Protecting the Civilian in Zones of Conflict:

The Case of the War in the former Yugoslavia and; Humanitarian Relief Personnel as Human Rights Activists

by

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PROTECTING THE CIVILIAN IN ZONES OF CONFLICT: THE CASE OF THE WAR IN THE FORMER YUGOSLAVIA AND HUMANITARIAN RELIEF PERSONNEL AS HUMAN RIGHTS ACTIVISTS

by
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This thesis is dedicated to all those who have been silenced
by the unnecessary cruelties of war.

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Abstract

This thesis is a two part study of justice. The trauma of conflict in developing countries which has resulted in deprivation that increase their vulnerability to further conflict is becoming an increasing challenge to those involved in medical humanitarian relief. A core consideration of the concept of rehabilitation of a society traumatized by conflict is that recovery assistance should include emotional recovery and not be exclusively concentrated on physical needs. First, it is my contention that it is no longer acceptable for the international community to allow the powerful and brutal forces in this world to impose indiscriminate reigns of terror upon innocent civilian populations without seeking some form of recompense and justice. The second part of this thesis explores the gap in the humanitarian aid community's operational ability to respond to instability and conflict. The ability of aid organisations to achieve conflict mitigation, management, and resolution are increasingly dependent upon the different range of skills and the comparative advantage of each player. It is my contention that divergent views need to reach a consensus in order to bring to an end further disputes that may hamper the effective delivery of relief. The opportunities and challenges of non-interventionist emergency aid strategy is contrasted with interventionist developmental strategy. Two theories of justice are utilized to help solve an ethical dilemma faced by humanitarian relief personnel. Thus criteria for evaluating ethical dilemmas are established. The thesis concludes with some implications for the future regarding the deterrence affect of international criminal courts.

INTRODUCTION

Humanitarian Relief and Development

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed.
It is the very essence and reason for his being.
When he violates this sacred trust, he not only profanes his entire cult
but threatens the very fabric of international society.

General Douglas MacArthur
Tokyo War Crimes Trials, 1946.

As of 1995 there were 56 internal conflicts ongoing in the developing world. This number is up from 34 conflicts in 1970. Ninety-five percent of the victims of today's conflicts are civilians. The disruptive effect of conflict on the civilian population has been profound to say the least. For example, the United Nations Department of Humanitarian Affairs estimates as of 1995 a level of upwards of 17 million refugees, 26 million internally displaced persons, and 100 million economic migrants as of 1995.

The trauma of violence in developing countries only results in further deprivations of the basic necessities of life, and serves to increase their vulnerability to further conflict and decrease their resistance to its destructiveness. This vicious cycle of violence and deprivation has become an increasing challenge to those involved in medical humanitarian relief and peace-keeping efforts (Moore 1996:1).

In order for recovery assistance to be effective it needs to serve the transition between short-term emergency assistance and long-term economic development. Restoring the victims of prolonged violence to a modicum of self-sufficiency that is sustainable involves reintegrating disrupted populations back into their society, the repatriation of refugees, and returning displaced persons to help rebuild what remains of their communities. Kofi Annan, when he was UN Under-Secretary-General, underscored the point that: "A secure environment, humanitarian assistance and political reconciliation are inextricably linked". In so saying, Kofi Annan draws a connection between food, medicine and shelter; with cease-fire monitoring, demobilization of the military, de-mining, and police training; with elections monitoring, and restoration of the respect for human rights. Each task, whether implemented effectively or not will have a major impact on all the others. This notion is emphasized by Boutros Boutros-Ghali in his Agenda for Development when he states: "Successful development cannot be achieved by pursuing any one dimension in isolation, nor can any one dimension be excluded from the development process. Without peace, human energies cannot be productively employed over time. Without a healthy societal justice, inequalities will consume the best efforts at positive change." Furthermore, if the international community's peace-keeping and political efforts lack the catalyst and binder of social and economic renewal, they will be wasted and the humanitarian crises can be expected to reappear (Moore 1996:3).

A core consideration of the whole concept of rehabilitation of a society traumatized by conflict is that recovery assistance should contribute to a process which encompasses emotional recovery of psychic damage and therefore should not be exclusively concentrated on the physical realm (Moore 1996:2). Aid societies are still struggling with the notion of what it means to be 'neutral' in a conflict. It is still unclear how to feed the 'victims' of a conflict without feeding the perpetrators of their genocide. Similarly, aid societies are often powerless to prevent all sides in a conflict from denying their enemies access to life-saving food and medicines. Despite these very real and troubling deficiencies, this thesis argues that it is unworthy of the international community to allow the powerful and brutal forces in this world to impose indiscriminate reigns of terror upon innocent civilian populations without seeking some form of recompense, accountability, and/or justice. Furthermore, nations who continue to display indifference to profound injustices on the scale of genocide should be marginalized from the international community unless and until they embrace the universal principles of justice and decency which bind us all.

There is a growing debate over the linkages between relief and development. Until recently disasters and emergencies, including those caused by conflict, were perceived as temporary interruptions in an otherwise progressive development process. This view is increasingly being challenged. The idea of a 'linear' continuum does not reflect the chronic nature of conflict and vulnerability. Nor does it acknowledge the weaknesses in the development process itself which has failed to give sufficient attention to building the capacity of developing countries to deal effectively with the 'shocks' of instability and conflict (Hansen 1995:8).

Related to the question of the links between relief and development is the concept that human security, along with that of sustainable development, is emerging as an important element in the aid policy dialogue. The humanitarian aid boundaries are becoming increasingly blurred as they extend into areas of governance, peace-keeping, and global environmental management (Hansen 1995: 8-9). Before the international community can do anything about improving the way it responds to conflict-related emergencies, it needs to address some key questions.

Considered a vital prerequisite to improvements in operational performance is the need to fill the gap in understanding the causes and nature of conflict. A well targeted case-study approach is a useful way to examine the issues given that conflict, instability, and tension are extremely variable phenomena. Therefore, one needs to look closely at the underlying reasons for, and nature of conflict in the specific countries where it occurs (Hansen 1995:9).

Chapters one and two of this thesis examines the war in the former Yugoslavia between 1991 and 1995. The war in the former Yugoslavia is instructive because first, it is a recent example of widespread and massive human rights abuses coupled with flagrant violations of medical neutrality and rules of proportionality, which hold that civilian casualties should not be excessively out of proportion to military advantage. The violations of International Humanitarian Law (IHL) were so grievous during this war that for the first time since the International Military Tribunal at

Nuremberg in 1945 the international community deemed it necessary to establish an International Criminal Tribunal to bring the perpetrators of the war crimes to justice.

Chapter one begins with an analytical discussion on the origins and efficacy of International Humanitarian Law as embodied in the Four Geneva Conventions of 1949 and the two Additional Protocols of 1977, in protecting civilians from the hostilities of war. The discussion will include an analysis of: (i) the efforts of the International Committee of the Red Cross (ICRC) in persuading States to accept humanitarian treaties; (ii) the training of armed forces personnel to respect International Humanitarian Law (IHL); (iii) actions taken in the event of 'grave breaches' of IHL; (iv) arguments for and against the use of armed intervention on humanitarian grounds.

Chapters three and four of the thesis examines a major gap in the humanitarian aid community's operational ability to respond to instability and conflict. Chapters three and four look at two key organisations in humanitarian relief, the International Committee of the Red Cross, and Médecins Sans Frontières. The ability of each organisation to achieve conflict mitigation, management, and resolution will be examined. As there are now many different players in the humanitarian relief field - UN agencies, non-governmental organisations, and private organisations - each with their different range of skills and expertise, it is important to identify and explore the comparative advantages of each player (Hansen 1995:9). A historical review of the two organisations helps to illustrate that the 'culture' of an organisation can play a significant role in its ability and/or willingness to adapt to a changing environment.

Chapters three and four will examine the issue of linking relief and development assistance in situations of instability or conflict. There is an increasingly divergent view between those who assert that emergency relief aid should be concentrated solely on saving and preserving life; and those (primarily with a development background) who bring a justice-driven philosophy to their work in conflicts. In a sense this debate is over the 'purity' of emergency aid (Hansen 1995:10).

Emergency aid 'purists' argue that the essential impartiality and unconditionality of humanitarian assistance can only be guaranteed by the delivery of straightforward 'welfare' services such as medical services, shelter, and food aid. Those who have adopted a more 'developmental' approach believe that it is important to include in humanitarian relief those elements usually found in development programmes (e.g.: gender awareness, human rights). This thesis argues that the divergent views held by those involved operationally in emergency aid need to reach a consensus in order to bring to an end any further disputes that may hamper the effective delivery of relief. This thesis argues that what is at stake is not a matter of any one approach being right or wrong, but more a question of coming to understand and appreciate the opportunities and limitations of each approach.

Constraints imposed by negotiated access and the respect for sovereignty and the limits placed on humanitarianism in the name of neutrality have led many critics to urge for the jettisoning of the whole concept of neutrality between belligerents in favour of a stronger commitment to the victims themselves. It has been argued that "Solidarity rather than neutrality has to be the guiding hand" (Levine 1995:39). This thesis examines the question of whether 'solidarity' with the victims of a conflict juxtaposed with neutrality provide greater benefit to the victims in situations where relief reaches women and children on both sides to the conflict (Levine 1995: 39).

Chapter five explores the ethical dilemma of whether or not humanitarian workers should publicly denounce human rights violations to the point where operational relief activities are jeopardised. Elements of consequentialist and social contract theory are utilized to help support strategic policy guidance for the various actors in the arena.

Thesis Statement

First, this thesis argues that the settling of human rights violations (perpetrated against the civilian population caught in zones of conflict), by making state criminals accountable for their actions, is a fundamental precondition for lasting peace negotiations, and sustainable reconstruction and development. This thesis will show how the binding norms of international humanitarian law deepen the obligation of the state to overcome impunity for massive human rights violations wherein the individual will have the right to: (i) see justice done; (ii) to know the truth; (iii) to nonmonetary forms of restitution; and (iv) to reorganised and accountable institutions. Furthermore, the establishment of international criminal courts to prosecute individuals for their "crimes against humanity" may be a decisive factor in deterring future atrocities and promote interethnic, racial, and religious reconciliation.

Second, this thesis examines how human rights violations, perpetrated against the civilian population caught in zones of conflict, should be handled by individual humanitarian aid workers. This thesis compares and contrasts the opportunities and challenges of the non-interventionist emergency aid strategy with interventionist developmental strategy. This thesis asks the question of whether or not public denunciation of human rights violations is an appropriate strategy for humanitarian aid workers to adopt when serving the civilian population at risk.

CHAPTER ONE

The International Committee of the Red Cross and International Humanitarian Law

Laws are silent amidst the clash of arms
Cicero

International humanitarian law (IHL) is defined as international rules established by treaties or custom. They are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict (Sandoz 1987:27).

International humanitarian law is contained in six international treaties, the four Geneva Conventions of 1949, Protocol I of 1977 which regulates international armed conflicts, and Protocol II of 1977 which regulates non-international armed conflicts. International humanitarian law is binding to all states a party to them and must be observed by all belligerents whatever the cause or grounds for war.[1]

[1] As of 1992, 169 states were a party to the Geneva Conventions, 110 states were a party to Protocol I, and 100 states were a party to Protocol II *International Review of the Red Cross*, no. 288,(1992):.279-263.

Protection of the Civilian Population until 1949

IHL is founded on principles codified in the 1868 Declaration of St. Petersburg which states "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."[2] The link between international humanitarian law and the rules governing relief assistance to civilian populations stems from the notion that relief assistance to civilian populations is one way of protecting them from the rigours of armed combat (Plattner 1992:2).

It is interesting to note that before 1949 there were no humanitarian rules relating specifically to the civilian population. The governments of the time of the 1899 and 1907 Hague Conventions were convinced it was impossible to intern nationals of a belligerent state who were resident in the territory. They therefore refused to include any such prohibitions in the Regulations (Plattner 1992:2). By the end of World War II, however, there was no longer any government who questioned the need for an instrument designed especially for the protection of civilians in time of war. This instrument became the Fourth Geneva Convention of 1949.[3]

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[2] For the text of the Declaration of St. Petersburg of 1868 see *The Laws of Armed Conflict, A Collection of Conventions, Resolutions and Other Documents*, eds., Dietrich Schindler and Jiri Toman Martinus Nihoff Publishers, Dordrecht, Henry Dunant Institute, Geneva, (1988): 285-288.

[3] In 1921 the ICRC began preliminary drafts to deal with humanitarian problems thrown up by war. The most important of these forbade deportations and execution of hostages. In 1929 governments would not commit to such provisions. One can only speculate that had the draft been adopted the legal and political context of the fate of the Jews and civilian population of Nazi-occupied territory may well have been different (Plattner 1992:2).

Lessons can be drawn from the blockade experiences of World War II. The military objective of a blockade is to isolate the adversary and cut off sources of supplies. For the civilian population this leads to the prevalence of deficiency diseases which result in sharply rising mortality rates (Bugnion 1994: 263). As the Fourth Geneva Convention did not yet exist, the ICRC carried out humanitarian relief under the aegis of the Joint Relief Commission set up by itself. These relief operations required the agreement of the principal belligerents. The ICRC conducted two separate sets of negotiations with Germany and the Allies. On 11 January 1941, the Ministry of Foreign Affairs of the German Reich agreed in principle to relief operations for the benefit of civilian populations of the occupied territories[4]. Germany undertook that no part of relief would be diverted to German troops or civilian administrators (Bugnion 1994: 265).

The British government, on the other hand, argued it was the duty of the Occupying Power to provide food for occupied territories. They feared that relief might enable the Occupying Power to increase its requisitions of locally produced food. Furthermore, the occupied territories would not have been at risk of famine had the invader not seized all available reserves. England argued that humanitarian considerations should not stand in the way of a blockade because only rigorous blockade would bring hostilities to a speedy close (Bugnion 1994: 265).

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[4] The Germans used the puppet state of Slovakia as a base for attacking Poland. The destruction of Czechoslovakia in March 1939 assured Hungary shared a common border with Poland and Budapest had been instructed to occupy the eastern extremity of Czechoslovakia, and the Carpatho-Ukraine. As a by product of their conquest of Holland, Belgium, and France, the Germans stripped those countries to furnish

The argument of the British government would be considered absolutely incompatible with international humanitarian law today. In fact, it is an attempt to justify total war which is precisely what international humanitarian law seeks to prevent. This scenario is instructive for several reasons. First, the German response shows that relief need not be regarded as contrary to a belligerent's military interests. Second, a totalitarian State waging a war of aggression was able to welcome the ICRC's proposal whilst one of the oldest democracies in the world argued against it. This demonstrates that a country that goes to war for a 'just cause' may not necessarily behave in a humanitarian way. More to the point, a country that normally respects human rights will not necessarily respect humanitarian law (Plattner 1992: 4).

These negotiations led to two highly important provisions of Article 23 of the Fourth Geneva Convention which makes mandatory the free passage of goods necessary to the survival of the civilian population. As per Article 59 of the Fourth Convention, the Occupying Power is obliged to agree to relief schemes in which the supervision of the distribution of supplies is compulsory (Plattner 1992: 4).[5]

It can be argued, therefore, that the provisions of international humanitarian law are far too critical to allow for ineffective regulations and enforcement measures. Its history clearly demonstrates that IHL was not developed from conceptual theories, but from the practical and actual considerations of warfare. Therefore, in order

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their war effort. Organized looting and exploitation of the occupied areas point to the special character of the campaign in the East. (Weinberg 1994:190).

for international humanitarian law to be applicable and acceptable to the international community as a whole it needs to find the correct balance between obligations, rights, and duties (Plattner 1992:7).

An illustration of how challenging this can be is seen at the close of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Geneva in 1977 where the representatives of the States party to the 1949 Geneva Conventions adopted, on 8 June 1977, the two Additional Protocols[6], following a ten year preparatory period. Though considered landmark by 1982 a total of only 27 States had ratified Protocol I. Similarly, a total of only 23 States had ratified Protocol II, with no states in the possession of nuclear weapons among them. Recalling that 152 States were a party to the 1949 Geneva Conventions at the time.

There was a real danger that the Additional Protocols of 1977 would 'die on the vine' so to speak. The marked lack of enthusiasm for the Additional Protocols did not bode well for civilian populations exposed to hostilities in the future. The ICRC decided to take action by appointing a legal expert in 1983, who was given the task of coordinating a campaign to ensure all the States party to the 1949 Geneva Conventions

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[5] The precedent set by Biafra called for the specific prohibition of starvation as a weapon as set out in the Additional Protocol I, Article 54, and Additional Protocol II, Article 14, of 1977.

[6] For a review on the two Additional Protocols of 1977 *see* "International Humanitarian Law and Human Rights Law: Their Mutual Influence and Impact" Thesis Appendix (1998).

also became a party to the Protocols of 1977 thereby making the legal instruments universal.[7]

As a result of these concerted efforts, between 1 January 1983 and 31 December 1995, 116 States became bound by Protocol I, and 111 States were bound by Protocol II. Among them were two permanent members of the Security Council, China and the Russian Federation, nearly all members of NATO, all countries of Central and Eastern Europe, nearly all African and Latin American States and a large number of Asian countries, plus the Holy See (Gasser 1997:2).

This demonstrates the enormous effort required to get States simply to sign on to humanitarian law treaties. Getting the armed forces to respect international humanitarian law is another matter entirely. For instance, it has been argued the laws became 'silent' in the disintegration of the former Yugoslavia which saw some of the worst violations of international humanitarian law since World War II (Roberts 1997:1).

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[7] The special advisor carried out his duties for 13 years. He traveled to 70 capitals several times over to meet with officials from Ministries of Foreign Affairs, Defense and Justice. Direct contact with the armed forces and their legal services proved particularly useful. The personal involvement of two ICRC Presidents, Alexandre Hay and Cornelio Sommaruga helped persuade many ministers to study the question and take a favourable decision. *See* Paul Berman. "The ICRC's Advisory Service on International Humanitarian Law: the challenge of national implementation", *IRRC*, no. 312 (May-June 1996): 338-347.

Each of the four Geneva Conventions of 1949 stipulate that States Parties have an obligation to:

> ...undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmesof military and, if possible, civil instruction, so that the principles thereof may be known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains. [8]

Therefore, there remains little doubt as to the responsibility of States and their respective Commanders-in-Chief to train their armed forces in international humanitarian law.

The responsibility for the dissemination of international humanitarian law within the ICRC rests with five officers and a Major General acting as consultant at the headquarters in Geneva. The ICRC employs retired officers from various countries trained in the law as it has been shown that having an instructor with operational field experience enhances credibility in the eyes of the trainees.

The overall approach to training includes:

(i) Training at the junior rank level is part of normal field instruction such as capture drills, evacuation, treatment of the dead and wounded, treatment of adversary's medical staff, respect for protected property, drills for dealing with the white flag of truce and humanitarian aid vehicles. At the end on each session the tactical and law of war lessons are brought out as part of normal debriefing. Tactics and issues relating to the law become routine and a matter of normal behavior in action (Roberts 1997:5).

(ii) The ICRC offers courses for military academies and staff colleges with the aim to give instruction in the law to every officer entering the armed forces. The object is to create a multiplying effect whereby 1 officer commands 30 men, and eventually a company of 100. Similarly, a staff college graduate will command a battalion of 600 men.

(iii) The ICRC trains instructors in international humanitarian law. In 1997 they trained 100 instructors during 5 to 8 day workshops.

(iv) Senior officers and staff officers are taught the broader issues of law such as command responsibility and the implications for logistics and planning. Case studies based on recent wars are used to highlight the laws of war. Questions to be looked at include what are the guidelines for UN forces regarding respect for IHL and what laws are applicable to peace enforcement (Roberts 1997:5).[9]

(v) Local specialists in human rights law are invited to cover situations where domestic law and international humanitarian law intersect.

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[8] Articles 47, 48, 127 and 144 of the four Geneva Conventions of 1949, respectively.

[9] Recent participants in the course have admitted to knowing less than 50% of the subject matter. On some aspects of the law there is complete lack of knowledge. For instance, almost all participants regarded the white flag as a sign of surrender and not, as intended in the law, as a sign that a party to the conflict may simply wish to negotiate. A senior officer remarked he now understood why when he was a young officer approaching a party showing a white flag and insisting on their surrender, his comrade was shot and killed and he was wounded (Roberts 1997: 6).

Armed Intervention for Humanitarian Goals

Bernard Kouchner, the former French President of Médecins du Monde, and later Secretary of State for humanitarian action, proposed to the United Nations General Assembly that a "right to interference" be established on the grounds that humanitarian organizations were not equipped to oppose states that presented obstacles to relief activities. On 5 April, 1991, the United Nations Security Council passed Resolution 688, which concerned relief efforts on behalf of the Kurdish population in northern Iraq. Resolution 688 established, for the first time, a link between humanitarian assistance to peoples in distress with respect for human rights and the maintenance of international peace and security.

While respecting the sovereignty of Iraq, the Resolution called on the State to allow immediate access by international humanitarian organizations to all those in need of assistance. The size of the mass exodus from Kurdistan, coupled with the incapacity of aid organizations to respond immediately combined to make a military-type operation with a humanitarian objective inevitable.[10]

The ICRC has been critical of such military-type relief operations on the grounds that they blur military objectives behind humanitarian goals. The ICRC argues that humanitarian operations will no longer be perceived as being impartial, independent

[10] Operation "Restore Hope" in Somalia was the second such operation followed by the Rwanda-Zaire border operation of the French armed forces, and the US armed forces intervention in Haiti (Russbach & Fink 1994: 7).

and neutral which may endanger future operations (Russbach & Fink 1994: 7). For instance, the four basic conditions the ICRC have identified as being required for humanitarian action: (i) access to the victims of the armed conflict; (ii) dialogue with authorities; (iii) control over the entire chain of humanitarian action; (iv) adequate resources (Russbach & Fink 1994:8); may well be jeopardized if a Party to a conflict views a humanitarian relief operation as being of a political or military nature.

Humanitarian relief is also in danger of being manipulated by recipients. For example, the publicizing of casualty data are often part of strategic considerations by both sides to a conflict. First, Parties to a conflict may have an interest in concealing problems that will encourage international public debate. Second, Parties to a conflict may have an interest in overstating the plight of the victims under their control in order to vilify the enemy. For instance, in Serbia- Montenegro there were accusations of biases in relief programmes and of partiality towards one party over another in support of the enemy.[11]

[11] Bosnian Serbs disputed every convoy that passed through their territory to supply Croat or Muslim enclaves with relief goods. See M. Mercier, *Crimes without punishment - the humanitarian action in former Yugolsavia, 1991-1993*, Bruxelles: Bruyant, 1993.

Despite the ICRC's arguments against armed intervention for humanitarian objectives they too have resorted to armed protection for its convoys and warehouses for the first time in its history. The reason being that in recent conflicts - like the one in former Yugoslavia - the working conditions for all expatriates of humanitarian organizations have deteriorated dramatically. For example, before 1989, threats and attacks on staff of humanitarian organizations were a rarity and considered purely accidental. Since 1989, there has been no conflict in which humanitarian workers have not been harassed, menaced, prevented from working, attacked, robbed, injured and killed.[12]

Humanitarian action quickly becomes irrelevant when there is no dialogue with all levels of authority. Whilst some humanitarian work can continue in the field or in prisons, the larger issues dealt with at gubernatorial levels are quickly stalled by refusal of meetings, rejection of recommendations, and challenges to the quality of work of the delegates. When situations reach an impasse the ICRC must call upon the diplomatic community and on international public opinion for help (Russbach & Fink 1994: 11).

