

# Integration and coherence: is there a future for independent humanitarian action? A legal inquiry into the provision of humanitarian assistance and protection during armed conflict today

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## Abstract

This article challenges, from a legal perspective, the validity of independent humanitarian action (HA) during armed conflict in the face of the United Nations integration and coherence doctrine. The traditional legal foundations of humanitarian action in war are reviewed. In the last decades the modus operandi of actors in armed conflict and their interpretation of international law has evolved and in this framework International Human Rights Law (IHRL) has become the main legal resort to legitimise humanitarian intervention.

Confusion between military, political and humanitarian involvement in conflicts has eroded the legal principles of independent HA in favour of opportunities for general law enforcement and IHRL protection and promotion. This paper concludes that there are legal grounds to advocate for independent HA, in order to maintain the humanitarian imperative and the interests of the victims of war, as a valid action in itself without attaching HA to objectives of global peace, security and human rights.

**Key Words:** Conflicts, International Human Rights Law, Humanitarian Action, Actors.

## Resumen

Este artículo plantea, desde una perspectiva legal, la validez de la acción humanitaria independiente (AH) durante el conflicto armado en el marco de la doctrina de integración y coherencia de las Naciones Unidas. Se revisan los fundamentos jurídicos tradicionales de la acción humanitaria en la guerra. En las últimas décadas, el modus operandi de los actores en los conflictos armados y su interpretación del derecho internacional ha evolucionado y en este marco el Derecho Internacional de los Derechos Humanos (DIDH) se ha convertido en el principal marco legal para legitimar la intervención humanitaria.

La confusión entre la participación de lo militar lo político y lo humanitario en los conflictos ha erosionado los principios de una AH independiente en favor de la aplicación de normativa general así como de la protección y promoción del DIDH. En este trabajo se concluye que existen motivos legales para defender una AH independiente, con el fin de mantener el imperativo humanitario, los intereses de las víctimas de la guerra, así como una acción válida en sí misma sin necesidad de asociar la AH a los objetivos de paz mundial, la seguridad y los derechos humanos.

**Palabras clave:** Conflictos, Derecho internacional de los Derechos Humanos, Acción Humanitaria, Actores.

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## 1. Introduction

Armed conflicts and their associated human crises are increasingly managed by global governance and international actors on the basis of a broadened approach, where civilian and military personnel are supposed to work simultaneously and hand by hand, leading to an increasingly blurred distinction between civilian relief aid, military involvement and political management of war and crisis. More and more, humanitarian aid has become one among many components of the response to armed conflict and humanitarian crises, which nowadays may include goals aiming to achieve democratisation, mainstreaming human rights, establish rule of law and peace pursuits, among others<sup>2</sup>. Since the late 1980s there is the incrementally growing doctrine of multidimensional international response to armed conflicts, of coherence and integration (explained in part II), led by the United Nations (UN).

Traditionally, humanity, impartiality, neutrality and independence and have been the principles guiding humanitarian action (HA). There have been numerous debates related to the politicisation of HA. This work intends to narrow down the analysis to humanitarian action in armed conflicts and other situations of armed violence, where it is confronted with the UN doctrine of integration. In this scenario, is the claim of independence of humanitarian action still relevant within the multidimensional policy and legal framework of integration and coherence?

In the last decade, there have been an impressive number of analyses and professional and academic debates around humanitarian principles and its value from a policy perspective, but there seems to be a gap on the legal analysis of these doctrines and its consequences for humanitarian actors. This dissertation contributes to current debates over the nature and role of humanitarian action in armed conflicts from a legal perspective.

The focus of this paper is to link the dissertation question on the relevance of independent humanitarian action with the overwhelming doctrine of integration, coherence and stabilisation that is steering the major “humanitarian” responses in the present time. The legal aspects and legal resonance of this doc-

trine, the links to public affairs and governance, and its legitimacy in a supposedly multilateral world will be investigated.

In order to grasp the dissertation question and its legal resonance, the first part of this work will tackle the legal regulation of HA in International Law (IL); which legal parameters and definitions are to be found as the legal justificatory basis for humanitarian action during armed conflict. Beyond the traditional grounding of humanitarian action during conflict in International Humanitarian Law (IHL) there are increasing debates arguing for the justification of a right to humanitarian assistance based on International Human Rights Law (IHRL)<sup>3</sup>. Moreover, in this first part, the legal translation of humanitarian principles is described and analysed.

In the second part of the dissertation, there will be an overview of the context of humanitarian action currently. Here the origins and implications of the coherence and integration doctrine, led by United Nations, will be explored, particularly from a legal perspective in light of the first part results. It is particularly relevant here to present an overview of the contextual elements; the nature of armed conflict and its international response; the legal basis for humanitarian intervention, as well as its differences with humanitarian action. By defining these spheres – humanitarian intervention and humanitarian action – it will be shown how, in legal terms, these categories have been blurred by the integration and coherence doctrine.

In the final part, this paper will explore how two very different humanitarian actors present in armed conflicts act and define themselves in light of the IL legal framework. The choice of the International Committee of the Red Cross (ICRC) and of *Medécins Sans Frontières* (MSF) is based in their public positions advocating for a space for independent humanitarian action, and their uses of IL in order to legitimise and justify their humanitarian work. Nevertheless, these positions are not completely shared among the humanitarian community. Other actors, (the United Nation’s doctrine of integration and coherence is an illustrative example of this different approach) are strongly advocating for a more comprehensive approach to humanitarian work, and legally speaking, a convergence of

<sup>2</sup> The United Nations reform process leading to the creation of the Inter-agency Standing Committee country teams, the Central Emergency Response Fund, the Common Humanitarian Fund and the cluster system are examples of this trend. ICRC Annual Report, 2007.

<sup>3</sup> International Refugee Law, although relevant for humanitarian action opens up other avenues of debate, which go beyond the scope of this paper.

International Humanitarian Law (IHL) with International Human Rights Law (IHRL). In this spirit conflict resolution, peace and stability are seen as higher goals, where humanitarian action should be a part of a greater, integrated and coherent effort within the international community involvement in armed conflicts.

## 2. The legal regulation of Humanitarian Action in International Law: tradition and innovation

In today's armed conflicts there are numerous discussions and passionate debates around humanitarianism; what it is, what it should be and what is definitively not. Simultaneously, in the global governance scenario, the legal discourse, particularly the human rights one, has been shaping the boundaries of legitimacy of actors and their actions consistently since the establishment of the United Nations Charter. Therefore it is necessary to go back to the legal basis and current legal debates about what constitutes humanitarian action from a legal perspective, through an analysis of the relevant branches of IL. On the one hand IHL gives us a traditional understanding of humanitarian action in armed conflict; of assistance and protection as part of the concessions warring parties agree in the development of warfare. On the other hand, IHRL understands humanitarian assistance as an 'instrumental' right in order to protect core human rights like the right to life, integrity or freedom from torture<sup>4</sup>.

### 2.1. Humanitarian assistance in International Humanitarian Law (IHL) and International Human Rights Law (IHRL)

Humanitarian action is defined by many aspects; ethical ideals, legal grounds, its purpose, means and actors, among

others. In this section, the focus will be placed in two fundamental aspects of humanitarian action during armed conflict and other situations of armed violence; the potential sources of its legal foundations (section 1.1) and its legal principles (section 1.2).

Traditionally, humanitarian action involves two concepts; the provision of assistance in order to cover basic needs, and protection, in line with the preservation of human dignity and basic rights<sup>5</sup>. In situations of armed conflict, humanitarian action is agreed by scholars to be legally grounded in conventional IHL, international customary law, and, as some argue, the principles of law.

#### THE CONVENTIONAL BASIS

The provision of relief to the civilian population falls within the scope of the IV Geneva Conventions, the two Additional Protocols and Common Article 3. These legal texts contain the right to humanitarian assistance and the duty of States to facilitate such assistance<sup>6</sup>. This is a fundamental legal basis for humanitarian actors when advocating for access to assist and protect populations in need. The contents of these provisions contain key elements for humanitarian actors; the ICRC and other humanitarian impartial actors are entitled to be respected and protected<sup>7</sup>, to have free passage<sup>8</sup>, and they must be ensured freedom of movement<sup>9</sup>. Moreover, these obligations are further rooted in international customary law as explained further below. It is important to note that, under IHL, the consent of the parties is an essential element. Additionally, from the beneficiaries' perspective, the right of the civilian population in need to receive humanitarian relief is recognised as well<sup>10</sup>. Nevertheless, the scope of conventional IHL for humanitarians is limited. As some authors underline, 'there exists misunderstanding of IHL contents and overestimation of

<sup>4</sup> Stoffels, Ruth, (2004): «Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps», *International Review of the Red Cross*, vol. 86, n.º 855, September 2004, p. 515-546.

