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Humanitarian Policy Group

Principes of Humanitarian Action in International Humanitarian Law

Study 4 in *The Politics of Principle: the principles of humanitarian action in practice*

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Study Notes

This report is one of four from ODI study entitled *The Politics of Principle: the principles of humanitarian action in practice*. The other three reports are *The Politics of Principle: The Principles of Humanitarian Action in Practice: Study 1:* HPG Report 2, *The Joint Policy of Operation and the Principles and Protocols of Humanitarian Operation in Liberia: Study 2* HPG Report 3, *The Agreement on Ground Rules in South Sudan: Study 3*: HPG Report 4. A Relief and Rehabilitation Network Briefing Paper entitled *Humanitarian Principles in Practice: A Critical Review*' which summarise some key findings and issues from the study in a much shorter paper, is also available from ODI.

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1. Introduction

The volume of humanitarian assistance increased dramatically in the years following the end of the Cold War. In part, this may be explained by increased need, due to conflict in the wake of the changes in the world order; but it also represents a change in focus of the international response to conflict abroad. A readjustment in the sphere of strategic interest of the major powers has been accompanied by political disengagement in non-strategic areas, and strategies of in-country and temporary protection are replacing willingness to accept large numbers of refugees. Humanitarian assistance is increasingly becoming the preferred response to complicated crises (Duffield, 1998).

The number of agencies delivering this assistance has increased correspondingly. Work that would traditionally have been the province of the International Committee of the Red Cross (ICRC) alone is now undertaken by a range of UN agencies and a sharply increased number of NGOs willing to deliver relief in the midst, or the immediate aftermath, of war (Borton et al. 1994). These new arrivals on the humanitarian scene have provoked, and continue to engage in, a debate on the problems of such assistance. The first set of issues concerns the impact of resources brought into the war area on the war itself. Does relief fuel the conflict, or skew the power relationship between the parties? This is complicated when, as is now common, one or more of the parties is a non-state actor. The second revolves around how to act in the face of gross human rights violations, and whether indeed it is possible to assist a civilian community who are themselves the target of attack. And the third concerns how to co-ordinate or implement strategies devised to combat the other problems: in other words, the question of regulation of the relief agencies themselves.

Much of the current debate centres around the notion of 'humanitarian principles', or more accurately the principles of humanitarian action such as Neutrality and Impartiality. The fundamental principles of the Red Cross have long guided the operations of the ICRC and national Red Cross societies (Pictet, 1979). In recent years variations on this theme have emerged. One is the Red Cross / NGO Code of Conduct (SCHR, 1994), which has been signed by over 140 agencies. Another is the Humanitarian Charter and Minimum Standards in Disaster Response being elaborated by the Sphere Project (The Sphere Project, 1998). There have also been several attempts to develop and disseminate these principles at a field level by both the UN and NGOs, such as the Joint Policy of Operations in Liberia (JPO) (Atkinson, 1997) and the 'Ground Rules' initiative in southern Sudan (Levine, 1997).

While 'humanitarian principles' are increasingly looked to as a rudder with which to steer a course through the murky waters of relief provision in complex emergencies, there is also a sense that international humanitarian law may provide the key to workable humanitarian principles. After all, the ICRC operates according to international humanitarian law, and the ICRC principles, elaborated over a long history of action in conflict, seem to serve it well. In view of this interest, this study aims to clarify the status and content of the principles of humanitarian action in international law. Beyond clarification, however, it is hoped that it will contribute to practice in two ways. First, an understanding of the extent to which these principles are supported by international law can strengthen arguments for their observance. The weight of international law may serve as a negotiating tool, both within the humanitarian community and between the community and local authorities. Secondly, legal doctrine may help flesh out the content of the principles and so provide guidance in their implementation.

The first section of this paper lays some important groundwork for using international law in this way. It starts by defining the key notions of 'humanitarian principles' and 'international humanitarian law'. The relevance of this law to relief agencies then needs to be explained, as international humanitarian law does not directly address this group (only the parties to a conflict or individual fighters can be the subjects of international humanitarian law). The final part of this preliminary section outlines the strict legal conditions of applicability of the law. While technical distinctions should not be over-emphasised here, the law cannot be oversimplified either if it is to be relied upon.Thehe goal of this first section is thus to provide a solid picture of the legal parameters.

The paper then moves to its primary concern: the principles of humanitarian action themselves. In particular, it examines the status and content of the terms 'humanitarian', 'impartial' and 'neutral', and their implications for relief agencies. It then looks briefly at whether the legal content of these terms helps determine the legitimacy of human rights 'conditionality' in humanitarian assistance. Finally,

the paper considers whether international law imposes a requirement that humanitarian assistance be given with the consent of the relevant party to the conflict.

This paper is part of a wider study by ODI into the idea of humanitarian principles. The study has also included field research into two attempts by agencies in Sudan and Liberia to deal with some of the problems facing humanitarian action in war through a more explicitly principled approach. The two case studies were the Ground Rules in South Sudan (Study 3: Bradbury, 2000) and the PPHO and JPO in Liberia (Study 2: Atkinson and Leader, 2000). There is also a synthesis paper which brings together the results of the other three papers (Study 1: Leader, 2000). The research has been published in its individual components to allow those interested in only one subject or country to select the relevant section rather than read the entire study.

