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RECONCEPTUALIZING THE BOUNDARIES OF “HUMANITARIAN” ASSISTANCE: “WHAT’S IN A NAME” OR “THE IMPORTANCE OF BEING ‘EARNEST’”?

SURABHI RANGANATHAN*

*Humanitarianism consists in never sacrificing a human being to a purpose.*¹

INTRODUCTION

As the above quote indicates, “humanitarianism,” when not bound to any specific context, is a rather general concept that can be explained as “concern for human welfare especially as manifested through philanthropy.”² In common parlance, all action directed towards humane treatment of others can be described as humanitarian. International law practice however has conferred a secondary meaning upon the term “humanitarian,” as a label to be applied in certain specific situations. Thus by convention, “international humanitarian law” is the law prescribing the behavior of state-parties during armed conflict.³ “Humanitarian assistance” describes the actions taken to provide relief and limited protection to persons affected by the conduct of

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1. Albert Schweitzer: French Theologian, Musician and Medical Missionary, <http://www.giga-usa.com/gigaweb1/quotes2/quautschweitzeralbertx001.htm> (last visited January 16, 2007).

2. MERRIAM WEBSTERS II NEW COLLEGE DICTIONARY 537 (1995); *accord* THE OXFORD ENGLISH DICTIONARY 475 (2d ed. 1989) (defining humanitarianism as the “practice of humanitarians,” those who profess mankind’s “duty” as the “advancement of the welfare of the human race”).

3. FRANCOISE BOUCHET-SAULNIER, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 187 (2002).

hostilities — prisoners of war, civilians, sick and wounded, and persons *de hors combat*.⁴ Humanitarian assistance is also applied to describe similar actions during natural disasters.

The Geneva Conventions of 1949,⁵ and the Additional Protocols,⁶ are the primary sources of international humanitarian law, and provide guidance for humanitarian assistance by agencies specifically committed to this purpose and displaying certain characteristics — impartiality and humanitarian purpose.⁷ This “classic understanding” is further crystallized in the practice of the International Committee of the Red Cross (ICRC) and the Fundamental Principles of the Red Cross⁸ that summarize the

4. See *infra* notes 15-45 and accompanying text (discussing the contents of the article relative to the concept of humanitarian assistance, the Geneva Convention, and the International Red Cross).

5. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 85, (successor of the 1907 Hague Convention X [hereinafter Geneva Convention II]); Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III](the Convention was first adopted in 1929, but its present revised version was adopted on Aug. 12, 1949); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV], (based on parts of the 1907 Hague Convention IV).

6. For the purposes of this paper the two relevant protocols are: Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; and, Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

7. See *infra* notes 24-45 and accompanying text (describing the provisions which layout the rights of agencies committed to humanitarian assistance and the mandated principles of their basic ideology).

8. The Fundamental Principles of the Red Cross and Red Crescent were proclaimed at the 20th International Conference of the Red Cross, at Vienna in 1965. INTERNATIONAL COMMITTEE OF THE RED CROSS, THE FUNDAMENTAL PRINCIPLES OF THE RED CROSS AND RED CRESCENT (1965), available at http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0513?OpenDocument&style=Custo_Final.4&View=defaultBody2 [hereinafter FUNDAMENTAL PRINCIPLES]. The label “Fundamental Principles” will be used interchangeably with the “Red Cross Code” and “Red Cross Principles.” According to the ICRC, the Fundamental Principles bind together the National Red Cross and Red Crescent Societies, the ICRC, and the International Federation of Red Cross and Red Crescent Societies, and guarantee the continuity of the movement and its humanitarian work. These principles are not binding upon humanitarian agencies other than the Red Cross but have acquired a degree of normative sanction over the years and many agencies have chosen to structure their mandate and operations keeping these principles in mind.

The Red Cross Code was also referred to by the International Court of

organization's operational ideology which consists of commitment to humanity, impartiality, neutrality, and independence.⁹ These principles do not legally bind other agencies, but have served as prudential rules to guide their conduct. It has thus been popularly held that the rights and privileges accorded to humanitarian agencies are conditioned upon their adherence to these principles in carrying out prescribed tasks.¹⁰ In other words, these principles have described the humanitarian ideology as much as *relief* and *protection* have defined the humanitarian mandate.¹¹ What is immediately striking about this conception is its ideological simplification of the role agencies must play. They must, in short, deliver material assistance, and pay no heed to the broader political environment. Of course, the tasks involved are not easy, but the agencies are spared from worrying about the overall impact of their activities upon the conflict.

However, over the last decade and a half, many agencies have become aware of the broader complexities that accompany all conflicts; the more recent ones in particular. In response, they are consciously modifying the manner in which they approach humanitarian emergencies and the nature of the functions they perform. Their involvement has grown both in duration and breadth of activity and their ideology is moving away from the Red Cross principles.¹² This is clear from the practice of several

Justice in the case concerning Military and Paramilitary Activities in Nicaragua for a definition of authentic humanitarian aid. (Nicar. v. U.S.) (Merits), 1986 I.C.J. 14 (June 27). For criticism of the court's approach in this respect, see LARRY MINEAR & THOMAS G. WEISS, HUMANITARIAN ACTION IN TIMES OF WAR: A HANDBOOK FOR PRACTITIONERS 8 (1993).

9. See FUNDAMENTAL PRINCIPLES *supra* note 8. In all, the Red Cross Code contains seven fundamental principles; the other three are volunteerism, unity and universality. *Id.*

10. Kenneth Anderson, *Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies following the 2003-2004 Afghanistan and IRAQ Conflicts*, 17 HARV. HUM. RTS. J. 41, 57 (2004).

11. See *infra* notes 15-45 and accompanying text (describing the provisions which layout the rights of agencies committed to humanitarian assistance and the mandated principles of their basic ideology).

12. The rights based language of the Humanitarian Charter drafted by the Sphere Project is an illustration of this, even though the charter claims to be concerned with only the most basic requirements for sustaining the lives and dignity of those affected by calamity or conflict. The Sphere Project, Humanitarian Charter and Minimum Standards in Disaster Response, <http://www.sphereproject.org/content/view/25/84/lang,English> [hereinafter Humanitarian Charter and Minimum Standards in Disaster Response]. The Sphere Project was launched in 1997 by a group of humanitarian Non-Governmental Organizations (NGOs), and the Red Cross and Red Crescent movement, to draft a *Humanitarian Charter and Minimum Standards in Disaster Response* for aid agencies to follow. The Sphere Project, Welcome to Sphere Project, http://www.sphereproject.org/component/option,com_frontpage/Itemid,200/lang,English/. The Charter affirms that the humanitarian imperative demands that all possible steps should be taken to prevent or

agencies, which have added testifying and advocacy, development, and peace building to their short-term relief agendas. Indeed, the move towards a “holistic” approach to humanitarian crises, covering military activities, relief, and state-building is being advocated in several quarters, including the higher echelons of the United Nations.¹³

This broadening of the traditional boundaries of mandate (i.e. the functions) and ideology (i.e. the operating principles) has led to concern in some quarters holding the belief that by taking on responsibilities beyond relief-work, and taking political and human rights considerations into account, these agencies have compromised their commitment to humanitarian assistance,¹⁴ and consequently lost claim to the rights and privileges that flow from such commitment. By this view, the agencies would not be considered humanitarian actors because their involvement goes beyond the primary functions and ideologies associated with humanitarianism. For this reason they may be denied the protections available in the Geneva Conventions.

In response to this it may be argued, as this paper seeks to, that humanitarian assistance is a fluid concept. Its content

alleviate human suffering arising out of conflict or calamity, and that civilians so affected have a right to protection and assistance, arising from dignity of human beings. Out of the seven principles embraced by the Red Cross Code, it makes express mention only of humanity and impartiality. See Humanitarian Charter and Minimum Standards in Disaster Response, *supra*.

13. See, e.g., The Secretary-General, *An Agenda for Peace: Report of the Secretary General of the United Nations, pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, U.N. Doc. A/47/277, S/24111 (June 17, 1992). This vision of cohesive action was cemented further by the creation of the Department of Humanitarian Affairs, subsequently replaced by the Office for the Coordination of Humanitarian Affairs, to coordinate assistance programs between different actors. The mandate of the OCHA was expanded to include the coordination of humanitarian response, policy development, and humanitarian advocacy. For more information see United Nations Office for the Coordination of Humanitarian Affairs, *A Brief History of OCHA*, <http://ochaonline.un.org> (last visited Jan. 21, 2007). See also THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) available at <http://www.iciss.ca/pdf/Commission-Report.pdf>. Though very insistent on clear mandates, the International Commission's report goes on to state that a great deal of cohesion is required for successful achievement of the ultimate ends. It mentions especially the need to limit or suspend humanitarian assistance entirely in certain situations due to strategic military pressures. See *id.* at ¶¶ 7.23-24.

14. See DAVID RIEFF, *A BED FOR THE NIGHT: HUMANITARIANISM IN CRISES* 267-336 (2002) (arguing that the effects of this extension of the humanitarian agenda have already resulted in the “death of a good idea”); see also Nicolas de Torrente, *Humanitarian Action under Attack: Reflections on the Iraq War*, 17 HARV. HUM. RTS. J. 1 (2004) (expressing another view that the intense politicization of humanitarian assistance has compromised its effectiveness and severely affected its credibility).

depends upon the situation. What is necessary is to identify the immutable features of the humanitarian enterprise, and allow flexibility in all other aspects. This paper analyzes the Geneva Conventions and the writings of some of the towering figures associated with the ICRC to conclude that of all the principles associated with "humanitarianism" only the primary commitment to humanity, and to some extent impartiality, carry any degree of immutability. Similarly, it studies the link between relief-work and other functions to conclude that the changing nature of involvement is called upon by the changing nature of the conflicts themselves, and is thus a more appropriately humanitarian response. Finally, it offers a few suggestions to develop a logical framework for determining when an agency's actions can be considered suitably "humanitarian" to justify the applicability of the Geneva Conventions.

The paper thus opens with an examination of the traditional understanding of humanitarian assistance, and the nature of the changes seeping through it. The following section commences an analysis of the qualities of the new humanitarianism developed as a result of these changes. First, the section attempts to demonstrate new humanitarianism's inevitability due to the various pressures and pulls that operate upon humanitarian agencies in present day conflicts. Next, it seeks to prove new humanitarianism's ideological fidelity to the idea of humanitarianism in international humanitarian law, and the identity of the broader role played by humanitarian agencies with their basic task of bringing relief. Lastly, it examines the concerns generated by the evolution of the humanitarian enterprise, which potentially undermine the agencies' claims to the rights and protections of the Geneva Convention. In the final section, the paper offers a few suggestions for determining when these rights and protections should be made applicable.

