« memorandum of understanding », des accords entre organisations. On passe énormément de temps à faire ces accords, et quelquefois on est un peu déçu de la façon dont ils sont appliqués, tant à l'intérieur du système des Nations Unies qu'avec les Etats ou les organisations non gouvernementales. Je pense que c'est un domaine où l'Union Européenne et les Nations Unies vont travailler de façon très étroite, puisque c'est évidemment dans notre intérêt à tous d'arriver à une solution acceptable pour empêcher les doubles emplois et pour empêcher aussi la prolifération d'organismes quelquefois très motivés mais qui s'occupent de choses dont on s'occupe déjà par ailleurs, c'est un peu un gaspillage d'énergie et de ressources.

III.

PAR

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My comments are in reaction to a preliminary outline of Mr. Bettati's presentation which was headed « Les Nations Unies et l'intervention humanitaire ». To focus on the question of terminology in the framework of this debate on the European Union and United Nations action in the humanitarian field, it would seem to me, it is not simply to quibble over a matter of semantics for the terminology used by different actors conceals profound differences as the appropriate reactions of states to humanitarian crises. I am sure Mr Bettati is very used to that kind of debate and his extensive writings on the topic show that he is fully conscious of these issues.

Nevertheless I would like to insist that we are slipping into dangerous ground when we begin to refer to the United Nations' actions as « humanitarian intervention » because this only results in blurring the issues. We have to continue to demarcate humanitarian intervention by states aimed at stopping gross and widespread violation of human rights occuring within a state and directed against the authority in control of the country in question, from humanitarian assistance aimed to alleviate human suffering within

a state regardless of its cause and on the basis of certain ground rules. In turn, these issues should be demarcated from coercitive action to ensure the provision of humanitarian assistance by peacekeeping forces or by states acting individually or through regional agencies authorized by the appropriate international organisation. These distinctions are important because, in the absence of a comprehensive legal framework to govern the issues raised by Mr Bettati, we are being faced with a new and rapid succession of developments in international law and the law of international organisation in reaction to emergency situations that need to be identified.

I would like to point out, however, that so-called new trends which Mr Bettati has reffered to, and in particular the recent declarations which have been made within the framework of the European Union, do not require that we depart from the traditional distinctions that have been made in the past or the traditional legal basis on which such action has been based.

Obviously, I do not discount the fact that in the future we may take off in a different direction.

But what are we walking so far ? We are talking about a principle of non-intervention which continues to be reaffirmed — in fact no international legal concept has been so central to current controversies as that of non-intervention into the domestic jurisdiction of States. The so-called « reserved domain », which is as jealously defended by some as it is decried by others, is deemed to be one of the bastions of state sovereignty. As a result, the on going ethical and legal debate on the validity of so-called humanitarian intervention has called for an end to « statist concepts » of international law. But does the question really have to be framed in this manner ? Does one really have to pit the imperatives of human rights against those of state sovereignty ? For even the recent evolution of international law, which Mr Bettati has described to us, has shown that it is not paradoxical to continue to insist on the admissibility of intervention in the internal affairs of States, whilst promoting the protection of the human person. Both develpments have been considered as forming important parts of the fabric of the international legal order ; the former are part of the « protectionist » norms safeguarding the rights of weaker States, the latter part of the content of « ethical norms ».

I would like to focus on three issues in order both to clarify the legal situation and identify unresolved problems.

1. — The issue of non-intervention in internal affairs

The principle of the inadmissibility of the direct or indirect intervention in the internal affairs of States (i.e. in the form of coercitive action), which is laid down in a variety of universal and regional instruments, continues to be consistently affirmed. General Assembly resolutions (see 2131 (XX) or 2625 (XXV)) stated quite clearly that « No State may use or encourage the use of economic, political, or any type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind ». That has been upheld by the International Court of Justice in the *Nicaragua Case*.

Moreover, the threat or use of military force in international relations is proscribed by article 2(4) of the United Nations Charter (unless of course regulated by the Charter itself), and unilateral military interventions, whatever their alleged purpose, have been for the most part outrightly condemned by the UN majority, despite efforts to elaborate a doctrine in this respect. The ICJ itself did not consider the use of force an appropriate method to ensure respect for human rights in another State : « the protection of human rights — a strictly humanitarian objective — cannot be compatible with the mining of ports, the destruction of oil installations, or again the training, arming and equipping of the contras » (1).

2. — The issues of unilateral humanitarian assistance

It is clear that the offer and provision of humanitarian assistance is not testamount to intervention in the affairs of another state. Again, in tracing the scope of the principle of non-intervention in the *Nicaragua case*, the ICJ distinguished unlawful intervention from the provision of strictly humanitarian assistance which it did

(1) Military and Paramilitary Activities in and against Nicaragua (*Nicaragua versus United States of America*) (Merits), ICJ, Rep. 1986, pp. 134-135.

not consider contrarily to international law (2). General Assembly resolution 46/182 entitled « Strengthening of the coordination of humanitarian emergency assistance of the United Nations », in which the General Assembly emphasizes the collective efforts of the international community, in particular the UN system, in providing humanitarian assistance, as well as the resolution of the Institut de Droit International adopted in September 1989 at Santiago de Compostella (3), support these views.