<sup>5</sup> Durand, André, (1981): «The ICRC», *International Review of the Red Cross*, no 46, p. 13.

<sup>6</sup> Abrisketa, Joana (1999): «El derecho a la asistencia humanitaria: fundamentación y límites» en Unidad de Estudios Humanitarios (1999) *Los desafíos de la acción humanitaria. Un balance*. Icaria/Antrazyt, Barcelona, p. 79.

<sup>7</sup> In international armed conflicts, AP I Art. 71(2) and in internal conflicts, AP II, Art. 18(2).

<sup>8</sup> In international armed conflicts, Geneva IV, Art. 23, the AP I, Art. 70(2) broaden this obligation and in internal conflicts, AP II draft Art. 33.

<sup>9</sup> For international and internal armed conflicts the Amended Protocol II of the Convention on Certain Conventional Weapons, developed in Art. 12.

<sup>10</sup> The Geneva IV, Art. 30, recognises the right of protected persons to make application to the protecting powers, the ICRC as well as to any organization that might assist them.

the portion which relates to humanitarian relief<sup>11</sup>. Mackintosh emphasises that from 289 articles, only 22 relate to the provision of relief.

A final element to highlight is the fact that in the IHL conventional provisions, there is a significant difference made between international and internal conflicts. These distinctions have softened under the perspective of customary international law.

#### THE CUSTOMARY BASIS

Customary international humanitarian law overcomes several of the grey areas found in the conventional legal foundation of humanitarian action analysed above; for instance, the requirement of consent by belligerent parties<sup>12</sup>. An authoritative source of legal opinion derives from an ICRC study on customary IHL. This study highlights relevant international customary provisions for humanitarian aid in armed conflict, particularly in the following three customary rules;

- Rule 31, *humanitarian relief personnel must be respected and protected*. This constitutes an indispensable condition for the delivery of humanitarian relief to civilian populations in need<sup>13</sup>. This rule is directly linked with the principle of distinction between combatants and non-combatants.
- Rule 55, *the parties at conflict must allow and facilitate the rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their control*<sup>14</sup>.
- Rule 56, *the parties to the conflict must ensure freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions. Only in case*

*of imperative military necessity may their movements be temporarily restricted*<sup>15</sup>.

There exist numerous state practices on these three obligations, in the form of UN statements and resolutions. In section 2.2, a deeper analysis of the United Nations Security Council (UNSC) is undertaken as it pertains to the broader legal framework of 'humanitarian intervention'.

#### IS THE FREE PASSAGE OF HUMANITARIAN ORGANISATIONS A PRINCIPLE OF LAW?

The right of free passage of humanitarian actors is, according to legal scholars and relevant jurisprudence of the International Court of Justice (ICJ), legally rooted as a principle of law. Abrisqueta<sup>16</sup> affirms that it constitutes a principle generally accepted and supported by significant and well established practice, such as in UN General Assembly resolutions adopted by consensus<sup>17</sup>. In words of Assmoah<sup>18</sup> those resolutions arguing the right of free passage for humanitarian actors are 'the expression from the undefined category of the general principles of law'. Additionally, the ICJ in its ruling of the *Nicaragua case* established that the United States are obliged to respect the 1949 Geneva Conventions because that obligation:

'... Derives not only by the Conventions themselves, but also from the general principles of humanitarian law, from which the Conventions constitute a concrete expression'<sup>19</sup>.

#### HUMANITARIANISM BASED ON IHRL

As mentioned in the introduction, the legal discourse of human rights has invaded the language of global governance, and the humanitarian sector is not an exception. Numerous scholars, NGOs and international actors like UN and others, 'when talking of people's suffering, its causes and any subsequent humanitarian action,

<sup>11</sup> Mackintosh, Kate, (2000): «The principles of Humanitarian Action in International Humanitarian Law», *Humanitarian Policy Group Report* n.º 5. Overseas Development Institute, March 2000, p. 4.

<sup>12</sup> Henckaerts, Jean-Marie, Dowsald-Beck, Louise (2005): *Customary International Humanitarian Law. Volume I: Rules*, ICRC, Cambridge, p. 196.

<sup>13</sup> *Ibid*, p. 105 (emphasis added).

<sup>14</sup> *Ibid*, p. 194 (emphasis added).

<sup>15</sup> *Ibid*, p. 194 (emphasis added).

<sup>16</sup> Abrisqueta, J, *op. cit.*

<sup>17</sup> Two significant examples are; UNSC Res. 1261 (1999) On children in conflict, and UNSC Res. 1265 (1999) On the protection of civilians in armed conflict.

<sup>18</sup> Asamoah, Obed Y. (1996): *The legal significance of the Declarations of the General Assembly of the United Nations*, Martinus Nijhoff Publishers, The Hague.

<sup>19</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), ICJ Reports, 1096, p. 220.

talk in the language of legal rights and responsibilities<sup>20</sup>. In this final part of section I, my interest is to explore the IHRL basis of humanitarian action, bearing in mind that the *rights-based approach* analysis to humanitarian action will be undertaken in section III.

The main argument in support of rooting humanitarian action in IHRL comes from the gaps which IHL leaves unfulfilled<sup>21</sup>, and, in general terms; specific forms of violence (i.e. gender based), the protection of specific groups (i.e. children, displaced populations), and general protection issues. IHRL contains a hard core of rights<sup>22</sup> which are non-derogable and must be enforced and protected at all times, including in situations of armed conflict, regardless of its international or internal nature, as well as other situations of violence. IHL and IHRL can be complementary in the protection of people under armed conflict. According to Stoffels, 'the right of the civilian population to humanitarian assistance can be derived from the principle of inviolability, which is at the basis both IHL and IHRL'<sup>23</sup>. She cites Pictet<sup>24</sup> who identifies three principles common to both IHL and IHRL; inviolability, non-discrimination and security. These legal principles can be advanced by humanitarian organisations when negotiating access to populations in need. Additionally, the ICJ in several rulings<sup>25</sup> has established the link between IHL and IHRL which can be used as a persuasive legal argument by humanitarian actors.

The obligation of States to protect and prevent violations of the right to life<sup>26</sup>, integrity, and freedom from torture and other ill-treatment, is argued to be linked to the right to humanitarian assistance, where the latter is an *instrumental* right to ensure the protection of the formers. It is massively recognised that during armed conflicts human rights are widely violated; an instrumental approach of humanitarian action which could contribute to the protection and enforcement of human rights in conflict is therefore desirable under an IHRL perspective. Finally,

the UN machinery has enforced the link between IHL and IHRL widely. For instance, the Commission of Human Rights' actions in relation to armed conflicts explicitly underline this link<sup>27</sup>. The relation between IHL, IHRL and humanitarian action is critically analysed in part III, section 3.3 of this work.

## 2.2. Humanitarian principles and their international legal translation

Humanitarian action in armed conflicts claims to be principally guided and have a legal translation. In the words of IHL, relief has to be 'humanitarian', 'impartial', and 'without adverse distinction'. According to ICRC legal doctrine, *humanitarian* means that which is 'being concerned with the condition of man considered solely as a human being...not affected by any political or legal consideration'<sup>28</sup>. In other words, the allocation of relief has to be done without discrimination and in a universal spirit. This principle underlines the universality of humanitarian aid, as this must be allocated 'proportionally to need': Need here is the guiding element, not political or military considerations which could easily lead to a division between "bad" and "good" victims. Mackintosh<sup>29</sup> additionally supports this view when citing the ICJ in its *Nicaragua* case which reaffirms this legal requirement, when stating that the United States (US) have violated IHL through its support to the Contras. US defence argued 'humanitarian assistance' and the court ruled:

'An essential feature of *truly humanitarian* aid is that is given 'without discrimination' of any kind... not merely to the Contras and their dependants'<sup>30</sup> (emphasis added).

*Impartial* comprises three essential elements; non-discrimination (or in the wording of Geneva Conventions, 'no adverse

<sup>20</sup> Slim, Hugo, 2005. *Idealism and Realism in Humanitarian Action*. ACFID Humanitarian Forum, Centre for Humanitarian Dialogue, Canberra, p. 12.

<sup>21</sup> For example, the duty of a State to ensure that its own population is adequately supplied at all times in emergency/ conflict situations (Stoffels, 2004: 516).

<sup>22</sup> The right to life, the prohibition of torture and other ill-treatment, the prohibition of slavery, the prohibition of retroactive criminal legislation and punishment.

