Humanitarian Assistance in Armed Conflict

Conference of the Luxemburg Group*
24-25 May 2004
Graduate Institute of International Studies, Geneva

Introduction

Following the first conference on "Transatlantic Relations and the Challenges of Globalization" on 24-25 October 2003 in Schengen,[1] the Luxembourg Group held a second conference on "Humanitarian Assistance in Armed Conflict" on 24-25 May 2004 in Geneva. Both conferences are part of a series of conferences on "International Cooperation and Conflict in the Post-September 11 World". Within the framework of this project, a third conference will be organized on "Transatlantic Relations: How Do We Make the UN and Multilateralism Effective?" on 13-14 September 2004 in Washington D.C.

The Luxembourg Group is composed of the University of Luxembourg, the Graduate Institute of International Studies (HEI), Geneva, and the Centre for Transatlantic Relations at Johns Hopkins' Paul H. Nitze School of International Studies (SAIS), Washington D.C. (on behalf of the American Consortium on European Studies). This series of conferences is placed under the High Patronage of His Royal Highness the Grand Duke Henri de Luxembourg, who initiated the project.

Approximately 70 participants attended the second conference, including scholars, international civil servants, political and socio-economic

* The present report has been prepared by Yasmin Naqvi, Research Assistant at the Graduate Institute for International Studies, and Adrian Pabst, Research Assistant at the Luxemburg Institute for European and International Studies.

professionals, young researchers and students from over 25 countries. The aim was fourfold: (i) to bring academic research and analysis to bear on pressing issues of transatlantic relations; (ii) to contribute to renewed transatlantic dialogue; (iii) to initiate academic cooperation among the members of the newly founded Luxembourg Group; and (iv) to encourage students and young scholars to undertake research on issues linked to transatlantic relations.

In the course of five discussion sessions and on the basis of papers and panel presentations, the conference dealt with five major topics:

(i) the historical background, contemporary issues and prospects regarding interventions on humanitarian grounds;
(ii) multiple tasks and multiple faces of humanitarian assistance;
(iii) humanitarian assistance, criminal law enforcement and human rights;
(iv) protecting the protectors — the role of the military in humanitarian assistance; and
(v) sustainable assistance to the victims of armed conflicts and post-conflict nation-building.

Intervention on humanitarian grounds: History, issues and prospects

Introduction

The first part of the conference addressed predominantly the historical, institutional and conceptual background of humanitarian assistance in armed conflicts. The chair, Prof. Andrea Bianchi (HEI), stressed in his introductory remarks that humanitarian assistance is a multifaceted phenomenon that lies at the interface of law, politics, economics and ethics.

Lead speakers

• **Davide Rodogno (Fonds National de la Recherche Scientifique, Suisse): "Humanitarian interventions and the standards of civilization: Europe and the Ottoman Empire 1815-1911"**

The thrust of this paper was that military interventions on "humanitarian" grounds are by no means a wholly new phenomenon. Instead, such interventions have a history in the West whose origins can be traced back as far as the late eighteenth century. From this history emerge structures of thought and practice which in the nineteenth century gave rise to the first political and legal practice of humanitarian interventions. To revisit the

1 The report is available at <http://www.luxembourggroup.org/reports/html>.

recent history of such interventions is to shed some light on contemporary forms of humanitarian assistance. In particular, it turns out that humanitarian interventions today are distinct yet related phenomena which share at least three crucial features with such interventions in the past: first of all, they invoke notions of civilization and a common right of humanity, secondly, they manifest the pervasiveness of self-interest, and thirdly, they are deeply affected by the rules of the international system in which they occurred.

In theory, interventions on humanitarian grounds in the nineteenth century took place as a response to the violation of the common right of humanity (*droit commun de l'humanité*) and took the form of collective action on the part of "law-abiding" States. In practice, however, such interventions amounted to military campaigns launched by European States in retaliation against atrocities committed towards fellow Christians. In essence, countries which considered themselves to be civilized, and part of the so-called family of nations, e.g. the British Empire, invaded countries considered to be uncivilized or half-civilized, e.g. the Ottoman Empire, in defence of a Christian minority. The normal pattern of events was as follows: if there was turmoil followed by crimes against fellow Christians, the European concert would intervene, at first diplomatically, then militarily. After coming to the rescue of Christians, there would be a ceasefire secured by European forces and monitored by European commissioners, who would also oversee pro-Western reforms.

The rise of interventions on grounds of "humanity" followed three historical developments: the abolition of the slave trade, European colonization of Asia and Africa, and the emergence of the notion of "civilization" in international politics and law, especially the right to intervene on account of the supremacy of European civilization over allegedly inferior civilizations. This simultaneously marked continuity and change vis-à-vis the past. With the exception of the nineteenth century "scramble for Africa", "humanitarian" intervention did not result in outright colonization. However, all actions were also in the self-interest of the intervening countries. Similarly, the process was not exclusively driven by economic or political motives but involved international law. Certain legal experts in the nineteenth century held that the right to intervene on the grounds of humanity was justified where collective action, based on the need to uphold fundamental "common" values of humanity, could be taken by "civilized" States against an "uncivilized" State committing atrocities. However, the reforms and innovations in international law did not extend the same rights to all countries, but

constituted amendments to the Westphalian settlement in such a way as to legitimize foreign intervention in nominally sovereign States.

The significance of humanitarian interventions was the emergence of a moral crusade, characterized by self-confidence and zeal, which was enhanced by secular modernization. This recovered zeal was both religious and ethnic, in that actions were particularly directed against Islam and there was a total disregard for the suffering of non-Christian, non-White populations, e.g. the non-intervention at the time of Russian anti-Semitic pogroms and the killings of Turks in Central Asia. However, if a "humanitarian intervention" threatened peace and stability in Europe, and if the self-interests of European powers were not sufficiently jeopardized by the actions of the "uncivilized" State, European powers did not intervene, even if fellow Christians were massacred. This was the case when atrocities were being committed against the Armenians during the late nineteenth and early twentieth century.

At least two themes emerge from this historical account: first of all, the inherent moral ambiguity of military interventions on humanitarian grounds, including the dubious claim of the intervening States to be acting in the common interest, and, secondly, the pervasiveness of national self-interest in international affairs.

• Ramesh Thakur (United Nations University, Tokyo): "The United Nations and the Responsibility to Protect"

The second presentation was centred on how the United Nations (UN) should respond to the triple dilemma that characterizes international relations-complicity, inaction and illegality. The recent events involving Rwanda, Kosovo and Iraq illustrate this dilemma. First of all, to respect national sovereignty at all times is to risk being an accessory to humanitarian tragedies or to violations of inalienable individual and collective human rights codified in international and universally binding law. Secondly, to argue that only the UN Security Council can authorize interventions is to risk inaction due to the failure of the Council as a whole or due to an individual veto. Thirdly, to use force without UN authorization is to violate international law. In some sense, this triple dilemma raises one and the same problem: how to put an end to serious violations of international law by States at the domestic level through military intervention while at the same time outlawing and criminalizing war as a tool of unilateral State policy.

In the face of this triple dilemma and the underlying problem, and in response specifically to Secretary-General Kofi Annan's "challenge of

humanitarian intervention", the Canadian government set up a commission which produced a report entitled *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. In essence, the report seeks to affirm both the priority of national sovereignty and the legitimacy of international intervention. The main conceptual means of achieving this is to reconfigure the relation between rights and duties or prerogatives and responsibility by bringing about three changes in the current political and legal situation. First of all, a change in conceptual language is advocated — away from "humanitarian intervention" to the "responsibility to protect". The reason is that the language of humanitarian intervention and assistance has led to terrible instances of either inaction (Rwanda) or action (Kosovo) or a combination of both (Somalia), as well as to conceptual and policy aberrations, perhaps best captured by the oxymoron "humanitarian bombing". The reconceptualization of the problem serves to shift the focus from the rights of States to the rights of victims and thereby to approach the issue from the standpoint of the responsibility of States, rather than the authority of States.

The second goal, in the wake of both Kosovo and Iraq, is to internationalize the issue. The idea is not to elevate the UN over and above national sovereignty and national governments, but to establish it as the ultimate arbiter in the event of national and trans-regional failure. The Commission expressed the double belief that all sovereign States have the responsibility to protect populations and, should this responsibility not be assumed, it falls to the international community. In short, only if a State is unwilling or unable to assume it, or is itself the perpetrator of crimes, does the responsibility to protect pass to others. So the point is to reaffirm at the same time the priority of the national level and the link with the international level.

The third goal is to define effective, legitimate action, i.e. not a blueprint for intervention but the parameters to come to a decision on a case-by-case basis. The crucial elements for this sort of decision-making and for this sort of action are "due process" and "due authority". The Commission's idea is to modify the focus: whereas the traditional approach to "humanitarian intervention" has hitherto focused on the rights and prerogatives of intervening States, the new approach based on the "responsibility to protect" focuses on how to alter the power relations between perpetrator and victims and then to embed protection in long-term institutions. The point is to suspend sovereignty temporarily, not to abrogate it permanently by way of regime change.