2. Parameters

2.1. Definitions

2.1.1 Humanitarian principles

Two terms need defining before we can go any further. Most obviously, what are humanitarian principles? In its broadest sense, the term can be used to refer to the principles underlying international humanitarian law. Another, in a much narrower sense refers to principles devised to guide the work of relief agencies in conflict, alternatively termed 'principles of humanitarian action' (Leader, 1998). The Red Cross / NGO Code of Conduct is an example of the latter. Sets of principles which address the broader concerns of international humanitarian law include the Ground Rules in southern Sudan and the draft Humanitarian Charter of the Sphere Project. These last two are broader in that, alongside principles concerning the manner in which relief will be delivered, they contain statements of support for non-combatant immunity (the Sphere Project), or for fundamental human rights (the Ground Rules).

Fundamental human rights and non-combatant immunity are principles enshrined in international law. Their legal status is clear, and so they do not need examination here. This paper will rather consider the more ambiguous legal position of principles of humanitarian action.

2.1.2 International humanitarian law

The other term in need of elaboration is international humanitarian law. Despite the increasing currency of this phrase in debates about humanitarian assistance, there appears still to be a widespread misunderstanding of its content (Slim and McConnan, 1998), and in particular an over-estimation of the proportion of international humanitarian law which relates to humanitarian relief.

International humanitarian law is often divided into two strands: 'Geneva' and 'Hague' law.[1] Hague law concerns the conduct of hostilities, codified in a series of declarations and treaties following the first Hague Peace Conference in 1899. The most significant principle of Hague law is that the right of belligerents to adopt means of injuring the enemy is not unlimited. From this derives the prohibition of the use of weapons calculated to cause unnecessary suffering or superfluous injury.[2] The principle of distinction between civilians and military targets also has its roots in this branch of the law.[3]

The four Geneva Conventions of 1949 are the most complete statement of Geneva law. They contain nothing about the conduct of hostilities: instead they are concerned with the treatment of victims of war. The first two Conventions concern the treatment of wounded and sick members of the armed forces: Convention I dealing with war on land, and Convention II with war at sea. Convention III concerns the treatment of prisoners of war, and Convention IV concerns civilians, principally those in the power of the enemy. Article 3, common to all four Conventions, prescribes the minimum standard of treatment to be afforded persons taking no active part in the hostilities (which covers all of the above categories)

The two 1977 Protocols to the Geneva Conventions combine aspects of Geneva and Hague law.

The provision of relief to the civilian population falls within the scope of the fourth Geneva Convention, the two Additional Protocols and common article 3. Of a total of 289 separate articles, however, only 22 relate to the provision of relief.[4] Common article 3 is the most minimal, providing, in the case of armed conflict not of an international character, only that: 'An impartial humanitarian body, such as the ICRC, may offer its services to the Parties to the conflict'.

2.2 Relevance of international humanitarian law to relief agencies

Like any international treaty, the Geneva Conventions are addressed to states. They impose obligations upon states which ratify the Conventions, and in so far as they reflect customary international law they are binding on all states, whether or nor they are parties to the Conventions. According to legal doctrine, when a state has ratified the Conventions or Protocols, the provisions relating to internal wars are also binding on the non-state party to the conflict. The relevant customary principles will be binding on any two or more non-state parties involved in an internal conflict, even if no state is involved.

It cannot strictly be said, therefore, that the Geneva Conventions confer rights or impose obligations upon humanitarian agencies. The Conventions simply do not address these actors. The articles of the Conventions which concern civilian relief rather describe the situations in which states must allow such assistance to be delivered to the civilians in their

power, and the conditions which they are entitled to impose on such delivery.

This is nonetheless helpful to relief agencies in two ways. First, if relief must be allowed under certain conditions, relief agencies abiding by those conditions are entitled to insist on access to populations in need. Arguments for access are strengthened to the extent that the humanitarian operation reflects the provisions of international humanitarian law. Secondly, an examination of the conditions under which relief must be allowed can provide guidance to agencies struggling with the problems of operating in the midst of conflict. The provisions of the Conventions which relate to relief reflect the same concerns faced by humanitarian organisations today. The drafters of the Conventions accepted that states would not allow humanitarian assistance to pass through their territory were it to advantage the military effort of the enemy. The conditions which states are entitled to impose are designed to minimise, if not eliminate, the impact of relief on the progress of the war. This goal is shared by contemporary relief organisations in their alarm at potentially skewing a power balance or prolonging a conflict. Both the Conventions themselves and legal doctrine surrounding the relief provisions, therefore, may flesh out or add weight to the principles of humanitarian action which contemporary actors are devising for themselves.

2.3 The letter of the law vs. the spirit of the Conventions

The 22 articles relating to civilian relief cited above do not all apply in all situations. They vary according to whether the conflict is international or internal in nature, and also according to the particular circumstances in which the civilians find themselves. While the letter of the law should not overshadow the spirit of the Conventions, it is important to be aware of these distinctions, so that an argument for access on strictly legal grounds, for example, can be correctly made.