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[12] The ICRC lost more than 30 locally recruited employees in Somalia. The same number have been killed in the line of duty in Rwanda (Russbach & Fink 1994: 12).

<u>Measures Available to States to Ensure Respect for International Humanitarian Law</u>

Measures currently available to States to help ensure respect for International humanitarian law in the face of violations include:

(A) Diplomatic Pressure: (i) vigorous and continuous protests lodged by as many Parties as possible with ambassadors representing the State in question in their respective countries. (ii) Public denunciation by a particularly influential regional organization. (iii) Diplomatic pressure on the author of the violation through intermediaries. (iv) Reference to the International Fact-Finding Commission as per Article 90 of Protocol I of 1977 (Palwankar 1994:3).

(B) Coercive Measures that States may take themselves: In order to remain lawful the coercive measures must; (i) be directed against the State responsible for the unlawful act; (ii) be preceded by a warning to the State asking it to stop said acts; (iii) be proportional; (iv) respect fundamental humanitarian principles as provided for in IHL; (v) be temporary and therefore cease as soon as the violation of the law by the State in question ceases.

(C) Measures of Retortion: This refers to acts which are unfriendly but intrinsically lawful. They include: (i) expulsion of diplomats; (ii) severance of diplomatic relations; (iii) halting diplomatic negotiations and refusing to ratify agreements; (iv) non-renewal of trade privileges; (v) reduction of public aid to the State in question.

(D) Possible Unarmed Reprisals: (i) restrictions or bans on arms trade, military technology and scientific co-operation; (ii) total ban on commercial relations; (iii) ban on investments; (iv) freezing of capital; (v) suspension of air transport (Palwankar 1994:4).

(E) Unarmed Measures Decided by the UN Security Council: Unarmed measures as per Article 41 of the UN Charter include the complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, coupled with the severance of diplomatic relations (Palwankar 1994:5).

(F) Measures Decided by the UN General Assembly (UNGA):

(i) The UNGA may recommend that members adopt sanctions against a state whose conduct is contrary to the rules of the Charter.

(ii) The UNGA and the Secretary-General may be mobilized by member states to issue statements on the applicability of IHL and denounce violations which have been committed.

(iii) States may use public denunciation and/or confidential negotiation procedures provided for in the Commission on Human Rights in order to bring pressure to bear on States to respect IHL.

(iv) The UN may utilize the services of special rapporteurs mandated to conduct inquiries into specific violations of IHL.

(v) States may request the International Court of Justice to give an advisory opinion on whether an alleged violation of IHL by a State actually constitutes a breach of an international commitment (Palwankar 1994:7).

Regarding the use of armed force it is generally accepted that all military countermeasures by a State are unlawful. The sole body competent to impose a sanction involving armed force is the UN Security Council. The single purpose as permitted under Chapter VII of the Charter is for restoring peace and security. Therefore, the lawfulness of the use of force under such circumstances is strictly limited to this goal and cannot be derived from any provision of IHL. Recalling that IHL is grounded in the premise that armed conflict results in human suffering. IHL is a body of rules and codes of conduct that attempt to alleviate this very suffering. Therefore, it would be legally and logically indefensible to deduce that the same law itself allows for the use of armed force to achieve its objectives. It is argued, therefore, that enforcement measures fall outside the scope of international humanitarian law (Palwankar 1994:6).

Neutrality and Humanitarian Assistance and the International Committee of the Red Cross

The ICRC's definition of neutral humanitarian assistance was formulated on elements drawn from current laws and thinking on the matter. First, the ICRC asserts that the validity of neutral humanitarian assistance is grounded in IHL and is closely associated with impartiality and non-discrimination as per Article 70 of Protocol I and Article 18 of Protocol II. The ICRC supports the principle of neutrality which implies that "humanitarian assistance is never interference in a conflict." (Pictet 1975:44).

Second, the ICRC stands firm on the notion that assistance imposed by armed force is interference and does not meet the criterion of neutrality. For example, the parachuting of food and medicines by Indian aircraft, into Tamil-controlled areas of Sri Lanka in 1987 is considered to be of dubious legality because the civilian aircraft used were escorted by Mirage jets (Corten and Klein 1992:144-145).

The ICRC does make allowance for armed escorts that do not divest it of its neutral status provided the sole purpose of the escort is to protect relief supplies from banditry and common criminals.[13]

[13] See "Resolution of the Council of Delegates", *IRRC*, no. 297, (Nov.-Dec. 1993):477-478.

Finally, neutral assistance must give priority to the most urgent cases of distress and is not necessarily bilateral (Sandoz 1986:818-820).

Though the above descriptions is far from an exhaustive list of neutral humanitarian assistance, it is safe to say that relief assistance protected and escorted by UN troops prepared to use force against parties to a conflict can under no circumstances be considered neutral. Operations requiring the use of force deviate from the requirements of consent of the parties, impartiality, and the non-use of force.[14]

The ICRC's notion of neutrality is conceptualized as a quality of humanitarian assistance afforded to the victims of armed conflict. It remains linked with the definition of neutrality which introduced the concept into international law in the first place. In other words, neutrality designates the status of a State or organisation which chooses to stand apart from armed conflict.. Its application is dependent on the criteria of abstention and impartiality which characterized neutrality from the outset (Plattner 1996:161-179).

[14] Boutros Boutros-Ghali cites the precedents of Somalia and Bosnia-Herzegovinia in *Supplement to an Agenda for Peace: Position paper of the Secretary-General on the occasion of the Fiftieth Anniversary of the United Nations*, A/50/60S/1995/1, (3 January 1995): paras. 33-35.

Neutrality and the Security of Humanitarian Personnel

The physical security of humanitarian relief personnel in the field can be considered more a political issue rather than a technical one. The conundrum being that even though organizations like the ICRC adhere to a strict code of neutrality and impartiality when dispensing humanitarian aid, belligerents may perceive this as giving aid to the enemy and therefore they feel justified in targeting humanitarian relief personnel.[15]

The ICRC used to believe that it enjoyed a greater degree of protection from the effects of warfare than might other humanitarian organizations. This is on account of the ICRC's long-standing reputation for independence, impartiality, expertise, and because of the 'universal' significance of the red cross emblem. It must now be recognized that all humanitarian organizations are equally vulnerable to deliberate attacks, killings and hostage takings (Comtesse 1997:1).

One explanation for this new vulnerability of humanitarian personnel in the field is the emergence, after the Cold War, of disorganized armed groups which are oblivious of the very notion of respect for humanitarian activity. The periods of chaos

[15] On 17 December 1996, six delegates of the ICRC were assassinated in their beds at the ICRC hospital in Novye Atagi near Grozny. The expatriate staff killed included Western Europeans, Canadians and New Zealanders. The assassins were equipped with guns fitted with silencers. The attack was clearly aimed at the expatriate staff, since two Chechen interpreters and two guards were spared.

and anarchy that punctuated previous wars and revolutions have, in the past, lasted for a period of a few days, and/or weeks at the most. Today, these periods of chaos are lasting for months on end and become a new form of lawless normality in which the humanitarian worker may no longer have a safe haven within which to operate (Comtesse 1997:2).

More to the point, it is argued that today's armed conflicts have lost both their ideological nature and their strategic significance since the Cold War ended. As a result, belligerents are no longer subject to any constraints. Wars are increasingly being fought for ethnic and cultural reasons that promote exclusion, the aim being to eliminate totally rather than simply conquer the 'enemy.' In these circumstances humanitarian activity, which by definition seeks to ensure respect for both parties to a conflict, will inevitably find themselves at odds with one or another Party to the conflict.

Humanitarian organizations are increasingly faced with the ethical dilemma of either vociferously denouncing violations as they encounter them, and risk being driven from the field, or, standing as mute and helpless witnesses to mass exterminations. In such cases it is argued that military authorities would have no scruples about turning their weapons against humanitarian personnel in order to prevent such witnessing from occurring. The question to be raised here is whether humanitarian activity as we know it belongs to a past order in which some forms of decency prevailed despite military hostilities between Parties (Comtesse 1997:2).

See Francois Bugnion "17 December 1996: Six ICRC delegates assassinated in Chechnya", In response to this dilemma, some have argued that declaring humanitarian activity as obsolete when in fact it has never been needed more is an inappropriate solution. The increasing vulnerability of humanitarian personnel may be largely due to the increasing politicization of humanitarian relief. It is interesting to note that virtually all major humanitarian organizations have their roots in Western countries, or have Western countries as their closest allies. Similarly, they all share an ideological world view imbued with Christian morality and individualism that places a premium on suffering and compassion. They share the political and cultural system which gave rise to the United Nations, and still dominates it to this day. Furthermore, they can only operate as long as they have the financial support from the Western States (Comtesse 1997:3). A country's foreign policy, if expressed through humanitarian relief, may choose from a plethora of projects clamoring for funding, those that best reflect its political objectives and not those based solely on the relief of human suffering (Comtesse 1997:4). Such a country can then exert its power through the size of the contribution to the humanitarian organization. They can then influence humanitarian priorities; thereby giving the lie to pretensions of neutrality and impartiality.

IRRC, no. 317 (March 1997): 140-142.

CHAPTER TWO

International War Crimes Tribunals vs. Impunity:

The Case of the War in the former Yugoslavia

Historical Background

The former Yugoslavia, before the war of 1991 and 1995, consisted of six republics and two autonomous regions. Today Bosnia and Herzegovina, Croatia, Slovenia, and Macedonia are independent nations with Serbia and Montenegro comprising the rump of Yugoslavia. The war in the former Yugoslavia took place primarily in the region of northwestern Bosnia and Herzegovina.

The large Muslim population of Bosnia and Herzegovina[1] owes its religion and culture to the Turkish occupation under which many Slavs adopted the Islamic faith. The sizable Croat (Roman Catholic) population live primarily in the south-west ,adjacent to the Dalmatian coast. The Serb (Eastern Orthodox) population inhabit the western and northern borders which formed the boundary with the former Austro-Hungarian Empire.

Each of these ethnic groups had, in their past, its own era of greatness and empire. For the Serbs, in medieval times, it was the unsuccessful resistance of the Serb nation to Turkish occupation which ended in defeat at the battle of Kosovo. This sight remains a powerful symbol of Serb heroism and nationalism to this day. In 1929 the

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[1] Prewar population of 4.4 million. Religious traditions include: 44% Muslims (Bosniaks), 31% Eastern Orthodox (Bosnian Serbs), 17% Roman Catholics (Bosnian Croats). *Friends of Bosnia*, (10/26/97):1.

Kingdoms of Serbia[2], Montenegro[3], Croatia[4], Slovenia[5], and Bosnia and Herzegovina changed their names to the Kingdom of Yugoslavia (the Kingdom of the southern Slavs).[6]

The Second World War marked a time of harsh repression and brutal treatment of minorities within the former Yugoslavia. The three distinct Yugoslav forces: the Ustasa forces of the Croatian State; the Chetnick forces of the Serbian monarchists; and the Serbian Partisans who were largely communist, fought one another in a prolonged civil war and against foreign invasion and occupation. The Partisans under Josip Broz, later known as Marshall Tito, ultimately prevailed to unite and rule what would become the federal Republic of Yugoslavia .

Many of the conflicts of the Second World War took place in Bosnia and Herzegovina where atrocities against civilians, especially by Ustasa forces against ethnic Serbs, were committed. For instance, within six months in 1941, the Croatian Ustasa forces are credited with killing over a quarter of a million ethnic Serbs. At the same time the Partisans were credited with killing numerous Muslims and Croats in 1942 and again in 1945. The revenge of the Serbs for the atrocities committed by the Croatian Ustasa

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[2] Prewar population 9,800,000. This republic is the largest and most populous with 66% ethnic Serbs of Eastern Orthodox religion. *Ibid:* 1.
[3] Prewar population of 584,000. Mostly Serb Orthodox, Montenegro and Serbia now comprise what is left of Yugoslavia. *Ibid:* 1.
[4] Prewar population of 4.8 million. The second largest republic of former Yugoslavia. 79% ethnic Croations and 12% ethnic Serbs concentrated in the Krajina region. Mostly Roman Catholic. *Ibid:* 1.
[5] The smallest in land mass but the wealthiest former republic. Slovenia is the closest to western Europe sharing a border with Austria. Population is entirely ethnic Slovenes with distinctive Slavic language and traditions. *Ibid:* 1.
[6] *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991*, UN Case No. IT-94-1-T,(7 May 1997):15. Hereinafter *Judgment in the Tadic Case.*

forces was eventually realized when the Croatian army, after surrendering to the Allies at the war's end, were handed over to Marshal Tito's victorious Partisans who are reported to have summarily executed upwards of 100,000 Croat soldiers.[7]

Such is the legacy with which the population of Bosnia and Herzegovina has had to live. Yet in the years from 1945 to 1990, there are no tales of ethnic tensions or atrocities. Throughout the years of Marshal Tito's communist Yugoslavia, religious observance was discouraged which resulted in a decline of churchgoing and mosque attendance. Divisive nationalism and open advocacy of national ethnic identity were severely discouraged. Marshal Tito maintained a close relationship with the Soviet Union and framed the Constitution on the Soviet model. The postwar Yugoslavia was a highly centralist State with power exercised federally from Belgrade. In 1974, a new Constitution devolved power to the Republics of Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro.

What developed into the total disintegration of Yugoslavia as Marshal Tito knew it was preceded by financial problems in the late 1980s which lead to a protracted economic crisis. Yugoslavia had pursued its own unique system of socialist self-management which was increasingly regarded as outmoded. By 1988 the whole structure of socialist self-management was abolished and the constitutional references to the

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[7] Judgment in the Tadic Case (1997):17.

working class as the possessors of political power were removed. Nationalism took the place of communism.[8]

The year 1989 marked the 600th anniversary of the fourteenth century Serbian struggle against the Turkish foe. At Serbian gatherings to celebrate the anniversary, the then powerful political figure, Slobodan Milosevic, declared that he would never again allow anyone to oppress the Serb people. Perhaps in part as a reaction to what was occurring in Serbia, the Slovene leadership also adopted a nationalistic political platform and amended their Constitution to empower the Slovene Assembly to take measures to protect their rights from violation by the federation of Yugoslavia. Similarly, in 1990 the strongly nationalistic government of Franjo Tudjman amended the Croatian Republic's Constitution to recreate Croatia as a sovereign national state.

Macedonia likewise declared independence in September 1991. Serbia and Montenegro continued to support the concept of a federal state wholly Serb dominated. This was formally established in April 1992. This completed the dissolution of the former Socialist Federal Republic of Yugoslavia.[9]

The disintegration of multi-ethnic federal Yugoslavia was followed by the disintegration of the multi-ethnic Bosnia and Herzegovina which was the only Republic which possessed no single national majority. Hence, both Bosnian Serbs and Croats declared they would rather resort to armed conflict than accept minority membership in a

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[8] Judgment in the Tadic Case (1997):19.

Muslim-dominated State. The objective of Serbia, under Slobodan Milosevic, was to create a Serb-dominated western extension of Serbia, taking in portions of Croatia and Bosnia and Herzegovina. Among the obstacles was the very large Muslim and Croat populations native to Bosnia and Herzegovina. To deal with this the practice of ethnic cleansing was adopted.[10]

The Human Toll of the Balkan War

There's battle lines being drawn
Nobody's right if everybody's wrong
'For What It's Worth'
Buffalo Springfield

The precise number of casualties in the Balkan war may never be known. The Muslim-led Bosnian government remains the only side of the conflict that has issued statistics on the number of dead and missing throughout the war. The statistics estimate more that 150,000 dead or missing on its side with upwards of 175,000 wounded. Of the 150,000 dead, 17,000 are reported to be children. Neither the Bosnian Serbs nor the Bosnian Croats have said how many casualties they have suffered. International estimates put the number of refugees made homeless by ethnic cleansing at 2 million throughout the former Yugoslavia. In the worst single incident, as many as 4,000 Muslims were reportedly rounded up by Serb forces and summarily shot and buried in mass graves in Srebrenica in July 1995. Similar campaigns were carried out by the Croatian forces. For instance, in the village of Ahmici in central Bosnia 120 Muslims

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[9] Judgment in the Tadic Case (1997):21.

were summarily executed by Croats in April 1993. Tens of thousands of Serbs and an estimated 250,000 Croats have been forced to abandon their homes during the 1991 war out of fear and intimidation.[11]

Three features of the war in Bosnia are known to have a potentially devastating effect on the health and welfare of the civilian population as was reported by the World Health Organisation in July 1993. The features of the war include: (i) the policy of ethnic cleansing of undesirable nationals; (ii) deliberate attacks on hospitals, health care personnel and health care infrastructure in general; (iii) and a deliberate and profoundly brutal policy of systematic rape perpetrated against the female population.

Ethnic Cleansing

A town is said to have been "cleansed" when one ethnic group has succeeded in getting rid of another group. This may be achieved by forced eviction, intimidation, arson and murder. For example, by July 1993 the town of Sarajevo had been besieged for over 400 days. Sarajevo, like many towns in Bosnia, is surrounded by steep hills. The Serbs could therefore place their artillery in such a way as to inflict indiscriminate bombardments thereby sealing off access to food and interrupting the public water supply. When a population is at their breaking point a road is opened up to

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[10] It has been reported that more than 200,000 Bosnians have been killed, 200,000 have been injured, 50,000 of them children. Millions of people have been deported. 60% of all houses in Bosnia, 50% of the schools, and 30% of the hospitals were destroyed. *Friends of Bosnia* (10/26/1997):3.

[11] 'Balkan war's human toll may never fully be known', *Associated Press - The Detroit News*, 26 October 1997.

let the women and children and elderly out. Internment or massacre is reserved for the men of military age.[12]

Targeting Hospitals

It has been reported that for the first time in the recorded history of war, hospitals in Bosnia and Croatia have been deliberately and systematically targeted for destruction. For example, in Vincovci in Croatia the hospital was bombarded for several months at close range by both tanks and rockets from September 1991 until January 1992. Similarly, in the hospital in Breza, on the front line near Sarajevo, the x-ray department, the pharmacy, and the pathology laboratory had each received a direct mortar hit whilst no other building within two hundred metres had been damaged. Similar attacks have occurred on hospitals in Bihac, Mostar and Sarajev (Acheson 1993:45).

Systematic Rape

In August 1992, following initial reports of atrocities, the United Nations Commission on Human Rights appointed a Special Rapporteur to investigate human rights abuses in the former Yugoslavia. In January 1993, the Special Rapporteur sent a team of medical experts to Bosnia and Herzegovina to investigate rape allegations and to

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[12] During war related emergencies in developing countries, infectious diseases consistently have been reported as the leading cause of morbidity and mortality in the civilian population. However, the proportion of deaths in the civilian population attributed to war-related injuries in Bosnia is among the highest documented in recent humanitarian emergencies related to civil war. 'Status of Public Health - Bosnia and Herzegovina, August - September 1993', *JAMA* vol. 271, no. 12 (March 23/30 1994): 898.

file a report. The report found that most of the documented cases occurred between the fall of 1991 and the end of 1993. Rapes of Muslim, Croatian and Serbian women by Serbian men, were reported. The majority of cases involved Muslim women from Bosnia and Herzegovina. The perpetrators include soldiers, paramilitary groups, local police and civilians. Although the number of rapes is disputed the Bosnian Ministry of the Interior suggested a figure of 50,000 (Niarchos 1995:656).

The rapes documented seem to fall into five patterns. In the first pattern the rapes are committed before fighting breaks out where individuals or small groups break into a house to terrorize the inhabitants and rape the women. The women might be raped by one man or many.[13]

In the second pattern the rapes occur in conjunction with invasion and capture of a town or village. The population is assembled and prepared for deportation. Gang rapes are common. In one case an elderly woman was raped in front of a group of 100 villagers.

In the third pattern the rapes occur while the women are held in detention. After a town is cleared the men are executed and the women are sent to detention camps.

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[13] In one case a woman was gang raped by eight soldiers in front of her six-year old sister and five-month old daughter (Niarchos 1995:656).

Once again gang rapes are common and are of a particularly sadistic nature involving severe beatings and torture.[14]

The fourth pattern involves large and well organized 'rape-camps' where the women are beaten and sometimes killed. The intention is to impregnate the women and detain them until the seventh month when it is too late to obtain an abortion.

The fifth pattern involves forcing women into brothels where they are more often killed than released.[15]

The Camps

After the take-over of Prijedor and the outlying areas, the Serb forces confined thousands of Muslim and Croat civilians in the Omarska, Keraterm and Trnopolje camps. The establishment of these camps was part of the Greater Serbia plan to expel non-Serbs from opstina Prijedor. Generally the camps were run at the direction of the armed forces and the police. The most notorious camp where the most horrific conditions existed was the Omarska camp located at the former Ljubija iron-ore mine two kilometres to the south of Omarska village. The camp was in operation from 25 May 1992 until late August 1992. Omarska held up to 3,000 prisoners at one time, primarily

[14] Soldiers, camp guards and even civilians may be allowed to enter the camp, pick women out, rape them and either kill them or return them to the site (Niarchos 1995:656).

[15] Many of the rapes involved the element of spectacle, occurring in the presence of the victim's family or the local population. Victims were often sexually abused with guns, broken bottles, or truncheons; family

men plus approximately 38 women. Mostly all the inhabitants were Muslims or Croats. The commander of the camp was Zeljko Meakic.[16]

When prisoners arrived by bus at Omarska, they were searched, then beaten and kicked as they stood legs apart and arms upstretched against the eastern wall of the administration building. Prisoners were held in large numbers in confined spaces, sometimes 200 persons were held in a room of 40 square metres.[17] Only one meal a day was provided consisting of a plate of watery potato soup and a slice of bread or rotten beans. The suffering from hunger was acute. The prisoners were fed in batches of 30 at a time and had to run to their daily meal being beaten by the guards as they went.[18] Conservative estimates of weight loss during their time at Omarska was 20 to 30 kilogrammes per person.

Drinking water was often denied to prisoners for lengthy periods and the water that was available was unsuitable for human consumption resulting in sickness. Prisoners risked being beaten if they asked to use the lavatories and were often forced to excrete in their rooms. Guards refused to open the windows in the summer heat.

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members were forced to assault each other. Victims ranged in age from seven to sixty-five years old. The victims are often threatened with death if they resisted in any way (Niarchos 1995: 658).

[16] Judgement in the Tadic Case (7 May 1997):41.

[17] Prisoners were packed one on top of the other and often had to lie in the midst of excrement. As many as 600 prisoners were made to sit or lie prone outdoors continuously regardless of the weather for several days and nights on end for as long as a month, with machine guns trained on them. Judgment in the Tadic Case:42.

[18] Some prisoners chose to miss their daily meal for fear of further beatings. Judgment in the Tadic Case:42.

Prisoners were called out for interrogation some days after their arrival. They were often severely beaten during interrogation and made to sign false statements regarding their involvement in acts against Serbs. In the evening, prisoners would be called out from their rooms and attacked with sticks, iron bars or lengths of heavy electric cable. Sometimes the weapons would have nails embedded in them so as to pierce the skin. Frequently prisoners called out in this manner were never seen again.[19]

Testimony has been given of mass executions of prisoners. Witness Q testified that one morning they were called out to load over 150 bodies onto a large truck. Machine gun fire was heard the following night and over 50 bodies were similarly disposed of in the morning. Other accounts by witnesses speak of over 250 people being killed in a similar way.[20]

Psychiatric Consequences of the War in the former Yugoslavia

While no war is good, some wars are psychiatrically worse than others. For instance, clinical research involving traumatized refugees such as Cambodians, Vietnamese, Laotians, European Jews, and Central Americans, have all demonstrated a high rate of psychiatric sequelae such as depression, dissociation, somatization, and hyper-anxiety. Studies of Indochinese refugees conducted retrospectively, decades after the traumas had occurred provide evidence which supports the association between

[19] Women were routinely called out at night and raped. One witness testified that she was taken out five times and raped and beaten after each rape. Judgment in the Tadic Case: 43.