<sup>23</sup> Stoffels, R, *op. cit.*, p. 516.

<sup>24</sup> Pictet, Jean (1983) : *Développement et principes du droit international humanitaire*, Perdone, Paris, p. 78.

<sup>25</sup> See section III, part 3.3 for a developed argument in this sense.

<sup>26</sup> The right to life is enunciated in several IHRL instruments, for instance; the preamble of the Universal Declaration of Human rights (1948), International Covenant on Civil and Political Rights, Art. 2 (1966), Convention on the Rights of the Child, Art. 6 (1989), as well as numerous regional instruments.

<sup>27</sup> Stoffels, R. *op. cit.*, p. 527.

<sup>28</sup> Pictet, J, *op. cit.*, p. 96.

<sup>29</sup> Mackintosh, K, *op. cit.*

<sup>30</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), ICJ Reports, 1986, p. 243.

distinction'), proportionality (according to the need), and no subjective distinctions (the concept of 'deserving' or 'undeserving' victims)<sup>31</sup>. The importance of humanitarian principles is related to the fact that under them, humanitarian actors are explicitly given the conditions for access for relief operations under IHL<sup>32</sup>.

Complementary to the implementation of humanitarian action, there are other relevant principles, not explicitly included in the Geneva Conventions but arguably in the spirit of the law<sup>33</sup>; which are neutrality and independence<sup>34</sup>. The first is related with the key idea that relief operations must abstain from benefiting either side of the conflicting parties (so as not to fuel the war). The second refers to the requirement that HA maintains its focus on the humanitarian imperative, above from any political or military consideration or objectives. In other words, independence is directly linked to the concept of *humanitarian space* or operational principles of humanitarian field work. Specifically this refers to *how and who* implements humanitarian action, and that these principles determine the position of humanitarian agencies<sup>35</sup>. 'Humanitarian space' is a term first used by former *Medécins Sans Frontières* (MSF) president Rony Brauman as "a space of freedom in which we are free to evaluate needs, free to monitor the distribution and use of relief goods and have a dialogue with the people"<sup>36</sup>. The IHL legal translation of independence in the Geneva Conventions is explicated when stating that relief action 'which is humanitarian and impartial in character and conducted without any adverse distinction' must be undertaken. Other legal sources available to root the concept of humanitarian space in law are customary international law (see section above) and the Statutes of the Red Cross and Red Cres-

cent Movement, which also refers to humanitarian actors as 'neutral and independent'<sup>37</sup>.

The principle of independence 'contradicts the growing coherence between political objectives and humanitarian aid'<sup>38</sup>, especially regarding the UN doctrine of integration and coherence. Because humanitarian action 'strives to be neutral, it must be as independent as possible of political processes and goals'<sup>39</sup>. In order to understand the legal and operational contradictions for humanitarian action derived from this doctrine, the next part of this work deals with the context of humanitarian action today.

### 3. The context of humanitarian action today: coherence and integration from a legal perspective

Nowadays there are increased pressures on humanitarian actors to integrate in their activities of assistance and protection a wide range of non-humanitarian goals: Conflict resolution, mainstream of human rights, state building, governance, and democratisation; to name a few. Can this trend be seen as a positive and rather progressive fact for the advancement of the protection of human rights and freedoms towards a more peaceful, stable and secure world, or does it constitutes a dangerous slide away from humanitarianism values and principles, and from its core objectives of saving lives and alleviating suffering? This part deals with the context of global governance in which humanitarian action in armed conflict is allocated, and the legal basis for humanitarian intervention, as an extreme form of integration and coherence doctrine led by UN<sup>40</sup>.

<sup>31</sup> Pictet, J, *op. cit.*, p. 8.

<sup>32</sup> Mackintosh, K, *op. cit.*

<sup>33</sup> See section 3.2 of this paper.

<sup>34</sup> These principles are contained in the Code of Conduct of the Red Cross and Red Crescent Societies (Art. 3 and 4) which has been widely adhered by international and national NGOs, and are significant in the absence of international legal regulation of NGO activities.

<sup>35</sup> Leader, Nicholas, (1998): «Proliferating Principles; Or How to Sup with the Devil without Getting Eaten», *The Journal of Disaster Studies, Policy and Management*, vol. 22, n.º 4, Overseas Development Institute, December 1998, p. 299.

<sup>36</sup> Grombach Wagner, Johanna, (2007): «An IHL/ICRC perspective in 'humanitarian space'», *Humanitarian Practice Network*, HPG, 2007. p. 1.

<sup>37</sup> *Ibid*, p. 3.

<sup>38</sup> Pasquier in Curtis, Devon, (2002): «Politics and Humanitarian Aid: Debates, Dilemmas and Dissention», *Humanitarian Policy Group Report* n.º 10. Overseas Development Institute, April 2002. p. 13.

<sup>39</sup> Pugh, Michael, (1998): «Military Intervention and Humanitarian Action», *The Journal of Disaster Studies, Policy and Management*, vol. 22, n.º 4, Overseas Development Institute, December 1998, p. 340.

<sup>40</sup> Curtis, D, *op. cit.*

An increasing and diverse number of actors<sup>41</sup> with a plurality of legal regimes<sup>42</sup> and divergent policies are involved in international responses to armed conflicts; humanitarian response is one among other components of this. In the global governance arena 'IL catalogues the arguments people have used to assess the legitimacy of state behaviour'<sup>43</sup>. The legal discourse of rights and duties is intended to embed legitimacy to actions among very different constituencies: States, international organisations, non-state armed actors, or actors from international civil society. In today's armed conflicts, as agreed by many authors (Terry<sup>44</sup> and others), there seems to be a dangerous trend: Humanitarian assistance is increasingly becoming the preferred response to complicated crisis, such as in Somalia (Duffield, 1998). Nevertheless, it is interesting to question what is the context and legal basis of this form of international involvement.

### 3.1. *The nature of armed conflicts and its current international response; the coherence and integration doctrine*

Current humanitarian delivery framework in armed conflict situations is extremely complex. There are three main elements which can render an understanding of the changing nature of humanitarianism nowadays.

Firstly, the nature and reach of armed conflicts nowadays is changing. In 2005, the *Human Security Report* quantified only two interstate conflicts but 26 civil wars and 30 internal conflicts between non-state actors<sup>45</sup>. The conventional legal regulation of humanitarian action is mainly focused on international conflicts and states. Today's armed conflict reality indicates a

gap between legal basis and current practice, challenging the legal basis of the international community's response to war. It is significant to mention that, in terms of security and management of field operations in these environments, the delivery of aid has also been rendered more dangerous and complex.

Secondly, it is necessary to bear in mind that it is mainly through an increasingly elaborated and multidimensional international response to armed conflicts, and not just contextual elements<sup>46</sup>, that the humanitarian work has become more complex. In other words, the increased complexity derives from the multiplication, proliferation of actors involved in relief efforts.

Thirdly, the place and role of humanitarianism has perceptibly changed. This is associated with global security governance and legitimacy allocation through international law and legal discourse. Since the 90's, humanitarian action is increasingly occupying a space left by politics, augmenting its role as a form of international involvement in war and other violent crisis<sup>47</sup>. Nevertheless, the factor that has thrown humanitarianism into the limelight has been the militarisation of humanitarianism. Four operations are milestones: *Provide Comfort* (Kurdistan, 1991), *Restore Hope* (Somalia, 1992) and the 90's operations in Bosnia and Rwanda. Since then we can witness the trend of the 'securitization of aid'<sup>48</sup>; and that of policy coherence and integrated models responding to crisis.

Effectively, mainly through the first and second elements, UN has:

'Articulated an *integrated approach*, under which military interventions to bring stability, political efforts to introduce democracy, hu-

<sup>41</sup> UN bodies (specialised agencies such as UNHCR, UNICEF or UNDP but also Peace-keeping forces and coordination bodies), States (as policy makers, donors, troop providers), international NGOs, international organisations (IOM, World Bank), multinational corporations (involvement in a variety of areas, i.e. reconstruction, transport, security), etc.

<sup>42</sup> From intergovernmental organisations such as UN (UN Charter as a legal base), to NGOs without an international legal mandate, to private actors bounded by national and international laws (i.e. multinational corporations or private security companies) or internationally mandated private organizations such as the ICRC or pertaining to the UN system such as the UN agencies, for instance UNHCR.

<sup>43</sup> Kennedy, David (2004): «Humanitarianism and Force», en *The Dark Sides of Virtue. Reassessing International Humanitarianism*. Princeton University Press, Princeton and Oxford, p. 273.