2.3.1 Non-international armed conflict

Common article 3 is applicable in all non-international armed conflicts, regardless of state ratification, as it is has become part of customary international law. However, it is of no great help in this context, as the only explicit reference to relief is the above-quoted provision authorising an 'impartial humanitarian body, such as the Red Cross' to offer its services.

Article 18 of Additional Protocol II is a significant addition to this, providing that

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

However, Additional Protocol II is not generally accepted to have become part of customary international law, so it will not apply on a territory unless ratified by the government.[5] In addition, it is only then applicable between the armed forces of the state, on the one hand, and dissident armed forces which satisfy certain criteria, on the other.[6]

2.3.2 International armed conflict

The broadest provision for civilian relief in international armed conflict appears in Additional Protocol I, which is applicable to all civilians in need in territory under the control of a party to the conflict. This is the only provision which relates to a party's own population in need. However, Protocol I is not universally accepted to be part of customary international law, so its application may again depend on ratification.[7]

The Geneva Conventions themselves are generally accepted to reflect customary international law, and in any event they have been almost universally ratified. With the exception of common article 3, they apply in international armed conflict. The provisions in the fourth Convention apply principally to civilians in the hands of the enemy, who are then categorised as either the civilian population of occupied territory, or as enemy aliens in the territory of a party to the conflict. Both these groups should be allowed to receive relief sent to them, where they are inadequately supplied.

The most detailed relief provisions also relate to the population of occupied territory.[8] There is a weaker obligation upon states to allow the passage through their territory of certain relief items intended for the whole civilian population of another party, including the enemy.[9]

However, technical distinctions should not be over-emphasised for a number of reasons. Firstly, the goal of the current project is to draw guidance from international law for the principles of humanitarian action, and this necessitates a broad approach. As far as the nature of the conflict is concerned, for example, the bulk of legal provision for humanitarian assistance concerns international armed conflict, while it is a commonplace to note that the bulk of armed conflict which now occurs is non-international in character. The problems of relief becoming bound up in the war are nonetheless similar, so that the lessons to be gleaned from international humanitarian law are as relevant to non-international conflict as to traditional inter-state war.

Secondly, the Conventions grew out of a particular historical experience which may be less relevant today. The distinctions between different groups of civilians in need, for example, reflect the situation obtaining at the time, and in particular the experience of the Second World War.[10] The predominant model of conflict has changed, and with it the defining characteristics of those in need. The goal of the Conventions is best achieved by adaptation to the modern context.[11]

Lastly, the Conventions themselves urge a broad interpretation, as is shown in that core provision, common article 3. The text of that article (which applies in the case of any armed conflict) gives the following clear instruction to warring parties:

> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

It is in the spirit of the Geneva Conventions, in other words, that the provisions relating to international armed conflict be applied in internal wars wherever possible.

3. The Principles of Humanitarian Action

As mentioned above, the relief provisions in the Geneva Conventions and their Additional Protocols are phrased in terms of obligations on the parties to allow relief on to or through their territory, the conditions which they are entitled to impose upon that relief delivery, as well as the grounds on which they can withhold their consent. The principles of humanitarian action therefore appear as conditions for access for relief operations under international humanitarian law.

Three terms appear repeatedly in the Geneva Conventions and Protocols to qualify legitimate relief activity: 'humanitarian', 'impartial' and (to a lesser extent) 'without adverse distinction'. These ideas are usually included among principles of humanitarian action: humanity and impartiality are two of the seven fundamental principles of the Red Cross Movement, and appear among the principles in the Ground Rules for southern Sudan. The two could be said to contain within them the principle of non-discrimination. All three appear in the Red Cross / NGO Code of Conduct.

The basic provision for civilian relief appears in article 10 of Geneva Convention IV which provides that

> 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 organisation may, subject to the consent of the parties to the conflict concerned, undertake for the protection of civilian persons and for their relief. (emphasis added)

The content of these principles is fleshed out to some extent by legal doctrine. One of the most authoritative sources of this is the official ICRC Commentary to the Conventions, published in 1958 (Pictet, 1958). The Red Cross principles are also relevant. Although not prescribed by the Conventions, and established rather by the Red Cross Conferences, these are recognised and given a certain status in international humanitarian law. The Conventions refer to the governing effect of the principles on the activities of the Red Cross in several places, and occasionally to their application to the activities of other humanitarian organisations.[12]

Work that has been done on the interpretation of the fundamental principles of the Red Cross is therefore of help in elaborating the definition of these terms under international humanitarian law.

3.1 'Humanitarian'

The ICRC commentary to the Geneva Conventions defines humanitarian as 'being concerned with the condition of man considered solely as a human being, regardless of his value as a military, political, professional or other unit', and 'not affected by any political or military consideration' (Pictet, 1958: 96). This appears to refer to the motivation for offering assistance, rather than the manner of carrying it out. It might suggest the exclusion, however, of 'solidarity' organisations which deliberately provide relief to the victims of one side to a conflict, from its scope. Are such agencies concerned with the individual as a political unit?