A. *The Early Conception of Humanitarian Assistance*

At the outset, humanitarian assistance was envisaged as the provision of immediate, short-term relief for the wounded during armed conflict. Its modern history is linked to that of the ICRC, the organization founded by Henry Dunant.¹⁵

15. Dunant chanced upon the battle of Solferino in 1859 to discover that the major European military powers had chosen to provide more veterinarians for their injured horses than doctors for their wounded soldiers and set about organizing medical assistance for these soldiers, advocating also the formation of private societies to deal with the wounded in other such wars, and in 1863, at his initiative, the International Committee for Relief to the Wounded was formed. This was the precursor to the ICRC. David P. Forsythe, *International Humanitarian Assistance: The Role of the Red Cross*, 3 BUFF. J. INT'L L. 235, 237 (1996-97); see also HENRI DUNANT, A MEMORY OF SOLFERINO (ICRC, 1986)

The Geneva Conventions of 1949 and the Additional Protocols do not define “humanitarian assistance” but provide a basic description of the rights and responsibilities of humanitarian agencies.

The basic thrust is on immediate relief work, including: caring for the sick and the wounded,¹⁶ supply of foodstuffs, medical supplies, and clothing;¹⁷ distribution of materials for educational, recreational or religious purposes;¹⁸ assistance to captive persons in organizing their leisure time during internment;¹⁹ and, measures to protect civilians and assist them to “recover from the immediate effects[] of hostilities or disasters and also to provide conditions necessary for [its] survival.”²⁰

The language is permissive, allowing “impartial humanitarian bodies like the ICRC” to offer their services for these activities.²¹ Thus, while consent of the parties to the conflict is mentioned as a prerequisite for undertaking protection and relief work,²² agencies having the above-mentioned characteristics have a right, more or less, to offer assistance to the parties; in event of occupation, the occupying powers have a duty to accept the same.²³

(1862). Durant’s entire book is available in several languages, including its original French, at the ICRC website, http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0361?OpenDocument&style=Custo_Final.4&View=defaultBody2.

16. Geneva Convention IV, *supra* note 5, art. 3(2).

17. *See, e.g.*, Geneva Convention IV, *supra* note 5, art. 59.

18. *See, e.g.*, Geneva Convention IV, *supra* note 5, art. 145.

19. *Id.*

20. Additional Protocol I, *supra* note 6, art. 61. These are listed as including:

- (i) warning; (ii) evacuation; (iii) management of shelters; (iv.) management of blackout measures; (v.) rescue; (vi) medical services, including first aid, and religious assistance; (vii) fire-fighting; (viii) detection and marking of danger areas; (ix) decontamination and similar protective measures; (x) provision of emergency accommodation and supplies; (xi) emergency assistance in the restoration and maintenance of order in distressed areas; (xii) emergency repair of indispensable public utilities; (xiii) emergency disposal of the dead; (xiv) assistance in the preservation of objects essential for survival; (xv) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization.

Id.

21. *See generally* Additional Protocol I, *supra* note 6, art. 3, 7 (relating to the protection offered by humanitarian bodies for international armed conflicts); Geneva Protocol II, *supra* note 6, art. 18 (relating to the protection offered by humanitarian bodies for non-international-armed conflicts).

22. Geneva Convention III, *supra* note 5, art. 9.

23. *See* Geneva Convention I, *supra* note 5, art. 3(2) (identifying the minimum provisions to be applied); *see also* Geneva Convention I, *supra* note 5, art. 9 (elaborating further upon the “Right of Humanitarian Initiative” and the duty of the parties to the conflict to accept the proffered aid); Additional

A number of provisions further clarify the rights of these organizations. These include, inter alia: provisions against attack upon fixed establishments and mobile medical units,²⁴ hospital ships,²⁵ relief consignments,²⁶ and medical, religious, and relief personnel.²⁷ They also include mandatory free passage to relief consignments²⁸ and exemption of these consignments from taxes,²⁹ as well as mandatory provision to the ICRC of facilities necessary for carrying out the humanitarian functions assigned to it by the Conventions and the Protocols and any other humanitarian activities, subject to the consent of the parties.³⁰ Similar facilities are to be granted to the Red Cross Societies to carry out humanitarian activities in accordance with the Conventions and the Protocols, and the fundamental principles of the Red Cross; so far as possible, similar facilities are also to be made available to other duly authorized humanitarian organizations.³¹

In addition, there is a general admonition to the effect that parties must not regard acts of impartial humanitarian agencies as either interfering with their sovereignty or as unfriendly acts. Thus, they must not put forth impediments because of political motives or reasons related to the conflict. For the same reason, they must not seek unnecessarily restrictive interpretations of the Conventions' provisions.³² The phrase "impartial humanitarian body" is repeated throughout, clarifying that all these rights are conditioned on these characteristics. It is important also that humanitarian agencies act within their mandate and not commit

Protocol II, *supra* note 6, art. 18 (discussing duties relative to non-international armed conflicts); International Committee of the Red Cross, Statutes of the International Committee of the Red Cross (2003), <http://www.icrc.org/web/eng/siteeng0.nsf/html/icrc-statutes-080503> (last visited Jan. 21, 2007) (presenting and identifying legal status, role, and structure of the International Committee). *See generally* BOUCHET-SAULNIER, *supra* note 3 (identifying practical guides to Humanitarian Law).

24. Geneva Convention I, *supra* note 5, art. 19

25. *Id.* art. 20.

26. Additional Protocol I, *supra* note 6, art. 70(4)

27. *Id.* art. 15.

28. Geneva Convention IV, *supra* note 5, art. 59.

29. *Id.* art. 61

30. Additional Protocol I, *supra* note 6, art. 81.

31. *Id.*

32. *See generally* Geneva Convention I, *supra* note 5, art. 9 (establishing that the Geneva Conventions do not hinder humanitarian activities); Geneva Convention IV, *supra* note 5, art. 10 (establishing that as with the Geneva Conventions I-III, the Geneva Convention IV, relative to civil persons, also does not hinder humanitarian activities); Additional Protocol I, *supra* note 6, art. 70(1) (establishing that in the re-affirmation of the Geneva Conventions, "offers of such relief shall not be regarded as interference"). *See also* BOUCHET-SAULNIER, *supra* note 3, at 8 (recognizing that the Geneva Conventions identify the roles of Government in times of conflict and "clarify that these initiatives cannot be considered as interferences").

any acts that are hostile or harmful to their enemy, for in either case, following due warning, the protections may be taken away.³³ Finally, while the ICRC and to a substantial extent the Red Cross Societies must be allowed access for relief work, the other agencies may be limited by number, as long as this does not hinder supply of effective and adequate relief.³⁴

All of the above thus points to a fairly clear mandate and a fairly clear basic ideology, focused on provision of aid and protection, without attention to political factors or characteristics of recipients apart from the fact that for the purposes of receiving such aid or protection they fall into certain categories of persons — civilians, prisoners of war, and persons wounded, sick or *de hors combat*.³⁵ This is how the ICRC, for instance, has sought to define its role in situations of armed conflict and serves as a cursory description of “classical humanitarianism.”

The Fundamental Principles of the Red Cross flesh out this operational ideology further. This code provides that the Red Cross will act on the basis of *humanity, impartiality, neutrality, independence, voluntary service, unity and universality*. The last three indicate mainly that the Red Cross does not act for profit, that there can be only one Red Cross Society in a country, and that all Red Cross Societies across the world are equal and must help each other. It is the first four principles that provide the substantive framework which dictates the ICRC’s action in a particular situation.

The principle of *humanity*, considered to be the primary principle among the seven, which are ranked in order of importance, essentially contains three elements: “to prevent and alleviate suffering;” “to protect life and health;” and, “to assure respect for the individual.”³⁶ These three elements must not only be the primary objectives of relief agencies, but classical humanitarianism believes that these must also be the only objectives.³⁷

33. See Geneva Convention I, *supra* note 5, art. 21 (identifying the acts and manner in which protection will cease); Additional Protocol I, *supra* note 6, art. 13, 74(4) (establishing provisions regarding the discontinuance of protection); Additional Protocol II, *supra* note 6, art. 11(2) (identifying the limits to the protection of medical units and transports).

34. Geneva Convention IV, *supra* note 5, art. 142.

35. See *supra* note 5 and accompanying text (identifying the category of persons covered by the Geneva Convention).

36. JEAN PICTET, THE FUNDAMENTAL PRINCIPLES OF THE RED CROSS: COMMENTARY (Henry Dunant Institute, 1987) (1979), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5MJE9N>. Pictet’s commentary, though it was published more than fifteen years after the Fundamental Principles were adopted, is the official version approved by the ICRC. It will therefore be referred to extensively in the next few sections to draw out the classical understanding of humanitarian.

37. *Id.* at 21-22. As Pictet notes:

The principle of *impartiality* implies essentially two things: non-discrimination, such that all persons are equal in suffering, without regard to which "side" they belong to, or once they are *hors de combat*, what their status had been in the conflict; and, proportionality, which is a distributional principle implying that between persons assistance shall be allocated according to their degree of need, with priority being given to those whose need is the greatest.³⁸ Pictet insists there is a third element also to the principle of impartiality, which he also terms "impartiality."³⁹ He defines this as involving the removal of all subjective discrimination, i.e. non-distinction between persons even of the same group, on any basis, other than need.⁴⁰ This overall idea of "assistance without discrimination" is clearly reflected in the amplification of the principle of *humanity* in the Code.⁴¹

The principle of *neutrality* flows in a sense directly from the idea of not taking sides, which is implied in the principle of impartiality. However contrary to that principle, which implies no distinction between persons requiring assistance, neutrality posits that humanitarian agencies should not distinguish between parties to a conflict. Included in this are military neutrality, taking no sides in the hostilities, political neutrality, and not engaging in controversies of a political, racial, religious, or ideological nature.⁴² Evidently, neutrality also implies that no act of the humanitarian agency should be seen to confer or take away legitimacy from any government. It is also the reason why the ICRC abstains from making public denunciations about violations committed by either side.⁴³ Many of these ideas have come under

Although it is the purpose of the Red Cross to make the world a better place, it can do so only in certain respects. It cannot undertake every activity regarded as benevolent but must concentrate on specific responsibilities. Only in so doing will it guard itself from a dangerous dispersal of effort.

Id. at 22. The philosophy behind this principle — to work towards the well being of all others — is more or less unchallenged today, although what can be included within such well being has come into debate. Pictet classifies the four substantive principles into "substantive" (humanity and impartiality) and "derived" (neutrality and independence) principles. Among the substantive principles, he gives primacy to humanity as "essential," and asserts in substance that impartiality is an unarguable element of the same. *Id.* at 12-13.

38. *Id.* at 37-42.

39. *Id.* at 48-51.

40. *Id.*

41. *Id.*

42. *Id.* at 54-59.

43. *Id.* at 59. However, in one context at least, the ICRC's silence was seen less as a concern for its own neutrality than as a concession to Switzerland, a state to which it is pretty closely affiliated. During World War II, Switzerland was careful not to take any sort of stand against Germany, and due to this, the ICRC, which had witnessed the Final Solution in preparation and which had

attack and the idea of neutrality has been watered down a great deal, not the least by the ICRC's own actions. This will be discussed in more detail in the third subsection of this section.