However it is also important to emphasize that the provision of such humanitarian assistance has been carefully conditioned.

a) The purpose of such offers of assistance if it is to escape condemnation as an intervention in the internal affairs of a state, must be the provision of strictly humanitarian assistance to prevent and alleviate suffering, confined to the provision of food, clothing, medicine and other humanitarian assistance and must be granted and distribued impartially and without discrimination to the victims of the civilian population (4). It must be admitted that the terms non-discrimination and impartiality have been debated at length in the literature — for instance a distinction must be made between the principle of impartiality in relation to the action by UN organs, for example the UNHCR, and that on which the ICRC grounds its action.

b) There must be full respect for the sovereignty, territorial integrity and national unity of States, as stated in General Assembly resolution 46/182, and on the need, if only in principle, for the consent of the affected « country » (interestingly, not « State »). Admittedly, this is no easy matter and raises number of issues, in particular when States are in process of dissolution : for instance, who gives this consent, and when is this consent to be taken as given.

c) Such offers of assistance must be non-coercitive. As stated in Resolution of Compostella : « Such offers of assistance shall not, particularly by virtue of the means used to implement them, take

(2) *Ibid.*, pp. 124-125.

(3) *Annuaire de l'Institut de Droit International*, vol. 63-I, pp. 309-436.

(4) As the ICJ put it, it must consist in humanitarian assistance conducted in conformity with the fundamental principles of Red Cross, namely « to prevent and alleviate human suffering whatever it may be found...to protect life and health and to ensure respect for the human being » with « no discrimination as to nationality, race, religious beliefs, class or political opinions » (Note 2).

a form suggestive of threat of armed intervention or any other measure of intimidation ».

The onus has been placed on the state in whose territory the victims find themselves to accept such assistance. In other words the question of humanitarian assistance has been framed, not in terms *per se* of a humanitarian *right to assistance* (although this may be seen as an aspect of other human rights, such as the right to as life — and may well be an emerging right of its own) but in terms of state obligations. Again, the Resolution of the Institut de Droit international declares : « States in whose territories these emergency situations exist should not *arbitrarily* reject such offers of humanitarian assistance ». Moreover, Security council resolutions have strongly condemned « the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population » (Res. 794 (1992)) and insisted in Res. 688 (1991) « that Iraq allows authorise immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq ».

3. — The issue of collective institutionalized measures

Institutionalized action, whether non-coercive or coercive, must be placed within a different legal framework. I would like to refer in this context to article 2 (7) of the Charter as well as to Security Council enforcement action Chapter VII.

a) Article 2 (7) of the Charter which states : « Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State », although often confused with the principle of non-intervention, is of a different nature alltogether. For whilst, the principle of non-intervention is concerned with prohibiting *unilateral* State interventions into the discretionary domain of another state. Article 2 (7) relates to the delimitation of international jurisdiction, i.e. defines the relations between the United Nations and its members States. Here the development has been very different.

Nowithstanding the fact that Article 2 (7) was meant to be more restrictive than article 15 (8) of the League Covenant, this article has been consistently eroded and the field of international jurisdiction expanded, particularly in the field of human rights. This shown that indeed, as the Permanent Court of Justice recognized as far as 1923 in its Advisory Opinion on *Nationality Decrees issued in Tunis and Marocco*, the borderline between internal and international affairs is a constant state of flux, and that wether a matter is or is not a question of domestic jurisdiction « is an essentially relative question ; it depends upon the development of international relations » and international law.

The United Nations has expanded its jurisdiction in the field of human rights in two ways : First, by asserting that the actions it has undertaken do not constitute intervention since they are not testamount to dictatorial action ; secondly by confirming that a matter is no longer one of domestic jurisdiction because it is regulated by human rights law or, and this may be the case of an emergency situation where no violation of human rights law is taking place, is a matter of international concern, i.e. a potential threat to the peace.

b) Coercive measures under Chapter VII escape the ambit of article 2 (7). The prelude to the adoption of such measures is a determination by the Security Council that the situation constitutes a threat to the peace, breach of the peace or act of agression. Economic sanctions under article 41 of the Charter are of course binding on states by virtue of article 25. But though the Security Council in theory can also decide to resort to military force, apart from its instructions to peacekeeping forces it has so far only *authorized* use of such military action by sub-contracting to states or regional agencies. Amongst the uses of force, it has called for is that to enforce and protect the provision of humanitarian assistance. One may quibble about the nature of such authorisations and their scope for there is no express provision in the Charter relating to the competence of the Council to as opposed to *ordering* the use of military force. Nevertheless this has been justified on the basis of the implied powers of that organ, for, as the ICJ observed in the *Expenses Case* : « it cannot be said that the Charter has left the Council impotent in the face of an emergency situation when agreements under article 43 have not a been concluded » (5). The practice

(5) ICJ, Rep. 1962, p. 167.

of the Council reflected in numerous resolutions (6) has confirmed this trend. The importance of this practice under Chapter VII lies in having established the link between violations of human rights, humanitarian assistance and the maintenance of international peace and security. It has also shown that military action for defined and limited purposes may, in the absence of state consent, be taken in an institutionalized context on the basis of a Security Council authorization acting under Chapter VII.

It is evident from this evolution that such issues can no longer be seen to lie exclusively within the domestic jurisdiction of states and that there is a sufficiently broad platform for action by the international community, within the bounds of existing international law, as well as being shaped by soft law. It also shows, however, that this evolution does not have to take place at the expense of the principle of non-intervention, or onvolve the demise of « statist conceptions of international law », which the proliferation of new entities which have recently entered into membership of the United Nations belies.