The International Court of Justice had occasion to consider this aspect of the issue in the case of *Nicaragua vs. United States*, when the Sandinista government accused the United States of various infringements of international law, mostly through its support to the Contras. One of the defences offered by the United States was that this support took the form of humanitarian assistance, which the Court agreed could not be regarded as contrary to international law. However, it concluded that the assistance offered by the US was not truly humanitarian in nature:

> An essential feature of truly humanitarian aid is that it is given 'without discrimination' of any kind. In the view of the Court, if the provision of 'humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependants.[13]

In order to merit the description 'humanitarian' according to the Court, assistance must be given to all sides in the conflict. But agencies customarily operate in the territory of just one party to a conflict. How, for example does this interpretation square with

the mandate of National Red Cross Societies, which exist to act in principle on behalf of the citizens of their own countries and yet who presumably operate in accordance with the fundamental principles of the Red Cross? In fact the Geneva Conventions not only make provision for national 'humanitarian' relief societies, but even permit the national societies of neutral third countries to come to the aid of one party to the conflict (a situation more analogous to the operation of modern international NGOs).

Other examples from international practice further challenge the International Court of Justice's interpretation. One authority on international humanitarian law points out that state practice does not suggest that humanitarian assistance has to be given to victims on all sides. States often give what they describe as humanitarian assistance to the populations of parties to a conflict with whom they are in sympathy, and this is never denounced by the international community for transcending the bounds of humanitarianism (Kalshoven, 1989; 518–19).

There does not in fact appear to be a simple requirement that assistance be given to victims on all sides in a conflict in order to satisfy the definition of 'humanitarian' under international law. Perhaps no more can be deduced from this term than the very basic Red Cross definition of the principle of humanity: preventing and alleviating human suffering.

3.2 'Impartial'

Some answers to the questions above may be found in the definition of 'impartiality', the second main key to relief provided for by the Geneva Conventions. In his work on the fundamental principles of the Red Cross, Jean Pictet isolates three elements of impartiality. The first is non-discrimination (and here we are thrown back to the principle of no adverse distinction which also appears in the text of the Conventions): the absence of objective discrimination on the basis of membership of a social 'group'. The Conventions provide examples of the types of adverse distinction they prohibit in common article 3, which proscribes 'any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'. Importantly, this list is open-ended.

The second element of impartiality is the principle of proportionality, or that assistance will be afforded according to need. This is echoed in all of the charters of principles currently in use or under consideration by relief agencies, and can be said to be a principle firmly embedded in international humanitarian law. There is clearly some tension between this universally accepted principle and the above-identified lack of an obligation to operate on all sides of a conflict. Surely if the need is equal on two sides, the principle of impartiality should operate to ensure that humanitarian assistance is offered to both. And if an agency, on the contrary, operates on one side only, has it not contravened the principle? It seems that while the principle of impartiality suggests that programmes should be designed to respond to the greatest need, they do not lose the right to be called humanitarian if for operational reasons they serve the population of just one area. The aspirations the principles represent, however, must continue to be implemented to the maximum extent (Pietet, 1958).

The third element of impartiality under international humanitarian law is that there should be no subjective distinctions: no individual decisions on whether the recipient is innocent or guilty, good or bad, and hence deserving or undeserving of assistance on any basis other than need. An interesting contrast can be drawn here with international refugee law. Under the statute of UNHCR, that organisation is prohibited from assisting those accused of international crimes (paragraph 7d). In other words, it is explicitly required *not* to be impartial, in the sense just described, where such issues are at stake. This tension between the principles of UNHCR and those of international humanitarian law may have contributed to the lack of clarity among relief agencies over how to deal with the refugee camps in the Great Lakes region after the Rwandan genocide. Certainly it highlights a conflict for UNHCR as a provider of humanitarian assistance.

3.3 'Neutral'

Neutrality is often quoted as a principle of humanitarian action, yet it is not mentioned in the Geneva Conventions. One reason for this may be that the term has a technical meaning in international law, in relation to the position of non-belligerent states. While this sense of the term is not without relevance to humanitarian agencies, it has more resonance with the ICRC than with relief agencies in general, and will not be examined here.[14] The ICRC commentary to the Conventions explicitly underlines that they do ' not require the organisation to be neutral' [(Pi](Pichet, 1958: 97).

Neutrality is nonetheless one of the fundamental principles of the Red Cross, and so is brought within the ambit of the Conventions by reference to these (see above). As such, it contains two aspects: ideological neutrality, presumably as expressed through comment or operation, and non-participation in hostilities, direct or indirect. The latter aspect is at the very core of the provisions for humanitarian assistance in the Conventions. As mentioned at the outset, these provisions are principally designed to ensure that relief does not advantage the adverse party, which might otherwise indirectly involve the relief providers in the conflict. Some of the more detailed conditions set out in the Conventions are expressions of this basic requirement of neutrality, and can therefore serve to flesh out its content, or to suggest ways in which it can be implemented.