<sup>44</sup> Terry, Fiona, (1999): «Reconstructing whose social order? NGO in Disrupted States». *Medecins Sans Frontieres* (internal document), 1999, p. 1-25.

<sup>45</sup> Hoffman, Claudia, (2006): «Engaging Non State Armed Groups in Humanitarian Action», *International Peacekeeping*, vol. 13, n.º 3, September 2006. p. 396.

<sup>46</sup> Terry, F. *op. cit.*

<sup>47</sup> Brauman, Rony (1994) : *L'action humanitaire*, Flammarion, Paris.

<sup>48</sup> Stoddard, Abby, & Harmer, Adele, (2006): «Little Room to Manoeuvre: The challenges to Humanitarian Action in the New Global Security Environment», *Journal of Human Development*, vol. 7, n.º 1, March 2006, p. 27.

man rights attempts to prevent impunity, and humanitarian endeavours to save life were to be managed within a common institutional framework mindful of these broader concerns'<sup>49</sup> (emphasis added).

The chronology of policy documents leading to the integrated mission concept starts in 1992, when UN Secretary General (UNSG) Boutros Ghali<sup>50</sup> defined security in terms of economic and social problems, with aid seen as a tool in order to address root causes of conflicts. Later, in 1997, the UNSG Kofi Annan<sup>51</sup> placed stress on the coordination of activities through two steps: Firstly, the unification of all UN agencies under a UN Resident Coordinator or a Special Representative of UNSG; and secondly, the creation of the Office for the Coordination of Humanitarian Assistance (OCHA). Finally, in 2000, the *Brahimi Report*<sup>52</sup> recommended 'structural coherence' for all UN peace keeping operations, and proposed that the 'Integrated Mission Task Forces' should become the standard vehicle for planning and supporting UN missions. Since then, the model has been applied in Timor Leste, Sierra Leone, Afghanistan, Liberia, Democratic Republic of Congo, Burundi, Haiti, Iraq, Ivory Coast and Sudan. The UN defines integrated missions as:

'An instrument with which the UN seeks to help countries in transition from war to lasting peace, or address a similarly complex situation that requires a system-wide response, through subsuming various actors and approaches within the overall political-strategic crisis management framework'<sup>53</sup>

We acknowledge a broader debate over the politicisation of humanitarian aid, but our focus will remain the UN integrated missions as defined above. The core of the integrated mission's concept lies the UN peace keeping, legally bounded by the UN Charter and the UNSC resolutions, so the second section of this part analyses the legal foundations established by this body, particularly, through a redefined concept of international peace and security associated with IHRL. The argument in a nutshell:

Integration is perceived by UN as a compulsory condition to fulfil the UN's peace building objectives, the aim of UN as an inter-governmental organisation.

The contextual elements mentioned above; the changing nature of armed conflicts or 'complex emergencies' and the increased complexity of aid system; has led to the development of the coherence and integration doctrine, in an environment of a security dominated global agenda. It is important to develop on the structures of the aid system itself, to grasp the consequences for HA. In fact, until 1992, UN peace keeping and assistance activities were entirely separated, and there was little coordination in the humanitarian sphere<sup>54</sup>. A structural internal change within the humanitarian system enabling integration has seen the multiplication of coordination mechanisms, e.g. UN Executive Committees since 1997<sup>55</sup>. It is significant to mention that major donors have followed the trend of integration and coherence. The 'Good Humanitarian Donorship' initiative (2003) is an illustrative example with many implications, specially in terms of *financial independence*, for all actors involved in the relief system.

There is no doubt that certain advantages are associated with integration; through centralised decision-making, there is certainly more consistency and coherence, but at the same time, broader political and institutional concerns are injected<sup>56</sup>, with rather negative impacts for humanitarian activities. As Macrae highlights, 'under a coherence agenda humanitarian action becomes part of a political strategy'<sup>57</sup>. Supporters of coherence and integration claim that the aim is to achieve effective stability in the long term. The critics counter that coherence leads to the abandonment of universality – which, as seen before, is a core principle of HA; as well as the subordination of humanitarian action in favour of political gains: Elections, peace agreements, and state and institutional building to name a few. In part III,

<sup>49</sup> Various authors 'Humanitarian Aid and Intervention: the challenges of integration' p. 1 (see bibliography).

<sup>50</sup> 1992, B. Ghali, *An Agenda for Peace*. UN Doc.A/47/277.

<sup>51</sup> 1997, K. Annan, *A Programme of Reform*. UN Doc.A/51/950.

<sup>52</sup> 2000, I. Brahimi, *Report on the Panel of UN Peace Operations*. UN Doc. A/55/305-5/2000/809.

<sup>53</sup> Eide, Espen. Kaspersen, Anja. Kent, Randolph & von Hippel, Karen (2005): *Report on Integrated Missions: Practical Perspectives and Recommendations*. Independent Study for the Expanded UN ECHA Core Group, p. 14.

<sup>54</sup> Stoddard, A & Harmer, A. *op. cit.*, p. 28.

<sup>55</sup> This structure is comprised among the general UN reform package of 1997. Other institutional mechanisms in line with these structural developments are cited in note 1 above.

<sup>56</sup> Minear, L. cited in Various authors, (2006): «Humanitarian Aid and Intervention: The Challenges of Integration», *Ethics and International Affairs Journal*, vol. 18, issue 2, p. 59.

<sup>57</sup> Macrae, J. cited in Curtis, D. *op. cit.*, p. 9.

an analysis from the concrete perspective of ICRC and MSF will deepen these findings.

A final consideration for this section is that the coherence and integration agenda, leading to the blurred borders of humanitarianism and politics, is poorly understood without an analysis of the concept of 'humanitarian intervention': It is through the recourse to the IHRL in the interpretation of the normative UN Charter, that 'humanitarian interventions' have been legally justified. This is precisely the analysis undertaken in the next section.

### 3.2. *Global security governance and human rights; the United Nations Security Council legal regulation of international involvement in crises*

State interventions without the consent of the 'host' country, in the name of humanitarian motives, have a long history<sup>58</sup>; Hugo Grotious<sup>59</sup> in 1625 had already suggested the idea. It was only in the 90's, however, that for multilateral responses, as Kennedy underlines, 'the use of force for humanitarian purposes – "humanitarian intervention" – appeared for the first time as an explicit legal argument'<sup>60</sup>. UN led multilateral 'humanitarian intervention', as previously mentioned, represents an extreme form of coherence and 'marks the final collapse of the distinction between humanitarianism and politics'<sup>61</sup>. It is defined as 'coercive measures by outside military forces to ensure access to civilians or the protection of rights without the consent of local political authorities'<sup>62</sup>. At the core of this doctrine and leading the development of its legal basis lies the UNSC. This section

deals with the legal resonance of the humanitarian intervention concept, as a key element to understand the intended transition of HA into an integrated and coherent approach in the UN system. Nevertheless, the analysis does not intend to give a full and exhaustive review of the concept of humanitarian intervention, which exceeds the purpose of this work. The normative framework developed by the UNSC establishing a link between IHRL and humanitarian intervention is made, therefore, through some country examples and key policy documents of the peace-keeping doctrine.

The UNSC has a "primary responsibility for the maintenance of international peace and security"<sup>63</sup>. One of the fundamental legal principles in line with this role, contained in the UN Charter, is the *principle of non-use of force*<sup>64</sup> in relations between nations. This principle has been reinforced by the *principle of the sovereign equality of all Member states*<sup>65</sup> and broadened by the *principle of non-intervention* in internal affairs<sup>66</sup>. Nevertheless, the UNSC has, through its resolutions, created the concept of forcible 'humanitarian intervention' as a legal argument. A brief chronology of legal resolutions which has led the affirmation 'human rights abuses constitute legitimate justifications for the UNSC intervention under chapter VII of the UN Charter'<sup>67</sup> follows.

According to Ramcharan<sup>68</sup>, during the 70's, two UNSC resolutions paved the way to link the protection of human rights in armed conflict with the provision of humanitarian assistance; in relation with the conflicts affecting India-Pakistan<sup>69</sup> and Cyprus<sup>70</sup>. Later, in 1982, the situation of Lebanese and Palestinian populations<sup>71</sup> reaffirmed the emphasis on the rights of civilian populations. It was not, however, until the above mentioned

<sup>58</sup> Some examples from the XX century: US interventions in Cuba (1968), Granada (1983), Panama (1989) or Liberia (1990) or French interventions in Zaire (1979), Central African Republic (1979), (Beigbeder, 1991:360).

