that is taken against the will of someone else, in this particular case a sovereign State.

With respect to “State sovereignty”, or, as it is often referred to “territorial sovereignty”, the picture is more complex. Whether you use one or the other, there is a clear connection between them in the sense that State sovereignty requires a territory over which the State in question can exercise its sovereignty.

As Professor Vargas Carreño points out, there is a traditional view that “territorial sovereignty” means the power of the State to exercise supreme authority over all persons or things within its territory, while at the same time respecting the sovereignty of other States. There is in this context often reference to the peace accords of Westphalia in the 17th Century, which gave States a more or less unlimited freedom of action.

This idea is no longer accepted. As you have just heard, today the picture is far more complex. As the Legal Counsel of the United Nations, my primary source in seeking guidance in defining the concept is obviously the Charter of the United Nations. Reference must of course be given to Article 2, paragraph 7 as a fundamental provision reflecting the concept of “territorial sovereignty”. Reference must further be made to Article 2, paragraph 1 on the sovereign equality of States and the famous Article 2, paragraph 4 on the prohibition of the threat or use of force against the territorial integrity or political independence of any State unless such an action is taken pursuant to the Charter. As I have pointed out on other occasions, these provisions cannot be read in isolation from other provisions of the Charter. I recall in this context the provisions in the Preamble reaffirming the faith of the United Nations in fundamental human rights, and the provisions calling for respect for human rights and fundamental freedoms for all without any distinction in the provision that sets out the purposes of all the Organization. I refer to Article 1, paragraph 3.

Apart from the Charter, reference in this context is also often made to the Friendly Relations Declaration, which was adopted by the General Assembly in 1970. This Declaration focuses on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations. It focuses on the sovereignty aspect, since there are no provisions concerning the duty not to intervene in matters within the domestic jurisdiction of any State, with specific reference to the Charter; the duty of States to co-operate with one another, again with specific reference to the Charter and the principle of equal rights and self-determination of peoples. Interestingly enough, there are also provisions in the Declaration that focus on the protection of individuals in
the interest of the international community. What about doctrine, what guidance do we find there? Professor Vargas Carreño has made some references. Certainly, many attempts have been made to clarify the concept of “territorial sovereignty”. However, I think that it is fair to say that there is no clear definition agreed upon. The intervention by the Secretary-General in the debate in the General Assembly last year provoked a vivid discussion which, in a sense, demonstrated that there are very different views on this topic. Also new concepts have appeared in the debate. I refer to the “sovereignty of peoples” and “sovereignty of the individual”. The only clear conclusion one can draw is that the traditional concept is being disputed and can no longer be upheld.

No doubt, many are wrestling with the question on how to consolidate two elements that present themselves in connection. One is the desirability on the part of the State, or rather those who govern it, to retain as much freedom as possible to act. The other is the more general interest among the States in the global community and, perhaps even more, among peoples around the world for which this freedom is limited in such a way that other individuals or interests within or outside the territory of the State are not harmed. In this latter respect we can note that there has been a tremendous development in the field of human rights and humanitarian law since the establishment of the United Nations. The Organization has often, but not always, taken the lead in achieving this progress. The 1948 Universal Declaration of Human Rights, the 1948 Genocide Convention and the two Covenants of 1966 can serve as good examples among many others. Similar efforts have been taken at the regional level. In particular in the field of humanitarian law, others have made contributions. The 1949 Geneva Conventions and the two Additional Protocols of 1977 are good examples. I note this Congress is organized under the auspices of the most prominent organs that serve humankind in the field of humanitarian law.

The common denominator among the instruments to which I have made reference is that they are meant to protect individuals in relation to sovereign States and individuals in situations of war and armed conflict. It is of course important to note in this context that the international instruments are negotiated by States and that the States in the exercise of their sovereignty freely undertake the obligations that flow from them. Of special interest in this context is the development of international humanitarian law that has occurred under the auspices of the United Nations since 1993. I refer in particular to the establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. The adoption of the Rome Statute of the International Criminal Court in 1998 represents a milestone in the development of international law, a missing link in the international legal system was created.

No doubt, you have noted the efforts of the United Nations to assist both Cambodia and, now lately, Sierra Leone in establishing jurisdiction to end impunity in situations where human rights and humanitarian law have been violated beyond comprehension.

These later efforts only prove the point that the world community is in desperate need of a standing international criminal jurisdiction. The coming into force of the Rome Statute is eagerly awaited by many. Presently there are 98 si-
gnatures and 14 ratifications. When the Rules of Procedure and Evidence and the Elements of Crimes were adopted by the Preparatory Committee on 30 June this year, further clarifications were made. It is my hope that this will speed up the ratification process so that we can achieve as soon as possible the 60 ratifications that are necessary for the entry into force of the Statute.

To conclude on this point, there are many forms of humanitarian action in a broad sense that are in conformity with, if not required by the Charter of the United Nations. However, when humanitarian action is taken in the form of humanitarian intervention, problems present themselves, and this is where I will now focus. I recall that Secretary-General Kofi Annan, in his Annual Report last year made a very clear statement to the effect that the international community must be prepared to engage not only politically but also, if necessary, militarily, in containing, managing and alternatively resolving conflicts that have got out of hand. He said that this would require a better functioning collective security system than exists at the moment. Above all, he said, it will require a greater willingness to intervene to prevent gross violations of human rights (para. 56). As an illustration the Secretary-General drew attention to the case of Kosovo. He pointed to two different viewpoints which precluded the Security Council from intervening: on the one hand, the view held by those who stressed inviolability of State sovereignty and, on the other hand, the view held by those who stressed the moral imperative to act forcefully in the face of gross violations of human rights (para. 66). He also pointed to the dilemma posed by State sovereignty and the need to intervene forcefully, if this is necessary. A famous quote from his summing up is: “Just as we have learned that the world cannot stand aside when gross and systematic violations of human rights are taking place, so we have also learned that intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world’s peoples. This developing international norm in favour of intervention to protect civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community”.

The debate that was sparked by the Secretary-General’s report and his statement in the General Assembly was very vivid and demonstrated different views, some would say disturbingly different views. Unfortunately, the debate in the General Assembly demonstrated a divide along the North-South line. There were strong advocates on both sides, one recommending immediate intervention in situations of grave human rights violations, the other advocating the defence of national sovereignty as a fundamental principle that could not be challenged. Common denominators in the intervention of most speakers were that there was a need to react in cases of gross human rights violations, but there was at the same time a need to define clear and consistent criteria to ensure that humanitarian intervention would be equally applied. Specifically, a reference was made for the need to base any action on the United Nations Charter and other norms of international relations. It is fair to say, however, that the reaction with respect to humanitarian intervention was more or less negative.

Many participated in the media debate that followed. It is interesting to note that many warned against the consequences of a demonstrative willingness to intervene in all kinds of situations where the population of a particular region or
province demands independence. Many warned about destabilizing the present system, which requires approval by the Security Council before action can be taken.

No doubt, many of those concerns are legitimate. It strikes me, however, that “territorial sovereignty” is more of an issue to governments that are less powerful in guaranteeing human rights to their populations. Sometimes, when States invoke “territorial sovereignty” for their protection against external threats, it is in reality relied on for internal purposes. This is not to say that it is inappropriate to invoke “territorial sovereignty” in other fields where measures may be necessary to protect national interests. However, when it comes to human rights and humanitarian law this reference becomes tenuous, in my view. I would like now to focus on the ability of the United Nations to undertake humanitarian intervention and the conclusions that can be drawn at the present juncture.

My point of departure is that only the Security Council has the authority to take a decision on such intervention (the General Assembly and “Uniting for Peace” can only be viewed as an emergency solution). The fact that a conflict may be seen as internal, in no way detracts from the fact that today such conflicts often pose clear threats to international peace and security. The Secretary-General pointed to the situations in Rwanda and Kosovo as obvious cases. In such situations the Security Council not only has the right but also the obligation to determine what measures should be taken in accordance with the Charter to maintain or restore international peace and security. I refer to Article 39 of the Charter.

It is here that we encounter the question of the political ability of the Security Council to act. The two examples demonstrate that, although the situation to most observers was clear, the Council was unable to take action. Certainly, one has to be careful; if the Council is seen to be easily engaged in humanitarian intervention, this can provoke activities, in particular, as was pointed out in the debate, by separatist groups, that would otherwise not have occurred. It is therefore important that the Council acts with extreme caution in order not to threaten the present system for the maintenance of peace and security, as reflected in the Charter.

At the same time it is important that the members of the Security Council take very seriously the obligation laid down in Article 39 of the Charter. As I have maintained on earlier occasions, in the exercise of their duties, the members of the Security Council will in the future act under the eyes of an increasingly well-informed general public. The members of the Council have to act with credibility in these situations. If they do not, they may leave others with no choice but to act on their own in disregard of the letter of the Charter. Provided that such action is proportionate, it will in the eyes of the general public be seen as conformity with the spirit of the Charter, even if, strictly speaking, it violates its letter.

Therefore, the members of the Council have a great responsibility in maintaining the political ability of the United Nations to act in situations where humanitarian intervention is necessary. I view that responsibility to protect the Charter and its viability as being similar to the responsibility that national legislative organs have to protect the constitution of the State. The remedy here is of course that Member States, and in particular the members of the Security Council, gradually must come to a common understanding that makes it possible for them to unite
when action is necessary. The political rifts that have sometimes occurred in the Security Council in the past years and their negative effects on important actions taken by the Council are disturbing experiences.

Let us now focus on the ability from a practical viewpoint of the United Nations to undertake humanitarian intervention. The experiences from Kosovo and East Timor can serve as illustrations. Looking first at Kosovo, Security Council Resolution 1244 (1999) of 10 June 1999 must be understood to contain a clear obligation on the United Nations to govern Kosovo. This is not an easy task, in particular since the resolution at the same time directs that the sovereignty and territorial integrity of the Federal Republic of Yugoslavia must be respected. But the operative paragraphs of the resolution are very precise. The tasks entrusted to the Organization cannot be fulfilled, unless the United Nations Interim Administration Mission in Kosovo (UNMIK) has full executive as well as legislative power. When reference is made to humanitarian intervention, most people would no doubt think of a military operation. Of course, it goes without saying that the military component is a necessary requirement for humanitarian intervention. However, what has become increasingly clear is that humanitarian intervention also requires that some kind of civil administration is established, most probably in a very hostile environment. To deploy such an administration is a difficult task.

First of all, one can point to the difference between a military contingent and a civil administration. While military forces are often organized well in advance and operate under known chairs of command, a civilian administration by definition requires that a number of individuals come together, most probably from different countries. The identification of such persons and the recruitment process is both time-consuming and difficult. Also, the tasks which a civil administration will have to undertake are much more complex and multi-faceted than the tasks of a military operation. This is not to belittle the military efforts, which are extremely demanding if you look at the two examples that we are discussing here.

It did not take long to realize that the civil administration in Kosovo had to engage in many sectors of daily life. In this context, the humanitarian operation is of course of special interest. However, the demands on those who are trying to re-establish a functioning society seem to be unending. They encompass such different matters as the establishment of a functioning judiciary, to providing for public utilities and the daily needs of the population. The complexity of this operation is apparent to anyone who follows the media. Specifically, the ethnic violence and the difficulty of the two societies, the Serb and Albanian, to live together, are apparent. Also, it is a sad fact that those who engage in humanitarian intervention also have to face the problem of criminality, which becomes widespread in all societies where there is no functioning system for the maintenance of law and order.

One observation that we made very quickly in the United Nations Office of Legal Affairs is the need to legislate. Some of the legislative requirements are obvious; there must be a functioning criminal justice system; there must be registration of the people living in the region; there must be education etc. However, right at the beginning it became apparent that it was necessary to legislate also in the fields of, for example, customs, taxes and banking. This means that the United Nations, which traditionally applies international law, now is in a situation where it has
to legislate in fields that under normal circumstances fall within the competence of national parliaments. As of today, UNMIK has issued nearly 80 regulations, in some cases also followed by directions, which are issuances usually of a procedural character to assist in the implementation of a regulation. These issuances are a lower “constitutional” level and must be consistent with regulations.

A particular complicating factor in this situation is that there is no clear idea about the future relationship between Kosovo and the other parts of the Federal Republic of Yugoslavia. It is the duty of UNMIK to provide transitional administration while at the same time it is to establish and oversee the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo. There will be local elections in Kosovo in October of this year. The day will come, however, when a Kosovo-wide election must be held to produce a regionally elected body that can eventually become a partner in the political dialogue that must be opened with Belgrade.

Another factor that must be born in mind is that UNMIK was founded on four pillars, of which only two (humanitarian operations and civil administration) are performed by United Nations entities. The two other pillars are provided by the Organization of Security and Cooperation in Europe (OSCE) and the European Union (EU). I will not go into detail about the particular demands that this diversity has put on those who are set to co-ordinate the operation, but leave this analysis to those who eventually will evaluate the performance of the mission. Although the situation in East Timor is different, much of what has been said about Kosovo applies also to the United Nations Transitional Administration in East Timor (UNTAET). However, in East Timor we know that a new State is being born, which, needless to say, makes some issues simpler. On the other hand, the tragic circumstances that led to the establishment of UNTAET, and the specific problems that the operation is facing, put heavy demands on those in charge.

According to Security Council Resolution 1272 (1999) of 22 October 1999, UNTAET has the overall responsibility for the administration of East Timor. It is empowered to exercise all legislative and executive authority, including the administration of justice. This resolution also means that UNTAET is responsible for the provision of security throughout East Timor; in Kosovo this task is entrusted to KFOR, which is not a United Nations entity.

One of the major problems in East Timor, apart from the fact that the infrastructure was severely damaged after the upheavals when the result of the popular consultation was published, is to identify persons at the local level who can take charge of the many tasks that must be performed within an organized society. Great efforts have been undertaken by the mission to engage the local population, and it is heartening to see how much has been achieved already under very difficult circumstances.

Also here the question of legislation and applicable law presented itself immediately. A particular problem is that there are very few East Timorese who have legal education and hardly any who have experience of sitting on the bench. Great efforts have been made to set up a system that can serve East Timorese society in the future in accordance with their own wishes and, of course, their own traditions. A disquieting factor lately is that there are indications that there is still
militia activity both in West Timor and re-emerging in East Timor, orchestrated from the Indonesian province of West Timor. The problem of bringing to justice those who bear the greatest responsibility for what emerged after the popular consultation still remains.

No doubt, UNMIK and UNTAET will generate a tremendous amount of experience and lessons learned. No situation is of course exactly similar to another in this context. However, already now there are certain common denominators. About a year ago, I identified three such common elements. Today they are even more visible.

The first conclusion is that a humanitarian intervention may very well entail that the territory in question will have to be governed by the United Nations. This means that the Organization will have to identify and recruit persons of a different background from what has been the case in the past. In particular, many of the tasks that need to be addressed require an expertise that is not readily available within the organization, and even if it was, the resources are already so stretched that it would not be possible for these experts to do all the work that is necessary.

A second conclusion is that, while most people would be looking at more readily understandable elements, such as shelter, utilities and things that you need for an ordinary day-to-day life, there is an immediate requirement of putting in place a system for the administration of justice. The organization of a civilian police is equally important in order to curb the criminality, which can very quickly develop in areas of the kind we are discussing now.

A third observation is that, unlike in traditional peacekeeping operations where the United Nations personnel is welcomed by all sides, in the case of humanitarian intervention there is a great likelihood that the former adversaries see the UN personnel as partial. This entails additional risks for United Nations and associated personnel. In this context, I emphasise the need for Member States to sign and ratify the 1994 Convention for the Protection of United Nations and Associated Personnel.

In addressing the ability of the United Nations to perform, reference should also be made to the reports on the tragedies that took place in Srebrenica and Rwanda, commissioned by Secretary-General Kofi Annan. In this year’s Annual Report to the General Assembly, the Secretary-General presents certain clear lessons that emerged from these two reports, which, as he puts it, has since been reinforced by experience, in particular from the United Nations Mission in Sierra Leone (UNAMSIL). The Secretary-General points, in particular, to: the importance of joint action by Member States and the Secretariat to strengthen the instrument of peacekeeping; the need to be clear as to whether peacekeeping or enforcement is needed in a specific situation; the importance of providing appropriate resources to meet mission needs, and of having, even within peacekeeping operations, a credible deterrent capacity. This would of course apply a fortiori in situations of humanitarian intervention.

The Secretary-General is, however, concerned about the reaction to his address to last year’s General Assembly, to which I referred at the outset. If that reaction is any guide, he fears that we may still fall short of being able to provide a credible answer to the question of what happens next time we are faced with a
threat of a comparable crime against humanity. Recognition that many States have serious and legitimate concerns about intervention does not answer the question that he posed in his report: “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica to gross and systematic violations of human rights that offend every precept of our common humanity?”. In essence, Secretary-General Annan maintains, the problem is one of responsibility. In circumstances in which universally accepted human rights are being violated on a massive scale we have the responsibility to act.

Reverting to the title of this presentation, “Humanitarian Action and the Charter of the United Nations” and to what I have said so far, I would like to sum up this part as follows: if humanitarian action in the form of humanitarian intervention has to be undertaken, the Charter of the United Nations requires that this intervention should be undertaken under the rules of the Charter and within its system of collective security. This means that, unless in a particular case the task is referred to a regional organization, the United Nations must undertake it and, consequently, be financed and equipped in such a way that it can undertake the task. This brings me to a glance at the immediate future. In this context I would like to point to the high-level Panel, the Panel on United Nations Peace Operations, convened by the Secretary-General on 7 March 2000. A couple of weeks ago, on 17 August 2000, the Chairman of the Panel, Mr. Lakhadar Brahimi, former Foreign Minister of Algeria, presented the Panel’s report to the Secretary-General. It appears in document A/55/305-S/2000/809 of 21 August 2000. In commenting on the report, the Secretary-General maintains: “The Panel’s analysis is frank yet fair; its recommendations are far reaching yet sensible and practical. The expeditious implementation of the Panel’s recommendations, in my view, is essential to make the United Nations truly credible as a force for peace”.

The high level Panel has presented a number of recommendations, of which some are of particular interest to this Congress.

With respect to preventive action, the members focus on the Secretary-General’s appeal to “all who are engaged in conflict prevention and development - the United Nations, the Bretton Woods Institutions, Governments, and Civil Society organizations - to address these challenges in a more integrated fashion”. Fact-Finding missions are supported.

With respect to peace-building strategy, the Panel recommends a doctrinal shift in the use of civilian police, other rule of law elements and human rights experts in complex peace operations. This is to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments.

With respect to peacekeeping doctrine and strategy, the Panel maintains that peacekeepers must be able to carry out their mandates professionally and successfully and be capable of defending themselves as well as other mission components and the mission’s mandate. To this end they need robust rules of engagement against those who renege on their commitments to a peace accord or otherwise seek to undermine it by violence. One set of recommendations concerns clear, credible, achievable mandates. Before the Security Council agrees to implement a cease-fire or a peace agreement with a United Nations peacekeeping operation,
the Council should assure itself that the agreement meets threshold conditions, such as consistency with international human rights standards and practicability of specified tasks and timelines. Furthermore, the Panel recommends that the Security Council should not adopt resolutions in final form which authorise missions with sizeable troop levels until such time as the Secretary-General has firm commitments of troops and other critical mission support elements from Member States. A clear chain of command and unity of effort should be established. Also, the Panel maintains that the Secretariat must tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing mission mandates.

With respect to transitional civil administration, the Panel recommends that the Secretary-General invite a panel of international legal experts, including individuals with experience in United Nations operations that have transitional administration mandates, to evaluate the feasibility and utility of developing an *interim* criminal code, including any regional adaptations potentially required, for use by such operations pending the re-establishment of local rule of law and local law enforcement capacity.

With respect to military personnel, the Panel recommends that a revolving “on-call lists” of about 100 military officers be created to be available at seven days’ notice to enforce the planners in DPKO with teams trained to create a mission headquarters for a new peacekeeping operation. Similar “on-call lists” are also proposed for civilian personnel. In this respect the Panel recommends that about 100 police officers and related experts should be on an on-call list. The same applies to judicial, penal, human rights and other relevant specialists, who, together with specialist civilian police will make up collegial “rule of law” terms. An Internet-Intranet roster of pre-selected civilian candidates should be established.

With respect to funding, the Panel recommends a substantial increase in resources for Headquarters support of peacekeeping operations. Furthermore, the Panel recommends substantially enhancing the field of mission planning and preparation capacity of the Office of the High Commissioner for Human Rights.

No doubt these recommendations will provoke a lively debate among Member States. However, action is necessary in the immediate future in order to establish credibility. The Deputy Secretary-General is charged with leading the efforts to implement the Panel’s recommendations. We had a first meeting two days ago.

In conclusion, I think that it is fair to say that, legally, the situation today is much clearer than it was before. State sovereignty simply cannot be invoked as in the past. Other legitimate interests are increasingly putting demands on the United Nations to act. The Charter is clear: it is for the United Nations, specifically the Security Council to act when there is a threat to peace and security. As past events have demonstrated very clearly, also internal conflicts pose such threats.

While significant focus should be on preventive action and efforts by Member States to avoid situations where humanitarian intervention is called for, such intervention may nevertheless be necessary when there are no other solutions. If this is the case, the Member States must give the Organizations the necessary resources to perform its duties. It is simply not acceptable that mandates are given while the resources to perform these mandates are not forthcoming. At the same time we who work for the Organization must look at our own performance and
make every effort to make a solid contribution to the common cause. Whether we act on behalf of Member States or within the Organization, we should always keep in mind that the Organization was created “to save succeeding generations from the scourge of war” and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law, including fundamental human rights, can be maintained. We must all work together to make certain these are not empty words!
Mr. President, Mr. Chairman,
Excellencies,
Ladies and Gentlemen,
Dear Friends,
Let me, first of all, tell you how pleased I am to be with you today in San Remo.

For many years I have wished to visit the famous Istituto Internazionale di Diritto Umanitario and, above all, to participate in one of the San Remo’s well-known Round Tables. I have never had the chance to do so until now, and I assure you that I consider it a great honour to be able to pay my first visit to the Institute on the occasion of its 30th anniversary. As you may know, President Patrnogic invited me to join the conference in my capacity as a member of the International Committee of the Red Cross.

But, as you may also know, besides this function I wear another hat: I mean the one of being a professor of international, European, constitutional and administrative law at the University of Zurich.

When I was informed about the themes of today’s programme, I thought that it might be more interesting for you if I selected a subject from my work as a professor instead of speaking in my function as an ICRC-Member. So instead of addressing you with a speech about the International Committee of the Red Cross and State Sovereignty as announced in the programme I have chosen to share with you a few thoughts concerning some legal problems of modern international humanitarian law, which are of a more theoretical, conceptual nature. Unfortunately, it was too late to integrate this change of subject into the programme, but I trust you will have no objection. The subject will be International Humanitarian Law - Core of a Minimal World Constitutional Order?

Why do I want to discuss with you some basic questions of law? It is due to two basic experiences I made as member of the ICRC.

1) During many discussions we had in the Committee I realised that law was conceived of in a much too technical way. The lawyer was considered as an expert-technician whereas I have always thought that law, above all international law, has a strong ethical basis, ethical goal and an ethical potential.

2) International Humanitarian Law is considered by many specialists in the field as a sort of hortus inclusus, a very limited and isolated field of highly detailed rules and somewhat obscure principles. In my view, however, it is just one field within a wider, embracing order, integrated in and connected with the much wider areas of law and international relations.
theoretical way later on: the first story deals with Nelson Mandela, the second - and how could I not choose him - with Henri Dunant, and the third with Mahatma Ghandi.

Nelson Mandela. I read his wonderful biography *Long Walk to Freedom* in my summer vacation in the mountains of my home canton in Switzerland. I especially remember two passages. Looking back over his 27 years of imprisonment Mandela wrote: "In prison, my anger towards whites decreased, but my hate for the system grew. I wanted South Africa to see that I loved even my enemies while I hated the system that turned us against one another".

Reading these sentences of President Mandela it suddenly became clear to me how important structures, systems - and by this I mean law - are for the ability of each of us to live a decent, good and moral life. And Mandela alluded, in another place, to the fact that South Africa is a country rich with diamonds. He said that diamonds are not only hidden in the ground, but each human being - even the politicians who caused him to be sent to prison and the most cruel of his prison wardens have diamonds in their soul - it was only a question of the system - and I would again repeat of the law - to allow these diamonds to become visible and to shine.

Henri Dunant's story is known to all of you: the Geneva businessman who, by accident arrived at Solferino on the very day when one of the cruellest battles in the 19th century European history was taking place. The battle was celebrated in enlightened Europe as being a milestone in the process of liberating Italy from the Habsburg rule. But Dunant was not interested in this: he directed his attention to the wounded and dying soldiers lying on the battlefield long after the kings and generals had left.

Dunant had three creative ideas:

First, the war should not be the exclusive affair of the military: it should also fall within the responsibility of society.

Second, that international conventions should be established placing a legal obligation on States to respect certain humanitarian rules, be it individually or jointly, and third, that a neutral sphere should be created - represented and symbolized by hospitals, sanitary services, ambulances, - etc. in which friends and enemies should be treated without discrimination. I shall refer to this idea later under the heading of a "humanitarian space".

The third story relates to Mahatma Ghandi. One day, so the story goes, a king who asked him how he might become more successful in his not so successful life approached him. It is said that Ghandi told him to visit a wise old man at the foot of the Himalayan Mountains. The wise man listened to the king, disappeared in the back of the room and then brought him a seed of corn. He told him to take it home and every thing would turn out for the best.

After a while the king came back to Mahatma and told him that success had not come, as he desired. Mahatma asked him "What did you do with the seed? I kept it in a golden box", the king answered. "Wrong", said Ghandi "you should have planted it in the ground. So wheat would have grown out of it and then a flourishing field would have been able to nourish your people and become happy and successful as its king".
The lesson to be learned from these stories is:
- that systems, and I mean especially legal systems, are important;
- that at the core of the international legal order is what I call the “humanitarian space”;
- and that it is not only the function of the lawyer to be a capable legal technician, but also he must go out and disseminate his knowledge and beliefs into the system of “rule of law” wherever it is needed.

So let me now make some remarks, ladies and gentlemen, concerning our theme International Humanitarian Law as a core of the “Constitutional System of Public International Law?” International Humanitarian Law - Core of a Minimal World Constitutional Order?

My point of departure is, as indicated by the title of my presentation, that international law is in itself structured along hierarchical lines, that, in other words, international law as a whole is based on a constitutional foundation.

I will then explore, if and in what manner international humanitarian law can be revealed as a clear and elementary core of this constitutional basis of international law. The purpose of my analysis is to develop a “constitutional approach” to the understanding of the system of public international law and to identify, by using this method, the special place occupied by it within this architecture. You may perhaps consider this theme somewhat academic. You may think of the proverb which says “He who is good in nailing sees nails everywhere” and reproach me that because I am engaged professionally in constitutional law I am seeing constitutional arrangements everywhere, even in the system of international law into which it just does not fit.

I would like, however, to convince you that such a reproach would be a great mistake. Permit me, ladies and gentlemen, to set out my observations in three stages. These stages are given somewhat slogan-like titles by which I am also indicating that my presentation is of an as yet provisional and experimental nature. The sections are entitled as follows:

Firstly, “Opening up of an Era”: this is intended to provide a brief overview of the opening up of the system of international law to the individual law initiated in the last century, and the development of international humanitarian law from then to the present day.

Secondly, three basic themes of the current debate on international law are dealt with under the title Ambivalence and Radical Change? this is to say the “Tadic” case on which the Appeals Chamber of the International Tribunal for ex-Yugoslavia ruled, the Advanced Opinion on nuclear weapons of the International Court of Justice, and a generally interesting debate concerning “minimum standards of humanity”.

Thirdly, and finally, it is my intention to put to you, under the title A constitutional approach after all, the contention that it would appear appropriate, precisely now and precisely in view of the recent developments in international humanitarian law, to take up again the early but long since abandoned threads of “constitutionalism” in international law and to do so in terms of a view which is radically altered in comparison with everyday perceptions, that is to say, in terms of a qualitative leap.
Opening up of an Era

As you know, the basis of international humanitarian law was laid down in the 1860s. In that respect Jean Pictet wrote: “In Geneva an era has opened up which gives precedence to human beings and the principles of humanity”.

He was alluding to the First Geneva Convention of the Red Cross for the Relief of the Wounded and Sick in War in the Field. The conclusion of this agreement was - as already mentioned - inspired by the Geneva businessman Henry Dunant, who described his experiences of the brutality on the battlefield at Solferino in his book A Memory of Solferino and thus shook the conscience of the general public at large. The Geneva Convention, comprising only ten articles, which was subsequently signed in Geneva in accordance with Dunant’s initial call, became the seed of substantive law from which grew the complex, detailed and meticulously commented set of agreements, now comprising some 1,000 articles, which make up the international humanitarian law now in force.

When talking about the opening up of an era in 1860s, mention should also be made of the Declaration of St. Petersburg of 1868, an international treaty which became the basis for the international rules on methods and means of warfare which were later developed primarily at The Hague Peace Conferences of 1899 and 1907. Both branches of law - Geneva law or “law of the victims of war” and Hague law or “combat law” were merged - primarily in the course of drafting the two 1977 Protocols additional to the Geneva Conventions - to form a single legal system of rules, that of “international humanitarian law”.

There is a third, modern-day tendency that should also be mentioned. In terms of subject matter the international humanitarian law which resulted from the combination of Geneva law and Hague law now largely coincides with human rights protection in international law as it has begun to develop since the Second World War in the context of the UN and various international regional organizations. The two areas of law - international humanitarian law and human rights protection - form circles, which, although still separate, largely overlap.

The legal subjects initially developed independently but the first international human rights conference held in Teheran in 1973 to mark the twenty-fifth anniversary of the Universal Declaration of Human Rights clearly demonstrated the inherent link between human rights and international humanitarian law by the resolution Human Rights in Armed Conflicts. It has become self-evident, primarily because of a clear and abrupt shift in armed conflicts towards conflicts within States,

- that although in most cases of present-day armed conflict, human rights and international humanitarian law are at times applied in a complimentary manner, they are generally applied in parallel;
- that human rights must be interpreted in the light of international humanitarian law and vice versa;
- that the two systems of rules enhance one another;
- that although they are monitored and implemented by different protective mechanisms, they increasingly refer to the rules of the other.

With reference to Resolution 244 of the UN General Assembly adopted in the wake of the Teheran Conference, Frits Kalshoven wrote: “With the Resolution,
the starting shot had been given for an accelerated movement which brought the three currents: Geneva, The Hague and New York, together in one stream”.

Thus, the era which “gives precedence to human beings and the principles of humanity” to which Jean Pictet referred would appear, to a certain extent, to have come to an end in modern international law.

Or are we now facing a situation of fundamental change, the threshold to a quantitative leap towards a new structure and/or interpretation of international law, which could specifically mark the development of a constitutional system of international law? Various indications point to the situation of radical change, which may mark the transition to a new logic in the thinking on international law.

Ambivalence and radical change

So, first a few words on ambivalence and trends towards radical change in the present conception of international law. As I said, I would like concisely and briefly to single out three cases.

a) the Tadic judgement of the Appeals Chamber of the International Tribunal for the former Yugoslavia;

b) the Advisory Opinion on nuclear weapons of the International Court of Justice;

c) the ongoing debate over “minimum standards of humanity”.

a) The “Tadic judgement”

To my mind, a first milestone on the way towards a rapid development in the law is the Tadic case on which the International Criminal Tribunal for the former Yugoslavia ruled on 2 October 1995. The Tribunal was established by the Security Council to punish grave breaches of international humanitarian law.

Pursuant to its Statute, it was empowered to try three offences: 1) grave breaches of the Geneva Conventions of 1949 (Art. 2 of the Statute); 2) violations of the laws or customs of war (Art. 3 of the Statute), and 3) crimes against humanity committed in international armed conflict (Art. 5 of the Statute). In our context the judgement is interesting, roughly speaking, on two counts. Firstly, it is necessary to highlight the tribunal’s finding that the fundamental principles and rules of international humanitarian law are essentially applicable not only to international but also to internal armed conflict. The Tribunal thus acknowledges, on the basis of its mandate under Article 3 of the Statute, a standard of customary law in international humanitarian law which applies both to international and internal armed conflict. The Tribunal thus acknowledges, on the basis of its mandate under Article 3 of the Statute, a standard of customary law in international humanitarian law which applies both to international and internal armed conflict which includes the minimum principles contained in common Article 3 of the four Geneva Conventions and, in addition, further principles such as those governing the methods and means of conducting armed conflicts. Secondly, of fundamental importance is the Tribunal’s finding that serious violations of fundamental principles and rights in international humanitarian law also establish the individual criminal liability of those who commit or order such violations. On account of the significance of the infringed ethical values such violations do not merely affect the interests of the States concerned, they also infringe, by their nature, the vital legal interests of the international community - in a manner which is shocking to the human conscience.
We are, it would appear, on the verge of a decisive breakthrough. The Tribunal sanctioned what it considered to be a development initiated long ago whereby the traditional dichotomy of international and internal armed conflict has been substantially blurred and eroded. In that respect the Tribunal states four grounds for extending international humanitarian law to armed conflict within States:
- the evident increase in civil wars as a result of the growing accessibility of weapons and the increase in ideological, ethnic and economic tension within States;
- the increasing cruelty and brutality of internal armed conflict;
- the extent of such hostilities coupled with the danger of third States becoming directly or indirectly involved;
- the fundamental change in the basic form of international law brought about by the modern development of human rights protection.

These findings led the Tribunal to the general conclusions that the old “State-sovereignty-orientated approach” had gradually been replaced by a “human-being-orientated approach”.

The Roman law maxim “hominum causa omne ius constitutum” (all law is created for the benefit of man) had also established a firm foothold in the international community. Therefore, it followed that as regards armed conflict the distinction between international and internal conflict was losing its value in so far as it related to human beings. Why, the Tribunal asked, should civilians be protected from the use of military force and rape, torture or the wilful destruction of hospitals, churches, museums or private property, and the use of weapons which cause unnecessary suffering, be prohibited where two sovereign States wage war on one another, but the same prohibitions and protection not apply where armed violence had broken out “only” within the territory of a sovereign State?

“If international law - so the Tribunal concluded - while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight” (p. 54).

b) The Advisory Opinion of Nuclear Weapons of the International Court of Justice

I now move from the “micro-field”, that is to say, the question whether and to what extent principles of international humanitarian law are applicable to internal armed conflict or are applied to internal turmoil, unrest and tension, to the “macro-level” and in particular the question of the permissibility under international law of the threat or use of nuclear weapons. This question has preoccupied legal writers and practitioners for decades. In June this year the International Court of Justice drew up an opinion on this question. It is by far the most important finding which the International Court of Justice has presented to date on fundamental issues of international humanitarian law.

In its central conclusion the Court ruled by seven votes to seven and by the President’s casting vote that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”.

The Court made it clear, however, that “in view of the current state of internatio-
nal law, and of the elements of fact at its disposal, it cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”.

Naturally, it is not possible to analyse the opinion and in particular the above-mentioned conclusion here in only limited detail. However, two remarks of a more fundamental and methodical nature would appear to be appropriate. Firstly, a certain lack of clarity and ambiguity is evident in the judgement. The threat and use of nuclear weapons were described as “generally” contrary to international law. However, the Court considers - it goes on - that it cannot determine the “current state” of international law or the essential elements of fact with sufficient clarity to rule definitely and absolutely on the question referred to it. It is also impossible to see or understand what is meant by the provision “extreme circumstance of self-defence” in which the very survival of a State would be at risk.

Thirteen of the fourteen presiding judges issued their own, in part extensive, declarations and opinions - which also appears to be symptomatic of the nature of the Court’s ruling. Only by including these additional opinions is it possible to form an overall picture of the view of the Court and in particular to interpret the Opinion itself properly. However, a comprehensive examination reveals a varied conclusion whereby: 8 judges decided that the use of nuclear weapons was contrary to international law, 4 judges decided that it was permissible under very limited circumstances, 2 judges took the supposed majority view that the legal situation could not be determined with sufficient clarity to rule definitively on the question referred to the Court.

What is striking, therefore, is the pluralism, divergence and ambiguity of the legal opinions incorporated into and surrounding the Opinion. Does this fact - we ask ourselves - and the Court’s starting admission that it considers itself to be unable to determine whether the current state of the law is a symptom of a serious situation demand radical change in international law or not? Might a “constitutional” approach create greater clarity and consistency?

This leads me to the second methodical remark. It is interesting to note that only one judge stated reasons for his opinion which were based strictly - though ultimately not consistently - on positivism. The arguments of the other judges were predominantly “theological” in nature. They were guided by the spirit and purpose of the fundamental principles of international humanitarian law, the right of self-defence, international law as a legal system and, finally, the raison d’être of human civilization.

This makes large sections of the text of the Opinion as a whole exciting reading in terms of the “philosophy” of law. It is amazing that in this context the question of a constitutional dimension to international law was raised only in passing. In 1945 Max Huber, the President of the ICRC, wrote as follows on this issue: “The ideal of the Red Cross embodies the notions of value and dignity of human beings. As such it goes well beyond the international law and the law of war. In the most profound sense of the term, the entire human community depends on this idea”.

Was he not referring to a level of provisions, which is inherent in the overall legal system and not just meta-legal? Is the cycle of a philosophical and then positive law approach not now reverting back to a philosophical one? In view of the
current state of the law and the structure of the legal system should these supreme values not be designated, characterized and classified as the constitutional aims or constitutional principles of the international legal community?

c) *Minimum Standards of Humanity*

That leads me to the second point, the project to codify a number of “*minimum standards of humanity*”, launched in 1990 as the “*Turku Declaration*” by a private group of experts including authorities on international law such as Theodor Meron, which has since been incorporated into the UN Human Rights Commission. The aim of this undertaking is to establish, in a simple and clear form, basic standards of human rights and humanitarian law to be applied under the circumstances and to all parties in war and in peace, irrespective of the legal classification of a conflict.

In practical terms it is aimed primarily at cases of a national state of emergency and internal unrest and outbreaks of violence of a spontaneous and systematic nature since in such situations both human rights protection in international law and international humanitarian law generally fail to fulfil their purpose. In such emergency situations human rights can often not be enforced objectively and effectively by the national authorities because they themselves frequently form, or are in danger of forming, part of the conflict for safeguarding human rights, generally allowing the contracting parties to renounce treaty provisions save for a hard core of untouchable guarantees. International humanitarian law is applicable as such only to armed conflict. However, the international unrest and tensions envisaged here fall, by definition, under the threshold of international humanitarian law which is also applicable to internal conflict. Accordingly, the spirit and purpose of the “*minimum standards of humanity*” is to close the gap, which arises from this combination of legal systems made up of human rights protection and international humanitarian law. It is basically interesting that in this respect the international community is probably about to develop principles of the “*rule of law*” inspired in a grey area between international law and international policy relating to international protection of human rights, on the one hand, and international humanitarian law on the other, which are to be applied where national authorities are no longer (or no longer fully) able to safeguard human rights and the fundamental principles of the “*rule of law*” in a neutral and unbiased manner, that is to say, where the ability of the internal system of a State to function has broken down.

A “*constitutional*” approach after all?

The previous section related to a borderline situation. The ability of mankind to destroy the foundations of coexistence, and indeed to destroy itself, which overshadowed the Cold War and is still not obsolete even today, and the new, local venues for the unleashing and escalation of brutal, irrational violence to which the international community responds with criminal law on account of violations of the fundamental values of humanity (international crime as the focal point of the new order). Both basic situations, namely the rationally calculated, planned possibility of self-destruction and the anarchy at local level characterized by demonization and irrationality, are confronting the international community with
radically new challenges.

In view of the "absolutely new situation" created by nuclear weapons, philosophers such as Karl Friedrich von Weizsäcker called for "a constant reduction in imperial sovereignty and the development of a type of world internal policy" (Weltinnenpolitik). Far-sighted experts in international law such as the Austrian Alfred Verdross had drawn up a constitutional system for the community based on the rule of international law decades earlier. What do I mean by the (speculative) idea of an international constitutional system or a - to put it less pretentiously - a "minimal international public order"? Let me try and explain using the following arguments.

First. The above-mentioned situation characterized by fundamental change and ambivalence indicates that in the case of international humanitarian law we are not dealing with a system of treaties based on the principle of reciprocity, but with an objective basic system. Such a basic concept was envisaged two centuries ago in a goodwill treaty between Fredrick the Great and Benjamin Franklin in which the two statesmen pledged - borrowing from the terminology of the American Declaration of Independence - "before the forum of the world public" to treat the victims of all future conflicts according to the principles of humanity. The idea of an obligation towards the international community points to common objectives and a common set of values to which the law as a whole is to be geared and by which it is to be measured.

Second. It is possible to single out from international humanitarian law as system of objectives and values fundamental values, which could be given a constitutional ranking. These principles are firstly in the nature of the obligations and rights directed at States. Belligerents are subject to restrictive rules on the conduct of hostilities and are required to protect certain groups, which are not, or no longer, involved in the fighting. However, what I find interesting is that international humanitarian law also establishes, at times subjective, in part even inalienable, rights and the present trend is clearly towards international humanitarian law also imposing obligations not only on States or a party to a civil war, but also directly on the individual. The individual should - where it is appropriate in the light of a theological interpretation (interpretation in conformity with the constitution) - not only be a beneficiary but also someone with rights. Would this - I wonder - even open up the way for claims for damages to be brought by individuals on the grounds of a violation of international humanitarian law?

Third. The legal obligations and mechanisms for the respect and implementation of international humanitarian law point to a collective responsibility of the community of States to enforce international humanitarian law. That is because under common Article 1 of the four Geneva Conventions, the Members States are required not merely to respect the agreements, but to ensure that third parties respect them ("respecter et faire respecter") and Article 89 (1) of the First Additional Protocol imposes this requirement not only on States, but also on other entities of the community based on the rule of international law, including the UN.

States have at their disposal in particular humanitarian organizations such as, primarily, the ICRC, as an instrument with which to implement international humanitarian law. They are, in the broadest sense, agents of the international com-
munity and are vested with a specific mandate. Certain essential basic conditions for “humanitarian action” can be inferred one, from their mandate and two, from the rights and obligations, which make up humanitarian law. In three-dimensional terms they are referred to as “humanitarian space” in which humanitarian action alone can be taken effectively and efficiently. This involves the principles of independence, neutrality and impartiality which are enshrined in Red Cross law but also recognized, for example, by the UN General Assembly. In its Nicaragua judgement the International Court of Justice also noted specially that humanitarian action, in particular by the Red Cross, which satisfies these requirements and is taken within the framework of a non-international armed conflict, does not infringe the prohibition on intervention laid down in international law.

Thus, there is an admittedly only very fragmentary and non-integrated system for the implementation of international humanitarian law. Could some kind of organizational and functional separation of powers or better separation of duties also be inferred from the constitutional structures of international humanitarian law? In accordance with this, States and the international institutions charged by them would be responsible primarily for the political maintenance of peace, courts for the international administration of justice, and humanitarian organizations for the practical implementation and monitoring of the principles of humanity and in particular international humanitarian law. At this point I will leave this question open.