[20] Judgment in the Tadic Case: 44.

refugee trauma and post-traumatic stress disorders (PTSD) (Weine, *et al* 1995:536). As the war in Bosnia-Herzegovina has produced the greatest refugee crisis in Europe since World War II, with more that 3,000,000 former Yugoslavians being displaced - it would be prudent to address their mental health needs in some form or another.

The war in Vietnam led to the development of the diagnosis of PTSD. The war in Vietnam, for the Americans, is an example of a psychiatrically bad war due to the fact that it was prolonged, rapidly changing, it was directed against and ill defined enemy, and ended in defeat for the American forces. The Vietnam war resulted in PTSDs, substance abuse, and behavioral disturbances in at least a third of a million sufferers (Egendorf *et al,* 1981; La Guardia *et al*, 1983; Centers for Disease Control, 1988a, b; Resnick *et al,* 1989) (O'Brien 1994:443). The atrocities of war have been shown to have a powerfully destructive effect on the mental health and stability not only of the surviving victims, but also for the perpetrators.[21]

The war in Bosnia-Herzegovina has the hallmarks of a psychiatrically bad war primarily due to the fact that it was a civil war where former neighbours fought one another within their own communities. Secondly, as in the war in Vietnam, the conflict was prolonged and the enemy was not clearly defined. Thirdly, the combatants were not all from a professionally trained army but were citizens driven by a sense of obligation and ethnic or religious ideology. Eye-witness reports of the excessive use of alcohol as a disinhibitor were common. These factors combined with the serious lack of basic provisions and medical services helped to increase the psychological pressures on the civilian population as well as the professional armed forces (O'Brien 1994:443).

It is important to note that it is not being a soldier which puts a person at risk of PTSD in wartime. In fact being a trained professional soldier may have a protective effect against the development of psychiatric sequelae. What is important is the 'Vietnam effect', which associates greater long-term mental health problems with the duration and intensity of combat exposure (Kaylor *et al,* 1987; Breslau & Davis, 1987). Because many civilians were exposed to high degrees of combat in Bosnia their susceptibility to psychiatric sequelae is increased significantly (O'Brien 1994:444).

A recent study of the survivors of ethnic cleansing in Bosnia suggest the psychiatric sequelae of ethnic cleansing includes not only traumatic stress symptoms but unique responses to the mutilation of identity and core relationships. The result is the outer and inner worlds of survivors of genocidal trauma are shattered. Mass destruction of communities leaves individuals bereft of a sense of identity and belonging. Being subjected to atrocities, witnessing atrocities, or being forced to perpetrate atrocities against one another leaves the survivor feeling humiliated, helpless and less than human. The lives of the survivors of genocidal trauma are inundated with intrusive imagery of the traumatic events. According to the testimony of one survivor his memories of the trauma are likened to a film that constantly plays in his head where "memories crowd each other out" (O'Brien 1994:540).

[21] Post-Vietnam studies indicate that involvement in atrocities is a predictor of PTSD (Yager *et al,* 1984;

Before the war in Bosnia, the population of the former Yugoslavia enjoyed a literacy rate of over 90%. It had a life expectancy rate only four years less than Western European states. It had more hospital beds per thousand population than the USA, and more physicians per thousand than the UK. By 1994 a 19- bed hospital in Visoko, Bosnia, boasted an emergency department located in a garage with an emergency lighting system that was powered by a 12-volt car battery connected to a bare light bulb. The laboratory had a new blood-chemistry machine but no reagents, which effectively rendered it inoperable. The blood-holding cooler held a total of six units of blood. In this environment the physicians had performed 4,500 surgical procedures, of which 1,300 would be classified as major (surgery classified as 'major' means the abdominal cavity has been entered and the visceral organs have been exposed) (Johnston 1994:1027). Given the deplorable conditions of health services in the former Yugoslavia it is highly unlikely that priority will be given to prevalence and treatment of psychopathologies. Furthermore, psychiatric disability will more than likely present long after the political and economic situation has been stabilized as was the situation in the Far-East prisoners of war who decompensated forty years after the fact. That much of the psychopathology will be unattended to due to other more pressing needs such as food, shelter and replacing of infrastructure, does not necessarily mean it is any less important or that the long term effects on the population will be any less devastating.

Breslau & Davis, 1987) in O'Brien 1994:443.

Accountability for Past Human Rights Violations

The notion of institutional responses to violations of a universal standard recognizes that human rights abuses happen in both the developing and fully industrialized nations and that the burden should fall on the state to mobilize its resources and provide some form of redress for the violations. Some have argued the best way to measure a society's commitment to democracy is by the degree governments are willing and able to organize governmental structures so that they are capable of judicially ensuring the full enjoyment of human rights for all its citizens (Mendez 1997:257). However, both the need to consolidate a shaky democracy and the need to stop the fighting in a conflict situation undoubtedly condition the possibilities of redressing past wrongs and place limits on what policies of accountability are able to achieve. With this in mind this thesis asserts that the settling of human rights violations, by making state criminals accountable, is a fundamental aspect of lasting peace negotiations which is a necessary precondition for sustainable reconstruction and development, as opposed to a 'lull in the fighting'.[22]

There is today strong legal support for the emerging principle in international law, that states have obligations to take specific steps to redress wrongs committed by the massive and systematic violations of fundamental human rights, i.e.,

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[22] It is important to note that issues of accountability have been shown to have a life of their own. For instance, there is the renewal of public debate about what the state owes the families of the 'disappeared' in

extrajudicial execution, torture, disappearances, and prolonged arbitrary arrests as per the International Covenant on Civil and Political Rights (ICCPR).[23] Furthermore, the UN Human Rights Committee, which is the authoritative interpreter of the ICCPR, asserts that blanket amnesty laws and pardons are inconsistent with the Covenant as they create a "climate of impunity" and deny the victims the "right to a remedy".[24]

Other binding norms of international law point to a deepening of the obligation of states to overcome impunity for massive human rights violations which constitute crimes against humanity. For instance, the Genocide Convention establishes the obligation to punish,[25]the Torture Convention obliges signatories to make torture punishable within their domestic jurisdiction, to arrest suspected torturers, and to extradite and prosecute them.[26] These state's obligations correspond to an individual's right: (i) to see justice done; (ii) to know the truth; (iii) to seek compensation including nonmonetary forms of restitution; and (iv) to demand reorganized and accountable institutions (Mendez 1997:261).

It is important to differentiate between these rights and obligations as "emerging principles" only and not as binding international laws. These emerging principles have resulted from the expansion of existing norms in the form of nonbinding

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Argentina. This comes after more than a dozen years of democracy and government attempts to reckon with the past and bury it once and for all (Mendez 1997: 257,258).

[23] ICCPR *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (1966).

[24] *Comments of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, UN Doc. ICCPR/C/79/Add.46 (1995) (Comments on Periodic Report by Argentina).

[25] See Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948.

resolutions and the practice of nations. For instance, the Geneva Conventions of 1949[27] establish the obligation to punish "grave breaches" or war crimes occurring in international conflicts. The Security Council resolution establishing the landmark jurisdictional decision to establish an International Criminal Tribunal for the former Yugoslavia in the *Tadic* case, and in Rwanda, led to the extension of this notion for non-international conflicts. Recent development in respect to the 'right to know the truth' led to a meeting of experts convened by the U.N. which has argued that the right to know the truth has achieved the status of customary international law norms (Mendez 1997:262). These examples point in the direction that the laws on the issue of massive violations of human rights are developing rapidly. Furthermore, even though these emerging principles are not yet 'hard law' *per se*, they nevertheless constitute binding obligations on states that wish to see themselves as participants in an international order that respects the rule of law and customary norms. Finally, these emerging principles serve as an impetus for the international community to insist on measures that counteract impunity for human rights violations and attempts of governments to "draw a line on the matter and move on" (Mendez 1997:264).

A final observation about these principles is that they constitute "obligations of means" and not of "results". This means that a state is in compliance with

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[26] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46.

[27] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV).

its obligation to punish even if a trial results in an acquittal if the prosecution was conducted in good faith and "not as a ritual preordained to be ineffective". At the same time these obligations are subject to conditions of legitimacy whereby the government must act with full respect for due process standards mandated by international law. Prosecution and punishment will therefore require the highest degree of deference for the rights of the accused as the outcome may result in the loss of liberty for the person (Mendez 1997:264).

Forgive and Forget -The Jimmy Carter Approach

As recently as the early 1980s the prevalent view regarding what governments should do in response to massive human rights violations that occurred in the recent past was to favour the settlement of disputes by forgiving and forgetting. The views of former President Jimmy Carter reflect this position as was recently demonstrated by his offer of amnesty to General Raoul Cedras as a condition for allowing democracy to return to Haiti.[28] President Carter justifies this stance by declaring that he is less concerned with past violations but more with avoiding future ones. It is far from proven, however, that policies of forgiving and forgetting effectively deter future violations. In point of fact the opposite has shown to be true, at least in Haiti where each case of amnesty granted by the military has led to further atrocities.[29]

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[28] This offer was made over the express objections of Haiti's democratically elected leader, Jean-Bertrand Aristide (Mendez 1997:266).

Further debate regarding accountability for massive human rights violations advocates support for the notion that simply telling the truth is preferable to seeking justice by way of criminal prosecutions. It is being argued that 'truth commissions' such as the one in South Africa[30], promotes reconciliation whilst prosecutorial tribunals are seen as vindictive.[31] In regards to the crisis in Bosnia, Robert Pastor, former senior aide to President Jimmy Carter, has advocated the closing down of the war crimes tribunal and replacing it with yet another "truth commission".[32] There is some question as to exactly what would be gained by another "truth report" about the war in the Balkans, given the UN rapporteurs have already documented the crimes in painstakingly specific detail.[33] It is interesting to note that every eminent jurist appointed by the United Nations has proposed that the next inevitable step regarding accountability for the atrocities committed in the war in the Balkans should be to seek justice (Mendez, 1997; p. 276). Furthermore, a trial without full disclosure of the facts would violate due process. Therefore, the implication that there is some sort of contest between truth and justice is inappropriate and without merit.

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[29] *See* Kenneth Roth. "Human Rights in the Haitian Transition to Democracy", in *Human Rights and Political Transitions: Gettysburg to Bosnia* eds. Carla Hesse & Robert Post (1997).

[30] It is important to note that Nelson Mandela allowed 'justice' to take its course in the case against former defense minister, General Magnus Malan who spent several months behind bars before being acquitted, all the while Mandela refused to intervene (Mendez 1997:267).

[31] *See* Charles Krauthammer. "Truth, Not Trials: A way for the newly liberated to deal with the crimes of the past", *Washington Post,(* 9 September 1994): A27.

[32] *See* Neil A. Lewis. "Nuremberg Isn't Repeating Itself", *New York Times* (19 November 1995):E5.

[33] See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),* at 27, UN Doc. S/1994/674.

Justice vs Peace and Reconciliation

There has been some debate over the notion that prosecution of massive human rights violations are inimical to peace and reconciliation. In contrast, one can make a strong argument that in order to achieve sustainable peace, as opposed to a "lull in the fighting", one must first fully address violations of human rights and the laws of war by all sides of the conflict (Mendez 1997: 273).

True reconciliation cannot be imposed by decree. True reconciliation involves the acceptance in the hearts and minds of a nations citizens that every member of the society has worth and dignity. Furthermore, before any form of forgiveness can take place a society needs to have accurate knowledge and full disclosure of what it is that requires their (society's) forgiveness in the first place. Finally, true reconciliation requires some degree of atonement for the deeds perpetrated against the victims. It seems patently unfair to extract forgiveness from victims who themselves receive no acknowledgment of wrongdoing from those who will benefit from their forgiveness (Mendez 1997:274).

Forms of retribution are not necessarily vindictive. Forms of retribution through punishment can instead be seen as a society ensuring that certain behavior will not be tolerated, particularly if that behavior poses a threat to the innocent and defenseless. Therefore, forms of retribution can be seen as a signal to the victims that their plight will not go unheeded (Mendez 1997:276). In so saying, victims do not have a right to a certain form or amount of penalty. They do, however, have a right to see justice done by means of a process.

One important reason for the prosecution of war crimes is that they are an effective way of separating collective guilt from individual guilt. This is of utmost importance with respect to the Balkan war whereby any effort to remove the centuries old stigma of historic misdeeds from innocent members of communities who have been collectively blamed for atrocities committed in the past would be welcome. Furthermore, trials allow communities to break the cycle of ethnic violence as they distinguish between the innocent members of rival ethnic groups from those who have used their power to manipulate ethnic rivalries for political purposes(Mendez 1997:277).

The question to be asked at this point is whether or not peace and justice are irreconcilable. Even though both are committed to putting an end to the inhumanity of war, in practice, the punishment of past human rights abuses has not been a priority in the history of modern diplomacy and peace-building initiatives. As a general rule, practical political and economic considerations have prevailed resulting in the perpetrators of massive atrocities receiving impunity for their deeds nomatter how grievous.[34]

[34] After the communist victory of 1975 in Cambodia, the Khmer Rouge regime under Pol Pot is estimated to have committed genocide against upwards of 1 million people. Pol Pot remains at large and the crimes of his regime are still unexpiated. James Walsh, "Can Justice Ever Be Done?", *Time* (22 May, 1995): 21.

A notable exception to this rule, however, is the unprecedented establishment of the International Criminal Tribunal for the Former Yugoslavia (*hereinafter*Yugoslav Tribunal) by the UN Security Council under Chapter VII of the UN Charter. The tribunal, established during an on-going armed conflict, is considered unique in the annals of international relations as it institutionalizes the demand for justice which is now seen as an integral part of the peace process.[35]

Justice vs Peace - A Conceptual Paradigm

As far back as 1948, the Universal Declaration of Human Rights recognized that the protection of "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[36] It is important to note, however, that for the invocation of Chapter VII by the UN Security Council, a threat to international peace and security must first be established. The nexus between peace and justice is a legal requirement despite the fact that in the face of mass genocide, and the organized and systematic rape of women it hardly seems relevant. Nevertheless, the mandate of the Security Council is the maintenance of peace and security and not compliance with international humanitarian law (Akhavan 1996: 261).

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[35] The Dayton Peace Agreement signed in December 1995, includes the Tribunal as an "essential aspect" of peace implementation (Akhavan 1996:259).

[36] Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A(111), 2 U.N. GAOR (Resolutions, part 1) at 71, U.N. Doc. A/810 (1948).

It is interesting to note that throughout the deliberations leading to the establishment of the Yugoslav Tribunal, members of the Security Council spoke in terms of an "outraged conscience of humanity" and referred to the universality of rights in demanding justice irregardless of considerations if international peace and security. For instance, the Brazilian representative declared that "effective prosecution and punishment of the perpetrators of these crimes is a matter of high moral duty". The representative for Venezuela declared that the "evolution of international society reveals the need to create a corrective and punitive forum, particularly in the case of crimes affecting the very essence of the civilized conscience."[37]

The deliberations of the Security Council indicate that there was widespread acceptance of the view that the establishment of an international tribunal is a contributory factor in the restoration of peace and security. The international tribunal was seen as a measure of deterrence against future atrocities in the former Yugoslavia and elsewhere, as well as a promoter of interethnic reconciliation. As the US Secretary of State, Warren Christopher explained:

> The events in the former Yugoslavia raise the questions of whether a State may address the rights of its minorities by eradicating those minorities to achieve ethnic purity. Bold tyrants and fearful minorities are watching to see whether ethnic cleansing is a policy the world will tolerate. If we hope to promote the spread of freedom, or if we hope to encourage the emergence of peaceful, multi-ethnic democracies, our answers must be a resounding "no."[38]

The international tribunal can play a vital role in the process of interethnic reconciliation in the former Yugoslavia. It has been argued that the collective

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[37] U.N. SCOR, 3217th mtg. at 6, U.N. Doc. S/PV.3217 (1993).

demonization of ethnic groups through incitement to hatred has proven to be a convenient political instrument for the consolidation of power particularly in postcommunist societies. Some have gone so far to say that the conflict in the former Yugoslavia in not so much of a war of peoples but more of a war of values between multiethnic democracy and fascism. The UN representative from Hungary has suggested that, far from being a spontaneous outburst of "tribal hatred", the conflict in the former Yugoslavia was deliberately provoked through campaigns of indoctrination and misinformation. He goes on to assert that the policy the international community adopts with respect to the former Yugoslavia will be critical in making it "either easier or more painful, or even impossible, the healing of the psychological wounds the conflict has inflicted..."[39]

Skeptics, however, have argued that the Tribunal is "merely a salve for the conscience of the international community which failed to intervene against genocide in the heart of Europe" and that the Tribunal is "nothing more than a symbolic protest implemented with no intention to make it effective" (Akhavan 1996:267). In rebuttal, it has been argued that as the Holocaust of Nazi Germany created the universal moral revulsion which produced the 1948 Universal Declaration of Human Rights, so too the practices of "ethnic cleansing" in the former Yugoslavia and Rwanda stand as the "twin pillars of moral outrage upon which the beginnings of an international criminal

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[38] U.N. SCOR, 3175th mtg. at 4, U.N. Doc. S/PV.3175 (1995): 12-13.
[39] *Ibid* 19-20.

jurisdiction" can be established. This is considered an improvement over comparative situations where genocide has been committed with complete, unredressed impunity.[40]

Implementation of the Dayton Peace Agreement and the Yugoslav Tribunal

The General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto (*hereinafter* Dayton Agreement) was initialed by representatives of the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia on 21 November 1995 in Wright-Patterson Air Force Base in Dayton, Ohio, and signed on 14 December 1995 at the Paris Peace Conference. As such, the Dayton Agreement is an international agreement between States and governed by international law under jurisdiction of Article 2(a) of the Vienna Convention on the Law of Treaties.[41]

In contrast, the Yugoslav Tribunal derives its authority from Security Council Resolution 827, which is a binding enforcement measure under Chapter VII of the Charter. In legal terms, therefore, the Statute of the Yugoslav Tribunal holds a judicial status which is autonomous from and superior to that of the Dayton Agreement. This aspect of the Dayton Agreement is highly significant for the effectiveness of the

[40] Argentina waged its "dirty war" between 1976-82 where the military has admitted to flying planeloads of civilians out over the sea and pushing them to their death. Former Ethiopian dictator Mengistu Haile Mariam's "Red Terror" from 1977-78 boasts upwards of 2,000 people being summarily executed and hundreds of thousands forcibly relocated (Walsh 1995:18).

Yugoslav Tribunal. Article II(4) of Annex 1-A of the Dayton Agreement stipulates that parties "shall cooperate fully with any international personnel including investigators" but cooperation will not necessarily involve the arrest or surrender of indicted persons. These limitations were instituted because, according to diplomatic sources, the military commanders hoped to avoid a repeat of the Somalia situation where UN troops became involved in an unsuccessful hunt for war criminal General Mohammed Farrah Aidid, which resulted in violent reprisals and the eventual withdrawal of the US troops under a cloud of defeat (Akhavan 1996: 276).

In order to avoid similar debacles in the former Yugoslavia, it has been suggested that funds for reconstruction be given on condition of the surrender of indicted persons. More to the point, the amount of funds withheld would correspond to the importance of the accused. In other words, conditions could be created whereby the benefits of cooperation considerably outweigh the costs of defiance (Akhavan 1996:283).

The Treatment of Rape as a War Crime

Some have observed that the relationship between rape in peace and rape in war is what anti-Semitism is to the Holocaust. One is the inevitable result of the other, but the scale of horror is vastly different (Niarchos 1995:651). Rape has always occurred in war, and has been defined as a war crime since the laws of war have first been codified. However, when prosecution of war crimes has been considered, rape has been either

[41] Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969, U.N. Doc.

overlooked entirely or diluted amongst other crimes against civilians. Never has it been considered a distinct crime of gender.

Catherine Niarchos (1995: 651) asserts the military strategy of rape, mutilation, and femicide, perpetrated during the war in the former Yugoslavia, has at last caught the world's attention. Unlike the International Military Tribunals in Nuremberg (IMT) and in the Far East (IMTFE), the Yugoslav Tribunal includes in its founding statute an explicit reference to rape. There is some hope that such a reference will establish a precedent of enormous significance to all women in peacetime or war. As was the case in the Nuremberg and Tokyo tribunals, the Yugoslav Tribunal carries with it a responsibility that reaches beyond mere judicial due process. The Yugoslav Tribunal deals with human rights issues that transcend beyond the mere violation of international humanitarian law and touch upon the very core of how we want to define civilized behavior and humanity. Professor Telford Taylor, in his description of the court's responsibilities in *The Medical Case* at Nuremberg, expresses similar sentiments when he asserts:

> The mere punishment of the defendants, or even of thousands of others equally guilty, can never redress the terrible injuries which the Nazis visited on these unfortunate peoples. For them it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable; and that this Court...stamp these acts, and the ideas which engendered them as barbarous and criminal...[42]

A/CONF.39/27, 8 I.L.M. 679 (1969).

[42] Telford Taylor, *The Nuremberg War Crimes Trials*, 450 *International Conciliation* pp. 242,284-86. Professor Taylor viewed the trial and judgement as a "signal contribution both to international law and to medical jurisprudence. The court's decision set forth ten ethical principles concerning medical experiments on human subjects and led the World Medical Association to modify the Hippocratic oath to prohibit "race, religion, party politics or social standing" from interfering with professional judgement.

Niarchos (1995) proposes that it would indeed be a tremendous step forward if the Yugoslav Tribunal achieved a similar contribution to the end of all violence against women. Niarchos (1995:668) asserts the policy of mass rape in the former Yugoslavia speaks to the universality of women's experience in war whereby almost every motive for wartime rape was present - rape as misogyny, to destroy culture and community, to instill terror, to boost morale, to reward, and to send a message of defeat. An important point of distinction between the war in the former Yugoslavia and other conflicts is that the details of the rapes have been chronicled to an unprecedented degree. It is this fact that may finally prevent rape in the former Yugoslavia from becoming once again the "forgotten war crime".

Rape and International Humanitarian Law

Article 27 of the Fourth Geneva Convention of 1949 provides for protections for women against rape whereby:

> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.[43]

The pitfalls of linking rape and *honour* are worth mentioning. In the first place, rape is characterized as more of a seduction gone wrong rather than a massive and brutal assault on a woman's body and psyche. Secondly, the emphasis on protecting one's honour reinforces society's notions that a woman once raped is somehow disgraced and unworthy. Finally, categorizing rape as a mere crime against honour and reputation makes it seem less critical to prosecute in relation to *real* crimes such as arbitrary execution (Niarchos 1995:674).

That rape is not regarded as a serious crime is evidenced by its omission from Article 147 of the Geneva Convention which lists the "grave breaches"[44] of international humanitarian law. The significance of listing a crime as a grave breach is that it then becomes subject to universal jurisdiction not to mention a recognition of the gravity of the crime. It is interesting to note that forcing a person to serve in the forces of a hostile power and the wanton destruction of *property* (italics mine) have achieved a higher status as a war crime than rape.