3.4 Other conditions: 'neutrality' in detail

Article 23 of Geneva Convention IV provides an interesting example. This article provides that a party shall allow free passage of certain goods through its territory, intended for the civilians of another party to the conflict. The obligation is subject to the condition that this party is satisfied that there are no serious reasons for fearing:

a) that the consignments may be diverted from their destination,
b) that the control may not be effective, or
c) that a definite advantage may accrue to the military efforts or the economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

Unless an organisation can guarantee the above, it cannot insist upon access under international humanitarian law. What would it involve for a humanitarian organisation to be able to give the necessary assurances? Paragraphs a) and b) suggest an obligation to supervise the distribution or passage of goods effectively. An organisation must be in 'control' of the resources it brings into a territory. This is of course a key issue for current humanitarian operations in a conflict: here we see that it is an explicit requirement of international humanitarian law.

The extent of control required is presumably such that there can be 'no serious reason for fearing' the effects described in paragraph c). More detailed guidelines can be found in the commentary to another article, which provides for the supervision of the distribution of relief items in occupied territory by the Protecting Powers[15], the ICRC or 'any other impartial humanitarian body' (Article 61 of Convention IV). The following suggestions are made as to what satisfactory supervision might entail:

> the relief supplies must reach the people for whom they are intended and every precaution must be taken to ensure that the recipients do not place them on the 'black market': frequent spot checking in storehouses, constant surveillance of the actual distribution and verification of the reports drawn up by the distributing bodies are among the measures which will make it possible to ensure that the supplies are used for their correct purpose (Pictet, 1958: 325).

As both provisions aim to ensure that relief is not diverted from its intended beneficiaries, these suggestions may be read into the type of control required by Article 23. 'Verification of reports drawn up by the distributing bodies' sounds like post-distribution monitoring, for example.

Effective control might also be read as requiring a certain professional standard from distributing agencies. As another passage from the commentary to article 61 remarks:

> …The humanitarian organisations called upon to replace the Protecting Power must not only offer every proof of being impartial, but must also have available the necessary qualified staff and material resources (Pictet, 1958: 326).

There are echoes of this in the Ground Rules in southern Sudan, under which 'all agencies commit themselves to recruiting only those staff judged to have the adequate technical and personal skills and experience required for their work' (see the Ground Rules, Section B, para. 4, reprinted in Levine, 1997).

Paragraph c) itself has more far-reaching implications. Again, the issues it raises are precisely some of those most pertinent to current debates about humanitarian assistance. In order to be able to satisfy an authority that no definite advantage would accrue to the military efforts or the economy of its enemy in the ways described, an organisation would have first

to carry out some analysis of the impact of its relief work on the local economy. This is something which organisations are currently discussing, and which the 'do no harm' approach is making more familiar, but it is certainly not widespread practice at this point, and there is no common awareness that it has roots in international humanitarian law.

The second implication of paragraph c) is that assistance which is intended to support the local economy runs contrary to the strictures of international humanitarian law. In other words, while international humanitarian law could be seen to require a party to assess in some detail the impact of its activities on the local economy, this is only in order to check that the economy is *not* benefiting in any significant way: more 'do no good' than 'do no harm'.[16] A developmental approach in humanitarian assistance, as espoused by some of the relief and development agencies, might contravene the definition of humanitarian assistance in international law. Some of the contemporary sets of principles of humanitarian action span these two approaches, and therefore contain a contradiction within themselves. Such a contradiction appears in the Red Cross /NGO Code of Conduct,[17] and is evident in the operation of the Ground Rules in southern Sudan, where Operation Lifeline Sudan is at the same time committed to 'capacity-building' – a classic development term – and to the humanitarian principles of impartiality and neutrality, which exclude the former, in the sense suggested here. The existence of this kind of contradiction is to some extent a result of agencies which traditionally work in peacetime development branching out into work in the midst of conflict.

4. Conditionality and Consent

4.1 Human rights 'conditionality'

The question of whether making humanitarian assistance conditional contravenes the principles of international humanitarian law is relevant here. The introduction of human rights considerations into decisions about when and how to deliver humanitarian assistance, is sometimes discredited as 'human rights conditionality', and a contravention of that component of impartiality which requires that relief be given on the basis of need alone. Is this accusation a fair one?

It is clear that, to conform to the principles of the Geneva Conventions, assistance must be intended to relieve human suffering, and must be motivated by the condition of individuals as human beings, rather than by their value as military, political, professional or other units. It must be allocated on the basis of need alone. If human rights conditionality is seen as a cynical foreign policy tool, as a means to further strategic rather than human rights aims, clearly it contravenes these principles. But if it genuinely seeks to improve the condition of individuals (without adverse distinction), the answer is not so clear. The international legal definitions of humanitarian, neutral and impartial give no guidance as to how widely or narrowly the definition of need should be drawn, nor how short-or long-term a solution should be sought. In simple terms, if it were possible to show that, by withholding assistance one day, fewer people would be slaughtered the next, the withholding of that assistance would be quite within humanitarian principles. The strategy would be designed to relieve human suffering, it would be responding to need, and it would have the correct motives.

In sum, international humanitarian law adds little to the debates on this subject. The key issues continue to be whether it is possible to predict long-term consequences accurately enough to justify short-term sacrifice, and whether the introduction of more strategic thinking into humanitarian assistance opens the door to anti-humanitarian political manipulation. International law reaffirms core principles, but in this case neither helps with their practical application nor with the ethical dilemmas.