The principle of *independence* requires humanitarian action to be dissociated from political, financial, or military pressures.⁴⁴ This appears straightforward but has actually been the least realized for most agencies apart from the ICRC because budgetary constraints, concurrent government initiatives, the primacy of military personnel in medical relief, etc., have often called for these agencies to act with a certain degree of cohesion with, and even under the supervision of, the government and the military. Following these principles allows humanitarian agencies the guarantees of access, safety from attack, and assistance from parties in conflict as provided by the Geneva Convention and discussed earlier.⁴⁵ They have thus enjoyed a great deal of popularity with many humanitarian agencies, who have accordingly sought to structure both their mandate and their ideological stance to resemble that of the ICRC. However, as the next section will demonstrate, in recent years more and more of these agencies have begun to deviate from this position.

B. Broadening and Blurring

For many agencies, the conflicts of the past decade have exposed both the limitations of providing immediate and short term relief as well as of the accompanying non-judgmental, non-political ideology. The paradoxes of humanitarian relief and the role it may play in fueling conflict are all too evident.⁴⁶

planned to make news of this public, decided finally to do nothing, a decision for which it was deeply criticized later. See DAVID P FORSYTHE, THE HUMANITARIANS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS 47-50, 187-190 (2005) (describing the ICRC's response to the "Swiss National Interest"). Writing in 1979, Pictet thus adds a footnote that "[t]his does not of course in any sense prevent the condemnation of inhuman practices such as torture." PICTET, *supra* note 36, at 60 n.1.

44. BOUCHET-SAULNIER, *supra* note 3, at 140.

45. See *supra* note 5 and accompanying text (describing the content and scope of the Geneva Conventions).

46. First, it is not easy to ensure that aid reaches the persons it is intended for both because, due to the growing complexity in the nature of conflicts, it is often difficult to identify victims and it may be misappropriated by the dominant side. Second, aid may fuel the conflict, either by allowing the parties to continue hostilities, free from worries about how their families will be faring, or by directly though unwittingly contributing to the war effort, through a supply of material resources and services. Third, aid may make beneficiaries more vulnerable to attack, from those seeking similar assistance; or create a culture of dependency which later comes in way of self reliance. Fourth, aid may serve as a cover for not taking other more appropriate action; it may be used to contain a situation, such that resolving it can be avoided. Finally, the manner in which the funds for aid are raised may serve to objectify the recipients in the eyes of the international community. See

A second set of factors further undermines classical humanitarianism's premise of moral incontestability — that providing material assistance during situations of armed conflict is always a good thing. A commitment to engage only in relief work, without paying heed to the political environment or other factors, often undercuts the importance of human rights. Viewing aid as conditioned not on the right of the victims, but on their needs disempowers them in the long term. Also, in situations where one party is at fault, not questioning, publicizing or openly condemning its policies does little to either discourage its activities or prevent a vicious cycle of retaliation from setting in, or make the rest of the world aware, by example, of the harms associated with such conduct. Many agencies have begun to speak-up about the situations they witnessed or were involved in. Some, like the ICRC, speak to the states involved;⁴⁷ others, like the Medecins Sans Frontiers ("MSF"), and Oxfam, speak directly to the public.⁴⁸

generally FIONA TERRY, CONDEMNED TO REPEAT: THE PARADOX OF HUMANITARIAN ACTION (2002) (detailing analysis of the matter in which these paradoxes have manifested themselves in, and impacted upon different humanitarian crises).

47. YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS: THE RIGHT AND DUTY TO HUMANITARIAN ASSISTANCE 144 (1991). Even within the ICRC there have been opinions that favor more public expression. For instance, the Tansley Report prepared by a joint committee mandated by the ICRC and the League of Red Cross Societies to review the Red Cross mission and suggest future directions for growth, suggested greater flexibility in this regard. JOINT COMMITTEE ON THE REAPPRAISAL OF THE ROLE OF THE RED CROSS, FINAL REPORT: AN AGENDA FOR THE RED CROSS (1975). As an excerpt provides:

While the Red Cross has achieved much on the basis of discretion in the past, the movement should recognize the danger that discretion is comfortable to both the controlling authority and the Red Cross. Thus it may be continued not because it is necessary but simply because it is comfortable.

BEIGBEDER, *supra*, at 149 (quoting JOINT COMMITTEE ON THE REAPPRAISAL OF THE ROLE OF THE RED CROSS, FINAL REPORT: AN AGENDA FOR THE RED CROSS (1975)). The Report did not however prescribe publicity as the course of action in all cases. Beigbeder notes that in one section the report refers to direct action, consisting of mobilizing public opinion against particular groups or governments, as incompatible with the Red Cross. *Id.*

48. The ICRC, of course, is motivated by its concern for neutrality by not going public. However, the MSF, which takes the opposite opinion on testifying, also claims that its neutrality is unaffected by public denunciations. Nicholas de Torrente, Executive Director of the MSF states:

Using IHL as a reference, MSF also believes that neutrality supports denouncing abuses committed by any belligerent with the aim of improving the protection and assistance afforded to victims. Neutrality does not mean that the impact of humanitarian action will be neutral in the way that a neutral compound, when inserted into an ongoing chemical reaction, does not affect it. Humanitarian organizations

This, along with the growing media involvement, has made a huge difference in the way these humanitarian crises have begun to be perceived by people all over the world. The previously vague images are now seen to be “real people” exploited in situations of conflict and disasters — often by state actors — and the obstacles that humanitarian agencies overcome to bring relief are brought vividly to life.⁴⁹ With this change in perception and with public opinion against armed conflict becoming more strident, states have responded at two levels. First, states have become more actively involved in the delivery of humanitarian assistance, leading to a proliferation of government funded “NGOs” and national agencies who play a direct role in relief and reconstruction.⁵⁰ More importantly, they have sought to capitalize

actively seek to alleviate suffering, and their actions and statements necessarily have an impact on the political dynamics of a conflict.

Torrente, *supra* note 14, at 5.

49. See A Brookings/Harvard Forum: Press Coverage and the War on Terrorism “The CNN Effect”: How 24-Hour News Coverage Affects Government Decisions and Public Opinion (2002), available at <http://www.brook.edu/comm/transcripts/20020123.htm> (discussing the impact of media coverage on the war on terrorism). But see Peter Viggo Jakobsen, *Focus on the CNN Effect Misses the Point: The Real Media Impact on Conflict Management Is Invisible and Indirect*, 37 J. OF PEACE RESEARCH 131 (2000) (arguing that the media plays a very limited role). See also Urs Boegli, *A few thoughts on the relationship between Humanitarian Agencies and the Media*, 325 INT’L REV. OF THE RED CROSS, 627-631 (1998) (commenting critically on the instrumentality of the media), available at <http://www.irc.org/web/eng/siteeng0.nsf/html/57JPJG>.

50. For instance in 1995, USAID responded to “57 emergencies saving hundreds of thousands of lives.” The U.S. Agency for International Development, *USAID Humanitarian Response*, <http://www.usaid.gov/ga/humassistance/background/index.htm> (last visited Jan. 21, 2007). Its rather broad “humanitarian” mandate is described as follows:

The U.S. Agency for International Development (USAID) supports both humanitarian and sustainable development assistance in the form of U.S. agricultural commodities, as well as food assistance in response to emergencies and disasters around the world. In addition, the agency provides resources to U.S. private voluntary organizations (PVOs) and the World Food Program to implement sustainable development programs targeted to improve the food security of needy people, either by the direct distribution of agricultural commodities or the use of local currencies generated by the sale of these commodities in the recipient county.

In response to manmade and natural disasters worldwide, USAID funds emergency relief and transition efforts. USAID also provides funds to improve the capacity of foreign nations to prepare and plan for disasters, mitigate their effect, and teach prevention techniques, increasing the skills available locally to respond when disaster strikes.

Finally, USAID fills the gap between emergency humanitarian relief and long-term development assistance by providing special intervention in complex emergencies, post-conflict scenarios, and the prevention of disaster.

Id.

on the positive energy that is generated around humanitarian assistance by passing off many political crises as humanitarian.⁵¹

The language of humanitarian assistance has thus been broadened to include military intervention, physical protection, and, of course, human rights concerns in addition to the primary idea of providing relief. The categories of "humanitarian" actors have also proliferated, with similar functions being performed by aid agencies, government organizations, and, significantly, the military.

The "new humanitarianism" thus bears little resemblance to the classic version or its ideals, apart from a basic commitment to relief work. Even this is not an incontrovertible commitment. To quote the British relief specialist Fiona Fox:

There is a new humanitarianism for a new millennium. It is principled, ethical [and] human rights based It will withhold aid if to deliver it could prolong conflict and undermine human rights. [And] it rejects the traditional humanitarian principle of neutrality as on the one hand morally repugnant and on the other hand unachievable in the complex political emergencies of the post-Cold War period.⁵²

Indeed, the principles of neutrality and independence have been more or less expressly sidelined by most agencies in a number of crises.⁵³ "Impartiality" in the distribution of aid has also received a blow as humanitarian agencies have been pressured, by parties or circumstances, to provide their services to one side when they are unable to correspond with the other.⁵⁴

While these developments are, on the one hand, evidently seen as a strengthening of the humanitarian enterprise, on the other, they raise questions about the continued access of these agencies to persons in need. Such access may be limited by parties in conflict, or it may be fettered by their own growing political role, as "withdrawal" may be used as a means of communicating displeasure, or, because non-state actors may be hesitant to

51. See generally RIEFF, *supra* note 14. Rieff discusses the examples of Kosovo and Afghanistan as situations in which political intervention would be justifiable, but is not offered as a reason; instead, military action is cloaked in the garb of "humanitarian" intervention. *Id.*

52. RIEFF, *supra* note 14, at 314.

53. See, e.g., Anderson, *supra* note 10, at 45-46 (discussing the outrage and horror stemming from the U.N. Baghdad headquarters bombing that killed twenty-three people); see also Peter Walker, *Between Cooptation and Irrelevance: Humanitarian Action After Iraq*, 17 J. REFUGEE STUD. 260 (2004) (providing a more in-depth discussion of humanitarian action after the Iraq crisis, specifically the need to redress humanitarian action).

54. See MINEAR & WEISS, *supra* note 8, at 24 (detailing the example of Operation Lifeline Sudan, where the Khartoum authorities demanded for the areas they controlled, a larger share of aid than would be due according to strict proportionality).

communicate with agencies with obvious political or military affiliations. Agencies may themselves have to choose not to establish links with certain groups (terrorist groups for instance) lest this be seen as a conferral of legitimacy.⁵⁵

An even bigger concern is that of security. The right against being attacked is effective upon the premise that these agencies do not interfere with state sovereignty, nor engage in functions other than relief. Where agencies are clearly linked to political and military actors and where physical protection of victims and other persons becomes intertwined with their duties, the immunity from attack may weaken or cease altogether.⁵⁶

55. For instance, Professor Anderson claims that the incontestability of humanitarian action should not prevent the United States government from targeting a meeting between a humanitarian organization and Al Qaeda. Anderson, *supra* note 10, at 63. The Bush government, Anderson asserts, feels the same. *Id.*

This kind of an attitude, justifiable or not, certainly makes the possibility of communication between the "Western" humanitarian agencies and terrorist groups less likely, impeding the former's chances of obtaining safety guarantees. This poses a barrier in addition to the ethical question on whether humanitarian agencies would be justified in stretching neutrality to the extent of not passing judgment even on the activities of terrorist groups (played off against the need to obtain access to areas controlled by these groups who in material terms are nevertheless in need of humanitarian assistance).