<sup>59</sup> *De jure belli ac pacis* in 1625.

<sup>60</sup> Kennedy, D. *op. cit.* p. 259.

<sup>61</sup> Woodward, M, cited in CURTIS, D. *op. cit.* p. 11.

<sup>62</sup> Weiss, Thomas George (2005): *Military-Civilians Interactions. Humanitarian Crises and the responsibility to Protect*. 2nd edition, Rowman & Littlefield Publishers, Lanham (US), p. xxix.

<sup>63</sup> Art. 24 of the Charter of United Nations.

<sup>64</sup> Chapter VI requires States to first seek solution to international disputes by peaceful means. Notwithstanding, Chapter VII deals with the use

of force, under the condition of enforcement measures which can only be taken under the authority of the UNSC.

<sup>65</sup> Art. 21 UN Charter.

<sup>66</sup> Beigbeder, Yves (1991): *The Role and Status of International Humanitarian Volunteers and Organisations. The Right and Duty to Humanitarian Assistance*, Martinus Nijhoff Publishers, The Netherlands, p. 357.

<sup>67</sup> UN Secretary General Report on the Protection of Civilians in Armed Conflict. UN.Doc.S/1999/957, para. 67.

<sup>68</sup> Ramcharan, Bertrand (2002): *The Security Council and the Protection of Human Rights*, Martinus Nijhoff Publishers, The Netherlands.

<sup>69</sup> UNSC Res. 307, 21 December 1971.

<sup>70</sup> UNSC Res. 361, 30 August 1974.

<sup>71</sup> UNSC Res. 512, 19 June 1982.

military-humanitarian interventions of Kurdistan (1991) and Somalia<sup>72</sup> (1992), that the explicit connection between violations of human rights and their impact on the international peace and security was made.

The normative framework of peacekeeping operations *imposed* by force is to be found in Chapter VII of the UN Charter<sup>73</sup>, and the basic UN document on peacekeeping operations, otherwise known as the Capstone doctrine<sup>74</sup>, clearly states that 'IHL is an integral part of the normative framework for UN peacekeeping operations'. The UNSC, when mandating a peacekeeping force, establishes the normative foundations for multi-dimensional operations. These include, under the same integrated and coherent mandate; security, respect for the rule of law and IHL, governance and humanitarian issues. In 1990, UNSC imposed sanctions on Iraq and created corridors for humanitarian relief in the north of the country<sup>75</sup>. The same logic was followed in Somalia in 1992<sup>76</sup> and Bosnia-Herzegovina in 1993<sup>77</sup>. Additional recent examples, specifically integrating humanitarian assistance in a broader range of activities are the UN Integrated Mission in Democratic Republic of Congo (MONUC)<sup>78</sup> and the UN Integrated Mission in Timor Leste (UNMIT) mission mandate<sup>79</sup>. Specifically, the Capstone doctrine assigns a function to 'provide a framework for ensuring that all UN and other international actors pursue their activities at the country-level in a *coherent and coordinated manner*'<sup>80</sup>.

An extreme example of coherence and integration doctrine is found in the current intervention in Iraq. UNSC resolution 1546 'effectively shackled and subordinated the UN's humani-

tarian role to the fortunes or misfortunes of the Multinational Force and the political role of the UN Assistance Mission for Iraq (UNAMI) in facilitating the transition of Iraq away from occupation'<sup>81</sup>. Following this trend, UNSC resolution 1770 (10 August 2007) increases the subordination of the UN agencies when placing them under the umbrella of the coalition.

Nevertheless, the UNSC, when authorising a mission under Chapter VII linking IHL violations with a threat to international peace and security, 'still applies that criterion with considerable unevenness'<sup>82</sup>, raising doubts about the selectiveness of this form of intervention. Some authors underline the concern of those receiving these interventions and their suspicions that they are a new form of legal domination by the north over the south<sup>83</sup>. Other analysts<sup>84</sup> witness the consecration of a 'right to intervene' in the General Assembly resolutions 'on humanitarian assistance during natural catastrophes'<sup>85</sup> and authorising the creation of 'emergency corridors'<sup>86</sup>, but that this 'right' remains legally undefined and politically contested.

Political motivations behind 'humanitarian intervention' render them selective, and have profoundly contributed to the confusion between military operations and humanitarian action, with wide negative consequences for the latter; 'reduced humanitarian access, subordination of humanitarian priorities, perceived loss of neutrality, and increased insecurity'<sup>87</sup>.

The following and final part deals with facing integration in practise. In the first section how two humanitarian actors, the ICRC and MSF, face integration using IL as an argumentative tool to defend their positions is analysed. Not all of the humani-

<sup>72</sup> For example, 'the ser magnitude of the problem and its continuation constitutes a threat to peace and security of the region' UN Doc. S/PV. 3060, p. 31-32.

<sup>73</sup> Action with respect to Peace, Breaches of Peace and Acts of Aggression.

<sup>74</sup> UN Peacekeeping operations. Principles and Guidelines, in Capstone Doctrine, (2008): *UN Peacekeeping Operations: Principles and Guidelines*. United Nations, p. 14.

<sup>75</sup> UNSC Res. 661, 6 August 1990, followed by UNSC Res. 665, 25 August 1990 and UNSC Res. 666, 13 September 1990.

<sup>76</sup> UNSC Res. 794, 3 December 1992.

<sup>77</sup> UNSC Res. 819, 16 April 1993 and UNSC Res. 824, 6 May 1993.

<sup>78</sup> UNSC Res. 1493, 28 July 2003, followed by UNSC Res. 1533, 12 March 2004, UNSC Res. 1565, 1 October 2004 and UNSC Res. 1797, 30 January 2008.

<sup>79</sup> UNSC Resolution 1704, 25 August 2006.

<sup>80</sup> CAPSTONE DOCTRINE, *op. cit.*, p. 23 (emphasis added).

<sup>81</sup> Donini, Antonio, (2008): *Humanitarian Agenda 2015: Final Report on the state of humanitarian enterprise*. Tufts University, p. 18.

<sup>82</sup> Minear, L, in Various authors (2006), *op. cit.* p. 56.

<sup>83</sup> Cahill, Kevin (ed.) (2003): *Basics of International Humanitarian Missions*, Fordham University Press & The Center for International Health and Cooperation, New York, p. 14.

<sup>84</sup> See Fleuriot, C., 'Droit d'ingérence, où en est-on ?'. *Le Monde Diplomatique*, Septembre 2008, p. 24.

<sup>85</sup> UNGA Res. 43/131, 8 December 1988.

<sup>86</sup> UNGA Res. 45/100, 1990.

<sup>87</sup> Donini, A. *op. cit.* p. 24.

tarian community share their views, and there is increasing debate over a more comprehensive concept of humanitarian action is undergoing, linking IHL and IHRL. This phenomenon is analysed in the second section of part III.

#### 4. Facing integration; humanitarian actors advocating for independence through International Law

In order to analyse the validity of the hypothesis of humanitarian independence in the context of the integration and coherence doctrine, this work will focus on two actors present in the provision and delivery of humanitarian aid; the International Committee of the Red Cross (ICRC) and the international NGO *Medécins Sans Frontières* (MSF). The rationale for the selection of actors analysed is related to their reaction towards the integration and coherence doctrine; they both advocate for independence but from very different starting points: an independent private organisation, ICRC, mandated by international law as the warrant of International Humanitarian Law (IHL); and an international NGO, with no legal personality or mandate but whose self-assigned charter refers to elements of international law such as IHL and IRHL.

In general terms, Minear, through the Humanitarianism and War project<sup>88</sup> experience since 1991, has identified three models describing the relationship between HA and political framework; integration, insulation or independence<sup>89</sup>. The latter has been clearly chosen by ICRC and MSF.

In the first part of this work, the legal foundations for HA in IHL, as well as the authoritative opinion of recognised jurists and the ICJ clearly show the importance of humanitarian action to be principled and independent from political agendas in order to achieve its aims. Humanitarian actors constantly have to negotiate access and conditions of work under pressures derived from political agendas of the parties in conflict, security constraints and the increasingly complex contexts where populations in need are to be found. In this sense, practical field arrangements often clash with ideal conditions for the implementation of hu-

manitarian action. Nonetheless, the UN integrated approach is most probably not going to fade away, and it is predictable that UNSC will continue to authorise peacekeeping missions under the integration doctrine and in the contexts where there will be humanitarian needs to be covered. As Pugh underlines, 'providers cannot choose to avoid operating in a secure space imposed by the interventionary force, they must operate wherever there is a need' (1998:340). However, both ICRC and MSF advocate for independence of HA. They agree that it is fundamental to make a necessary distinction between conflict resolution and HA. As Sassoli<sup>90</sup> points out, conflict resolution must take sides, and HA must remain neutral and cannot become an alibi for intervention. Therefore, it is relevant to question how these actors advocate for independence, how they use IL in order to support their claims, and most importantly, how, given the international legal foundations of humanitarian work, they will try to defend humanitarian space in the midst of armed conflicts.