4.2 Consent

The Geneva Conventions always provide that the delivery of relief is subject to the consent of the relevant party to the conflict. Could there then be said to be an obligation upon humanitarian agencies to operate with the consent of the authorities? This is the *modus operandi* of the Red Cross.[18] The Guiding Principles annexed to the resolution creating the UN Department of Humanitarian Affairs declare that

> 'humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country'. (General Assembly resolution 46/182, 19.12.1991).

And the ICRC commentary suggests that this should generally be the case under the Geneva Conventions:

> Humanitarian activities … may be of any kind and carried out in any manner, even indirect, compatible with the sovereignty and security of the State in question.[19] (Pictet, 1958:98. emphasis added).

It can be argued, however, that the consent of the authorities does not impact upon the principles under which a humanitarian organisation should operate according to international humanitarian law. The Geneva Conventions set out conditions under which a government may legitimately refuse humanitarian access (see above), and (by implication) the conditions which humanitarian operations must meet in order to be allowed to carry out their work. If a government refuses arbitrarily, an organisation which nonetheless carries out its operation according to those conditions could still be said to be operating in accordance with international humanitarian law. The government's violation of its responsibilities should not affect the legality of the humanitarian operation.

As a corollary to this, neither should the removal of the requirement of consent change the conditions for the operations of the humanitarian agencies. It has been suggested that a humanitarian operation carried out under the terms of a coercive UN Security Council resolution, for example, has a looser relationship to the humanitarian principles contained in the Geneva Conventions.[20] In other words, if a state is ordered to accept the operations of humanitarian agencies on its territory, those agencies no longer need to win access by operating according to international humanitarian law.[21] But the relationship between consent and the principles of humanitarian action under international humanitarian law is not one of mutual dependence. Consent must be granted if certain conditions are met, but the principles of humanitarian action continue to define

legitimate humanitarian action whether or not the consent is provided.

One interesting aspect of the Security Council resolutions imposing humanitarian assistance is that they have been largely similar in relation to both international and non-international conflict. Resolutions in relation to the civil wars in former Yugoslavia (before its dissolution) and Rwanda oblige the relevant states to accept and protect humanitarian assistance in the same way as those relating to the international conflict between Iraq and Kuwait, for example. As we have seen, a strict application of the Geneva Conventions differentiates substantially between these two types of conflict, affording significantly less protection to the citizens of countries caught up in an internal war. Security Council resolutions alone cannot change international law; but, in combination with the increasing tendency of states in internal conflicts to accept humanitarian operations on their territory, this practice may point towards a decline in the significance of the nature of the conflict where humanitarian assistance is concerned. If it exists, it is a tendency which the humanitarian community should certainly support, by making the same arguments and applying the same principles where possible in all conflicts.

5. Conclusion

Several points emerge from an examination of the status and content of the principles of humanitarian action in international law which are relevant to contemporary relief operations. First, the concepts 'humanitarian', 'impartial' and 'neutral' clearly exist in international humanitarian law. Definitions of the term 'humanitarian' are the least useful, although it would appear not to carry with it an absolute requirement that relief be provided to the civilian population of all parties to a conflict. The term 'neutral' does not appear in the Geneva Conventions in relation to humanitarian assistance, but the concept this term represents (as a Fundamental Principle of the Red Cross, for example) is crucial to the relief provisions of that body of law.

Elaboration of the principles of impartiality and neutrality in international humanitarian law supports some aspects of contemporary principles of humanitarian action, and conflicts with others. One interesting issue in relation to impartiality is the requirement that no distinctions be made between beneficiaries on the basis of whether they are individually 'good' or 'bad', innocent or guilty of even the most horrendous international crimes. Many voices in the humanitarian community called for precisely these distinctions to be made in the Great Lakes refugee crisis of 1994–8. Indeed, the statute of UNHCR, the lead agency in that situation, requires it to do so. International humanitarian law suggests the contrary approach: according to its philosophy, the midst of conflict is no time to be attempting to determine individual circumstances beyond those of humanitarian need. The principles of humanitarian relief sit uncomfortably alongside the defining rules of legal protection which govern the actions of an agency like UNHCR (indeed, the conflict raises questions about the appropriateness of that agency taking the lead in such operations).

Neutrality of relief operations is the humanitarian principle most fully developed in the Geneva Conventions. As mentioned above, the term itself is not used, but the concept of non-participation (direct or indirect) in hostilities is at the core of the relief provisions. These provisions require effective control of resources brought into the conflict area by the humanitarian organisation, which includes supervision of distribution and may extend to post-distribution monitoring. They may also be read to require properly qualified personnel. In this respect international humanitarian law supports the efforts being made by contemporary actors to avoid the diversion of relief from its intended beneficiaries, and suggests that rigorous standards be maintained. States would be entitled to refuse access to relief which failed to be provided according to such a system.

In another respect, however, this concept of neutrality diverges from contemporary principles of humanitarian action: it contains a requirement that no definite advantage accrue to the local economy from the relief supplies brought into the territory. This runs contrary to the developmental or capacity-building approach apparent in some statements of humanitarian principles, which aims for a longer-term impact from humanitarian operations. Clearly all relief agencies are concerned that their humanitarian resources should not sustain a war economy; the difference identified is one of priority. Neutrality of relief in international law sacrifices any kind of sustainability or longer-term economic goal in order to ensure that resources do not feed into the military efforts of either party.