This situation is different normatively from a case of conflict between states, where issues of cooperation are neither ethically nor practically hampered by anything other than the will of the state itself.

56. Iraq, again, provides an example of this. In one of the most horrific instances of attack on humanitarian personnel, the UN Headquarters in Baghdad were bombed on August 19, 2003. *Id.* at 44. Twenty-three persons were killed including U.N. Head of Mission and Special Representative, Sergio Vieira de Mello. *Id.* at 45. The bombing left the entire network of humanitarian workers devastated. *Id.* Representative de Mello was one of the most respected diplomats, who had "served as chief U.N. official in Kosovo following the NATO bombing campaign" as well as the "head of the U.N. East Timor Transitional Administration". *Id.* "At the time of the bombing [de Mello] was on leave as U.N. High Commissioner for Human Rights." *Id.* Additionally, the UN office had "served as a liaison point for international NGOs of all kinds and possessed one of the few internet connections through which NGO workers could contact friends and family outside the country," leading to a regular flow of humanitarian personnel through it. *Id.* Two months later, the ICRC headquarters in Baghdad was bombed. *Id.* Thirty-five other humanitarian personnel were killed and more than "200 wounded as part of coordinated attacks throughout the city." *Id.*

The greatest irony perhaps is that, as Professor Anderson reports, the U.N. has asked absolutely for minimal protection to avoid being linked to the United States military as far as possible and to segregate their functions of relief and reconstruction from the occupation by the coalition forces. *Id.* at 46-47. Ultimately though, in the Iraqi resistance they were classed along with the politico-military invasion. *Id.*

Professor Anderson analyzes that with the growing complexity of assimilating elements beyond immediate material assistance, humanitarian

Apart from access and security, the other rights and protections embodied in the Geneva Conventions are also clearly conditioned on the impartial humanitarian character of these agencies. It is therefore important to examine whether the broadening of the humanitarian mandate has blurred these characteristics of the aid agencies so much that they should no longer avail of the guarantees under the Geneva Conventions. The thrust is not upon debating the rights and wrongs of the extended mandate or the ideological changes; this paper seeks to study only whether these developments have been in consonance with the needs and realities of the present day conflicts, and whether despite their break from specific Red Cross principles, aid agencies continue to justify being labeled as "humanitarian." The next section will look at the first part of the question, i.e., the pressures and realities that have required a modification of approach.

C. An Unscientific Taxonomy of Challenges Confronting Humanitarian Agencies

1. The Changing Context

Probably the most important catalyst of change is the different nature of present day conflicts. Open wars between states are rare; armed conflict of state with non-state actors, or between non-state actors, being far more common. Non-state actors, it must be remembered, are not bound to the Geneva Conventions nor considered legitimate warring parties and in many situations may be justifiably treated as criminals. This makes it more difficult for humanitarian agencies to not take sides. Indeed, agencies that deploy aid without considering the context run the risk of helping even terrorist organizations.

The Red Cross Code, especially the injunction for neutrality, does not take this into account. The prescriptions may thus prove to be of little value to many aid agencies. Indeed, the first challenge that humanitarian agencies are faced with is that of reconciling a strict adherence to the fundamental principles with other realities. The ICRC may hold on to a strict ethic of neutrality, but many agencies feel it is more important to take a stand when they perceive intentional and grave violation of international humanitarian law.⁵⁷ For these organizations,

action can no longer be accorded its previous morally incontestable status. "The reconstruction of society requires a politics, and choices about all matters in society — political, economic and cultural — which, by their nature, are contestable." *Id.* On this basis he declares humanitarian inviolability is in crisis. *Id.* at 58.

57. This range of responses was seen during the alleged genocide in Biafra. During the alleged genocide, the ICRC preferred to take no position, but

advocacy is a moral imperative.⁵⁸ Another factor supporting non-neutrality may be the premise that publicizing the horrors of the conflicts may work ultimately towards the permanent eradication of war as states learn to be more humanitarian.⁵⁹ In the same way, in many conflicts, the fact that aid cannot be offered across both sides is not always an argument for withdrawing it completely. Some agencies see impartiality only as a desirable goal, not an absolute condition.⁶⁰

Similarly, for some, concentrating only on immediate relief is akin to “putting band aids on malignant tumors.”⁶¹ Especially with the popularization of the language of human rights, to provide only immediate relief appears an inadequate response. In any case, psychologically, relief work is nearly always a no-win situation for the humanitarian actors⁶² for they are always required in the most hopeless situations and made to move on before things change appreciably for the better. Thus, the desire

disillusioned by this, a group of its officials broke away to form the MSF. The MSF’s operational philosophy includes a willingness to testify against and denounce in public, serious violations of the Geneva Conventions. See Fiona Terry, *The principle of neutrality: is it relevant to MSF?*, M’EDICINS SANS FRONTIÈRES, available at <http://www.msf.fr/documents/base/2000-12-01-Terry.pdf> (discussing whether neutrality should continue to be a tenet of the MSF and proposing hypothetically that neutrality should be stricken from the MSF Charter). Many of the British charities follow the same approach.

58. To quote Edward B. Rackley of the Humanitarian Affairs Department, MSF-Holland:

I am thinking of the fundamental notion that, when faced with the suffering of others, near or far, silence and inaction are impossible to countenance. Thus is passivity indistinguishable from complicity, which explains the activist, interventionist nature of humanitarian logic. Of course, the humanitarian injunction against silence and passivity is not itself a solution to the suffering of others, but it captures the essence of the moral logic behind humanitarian action.

Edward B. Rackley, PhD, *Humanitarian Practice Network*, A Bed for the Night: Humanitarianism in Crisis, <http://www.odihpn.org/report.asp?ID=2484> (last visited Jan. 26, 2007) (reviewing DAVID RIEFF, A BED FOR THE NIGHT: HUMANITARIAN IN CRISIS (2002)).

59. One criticism of Dunant’s view of humanitarian assistance — the giving of relief without the questioning of war — has been criticized as encouraging war by making it appear more “humane.” Ivar Libaek discusses the criticism surrounding the Nobel Peace Prize awarded to Dunant in 1901 as well as the reasons why the Red Cross was awarded three further Peace Prizes. Ivar Libaek, Nobelprize.org, The Red Cross: Three-Time Recipient of the Peace Prize, (2003), http://nobelprize.org/nobel_prizes/peace/articles/libaek/index.html; see also FORSYTHE, *supra* note 43, at 22-23 (stating that the two main arguments against Dunant’s selection for the Nobel prize were that Dunant “did not work directly for peace” and that “making war more human perpetuated the institution of war”).

60. See *supra* note 45 and accompanying text.

61. RIEFF, *supra* note 14, at 307.

62. *Id.* at 22.

to be part of the process of rejuvenation may drive them to adopt development and reconstruction activities.

2. *Financial Pressures*

Most aid agencies depend upon contributions from states and private persons for their survival. With the increase in the number of humanitarian crises, budgets have naturally expanded, making obtainment of funding a matter of greater concern.

Leaning on states for greater contributions reduces the independence of humanitarian agencies, for their involvement may be modified as per their donor states' wishes.⁶³ For instance, the United States, a major provider of aid, has been able to put pressure on United Nations Agencies by withholding contributions from those that engage in assistance or development work in Palestine.⁶⁴ Even back in the 1940s, the ICRC's decision to suppress its information about the "Final Solution" is believed to have been influenced by Switzerland's neutral stance with respect to Germany.⁶⁵

A more significant influence on the mandate and ideology of humanitarian agencies is the need to raise finances from the public. Agencies have to conform to the prevailing public opinion of the time. This influences not only the particular crises they get involved in, but also the nature of functions they perform.⁶⁶ The Kosovos of the world thus get far more attention than the Sierra Leones.

With the growing role of private funding, the portrayal of humanitarian crises has also changed. Agencies are often forced

63. Minear notes from his experience of Afghanistan:

The humanitarian effort, local and international, has been further complicated by pressures brought to bear by donor governments on private agencies. From the early months of the humanitarian response, Muslim NGOs have been subjected to close scrutiny. Several such agencies based in North America have had their assets seized by the U.S. and Canadian governments. UNICEF has reportedly come under pressure from the United States for its past funding of a Muslim NGO. Pakistan has reportedly expelled expatriate staff of several agencies identified as sympathetic to the Taliban. Several Saudi-based groups have been publicly identified as suspect, although Saudi authorities have challenged the allegation.

LARRY MINEAR, HUMANITARIAN ACTION IN THE AGE OF TERRORISM 7 (Humanitarianism and War Project, Working Paper No. 63, (2002)), available at <http://www.unhcr.org/research/RESEARCH/3d57aba71.pdf>.

64. See Jose E. Alvarez, *Legal Remedies and the United Nations A La Carte Problem*, 12 MICH. J. INT'L L. 229, 234-35 (1991) (detailing the United States' withholding of funds believed to provide benefits to the PLO).

65. See FORSYTHE, *supra* note 43, at 44-50 (discussing the reasons why the ICRC did not speak publicly about its views of the Nazi death camps).

66. See Barbara Harrel-Bond, *Humanitarianism is a Straitjacket*, 84 AFRICAN AFFAIRS 3 (1985) (discussing the impact of the media on humanitarian agencies).

to showcase the crises so they can raise more money. This may lead to over-hyping of actual facts, describing them inaccurately, or portraying victims as objects of charity.

3. *Field Realities: Military and Political Duties*

Humanitarian agencies do not take on active military duties, but they may be pushed into offering indirect assistance to groups in danger. An instance of this is the “protection by presence” afforded by agencies in Sudan.⁶⁷ Protection by presence as an idea does not always represent a formal extension of the humanitarian mandate. Increasingly, however, given the more complex nature of conflicts, it has come to include the stationing of humanitarian actors on the line between the attackers and the attacked; or publicizing the attacks and the nature of government involvement and putting pressure on the government to stop its assistance to the attackers: both of which are positive acts, and involve non-neutral actions beyond the traditional role of providing relief. Indeed, in Darfur, the initial phase of humanitarian presence was followed by targeted attacks on aid agency workers, since for the Janjaweed, the relief workers were akin to security agents.

Like protection by presence, an agency may be required to take on other functions of a more political character as well because it is present at a particular site. For instance, their responsibilities may be linked to temporary civil administration, reconstruction, reporting and assessment of the situation for government authorities, etc.⁶⁸ Involved agencies can thus hardly remain fully neutral or independent from government agendas.