##### 4.1. *The warrant of the tradition: ICRC and IHL; legal mandate, assistance and protection*

The ICRC mission is to protect and assist the civilian and military victims of armed conflicts and internal disturbances on a strictly neutral and impartial basis. Its activities include visits to prisoners of war and civilian detainees, the searching of missing persons, family reunification, the provision of humanitarian relief and spreading the knowledge of IHL, among others<sup>91</sup>. This mandate has been legally conferred on it by States through the four Geneva Conventions of 1949 and their Additional Protocols of 1977, and it is granted with an international legal status distinctive from intergovernmental agencies or NGOs. ICRC understands that humanitarian action implies assistance and protection. Humanitarian protection involves three things; 'development of a legal framework that protects the minimal standards required for human dignity in conflict; supervising the conditions of detention in war and exceptional national instability; and providing for the basic needs of the civilian population'<sup>92</sup>.

<sup>88</sup> See: [www.hwproject.tufts.edu](http://www.hwproject.tufts.edu)

<sup>89</sup> Minear, L, in Various authors (2006), *op. cit.*, p. 54.

<sup>90</sup> Sassoli, Marco & Bouvier, Antoine (2006): *How does law Project in war? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*. 2nd edition, ICRC, Geneva, p. 295.

<sup>91</sup> ICRC, 2005. *Discover the ICRC*. ICRC; Geneva, p. 3.

<sup>92</sup> Forsythe, David, & Rieff-Flanagan, Anne (2007): *The International Committee of the Red Cross. A neutral humanitarian actor*, Routledge, London, p. 3

ICRC positions itself in armed conflicts as a humanitarian, neutral and independent actor, whose main concern is strictly of a humanitarian nature: 'Limiting the process of war so as to protect the dignity of persons to the greatest extent possible'<sup>93</sup>. In other words, ICRC voluntarily takes a position which is non-judgemental regarding the fairness of war, its legality or illegality or any other form of justification or disqualification of a given war. Accordingly, this places the organisation at a distance from political or military agendas, because those could potentially jeopardise the universal response to the needs of victims without determining who *deserves* the aid. Through a firm rooting in the legal provisions for the humanitarian assistance and protection contained in IHL, ICRC has clearly stated the dangers, for both humanitarian actors and populations in need, associated with broadened, integrated approaches to armed conflicts and other forms of violence. Already in 1997, its president Cornelio Sommaruga<sup>94</sup> stated:

'The ICRC saw the danger of humanitarian efforts becoming integrated into a political process and of their becoming politicised themselves. It thus became necessary to reaffirm that political efforts at conflict resolution and the requisite military support must be clearly separated from humanitarian action, which cannot be subordinated to the political aims of peace-keeping operations. This is why the ICRC has strongly advocated the creation of a humanitarian space, thereby emphasizing the need to leave room for independent humanitarian action in situations of conflict'.

This position has not changed with the evolution and deeper implementation of the integration and coherence doctrine. On the contrary, explicit rejection of ICRC to be part of the integrated approach promoted by UN has been reaffirmed by its Director of Operations, Pierre Krähenbühl<sup>95</sup>; 'ICRC will not be part of integrated approaches' because 'it must be – and be seen to be – neutral and independent' and clearly 'distinct from political or military agendas of any one actor'. In support for this decision, Krähenbühl argues that the organisation must remain steer by its 'strict working principles and criteria', which aim to maintain a broaden dialogue and acceptance by all parties to the con-

flict<sup>96</sup>. In this sense, it is important to underline that ICRC is legally mandated for the dissemination and promotion of IHL, so in order to accomplish this task it must establish contact and relations with all parties to a conflict. The IHL legal principles of humanitarian action – humanity, impartiality and given without adverse distinction – make imperative that it is implemented universally and without discrimination where there are needs. Moreover, ICRC has analysed the challenges posed by the current nature of armed conflicts. From an operational perspective, ICRC has decided to: Firstly 'reassert its operational approach based on proximity to those in need and broad acceptance of the organisation by all parties in conflict'; and secondly 'maintain a decentralised approach to security management'<sup>97</sup>. Both conditions clearly clash with the integrated and coherent doctrine where planning, decisions and actions are centralised and respond to a multi-dimensional mandate beyond humanitarian objectives only.

The maintenance of 'humanitarian space' can also be argued in terms of conventional IHL, customary IHL and the principles of law as discussed in part I. ICRC has a particular internationally legal mandated role in this respect. As Grombach-Warner<sup>98</sup> remarks,

'The drafters of the Geneva Conventions, and the states that endorsed them, had an additional concern. They recognised the need for a neutral and independent organisation, which could, when needed, act as an intermediary between the parties, an organisation which would be accepted by all parties, and recognised as having a specific role apart from any political project or military goal... this function was, and still is, specifically expected of the ICRC'.

The spirit of the law acknowledges independence as key for the humanitarian imperative of saving lives and alleviating human suffering to be fulfilled. An 'all victims approach' is the rational for the ICRC rejection of full participation in the integrated approach. In other words, 'ICRC believes that preserving the comparative advantage conferred by its neutral and independent approach, added to its proximity to the victims in the field, is in the best interest of the victims of armed conflict'<sup>99</sup>.

<sup>93</sup> *Ibid*, p. 4.

<sup>94</sup> Sommaruga, Cornelio, (1997): *Humanitarian Action and Peace-keeping operations*. Keynote and the Conference on Humanitarian Action and Peace Keeping Operations, United Nations Institute for Training and Research, Institute of Policy Studies and National Institute for Research Advancement, Singapore, p. 25.

<sup>95</sup> ICRC, 2007. *Overview of Operations 2008*. ICRC; Geneva.

<sup>96</sup> *Ibid*, p. 8.

<sup>97</sup> *Ibid*, p. 6.

<sup>98</sup> Grombach-Warner, J, *op. cit.* p. 3.

<sup>99</sup> Forster, Jacques, (2005): *An ICRC perspective on integrated missions*. Conference on Integrated Missions, p. 3.

As a final comment, the specific role of ICRC being legally mandated as an independent humanitarian actor may seem an obvious counter-balance choice to legally discuss the integrated and coherent doctrine. The purpose of this section is to explore a practical and field-based link between IL and humanitarian action facing integration. This is required because of the use global governance actors have made, and are still making, of IL to legitimise the integrated approach. The following section adds arguments from a different perspective; a non-governmental organisation, that also stresses the importance of independence. MSF also argues in terms of IL for an independent humanitarian space.

#### 4.2. *The 'enfant terrible': MSF; all sources of international law for a non-legally mandated actor*

*Medécins Sans Frontières* (MSF) is a private international organisation which defines itself as humanitarian and medical<sup>100</sup>. These elements are essential to analyse its position in international law. My interest is to briefly overview the legal status of NGOs, but an exhaustive analysis is beyond the scope of this work<sup>101</sup>.

A common starting point is to recognise that there is no widely accepted definition of the term 'non-governmental organisation' in IL<sup>102</sup>, because NGOs are created under national law: 'There is no international legal regime governing the status and activities of NGOs'<sup>103</sup>. The UN Economic and Social Council (ECOSOC) legally established by the UN Charter (Art. 71), through consultative arrangements with NGOs, provides a generally accepted definition from an IL perspective;

'Any such organisation that is not established by a governmental entity or intergovernmental agreement shall be considered as

non-governmental organisation for the purpose of these arrangements'.<sup>104</sup>

All the same, for the purposes of this work, it is important to remark that IHL creates international rights and duties for non-state organisations. The conventional IHL Conventions and Protocols, as well as the customary humanitarian law, in its provisions regarding humanitarian relief, while explicitly mentioning the ICRC, also leave open to the participation of 'any other impartial humanitarian organisation'<sup>105</sup>, 'relief (or aid) organisations'<sup>106</sup>, and 'any other organisation'<sup>107</sup>. It is worthy to remark that common article 3 of Geneva Conventions provides protection to 'persons taking no active part in the hostilities' and specifically mentions personnel of 'impartial humanitarian body'. Additionally, the medical character of MSF also finds elements of due respect and protection, as well as facilitation of its work as a medical organisation and for its medical personnel<sup>108</sup>. This also entitle duties directly linked with the rights of the protected persons placed in their care<sup>109</sup>.