In what ways might the new approach based on the "responsibility to protect" overcome recent problems related to (non-)intervention? In the face of both violations of international law at the domestic level and international illegality, the Commission has sought to "reaffirm the central, indispensable and irreplaceable role of the UN in authorising any military intervention in today's world". This is because the UN is considered to be an indispensable font of international authority and it is therefore preferable to improve its operation rather than to seek alternatives. The Commission also believes that international action is warranted if two sets of conditions are fulfilled: if there is just cause, right intention, last resort, proportionality and reasonable prospects of success, and if operational principles which guide intervention are respected.

This raises the question of what to do if the Security Council fails to act and thereby fails to fulfil its responsibility to protect, e.g. in Rwanda. New possibilities would need to be explored, such as taking up the issue in the General Assembly where majority votes are operative, as was recommended in the "Uniting for peace" resolution of 1950, or strengthening possibilities of regional and trans-regional initiatives, e.g. enabling African or Asian-led missions. What is clear to the Commission is that unilateral actions are to the detriment of both the UN and national sovereignty, because they undermine the UN and risk lapsing into irresolvable and intolerable contradictions: elevating one instance of national sovereignty over another (that of the invading State over and against that of the invaded State) without any genuine proof (weapons of mass destruction); moral superiority on the one hand and descent into barbarity on the other (Abu Ghraib); excessive attention focused on some countries (Afghanistan, Iraq) at the expense of others (Sudan, Congo, Burundi, Liberia, etc.); holding tyrants accountable while demanding immunity for one's own armed forces; etc.

Seeking to counter the threat of multilateral inaction or unilateral action, the Commission reckons that its work is an illustration of a potential new international consensus on intervention, binding together national sovereignty and international responsibility. If the needs and the calls for intervention have not gone away and will not do so, and if there remains a gap between the need for humanitarian protection and the ability of outsiders to provide effective help, then the choice is no longer whether to intervene or not, but how to intervene: multilaterally *versus* unilaterally, legally *versus* illegally. The ultimate aim must be to enhance both security and humanity; the new symbol is East Timor, not Rwanda.

Panel presentations

Prior to the panel presentations and discussions, the chair, Prof. Andrea Bianchi, highlighted four issues for debate. First of all was the Schmittian distinction between legality and legitimacy, especially in terms of the decision to intervene individually or collectively in sovereign countries. Secondly, the context of the UN Charter provision to outlaw war and the possible need to amend or reform this post-Second World War paradigm. Thirdly, the extent to which international law is equipped to deal with emergency situations, and the instruments at the disposal of the international community to take prompt action. Finally, whether and if so to what extent the international community can be said to be characterized by a commonality of values.

The first panel speaker was Dr Cornelio Sommaruga, member of the International Commission on Intervention and State Sovereignty (ICISS). He pointed out that humanitarian action is first and foremost protection, assistance being a tool for protection, and underscored the conceptual innovation of the report in question. To replace the traditional concept of "humanitarian intervention", the report puts forward the concept of the "responsibility to protect", and in place of the "right to intervene", it sets out the responsibility to act if a sovereign State fails in its duty and to help rebuild failed and failing States. The report stresses the responsibility to prevent — to prevent inaction or unilateral pre-emptive action that does not address the medium and long-term consequences. More specifically, with respect to humanitarian action, the idea of the Commission is to shift from a certain cult of immunity to international legitimacy: at the centre of this new approach is a broader concept of security — human security — that encompasses not only military security (extended to include interventions directed against both actual and anticipated effects of State action) but also securing life, dignity and fundamental freedoms of the human person, all of which are best guaranteed by sovereignty. However, grounds for a "just cause" do not include racism, discrimination or the overthrow of democratically elected governments. Any military intervention must also fulfil the criteria of proportionality and of a "reasonable prospect of success", namely a realistic transition from the combat to the post-conflict stage in order to alleviate suffering and to reconstruct the war-ravaged State. To be effective, all these changes require something like a code of conduct for the wielding of veto power within the Security Council. The overriding aim must be the effective protection of the human being from domestic as well as international atrocities, in an effort to match reality to rhetoric.

Professor Georges Abi-Saab (HEI) made five remarks concerning international law:

(i) A strictly legal principle or rule regulating "humanitarian intervention", now allegedly in the process of revival, never existed before the UN Charter. This is because, at least until the Kellogg-Briand Pact of 1928, the prevailing doctrine was the "theory of indifference", i.e. that international law was "indifferent" to, hence does not prohibit, resort to war. "Humanitarian intervention", as a doctrine, pertained to the rhetoric of political and moral justification for exercising a legally non-prohibited faculty, i.e. resort to war in certain situations.
In contrast the UN Charter, in its Article 2.4, has decreed a comprehensive prohibition of the individual use of force (whether by one or more States), except in self-defence, but leaving aside collective action in the name of the international community, which is a totally different matter. If there is one principle or rule of contemporary international law of which the peremptory or *jus cogens* character is universally recognized, it is this rule. This means that there is no way of modifying it (for example by introducing a new exception to it), except by establishing "a subsequent norm of general international law having the same character", i.e. a norm which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". This condition is well nigh impossible to fulfil, particularly for the introduction of a new "humanitarian intervention" exception.

(ii) The term "intervention" is often loosely used, particularly by American writers, as synonymous with the use of force. But "intervention" can also be by other means, economic, political or even legal, as long as they amount to trespassing on what is by international law an exclusive jurisdiction of the State. This is the sphere of "domestic jurisdiction" or the defensive representation of sovereignty. But sovereignty is not static, and whatever matter the State consents to subject to an international obligation is no longer a matter of domestic jurisdiction. Human rights are the prime example of such an evolution. Thus, intercessions by States and international organizations in the case of human rights violations do not constitute acts of intervention. This does not mean that States can individually resort to force in the name of human rights, in disregard of Article 2.4 of the Charter. But what States cannot do individually, they may be able to do collectively in the name of the international community, through the mechanisms of the UN.

Indeed, not all use of force constitutes "intervention". For in addition to self-defence (an exception to the individual use of force), the Charter provides for collective measures, which are coercive measures and which include military means. But to regulate their use the Charter has taken the precaution of centralizing the decision-making process in the hands of the Security Council, at three separate stages, through all of which it has to pass: (a) a decision in the form of a "finding" or a "determination" that there is a "threat to peace, a breach of peace or an act of aggression..."; (b) a decision on what measures need to be taken to face up to it; and (c) a decision as to the "means of execution" of these measures, either by using the UN's own resources (which never materialized), or by giving mandates to member States or regional organizations.

(iii) In the post-Cold War euphoria of the early 1990s, the Security Council adopted a broad interpretation of "threats to peace" to cover humanitarian emergencies, thus opening the way for it to take "collective measures" in such situations.

However, towards the end of the decade a widespread perception of a renewed paralysis of UN mechanisms allegedly led the North Atlantic Treaty Organization (NATO) to intervene in Kosovo outside the UN framework. Hence the dilemma cited by Kofi Annan in his speech to the General Assembly on 20 September 1999 in the wake of that crisis, and of which he said that it "(...) must not be between Council unity and inaction in the face of genocide — as in the case of Rwanda (...) and Council division, and regional action, as in the case of Kosovo". But this is a false dilemma, if one goes by those two examples. For what was lacking in Rwanda was not the possibility of authorization by the Security Council, but the political will of member States to commit troops for collective action. Conversely, in Kosovo the possibilities for negotiations were not exhausted before resorting to unilateral action. And in any case, if the Security Council was blocked, there remained the untried possibility of going to the General Assembly under the "Uniting for peace" resolution.

(iv) The ICISS Report entitled *The Responsibility to Protect* has much to commend it, inasmuch as it seeks to enlarge the scope of collective action through proper UN channels by placing emphasis on prevention and peace-building and on recourse to the General Assembly if the Security Council is paralysed. It would, however, be highly objectionable if it is meant to be an "intervener's chart" — as it appears from

the outside — in that it does indicate two cases (large-scale loss of life or ethnic cleansing) providing "just cause" for military intervention, which seems to include individual use of force by one or more States and without UN authorization.

(v) But what is wrong with using force, even without UN authorization, in order to avert or halt such atrocities? It is intervening in the name of humanity, while refusing to submit to the UN's judgment and evaluation as to the existence of a humanitarian emergency and the need to resort to the extreme measure of use of force in order to face up to it. If the Security Council is blocked by the veto, the General Assembly is more open and much more representative of humanity. But if two thirds of the Assembly does not view a situation as a humanitarian catastrophe, how can anyone still claim that a reason exists to intervene militarily without being highly suspect of pursuing personal interests in the guise of serving humanity?

Prof. Keith Krause (HEI) also stressed the idea that sovereignty is an elastic, dynamic concept because inalienable individual rights hold supreme sway and national sovereignty is a conditional state conferred by the international community. Furthermore, a purely legalistic approach ignores important legal norms and processes, raising the question of who can speak in the name of the international community: if neither a single individual State nor the UN Security Council are the universal guardian of human rights, then this role falls perhaps to a "minimum coalition of the willing" to vouchsafe multilateralism and intervention. Even if it is clear from practice that there are no generally accepted rules of intervention, military action cannot be ruled out, on condition that it is accompanied by a willingness to foster human rights and build institutions, involving both the local population and the international community. Such actions represent State-making and reflect a larger-scale process of social engineering, creating new dilemmas. On the whole, there are no viable principles of non-intervention and interventionist practices evolve as part of the larger Westphalian liberal project on how States should treat their citizens and those of other countries.