Fourth. Certain generally recognized structural elements of international humanitarian law per se, for example, also point to the constitutional nature of the fundamental principles of international humanitarian law: its nature as “ius cogens” as specifically recognized by the Vienna Convention on the Law of Treaties; the “erga omnes” effect of the fundamental principles of international humanitarian law; the absolute nature of its fundamental rules in the sense that they are subject to no restrictions and cannot be derogated from; the inability to terminate the treaties during armed conflicts; the exclusion of reciprocity pursuant to the Vienna Convention on the Law of Treaties in the event of a treaty infringement by the other party.

Fifth. The following can be thought of as “vehicles” of positive law establishing the constitutional nature of international humanitarian law: the famous “Martens clause”, provided that is it is construed not merely as a (declaration) provision referring to the law which already exists in positive law, but as a “focus point” for superior fundamental principles; consent of the international community as a spontaneous, informal expression of the “constitution-forming” authority of the international community; a fundamental, general legal principle, inherent in the system of international law per se, of the international community based on the rule of law; an “opinion iuris” of the international community based on a constitution which is also upheld in practice by States.

Conclusion. It can be said, I believe, that these fundamental principles of international humanitarian law now form part of a basic system of the international community. One could also speak of a minimal “ordre public” of the international community or of a partial foundation in the “architecture” of the overall system of international law, or one could describe this phenomenon using the expression
international humanitarian contract which was coined by Cornelia Sommaruga but used in a somewhat different context.

I am well aware of the fact that - although I have tried to formulate my thoughts in a simple manner - my "exposé" still probably sounds very legal to the ears of many of you and many expressions must seem very "wooden". So let me try to summarize these thoughts in terms which I shall borrow from other, maybe more popular, fields of thought. In my first part I tried to demonstrate that international humanitarian law and human rights law, despite having different origins pursue a common goal. Despite being embodied in different sets of legal instruments both domains are, in substance, gradually growing together. I could not give you a more telling account of this fact than Kofi Annan's Annual Report for the year 1999 which opens with the sentence: "Confronting the horrors of war and natural disasters, the United Nations has long argued that prevention is better than cure" (S. 1).

Right at the outset of his report he refers to humanitarian disasters and violations of the Geneva Conventions in armed conflict (S. 2) and he continues over many pages to speak about the mass of human suffering.

I tried in my second part to demonstrate that we are at present - so it seems to me - crossing a long period of conceptual ambiguities, as they are, for instance, reflected in the "Tadic" Case, the "Minimal Standards" Project or the "Nuclear Weapons Case".

And in the third part the question was raised as to whether we are not now reaching the point where there is a strong need for re-orientation. I raised the question whether the concept of a "constitutional framework" might provide the clue for redefining the identity of public international law as a whole. Within this constitutional framework international humanitarian law would be a "core" element.

The philosopher Isaiah Berlin, for instance, once wrote: "... principles shine forth most clearly in the darkness and void, because the inner vision is still free from the confusions and obscurities, the compromises and blurred outlines of the external world" (S. 11). So my question is "Isn't it primarily in situations of extreme emergency, where individuals have lost the support and protection by their own nations, that the essential core of minimal right is revealed?".

Or to take the view point of Judith Shklar, a Harvard Professor of Political Science, when speaking about justice which seems to lay at the bottom of a constitutional order. She said that in determining if an injustice has occurred the voice of the victim has to be given preference. The sense for injustice is a general characteristic of the human condition "ein allgemeines Merkmal unseres Menschseins" and the heart of our moral system "natürliches Herzstück unserer Moral", and this sense of injustice provides the strongest base for our claim to the right to dignity "best Begründung für unseren Anspruch auf Würde". So when it comes to finding out if injustice has been violated, the voice of the victims would, in her opinion, be the most credible one. Or let me refer to another source, Michael Walzer, Professor at Princeton Institute of Advanced Studies who drew a clear distinction between a "minimalist" morality containing rules indispensable for human dignity and a "maximal" morality which is considered a "luxury" in a flourishing society.

Is a lawyer not tempted to draw the line between "minimal" and "maximal"
morality in analogy to method, identifying constitutional law, and should the essence of international humanitarian law not be conceived of as a core of the international constitutional system?

As we now speak about “constitutionalism” or a “constitutional system” we immediately associate those notions with the term of “individual rights”. I think the time is ripe where we should make an intellectual effort to re-conceive the system of international humanitarian law in terms of the rights of the victim. During the great Age of Enlightenment, not far from San Remo and not far from Solferino, the Italian lawyer and philosopher Cesare Beccaria undertook the revolutionary effort of re-defining criminal law. He considered criminal law as part of an overall constitutional system and re-defined its elements starting from the basic values of human dignity and human freedom. Similarly, I think that international law which is presently considered as a set of - more or less technical, detailed - directives should, in the light of developments in human rights law, find its way back to the spirit of the Age of Enlightenment by which it was shaped, and gradually move forward acknowledging the idea of rights as a basis of its system. You might ask what sense it makes to acknowledge rights if there is no appropriate addressee. In his excellent book Development as Freedom, Amartya Sen put the concept of freedom into the centre of his theory of development, gave an answer by referring to Immanuel Kant who drew the distinction between those rights to which there corresponds a “perfect” obligation and those which are related to an “imperfect obligation”. In the latter case the claims are addressed generally to anyone who can help, even though no particular person or agency may be charged with bringing about the fulfilment of the rights involved (230). But let me stop here by reminding you that the thoughts I have developed are - of course - my personal, “professional” ideas and not those of a member of the ICRC. Let me conclude by telling a final story, where the scene is set on the high seas. I first thought of a story about a little boat in the storm on the high seas: there is a small boat which does not direct its course towards a certain coast and does not put its sails into a certain wind, a boat which is in permanent danger of being devoured by the sea but which also has a good chance to survive, a boat symbolizing the ICRC. I then decided to choose another story, one which I read in a book advising business people on how to deal with professional problems efficiently.

I bought this book some years ago somewhere at a bus station in the Mid West. The story goes as follows: there was a battleship in heavy seas. It was night. The officer in charge informed the captain that the ship was on collision course with another ship whose light had been observed in the distance. The captain gave an order to tell the boat “We are on collision course, change direction by twenty degrees”. The answer came “I advise you to change course by twenty degrees”. The captain replied, “We are a battleship, the captain is speaking. Who are you?”. The answer came back: “I am a seaman, second class”. The captain: “So I order you to change course immediately”. The answer: “You had better change, Sir, I am a lighthouse”.

What do I want to say with this story? I mean that humanitarian institutions, weak as they may be, are able to direct the course even of the strong and powerful if two conditions are fulfilled: if a solid basis of doctrine and of management exists on which they may act and if a strong, illuminating message is sent out by
those who serve it.

1 Justice O. Wendell Holmes put it well: “The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men” (161).

2 Lord Russell speaks of the “administrator’s fallacy” (S. 287).

3 E. Jaeger wrote: “Je mehr Belege, desto verborgener das System... Vieles vernebelt die Wissenschaft” (S. 97).

4 See also H. Lauterpacht who observed that classical international law in so far as it dealt with substance was mainly concerned with the law of war. See H. Lauterpacht, International Law and Human Rights, London 1950, S. 62/63.
Ringrazio gli organizzatori del corso ed i responsabili di questo prestigioso Istituto che mi consentono di fornire il mio modesto contributo, contributo di militare, alla tematica relativa al problema umanitario. Naturalmente, proprio perché militare, a me compete evidenziare in quale misura lo strumento militare possa essere il veicolo di un’azione umanitaria e come i compiti orientati a questo tipo di intervento siano compatibili con quelli prettamente operativi.

Per cercare di dare soluzione all’interrogativo, mi rifarrò ad esempi concreti, traendo riflessioni dalle esperienze che ho maturato in Bosnia Herzegovina, in Fyrom ed in Kosovo, quale comandante di contingenti impegnati in operazioni di supporto alla pace. Ognuna delle tre operazioni che ho citato presentava e presenta caratteristiche operative differenti, ma tutte evidenziano aspetti di rilievo per quanto attiene all’azione umanitaria.

Farò riferimento principalmente alle vicende in Fyrom ed in Kosovo sia per ragioni di vicinanza temporale, sia perché, sotto molteplici aspetti, sono state quelle che maggiormente hanno evidenziato le potenzialità dello strumento militare nel campo umanitario. Articolerò pertanto la mia esposizione illustrando i seguenti tre argomenti:

- l’impegno militare delle Forze Armate in Fyrom ed in Kosovo, nell’ambito delle Operazioni “Joint Guarantor” e “Joint Guardian”, delineando le caratteristiche peculiari delle missioni;
- i compiti umanitari e le attività a sostegno delle popolazioni;
- le valutazioni in merito al rapporto tra le Forze Armate e l’azione umanitaria.

Queste valutazioni finali non hanno alcun carattere di ufficialità, ma sono il naturale prodotto concettuale dell’analisi degli ammaestramenti tratti dalle partecipazioni personali ad operazioni di sostegno della pace.

L’impegno militare in Fyrom ed in Kosovo è passato attraverso alcuni momenti significativi:

- avvio, nel dicembre 1998, dell’operazione “Joint Guarantor” con la costituzione di una Forza di estrazione per la sicurezza dei verificatori dell’OSCE dislocati in Kosovo;
- inizio, il 24 marzo 1999, della campagna aerea della NATO, contro gli obbiettivi serbi;
- inizio dell’afflusso in Fyrom, all’inizio di aprile, dei profughi kosovari e conseguente avvio di una vera e propria operazione di soccorso umanitario e di protezione militare;
- firma, il 9 giugno 1999, di un Accordo di pace fra la NATO e l’Esercito Yugoslavo a Kumanovo;

Come ho già evidenziato, le caratteristiche delle due operazioni in Fyrom ed

In quella situazione di grande indeterminatezza, si doveva dare protezione alla nazione, la Fyrom, che ospitava i contingenti e, nello stesso tempo, garantire la propria sicurezza. Rammento al riguardo la vicenda dei tre soldati statunitensi fatti prigionieri dalle forze serbe durante un’attività di pattugliamento. Ma i compiti che da un certo giorno in poi hanno coinvolto quasi completamente i Contingenti militari sono stati quelli umanitari. Ai soldati della forza internazionale si presentava in tutta la sua enormità, nei primi giorni di aprile, un inimmaginabile dramma. Migliaia e migliaia di profughi provenienti da ogni parte del Kosovo entravano in Fyrom, mettendo a dura prova le capacità di accoglienza della nazione balcanica.

Era l’indicazione del dramma che si stava svolgendo all’interno del Kosovo di cui si prendeva coscienza attraverso i racconti e le testimonianze dei profughi che, dopo aver vissuto all’addiaccio per giorni e giorni, giungevano esausti e sofferenti ai confini con la Fyrom. Alle base dell’irregolare esodo dal Kosovo di tanti uomini, donne e bambini, c’era presumibilmente una precisa strategia. Centinaia di migliaia di profughi venivano allontanati dai Paesi di origine, quasi deportati per giorni e giorni all’interno della regione contesa e venivano poi spinti verso la Fyrom e l’Albania. Nonostante la tensione per i possibili attacchi serbi l’attenzione dei Contingenti veniva completamente rivolta verso quella emergenza umanitaria, cercando di limitare al massimo le sofferenze della popolazione. Si montavano, in quelle difficili giornate, tende per centinaia e centinaia di persone, ma ne arrivavano migliaia di più. Era quindi un momento molto delicato nel quale emergevano prepotentemente la solidarietà e, soprattutto, la capacità dello strumento militare di intervenire tempestivamente. Ma era un momento che sarebbe poi continuato a lungo, per molti giorni, quasi 80, nei quali, le certezze cominciarono a vacillare, nei quali la campagna aerea della NATO sembrava non conseguire gli effetti sperati, nei quali il solo pensiero dell’inverno, il rigido inverno dei Balcani, attirava sempre di più i responsabili dei campi profughi. Indicherò alcuni dati che possono far comprendere con maggiore chiarezza lo sforzo che i contingenti militari della forza internazionale hanno sostenuto nella circostanza.

Innanzitutto l’entità dell’esodo. I profughi affluiti in Fyrom hanno raggiunto quasi 300 mila unità. Alcuni sono stati ospitati dalle famiglie della stessa etnia albanese che vivono in quella nazione, ma un grandissimo numero sono stati sistemati nei campi di accoglienza. I contingenti della forza internazionale
hanno realizzato, organizzato e gestito oltre 10 campi, tutti dislocati nella parte nord-occidentale della Fyrom, quella a più alta densità di etnia albanese. Erano strutture campali realizzate dal nulla in aree definite dalle Autorità locali. Le loro dimensioni erano grandissime e la capacità ricettiva elevatissima. Basti ricordare che quello di Stenkovac, vicino a Skopje, è arrivato a contenere 35 mila profughi, mentre quello di Cegrane addirittura 50 mila! Il sostentamento della popolazione è stato totale ed i contingenti hanno organizzato, all’interno dei campi, tutti i servizi necessari per la vita di comunità: dalla pulizia, all’assistenza sanitaria, alla distribuzione delle derrate alimentari alla sicurezza, ecc… Quindi un impegno di proporzioni gigantesche ed invero sostenibile in quei primi giorni solo da parte di Organizzazioni fortemente strutturate.

Vediamo ora la seconda operazione indicando i numerosi aspetti connessi con l’azione Umanitaria. Questa operazione, tuttora in corso in Kosovo, è iniziata il 9 giugno 1999 con gli accordi di pace raggiunti nei colloqui tra i comandanti dei contingenti della NATO ed i rappresentanti serbi. Ma quali erano le caratteristiche di questa nuova operazione?

Innanzitutto l’area del Kosovo era stata suddivisa in cinque settori affidata ai contingenti francese, statunitense, tedesco, italiano ed inglese. Gran parte delle abitazione (circa il 70% nel settore italiano) risultava totalmente o parzialmente danneggiato. Ecco alcune immagini di queste distruzioni. La vicinanza all’Albania ed al Montenegro esaltava la possibilità di infiltrazioni della criminalità da quelle due nazioni. Per la contiguità con l’Albania, l’etnia albanese era fortemente radicata nell’area e, conseguentemente, numerosa e determinata era l’adesione della popolazione locale all’UCK.

Ma la zona rivestiva e riveste tuttora grandissima importanza anche per i serbi che sono profondamente legati per ragioni storiche e religiose al Kosovo. Quest’immagine evidenzia il gran numero di chiese ortodosse e di importanti luoghi di culto. Alcuni dei quali sono veri e propri gioielli d’arte e rappresentano la storia religiosa dei serbi (Pec, Decani). In questa situazione, iniziava, per i contingenti della forza internazionale di pace l’ingresso nel Kosovo ed, invero, l’entusiasmo del giorno della firma degli accordi lasciava ben presto lo spazio alla sgradevole percezione della continuazione della guerra.

Infatti, lo scenario che si presentava alle unità era caratterizzato da:
- combattimenti tra le opposte fazioni in atto su tutto il territorio;
- completa dissoluzione delle istituzione statuali;
- assenza di Autorità, Magistrati, Forze di Polizia;
- grave situazione dell’ordine e della sicurezza pubblici;
- realizzazione di “alleanze criminali” fra bande kosovare ed albanesi;
- presenza di Autorità autocostituite che tentavano di legittimare il loro ruolo con la violenza;
- completo collasso del sistema economico;
- ambiente fortemente degradato con presenza diffusa di cadaveri che da molto tempo giacevano abbandonati sul terreno;
- presenza di “enclave” di minoranze di serbo-kosovari e di rom;
- elevato livello di distruzione degli edifici e delle infrastrutture;

In questo delicato e complesso contesto, un altro elemento veniva ad ag-
gravare la situazione: la completa assenza, nella fase iniziale dell’operazione, dei rappresentanti delle organizzazioni internazionali. In sostanza, nei primi trenta giorni di attività convulse, i contingenti erano soli e, quindi, da soli hanno dovuto assolvere molteplici e differenziate funzioni;
- militari, per assumere un’efficace controllo del territorio;
- negoziali, per comporre o tentare di comporre, attraverso trattative con le parti contrapposte, le difficili situazioni locali;
- amministrative, giudiziarie, di pubblica sicurezza, per regolamentare la ripresa della attività delle popolazione, per ridurre la situazione generale di disordine e di pericolo e per contenere la presa del “potere” da parte di formazioni politico-militari non riconosciute;
- umanitarie, per far fronte alle numerose esigenze di sostentamento della popolazione, di difesa della sua identità e di salvaguardia dei diritti fondamentali dei suoi membri.

I comandanti dei contingenti, a loro volta, si sono trovati ad essere i più alti funzionari preposti all’amministrazione di un territorio con poteri sia civili sia militari. In sostanza, una sorta di governatori da cui dipendeva non solo l’assolvimento dei compiti operativi, ma anche di quelli umanitari. Vediamo, quindi, quali sono stati i compiti umanitari assolti dai contingenti militari, anche se va subito rilevato che, nel contesto del Kosovo dopo il termine del conflitto, anche le attività più operative avevano evidenti ed immediati risvolti di carattere umanitario.

Innanzitutto la sicurezza ed il sostentamento delle migliaia di profughi che rientravano in Kosovo provenendo dalla Fyrom e dall’Albania. Nonostante i programmi dell’Alto Commissariato per i Rifugiati dell’ONU, che prevedevano il ritorno scaglionato nel tempo, il rientro dei profughi è stato velocissimo. Richiamò l’attenzione sul settore occidentale dove, nel breve volgere di 10-15 giorni, è rientrato il 90% dei profughi. Naturalmente i profughi non avevano più casa e nessun mezzo di sostentamento. Bisognava garantire un tetto, l’assistenza, il vettovagliamento: un po’ la ripetizione di quanto avvenuto in Fyrom.

La ricerca e l’individuazione delle fosse comuni, che ha portato alla scoperta di numerosi luoghi di crimine e alla conferma di decine e decine di atrocità commesse prima dell’arrivo dei contingenti della forza internazionale. Le attività di sminamento, condotte in moltissime aree con gravi pericoli data la completa irregolarità della disseminazione delle mine operata da tutte le fazioni in lotta. Strettamente legata all’attività di sminamento è stata l’istruzione della popolazione, soprattutto dei bambini, sui pericoli degli ordigni esplosivi e sul modo di riconoscerli. Anche qui è possibile portare l’esempio del settore italiano, per avere un’idea dell’ampiezza della problematica che ancora pesa sulla popolazione del Kosovo.

La sicurezza delle minoranze, costituite dalla popolazione serbo-kosovara e dai rom che, a parti invertite rispetto a qualche mese prima, erano ora minacciati e fatti oggetto di violenza. Si trattava, quindi, di presidiare abitati, contrade, qualche volta case singole, respingendo gli attacchi continuamente portati dai nuovi “padroni” del territorio, i membri dell’etnia albanese. L’assistenza alla popolazione locale soprattutto sotto l’aspetto sanitario; numerose le operazioni e le visite mediche effettuate dagli ospedali da campo militari. Ma oltre a questo nobile aspetto
di assistenza umanitaria, i contingenti hanno dovuto anche rimuovere gli enormi cumuli di rifiuti che costellavano le città kosovare al fine di impedire il diffondersi di epidemie. Ed hanno dovuto ancora provvedere alla rimozione ed alla sepoltura dei numerosi cadaveri abbandonati, che nessuno si curava di seppellire.

La ricostruzione delle infrastrutture, attività non soltanto indirizzate alla ricostruzione di quelle stradali ma anche al ripristino delle funzionalità degli edifici scolastici per favorire la ripresa di una vita il più possibile normale. Vanno qui ricordati gli interventi del personale del genio per la ricostruzione di ponti distrutti e per la riattivazione delle linee ferroviarie più importanti così come la costruzione a Djakovica di un aeroporto in grado di risollevare l'economica di tutta l'area. La sicurezza dei luoghi di culto della religione ortodossa, numerosissimi in tutto il Kosovo, molti dei quali, però, già completamente distrutti prima dell'arrivo dei contingenti. I maggiori di tali luoghi sono stati sottoposti a misure di protezione diretta da parte delle unità militari per impedire la distruzione, il danneggiamento e/o la spoliazione; in tale ambito è opportuno ricordare che, comunque, una protezione diretta di un bene culturale assorbe risorse militari significative e per un lungo arco di tempo. In sostanza, nell'operazione in Kosovo, che pur ha avuto risvolti operativi di grande importanza, puntualmente testimoniati dai media internazionali, la componente umanitaria si è rivelata grandissima. I contingenti militari si sono fatti carico di questi compiti umanitari diversissimi per assolvere al meglio, e spesso agendo d’iniziativa, funzioni diversificate. Non è stato facile ma tutto è stato fatto al meglio, tenendo conto delle risorse disponibili e dei pesantissimi condizionamenti imposti dallo scenario locale.

Ricordati sinteticamente gli aspetti umanitari delle più recenti operazioni nei Balcani, mi avvio a concludere delineando alcune personali e brevi valutazioni e considerazioni in merito all'argomento dell'esposizione: le Forze Armate e l'azione umanitaria.

La prima considerazione è relativa al fatto che, in tutte le operazioni di Supporto alla pace, anche in quelle non indirizzate specificatamente agli aiuti alla popolazione, una parte notevolissima delle attività dei contingenti, specie nei primi giorni/settimane, è rivolta all’assolvimento di compiti più o meno direttamente attinenti all’ambito umanitario. In Fyrom, pur in presenza di un incombente pericolo operativo, le Forze militari hanno rivolto le loro attenzioni quasi esclusivamente alla sistemazione ed al sostentamento dei profughi.

Emerge da qui l’esigenza che le unità interessate ad operazioni di supporto alla pace siano comunque configurate in maniera da poter garantire una consistente possibilità di risposta ad emergenze umanitarie.

La seconda considerazione nasce dalla constatazione che, allorché si manifesta, l'emergenza umanitaria assume molto spesso dimensioni gigantesche. Ed ancora, dalla constatazione che l'emergenza umanitaria si determina frequentemente nei momenti più caldi delle crisi, quando i problemi di carattere operativo sono ancora elevatissimi. Gli esempi della Fyrom e, soprattutto, del Kosovo sono illuminanti a riguardo.

Ciò mi induce ad affermare che, ferma restando la capacità risolutiva delle grandi Organizzazioni internazionali, il primo intervento umanitario non potrà che essere effettuato da unità militari.
Concludo, quindi, esprimendo il convincimento che l’azione umanitaria costituisce obiettivo e finalità strettamente legati alle capacità ed alle possibilità delle Forze Armate. Ma, soprattutto che, per le caratteristiche delle odierne situazioni conflittuali e, verosimilmente, di quelle future, la componente umanitaria riveste un’importanza sempre maggiore per il raggiungimento del successo in una operazione di sostegno della pace.
STATE SOVEREIGNTY AND PROTECTION
OF REFUGEES AND DISPLACED PERSONS

Kallu KALUMIYA
Deputy Director, Department of International Protection, UNHCR

Mr. Chairman, Ladies and Gentlemen,

It is indeed a challenge to examine the relationship between State sovereignty and the protection of refugees and displaced persons. Our international protection work has recently come under increasing scrutiny. For instance, countries of asylum in the West restricted access to asylum procedures or are interpreting the 1951 Convention narrowly, claiming that it is their sovereign right to determine who shall enter the country. Some argue that UNHCR’s involvement with internally displaced persons is often done at the expense of international refugee protection. Others would like UNHCR to become even more involved with situations of internal displacement so that those displaced remain within their country of origin. At the same time, there is growing reluctance to provide adequate financial and political support to UNHCR’s humanitarian programmes. We in UNHCR recognise of course that hosting refugees and asylum-seekers has its financial, social and political costs. States are exposed to pressures resulting from broader migration issues and find it increasingly difficult to cope with the complexities of large scale refugee flows. And they argue with legitimacy that they have the right to exercise full control over their territory. But how does this right which is so essential to the mechanics of the current international framework tally with international responsibilities to protect refugees and others at risk from conflict and serious human rights violations? To address these challenges, it is indeed important to balance the legitimate interests of States, which include their international responsibilities towards refugees and others at risk.

This balancing act is the underlying premise of my presentation. I will first look in more detail into the relationship between refugee protection and State sovereignty, and then analyse how State sovereignty impinges on our work with the internally displaced.

Refugee Protection and Sovereignty

Conflicts and human rights violations are sadly daily occurrences, producing a never ending cycle of displacement: be it in the Great Lake Region, the Horn of Africa, in Afghanistan, or the Caucasus, just to name a few. But refugee problems are not only closely tied to the spread of inter-ethnic conflicts and the capacity of States to respond to and resolve them, but also to globalization and the management of migration aspects. There is no doubt that States have a serious apprehension about “uncontrolled” migration in this era of globalization – globalization in communications, in economics and indeed in migration. The more freely capital and goods move around the world, the more rapidly information and people can travel, the harder it becomes to inhibit the movement of people. The availability of one part of the world to another – with the expansion of global access – is a clear
encouragement to the would-be migrant and opens up more possibilities for the forced migrant with the result that the distinction between asylum-seekers and other forms of disadvantaged migrants is being eroded. As a result, asylum and irregular migration have become seriously confused in the public mind, and refugees have often become stigmatised as people trying to circumvent the law. The threat of uncontrolled migration, combined with trafficking and human smuggling, mass influx, costs of asylum, abuse of asylum procedures, difficulties in returning unsuccessful asylum-seekers are only some of the reasons States are citing for their asylum fatigue. Some States are disillusioned since they are unable to cope with an ever increasingly costly mechanism to deal with asylum applicants.

This combination has lead to a re-shaping of asylum policies, and States are more and more zealously safeguarding their sovereign prerogative to offer asylum on their terms. As former High Commissioner, Sadrudin Aga Khan, pragmatically explained, States have been reluctant to forego their prerogatives here because as they see it they would be making “commitments of a permanent and unlimited nature in a field in which too large a part is left to the hazards of international life and the upheavals which our age is witnessing. The result is that states are becoming increasingly inventive in curtailing these commitments and by ways and odds, or even in conflict with, international law principles which circumscribe their prerogatives”.

In practice, we have indeed witnessed an overly restrictive application of the 1951 Refugee Convention and its 1967 Protocol, coupled with a formidable range of obstacles erected by States to prevent legal and physical access to their territory, as well as the bewildering proliferation of alternative protection regimes of more limited duration and guaranteeing lesser rights when compared to those of the 1951 Convention.

In order to find ways to overcome these challenges, we organized a series of regional symposia between 1997 and 1999 on the theme “Challenges to the Institution of Asylum and Refugee Protection – Reconciling State Interests with International Asylum Obligations”. These four symposia brought together government and independent experts on asylum issues in the European, African, Asian and Latin American regions. They were designed to explore the apparent tensions between State interests and international responsibilities and to identify areas of possible convergence, as well as activities to promote greater harmony between the two. Let me first outline the main State concerns as they have emerged in our discussions:

- financial burden resulting from processing claims and providing for the accommodation and basic needs of asylum seekers;
- abuse of established asylum structures, thereby circumventing legitimate border controls;
- security concerns particularly where refugees and asylum seekers have to resort to illegal residence and entry because of the restrictive admission policies - in such cases, refugees are perceived and portrayed by media as criminals; further, there is a growing concern about the links between migrant trafficking and other forms of transnational crime, drugs, arms trading and prostitution;
- competing with national priorities for limited resources, especially in poor countries where many local populations are facing high levels of poverty;
- lack of economic incentive to accept refugees; in the current environment,
humanitarian considerations are the only incentive for States to accept refugees, but these are insufficient to provide a sufficiently solid durable basis for refugee protection;

f) tensions caused in relations between two or even more States;
g) social and political unrest fuelled by tensions caused within a State through insensitive mixing of cultures, through disturbance of delicate ethnic balances or through exacerbation of xenophobic sentiments;
h) lack of domestic refugee legislation in some States.

While some of these concerns are legitimate - among others, financial burden, security concerns, competing for limited resources, social and political unrest fuelled by tensions - there are important principles in the refugee context which cannot be compromised and are part of peremptory international law, namely: the principle of non-refoulement and the duty to act in good faith, the general principle as contemplated by Article 38(1)(c) of the Statute of the International Court of Justice. This principle provides guidance to States in the fulfilment of their international responsibilities, that is; compliance with customary rules (consuetude est servanda) and with treaty obligations (pacta sunt servanda).

States are obliged not to return refugees to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. As a corollary of the non-refoulement principle, States are further obliged to admit asylum seekers and refugees to their territory if their rejection at the border would lead to a threat to their life or freedom. The scope of applicability of the non-refoulement principle has come under increasing scrutiny in recent years, particularly in extra-territorial areas. Some States refer to the principle of sovereignty and argue for lesser responsibility in territorial waters or on the high seas. UNHCR, however, argues that if a specific State prevents the landing or influences the course of a vessel, such actions are to be attributed to the intervening State, resulting in its responsibility to fulfil its obligation under the 1951 Convention.

The second principle, namely the duty to act in good faith, obliges States party to the 1951 Convention to honour their obligations under the Convention vis-à-vis refugees and asylum seekers on their territory.

Now the very question is: how can the different interests and aspects best be balanced, thereby ensuring effective refugee protection and avoiding erosion of basic refugee protection principles? Or what mechanism can/should be developed to enhance refugee protection, thereby taking account of legitimate State concerns? Can external factors which are part of overall environment be influenced? The changes in national interests (including international political context and domestic situation of receiving States) are not very susceptible to change. Refugees are likely to continue to be perceived as a cost. However, this perceived burden could in itself motivate investment and cooperation to deal with the causes of the problem or to find alternative modes of protection. Addressing root causes, prevent reception in the region and regional mechanisms for temporary protection likely to be areas of interest convergence, where States are motivated to cooperate to reduce the international costs of hosting large numbers of refugees. Changing how people view the benefits and burdens of protecting refugees through education and media, and
how they define their ethical duties to refugees by referring to local traditions and values could be a feasible measure to reconcile the different interests. More needs to be done on how an ethical asylum policy could be portrayed as a component of national interest, rather than as in conflict with it.

For UNHCR, there is a need for concern about all of these issues and we are exploring ways how to assist refugees and States alike in this changing environment, shaped by national and international politics. Most States agree that the best way to minimize asylum costs was not to wind back agreed refugee protection but to invest actively, imaginatively and resourcefully attacking the causes of departure at their source, while at the same time making every effort to restore confidence in the asylum system. UNHCR for its part needs to take stock of the global normative framework for refugee protection. It must strengthen its advice and assistance to States on their national procedures, while continuing actively to pursue the putting in place of national refugee legislation and structures. The Office also has an important role in promoting dialogue and cooperation on refugee issues at the regional level. In addition, it should explore education and media and see how to best use these tools to achieve a better understanding of refugee issues. All these activities have one aim in common: to clearly and unequivocally uphold standards of protection for those who fall within the “protection gap” between international refugee law and State practice.

Some of the activities to be undertaken by UNHCR are already in process: recently, UNHCR proposed at the meeting of the Standing Committee of UNHCR’s Executive Committee to commence a process of globally based consultations, with senior government representatives, experts in the refugee protection area and NGOs. These consultations should serve to clarify the scope and content of protection in different refugee producing situations, including those not covered by the 1951 Convention. The Standing Committee strongly endorsed this proposal and it is hoped, that through this process, innovations are introduced into the protection framework so that the 1951 Convention and its 1967 Protocol can continue to provide the necessary protection guarantees, and in a manner compatible with other legitimate concerns of States.

Since misperceptions often stem from ignorance or manipulation of the facts about asylum seekers and refugees, UNHCR has created education tools and made them available on the web (www.unhcr.ch/refworld): teachers can access unit and lesson plans, as well as receive information on where to order training material. Further, the understanding of refugee protection is promoted through assisting Universities to establish refugee law programmes or to ensure our presence in the academic world.

UNHCR has also been exploring the various ways of using the media to help the general public understand refugee issues. Over the past two years, UNHCR has run a professionally designed public awareness campaign of TV spots, posters and print ads in a number of European countries. The project - funded by the European Commission - aims at ensuring a smooth reintegration of recognised refugees. It also combats negative stereotypes and xenophobic attitudes towards these refugees. Similar campaigns are now underway in countries in Southern Africa, notably a “roll-back xenophobia” campaign in South Africa, which has sought
to address xenophobia by forging strong partnerships with local institutions and framing the protection of asylum seekers and refugees in the broader context of human rights and national constitutional guarantees. But public awareness campaigns, even though quite effective, are not the only way of getting our message across to the “wo(man) in the street”. Refugee issues can also be brought up during debates on asylum and migration, which frequently arouse considerable media attention. Neither UNHCR nor the governments should shun this debate. However, this requires on UNHCR’s part the courage to take up controversial issues and it also requires the willingness by governments to accept constructive criticism and suggestions. A public debate on asylum is not a clash between States and refugee rights groups. In the long run, it is part of a joint effort to make refugee protection better and more efficient.

Protection of Displaced Persons and Sovereignty

Let me now turn to the issue of State sovereignty and the protection of displaced persons and UNHCR’s role in situations of internal displacement. While refugees cross borders and are therefore outside their countries of origin, internally displaced persons remain within state territory, and their protection and assistance is, in principle, a function of domestic jurisdiction. In practice, however, a number of States are unable or unwilling to provide legal and physical protection to persons in areas affected by internal armed conflict, internal strife or other causes. Does sovereignty prevent the international community or other States to intervene and/or to provide assistance under such circumstances? Can we as representatives of States or international organisations just stand aside and watch how people are exposed to inhuman and degrading treatment and/or are tortured, killed? And what role can UNHCR actually play?

As representatives from States, international organisations, non-governmental organisations, we cannot ignore people whose number is increasing by the day. It is estimated that currently some 20 to 25 million people may be internally displaced around the world - a figure higher than the number of refugees. In the Democratic Republic of the Congo alone, for example, an estimated 1.8 million people are displaced internally. Tens of thousands of them lead a nightmarish existence, roaming the bush in search of food, safety and temporary shelter. Caught between multiple warring parties and constantly shifting frontlines, many of these “forced nomads” do not even know who is fighting, let alone why. Thousands have been trapped, wounded or killed in the crossfire. The governments responsible for protecting the rights and well being of internally displaced people are often the cause of their plight, as they pursue calculated strategies aimed at changing the ethnic map of the country or gaining control over economic resources. In far too many of these situations, displacement is not merely a consequence of conflict, but its very objective.

On various occasions, interventions have been made in the past by the international community in order to stop genocide, to prevent massive violations of international humanitarian and human rights laws, to protect civilians or to ensure that relief operations can be carried out. Liberia (1990), Iraq (1991-1992), Somalia (1992-1995), Bosnia and Herzegovina (1992-1995), just to mention a few.
The international community has been repeatedly criticized for its lack of decisive actions in the conflicts in Croatia and Bosnia and Herzegovina - Cutover, Banjo Luke, Srebrenica, Prijedor, Ahmici are just some of the places where harassment, intimidation, rape, torture, detention, forced relocation, extra-judicial killing, destruction of places of worship and cultural importance occurred on a large scale. When the war in the former Yugoslavia finally reached Kosovo and it became evident that all peace negotiations had failed and that the Security Council was not going to issue a Resolution authorising force to stop the ongoing atrocities, the NATO Secretary-General authorized air strikes against the Federal Republic of Yugoslavia (Serbia and Montenegro) on 24 March 1999, with the declared aim of putting an end to the violence in Kosovo. This triggered a severe debate among scholars, State representatives and other actors. Some called it an aggressive act in breach with international law, others called it a justified humanitarian intervention, yet others say: yes it was a breach of international law but from an ethical viewpoint the resort to armed force was justified under the given circumstances. This brings us to the very heart of the sovereignty issue: under what circumstances should a State accept interference? What type of interference: use of force? relief assistance?

The UN Charter is very clear on the legality of interference by force. If the Security Council determines that massive violations of human rights are occurring within a country, which constitute a threat to peace, then it can call for or authorize enforcement measures to put an end to these violations. Without such an authorization, any intervention by force would amount to a breach of Article 2(4) of the UN Charter. The question remains, however: what to do in situations where all the stipulated criteria are met except for the authorisation by the Security Council because of the politics of the day. In the context of Kosovo, States resorted to what they labelled “humanitarian intervention” to put an end to the atrocities in Kosovo. While there is a legal debate on whether, based on this particular instance, one could already argue for the development of a general doctrine justifying humanitarian intervention, it is important for States to realise that in cases where they abuse their sovereignty by brutal and excessively cruel treatment of those within its power, the international community and other States are not going to stand by and watch. But “to forge unity behind the principle that massive and systematic violations of human rights - wherever they take place - should not be allowed to stand” will be the very challenge to the Security Council and to the United Nations, as stressed by the Secretary General Kofi Annan in his address presenting his Annual Report last year in September.

While the Security Council can order the provision of humanitarian assistance under Chapter VII of the UN Charter if there is a situation in a country which constitutes a threat to peace and security, common Article 3, paragraph 2, of the 1949 Conventions and Article 18 of Protocol II provide another basis for the provision of relief assistance. However, Article 18 of Protocol II contains elements, which give a State more discretion, since relief actions can only be undertaken “subject to the consent of the High Contracting Party concerned”. But ICRC convincingly argues in its Commentary that the consent of the State concerned can only be denied under
valid and objective grounds, although one cannot say that there is an absolute obligation for a party to an internal armed conflict to accept strictly humanitarian and impartial relief operations since the parties have always the possibility to “select” the agencies and to limit access on the basis of military or “State interest” considerations. In general, it is held that not only ICRC but also UNHCR and all other international and non-governmental organisations can offer their services to the parties of a given conflict, as long as they are humanitarian and impartial according to their mandates.

Summing up, particularly, where gross and egregious breaches of human rights, amounting to crimes against humanity are carried out on the territory of a sovereign State, the international community and States have an obligation to intervene and to stop atrocities. Where a State abuses its sovereignty by brutal and excessively cruel treatment of those within its power, such a State cannot hide behind sovereignty and must accept interference from outside. In order to deny relief assistance, States must provide valid and objective grounds - it will be very hard for them to come up with such reasons if they themselves are unable to provide such assistance.

Before looking critically at what role UNHCR can actually play in such situations, particularly during ongoing fighting, let me first outline the framework in which UNHCR has to operate. First, we need to be given a mandate in order to become involved in situations of internal displacement (unless our involvement with internally displaced persons is in the context of a voluntary repatriation programme where the displaced have been mingled with returning refugees as well as with the local population). In the past, UNHCR has been tasked by the General Assembly on several occasions to provide assistance and protection to internally displaced persons. Second, while the issue of mandate is crucial for UNHCR to become involved in the first place, further conditions must be fulfilled: besides the consent of the State and, where relevant, any de facto force exercising control over the territory in question, we need access to the affected population and adequate security for UNHCR and, above all, adequate human and financial resources. Otherwise, we are unable to undertake the tasks of providing assistance and protection to the persons displaced.

While the delivery of assistance is essentially a logistical exercise, it is more difficult to provide effective protection during conflict when belligerent parties blatantly violate human rights and international humanitarian laws. We have to ask ourselves: what can we actually contribute through mere presence? What can we do if people are driven out of their houses? Mistreated? Killed? Would we not just be giving States unwilling to intervene the justification for their non-intervention because the international community is taking care of the persons displaced while in practice we are unable to protect them?

As a humanitarian organisation it is difficult to provide effective protection by our mere presence in the situation of all-out conflict. While we can try to negotiate with the forces and remind them of their obligations, we cannot do anything on the ground if atrocities are committed. In order to be effective, the international community must be willing to take robust action to stop atrocities. As already outlined in our 1993 Note on international protection: “Despite what has been achieved
... UNHCR experience also shows that in the absence of a political resolution of a conflict, humanitarian assistance and international presence cannot by themselves provide effective protection to victims nor prevent further displacement and refugee flight”.

Another severe impediment to UNHCR’s activities is the non-removal of the root causes of the conflict. It is important to keep in mind that forced displacement is a consequence of underlying political, social and economic problems. Humanitarian action undertaken without regard to these root causes or without a determination to achieve real solutions is doomed to fail. The efforts of UNHCR and other humanitarian actors can only buy time for peace initiatives to bear fruit or help to bridge the gap until longer-term reconstruction and development efforts are underway.

Nevertheless, “UNHCR is committed to greater involvement with the internally displaced”, as recently stated by the High Commissioner. Either as lead agency for a particular operation, or in a supportive role when one of our partner agencies is better positioned to provide leadership and direction to an operation. But above all, let me assure you, that we do not forget our traditional mandate - the protection of refugees, the very heart of our organisation.

Concluding Thoughts

Let me conclude:

Sovereignty is not sacrosanct. States have to accept interference where they themselves have agreed to encroachments on their sovereignty through international treaty law.

Refugee law is not a static but a dynamic body of principles which has and must retain, an inherent capacity for adjustment and development in the face of changed international scenarios. UNHCR’s approach to promoting this development rests on the understanding that refugee protection is first and foremost about meeting the needs of vulnerable and threatened individuals. These needs, of course, have to be accommodated and addressed in a framework of sometimes competing interests of other parties directly affected by a refugee problem, which include States, host communities and the international community generally.

While we recognize the need for balancing the various interests, this must not happen at the expense of refugee protection. UNHCR regards it as its legal and mandate responsibility to strengthen the available protection modalities for refugees, not to lower the international protection paradigm.
CONTRIBUTIONS
LA SÉCURITÉ COLLECTIVE ET LA MISE EN ŒUVRE 
DU DROIT INTERNATIONAL HUMANITAIRE

Habib SLIM
Secrétaire-Adjoint, Croissant-Rouge tunisien

L’un des plus graves problèmes auquel se trouve, de plus en plus fréquemment confronté le Droit International Humanitaire est celui de son effectivité. Certes, les États parties se sont engagés, aux termes de l’article 1er commun aux quatre Conventions de Genève, à respecter et à faire respecter ces instruments et, par conséquent, à sanctionner par eux-mêmes les violations graves du DIH au cours des conflits armés. Mais dans la mesure où l’effectivité de ces sanctions reste tributaire de la bonne volonté des États belligérants, ces derniers se considèrent comme seuls juges de leur opportunité. Dès lors, il faut toujours s’attendre à ce que les États n’y aient recours qu’en fonction de leur intérêt national et non en fonction de l’intérêt de la communauté internationale. Certes, cette question de l’effectivité du DIH n’est pas spécifique à ce droit, puisqu’elle relève, en fait, d’une problématique plus générale qui est celle de tout le droit international. En effet, d’une façon générale, la règle de droit international est une règle qui n’est pas assortie de sanction dès lors qu’il n’existe pas encore dans la société internationale une autorité qui détient un pouvoir général de sanction contre les États, au sens pénal du terme.

Toutefois, la question peut être considérée comme particulièrement grave pour le DIH pour deux raisons au moins: la première, c’est que le DIH est formé de règles considérées, aujourd’hui, comme des normes impératives du droit international général auxquelles aucune dérogation n’est permise et constitutives d’obligations erga omnes vis-à-vis de la communauté internationale tout entière et non vis-à-vis des États seulement; quant à la seconde raison, elle tient au fait que les violations graves du DIH tendent à se multiplier, à l’heure actuelle, au fur et à mesure que s’allonge la liste des guerres civiles et des conflits nouveaux, appelés conflits déstructurés, au cours desquels s’accumulent les crimes de guerre les plus atroces qui révoltent d’autant plus la conscience de la communauté internationale qu’ils sont assurés de l’impunité.