In order to complete the international legal links of MSF as a medical NGO with IHL, one must look at the principles of the organisation. In its Charter, MSF refers to non discrimination, and particularly rephrases IHL provisions when claiming to;

'Observe strict neutrality and impartiality in the name of universal medical ethics and the right to humanitarian assistance and demands full and unhindered freedom in the exercise of its functions'.

Independence is another fundamental principle for MSF, adhering to 'strict independence from all structures of power', a 'refusal to serve or be used as an instrument of foreign policy by any government', and a concern for 'financial independence'<sup>110</sup>. It is from these legally inspired bases that MSF positions itself, as a civil society movement<sup>111</sup> and humanitarian actor, claiming a space

<sup>100</sup> MSF humanitarian and medical activities include a significant number of advocacy initiatives on behalf of the populations assisted by the organisation. Nevertheless, given the scope and limits of this work, the only references to advocacy here are going to refer to the UN integration doctrine.

<sup>101</sup> For an exhaustive analysis of the legal status of NGOs and its personnel, see Beigbeder, 1991 (bibliography).

<sup>102</sup> Lindblom, Anna-Karin (2005): *Non-Governmental Organisations in International Law*. Cambridge University Press, Cambridge, p. 36.

<sup>103</sup> Beigbeder, Y, *op. cit.*, p. 327.

<sup>104</sup> E/RES/1996/31, *Consultative Relationship between the United Nations and Non-Governmental Organisations*, 25 July 1996, para. 12.

<sup>105</sup> Geneva I, II, III, Art. 9, Geneva IV, Art. 59, and Protocol I, Art. 81.

<sup>106</sup> Geneva IV, Art. 30, 59, 63 and 142, Protocol I, Art. 17, and Protocol II, Art. 18.

<sup>107</sup> Geneva I, Art. 74 and 125.

<sup>108</sup> Geneva I, Art. 19, 20 and 21, Geneva II, Art. 23, Geneva IV, Art. 19, Protocol I, Art. 12 and 13 and Protocol II, Art. 11.

<sup>109</sup> Beigbeder, Y, *op. cit.*, p. 338-342.

<sup>110</sup> MSF Chantilly Document (1995).

<sup>111</sup> Defined as an association of volunteers. *Idem* note above.

of action within the humanitarian arena. The absence of a legal mandate and status confers the organisation with a degree of flexibility, or as Macalister-Smith<sup>112</sup> points out 'NGOs tend to bridge functionally the separation that exists between the state and the individual in international law doctrine'. Moreover, MSF argues that although the MSF statute does not emanate from an official mandate, the organisation acts within a legal framework<sup>113</sup>.

Before analysing the position of MSF regarding the UN integration doctrine, it is worthy to mention its understanding and use of elements of IL<sup>114</sup>. As previously seen in this section, MSF fully adheres to the provisions of IHL which permit the achievement of concrete field operations for the populations in need on two counts; because IHL establishes specific norms of treatment for protected groups of persons, and IHL assigns specific rights for humanitarian impartial organisations (and additional rights and duties for medical relief). The starting position regarding IHRL is clear; MSF does not define itself as a human rights organization<sup>115</sup>. That said, while MSF has respect for IHRL as an integral part of humanitarian action and its fundamental principles nevertheless remain, IHRL is often part of the argumentation developed by international diplomacy, with the subsequent risks of political interests and implications for impartiality; and, although IHRL permits activities of advocacy and denunciation, it does not constitute a legal reference framework for concrete humanitarian activities<sup>116</sup>. Focusing on how IL can contribute to create a humanitarian space for concrete actions in the field, where IHRL provisions have been translated into national legislation of the countries that MSF operates in, they are potentially useful to negotiate interventions or activities related with specific categories of protected people, such as street children<sup>117</sup>.

The debate over IHRL and IHL in humanitarian action will be further analysed in the last and following section. At this point, it is necessary to overview the position of MSF regarding the UN integration and coherence doctrine.

MSF has publicly made a very clear opposition to the participation in the UN integrated approach:

'Whilst determined to retain its *independence* in the face of the current reforms, MSF will continue a dialogue with the UN operational agencies and also accepts the need for a context-related, operation oriented coordination... MSF will maintain its independence of analysis and action and resources so as not to jeopardise the *strictly humanitarian and impartial nature of our organisation, particularly in conflict situations*, where is critical to keep the trust of the belligerents to be able to reach those who require our assistance'<sup>118</sup>.

MSF sees with concern the impact of the integration and coherence doctrine, because of its potential negative impact on the ability to 'provide timely and appropriate assistance to those most in need'<sup>119</sup>. The MSF counter-argument regarding integration, specifically remarked in situations of conflict, is clearly one of resistance to political and financial pressures through the reaffirmation of the humanitarian principles rooted in conventional and customary IHL, and, secondly, a defence of humanitarian space via reaffirmation of the clear independence of analysis and operations. This humanitarian space is again strategically defined in the language of IHL:

'The implication of the coherence agenda is that meeting lifesaving needs is too limited in scope, and that the principles of impartiality, neutrality, and independence that have typically characterized humanitarian action should be set aside in order to harness aid to the "higher" goals of peace, security, and development'<sup>120</sup>

<sup>112</sup> Macalister-Smith, Peter (1985): *International Humanitarian Assistance. Disasters Relief Actions in International Law and Organization*, Martinus Nijhoff Publishers, Boston, p. 4.

<sup>113</sup> Bouchet-Saulnier, Françoise, (2000): «The Legal Responsibility of MSF», *Medécins Sans Frontières* (internal document). MSF Spain. Workshop on Protection, Barcelona, Septiembre 2000. p. 2.

<sup>114</sup> Given the scope of this work, the International Refugee Law, although relevant, it is not considered here.

<sup>115</sup> Biquet, Jean-Marc, (2000): «Protection of Humanitarian rights : the role of MSF», *Medécins Sans Frontières* Belgium, December 2000, p. 2.

<sup>116</sup> Bouchet-Saulnier, Françoise, (2001): «The theory and practice of rebellious humanitarianism», *Humanitarian exchange (HPN)* n.º 19, September 2001, p. 15-17.

<sup>117</sup> Comments from an MSF debate 'Droit humanitaire, justice et droits de l'Homme', 8 March 2000.

<sup>118</sup> Dubuet, Fabien, (2006): «United Nations: deceptive humanitarian reforms?» *MSF International Activity Report 2006*, Geneva, p. 2 (emphasis added).

<sup>119</sup> Stobbaerts, Eric, Martin, Sarah, & Derderian Katherine, (2007): «Integration and UN humanitarian reform», *Forced Migration Review*, n.º 29; Humanitarian reform: fulfilling its promise?, December 2007, p. 18.

<sup>120</sup> De Torrente, Nicolas, (2006): «Humanitarianism Sacrificed: Integration's False Promise», *Ethics and International Affairs Journal*, vol. 18, issue 2, p. 3.

MSF sees the UN integration and coherence doctrine as clearly subordinating HA, not only for UN agencies, but also for 'independent humanitarian actors with different objectives into the same logic'<sup>121</sup>. The UN Secretary General note on integrated missions<sup>122</sup> and its reaffirmation of the central role of integration in peace-keeping missions, is perceived by MSF that 'in UN's view humanitarian action remains subordinate to the UN's political arm and that humanitarian aid comes second to the political objectives pursued by the peacekeeping missions'<sup>123</sup>. MSF reaffirms the humanitarian imperative, and the populations in need, before other considerations of political, security or developmental in nature.

#### 4.3. IHL, IHRL or both? A contested definition of humanitarian action; needs versus rights?

Wording and conceptualisation is important, and from a legal perspective, essential. How HA and humanitarian actors are defined and conceptualised has significant implications for both the people in need and the organisations providing assistance. Having seen that ICRC and MSF advocate for clearly independent humanitarian action, it must be noted that there is no consensus among the varied constituencies of humanitarianism. On the contrary, many advocate for a much more 'politicised' and 'integrated' humanitarian action. This last section analyses how the two legal foundations of HA; IHL and IHRL, have crystallized in the 'needs versus rights' debate.