Discussion

In the course of the discussion, questions mainly related to three subjects:

(i) Can particular cases enable us to derive general principles and, if so, what principles? This is particularly pertinent in the aftermath of 9/11, when case-by-case decisions have been replaced by the overriding

campaign of the so-called "war on terror" and by the new doctrine of pre-emption.

(ii) Is the relation between national sovereignty and individual rights a genuine tension or a false dichotomy?

(iii) Intervention and UN decision-making processes:
- With or without the consent of local authorities?
- Who authorizes and conducts interventions, especially in the light of the increasing privatization of actions?
- If vital interests of UN Security Council member States are at stake, they should abstain, according to the UN Charter (Art. 27.3), but this has never been practised; changes to veto-wielding powers should therefore be considered, which an enlarged Security Council would make even more complex.

In their replies, the panel members agreed that there is no simple solution to the question of intervention. Some considered that the main challenge is to reconfigure authorized interventions by way of including the UN General Assembly and the country concerned by the intervention. This is crucial, since within the General Assembly national interest cannot lead to a veto, unlike the Security Council where, for example, China vetoed the prolonging of the UN mandate in Macedonia because the latter had recognized Taiwan. It was suggested that a veto which thwarts a peremptory norm of international law should not be considered valid. The General Assembly might not be perfect, but no other single organization or system of rules is superior: legitimacy requires rules, and organizations like NATO do not command universal respect but instead are seen as defending the narrow self-interest of the major former colonial powers. There was disagreement on "unilateral" interventions. While some supported member States taking action if the Security Council fails to act, others made the point that the Security Council fails to act in the majority of cases, making such an exception nonsensical.

Multiple tasks and multiple faces of assistance

In session two the chair, Prof. Andrew Clapham (HEI), opened the discussion by noting that the military is increasingly being asked to do things in the humanitarian arena which it is ill-equipped to do. To clarify roles, it must be asked what sort of mandate should be given to international and non-governmental organizations. Furthermore, by entrusting the UN with multiple tasks in the face of complex emergencies, are we issuing a mandate that is impossible to fulfil?

In this session, the focus was on the nature and operation of assistance. One of the most fundamental problems is a confusion of tasks: both military and civilian institutions engaging in humanitarian assistance are being asked to assume responsibilities they are neither supposed nor qualified to perform. Four participants in such activities can be distinguished: the UN, national governments, the International Committee of the Red Cross (ICRC) and non-governmental organizations (NGOs). Perhaps more than any other participant, the UN faces multiple tasks, which amount to multiple and frequently conflicting mandates:

(i) authorizing the use of force;
(ii) peace-enforcement under UN authorization;
(iii) peace-keeping under UN mandate;
(iv) arranging for humanitarian assistance during and after conflicts;
(v) imposing sanctions and organizing aid programmes (e.g. "oil for food"); and
(vi) overseeing reconstruction.

Lead Speaker: David Rieff, Journalist, New York Times Magazine

There are manifold grounds for scepticism as to the feasibility and purpose of humanitarian assistance in armed conflict. First of all, if there is no genuine commonality of values, then the very existence of the international community is questioned. This is not to deny the existence of an international order (dominated by the United States of America (US) and the Bretton Woods institutions) and of international structures (above all the UN), but organizations like NATO illustrate the absence of common values. Secondly, if there is no genuine international community, then it is either impossible or impracticable, or both, to match rhetoric to reality because the question is: "whose" rhetoric? "Whose" reality? Thirdly, there is confusion in the very term "humanitarian intervention", for "intervention" is equivalent to war, whereas "humanitarianism" is about alleviating suffering (referring to the fundamental principles of the ICRC and *Médecins sans Frontières* (MSF)).

Fourthly, humanitarian action ought not to be part of some grand global project but instead more modest and limited. Like other "master ideas", humanitarian assistance risks being hijacked by some completely different agenda. Either agencies like the United Nations Development Programme (UNDP), which focus on development aid, have also engaged in humanitarian relief but with objectives altogether different to those of the

ICRC or MSF; or bellicose democracies like the US have reclaimed humanitarian action, only to outsource and subcontract actual operations to private, multinational companies, as both the State and the market view the humanitarian sector as a lucrative business. One of the main problems is that most funding originates from States, which resort to humanitarian assistance as a preferred form of justifying military interventions, in other words a form of "soft power".

All these trends leave humanitarian assistance exposed to the twofold assault by States, which have reined in the independent players, and by corporations, which compete with humanitarian organizations for government funding and contracts. But humanitarian assistance has also suffered from misguided expectations on the part the "humanitarians" themselves, who have moreover given in to the new ideology of the human rights' movement that has acted like a quasi-colonial power. Conclusion: humanitarian assistance should refocus on its original mission.

Panel presentations

According to Agnes Callamard, an independent consultant on humanitarian and human rights affairs, Rieff's diagnosis of the humanitarian sector is broadly correct, but there are different explanations and perspectives. While it is true that a tendency away from the original mission of relief aid to human rights activities has indeed occurred, it is also true that the debate on how to recover the original mission is largely self-referential. For instance, the dominant message of the heroic Western intervener saving the lives of hapless victims has not been challenged. Yet it sustains images, jargons and practices that borrow heavily from the military sector and is both problematic and inappropriate to address the present and current challenges confronted by humanitarian agencies. The call for reclaiming humanitarianism is not being associated with the beneficiaries of humanitarian assistance or the crisis-affected communities, as subjects of the humanitarian universe. Yet the nature of the relationships between the relief organizations and disaster-affected populations and their perceptions of each other are central to humanitarian actions and to redefinition of the humanitarian ethos. Instead of taking its moral cue from those suffering and surviving crisis situations, as suggested by Hugo Slim, the humanitarian ethos remains defined through and by one single player: the intervener.

With the events surrounding 11 September 2001 and the US-led intervention in Iraq, this *modus operandi* is no longer tolerated. Humanitarian crises have been exposed as eminently muddy and political. This exposure

has involved lifting the veil of the independent, technically superior, neutral and compassionate intervention that humanitarian players had taken great care to draw over their actions. With 9/11 in the background, the veil has been replaced by the cloak of the "dangerous other", with the other being largely defined as anyone who does not look, think or act like oneself.

The humanitarian machinery is not geared to this context. It is still functioning on the assumption that disasters and emergencies are something on the margins of human existence, divorced from "normal" life, and that there are, somewhere far away, helpless victims in need of a heroic (Western) intervener. The humanitarian system is still clinging to the compassionate veil in a fashion that has become increasing self-referential.

Missing from the current soul-searching exercises is the actual engagement with the meaning and praxis of accountability. Humanitarian agencies can no longer assume their moral duty unilaterally. Instead, those affected must be genuinely involved in shaping the contours of the humanitarian response, mutually and reciprocally. Failure to do so brings into discredit any morally justified enterprise, including the humanitarian one.

The humanitarian sector has reached such a stage. It must find ways to function outside an imperialist benevolent model, or else it will confront increasing levels of intolerance against humanitarian action and deadly attacks.

Dennis McNamara, Inspector General at the Office of the United Nations High Commissioner for Refugees (UNHCR), corrected what he took to be a number of misperceptions. First of all, UNHCR has had multi-functional tasks since its creation in 1951, and not just recently. Neither the mandate nor the ambition has expanded; what has expanded is the sheer scope of needs in terms of refugees, displaced populations and victims of war or of natural disasters. Secondly, what has also changed significantly is not the aspiration, but the political and security context in which humanitarian assistance operates, since the work in conflict areas today is utterly different on account of the change in the technological nature of warfare. Thirdly, while independent organizations have always been easy targets, the most serious failure has been that of State responsibility, both individual and collective.

This is not to say that the UN system is not problematic, but it is to say that it reflects the problems of the international system of nation-States. Fourthly, the single biggest obstacles to effective humanitarian assistance are the simultaneous militarization, politicization and privatization of humanitarian action, which have destroyed much of the independence of the humanitarian sector and undermined efforts to establish minimum

benchmarks for intervention. These three phenomena have also produced the wrong sort of division of labour, where the military, rather than effectively securing a post-conflict situation, are requested to help rebuild the country and assume policing activities. A degree of political realism is needed so that conscious decisions about when the military should not be involved in humanitarian work may be made.

Prof. David Sylvan (HEI) argued that any fears of over-politicization are misplaced. The notion of humanitarian relief is inherently political and should be responded to as such. Moreover, given the scale of the problems and the thin dividing line between "humanitarian" problems and "normal" problems of hunger, disease, etc., the only solution is to governmentalize the problem via some kind of State-like action at the international level. An analogy may be made here with the failure of humanitarian organizations at the domestic level in the nineteenth century. The one thing those organizations did then was to put the issue on the agenda for State action, and the one thing that humanitarian relief agencies can do now is to put the issue on the agenda for State-like action and thus, in effect, to propagandize for their own incapacity.

Discussion

The questions and discussion were concerned with four key topics:

(i) the politicization of humanitarian assistance;
(ii) the militarization of humanitarian assistance;
(iii) the privatization of humanitarian assistance; and
(iv) the need to "governmentalize" humanitarian assistance.