4. *Field Realities: Efficiency Gains From the Involvement of Other Actors*

The blurring of the difference between humanitarian crises and situations of abuses of human rights has not only lead to humanitarian agencies taking up advocacy and lobbying, but also to the involvement of development and human rights bodies in the

67. Max Glaser, UN-OCHA Senior Humanitarian Affairs Officer, in Darfur between July and December 2004, writes that in Darfur, the Khawajas (foreigners) were welcomed by the displaced Fur tribes more as guarantors of their safety than as providers of aid. Max Glaser, *Humanitarian Practice Network*, The Darfur Crises: Simple Needs, Complex Response, <http://www.odihpn.org/report.asp?ID=2637> (last visited November 28, 2006). The Furs had received little protection from the government which had links to the Janjaweed militias. *Id.* The presence of humanitarian actors served to shelter the Furs from the attacks by the Janjaweed because the latter were hopeful of material assistance, and also pushed the local officials to function better to provide security to the displacement camps. *Id.*

68. See BOUCHET-SAULNIER, *supra* note 3, at 4-7 (noting that agencies play a vital role during “epidemics, famine, [and] conflict exodus” when government powers are not able).

early phases of providing material relief. Indeed, for many bodies, it is more viable to combine relief work with other activities, because it helps them to use resources more efficiently, by applying them to treat the causes of the crises rather than the symptoms.⁶⁹

The military is often well placed to contribute towards relief work in terms of rescues, distribution, and protection of supply lines. With the growing threat to humanitarian agencies in conflicts involving non-state actors, or even terrorist states, it may be necessary for the latter to seek support from the former.⁷⁰ Indeed, in some situations, security concerns may force humanitarian agencies to quit the region, and the military to assume the full burden of relief work.⁷¹

5. *Colorable Use of the Humanitarian Agenda*

Powerful states, like the United States, are also responsible for intentional modification of the humanitarian ideology. As discussed earlier, with the growing prominence of relief work in the media, contributing to the high degree of legitimacy enjoyed by humanitarian actors, states have sought to employ the language of

69. See RIEFF, *supra* note 14, at 22 (pointing to the experience of an Italian UN official in Afghanistan, whose agency had rebuilt a local hospital three times after three separate raids by the warlords, only to have it raided a fourth time by the forces of Abdul Rashid Dostum). Rieff wonders, as the official himself did, whether in such situations the aid agencies were really doing much good by providing relief without taking other factors into consideration. *Id.* at 23. He opines that they may well be creating a culture of dependency, or worse, inadvertently assisting some warlord's war effort. *Id.*

70. See Anderson, *supra* note 10, at 41-42 (noting that humanitarian agencies now face much higher risks from terrorist and guerrilla forces). There is of course a great deal of debate on whether humanitarian agencies should on principle associate themselves with the military, since doing so takes away from their neutral independent character. Nevertheless, pragmatism would dictate that it may be foolhardy for agencies to refuse military protection, where there is little guarantee of their safety. For further discussion see *id.*

71. See CARA THANASSI, IRAQ: HUMANITARIAN-MILITARY RELATIONS (Oxfam International, Oxfam Briefing Paper 41 (2003)), available at http://www.oxfam.org.uk/what_we_do/issues/conflict_disasters/downloads/bp4_1_iraq.pdf (positing that the realities of situations like Iraq are such that it may not be possible for humanitarian agencies to operate effectively in all places). This is unusual because Oxfam is typically not in favour of military involvement in humanitarian assistance. The military should thus be prepared to discharge the former's functions as well, although temporarily and for as short a period as possible. *Id.* For a critical assessment of the military's capability to effectively contribute towards the delivery of humanitarian assistance see JANE BARRY WITH ANNA JEFFERYS, A BRIDGE TOO FAR: AID AGENCIES AND THE MILITARY IN HUMANITARIAN RESPONSE (Humanitarian Practice Network, Network Paper 37 (2002)), available at [http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5FKHH5/\\$FILE/odi-bridg-e-jan02.pdf](http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5FKHH5/$FILE/odi-bridg-e-jan02.pdf).

humanitarian assistance as a cover for their political agendas. Ironically, this language has been used to explain both strategic decisions to intervene in some situations and to stay out of others.

In Bosnia in the early 1990s, the United States and the Western European States, wary of interfering directly, used humanitarian action as a substitute for political commitment. This resulted in a ludicrous situation where vast resources were diverted from other regions and concentrated on Bosnia, allowing agencies to make very good provisions to feed, shelter and clothe the Bosnian civilians. No protection, however, was given against attacks by the Serbs, and the same agencies were forced to get out of the way once the killings began.⁷² In Kosovo a few years later, the same states, now tired of Milosevic and seeking a regime change, were happy to clothe their independent political strike (via the NATO) as humanitarian intervention. Clearly, Milosevic was responsible for ethnic cleansing and his removal was supported by humanitarian agencies. However, NATO members were moved to act as much to prevent the threat to peace and order to Europe due to the spread of ethnic fascism, as for humanitarian concerns, though they based their action solely on the latter reason, thus contributing to precedent for intertwining the humanitarian agenda with politico-military aims.⁷³

What has followed essentially is the portrayal of various political and military crises as humanitarian, in the same way as situations involving abuses of human rights have been described as humanitarian emergencies. There is a lack of clarity about the boundaries of humanitarian action, which has naturally impacted upon the mandate and ideology of humanitarian agencies.

D. Humanitarianism: Evolution or Change?

Classical humanitarianism had a concrete meaning both in terms of the tasks envisaged for humanitarian agencies and in the

72. RIEFF, *supra* note 14, at 123-54. For a detailed analysis of the UNHCR's role in Bosnia, see also Kirsten Young, *UNHCR and ICRC in the Former Yugoslavia: Bosnia-Herzegovina*, 83 INT'L REV. OF THE RED CROSS 781, 782 (2001) (explaining that UNHCR "faced its greatest challenges in Bosnia-Herzegovina" and was one of the most difficult situations the organization has ever undertaken).

73. Reiff quotes Eric Dachy, the operations director of MSF Belgium stating:

One could have hoped that [in Kosovo], politics would finally reclaim its rights, even in its most extreme form, war and one could have hoped for a more intelligent delineation of the field of humanitarian intervention and the field of political, diplomatic and military decisions [Instead], we witnessed on the one hand a war that would not call itself by the right name, and on the other the creation of a militaro-humanitarian space whose strategic priorities reflected more the interests of the great powers than of the populations being helped.

See RIEFF, *supra* note 14, at 201.

tenets of their operational ideology. It is necessary to explore, however, whether it was the only meaningful conceptualization, or whether the basic idea of humanitarianism is broad enough to accommodate the new humanitarians, according to them the rights and privileges associated with the former category.

This section will delineate the fixed and functional components of the content of humanitarianism in theory, by looking at the bases of the Red Cross Principles, as understood by three significant pivots of the humanitarian movement. All of them have been linked to the ICRC in different capacities. It is submitted that their writings allow a much broader view of humanitarianism, and indeed a broader mandate for humanitarian agencies as well as a more limited role for the principles than is suggested by the ICRC and other critics of the new humanitarians.

1. *Dunant, Pictet, Kouchner: Liberalism, Principles and Crossing-Over*

Dunant's conception of humanitarian assistance does not indicate a strict insistence on the present day principles of the Red Cross. His concern was limited to providing non-partisan aid to wounded soldiers. To this end, while he never questioned the inevitability of war, he had plenty to say about the faulty organization of medical relief in the armies;⁷⁴ he was moreover not averse to working with the military to improve matters — both at Solferino and in the future.⁷⁵ Furthermore, his original conception of a series of national societies included by definition their working in cohesion with their governments, as auxiliaries, to maintain a state of preparedness for assisting the war wounded.⁷⁶ Finally, Dunant was a great believer in the powerful role for public opinion and publicity.⁷⁷

74. *See generally*, DUNANT, *supra* note 15 (calling for the creation of an army of volunteers because he was so horrified at the sight of wounded soldiers suffering at the Battle of Solferino).

75. *Id.* at 25. Dunant stated:

The work itself would consist in bringing aid and relief (in agreement with the military commissaries, i.e., when necessary with their support and under their instructions) onto the battlefield whenever battle was joined, and subsequently to continue to care for the wounded in the hospitals until their convalescence was complete.

Id. Dunnant further wrote:

Is there a single officer, a single general, considering his troops as "his boys," who would not be anxious to facilitate the work of volunteer helpers? Is there a military commissary, or a military doctor, who would not be grateful for the assistance of a detachment of intelligent people, wisely and properly commanded and tactful in their work?

Id.

76. *Id.*

77. *See* ANDRE DURAND, THE INTERNATIONAL COMMITTEE OF THE RED

The two ideals that come out most clearly in his writing are not neutrality and independence,⁷⁸ but impartiality and volunteerism.⁷⁹ Dunant's ideology was thus not really the ideology that was later to become associated with the Red Cross Movement. A great deal of the divergence probably had to do with the fact that Dunant's conception of the Red Cross was centered around national societies. The role of the ICRC was to be more limited, it would not get involved directly in protection and relief; its function was to "guide and not govern"⁸⁰ the development of international humanitarian law and its application by the Red Cross Societies.

The First World War brought the ICRC into greater prominence; it took on the task of visiting detainees in different camps and it was probably from here that the emphasis on independence, neutrality, and discretion became more severe. The ICRC as an international organization had to interact with many states and for this it had to be careful to be seen as unaligned with any of them. This is evident from Pictet's commentary on the Fundamental Principles. He differentiates, however, between humanity and impartiality as essential principles, and neutrality and independence as "derived" principles, valuable to transform the principles of humanity and impartiality into reality.⁸¹ In his

CROSS 4-5 (1981) (noting that Dunant wrote his book carefully with the objective of impacting the public).

78. Forsythe suggests that the National Societies, even in later years, have not been remarkable for their independency or autonomy from the states. FORSYTHE, *supra* note 43, at 21. Not only do they defer to government in their localized operations, they also let themselves be guided to a degree by policies putatively driven by states, as they are allowed to attend and vote at Red Cross Conferences. *Id.* He questions how the policies determined during these conferences can then be considered neutral, impartial and independent; in other words "how can governments be independent of 'politics'". *Id.* Another telling example Forsythe gives relates to the American Red Cross. During the First World War, a citizen was convicted of treason for the sole reason of being insufficiently charitable towards this organization. *Id.*

79. In Dunant's own words:

For work of this kind, paid help is not what is wanted. Only too often hospital orderlies working for hire grow harsh, or give up their work in disgust or become tired and lazy. On the other hand, immediate action is essential, for help which will save a wounded man today will not save him tomorrow, and if time is lost gangrene takes hold and carries off the patient. There is need, therefore, for voluntary orderlies and volunteer nurses, zealous, trained and experienced, whose position would be recognized by the commanders or armies in the field, and their mission facilitated and supported.

DUNANT, *supra* note 15, at 29-30.

80. FORSYTHE, *supra* note 43, at 25.

81. For instance, for national societies Pictet advocates a degree of flexibility in applying these principles:

The National Societies are the auxiliaries of the public authorities, whose full support they need and with whom they must have relations of full confidence. These Societies cannot exist as foreign bodies within

own words:

Neutrality does not in itself have any ethical value and can thus be assessed only in relation to particular circumstances. It takes on a moral aspect, and can even achieve nobility when it arises from the kind of firm determination which makes it possible for an institution to put its fundamental principles into effect and carry out its mission faithfully — which is precisely the case with the Red Cross.⁸²

He certifies that the reason for this is given in the principle itself — to maintain the confidence of all sides.