Ces nouveaux types de conflits ont produit des résultats intolérables, qui se sont avérés extrêmement désastreux, sinon meurtriers, pour la population civile, sans que les Nations Unies, le CICR et les organisations humanitaires aient été en mesure d’intervenir pour assurer protection et secours à cette population du fait que les acteurs de ces conflits ne sont plus ni des États, ni des armées structurées et hiérarchisées comme dans les conflits classiques. Parfois aussi, l’État lui-même a refusé une solution négociée comme ce fut le cas au Kosovo, ouvrant alors la voie à un processus de massacres, de déportations massives et de déplacement de la population civile vers les zones frontalières voisines.

Or, on recense actuellement pas moins de dix conflits internationaux et vingt-cinq guerres civiles qui font rage dans toutes les parties du monde, essentiellement en Afrique. Ces guerres sont souvent dues à des causes multiples, dont certaines
sont classiques, comme les revendications territoriales ou les réactions contre les dictatures. D'autres sont beaucoup plus récentes puisqu'elles se sont multipliées dès le début des années quatre-vingt-dix, du fait d’un regain des nationalismes, ainsi que de l’explosion des haines religieuses et ethniques ancestrales, longtemps contenues par des facteurs politiques et idéologiques. En effet, dans cette nouvelle société internationale, caractérisée par la chute du communisme et la fin de l’ère bi-polaire, les affrontements directs ou indirects entre grandes puissances ont cédé le pas aux conflits internes et aux guérillas, de nature complexe et le plus souvent marqués par un enchevêtrement des combats. Face à ces nouveaux conflits, le DIH s’est avéré particulièrement inadapté, puisque le droit de Genève, conçu surtout pour les conflits à caractère international, ne comporte guère de règles relatives à la mise en œuvre du droit humanitaire dans les conflits armés non-internationaux. Ainsi, les violations de l’article 3 commun aux quatre Conventions de Genève de 1949 et du Protocole II de 1977 ne sont pas qualifiées d’infractions graves du DIH, au sens strict du terme, et ne sont donc sanctionnées que par l’obligation d’y mettre fin et non pas par l’obligation de punir leurs auteurs. Au surplus, l’assistance humanitaire ne peut être envisagée qu’avec le consentement de l’État concerné, le CICR ne pouvant intervenir que sous forme d’offre de services aux Parties en conflit. Encore faut-il ajouter que, comme l’affirme M. Yves Sandoz, le système des puissances protectrices n’est pas envisagé dans ce cadre. 

Or, ces lacunes relatives à la mise en œuvre du DIH se sont avérées particulièrement graves, face aux conséquences désastreuses de certains nouveaux conflits, du point de vue humanitaire, puisqu’on a parlé à juste titre de désasters humains causés par des conflits localisés ou par des guerres civiles entre ethnies. Et l’on s’est aperçu que ni le CICR, ni les ONG, ni même les opérations classiques de maintien de la paix n’étaient aptes à arrêter ces désasters humanitaires. Le seul recours qui restait possible était l’utilisation du système de sécurité collective de la Charte des Nations Unies qui, aux termes du Chapitre VII, investit le Conseil de sécurité de pouvoirs exorbitants pour entreprendre des actions humanitaires grâce à des mesures coercitives de nature militaire ou non militaire, mais contraignantes pour les États. En effet, assez rapidement, les cinq membres permanents du Conseil de sécurité, c’est-a-dire les États-Unis d’abord, ensuite et dans une moindre mesure la France et les autres membres permanents, à l’exception de la Chine, sont arrivés à la conclusion que la seule façon d’arrêter ces tragédies humanitaires était de faire jouer un rôle majeur au Conseil de sécurité grâce à des résolutions à caractère humanitaire adoptées dans le cadre du système de sécurité collective institué par le Chapitre VII de la Charte des Nations Unies. Comme l’affirmait si bien le Professeur Pierre-Marie Dupuy, c’est dans ce cadre que le Conseil de sécurité est le seul à pouvoir agir à la fois rapidement et fermement, par la voie de résolutions obligatoires pour tous les États membres, et à entreprendre par la force des actions humanitaires ou des sanctions contre une violation massive ou généralisée du droit humanitaire.

Ainsi, l’on peut dire que la mise en œuvre du droit humanitaire au cours des dix dernières années n’est devenue effective que lorsqu’elle est tombée dans le droit commun de la sécurité collective, autrement dit dès lors que le Conseil de sécurité s’est mis à élargir à certaines violations graves du droit humanitaire la
notion de menace contre la paix et la sécurité internationales, au sens de l’article 39 de la Charte des Nations Unies. Or, cet élargissement, qui a servi de fondement à la référence au Chapitre VII dans un grand nombre de résolutions contraignantes à caractère humanitaire adoptées par le Conseil de sécurité, a évolué en fonction de considérations ou d’appréciations politiques qui ont été surtout celles des cinq membres permanents du Conseil. Dans un premier temps, on a constaté que cet élargissement a été incessant, tant les relations entre les cinq grands étaient marquées par une volonté de maintenir le consensus leur permettant de prendre des décisions collectives, dans le cadre du condominium institué par les pères fondateurs de la Charte. Mais, la crise du Kosovo a sonné le glas de ce consensus et a empêché au Conseil de faire face à ses responsabilités malgré l’ampleur de la tragédie humanitaire vécue par les populations civiles, victimes des exactions serbes. C’est pourquoi, après avoir adopté sans résultat plusieurs mesures d’embargo contre la République Fédérale de Yougoslavie, le Conseil de sécurité a été empêché de sauter le pas qu’il avait franchi jusque-là dans tous les autres cas en adoptant contre cet État des mesures de coercition militaire. Il sera intéressant de voir comment la recrudescence des violations graves du droit humanitaire a été, dans la pratique, à la fois un accélérateur, puis un frein à l’extension de la notion de menace contre la paix.

La recrudescence des violations graves du droit humanitaire, accélérateur de l’extension de la notion de menace contre la paix

L’on sait que, grâce à la crise puis à la guerre du Golfe, le Conseil de sécurité, libéré de l’ antagonistisme des blocs, a pu redécouvrir toutes les potentialités jusque-là inexploitées du Chapitre VII de la Charte pour relancer le système de sécurité collective, demeuré longtemps inutilisé. Depuis, on est passé à l’excès inverse puisque, comme le dit si bien le Professeur P.M. Dupuy: “on est passé d’une exploitation minimale du Chapitre VII, héritée de la période post-glaciaire d’entente réduite entre les grands, à une sorte de surchauffe du système de sécurité collective. Cette surexploitation du système de sécurité collective de la Charte, durant les années quatre-vingt-dix, a été rendue possible grâce à un élargissement considérable du domaine de cette sécurité, par le biais d’une extension non moins considérable de la notion de menace contre la paix et la sécurité internationales”.

Le polymorphisme incontrôlable du concept de menace contre la paix

L’on sait que le fonctionnement des mécanismes de la sécurité collective est rattaché à la constatation faite par le Conseil de sécurité d’une situation de menace contre la paix, de rupture de la paix ou d’agression. Selon les termes de l’article 39 de la Charte, cette qualification est faite par le Conseil, cas par cas et selon une appréciation qui semble bien discrétionnaire du moment que le texte n’impose aucun critère d’appréciation, ni aucune condition susceptibles de limiter le choix du Conseil, en réalité le choix des cinq membres permanents de celui-ci. C’est dire que l’article 39 constitue la clé de voûte de tout le système de sécurité collective puisque c’est sur la base du constat prévu par les dispositions de cet article que le Conseil peut déclencher les mesures coercitives prévues par l’article 41 (mesures non militaires) et par l’article 42 (mesures militaires).
Dans la réalité, le Conseil de sécurité a agi comme s’il était en droit d’apprécier librement les situations dont il était saisi, et de les qualifier souverainement, même s’il ne l’a jamais dit. Et il ne s’est pas privé d’utiliser cette liberté pour entreprendre une extension prétorienne et illimitée de la menace contre la paix et la sécurité internationales. Comme le dit si bien le Doyen Maurice Torelli: “La diversité des situations auxquelles le Conseil de sécurité doit faire face (Irak, Somalie, Yougoslavie), la rapidité de leur évolution en tant qu’organe de décision font que ce dernier ne peut agir que pragmatiquement, sans avoir une doctrine clairement établie”. Et il en conclut que le Conseil “va donc être amené à puiser au coup par coup dans les moyens mis à sa disposition notamment par le Chapitre VII, voire à innover lorsqu’il faut envisager le recours à la force”.

On a beaucoup discuté sur le point de savoir si les pouvoirs du Conseil de sécurité quant à l’extension du domaine de la menace à la paix, en vertu de l’article 39 de la Charte, sont illimités sur le plan juridique et s’il n’est pas possible de concevoir des limites à la volonté du Conseil, en dehors de cet article, à travers les autres dispositions de la Charte, notamment à travers les dispositions de l’article 24 - para. 2 qui imposent au Conseil d’agir, dans l’accomplissement de ses devoirs “conformément aux buts et principes des Nations Unies”. Comme on a beaucoup discuté de la question de savoir s’il est possible d’imposer au Conseil de sécurité un contrôle sur ses actes.

Pour aussi intéressantes qu’elles soient sur le plan juridique, de telles discussions n’ont guère de portée pratique. En effet, il faut compter avec la volonté des membres du Conseil de sécurité, notamment les cinq membres permanents, de maintenir l’autorité du Conseil en tant qu’organe principal du maintien de la paix et de la sécurité internationales et, donc, en tant que bras agissant de la sécurité collective. Et c’est dans cette perspective qu’il faut placer l’élargissement par le Conseil du domaine de la menace contre la paix, seule condition nécessaire à l’élargissement de son action. Dès le 31 janvier 1992, le Conseil lui-même, réuni symboliquement et pour la première fois au niveau des Chefs d’État et de gouvernement a marqué son intention de procéder à une telle extension dans la déclaration commune adoptée à cette occasion et dans laquelle il est demandé au Secrétaire général de préparer un rapport sur les données nouvelles de la sécurité collective en tenant compte du fait que: “la paix et la sécurité internationales ne découlent pas seulement de l’absence de guerre et de conflits armés”, mais que d’autres menaces de nature non militaire à la paix et à la sécurité trouvent leur source dans l’instabilité qui existe dans le domaine économique social humanitaire et écologique. Une telle affirmation signifie qu’en dehors du champ classique des conflits armés inter-étatiques, la menace contre la paix peut envahir tous les domaines de la régulation humaine. De telle sorte qu’à partir du moment où la notion de paix et sécurité n’obéit plus à des critères identifiables et que le concept de menace contre la paix devient un concept éminemment polymorphe, aucun domaine ne puisse plus échapper alors à la volonté d’agir du Conseil de sécurité.

Par ailleurs, comment omettre de mentionner ici que, selon les termes de l’article 2-para. 7 de la Charte, il faut considérer qu’aucun domaine ne peut échapper à la compétence du Conseil de sécurité agissant en vertu du Chapitre VII puisque ce dernier peut, en vertu des pouvoirs qui lui sont conférés par ce
Chapitre, au nom de la sécurité collective, intervenir même dans les affaires qui relèvent essentiellement de la compétence nationale d’un État.

Encore faut-il rappeler que les débats qui ont eu lieu à ce sujet au cours de la Conférence de San Francisco tendent à prouver que, malgré les réticences de certains États, les cinq grandes puissances au moins ont considéré que lorsque le Conseil de sécurité agit dans le domaine de la sécurité collective, en vertu du Chapitre VII, rien ne peut l’arrêter, et que non seulement il édicte le droit, mais “il est lui-même le droit”, pour reprendre la formule célèbre du délégué américain. Même si celui-ci s’est employé également à rassurer certains délégués qui appréhendaient qu’un Conseil de sécurité doté de pouvoirs aussi exorbitants en matière de sécurité collective ne se transforme en dictateur, dès lors que les cinq membres permanents sont d’accord.

C’est d’ailleurs dans cette logique que le Conseil de sécurité a entrepris avec la fin de la guerre froide et le retour à un certain consensualisme entre les cinq grandes puissances, d’élargir continuellement la notion de menace contre la paix, pour y inclure des situations très variées de menaces contre la paix et la sécurité internationales ou de menaces contre la paix et la sécurité dans la région, telles l’afflux de réfugiés kurdes vers les frontières internationales de l’Irak, les guerres civiles, le terrorisme, le coup d’État contre un gouvernement élu démocratiquement (Haïti), le nettoyage ethnique, etc... À tel point qu’on a pu dire que cette notion de menace contre la paix et la sécurité est devenue un espace où le Conseil de sécurité peut aisément ranger toutes les situations qu’il ne souhaite pas, pour des raisons politiques évidentes, classer dans la catégorie des situations de rupture de la paix, comme l’occupation du Koweït par l’Irak (Résolution 660 du 2108/1990) qui, curieusement, n’a pas été qualifiée de situation d’agression. Il s’agit donc d’une notion fonctionnelle qui constitue, pour le Conseil de sécurité, un minimum requis et un préalable nécessaire au déclenchement de mesures coercitives, mais qui n’implique pas de contenu propre, dans la mesure où elle n’est ni un indicateur quant à la gravité de la situation, ni quant à l’intensité des mesures de coercition envisagées. Tous ces caractères s’appliquent naturellement aux résolutions à caractère humanitaire du Conseil de sécurité.

L’élargissement de la menace contre la paix au domaine du DIH

Dès la fin de la guerre du Golfe, le Conseil de sécurité a étendu la notion de menace contre la paix tout d’abord à la situation d’urgence humanitaire qui prévalait au Kurdistan irakien, ensuite aux crises humanitaires et enfin aux situations de violations généralisées du droit humanitaire.

Certains auteurs ont cherché à restreindre les pouvoirs du Conseil de sécurité dans le domaine humanitaire en affirmant que la seule présence d’une situation d’urgence ne suffit pas à instituer une menace contre la paix et que celle-ci nécessite la réunion de deux éléments cumulatifs: “l’impossibilité pour l’aide humanitaire de parvenir à la population” et la “perte grave d’autorité subie par le gouvernement de l’État concerné”.

Dans la pratique, il est difficile d’opposer au Conseil de tels arguments à partir du moment où il a déjà constaté dans la Résolution 688 adoptée le 3 avril 1991 la situation de détresse résultant de la répression des populations kurdes par...
le régime irakien qui “a conduit à un flux massif de réfugiés vers des frontières internationales et à travers celles-ci et à des violations de frontières (...) qui menacent la paix et la sécurité internationales dans la région”. Sans que l’on sache très bien d’ailleurs, si dans l’esprit des membres du Conseil, c’est la violation de frontières internationales du fait de l’afflux massif de réfugiés vers ces frontières qui constitue une menace par elle-même, ou si celle-ci est liée à la répression des populations civiles irakiennes qui a provoqué un exode massif de réfugiés vers les frontières turques qui ne sont pas plus sûres pour elles13. Au demeurant, l’on se souvient que cette Résolution 688 a servi de base juridique à l’opération appelée “Provide comfort” et a permis aux États Unis, à la Grande-Bretagne et à la France d’instituer, au nord et au sud de l’Irak, des zones de sécurité aérienne dont l’objectif était, à l’époque, de protéger l’exode des réfugiés, mais qui ne servent plus aujourd’hui qu’à des interventions quasi-quotidiennes de l’armée américaine et de l’armée britannique contre le territoire irakien.

L’élargissement de la menace contre la paix aux situations de crise humanitaire


Il s’agit souvent, aussi, de situations de conflits internes engendrant de lourdes pertes en vies humaines, ou bien de grandes souffrances à des populations déshéritées, comme au Haut-Karabakh, en Somalie ou au Rwanda (Résolution 918 du 17/05/1994). Ces précédents ont fini par instaurer une véritable pratique du Conseil de sécurité qui a été résumée dans une déclaration faite par son Président, le 26 février 1993, sur les aspects humanitaires de l’Agenda pour la paix, et dans laquelle il affirme que “le Conseil de sécurité note avec préoccupation l’apparition de crises humanitaires … qui constituent des menaces contre la paix et la sécurité internationales, ou aggravent les menaces existantes” (Doc. 8/25344).

L’élargissement de la menace contre la paix aux situations de violations généralisées du DIH

chargé de juger les auteurs des violations du droit humanitaire commises sur le territoire de l’ex-Yougoslavie, et l’autre à la création du Tribunal Pénal International pour le Rwanda chargé de juger les personnes présumées responsables d’actes de génocide ou de violations graves du droit international humanitaire commis sur le territoire du Rwanda et des États voisins. Les statuts de ces deux tribunaux nous permettent de définir, à travers les catégories d’infractions poursuivies, les violations du droit humanitaire considérées par le Conseil de sécurité comme des menaces à la paix. Ce sont:

- les infractions aux Conventions de Genève de 1949 et au Protocole additionnel II;
- les violations des lois et coutumes de la guerre, telles que définies par le Statut du Tribunal de Nuremberg et par la IVè Convention de la Haye du 18/10/1907;
- les crimes de génocide, tels que définis dans la Convention du 9/10/1948 sur la prévention et la répression du crime de génocide;
- les crimes contre l’humanité tels que définis par l’Accord de Londres 8/08/1945 sur le Tribunal de Nuremberg et le statut du Tribunal de Tokyo.

La question qui se pose également est de savoir à partir de quel seuil de gravité les violations du DIH ont été érigées par le Conseil de sécurité en situations de menaces contre la paix? Si l’on se réfère notamment aux Résolutions 808, 827 et 955, on constate que le Conseil parle surtout de “violations flagrantes et généralisées” ou de violations flagrantes, généralisées et systématiques du DIH, comme il évoque en particulier les “tueries massives”, la détention et le viol massif organisés et systématiques des femmes ou encore “la pratique du nettoyage ethnique”. Ce qui montre que le Conseil de sécurité ne prend en considération, dans ses résolutions à caractère humanitaire, que les situations massives ou systématiques de crimes particulièrement odieux commis au cours de conflits internationaux ou de guerres civiles pour conclure à l’existence de menaces contre la paix. Et, en cela, la pratique du Conseil est conforme à l’état du droit international, tel que résumé par la Résolution de l’Institut du droit international adoptée le 13/09/1989 à Saint-Jacques-de-Compostelle et relative à la protection des droits de l’homme et au principe de non intervention dans les affaires intérieures des États, puisque cette Résolution affirme dans l’article 2-para. 3 que “des mesures propres à assurer la protection collective des droits de l’homme sont tout spécialement justifiées lorsqu’elles répondent à des violations particulièrement graves de ces droits, notamment des violations massives ou systématiques, ainsi qu’à celles portant atteinte aux droits auxquels il ne peut être dérogé en aucune circonstance”. Comme on le voit, c’est à travers la notion de menace contre la paix que les violations du DIH ayant atteint un certain degré de gravité peuvent entrer dans la sphère des actes susceptibles d’être sanctionnés par le Conseil de sécurité dans le cadre du Chapitre VII de la Charte. Et l’on s’aperçoit du même coup que la notion de menace contre la paix qui doit qualifier ces situations de violations du DIH n’est qu’une notion fonctionnelle qui permet au Conseil de franchir une étape préalable à l’adoption éventuelle des mesures coercitives qu’il estimerà nécessaires ou opportunes.

L’autorisation de recourir à la force et les limites des sanctions
Une fois que le Conseil de sécurité a utilisé cette clé de l’article 39 de la Charte pour bien indiquer l’existence de violations graves du DIH qui relèvent, désormais, du Chapitre VII et qui ouvrent donc la porte à des actions coercitives, il a le choix entre deux types de mesures, logiquement en fonction de la gravité de la situation. Il peut opter soit pour des mesures de coercition non militaire (article 41), soit pour des mesures de coercition militaire (article 42). L’on sait que, dans la pratique, le recours à la coercition non militaire, conformément à l’article 41 de la Charte, a montré ses limites pratiquement sur tous les théâtres d’opération humanitaire, aussi bien dans le cadre des conflits internationaux que dans le cadre des conflits non internationaux, en particulier dans celui des conflits nouveaux, comme en Somalie, au Rwanda, en Sierra Leone, au Liberia, en Angola etc...puisqu’le plus souvent, les mesures d’embargo n’ont que peu d’effets sur les moyens dont disposent les acteurs sur le terrain pour continuer à s’attaquer à la population civile qui devient ainsi l’otage des combattants.

Dès lors, on comprend pourquoi les rédacteurs de la Charte ont prévu dans le texte de l’article 42 que dans les deux hypothèses où le Conseil de sécurité estime que les mesures prévues à l’article 41 seraient inadéquates ou qu’elles se sont révélées telles, il peut décider des mesures de coercition militaire qui sont les mesures les plus graves. Cette gravité explique pourquoi les pères fondateurs ont enfermé l’utilisation de telles mesures dans des limites et des conditions assez strictes, prévues par les articles 43 et suivants de la Charte. De telle sorte que l’adoption de ces mesures, comme leur mise en œuvre reste, entièrement, entre les mains du Conseil de sécurité, agissant au nom de la collectivité internationale. Le rôle des États consiste seulement à prêter main forte au Conseil, pour lui offrir les moyens militaires et les contingents dont il ne dispose pas. Ce qui signifie qu’aucune des dispositions du Chapitre VII n’a rouvert la voie à l’usage de la force par les États, cet usage demeurant interdit si l’on excepte la situation spécial de la légitime défense, prévue par l’article 51.

Sur cette base, l’on peut dire que l’utilisation, par le Conseil de sécurité aussi bien des mesures de l’article 42 que des mesures de l’article 43, dans ses résolutions à caractère humanitaire, a fait avancer la question de la mise en œuvre effective du DIH et surtout la question de la sanction des violations graves du DIH. Cependant, ces avancées peuvent paraître à la fois limitées et contestables.

**Les mesures coercitives non militaires destinées à assurer l’application du DIH**

Au fil des résolutions contraignantes adoptées, le Conseil de sécurité a tenté aussi bien de rendre opérationnelle l’assistance humanitaire à travers des mesures d’assistance et de protection, que de mettre fin aux violations du DIH, à travers des mesures de dissuasion ou de sanction.

**Les mesures d’assistance humanitaire**

Deux types de mesures ont été décidées par le Conseil de sécurité dans le but de faciliter et de renforcer l’assistance humanitaire aux victimes des conflits internes, en particulier aux victimes des nouveaux conflits, et de rappeler les bel-
ligérants au respect de leurs obligations humanitaires.

Les obligations d’assistance humanitaire imposées aux parties

Les obligations des parties d’assurer la sécurité des convois humanitaires
À plusieurs occasions, le Conseil de sécurité s’est trouvé également confronté à un problème très grave qui est celui de l’insécurité des zones de passage des convois humanitaires, en particulier en Somalie, mais aussi en Bosnie, au Libéria, en Géorgie et au Rwanda, où le personnel et les fournitures sont menacés par des factions ou des bandes rebelles qui opèrent sur des terrains incontrôlés et incontrôlables par des autorités militaires civiles. C’est dire que, de ce fait, tout l’acheminement de l’aide humanitaire à des populations qui en ont grandement besoin et qui sont les véritables victimes du conflit se trouve menacé. L’on sait que les ONG et surtout le CIRC ont eu de très grandes difficultés pour l’acheminement de l’assistance humanitaire en Somalie du fait de l’action des factions rebelles qui se partagent le territoire et que le CIRC a dû, en définitive, payer un tribut pour obtenir un droit de passage à travers les zones de combat et accéder ainsi aux victimes affamées. Et cela malgré les Résolutions 794 et 814 adoptées par le Conseil de sécurité dans le cadre du Chapitre VII, respectivement le 03/12/1992 et le 26/03/1993. La première exige que toutes les parties, tous les mouvements et toutes les factions prennent toutes les mesures nécessaires pour assurer la sécurité du personnel des Nations Unies et des autres organisations participant à l’acheminement de l’aide humanitaire.

Les mesures de protection humanitaire

Plusieurs types de mesures ont été décidées par le Conseil de sécurité dans le but de mettre en sécurité les victimes des conflits armés, en particulier la population civile, dans des zones à finalité humanitaire, ainsi que dans le but d’assurer à cette population un minimum de sécurité grâce à la présence de forces de maintien de la paix.

Les zones soustraites aux combats

Ces zones ressemblent, naturellement, aux zones et localités sanitaires et de sécurité, prévues par l’article 14 de la 4ème Convention de Genève du 12/08/1949 qui permet la création, sur le territoire des États belligérants et sur les territoires occupés, de zones et localités sanitaires et de sécurité organisées de manière à mettre à l’abri des effets de la guerre les blessés et les malades, et les personnes les plus vulnérables. Mais, cette création ne peut se faire qu’avec l’assentiment des parties. C’est précisément ici que réside toute la différence entre ces zones et les zones soustraites aux combats et imposées par le Conseil de sécurité, en vertu du Chapitre VII, article 42, c’est-à-dire par voie de résolution contraignante. Dans cette optique, deux types de zones ont été établies par le Conseil de sécurité: les zones de sécurité et les zones d’interdiction de survol. Cependant, l’efficacité de ces zones soustraites aux combats a été mise en doute, en particulier par le Secrétaire Général des Nations Unies (Rapport annuel de 1994), sinon du point de vue de leurs résultats sur le plan de l’assistance humanitaire aux populations enclavées et quasiment assiégées, du moins du point de vue des conséquences pour le Conseil de sécurité du non respect de “ces structures de dissuasion passive et peu crédibles (...) susceptibles de se transformer aisément en une construction d’impuissance et de perte de la capacité d’agir”.

Les zones de sécurité


Les zones d’interdiction de survol par des avions militaires ou par tous aéronefs


L’utilisation des opérations de maintien de la paix et des missions d’observation

À plusieurs reprises, le Conseil de sécurité a dû élargir la mission des casques
bleus à des tâches humanitaires, ou à des tâches de surveillance de l’application des mesures coercitives décidées par le Conseil à des fins humanitaires, en recourant le cas échéant à la force.

**Les opérations de maintien de la paix au service de l’assistance humanitaire**


Dans d’autres cas, les soldats de la paix ont reçu pour mandat de protéger les convois humanitaires. Il en est ainsi de la FORPRONU (Résolutions 752, 758, 761, 764 et 776), de l’ONUSOM II (Résolution 814), de la MINUAR (Résolutions 872, 912 et 918), de la MONUG (Résolution 937).

**Les opérations de maintien de la paix, au service des mesures coercitives décidées à des fins humanitaires**

Il en a été ainsi en ce qui concerne la FORPRONU qui a reçu, en vertu de la Résolution 836 du 4/06/1993, une extension de son mandat lui permettant dans les zones de sécurité de dissuader les attaques ..., de contrôler le cessez-le-feu, de favoriser le retrait des unités militaires ou paramilitaires et d’occuper quelques points essentiels sur le terrain. Elle autorise également la FORPRONU à prendre pour se défendre les mesures nécessaire, y compris en recourant à la force en riposte à des bombardements ... contre les zones de sécurité, à des incursions armées, ou si des obstacles délibérés étaient mis à l’intérieur de ces zones ou dans leurs environs à la liberté de circulation de la FORPRONU ou de convois humanitaires protégés. Il est clair que ce texte autorise la FORPRONU à faire largement usage de la force, en dehors des limites des zones de sécurité, aussi bien pour se défendre que pour faire respecter les obligations qui s’imposent aux parties quant à la liberté des convois humanitaires.

Dans la même optique, la Résolution 871 du 4/10/1993 autorise la FORPRONU en Croatie à faire usage de la force pour se défendre, non seulement pour assurer sa sécurité, mais aussi sa liberté de mouvement. Ceci lui donne une large liberté de manœuvre qui dépasse la légitime défense nécessaire. Il en est de même en ce qui concerne l’ONUSOM II, autorisée par la Résolution 814 du 26/03/1993 à prendre les mesures coercitives qui pourraient s’imposer pour neutraliser les éléments armés qui attaquent ou menacent d’attaquer les installations ou le personnel des organisations chargées de distribuer l’aide humanitaire en Somalie. La Résolution 837 du 6/06/1993 a même donné à l’ONUSOM II l’autorisation de se doter des moyens nécessaires pour riposter de manière appropriée aux attaques armées qu’il subies dans l’accomplissement de son mandat ou pour dissuader de telles attaques.

Cette pratique extensive du rôle des forces de maintien de la paix à des mesures coercitives décidées par le Conseil de sécurité à des fins humanitaires, sous la forme d’une autorisation à faire usage de la force seulement pour se défendre mais aussi pour défendre les organisations humanitaires et leur matériel, ainsi que pour riposter et dissuader l’adversaire, n’a pas manqué de rapprocher fortement
ces opérations des actions de rétablissement de la paix\textsuperscript{16} ou d’imposition de la paix.
Désormais, la différence entre celles-ci et celles-là n’est plus qu’une différence de degré et non une différence de nature, dès lors que l’élément consensuel qui caractérisait principalement les opérations de maintien de la paix a disparu. Et cette confusion a été d’autant plus accentuée que dans certains cas, comme en Somalie ou en ex-Yougoslavie, de telles opérations se sont succédées (ONUSOM I, Restore Hope, ONUSOM II), ou superposées (FORPRONU, Raids aériens de l’OTAN).

Certains se sont demandés, à juste titre, si un tel glissement des opérations de maintien de la paix vers les opérations de rétablissement ou d’imposition de la paix ne risquait pas d’enfoncer les Casques bleus dans un engrenage de guerre fort dangereux, par le jeu de l’escalade de la violence. Cela s’est passé notamment en Somalie où, le 13 juin 1993, des Casques bleus pakistanais ont tiré sur des manifestants contre les raids aériens de l’ONUSOM II, tuant 14 civils, à la suite de la perte de 23 soldats du contingent pakistanais tués dans une attaque de la faction armée du Général Aïdid\textsuperscript{17}. Au surplus, on n’a pas manqué de relever qu’un tel emploi des forces de maintien de la paix là où il n’y a pas de paix à maintenir relève de la confusion juridique.

\textbf{Les mesures de sanction ou vers la fin de l’impunité des crimes de guerre}


La question la plus importante qui a été soulevée au sujet de la création de ces deux Tribunaux \textit{ad hoc} par le Conseil de sécurité, en l’absence d’un tribunal pénal international permanent à compétence générale, est celle de la légalité ou de la constitutionnalité de la procédure de leur création par rapport à la Charte des Nations Unies, notamment par rapport aux dispositions du Chapitre VII. A cette question, le Tribunal Pénal International pour l’ex-Yougoslavie a répondu, dans son arrêt du 2/10/1995 de l’Affaire Tadic, que la création de ce Tribunal est tout à fait conforme à la lettre et à l’esprit des dispositions de l’article 41 de la Charte qui prévoit, d’une manière non limitative, le genre de mesures coercitives n’impliquant pas l’emploi de la force que le Conseil de sécurité peut être amené à prendre, même si la création d’un tribunal pénal international peut paraître comme une mesure éloignée de celles qui sont expressément prévues par le texte de l’article 41\textsuperscript{18}.

La seconde question qui a été soulevée quant à la création de ces tribunaux \textit{ad hoc} est celle de savoir si, comme le dit le Professeur P.M. Dupuy: “le Conseil de sécurité est conçu dans la Charte pour exercer dans le cadre du Chapitre VII des pouvoirs de police internationale et non sanction quasi-judiciaire de la violation du droit”\textsuperscript{19}. En
réalité, à cette question il faut répondre que ni l’application du droit ni la sanction des violations du droit notamment la sanction des violations du droit humanitaire, ne sont étrangères à la préservation de l’ordre public et à la répression des atteintes à cet ordre public.

Les mesures coercitives militaires autorisées par le Conseil de sécurité et destinées à assurer l’application du DIH

Il convient de poser, ici, le problème de la mise en œuvre du droit humanitaire, dans le cadre de l’article 42 de la Charte, c’est-à-dire par des mesures coercitives impliquant l’usage de la force et par le biais de la pratique des autorisations accordées par le Conseil de sécurité aux États d’utiliser tous les moyens pour assurer l’application de ses résolutions précédentes. L’on sait que cette pratique a été inaugurée par la Résolution 678 et que cette phrase: “utiliser tous les moyens” a été le seul compromis acceptable par la Chine, pour autoriser ce qui devait constituer une intervention contre l’Irak. Cette phrase qui veut tout dire et rien dire à la fois, a permis aux cinq membres permanents du Conseil de sécurité de trouver un consensus autour du projet de résolution qui était débattu, le texte finalement accepté par tous ayant pour seul avantage de permettre à chacun d’avoir sa propre lecture du texte: pour la Chine, tous les moyens ne signifient pas les moyens militaires et pour les autres, tous les moyens signifient les moyens militaires!

Ce précédent que l’on croyait pouvoir considérer, à l’époque, comme précédent isolé devient une pratique courante, puisque repris par la Résolution 794, en ce qui concerne la Somalie, puis par la Résolution 929, en ce qui concerne le Rwanda, puis par la Résolution 940, pour Haïti etc. ...

Certains considèrent à juste titre cette pratique comme une pratique inconstitutionnelle, ne serait-ce que parce qu’elle rouvre la porte à l’emploi de la force par les États et qu’elle contredit, en cela, à la fois l’esprit et la lettre la Charte des Nations Unies, en particulier l’article 2-para. 4. A cela, il faut ajouter que cette pratique a un second inconvénient, aussi grave que celui de l’inconstitutionnalité, c’est qu’elle n’est utilisable que tant qu’elle se situe dans le cadre d’un consensus du Conseil de sécurité. Malheureusement, comme on l’a vu à l’occasion de la crise du Kosovo, hors d’un tel consensus, malgré l’acuité humanitaire de la crise, le Conseil de sécurité a été obligé à une autre intervention, celle de l’OTAN, qui n’était même pas autorisée et qu’il faut bien considérer comme une simple opération de contre-mesure.


The raison d’être of statehood is vividly described in the American Declaration of Independence 1776: “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness - That to secure these rights, Governments are instituted among Men, deriving their just Powers from the consent of the Governed”.

The State is the machinery configured for achieving and enjoying the birth rights of life, liberty, and happiness. The State is not a master but servant of the people. The right to life, liberty, peace, dignity and development belong to the individual and are rights without borders. The treatment of an individual within the borders of a State is no longer within the exclusive sovereignty of a State. The development of international law and the process of globalisation are redefining the traditional concept of State sovereignty. According to Professor Schwarzenberger “the totality of the rules of international law can be explained as a constantly changing and dynamic interplay between the rules underlying the principles of sovereignty and those governing the other fundamental principles of international law”.

The framers of the United Nations Charter though dedicated to peace were aware of the terrors of armed conflicts. The Organisation was established to “maintain international peace and security” if necessary by taking “effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace” [Article 1(1)]. The international collective security system is spelled in Chapter VII, whereby the Security Council is authorised to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security” [Article 42]. Again, while the “domestic jurisdiction” clause of Article 2(7) safeguards State sovereignty, an exception is made in the case of enforcement action under Chapter VII. Measures taken by the Security Council for the maintenance and preservation of world peace and international security take precedence over State sovereignty. There has been a major change in the pattern of armed conflicts. 90% of armed conflicts that are taking place today are within and not between States. The collective security system envisaged under the Charter faced a challenge during the Kosovo crisis causing widespread destruction and displacement of population. The Security Council was prevented from intervening in Kosovo because of the disagreement among its permanent members on the legitimacy of UN intervention. Proponents of the doctrinaire approach emphasised the inviolability of Serbian sovereignty. Others emphasised the imperative to act by the use of force in the face of blatant abuses of human rights. The result was that the Security Council was stymied and the international security system established under the Charter was circumvented by NATO with the bombing of Serbian targets. Does not the NATO bombing involving unilateral military action by a group of States undermine the improvable system devised by the Charter?
If the primacy of the Security Council in the maintenance of international peace and security is not respected, the very foundations of the Charter system are threatened. There is no other universally accepted legal basis for stopping acts of wanton violence. In the process of conflict prevention, peace-making and peace-keeping, there is no scope for regional organisations. Apparently the States that opposed United Nations humanitarian action during the open debate on the humanitarian aspects of the issues before the Security Council in March [SC/6818, 9 March 2000] of this year were oblivious to the dangers of interventions outside the Charter. The following Charter provisions envisage humanitarian action:

**Preamble:** The United Nations was founded to “save succeeding generations from the scourge of war”.

**Purposes:** Para (1) of Article 1 has two components. The first describes the essential “purpose” of the UN, namely “to maintain international peace and security”. The second part elaborates the process through which the purpose was to be achieved, namely to “take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of peace”. The first three clauses of Article 1 suggest that “peace” is not merely the absence of “war”.

**Principles:** The Security Council under Article 2(7) is authorised to “interfere” in “matters which are essentially within the domestic jurisdiction of any State” in adopting enforcement measures under Chapter VII.

**Functions of the Security Council:** The “maintenance of international peace and security” under Article 24 is the “primary responsibility” of the Security Council. The “primary responsibility” indicates that the Security Council is politically more powerful than other organs. [Lockerbie Aerial Incident Case (1992) ICJ Rep 114].

**Enforcement measures:** Chapter VII deals with the measures that the Security Council may take for preserving and restoring peace. The Security Council under Article 39 has two functions: (a) determination of “the existence of any threat to peace, breach of peace, or an act of aggression”, and (b) decide upon the measures “to maintain or restore international peace and security”.

The scope of determining “any threat to peace” has been enlarged with the end of the Cold War. The fighting between the forces of the Federal Government of Yugoslavia and the two seceded States of Croatia and Slovenia; fighting between two factions in Somalia; the failure of Libya to surrender the two suspects in the Lockerbie bombing, were a “threat to peace”. Once the prerequisites under Article 39 are determined, the Security Council can proceed on the measures, non-coercive as well as coercive, envisaged in Articles 41 and 42. Under Article 42 such action by “air, sea, or land forces” may be taken as is necessary to (a) “maintain” or (b) “restore” international peace and security. During the Gulf War the deployment of a UN observer unit to oversee the Kuwait-Iraq border under Resolution 678 is an example of the post-conflict efforts to restore peace.

**The Secretary-General:** In authorising the Secretary-General to notify the Security Council of any situation likely to threaten the maintenance of international peace and security, Article 99 recognises him/her as a high political functionary to take initiative in the maintenance of peace and security. It authorises him to submit declarations, proposals, and draft resolutions to the Security Council. The
summoning of the emergency meetings of the Security Council by the Secretary-General in the initial stages of the Congo crisis and the occupation of the American Embassy in Tehran are examples of the exercise of the powers under Article 99.

The last decade witnessed a new phenomenon, disintegration of States leading to dissipation of sovereignty and disappearance of States. An announcement in the International Herald Tribune [5 January 1998] declared the primary role of the United Nations Development Office for Somalia (UNDOS), inter alia, as:

“to establish a planning framework and processes to guide and support the reestablishment of government”. In the mind of a reader who is not familiar with the developments in Somalia an immediate doubt that will arise is as to what happened to the government of erstwhile Somalia that it now requires to be “re-established”. In international law a State may become extinct by annexation, voluntary merger or through capitulatory regimes. The 1933 Montevideo Convention on Rights and Duties of States 1933, generally accepted as reflecting the requirements of statehood in customary international law, envisages in Article 1: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter relations with other States”. The existence of an effective government with administrative, legislative, and judicial organs is necessary for political stability of any community. Independence of the State requires the capacity to enter into relations with other States or international institutions and fulfil the consequent obligations.

One disturbing phenomenon of the post-Cold War era is the proliferation of ethnic, religious, or similar types of armed conflicts leading to the disintegration of States. In situations like Rwanda, Somalia and Liberia sovereignty had collapsed. There was no State structure or military hierarchy to prevent carnage and pillage. The dissipation of State sovereignty due to internal controversial tendencies remains a major security threat for the the international community.

A 1995 study² of failed States examined 600 possible factors in 113 cases world-wide from 1955 to 1994, including Rwanda, the Soviet Republics, Yugoslavia, Somalia and Liberia. The study examined four separate kinds of State failure:
- Revolutionary wars
- Ethnic wars
- Mass killings and genocide
- Adverse or disruptive regime changes

Today the international community cannot be a passive spectator to massive massacres and destruction. Ethnic conflicts blur the distinction between national and international conflict and falsify the notion that only interstate conflict can be a “threat to international peace and security” under Article 39 of the United Nations Charter. Conflicts with hundreds and thousands of casualties and widespread displacement are a formidable threat to international peace and security in a highly interdependent world.

In situations where State sovereignty is in a limbo, an important question that arises is who can replace the deficiency of organised State structure and on what basis? To what extent may force be used by the United Nations in cases of disintegrating States?
Under the system of collective security the United Nations itself is authorised to intervene to restore peace, notwithstanding the “domestic jurisdiction clause” of Article 2(7). In the existing legal framework such action is possible only under Chapter VII of the Charter.

There are trepidations in humanitarian action. Humanitarian personnel had themselves become victims of murderous onslaughts. In Sierra Leone, recently in May, peacekeepers of the United Nations Mission in Sierra Leone (UNAMSIL) were taken as hostages (S/2000/751 31 July 2000). In some cases humanitarian actors had to be withdrawn in self-defence at a time when their presence was most needed. The exploitation of humanitarian aid by the warring parties is narrated by a researcher in 1994: “In Somalia, extracting relief and ‘protection money’ from aid agencies became big business. In Ethiopia, Sudan and Mozambique, relief became a key source of foreign currency to help finance war”.

An ominous development during the last decade has been the settlement of conflicts through negotiations. Comprehensive peace agreements required complex implementation process. Post-conflict peace-building involved the return and reintegration of displaced persons, reconciliation, rebuilding the judicial system, promotion and protection of human rights, electoral assistance and rebuilding war-torn political, economic, and social infrastructures as in Cambodia, Haiti, El Salvador, Guinea-Bissau, and East Timor.

The United Nations is deeply committed to preventing armed conflicts. Non-violent conflicts may eventually escalate into violent armed conflicts. The strategies for preventing armed conflicts, or re-eruption of armed conflicts, include (a) preventive diplomacy, (b) preventive deployment, and (c) preventive disarmament.

Preventive diplomacy involves mediation, conciliation, or negotiation.

Preventive deployment helps to contain conflicts by building confidence in areas of tension or between highly polarised communities. The United Nations Preventive Deployment Force (UNPREDEP) in former Yugoslav Republic of Macedonia established in 1995 has been the only such force. The Secretary-General had recommended for its extension at least until 31 August, but China vetoed the resolution [SC/6784 - 18 January 2000, p. 21].

Preventive disarmament is aimed at slowing down trafficking in small arms and light weapons in the conflict prone areas. In order to implement peace agreements in El Salvador and Mozambique combat forces were demobilised when their weapons were collected and destroyed. It is an irony that we have international legal regimes to prevent trafficking in human persons and narcotics, but none to prevent trafficking in lethal weapons.