One point that was repeatedly made was the importance of striking the right balance between different tasks, military or civilian, idealistic and pragmatic. The main challenge for the humanitarian sector is and remains how to escape the trap of either being co-opted or becoming irrelevant — for instance, the UN serving as some "after-sales service provider to the US". There was strong disagreement as to the best way forward. While many maintained that a return to more exclusively humanitarian activities was necessary (leaving to others the public advocacy of human rights and issues of nation-building), others contended that there is a vast silent majority of peoples across the globe who agree with aid and the underlying liberal values.

The bone of contention was whether the dominant political and economic model — in short, neo-liberalism — constitutes a viable and desirable vision for those in receipt of aid, and whether there is not a risk of utter self-

complacency. So the point of stripping back agencies to their original mission is to engage in emergency relief aid, not in some grand ideological project; to specialize in what they are most competent at, and not to run after donors' aid. The problem is the structure of funding: because the European Union (EU) and the Europeans have backed away, UNHCR depends increasingly on one donor and is therefore subject to huge political pressures. Another problem lies in the mix of motives on the part of the military involved in humanitarian missions; while the military may be used to provide security for humanitarian organizations, this should not be under the cover of "winning hearts and minds". On the other hand, it was argued that the dichotomy between power and principles should not be too sharply drawn, and that most military actions are a combination of striving towards a higher goal and of physical coercion.

To the question whether there are any successful examples of humanitarian assistance, it was suggested that Sierra Leone and Mozambique could be seen as such and that it is essential not to confuse political, military and humanitarian crises. Afghanistan and Iraq are by no standards humanitarian crises, but Darfur in Sudan is. In terms of funding, it is the member States that are calling the shots: funding determines work, so Africa is being neglected because there is a clear lack of willingness on the part of the donor governments.

To the question as to what, if any, legal principles could guide humanitarian aid, some panellists responded that principles are preferable to discretionary action, but the fact is that there are not as yet any well-defined, circumscribed norms, except for the fundamental principles of the International Red Cross and Red Crescent Movement. The crucial challenge is to devise norms that are not self-referential and also to unpack principles such as independence and neutrality to test how they should function in real life situations, e.g. when negotiating access. However, other panellists questioned the inherent link between emergency relief aid and legal norms and principles. They advocated instead a new pragmatism that breaks with the new human rights idealism and puts pressure on national donor governments in such a way that they do not spend their entire funds on political and military crises (like the United Kingdom on Afghanistan and Iraq), but redirect their efforts to more traditional emergency relief and development aid.

Address: •International criminal law and humanitarian assistance

Judge Theodor Meron (President, International Criminal Tribunal for the former Yugoslavia)

There has been tremendous progress in the evolution of institutions, rules and practices in international criminal law in recent years. First of all, 1993 saw the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), which today is composed of 14 permanent judges, 9 *ad litem* judges and an Appeals Chamber. Similar tribunals have been set up for international crimes in Rwanda, Sierra Leone and Cambodia, etc. The development of the international criminalization of humanitarian law (IHL) has strengthened humanitarian assistance, for example, by criminalizing the prohibition of starvation and by imposing limits on States' ability to refuse humanitarian aid. The Rome Statute of the International Criminal Court (ICC) has been a most important development in this regard. It builds on the customary law of the Geneva Conventions and other efforts to prevent humanitarian workers from being the target of attacks. Such attacks on the UN, the ICRC and the civilian population inevitably weaken respect for humanitarian law and provide a pretext for parties to derogate from obligations under IHL. Indeed, since 1992, more than 210 UN personnel have been killed and more than 260 kidnapped.

From the perspective of international criminal law, one of the main difficulties is to define what humanitarian assistance is. While there is debate at the margins, it is possible to define it as a set of efforts aimed at providing supplies that are essential to survival. Humanitarian assistance generally involves some kind of transfer of aid from the occupying power to the occupied population. This aid is administered in emergency situations, frequently by NGOs, and the beneficiaries are civilians. A second difficulty is to define who is a target of attacks. Article 8 of the Rome Statute, which lists the war crimes over which the ICC has jurisdiction and was drawn up in the wake of experiences in both Somalia and Sudan, includes the crime of "intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace-keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict". The ICC will have to decide which missions will fit in with the definition of "humanitarian assistance". Although certain protections already exist for UN personnel and humanitarian workers in

existing treaties, this provision clearly provides the basis for the prosecution of persons launching such attacks. It is also the first instrument to protect relief personnel in internal conflicts. The Statute for the Special Court for Sierra Leone has a similar provision. Taken together, these instruments indicate a general consensus that deliberate attacks against humanitarian assistance missions constitute a war crime.

Furthermore, the deliberate starvation of the civilian population is also a war crime under the Rome Statute, including wilfully impeding relief supplies as provided for under the Geneva Conventions. However, what is disappointing is the fact that this provision applies only to international conflicts. Despite international condemnation of that practice, it remains a war crime only when committed during an international armed conflict. Such behaviour may nonetheless be prosecuted when committed during an internal conflict if it amounts to genocide or a crime against humanity.

In terms of the crime of genocide, it is increasingly being accepted that starvation may fall into the category specified by Article II(c) of the Genocide Convention, which defines genocide as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The cases before the International Criminal Tribunal for Rwanda (ICTR) concerning *Akayesu* and *Kayishema* seem to support this view. Therefore, attacks on humanitarian missions could be considered as acts of genocide in internal conflicts, provided the requisite intention can be proved. Often, however, such attacks have other motivations, such as trying to weaken the resolve of international organizations or terrorizing international workers. But the criminalization of the behaviour is tied to the intention towards the beneficiaries. In any case, an excessive invocation of genocide will only serve to devalue the concept.

It may also be argued that attacking humanitarian workers could amount to a crime against humanity under Article 7.2 (b) of the Rome Statute, which provides that "'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Here the crime is not directly harming humanitarian missions, but harming the beneficiaries of such aid. While there is no need to prove the intention of destroying a particular beneficiary group in whole or in part (as for genocide), there is a need to show that these conditions were calculated to destroy a part of the population.

In terms of protecting humanitarian assistance workers, it is true to say that criminalization does not solve the problem of attacks on such workers. Beyond international criminal law, what is needed is a renewed commitment to international ethics and notions and practices of chivalry in belligerency, e.g. by removing any international and national political and cultural barriers and thereby also some of the cultural or religious legitimacy for such acts. By treating those who commit such attacks as war criminals, the international community will be reaffirming the work of the UN and the ICRC as a matter of law and morality.

Humanitarian assistance, criminal law enforcement and human rights

The chair, Prof. Vera Gowlland (HEI), raised various key questions at the beginning of the session: what do we mean by humanitarian assistance? What kinds of assistance are we talking about? Should the question be looked at from the point of view of State responsibility vis-à-vis humanitarian assistance?

Lead Speaker: Prof. Louise Doswald Beck (HEI)

This topic may be approached from the perspective of the responsibility of the State with regard to the armed conflict on its territory and the responsibility of third States. In both IHL and human rights law, there is a requirement for States to ensure that their populations are provided for. This obligation covers both the direct provision of humanitarian aid and receiving it from outside sources. A question that arises therefore is: has the international community shifted responsibility by passing resolutions in multilateral fora insisting on the provision of humanitarian assistance by humanitarian organizations?

In terms of IHL, obligations exist for the provision of medical treatment to both the military and civilians, and of food and water to the civilian population. Intentional starvation of the civilian population was traditionally not seen as a major problem. In 1977, at the Diplomatic Conference, delegates decided to improve the law so as to counter this method of warfare. Additional Protocol I accordingly prohibits deliberate starvation, including deliberately destroying supplies, and also obliges States to grant access to relief supplies, subject to security conditions. Starvation is similarly prohibited in Additional Protocol II, although there is no provision in it stipulating that access must be allowed to relief supplies. It is generally accepted that these new rules have become part of customary law. The UN has some

practice of criticizing methods of warfare that result in starvation, but has passed a very large number of resolutions criticizing States for not giving access to relief suppliers, including in non-international armed conflicts. This practice indicates that such a rule (that States must allow the supplying of relief) has become a part of customary international law.

Under human rights law, certain derogations are possible in times of pubic emergency. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) makes it clear, however, that the right to life is non-derogable. Human rights bodies have taken this right to include not only the prohibition to kill, but also the obligation for States to undertake positive measures to protect life. The prohibition of inhuman treatment is also non-derogable, and has been interpreted as covering the withholding of treatment from detained persons. However, the most relevant instrument is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which does not provide for any derogations whatsoever. This covenant requires every State party to take steps to achieve progressively the full realization of the rights recognized therein, including the right to food and the right to health. While States remain reluctant to accept their obligations, despite their treaty character, a committee was set up in 1985 which receives State reports and adopts General Comments to give specific content to the obligations under the covenant. In this regard, General Comment 3 stated that some rights must be immediate, such as the right to non-discrimination. Furthermore, if any group of persons are deprived of fundamental rights, this constitutes a *prima facie* failure of the State to respect its obligations. By intimating that States must use "all available resources" to fulfil their obligations under the covenant, the need for States to accept relief supplies is reinforced.