It was found that these principles apply whether or not consent for the relief operation is given, and that a decision to continue in the absence of consent is not necessarily contrary to international law. And while the principles are relevant to a determination of the legitimacy of human rights 'conditionality', they do not help with the strategic questions which lie at the root of this debate.

Finally, the distinction between international and internal conflicts is formally important in international humanitarian law. In recent years, however, the practice of relief operations has been similar in both international and internal conflicts. The erosion of legal distinctions in this area is only to the benefit of civilian beneficiaries, and it is to be hoped that this practice signals a continuing trend.

End Notes

[1] These two branches together can also be termed *ius in bello*. International humanitarian law is an imprecise term, which might also be seen to include *ius ad bellum* – the use of force in international law – as well as the law of disarmament, etc. The narrower sense is used here

[2] Regulations annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land: articles 22 and 23

[3] Article 25 of the Regulations prohibits 'The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended'.

[4] see Appendix 1

[5] This is not to say that no one believes certain provisions to be customary in nature: see the International Criminal Tribunal for Yugslavia Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 in *Prosecutor v Dusko Tadic*

[6] Namely, those 'which, under responsible command, exercise such control over a part of [the State] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol': article 1, Additional Protocol II.

[7] Neither the United States nor France has ratified Protocol I, for example, although strong arguments have been made for the customary status of many of its provisions. The forthcoming ICRC study on the customary law of armed conflicts will be helpful in this regard, as well as in relation to customary law in internal conflict.

[8] Aliens in the territory of a party to the conflict: article 38; population of occupied territory: articles 59–63, Convention IV

[9] Food and clothing for children, pregnant women and maternity cases; medical and religious objects for the general civilian population: article 23, Convention IV.

[10] These distinctions are less significant than that between international and non-international conflict in terms of the benefits that ensue, particularly since the entry into force of Additional Protocol I (where this applies).

[11] Support for this argument can be found, for e.g., in the work of Professor Meron (1998)

[12] For example, in a provision relating to occupied territory: 'Subject to temporary and exceptional measures imposed for urgent reasons of security by the occupying power: a) recognised National Red Cross [etc.] Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions' (emphasis added) article 62, Convention IV.

[13] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, I.C.J. Reports 1986, 243

[14] For an elaboration of the legal doctrine of neutrality and its application to humanitarian bodies, see Plattner, 1996.

[15] Protecting Powers are neutral states designated by each party to the conflict to safeguard its humanitarian interests. Many of their functions under the Geneva Conventions may be delegated to the ICRC.

[16] The Commentary notes that the use of the term 'definite advantage' is intended to raise the threshold, as 'It is true that any consignment of medical and hospital stores, food and clothing always benefits the receiving power in one way or another'. (Pictet, 1958:182). The provision of basic seeds and tools to sustain individual families, for example, would be unlikely to fall foul of the condition in article 23, Convention IV.

[17] Principle 6 commits its signatories to building disaster response on local capacities. It specifies that 'Where possible, we will strengthen these capacities by employing local staff, purchasing local materials and trading with local companies.'

[18] In June 1987, India famously went ahead with an air drop of relief supplies to the Tamil community in Sri Lanka, without the consent of the Sri Lankan authorities. The Indian Red Cross, however, declined to participate in the operation without the consent of the Sri Lankan government. See Meyer, 1987.

[19] This passage is more ambiguous than the others, as humanitarian action is by definition compatible with State sovereignty: it is not to be deemed unlawful intervention (see *Nicaragua* case; UN General Assembly Resolution 2625XXV of 1970 – Declaration on Friendly Relations). It is also in the field of humanitarian action, as in that of human rights generally, that traditional notions of sovereignty are to some extent being eroded. See comment on Security Council resolutions below.

[20] 'UN Security Council resolutions have significantly rewritten the articles in the Geneva Conventions that deal with humanitarian relief, in effect bestowing new

legal privileges on relief workers and implicitly lessening their own legal obligations.' (African Rights, 1997: 123).

[21] See UN Security Council resolutions 688 (Iraq); 771 (former Yugoslavia); 758 (Bosnia and Herzegovina), etc.

Bibliography

African Rights (1997) *Food and Power in Sudan*, London: African Rights.

Atkinson, P. (1997) *The war economy in Liberia: a political analysis*. Network Paper 22, London: Relief and Rehabilitation Network, Overseas Development Institute.

Atkinson, P., and Leader, N. (2000) The Joint Policy of Operation and the Principles and Protocols of Humanitarian Operation in Liberia. Study 2 in: The Politics of Principle: the principles of humanitarian action in practice. HPG Report 3. London: Overseas Development Institute

Beyani, C. (1996) The Legal Basis for Humanitarian Assistance. Paper prepared for Dublin Forum on Ethics in Humanitarian Aid, 9-12 Dec: 1996.