Rape as a Crime Against Gender

The Nuremberg trials are considered a triumph of the rule of law considering the alternatives such as execution without trial of the major war criminals, banishment of the German general staff, and reducing Germany to an agrarian society (Taylor 1992: 30-31, 107-08 in Niarchos 1995: 679). However, the Nuremberg trials contributed nothing significant to advance the international laws regarding wartime rape. Rape as a distinct category of atrocity was not recognized and was definitely not seen as

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[43] Geneva Convention IV, Article 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.
[44] Article 146 lists the following crimes as grave breaches:
willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial,...taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

persecution based on gender. The inability or unwillingness to link rape with gender is as preposterous as viewing the Holocaust as a persecution of civilians with no ethnic and religious connection. It is argued, therefore, that there is no excuse not to recognize rape, in wartime or peace, as an extreme form of gender discrimination and that international humanitarian laws should be revised to reflect this reality (Niarchos 1995:679).[45]

Discussion

Marshall Tito's policy of whitewashing the extent of atrocities committed by all sides in World War II Yugoslavia has been blamed for the endurance of the myth that the Serb population were nothing but victims in war. The propagation of this myth resulted in a half-century of dormant resentment that burst forth with a vengeance after communist Yugoslavia disintegrated (Walsh 1995:18). This speaks to the point that unsettled grievances do not simply go away contrary to the 'forgive and forget' philosophy of former President Jimmy Carter. Not only do they not go away, they rankle, fester and can ultimately divide a society between the victor and the vanquished. Yet in the practice of peace-building and post-conflict resolution, civil peace is often negotiated at the expense of justice. So says Enes Karic, Sarajevo's Minister of Education:

> When someone kills a man, he is put in prison. When someone kills twenty people, he is declared mentally ill and put in a psychiatric ward. But when someone kills two hundred thousand people, he is invited to Geneva for peace negotiations.

[45] Recently there has been some progress in this respect. Both Canada and the United States have adopted guidelines permitting asylum based on gender persecution. *See* Audrey Macklin "Refugee Women and the Imperative of Categories", *Human Rights Quarterly,* vol. 17 (1995): 213,214.

The underlying assumption that must be challenged here is that the granting of blanket impunity for massive violations of human rights is not a precondition for sustainable peace, furthermore, justice by way of making perpetrators accountable for their actions through the rule of law is not the same as revenge.

Some have argued the Nuremberg trials set a tone of "moral condemnation that in itself proved a powerful cleansing force". The testimony and thorough documentation of Nazi atrocities were done to such an extent that Germans could not deny them. Postwar Germany was therefore forced to confront its past and hopefully draw lessons from it. The result was a West German society built with as solid a commitment to democratic and humanitarian values as can be said for anywhere else in the world (Walsh 1995:19-20).

One can only hope that the Yugoslav Tribunal will have an equally far-reaching impact on the future of the emerging post Cold War international order. The resolve of the Security Council to institute effective punishment of massive human rights violations together with mounting empirical evidence of the interrelationship between justice and postconflict peace building provide powerful incentive for the establishment of a permanent criminal court. A permanent judicial body may demonstrate an international commitment to justice and act as a deterrent for future regimes considering violating human rights on a massive scale. Like the Nuremberg trials, the Yugoslav Tribunal will be closely watched to see how effectively it enforces the most elementary norms of civilization whereby "in struggling against the cruelty of the tormentor and the cynical indifference of the spectator, we fight for values which transcend creed, culture, and time, and thereby affirm the essential oneness of the human race" (Akhavan 1996:284-85).

Fair Trial or Kangaroo Court:
The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 - Prosecutor v. Dusko Tadic a/k/a/ "Dule"

The Opinion and Judgment rendered by Trial Chamber II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (*hereinafter* International Tribunal) following the indictment and trial of Dusko Tadic. The judgment of Tadic, a citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of Bosnia and Herzegovina at the time of the alleged crimes, is the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal.[46]

[46] The military tribunals at Nuremberg and Tokyo were multinational in nature, representing only part of the world community. The International Tribunal's 11 judges are drawn from States around the world, and the Tribunal is not subject to the national laws of any jurisdiction and has been granted primacy with the courts of States. *See* Judgment in the Tadic Case (7 May 1997):2.

Procedural Background

Dusko Tadic was arrested in February 1994 in Germany, where he was then living, on suspicion of having committed offences at the Omarska camp in the former Yugoslavia in June 1992. These include torture, and aiding and abetting the commission of genocide. The Prosecutor of the International Tribunal, Richard J. Goldstone, filed an application under Rule 9 of the Rules, seeking a formal request to the Federal Republic of Germany, pursuant to Rule 10, for deferral by the German courts to the competence of the International Tribunal. These provisions allow the International Tribunal to exercise its primacy jurisdiction in cases that may have implications for investigations or prosecutions before an International Tribunal.[47] The accused entered a plea of not guilty to all counts of the Indictment and was remanded in detention pending trial. The proceedings were broadcast live from the seat of the Tribunal in The Hague, Netherlands, with simultaneous interpretation in English, French, and the language of the accused.[48] The Defence raised three principal arguments, disputing the legality if the establishment of the International Tribunal by the Security Council, challenging the primacy jurisdiction with which the International Tribunal is endowed and challenging the subject-matter jurisdiction.[49]

On 1 November 1995 the Prosecution filed a motion seeking delayed release of the televised broadcast of proceedings so as to protect witnesses from

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[47] *Ibid* :3.
[48] *Ibid*:4.

inadvertent disclosure of their protected identity. On 15 November 1995, the Trial Chamber ordered that the release of the broadcast would be delayed for 30 minutes.[50]

The trial of the accused commenced on 7 May 1996. Mr. Grant Niemann opened for the Prosecution, followed by Mr. Michail Wladimiroff for the Defence. The presentation of the Prosecution case-in-chief continued for 47 sitting days and concluded on 15 August 1996. During this period 76 witnesses gave evidence and 346 Prosecution exhibits were admitted together with 40 exhibits from the Defence.[51]

Applications for protective measures for additional witnesses continued to be made by both parties throughout the proceedings. Orders for the shielding of witnesses from public view and for the electronic distortion of the broadcast image of the witness were issued for eight witnesses. The evidence of 17 witnesses, both Prosecution and Defence, was heard in closed session but in full view of the accused and counsel. Of the four witnesses granted anonymity, one testified in open session without any protective measures. Witness H, was heard in closed session and was shielded from the view of the accused but not from Defence counsel.[52]

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[49] The Appeals Chamber unanimously upheld the Trial Chamber on the challenge to primacy and held that the International Tribunal had subject-matter jurisdiction. *Ibid*:6.
[50] *Ibid*:7.
[51] *Ibid*:9
[52] *Ibid*:10.

The Indictment

The Indictment against Dusko Tadic was issued by the Prosecutor of the International Tribunal in February 1995 and confirmed on 13 February 1995. Paragraph 4 of the Indictment refers to a number of varied and separate incidents which are alleged to constitute persecution. It charges that the accused participated with Serb forces in the attack, destruction and plunder of Bosnian Muslim and Croat residential areas, the seizure and imprisonment of Muslims and Croats in the Omarska, Keraterm and Trnopolje camps, and the deportation and expulsion by force or threat of force of the majority of Muslim and Croat residents from opstina Prijedor. The accused is charged with participating in killings, torture, sexual assaults and other physical and psychological abuse of Muslims and Croats both within the camps and outside.[53]

Evidentiary Matters:Access to Evidence

A difficulty encountered by both parties has been their limited access to evidence in the territory of the former Yugoslavia, due to the unwillingness of the authorities to cooperate with the International Tribunal. A number of steps, therefore, had to be taken by the International Tribunal to assist the parties. First, a video-conference link from a secure location in the territory of the former Yugoslavia was established so that numerous Defense witnesses otherwise unable or unwilling to give evidence were able to do so. The identities were suppressed of both Defense and

Prosecution witnesses who sought it as a condition of giving evidence. Some testimony was given in closed session to conceal their identity from the public. Some Defense witnesses, concerned about coming to the seat of the International Tribunal to testify, were granted safe conduct against arrest or other legal process against them by the Prosecutor while present to testify in The Hague.[54]

Lack of Specificity of the Charges

As appears from the Indictment, some of the paragraphs charge that the offense in question occurred "around' or "about" a particular date. This becomes important with regard to the difficulty of establishing an alibi defense for events that occurred over a long period of time. The Defense asserts that the accused, although present within the region where the offenses occurred, was not involved in any of the alleged activities but was instead leading his own quiet life living with his family.

The Prosecution, on the other hand, is bound only to prove each of the elements of the offenses charged. They are not bound to specify and prove the exact date or time of an offense when the date or time is not also an element of the offense. Therefore, the evidence collected by the Prosecution was considered sufficiently precise that a lack of specificity did not result in any denial of the accused's right to a fair trial.[55]

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53 The accused denies ever being at the Omarska or Keraterm camps. The Defence offered testimony of two witnesses who claim they never saw the accused at the Omarska camp. *Ibid*:12,127.
54 *Ibid*:128.
55 *Ibid*:129.

Corroboration

The Defense contends that in civil law, as distinct from common law, some degree of independent causal corroboration of evidence is required. The Defense contends this *unus testis, nullus testis* (one witness is no witness) rule should be applied in order to meet what it claims were "fair and settled standards of proof" rather than relying on "ad hoc standards to enable it (the International Tribunal) to convict".

The Defense's assertion that corroboration remains a general requirement in present day civil law is no longer correct. The determinative powers of a civil law judge are best described by reference to the principle of the free evaluation of the evidence. In other words, the judge holds the inherent power as a fact finder to make a decision that is based solely on the basis of his or her personal intimate convictions. Therefore the principle which requires testimonial corroboration of a single witness's evidence is in almost all modern continental legal systems no longer a feature.[56]

Victims of the Conflict as Witnesses

The argument has been put forward by the Defense that the "specific circumstances of a group of people who have become victims of this terrible war...causes

[56] This principle does not exist in Marxist legal systems, including those of the former Yugoslavia and China. *See* Article 342, Code of Criminal Procedure, Belgium; Section 896, Criminal Code, Denmark; Article 261, Criminal Procedure Code, Germany: Article 177, Code of Criminal Procedure, Greece; Article 741, Code of Criminal Procedure, Spain. *Ibid*:129.

questions to be raised as to their reliability as witnesses in a case where a member of the victorious group, their oppressors, is on trial".

In response it was argued that it is neither appropriate, nor correct to conclude that a witness is deemed unreliable solely because he was the victim of a crime committed by a person of the same creed, ethnic group, armed force or any other characteristic of the accused. It is important to note that the testimonial evidence of a witness needs to be appreciated independently of the number of witnesses. Furthermore, as there are no rules concerning the matter of one witness being worthy of more credit than another witness, testimonial evidence needs to be taken in relation to other pieces of evidence.[57]

Pre-trial Media Coverage and the Infection of Testimonial Evidence

The Defense argued the pre-trial media reporting of the indictment and arrest of the accused was released in regions which many of the refugees from the former Yugoslavia had fled. The Defense asserted this affected the reliability of witnesses who now claimed they could identify the accused.[58]

It was decided that like all trials, the potential impact of pre-trial media coverage is a factor that must be taken into account when considering the reliability of

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[57] *Ibid*:130.
[58] Of the 20 television programmes about this case, 15 carried the picture of the accused for at least one part of the report. *Ibid*:131.

witnesses. This aspect can be raised in cross-examination of witnesses and evaluation of their testimony.

Participation as a Basis of Liability

The Trial Chamber of the International Tribunal found that during certain events alleged in the Indictment, the accused did not directly commit some of the offenses but was present at the time of their commission. In regard to these instances, the Trial Chamber must determine whether the Prosecution has proved beyond reasonable doubt that the conduct of the accused sufficiently connects him to the crime such that he can be found criminally culpable.

The most relevant sources for such a determination are the Nuremberg war crimes trials which resulted in several convictions for complicitous conduct. The relevant cases disclosed a clear pattern whereby: (i) there is a requirement of intent which involves the awareness of the act coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime; (ii) the prosecution must prove that the conduct of the accused contributed to the commission of the illegal act.[59]

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[59] *Ibid*:177.

The remaining question for consideration is the amount of assistance that must be shown before one can be held culpable for involvement in a crime. A review of certain post-Second World War cases is instructive in this instance.

In the *Dachau* case before the United States Military Tribunal the accused were charged with acting in pursuance of a common deign to participate in the "subjection of" the inmates of the camp to "cruelties and mistreatments". The court noted that in order to prove the allegations against each accused, the prosecution had to prove: (i) a system of ill-treatment at the camp; (ii) awareness on the part of each of the accused of the system; (iii) that each of the accused "encouraged, aided and abetted or participated" in enforcing the system. The main issues of contention being the third element in that the conditions of the concentration camp were inevitably produced by the way in which it was run. Since every one of the accused was at one time a member of the camp staff, the court found each of them culpable. The guilt of each of the accused was established either by showing that his duties in themselves were in execution or administration of an illegal system, or, that although the duties themselves were not illegal, the accused performed them in an illegal manner. Thus the court found the accused guilty of direct involvement in what was determined to be the illegal act of participating in the running of the camp.[60]

In another case, Robert Mulka, a camp commander at Auschwitz was convicted of being an accessory in the murder of approximately 750 persons in the

Auschwitz Trials before a German court. This finding was based on the determination that he was involved in the procuring of Zyklon B gas, the constructing of the gas ovens, arranging for trucks to transport inmates to the gas chambers, and alerting the camp bureaucracy as to the imminent arrival of transports. Similarly, Karl Hocker, the adjutant camp commander was convicted of complicity in joint murder by receiving and passing of teletypes detailing the imminent arrival of Hungarian prisoners to the camp, who were later killed there.[61]

Aiding and abetting, therefore, includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would be considered to have an encouraging effect even if he does not physically take part in the second beating. The accused would still be considered to have participated in the second beating as well. This assumes the accused did not withdraw entirely from the group and did not speak out against the conduct of the group.

At the same time, actual physical presence of the accused when the crime is being committed is not necessary. Based on the precedent of the Nuremberg war

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[60] The court sentenced 36 of the 40 defendants to death and the others to varying terms of hard labour. *Ibid*:180.

[61] *Ibid*:181.

crimes trials an accused can be considered to have participated in the commission of a crime if he is found to be "concerned with the killing" in a direct and substantial way.[62]

Persecution as a Crime against Humanity

The words "persecute" and the act of "persecution" have come to acquire a universally accepted meaning for which a proposed definition is: State Action or Policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.[63]

What is necessary, therefore, is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights. Because "persecution type" crimes are different from "murder type" of crimes against humanity it is not necessary to have a separate and specific act of an inhumane nature to constitute persecution. The very act of discrimination itself is considered inhumane.

Thus the crime of persecution encompasses acts of varying severity, from killing to a limitation on the type of professions open to the targeted group. The

[62] *Ibid*:183.

Nuremberg Judgment considered the following acts, amongst others, in its finding of persecution: discriminatory laws limiting the offices and professions open to Jews; restrictions placed on their family life and their rights of citizenship; the creation of ghettos; the plunder of their property and the imposition of a collective fine.[64] As the International Tribunal's closest historical precedent, the statements of the Nuremberg Tribunal on persecution are informative and succinctly encapsulate the essence of the norm of persecution. The Nuremberg Judgment, in an often quoted statement, notes that:

> The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale.... With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews reached the stage where it was directed towards the complete exclusion of Jews fromGerman life. Pogroms were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of 1 billion marks was imposed on the Jews, the seizure of Jewish assets was authorised, the movement of Jews was restricted by regulations to certain specified districts and hours.[65]

Thus, persecution can take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present, and persecution does not necessarily require a physical element.

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[63] *Ibid*:185.
[64] *Ibid*:188.
[65] *Ibid*:189.

The evidence supported the finding that the acts of the accused constitute persecution.[66] It is important to note that the requirements for the crime of persecution are additional to the conditions of applicability for crimes against humanity, which must also be satisfied. The requirements for crimes against humanity are that the acts be taken against a civilian population on a widespread or systematic basis in furtherance of a policy to commit these acts and that the perpetrator has knowledge of the wider context in which his acts occur.[67]

Conclusion

Article 227 of the 1919 Treaty of Versailles provided that German Emperor Wilhelm II should be tried by an international court to answer charges of "flagrant offenses against international morality and the sacred authority of treaties". Since the Netherlands refused to give up the accused the trial never took place. The Nuremberg and Tokyo trials after the Second World War represented some progress towards the creation of a body with truly international criminal jurisdiction. Critics, however, have argued that they were unduly influenced by the laws and justice of the victors rather than those of the universal community of States (Tavernier 1997:2).

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66 The accused's role in the seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings constitute an infringement of the victims' enjoyment of their fundamental rights. *Ibid*:194.

67 The trial of Dusko Tadic ended 28 November 1996. A three-judge panel found Tadic guilty on 11 counts of persecution and beatings. The panel found Tadic not guilty on 9 counts of murder citing insufficient evidence. Eleven other counts were declared inapplicable. Tadic was sentenced to 20 years in prison on 14 July 1997. The panel recommended that he serve at least 10 years of his sentence. *Court TV Casefiles:Bosnia War Crimes Tribunal (1998).*

The establishment of the international criminal tribunals for the former Yugoslavia and for Rwanda are the only examples of criminal tribunals that have been established by the international community as a whole and have not been imposed by the victors on the vanquished in an international conflict. In so saying, the idea has been put forward for setting up a permanent international criminal court to try the war crimes committed by the United States in Viet Nam, to prosecute Saddam Hussein for his responsibility in the Iraqi aggression against Iran, and to try war criminals in Chechnya, Burundi and Zaire, now called the Congo, and to try Pol Pot for his role in the genocide in Cambodia (Tavernier 1997:2).

Whether the International Tribunal will succeed in fulfilling its mission will be for historians to judge. What can be said is the formation of the International Tribunal for the former Yugoslavia has sparked much comment and debate about international humanitarian law and international criminal law. The International Tribunal for the former Yugoslavia relies on the widespread publication of its judicial acts and commentaries in accordance to its mandate and with the well known maxim, "Justice must not only be done, but must be seen to be done". In so saying, it is no longer considered enough for the International Tribunal to simply administer international criminal justice impartially and with due regard for the rights of the accused. It must also carry out its activities under the scrutiny of the international community to ensure the voices of the victims are heard (Cassesse 1997:2).

CHAPTER THREE

The International Committee of the Red Cross: How it All Began

In 1862, a Genevan philanthropist named Gustave Moynier, then president of the Geneva Society for Public Utility (SGUP), received in the mail a book written by a young, unknown business man named Henry Dunant. The book, titled *A Memory of Solferino* described the human carnage at the battle of Solferino in 1859, when French and Sardinian armies clashed with the armies of Emperor Francis Joseph of Austria. Dunant called for the formation of voluntary aid societies that would train nurses to care for fallen combatants (Hutchinson 1996:11).

Dunant, a fervent evangelical Christian, sought to bring himself and others closer to God through acts of repentance and contrition. Moynier, a high-minded Calvinist, preferred utilitarian philanthropy based on rationality, sobriety, and self-discipline. In light of these differences it was inevitable that the collaboration between the two men would be brief and strained. Henry Dunant, considered the 'founder' of the Red Cross, would end their cooperation by severing his ties with the organisation citing philosophical differences.[1] Until then, however, the 1860s proved to be an auspicious moment in history for the founding of a humanitarian organisation. At that time the

[1] Dunant resigned from the Red Cross in 1867 and founded in Paris the International and Universal Humanitarian Endeavor on Behalf of Armies and Navies, the letterhead of which bore the Red Cross emblem, much to the consternation of Moynier. Dunant disassociated himself from the Red Cross on the grounds that it had become too militarized. Dunant was a pacifist and this created an awkward moment for the Red Cross in 1901 when Henry Dunant was awarded the Nobel Peace Prize together with pacifist leader Frederic Passy (Hutchinson 1996:191).

European powers were at last prepared to give some attention to the care of soldiers wounded in their wars. It was in these 'favourable' circumstances that both Moynier and Dunant were able to launch the Red Cross, and exert their influence in the signing of the First Geneva Convention (Hutchinson 1996:12).

What is now recognized as the precursor to the Geneva Conventions, is the passage in Dunant's book which calls for the activities of the volunteer aid societies to be sanctioned by an agreement among Europe's military leaders whereby:

> On certain special occasions, as, for example, when princes of the military art belonging to different nationalities meet at Cologne or Chalons, would it not be desirable that they should take advantage of this sort of congress to formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for relief of the wounded in the different European countries?[2]

Dunant's vision of a voluntary humanitarian society appealed at once to Moynier's utilitarian philanthropy. For instance, the organisation of an aid society on the scale they were contemplating would involve discipline, efficiency, and above all, preparedness. Furthermore, what appealed to Moynier about the endeavour was the notion that such an aid society could be a force for spreading "more civilized standards of conduct". Moynier hoped that voluntary societies in aid of the wounded could teach armies, and through them the 'common people' the more civilized codes of conduct

[2] (Hutchinson 1996:20).

which would stem the advancing tide of popular government and not destroy European civilization as he knew it.[3]

Two questions need to be examined at this point. First, why was there no concerted effort to deal with the casualties of war before the proposals of Henry Dunant in 1863? Second, why was there finally, such an overwhelmingly positive response to Dunant's proposals?

The answer to the first question can be found in the sheer scale of Napoleonic warfare. After the peace in Europe of 1815, statesmen were so busy keeping the peace that there was little time or energy left for setting rules of conduct for the next war. Half a century later, however, Europe was a very different place indeed. First, the introduction of conscription altered the relationship, duties, and obligations between states and their men in arms. Second, the sanitary reform movement pioneered by men like Sir Edwin Chadwick and Sir John Simon in England, and Louis Villermé in France[4], finally connected the relationship between political economy and public health which would ultimately impact both civil and military affairs. Finally, the communication revolution brought about by the innovations of the telegraph, the railway system, and the popular press, combined to affect the way Europeans learned and thought about war. This was evidenced by the public outcry to the Crimean War, which, though fought in the

[3] Moynier was from a patrician family that had fled Geneva after the popular disturbances of 1846. Though several other young men lined the barricades of 1848, Moynier himself was in Heidelberg studying Goethe before proceeding to Paris to study law. It was there he may have become aware of Alexis de Tocqueville's *Democracy in America* (1835-1840), seen by many Europeans as a warning of what the coming age of the masses could be like (Hutchinson 1996:21).

far away "East", was brought to the breakfast tables of Western Europeans by telegraph and the reports of journalists in their new role of "war correspondent".[5]

Dunant, while attending an International Statistical Congress in Berlin, met Dr. J.H.C. Basting, a military physician who was translating *A Memory of Solferino* into Dutch. Basting managed to convince Dunant that his scheme of founding a humanitarian organization on such a grand scale, would come to nothing unless medical personnel and volunteers were protected from enemy action while rendering assistance on the field of battle. Based on these discussions Dunant drafted a convention[6] that proposed not only official protection and patronage of national committees but also international recognition of the neutrality of "military medical personnel and their assistants, including members of voluntary aid attachments".

It is important to note that it was by virtue of the neutrality proposal, and the concerted international effort it would ultimately require, that a place would be secure for the newly formed humanitarian aid organization in almost every nation around the

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4 *See* Appendix - "The Origins of Public Health Activism" (Kingsland 1998).

5 The upshot of this free flow of information was that reports of battle casualties could no longer be controlled or delayed as they had been previously. This "fostered such a degree of awareness "among all ranks of society" that states could no longer treat their soldiers as callously as they had done in the past". So says Thomas Longmore in a lecture to the Royal United Service Institution in 1866. (Hutchinson 1996: 26-27).