General Comment 12 concerning the right to food lays down that States must not prevent people from getting food by their own efforts and contains an obligation to facilitate access to food, thus mirroring the obligation in IHL. If persons are unable to obtain adequate food, States must ensure that it is provided directly. A distinction must be made between a genuine inability of a State to fulfil its obligations and an unwillingness to do so. By refusing aid from the international community, a State would be seen as being unwilling, rather than unable, to fulfil its obligations under the covenant and could be held responsible. General Comment 14 on the right to health highlights the need to have health care available without discrimination and the obligation to respect this right, and thus not deliberately prevent people from having access to such care. From this, the rule can be

derived that States must not use nuclear or biological weapons in armed conflicts and must not restrict access to medical care, as to do so is a violation of IHL. It also implies that States must allow relief organizations to provide health care.

Is there a duty for non-belligerent States to provide humanitarian aid under IHL? No such rule would appear to exist in treaty or in customary law. Common Article 1 of the Geneva Conventions requires all States parties to respect and ensure respect for the rules contained therein, but this generally means that States must endeavour to ensure that other States do not violate their obligations. Under the Rome Statute, the International Criminal Court has jurisdiction over the war crime of wilfully impeding relief supplies, but only when it is committed during international armed conflicts. However, a serious violation of IHL is deemed to be a war crime, and Security Council resolutions condemning such acts would seem to show that this behaviour, whenever committed, is such a serious violation. Under the principle of permissive universal jurisdiction, therefore, any State could indict someone for not allowing such relief. The question of whether a person from a third party State could be held individually criminally responsible for not allowing the provision of aid remains a question for discussion. There does seem to be a lack of clarity about third States' obligations in terms of humanitarian assistance. The inability of victims to make individual petitions under ICESCR is another weakness in the enforcement of humanitarian obligations. So in short, there is a gap between the internationally recognized duty to provide relief in both international and national conflicts and the effectively enforceable duty of care on the part of third States.

Panel presentations

According to Jelena Pejic (ICRC), it would appear that recent events have led to a blurring of the distinction between the law regulating recourse to force (*jus ad bellum)* and that governing the way in which force is used *(jus in bello)*, in the sense that the perceived "justness" of intervention has sometimes led to the *de facto* suspension of human rights law or to the "relaxing" of certain obligations under international humanitarian law (IHL). It should be made clear that, despite any moral justifications for intervention, once armed force is used IHL becomes fully applicable. With regard to the debate on humanitarian intervention, she remarked that at the latest International Conference of the Red Cross and Red Crescent, a reference to the concept of human security was removed from the draft declaration because some delegations felt that the concept could be stretched to include the right of humanitarian intervention,

which they opposed. Referring to the "back-to-basics" approach advocated by some participants, she said that it is important to know exactly what it means in terms of law, mandates or guiding principles. If it refers to international law, then it is ill conceived because it seems to suggest that the law is sufficient as it stands. If it refers to mandates, it is not clear how international regulation of NGO mandates would affect the mandates of existing organizations. Moreover, the "back-to-basics" approach seems to advocate a reductionist view of the ICRC's mandate as encompassing just basic protection and assistance. The mandate of the ICRC, however, is not based solely on the Geneva Conventions or the Additional Protocols, but also on the Statutes of the Red Cross and Red Crescent Movement, including the important Article 5, which provides the organization with a "right of initiative". If the said approach refers to the guiding principles of the ICRC, then it is equally ill conceived, because only the principle of impartiality is laid down in the Geneva Conventions. Other fundamental principles such as neutrality and independence are principles of the Red Cross and Red Crescent Movement. Not all organizations working in conflict zones are neutral and not all should be so. It is therefore not advisable to lump all humanitarian organizations and human rights and development agencies together.

In fact, what recent events and legal developments demonstrate is that the two crucial issues are enforceability and political will. In order to ensure compliance with IHL outside of the criminal realm, there are three types of rules which parties to a conflict should abide by: (1) preventive rules (for example, complying with the rules of the conduct of hostilities so that the due distinctions are made between civilians and the military, including preventing forced displacement and protecting the environment and civilian objects); (2) rules on humanitarian assistance (if the preventive rules are not successfully applied) such as providing relief for the civilian population and ensuring the security of humanitarian personnel; and (3) individual and collective relief for persons in the power of a party to the conflict, whether interned or detained. Importantly, the ICRC Study on Customary Law of IHL is likely to show that the rules governing the provision of relief are practically the same in international and non-international armed conflicts. Criminal law is unlikely to be the best way of enforcing IHL because it is always an *ex post facto* measure. More needs to be done to ensure compliance during armed conflicts.

It appears that the problem of enforceability of IHL lies less in a lack of mechanisms than in the lack of political will to utilize existing instruments. A new mechanism, such as a commissioner or commission on IHL to hear

individual complaints of violations thereof, has been suggested. But it may be asked why such a new mechanism would be any more successful than existing ones, such as the International Fact-Finding Commission, which is in danger of falling into abeyance. The real question, therefore, is how can political will be generated in this regard?

Prof. Marco Sassoli (University of Geneva) argued that there continues to be a primacy of State consent and State action notwithstanding innovative interpretations of international legal provisions. Although international customary law can overcome the need for State consent under treaty law, can custom be created simply by the practice of States passing resolutions in the face of State inaction on the ground? The selectivity of State support for rules of IHL undermines its credibility. At the criminal level, even though international customary law has eliminated *de jure* absolute State sovereignty, States do not follow suit and are thereby undermining the *de facto* application of the universal jurisdiction already in place. In the case of Switzerland, for instance, prosecution on grounds of a violation of international criminal law can only take place if there is a genuine link between the person in question and Switzerland; since a recent change in legislation the mere physical presence on Swiss territory (e.g. consulting one's banker) is no longer sufficient. Similarly, Belgium has been forced to amend its law on universal jurisdiction, and Spain has reinterpreted its legislation to limit what was universal jurisdiction to passive personality jurisdiction. The International Criminal Court (ICC) is symbolically important, but to really get results in international criminal law, national prosecutions are vital.

Criminalization may facilitate the return to peace in countries recovering from conflict by individualizing the punishment of wrongdoers (and thereby avoiding collective punishment resulting from sanctions, for example). However, it is equally important to stress that criminalization is not a miracle solution and represents only one response to socially violent behaviour. This is because, first of all, criminalization only ever has a preventive effect if the probability of being caught and prosecuted is high, which currently it is not. Secondly, the perception of legitimacy of the prosecuting forum is essential in the society of the accused. The ICC is an important step in this regard. The ICTY, for example, enjoys little legitimacy in the eyes of many in Belgrade and therefore has little effect within Serbian society. The ICC needs to stand as a symbol of international justice, while national courts do the actual job of prosecuting.

In a similar vein, Nicholas Howen (International Commission of Jurists) claimed that there is a need in the present environment to reaffirm

basic principles and to reject pragmatism with regard to "how much" human rights law and IHL should be respected in a given situation. In particular, he drew attention to the specificity of military justice (which Clemenceau had defined as that which is to justice what military music is to music). The main problem with military justice is the absence of independence and impartiality of the process. Furthermore, in relation to the revelation of abuses by US soldiers and private contractors in Iraq, it could be seen that traditional human rights checks and balances from the moment of arrest, right through to detention and trial or release, are being ignored. Although there is a well-formed body of human rights standards, the current approach is to pick and choose, thereby elevating exception as the new rule. Such an environment makes situations such as the mistreatment of prisoners in Iraq much more likely to occur. Respecting fundamental human rights standards, such as the right to habeas corpus and guaranteeing detainees' access to the outside world, would reduce these kinds of risks. The pragmatic approach to human rights which says that a little bit of human rights is sufficient is ill-advised and legally wrong; while IHL may modify human rights during armed conflicts, it does not suspend them; they continue to apply.

Discussion

The discussion concentrated on the usefulness of the "back-to-basics" approach and on the division of duties and tasks between organizations that deal with human rights and those that deal with humanitarian assistance. Many humanitarian organizations are taking on human rights issues because they are attractive to donors. The problem is: how can an organization be impartial and humanitarian if it is also reporting on human rights violations and taking political sides? On the other hand, human rights organizations want to be become humanitarian because everything is becoming contractual. Hence the autonomy of all players is being curtailed by the nature of donations, which nowadays tend to be short-term contracts rather than long-term grants. A further question is whether international public or international contractual law might be effective alternatives to hold non-State players accountable. Most panellists argued that war is simply becoming too fashionable and that State compliance with international law is becoming increasingly selective. If States lose sight of the fundamental rule prohibiting recourse to the use of force, the rest is "just window-dressing".

What is needed, therefore, is to strengthen both the individual right to petition and international tort law to hold private contractors accountable for their acts. More specifically, among alternative law enforcement mechanisms

there are provisions in public international law, due diligence rules and laws that regulate the delegation of State responsibility to private contractors. It was also stressed that Security Council resolutions granting immunity to troops and private contractors are a serious step back in efforts to secure human rights and humanitarian assistance through international legal provisions.

On the question of operating procedures, it was asked whether the ICRC should review its working principles (especially confidentiality) in view of the fact that the mistreatment of prisoners in Iraq only stopped once the media got their hands on the leaked ICRC report. Furthermore, since the bomb attack on the ICRC in Baghdad, should not the ICRC consider compromising certain principles, like that of not accepting armed escorts, in order to ensure that it can continue working in all environments? To these questions, it was replied that as long as the ICRC feels that results are being achieved through its confidential dialogue with a State party, it will continue pursuing this avenue. Moreover, to have expected the ICRC to speak out publicly only about prisoner abuse in Iraq does not take into account the way in which the ICRC reacts to situations in other detention centres around the world. Regarding security, as a general rule the ICRC would not accept armed escorts, but would contemplate the temporary use of such escorts in very specific situations, such as when its relief operations are threatened by banditry.