The efforts of the United Nations in preventing armed conflicts and maintaining international peace and security have always been on an ad hoc basis. Take for example the case of Sierra Leone. A small, desperately poor, former British Colony had been ravaged by a mixture of coups, civil wars and hyperinflation. Following recent outbreaks of violence the United Nations Mission in Sierra Leone (UNAMISAL) was established under Chapter VII on 22 October 1999 for an initial period of 6 months [SC Resolution 1270 - 27 October 1999] to cooperate with the Government of Sierra Leone and other parties in the implementation of the Lomé
Peace Agreement. Its mandate was extended until 7 August 2000 [Resolution 1289/2000 in S/2000.751]. Again its mandate was extended until 8 September 2000 [Resolution 13/3/2000].

The UN troops were poorly trained and lightly armed. In May this year rebel leader Foday Sankoh, and his gruesome Revolutionary United Front captured some 500 UN peacekeepers. The UN troops were easily cut off and surrounded. Their whereabouts remained unknown. In earlier clashes between RUF and UNAMSIL, Sankoh forces had stripped the peacekeepers of everything including their uniforms and marooned them prompting Kenya and Nigeria to withdraw their forces. The hostages were eventually released in batches over 2 months.

After the extension of the mandate of UNAMSIL by one month, about 200 American troops will go to Nigeria and Ghana to train and equip local personnel bound for peacekeeping duties in Sierra Leone. While the US troops will not be involved, it could provide logistic support in airlifting the Nigerian and Ghanaian and Nigerian soldiers to Sierra Leone. Some lessons are to be learnt from the Sierra Leone catastrophe. Most important is that an ephemeral force whose mandate is extended on a monthly basis is bound not to be successful. As there is an increase in such events, it is time for the international policy makers to explore the possibilities of establishing a long-term, preferably a permanent peace force.

In September 1996 President Bill Clinton had mooted the plans for an African Crisis Response Force. The Force consisting of an all-African military force of 10,000 troops would intervene in Africa’s recurrent crises. The Force would be sent to countries where insurrection, civil war or campaigns of genocide threaten mass civilian casualties. The Force would not intervene in the fighting but would protect safe areas where civilians could receive humanitarian assistance. Such forces would have no legal legitimacy because of the international legal regime vests the functions of maintaining international peace and security only in the United Nations.

The United Nations, should therefore, instead of organising a multinational rapid response contingent on an ad hoc basis, establish a Standing Force, trained, armed, and equipped and ready to respond to any emergency situation. The decision to use such force would be made by the Security Council. After the use of force the peace-building process would begin. Such Force could also ensure:
- protection of UN and international personnel and installations
- personal safety of beneficiaries of humanitarian assistance
- protection of humanitarian transport and infrastructure necessary such as airports, harbours, bridges and so on
- protection of safe areas and no-fly zones
- disarming the parties to the conflict

Funding of such a Force may pose some difficulties. Thirty-six countries have requested a debate on revising the 27-year old scale of contributions to the peacekeeping budget [The Straits Times, 11 August 2000, p. 13]. It may be a good opportunity to examine the prospects of such a Standing Force. The maintenance of international peace and security is within the exclusive field of the Security Council. The General Assembly has the authority over the budget. If the Force is established with the concurrence of both the organs, it would also have legitimacy.
That would be the only way for effective peace.

1 *A Manual of International Law*, 1960, p. 84.


3 D. Keen, “When the rulers go to war with their own people”, in *International Herald Tribune*, 17 August, 1994.
Right to humanitarian assistance as a human right

One of the legal forms in which humanitarian action (hereafter HA) is expressed is the Right to Humanitarian Assistance (hereafter RHA).

Usually, RHA is provided for the benefit or in favour of the victims. This is a sort of gift, an act of generosity and solidarity, kindness, donation which the beneficiary has not the right to request, but which is given because of the goodwill of the donor. RHA, on the other side, is a gift to which the beneficiaries are entitled; they can request such assistance to be given to them or, if relief, goods and services are provided without being asked for by the victims, as a gift which they have the right to receive. This is a higher degree of relations between the donors and recipients, which has the form of a human right.

Human rights have greatly developed in the post World War II period, in particular in the last decades, and have become the main trend of development of international and national law. Under this system or branch of law, the human person is supplied with a series of basic rights as legal rights, and every person can request all those concerned to permit him/her to enjoy such rights. The other side of these rights is the duty of the bodies concerned to act in such a way that the rights are enjoyed. The system of basic human rights has been developing since 1948. In the meantime many new rights have appeared and have been recognized as such. This development has not been terminated. New rights have emerged because the development of human society and the events in international relations have brought out such a need for defining and recognizing new rights, part of the existing system.

In the basic documents on Human Rights, the Universal Declaration, the Covenants, regional Human Rights Charters or Conventions, and in other human rights instruments, no special mention of RHA is made. In numerous humanitarian actions that are taking place continually the victims expect to receive humanitarian assistance without asking for it, they consider that this is something to which they have the right, not as an act of grace. It is true that on containers of relief goods and vehicles taking part in humanitarian action there is an inscription “gift of …”. But this means that this assistance is given by a donor, which does not have a duty to provide this assistance, or not assistance of that kind. It does not mean that the recipient does not have a general right to receive humanitarian assistance. This right exists in customary rule and is in a process of formation: the victims of all kinds of disasters and other emergencies have a right to ask for and to receive humanitarian assistance in a general way, without specifying who has the duty to grant this right.

As we consider that RHA belongs to the human rights law, the examination of its quality, as a customary international law rule should start with that right as seen by its beneficiaries or potential beneficiaries - the victims of disasters. This
approach we have examined. In order to become a rule of customary international law it must find its confirmation in an objective element - State practice and the practice of relevant intergovernmental organizations, namely those which have within their mandate the provision of humanitarian assistance. The widespread and very long practice of these subjects of international law confirm that they consider RHA to be a sort of human right in all the emergency situations of all categories of victims. There are often many groups or types of victims, some of them entitled to RHA by treaty law, for others the treaty law is silent. In the State and international organizations' practice all these different groups are entitled to RHA, i.e. to ask for assistance and to receive it, regardless of the status of the victims in treaty law. In practice, States and international organizations concerned endeavour to extend humanitarian assistance to all the victims requiring it. If some of the groups do not receive it, there is no proof that this could be interpreted that the victims concerned do not have the RHA, but that there are other reasons for not extending them humanitarian assistance in a particular case. The donors often do not have the necessary financial or material resources to cover all the needs; they must act selectively, providing relief first to the groups most urgently in need of it. Another reason could be that the donors do not have the specific kind of assistance required in a particular case, or not in sufficient quantity. Problems of transportation and transit could also be an obstacle to extending such assistance. Collecting assistance requires certain time, especially if the number of victims is huge, so that the time factor also appears. The State and relevant international organizations' practice is expressed by their verbal acts, statements, but mainly in actual action to provide relief. This practice is so intense, dense, widespread, and extensive, that it represents a solid body of State practice, required for the formation of a customary law rule. In addition to the State and relevant intergovernmental organizations' practice, there is an important practice of certain non-governmental organizations specialized in humanitarian assistance, such as the Red Cross and Red Crescent Movement, and in particular the ICRC, which has the quality of a subject of international law. This practice must also be taken into account, it is not only tolerated but also supported by States, and therefore is a factor in the formation of the opinio juris.

The quality of customary law rule should be confirmed by the subjective element, the belief that the victims have a RHA. It is present because it cannot be accidental that States and international organizations concerned tolerate or even actively support humanitarian assistance actions, so numerous, frequent, huge in quantity, to be repeated, without protesting against such actions. They believe, often without making specific declarations, that the actions are based on a customary law rule that the victims of all kinds are entitled to it. The legal problem which confuses sometimes the quality of RHA as a customary law rule is that this right is not supported by the clear regulation of the duty to extend humanitarian assistance, as corresponding to the rule in question. This duty should be developed and regulated more precisely in order to give full value to the RHA.

The role of treaties in the formation of RHA as a customary law rule is that they show how RHA is recognized to certain categories of victims only, and how it is completed by other rules necessary to implement it, containing rights and duties
to the other actors. The RHA established in treaties serves as a guide as to how to develop the same right for other categories of victims or in other situations.

RHA is a specific human right which contributes substantially to the realization of some other fundamental human rights, such as the right to life, to health, to the protection of physical integrity, to basic social services, to medical assistance, to spiritual assistance, to the protection of the family. In this sense RHA could be considered a subsidiary right, which comes into play only when there is no other way to realize these fundamental rights to the full extent. It is also a right which enables the person concerned to maintain the fundamental standards of humanity, which is now being discussed in the United Nations. In practice RHA is in all serious disaster situations of highest importance, it cannot be ignored, because the numerous victims, sometimes for a prolonged period of time, suffer greatly undue hardship owing to the lack of the supplies and services essential for their survival. Very often, even large-scale humanitarian assistance operations far from satisfy the basic needs. Thus the subsidiary RHA comes to the forefront of all rights. It is also evident that often RHA limits the sovereign rights of States, because it is inspired by the elementary considerations of humanity, which are recognized in international law as one of the main factors in international relations.

**Law in force and the right to humanitarian assistance**

RHA could be found in the conventions of international humanitarian law, the Geneva Convention of 1949 and their Additional Protocols of 1977, for armed conflict situations, but not for all the victims. It is proclaimed for those victims who are greatly limited in their movements or in the exercise of their other rights (POWs, internees, persons in occupied territories). These victims are permitted or allowed to receive humanitarian assistance, which implies their right to receive it. In other cases, this is only a customary law rule. It is necessary to note that RHA covers not only basic goods but also certain humanitarian services (medical, tracing, spiritual, social). The right of victims to enjoy the benefits of such services is clearly proclaimed in many provisions. To name a few examples: POWs shall not be prevented from presenting themselves to the medical authorities for examination (Art. 30, III Geneva Convention). Protected civilian persons are entitled to respect for their person, their honour, their family rights, their religious convictions and practices, and their manners and customs (Art. 27, IV Geneva Convention). The right of families to know the fate of their relatives (Protocol I, Art. 32).

RHA, established in certain conventions for specific categories of war victims only, has developed in practice. All the victims have a deep conviction, regardless of their status, that they are entitled to humanitarian assistance when they are in need of it. This has been expressed through numerous humanitarian action operations conducted the world over continually. International organisations, which have in their statutory acts, besides other tasks, the task of providing humanitarian assistance, considered that it was their duty to make efforts to provide such assistance, upon request from the victims or on their own initiative. While there exists the right of everybody to offer humanitarian assistance, as a counterpart to RHA, there is no strict duty of States and of many international organisations to provide a specific type or quantity of humanitarian assistance but only a vaguely
proclaimed duty to come to the assistance of victims. Therefore, often humanitarian action and the resulting humanitarian assistance are in many cases not adequate to the needs. The potential donors are also limited by their resources available for that purpose.

The general trend in the post World War II period has been the increase of humanitarian assistance in volume. This has had an influence on the development of the conscience of the victims that they have the RHA.

By 1992, when the San Remo Institute directly discussed this right, RHA had developed and had been affirmed to such an extent that the Institute was able to draft certain Guiding Principles of the exercise of that right. Taking into consideration the composition of the Institute and the participation at its Round Tables, their conclusions could be considered to be an expression of an important part of the doctrine, and of the state of development of that right. It is of interest to note that in 1999, in the act on the observance by UN forces of international humanitarian law (Secretary-General’s bulletin of 6 August 1999) the detainees are already entitled to receive food, clothing, hygiene and medical attention (item 8.c). This is not a convention but an act expressing the legal opinion prevailing today. There is also the right of their family members to know about the fate of their relatives (item 9.8). RHA has thus attained already a high degree of development.

Concerning the classification of RHA, according to the above-mentioned act of the UN Secretary-General, it is a part of international humanitarian law. At the same time we speak about RHA as a human right. This is not contradictory. These two branches of international law overlap. International humanitarian law is, according to numerous UN General Assembly resolutions “respect for human rights in armed conflict”. International humanitarian law stricto sensu relates only to armed conflict situations, while RHA covers all kinds of situations, both armed conflict and other types of emergency situations. In this sense RHA is a part of international humanitarian law in a broad sense, which the San Remo Institute has been promoting in its activities. This term covers both armed conflict as well as other disasters causing victims.

It should be underlined, finally, that it is not sufficient to proclaim the RHA. This right must be supplemented by many other rules regulating various relations, rights and duties of other actors engaged in a humanitarian action. Without these rules RHA remains an imperfect right, which can be realized only if other actors fulfil their duties, which are essential for the exercise of RHA. The main other actors are: the authorities exercising control over the territory in which there are victims, third States, international intergovernmental organizations having responsibilities in the sphere of humanitarian action, non-governmental international organizations with similar responsibilities.

The right to humanitarian assistance and sovereignty

For the enjoyment of RHA by the victims of a disaster, the principle of sovereignty, the fundamental principle of every independent State, has special importance and is one of the basis of present international law. On the basis of this principle, every State has rights and duties, some of them relevant to RHA.

The relationship between RHA and sovereignty follows the pattern of other
human rights, to the extent that RHA has been recognized as a human right. In my view, the long development of humanitarian action, especially in the second half of the XXth century, has brought about the formation of a RHA as a human right. It is, however, a human right in the process of formation and recognition, not yet fully developed, but sufficiently advanced that its relationship towards sovereignty could be studied.

There is, first of all, the general duty of every sovereign State, and of the authorities claiming the status of a State, to extend humanitarian assistance to all the people on its territory who are victims of a disaster, and who need humanitarian assistance because they cannot by their own means and efforts, satisfy their basic needs. The State has a duty to care not only for its own people, but also for the foreigners who come to its territory, like refugees or foreign POWs and internees who have come forcibly. The victims should address themselves to authorities controlling the territory. This request is stronger if it is based on RHA, which, like every human right, is directed against all authorities, requesting the respect or a realization of that right.

Further examination of RHA in relation to sovereignty depends on the situation. If there is an international armed conflict, conventions of international humanitarian law limit the sovereignty by imposing duties in favour of the victims of the war. These conventions make a difference between specific categories of victims such as POWs or civilian internees or the population of occupied territories, on the one side, and the other war victims, on the other. In the first case there is a RHA of these victims, and the sovereignty of the territorial State is limited to such an extent that it has a legal duty to permit humanitarian action under all circumstances. In the second case, the full sovereign rights are preserved in the form of the right to give consent to every humanitarian action or operation. In non-international armed conflict the consent of the local authorities to every humanitarian action is also required. There are, however, factors, which influence the conduct of the State authorities concerned. This is the question of the qualification of a situation. The one and same situation may be qualified by some as an international armed conflict, as a non-international conflict by others, or not an armed conflict at all by still others. There is no competent international body to decide which qualification is right, and, consequently, which rules apply. Concrete situations often do not conform to the legal construction contained in the conventions. There are also mixed situations where elements of different situations are mixed, there is no pure non-international conflict; it has more or less elements of an international conflict.

The practice of numerous humanitarian assistance actions carried out around the world shows that the strict difference between various types of victims and situations is gradually being obliterated. All groups of victims tend to demand humanitarian assistance as their right, and in this way they limit the sovereign rights of the territorial State to decide whether to agree with a humanitarian action or not. RHA acts as a human right erga omnes. The sovereign rights to decide freely about any humanitarian assistance action still remain in one form or another, because every such action requires the collaboration of many actors, in particular of the local authorities. This trend of development in my view reflects the formation
and development of a customary law rule of RHA as a human right.

When speaking about sovereignty, it is not the question of the territorial State only, other States are called upon to cooperate if a humanitarian action is to be efficient, effective and successful from the point of view of the victims. If they refuse to permit the transit, or do not cooperate fully without good reasons, they have also violated RHA of the victims.

There is a case of the imposition of economic sanctions upon a country by the Security Council of the United Nations for political reasons. These may come into conflict with RHA if they do not take into account humanitarian considerations. Recent practice of the United Nations should be studied to clarify that problem of two conflicting interests. The practice of the ICRC should also be taken into consideration, which is victim-oriented impartial and neutral.

In cases when there is no armed conflict but other disaster causing victims and calling for humanitarian action, there are fewer legal rules of conventional nature. In these situations the recognition of RHA of the victims would also be of the greatest importance. This right is, however, still in the phase of formation and recognition, and does not have the full effects of a human right. Sovereign rights are retained to a high degree. This is one of the consequences of the general state of the disaster relief law, which is not satisfactory. The role of this law should be to reconcile the various interests, which may be conflicting.

**Further development of the right to humanitarian assistance**

RHA is a higher legal form of action to reduce human sufferings of victims of all kinds of disasters. Like all the other basic human rights, it should be fully recognized and affirmed, in order to defend the right of the victims to the attainment and preservation of the minimum standards of humanity. States should use their sovereign rights to facilitate and render possible the enjoyment of basic human rights. At the same time the valid interests of sovereign States should also be taken into consideration. The balance between the possible opposing interests should be established and better regulated by general development of the law. Part of it is the affirmation of RHA as a human right.

In any humanitarian action, there may be abuses of specific rights and rules, including RHA, for specific political interests of some subjects of international law. Therefore, the need to base any humanitarian assistance action on the principles inherent in this type of action should be stressed. These principles, drawn from international humanitarian law and confirmed by the UN General Assembly resolutions dealing with humanitarian action and humanitarian assistance, are humanity, impartiality and in some acts neutrality. The respect of these principles is essential if humanitarian considerations are to be a guiding requirement. In the same direction further development of RHA should be promoted. This would be the best way to serve the interests of all victims, respecting at the same time the recognized sovereign rights to all the States.

The mere proclamation of the RHA is not sufficient. It should be supported by other rules, essential for the realization of RHA, regulating the rights and duties of other actors in any humanitarian action. These rules should be adapted to specific situations (armed conflicts, disturbances, persecutions etc.) or to specific
categories of victims (war victims, refugees and displaced persons, detainees, etc.).
They should cover the types of humanitarian assistance. The rights and duties of
donors, the access to victims, the problems of transit, facilities to be accorded to the
consignments of humanitarian assistance, the status of personnel, the control that
assistance is not abused or misappropriated, the efficient national and international
coordination of any operation of humanitarian assistance - these are some of the
problems requiring answers. Law should have the role of harmonizing various,
often conflicting, interests. Insofar as this has not been already done, the develop-
ment of modern disaster relief law should be promoted, if RHA is to be realized.
The interest of the victims as the ultimate consideration should be the guide in
these efforts. The San Remo Institute should continue to give its contribution to
the RHA, on the basis of the Guiding Principles it adopted in 1993.
ACTION HUMA-NITAIRE ET SOUVERAINETÉ DE L’ÉTAT.
OÙ EST LE PROBLÈME?

Osman EL HAJJÉ
Université Jinane, Liban

Introduction

L’action humanitaire, pour se déployer légitimement et en conformité avec le droit international humanitaire, doit s’entourer d’un ensemble de règles de droit qui précisent et définissent les acteurs auxquels revient le droit à l’action: les destinataires, en la faveur desquels l’action devrait produire ses effets; les circonstances qui la justifient et lui donnent naissance; enfin, le cadre général qui la délimite et borne son champ en lui épargnant d’entrer en conflit avec les compétences et prérogatives de l’État.

Or, l’action humanitaire, dès lors qu’elle s’exerce sur le territoire d’un État souverain et internationalement reconnu, entre immanquablement en compétition avec certaines prérogatives de la souveraineté, pourtant, celle-ci ne peut établir aucune concurrence sans son consentement, tacite ou exprès, sa coopération et sa surveillance autrement elle perd de sa substance. En effet, la souveraineté signifie l’exclusivité des compétences sur un territoire délimité et à l’égard d’une population déterminée et, par déduction, du droit à l’action humanitaire comme constituant une des composantes de la souveraineté. Ce qui veut dire aussi que l’autorité qui peut traiter au nom et pour le compte d’une population d’un territoire est précisément celle qui détient la souveraineté à l’égard de cette population et sur ce territoire1 parce qu’elle est présumée se chargeant de la protection de cette population non seulement contre toute intervention armée, mais aussi contre toute “immixtion d’un État dans une affaire relevant de la compétence d’un ou de plusieurs autres États en vue d’en influencer le cours”2. Il s’en suit des conséquences qui peuvent se révéler terribles pour l’individu et les populations d’un pays quelconque, lorsque la souveraineté est mal exercée ou défaillante. C’est d’ailleurs le cas lorsqu’elle ne s’exerce pas selon les buts qui lui sont assignés par le droit international3, à savoir que ses titulaires violent directement ou laissent violer les droits prévus par la Déclaration universelle des droits de l’homme du 10 décembre 1948, le droit international humanitaire et les autres instruments internationaux des droits de l’homme, au lieu de les respecter, les faire respecter, les promouvoir et les protéger4. Cependant, toute activité humaine en faveur d’autres hommes ne peut être considérée nécessairement comme humanitaire, celle-ci devrait remplir certains critères objectifs et subjectifs.

Essai de définition

Qu’entendons nous par action humanitaire?

Objectivement et positivement, c’est l’activité organisée et programmée par un homme ou un groupe d’hommes. Mais, cette activité peut être aussi entreprise par un État ou plusieurs États, avec ou sans concertation préalable destinée à constituer un organisme opérationnel5. Elle devrait avoir pour unique objectif déclarer de
secourir d’autres hommes ou groupes d’hommes se trouvant dans une situation de détresse matérielle; absence caractérisée et alarmante de nourriture, logement, médicaments et soins, ou détresse morale; discrimination et oppression entraînées par des violations systématiques, flagrantes et massives des droits de l’homme. Les personnes secourues doivent se trouver sur un territoire autre que celui de l’État ou de l’institution de laquelle relève l’activité humanitaire, ce qui engendre une nécessité de traverser les frontières d’un État souverain et, par conséquent, l’exigence de son consentement pour fournir l’assistance et le secours souhaités.

Subjectivement et négativement, l’activité humanitaire ne devrait pas viser d’autres objectifs, à savoir politiques ou militaires, et l’État sur les territoires duquel s’exerce cette activité doit être dans l’incapacité matérielle, partielle ou totale, de l’accomplir par ses propres moyens, dans un temps adéquat, eu égard à l’ampleur de la détresse constatée et des besoins à subvenir, ou n’ayant pas la volonté politique de l’entreprendre, parce qu’il est à l’origine de la situation à affronter ou encore parce que la situation lui échappe complètement ou partiellement du fait de l’effondrement de ses institutions opérationnelles les plus importantes, mettant ainsi l’État dans une situation de défaillance notoire.

L’activité humanitaire devrait se dérouler dans un temps limité qui pourrait être évalué préalablement et qui prendra fin au terme fixé ou dès qu’un changement favorable et durable de la situation aura été induit. Autrement, l’activité humanitaire se charge d’une manière injustifiée d’une prérrogative de la souveraineté et produit par conséquent des effets contraires aux objectifs recherchés par le droit humanitaire, à savoir seconder l’État dans un moment difficile de son existence en attendant l’arrivée des jours meilleurs où il pourrait à nouveau assumer les droits et pouvoirs qui lui reviennent exclusivement.

Pourquoi l’action humanitaire?

L’action humanitaire ne peut être dissociée des concepts de solidarité et d’unité du genre humain, propagés partiellement par les écrits religieux tout au long de l’histoire puis par les auteurs humanistes. Ces idées se sont concrétisées à travers la conclusion des différentes conventions de droit humanitaire, conventions de La Haye de 1907 et de Genève de 1949, l’instauration de la Société des nations en 1919, puis les Nations Unies en 1945 et la Déclaration universelle des droits de l’homme en 1948, avec tout ce qu’elles ont entraîné comme activité normative nationale et internationale, donnant de la sorte un élan jamais égalé de l’activité humanitaire dans les différents coins du monde et partout où une nécessité se faisait sentir. C’est que des États mal instaurés et structurés, des populations insatisfaits ou trompées, et des limites territoriales mal définies ou inadaptées ont entraîné une multiplication des conflits et des drames sans solutions dans le court terme. Il faut ajouter le nombre de plus en plus élevé de catastrophes naturelles qui s’accompagnent d’un affaiblissement des structures étatiques chargées du secours. Il était donc nécessaire que la communauté internationale invente ou consolide les moyens existants afin de soulager des groupes humains dans des situations de détresse presque absolue en empêchant leur agonie et leur disparition définitive. En effet, l’ensemble constitué par la communauté humaine ne peut négliger ou abandonner une partie de lui-même sans perdre son intégrité et avec elle son
âme même, prélude à sa propre disparition. Dans ce sens, parler de souveraineté suppose en premier lieu son encadrement par la communauté des nations mais aussi son assignation à des fonctions de service dans l’intérêt de tous sans aucune discrimination non justifiée par les règles de proportionnalité et de légalité.

A cet effet, la CIJ dès 1970 considérait que l’interdiction du génocide, de la discrimination raciale et de l’esclavage, mais aussi le respect des droits fondamentaux de la personne humaine, sont des obligations erga omnes donc intangibles et hors des atteintes du droit interne et par conséquent “tous les États peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés”12. Cette position de la Cour a trouvé une réalisation concrète dans le statut de Cour Pénale Internationale dont l’article 5 énumère les différents crimes susceptibles d’être poursuivis devant ses instances, même par des particuliers organisés, en passant par les services du procureur de la Cour (art. 13 du Statut).

Pourtant, lorsqu’un État ne respectait pas ses obligations, le droit international jusqu’à il y a peu n’était pas compétent pour se superposer à son système juridique et à ses institutions nationales15. Les drames Bosnie, Rwandais, Haitien et Somalien ont ouvert une brèche dans le système en permettant au Conseil de Sécurité d’intervenir sur la base du Chapitre VII et de l’article 39 de la Charte et sans attendre une quelconque initiative de la part de l’État en cause parce qu’il est incapable de la prendre ou tout simplement ne veut pas la prendre. Ainsi, on peut dire que l’action humanitaire est appelée à se déclencher, à présent, dès lors qu’un État demande l’aide ou que la communauté internationale représentée par le Conseil de Sécurité juge qu’une situation déterminée représente une menace pour la paix et la sécurité internationales, même dans un sens large, avec comme preuve l’acquiescement sans opposition ou réticence de la part des autres États membres des Nations Unies. Or, à plusieurs reprises, le Conseil a utilisé les prérogatives découlant du Chapitre VII: rappelons-nous des cas de la Somalie, du Rwanda, de l’ex-Yougoslavie ou du Timor oriental.

Ces interventions humanitaires ont abouti généralement à stabiliser la situation et à sauvegarder une société humaine en perdition, en attendant des jours meilleurs pour son rétablissement. Il est donc légitime de se demander, devant la situation nouvelle créée par les interventions du Conseil de Sécurité14, si la souveraineté est menacée dans son contenu et comment y remédier sans menacer les fondements même de l’ordre juridique international basé sur le concept de l’indépendance réciproque des États mais aussi sur leur solidarité.

**Corriger le concept de souveraineté**

La souveraineté n’est pas dirigée uniquement contre l’extérieur, interdisant toute intervention ou immixtion dans les affaires intérieures de l’État titulaire de la souveraineté15. Celle-ci comporte l’obligation de maintenir l’intégrité territoriale, la paix sociale, la sécurité, la prospérité et la protection des droits de l’homme. Grotius observait déjà que “tous les princes sont obligés” à “l’observation du droit naturel et du droit divin, ou même du droit des gens”16. George Scelle va encore plus loin en observant que le droit des gens est prioritairement le droit des individus et que la souveraineté n’existe pas du fait que le pouvoir est toujours limité dans la société par la résistance de ses membres et par conséquent que le droit seul
s’impose à tous, et que lui seul est souverain 17.

Cet ensemble de prérogatives de la souveraineté constitue un tout et si l’un de ces éléments vient à manquer, l’État se trouve menacé dans son existence même. Pour cette raison, le droit international met à la charge de l’État la responsabilité d’empêcher toute intervention extérieure dans ses affaires et de refuser tout partage des tâches découlant de sa souveraineté sans son accord, comme il est d’ailleurs stipulé dans les Conventions de Genève de 1949. La conférence internationale de la Croix-Rouge l’a confirmé en 1969, lorsqu’elle a pris une résolution stipulant que “l’aide... doit être organisée de manière à éviter tout préjudice à la souveraineté et à la législation nationale” 18, de même, le Protocole II de 1977 stipule à son article 3 que “Aucune disposition du présent Protocole ne sera invoquée en vue de porter atteinte à la souveraineté d’un État ou à la responsabilité du gouvernement de maintenir ou de rétablir l’ordre public dans l’État ou de défendre l’unité nationale et l’intégrité territoriale de l’État par tous les moyens légitimes”. En contrepartie, l’État doit se montrer à la hauteur de la confiance accordée et des prérogatives déléguées.

Pour les raisons qui ont été signalées, l’État assume prioritairement l’action humanitaire et la protection de ses propres citoyens en excluant toute autre intervention d’où qu’elle vienne. Cependant, des limites s’imposent, et elles sont engendrées par les circonstances. En effet, il ne peut être question de laisser les populations sans secours et dans la détresse sans manquer gravement à la règle de la solidarité qui est inséparable de la souveraineté dans un monde interdépendant. Par conséquent, il peut paraître légitime à toute population lorsque la carence des autorités du pays est constatée, de réclamer l’aide et le secours de l’extérieur, c’est une question de légitime défense et un droit naturel à la survie 19.

Mais qui peut constater la carence? La réponse n’est pas aisée parce que toute proposition risque d’aller à l’encontre du principe de la souveraineté et elle peut l’affaiblir à l’extérieur préalablement à son élimination. Ajoutons en outre que nous vivons toujours dans un monde en compétition et toute initiative risque, au lieu d’apporter une solution, d’affaiblir la partie faible tout en renforçant l’autre. En effet, si la solidarité existe réellement, elle n’a pas encore abouti au stade où on oublie ses intérêts particuliers et égoïstes.

Cependant, devant le danger qui plane sur la vie du groupe, il est permis d’envisager toute solution en mesure d’apporter le salut et de soulager les souffrances des gens, le droit à la vie étant consacré comme un droit intangible par le Pacte international des droits civils et politiques. À cet effet, on peut envisager la création d’un organisme d’alerte auprès du Conseil de Sécurité chargé de recueillir et de traiter les informations provenant des organisations civiles nationales elles-mêmes, au risque de les exposer à toutes sortes d’accusations, ou d’organisations étrangères ou internationales travaillant ou ayant des correspondants sur place. Ces informations, après examen et authentification, peuvent éclairer une décision du Conseil. Mais, auparavant, celui-ci devrait être démocratisé avec la participation des pays du Sud et ses décisions devraient être motivées.

A cet effet, et pour rendre ces constatations crédibles, l’organisme constitué devrait être doté des moyens et du pouvoir d’enquêter et de vérifier les différentes allégations. Le système actuel du rapporteur indépendant et du représentant spécial a montré ses limites et ne peut être chargé d’un tel travail.
Ainsi, l’amélioration du système actuel par l’octroi d’un rôle statutaire au Conseil de Sécurité aboutira immanquablement à désserrer l’étau de la souveraineté dans l’intérêt de la survie du groupe humain délaissé et, par conséquent, les raisons et les circonstances qui motivent sa mise en œuvre doivent être d’une gravité certaine.


3 La souveraineté signifie pour le tiers l’interdiction de toute intervention dans les affaires intérieu-


4 Voir l’article premier des quatre Conventions de Genève du 12 Août 1949.

5 Dans ce sens, l’objectif premier de l’organisme ou de l’organisation instituée est la fourniture des secours et d’autres moyens d’aide à ceux et celles qui en ont besoin. Le principe de neutralité proné par le Comité International de la Croix-Rouge et, dans une moindre mesure, par le Haut Commissariat des Nations Unies pour les Réfugiés caractérise ces organisations.


8 Exemples de l’Ex-Yougoslavie pour le Kosovo, de l’Indonésie et du Timor oriental.

9 La Somalie et Haïti.

10 Voir l’article 2 du Pacte International relatif aux droits civils et politiques qui indique que “Les États parties au présent Pacte s’engagent à respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence les droits reconnus dans le présent Pacte, sans distinction aucune”.


12 Ibidem, para. 32, p. 32.


16 H. Grotius, Le droit de la guerre et de la Paix, trad. J. Barbeyrac, Amsterdam, 1729, tome I, p. 150.
18 Voir la Résolution XXVI de la Conférence d’Istanbul du Mouvement de la Croix-Rouge.
Monsieur le Président, Mesdames, Messieurs,
Permettez-moi, au nom de Médecins du Monde-France, de me joindre aux autres orateurs pour vous remercier de nous avoir invités à nous exprimer à l’occasion de ce Congrès, qui marque le trentième anniversaire de l’Institut International de Droit Humanitaire.

Nul ne peut ignorer aujourd’hui, au sein du nouveau contexte mondial, l’urgence qu’il y a à replacer concrètement la question de la Protection des Populations sur le devant de la scène internationale. En effet, le constat est unanime: la vulnérabilité des populations civiles dans les conflits internationaux ou non internationaux est grandissante.

En 1918: 5% des victimes de la première guerre mondiale étaient des civils. Alors qu’en 1999: 95% des victimes des guerres sont des civils.

À la merci de nouveaux types de conflits, les populations sont devenues les otages d’enjeux qu’elles ne maîtrisent pas. Prises entre les tirs croisés des différents camps qui s’opposent, celle-ci sont assassinées, affamées, déplacées, pillées, au lieu d’être protégées. Le bilan de ces vingt dernières années est insoutenable.

Depuis la fin de la guerre froide, de nouveaux types de conflits, à la configuration de plus en plus floue, sont apparus. Au Soudan, en Angola, au Kosovo, des conflits internes opposent une armée dite régulière à une force dite de libération. En Somalie, au Liberia et en Sierra-Leone s’opposent des factions entre elles dans des contextes où l’État n’est plus bien souvent qu’un acteur incapable d’endiguer la violence. Ces conflits sont de plus en plus complexes. Une multiplicité d’acteurs interviennent souvent au sein d’un même conflit: armée nationale, factions, milices, mercenaires, intervention d’autres pays frontaliers ou non.

Dans ces contextes, les alliances entre ces forces se font et se défont sans aucune logique. L’ex-Zaïre en est le meilleur exemple.

Les conflits se privatisent: des mafias, des représentants d’intérêts économiques deviennent aussi les acteurs des conflits, comme en Angola.


Les femmes et les enfants se trouvent particulièrement exposés à la violence: trop souvent les femmes deviennent l’objet de viol et d’exploitation sexuelle alors que les enfants, proie facile, sont contraints à travailler ou à combattre.

En résumé, Médecins du Monde établit à partir de sa présence dans la plu-
part des conflits qui ont éclaté ces vingt dernières années un constat accablant: l’absence de protection des populations civiles au sein de ces nouveaux conflits et la réduction de l’espace d’intervention des organisations humanitaires. C’est ce qu’a encore démontré le conflit en Tchétchénie… L’action humanitaire se trouve ainsi dans une impasse.

Paradoxalement, alors que les conflits de ces 20 dernières années condamment les populations civiles à une vulnérabilité de plus en plus grande, la société internationale n’a cessé, dans le même temps, de se doter d’instruments juridiques de plus en plus nombreux pour protéger les populations. C’est ainsi que le droit international humanitaire, qui a pour objectif de limiter la violence de la guerre, de protéger les droits fondamentaux de la personne humaine en période de conflit armé, et qui prévoit les conditions de l’accès à l’assistance humanitaire et la protection de ceux qui l’apportent, est bafoué.

Il faut souligner que des acteurs très divers contribuent à établir aujourd’hui des diagnostics humanitaires: ONG, Agences des Nations Unies, journalistes, personnalités indépendantes… Mais ces acteurs, convaincus, dans les moments de crise, de l’urgence de la nécessité de protéger les civils, sont insuffisamment entendus par les États en situation de décision politique. Face à l’ensemble de ces initiatives collectives ou individuelles, mais dispersées, il manque néanmoins aujourd’hui l’essentiel pour protéger concrètement, rapidement et efficacement les populations civiles auprès desquelles nous nous mobilisons.

Il manque l’essentiel, parce qu’il n’existe pas d’organe fournissant des données suffisamment reconnues comme objectives et incontestables, pour provoquer des décisions. Les chiffres disponibles étant le plus souvent fournis par les belligérants en fonction de leur stratégie militaire ou par des témoins peu fiables.


La Commission pourrait fonctionner par des contributions volontaires des États ou des donations privées, si la volonté politique est là. La Commission Humanitaire se présenterait ainsi comme l’instrument spécifique chargé d’introduire la question de la protection des populations civiles lors des conflits armés dans les décisions du Conseil de Sécurité. Elle ne se substituerait ainsi en rien aux fonctions d’autres institutions qui existent déjà, mais agirait, au contraire, en complément de celles-ci.

En conclusion, il s’agit ainsi de préserver la communauté humaine, la vie de chacun, de garantir une paix durable et de faire barrage à la barbarie. Nous continuons à Médecins du Monde à relever ce défi.
Premessa

Dal 31 agosto al 2 settembre 2000 si è svolta a Sanremo la consueta Tavola Rotonda annuale sui problemi attuali del Diritto Umanitario, promossa, come ogni anno, dall’Istituto Internazionale di Diritto Umanitario, che nel suo genere è unico al mondo. I massimi esperti mondiali, di tutti gli Stati, si scambieranno, informalmente, i loro maturati punti di vista, non vincolanti per gli Stati stessi, in merito al tema, coraggioso, inusuale ed inaspettato, dell’azione umanitaria e la sovranità degli Stati. Si tratta di un tema molto difficile e controverso sul quale tutti hanno espresso le loro idee, e sull’azione umanitaria e la sovranità degli Stati. Si tratta di un tema molto difficile e controverso sul quale tutti hanno espresso le loro idee, e sul quale mi pare che anche la Difesa italiana (ed in particolare le Forze Armate - abbreviate in seguito con FF.AA.), i cui contingenti partecipano a molteplici “missioni di pace”, che vanno da Timor al Kosovo, debba dire autorevolmente la sua.

Dopo un breve cenno di storia, almeno la più recente, prima di trarre delle conclusioni quanto più possibile attagliate a FF.AA. di professionisti (direzione verso cui stanno andando i così detti Paesi ricchi), tratterò sinteticamente i seguenti argomenti:

- il diritto di assistenza come base dell’azione umanitaria;
- l’azione umanitaria e la Carta delle Nazioni Unite.

Sembra di poter notare innanzitutto che, come in tutte le situazioni, ci sono “figli e figliastri”. Cosa succede in Birmania o in Africa interessa poco alla Comunità internazionale, quello che succede in Cecenia (palesi violazione dei diritti dell’uomo) sono fatti a torto considerati “interni” di una grande potenza, o presunta tale, con cui è bene andare comunque di comune accordo e, di conseguenza, non si interviene, mentre la comunità internazionale, e per essa la NATO, interviene in Croazia, addirittura mostra i muscoli nel Kosovo o in Albania, perché si turbano interessi che sono ormai consolidati. Queste regole arcaiche, di altri tempi, sembra che abbiano fatto il loro tempo.

Inoltre, occorre aggiungere che, tramontando sempre di più le guerre di aggressione e di conquista (i così detti conflitti armati internazionali), e le conseguenti esigenze connesse alla difesa vera e propria, almeno degli Stati ricchi, le FF.AA. non solo si assottigliano, ma anche il loro impiego pratico assomiglia sempre più a quello della cavalleria dei tempi di re Artù. Ciò le FF.AA. sono sempre una specie di assicurazione costante, come una tassa fissa, che la Comunità paga, non solo alla propria difesa, ma anche all’intervento nelle pubbliche calamità e per scopi speciali. In sintesi, le FF.AA. assomigliano sempre più ad un gruppo specializzato di “guerrieri senza macchia e senza paura”, dotate di mezzi che alleviano sempre di più lo sforzo fisico, che sono sempre più standardizzate in ambito mondiale, capaci e professionali, che applicano nelle operazioni militari, regole comuni di Diritto Internazionale. Esse per lo più sono leali verso la Comunità internazionale, che rappresentano, dotate di adeguati strumenti di morte, si impegnano per la tutela
dei più deboli e dei sofferenti, in particolare delle vittime della guerra, dei feriti, dei malati e dei profughi, in altri termini di coloro che hanno bisogno di aiuto o di protezione.

Le eventuali infrazioni alle regole (i così detti “crimini di guerra”, che riguardano anche la tutela dei beni culturali e ambientali, specie di quelli che fanno parte del così detto “patrimonio dell’umanità”), da chiunque vengano commessi, vengono pagate sempre più a caro prezzo, con pene sempre più unificate e standardizzate in ambito della Comunità internazionale, fatta salva per il momento, la pena di morte. È da considerare anche che le pene sono comminate da specialisti, che siedono permanentemente per giudicare equamente ed internazionalmente dei fatti che succedono nel mondo. E qui esiste, come dirò in seguito, il pericolo di una possibile demonizzazione o strumentalizzazione internazionale.

Aspetti storici

All’inizio degli anni 90, quando si considera ormai finito il mondo bipolare per iniziare il periodo così detto multipolare delle relazioni internazionali, si pensava anche tramontato per sempre il tempo delle cannoniere, (superpotenze a parte - ricordo per inciso che il muro di Berlino era appena caduto). Formando i consiglieri giuridici delle FF.AA. italiane, oggi con i diplomi di riconoscimento firmati addirittura dal Capo di Stato Maggiore della Difesa, a dimostrazione della rinnovata importanza professionale, si trattava con un sorriso la lezione del “diritto di ingerenza” a scopi umanitari, essendo nel Diritto Internazionale in uso il “diritto all’impiego della forza” da parte degli Stati confinato alla “legittima difesa”. La posizione del resto molto avanzata della Chiesa di Roma, magnificamente ricordata e riepitologata recentemente dal cardinale Martini, di una certa ingerenza a scopi umanitari, limitativa della sovranità, era stigmatizzata quasi da tutti mentre oggi si comincia ad accettarla.

L’intervento armato di Stati terzi, estranei al conflitto, per mettere fine a palessi gravi violazioni di Diritto Umanitario, si considerava inaccettabile in quanto poteva:
- costituire precedente internazionale;
- contribuire a creare una grande e grave incertezza nelle relazioni internazionali;
- nuocere al sistema di sicurezza, basato sulla carta dell’ONU;
- creare i precedenti per eventuali abusi o per veri e propri soprussi;
- costituire pretesto per un intervento con finalità diverse (possibili violazioni dei diritti umani).

Occorre, infatti, ricordare che l’articolo 3 del II Protocollo di Ginevra del 1977, ribadiva i principi del “non intervento” negli affari interni di uno Stato e l’inviolabilità della sovranità nazionale, rendendo illegittimo l’intervento “diretto o indiretto, quale ne sia la ragione, in un conflitto armato o negli affari interni o esteri dell’Alta Parte Contraente sul cui territorio avviene detto conflitto”. In particolare era interdetto qualunque attentato sia alla sovranità di uno Stato, sia “alla responsabilità del Governo di mantenere o di ristabilire l’ordine pubblico nello Stato, o di difendere l’unità nazionale e l’integrità dello Stato con tutti i mezzi legittimi”.

Una svolta in questo pensiero fu rappresentata dalla neonata questione
interna dei curdi (la questione interna dei curdi c’è sempre stata!) in Iraq e dalla Risoluzione 688, poi ripetutasi in Somalia, in quanto, per la prima volta:
- si ebbe unanimità dei 5 membri del Consiglio di sicurezza, che per la prima volta ha potuto svolgere la funzione di “direttorio internazionale” sulle violazioni del diritto internazionale;
- si era scalfito il monolite del principio della “non ingerenza”;
- questioni connesse con l’applicazione del Diritto Umanitario erano entrati nel Diritto delle Nazioni Unite.