6 When the delegates for the First Geneva Conference assembled on 26 October 1863 the point of departure for their discussion was the draft agreement drawn up by Moynier. Dunant revised the original ten conventions to include neutrality as per Article 10 Section (b) of the Resolutions adopted at the Geneva International Conference of 1863. *See* Appendix 1- Chapter Three.

world.[7] Without the requirement of neutrality it is conceivable that many of the states may well have concluded that humanitarian aid societies were unnecessary, impractical, or an inconvenience not worth the trouble. However, humanitarianism coupled with the idea of neutrality proved enough justification for the societies in both moral and utilitarian terms. Neutrality allowed states to respond to the increasingly vocal public opinion about the carnage of warfare while at the same time they could protect their investment by improving military medical practices (Hutchinson 1996:30).

Implicit in the history of the Red Cross is the assumption that the growth of the Red Cross since 1863 is evidence of a long-standing and deepening commitment to humanitarianism and its principles, at least from countries that are signatories to the Geneva Conventions and have officially recognized their national Red Cross (or Red Crescent)[8] society. So much so that by 1965, seven fundamental principles of the International Red Cross and Red Crescent Movement were proclaimed at the Twentieth Conference in Vienna. They are: Humanity, Impartiality, Neutrality, Independence, Voluntary Service, Unity, and Universality.[9]

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[7] The conference in Geneva in 1863 brought together a handful of interested individuals; by contrast, the Tenth Conference in 1921 was attended by hundreds of delegates from Red Cross societies spread over six continents (Hutchinson 1996: 346).

[8] In July of 1865, the Ottoman Empire was the only non-Christian state among the great powers to announce its adherence to the Geneva Convention. The distaste of the Ottoman officers for the Red Cross emblem of a red cross on a white field (inevitably associated with the Crusades) resulted in the Ottoman Red Crescent Society (ORCS) to instead adopt the crescent as its symbol (Hutchinson 1996: 142).

[9] For definitions of the seven fundamental principles see Appendix 2 - Chapter Three.

Organizational Profile of the International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) was founded in 1863. It is a private, independent, Swiss institution. The role of the ICRC is to act as a neutral intermediary in humanitarian matters during international armed conflicts, civil wars and internal strife. Its role during armed conflicts is defined in the four Geneva Conventions of 1949 and their Additional Protocols of 1977.[10] The aim of the ICRC is to provide protection and assistance to: military and civilian war wounded, prisoners of war, civilian war detainees, political detainees, and civilian populations in occupied territories.

The composition of the committee is a maximum of 25 Swiss citizens. Headquarters are in Geneva, Switzerland, with 664 members of the staff as of 1993. The ICRC maintains a permanent presence in 60 countries around the world distributed as follows:

Africa - 23
Asia - 12
Europe - 9
Latin America - 7
Middle East - 9

The ICRC also maintains a delegation in New York which handles relations with the United Nations. As of 1993 expatriate staff included 862, National Society staff included 175, and local employees included 4,800. The ICRC is financed from voluntary contributions from governments, the European Union, National Societies

[10] *See* Appendix 3 - Chapter Three.

and private donors. In 1993 the ICRC's activities reached a record high. Its expenditure[11] also reached a new peak, as did the volume of relief supplies distributed[12]. ICRC delegates visited more detainees than ever before and distributed a record number of Red Cross messages.[13]

For instance, as of February 1994, the ICRC maintained 26 delegations involving some 250 permanent expatriate staff and 900 local employees throughout the former Yugoslavia. An average of 25 tonnes of relief supplies were flown into Sarajevo daily aboard the ICRC's Ilyushin 76 aircraft. As of January 1994, the plane had made 76 trips from Zagreb to the besieged Bosnian capital, bringing in more than 1,900 tonnes of relief. The bulk of the cargo consisted of food (flour, beans, sugar, canned vegetables, tea, cocoa) which were distributed to the 17 soup kitchens the ICRC ran on both sides of the front line, together with the local Red Cross. The elderly and disabled had their meals delivered to them by Red Cross volunteers known as Red Cross Runners.

The ICRC also flew in medical supplies for the hospital at Kosevo where the rehabilitation ward for war casualties was renovated by the Norwegian Red Cross and

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[11] The ICRC's overall expenditure in 1993 for activities carried out at headquarters and in the field totaled 777 million Swiss francs (US$ 518 million). The budget for 1994 totaled 749 million Swiss francs (US$ 500 million). *ICRC News no.1* (6 January 1994):3.

[12] The ICRC distributed more than 300,000 tonnes of relief supplies (food, clothing, blankets, tents, etc.) in 50 countries, including medical assistance worth 22 million Swiss francs (US$ 15 million). The ICRC had surgical staff working in six hospitals which admitted 8,000 patients over the year. 16,000 surgical operations were performed. More than 12,000 amputees were fitted with prostheses. *ICRC News no. 1* (6 January 1994):4.

[13] The ICRC's Central Tracing Agency (CTA) succeeded in establishing the whereabouts of 10,184 people. The CTA arranged for the exchange of 4,703,258 messages between members of families split up by conflict. It enabled 2,182 people to rejoin their families. Fifty-six courses on humanitarian law and the

the ICRC. For surgery, the ICRC supplied a broad range of drugs, infusions, wound dressings, x-ray films, surgical instruments and blood transfusion material. The ICRC replaced equipment such as operating tables, lamps, sterilizers and anaesthetic machines which had been damaged as a result of the war. A total of 37 drugs were supplied to treat chronic diseases[14] such as high blood pressure, mental disorders and epilepsy. In keeping with its mandate to provide for war victims the ICRC delivered surgical material to various institutions in the former Yugoslavia. For instance, the Rudo Institute for Prosthetics in Belgrade received material valued at some 287,000 DM. Generators and spare parts were brought in regularly for the gas heating programme a joint endeavour of the ICRC and the Netherlands Red Cross.

With the influx of war-wounded and refugees, the demand for blood and blood products increased dramatically. With the advent of sanctions, towards the end of 1992 the Blood Transfusion Centre in Belgrade, once a sophisticated medical institution, was struggling to supply some 60 major medical facilities in Serbia. The Centre's Director Dr. Vukman N. Gligorovic proclaimed "Surgery, oncology,...you name it, they cannot do a thing without blood". An appeal was sent to the ICRC and by February 1993, the ICRC provided the Centre with transfusion material valued at 120,000 DM. In April and May of 1994 the ICRC again delivered blood bags and testing material valued at 480,000 DM. Donations of this size ensure essential blood supplies for several months.

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law of war were given for members of the armed forces at all levels in more than 65 countries. *ICRC News no. 1* (6 January 1994):3.

[14] Costing some 119,000 DM per month, this ICRC initiative is being funded entirely by the Norwegian, Swiss and German Red Cross Societies, *"ICRC Activities in the Region of Former Yugoslavia"*, (August 1994):4.

Where access to life-saving or adequate health is not possible, the ICRC, as a neutral intermediary, will attempt to transfer patients across front lines. During 1993, the ICRC was successful in transferring some 190 war-wounded from Bosnia-Herzegovina to hospitals in Zagreb where they could receive specialised treatment.[15]

The Significance of Obtaining UN Observer Status: The ICRC Comes of Age

On 16 October 1990, the UN General Assembly adopted by consensus resolution 45/6 granting observer status to the International Committee of the Red Cross in consideration of the special role and mandates conferred upon it by the Geneva Conventions of 12 August 1949. Previously the ICRC held only consultative status which does not entitle the holder to regularly attend meetings[16] and conferences of the main UN bodies. The ICRC was therefore dependent on invitations to attend meetings dealing with humanitarian issues. Furthermore, consultative status does not entitle the holder to speak on its own initiative in the Economic and Social Council or in other major bodies of the UN. The result was the ICRC had to engage in lengthy discussions with the representatives of States, asking them to launch a specific humanitarian initiative or move that the ICRC be invited to take part in a certain meeting (Koenig 1991:2).

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[15] *Ibid*:4.

[16] For example, when the General Assembly or Security Council met in special session to discuss the escalation of violence in the Israeli-occupied territories, the ICRC - the very organization whose strictly impartial and neutral activities have enabled it to acquire considerable humanitarian experience in caring for

It has been argued that observer status would bring about a closer association between the ICRC and the United Nations thereby risking the ICRC's strict code of maintaining neutrality and discretion. The ICRC counters this with the argument that first, ICRC humanitarian work and UN peacekeeping operations have completely different bases in law and are conducted under different mandates. Observer status in no way alters this. Second, the ICRC assures that confidential information concerning non-international armed conflicts or internal disturbances will be shared only with the State that the ICRC is carrying out its humanitarian mission in (Koenig 1991:2).

Observer status for specialized agencies are entitled to: (i) be represented at meetings of the Economic and Social Council; (ii) to participate, without the right to vote, in deliberations with respect to items of concern to them and to submit proposals regarding such items, which may be put to the vote at the request of any member of the Council (Koenig 1991:4). Specialized agencies are those that have been established by intergovernmental agreement and have wide international responsibilities in economic, social, cultural, educational, health and related fields. For example, specialized agencies such as the World Health Organization and the International Atomic Energy Agency have permanent observer status in those of the main UN bodies that deal with their field work.

The ICRC, unlike other specialized agencies, has within it a distinctive duality. On the one hand it is a private association subject to the Swiss Civil Code. On the other hand it is vested with a "functional personality" in the area of international

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the victims of the Israeli-Palestinian conflict - was regularly excluded from participation in the meetings humanitarian law, something considered unique in the law of international organizations. It is by virtue of the ICRC's "functional personality" that the rules governing observer status for specialized agencies cannot be applied as they stand. The ICRC's rigorous policy of confidentiality in its work precludes any granting of access on a reciprocal basis between itself and the Economic and Social Council (Koenig 1991:5).

Organizational Strengths of the Red Cross

In 1975, a study was carried out to examine and reappraise the ICRC by observing the organisation in action in the field, both in natural disasters and in conflict situations. The study group, under Donald Tansley, attended major Red Cross international meetings and interviewed experts from various agencies and research institutions. As a result of the studies six background papers were produced. The papers formed an integral part of the reappraisal of the ICRC, and were published prior to the Final Report.[17] The strengths and weaknesses that will be highlighted in this chapter are drawn from the conclusions of the Tansley Report.

Reputation

The Tansley Report found that a favourable image of the Red Cross exists among governmental officials, leaders of international organisations and eminent persons from many walks of life. The most striking finding however, was the universality of that

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(Koenig 1991:3).

opinion. The Report found the Red Cross was highly regarded in developed and less developed countries alike. There was no significant difference of opinion between men and women of virtually all political, ideological, and religious persuasions. The Red Cross was viewed as an institution that can be trusted and should definitely continue to function. In the words of Donald Tansley the Red Cross "can draw on a reservoir of goodwill in the image it has built up in the eyes of mankind over more than a century".[18]

Relevance of Red Cross Activities

The Red Cross is seldom faced with a need to justify its existence. Its mandate to protect and provide assistance with health and welfare provide their own justification. The limited mandate of the Red Cross, i.e., to provide temporary relief without regards to the underlying causes of suffering, are considered a strength by some in that the Red Cross is perceived as an organisation that will not advocate the overthrow of a regime as a condition to providing aid. Therefore the Red Cross is more often than not a welcome intermediary between the time of a disaster and the arrival of larger-scale government organised assistance.[19]

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[17] See *Final Report: An Agenda for Red Cross*, July 1975 (*hereinafter* the Tansley Report).
[18] Donald Tansley. "Strengths and Weaknesses of the Movement", *Final Report: An Agenda for Red Cross* (July 1975): 44.
[19] Tansley Report 1975:44.

Experience and History of Achievement

It is fair to say a large part of the good will that is generated towards the Red Cross worldwide is largely due to the fact that over the 135 year history of the organisation the Red Cross has maintained an enduring presence throughout the most catastrophic events of the past century which include: two World Wars, natural disasters of every description, and regional and global epidemics.

During its history the Red Cross has pioneered medical relief services such as its blood programme. It is a clear leader in the development and dissemination of international humanitarian law. It has initiated mechanisms for visiting prisoners of war and political detainees, as well as for tracing displaced persons following conflicts or disasters.

Acceptability

The structure of the Red Cross Society is a highly flexible one for gaining access to victims of conflict or disasters. It can present one of its three faces, the ICRC, the League, and the National Societies. In light of this the Red Cross, more than any other non-governmental organisation to date, has consistently gained access to victims in conflicts. This is particularly true for victims on "enemy" sides in internal conflicts.[20]

[20] Tansley Report 1975:45.

Network of National Societies

The Red Cross boasts a network of National Societies that span over 120 countries around the world. The Red Cross National Societies have become important channels for mobilising and distributing disaster assistance. They have become indispensable channels for communication in the event that government communications break down. Furthermore, the indigenous nature of the National Societies has proved to be of considerable advantage in developing countries, where national solutions to national problems is often more effective and sustainable than those solutions imposed from outside the respective country.[21]

Close Relationship with Public Authorities

In order to be recognised by the ICRC a National Society must first be recognised officially by its government as an auxiliary to the armed forces medical services under the auspices of the Geneva Conventions. At the international level, the ICRC now enjoys observer status within the United Nations. This close association with government officials, resources and expertise is seen as a considerable advantage especially when it comes to obtaining access to victims of conflict situations and

[21] For an example of how National Societies in Central America developed a cooperative approach which was crucial to the success of the operation mounted in response to the Managua earthquake disaster of 1972 *see* "Present Role of Red Cross in Assistance" In *Final Report:An Agenda for Red Cross* (July 1975).

influencing governments to act on behalf of humanitarian issues, i.e., the anti-personnel landmine campaign (Tansley Report 1975:46).

The aforementioned strengths of the Red Cross have proved time and again to be valuable assets to the organization. The successes of the ICRC, however, describe a legacy of the past whereby future success to an equivalent degree is by no means ensured. The Tansley Report uncovered weaknesses within the organisation that if not addressed can seriously undermine the future role of the ICRC as a relevant and significant force in the humanitarian field.

Organizational Weaknesses of the Red Cross

Lack of Cohesion

When the ICRC was first conceived there was a common sense of purpose and direction that guided the principles of action and commitment within the organization i.e., to alleviate and ameliorate the suffering of the wounded in war. Today, Red Cross societies can be found supplying aid to victims of natural disasters, drafting humanitarian law, visiting political detainees, cleaning polluted beaches, resettling refugees, giving first aid to skiers, arranging holidays for the handicapped, and giving swimming lessons. These represent a fraction of the activities the Red Cross now finds itself committed to (Tansley Report 1975:47).

While to some degree diversity can be seen as a strength, it also carries with it the danger of disintegration. This ever-growing variety of activities barely related to one another threatens to diminish the Red Cross's universality which ultimately would lessen the impact of the Red Cross as a significant force in the humanitarian field (Tansley Report 1975:47).

Lack of Planning and Evaluation

One characteristic of the Red Cross strongly emerged from the Re-appraisal study. This was the Red Cross's lack of commitment to comprehensive planning and critical analysis of their programmes. The Tansley Report concluded the

Red Cross was inherently mistrustful of intellectual appraisal and especially critiques of their programmes. This is not surprising recalling that the roots of the organization were grounded in *ad hoc* responses to human suffering from sudden and unpredictable disasters be they natural or man-made.

The result of this lack of planning is that the Red Cross engages in increasingly marginal and 'irrelevant' activities without regard to viable alternatives or to the cost/benefit ratio. For instance, most of the National Societies suffer from a lack of funding. The approach to funding is somewhat cavalier where the National Society will look at what funds are available first then consider what activities they may carry out with them without any attention to increasing their level of funding or securing funds on a more permanent basis. The Report concluded that this has led to a lowering of standards and a decline of real impact of its programmes (Tansley Report 1975:49).

Autonomy

To the outside world the Red Cross often appears reluctant to cooperate with others in the humanitarian field. Though it is recognized that independence from political interference is a necessity, it has been argued that the Red Cross carries the notion of independence too far where it has become isolation. For instance, greater cooperation on a technical level between the Red Cross and UN agencies, and other non-governmental agencies could surely result in greater efficiencies and less duplication of services without endangering the independence of the Red Cross on policy matters (Tansley Report 1975:50).

The Dark Side of Charity

Recipient National Societies have been accorded little real power to make decisions as to their priorities or as to the allocation of outside funds. It is the donors that tend to make the decisions unilaterally on what is given, how it is given, and how it will be used. Financial gifts tend to be sporadic which allows recipients little advance guarantee that resources will be available for their programmes (Tansley Report 1975:51).

Conclusions of the Tansley Report

The Tansley Report was remarkable in two ways. First, it started a process of self-examination of the Red Cross organization. Second, it took courage for the Red Cross to make the Reappraisal of the Final Report public.[22] The results of the Tansley Report were discussed in the Council of Delegates and at the International Conference in Bucharest in 1977. Whilst some of the National Societies took the report seriously enough to further examine the findings, it is interesting to note that the ICRC Council of

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[22] Tansley himself recalled that the immediate reaction to the *Final Report* of 1975, was marked by feelings of shock and hurt. Some were dissatisfied as they were prepared for a ready plan of action to be implemented, not for "an agenda for discussion". (R. Szutchlik and A. Wijkman, "What was the Impact of the "Tansley Report"?', 1988:9, In ed. Ian McAllister. *Relief, Development & Peacekeeping Fragile Connections*, Working Paper no. 10, ICRC).

Delegates turned down a proposal to set up an advisory working group as a follow-up to the Report and to propose practical measures for improvement.[23]

Some of the concerns raised by members of the Red Cross organization included the notion that in response to conflict situations "the ICRC has not been able to play its previously virtually unquestioned role". Perhaps this is a reflection of a general decline of the prestige and respect accorded to international organizations as a whole.

Several of the respondents to the Tansley questionnaire emphasised the importance of the Red Cross organization to maintain its credibility. Some reported that through modern communications previously isolated events are now broadcast on the world scene. One respondent spoke of the birth of a "world conscience" whereby there is a growing expectation among the public for observance of certain minimum humanitarian standards. This increasing recognition of the universal and political importance of humanitarian values as per the Fundamental Principles of the Red Cross, is thought by some to have created a unique opportunity for the Red Cross/Crescent organization to become an "expression of world conscience". According to one person, the Red Cross should be less service-oriented and more value-oriented. Furthermore, the Fundamental Principles should be taken as constitutive values of every human society representing a minimum threshold of tolerance throughout the world.[24]

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23 *Ibid:9.*
24 *Ibid:* 21.

Public Denunciation of Violations of International Humanitarian Law: The ICRC's Point of View

In order to be visible to donors and assist in raising funds, or to publicly denounce atrocities in the field, humanitarian organizations are increasingly finding themselves in a race for air time from the media covering that particular conflict or disaster. As the media is largely form the West, and the reports are largely going out to the West, it is no surprise that warring parties conclude that the humanitarian organizations are therefore allied to the West. This has been blamed for the building up of mistrust towards humanitarian organizations and outside agencies, whose very foreignness has on occasion become sufficient grounds for antagonism (Lusser and Chopard 1997:1).

Humanitarian organizations like the ICRC, that operate under strict principles of neutrality and impartiality, are being perceived as helping the "enemy", and are therefore being increasingly challenged on this point. Humanitarian relief workers now find themselves in the position of having to justify the "humanitarian reflex", i.e., impartial assistance based on objective human need.

Recalling that all humanitarian activity carried out in another state, while not considered interference in matters of sovereignty, nevertheless constitutes an intrusion into an already troubled situation. A disturbing trend of recent conflicts is that underlying cultural clashes have been exacerbated to the point where humanitarian assistance has been immobilised. For instance, the collapse of State institutions and chain of military command, coupled with the influence of drugs on the behavior of the combatants, the formation of splinter groups, and conflicts of a genocidal nature all combine to pose major challenges for humanitarian organizations of today (Lusser and Chopard 1997:1-2).

The ICRC argues that in these difficult circumstances, an agency that is recognized as neutral and impartial is a vital component in relation to clashing cultures and tribal identities. The ICRC bases its initial attempt to overcome these difficulties on the willingness to listen. The ICRC contends it is first essential to gather knowledge about the people whom the organization wishes to help. The ICRC achieves this via a network of 21 regional delegations that are themselves not involved in emergency relief activity. The ICRC claims this listening task forges invaluable contacts with warring parties and their victims. The ICRC contends that by being aware of how its presence is perceived it is better prepared to adjust its operations in the face of rumours. criticisms, misunderstandings, which if left unheeded can result in violent backlashes (Lusser and Chopard 1997:3).

While a willingness to listen helps to narrow the gap between the humanitarian worker and the aid recipients, it alone cannot be expected to bridge the gap altogether. There inevitably comes a time for dialogue. Such dialogue, according to the ICRC, must be based on the validity of the principles of international humanitarian law.

Though the validity of international humanitarian law is not negotiable, if this body of law is to be respected the issue of its legitimacy needs to be addressed. Given that nearly every State in the world is party to the Geneva Conventions, and their Additional Protocols, there remains a few States that have not joined in the consensus except through the signature of plenipotentiaries whose authority may be challenged. In such situations it becomes necessary to seek a measure of common ground in terms of humanitarian principles found in customary law and local practices.[25]

The ICRC delegates therefore, do not simply show up at check-points to ensure the passage of relief convoys. They are there primarily to gain access to the victims and to call upon the combatants to comply with humanitarian law. The ICRC must develop skills that can teach the law of war to both high-ranking officers of regular armies and armed individuals unbound by any form of legitimate control or order who are "deaf to any kind of logical argument".[26]

In lieu of this the ICRC has developed the tradition of discreet diplomacy which they feel has served them well over the past 135 years. The tradition of private advocacy, as opposed to public, is credited with the achievement of remarkable humanitarian successes. Private advocacy has helped to gain the confidence of the public

[25] It has yet to be proved that any culture has devised a code of conduct at odds with humanitarian principles. Research the ICRC has carried out into the cultural heritage of widely differing communities seems to confirm that the basic principles of international humanitarian law are universal *See* Edith Baeriswyl's text in the *International Review of the Red Cross*, no. 319, (1 July 1997):357-371.
[26] The ICRC employs 49 expatriates for dissemination-related activities, and has budgeted 36 million Swiss francs for 1997 (Lusser and Chopard 1997: 2).

authorities in that it lessens the possibility of embarrassment or controversy (Meyer 1996:3).

Private vs. Public Advocacy: The Pressure to Change

In recent decades, an increasing number of special-interest groups, such as Amnesty International and Greenpeace, have been formed for the sole purpose of publicizing a particular problem or issue with a view to raising public consciousness towards action for or against certain policies. Similarly, a growing number of development agencies and non-governmental humanitarian organizations have also launched public campaigns with an aim to change government policies.

Open condemnation of the ICRC for their silence in the face of the Holocaust coupled with an apparent growing disrespect for international humanitarian law is helping to increase pressure on the ICRC to engage in public condemnation of violations of the Geneva Conventions and their Additional Protocols. There has been some debate over whether or not the Red Cross should use their stellar reputation, built up individually and collectively over the past 135 years, to publicly address such violations utilizing the growing power of the media (Meyer 1996:3).

Furthermore, in light of the growing number of aid agencies now competing for funding, the ICRC is relatively well positioned to raise its profile in order to gain an increasing share of public attention and subsequently increase its financial support. It has also been argued (Meyer 1996:3) that it is time for the Red Cross to move beyond their traditional role of humanitarian relief in order to remain relevant in today's world. Ironically, it may be the weight of public opinion which ultimately has a greater effect on the behavior of belligerents and authorities alike, rather than the adoption of yet another humanitarian law.