Protecting the protectors: the role of the military in humanitarian assistance

The chair, Prof. Victor-Yves Ghebali (HEI), remarked that Somalia provided a paradigmatic illustration of the problem of the military being involved in humanitarian missions, as well as the need for protection in volatile environments. He also underscored the relevance of subcontracting a permanent member of the Security Council to carry out military assistance, e.g. France during the 1994 genocide in Rwanda. Finally, he asked panellists the basic question of whether humanitarian assistance can be or has been prevented by the military.

Lead Speaker: Mark Laity (former Special Adviser to the Secretary-General of NATO and now a consultant to SHAPE, speaking in a personal capacity)

From the perspective of NATO the title of the present subject would be challenged: the protectors are not only the humanitarian workers, because soldiers regard themselves as protectors as well, not least since the end of the Cold War and the change in the nature of conflicts. This change

means that most, if not all, military interventions are also peace support operations (e.g. Bosnia, Kosovo and Afghanistan), at least as far as NATO's interventions are concerned. NATO missions now involve such tasks as the protection of aid convoys and the stabilization of post-conflict situations. This has been a challenge to both NATO and NGOs, some of which had an anti-military instinct largely based on their experience of non-NATO armies. Initially, when western armies first deployed in Bosnia, some NGOs found it difficult to accept them and to work with and alongside these forces. However, mutual experience in the Balkans has changed this; the recognition that the military can often give an added value to the work of NGOs is leading to increasingly good cooperation. This cooperation has come about as a result of pragmatism on both sides and a confluence and continuity of shared interests, e.g. the construction of refugee camps in Kosovo.

However, it is also true to say that the positive climate generated in the Balkans has changed since 9/11 for a number of reasons. First of all, the interventions in Afghanistan and Iraq did not have the same level of international acceptance. While NGOs accepted with reservations that there was a just cause in Afghanistan, there was far more antipathy towards the conflict in Iraq. NGOs cover a huge range of causes and views, and the fact that many were critical of the occupation of Iraq does affect their willingness to cooperate or coordinate with the Coalition. Secondly, the way in which wars are fought has changed. In peace support operations there is an integration of all sorts of different dimensions beyond straightforward warfare, for instance "winning hearts and minds" and including the delivery of humanitarian assistance during and after the hostilities. This blurs the traditional clear-cut lines, and when stabilization and support for the civilian authority is a military task it is simply unrealistic to think that the military should not get involved on the fringes of humanitarian work if such work is part of the mission's success.

A good example is institutions like the Provincial Reconstruction Teams (PRTs) in Afghanistan. These are not traditional military units but have a variety of functions, which may give NGOs the feeling the PRTs are moving onto the NGOs' turf. We do need to respect each other's roles, but in these more complex scenarios we also need an intelligent approach to each other's concerns. Nor should anyone pretend that somehow NGOs are above the conflict. Ideally relief aid should be directed impartially to the victims of conflicts, yet NGOs know that in reality this does not always happen; it can even fuel a conflict when those fighting grab the aid. Sometimes aid has even been given to fighters in order to ensure that aid convoys can pass. On the part of the military, aid may be given benevolently, but in a "targeted"

way to ease political problems, leading to accusations of the politicization of aid. The speaker argued that, however unwelcome they may be, aid did have political dimensions and it was naïve not to realize this.

A further dilemma is that NGOs have an understandable stake in being seen to be independent, yet at the same time require security in order to dispense aid, which raises the question of the nature and extent of military escorts. The UN and NGOs prefer area security to escorted convoys, in order to minimize contact with the military, but in lawless areas such as parts of Afghanistan it is impossible for the military to guarantee area security. Another problem is that in some of the recent conflicts aid agencies are seen by terrorist and extremist groups as being linked with western political agendas and are therefore seen as "legitimate" targets for terrorist groups. In other words, the NGOs' view of themselves as independent apolitical providers of aid and assistance, who are above the conflict, is not accepted by some of those involved in the fighting who do not recognize their neutrality. This is a growing problem. All these tendencies demonstrate the increasing tension between the need for security and the need for independence.

Panel presentations

Michel Arrion (European Commission) explained that humanitarian assistance is a mixed competence, both in terms of national and European policies and between European institutions. The Commission implements a European humanitarian policy, while the EU Member States continue implementing their national humanitarian policy. There is so far no specific legal basis in the various European treaties, so humanitarian assistance has been dealt with as part of external relations and development cooperation, but the new constitution may well provide the desired legal framework within which to organize and implement EU humanitarian assistance. European humanitarian assistance is based on the fundamental humanitarian principles, as defined by a 1996 Regulation. While neutrality is mentioned in the preamble to the Council Regulation on humanitarian assistance, a majority of member States rejected the reference to neutrality in operative provisions, but the draft text of the new EU Constitution finally does refer to this principle. It must be noted, though, that in practice it can be schizophrenic: one and the same European Commissioner would suspend development aid for a developing country, only then to grant humanitarian assistance to the victims in that same country.

However, using humanitarian aid to further political goals is not an acceptable practice. For example, the European Commission objected to the practice of the Coalition forces in Afghanistan dropping pamphlets saying that

aid would be given in exchange for information. Military operations disguised as humanitarian missions are dangerous and ill-advised, confusing the populations receiving assistance and putting the lives of aid workers at risk. Military protection of humanitarian workers should only be provided in a limited manner and only at the request of the respective organization. A reinforced common security and defence policy is desirable, not to create a political, legal and institutional framework for humanitarian interventions but for the sake of a clearer division of labour between different EU institutions. The objective should be to distinguish between relief aid, development aid and long-term solutions to the underlying problems. In this sense, humanitarian assistance should not be seen as crisis management but as ad hoc targeted help that provides essential supplies for the victims of conflicts. The latter are — or should be — the prime beneficiaries of protection. However, a more fundamental question is the nature and operation of donation and funding, which should focus on values of impartiality and neutrality and which should again be long-term commitments.

Colonel Bruno Roesli from the Swiss Army held that the prime role for the military is the establishment, creation and expansion of a safe and secure environment. The planning, management and actual execution of humanitarian assistance should be done by civilian humanitarian agencies whenever the situation allows. Especially at the start of an international intervention, situations may occur in which the integrated coordination of all military and civilian activities, including relief for the civilian population, has to be provided by the military. Such was the case in Kosovo in mid-1999, when KFOR (Kosovo Force, the NATO-led international force in Kosovo) had to contend with a complete breakdown of local law and order and vital civilian infrastructures, and international organizations were only gradually building up their own structures and capabilities. However, this period of military-dominated management should remain the very rare exception. In order to smooth the way for cooperation between military and civilian players in complex emergencies, every effort should be made to bridge the existing culture gap between them. Everyone involved in multinational crisis management and humanitarian assistance is still struggling with the strategic implications of 9/11. Existing guidelines for civil-military cooperation in humanitarian assistance have proved to fall conceptually short of existing and emerging requirements. Rather than trying to formally negotiate new guidelines, which are prone to being already outdated when signed, an institutional, regular and structured civil-military dialogue was advocated.

Hugo Slim from the Centre for Humanitarian Dialogue in Geneva argued that there is inevitable ambiguity between military and humanitarian

players — throughout history people trying to be humanitarian have required the use or protection of armed force, while soldiers have often felt it necessary to carry out humanitarian acts. Secondly, all military forces have humanitarian responsibilities and must take them seriously, which is to say that soldiers should be humane and compassionate in warfare and that they are bound by obligations under the rules of the law of war. He also cautioned against excessively simplistic oppositions and categorizations. There is not only NATO and the West on one side and everyone else on the other side: the players can also be mandated or non-mandated troops, belligerent or entrusted with peace missions; there can be insurgents as well as government counter-insurgents, not to forget the increasing number of private military companies. Other criteria can cut across all these categories.

Moreover, it is indispensable to distinguish the wide range of different roles that all these different players can take on. They include:

(i) area security, i.e. securing an environment and thereby enabling humanitarian organizations to access certain areas;
(ii) close protection of vulnerable groups and humanitarian workers and organizations;
(iii) providing and distributing aid; and
(iv) providing logistics to enable others to distribute aid.

The predominant considerations raised by the question whether to protect the protectors seem to be as follows: motives, legitimacy, competence, perception, and the risks involved in the so-called phenomenon of "cross-dressing". All are complicated by overlapping motives. On the one hand, NGOs have sometimes happily joined with brutal military forces (e.g. Mozambique, Sandinistas in Nicaragua). On the other hand, there are conflicting moral values at work, for instance with respect to insurgency and counter-insurgency. At other times, humanitarian organizations and the military have the same goals, such as providing food, water and shelter.

In his presentation, Balthasar Staehelin (ICRC) argued that in an increasingly polarized world, humanitarian actors face the danger of being both instrumentalized and rejected. The legitimacy of humanitarian actors is linked to their strict adherence to an impartial — and as regards the ICRC — an independent and neutral approach. If humanitarian action is used as a tool to further a political and/or military agenda, humanitarian actors become the target of the adverse party to a conflict. The growing insecurity of humanitarian actors today underlines the imperative need to separate humanitarian from political and military action, not to integrate it! In this light, the ICRC is opposed to concepts such

as the PRTs: they constitute a dangerous blurring of lines where military and humanitarian actors appear without clear distinction and where the delivery of aid is at times made dependent on the local communities' collaboration with war efforts. This violates the principles of impartiality and neutrality and may eventually lead to rejection of humanitarian aid or aid workers.