Si trattava, infatti, di una palese ingerenza che l’ONU esigesse dall’Iraq di mettere fine senza indugio alla repressione allora in atto contro i curdi, cooperando addirittura, a tal fine, con il Segretario Generale dell’ONU. In pratica il Consiglio di Sicurezza avocava a sé un diritto di ingerenza negli affari interni degli Stati, mentre esisteva nel precedente Diritto Internazionale un diritto da parte degli Stati di accedere alle vittime della guerra.

Inoltre fin dal 1981 il Presidente francese aveva parlato in sede internazionale di “dovere di ingerenza” per motivi umanitari, e precisamente di “diritto di assistenza di un popolo in pericolo”, se non altro per deplorarne l’inesistenza giuridica nel Diritto Internazionale. Quanto meno tale principio sembrava valido in situazioni di estrema urgenza, e il Presidente francese sosteneva anche che un giorno tale principio avrebbe dovuto figurare nei diritti dell’Uomo, dato che “nessuno Stato può ritenersi proprietario delle sofferenze che egli stesso genera o nasconde”. E nel 1988, sempre su iniziativa francese, a cui si affiancava l’Italia, si ebbe la Risoluzione 43/131 dell’Assemblea Generale, che aveva per titolo “assistenza umanitaria alle vittime di catastrofi naturali e di situazioni di urgenza dello stesso ordine”, che comprendeva anche i conflitti armati.

Lo stesso Pontefice ha, come dicevo, in numerose circostanze, fatto appello alla comunità internazionale per fermare i massacri impiegando contingenti militari, cioè per svolgere con le FF.AA. una azione di ingerenza al fine di poter esercitare liberamente il diritto di assistenza alle popolazioni vittime della guerra, o per impedire o far cessare enormi sofferenze umane.

Il diritto di assistenza come base dell’azione umanitaria

Tutte le Convenzioni di Diritto Internazionale Umanitario in fondo, nel loro complesso, costituiscono il diritto di assistenza. La prima codificazione internazionale del diritto di assistenza del legittimo combattente, visto sotto l’ottica di prima vittima della guerra, data 1864; invece la prima codificazione del diritto di assistenza del legittimo combattente, caduto in mano del nemico data 1899, prima conferenza della pace dell’Aja, essendo in precedenza la cattura di prigionieri ed il loro trattamento, affidati all’onore militare ed agli usi di guerra. Per i non combattenti, ossia per le popolazioni civili, che sono quelle che ci interessano ai fini della presente trattazione, le prime codificazioni, piuttosto frammentarie, risalgono al 1868 (Dichiarazioni di San Pietroburgo), al Manuale di Oxford 1880 ed al complesso di convenzioni dell’Aja 1899-1907. Per i conflitti di carattere internazionale, il buon diritto delle popolazioni civili all’assistenza umanitaria si riafferma con le regole del 1949, migliorate nel 1977, mentre per i conflitti a carattere non internazionale, o interno, tutto era affidato all’articolo 3 comune alle quattro Convenzioni di Gi-
nevra del 1949, migliorate, per quanto realisticamente possibile, dal II Protocollo aggiuntivo del 1977.

Ma tale diritto all’assistenza può essere esaminato secondo ottiche completamente diverse, e più precisamente (ed a titolo di esempio):
- diritto delle popolazioni civili vittime di un conflitto (o dei profughi: questi ultimi sono sempre a fattor comune) di godere di una assistenza umanitaria;
- diritto/dovere degli Stati di assistere umanitariamente le popolazioni civili di un territorio occupato;
- diritto/dovere dello Stato sul cui territorio svolga un conflitto non internazionale ad assistere umanitariamente le popolazioni civili nazionali;
- diritto di Stati terzi, estranei al conflitto, di assistere le popolazioni civili vittime coinvolte;
- diritto ad iniziative di assistenza dei civili coinvolti da parte delle Potenze Protettrici;
- diritto ad iniziative di assistenza da parte di Enti umanitari che offrano garanzie di imparzialità (sempre molto pochi, malgrado le dichiarazioni o gli statuti).

Come si vede, molte sono le sfaccettature sotto le quali il problema del diritto di ingerenza può essere visto.

In sostanza nei conflitti di carattere internazionale esiste un sillogismo sottinteso (che, a mio avviso, non dovrebbe esserlo): se tanto lo Stato occupante, in quanto tale, è obbligato a concedere alle popolazioni nemiche in suo potere in territorio occupato, almeno altrettanto lo Stato deve garantire alle popolazioni nazionali vittime della guerra che si svolga in territorio nazionale. Del resto (articoli 55 e 56 della IV Convenzione di Ginevra) la Potenza occupante ha precisi doveri in merito all’approvvigionamento di materiali sanitari e nel campo del vettovagliamento (affamare le popolazioni è un metodo di guerra vietato) delle popolazioni nei territori occupati (ed esistono precisi vincoli e limitazioni nelle requisizioni dei beni indispensabili alle popolazioni civili, sotto il controllo delle Potenze Protettrici). Ma questo ovvio sillogismo molte volte è tradito dalla realtà dei fatti, specie nei conflitti a carattere interno, dove i contrapposti partiti sono trattati con un odio, che sembra sfumato o che manchi del tutto nei conflitti internazionali.

Il primo Protocollo aggiuntivo del 1977 portava anche dei miglioramenti nel trattamento delle vittime della guerra nei conflitti armati internazionali, con particolare riferimento alle popolazioni civili nei territori occupati, ma altrettanto non si poteva dire nei conflitti interni (o non internazionali), dove il tutto era affidato alla buona volontà delle Parti in conflitto, ed ai modi di interpretazione dell’articolo 3 comune alle quattro Convenzioni di Ginevra, anche se si sanzionava che “con il consenso dello Stato, sul cui territorio si svolge il conflitto, possono essere intraprese azioni di soccorso in favore delle popolazioni civili, di carattere esclusivamente umanitario ed imparziale, quando le popolazioni soffran di privazioni eccessive per la mancanza di approvvigionamenti essenziali alla sopravvivenza, come viveri e materiale sanitario”.

L’azione umanitaria e la Carta delle Nazioni Unite

Dalla Carta delle Nazioni Unite, oltre alla necessità di un’azione umanitaria attraverso la Comunità internazionale, oggi molto ampliata per la nascita di nume-
rosi nuovi Stati, si possono trarre numerosi spunti dagli articoli 1 e 2 e dai capitoli VI (soluzione pacifica delle controversie), e VII (azione rispetto alle minacce alla pace, alle violazioni della pace ed agli atti di aggressione).

Gli articoli 1 e 2 affermano che l’ONU ha come fine il mantenere la pace e la sicurezza internazionale, sviluppando le relazioni amichevoli tra i popoli e seguendo la cooperazione internazionale, tra l’altro con la soluzione dei problemi internazionali di carattere umanitario, fermi restando i principi della sovranità uguaglianza di tutti i popoli, dell’adempimento degli obblighi assunti in buona fede dagli Stati Contraenti, senza ricorrere alla guerra, e con l’astensione da parte di tutti dalla ingerenza negli affari interni degli Stati, aiutando l’ONU nelle azioni che vorrà intraprendere.

Il Capitolo VI (art. da 33 a 38), che riguarda la soluzione pacifica delle controversie (internazionali ed interne) è tra i più romantici ed utopistici che vi siano, perché da un lato pretende dalle Parti in causa, aderenti o meno giuridicamente al trattato, procedure pacifiche (come il negoziato, l’inchiesta, la mediazione, la conciliazione, l’arbitrato, il regolamento giudiziario, l’intervento di organizzazioni regionali, ecc.) e dall’altro vuole una unanimità del Consiglio di Sicurezza e non una maggioranza qualificata in seno ai Membri permanenti. La pratica insegna, che tale unanimità è raggiungibile molto raramente e solo dopo che le “vittime della guerra” abbiano subito gravi insulti, sia per la mancata tempestività di intervento delle Nazioni Unite, sia per la incertezza delle regole applicabili soprattutto in un conflitto armato non internazionale. Ma la Carta risale al tempo della fine della guerra, con l’umanità stanca di combattere, dove sembrava dover trionfare l’utopia della pace perpetua, dove la Comunità internazionale, ma soprattutto il Consiglio di Sicurezza, erano composti da Stati vincitori e loro alleati.

Il Capitolo VII della Carta dell’ONU, che riguarda l’azione rispetto alle minacce alla pace, alle violazioni della pace ed agli atti di aggressione (paragrafi da 39 a 51), è quello più frequentemente applicato nei conflitti interni, viziato sia dall’unanimità che il Consiglio di Sicurezza dovrebbe esprimere (per cui in certi conflitti si interviene, ed in altri no, a seconda dei casi, a seconda che nello Stato interessato vi siano o meno interessi economici o materie prime strategiche, o che sia coinvolta o meno una superpotenza o una potenza intermedia), sia dal tipo di FF.AA. che vengono messe a disposizione della Comunità internazionale (tutte le FF.AA. senza limitazioni di una superpotenza, contingenti limitati di più Stati o organizzazioni internazionali, come la NATO, l’OSA ecc., o altre soluzioni). Il tutto è complicato e quasi sempre viziato non solo dal principio della “equa rappresentanza geografica”, quasi sempre contrapposto al criterio di “chi vuole e può”, dal criterio degli “Stati ricchi” e da una possibile ingerenza, che deve finalmente essere regolata con trattati dalla Comunità internazionale, in modo da avere prima o poi peso giuridico per tutti.

Considerazioni

Non vi è dubbio che per l’effettivo progresso del Diritto Umanitario (che si traduce nel riuscire a dettare norme semplici, fattibili, compatibili con la sicurezza del personale impiegato, che viene sempre al primo posto, sempre eguali tra loro e compatibili con un corretto addestramento - il soldato di qualunque nazione,
infatti, non è un leguleio e viene addestrato per automatismi -) è necessario che l’insieme dei diritti e dei doveri per gli Stati e per i suoi agenti armati costituisca un insieme unico e armonico, accettabile nel suo complesso dalla Comunità internazionale.

Tuttavia, il grande problema dell’assistenza umanitaria per poter esercitare realmente il diritto di assistere le vittime della guerra, resta sempre quello di arrivare alle “vittime” per portare loro il soccorso umanitario, cioè quello della creazione di corridoi di sicurezza attraverso i quali possa scorrere la linfa vitale ed imparziale della solidarietà internazionale.

Quello che per gli Stati è un diritto di assistenza sul piano del diritto internazionale, sul piano etico e morale si trasforma in un dovere di assistenza; assolvere a tale dovere moltissime volte (direi quasi sempre, soprattutto quando vi è un pericolo grave) è onore e privilegio delle FF.AA. dei contingenti internazionali delle “Forze di pace”.

Se da un lato le attività del personale di soccorso possono essere limitate e gli spiegamenti ristretti “solo in caso di necessità militare imperiosa”, dall’altro lato occorre che tale personale, nella propria azione umanitaria, tenga conto delle esigenze di sicurezza della Parte sul cui territorio tale personale svolge la sua azione di soccorso.

Inoltre occorre pensare e tutelarsi anche dalle possibili strumentalizzazioni che gli interventi possono provocare da parte dei vari Paesi: in particolare le accuse possono riguardare le cause dei conflitti, il modo di fare politica, il modo di intervenire, chi interviene o altro. Per questo le grandi potenze cercano di trascinare negli interventi le grandi organizzazioni militari regionali, come la NATO o l’OSA, ecc. per non rischiare un isolamento, che non conviene a nessuno e che è sempre potenzialmente pericoloso ai fini di una strumentalizzazione.

Esiste nella Comunità internazionale un unico vero problema: l’applicazione e la unicità delle regole di combattimento; esse comportano il continuo perpetramsi dei crimini di guerra e la unanime esecrazione da parte della Comunità internazionale. Ne deriva il problema delle loro sanzioni. Le vittime della guerra sono sempre le stesse: i combattenti, le popolazioni civili ed i loro beni, ivi compresi i beni culturali, che appartengono alla storia dei popoli e per i quali occorre provvedere per tempo. In tale settore, il Convegno internazionale di Pitigliano, svoltosi dal 6 al 9 aprile 2000, sotto l’Alto Patronato del Presidente della Repubblica e della Pontificia Commissione per i Beni Culturali della Chiesa ed il patrocinio tra l’altro del Ministero della Difesa, dei Beni Culturali, dell’Istituto Internazionale di Diritto Umanitario di Sanremo, della Croce Rossa Italiana, della SIOI, della Fondazione Europea Dragan, del Centro UNESCO di Milano, pilotato dalla Società Italiana per la Protezione dei Beni Culturali (SIPBC) in tempo di guerra, ha dedicato alle FF.AA. italiane una intera giornata, in cui si sono esaminati i danni ai beni culturali del Kosovo. D’altra parte lo Stato Maggiore della Difesa, all’altezza delle migliori tradizioni umanitarie nazionali, ha a suo tempo comunicato che il contingente italiano operante in Kosovo, su sollecitazione del Capo di SMD, applicherà in toto il protocollo dell’Aja del 1999, aggiuntivo alla convenzione dell’Aja del 1954, a prescindere dalla ratifica italiana del protocollo stesso.
Conclusioni

La strada, da percorrere è quella di unificare tutti i tipi di conflitto e di applicare in guerra sempre le stesse regole, tutto il resto viene di conseguenza!

Per realizzare questo sogno sembra esserci una sola via: la internalizzazione di tutti i tipi di conflitto futuri da parte della Comunità internazionale, i cui Stati principali, amanti della pace oggi, più o meno, in caso di conflitto fanno i pompieri. Questo succede o prima o dopo, ma in genere il più tardi possibile, quando cioè non si può proprio farne a meno e i conflitti si sono incancreti, i disastri ed i crimini provocati dalla guerra sono troppi. Si tratta però, a meno che non paghi l’ONU per motivi di equa rappresentanza geografica, dei Paesi ricchi, sempre più allergici alle perdite umane e sempre più disposti a pagare con denaro per ottenere i risultati. Il problema da risolvere permanentemente è quello di avere poche “vittime della guerra” e pochi “crimini”: ciò si può ottenere con un intervento della Comunità internazionale il più immediato possibile, al fine di una riduzione dei danni. In sostanza, all’atto dello scoppio delle ostilità, dovunque queste dovessero succedere e qualunque sia il tipo di conflitto, la Comunità internazionale deve intervenire subito, con un contingente preordinato e modesto (le famose FF.AA. a disposizione e previste: articolo 43 della Carta). Per quanto piccolo, ma bene armato e deciso, questo contingente multinazionale, (in sostanza formato da cavalieri antiqui cui accennavo in premessa), esso varrebbe per un primo tempo ad internazionalizzare il problema, riservandosi la Comunità internazionale in seguito di incrementarlo, se necessario. Occorre sanzionare il principio che ricorrono alla guerra tutti gli Stati e le fazioni che non sanno colloquiare altrimenti, imponendo e lasciandone giudicare, con funzioni di arbitrato, il Consiglio di Sicurezza delle Nazioni Unite.

Questa internalizzazione automatica dei conflitti comporterebbe, come conseguenza, l’usare le stesse regole in tutti i molteplici tipi di conflitto; regole di comportamento corretto sempre eguali da imparare e da insegnare ai combattenti legittimi di tutti i Paesi. Il che porterrebbe ad una chiarificazione ed a una più grande certezza del diritto da parte di tutti. Né d’altra parte è semplice insegnare ad un soldato a comportarsi secondo le circostanze, essendo già difficile e abbastanza contro natura insegnargli un comportamento sempre uguale (quale quello di aspettare a reagire al fuoco del combattente contrapposto, al fine di limitare morti e danni, nel caso ci fosse stato uno sbaglio, malgrado tutti i giubbotti antiproiettile di cui lo si possa dotare).

Inoltre, il Tribunale internazionale per i crimini di guerra (quello di Roma, per intendersi) dovrebbe sedere in permanenza, fin dal tempo di pace, sperando che non abbia mai nulla da fare (perché nel mondo non ci sono guerre in atto), sempre pronto a giudicare su quei crimini, che venissero commessi e che la Comunità internazionale ha sancito come “crimini di guerra”. È tempo che tale tribunale sieda in permanenza, analogamente a come è sempre attivo ed efficiente il Consiglio di Sicurezza delle Nazioni Unite. Le sue condanne sembrano poco efficaci sul piano pratico, in quanto i criminali trovano sempre Paesi disposti ad ospitarli; però i criminali hanno limitata libertà di movimento e, quel che conta maggiormente, sono sottoposti alla pubblica esecrazione in patria ed all’estero.

In sostanza si sostiene che i tribunali di guerra ad hoc (quelli, per intendersi, che una volta vengono costituiti a posteriori ed una volta no; senza contare, poi,
che una costituzione a posteriori è sempre sospetta e il più delle volte strumentalizzabile: storicamente corre il pericolo di identificarsi col “tribunale dei vincitori”) hanno fatto il loro tempo, il tempo dell’ingiustizia, o del giudizio “se fa comodo a qualcuno”, o del giudizio “strumentale e di squallida propaganda”. È tempo e millennio per cambiare tutto questo una volta per tutte, sanzionando per motivi connessi con la sopravvivenza dell’umanità, le funzioni di “direttorio mondiale” del Consiglio di sicurezza delle Nazioni Unite, formato permanentemente dai 4 o 5 Paesi così detti grandi (ma potrebbero essere i 7 Stati ricchi più la Russia, la Cina e l’India) e da un’equa rappresentanza geografica, dove le decisioni siano prese a maggioranza e non all’unanimità.

Ma per fare questo, occorre accelerare la ratifica degli accordi presi dai plenipotenziari degli Stati a Roma. Forse i tempi non sono ancora maturi per avvicinarsi ad una graduale perdita di sovranità collettiva così importante a favore della Comunità internazionale, ma è certo che il mondo si sta relativamente rimpicciolendo e sovraffollando, con una crescita esponenziale dei pericoli per l’umanità (costituiti dagli armamenti e non), che vanno fronteggiati in modo sempre più globale e planetario.

A questo contribuirà la Tavola Rotonda di Sanremo: non è importante, infatti, che questi problemi così ardui si risolvano con una chiacchierata tra amici, anche se si tratta di un ambiente di “esperti”: è importante, invece, che essi siano posti sul tappeto e che ad essi si cominci a pensare, per rendere il mondo oggi sovraffollato del terzo millennio, stroncando le guerre sia internazionali che interne sul loro nascere, più bello e più vivibile per tutti.
SOME REFLECTIONS ABOUT STATE SOVEREIGNTY

Chiara BONOTTO, Diego DI GIOVANNI, Adriana GULINO

State sovereignty according to Public International Law

It is well-known that States are the principal subjects of international law. Even if it is not possible to give an exact definition of the term “State”, its essential characteristics have been well fixed both by scholars and international juridical instruments.

According to Article I of the Montevideo Convention of 1933 on the Rights and Duties of States (signed by the United States and certain Latin American countries), the State, as an international subject, should possess the following qualifications:

a) a permanent population;
b) a defined territory;
c) a Government (to which the population renders habitual obedience); and
d) a capacity to enter into relations with other States.

The c) and d) qualifications are extremely relevant as they represent internally the supremacy of the governmental institution and externally the supremacy of the State as a legal subject.

The juridical expression of this power is the “State sovereignty”.

The Arbitration Commission of the European Conference on Yugoslavia in Opinion n.1 (29 November 1991) declared that:

“The State is commonly defined as a community which consists of a territory and a population subject to an organized political authority” and that “such a State is characterized by sovereignty”.

However, sovereignty itself is founded upon the fact of a defined territory, even if there is no necessity in international law for defined and settled boundaries. As a matter of fact contemporary practice does not consider this element in a strict way and its presence is interpreted widely, depending on the circumstances and the contest of each situation.

For instance, even if the territory, the population and the government exist, the State of Palestine has not been recognized by the whole International Community; on the contrary, Israel is recognized as a sovereign State even if its borders, up to now, are not fixed.

But, what does “sovereignty” exactly mean?

In the past, it did not only represent the State’s power to enact its political, economic and social conduct but it was primarily a “religious concept” as being something which was “absolute sacred and inviolable”.

Thomas Hobbes referred to State as the “Leviathan” (which is the concurring title of his work), as a supreme mechanism to control and harness the evil capabilities of men. For this reason, Hobbes portrays a State as sovereign and its sovereignty is in direct relation to its basic existence.

Continuing historically, sovereignty was the crucial element in the Westphalia
Peace-Treaty of 1648, the international agreement that was intended to end the thirty-year war and to encourage a coming peace period, recognizing absolute authority to the sovereigns of each State.

Nowadays, could we still interpret the concept of sovereignty in the same way as in the past? Of course, the notion behind State sovereignty is still that a State should be able to govern itself, free from external interference.

In other words, we can continue to support the traditional public international law Statement defining State as “supreme potestas superiorem non recognoscentes”; but, increasing the international law principles (both conventional and customary) and revealing how urgent the protection of human beings’ rights are, in peace time as well as in war time, the concept of sovereignty is on its way to evolve.

We could consider, for instance, the two criteria emphasizing whether or not sovereignty exists: the effective and the independence of the government.

Regarding the first criterion, it is interpreted as the capability of a government to exercise its own power over a community in a certain territory.

The second key-criterion, independence, is linked to the effective exercise of the “pouvoir d’empire” of a State. Independence is a quality of sovereignty and the latter is a sort of guarantee of the exterior independence of a State; namely, a State is considered independent and sovereign only if its legal system is unique, having its legal force in its Constitution.

Professor Brownlie highlighted many examples of recognized States without effective governments: Rwanda, Burundi and the most recent case of Somalia.

At this point, we could wonder why these States are considered sovereign anyway.

According to Bull and Watson: “These countries are considered as States essentially because of the International Community consent, in order to preserve their independence and to encourage their State-building”.

The above-mentioned authors, in order to justify State quality, propose to recognize a legal independence resulting from a right to self-determination (negative sovereignty), which is also separated from the presence of an effective capability to govern, that is an essential point according to international law.

State power

Concerning the essential quality of sovereignty, we need to analyse the State’s competence in the implementation of it. The fundamental scope of sovereignty and its existence are justified through the execution of all State functions.

Public international law, usually separates discretionary competence and ruled competence: even if, on the one hand, the law qualifies the State as sovereign and free to self-manage (discretionary competence), on the other hand, the same law can impose some criteria or limitations for everything related to the exercise of its activities (ruled competence). For instance, international law affirms that States enjoy a sovereign power on their territorial sea, but this power is, nevertheless, well limited from the same law with the norm that rules inoffensive passage of stranger ships.

The most important discretionary competence is what is commonly well known as domestic jurisdiction; its best definition (accepted by the majority of
States) is contained in a famous opinion of the International Permanent Court of Justice:

“The State is free to exercise international activities, against which, no conventional nor customary Obligations exist”.

Usually the concept concerns the field of activities such as State and citizens’ relationship, government management and social and economical policy: all these consist in an exclusive right, inherent to the territorial sovereignty.

Furthermore, the concept of domestic jurisdiction is defined in Article 2 p. 7 of the Charter of the United Nations; in fact: “the United Nations cannot intervene in matters which are essentially within the Domestic Jurisdiction of any State […] this principle nevertheless, shall not prejudice the application of enforcement measures under Chapter 7”.

The exclusive character of sovereignty implies for each State the mutual obligation of non-intervention in the internal affairs of the States, which are part of the International Community. Art. 2 p. 4 states: “All members shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any State or in any State, or in any other manner inconsistent with the purpose of the United Nations”. In particular, the principle prohibits all the activities that could interfere with the domestic or foreign policy of a certain State.

According to the Resolution of the United Nations General Assembly (1970, 2625/XXV) this obligation is considered as a principle of customary International Law.

In the famous decision of the “Military and paramilitary activities against Nicaragua” the International Court of Justice precisely defines the content of the obligation of non-intervention. It clearly affirmed that the American intervention was illegal as it represented the particular case prohibited by the law, namely:

“A military action in order to support subversive armed activities or terrorism within the border of another State”.

Finally, the Court, on the one hand, condemned the Contras because of the violation of the humanitarian law, but, on the other hand, it condemned the United States mainly because of the distribution of documents on terrorist activities in violation of humanitarian law.

At this stage, what is interesting to notice is also the comment given by Professor Dupuy; he stated that: “The principle of non-intervention cannot exhaust itself with the respect of territorial integrity of another State, just because it could be exercised through economical or political pressures, and without using armed force”.

Nevertheless, even if the Court States that the principle of non-intervention is not subjected to any kind of modification, State practice shows a considerable number of violations all related to human rights and humanitarian matters.

**Sovereignty and Humanitarian Assistance**

The most important exception to the principle of non-intervention is represented by humanitarian intervention.

Humanitarian action is considered a very controversial matter because it implies the physical presence of a State (or of a group of States) within the border and in the territory of another State. It is obvious that this “presence” represents a
violation of the territorial sovereignty of the State concerned.

According to Public International Law, humanitarian intervention is considered a lawful action only as a common reply in order to stop “serious violations”. In the same meaning, Article 89 of the 1977 Second Protocol to the Geneva Conventions States that “in case of serious violations, States have to intervene unilaterally or in cooperation in order to stop it”.

The Charter of the United Nations, under Chapter 7, also provides for armed intervention to force the Offender State to interrupt violations.

It is well known that the Security Council is charged by the Charter to undertake any action in order to restore international peace and security, but the most recent Kosovo-case showed us a long series of unlawful acts without the consent of the Security Council.

Since 1998, or even before, the Serbian Government organized a grave form of repression against the Albanian minority of Kosovo (Serbian region), worsening the situation in the late 1998 with a massive “ethnic cleansing” against them.

In order to stop atrocities, the Security Council tried to make a decision over the case, but because of the veto-paralysis, it could not do it unanimously; so NATO acted in force of the final decision of its headquarters, but without any consent from the Security Council.

This armed action still represents a very controversial measure, as the majority of the international lawyers and professors consider it as an unlawful act accomplished in violation of the Serbian sovereignty and territorial integrity.

On the other hand, we cannot forget the hundreds of people that were killed in the country before the NATO intervention. We cannot turn blind eyes on the enormous violations of human rights that occurred in Kosovo and, at this stage, we need to cope with humanitarian intervention. The big problem is immediately in front of our eyes.

How does one define humanitarian intervention in such a way as to better grasp its meaning, scope, limits, justifications, effectiveness, efficiency and so forth?

While the concept of humanitarian intervention is not new, what is new can be found at the level of its legal implication - already inscribed in various conventions - implications that some States attempt to ignore.

We have to underline once again that humanitarian assistance is an obligation for States and a right for victims.

On December 8, 1988 the UN General Assembly adopted the Resolution 43/131 entitled “Humanitarian assistance to victims of natural disaster and similar emergency situations”, as a consequence, neighbouring States must facilitate access to victims.

Finally, this resolution recalls that: “the principles of Humanity, Neutrality and Impartiality must be given utmost consideration by all those involved in providing humanitarian assistance”. Resolution 45/100 December 14, 1990 proposed that States establishing “relief corridors” and Resolution 688, 1990 emphasizes the relationship between the massive violations of human rights within a country and the threat to international peace and security. It would so appear from our words that the concept of sovereignty is no longer sacred. As human rights have come to compel
more and more attention on the international scene, sovereignty has gradually lost ground.

We actually have the situation where the most fundamental human rights are no longer of exclusive domain of the internal affairs of any State. We could also say that, as long as they respect the principle of impartiality, neutrality and non discrimination, Non Governmental Organizations are not required, or at least not in legal terms, to obtain the approval of a State in order to deliver humanitarian assistance.

The principles of non-intervention or non-interference that guarantee sovereignty, while binding on States, are not binding on NGOs.

As we can see, there is an increasing relevant contribution of NGOs to the humanitarian action topic in contemporary society.

The International Institute of Humanitarian Law, for instance, (who celebrates the 30th anniversary of its foundation this year) plays an active role, particularly, concerning the debate between the principles of humanitarian action and State sovereignty.

The Institute, during its annual meetings relating to this topic, has recorded a new trend.

Sovereignty could not be considered as an obstacle to the protection of victim’s rights. In that sense, it took the initiative to promote the right to humanitarian assistance placing this question on the Agenda of its XVII Round Table in 1992.

Afterwards, the “Guiding Principles of the Right to Humanitarian Assistance” was adopted, not only to define the right, but to build up principles and rules necessary for its implementation.

**The new trend: crisis or not?**

According to many contemporary authors, involved in political matters, the national State is going through a crisis without precedent.

They attribute this phenomenon to the massive transfer of its exclusive competence towards super-national institutions (for instance, the United Nations, the European Union, NATO) and to the development of the recognition of people’s identity (as a reaction to standardizing of the world under the culture of the Media), starting a process of dismemberment and devolution, launching an attack towards the State and its domestic law and order. To better understand this event, we will try to analyse the key-points that take part in the crisis. The main idea that we usually hear from the analysts of the world systems States that “the globalisation threatens State sovereignty, depriving it of its main meaning and making it an old-fashioned concept”.

Thus, we can define “globalisation” as a phenomenon that has changed the way of seeing the world, removing borders, increasing and speeding up communication between individuals and States, making the world a “global village”.

Economics, environment, human rights, health, crimes, drugs, migrations and so forth, are not considered anymore exclusive “domestic jurisdiction” of a State; on the contrary, governments debate at international level in order to cooperate and to solve all these kinds of problems. At present, in fact, international organizations play a fundamental role inside the world system, strengthening the interdependence
between States, but, at the same time, gaining some power by them to spend for the common interest.

For example, from an economic point of view, the opening of borders to capital movements increases tax evasion. But, States do not manage anymore on their own a great part of the economic subject, since, on the one hand the European Union and on the other hand the G8, address common programs at regional and international level.

State decline is more evident in the field of information, communication and culture. In fact, since its foundation the State has always acted as a depositary of the national culture (namely: common language, values, symbols, practices and so on), strengthening the feeling of national identity and unity.

Nowadays, whether unfortunately or not, the net-culture is very popular all over the world and as it has a great influence on the promotion of knowledge, it leaves its mark on the national culture. Paradoxically, the quickness and the variety of ways to communicate emphasize the need of identity of peoples, minorities and races, increasing differences and their wish of distinguishing. Conflicts between States and, above all, within States forced the analysts of political systems to be deeply concerned about the “fictitious” character of the State and on the unbearable claim of the same to oblige different races to cohabit within a Nation-State.

This circumstance, together with racial and religious reasons, could be interpreted as the fundamental cause of the breaking out of non-international conflicts; we can mention, for instance, the conflicts of the XX century’s last decade in Former-Yugoslavia and in Rwanda.

As people account for their need of identity, they do not accept anymore a view of the world that wants to “standardize” them. That is one of the main reasons for people getting back to “souverainisme”: namely, individuals and some States refuse to submit themselves to everything that represents a multinational and super-national entity.

Particularly, developing countries expressed their deep attachment to the principle of sovereignty during the General Assembly meetings, in order to oppose themselves to the “totalitarian” principles stated by certain countries and organizations.

As a matter of fact, the Seattle Conference was a clear example of the will of weakened States to refuse decisions they do not agree with. For these countries renouncing the principle of sovereignty would mean to perpetuate the lack of balances and to get lost in the process of globalisation. On the contrary, they need to affirm their sovereignty, for example, in the field of the exclusive right to self-manage natural and human resources, in order to reach flexibility of working and the chance to obtain international investments.

The attachment to the sovereignty principle is clearly showed also by some European countries: for instance France, United Kingdom and Denmark, where the Referendum to join the European Union did not pass.

Actually, France is still playing a great role in the debate about sovereignty, due to the fact that the word “sovereignty” is the most ancient in its political dictionary. It wants to keep on playing a leader role in the process, taking care, in its relation with the European Union, not to lose control of its power, being prejudicial
of the interest of its citizens.

United Kingdom, who still resists from transferring part of its power to the European institutions, shares the same point of view.

At this point, it is pretty evident that States play a very particular role in the scene. As a matter of fact, on the one hand, they are members of international organizations, being engaged in international cooperation, limiting their power each time they sign an international agreement; but, on the other hand, they are deeply bound to that unique power (if not absolute anymore) resulting from sovereignty and that still represents a source of force at international level.

We have already said that people have always fought for sovereignty and for obtaining sovereign independence: this only means that the force of globalisation is far from making States trifling subjects.

Nevertheless, we need to emphasize that States are not anymore privileged subjects of international law, due to the increasing and recognized role of the United Nations and international and regional organizations particularly of individuals, even if doctrine still does not consider them subjects of International Law.

**Conclusion**

We are conscious of the increasing importance of the role of the individual in the contemporary society. In our opinion, the respect of the individual should be the most important value in everyday life. But political and economical matters always seem to overcome this value and do not take care of it.

We think that we should prevent the politicisation of humanitarian action. This debate obscures the reality, the necessity and the urgency of such assistance and reveals the selfishness of certain States.

At this stage, we would firstly suggest that the political and legal limits, which are obstacles to the implementation of humanitarian assistance, should evolve. Humanitarian assistance has necessarily to meet some criteria if it is to be in harmony with the world reality we are living in every single day. It has to meet the requirement of re-equilibration and adaptation, as we have already pointed out that the legitimisation parameters are already in progress.

Secondly, we suggest that in order to overcome the controversy between sovereignty and humanitarian assistance, we need a new approach of sovereignty. It is necessary that the problem of absolute and exclusive sovereignty be reconsidered in the view of the conditions of a large part of the world population and their rights.

Thirdly, we would like to underline that humanitarian assistance should not fall victim to the diverging interests or perceptions of States. It must not obey to different sets of rules. We actually think that the respect of human rights has to be the base of humanitarian assistance, and its universal dimension can not be abused by States.

Fourthly, we guess that it is also relevant to know very well the context in which an operation is being conducted. We have to look very carefully to the causes of the crisis and the impact of the solutions.

It is also very important to consider the social-cultural aspects, the development of means of challenging crises onto the international scenes. Prevention must
take the place of intervention and, as a consequence, we suppose that profound changes are required both nationally, regionally, internationally and within the United Nations.

From a theoretical point of view, the International Community should rethink the concept of nation no longer linked to the old State’s paradigm but taking more consideration of the population; then, reshape its competence, bearing in mind that the transfer of power does not mean a reduction of its essential subjectivity.

As we have already pointed out before, we agree with the idea that the evolution of sovereignty, in recent years, should be the result of material, technological developments, of the ever changing realities of power, and of the influence of ideas such as self-determination and respect of human rights.

At this stage, the international community should come across a new approach to the concept of sovereignty, taking into account the new trends and the new position within this new international system.

Finally, international law should certainly give a new direction and guarantee the process of development.

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3 I.C.J. Collection, Opinion 7 February 1923.
6 According also to the new interpretation of Art.1 common to the Four Geneva Conventions which States: “the High contracting parties undertake to respect and ensure respect for the present Convention in all circumstances”.
Humanitarian action, with no borders and no barriers, based on the right of the individual to ask and receive assistance, in all circumstances, is a great challenge for the modern world. Humanitarian action is a juridical reality which is well-established and formulated in international instruments. Through humanitarian law and human rights, Sovereign States are obliged to grant the basic and irrevocable rights to all, and guarantee the respect of the person...

The President, Jovan Patrnogic

Introduction

On the occasion of its 30th Anniversary, the International Institute of Humanitarian Law (IIHL) convened an international Congress in San Remo to discuss a very challenging topic in today’s context: Humanitarian Action and State Sovereignty. The Congress was attended by a great number of persons and experts in humanitarian law and human rights issues, as well as representatives of States, international and non-governmental organisations. The Congress was supported by many instances, which could be seen from the numerous messages received and addresses delivered. Messages were received from: the President of the Republic of Italy; the President of the European Commission; the Italian Minister of Foreign Affairs; the Secretary of the State of the Holy See; the Secretary-General of the United Nations; and the UN High Commissioner for Human Rights. Addresses were delivered by: HSH Prince Albert of Monaco; Dr. Mohamed Al-Hadid, Vice-Chairman of the Standing Commission of the Red Cross and Red Crescent, on behalf of HRH Princess Margriet; Mr. Soren Jessen-Petersen, Assistant High Commissioner for Refugees; Amb. Xavier Michel on behalf of his Excellency Boutros Boutros Ghali, Secretary-General of the “Organisation Internationale de la Francophonie”; Dr. A. Berrini, Deputy Mayor of San Remo; Prof. Jovan Patmnogic, President of IIHL, and Dr. Stefania Baldini, Secretary-General of IIHL, presented the Institute’s latest video covering its 30 years of humanitarian dialogue. The various subjects were introduced by eminent personalities and experts, followed by discussions.


The first topic Humanitarian Action and State Sovereignty was introduced by Amb. Prof. Edmundo Vargas Carreño, Chile, and Humanitarian Action and the Charter of the United Nations, by Mr. Hans Corell, UN Under-Secretary-General
for Legal Affairs, who both gave excellent exposés, covering all aspects of this
delicate issue. It was generally held that sovereignty can no longer be interpreted
as some 50 years ago - it must be fully compatible with the UN Charter and must
take into account the enormous development of the international legal system,
particularly concerning human rights and humanitarian law. It was confirmed that
the international system based on sovereignty is not contested. But sovereignty
implies rights and obligations alike: while the principle prohibiting any external
intervention remains as a cornerstone of international law, there is a growing
number of obligations, among others, the obligation to good governance and
protection of human beings. Speakers and participants underlined the impor-
tance of ensuring accountability of individual perpetrators of human rights and
international humanitarian law violations. Particularly, the adoption of the Rome
Statute of the International Court in 1998 was welcomed, but further efforts need
to be undertaken to ensure the establishment of the Court as a matter of urgency
- for that, 60 ratifications are necessary - and to ensure universal acceptance of
the Court.

**Right to Assistance, basis of Humanitarian Action**

Prof. Marie-José Domestici-Met, France, considered in her presentation “Right
to humanitarian assistance, basis of humanitarian action”, that the very concept
of right to assistance is rooted in the fundamental rights to life and to human
dignity, and that the recognition of a right to humanitarian assistance would be
the climax of the movement towards an efficient humanitarian assistance. Yet, she
did not disregard the fact that such a right had not yet been fully recognised, and
she underlined that the legal doctrine could help its development; in this sense
the Guiding Principles of the Right to Humanitarian Assistance, adopted by the
San Remo Institute in 1993, should be taken into consideration. Prof. Domestici-
Met also stressed some difficulties due to legal techniques. In particular, what
is the triggering mechanism of the right to assistance? What is a humanitarian
catastrophe? When is a human rights violation massive enough? And the corre-
sponding obligation to render assistance raises the difficulty of determining who
is legally compelled to act in favour of given victims having a right to assistance.
Who is guilty if no assistance is offered? The problem is much more difficult than
the so-called “ingerence”, related to the consequences of an unlawful refusal of
access to victims opposed to good-willing rescuers.

Even if humanitarian law can be considered as encompassing the concept of
objective obligations, there is still much work to be done on it. Finally, Prof. Dome-
stici-Met, while calling in favour of the right to assistance, underlined the limits it
imposed to relief workers: they do not act on their own will, but in order to fulfil
the victim’s right. They have no right to abstain, nor to exceed the needs they are
entitled to. They may have a wide range of actions (distributing services, exerting
legal protection, calling on all contestants in order to bring them to compliance with
humanitarian law, organising military protection of humanitarian assistance…).
The ultimate degree could perhaps be resort to force, but within the strict respect
of, first, legal procedures set up by the UN Charter and the Acheson Resolution,
and, secondly, of principles of proportionality and precaution in action. As to
the first condition, should a severe sticking point occur, the legitimacy of State actions taken according to the “role splitting” once proposed by Georges Scelle could be explored, preferably on a concerted basis. But, under no circumstances, must veto be presumed.

It was generally held that a State had the obligation to provide the necessary humanitarian assistance to persons under its jurisdiction and should accept assistance from the international community or other States in cases where it was not able to provide it itself. If, however, a State declines assistance without any valid resort, humanitarian interventions could come into play under the terms of the UN Charter, and the State cannot validly invoke sovereignty, under such circumstances. On the part of the UN Security Council, there is the obligation to undertake various adequate measures, such as fact-finding missions, sanctions, or other types of measures. It was also stressed that the international community had to place greater emphasis on establishing more effective conflict-resolution mechanisms in order to prevent conflicts in the first place or to stop them as soon as possible after they break out. Where the deployment of forces becomes necessary, it is important to define their mandate clearly, to give realistic deadlines and provide the necessary resources.

Armed Forces and Humanitarian Action

General Mauro Del Vecchio, Italy, presented the action undertaken by military forces in FYROM and Kosovo. Bearing in mind his experience, he stressed the fact that in such circumstances the military forces had to develop capacities in many fields, even in the humanitarian field, in cases where the competent humanitarian organisations were not present. He underlined the importance of the need for all organisations with different mandates and competencies (for example, military, humanitarian, judicial, administrative) to work in a well co-ordinated manner.

Red Cross and Red Crescent Humanitarian Action and the Plan of Action adopted by the 27th International Conference of Red Cross and Red Crescent

The presentation of Mr. Blondel, Head of the Division for Policy and Cooperation, ICRC, related to the 27th International Conference of Red Cross and Red Crescent. He shed some light on the results of the Conference which, in general, can be assessed as positive. The main result, without doubt, was the approval of the Plan of Action, which covers all the current issues of humanitarian law and action, and which identifies clearly the directions to be followed in order to achieve a significant improvement of the implementation of the existing rules of this law. But Mr. Blondel also stressed that many delegations feared that humanitarian action could put national sovereignty into question. These widespread fears explain why the documents issued from the Conference and which were concluded on the basis of consensus, are not very daring. Such documents do not always give the impression that the protection of victims has been given the priority it should have been given. Nevertheless, the success of such Conferences depends overall on their follow-up, and the Standing Commission has made it their priority to establish a follow-up mechanism immediately after the 27th International Conference. The ongoing process of introducing an additional protective emblem through a Third
Additional Protocol to the Geneva Convention was also presented. The aim of the Protocol is to gain real universality for the Movement.

**International Committee of the Red Cross and State Sovereignty**

To overcome the recurring debate and bearing in mind the UN experience, as well as that of international organisations, including ICRC, “sovereignty versus the right of individuals”, Prof. Thürer, member of the ICRC, calls, in his presentation, for a new conception of international law, in which the world order would be built on a constitutional basis. International humanitarian law and human rights law are the core of this “Constitutional System”.

**Media Sovereignty, Provocation without Responsibility**

The Media panel explored the role of the media and its relationship with sovereignty and humanitarian action. The panellists, journalists, emphasised the rapid change in media in recent years and the crucial importance of the media in dealing with the different players such as governments, military, and aid agencies, and above all, local populations in conflicts. The information needs to flow not only from the top down but also from the bottom up. There needs to be a close working relationship amongst the different players, particularly the media and conveyers of international humanitarian law. The panellists also emphasised the strengths and weaknesses of the media, notably the dangers of media commercialisation and the growing opportunities presented by the Internet. The Internet is providing a voice to people outside the mainstream. This will help to compensate for the decreasing quality of mainstream journalism. For humanitarian action to be effective mainstream media and information programmes for affected populations need to be highlighted as essential components of all relief work.