It is important to note that while groups like Amnesty International and Human Rights Watch fulfill a necessary function, they are not required to perform practical humanitarian services in the midst of armed conflict when the security of the State and of its most vulnerable groups are profoundly threatened. This begs the question - has not the ICRC's approach of quiet diplomacy generally served victims of conflict well over the years, enabling tangible humanitarian results to be achieved that would arguably not have resulted in the glare of public advocacy? Similarly, there is also the question of the type of issue chosen for the Red Cross's advocacy role. Which issue should the ICRC focus on given its broad range of activities, who chooses, and how?[27]

If the ICRC adopts a role of public advocate, attention must be paid to the *reasonableness* (italics mine) of the position adopted. For instance, should the ICRC continue with its previous tradition of 'realistic idealism'[28] of pursuing what is attainable

[27] For instance, the ICRC was active in helping to achieve a ban on chemical weapons after the First World War, and recently had campaigned against the use of anti-personnel landmines which falls within the law of the Hague. It has been argued that the ICRC does not have the capacity to address issues of this scope and complexity (Meyer 1996:4).
[28] Henry Dunant in his *A Memory of Solferino*, advocated a practical, realistic prescription to help the wounded on the battlefield. Dunant recognized that, since wars exist, one can only do what one can at a practical level to limit its savagery (Meyer 1996:3).

in the circumstances despite loftier long-term goals? On the other hand, should the ICRC adopt an "all-or-nothing" approach similar to other public advocacy organizations?

Before adopting a blanket policy of public advocacy it has been suggested that the ICRC take into account the following considerations.

(i) Is the subject matter central to Red Cross humanitarian concerns?

(ii) What are the implications of a public campaign on the other activities and reputation of the Red Cross organization, both in the short and long term?

(iii) Are the campaign activities compatible with the Fundamental Principles?

(iv) Will the Red Cross be able to maintain a distinctive identity separate from other organizations that may be supporting the same cause?

(v) Can the experience of Red Cross field workers be utilized to influence thinking?

(vi) National Red Cross Societies must not be coerced into participating in campaigns they consider to be counter-productive to their current national circumstances.

It is a fact that the ICRC is invited by authorities to undertake specially recognized roles both in the field and at government meetings in which other humanitarian organizations are not included. This has required a relationship of mutual trust and confidence between ICRC delegates and government officials at all levels. It has therefore been argued that the launching of a public advocacy campaign directed against government policy undermines this trust and jeopardizes effective negotiations forever more (Meyer 1996:5).

Breaches of International Humanitarian Law: Actions Taken by the ICRC

Despite the provisions of the Geneva Conventions and their additional Protocols grave violations are often committed without any form of redress much less prosecution. In the event of a grave breach of international humanitarian law the ICRC can choose one of three options in dealing with it.

First, the ICRC may take action on its own initiative. This step involves the notification of authorities of any acts or omissions that in its opinion appear to be contrary to international humanitarian law. Such notification may be made at various levels of authority and may range from an oral remark by an ICRC delegate to the director of a prison to a detailed report by the President of the ICRC to the government concerned. As a rule such actions remain confidential.[29]

The ICRC will make public statements but only when three specific conditions are fulfilled: (i) the violations must be a major breach of international humanitarian law; (ii) the publicity given to them must be in the interest of the persons or

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[29] "Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law", *IRRC* no. 221, (1 March 1981):1.

population affected or threatened; (iii) either the ICRC delegates must have witnessed the violations with their own eyes or they are a matter of common knowledge.[30]

Conclusion

The ICRC operates in an environment of strict confidentiality and discretion and stands firm in its commitment to the maintenance of neutrality in the face of increasing criticism. Paraphrasing the ICRC delegate who was the chief negotiator for the liberation of over 600 people held hostage by members of the guerrilla movement Tupac Amaru at the Peruvian Japanese Embassy on 17 December 1996, "neutrality is not necessarily an exciting thing to be in today's world".[31] In other words, to have no opinion for or against issues of some importance is increasingly considered to be inadequate. The ICRC delegate expressed his views on neutrality whereby "when you remain neutral, you get into trouble. When you are not neutral, you get into trouble. The ICRC prefers to get into trouble by remaining neutral". The delegate argued that neutrality is a tool to be used to gain access to victims. If the ICRC can gain access to the victims they can then act as a *neutral* intermediary between parties to a conflict which can open up the channels for dialogue.

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30 *Ibid:* 2.

31 ICRC delegate. Interview by author, notes, Halifax, N.S., 5 May 1998.
Over 600 people were inside the Japanese embassy at the time of the hostage taking. Within a few hours the ICRC delegate managed to negotiate for the release of approx. 250 of the women hostages. Peruvian President Fujimori's mother was among one of them. The guerrilla movement Tupac Amaru first appeared in Peru in 1982.

The ICRC is uncompromising in its role as neutral intermediary. This was evidenced during the hostage negotiations when the ICRC delegate was carrying terms and conditions to and fro between officials of the Peruvian government and the leader of the Tupac Amaru guerrilla movement.[32] Government officials asked for the delegates opinion of the rebels and their ability to negotiate in good faith. The ICRC delegate steadfastly refused to give an opinion on this matter. The Peruvian government officials accused him of "siding with the rebels", and claimed he was sympathetic to their cause and therefore would not help the Peruvian government in their efforts to free the hostages. Recalling that the siege of the Japanese embassy lasted for 127 days and the pressure on the ICRC delegates to divulge what they knew of the rebels grew fierce[33]. In spite of this pressure the ICRC delegate continued to refuse to aid and abet the negotiation process in any way other than that of neutral intermediary for *both* parties to the conflict.

Examples such as this graphically illustrate the ICRC's commitment to neutrality whereby they prefer to remain an organisation that truly stands apart from intervention that can in any way be perceived as partisan.

[32] President Fujimori came to power in Peru in 1990, he was re-elected in 1995 with a majority government based on a neo-liberalist and populist mandate with the authority of a military regime.

[33] The hostage crisis was broadcast live on five channels throughout Peru and the rest of the world. Many of the hostages were Japanese officials of high office and there was significant pressure from Japan for a positive outcome of the event. The power had been cut to the embassy so the sanitary conditions were getting increasingly desperate. There was a very real concern that the hostages, not used to being confined in crowded quarters and not psychologically prepared to be prisoners would rebel against the guerrillas which would result in a 'bloodbath'.

APPENDIX 1 - CHAPTER THREE

Geneva Conventions of 1863

Article 1. Each country shall have a committee whose duty it shall be, in time of war and if the need arises, to assist the army medical services by every means in its power.

The committee shall organize itself in the manner which seems to it most useful and appropriate.

Article 2. Any number of sections may be formed to assist the committee, which shall be the central directing body.

Article 3. Each committee shall get in touch with the government of its country, so that its services may be accepted should the occasion arise.

Article 4. In peacetime, the committee and sections shall take steps to ensure their real usefulness in time of war, especially by preparing material relief of all sorts and by seeking to train and instruct volunteer nurses.

Article 5. In time of war, the committees of belligerent nations shall supply relief to their respective armies as for as their means permit; in particular they shall organise volunteer nurses and place them on an active footing and, in agreement with the military authorities, shall have premises made available for the care of the wounded.

They may call for assistance upon the committees on neutral countries.

Article 6. On the request or with the consent of the military authorities, committees may send volunteer nurses to the battlefield where they shall be placed under military command.

Article 7. Volunteer nurses attached to armies shall be supplied by the respective committees with everything necessary for their upkeep.

Article 8. They shall wear in all countries, as a uniform, distinctive sign, a white armband with a red cross.

Article 9. The committees and sections of different countries may meet in international assemblies to communicate the results of their experience and to agree on measures to be taken in the interests of the work.

Article 10. The exchange of communications between the committees of the various countries shall be made for the time being through the intermediary of the Geneva committee.

Independently of the above resolutions, the Conference makes the following recommendations:

(a) that governments should extend their patronage to relief committees which may be formed, and facilitate as far as possible the accomplishment of their task;

(b) that in time of war the belligerent nations should proclaim the neutrality of ambulances and military hospitals, and that neutrality should likewise be accorded, fully and absolutely, to all official medical personnel, to volunteer nurses, to the inhabitants of the country who go to the relief of the wounded, and to the wounded themselves.

(c) that a uniform distinctive sign be recognized for the medical corps of all armies, or at least for all persons of the same army belonging to this service; and that a uniform flag also be adopted in all countries for ambulances and hospitals.

See John F. Hutchinson. *Champions of Charity*, Westview Press 1996:37.

APPENDIX 2 - CHAPTER THREE

The Fundamental Principles of the

International Red Cross and Red Crescent Movement

HUMANITY

The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.

IMPARTIALITY

It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

NEUTRALITY

In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities, or engage at any time in controversies of a political, racial, religious or ideological nature.

INDEPENDENCE

The Movement is independent. The National Societies, auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

VOLUNTARY SERVICE

As a voluntary relief movement, it is not prompted in any manner by desire for gain.

UNITY

There can be only one Red Cross or one Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

UNIVERSALITY

The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.

APPENDIX 3 - CHAPTER THREE

The Geneva Conventions

Closely related to the establishment of the Red Cross, the Geneva Conventions are international agreements which, in essence, set out a code of practice relating to the care and protection of war victims. Their main historical development was as follows:

1864 - First convention, for the amelioration of the condition of the wounded and sick in armed forces in the field.
1906 - Second convention, for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea.
1929 - Third convention, relating to the treatment of prisoners of war.
1949 - Fourth convention, relating to the protection of civilian persons in time of war.

Additional Protocols, 1977

Protocol I - Relating to the protection of victims of international armed conflicts.
Protocol II - Relating to the protection of victims of non-international armed conflicts.

The three Conventions extending the original Geneva Conventions of 1864 were adopted to provide protection for more categories of war victims. There are now four Geneva Conventions, which were adopted by member states in 1949, covering armed forces on land, at sea, prisoners of war and civilians.

These treaties have been accepted by virtually every country in the world.

In addition, two new treaties, called Protocols, were drawn up in 1977. These add to and update the 1949 Geneva Conventions, taking into account modern means of warfare and aiming to give greater protection to *civilians.*

There are no set rules for the names of treaties, which are written agreements between states, governed by international law. The term ‘protocol’ is, however, often used to describe a treaty which adds to an existing treaty, and it seems that this is why the term was chosen in this instance.

Enforcement of the Geneva Conventions and Protocols is often difficult as it depends on the state applying those treaties.

CHAPTER FOUR

Médecins Sans Frontières: Its' History and Philosophical Origins

Médecins Sans Frontières (MSF) was founded in 1971 by a small group of French physicians, headed by Bernard Kouchner, upon their return from a tour of duty in Biafra. These physicians had served as volunteers in Biafra under the joint aegis of the French and International Red Cross (Fox 1995:1607). While the formation of MSF can be credited to the personal motivation and commitment of the individuals involved mention should be made of the influence of certain post-World War II events which helped shape a new generation of French intellectual thinking to which the individuals of MSF adhered.

The primary influences included: (i) the institutional memory of the Vichy regime's cooperation during the German occupation of France in World War II contrasted with the efforts of the French Resistance; (ii) the legacy of the extent of the crimes against humanity from the Nazi concentration camps and the Holocaust; (iii) the widespread anticolonialist movements in Africa, Asia, and Latin America, and the questioning about France's colonial policy, presence, and military role in North Africa; (iv) the development of a post-Stalinist 'New Left' movement in France in the late 1950s, with its heroization of African, Latin American and Asian political figures.[1]

From its conception MSF was grounded in contemporary French history and intellectual culture, premised on the belief that the provision of medical care, service and relief is a humane form of moral action with the capacity to bind up wounds that are greater than the physical. Therefore, MSF attempts to "heal the body politic" as well as the human body.[2]

The core concept on which the medical and human rights action of MSF is premised was first expressed by its founder Bernard Kouchner as "le droit d'ingerence" - "the right to interfere", which has gradually evolved into "le devoir d'ingerence" - "the duty to interfere". This mandatory interference is grounded in the assertion that there is an "ardent obligation to act" wherever and whenever there is suffering as a consequence of violence, persecution, warfare, oppression, exile or exodus. Christophe Rufin, a vice-president of MSF/France calls for "plunging into the arena...dashing headlong into the midst of wars...in order to reach the victims...breaking whatever rules are used against [them and] humankind" , all the while making enough "noise" to be clearly "heard" (Fox 1995:1609).

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[1] The movement reached its climax with the eruption of the May 1968 'Student Revolution' throughout French universities - Bernard Kouchner was involved through his membership in the Union des etudiants communistes. (Fox 1995):1608.

[2] R. Kaplan. "Getting Involved", *The New Physician, vol. 17,* (July-August 1993).

One of MSF's most fundamental principles of action involves its commitment to bear public witness to the violations of human rights and dignity that they encounter in the field. This resolve was a direct reaction to the actions of the International Committee of the Red Cross, who delivered food and medicine to people in the concentration camps during World War II, whilst not speaking out against the atrocities taking place. MSF rejects this 'rule of silence' and the collaboration it implies. MSF chooses instead to evoke public indignation by informing the public, on a world-wide scale, of human rights abuses they encounter in the field (Fox 1995:1609).

MSF espouses a 'non-ideological ideology', which disavows any political or religious identification or affiliation. With reference to sans frontieres (without borders) they also challenge the so-called 'sacred principle' of the sovereignty of the State. In this MSF sees a 'new world order' governed by the principles of the Universal Declaration of Human Rights as set forth in the Charter of the United Nations General Assembly 10 December 1948, and by an international tribunal which is 'above nation-states'.[3]

The principles of MSF have become increasingly institutionalized on a broader scale. For instance, "The right to interfere, in spite of frontiers and in spite of States, if suffering persons need aid", has been incorporated into resolutions passed by the

[3] While acknowledging the limitations of the United Nations, MSF sees it as the closest approximation to this kind of tribunal. (Fox 1995):1610.

U.N. General Assembly which call for a "new humanitarian order" that finally legitimizes the role of non-governmental organizations like MSF in providing *in situ* aid.[4]

In 1980, Médecins du Monde was founded as a result of a split within MSF between members of its founding and second generations. The split occurred as a result of the 1979 Vietnamese 'boat people' crisis. The founder of MSF, Bernard Kouchner, felt MSF should invest its resources in chartering a boat to rescue the Vietnamese from the South China Sea whilst mobilizing media support to publicly dramatize the action. The younger members of MSF felt that a rescue of the 'boat people' was an endeavour that surpassed the competence and capacity of a *medical* humanitarian organisation such as MSF. As a result of a vote, the rescue for the 'boat people' was rejected by a majority. Kouchner claimed he was "expelled" and "betrayed" by the very organisation he founded.[5] The remaining members of the organisation took exception to what they felt was Kouchner's undemocratic and publicity-seeking style. Kouchner, along with a majority of his peers who were his companions in Biafra left MSF to found Médecins du Monde.

[4] The recognition of the necessity of free access to the victims of suffering has spawned the creation of "corridors of emergency" to enable aid to be transported directly to the scene. *See* Resolution 43/131 of the General Assembly of the U.N. (8 December, 1988), and Resolution 45/100 (14 December, 1990).

[5] It is interesting to note that, like Kouchner, Henry Dunant, the founding father of the ICRC, found it necessary to split with the organisation over a difference of principles on how it should be run.

Médecins Sans Frontières: Organisational Profile

MSF has remained the larger of the two organisations and is the best known and most generously supported voluntary association in France. MSF is made up of a network of six operational centres and twelve delegate offices in Europe, North America and Asia plus the Brussels-based International Office. The six operational centres based in Amsterdam, Barcelona, Brussels, Geneva, Luxembourg and Paris are responsible for carrying out the operations of MSF in the field. The operations department is supported by departments of logistics, medical, human resources, financial, communications, and fund raising. Each centre is run by a President and a General Director. The Board of Directors of each section is composed of volunteers and is elected by the annual General Assembly.

Delegate offices are responsible for recruitment, public relations and fundraising. They are providing an increasing number of health professionals for field missions. They are based in Australia, Austria, Canada, Denmark, Germany, Greece, Hong Kong, Italy, Japan, Sweden, the UK and USA. The International Council is a quarterly meeting of the Presidents and General Directors of the six operational centres. It outlines the main strategic orientations. It has a rotating presidency with one country succeeding another. The International Office, based in Brussels, represents the MSF network to international institutions and organisations with two antennae to the international organisations in Geneva and in New York.[6]

MSF launches its field missions when either war or natural disasters have led to situations where outside assistance is deemed necessary. When MSF is alerted to a new crises situation it immediately sends a fact-finding team on an exploratory mission to assess the humanitarian needs along with the practical implications of intervention. The team then reports either directly or by satellite from the field, on the medical, nutritional, sanitation needs, as well as the political and logistical constraints. If MSF chooses to engage in a mission a coordination task force comprising staff from operations, human resources, logistics and communications, is set up within hours. The task force then defines the project's objectives and sets up a budget for the necessary personnel, equipment and transport. MSF is then ready to immediately begin sending volunteers and equipment to the field.[7]

MSF is a private, independent, non-profit organisation, without political, economic, or religious affiliations. Apart from donations by private individuals, the organisation also accepts contributions from governments, international organisations, businesses, churches, and foundations. However, MSF will only accept these funds under the following conditions: (i) all projects to be funded must have a strictly humanitarian objective; (ii) all projects must be carried out in conformity with the Charter of MSF (see Appendix to Chapter IV); (iii) the donor will receive no direct benefit, whether political,

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[6] *See* "An International Network", MSF Activity Report (1993-1994):57.

financial, economic, or otherwise from any project; (iv) MSF will retain the freedom to select its projects.[8]

In 1993, 40 percent of MSF's funding came from contributions by private donors in addition to contributions from the European Community, the United Nations High Commissioner for Refugees and the governments of Belgium, Canada, Finland, France, Luxembourg, the Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom, and the United States. Eighty-five percent of expenditures are allocated for operations, 6 percent to administration and 9 percent to communication and fund raising.[9] As of 1 February, 1994, MSF was conducting projects in some 70 countries around the world.

Médecins Sans Frontières: Organisational Strengths

Logistical and Technical Support

MSF is able to depend on reliable logistical support on short notice. The organisation can therefore decide to intervene in an emergency situation secure in the knowledge that planes will be loaded with cargo within a twenty-four hour period. In order to achieve this MSF had three logistical centres based in Amsterdam, Bordeaux, and Brussels. These centres purchase, test, and store equipment such as vehicles,

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7 *See* "The Response to Emergencies", *Ibid:* 54.

8 As of 1993 MSF had 972 permanent expatriate posts, 1,957 volunteers sent to the field, private donations of US$ 2.1 million, and expenditures of US$ 186 million. *See* "Financial Ethics", *Ibid:*55.

9 *See* "MSF in Figures", *Ibid:*56.

communication equipment, water and sanitation equipment, surgical instrumentation, shelters, tools, and cold chains (essential for vaccination agents and blood products).

Upwards of sixty different kinds of emergency kits have been developed for use in specific emergency situations which are ready for on the spot assembly. The kits provide almost everything from shelter, communications facilities, and power supplies, to water processing facilities, and food for specific numbers of people.[10]

Recruitment

MSF has an active recruitment policy that provides training courses for selected volunteers. Volunteers are briefed before leaving on a mission and debriefed on their return. In emergencies, the organisation relies on a stand-by staff of experienced professionals, all of whom are ready and prepared to leave on short notice. Recruitment[11] focuses on members of the medical profession but numerous logistical and administrative personnel, financial managers, sanitary engineers, and mechanics are also sent out to work alongside the physician and nursing staff.[12]

[10] *See* "The Response to Emergencies", *Ibid:* 54.
[11] There appears to be no shortage of qualified volunteers ready and willing to leave on a mission on short notice. (MSF - official, *telephone interview by author*, notes, 22 January 1998).
[12] *See* "Response to Emergencies" MSF Activity Report (1993-1994): 54.

Availability and Utilisation of Expertise

In order to ensure a successful humanitarian mission a certain amount of technical expertise is required. MSF provides this technical support to its missions by specialist teams based at headquarters. The teams foresee and make allowances for nutritional needs, vaccination, sanitation and hygiene needs of the mission. Comprehensive handbooks are provided with translations into several languages. MSF has helped create three consultancy and training bodies in public health which also carry out field surveys. They are Epicentre in Paris, Aedes in Brussels, and Healthnet in Amsterdam.

Organisational Weaknesses

French Versus Non-French Tensions

The *engagé* notion of immediate, emergency oriented, interventionist action which originated in the France office of MSF predominates to this day. In contrast, the American view of MSF action involves a stronger commitment to sustained rehabilitation and to longer-term development projects. The Americans prefer to adopt a cooperative approach with indigenous medical organisations with greater emphasis on teaching as a form of action. At the same time the Americans are more open to examining their philosophical assumptions, policies and field operations through a process of inquiry and research (Fox 1995:1615).

The debate over what kind of balance should be struck between emergency, rehabilitation, and development[13] projects has become an element of strain and conflict between the French and non-French branches of the organisation. A major focus of these tensions concerns whether or not the Paris office has superordinate[14] authority over the action of the non-French divisions. It is not clear how independent the non-French branches are considered to be, either in their own eyes or as viewed by the French.

All the offices of MSF have experienced rapid growth and this has had a profound organisational effect. For instance, MSF-Holland is currently as large as the entire MSF movement was in 1989. More to the point, in 1989 when MSF-France was still the largest centre it virtually dictated policy to the 'satellite' offices *per se*. For instance, when MSF-France made a statement about an issue there was no question that it spoke for MSF in its entirety. Now MSF-Holland and MSF-Belgium are as large as MSF-France and are asserting greater independence which has resulted in increasing confrontations between the offices. Though not necessarily a bad thing in and of itself there is the recognized need for at least some basis for equality between the regions (Milliano 1995).

[13] Paraphrasing an MSF-official, "We (MSF) should definately get out of the development business. There are other organisations who can do that better than we. Ideally, we would like to be put out of business altogether. We are waiting for the day when we have nowhere to go, nothing to do." (*Telephone interview by author*, notes, 22 January 1998).

[14] Officials at both the MSF-Toronto office and MSF-New York office said that MSF is working towards a more centralised structure but that "it is not easy". Officials at both offices stated they felt a common ideology was still relevant and that MSF as a whole was working towards it but that it was a source of conflict (*Telephone interviews by author*, notes, 22 Jan. 1998 and 16 April 1998.)

The Charter

The Charter of MSF reflects the atmosphere of the Cold War, when neutrality was considered an important distinguishing value. Yet this policy of neutrality directly conflicts with their stance on speaking out in the face of human rights abuses. MSF must now try and answer what will it mean in the future post Cold-War environment to be an independent, medical, humanitarian, and non-profit organisation. Which core values will the MSF offices share? More to the point, is a common ideology still relevant or even desired? Will separate ideologies eventually devolve into entirely separate and distinct MSF organisations altogether? These matters are currently being reviewed in the International Council, while to date the Charter does not reflect any new changes.

Neutrality in the Face of Human Rights Violations:
The Médecins Sans Frontières Point of View

The deliberate slaughter of innocent civilian populations is far from a new phenomena. On the contrary, the twentieth century is full of them. What is new, however, is the presence of a multitude[15] of humanitarian organisations in the field.

[15] An official at MSF-New York office commented that "there were too many players in the field" and that this was a source of confusion for everyone involved much to the detriment of the people they were there to help (*Telephone interview by author*, notes, 16 April 1998).

More and more of these non-governmental organisations and UN relief agencies are being given a substantial role in the protection of civilians.