Blondel, J. (1989) "The meaning of the word 'humanitarian' in relation to the Fundamental Principles of the Red Cross and Red Crescent" *International Review Of The Red Cross* No.273 November-December

Borton, J., Nicholds, N., Benson, C. and Dhiri, S. (1994) NGOs and Relief Operations: Trends and Policy Implications. Overseas Development Institute, London.

Bothe, M. (1989) "Relief Actions: the position of the recipient state" in Kalshoven (ed.) 1989 *Assisting the Victims of Armed Conflict and Other Disasters* Dordrecht: Martinus Nijhoff

Bothe, M., Partsch, K.J., Solf, W.A. (1982) *New Rules for Victims of Armed Conflicts: Commentaryon the Two 1977 Protocols Additional to the Geneva Conventions of 1949*.The Hague: Martinus Nijhoff

Bradbury, M., Leader, N., Mackintosh, K. (2000) The Agreement on Ground Rules in South Sudan. Study 3 in The Politics of Principle: the principles of humanitarian action in practice'. HPG Report 4. London: Overseas Development Institute

Duffield, M. (1998) Aid Policy and Post-Modern Conflict: A Critcal Review. *Occasional Paper 19*, Birmingham: The School of Public Policy, University of Birmingham.

Harroff-Tavel, M. (1989) "Neutrality and Impartiality: the importance of these principles for the International Red Cross and Red Crescent Movement and the difficulties involved in applying them" *International Review Of The Red Cross* No.273, November-December 1989

I.C.J. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, Reports 1986

Kalshoven, F. (ed.) (1989) *Assisting the Victims of Armed Conflict and Other Disasters* Dordrecht:Martinus Nijhoff

Kalshoven, F. (1989) "Impartiality and Neutrality in Humanitarian Law and Practice" *InternationalReview Of The Red Cross* No.273 November-December 1989, 516-535

Leader, N. (2000) The Politics of Principle: the principles of humanitarian action in practice. HPG Report 2. London: Overseas Development Institute

Leader, N. (1998) Proliferating Principles: Or How to Sup With the Devil Without Getting Eaten. *Disasters* 22, 288-308.

Levine, I. (1997) *Promoting Humanitarian Principles: the South Sudan Experience*. Network Paper 21, Relief and Rehabilitation Network.. London: Overseas Development Institute.

Macalister-Smith, P. (1989) "Rights and duties of the agencies involved in providing humanitarian assistance and their personnel in armed conflict" in Kalshoven (ed.) (1989) *Assisting the Victims of Armed Conflict and Other Disasters* Dordrecht: Martinus Nijhoff

Meron, T. (1998) "Classification of armed conflict in the former Yugoslavia: Nicaragua's fallout" *American Journal of International Law* Volume 92 No. 2 April 1998, p 236

Meyer, M.A. (1987) "Humanitarian Action: A delicate balancing act" *International Review Of The Red Cross* No.260 September-October 1987, 485-500

Pictet, J. (1979) *The Fundamental Principles of the Red Cross*, Geneva: Henry Dunant Institute.

Pictet, J. (1958) *The Geneva Conventions of 12 August 1949: commentary. Published under the general editorship of Jean S. Pictet, director for general affairs of the International Committee of the*

Red Cross. Geneva : International Committee of the Red Cross, 1952-60.

Plattner, D. (1996) "ICRC neutrality and neutrality in humanitarian assistance" *International Review Of The Red Cross* No.311, March - April 1996, 161-179

SCHR (1994) *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief*. RRN Network Paper 7, London: Relief and Rehabilitation Network, Overseas Development Institute

Slim, H. and McConnan, I. (1998) A Swiss Prince, A Glass Slipper and the Feet of 15 British Aid Agencies: a study of DEC Agency Positions on Humanitarian Principles. Oxford: Disasters Emergency Committee.

The Sphere Project (1998) *Humanitarian Charter and Minimum Standards in Disaster Response*. Geneva: The Sphere Project.

Swinarski, C. (ed.) (1984) *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*. Geneva: International Committee of the Red Cross, 1984.

Swinarski, C. (1984) "La notion d'un organisme neutre et le droit international" in Swinarski, C. (ed.) *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*. Geneva: International Committee of the Red Cross, 1984.

Appendix 1: Articles of the Geneva Conventions and Additional Protocols Relating to Civilian Relief (non-medical)

Geneva Convention IV

Article 3	Non-international conflict
Article 10	General provision

Enemy civilians

Article 23	Free passage of certain relief items

Protected persons

Article 30	Relief organisations 'shall be granted all facilities' by the authorities

Aliens in the territory of a party to the conflict

Article 38	'Shall be enabled to receive' relief sent to them

Occupied territories

Article 59	Collective relief: relief schemes shall be agreed to and facilitated if population is in need
Article 60	" "
Article 61	" "
Article 62	Individual relief: 'shall be permitted to receive' relief sent to them
Article 63	Relief societies shall be able to pursue activities in accordance with Red Cross principles

Internee relief

Article 108–112

Detainee relief

Article 142

Additional Protocol I

Article 68	Field of application
Article 69	Basic needs in occupied territories
Article 70	Key provision
Article 71	Protection of relief personnel
Article 81	Parties to the conflict shall facilitate the work of humanitarian organisations

Additional Protocol II

Article 18	Relief societies and relief actions