**State Sovereignty and Protection of Refugees and Displaced Persons**

Mr. Kalumiya, Deputy Director of the Department of International Protection, UNHCR, who examined the relationship between sovereignty and the protection of refugees and displaced persons, confirmed that sovereignty is not sacrosanct and that States have agreed to encroachments on their sovereignty through international treaty law. He particularly emphasised that refugee law is not a static but dynamic body of principles, which has, and must retain, an inherent capacity for adjustment and development, including the accommodation of legitimate State interests. However, this process must not lead to the erosion of basic protection principles. Meeting the acute needs of the internally displaced persons remains a challenge. UNHCR and ICRC, as well as other UN Agencies and NGOs have been providing assistance, but the international response on behalf of internally displaced persons, in particular their protection, has remained somewhat ad hoc and inconsistent. More efforts must be undertaken to ensure that the needs of internally displaced persons are addressed.

**Recommendations and Conclusions**

During the Congress, various aspects of State sovereignty and humanitarian action have been discussed, and these are the main conclusions as they have emer-
ged from the Congress: The world is organised on the basis of State sovereignty and this should remain the basis of the world order. However, sovereign States shall respect a growing number of obligations, constituting more and more important limits to their sovereignty. Among these obligations, special importance must be attributed to those protecting the interests of the international community as a whole. This is particularly the case concerning:

a) the obligation for each State to promote and respect human rights and humanitarian law;

b) the obligation not to act in a manner which causes harm to other States or the human environment (for example, pollution, water problems, massive flow of refugees and displaced persons).

It is very important to keep and/or rebuild States able and willing to respect the fundamental principles of the world order. In the short term, there is a need to resolve the dilemma between the respect of State sovereignty and the necessity to act even without governmental consent when human rights or humanitarian law are violated on a large scale.

The international organisations have an important role in this field in conformity with their respective mandates and in accordance with principles of the UN Charter. The well-coordinated action on the part of these different organisations at the regional and universal level would be an important contribution towards ensuring the respect of human rights and humanitarian law. The UN system has the central role in dealing effectively with massive violations of human rights and humanitarian law, as such violations clearly constitute a threat to peace and security. The primary responsibility, as well as the duties of the UN Security Council in this field shall be stressed. In other words, it must be underlined that the inaction of the Security Council in cases of massive violations implies disregard of the principles of the UN Charter.

But the real problem is what to do in cases where the Security Council is unable to take decisions in situations where an action is evidently necessary.

There is no clear response to this dilemma. But some ideas, which have been presented, might be worthwhile examining further:

a) the reform of the UN system in order to avoid a deadlock of the Security Council,

b) the identification of means and procedures for monitoring the Security Council,

c) the creation of a UN body to constantly evaluate the world situation and ascertain objective and credible facts which should facilitate the taking of decisions on international action, which can range from delivery of humanitarian aid to military intervention.

However, some objections were put forward, in particular, the fact that it is not the lack of information which prevents States to act. The importance to raise the consciousness of the Security Council members, particularly of the permanent members, of their particular responsibility should be underlined as a key measure to increase the efficiency and credibility of the Council. Another aspect worthwhile
looking into is the usage of different terms, particularly of the term “humanitarian intervention” (the usage of the term created confusion in public, especially as to the role of the different actors). The establishment of a Standing Force was also suggested to ensure immediate and effective deployment of peacekeeping forces if needed.

As for humanitarian action, it has to be reminded that there is a recognised right for the population to have food, medicine and other goods essential for their survival at their disposal. In case of armed conflict, the parties to the conflict have the duty to meet these basic needs or to accept international humanitarian action if they are unable to do so.

A delicate issue is: what to do if they refuse such an action, although absolutely necessary. In those situations, humanitarian organisations can only transfer the problem to the United Nations and States, which have to take measures in conformity with the UN Charter.

Humanitarian organisations have a key role to play in trying, by all means, to avoid the deadlock caused by the fact that States refuse assistance. For that purpose, they have to enhance the dissemination of international humanitarian law principles and work with the States in peacetime to build up their confidence on their capacity to deliver assistance in a neutral, impartial and professional way.

Humanitarian organisations have also to recognise the very detrimental effect caused by actions which are not properly co-ordinated and carried out without sufficient professionalism. To build up this confidence, it is therefore also important to obtain from all humanitarian organisations the commitment to work under basic ethical principles with great professionalism and in good co-ordination. The existing code of conduct (in particular the one adopted by the International Red Cross and Red Crescent Conference) have therefore to be disseminated, respected and constantly re-examined in the light of new situations and experiences.

Finally, the quality of the debates and the importance for the International Institute of Humanitarian Law to maintain its central role in hosting such gatherings on humanitarian issues has to be underlined. Co-operation with ICRC, UNHCR, UN High Commissioner for Human Rights, International Organization for Migration, and the International Federation of Red Cross and Red Crescent Societies and other interested humanitarian organisations is a key factor, not only to the success of such a forum but also to the future of humanitarian action.
The Council of the Institute, on the occasion of its 30th Anniversary, awarded the Prize for the Promotion, Dissemination and Teaching of International Humanitarian Law for the year 2000 to

The Korean Red Cross
Humanitarian Law Institute

for its valuable contribution to the development and dissemination of International Humanitarian Law

San Remo, 1st September, 2000

Dr. Stefania Baldini
Secretary-General

Prof. Jovan Patrnogic
President
NOTE OF THANKS

Eun-Bum CHOE
Republic of Korea, National Red Cross

Madam Prof. Garavaglia,
Prof. Patrnogic, distinguished Participants and Friends,

We are most privileged and happy to receive this honourable Prize of the IIHL 2000 “for the promotion and dissemination of Humanitarian Law”, which is awarded to the representatives of the Korean National Red Cross on the occasion of this international Congress on the occasion of “Humanitarian Action and State Sovereignty” being held in San Remo. We feel this Prize is not only a recognition but also a new encouragement for us to continue our efforts for the cause of humanity.

Availing ourselves of this opportunity, and on behalf of Korean Red Cross Society, we would like to join you to extend our heartfelt congratulations to the International Institute of Humanitarian Law on its 30th anniversary of its founding, which falls on this day.

The history of the last 30 years has showed us that, under the esteemed leadership of Prof. Jovan Patrnogic ever since its inception, the Institute has played, corresponding to its noble objectives, its role as a centre for Dialogue toward Peace and, therefore, deserves highest admiration for its every achievement in spite of the limited resources available.

Just for your information, allow us to very briefly mention our dissemination activities. The Korean Red Cross Society, through its Humanitarian Law Institute which exists in modest size, has carried out a nation-wide program to teach and conduct research in international humanitarian law and the Red Cross ideals and principles to different target groups covering military, universities, youth, Red Cross members, and so on. And, we are studying to improve our dissemination activities to extend to target groups such as journalists, civil servants etc...

Therefore, we would like to ask more cooperation from the Institute. Before concluding our note of thanks, we should recall the fact that our Red Cross Society made the first contact with the Institute as early as in 1977, when the latter organized an important meeting: “Conference of IHL Experts on Family Reunion” which then adopted a very significant resolution entitled “Red Cross negotiations in Korea”. Such an initiative implicated that the Institute had become one of the first runners to draw the attention of the international Community to the humanitarian dialogue taking place on the Korean peninsula.

As you may have witnessed through TV or radio in these days, there was an exchange of 200 aged people who, after over 50 years of separation, were able to visit their respective family members living in the South and North of Korea peninsula, as a result of the historical rendez-vous in Pyongyang between the leaders of the two Koreas on 15 June followed by their signing of the “South and North Joint Declaration”.

Negotiations are taking place for further rounds of family visiting and let us move forward to positive development in this respect.
We reiterate our thanks and sincere wishes for the success of this Congress as well as the continued prosperity of the International Institute of Humanitarian Law.
XXVth Round Table on Current Problems of International Humanitarian Law
within the Global Consultations on International Protection of Refugees
launched by the United Nations High Commissioner for Refugees

REFUGEEES: A CONTINUING CHALLENGE

25ème Table Ronde sur les Problèmes Actuels
du Droit International Humanitaire
dans le cadre des Consultations Globales sur la Protection Internationale des
Réfugiés lancées par le Haut Commissariat des Nations Unies
pour les Refugiés

LES REFUGIÉS: UN DÉFI PERMANENT

25ª Tavola Rotonda sui Problemi Attuali
del Diritto Internazionale Umanitario
nell’ambito della Consultazione Globale sulla Protezione Internazionale dei Ri-
fugiati promossa dall’Alto Commissariato delle Nazioni Unite
per i Rifugiati

RIFUGIATI: UNA SFIDA PERMANENTE

Under the auspices / Sous les auspices des / Sotto gli auspici di
International Committee of the Red Cross
UN High Commissioner for Refugees
UN High Commissioner of Human Rights
International Organization for Migration
International Federation of Red Cross and Red Crescent Societies
MESSAGE

“REFUGEES: A CONTINUING CHALLENGE”

Prince EL HASSAN Bin TALAL
of the Hashemite Kingdom of Jordan

In the recent past the international community has witnessed the celebrations of the 50th anniversaries of a number of international organisations and conventions. It is indeed worth celebrating the genuine efforts of many who have worked for a more humane and healthy world, as well as the courage of those who have greatly suffered for the lack of such a place. However, the heading of this meeting is “Refugees; a Continuing Challenge”; times of celebration are times for reflection on what has, what can and what still ought to be done. We have to ask ourselves whether we have done justice to what we inherited from our ancestors, and whether we have done our duty by future generations.

That people are forced to flee their homes to seek refuge from harm elsewhere is nothing new, it is an old story that has been told many times throughout history. The achievement of the last century was to recognise universal standards of protection in the development of human rights and humanitarian law and, more specifically, a refugee regime to protect such people. The last 50 years have seen an approach to human displacement that is at once more focused and more expansive. While the UNHCR’s core mandate to protect refugees and search for solutions has not changed since the Cold War time into which it was born, the range and scale of that organisation’s activities have dramatically increased to keep up with the greatly changing contexts of human displacement, and the corresponding soar in demand for its services. The issues of globalisation, the changing nature and growing complexity of population movements, and the evolving roles and responsibilities of the international community and organisations in addressing such issues will no doubt be questioned in detail here in San Remo. It is essential that the various actors: governmental, the UN system, the NGOs, civil society and individuals, be engaged in joint discussion. Unless the organisational lateral thinking develops between these many and varied entities, multilateralism is bound to wither away and bilateralism cannot offer satisfactory global answers. There is an urgent need to develop at the global level a universally acceptable architecture of human solidarity.

At a recent meeting of the Club of Rome, over which I have the honour to preside, I suggested that our future efforts should be devoted to the development of “the ethic of human solidarity”. The term “ethic” should be interpreted broadly, going beyond the moral to cover common sociocultural values. Certain values have been intrinsic to humanity’s collective consciousness: ensuring our survival and safeguarding our well being or, in other words, the respect for life, a recognition of human dignity and a sense of responsibility towards future generations. These values are the cornerstones of humanitarianism. It is logical that humanitarianism
hinges on an ethic of human solidarity. The concept of “solidarity” should not be limited to appealing for support for the general notion of “common humanity”, nor should it be seen as a “charity business” or do-goodism. It should, in fact, be a down to earth approach based on, and motivated by, “enlightened self interest” which should serve as the driving force behind policy making processes relating to contemporary challenges. We will be addressing this subject further in our forthcoming meeting in Valdivia in Chile.

When the Universal Declaration of Human Rights was drafted in 1948, ethical and cultural relativity was firmly rejected. According to the relativist approach, it is necessary to tolerate as equals even the most distorted notions about the freedom and dignity of man, even those involving degradation and slavery. This is not acceptable. What is needed is an ethical and legal foundation, acceptable to all, perhaps to establish a Charter of Human Rights as a universal goal. An important task is to promote realistic images of other cultures. Intercultural dialogue may help to lead the debate about human rights away from the narrowness of ossified opinion and a hegemonic approach. As the world today is becoming increasingly interconnected and intra-dependant, it is crucial that all cultures play a part in formulating its agenda. Professor Malitza of the Black Sea University has spoken of “one world, 10,000 cultures”. Any global proposal, in order to have legitimacy for all concerned, must be related to the various historical, cultural, legal and religious traditions.

The earliest Muslims were refugees, or perhaps more accurately, internally displaced persons. The Muslim calendar dates from the Hijra; the journey the Prophet Mohammed (peace be upon him) and his followers made to escape persecution in Mecca and find asylum in Medina. Today, some 70% of the world’s refugees are Muslim. But Muslims should not only be seen to be the victims of displacement but must act as partners in seeking solutions. Religious principles and traditions can promote the cause of the displaced, and, in the Muslim context, we can turn to the tenet of Zakat. For over 10 years we have called for the establishment of an Islamic Zakat Fund. That is an “ALMS” fund. The proposed fund could be of assistance in addressing the problem commonly referred to as donor fatigue. The basic concept is not one of charity, but of enhancing the social productivity of those who are displaced. The idea of a Zakat Fund was put to UNHCR in 1997, the CASWAME bureau expressed interest and further studied the proposal. Sometimes I ask myself: if there had been no world war, would we have succeeded in developing a Universal Declaration of Human Rights in 1948? Why can the defences for peace not be built in peacetime? Can we not speak of crisis prevention rather than crisis management, as though the management of a crisis is an end in itself instead of crisis resolution? We need to build on established principles while also discarding preconceived notions and mindsets, which hamper progress. Human rights are the common possession of all members of the human family, regardless of differences in gender, race, religion (or the opinions of immigration control officers). That is a principle on which there is, and can be, no disagreement. There should be no contradiction between the universality of human rights and the sensitivities relating to State sovereignty. Though also in principle inviolable, the sovereignty of a State does not give it license to brutalise, to disempower, to deny the rights
of its own citizens, or the rights of other peoples, to their safety and dignity. Even with modern progress and the unlimited means available to us there are still more questions than answers about our common future. I do not have the answers, but in searching for them I have tried to focus on the continuity of innovative changes. Without continuity, life itself would become unrecognisable. Important as it is, however, continuity is only one element of the three: continuity-innovation-change, in that order. Some years ago, in the Independent Commission on International Humanitarian Issues (ICIHI) of which I was one of the founding chairmen, we asked ourselves the question as to whether we were capable of “Winning the Human Race?”. In the final Report we published, we chose to give a message of HOPE, we “reaffirmed our faith in the basic human impulses which have ensured human survival and progress. Hope is one of those impulses”.

In Soweto earlier last year I was received at the home of Walter Sisulu who said to me “We have always worked against something (against apartheid, against xenophobia, etc), let us for once work FOR something”. I wish the distinguished participants and experts gathered here in San Remo all the best in their efforts to work for the protection of refugees and displaced people, as well as those who jeopardize their own safety in assisting the uprooted and the neglected. The courage that has already been shown by so many is cause for optimism, but would it not be wonderful one day to be able to speak of contentment rather than courage, of lives lived and not only survive?
RÉFLECTION À L'OCASION DU 50ème ANNIVERSAIRE DE LA CONVENTION DE 1951 AVEC UNE RÉFÉRENCE PARTICULIÈRE À L'AMÉRIQUE LATINE

Héctor Gros ESPIELL
Membre du Conseil IIDH

Cette Table Ronde de l'Institut International de Droit Humanitaire, organisée pour commémorer le 50ème Anniversaire de la Convention de 1951, nous a permis d'effectuer une évaluation actuelle de son application, de constater sa grande contribution au véritable humanitarisme, son influence sur la conceptualisation d'une idée plus générale et universelle des Droits de l'Homme tant en ce qui concerne leurs aspects individuels que collectifs, et son apport considérable au Droit international et à sa mise en œuvre.

Je ne souhaite nullement, à travers cette brève intervention, réitérer l'histoire de la Convention de 1951, qui est aujourd'hui la source de réflexions et d'éloges, sans préjudice des initiatives visant à améliorer et rendre plus efficace son application, car face aux énormes problèmes et défis actuels posés par la question universelle des réfugiés, il n'y a pas de status quo ou de contemplation du passé qui tienne. La Convention de 1951 et le Protocole de 1967 ont déclenché le processus d'universalisation du droit international des réfugiés. Ce droit fait partie aujourd'hui d'un droit international de caractère universel, et cela grâce au processus qui fit naître la Convention de 1951 et son Protocole additionnel.

Le droit international des réfugiés, nécessairement de caractère universel, reconnaît néanmoins l'existence de diversités régionales auxquelles il ne nie pas une expression juridique même de type conventionnel. Ainsi, ce droit international universel des réfugiés - qui est en vigueur et s'applique de manière directe et immédiate en Amérique Latine, puisqu'il s'inscrit dans le droit interne - ne s'est pas seulement nourri et en partie inspiré du droit américain. Par ailleurs, à travers l'établissement juridique de la notion d'asile - aussi bien territorial que diplomatique - il est confronté dès la moitié du XIXème siècle à l'un des aspects essentiels de la question, et il offre sur le plan régional en Amérique Latine un complément au droit qui émane directement de la Convention de 1951 et du Protocole de 1969.

Par conséquent, je me limiterai à quelques réflexions simples sur la Convention de 1951 et sur son rapport avec l'Amérique Latine.

Il s'agit, sur ce continent, d'un thème présentant des caractéristiques très importantes d'un point de vue politico-juridique à cause de la situation particulière qu'a connu et connaît encore aujourd'hui l'institution de l'asile territorial et diplomatique - un thème si proche de la question de réfugiés et, par conséquent, de la matière réglée par la Convention de 1951 - en matière de développement historique et traditionnel. Si, en ce qui concerne l'Amérique Latine, une réflexion sur ce thème peut se révéler ardue étant donné les difficultés à la définir de manière appropriée, il faut néanmoins tenir compte de la gravité de la question des réfugiés dans cette Amérique, comme conséquence directe des conflits armés internationaux et internes, des ruptures de l'ordre constitutionnel démocratique,
de la violence, du terrorisme, de la guérilla et du trafic de stupéfiants.

Ces extrêmes ont été et sont encore aujourd’hui les grands générateurs des mouvements humains auxquels le droit des réfugiés et son application pratique doivent faire face en Amérique Latine. Avec la Démocratie, avec la Paix, sans violence, à travers le respect des Droits de l’Homme, sans terrorisme, sans guérilla, sans répression arbitraire, sans pauvreté, avec la justice, les cas de déplacements auxquels le droit des réfugiés est confronté disparaîtraient dans la pratique.

De la relation entre le refuge et l’asile en Amérique Latine

Si les Nations Unies ne sont pas parvenues à élaborer une convention sur l’asile territorial, en 1951, toutefois, elles ont obtenu l’adoption de la Convention sur les Réfugiés, qui devait être complétée plus tard par le Protocole de 1967.

Bien qu’il s’agisse d’institutions avec une réglementation juridique distincte, il existe une relation entre les notions d’asile et de refuge à travers la matière qu’elles couvrent et leurs fondements humanitaires.

Le refuge est aujourd’hui universellement reconnu. Cependant, afin d’obtenir le statut de réfugié, une personne doit se trouver en territoire étranger et pouvoir démontrer que la fuite de son pays a été la conséquence d’une persécution politique, ou de la conviction et de la crainte fondée d’être victime d’une persécution de ce type. Il existe donc une relation évidente entre l’asile territorial et le refuge. Toutefois, le refuge repose sur une conception bien plus large, qui a aujourd’hui une sens collectif. Aujourd’hui, il a trait avant tout aux mouvements de populations qui sont la conséquence de la terreur et de la persécution, contrairement à l’asile qui revêt en règle générale - du moins c’était le cas à ses débuts - un caractère individuel et personnel. Avec ou sans base constitutionnelle directe, tous les pays d’Amérique Latine acceptent l’institution de l’asile comme un élément faisant partie de leur système juridique, reposant sur les mêmes raisons humaines et politiques qui donnèrent naissance au droit de toute personne poursuivie pour des raisons politiques à demander et à recevoir l’asile.

En Amérique Latine, le droit d’asile fait partie des droits reconnus à un niveau interne, même s’il n’est pas toujours reconnu expressément dans la Constitution. Par conséquent, dans les pays où il existe une disposition constitutionnelle expresse relative au droit d’asile tout comme dans ceux où celle-ci n’existe pas, le droit d’asile est reconnu, explicitement ou implicitement. J’examinerai maintenant la question du droit d’asile dans le droit international latino-américain.

Il est important de signaler que l’on peut aujourd’hui considérer que l’asile - aussi bien territorial que diplomatique - constitue une coutume régionale et que celle-ci représente donc en Amérique Latine une source du droit international.

Par conséquent, l’asile, qu’il soit territorial ou diplomatique, constitue une coutume régionale latino-américaine. C’est-à-dire que, faute de traités reconnus en la matière - il existe en Amérique Latine une multitude de traités mais les ratifications ne suivent pas -, la coutume en tant que source de droit s’applique pour la reconnaissance du concept d’asile.

Il existe également en Amérique Latine un accord unanime en ce qui concerne l’application directe des normes conventionnelles, ratifiées et en vigueur au sein du droit interne. Les solutions varient par rapport à la hiérarchie normative sur
la base de laquelle le traité doit être appliqué à l’intérieur du pays. Mais les traités s’appliquent toujours directement dans le droit interne, avec une hiérarchie normative au moins équivalente à celle de la loi interne, ce qui les amène bien souvent et surtout dans le cas des traités humanitaires - parmi lesquels on peut inclure, d’un point de vue conceptuel, les traités relatifs aux réfugiés -, à être considérés comme relevant d’un mandat constitutionnel, avec rang constitutionnel. L’asile ne peut être invoqué que dans les cas de crimes politiques ou de persécutions basées sur des raisons politiques.

On considère aujourd’hui que le terrorisme et, en général, les crimes contre l’humanité, ne font pas partie des crimes politiques pouvant justifier l’octroi de l’asile.

Parmi les instruments interaméricains les plus importants en la matière - c’est-à-dire ceux qui découlent du Système Interaméricain -, on retiendra la Convention de la Havane de 1928, la Convention de Montevideo de 1933 et les deux Conventions de Caracas de 1954, la première relative à l’asile territorial et la seconde à l’asile diplomatique. Il s’agit des bases normatives conventionnelles des instruments interaméricains. Il est toutefois essentiel de remarquer que les États-Unis, bien que membre du système interaméricain, ne sont partie contractante d’aucune des conventions internationales sur l’asile: ni de celle de la Havane, ni de celle de Montevideo, ni de celles de Caracas.

Actuellement, la situation a tendance à se compliquer encore davantage car le Canada, aujourd’hui membre de l’OEA, se trouve dans une situation analogue, et parce que les pays anglophones des Caraïbes, qui ont commencé leur entrée dans l’OEA à partir de 1958-1959, ne reconnaissent pas non plus l’institution de l’asile.

Il faut ajouter que si la Convention Interaméricaine des Droits de l’Homme, connue sous le nom de Pacte de San José, mentionne et reconnaît l’institution de l’asile dans son article 22, paragraphe 7, ni les États-Unis, ni le Canada, ne sont parties de cette Convention. Les instruments sous-régionaux sont ceux qui lient certains pays au sein de l’Amérique Latine.


Deux commentaires sur cette norme s’imposent. Premièrement, l’introduction de l’asile dans la Convention Interaméricaine des Droits de l’Homme se
réfère uniquement à l’asile territorial. L’asile diplomatique continue donc à être réglé par d’autres normes. Il ne rentre pas dans la Convention Interaméricaine des Droits de l’Homme. L’asile est octroyé devant la Commission des crimes politiques, excepté pour les cas de crimes communs. Etant donné que l’on considère aujourd’hui que le terrorisme et les crimes contre l’humanité ne constituent pas des crimes politiques, l’octroi d’asile aux terroristes et aux personnes ayant commis de tels crimes est donc injustifié. Aujourd’hui, quelle est la signification de l’asile en Amérique Latine?

Il faut reconnaître que l’asile a rempli une fonction politique importante en Amérique Latine. Il a connu son âge d’or lors de la première moitié du 20ème siècle, une époque marquée par l’instabilité politique, les révolutions et les coups d’état, et durant laquelle l’asile a constitué un véritable bouclier visant à limiter les conséquences de la persécution politique. Toutefois, il s’agissait d’une institution qui revêtait dans les faits un caractère sélectif et individuel. Il protégeait les hommes politiques ayant fui leur pays suite à un coup d’état, et encore ceux qui devaient se réfugier dans une Ambassade ou une Légation en cas de rupture violente de l’ordre constitutionnel ou de révolution. L’asile n’était pas synonyme, à cette époque, de protection massive, générale, parce que les personnes qui en faisaient la demande étaient des cas individuels, des personnes concrètes.

Les développements politiques, et en particulier la stabilisation politique que connaît actuellement l’Amérique Latine, la disparition des coups d’état et l’établissement de la démocratie, ont modifié cette situation. Aujourd’hui, le problème auquel nous sommes confrontés est celui des grands mouvements de populations: d’une part, les mouvements de réfugiés causés par des circonstances politiques ou par une crainte de persécution politique, ou encore par des motivations économiques ou sociales et, d’autre part, les minorités ethniques, les populations indigènes, les groupes fuyant la dévastation provoquée par les guerres civiles, etc.

C’est ainsi que, sur le plan politique, l’asile a progressivement perdu du terrain en Amérique Latine pour laisser une place toujours plus importante au refuge, une institution qui trouve son fondement dans la Convention des Nations Unies de 1951 et le Protocole de 1967. Nous avons d’ailleurs pu le constater très clairement au cours de ces dernières années où l’on a assisté, à cause de graves conflits internes en Amérique Centrale, au déplacement massif de populations fuyant la guerre civile, ainsi qu’à différents mouvements à caractère ethnique. La misère et les crises économiques ont aussi provoqué des grands mouvements, des déplacements internes et des migrations externes.

Aujourd’hui, l’asile territorial et le refuge politique basé sur la Convention de 1951 et le Protocole de 1967 doivent s’harmoniser, s’intégrer et se compléter.

C’est à l’occasion d’une réunion organisée il y a quelques années par le Haut Commissariat des Nations Unies pour les Réfugiés qui a eu lieu à Carthagène et à laquelle ont participé de nombreux juristes latino-américains, qu’a été adoptée la fameuse Déclaration de Carthagène. Grâce à celle-ci, le concept de réfugié s’est étendu non seulement aux individus et aux groupes de personnes qui abandonnent individuellement ou collectivement leur pays pour fuir une persécution politique ou une crainte fondée de persécution politique, mais également aux réfugiés connus sous le nom de réfugiés économiques, qui sont le fruit des mouvements de popula-


THE OAU CONVENTION GOVERNING SPECIFIC ASPECTS CONCERNING REFUGEES AND TEMPORARY PROTECTION IN EUROPE: WHAT CAN WE LEARN FROM EACH OTHER?

Émile OGNIMBA
Head Division of Humanitarian Affairs, Refugees and Displaced Persons, International Organization of African Unity

1951-2001; 1969-2001. Fifty years have passed since the adoption of the UN Convention relating to the Status of Refugees; thirty-two years since the adoption of the OAU Convention dealing with specific aspects of the refugee problem in Africa. The developments which have taken place in our world since that time, characterised today by greater and quicker transformations in the international environment, by extraordinary technological and economic progress, have all improved the quality of life in the northern hemisphere, while poverty still afflicts the south within a framework of general and constant conflict. These developments appeal for fresh, in-depth and dynamic reflection on the essential problems concerning the regime of international protection, the very expression of universal generosity, solidarity and humanity before the refugee phenomenon. The planetary character of our world, expressed by an unavoidable process of globalisation, resolutely imposes the necessity to review, at least, the interpretation of the fundamental principles and concepts upon which international refugee law has been built, so as to improve the quality of its content, and by so doing, meet the great humanitarian challenges of the day. Today, more than ever, the concept of generosity, hospitality, protection of borders must be reviewed from this viewpoint. For if the 1951 and 1969 Conventions continue to incarnate values that are timeless over the centuries, thus remaining “key instruments to assure the protection of refugees”, we must admit that the replies they give to meet the challenges brought about by the developments in the world are inadequate. These instruments must change; a change which is meaningful only if there is the will to adapt these instruments in keeping with international progress. This contribution is written with the same spirit. In other words, and as far as we are concerned, this means looking at the OAU Convention concerning refugees and trying to see if and how it can contribute to encouraging reflection, (already underway within the framework of global negotiations), with a view to making international protection more dynamic, and to creating a system of protection capable of facing the obstacles created by the globalisation of a world where peoples continue to have different backgrounds and cultures. The issue we are going to develop concerns the problem of the complementarity between the UN and the OAU Conventions. In addition, we shall give a general presentation of the OAU Convention, attempting to emphasise the context of its elaboration and the main axis on which it revolves. Later, in our examination of the issue of temporary protection, we shall try to build a bridge between the OAU Convention and the UN Convention to highlight their common points and especially their differing points, and to bring out the problems arising from international changes which call for a fresh study of the system of protection. Finally, we shall try to outline
replies to some of the problems.

The OAU Convention governing Specific Aspects of Refugee Problems in Africa

The OAU Convention on Refugees was signed on 10 September 1969 in Addis-Abéba and came into effect on 20 June 1974. Since that day, 44 Member States of the OAU (out of 53) have ratified it or adhered to it. The following nine countries are not party to it: the Comoros, Djibouti, Eritrea, Madagascar, Mauritius, Namibia, the Arab Democratic Republic of the Saharawi People, Sao Tome and Principe, Somalia.

To understand the provisions of the Convention, it is important to remember briefly the context which presided over its elaboration as a regional complement to both the UN Convention governing the status of refugees and the 1969 Protocol. From this point of view, two aspects deserve special attention. First of all, the problem of refugees in Africa has been examined in relation to the fight to liberate those African territories that had not been touched by the wave of independence in the 1960s or were still under racial domination and oppression.

The 1969 Convention is to be considered in this perspective. So, the term “refugee” is defined in such a way as to apply to “every person who, owing to external aggression, occupation, foreign domination …, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality” (Art.1 al.2). The second element relates to the cold war existing between the western world and the communist block, the division of Africa into two parties, moderates and advanced socialists, being one of the repercussions. In that period, so-called acts of destabilisation between one party and the other were particularly common. The refugee constituted “a political capital” a good investment in the destabilisation of the country of origin.

In this context, a strong link between the refugee problem and the problem of subversion was established, and covered by the Convention. Already, in its Resolution AHG/Res. 26 (II) concerning the refugee problem in Africa, the Conference of Heads of States and Government, reaffirming its wish to provide assistance to refugees from Member States on a humanitarian and fraternal basis, recalled the commitment of Member States to prevent refugees living on their territory from engaging in any action detrimental to the interests of the other Member States of the OAU, and requested that refugee problems should never become a source of tension between them.

This link thus established between the refugee problem and subversion has been provided for in one of the norms of the 1969 Convention. First of all, in paragraph 4 of the preamble where Heads of States and Governments express their desire “to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside”; while paragraph 5 indicates the determination of the African leaders “that the activities of such subversive elements should be discouraged …”.

Then, article III of the Convention, paragraphs 1 and 2 stipulates that: “every refugee shall … also abstain from any subversive activities against any Member State of the OAU” and that “Signatory States undertake to prohibit refugees residing in their respective territories from attacking a State Member of the OAU, by any activity likely
to cause tension between Member States, and in particular by use of arms, through the press, or by radio”.

Such was, therefore, the general situation in Africa at the time of the elaboration and adoption of the OAU Refugee Convention. More than thirty years later, the data has clearly and drastically changed. The two essential elements, upon which regional refugee protection was constructed, have been replaced. The regime of colonial and racial oppression existed until our world experienced a real upheaval which witnessed the change from a bi-polar system to a “superpower that imposes its model on the whole world”. Consequently, the situation in Africa has changed and not always in a positive way. Certainly, the continent has been freed from colonialism and apartheid; however, the division between moderates and advanced socialists is dependent on history. But at the same time, independence has not produced the effects hoped for. Poverty, which torments the continent, and devastating and endless conflict, paradoxically coinciding with the democratic wave unfurling itself over the continent, have both caused millions of people to flee. However, the challenges have increased and are even more complex.

To the question “How will the last 50 years compare with the future?”, which she was asked in an interview she conceded to the magazine, Refugees (vol. 3, n° 120, 2000, p. 23), Sadako Ogata, United Nations High Commissioner for Refugees at the time, pointed out: “In those early days we helped people who generally were persecuted by their own governments. The international community received them because they came mostly from a particular kind of situation, fleeing communism or authoritarian regimes. Then we became involved in the decolonisation process and in the 1970s and 1980s we helped protect victims of cold war conflicts. Internal conflicts increasingly have replaced inter-State wars in the last 10 years. The “mix” of people on the move - refugees, economic migrants, internally displaced persons - and their motivations have become far more complex…”.

Times have in fact changed and so has the refugee problem. New thoughts have also been formed, such as temporary protection, economic migration, the promised land and many others, all calling for a new response which, as mentioned above, does not always offer the traditional legal instruments on protection, and does not encourage the attitude of certain States that take refuge behind their “ramparts” and close their doors under some pretext or another; some countries even announce that they cannot shelter all the poverty of the world. However, it is clear that the atmosphere has changed with global developments, opening the way for time-saving, and so political, interpretations of the provisions of relevant Conventions. For example, the key element concerning persecution has been interpreted in all sorts of limiting ways, which aim at encouraging feelings of xenophobia and the rejection of the foreigner - attitudes encrusted in the system of certain countries.

The paradox today is the fact that forced globalisation opens borders to everything except to man. In this regard, Mrs Ogata correctly pointed out: “The globalisation of information, money and trade has developed very rapidly. But no system has yet emerged to handle the globalisation of human movement. The international community must produce a framework for migration management, in addition to a strengthened
The reply of the 1969 Convention to current challenges of the African example

This question simply consists of trying to find out how actual the Convention is and if it gives adequate answers to the problems created by developments on the continent. After all, the same question is valid for the UN Convention of 1951 and its 1967 Protocol. To answer this question, it is best to re-examine the fundamental points of the Convention.

First of all, the definition of the term “refugee”. It is common knowledge that the greatest merit of the OAU Convention lies in the broadening of the concept of refugee, beyond the idea of persecution (art. I al. 1), to include the security aspect. By so doing, the OAU Convention distinguishes itself from the United Nations Convention, which, as a last resort, gives quite a limited definition of refugee. In fact, paragraph 2 of article I of the OAU Convention, defines the term “refugee” as being, “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.

This definition is very timely considering current changes in a world where conflicts are becoming the main cause for forced movements of populations. It is obvious, however, that reality obliges us to go beyond the criteria that dominated a certain period and that continues to dominate in certain northern States, that is, persecution. In any case, it is an indisputable fact that, in Africa, the majority of refugees and displaced persons are the result of wars and different forms of violence that riddle the continent.

Then there is the principle of voluntary repatriation. Although this is considered to be a norm of customary law, its omission from the UN Convention could lead to arbitrary repatriation in undesirable conditions. This principle constitutes one of the cornerstones of the system of protection provided for in the OAU Convention. Article V of the Convention states, in fact, that “The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will”. In addition, emphasis is placed on the necessity of a safe return to the country of origin in the right political and economic conditions. In fact, during its 74th ordinary session, the OAU recalled its support of this essential principle, urging the countries of origin and refuge to encourage, in co-operation with the OAU and the HCR, voluntary repatriation of refugees willing to return to their home country ... also by creating a sure and safe environment (Decision CM/ Dec. 598 (LXXIV).

The principle of non-refoulement

This principle, which is provided for both in the UN Convention (art. 33) and that of the OAU, is also essential. The OAU Convention includes it in the part dedicated to asylum (article II al. 3), “No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would
be threatened …”. It is a fact that this principle has been applied in a hard way, so much so that the HCR were very worried at the time about the increasing use, by Europeans, of the detention of asylum seekers in closed camps, prisons or transit areas in airports. (Press release of 23 November 1995). We were often given proof of this through shocking images shown by the international media. Intentionally using mediaeval terms, Jacques Decornoy expresses the attitude of northern countries in the following way: “Le monde industrialisé s’entoure de courtines, se hérisse de mâchicoulis, se ceint de douves juridiques dont la transgression relève de l’exploit” (Le Monde diplomatique, Manière de voir 33, février 1997, p. 13).

The principle of non-refoulement or rather its application is today the centre of debates underway here and there with the view to strengthening the system of international protection. Its examination unavoidably leads to the global problem of asylum to which the OAU Convention has after all dedicated a key position. Article II is entirely dedicated to this topic. Quoting paragraph 1 of article II of the OAU Convention, “Member States of the OAU shall use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality”.

Paragraph 4 of the same article also encourages solidarity on the part of each Member State vis à vis the burden of the refugees (a current issue), stating the following: “Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum”.

Finally, the concept of temporary asylum is treated in the framework of paragraph 5 which states that “where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any other country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph”. It appears that temporary asylum, at least where Africa is concerned, is not a new idea even though it does not coincide exactly with the current trend of thought. Contrary to the OAU Convention, the UN Convention remains amazingly silent on the issue of the right to asylum and thus paves the way to all sorts of provisional solutions or interpretations of this right which are unlikely to reinforce it. The idea and practice of temporary protection are particularly revealing in this regard.

Temporary protection

We have pointed out that the OAU Convention examined this concept in a totally different framework to the present day one, which is part of a new practice applied by certain countries as a temporary reply to the massive influx of refugees. What does temporary protection mean?

The HCR tries to enlighten us on the subject in issue n° 123 of Refugees, (volume 2, 2001, p. 17) where temporary protection is defined in the following way: “Nations at times offer ‘temporary protection’ when they face a sudden mass influx of people, as happened during the conflict in the former Yugoslavia in the early 1990s, and
their regular asylum systems would be overwhelmed. In such circumstances people can be speedily admitted to safe countries, but without any guarantee of permanent asylum”. This practice has in fact been observed in Europe and has been the centre of a number of criticisms, purely because its logic was not inspired by generosity and solidarity, so fundamental to the elaboration and adoption of the UN Convention. The temporary solution, seemingly generous, proved to lead to several dangers. First of all, because its dateline was particularly limited - after a period of two years the “refugees” had to return whether they liked it or not; a return which does not always consider the changed situation in the country of origin. This was the case of refugees from Bosnia and Kosovo. Received with great pomp and given wide media coverage, they were soon made “to go back” under some pretext or another.

In addition, even at the same time as being welcomed, they appear to be refugees from the second zone and therefore not eligible to the advantages offered by the general system of international protection. This situation fuelled the debate on the application of the Convention at the time of massive influx, and continued at the global consultation level where the necessity to develop, once more, the tools to assure protection in situations of mass influx was acknowledged. Debates also recognised the necessity to establish a balance between, on the one hand, the statute of the refugee prima facie and, on the other, further clarification of the status on an individual basis.

The African reply

At the moment, the African continent has the largest number of refugees, mainly as a result of conflicts, arriving in the receiving country in mass flows. Large numbers of refugees overflow into the neighbouring countries of Mozambique, Rwanda, Liberia, Sierra Leone, Burundi, Angola to name but a few. Africa has always responded to this phenomenon of mass influx with great spontaneity, solidarity and humanity, despite the limited means at its disposal. Refugees have always been welcomed and considered as such, according to the spirit and the wording of the OAU Convention concerning refugees. What is symptomatic of Africa is that, having experienced such phenomena for many years, it has tried to fit its practice into the mould of the OAU Convention concerning refugees rather than develop a new concept of “temporary protection”. In other words, the principles of non-refoulement and voluntary repatriation have been put forward and the ways of integration and reinsertion have been studied. The recognition of refugee status prima facie does not automatically strengthen the process of individualising the refugee according to criteria which should necessarily be subjective.

Apart from the generosity and the sense of hospitality of the African continent, certain other reasons could explain the attitude of African States concerned such as Tanzania, Guinea, and the Democratic Republic of Congo. Such reasons could be, first of all, the porosity of the African borders, whose length and relief make controls difficult; then the artificial character of these borders that separate the same population and encourages reception and assimilation; finally, the absence of adequate national authorities to prevent the flow of refugees. These reasons have had an inevitable influence on the attitude of the receiving countries and,
consequently, on the elaboration of African practice in situations of mass influx.

Summarising, the concept of “temporary protection”, as it has been conceived and developed in certain industrialised countries, is far from the African practice which is more generous and more hospitable.

However, this practice, which can be praised for avoiding unfounded discrimination, has its risks, which should not be ignored. The first risk is undoubtedly that of introducing dangerous and de-stabilising elements into the country, which, in the African situation, are apt not only to damage relations between the receiving country and that of origin, but also to cause trouble in the receiving countries. This is the problem caused by the presence of armed elements among bona fide refugees.

And so the issue of refugees has recently been the root cause of the significant deterioration in relations between Member States of the Union of the River Mano (Guinea, Liberia, Sierra Leone). Moreover, relations between Tanzania and Burundi are marked by the presence of a large flow of Burundi refugees in Tanzania as a result of the cyclic conflicts which riddle the history of Burundi. Finally, the most striking and instructive example is, without doubt, the case of the Rwandan refugees in the Democratic Republic of Congo, who are caught in the middle of the conflict raging in that country. Therefore, now the question is to see whether, in effect, the “humanistic” solution adopted by Africa constitutes the best alternative in the face of situations of mass influx or would it be better to introduce new ways of preserving both the stability of the receiving countries and their relations with the countries of origin. It would seem that this question is important for Africa while it deserves further examination in the case of developing countries that have a relatively good knowledge of their own territory and run less risks of receiving de-stabilising elements.

In truth, the two attitudes, one concerning developing countries and the other concerning Africa, are complementary, and a common position can be found. In other words, in the case of space, everybody has something to learn from each other. More generosity towards developing countries, more caution in the case of African countries. This in fact means finding a balance between sentiment and reason to avoid reciprocal suffocation. In our opinion, this common ground could be the basis for developing a concept of protection which, without necessarily being temporary (according to the current meaning), would take into account the demands of State sovereignty, without bringing prejudice to the fundamental interests of the refugee and above all, to the spirit that has always characterised his reception.

At this point, the question of putting economic migrants into the same category as refugees could arise. In other words, could these migrants benefit from a minimum of protection even temporary? It is true that neither the UN Convention nor the OAU Convention have approached this question; but today, the phenomenon has become so great that it should be faced in all its aspects. Bringing up this question briefly, we do not intend to find a solution straightaway, but to start a debate, which has not taken place yet, each making illicit immigration a pretext to reject any idea of offering asylum to economic refugees.

The paradox which we underlined at the very beginning of this address, that
of “globalisation”, where the world’s frontiers were open to everything except to man, should make us reflect more. Shouldn’t economic migration be considered as a reaction against oppression, a “socio-economic” persecution of certain leaders against their people who rot in extreme poverty? Shouldn’t the tragic determination to escape this oppression, whatever the cost (boat people from Asia, the Caribbean, the Mediterranean area), ignite more generosity and burden sharing on the part of the well-off? This certainly calls for reflection or rather a debate.