For instance, from the days of its first conception MSF acted more as a 'watchdog' rather than a genuinely effective medical relief organisation (due primarily to the lack of material resources). The first generation of MSF volunteers were in fact 'runners' who brought information to the Red Cross and other UN agencies whose own activities were often hampered by legal and diplomatic constraints. It is important to note that from the very first MSF volunteers sought media attention to mobilise public opinion as a tool for promoting humanitarian activities (Brauman 1997:20).

There was, however, little or no theoretical basis grounding MSF's commitment towards their policy of 'speaking out'. Their actions beg the question, what exactly did 'speaking out' mean? Did it mean, like the ICRC, that MSF should confine itself to maintaining strict neutrality that supposed *true* humanitarianism called for?[16] Should MSF simply describe the suffering they encounter or should they speak about the causes of the suffering? Furthermore, should MSF report each and every event it came across, or should there be some sort of line of demarcation, or scale of events, whereby MSF would decide to denounce only those abuses that 'crossed the line' so to speak? An interview by the author with an official at MSF-New York office on 16 April 1998 revealed that each and every violation they came across should be denounced, even if it

[16] An interview with an official at MSF-Toronto office revealed that MSF had for too long dismissed the value of the quiet diplomacy of the ICRC, and that only now was MSF beginning to appreciate and utilize

endangers the mission, else MSF becomes accomplices. When this same question was posed to the official at the MSF-Toronto office the response was that the medical care came first and was not to be jeopardized else one is helping no-one. Paraphrasing his response he stated "after all we are not 'Advocates Sans Frontières'. We are medical relief personnel, first and foremost.[17]

These questions introduce the dilemma of satisfying two legitimate desires. The first is the desire to speak out publicly to avoid any notion of a passive acquiescence with oppressive overlords. The second is the desire, and/or necessity, of keeping such overlords 'happy' in order to gain their cooperation and to maintain access to the victims. MSF's attitude towards the two aspects of this dilemma were shaped largely by their experiences in Afghanistan after the invasion of the former Soviet Union, in occupied Cambodia, and finally in Ethiopia.

In Cambodia, MSF was on a collision course with the pro-Vietnamese powers in Phnom Penh in 1980. Tacitly refusing to submit to the Vietnamese government's desire to exercise complete control over international aid, the leaders of MSF organised a March for the Survival of Cambodia on the Thai side of the Cambodia-Thailand border on 6 February 1980. MSF was aware that they were jeopardising their future prospects of being able to operate in the country after such a provocative act. MSF

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such tactics. *Note:* the official had worked for the Red Cross for ten years before joining MSF (*Telephone interview by author*, notes, 22 January 1998).

[17] Interviews of MSF-officials were conducted on a confidential basis.

chose instead to publicly unmask a predatory dictatorship bent on utilizing international aid to strengthen its hold over the population (Brauman 1997:22).

In Afghanistan MSF made no apology about abandoning any pretense of a neutral stance in order to give their one-sided aid to the Afghani's resisting the occupying forces of the former Soviet Union. MSF's aid involved the very public denunciation to the United States Congress and the European Parliament, of the Soviet atrocities perpetrated against the Afghani's (recalling that over 1 million died in this war) (Brauman 1997:22).

Colonel Mengistu's Ethiopia was another scene of a direct confrontation between MSF and an oppressive government over humanitarian principles. During the famine of 1984-85 over 800,000 people migrated form northern Ethiopia to the south. International aid was used by Mengistu as 'bait' to draw people into the feeding centres where they would be summarily rounded up by the militia. The silence of the NGOs in the area were interpreted as a sign of approval, or at the very least, benign indifference. MSF failed in its bid to persuade other NGOs to join them in protest and was expelled from Ethiopia in December 1985. A few months later, however, the European Community and the United States brought a halt to the mass deportations. MSF asserts their concerted efforts of resistance and protest played no small part in ending the deportations. They will, however, admit that the actions of the USA in particular, may have been driven more by Reaganite thinking which was working towards the collapse of communism as a whole (Brauman 1997:23).

Over and above the United Nations response to armed conflict is the continued willingness of volunteer relief workers to travel vast distances in order to provide relief and comfort to crisis-affected communities. Several of these volunteers face considerable risk themselves. Some of the voluntary organisations that have largely supplied the pool of volunteers include MSF, Save the Children, CARE, Oxfam, Catholic Relief Services, Christian Aid, and the Red Cross. Given the nature of relief work in conflict zones it comes as no surprise that health care workers are often found at the frontlines of relief operations.[18]

In a crisis situation, the very fact that 'foreigners', be they workers from international relief agencies, diplomats, or journalists, recognise the suffering of a population provide a sense of reassurance (albeit at times false) that a semblance of dignity and security will be restored. It is often hoped that the mere presence of those not directly engaged in the conflict will discourage blanket human rights violations that may well have been occurring prior to their appearance in the field. Though the presence of expatriate front-line medical personnel has on occasion helped restrain both government and guerrilla forces, at other times medical personnel themselves become targets of deliberate attack or capture in attempts to eliminate unwanted witnesses. For example, during the Soviet-Afghan war, Red Army forces deliberately bombed clandestine hospitals run by international aid organisations (Toole 1997:18). Nevertheless, the

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[18] Most relief teams comprise doctors, nurses, sanitary engineers, nutritionists, midwives and medical technicians. Other organisations include: International Medical Corps Aide Medicale Internationale, Health Unlimited, German Emergency Doctors, and the British medical relief agency MERLIN (Toole 1997):17.

presence of relief workers is strongly considered to provide a sense of solidarity amongst populations where the world has chosen not to recognise the gravity of their plight or more often for geopolitical reasons, has neglected to respond to their needs in a decisive and adequate way. Front-line medical personnel are well placed to give eyewitness information to the world and to advocate a more vigorous response by the international community on behalf of the victims. The importance of the strength and timeliness of the response cannot be emphasised enough else the result can be disastrous, as was the case in Somalia when the ill fated military intervention was launched by the UN and the US military in late 1992 after reports of the high malnutrition and death rates reached the international community early that year (Toole 1997:18).

MSF's experience was gained primarily in the less developed countries of Africa, Asia and Latin America. The changing nature of conflict, however has resulted in increasing humanitarian emergencies in industrialised nations of eastern Europe and colder climates such as Kurdistan, Afghanistan, Tajikistan and the Caucasus. This trend poses new technical, logistical and cultural challenges. Whilst the classical humanitarian response to a crisis is based on objective human need, the reality is often more complex. For instance, the establishment of a hospital to manage civilian casualties in a war zone will surely involve dealing with combatants on a daily basis. They will be armed and often demanding priority care at the expense of civilian patients. Though medical teams may attempt to administer care based on need, armed combatants are not necessarily amenable to negotiation. The result being that relief agencies may have to pay local militia for 'protection'. Often relief workers must turn a blind eye to corruption, theft of relief supplies, and flagrant human rights abuses if they want to maintain services.

For example, in the Rwandan refugee camps in Zaire, efforts to ensure equitable distribution of relief supplies were thwarted by political and military leaders in the camps, many of whom had allegedly been directly involved in the genocide in Rwanda. The decision to continue assistance is often more difficult than the original decision to initiate the operation in the first place. In the case of the Rwandan refugee camps in Zaire, MSF decided to withdraw rather than continue to work in an environment where political leaders continued their violent oppression of the refugees and their exploitation of relief programmes to promote their own political agenda.[19]

Here we come to the heart of the ethical dilemma of today's humanitarian response to complex emergencies. The dilemma involves a choice between the presence of expatriate personnel to act as an important symbol of solidarity and security for a local population, or does their presence merely provide legitimacy, power and wealth to military or political factions controlling the population (Toole 1997:25). While excellent guidelines on a range of technical and legal issues have been developed and disseminated, no such guidelines exist to address the ethical challenges of relief work. Unfortunately there is not yet a consistent set of moral principles applicable in a global context that can help to guide the international response to emergencies of a complex nature (Toole 1997:36). The following chapter deals with the gap in the theoretical foundation of this ethical dilemma. The theoretical principles of contractarianism and consequentialism will be contrasted and compared. Applicable aspects of the two theories will be utilised as a basis of support for the decisions made by humanitarian relief workers in the field.

[19] The ramifications of this decision are still being debated within the organisation. (Toole 1997): 25.

APPENDIX 1 - CHAPTER FOUR

The Charter of Médecins Sans Frontières

Médecins Sans Frontières is a private international organisation. Most of its members are doctors and health workers, but many other support professions contribute to MSF's smooth functioning. All of them agree to honour the following principles:

Médecins Sans Frontières offers assistance to populations in distress, to victims of natural or man-made disasters and to victims of armed conflict, without discrimination and irrespective of race, religion, creed or political affiliation.

Médecins Sans Frontières observes strict neutrality and impartiality in the name of universal medical ethics and the right to humanitarian assistance and demands full and unhindered freedom in the exercise of its functions.

Médecins Sans Frontière's volunteers undertake to respect their professional code of ethics and to maintain complete independence from all political, economic and religious powers.

As volunteers, members are aware of the risks and dangers of the missions they undertake, and have no right to compensation for themselves or their beneficiaries other that that which Medecins Sans Frontieres is able to afford them.

APPENDIX 2 - CHAPTER FOUR

Interview Questions

1) Médecins Sans Frontières (MSF) states in its Charter that it observes neutrality and impartiality in the name of universal medical ethics. Reflecting the atmosphere of the Cold War where considerations of neutrality were an important distinguishing characteristic, does this stance not conflict with MSF policy of 'speaking out' about large scale and systematic human rights abuses which MSF itself has stated: "is as important part of its mission as work in the field".?

Please comment.

2) Given the denunciation of human rights abuses is a tool the rarity of which contributes to its effectiveness, what parameters does MSF use to decide when and/or how to denounce such abuses?

For instance how does MSF choose between:
a) simply describing the suffering.
b) talk about the root causes of the suffering.
c) utilize a scale of events which employs a line of demarcation.
d) report each and every example of distress.

3) Susannah Sirkin, when deputy director of Physicians for Human Rights (PHR) argued:

"the human rights community has been devastated by the events in Rwanda and Bosnia. We are also disappointed that there has not been a strong international medical voice condemning these atrocities and, especially support for medical colleagues in the front line."

What place do you see humanitarian aid organizations taking in a world plagued by violent conflicts with less and less international willingness to be involved or find solutions?

4) Is humanitarian aid itself in a crisis?

5) There was a time when MSF-France made a statement about something it clearly spoke for MSF in its entirety. With the growth of MSF-Belgium and MSF-Holland came greater national independence and autonomy from MSF-France.

Do you anticipate greater national autonomy will result in divergent views and therefore potential confrontations between regional offices? Furthermore, is a common ideological base still desirable and/or relevant?

6) The ICRC operating within strict principles of neutrality as mandated by the Geneva Conventions claims it is concerned with "only the material and psychological condition of detention and not the reasons". The ICRC has visited over 500,000 political detainees in over 90 countries.

Alain Destexhe, when Secretary-General of the international office of MSF, argued that aid packages alone are "superficial gestures" and that a "purely humanitarian approach acts as a blindfold which allows us to bask permanently in the warmth of our own generosity. It is far from certain that the victims are getting anything out of it".

How does MSF reconcile its stance against the ICRC's maintenance of strict neutrality in light of its successful track record?

7) Kofi Annan, when UN Under-Secretary-General for Peacekeeping Operations, stated that peacekeeping operations such as Bosnia and Rwanda have opened up analysis of the possibilities of 'coercive inducements'. This raises dilemmas about 'carrot sticks' where humanitarian aid can become a bribe or punishment if withheld. In either case it then becomes a highly politicized instrument which is far from neutral as to distribution or purpose.

Please comment.

CHAPTER FIVE

Introduction

Before turning to the task of evaluating the approaches to human rights violations used by the ICRC and MSF it is important to say a little bit about how moral evaluation proceeds. In the first half of this chapter I will sketch the two most highly developed accounts of how one should evaluate, from the moral point of view, institutions such as the ICRC and MSF. I will then turn to the task of evaluating each institutional response from both moral perspectives. My goal is to give the reader the tools with which to perform her/his own evaluation of the policies and procedures employed by the ICRC and MSF in the context of dealing with suspected cases of human rights violations.

Two Types of Moral Theory

Moral theories may be divided into two types, teleological and deontological.[1] There is, of course, some disagreement among ethicists on various technical issues dealing with how this distinction should be drawn. However, in broad outline, the distinction is this: teleological theories are theories which are goal-based. They hold that some non-moral goal is worthy of being attained and that we should adopt those moral rules which will serve to attain that goal. Put another way, such theories specify certain states of affairs as ones humans ought to seek and others as those they should avoid. Teleological theories begin by giving us an account of what is good (and what is bad), in the sense of saying what states of affairs it would be best to have and which it would be unfortunate to have obtained. Teleological theories then give an account of right (and wrong) in terms of whether or not the good is promoted. Crudely put, right actions are those which contribute towards the goal of making the world have more good and less bad in it. Wrong actions, on this view, are (roughly) those which tend to make the world have more bad and less good in it. As we will see it is this feature of teleological theories which makes them all consequentialist. The rightness or wrongness of an action, policy, or institutional arrangement is evaluated by asking whether the action, policy, or arrangement brings us closer to or takes us further from the goal or increasing the good and minimizing the bad.

Deontological theories, by contrast, are duty-based theories. They do not begin by specifying which states of affairs are good and which are bad and then define or otherwise analyze right and wrong actions in terms of whether the good is increased or decreased. Rather, deontological theories specify right and wrong in a way which is independent of their causal relation to the good. On a deontological theory the right thing to do, the right policy for an institution to adopt, the right institutional arrangements for a society to have is not just a function of whether these actions, policies, or institutional arrangements will make the world have more of what is good in it. Rather, rightness and wrongness are given some analysis independent of the idea of promoting the amount of goodness in the universe. These theories do not begin with a goal and generate duties by

[1] There are other types of moral theories besides those described in this chapter, but the two theories in this

asking whether having such duties will further the goal. Rather the duties are thought to have a grounding independent of any common goals humanity might have (or ought to have).

This feature of deontological theories raises an immediate problem. What could possibly serve to ground duties other than increasing the amount of goodness in the world? Why should one do one's duty unless so doing is reasonably likely to make the world a better place, to have more of whatever is good in it? The best deontological theories respond to this difficulty by appealing to our common rationality and concern for our fellows. They ground our duties in what it would be rational for each to agree to accept as constraints on the way she behaved, providing only that others accepted these constraints on their behavior also. Whereas teleological theories tell us we should do our duty because doing so will make the world a better place, deontological theories tell us we should do our duty because doing so is what is rationally required of people like us.

In this chapter I will first outline a version of the most highly developed teleological theory and then describe the best available deontological theory. My purpose is not to give a full account of either of these theories. (At any rate, this would be impossible in the space available.) Rather my purpose is simply to offer enough of a sketch of each approach so that we will be in a position to evaluate the policies of the ICRC and MSF from both the teleological and a deontological perspective.

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chapter are the dominant ones.

Consequentialism and Utilitarianism

As already indicated teleological theories specify a certain goal that social institutions ought to seek. Institutional policies, social rules, and individual acts are judged on the basis of whether they promote the attainment of the goal the theory specifies as morally worthy. Thus, it is the consequences of a policy, rule, or act which determines its moral worth, or lack thereof. It is in this sense that teleological theories are consequentialist. Ethicists have developed a wide variety of consequentialist theories but by far the best known and most popular type of consequentialist theories is utilitarianism.

Utilitarianism, in its simplest form claims that the morally right act, or policy, is that which produces the greatest *happiness* (italics mine) for members of society. Historically, utilitarian philosophy was considered to be progressive. It first arose as a radical critique of 18th century English society. The original utilitarian philosophers[2] were considered "Philosophical Radicals" who argued for a complete rethinking of English society whose practices were thought to be the product of feudal superstition as opposed to reason. Utilitarianism was first identified with the progressive and reform-minded political programmes such as: the extension of democracy; penal reform; and welfare provisions (Kymlicka 1990:45).

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[2] *See*, Jeremy Bentham. "An Introduction to the Principles of Morals and Legislation", in *A Fragment on Government and an Introduction to the Principles of Morals and Legislation*, ed. Wilfrid Harrison (Oxford: Blackwell, 1948).
J.S. Mill. *Utilitarianism*,ed. Mary Warnock, (London: Collins Press, 1962).

Utilitarianism demanded that oppressive customs and authorities that had been in force for centuries now be tested against a standard of human improvement. At its best, utilitarian philosophy could be considered a strong weapon against prevailing superstitions and prejudices. Furthermore, it provided a standard and a procedure that could challenge those who claimed moral authority over others (Kymlicka 1990:11).

Intuitionism and Consequentialism

It has been argued that utilitarianism has two attractive properties. First, it conforms to our *intuition*[3] that the well-being of humans matters. Secondly, it appeals to our intuition that moral rules should be tested against their consequences on human well-being. The attractive quality of utilitarianism's 'consequentialism' is found in the requirement that one must first ensure that the action or policy in question results in some identifiable 'good' or not. The benefit of a consequentialist approach is that it prohibits arbitrary moral condemnation. Therefore, before one can condemn an act as morally wrong one must first demonstrate who is wronged by it, and in what tangible way is one's life made worse off for it. Similarly, the consequentialist will pronounce an act as morally right if it can be demonstrated how one's life is made better off by it. All the

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[3] Conforming to our moral intuition does not make a theory intuitionistic. John Rawls (1971) describes intuitionist theories as having two features:

"First, they consist of a plurality of first principles which may conflict to give contrary directives in particular types of cases; and second, they include no explicit method, no priority rules, for weighing these principles against one another: we are simply to strike a balance by intuition, by what seems to us most nearly right. Or if there are priority rules, these are thought to be more or less trivial and of no substantial assistance in reaching a judgment." Utilitarianism in not an intuitionistic theory in this sense (John Rawls. *A Theory of Justice*, Oxford:Oxford University Press, 1971):34.

while the utilitarian (consequentialist) demands that the pursuit of human well-being be done impartially, i.e., for all the members of a society (Kymlicka 1990:10).

Preference vs. Hedonistic Utilitarianism

Utilitarianism based on informed preferences aims at satisfying one's preferences which are based on full, or perfect information, whilst rejecting those preferences that are either irrational or based on mistaken information. Given that there are several different kinds of 'informed' preferences, this view of utilitarianism is considered to be flawed in that it is extremely vague. If one accepts the premise that human well-being is based on more than achieving 'happiness'- or mere preference satisfaction - then there is no longer a straight forward method for measuring utility. Therefore, when utilitarian philosophy moves beyond hedonism it looses one of its attractive properties. However, though utilitarianism is ill suited to provide a simple criterion or scientific method for determining morally right or wrong acts, neither is it at a disadvantage, in comparison to other theories, when it comes to measuring human well-being (Kymlicka 1990; p.18). For my purposes the distinction between preference versus hedonistic satisfaction do not matter. People who are suffering and subject to human rights violations will naturally 'prefer' not to suffer. Therefore, maximizing pleasure (by minimizing pain) and maximizing preference satisfaction (by not abusing those who would prefer not to be abused) always give the same advice.

The Maximization of Utility

Utilitarianism argues that the morally right action is the one that maximizes utility, i.e., it seeks to satisfy as many informed preferences as possible. This is considered a morally just approach given the 'winners', by definition, must outnumber the 'losers' and there is no argument for why the unsatisfied preferences of the lesser number of 'losers' should take precedence over the more numerous preferences of the 'winners.' Recalling that a foundation of utilitarian philosophy is that no single individual stands in a privileged position and that no single individual has a greater claim to benefit from an act over any other (Kymlicka 1990:19).

Whilst utilitarianism argues that the morally right act is the one that maximizes utility, it does not proclaim that one should deliberately seek to maximize utility (Kymlicka 1990; p.29). The requirement to maximize utility is derived entirely from the prior requirement to treat people with equal consideration. In so saying, the strength of the argument *for* utilitarianism is premised on the notion that:

(a) people matter, and matter equally; therefore

(b) each person's interests should be given equal weight; therefore

(c) the morally right act will maximize utility (Kymlicka 1990:31).

Act-utilitarianism vs. Rule-utilitarianism

Act-utilitarianism is the view that a morally right or wrong action is to be judged by the consequences, good or bad, of the action itself. Rule-utilitarianism[4] is the view that a morally right or wrong action is to be judged by the consequences of a rule, good or bad, wherein everyone should perform said action in like circumstances.

The objections to rule-utilitarianism as compared to act-utilitarianism are premised on accusations of rule-worship. The rule-utilitarian presumably advocates their principle because they are ultimately concerned with human happiness. Yet, the question arises whether one should abide by a rule when it becomes known that it would not be most beneficial to abide by it? To simply respond to this by claiming that in *most* cases it would be beneficial to abide by such a rule, or that it would be better that everybody abides by the rule then that nobody does is considered inadequate. This response supposes that the only alternative to 'everybody does A' is that 'nobody does A.' It does not take into consideration the possibility that some people do 'A' and some people don't. Therefore, to refuse to break a generally beneficial rule in those cases in which it is not beneficial is irrational and could thereby be classified as a case of rule-worship (Smart 1973:10).[5]

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[4] There are two sub-varieties of rule-utilitarianism according to whether one construes 'rule' to mean 'actual rule' or 'possible rule'. The 'possible rule' interprets Kant's principle to "Act only on that maxim through which you can at the same time will that it should become a universal law" as "Act only on that maxim which you as a humane and benevolent person would like to see established as a universal law." (J.J.C. Smart., Bernard Williams 1973:9).

[5] David Lyons (1965) argues that rule-utilitarianism collapses into act-utilitarianism whereby the exception to rule 'R' produces the best possible consequences. This is evidence that rule 'R' should be modified to

Jeremy Bentham argued the quantity of pleasure being equal, the experience of playing pushpin[6] was as good as that of reading poetry. Bentham, therefore, would be classified as a hedonistic act-utilitarian. G.E. Moore argued that some states of mind, such as those of acquiring knowledge, had in themselves an intrinsic value independent of their pleasantness. Moore would therefore be classified as an ideal-utilitarian. J.S. Mill argued that there are both higher and lower pleasures that seem to imply that pleasure is a necessary condition for goodness but that goodness depends on other qualities of experiences other than pleasantness and unpleasantness. Mill would therefore be classified as a quasi-ideal utilitarian (Smart 1974:13).

What Bentham, Moore, and Mill are all agreed upon however, is that the rightness of an action should be judged solely by the consequences brought about by the action. For instance, let us examine the case whereby we know with certainty the total consequences of two alternative actions A and B, and that actions A and B are the only two possible actions open to us. The decision process for the act-utilitarian would involve asking whether the total consequences of action A are more beneficial than the consequences of action B, or whether the consequences are equal. The act-utilitarian must either commend A over B or vice versa. In so saying the act-utilitarian must do a double evaluation or piece of commending. First, the consequences of an action must be evaluated, then, on the basis of this evaluation one must further evaluate the actions A

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allow this exception. Thus we get a new rule to 'do R except in circumstances C.' (David Lyons. *The Forms and Limits of Utilitarianism*, London: Oxford University Press, 1965).

and B which would lead to the two sets of consequences. It is important to keep in mind, however, that whilst one may agree with the evaluation of the relative merits of the total sets of consequences of actions A and B, it may still be inappropriate to proceed with either action. For instance, it is conceivable that there could be a case where "the total consequences of A are better than the total consequences of B, but it would be *unjust* to do A, for you *promised* to do B" (Smart 1973:14). For present purposes the dispute between rule versus act-utilitarianism doesn't matter because the question is what rule should an agency adopt about public denunciation of human rights violations.