Independence, too, has a similarly instrumental value, its purpose being to guarantee the humanity, impartiality and neutrality of the Red Cross.⁸³ Pictet stresses that independence does not bar cooperation with public authorities, though the degree of cohesion may differ with the nature of the emergency. His comments suggest "we bear in mind that there are fields of activity . . . in which independence and neutrality do not have the same significance as they do in other fields."⁸⁴ Moreover, the test he prescribes to assess whether a Red Cross Society is *independent* is to determine whether it is able to act in accordance with the Principles of the Red Cross.⁸⁵ What he is clearly referring to is the ability of these agencies to conform to the "essential principles" — humanity and impartiality.⁸⁶

Finally Pictet's own definition of "Humanitarianism" — "[A] doctrine which aims at the happiness of the human species, or, if one prefers, it is the attitude of humanity towards mankind, on a basis of universality" — and his explanation leave the issue of what activities may be associated with humanitarianism fairly open:

Modern humanitarianism is an advanced and rational form of charity and justice. It is not only directed to fighting against the suffering of a given moment and of helping particular individuals, for it also has more positive aims, designed to attain the greatest

their nations, as Max Huber once remarked. We may therefore assume as a general rule that whenever a Society remains for a long period in contradiction with one of the principles it is due to ineluctable exigencies imposed upon it by the law or by the power of the State.

PICTET, *supra* note 36. Of note also is the more general assertion that "[t]he principles of the Red Cross do not all have the same importance. They have a hierarchical order, indicated at the outset by the sequence in which they are presented in the Proclamation." *Id.*

82. *Id.* at § 3.

83. *Id.* at § 4.

84. *Id.*

85. *Id.*

86. This is clarified further by his additional comments in the same paragraph "It will make sure that the voice of humanity is heard; it will act unselfishly and impartially; it will be open to all and in the service of all." *Id.*

possible measure of happiness for the greatest number of people. In addition, humanitarianism does not only act to cure but also to prevent suffering, to fight against evils, even over a long term of time.⁸⁷

Bernard Kouchner, once member of the ICRC, founder of MSF and then the break-away *Medecine du Monde*, and until recently the Special Representative of the Secretary General in charge of the United Nations Mission in Kosovo, demonstrates through his own career path the stages through which classical humanitarianism evolved into its new political incarnation. Kouchner broke with the ICRC over its policy of silence during the Biafran crisis, to form in 1971 the MSF, whose policy of relief included the willingness to testify if the need arose. He then broke from the MSF over its strict adherence to independence, arguing that humanitarianism must conceive of itself in the service of states and at the heart of state policy.⁸⁸

Kouchner argues, *inter alia*, for the right of intervention on humanitarian grounds,⁸⁹ and has carried his philosophy of holistic action into the civil administration he governed in Kosovo. His ideal of humanitarianism is again neither neutral nor independent; even so, humanity and impartiality remain virtues. His beliefs are thus a major counterpoint to the logic of classical humanitarianism.

It appears from the above that only humanity and impartiality are immutable characteristics associated with humanitarianism; neutrality and independence only have functional value. The next subsection will analyze whether this view is borne out in the Geneva Conventions.

2. *Do the Geneva Conventions Provide a Basis For Differentiating Between Fixed and Functional Characteristics of the Humanitarian Ideology?*

As mentioned before, the Geneva Conventions focus on "impartial humanitarian agencies" to which they allow several rights and privileges. It is submitted that the term "humanitarian" is to be generally interpreted as implying only the principle of *humanity*, and does not subsume the other fundamental principles in the Red Cross Code.

87. *Id.* at § 1.

88. See RIEFF, *supra* note 14, at 97. (quoting Kouchner as describing his approach as "not so much that humanitarians must learn to be political as that states must learn to be humanitarian").

89. See Bernard Kouchner, *Morals of Urgent Need*, in ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS 55 (Frits Kalshoven ed., 1989) (arguing that humanitarian aid "must be viewed as an essential human right").

This interpretation is supported by the separate mention of *impartiality*. Were "humanitarian" assumed to include all the seven fundamental principles embraced by the Red Cross Code, there would be no need to specify any one of them separately. Of course, it might be argued that the Geneva Conventions (1949) were drafted prior to the Fundamental Principles (1965), and the latter thus only fleshes out the operational ideology of the "impartial humanitarian" agencies referred to in the former. However, in the light of the text of Article 81 of Additional Protocol I adopted in 1977, this argument would be incorrect. The text of this Article is as follows:

Art. 81. Activities of the Red Cross and other humanitarian organizations

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities, within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.
2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.
3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the red Cross as formulated by the International Conferences of the Red Cross.
4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

Quite evidently, Article 81 draws distinctions between the ICRC, the national Red Cross societies and the League, and other humanitarian organizations. On the one hand, the obligations of

the parties to the conflict and the other high contracting parties to these other humanitarian organizations do not appear to be as strong as the obligations to the ICRC and other Red Cross bodies, as is made clear by the use of the phrase "as far as possible" in paragraph 4. On the other hand, the reference to fundamental principles in paragraphs 2 and 3 is missing in paragraph 4, even though the organizations are referred to as "humanitarian".

A commentary on the additional protocols of 1977, by Professors Michael Bothe, Karl Josef Partsch, and Mr. Waldemar Solf of the Office of the Judge Advocate General of the US Army, states:

[T]here was no reason to mention also the fundamental principles of the Red Cross, which cannot be binding upon bodies of an entirely different origin. The reference to the Conventions, mainly to Arts. 9/9/10⁹⁰ implies, however, that these organizations are permitted to carry out humanitarian functions only if they are impartial and do not distinguish on the bases of nationality, race, religion, social conditions or political orientation. That is the main requirement.⁹¹

The authors here are referring to the phrase "impartial humanitarian organization," which appears in these provisions and is repeated throughout the Conventions. Significantly, the same phrase also appears in the Additional Protocol itself.⁹² Therefore, even in instruments drafted after the Fundamental Principles were adopted, the description of humanitarian agencies was not changed to either delete impartiality or include the other principles. With the commentary of the Red Cross itself recognizing the difference between essential and derived principles, the emphasis on the specific principles of *humanity* and *impartiality* is evident from the use of the phrase "impartial humanitarian organization."

Furthermore, as its absence in Article 81 suggests, even the word impartial is a qualifier, pointing to a narrower category within the broader class of humanitarian agencies, which may or may not be impartial. While non-impartiality may appear to conflict with the conception of humanitarian work as non-

90. See Geneva Convention (I), *supra* note 5, at Art. 9. The common text of Article 9 in Conventions I-III, and Article 10 in Convention IV reads as follows:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief.

91. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 498 (1982).

92. Additional Protocol I, *supra* note 6, at arts. 5(3), 60(2).

discriminatory, in practice there do exist agencies that provide relief even where it is possible to access some of the parties to a conflict. Minear and Weiss give the example of the Catholic Relief Services, which "prefers to assist victims on both sides of the conflict unless needs on one side are met by other groups or unless operational considerations preclude working on both sides."⁹³ The Geneva Conventions, however, make clear that the same rights and privileges do not extend to non-impartial agencies.

It is true that much of this first principle's interpretation is a matter of perspective. The primary face of humanitarian relief, even as recognized in the Additional Protocol, is that of the ICRC and its ideologues. Nevertheless, what this section has aimed to demonstrate is that despite this, there is more room for movement within the Geneva Conventions than a dogmatic application of the Red Cross principles would indicate; the Conventions are indeed more inclusive (or perhaps more *exclusive*, in terms of the principles they uphold, for they do not commit humanitarian agencies to the principles of neutrality and independence).

This conclusion does not however imply that the "impartial humanitarian agencies" contemplated by the Convention have the authority to engage in all kinds of activities. The Convention lists certain tasks, and in addition it provides for a liberal construction of humanitarian activities.⁹⁴ Therefore, agencies may engage in tasks beyond providing those specified, but these must still be identifiable as humanitarian. The following subsection will examine this further.

3. *Hugo Slim: Charles Darwin and John Henry Newman*

Professor Hugo Slim uses the theories developed by naturalist Charles Darwin, and cleric John Henry Newman to evaluate the growth in the concept of humanitarian assistance.⁹⁵ Both Darwin, researching on the *Origin of the Species*,⁹⁶ and Newman, studying the development of different forms of Christianity, theorized upon

93. MINEAR & WEISS, *supra* note 8, at 24.

94. This flows from a reading of Article 9 of Geneva Conventions I-III (Article 10 of Geneva convention IV) as well as Article 81(1) of Additional Protocol I. Article 81 clearly recognizes that activities other than those specified by the Geneva Conventions or the Protocol can be humanitarian in nature. See also BOUCHET-SAULNIER, *supra* note 3, at 189 ("[International humanitarian law rules] must be interpreted in a manner that embraces the reality of conflicts, rather than in a manner aimed at avoiding responsibilities.").

95. Hugo Slim, *Fidelity and Variation: Discerning the Development and Evolution of the Humanitarian Idea*, 24 FLETCHER F. WORLD AFF. 5, 6-7 (2000).

96. Also the title of his path-breaking book on evolution published in 1859.

the "process of conflict and interaction"⁹⁷ inherent in the process of development of an idea (or an organism).

Newman offers seven tests for determining how each change was to be viewed as contributing to the growth of an idea — a stage in its moral development, or its decay.⁹⁸ These are: (1) Preservation of type — the idea should remain essentially the same, it might become larger but not totally different;⁹⁹ (2) Continuity of principles — new developments should be consistent with the principles underlying any idea; (3) Power of assimilation — the idea can absorb any development it makes; (4) Logical sequence — there is logical precision and harmony of proportion in the change; (5) Anticipation of its future — there are "early or recurring intimations" of later developments; (6) Conservative action upon its past — the new development essentially preserves the emphasis of the past; and (7) Chronic vigor — any new development is distinguished by its tenacity and duration.¹⁰⁰ Based on this, Slim argues that the original purpose of humanitarian action, i.e. relief assistance, is still unchanged.¹⁰¹

The mandates of many agencies have grown larger and sometimes, as evident from Fiona Fox's statement quoted earlier,¹⁰² other concerns displace those of providing immediate relief. However, it would be wrong to claim that the whole plethora of development and state-building activities take primacy over relief work. What may take primacy is the concern for human rights, and there is no real discord between humanitarian action and protection of human rights; technically they operate in different situations, the former during armed conflict and the latter in all other cases, but the changing nature of conflicts has narrowed this distinction. Indeed, the paradoxical effects of aid make it appropriate to take these other factors into consideration. Ultimately, the central feature of both is the principle of humanity. Also sustaining its vigor overall is the principle of impartiality although practical necessities may force some agencies to compromise upon this. By this view, the new developments are much easier to reconcile with the humanitarian mandate under the Geneva Conventions.

The change in humanitarianism must also be understood in the context of the practical pressures referred to earlier that have caused many agencies to modify their approach in order to remain

97. Slim, *supra* note 95, at 6.

98. See generally JOHN HENRY NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE (1989).

99. Slim uses Newman's own example. Using Slim's example, a small bird would become a larger bird but not a fish. Slim, *supra* note 95, at 7.

100. *Id.*

101. *Id.* at 13-14.