Conclusion

As we have emphasised from the beginning, the aim of this contribution has been to encourage dynamic reflection on the development of the system of protection, related to the great developments that have occurred in our world. By so doing, we have tried to see what Africa’s contribution could be, mainly through the OUA Convention, whose fundamental points continue to remain within the framework of these changes. We have also been given the occasion, by examining the question of temporary protection, to emphasise the advantages of both provisions of the Convention and African practice in the application of a system of protection in the case of mass influx. We have also emphasised the disadvantages.

Finally, what we would like to say is that both the Convention and the practice of the OAU could bring an important contribution to the establishing of a stronger system of protection. This contribution would only have sense if made in perfect harmony with other experiences to assure the universality of the system of international protection, in a world where material changes should be accompanied
This Paper is intended to facilitate dialogue concerning multiple challenges that have emerged at the crossroad of the migration/asylum nexus. It establishes the broad parameters of the debate and highlights some specific areas requiring greater attention. It offers prescriptive analysis based on existing material in the fields of refugee protection and migration management, drawn in part on ideas and arguments developed in documents produced by UNHCR, IOM and others. Nevertheless, the views expressed in this document are the sole responsibility of the International Migration Policy Programme (IMP).

The Paper is by no means a comprehensive work on this subject nor does it pretend to make conclusive recommendations.

The Migration/Asylum Nexus

There is growing recognition of the need to move away from addressing asylum and protection issues in a vacuum and towards examining them in the broader context of international migration flows. The reasons for this development are:

1. The drastic growth of uncontrolled irregular migration over recent years and the fact that refugees and asylum-seekers increasingly move within such broader mixed flows.
2. The resulting difficulties associated with distinguishing asylum-seekers and refugees from economic migrants.
3. The fundamental challenges posed by these developments on refugee protection systems on the one hand, and on migration management systems on the other.

1.1 Growth of Irregular Migration and Mixed Flows

In recent years, States have responded to increases in international migration flows by implementing restrictive immigration and enhanced border control policies, which have reduced possibilities for legal entry. As a result, significant numbers of both economic migrants and refugees are using similar modes of travel and methods of entry, reflected in part through expanding and sophisticated smuggling and trafficking rings.

The outcome of increased irregular migration and of mixed flows is two-fold. On the one hand, despite the increase in restrictive measures and policies adopted by States, there is nevertheless a sense that irregular migration is out of control and that strengthened migration management is required. On the other, the mixed nature of migration and refugee flows has contributed to the progressive undermining of asylum. Indeed, perhaps most alarming is the notion that all individuals fleeing persecution (of a specific nature) who are unable to avail
themselves of the protection of their Nation-State should be afforded protection elsewhere, has lost much of its humanitarian appeal.

1.2 Distinguishing Asylum-Seekers from Economic Migrants

The very essence of the question “Can Refugee Protection and Migration Control be Reconciled?” suggests that the goals of refugee protection and migration management are at odds with each other. However, this is a false dichotomy. The objectives of migration management, including but not restricted to, maintaining control over who enters, the manner in which s/he enters, and the length of stay involved, should not undermine the objectives of refugee protection, namely assuring that persons who request asylum due to a well-founded (and well-defined) fear of persecution receive protection.

The issue is not whether migration control is conducted at the expense of refugee protection or vice-versa, but rather how clear distinctions can be maintained between who constitutes an economic migrant or a legitimate asylum-seeker, and to apply relevant procedures according to these categories. As states UNHCR, “In the context of mixed or composite flows, asylum systems are likely to function better if States establish policies and procedures which permit them to distinguish clearly among the different categories of migrants and to identify solutions appropriate to their specific circumstances”.

1.3 Challenges to Refugee Protection and Migration Management

The key challenge for governments and practitioners on both sides of the protection and migration debate is how to uphold international standards of asylum and refugee protection while dealing with irregular migration through more effective migration management and enhanced border and entry controls. In order to respond to the challenges posed by the growth of irregular migration and mixed flows, and the difficulties associated with distinguishing asylum-seekers and refugees from economic migrants, governments must re-examine the effectiveness of their asylum and migration systems by undertaking, in parallel, two separate but related objectives:
- re-legitimizing their system of asylum, and
- establishing effective immigration policies and border management (while preserving access to asylum).

Re-legitimising Asylum

Asylum, both the system by which asylum is granted within each State, and the principle which guides extending protection in the form of asylum, has been “under attack” since the mid 1980s. This is due in large part to the perception that asylum systems are being abused either by economic migrants, by asylum-seekers who make multiple claims, or by those who have been granted asylum and then choose to “asylum shop” in search of a better alternative to the country of first asylum (CFA). Means of addressing asylum abuse are manifold, and some suggestions are illustrated in the Table annexed. Implementing such measures would discourage abuse and strengthen asylum systems. However, as illustrated in the “risks” category in the mentioned Table, such measures could also compromise
granting asylum to legitimate asylum-seekers. To guard against such negative effects, States and concerned institutions could, *inter alia*:

- provide assistance to CFAs to ensure *non-refoulement* of refugees on their territory;
- allow asylum applications at embassies in the region of origin, and in some cases allow applications for asylum in the country of origin, coupled with orderly resettlement programmes from existing UNHCR caseloads; arrange protection screenings during interceptions of boats; issue visas or temporary parole documents to enable legal migration for the purpose of applying for asylum; organise humanitarian evacuation programmes for orderly movement of large populations of refugees in a mass evacuation; and arrange search and rescue training for border patrols and coast guards.  

**Establishing Effective Immigration Policies and Border Management while Preserving Access to Asylum**

As stated earlier, challenges to asylum systems are a reflection of a much larger problem, namely that of irregular migration, and the fact that economic migrants resort to asylum channels for entry into a country to which they do not legally have access (for example, recent UNHCR figures indicate that in the EU, the total recognition rate for all those applying for asylum was just under twenty percent in the year 2000). While it is critical to ensure that legitimate asylum-seekers gain access to protection, it is also imperative that the bigger picture be addressed: how to establish effective border management while preserving access to asylum.

Although not wanting to halt immigration altogether, States seek ways to gain greater control over who enters their territory, with the objective of preserving an open “door” to legal migration while closing the “door” to all forms of irregular migration. Several steps can be taken to pursue this goal: developing elements of a comprehensive migration management system; ensuring that legal channels to migration remain open; addressing root causes of migration; and fostering co-operation and dialogue amongst States on how best to address multiple and mutual migration interests and concerns.

**Developing Elements of a Comprehensive Migration Management System**

Particularly in States that have just recently become countries of transit and/or destination, capacity building to strengthen national migration management is required, covering:

- admission policies supported by adequate laws on foreigners’ entry, status and residence (as well as those on asylum);
- border management and reception centres;
- legal migration mechanisms within and beyond the region;
- adequate institutional structures;
- means to accommodate or return irregular migrants;
- institutionalised and recurrent staff training;
- adequate technical and physical facilities;
- formal and informal mechanisms of discussion and planning;
- capacity for on-going strategic review and evaluation.
Developing such national migration management systems will also necessarily entail establishing appropriate protection mechanisms. Implementing adequate migration and protection mechanisms will in turn assist in clarifying the distinction between the notions of migration and asylum in countries where such distinctions are not yet fully concretised.

Ensuring Legal Channels for Migration

A principal factor accounting for the growth in irregular migration and migrant smuggling rings is the restriction on legal channels for immigration. Providing regular labour migration opportunities thus constitutes a further key element in a comprehensive migration and asylum policy approach. Elements of selected labour migration programmes implemented in some countries include programmes that:

- allow multiple short-term employment;
- can lead to long-term or permanent residence;
- address a variety of skill levels; and
- encourage co-operation between countries of origin and destination, whereby, for example, migrant return agreements can be tied to labour opportunities.

Such legal channels for migration (whether temporary or not) can assist in lifting the burden on the asylum caseload and over the long-term, contribute to re-legitimising asylum systems in popular destination countries. For example, programmes allowing multiple employment can act as a disincentive for temporary labour migrants to use the asylum system as a way to secure entry or stay; and programmes with the possibility of long-term or permanent residence also discourage use of asylum systems (and/or use of smugglers for illegal entry).

Addressing Root Causes of Migration

While poverty is frequently identified as a compelling reason for movement, the link between development assistance and alleviation of migration pressures is often under-emphasised. Measures to address such root causes can include: poverty alleviation/targeted economic opportunity development (*inter alia* through micro-enterprise and small business development; and special emphasis on most vulnerable groups); and overall economic development through migration (*inter alia* by maximising the positive effects of out-migration on origin countries, including Diaspora involvement, and targeted investment programmes with migrant remittances).

While addressing poverty root causes constitute an enormous challenge, drawing the link between economic migration, irregular migration and asylum abuse (through recourse to asylum as one of few alternatives) is imperative. As stated in a recent IOM document: “More explicit linking of migration and development assistance to reduce economic deprivation in origin countries is a reasonable action that can contribute to the goal of rationalising the migration flows, and enabling better protection of the truly vulnerable”.
Strengthening Inter-state Co-operation and Dialogue

If there is one truism when it comes to addressing international migration issues, it is that States cannot manage migration concerns and interests on their own, but that such issues require inter-regional, regional, sub-regional dialogue and co-operation, and the development of common understanding among States, as follows:

- building mutual trust and confidence between government officials in relevant ministries who deal with migration issues;
- identifying common approaches to common migration concerns: asylum and refugee protection; transnational crime and migration (smuggling and trafficking), labour migration, migration and infectious diseases (such as HIV/AIDS), migration and human rights of migrant workers and vulnerable groups, and
- improving migration data collection and analysis at national and regional levels, including establishing common understanding on migration definitions, developing a “common language on migration (and asylum)”, and strengthening mechanisms for exchange of migration data.

Conclusion

Changes in the volume and nature of international migration flows are affecting States’ ability to implement their refugee protection and migration systems. A notable challenge is the growing difficulty associated with distinguishing asylum-seekers and refugees from economic migrants as a result of their increasing tendency to employ similar modes of travel and methods of entry. In order to implement the rules and procedures that guide refugee protection and migration regimes, both systems must be strengthened in tandem. Undertaking measures to counter asylum abuse will assist in distinguishing between asylum-seekers and economic migrants, and by extension, strengthen asylum systems. By the same token, developing elements of a comprehensive migration management system; offering legal channels for migration; addressing the root causes of migration, and strengthening inter-state co-operation and dialogue will contribute to undermining irregular migration.

Having identified these strategies, an additional challenge will be to cater these approaches to the differing needs of States based on their specific migration and asylum situation.

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1 Contributing to asylum systems’ incremental demise, are expanding asylum figures, rising costs of asylum procedures, greater numbers of rejected asylum cases, and the tendency for (temporary) asylum to translate into permanent right to stay.
2 Refugee Protection and Migration Control: Perspectives from UNHCR and IOM p. 8 (31 May 2001). The challenge of identifying asylum-seekers from economic migrants is also critical as facilitated movement, due to various outcomes of the globalisation process, will likely continue to intensify the mixed flows of persons in need of protection and migrants. Global Consultations: Protection of Refugees in the Context of Individual Asylum Systems (28-29 June 2001).
3 I.G.C. Doc.
4 Material in this section drawn from C. Harns, IOM, Capacity Building at the Migration-Asylum Cross-
roads: Issues and Examples from IOM Experience, for the Global Consultations Regional Meeting, 3-5 July, Cairo.

5 Those granted refugee status or receiving complementary forms of protection, Trends in Asylum in 38 Countries 1999-2000, UNHCR, Geneva.

6 C. Harns, IOM, op. cit., for the Global Consultations Regional Meeting, 3-5 July, Cairo, p. 8.
**Means for Curbing Abuse of Asylum Systems**

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CONTRIBUTIONS
HUMANITARIAN AND LEGAL ASPECTS OF
THE 1951 REFUGEE CONVENTION

L.R. PENNA
Faculty of Law, University of Singapore

Curriculum Vitae

Professor L. R. Penna teaches International Humanitarian Law, Human Rights Law, Public Law, and United Nations Law, at the Faculty of Law, National University of Singapore. He is an Advocate and Solicitor of the Supreme Court of Singapore and an Advocate in India. He is a Resource Person on International Criminal Court for the Attorney General’s Chambers and a member of the Executive Committee of the Asia-Pacific Centre for Environmental Law (APCEL) and Board of Directors, International Society of Military Law and the Law of War. He was a member of the Academic Commission, International Institute of Humanitarian Law, San Remo, Italy, from 1986 to 2000 and of the International Advisory Board of the International Journal of Group Rights. He was a member of the Government of India Delegation to the United Nations Second World Conference on Human Rights in Vienna in June 1993 and its preparatory process. He was the Professor of Law and Principal of the University College of Law at the Osmania University, Hyderabad, India. He briefed the Government of Iran on a case before the Iran-United States Claims Tribunal, at The Hague, The Netherlands. He was an intern at the Office of the UNHCR, Geneva, Switzerland. He was one of the four participants in the first internship programme of the United Nations High Commissioner for Refugees launched in 1973.

Introduction

Traditionally, a refugee is a person who has fled or been expelled from his country of origin because of natural calamities, war, military occupation, or fear of racial, religious, or political persecution. Oppression and disaster have caused people to flee from their homelands since the time the enslaved Israelites fled Egypt in Biblical times. Millennia later, in the 15th century, the Jews and Moors were hounded out of Spain during the Inquisition. The Puritans sought religious freedom by settling in the New World during the 17th century. The nobility fled France during the Revolution. During the mid-19th century upheavals, many political exiles left central and southern Europe. Following the First World War, people were uprooted and displaced en masse from Asia Minor, the Soviet Union and the Balkans. In the 1930s thousands fled China because of the Japanese invasion, and from Spain due to the Fascist victory. During the Second World War an estimated 7 million Jews and others fled their homeland to avoid the Nazi holocaust. After the Second World War refugees fled the Communist take over of Mainland China and Tibet, Dutch nationals left during Indonesian struggles for freedom, and Arab and Oriental Jews were displaced during the Arab-Israel war. After the fall of Saigon that ended the Vietnam war in 1975, hundreds of thousands of Vietnamese fled by boat enduring pirates, sharks and starvation before being rescued.
Revolutions and foreign invasion have caused thousands of Afghans and tribal Kurds to flee their countries. In Africa thousands were uprooted during the period lasting from the wars of national liberation to the later day Rwanda massacres. While the situations in Kosovo and East Timor had assuaged the refugee situation in other parts remain alarming.

The 20th century has been a century of bloodshed, horror, terror, and human displacement. Fortuitously it has also been the century for the progressive development of international law for assuaging the suffering from anthropogenic disasters. Even though international law deals with the relations between States, the protection of the individual human person has been of primary concern in the systematic development of international law. The human factor has been at the core of the development of any international legal instrument. All legal norms are scrutinised on the touchstone of conduciveness to the promotion and protection of the individual. The protection of the human person has been at the nucleus in the development of Refugee Law particularly the 1951 Convention.

Since its origin in 1920, Refugee Law has been regarded as a special discipline within international law dealing exclusively with potential asylum countries. Indeed since Refugee Law deals with the protection of the human person, it has developed as a part of Human Rights Law. It was separated from Human Rights Law because it deals with more vulnerable persons and involves solutions within the national jurisdiction of two States, the country of origin and the country of refuge.

Evolution of Refugee Law

The League Covenant like the United Nations Charter did not refer to refugees. Their status under the League was regulated in separate legal arrangements, such as the Arrangement of 12 May 1926, the Arrangement of 30 June 1928, the Convention of 28 October 1933, the Convention of 10 February 1938, and the Protocol of 14 September 1939. The United Nations paved the way for modern Refugee Law when it adopted the Constitution of the International Refugee Organization in 1946. Concerned with the displacement of millions of persons during the Second World War, the United Nations General Assembly decided to establish a High Commissioner’s Office for Refugees as of 1 January 1951 and a year later adopted the Statute establishing the Office of the United Nations High Commissioner for Refugees as a subsidiary organ under article 22 of the UN Charter (Statute). The General Assembly convened a United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at Geneva. The Conference adopted the Convention Relating to the Status of Refugees, (Convention) which came into force on 22 April 1954.

The Convention was essentially limited to refugees from Europe as it applied ratione temporis to “events before 1 January 1951.” As such, the General Assembly sponsored a Protocol relating to the Status of Refugees 1967 (Protocol), which entered into force on 4 October 1967. The Protocol deleted the words “as a result of events occurring before 1 January 1951 and …” and “as a result of such events” from Article 1(A)(2), thus, extending the Convention to other parts of the world. 140 States are party to the Convention and/or its Protocol.
UNHCR and Executive Committee

The United Nations High Commissioner for Refugees (UNHCR) is the United Nations agency charged with the responsibility of protecting refugees. The UNHCR derives the mandate largely from the Statute, the Convention, and the Protocol. The work of the UNHCR is of a social and humanitarian nature and entirely apolitical. The UNHCR is required to follow policy directives of the General Assembly and the Economic and Social Council (ECOSOC). The UNHCR reports annually to the General Assembly through the ECOSOC. In furtherance of A 4, the ECOSOC established an Advisory Committee on Refugees later reconstituted as United Nations Refugee Fund (UNREF) Executive Committee. Later it was replaced by the Executive Committee of the High Commissioner’s Programme (EXCO). The EXCO consists of 53 State Members who are either asylum countries or major donors. Even five States who have not acceded to the Convention are members because they have voluntarily hosted large number of temporary refugees: they are Bangladesh, India, Lebanon, Pakistan and Thailand. The EXCO determines the general policies under which the UNHCR plans, develops and administers refugee projects and programmes. In addition to advising the High Commissioner for Refugees in discharging the duties, the EXCO approves and supervises the material assistance programmes funded by governments.

UNHCR mandate

The principal mandate of the UNHCR is “providing international protection ... to refugees” and “seeking permanent solutions for the problem of refugees”. The refugees are to be furnished with material assistance.

The General Assembly, because of humanitarian considerations, extended the mandate to cover situations of “concern to international community”, such as the Mainland Chinese in Hong Kong and the Algerians fleeing to Tunisia and Morocco to escape the hardships of their struggle for independence from France. The refugee status was extended to “displaced persons” during civil war in Sudan and the conflict in Vietnam.

Refugee

The Convention is a bill of minimum rights for refugees. State Parties to the Convention undertake the obligation to provide the minimum safeguards to the refugees. Etymologically the word “refugee” means any one who has been obliged to abandon her/his usual place of residence. In this general sense the word does not distinguish between people who had to leave their own country and the people who are displaced within their country. Whether people are fleeing because of persecution, political violence, communal conflict, armed conflicts, ecological disasters, they are all refugees. In the Convention, hence, the term “refugee” has limited connotation. The definition of refugee in the Protocol is identical to the one in the Statute. A refugee is a person who is outside her/his country of nationality or habitual residence and unable or unwilling to return to that country because of a well founded fear that she/he will be persecuted because of race, religion, nationality, political opinion, or membership in a particular social group. In Canada, France, and the United States women who fear genital mutilation in their
countries are regarded as refugees because female circumcision is considered as a form of persecution. The definition excludes persons who though displaced have not crossed an international border, or persons displaced by natural disasters, or economic migrants. War criminals, fugitives from justice except for political crimes, draft evaders, and soldiers are not refugees.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* elaborates the scope of the salient components of the definition. In “well-founded fear” - fear as a state of mind is subjective whereas “well-founded” relates to an objective element. A threat to life or freedom on account of race, religion, nationality, political opinion or membership of particular social groups is considered as “persecution”.

**Safeguards**

Refugees are entitled to the protection and status envisaged in the Convention and the Protocol in the territory of the State Parties.

**Non-refoulment**

The refugee has the right of non-refoulment. *Refoulment* is the reconduction of illegal immigrants to the frontier from which they came. Article 33 prohibits the return of refugees to the country of origin or to other countries where they would be at risk. *Non-refoulment* may not be claimed by a refugee for whom there are reasonable grounds for regarding her/him as a danger to the security of the country or who, because of conviction for a serious crime, is considered as a danger to the community.

An important issue regarding non-refoulment is whether the prohibition applies only to refugees present in a State territory. In the context of the interdiction and repatriation of Haitians following the *coup d'état* against the democratic Government of President Jean Bertrand Aristide, the American Supreme Court held that article 33 or the domestic law did not limit the power of the President to order the Coast Guard to repatriate undocumented aliens including refugees on the high seas.

**Temporary Refuge**

The Preamble to the Convention expressly recognises that “the grant of asylum may place unduly heavy burdens on certain countries”, and that a satisfactory solution to problems of international scope cannot be found without international co-operation. The Final Act recommended in paragraph D that governments continue to receive refugees in their territories and to act in concert in a true spirit of international co-operation so that these refugees may find asylum and the possibility of resettlement.

India has not yet acceded to the Convention. Yet during the 1971-72 partition of Pakistan India granted temporary refuge to a massive influx of 10 million refugees from East Bengal. Voluntary repatriation was the only solution. The General Assembly endorsed voluntary repatriation and by February 1972, 90% of the refugees returned to the newly independent Bangladesh. UNHCR co-ordinated through the United Nations Development Programme. UNHCR maintains a mission office in India.
Similar arrangements were made for the temporary refuge of the boat people of Vietnam in some of the Southeast Asian countries notably Indonesia.

**UNHCR functions**

The main functions of the UNHCR in relation to the refugees are to provide protection, search for opportunities for integration in the country of asylum, resettlement of the refugees in a third country, and their voluntary repatriation to the country of origin.

**Protection**

Protection of refugees is the cornerstone of UNHCR’s general programmes. The UNHCR works to secure respect for the rights of refugees and asylum seekers regarding admission, safety, non-refoulment, fair and humane treatment. This is done through monitoring and when necessary by direct intervention. UNHCR deploys international protection officers and support staff to key locations such as border-crossing points, camps, airports and immigration detention centres. Protection is provided through the supply of essential materials, food and water supplies. The UNHCR does not have any Blue Helmets to protect the humanitarian personnel and assistance. The protection activities are often wrought with physical risks particularly in situations of civil war, civil disorder, or complete breakdown of civil and military administration, where non-state actors are often armed, hostile, and disrespectful of international humanitarian law. In Somalia humanitarian convoys were highjacked by hostile elements. A few years back I had the opportunity of sharing a Panel Discussion on Humanitarian Assistance during Armed Conflict with Madame Ogata, the then United Nations High Commissioner for Refugees. She appealed to the Government of Singapore to depute members of their police force to accompany UNHCR humanitarian assistance missions. The Commissioner of Police of Singapore was also on the Panel. He agreed and assigned police officers for the UNHCR missions. It is in this spirit that Singapore took part in UN peacekeeping operations in East Timor\(^3\).

**Integration in Asylum Country**

The Convention does not require the State Parties to grant permanent admission to refugees. Indeed in the negotiating process, absence of the duty to grant permanent residence was critical for the successful adoption of the Convention. States are sovereign and their authority over immigration would not be eroded by the Convention. There is a vital difference between refugee status and permanent residence. However, until recently, developed countries rarely chose to repatriate the refugees. In the post-war era, because of cultural, economic, and strategic considerations, the refugee policies of many developed States were to grant residence to refugees. Many refugees were allowed to remain permanently in the countries of refuge.

The situation has changed. Refugees who seek to enter developed countries are from poorer nations of the South. Their racial and social profile is often seen as a threat to cultural cohesion of the developed countries. The economies of the developed countries do not require substantial refugee labour. This has resulted in
non-entrée policies. If refugees are received for logistic or political reasons they are granted the bare minimum entitlement required by the Convention or domestic law. The preference of developed countries currently is for repatriation.

Local integration was popular in Africa from the 1960s to the early 1980s when millions of dollars were spent to encourage self-sufficiency among the refugees. These programmes were not very successful because the refugees found it difficult to support themselves on the land allotted to them and integrate socially, economically, and legally. Despite such constraints 180,000 Sudanese refugees were integrated in Uganda, and 30,000 Guatemalan refugees in Mexico.

Resettlement

Resettlement is the moving of the refugees from the country of first asylum to a third country. There are many reasons for resettlement. It is an effective method of protection for those refugees whose safety and security cannot be safeguarded in the country of first asylum. Refugees threatened with refoulement, violence, or arbitrary detention because of their ethnic, religious or social background, and refugee women vulnerable to sexual violence fall within this category. Resettlement is an effective measure to assist refugees with special humanitarian needs such as those who are suffering from life threatening medical problems, injuries, mental or physical disabilities, victims of torture and rape, and refugees seeking family reunion. It is a viable solution for refugees who are unable to return home or remain in the country of refuge.

While no country is legally bound to resettle refugees, a number of States do so on a regular quota basis.

Repatriation

The refugee status is contingent upon the continuation of certain risks for refugees in the State of origin. Once the host State determines that the threats of risks no longer persist it may revoke the refugee status. Former refugees may then be subjected to the regular immigration procedures and required to return to the State of origin or habitual residence.

Repatriation is the return of the refugee to the country of origin or habitual residence. Repatriation programmes are matters of political will, financial resources, logistical skills, and legal framework. The Statute enjoins the UNHCR to facilitate and promote voluntary repatriation of refugees. An important legal issue is whether repatriation should always be voluntary or can it be mandatory when there is a change in circumstances. The prohibition against non-refoulement will not apply as the person ceases to be a refugee under A 1(C) (5) and (6).

Another important issue is: who is to decide whether the circumstances within the country of origin are propitious for the return of refugees? Apparently, the host country, because the Convention leaves the matters of determining the refugee status to it. As the UNHCR also has the mandate of facilitating and promoting repatriation, the UNHCR is required to collaborate with the host country for repatriation.

While the primary organisational function of the UNHCR is the protection of refugees, the recent practice appears to be in favour of repatriation. In the 1991
statement to EXCO the UNHCR asserted that one of the primary goals of the organisation is “to pursue every opportunity for voluntary repatriation. In a world where most refugees are confined to overcrowded, makeshift camps in conditions as dismal - if not more dismal - than the situation they have fled, the right to return to one’s homeland must be given as much recognition as the right to seek asylum abroad”\(^{31}\). The 1992 assertion is more emphatic: “Criteria for promotion and organisation of large scale repatriation must balance the protection needs of refugees against the political imperative towards resolving refugee problems… the realisation of a solution in a growing number of refugee situations today is most likely where the solution is made an integral part of a package which strikes a humane balance between the interests of affected States and the legal rights, as well as humanitarian needs, of the individuals concerned”\(^{32}\).

The role of the UNHCR in repatriation is seen in the repatriation of more than 500,000 Rwandan refugees from Tanzania. In a joint message of December 1996 with the Government of Tanzania, the UNHCR stated that following the return to Rwanda of more than 600,000 refugees from Zaire and 80,000 from Burundi and given the conditions in Rwanda, “all Rwandese refugees can now return to their country in safety”. The Tanzanian Government and UNHCR, hence, urged all refugees to make preparations to return to Rwanda by 31 December 1996\(^{33}\). During 1985-1990 1.2 million refugees were repatriated\(^{34}\). This does not include the 90% of the world’s refugees who return without the aid of any agencies\(^{35}\). In 1998, 1.9 million refugees returned to the countries of their origin\(^{36}\). 790,000 refugees were repatriated during the year 2000\(^{37}\).

**Armed conflicts and refugees**

Even though the Convention was adopted not long after the Second World War, it does not make any reference to armed conflicts. During the 1990s there have been a succession of armed conflicts, mostly internal, leading to humanitarian emergencies and massive refugee movements: in Iraq, Liberia, Rwanda, Somalia, Sri Lanka and former Yugoslavia.

Under the definition of refugee\(^{38}\) the criteria for refugee status is fleeing from “persecution” and not from “armed conflicts”. The definition of “refugee” in the Organisation of African Unity (OAU) Convention Concerning the Specific Aspects of Refugee Problems in Africa 1969\(^{39}\) is more responsive to victims of armed conflicts. The term refugee includes “every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”\(^{40}\).

The Convention is applicable, ratione personae, to persons fleeing persecution and not armed conflict. For availing the protection under the Convention that person, ratione loci, has to be outside the country of his nationality. He has to cross the border of the country of origin. The term “refugee” does not cover persons who flee armed conflict but who remain inside their country. The words “outside the country”, “unable” or “unwilling” “to return” also suggest that the departure from the country of origin or habitual residence is voluntary. Consequently the victims of the forceful movement of the votaries of independence in East Timor to West Timor or other places in Indonesia by the pro-Jakarta militias working openly
with the support of Indonesian armed forces were not legally refugees because they had not voluntarily left the country of habitual residence. Further victims of violence seeking refuge within the compound of United Nations Mission in East Timor (Unamet) or the 6,000 people seeking protection in the premises of the evacuated Nobel Laureate Bishop Belo’s house or the Red Cross compound, were not legally refugees within the definition of the Convention because they have not crossed the border.

**Functioning of the Convention**

No system works by itself. The system should be made to work. Making an international system to work involves many actors and institutions. The operation of international refugee system requires the co-operation and co-ordination between many States, and the UN organs. First of all it requires universal approval of the legal instruments. Out of 185 members of the United Nations only 133 countries have ratified the Convention. Some of the heavily populated countries have not yet ratified or acceded to the Convention. These countries represent about 38% of world populations.

Apart from political ramifications States zealously guard matters that fall within their domestic jurisdiction. Immigration is a matter of domestic jurisdiction. States have a tendency to deal with issues of refugees according to their domestic law and in a manner commensurate with domestic requirements and exigencies.

Refugees are a great strain to the economy of a State. Tanzania, traditionally one of the most hospitable countries for refugees, declared while chairing the EXCO that the heavy refugee burden has put in great peril the very existence of Tanzania as a nation. It was argued that the international refugee obligations should be balanced with the “right to exist”, socio-economic security, and law and order.

An important flaw in the refugee system is that even in regard to the States that have ratified or acceded to the Convention, there is no effective monitoring mechanism. There is no requirement to incorporate the provisions of the Convention in domestic law. Article III of the Protocol requires the State Parties to communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the Protocol. There is no requirement to report the number of refugees admitted and the measures taken for implementing the provisions of the Convention and Protocol in regard to them. If there is any requirement it is sporadic. The UNHCR has the mandate to protect the refugees. But it does not have the human resources to protect its own personnel and the humanitarian assistance to ensure that it reaches the intended beneficiaries. A few years back an armed gang of 12 attacked the UNHCR office in Maheba, Zambia and killed a guard, and a UNHCR refugee camp in West Timor was attacked. The safety and security of the UNHCR’s international and local staff is often in jeopardy. In 1998 the killings, arrests, illegal detentions and kidnapping of staff continued to be a matter of great concern.

During the Vietnam exodus, opportunities for voluntary resettlement or local integration were minimal. States had declined to allow refugees to settle locally on the grounds of objections to local integration, security considerations, and racial,
religious and linguistic differences not withstanding resettlement guarantees by flag or other States. Even temporary admission was not available. In succeeding years the Indo-Chinese refugee problem developed into one of the largest and most intractable. Over 1.5 million people fled Cambodia, Laos, and Vietnam and the countries of first refuge in south-east Asia declined to settle them locally.

The failure of political negotiations in armed conflicts creates stalemate situations. In Angola the Lusaka Peace Accords broke down at a time when 150,000 refugees had already returned to Angola. The renewed hostilities triggered an exodus of 30,000 refugees. In Sudan, because of the continuous conflict between government and opposition forces, 240,000 refugees still remain in Ethiopia and Uganda.

Even in situations where political solutions are working, the refugee problems remain unabated as was seen in Kosovo. At the peak of the conflict 200,000 persons were displaced inside Kosovo. After the NATO Forces entered the Province the Yugoslav Army and Serbian police units withdrew. With the return of the Kosovo refugees from Macedonia and Albania as life was returning to normalcy ethnic Albanians had attacked other minorities, namely, the Serbs and Roma (Gypsies) creating a refugee situation for the Serbs and Roma civilians.

One salient feature of the post-Cold War era is the proliferation of ethnic, religious, or similar types of armed conflicts leading to the disintegration of States. In situations like Rwanda, Somalia and Liberia sovereignty had collapsed. There was no State structure or military hierarchy to prevent carnage and pillage. The dissipation of State sovereignty due to internal fissiparous tendencies remains a major security threat for which the international community has to be prepared as it enters the 21st century. A 1995 study of failed States examined 600 possible factors in 113 cases worldwide from 1955 to 1994, including Rwanda, the Soviet Republics, Yugoslavia, Somalia and Liberia.

The former High Commissioner, Mrs Ogata, had highlighted the importance of rendering humanitarian assistance during the disintegration of States and the trepidations engendered in distributing the aid at a Panel Discussion in Singapore. Humanitarian personnel had themselves become victims of murderous onslaughts. In some cases humanitarian actors had to be withdrawn in self-defence at a time when their presence was most needed. The exploitation of humanitarian aid by the warring parties is narrated by a researcher in 1994: “In Somalia, extracting relief and protection money from aid agencies became big business. In Ethiopia, Sudan and Mozambique, relief became a key source of foreign currency to help finance war.”

Conclusions

The magnitude of the international refugee problem is very high. According to the UNHCR 2000 Global Report there were 21.1 million refugees worldwide. Most of them were living in Africa, Asia and Europe. More than half of them were refugees and the remainder were displaced persons, asylum seekers and stateless persons. 1990s also witnessed massive repatriation movements: the return of 2.8 million refugees to Rwanda; 1.7 million to Mozambique; and 800,000 to Kosovo.

Refugee Law is working in many of the situations. The system has responded
in most of the refugee situations. In some rare cases the system stymied. In order to make the international refugee system work, the UNHCR, the primordial institution, has been working relentlessly. In 1991 it established the Emergency Preparedness and Response Section (EPRS). An Emergency Response Team consisting of 30 well-trained UNHCR staff members is on standby for emergency deployment at every six-month cycle. Essential relief items is stored in the Central Emergency Stockpile in Amsterdam and Copenhagen warehouses. In 1998 over 60 emergency teams were dispatched to assist emergency or repatriation in Albania, Cambodia, Guinea, the Great Lakes region of Africa, Kosovo, Liberia, and Nicaragua. Yet, in spite of all the preparedness of a viable system it is not possible to protect every refugee everywhere in the world. Yet on a happier note one may conclude that the 1951 Convention has during the last fifty years saved countless lives by ensuring a means of escape for people facing imprisonment, torture, execution, and other human rights abuses for such reasons as their political or religious beliefs, or membership in a particular ethnic or social group.

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8 Resolution 319 (IV) of 3 December 1949.
9 Resolution 428 (V) of 14 December 1950.
10 Resolution 429 (V) of 14 December 1950.
12 A 1 A (2) and B (1).
13 Resolution 2198 (XXI) of 16 December 1966.
16 Statute, para. 2.
17 Ibidem, para. 1.
18 Ibidem, para. 10.
19 Resolution 1167 (XII) of 26 November 1957.
20 Ibidem.
23 General Assembly Resolution 3455 (XXX) of 9 December 1975.
24 Convention A 1(A)(2) and Protocol A 1(2): “Any … person who is outside the country of his nationality, or if he has no nationality, the country of his formal habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.”
26 A 33(1).
27 A 33(2).
29 Resolution 2790 (XXVI) of 6 December 1971.
35 Cuny, Stein and Reid, Repatriation During Conflict in Africa and Asia, 1992, Center for the Study of Societies in Crisis, p. 15.
38 A 1(A)(2) as amended by the Protocol.
40 A 1(2).
41 See The Straits Times, 7 September 1999, p. 1 and pp. 18-21.
47 Keen, “When the rulers go to war with their own people”, in International Herald Tribune, 17 August 1994.
I have been asked to address the applicability of the Refugee Convention to internally displaced persons (IDPs) and to explore what additional measures are needed to enhance their protection. For the purpose of our discussion, the Refugee Convention refers, of course, to the 1951 Convention relating to the Status of Refugees as modified by the 1967 Protocol. As for IDPs, I shall use the definition adopted by the International Law Association last year in its London Declaration of International Law Principles on IDPs, which defines IDPs as “persons or groups of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife or systematic violations of human rights, and who have not crossed an internationally recognized State border”. The Declaration also defines IDPs as “persons internally displaced by whatever causes, such as natural or man-made disasters or large-scale developmental projects, whenever the responsible State or de facto authority fails, for reasons that violate fundamental human rights, to protect or assist those victims”. The depth and magnitude of IDPs problems may be gleaned from the fact that IDPs now outnumber refugees by about two to one, and they often suffer more than refugees. For refugees have already reached cooperative safety by placing themselves under the protection of the country of asylum or resettlement, whereas IDPs continue to be mired in the ravages of war or persecution, albeit in their own country. In addition, despite the fact that practical distinctions between refugees and IDPs have in recent years become increasingly blurred, as shown in the humanitarian crises in northern Iraq, Kosovo, and East Timor, IDPs still lack systematic protection and assistance under international treaties or by international organizations. It is time to redress the imbalance through a balanced approach to the human rights and to the national sovereignty that takes into account the Security Council’s role under Chapter VII of the Charter of the United Nations. Let me address the issue of human rights first.

As defined by the late Sir Humphrey Waldock, former President of the International Court of Justice, human rights are “rights which attach to all human beings equally, whatever their nationality”. To the extent that their basic human rights have been violated, they are entitled to protection and assistance whether as refugees abroad or as IDPs within their own countries. Equal rights for all individuals be they nationals or aliens, refugees or IDPs are implied in all universal and regional human rights instruments through the use of such terms as “all human beings”, “everyone”, “no one” or “all”. Hence, not a single “right” in the Universal Declaration of Human Rights, for example, is specified or implied as belonging only to “refugees”, but not “internally displaced persons”. A major goal of the Refugee Convention is to strive for equal treatment of refugees and other aliens in such areas as the rights relating to movable and immovable property (art. 13), association (art. 15), wage-earning employment and self-employment (arts. 17 and 18),
housing (art. 21), education (other than elementary) (art. 26). Since the rights of nationals in these areas are at least as extensive as those of aliens, the rights of IDPs, who remain nationals of the country in which they are displaced, are in effect reaffirmed by the Refugee Convention in these areas through equal treatment of refugees and other aliens.

An even more important goal of the Refugee Convention is to strive for equal treatment of refugees and nationals of the host country in such areas as the rights relating to religion (art. 4), artistic and industrial property (art. 14), elementary education (art. 22(1)), public relief (art. 23), rationing (art. 20), access to courts (art. 16) and social security (art. 24).

Indeed, the ultimate goal is for refugees to become assimilated and naturalized as citizens of the host country (art. 34). Since IDPs remain nationals of the country in which they live, they are entitled to the same rights as refugees in these areas. In contrast, aliens who are not refugees could not claim such rights. However, is not discrimination in the treatment of refugees, aliens, nationals and IDPs on the basis of nationality or status incompatible with human rights? Like Caesar’s wife, should not the Refugee Convention, a foremost human rights treaty concluded under the UN auspices, be even seen as beyond reproach by not legitimizing such discrimination or distinction? How this can be accomplished will be discussed in the latter part of remarks.

It may be argued that although refugees and IDPs are entitled to the same basic human rights, international protection of the latter must surround obstacles posed by national sovereignty and non-interference in the internal affairs of States. However, such obstacles must be placed in context under Chapter VII of the Charter of the United Nations. Thus, if the Security Council decides that the nature and scope of a situation of internal displacement constitute a threat to international peace and security and orders that appropriate measures have to be taken to protect or assist IDPs, such measures would not, under the circumstances, be deemed to compromise national sovereignty or constitute intervention in the internal affairs of a State. Indeed, the UN Group of Governmental Experts on International Cooperation on How to Avert New Flows of Refugees, of which I was privileged to be a member, confirmed in its report that massive displacement of people, whether refugees or IDPs, is capable of “endangering international peace and security”, the prevention of which is “a matter of serious concern to the international community as a whole”. The report was endorsed unanimously by General Assembly Resolution 41/70 (3 December 1986). In addition to the oft-cited Security Council Resolution 688 of 5 April 1991 concerning the Kurds in Iraq, the Council declared the existence, between 1990 and 1996, of formal threats to international peace and security 61 times in contrast to only 6 times in the preceding 45 years. Many of the Chapter VII resolutions authorizing forceful intervention concerned primarily domestic human rights abuses or generalized violence, as in the cases of Haiti and Somalia, rather than actual threat or danger to peace outside a country’s boundary. The Security Council also authorized the establishment of the War Crimes Tribunals for Former Yugoslavia and for Rwanda, thus concerning itself with the causes and solutions of not only refugee, but also IDPs related problems.

Mrs. Ogata, former High Commissioner for Refugees, laid the theoretical
basis for UNHCR’s involvement in IDPs matters by stating: “It made little sense for UNHCR to bring relief and protection to one group of suffering people, i.e., refugees under the 1951 Convention, and to disregard the misery of the other afflicted people”. The current High Commissioner for Refugees, Ruud Lubbers, pointed out recently that UNHCR has already been involved in more than 30 IDPs operations under specific criteria since the early 1970s. The 50th Anniversary of the 1951 Convention provides the fitting challenge for the world community to try to review the needs of displaced persons both refugees and IDPs.

As my concluding remarks, I wish to propose for your consideration the adoption of a second Protocol to the 1951 Convention which would contain three features: The first is to add “armed conflicts, internal strife or systematic violations of human rights” to the causes of refugees in article IA (2) of the 1951 Convention in addition to “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. This addition would reflect current realities, conform to the definition of IDPs, and bring into consistency the law and policy of a large number of countries, which have subscribed to both the Refugee Convention and the 1969 OAU Convention or the 1984 Cartagena Declaration.

The second feature is for the new Protocol to list, perhaps in the form of an Annex, the human rights treaties and instruments of particular relevance to the protection of and assistance to all displaced persons, whether refugees or IDPs. This should replace the 1951 Convention’s specification of individual rights to which only refugees are entitled vis-à-vis aliens and nationals. Human Rights are, in the final analysis, interrelated and indivisible.

The third feature may be described as follows: Just as all universal human rights treaties or instruments, such as the Universal Declaration of Human Rights, the two 1966 Covenants, and the conventions against racial discrimination and genocide or on children’s or women’s rights, do not contain any geographic limitation as to their applicability, whether inside or outside the country of nationality, so the 1951 Convention already shorn of the geographic limitation of “Europe” under the 1967 Protocol, should be broadened consistently by deleting the words “outside the country of his nationality” from the definition of “refugee” (art. IA (2)). After all, article 1-3 of the 1967 Protocol already states: “The present Protocol shall be applied by the States parties thereto without any geographic limitation...”. The universality of human rights is, by definition, incompatible with geographic limitation.

Equal protection of refugees and IDPs is already a hallmark of such leading international nongovernmental organizations as ICRC and Medecins sans Frontieres. Can the United Nations do less?
LES VALEURS HUMANITAIRES DE LA CONVENTION DE 1951

Emmanuelle STAVRAKI
Membre associé de l’IIDH

I. Introduction

La protection des réfugiés fait partie de toutes les cultures, de toutes les doctrines politiques, sociales, religieuses, mettant en jeu des aspects politiques, humanitaires, développementaux, sociaux, culturels.

Le présent exposé se limite aux aspects humanitaires de la protection des réfugiés prévus par la Convention de 1951.

Cette Convention se base sur les principes fondamentaux du droit humanitaire et, plus spécialement, sur le principe d’humanité, ainsi que sur les principes des droits de l’homme. Elle réaffirme ainsi l’interdépendance et la complémentarité entre le droit humanitaire et les droits de l’homme avec le droit international des réfugiés.