Humanitarian and military actors should co-exist — clearly distinct — with mutual respect for the respective mission. Military actors play a key role in the implementation of IHL: their compliance with the law leads to a positive impact in humanitarian terms. Also, the creation of a stable and secure environment, arms collection and overseeing demobilisation are all military tasks greatly contributing to improving the situation in humanitarian terms. There may be times when non-military actors are unable to deliver aid and where military actors have to step in. But this should be a last resort since the military are neither trained nor equipped to do so.

The ICRC follows an approach based on its strict adherence to the principles of the Red Cross and Red Crescent Movement. The principle of independence entails that it refuses to be part of the "political toolbox", while the principle of neutrality ensures an ongoing dialogue with all parties to the conflict without blame or fault for political stances being ascribed. Impartiality remains the principle by which unconditional assistance is provided, depending on needs alone.

The war in Iraq can serve as an illustration to show what this concretely meant. The ICRC decided to remain present and operational in Iraq during the war and maintained a close dialogue with all parties including the former Iraqi government. This strictly neutral and independent approach, exclusively centred on the protection and assistance needs of war victims on all sides, enabled the ICRC to enjoy the trust of the warring parties, which was a precondition for many vital operations. To give but one example: in March 2003, when Basra was surrounded by UK troops but the Iraqi governor was still in power, ICRC teams managed to operate across the front-lines to repair the main pumping-stations which averted a major health crisis. Tragically, in summer and autumn 2003, the ICRC suffered deliberate attacks against its personnel and its delegation in Baghdad. It decided nevertheless to stick to its approach which excludes resorting to military protection, even if that meant adopting a more discreet approach including the temporary closure of its offices in Baghdad and Basra to the public. The ICRC security concept relies on its acceptance by and dialogue with all actors of violence in a given context. Where this acceptance is lost, the ICRC strives to restore it. Certain elements are in the hands of the ICRC,

but the overall direction humanitarian action will take may well affect its capacity to resist the vicious circle of instrumentalization and rejection.

Discussion

In the first part of the discussions, the speaker spelled out his view on the role of aid organizations. Asked whether the tension between independence of, and support for, aid organizations is not only at the operational level but also at the strategic level because donor States have an overt political agenda and tailor their funding accordingly, he maintained that the neutrality of all aid organizations is fast being eroded, however much they wanted to preserve it. This even applied to the ICRC despite its continuing firm adherence to that concept, for which it was hugely respected within NATO. He argued that the traditional freedom of NGOs to work in conflict zones depended on everyone involved, including the various factions, accepting the "rules of the game", but that some of the new terrorist and fundamentalist groups did not accept the idea of neutrality and actually targeted aid organizations — he wondered whether neutrality could survive. He also suggested that some NGOs were more political than they liked to admit, with their own agendas sometimes tailored to competing for funds with other aid organizations, which could also lead to a lack of coordination among such organizations. More generally, faced with a question about neutrality and the Western stance towards the Bosnian Serbs, he contended that the ICRC was rigorously apolitical, whereas other aid organizations were less so in practice.

Other panellists challenged this interpretation, arguing instead that political agendas and funding on the part of States have forced aid organizations to compete for funds and to take sides. However, this has not entailed any relinquishing of neutrality, independence or impartiality with respect to their fundamental stance. Maintaining neutrality while needing to "confront the truth" is difficult, they said, but there is no evidence that NGOs are not trying to make the principle work.

There was also disagreement between panellists on whether and, if so, to what extent early coordination in pre-conflict situations can avoid problems of delivering humanitarian assistance in post-conflict situations. Some argued that this is inherently problematic because it takes the conflict almost for granted and makes it quasi-inevitable, never mind the impossibility of planning for highly contingent events. Others, however, held that such coordination can be tremendously helpful, e.g. in the aforesaid case of Basra in Iraq. The question is: what do you discuss and with whom? The ICRC had very productive contacts with both Iraqi and Coalition forces before, during

and after the conflict. The European Commission had also begun coordination talks as early as possible in the lead up to the conflict. What is crucial is confidentiality and trust of all the parties involved. Better organization and coordination between NGOs at this stage would also be helpful.

The problem of the irrelevance of IHL when there is a great disparity between the size and strength of the parties to a conflict was raised. Such inequalities tend to lead to temptation for the weaker side to resort to unlawful methods of warfare, such as perfidy. For guerrillas, strict compliance with the rules of IHL means leaving themselves open to a likely defeat. How are such belligerents to be persuaded to obey the rules of combat? The panel answered that justifications put forward by the weaker parties for recourse to unlawful methods of warfare tend to lapse into arguments based on *jus ad bellum*. Nonetheless, there have been some examples of guerrillas being able to induce the stronger party (the government armed forces) to change policy, for example Hezbollah convincing Israel to leave Lebanon. It was also suggested that the application of Additional Protocol I would solve some of the problems associated with recourse to perfidy. It should also be recognized that guerrillas are increasingly waging wars against civilians, in breach of the basic protection that is the essence of IHL. These unresolved problems with regard to the application of IHL to asymmetrical conflicts highlight the fundamental question of whether armed struggle is always the best means to resolve a dispute.

Sustainable assistance to the victims of armed conflicts and post-conflict nation-building

The chair of the final session, Bertrand Ramcharan, Acting High Commissioner for Human Rights (OHCHR), set out some of the central questions and issues with regard to sustainable assistance to victims and post-conflict nation-building:

(i) the distinction between national capacity and international assistance;
(ii) the need to marshal national capacity;
(iii) the importance of a rallying vision (*vision rassemblante*) for nation-building;
(iv) how should international interest in national scenarios be sustained once a conflict has subsided;
(v) how should assistance be drawn down from core areas;
(vi) how should assistance needs be monitored as the situation evolves;
(vii) how should humanitarian imperatives be sustained in the face of dwindling resources.

Lead Speaker: Alvaro de Soto (UN)

De Soto argued that humanitarian assistance and nation-building are — or at least should be — unrelated and that it is preferable to speak of post-conflict peace building, rather than nation-building. This has been UN policy at least since the 1992 report *Agenda for Peace* on enhancing the UN's capacity for preventive diplomacy, peace-making and peace-keeping. This report defines peace-building as a "set of activities with view to ensuring that a conflict will not recur". In practical terms such activities include, at their core, the building up of civilian institutions so as to ensure that channels are provided for addressing grievances that in the past have led to armed uprising or confrontation. Many if not most internal conflicts arise because of authoritarian or exclusionary policies.

However, the inclusive approach advocated by the UN can create clashes, to the extent that some objectives directly conflict with others. For instance, in the case of El Salvador, the International Monetary Fund (IMF) and the World Bank (WB) helped design stabilization and structural adjustment programmes that involved substantial cuts in public spending, the lowering of public deficits as well as the restructuring of national debt. Yet at the same time, effective peace-building required higher public expenditure, *inter alia* by way of "soft loans".

Whatever the problems may be, it is clear that there is no genuine alternative to an approach that includes all players on which viable settlements rely, as evinced by the relative success of this approach in post-conflict situations as varied as Guatemala, Bosnia and Kosovo. For instance, the proliferation of players in Bosnia's post-conflict scenario inspired the "4-pillar" solution in Kosovo. One of those pillars in Kosovo was humanitarian assistance, which was not formally part of the post-conflict settlement in the core sense of reintegrating former combatants and creating an institutional framework to mediate future tension. During the negotiations over the reunification of Cyprus, the UN brought in the IMF and potential donors to show the Cypriots that the international community would be there for them should the settlement go forward.

The point is not to confuse humanitarian assistance and peace-building, but to concentrate on specific needs at particular moments in time: the first step is to involve the international community in terms of conflict prevention, which continues to be radically insufficient in both nature and scope. Secondly, if there is a situation of internal conflict or inter-State war, there is of course no alternative to humanitarian assistance. But this assistance is in no way part of the same settlement or toolbox as peace-building and

reconstruction. The reason is that the effectiveness of humanitarian assistance is not as dependant on inclusiveness, consensus and common values as peace-building. The latter is always some form of social engineering, requiring a consensual approach that brings in all relevant players and also requiring political direction. Referring to Isaiah Berlin, Alvaro de Soto remarked that not all human values are necessarily convergent, and that it is therefore a matter of political choice which values to adopt, defend and promote.

Panel presentations

In her presentation, Esther Brimmer, Deputy Director of the Centre for Transatlantic Relations, Johns Hopkins University SAIS, focused on four issues:

(i) the multifaceted dimension of sustainable assistance;
(ii) transatlantic relations and sustainable assistance;
(iii) post-conflict conduct and legitimacy; and
(iv) recovering conflict prevention.