102. See *supra* text accompanying note 52.

relevant and effective in the field, in a sense similar to Darwin's theory of the survival of the fittest. Slim draws direct analogies with Darwin's conditions of largeness of numbers and areas, intercrossing, and isolation as keys to effective survival of a species.¹⁰³ With respect to largeness, he argues that mathematically, a greater number of agencies will increase the probability of at least one of them finding the most efficient combination of activities — therefore, (in direct application of Darwin's support for variation in the species) Newman favors experimentation with different functions. Similarly, he encourages crossovers among staff in humanitarian, development, peace, human rights, and military agencies to develop an improved pool of humanitarian personnel. Finally, he relates the condition of isolation, which allows a species a chance to adapt to their environment secure from external threats, to the relative singularity of their involvement in relief work. Now that there is a proliferation of actors, military, political, and rights-oriented who participate in the aid giving process, and may be even more efficient in doing so, the threat of irrelevance of pure humanitarian agencies has increased, forcing them to modify their functioning.

Darwin also refers to climatic factors — conditions of life which facilitate the development of certain characteristics over others. Slim analogizes this to the present environment of humanitarian assistance where the focus is on peace building and all agencies are being pushed into adding this to their agenda.¹⁰⁴ Finally, in discussing the effects of use and disuse in the enhancement of certain capabilities over others, he provides an interesting explanation for the call to return to classic humanitarianism made by some agencies. He reasons that during the years of the Cold War, the primary function of the humanitarian agencies was to deliver "masses of food aid and emergency health care" and there was little invocation of their legal and protective roles. The agencies' expertise thus developed in this direction, which also fixed the association of humanitarianism with these functions,¹⁰⁵ making them resist the need to improve their capabilities in other areas.

Slim's analysis would thus explain the fits-and-starts in which humanitarianism appears to be transforming in conformity to the Darwinian thesis of natural selection, while not losing its link with its earlier identity, as demonstrated by application of Newman's theory. According to this, this new humanitarianism

103. Slim, *supra* note 95, at 17-19.

104. *Id.* at 19.

105. *Id.*

has therefore not resulted in a wholly new animal, unidentifiable with the earlier conception.

E. Consequences, Possible Pitfalls

Of course, it is not enough to argue that in theory the meaning of "humanitarian" can be stretched to include modifications in mandate and ideology. There are a number of pitfalls associated with this "evolution" that have to be addressed before a convincing argument can be made for extending the rights and protections accorded to classical humanitarians, to the new creed.

The issue of greatest concern, operating both as a cause and a consequence of the expanded conception of humanitarianism, is the possibility of colorable application of the humanitarian agenda. As discussed earlier, the broadened definition allows states to term many political and diplomatic situations "humanitarian emergencies" and justify military intervention and interference in the political affairs of other states on this basis.¹⁰⁶ The possibility that their operations may be hijacked to further selfish interests of states contributes much more to the crises of confidence in the ability of humanitarian agencies to fulfill their primary burden of providing relief than to the mere taking on of other responsibilities. To illustrate, in Bosnia it was not the UNHCR's foray into relief work¹⁰⁷ that later brought criticism upon it, rather, it was the fact that in doing so, it had furthered the fictional portrayal of the situation as primarily a humanitarian crisis requiring material assistance.¹⁰⁸

Françoise Bouchet-Saulnier cautions that with respect to the intertwining of state responses with those of humanitarian agencies even in actual humanitarian emergencies, "the confusion created . . . most often results in the [application of] rules that are the least favourable to victims and least constraining to states."¹⁰⁹ In other words, states are able to avoid a great deal of responsibility by virtue of association with humanitarian agencies. Loss of independence, therefore, does carry adverse consequences for the effective provision of material relief even while it results in the allocation of greater funding and more visibility to humanitarian projects.

106. See BOUCHET-SAULNIER, *supra* note 3, at 6 (positing that because of constant conflict humanitarian action "has become the only available form of political expressions").

107. In addition to its traditional duties of refugee protection and assistance.

108. See RIEFF, *supra* note 14, at 124-54 (discussing the problems and atrocities associated with the Yugoslavia break-up and the strife in Bosnia-Herzegovina).

109. BOUCHET-SAULNIER, *supra* note 3, at 3.

Assuming political character may also hinder the ability of humanitarian agencies to communicate with all actors. Where the political participation of humanitarian agencies manifests itself in criticism of state policy and advocacy for the enforcement of human rights, state parties may themselves deny them access, claiming that their non-neutrality can affect their commitment to impartial treatment of victims, or lead them to interfere with state sovereignty. Even otherwise, the agencies' own stature may prevent them from communicating with certain groups of non-state actors, terrorists in particular, lest it be seen as a conferral of legitimacy upon them.¹¹⁰ Of course, if the agencies appear to be closely affiliated with the political or military objectives of a particular state or states, non-state actors may themselves be reluctant to establish contact.

A related issue is reduced safety of the humanitarian actors due to perception of their affiliation with the one side — as demonstrated by the suicide attacks on the UN and the ICRC in Baghdad and the targeting of persons in Darfur and other places. Close association with the military is a primary reason, because it heightens fears of being targeted among the members of the opposing side, and also conveys an implicit ethical message, rationalizing dispute settlement by means of force.¹¹¹

Such association also brings into play many practical problems, for though some situations may argue for military involvement, there is a limited number of tasks that the military can perform viably. For instance, the medical capability of army hospital units is concentrated on treating wounded soldiers, while the civilian population needing attention consists largely of women, aged persons and children suffering from starvation, infections and physical or sexual abuse.¹¹² Thus, army doctors are not the best equipped to deal with these cases and their presence may only impede alternative medical assistance from being deployed. In addition, the aid provided by the military may be unsustainable and very short term, for it may continue only during the period of military operations;¹¹³ it may also be inappropriate for the situation.¹¹⁴

110. See *supra* note 55 and the accompanying text.

111. See MINEAR, *supra* note 63, at 9 (explaining that even humanitarian aid agencies may become subject to targeting).

112. BARRY, *supra* note 71, at 13.

113. *Id.*

114. Another example that points to the superfluity of military assistance is the dropping of food packets from military helicopters in war torn Afghanistan. These packets meant to feed civilians were unfortunately wrapped in the same packaging as the bombs meant for the military bases and their simultaneous dropping only created a lot of confusion even in places where it did not lead to deaths of civilians. MINEAR, *supra* note 63, at 10.

A tangential consequence of the politicization of humanitarianism is that resources are distributed disproportionately between different emergencies, as areas with greater political substance and media visibility generate more funds.¹¹⁵ Lack of clarity in the distribution of functions between different agencies, which results from their *suo moto* expansion of mandates, also, in all probability, results in over-application of resources in some activities at the cost of others.

Finally, an agency performing the whole plethora of functions, from relief to state building, may acquire a position above all checks and balances that are inherent when different agencies are in charge of different duties. It may even take on the character of a quasi-statal authority, raising immediate concerns about its accountability, etc.¹¹⁶ While this sort of status is unlikely to be accorded to a non-governmental humanitarian agency, it is not impossible if it has the requisite funds, manpower, and support of Security Council members. This again may cause the humanitarian agenda to be overshadowed, or subjected to political ends of states, particularly the donors to the operation.

All of these consequences do justify some of the concern about the expansion of humanitarian mandate, although they do not support the argument that the dilution of the Red Cross principles has led to its deterioration. The overall picture is of a stronger and more responsive role for humanitarian agencies in terms of the extent, variety, and duration of benefits they can provide, but undercut by the lack of clear boundaries and operational rules applicable to humanitarian agencies, leading to their greater vulnerability to misuse and exploitation for political motives.

It is significant that the problems which have caused many people to decry the "death of humanitarianism"¹¹⁷ are born out of

115. See Larry Minear, *Informing the Integration Debate with Recent Experience*, 18 ETHICS AND INT'L AFF. 53 (2004) (noting that such disproportionality has adverse results on emergency aid).

116. The UNMIK in Kosovo, is an example of an agency in charge of civil administration, military deployment and short term relief. Its record shows that there may have been situations where its personnel have acted arbitrarily, but the local people have been unable to do much about it, for UNMIK is not only the law maker and the executive for the region; it is also vested with judicial responsibility. On the Authority of the Interim Administration in Kosovo, sec. 3, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999), available at http://www.usig.org/countryinfo/laws/Kosovo/re99_01.pdf. See also OMBUDSPERSON INSTITUTION IN KOSOVO, SPECIAL REPORT NO 3: ON THE CONFORMITY OF DEPRIVATIONS OF LIBERTY UNDER "EXECUTIVE ORDERS" WITH RECOGNIZED INTERNATIONAL STANDARDS (June 29, 2001).

Furthermore though this undifferentiated structure was probably considered acceptable for its intended short term operation, the UNMIK has now been in Kosovo for the last five years — and the region is not much closer to self government.

117. RIEFF, *supra* note 14. The author uses the title "Death of a Good Idea"

confusion rather than corruption of ideology. As this paper has aimed to show up to this point, where the principle of *humanity* is well served, concern for the loss of neutrality and independence are unimportant for they are mainly operational in nature. Impartiality too, though it has been described as essential by Pictet, has been found to lack answers for all situations humanitarian agencies are faced with today.

Given that this broadening of the concept is not due to idiosyncrasy on the part of humanitarian agencies, but a result of the very real pressures and pulls operating upon them, the proper response is not to pose ethical challenges, but to attempt to formulate a framework to classify appropriately as humanitarian (or otherwise) different functions performed by agencies, and provide operational rules to reconcile them with each other. If this can be done, there is no reason to limit the application of rights and privileges available in the Geneva Convention to the classical humanitarian agencies. This, of course, is a task for sophisticated policy-makers. The next and final section of this paper will attempt only to put forth a few suggestions towards resolving the chaos surrounding the definition of "humanitarian."

F. Identifying the Boundaries of "Humanitarian"

For classical humanitarians, the common minimum denominator of all humanitarian mandates would be a primary commitment to providing relief. The recognition of the paradoxes of humanitarian assistance, and the assimilation of human rights concerns, however, has modified this to some extent, and it is perhaps more appropriate to talk of the basic commitment as the responsibility to secure the rights accruing to the dignity of human beings. It is important to remember that all rights-based actions cannot be assimilated within the humanitarian mandate, for the language of human rights applies in a much broader context. The solution however is not to fix the manner of assistance that is rightfully due from humanitarian agencies, but the situations in which they can be involved.

The Geneva Conventions and the Additional Protocol I apply to armed conflicts of an international nature, Protocol II to non-international armed conflicts. None of these instruments are adequate to cover all situations which give rise to the need for humanitarian assistance as greater involvement of non-state actors, and innovative means of carrying out terrorist attacks, etc., have made the old definitions inadequate.¹¹⁸ At the very least

to discuss humanitarian action in Afghanistan and Kosovo in the late 90s and early years of the 21st century.

118. The Geneva Conventions only apply to "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

then, the extension of the application of the Additional Protocols to include all situations which threaten the security of victims is required.