In the humanitarian sector, two apparently contradictory understandings of humanitarian action are found. On the one hand, the needs-based approach understands that humanitarian aid must respond to the needs, and should be given according to the principles of humanity, impartiality, neutrality and independence, and relying on the specific provisions of IHL for relief operations. On the other hand, the rights-based approach

relies on IHRL and the derived legal duties of states, so aid is addressed to 'right holders' with the objective to uphold rights. The 'respond to needs or uphold rights' debate goes beyond the basic frameworks of how to act and questions 'whether humanitarian action should be considered an act of charity, or an internationally and legally agreed obligation'<sup>124</sup>. In other words; 'needs, charity and relief; or violations, laws and duties'<sup>125</sup>. In principle, these two definitions of HA should not be in opposition. From a legal perspective, both IHL and IHRL establish rights and duties, but while being complementary<sup>126</sup> and having common elements, they differ in many aspects: Origins, codification, language, subjects, and implementation and reinforcement mechanisms. Are these differences a source of enrichment or confusion for humanitarian action?

IHL and IHRL come from very different origins and formulations: While IHL does not question the recourse to war, and the Geneva tradition determines how a party to a conflict must behave in relation to protected people; IHRL emphasises 'the rights of the recipients to a certain treatment'<sup>127</sup> and is opposed to war as 'peace is the underlying condition for the full observance of HR and war is their negation'<sup>128</sup>. There are significant differences between the foci of both branches of law. IHL starts from an 'internal' perspective and attempts 'to involve states consensually agreeing to constraint themselves by setting the bounds of permissible conflict'. In contrast, IHRL starts from an 'external' perspective, where as 'persons we are protected independently from our nation-state, potentially altogether independent of state action'<sup>129</sup>. This author notes that a major change in the international legal regime has been the expansion of IHL, through the universalisation of the HR discourse. Indeed, 'the HR community has embraced humanitarian law, transforming its standards for evaluating treatment into rights, i.e. civilians are now said to have a "right" to be distinguished from combatants'<sup>130</sup>. This merging of both branches of law is, according to

<sup>121</sup> Stobbaerts, E. *op. cit.* p. 18.

<sup>122</sup> UNSG 'Note of Guidance on Integrated Missions' adopted by the UN policy committee, 17 January 2006.

<sup>123</sup> Dubuet, F, *op. cit.*, p. 4.

<sup>124</sup> Curtis, D, *op. cit.*, p. 15.

<sup>125</sup> Slim, H, *op. cit.*, p. 12.

<sup>126</sup> 'While specific rules of IHL may be specifically relevant... both spheres of law are complementary and not mutually exclusive' (HRC, 2004, para.11). See also note 10 above.

<sup>127</sup> Doswald-Beck, Louise, & Vité, Sylvain, (1993): «International Humanitarian Law and Human Rights Law», *International Review of the Red Cross* n.º 293, March-April 1993. p. 101.

<sup>128</sup> Resolution XXIII, 'Human Rights in Armed Conflict' adopted by the International Conference on Human Rights, Teheran, 12 May 1968.

<sup>129</sup> Teitel, Ruti, (2002): «Humanity's Law: Rule of Law for the New Global Politics», *Cornell International Law Journal*, 35, 2002, p. 375.

<sup>130</sup> Kennedy, D, *op. cit.*, p. 261.

some authors, problematic as it 'gives rise to a complicated and somewhat contradictory legal regime through a universalising human rights language'<sup>131</sup>. Nevertheless, for others it is seen as positive; by its association with IHRL, many see humanitarian action as 'deeply politicised as never before', making suffering 'a mater of political responsibility'<sup>132</sup>. In the words of Chandler<sup>133</sup>, 'through the HR discourse, HA has become transformed from relying on empathy with suffering victims and providing emergency aid to mobilise misanthropy and legitimizing the politics of international condemnation, sanctions, and bombings'.

In the author's opinion, the expansion of the HR discourse and its application to humanitarian action has paved the road for humanitarian intervention, in the name of IHRL. The defenders of a rights-based approach, such as Slim, argue that this 'allows humanitarians to connect with 'proper politicisation' that goes beyond humanitarian protection and is grounded in natural rights and justice'<sup>134</sup>. Detractors of this approach argue that it 'demands all humanitarian aid to be judged on how it contributes to the protection and promotion of HR, thus allowing conditionality'<sup>135</sup>. This paper argues that the potential conditionality inherent within the rights-based approach would lead to the abandonment of some fundamental principles of HA, specifically, its universality, impartiality and humanity, by entering into judgements on 'good' or 'bad' victims. Additionally, the pacifist nature of IHRL could enter into contradiction with the required non-judgemental character of HA: Negotiate with all parties to a conflict and access all victims in need. Another aspect to take into account is that the politicisation associated with HR work, i.e. humanitarian intervention could compromise the ability of humanitarian organisations to access all people in need.

As a final comment, IHRL is a coherent body of law whose full application is possible during peace, as some rights are derogable, but this legal concept is alien to IHL. The limitations of IHRL during conflict, and in its merging with IHL, are feared by HR advocates as 'compromising the idealism of IHRL'<sup>136</sup>. The aims of peace and conflict resolution promoted by both IHRL

and the UN integration doctrine are absolutely legitimate, only if the realisation of this doctrine does not require the subordination of independent humanitarian action, laying conditions on the delivery of aid to all people in need. This author agrees with calls for independent humanitarian action, which has created, and will probably continue to create, a space of humanity in the middle of armed conflict, essential for the survival of people caught in war.

## 5. Conclusion

This work evaluates, from an international law perspective, the merits of the call for independent humanitarian action during conflict, when faced with the UN integration doctrine of subordination of HA into international peace and security goals.

When confronted with the UN integration doctrine, it is valid to question up to which point 'is it possible to predict long-term consequences accurately enough to justify short-term sacrifices?'<sup>137</sup>. In the author of this paper's opinion, the logic of sacrifice, that the fundamental and valid work of international peace and security requires; such as delaying the access to a certain area due to negotiations for a cease fire agreement to be achieved, or the imposition of embargos or sanctions cannot, and should not, be part of humanitarian action. Activities based on humanitarian principles have been, or run the risk of being, negatively affected by the need to conform to requirements of a non-humanitarian nature.

The analysis of IHL, customary IHL, the principles of law and complementary IHRL (part I) clearly determines the legal grounds for humanitarian assistance. The spirit of the law acknowledges independence as key for the humanitarian imperative, of saving lives and alleviating human suffering, to be fulfilled. Partisan political or military considerations cannot lead humanitarian action, because they risk to condition, jeopardise or close the right to humanitarian assistance on a universal and impartial ba-

<sup>131</sup> Teitel, R, *op. cit.* p. 362.

<sup>132</sup> Slim, H, *op. cit.* p. 13.

<sup>133</sup> Chandler, David, (2001): «The Road to Military Humanitarianism: How Human Rights NGOs Shaped a New Humanitarian Agenda», Slim, Hugo cited in C.

<sup>134</sup> Fox, John cited in Curtis, D, *op. cit.*, p. 17.

<sup>135</sup> Petrusek, David, (1998): «Moving forward of the development of minimum humanitarian standards», *The American Journal of International Law*, 92(3), July 1998, p. 560.

<sup>136</sup> Mackintosh, K, *op. cit.*, p. 11.

<sup>137</sup> Mackintosh, K, *op. cit.*, p. 11.

sis. Nevertheless, the international law arguments for independent humanitarian action seem far from sufficiently persuasive to preserve independent humanitarian space. The politicisation of humanitarian efforts is far from being a new phenomenon in history, and the UN integrated doctrine is a recent trend that deepens this politicisation by placing humanitarian action as another tool for global governance, security and peace. This doctrine is the product of the current context, and connects with the inclusion of humanitarian justifications for intervention in the name of IHRL (part II). Indeed, there is no doubt of the need for work in areas of peace, conflict resolution, and the promotion and protection of human rights, in order to tackle a global solution for global governance problems; but not with the sacrifice of the short term goal of saving lives and alleviating suffering in times of conflict. This paper argues that this, the humanitarian imperative, has a value in itself, and does not need to be subordinated to higher goals in order to justify its role. Some humanitarian actors, such as ICRC and MSF, advocate through IL for the maintenance of the independence of HA, but their arguments are not completely subscribed to by the numerous and diverse humanitarian constituency. Some see the politicisation of humanitarian action as a positive opportunity to tackle global governance problems, and the partisans of a human rights-based approach take this position (part III). This politicisation, through mainstreaming HA into IHRL, runs the risk of subordinating HA to non-humanitarian aims. As seen before (section 3.3) the global and pacifist character of IHRL can be contradictory to the short-term humanitarian imperative, particularly during armed conflict.

Humanitarian action has never claimed to be a global solution, but a reaction to the death and suffering of people, through saving lives and alleviating suffering. This apparently simple and vocationally universal idea is, once again, under threat, and this is not in the interest of conflict victims.

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