First of all, regarding sustainable assistance, she argued that early planning and provision of funds are absolutely central to the outcome. This is because economic and social needs begin to arise early in conflict situations, when it is infinitely more difficult to devise strategies. Assistance, if it is to be sustainable, requires funding at an appropriate level: for instance, US funding for Afghanistan was a priority in 2002, but there were no provisions for it in the 2003-2004 draft budget until Congress forced the Bush Administration to redeploy funds. What this also highlights is the importance of continuous political support and the right division of labour: who does what and when. At least two key questions arise: is there some continuum between relief and development aid? Is it more politically sustainable that the UN subcontracts operations to coalitions of national governments or regional organizations or that the UN conducts operations directly?

Concerning transatlantic relations, she said that there is a balance to be struck between bilateral and multilateral approaches to conflict management. While there is no blueprint for intervention, it is clear that the use of as many channels as possible provides more mileage. Among the many questions, she drew particular attention to the following two: how to bring about the necessary political will to intervene and to engage in sustainable assistance? How to back advocacy of intervention with the required resources, i.e. how to match funds to rhetoric? Also, is it possible to recover the engagement for peacekeeping after recent events (pointing out that the US is unlikely to engage in more peace-keeping after Iraq)? She argued that there are times when military

force is appropriate; the question remains: when are those times? As for post-conflict conduct and legitimacy, three factors determine whether assistance is and remains legitimate: the rule of law, a continuous balance between bi- and multilateral approaches and the impact of different policies on peace-building. For instance, in recent times humanitarian assistance has been undermined by human rights abuses and democracy in Iraq has been undermined by abuses — torture — at Abu Ghraib. On the latter issue, Ms Brimmer emphasized that the mistreatment of prisoners is morally reprehensible, nor is it, moreover, a pragmatic step towards improving the situation in Iraq. Finally, the Iraq campaign has also permanently undermined efforts to recover conflict prevention as a means to give reality to the concept of protection. Among those supportive of multilateral engagement, there need to be decentralized networks working on the problems and able to think about them creatively, undisturbed by present political pressures.

Mona Rishmawi (OHCHR) explained that the issue of the sustainability of assistance raises major challenges for an institution like the OHCHR. To address this issue, it should be acknowledged at the outset that situations such as those taking place in Afghanistan and Iraq demonstrate that recent conflicts are continuous and complex; it is therefore difficult to structure operations along the traditional concepts of post-conflict peace-making, peace-keeping and peace-enforcement. Also the attacks against the UN headquarters in Iraq on 19 August 2003, added a new dimension to the UN's ability to deploy staff in many places because of the perception in some quarters that the UN lacks neutrality. This has led to serious problems with staff security.

Three human rights issues were considered by Rishmawi to be of particular relevance to the subject of this panel: protection, international justice and justice reform. Victims of conflict ultimately want enhanced physical protection. They first look towards their own government for protection. They address the international community in order to push governments to respect human rights, ease restrictions and reverse repressive policies. When this fails, victims often urge the international community to act further. Here, victims often talk about international presence and rarely about military intervention, as civilians usually fear the consequences of even the most benign wars. Partially in response to these calls, the Security Council now almost routinely includes a human rights component in almost every peace mission. In some situations, the Security Council has also responded by giving peace-keepers an explicit protection mandate, as was the case for the situation in the Democratic Republic of the Congo. The main issue is the

political will to do something meaningful about a situation. The situation currently unfolding in Sudan's Darfur region poses particular problems in this area.

Another challenge is how to assist societies in addressing past, present and future human rights violations. There are major concerns regarding the capacity of local mechanisms, particularly the judiciary, to address in a fair, impartial and efficient manner vast magnitudes of human rights violations. Many judiciaries are seriously weakened before and during conflicts. In fact, the inability of national conflict resolution mechanisms to effectively address individual and group grievances is amongst the most frequent root-causes of conflict.

Recent years have witnessed the evolvement of several post-conflict "justice" and truth and reconciliation mechanisms. We have seen the creation of two *ad hoc* tribunals, at least five mixed or hybrid tribunals, the establishment of the International Criminal Court as well as about forty truth and reconciliation processes. There are many questions surrounding how these choices are made. Is the process nationally or internationally led? Are national societies presented with options or fixed views? Who really takes these decisions? How does international justice affect national justice? What kind of legacy does international justice leave behind and how much national judiciaries benefit from the international approach? The OHCHR is currently developing some tools to assist societies to enhance their knowledge regarding the challenges, processes and options in this area.

Another challenging area is that of justice reform. In the so-called post-conflict phase, the international community rushes to "reform" what is often seen to be a dysfunctional justice sector. Most of the approaches in this area are donor-driven. Emphasis is placed on rehabilitating buildings, furniture, and equipment that suffered from the conflict. Effort is also invested in reforming national laws and constitutions. But sometimes, substantive legal reforms are carried out unnecessarily and without an adequate understanding of the legal system itself. National models rather than international experiences are promoted and shared especially by bilateral donors. Justice reforms becomes a tool for third party influence. When the funding decreases, justice reform becomes less attractive. In addressing these issues, it must be acknowledged that justice reform requires some long-term perspectives. There is a need to influence not only laws and rules, but also attitudes and behaviours. The OHCHR is investing in developing techniques to help map out national justice systems, providing some benchmarks for reform and for monitoring the performance of such justice systems during and after the reform phase.

Franklin Thévenaz (Swiss Agency for Development and Cooperation (SDC)) explained that the concept of sustainable assistance was new for

many states. Previously, one talked only about emergency relief. The new concept involves notions of prevention, preparedness, rehabilitation and advocacy. It is a sobering statistic that 40 per cent of countries emerging from conflicts will lapse back into conflict, the percentage being 60 per cent for Africa. The road to sustainability is fraught with difficulty and therefore there is a constant need to provide assistance and protection to populations undergoing such transitions. We have, it seems, entered into an age where everything seems possible and acceptable, an environment that started to be in place before 9/11. When crises occur, every actor is present, e.g. in Kosovo, after the return of the civilian population, there were 520 NGOs working on the ground. In addition, there is a need to balance national capacity with international assistance. When a natural disaster occurs, 95 per cent of people are assisted by local assistance. There is a need, then, to concentrate on capacity-building. Meanwhile, interest at the international level needs to be sustained to secure long-term financing.

Discussions

At the beginning of the discussions the chair, Bertrand Ramcharan (UNHCR), raised the following questions: in Bosnia, the UN Secretary-General's Special Envoy was in charge of peace-making, peace-keeping and humanitarian assistance at the same time: can one compartmentalize these tasks? Concerning the relation between humanitarian assistance and peace-building, how far apart are concept and reality? Is it not incumbent upon national decision-making bodies to devise peace-building strategies? Other panellists also focused on the relation between pre- and post-conflict situations, arguing that it is simply wrong to destroy all existing structures and institutions in the hope of building peace and reconciliation. This is because at least some existing structures are functional and therefore indispensable to stable, pacified post-conflict situations: for instance, except for the presidential decrees, the Iraqi legal system was good and there were over 50,000 well-trained lawyers. To destroy this system is to deprive the country of valuable resources.

A second focus of debates was the possibility to revive the idea of a UN standing army, which could intervene in places like Darfur and secure an international protective mandate. It was widely agreed that there will be no such army under the sole authority of the UN Secretary-General in the foreseeable future because no UN member State is as yet prepared to delegate sovereignty in this way. However, what might be politically feasible is something like an international police force that helps to secure a post-conflict situation, or a rapidly deployable observation force.

The problem of women being exploited in post-conflict societies under the control of peace-keepers was the third focus of the debates. It was said that since the UN operations in Sarajevo and Kosovo, a change in the culture of peace-keeping was emerging. The Secretary-General had issued a bulletin providing clear guidelines on the subject. Furthermore, the growing awareness of anti-trafficking laws was putting pressure on peace-keepers to protect women vulnerable to sexual exploitation.

On the issue of the role of justice in post-conflict societies, a question at the outset was how mindful should efforts to restore justice be of those trying to make peace? In the Democratic Republic of Congo, for instance, should the UN wait for the outcome of the peace process before deciding whether to refer an investigation to the ICC? It was suggested that policy-makers should be mindful of such efforts, but should not give them undue precedence over all other principles important for peace-building. Instruments of justice can "hover in the background" during peace negotiations. The real question is: when do tribunals become appropriate? In El Salvador, there was no judiciary which could have dealt with cases such as those brought before the Truth Commission. Justice could have been achieved only through an ad hoc international tribunal, which no one had contemplated at the time. The Commission on Historical Clarification in Guatemala was specifically enjoined not to name names, but was able to recommend that a number of people be banned from the army or political positions. In addition, consideration should be given to the right to compensation for violations of rights, e.g. in Iraq. From the point of view of the OHCHR, breaking the cycle of impunity and bringing those responsible for egregious violations of human rights to justice will help to facilitate the return to peace. Well thought out processes need to be in place to improve justice systems in the wake of conflict.

It was likewise stressed that a properly functioning legal system requires a stable political environment and a dynamic economy that can help match principles to practices. In this connection, it was suggested by one participant that "sustainable" should mean "self-sustainable" rather than a sustained operation of the international community in a particular context. One of the issues that were discussed was how to counterbalance the priorities of the G7, the World Bank, the IMF and the World Trade Organization (WTO) with the requirements of peace-building, also at the stage of peace negotiations. Rather than seeking alternatives, the panellists agreed that the UN provides by far the best umbrella for such all-inclusive and all-encompassing negotiations and the implementation of peace settlements.