II. Les valeurs humanitaires de la Convention

La plus grande importance de la Convention réside dans le fait qu’elle reflète des valeurs humanitaires telles que: la définition du terme “réfugié”, le non-refoulement, l’interdiction des sanctions pour entrée ou présence illégale, l’interdiction de l’expulsion, le respect des droits de l’homme, le principe de la non discrimination, la coopération internationale et la solidarité internationale.

La définition du terme “réfugié”

L’une des valeurs humanitaires de la Convention est la définition du terme “réfugié” qui vise surtout la protection des victimes de la persécution.

Toutefois, bien qu’elle ne se réfère pas expressément aux victimes des conflits armés ou aux réfugiés économiques, elle les couvre s’il existe l’élément de discrimination. C’est ainsi que la violence dirigée contre un groupe particulier (social, religieux, politique) constitue une persécution et ses victimes sont des réfugiés.

Quant aux autres réfugiés qui fuient les conflits armés, internationaux ou non internationaux, la Convention ne les couvre pas. Force est donc de constater qu’il est nécessaire de donner une interprétation large de l’article 1 de la Convention en prenant en considération l’objet et le but de celle-ci, à savoir la protection de toutes les victimes, y compris celles qui fuient les conflits armés.

Cette interprétation est en accord avec le développement du droit international et avec la pratique des Organisations Internationales (le Haut Commissariat des Nations Unies pour les Réfugiés, le C.I.C.R.) qui étendent le concept de réfugié et répondent aux réalités actuelles et aux besoins humanitaires des réfugiés.

Le non-refoulement

Le non-refoulement est un principe fondamental qui fait partie du droit coutumier et conventionnel. Ce principe comprend le non retour des réfugiés (ou des demandeurs d’asile) résidant ou se trouvant irrégulièrement dans le pays, le
non rejet à la frontière, l’expulsion et l’extradition.

L’article 33 de la Convention ne spécifie pas si le réfugié doit être dans le pays légalement ou non. La simple présence du demandeur d’asile à la frontière doit le protéger contre le refoulement vers n’importe quel pays où il risque d’être persécuté du fait du danger à la vie, à la liberté ou du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

La Convention interdit le retour au pays d’origine “de n’importe quelle manière que ce soit”, y compris le retour à travers un pays tiers.

Le principe du non-refoulement se base sur le droit à la vie et constitue la pierre angulaire de la protection internationale des réfugiés.

L’interdiction des sanctions pour entrée ou présence illégale

L’article 33 sur le non-refoulement est complété par l’article 31 sur l’interdiction des sanctions contre le demandeur d’asile pour entrée ou présence illégale. Des sanctions (telles que poursuites, amendes, emprisonnement) ne doivent pas être appliquées aux demandeurs d’asile, même s’ils viennent d’un État tiers et non pas directement du territoire où leur vie ou leur sécurité est menacée. Il faut toutefois qu’ils se présentent “sans délai” et qu’ils démontrent des raisons valables pour leur entrée ou présence illégale.

La valeur humanitaire de cet article consiste en ce qu’il n’impose pas de restrictions d’entrée pouvant entraver l’accès aux demandeurs d’asile et rendre ainsi la Convention dénuée de tout sens.

L’interdiction de l’expulsion

L’interdiction de l’expulsion fait partie du droit humanitaire et du droit international général. L’article 32 de la Convention concerne l’interdiction de l’expulsion du réfugié reconnu ou en attente d’être reconnu (demandeur d’asile) qui réside régulièrement sur le territoire de l’État. Il complète ainsi l’article 33 de la Convention qui interdit l’expulsion des demandeurs d’asile résidant ou se trouvant irrégulièrement dans le pays.

Le respect des droits de l’homme

La Convention se réfère au respect des droits civils, juridiques et politiques des réfugiés. Signalons surtout le droit au respect de la religion (art. 4) et le droit à l’accès aux tribunaux et à l’assistance juridique (art. 16, par. 1) pour lesquels aucune réserve n’est permise (art. 42), le droit à l’éducation (art. 22) et le droit à la liberté de mouvement (art. 26).

La Convention prévoit aussi des droits sociaux tels que le droit à l’emploi (articles 17-19), le droit à l’assistance publique (art. 23), le droit à la sécurité sociale (art. 24) et le droit au logement (art. 21).

Le respect des droits de l’homme, principe fondamental du droit humanitaire, comprend le devoir de tout État de respecter les droits fondamentaux de l’homme pour toutes les personnes se trouvant sur le territoire, sans aucune distinction.

Le principe de la non discrimination

Selon l’article 3 de la Convention, “les États contractants appliqueront les dispo-
sitions de cette Convention aux réfugiés sans discrimination quant à la race, la religion ou le pays d’origine”. Aucune réserve n’est permise à cette disposition (art. 42) qui revêt une très grande importance, d’autant plus que les réfugiés sont, dans la pratique, victimes d’un traitement discriminatoire basé sur des considérations juridiques, politiques, idéologiques, religieuses ou autres.

Il est nécessaire de signaler que, contrairement à l’article 3 al. 1 par.1 commun aux Conventions de Genève et à d’autres instruments internationaux, la Convention de 1951 en se référant à la race, à la religion et au pays d’origine, ne couvre pas toutes les discriminations. Il faut toutefois prendre en considération l’objet et le but de la Convention, ainsi que son Préambule selon lequel “les être humains sans distinction doivent jouir des droits de l’homme et des libertés fondamentales”.

La coopération internationale et la solidarité internationale

La Convention de 1951 ne prévoit pas de mécanisme de mise en œuvre en temps de paix ou de conflit armé, mais elle se réfère expressément à la coopération des États avec le H.C.R. pour la surveillance de son application (art. 35). Cette coopération internationale, basée sur le principe de la solidarité internationale et sur le principe du partage équitable des charges pour faire face aux problèmes culturels, politiques, économiques, environnementaux des réfugiés, constitue une valeur humanitaire et une contribution importante à l’espít de la paix.

III. En guise de conclusion

La solution du problème global des réfugiés dépend du respect de la Convention de 1951 et surtout de ses valeurs humanitaires.

La Communauté internationale, en se basant sur le principe de la coopération internationale, doit promouvoir la résolution pacifique des conflits armés, cause principale des mouvements de réfugiés, et le développement de tous les pays qui engendrent des réfugiés, étant donné que le problème des réfugiés est un problème non résolu du développement.

1 Dans le cadre du droit humanitaire, l’article 44 de la IVème Convention de Genève protège le réfugié contre les abus du pouvoir de l’État d’accueil ou de résidence qui se trouve en conflit avec son pays d’origine. Cet article donne une définition large du terme “réfugié” et c’est là son importance en prenant en considération uniquement le fait qu’il ne jouit en fait (et non seulement en droit) d’aucune protection; l’article 45 al. 4 de la IVème C.G. protège le réfugié contre le refoulement et l’article 70 al. 1, 2 de la IVème C.G. protège le réfugié et le demandeur d’asile, c’est-à-dire que l’il ne jouit en fait d’aucune protection; v. aussi l’article 4 de la IVème C.G. ainsi que l’article 73 du Prot. 1 additionnel aux Conventions de Genève qui comble les lacunes de ces Conventions et donne une définition du terme de réfugié. Dans le cadre des droits de l’homme, voir l’article 3 de la Convention européenne des droits de l’homme, l’article 5 de la Convention européenne sur la suppression du terrorisme et l’article 3 de la Convention des Nations Unies contre la torture. Ces instruments constituent un pas important pour le développement des droits de l’homme, un moyen indirect pour l’internationalisation du contrôle de l’application de la Convention de 1951.


3 V. l’article 31 de la Convention sur les traités (1969); v. aussi la recommandation E de la Conférence des plénipotentiaires qui a élaboré la Convention de 1951, selon laquelle les États devraient appliquer
la Convention à d'autres réfugiés se trouvant sur leurs territoires.
5 V. l'article 45 al. 4 de la IVème C.G.: “Une personne protégée ne pourra en aucun cas être transférée dans un pays où elle peut craindre des persécutions en raison de ses opinions politiques ou religieuses”. Cette règle qui confirme le droit d’asile en temps de conflit s’applique aux réfugiés, v. PICTET, Commentaire de la IVème C.G., p. 286; v. aussi l'article 3 de la Convention Européenne des Droits de l’Homme, l’art. 3 de la Convention des Nations Unies sur la Torture, l’article 22, para. 3 de la Convention de San José, l’article II, para. 3 de la Convention de l’OUA.
6 L'article 33 ne reconnaît pas un devoir international des États d’accorder l’asile, ce qui rend le droit d’asile dénué de tout sens.
7 V. l'article 49 de la IVème C.G. sur l’interdiction des transferts forcés et des déportations, et l’article 85 du Protocole I sur les infractions graves, parmi lesquelles figurent le transfert et la déportation commis intentionnellement et en violation des Conventions et du Protocole.
8 V. Prot. IV additionnel à la Convention Européenne des Droits de l’Homme (1950), le Pacte sur les Droits Civils et Politiques de 1966 (art. 13).
9 V. l’article al. 1 para.I commun aux Conventions de Genève qui interdit expressément toute distinction de caractère défavorable basée sur la race, la couleur, la religion ou la croyance, le sexe, la naissance ou la fortune ou tout autre critère analogue.
10 V. article 14 de la Convention Européenne des Droits de l’Homme; l’article 24 de la Convention Américaine; l’article IV de la Charte Africaine.
LA VALEUR DE LA CONVENTION DE 1951
RELATIVE AU STATUT DES RÉFUGIÉS

Gilbert JAEGER
Membre de l’IIDH

Par Convention on entend, dans ce texte, également le Protocole de 1967 relatif au statut des réfugiés.

L’objet principal de la Convention est, comme son titre l’indique, de définir le statut des réfugiés. Au fil des événements, deux autres aspects de la Convention ont attiré davantage l’attention des États contractants aussi bien que celle des juristes, des ONG et des médias: la détermination de la qualité de réfugié et le droit d’asile. Pour évaluer la valeur présente de la Convention, il convient en effet de considérer les mouvements de population dans leur structure actuelle. Je vise évidemment la pression migratoire dans le Sud et l’arrivée dans les pays dits du Nord d’un grand nombre de demandeurs d’asile composé d’une majorité d’immigrants irréguliers et d’une proportion plus ou moins importante de personnes qui éprouvent véritablement une crainte de persécution. Dans quelques pays du Nord, il existe parfois depuis longtemps des lois d’immigration tandis que pour des raisons internes, de nature économique ou démographique, des lois d’immigration se mettent aujourd’hui en place dans la plupart des autres pays du Nord.

A cet égard, la valeur de la Convention comme instrument d’identification des uns et des autres est irremplaçable. La détermination de la qualité de réfugié n’est au demeurant pas réglée par la Convention. Les critériaux sont énoncés dans l’article premier mais rien n’est dit sur la procédure. Paul Weis, le Dr. Weis comme nous disions à l’époque, interrogé sur cette lacune, expliquait qu’il n’y avait pas eu de difficultés de procédure dans le passé en appliquant les arrangements et conventions de la Société des Nations, et que les plénipotentiaires de la Conférence de 1951 avaient estimé nécessaire de faire mention de la procédure.

Les normes internationales de la procédure sont consignées dans les Conclusions du Comité exécutif sur la protection internationale, surtout la Conclusion n°8 (XXVIII), et dans le Guide des procédures et critères à appliquer pour déterminer le statut de réfugié, dont la réputation n’est plus à faire.

Quant à l’asile, alors que la Convention n’oblige pas l’État contractant à octroyer l’asile durable au réfugié, on a fini par considérer la Convention comme un traité sur l’asile. (Par “on”, je ne vise évidemment pas les spécialistes de la Convention). Il est vrai que la procédure de détermination de la qualité de réfugié entraîne un asile provisoire ou temporaire accordé nolens volens au demandeur d’asile, notamment par l’effet combiné des articles 31 et 33. Il est vrai aussi que la plupart des États contractants accordent par des dispositions de droit interne, l’asile durable aux personnes reconnues comme réfugiés en vertu de l’article premier de la Convention.

Si l’octroi de l’asile à titre durable n’est pas formellement réglé par la Convention, celle-ci définit par contre très clairement son contenu. En effet, les articles 2 à 34 de la Convention énumèrent les droits et devoirs de l’État et du réfugié qui
constituent concrètement l’asile. Ceci est la valeur essentielle de la Convention telle qu’elle a été voulue par les plénipotentiaires de 1951.

On peut remarquer que les États n’appliquent pas tous rigoureusement les articles 2 à 34, soit par manque de capacité administrative, soit parce qu’ils ont formulé des réserves conformément à l’article 42 de la Convention et à l’article VII du Protocole, soit encore par négligence. Le cas existe également où un État a signé et ratifié les Convention & Protocole surtout pour manifester sa solidarité internationale. D’autre part, les réfugiés jouissent aujourd’hui, dans les pays qui ont ratifié les Pactes internationaux de 1996 et l’un ou l’autre des nombreux autres traités relatifs aux droits de l’homme conclus depuis 1951, et qui les appliquent, d’un statut plus favorable que celui prévu par les seuls Convention & Protocole. La Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille du 18 décembre 1990, vieille de 11 ans déjà, montre ce que serait sans doute le statut des réfugiés si la Convention y relative avait été conclue quarante ans plus tard.


La période 1948-1951 pendant laquelle la Convention a été conçue et conclue appartient encore à la période que j’appellerais “idéaliste” des Nations Unies. C’est pourquoi l’égide de la Charte et de la Déclaration universelle ne doit guère nous étonner. Les Convention & Protocole ne sont pas des instruments juridiques parfaits et certaines de leurs imperfections et lacunes seront examinés à cette Table Ronde, à San Remo. Nous savons, au demeurant, que les Consultations globales organisées par le HCR ont pour objet, entre autres, d’examiner l’utilité d’un nouveau protocole.

La valeur des Convention & Protocole ressort aussi de leur universalité. Ces traités sont ratifiés aujourd’hui par plus de 140 États, y compris la Chine et la Russie qui, devant accueillir de nombreux réfugiés, ont surmonté leur attitude négative de jadis. Cette universalité souligne la valeur de la Convention en sa qualité de charte des droits de l’homme des réfugiés.
PROTECTION OF REFUGEES  
The Yugoslav Red Cross Experience in the period 1990-2001

Yugoslav Red Cross

Since the early ‘90s, the problem of refugees has become the most serious humanitarian problem in the Balkan region. Moreover, the Balkan has become one of the regions in the world with the most difficult refugee problem.

There are plenty of reasons for this, but all of them can be summarized as one: disintegration of Former Yugoslavia. First, the disintegration was oppressive, and caused a great number of different armed conflicts, breaking out one after another in different areas. Such development of events has dangerously jeopardized the security of the population. Even when security was not jeopardized, there was a climate of mutual distrust and insecurity. Under such conditions, people considered abandoning their homes and going to other safer parts as being the only solution.

Those movements of people have affected, to a certain extent, all Former Yugoslav Republics, which are separate States today. However, Yugoslavia has been the most affected one. In one moment, in the middle of 1995, there were more than one million refugees in Yugoslavia. First, they came from Croatia and Bosnia and Herzegovina, but also from Slovenia and Macedonia.

The movement of refugees has been developing in accordance with the development of problems in Former Yugoslavia. At the beginning, when the problems had been shown at a political level, people rarely changed their places of residence. When the political conflicts developed into armed conflict, at that time of lower intensity, the number of refugees increased, primarily coming from the affected areas. The culmination of refugee influx was reached in August 1995, when within several days more than 300,000 refugees came to Yugoslavia, mostly from Croatia.

In this respect, the State of Yugoslavia was not prepared to address the problem of refugees, especially when they started to emerge in large numbers. There were no authorized and responsible State bodies for that job. Moreover, nobody in the State, probably for political reasons, was ready to accept the obvious fact that the number of refugees was increasing at that time.

That course of events had put the Yugoslav Red Cross into a very difficult position: the National Society has been prepared to provide assistance to refugees, but within our mandate. That means to provide humanitarian aid in food, hygienic items, first medical aid, etc. However, due to lack of adequate State measures, we were forced to do more than that.

On border crossings on which refugees were arriving, the Yugoslav Red Cross organized refugee shelter points at which the first humanitarian assistance was provided. However, due to lack of State response, the Yugoslav Red Cross was also forced to provide accommodation for a great number of refugees. Although reluctantly, we had to do that because there was no alternative, there was nobody else to take that responsibility.
Plainly, due to humanitarian reasons, we could not leave those people to their own destiny, being aware that they were completely helpless. We did that hoping that it would be a temporary measure and that the State bodies would take over responsibilities for that. Unfortunately, the temporary situation has been prolonged, in certain cases until today.

In 1992, the Commissioner for refugees was formed in Serbia and Montenegro. Unfortunately, that did not make the situation easier for the Yugoslav Red Cross, especially in the cases of great influx of refugees. In those cases, the Yugoslav Red Cross had to be engaged in their acceptance and registration, in line with the unavoidable provision of humanitarian aid, which actually was within our mandate.

The particular problem was the registration of refugees. The Yugoslav Red Cross registered all refugees at the points of entering Yugoslavia. Certainly, the process of registration was done according to the needs of the National Society, in order to provide and distribute humanitarian aid and enable Tracing Services to do their job. That registration could not replace official registration, which should be the responsibility of State authorities.

Unfortunately, nobody else had conducted the registration of refugees at the time when they were coming, and the registration conducted by the Red Cross had been the only one for a long time.

Such conditions made the solution of the status of refugees even more difficult.

The Yugoslav Red Cross is not authorized to regulate the refugee position; it is exclusively the mandate of State authorities. For example, that was the reason why refugees did not get identity cards in the beginning, and without them, they could not realize some of the basic rights; i.e. health insurance, education etc.

The Red Cross identity cards, made for the purposes of reception of humanitarian aid, often in these conditions, were used as proof of identity. However, they were not valid documents and it was very difficult for refugees to realize their rights; some State authorities recognized them, some of them did not. It is true that the Yugoslav Red Cross registration of refugees was the only one for a long time and was causing serious disputes between our National Society, and certain State authorities who often requested some data from the Yugoslav Red Cross for their own purposes. The Yugoslav Red Cross had to reject those requests, because we were obliged to protect the privacy of the data, as well as the integrity and independence of the National Society.

It is clear that this condition particularly affected the refugees themselves. The lack of systematic approach as well as the tendency of refugees “to hide” their position from the public, made their already difficult position even worse.

Under such conditions, the contribution of many NGOs, governmental organizations and other partners that assisted the Yugoslav Red Cross was enormous. Moreover, since the foundation of the Commissioner for refugees in Serbia and Montenegro they provided humanitarian aid for refugees. It is hard to imagine that those vulnerable people would have managed to survive without assistance.

Today, the situation of refugees has considerably improved. Several censuses of refugees have been conducted since 1996. The last one was conducted in spring
2001. There is a relatively reliable registration, and with great efforts, their health insurance, as well as education of children are provided.

However, the humanitarian situation is still very difficult. It is worth mentioning that many refugees have been settled in private accommodation, with relatives or friends, in one period more than 80% of them. In the meantime, the local population has become poorer and there are fewer conditions for that kind of accommodation. A great number of refugees (out of a total number of more than 500,000), including more than 200,000 internally displaced persons (from Kosovo and Metohija) today are settled in very poor conditions, in many cases without basic hygienic conditions. Humanitarian aid has decreased and half of the total number of refugees receives humanitarian aid from international resources. Moreover, we can expect a further decrease in humanitarian aid. Efforts made in order to enable the return of refugees have not shown the expected results, and possibilities for their integration into the community are limited, first of all, due to the extremely difficult economic situation in Yugoslavia.

Our ten-year experience in working with refugees, has enabled us to draw several conclusions, that can be useful for future activities.

In this case, refugees are one of the most vulnerable categories. The role of the Red Cross/Red Crescent in providing humanitarian aid for them is indispensable. However, the Red Cross/Red Crescent has neither mandate nor resources to do that.

Refugees have to be primarily the responsibility of State authorities. The State has to promptly prepare itself to provide for possible refugees, especially in areas where the great influx of refugees can be predicted.

The entire lack of concern of the State, especially the unprompted solution of the status of refugees makes the position of refugees even more difficult. This also hinders humanitarian action as well as coordinated and rational usage of resources of humanitarian aid, which can never be sufficient.
In developing action on behalf of refugees, the YRC certainly contributed to the application of the Convention on the Status of Refugees, its letter and spirit, including the 1967 Protocol.

The YRC acted in respect of the principle of non-discrimination incited in the Convention. It did not discriminate between the refugees. All of them received the same type of assistance (art. 3).

The YRC acted, based on authorization by the law, as the organization providing public relief and assistance (art. 23). By their registration, the YRC helped to provide the refugees with provisional identity papers (art. 27).

The YRC contribution also extended to the recommendations of the 1951 Diplomatic Conference. It provided welfare services, which were so needed, to these victims. The YRC acted in such a way that it extended its services regardless of whether the beneficiaries were covered by the terms of the Convention.

It also acted in the spirit of the 1967 Protocol, extending its work without any limitation as regards the time and geographic limits. It also took into consideration not only the text of the Convention but also relevant resolutions of the UN General Assembly and the conclusions of the HCR programme.

The whole action of the YRC on behalf of refugees has been a direct contribution to the enjoyment of certain fundamental human rights, as stipulated in paragraph 1 of the Preamble. In this way, the social and humanitarian nature of the problem of refugees has been expressed, but coming within its mandate as defined in the Movement’s Statutes. In the development of these activities, the YRC cooperated further with UNHCR’s office (art. 35).
A REPORT ON THE EFFORTS OF
THE REPUBLIC OF KOREA NATIONAL RED CROSS
TO MITIGATE THE SUFFERING OF KOREAN SEPARATED FAMILIES

Republic of Korea, National Red Cross

I. Historical Background of Separated Families

Having experienced two world wars in the 20th century, the world today is in pursuit of détente, free from ideological preoccupations and intent on building a structure for world peace. The Korean Peninsula has the dubious distinction of being the singular remaining nation that is divided by an artificial barrier erected over ideological disputes. This barrier’s existence for over half a century has been an extraordinary source of untold pain due to family separation.

To state it more concretely, dating from the 1945 decision to divide the Korean Peninsula and the subsequent outbreak of the Korean War in 1950, a significant portion of the civilian population in both the South and the North became scattered and separated from their loved ones. Even though the most immediate cause of separation can be attributed to the Korean War itself, a good many civilians also became separated due to various types of mobilization by force or flight from persecution in the period of the forcible occupation of Korea by Japanese imperialist forces from 1910 to 1945.

Separated families clearly represent one of the bitter tragedies suffered by Korean people in the 20th Century. The heartaches of individual civilians are certainly the most urgent challenge that we continue to face and are compelled to solve without further delay in the light of all humanitarian principles.

II. Definition and estimated number of separated families

It is prescribed in the regulation concerning separated families in the Republic of Korea (ROK) that “Relatives within third cousins, spouses and/or ex-spouses who have been scattered in the South and the North shall be applicable to the category of separated families regardless of cause and background on separation”.

By the end of 2000, an estimated 1.23 million first-generation separated family members, of whom 690,000 are over the age of 60, resided in the ROK. The number of separated family members who applied to the “Separated Families Information Integration Center” for identification of their kin was recorded at 114,000 at the end of 2000. The Republic of Korea National Red Cross (KNRC) runs the center in cooperation with the Government of the Republic of Korea.

In addition to separated families, a number of POWs and ROK abductees still exist in the North in spite of denials of their presence by North Korean authorities. The number of ROK abductees held in the North dating from the Korean War is estimated at 487. Through the testimonies of North Korean defectors and POWs who were able to escape and return to the South (17 as of the end of 2000), the names of 351 POWs have been identified.

In light of the abductees’ circumstances being, in a practical sense, virtually the same as those of separated family members with the exception of their legal
status, the ROK Government has taken the approach of solving this matter by including them in the category of separated families in a broad interpretation.

III. Resumption of the Inter-Korean Red Cross Talks

On 12 August 1971, the KNRC proposed to the North Korean Red Cross the holding of inter-Korean Red Cross Talks for the prompt solution of purely humanitarian problems pending between the South and the North. The KNRC’s position in the inter-Korean Red Cross Talks was clear from the start. Based on brotherly love and the humanitarian spirit of the Red Cross, the KNRC has consistently sought to solve the problem of separated families, thereby promoting mutual trust and understanding as groundwork for the realization of peaceful reunification of the country.

In pursuit of the means to eliminate the pains of separated families, nearly 100 rounds of various types of inter-Korean Red Cross Talks including 10 rounds of full-dress dialogue were organized from the 1970s through the 1990s. These enormous efforts, however, have not resulted in tangible fruits save the single simultaneous exchange visit of 50 separated family members by each side in 1985.

Meanwhile, the world has been moving toward a new international order characterized by ever-widening currents of information, openness and cooperation in the wake of the Cold War. Many have pointed to this new international trend as an opportunity for the ROK to pave the way toward peaceful co-existence and eventual unification between the South and the North. Not only for the purpose of proactively coping with changing international conditions, but also for the purpose of addressing the brilliant future of the country, an historic first-ever inter-Korean summit meeting (since national division in 1945) was held in Pyongyang from 13-15 June 2000. Following the summit, on 15 June 2000, the “South-North Joint Declaration” was issued. The declaration contained five points inclusive of “The two sides agreed to promptly resolve humanitarian issues such as the exchange visits of separated family members on the occasion of National Liberation Day (15 August), as well as the issue of unconverted long-term prisoners”.

Accordingly, two rounds of inter-Korean Red Cross Talks were organized following several working-level contacts in 2000 to realize the above-mentioned humanitarian issues and to further discuss ways to mitigate or eliminate the pains of separated families.

The two rounds of Red Cross Talks promoted mutual understanding on exchange visits, addressed checks for letter exchange and addressed the establishment and operation of a permanent meeting center.

IV. Efforts for separated family members

The period that immediately followed the inter-Korean summit held on 15 June 2000 until the present has been characterized by significant activities relating to separated families and carried out by both the South and the North Korean Red Cross Societies.

From August 15 to 18, 2000, both Red Cross Societies exchanged, for the first time since September 1985, delegations of separated families. A 151-strong delegation on each side comprising 100 separated family members, 30 staff members
and 20 journalists, visited Seoul and Pyongyang simultaneously. The second round of exchange visits, designed with more emphasis on actual family reunions, took place from 30 November to 2 December 2000. In contrast to the previous round, the duration of the 2nd visit was reduced by one day to a total of two nights and three days. In spite of the reduced length of stay, the 2nd exchange visit not only provided the separated families with more hours to spend with their relatives, but also developed into a more substantive event by de-emphasizing the tour schedule.

The third round of exchange visits took place from 26-28 February 2001 and followed nearly the same schedule as the second round. In the course of three rounds of exchange visits, a total of nearly 8,000 separated family members ascertained the whereabouts of their relatives and among them, more than 3,600 were able to meet their families.

The first reunion involved 1,170 persons while the second and the third reunion involved 1,220 and 1,240 persons respectively.

In addition to the pilot program of three rounds of exchange visits, two occasions of tracing inquiry exchanges for the purpose of ascertaining the fate and whereabouts of separated families were carried out between the South and the North Korean Red Cross Societies from January to February, 2001, at which time an additional 2,200 individuals were identified.

A groundbreaking exchange of letters took place for 300 individuals (from both South and North) who were drawn from those identified on March 15, 2001. The statistical data based on the three rounds of exchange visits and two occasions of address confirmation inquiries revealed that 6,142 individuals were alive and 4,071 had passed away among a total of 10,213 separated family members whose whereabouts had been ascertained.

In recognition that first-generation separated family members are rapidly aging and passing away in large numbers without knowledge of the whereabouts of their loved ones, it is imperative that an expedited search for the whereabouts of the entire group of Korean separated families be carried out most urgently and the establishment of meeting centers be completed at the earliest possible date. In preparation for the first task outlined above, the KNRC operates the “Separated Families Information Integration Center” in cooperation with the ROK Government, which gathers application and builds related databases for the identification of separated kin.

To facilitate meetings for long-lost members of families, both Red Cross Societies agreed in principle to establish a reunion center for this purpose. However, differences centering on the location of the site have hindered further progress between the two sides.

V. Humanitarian aid for reconciliation and cooperation between the South and the North

Due to floods and drought, which devastated its agricultural land in addition to other economic factors, North Korean authorities requested food assistance from international organizations in 1995.

Dating from 1995, the ROK Government, the KNRC and non-governmen-
tal organizations have been sending food, medical supplies, fertilizer and other necessary supplies to the North, without precondition, to help the people of the North overcome the hardships they faced. Within the period 1995-2000, various relief supplies equivalent to 475 million US dollars were sent to the North, (the ROK Government: 380 million US$, the KNRC: 64 million US$, other internal organizations: 31 million US$).

We Koreans do nurture the hope that the aid based on the universal value of humanitarianism and compatriotic love will help to achieve inter-Korean reconciliation and cooperation.

VI. Conclusion: Prospects for further family reunions

The problems between the South and North that have accumulated over the last 50 years of division cannot be removed in a day or two. Of all the problems, the plight of the separated families is most urgent and acute. As a symbolic and vital issue in inter-Korean reconciliation and cooperation, the KNRC will proceed with the family reunion project until such time as no separated families remain in this country. We further believe it to be a national project that can only improve the future of our nation.

In particular, on the 12th of August, in commemoration of the 30th anniversary of Seoul’s first proposal for Inter-Korean Red Cross Talks, the President (Mr. Young-Hoon Suh) of KNRC called on North Korea to resume Red Cross Talks that have been stalled since January and also suggested that the two sides cooperate to help the separated families aged 90 or over to be either reunited with their long-lost families or confirm the whereabouts of their family members split by the Korean War (1950-1953).

When we establish reconciliation and cooperation in every sphere between the South and the North, a key to the solution of the problem of separated families will have been found. Until such a fortuitous juncture, the KNRC will continue its efforts with sincerity and patience in accordance with the high ideals of the Red Cross. For all the reasons described above, we call upon the international community to give the issue of separated families on the Korean Peninsula their continued concern and heartfelt support.
Outline of the Statement
on the Occasion of
30th Anniversary of the First Proposal
for Inter-Korean Red Cross Talks

On 12th August 2001, the President of the Republic of Korea National Red Cross (KNRC), Mr. Young-Hoon Suh, issued a statement on the occasion of the 30th anniversary of its first proposal for Inter-Korean Red Cross Talks. In the statement, he offered the following proposals with the purpose of solving the urgent separated family issue that can not be further delayed:

President Young-Hoon Suh of the KNRC,

urged the North Korean Red Cross to promptly resume inter-Korean Red Cross Talks so as to discuss a way of complete solution of the unsolved separated family problems such as ascertainment of whereabouts, address checks, letter exchange and establishment of permanent meeting centers,

proposed that both sides exert special efforts to help 1,800 people aged 90 or over in the South to be either reunited with their long-lost families or ascertain the whereabouts of their kin at the earliest possible moment considering their age,

called for the Red Cross Societies of the two Koreas to make efforts for the resumption of the government-level talks on the development of South-North relations, thus enabling both sides to put the June 15 Joint Declaration into practice.
San Remo Declaration
on the Principle of Non-Refoulement

San Remo, Italy
September 2001
On the occasion of the 50\textsuperscript{th} Anniversary of the Convention relating to the Status of Refugees of 28 July 1951, the International Institute of Humanitarian Law, in co-operation with the United Nations High Commissioner for Refugees, organised the 25\textsuperscript{th} Round Table, from 6-8 September 2001, in San Remo (Italy), including a Panel of Experts on current issues related to the international protection of refugees.

The Council of the International Institute of Humanitarian Law, bearing in mind the Institute’s long-term interest in and association with the development and codification of international law pertaining to the status of refugees, adopts the following text as the:

SAN REMO DECLARATION
ON THE PRINCIPLE OF NON-REFOULEMENT

The Principle of Non-Refoulement of Refugees incorporated in Article 33 of the Convention relating to the Status of Refugees of 28 July 1951 is an integral part of Customary International Law.
Explanatory Note on the Principle of Non-Refoulement of Refugees as Customary International Law

Currently, 141 States are contracting Parties either to the Convention relating to the Status of Refugees of 1951 or to the Protocol Relating to the Status of Refugees of 1967, or both. All these States are, of course, bound by the principle of non-refoulement of refugees as incorporated in Article 33 (1) of the Convention, subject to the exceptions spelt out in Article 33 (2) as well as Article 1 (F). However, the principle of non-refoulement of refugees can now be deemed as an integral part of customary international law. Consequently, non-contracting Parties to the Convention and/or the Protocol are equally bound by the principle of non-refoulement of refugees: not because of any treaty obligation, but because this is general international law.

The principle of non-refoulement of refugees can be regarded as embodied in customary international law on the basis of the general practice of States supported by a strong *opinio juris*. The telling point is that, in the last half-century, no State has expelled or returned a refugee to the frontiers of a country where his life or freedom would be in danger - on account of his race, religion, nationality, membership of a particular social group or political opinion - using the argument that refoulement is permissible under contemporary international law. Whenever refoulement occurred, it did so on the grounds that the person concerned was not a refugee (as the term is properly defined) or that a legitimate exception applied. As the International Court of Justice pointed out in a different context, in the 1986 *Nicaragua* Judgement, the application of a particular rule in the practice of States need not be perfect for customary international law to emerge: if a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, this confirms rather than weakens the rule as customary international law.

Non-refoulement is a very important legal and humanitarian principle of international law. This principle is normatively established both in treaty and in custom, and thus it constitutes an integral part of customary international law. It may be regarded as the cornerstone of international refugee law.

That is not to say that every specific legal ramification of the principle of non-refoulement of refugees is generally agreed upon today in the context of customary international law. The nature of customary international law (as distinct from treaty law) is such that not every “i” can be dotted and not every “t” can be crossed. But while there are doubts affecting borderline issues, the essence of the principle is beyond dispute. This essence is encapsulated in the words of Article 33 (1) of the 1951 Refugee Convention, which can be regarded at present as a reflection of general international law.
Déclaration de San Remo sur le principe de Non-Refoulement

San Remo, Italie
Septembre 2001

Le Conseil de l’Institut International de Droit Humanitaire, conscient de l’intérêt et de l’engagement de longue date de l’Institut en matière de développement et de codification du droit international relatif au droit des réfugiés, adopte le texte qui suit:

**DÉCLARATION DE SAN REMO**
**SUR LE PRINCIPE DE NON-REFOULEMENT**

Le Principe de Non-Refoulement des réfugiés repris à l’Article 33 de la Convention relative au Statut des Réfugiés du 28 juillet 1951 fait intégralement partie du Droit International Coutumier.
Note explicative sur le Principe de Non-Refoulement des Réfugiés en tant que Règle de Droit International Coutumier

Actuellement, 141 États sont Parties contractantes à la Convention relative au Statut des Réfugiés de 1951 et/ou au Protocole relatif au Statut des Réfugiés de 1967. Tous ces États sont bien sûr liés par le principe de non-refoulement des réfugiés tel qu’il est repris à l’Article 33 (I) de la Convention, et soumis aux exceptions stipulées à l’Article 33 (2), ainsi qu’à l’Article 1 (F). Toutefois, le principe de non-refoulement peut désormais être considéré comme faisant intégralement partie du droit international coutumier. Par conséquent, les Parties non contractantes à la Convention et/ou au Protocole sont également liées par le principe de non-refoulement des réfugiés: non pas à travers une obligation émanant d’un traité, mais parce qu’il ressort du droit international général.

Le principe de non-refoulement des réfugiés peut être considéré comme étant incorporé dans le droit international coutumier sur la base de la pratique générale des états fermement appuyée par la doctrine. L’argument irréfragable étant en effet que durant les cinquante dernières années, aucun État n’a expulsé ou renvoyé un réfugié aux frontières d’un pays dans lequel sa vie ou sa liberté aurait été menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social particulier ou de son opinion politique, en arguant que le refoulement est permis dans le droit international contemporain. Chaque fois qu’il a été procédé à un refoulement, c’est soit parce que la personne concernée ne pouvait pas être considérée comme réfugié (conformément à la définition du terme), soit parce qu’une exception légitime était applicable à son cas. Comme l’a souligné la Cour Internationale de Justice dans un autre contexte, l’affaire du Nicaragua de 1986, il n’est pas nécessaire qu’une règle particulière dans la pratique des États soit parfaite au sens du droit international coutumier pour s’appliquer: en effet, si un État agit d’une manière à première vue incompatible avec une règle généralement admise, et trouve sa défense en plaident les exceptions ou justifications contenues dans la règle elle-même, cela renforce plutôt qu’affaiblit son support d’appartenance au droit international coutumier.

Le non-refoulement est un principe juridique et humanitaire très important. Ce principe est établi de manière normative aussi bien dans le droit des traités que dans la coutume, et constitue donc une partie intégrante du droit international coutumier. Il peut être considéré comme l’une des pierres angulaires du droit international des réfugiés.

Cela ne veut pas dire que chaque ramification juridique particulière du principe de non-refoulement des réfugiés soit généralement acceptée aujourd’hui dans le contexte du droit international coutumier. La nature du droit international coutumier (et c’est là ce qui le distingue des traités) est telle que tous les cas ne peuvent être envisagés. Pourtant, même s’il subsiste encore des doutes concernant les questions limites, l’essence même du principe reste incontestable. Cette essence du principe trouve sa formulation dans les termes de l’Article 33 (I) de la Convention des Réfugiés de 1951, qui peut désormais être considéré comme reflétant le droit international général.
Dichiarazione di Sanremo
sul principio di Non-Refoulement

Sanremo, Italia
Settembre 2001
In occasione del 50° Anniversario della Convenzione relativa allo status dei rifugiati del 28 luglio 1951, l’Istituto Internazionale di Diritto Umanitario ha organizzato, in cooperazione con l’Alto Commissariato delle Nazioni Unite per i Rifugiati, dal 6 all’8 settembre 2001 a Sanremo, la sua 25a Tavola Rotonda sui problemi attuali relativi alla protezione internazionale dei rifugiati.

Il Consiglio dell’Istituto, consapevole dell’interesse e dell’impegno di lunga data dell’Istituto stesso nei confronti dello sviluppo e della codificazione di quella parte del diritto internazionale relativo ai rifugiati, adotta la seguente

DICHIARAZIONE DI SANREMO
SUL PRINCIPIO DI NON-REFOULEMENT

Il principio di Non-Refoulement, contenuto nell’Articolo 33 della Convenzione relativa allo Status dei Rifugiati del 28 luglio 1951, è parte integrante del diritto internazionale consuetudinario.
Nota esplicativa sul principio di Non-Refoulement dei rifugiati quale diritto internazionale consuetudinario

Attualmente, sono 141 gli Stati che hanno ratificato la Convenzione relativa allo status dei rifugiati del 1951, o il Protocollo relativo allo status dei rifugiati del 1967, o entrambi. Tutti questi Stati sono vincolati, naturalmente, al principio di non-refoulement dei rifugiati, incorporato nell’Articolo 33 (I) della Convenzione e soggetto alle eccezioni enunciate nell’Articolo 33 (2), così come nell’Articolo 1 (F). Tuttavia, il principio di non-refoulement dei rifugiati può oggi essere considerato come parte integrante del diritto internazionale consuetudinario. Di conseguenza, anche gli Stati che non hanno ratificato la Convenzione e/o il Protocollo sono ugualmente vincolati dal principio del non-refoulement dei rifugiati, non sulla base di un obbligo derivante da trattato, ma in quanto esso è parte del diritto internazionale generale.

Il principio di non-refoulement dei rifugiati può essere considerato parte integrante del diritto internazionale consuetudinario sulla base di una pratica generale degli Stati supportata da una forte opinio juris. Il punto fondamentale al riguardo è che, negli ultimi cinquant’anni, nessuno Stato ha espulso o respinto un rifugiato verso le frontiere di un paese dove la sua vita o libertà potessero essere messe in pericolo - a causa della sua razza, religione, nazionalità, appartenenza ad un particolare gruppo sociale o ideologia politica - sostenendo che il refoulement è ammissibile secondo il diritto internazionale contemporaneo. Ognirqualvolta si è fatto ricorso al refoulement, ciò è avvenuto sul presupposto che la persona interessata non fosse un rifugiato (nel senso proprio della definizione) oppure per la presenza di una legittima eccezione. Come ha sottolineato la Corte Internazionale di Giustizia, in un contesto diverso quale il giudizio del caso sul Nicaragua del 1986, l’applicazione di una particolare norma nella pratica degli Stati non deve necessariamente essere perfetta per emergere quale diritto internazionale consuetudinario: se uno Stato si comporta prima facie in modo incompatibile con una norma identificata, ma difende il suo comportamento appellandosi ad eccezioni o giustificazioni contenute nella norma stessa, ciò conferma e non indebolisce la norma quale diritto internazionale consuetudinario.


Ciò non significa che ogni particolare ramificazione giuridica del principio di non-refoulement sia oggi generalmente accettata in quanto diritto internazionale consuetudinario. La natura del diritto internazionale consuetudinario (in quanto distinto dal diritto dei trattati) è tale che non tutte le “i” possano avere il puntino, e non tutte le “t” il trattino. Ma, mentre ci sono dubbi riguardanti le zone di confine, l’essenza del principio va oltre ogni dubbio. Tale essenza è racchiusa nelle parole dell’Articolo 33 (I) della Convenzione del 1951 sui Rifugiati, che può essere considerato attualmente come un riflesso del diritto internazionale generale.
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L’attuale fase storica, ancora caratterizzata da conflitti armati e da ripetuti episodi di violazione dei diritti umani, richiede ogni possibile impegno, nazionale e multilaterale, per consentire all’intervento umanitario di operare con sempre maggiore rapidità ed efficacia.

(Dal messaggio di Carlo Azeglio Ciampi, Presidente della Repubblica Italiana)

Events over the past few years - some of them tragic - have taught us that we must learn more effective ways of protecting the innocent where we can, and alleviating their suffering where we cannot. We must develop the understanding, the legal instruments, the methods and the means that will enable us to do so. We must find the tools to provide humanitarian assistance where, in the past, we have sometimes experienced difficulties or even failure.

(An extract from Kofi Annan’s message, United Nations Secretary-General)

The International Institute of Humanitarian Law (IIHL) is a private, independent and non-profit organisation created in 1970. Its prime objective is to promote the development, application and dissemination of international humanitarian law in all its dimensions, and thus contribute to the safeguard and respect of human rights and fundamental freedoms throughout the world. The Institute is officially recognised by the United Nations as a non-governmental organisation having consultative status with the Economic and Social Council and the High Commissioner for Refugees. It also has operational relations with UNESCO.

The Dragan European Foundation is an institution at European level, operative since 1950 and constituted by Prof. J. Constantin Dragan. To carry out its by-law aims, the Dragan European Foundation has given birth to various international activities such as private universities, postgraduate specialization courses, publishing, radio and television activities, the Cybernetics Academy Odobleja, the European Association for Bioeconomic Studies, the creation of specialized issues, the participation in the programmes of the United Nations Educational, Scientific and Cultural Organization through the establishment of the UNESCO Centre in Milan, the creation of the European Centre for Thracian Studies and of CERMA, European Applied Medical Research Centre, a series of lectures and international symposia.