At the same time, two other factors must be kept in mind. Firstly, broadening the context is not itself a full solution, for not all situations created by armed conflicts call for purely humanitarian responses; there are gray areas which governments can exploit for their own ends. Total independence of humanitarian agencies is usually considered the safeguard against this. However, in this paper, independence has been argued as a non-essential principle, for not only do the commentaries recognize it as such, but more importantly, in reality even the classical humanitarian agencies are rarely found to be truly independent from the parent or donor states. Trusting the sanctity of humanitarian assistance to an abstract commitment to independence, therefore, does not help. It is probably better to recognize that states will have a say in the action taken by most agencies and will work on improving the accountability of governments in characterizing a given situation as a "humanitarian crisis" as opposed to a diplomatic/ political tangle and in responding to it in a manner intended to resolve — not avoid — the problem. Government accountability in this regard is a matter that the United Nations and regional organizations must primarily address. However initiatives from other quarters — state bodies, the ICRC, NGOs, etc. should also be encouraged.

Secondly, it is appropriate to clearly define the categories of the "victims to the conflict." In actual situations it has been impossible to deny relief to persons who have played an active role. For instance, in Congo, the Hutu refugees very likely include a number of persons who played a part in the Tutsi genocide in 1996.¹¹⁹ In the Geneva Conventions there are of course provisions

Additional Protocol I, *supra* note 6, art. 1(4), includes within this:

Armed conflicts which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Even Additional Protocol II, *supra* note 6, at art. 1, which covers a wider range of situations, limits itself to:

[Conflicts] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

None of these situations would adequately cover terrorist strikes of non-state actors operating from outside the territory of the attacked state, biological warfare, or cyber warfare.

119. For further discussion see RIEFF, *supra* note 14, at 155-95.

for assistance to the wounded and sick soldiers as well as for treatment of prisoners of war. These do not, as discussed before, cover all situations where assistance may be required, nor do they identify the course of action with respect to "war criminals," such as the Hutu active participants to the Tutsi massacre undoubtedly are. Classical humanitarianism could avoid debate on this matter, as relief was dissociated from other issues, but new humanitarians require an operational rule.

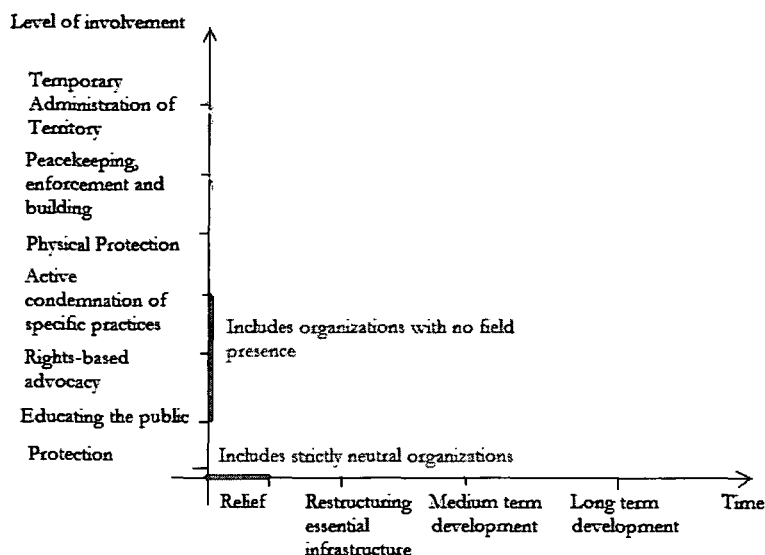
Indeed, a definite understanding of all categories of persons who may be assisted, and perhaps what the order of priority among them must be, will make it easy enough to identify, in a broadly "non-peaceful" situation, whether an agency is performing humanitarian functions or not. Whether the agency then involves itself in political analysis, rights based advocacy, or long term development work is immaterial. Thus, its rights and privileges, at least as far as the parties to the Convention are involved, should not depend on adherence to principles of neutrality or independence.¹²⁰

Again, to secure better cooperation, efforts could be made to clarify and disseminate the victim-centered focus of humanitarian agencies, such that their political stance and challenge to authority, etc., are fully recognized to be based on what is the best way to meet the needs of the victims in any given conflict situation. To encourage better cooperation, it might also help to clearly chart the overlaps in the functions and roles played by different agencies and categorize them (the agencies) accordingly. One way to do this could be by studying as separate but interactive variables the duration of involvement of an agency in a particular area, and the amount of responsibility it chooses to take

120. Indeed Minear and Weiss suggest eight "providence principles" to guide humanitarian action that are different from the Red Cross Principles, not only because there is no mention of neutrality and impartiality has been substituted by non-partisanship — a concept that does not prohibit positive discrimination when there is a clearly oppressed side, or prevent advocacy activities — but also because the authors clarify that these principles are not meant to operate as a single code, or as essential elements defining what is "humanitarian"; they may often be mutually conflicting and realizable to variable extents in each situation. See MINEAR & WEISS, *supra* note 8, at 19. Briefly, in addition to nonpartisanship, these principles are: relieving life threatening suffering; proportionality to need; independence; accountability; appropriateness; contextualization and subsidiarity of sovereignty. *Id.* These principles may be used as broad normative guideposts to assist agencies in determining their course of action. Minear and Weiss accept that there will be differences in their relative importance for different actors, and in the extent to which any or each of these prevail in a given situation.

on.¹²¹ Following the broad categorization of complex mandates, which flow from this and which are primarily extensions into advocacy, development, and security, different guidelines could be drafted for each category of agencies.¹²²

121. Very roughly, it could be done as shown below:



This figure aims to demonstrate how an agency's role may be split temporally and in terms of its involvement. For instance Agency A might remain only during the period of emergency relief, but may take on additional functions, or vice versa (the military); it might involve itself in long term development but not take on additional tasks beyond rights based advocacy (Caritas). The thick gray line on the x-axis indicates perfectly neutral organizations like the ICRC which prefer to steer clear of all other involvement; the line on the y-axis indicates organizations like Amnesty International which prefer to "watch" and analyze disturbed situations.

122. Minear and Weiss follow a more refined approach along the same lines in their "Handbook for Practitioners" — in which they advocate the formulation of a series of codes for different major sets of actors, stating clearly that a single code may result in the adoption of standards too innocuous to improve operations in any manner. *Id.* at 85. In another place they assert that "[h]owever desirable the achievement of consensus across a community of highly diverse and idiosyncratic institutions, a lowest-common-denominator approach runs the risk of diluting key principles. People in life threatening situations will be better served by a highest-common-denominator approach: that is, by one that seeks agreement among a narrower range of like-minded agencies. *Id.* at 5. They thus suggest using four "analytical categories" as the basis for understanding and drawing principles to regulate the "highly complex and richly textured tapestry of human needs and humanitarian action" — (1) *institutional pillars*: UN Organizations, donor governments, NGOs, and the ICRC for international conflicts and for host governments, insurgents and people's organizations for domestic ones (also included in both would now be the military, the media and regional intergovernmental organizations); (2) *nature of the conflicts*: ranging from

Non-parties to the Convention cannot, of course, be held to account and their response to the evolving mandate and ideology of the humanitarian agencies remains a matter of concern. It might in some situations, as discussed above, lead to greater hostility, the effect of which is to curtail the agencies' access to persons under de facto control of these non-parties and their operational safety. A limited solution is to offer incentives to organized armed groups to bind themselves to international humanitarian law, possibly by means of Special Agreements envisaged by Common Article 3 of the Geneva Conventions.¹²³ Greater transparency through efforts to publicize the distinction between the work of humanitarian agencies, which focus on the victims of conflicts and the work of governments, which have to take account of larger political/military ends; coupled with a commitment by states to not use humanitarian agencies to further other ends, may help non-state actors to trust humanitarian agencies to a greater extent.

Beyond this, there is necessarily an area of uncertainty with respect to non-state actors, especially in situations where humanitarian work, protection in particular, interferes with their agenda. Not much can be done to control or predict how different non-state actors will respond. Even so, drawing up clear guidelines for association of these agencies with the military is particularly important. The limits of both humanitarian action and military involvement would have to be clearly drawn such that, as far as possible, they do not overlap, even where they may have to work in association and where there is a need to substitute one set with the other (for instance, as is very likely, humanitarian

localized internal to multipartite international, distinguished also temporally and by the methods of warfare used; (3) *phases within a given conflict*: periods of intense fighting, lulls, refugee outflows, civilian attacks, etc.; and (4) *the spectrum of humanitarian assistance and protection activities*: from short term relief to reconstruction of essential infrastructure to medium and long term development. *Id.* at 15-18.

123. This suggestion comes from Brigadier Githiora, Head of the Legal Services of the Kenyan Department of Defence. Based on this, the ICRC records a number of suggestions made at the International Conference of the Red Cross and the Red Crescent, including "combatant immunity" to members of organized armed groups who undertake obligations under the Conventions. This would involve freedom from persecution for mere participation in hostilities — obviously not for any violations of IHL — or amnesties for such participation. An alternative could also be a reduction in the sentences imposed in proceedings under national law for participating in hostilities. The importance of strategic incentives, such as reciprocal respect of captives and legitimacy as political actors that may be gained from respect for IHL, was also mentioned. See INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (2003), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5XRDC>.

agencies with the military). The fact of the substitution and the reasons for it should be clearly publicized. Secret, undercover action only adds to the long term distrust for humanitarian actors.

The purpose of all the points made above is to suggest the outlines in a framework where constraints of ideology and mandate are not the critical features that define humanitarian assistance; rather, it is the nature of the conflict, the quality and primacy of the victims, and the commitment of the states to abstain from using the humanitarian agenda for other ends. Whether an agency is involved in more than relief work and whether it is non-neutral or non-independent is thus immaterial.

CONCLUSION

The aim of this paper was to study the evolution of the mandate and ideology traditionally associated with humanitarian assistance. Following the Dworkinian distinction between the "concept" and its particular "conception,"¹²⁴ the paper sought to argue that the classical version of humanitarian assistance was only one conception of the humanitarian enterprise, and that the modifications in mandate and ideology adopted by the new humanitarians was in response to the changed context in which humanitarian assistance was required, as well as the other pressures and pulls upon humanitarian agencies. The paper further argued that humanitarianism as a "concept" was broad enough to include the new evolved form of assistance, with its commitment to human rights leading it into a more political role, and requiring more than immediate relief work. For this reason, the paper contended that the rights and privileges accorded to the classic humanitarians through the Geneva Conventions and the Additional Protocols should be made available to the new humanitarians as well.

The paper accepted that there would be complications as a result of the greater involvement of humanitarian agencies. It identified some of these and discussed some of the steps that can be taken towards creating a framework to avoid the adverse consequences without restricting humanitarian agencies' mandates and ideologies. The paper therefore attempted to identify alternative factors to define the contours of humanitarian assistance. These include: clarifying the different types of situations in which assistance can be called for — updating the definitions of international and non international armed conflict in the Geneva Conventions; clarifying who may be a "victim" entitled to humanitarian assistance such that agencies have clear guidelines to address complicated situations such as where a perpetrator of one conflict is the persecuted in a related conflict;

124. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-136 (1977).

and increasing the accountability of states to abstain from colorable use of the humanitarian agenda. It also suggested that it may be useful to identify the different types of complex mandates, and draw up separate codes for each.

In the end, it is appropriate to reiterate that the basic defining feature of humanitarian assistance is its commitment to the betterment of human beings, particularly those who are most helpless and in need. Thus, confining humanitarian assistance in application is as much of a compromise on ethics as allowing it to be used for further political interests or other selfish ends of states.