Negative Utilitarianism

Sir Karl Popper (1966) puts forward an argument for negative utilitarianism whereby one should concern themselves less with the maximization of happiness and utility, and more with the minimization of suffering. Suffering, in this instance, is understood as misery involving actual pain not just the absence of happiness. Popper argues that the attraction of negative utilitarianism is that people may be more likely to agree upon what miseries they would prefer to avoid as opposed to what 'goods' they would prefer to see promoted (Popper 1966: ch.5, note 6). For example, whilst Mill and Bentham may dispute whether poetry is preferable to pushpin, they would more than likely both agree that an occasional visit to the dentist is far preferable to a chronic toothache (Smart 1973:30).

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[6] Jeremy Bentham. *Works,* volume 2, Tait, Edinburgh, (1843): 253-254, In Smart. J.J.C. and Williams. Bernard. *Utilitarianism for and against,* London:Cambridge University Press (1973).

The Praiseworthiness or Blameworthiness of Act-utilitarianism

The English philosopher Henry Sidgwick (1838-1900) attached importance to the distinction between the utility of an action and the utility of attributing praise or blame for the action. He argued that 'fallacious refutations' of utilitarianism have often depended on confusing the two things.

For want of a nail the shoe was lost;
For want of a shoe the horse was lost;
For want of a horse the rider was lost;
For want of a rider the battle was lost;
For want of a battle the kingdom was lost;
And all for the want of a horse-shoe nail.[7]

This rather begs the question of whether or not it is entirely fair to place the blame of a lost kingdom upon the shoulders of the unsuspecting blacksmith! After all, as A.N. Prior notes the blacksmith had no reason to believe that the fate of the kingdom would depend solely on one horse-shoe nail. Moreover, the loss of the kingdom could just as likely be the fault of there being too few canon in the field. So who bears *the* responsibility for the lost kingdom? The act-utilitarian will reply that the very notion of attributing ultimate blame or responsibility is "nonsense" and should be replaced with the dictum "Whom would it be useful to blame?" (Smart 1973:55).[8] All good utilitarians answer this question by figuring out how blaming can serve to further the goal of making the world a better place.

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[7] Nursery rhyme quoted by A.N. Prior. "The consequences of actions", *Aristotelian Supplementary*, volume 30, (1956):95.

[8] The idea that a consistent utilitarian would go mad with worry about the various effects of his actions is perhaps closely connected with an argument against utilitarianism put forward by Kurt Baier who holds that act-utilitarianism must be rejected because it entails that one could never relax and would use up every available minute in good works (Baier 1958):203-204.

<u>'Absolutely Right' Actions</u>

The claim that there is a type of action which is morally right, *whatever the consequences,* can be put by saying that such an action will be the right thing to do whatever the situation may be, nomatter what state of affairs results from doing said action (Williams 1973:90). At the same time, however, it can also be argued that there is the possibility of a situation whereby the consequences of doing the action in question are so terrible that it would be morally right to do something else (Williams 1973:90). What Williams (1973) is saying by this is that there is in fact no type of action which can be considered to be the *absolutely right* thing to do. In other words, there is no type of action which is the right thing to do whatever the consequences. Neither is an action to be considered absolutely right if the decision on whether the action is right "all depends on the consequences" (Williams 1973:91).

Williams (1973) argues that the moral significance of the two positions is found in the notion that if people do not regard certain actions as *absolutely out*, then this means they are prepared to entertain ideas about extreme situations whereby actions which would otherwise not be considered, become justifiable. People are therefore prepared to compare extreme situations and ask themselves what actions would be justified in them. Inhibitions one may harbour against thinking about situations in consequential terms begin to lessen. Differences between extreme situations and less extreme situations become not so much the difference between the exceptional and the usual, but between the greater and the lesser. Finally, the consequential ideas one is prepared to deploy in the exceptional (greater) situation seem more and more irrational not to deploy in the usual (lesser) situation (Williams 1973:92).

In contrast, is the notion that the *unthinkable* (italics mine) was in itself a separate moral category. It could be a feature of a moral outlook whereby one regarded certain courses of action as, quite simply, unthinkable. An action would be unthinkable in the sense that one would never entertain the idea of doing it. In so saying, regarding certain actions as viable alternatives becomes an exercise in the absurd. Such actions being so morally dishonourable and so "monstrous" that the very idea that a process of moral rationalization could yield some sort of an answer is considered "insane". "There are situations which so transcend in enormity the human business of moral deliberation that from a moral point of view it cannot matter any more what happens" (Williams1973:92).

Consequentialist (utilitarian) rationality, on the other hand, has no such limitations. After all, is not "making the best of a bad job" one of its maxims. For instance, the consequentialist (utilitarian) will have something to say on the difference between massacring seven million people or massacring seven million and one. The significant point that Williams (1973:93) is trying to make here is that there is a connection between the idea that there is nothing which is right *whatever the consequences* (italics mine) and the idea that everything depends on the consequences.[9]

The Role of Equity

One criticism of utilitarianism is based on the belief that it is "primitive" in that it does not consider questions of equitable distribution. Responses which argue that equitable distribution does not matter simply because utilitarianism has no way of making it matter are considered invalid. Similarly, it is not sufficient to argue that the situation need not arise because, in point of fact, inequities will give rise to discontent which invariably result in a reduction of total average utility (Williams 1973:143).

The Role of Substitutability

Another criticism of utilitarianism is found in the principle of the substitutability of satisfaction which is basic to the utility calculation. This principle is best illustrated by the Hicks-Kaldor compensation test whereby *change* can be taken as an unequivocal improvement if its beneficiary can be shown to be so much better off by it that one could compensate the 'loser' and still retain something left over. Recalling that this example of satisfactory compensation is a principle of economics. When this same principle is applied to social decisions it becomes a debatable point whether or not social

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[9] Williams(1973:93) goes on to assert that these two distinct ideas have important social and moral ramifications when we consider a world where we have lost the traditional reasons for resisting the first, and have more than enough reasons for fearing the second.

'goods' can be intersubstitutable.[10] It is not necessarily a universal truth that "every man has his price" (Williams 1973:145).

The Role of Perfect Information

The final criticism of utilitarianism examines the notion of what an individual would actually prefer if one were more fully informed and had a more correct sense of what things would be like if one's 'fully informed' preference came off. Given that what one wants, or is capable of wanting, is in itself a function of numerous social forces. It rests on the sense of what is possible. For instance, is it not reasonable to argue that many a potential desire fails to become an express preference simply because the very thought that it would ever be possible to achieve is absent. Williams (1973:147) argues that this point illustrates the "illusion which utilitarianism trades on" and which "renders utilitarianism irresponsible". The illusion being that fully informed preferences are available to us all and that the role of the social decision process is simply to follow them to fruition. Though this is a difficult issue both opponents and defendants of utilitarianism concede that utilitarianism requires extensive information.

Deontological Theories: John Rawls's Theory

John Rawls (1951) became dissatisfied with utilitarianism claiming that a judgment must "be felt to be certain by the person making it," and it must also be

[10] It is an arguable point whether or not social conditions such as liberty, justice, and opportunity are

"intuitive with respect to ethical principles, that is...it should not be determined by a conscious application of principles so far as this may be evidenced by introspection"(Rawls 1951). In Rawls's *Theory of Justice* (1971), he sets out the criteria for determining such judgments whereby:

> ...we can discard those judgments made when we are upset or frightened,or when we stand to gain one way or the other can be left judgments are simply those rendered under conditions favorable to the exercise of the sense of justice, and therefore in circumstances where the more common excuses and explanations for making a mistake do not obtain. The person making the judgment is presumed, then, to have the ability, the opportunity, and the desire to reach a correct decision (or at least, not the desire not to).[11]

In light of this, Rawls grounds his objections to utilitarianism on the basis that it "does not take seriously the distinction between persons." Rawls argues that utilitarianism fails to do justice to the "common sense" conviction that every individual possesses "an inviolability founded on justice or, as some say, on natural right which even the welfare of every one else cannot override" (Rawls 1971:178). Rawls illustrates this point by citing the example that the sacrifice of a slaves' well-being may be more than made up for by the *happiness* (italics mine) which their enslavement would bring to the master class. Though seemingly an extreme (and somewhat absurd) demand, and one that Rawls believes conflicts with one's sense of justice, classical utilitarian doctrine, nonetheless, leaves open the possibility that such arguments might be successfully put forward (Schaefer 1979:22).

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substitutable or compensatable.

[11] John Rawls. "A Theory of Justice", Cambridge, Mass.: Belknap Press of Harvard University Press, (1971):47-8.

John Rawls's Principles of Justice

Rawls's general conception of justice consists of one central idea: "All social primary goods - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured."[12] Rawls's general conception ties the idea of justice to the equal share of social goods wherein people must be treated as equals by removing only those inequalities which disadvantage others. This leaves open the possibility whereby if giving one individual a greater share of income results in an advantage (financial or otherwise) for another individual, then such an inequality shall be allowed. Put simply, inequalities are allowed if they improve one's initially equal share, and are not allowed if they invade (deplete) one's equal share. This single, simple idea, encapsulates the heart of Rawls's entire theory of justice (Kymlicka 1990:53).

Rawls breaks down his general conception into sections which are arranged according to a principle of 'lexical priority'. They are:

First principle (The Principle of Liberty) - Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second principle (The Difference Principle) - Social and economic inequalities are to be arranged so that they are both; (a) to the greatest benefit of the least advantaged;

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.

First priority rule (The Priority of Liberty) - The principles of justice are to be ranked in lexical order wherein liberty can be restricted only for the sake of liberty.

Second priority rule (The Priority of Justice over Efficiency and Welfare) - The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum advantages (Rawls 1971:302-303).

These features combine to form the 'special conception of justice', which seeks to provide a guidance system that intuitionism alone fails to provide. According to the above principles, certain social goods are more important than others and cannot be sacrificed for improvements in those other social goods. Equal liberties take precedence over equal opportunity which takes precedence over equal resources. Above all, Rawls's idea remains intact whereby an inequality is allowed only if it benefits the least well off (Kymlicka 1990: 54).

The Social Contract Argument

Rawls's social contract involves what sort of political morality people would choose were they setting up a society from an *original position*. Rawls's *original position* will be discussed more fully further on . First, it is important to examine the assumptions the social contract argument is based on. Rawls's social contract requires us

[12] John Rawls, *A Theory of Justice*, Oxford: Oxford University Press, (1971):303.

to imagine a state of nature where there is no political authority in the sense that there is no higher authority with the power to command obedience. Neither is there an authority who bears the responsibility of protecting individual interests or possessions. Given this state of nature, the question becomes, what kind of a 'contract' would such individuals agree to concerning the establishment of a political authority who would then have these powers and responsibilities (Kymlicka 1990:59).

The use of this so-called 'state of nature' has been criticized on the basis that there never was, nor ever could be such a state. Furthermore, one might wonder why a hypothetical agreement should have any force. As Ronald Dworkin (1977) has put this objection, "a hypothetical agreement is not simply a pale form of an actual contract; it is no contract at all" (Dworkin 1977:151).

Dworkin himself goes on to defend Rawls by saying that social contract techniques should not be thought of as the basis of an actual agreement but more as a device for teasing out the implications of certain moral premises concerning people's moral equality (Kymlicka 1990:60). Yet there remains a problem with the 'state of nature' in that it is considered to be unfair because some individuals will invariably retain more bargaining power over others. Some individuals will arguable possess more natural talents, resources, or shear physical strength whereby they are better positioned to "hold out longer for a better deal, whilst the weak must make concessions" (Kymlicka 1990:61). In light of this, Rawls created a device which would prevent people from exploiting their arbitrary natural advantages when selecting the principles of justice. Rawls calls this device the "veil of ignorance" whereby:

> no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the result of a fair agreement or bargain.[13]

Rawls's 'veil of ignorance' is meant to be an intuitive test of fairness in the similar way we can ensure a fair division of cake by ensuring that the person who cuts it does not know which piece they will get (Kymlicka 1990:61).

Finally, Rawls's social contract argument is based on the assumption that all are committed to attain an ideal of the 'good life'. In so saying, Rawls contends that certain things are needed in order to pursue these commitments. Rawls calls these things primary goods of which there are two kinds. The first are the social primary goods which are the goods that are directly distributed by social institutions such as income, opportunities, power, rights, and liberties. The second are the natural primary goods which include health, intelligence, vigour, imagination, and talent. The natural primary goods are affected by social institutions, but are not directly distributed by them (Kymlicka 1990:64).

Rawls's Maximin Strategy

The first step in Rawls's 'game' of choosing the principles of justice involves placing people behind his veil of ignorance. All things being equal, each individual is to seek to ensure that they will have the best possible access to the primary goods distributed by social institutions, i.e., income, opportunity, power, rights, and liberties. Since each individual may end up being any one of the other individuals in the decision process, Rawls's argues the best strategy in obtaining the principles which will promote one's own good, is to place yourself in the position of every other person in society and consider what would promote their good (Rawls 1971:148).

Rawls contends the most rational approach would be to adopt a 'maximin' strategy - wherein you would maximize what you would get if you wound up in the minimum, or worst-off position in society. According to Rawls, one should proceed on the assumption that your worst enemy[14] will be deciding what place in society you will occupy (Schaefer 1979:152-153). For example, suppose that the following distributions are all that was possible in a three person world: (a) 10-8-1; (b) 7-6-2; (c) 5-4-4. Rawls's maximin strategy would tell you to choose distribution (c) 5-4-4. Given that there is no way of knowing whether or not you will end up with the largest or smallest distribution,

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[13] Rawls (1971): 12.

[14] There is an inconsistency in Rawls's assumption that one's place in society will be determined by a "malevolent opponent" for Rawls had previously denied that the parties to the original position suffer from envy or other hostile feelings towards each other (Schaefer 1979:33)

the rational choice is the one that results in the largest distribution if you ended up in the worst (or least) advantageous position.[15]

The question has been raised as to what one should do in circumstances where one faithfully follows the 'rules' of the social contract by adopting the original position under the veil of ignorance and, as Rawls suggests, choosing a maximin strategy which yield principles of justice that do not match one's convictions of justice. In other words, the principles conflict with our intuition of what is just. Rawls asserts:

> ...we have a choice. We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted.[16]

This begs the question if Rawls modifies the original position in order to make sure that it yields principles of justice which match our intuitions, then why bother with the contract device at all (Kymlicka 1990:67)? Rawls responds to this by arguing that certain intuitions may seem less compelling when they are viewed from a perspective that is detached from one's own position in society. The value of the contract argument is that it tests our intuitions by showing whether they would be chosen from an unbiased perspective. The contract provides an impartial perspective from which we can consider more specific intuitions (Rawls 1971:21, 22, 586).

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[15] Note that the worst position in distribution (c) is 4 which is better off than the worst positions in distribution (a) which is 1, and distribution (b) which is 2 (Kymlicka 1990:65).
[16] Rawls (1971):20.

Rawls's Original Position: A Critique

Rawls's original position assumes that each party will possess "their own plans of life" and "conceptions of the good" which will "lead them to have different ends and purposes, and to make conflicting claims on the natural and social resources available." Rawls assumes "that the parties take no interest in one another's interests" and make "no restrictive assumptions about the parties' conception of the good except that they are rational long-term plans." Meaning that they are plans designed by each person to satisfy the greatest number of his desires. Thus, Rawls's conceptions of the good allows for them to be egoistic or not, and as "irreconcilably opposed" as "the spiritual ideals of saints and heroes."[17] Rawls assumes that, being rational, the parties will not suffer from envy, since another person's well-being will not affect the satisfaction of one's own desires. At the same time, it is supposed that each person in the original position will care about the well-being of those in the next generation (Schaefer 1979:28).

Schaefer (1979:28) argues that it is difficult to understand how it is a 'saint' or a 'hero' would take no interest in other people's well-being. Similarly, Schaefer questions how one whose final purpose was "wealth, position, and influence" [18] could remain immune from feelings of envy given the goods he is aiming at are essentially relative ones. Questions have also been raised about Rawls's conception of rationality.

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[17] John Rawls. *A Theory of Justice*, Cambridge, Mass.: Belknap Press of Harvard University Press, (1971):127.
[18] *Ibid:*129.

For instance, why is it rational to be rational? Is one not free to choose as one's purpose an ineffective means to an end? Finally, why is it rational to aim to satisfy the greatest number of one's desires rather than regarding one single aim as more important than all the others?

In order to "nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage" in an unjust way, Rawls assumes that no one in his original position "knows his place in society, his class position or social status,...his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like". Nor is he aware of "his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology. The parties do not know the particular circumstances of their own society...its economic or political situation, or [its] level of civilization and culture". Nor do they have any "information as to which generation they belong [to]".[19]

The specifications of Rawls's original position rather beg the question of whether or not people can possess any sort of meaningful general knowledge without having derived and developed such knowledge from the study of particulars. Rawls does not explain how it is one can have learned the laws of human psychology whilst remaining entirely ignorant of one's own psychology. Furthermore, given that there are no universal laws that determine human behavior with the same regularity that the laws of physics govern the material world it does not seem possible to devise general principles [of justice] for the regulation of a society without knowing something of that society's distinguishing characteristics (Schaefer 1979:29).

In determining the principles of justice that are to be chosen, Rawls has conceived of the parties to the original position as if they were participants in a game who do not know what their particular role in the game will be. The game is based on the assumption that each participant will aim at maximizing their gains in the name of justice. Recalling that each of the participants are free from envy because "envy tends to make everyone worse off". Therefore the participants are to "strive [only] for as high an absolute score as possible" without regard to the scores of their opponents. Finally, the participants are presumed "to be capable of a sense of justice" so much so that they "can rely on each other to understand and to act in accordance with whatever principles are finally agreed to... Their capacity for a sense of justice insures that the principles chosen will be respected".[20]

In order to estimate the potential gains the parties must have an index of points by which to *keep score* (italics mine). Since the game of justice involves the equitable distribution of a variety of 'goods' it would seem that the participants would need to know which goods contribute to a 'happy' life along with their relative importance. Yet Rawls has ruled such knowledge out by insisting that though each party has their own conception of the good, they do not know what their respective conceptions are. Rawls attempts to resolve this difficulty by utilizing his "index of primary goods"

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[19] *Ibid:*137.

which he assumes any *rational* (italics mine) person would want more of in order to achieve his particular notion of the good (Schaefer 1979:31).[21]

Schaefer (1979:31) argues that before one can make a rational decision about how to allocate the primary goods, one first needs to know what exactly it is one will be given the *right* or *opportunity* to do? Similarly, one needs to know what *power* they possess, power to do what, power over whom? Schaefer (1979) argues that Rawls provides no answers to these questions. Instead Rawls contends that given the index of primary goods upon which the participants must base their choices, and given the parties are rational, it will therefore be in their self-interest to agree on the two principles of justice that he lays out. The first principle being that "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all". It is important to note that the overriding priority of this principle stipulates that "liberty can be restricted only for the sake of liberty" and not for the sake of any other primary good.

Rawls's second principle of justice consists of two parts. First, "social and economic inequalities are to be arranged...to the greatest benefit of the least advantaged" (the difference principle), but they must first be "attached to offices and positions open to all under conditions of fair equality of opportunity".[22]

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[20] *Ibid:*144-145.

[21] Recalling Rawls's primary goods consist of rights and liberties, powers and opportunities, income and wealth, and self-respect. *Ibid:* 92-92, 396.

Rawls's explains his prioritizing the principle of liberty [which "forbids exchanges between basic liberties and economic and social benefits"] over the difference principle by claiming that:

> The idea underlying this ordering is that if the parties assume that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for an improvement in economic well-being. It is only when social conditions do not allow the effective establishment of these rights that one can concede their limitation; and these restrictions can be granted only to the extent that they are necessary to prepare the way for a free society... Thus in adopting a serial order [i.e., the priority of the first principle to the second], we are in effect making a special assumption in the original position, namely that the parties know that the conditions of their society, whatever they are, admit the effective realization of the equal liberties.[23]

Schaefer (1979) points out that Rawls at no time specifies what the *basic liberties* (italics mine) are, nor what are they basic for. In so saying it is therefore impossible to determine what constitutes an "effective realization" of them. Furthermore, Schaefer argues Rawls's statement is in violation of his principle that the parties to the original position are not to make choices with respect to any particular conception of the good. Instead we find Rawls assuming *for* the parties that they will find equal liberty to be of greater value than any other good. Similarly, Rawls's "special assumption" about the parties' knowledge of the conditions of their society violates his principle that they are not to know any particular facts about their society (Schaefer 1979:33).

In so saying, it can be argued that if the parties are to be allowed this particular knowledge of the good, and of the circumstances of their society, why then are

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[22] *Ibid:* 302.

they not allowed to know, or at least investigate the nature of the good and of the requirements of their particular society in other respects? Schaefer (1979) argues that Rawls designs his game in such a way that the parties have access to only the knowledge that will lead them to *choose* the principles of justice that he approves of. In other words, there is no evidence that the priority of liberty over other primary goods is necessarily the inevitable outcome of rational deliberation of free and equal persons. All Rawls has demonstrated is that he considers it a priority and wishes other to do the same (Schaefer 1979:33).

Practical Application of the Theories

It is quite easy, upon accepted foundations,
to build whatever one pleases
Michel de Montaigne (1533-1592)

Having identified a few characteristics and arguments for and against utilitarianism and Rawls's social contract theory this thesis will attempt to apply some aspects of each theory to the ethical dilemma faced by humanitarian workers in the field. The ethical dilemma being whether or not humanitarian workers should publicly denounce grave breaches of international humanitarian law (as per the Geneva Conventions) during field operations. It is important to note that this exercise will not include an in depth analysis of the merits of either utilitarian or social contract theories. The elements of each theory that have been identified and explored have been done solely for the purpose of discerning whether or not they are the appropriate elements to apply to

[23] *Ibid:* 151-152.

the dilemma. Furthermore, the purpose of the exercise is not to demonstrate which theory of justice is the best, nor which approach to the dilemma (public denunciation or maintain silence)[24] is morally right. The purpose of this exercise is to provide theoretical support, or refutation, for the decisions that have been made either way.

Before applying the elements of the two theories of justice to the ethical dilemma it is necessary to review the potential consequences of the positions taken. The first case involves the humanitarian worker who is mandated to maintain a strict code of silence in the face of human rights abuses. The humanitarian worker will therefore continue to co-operate with government authorities in the hopes of maintaining field operations such as a medical facility. In cases such as this history has shown that there is little reason to believe the human rights violations won't continue and even escalate as was evidenced in the 1991-1995 war in the former Yugoslavia.[25] At the same time, it must be recognised that if relief facilities remain operational and continue to serve the civilian population, then at least some portion of the civilian population will benefit from it, human rights violations notwithstanding.

Therefore, the *action* of maintaining silence will likely result in the *consequences*: (i) increasing number of civilian deaths due to continued and/or escalating human rights violations; (ii) decreasing number of civilian deaths due to maintenance of relief facilities.

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[24] Recall that the position held by the ICRC is to "maintain silence" as per the Geneva Conventions' position on neutrality. MSF maintains a policy of "public denunciation" when confronted with massive human rights violations.

The second instance involves a humanitarian worker who is mandated to publicly denounce grave breaches of international humanitarian law. This humanitarian worker chooses not to co-operate with belligerent government authorities and is prepared to discontinue humanitarian missions at their discretion.

History has shown the *action* of public denunciation of human rights violations may result in *consequences* such as: (i) increasing civilian deaths due to discontinuation of relief operations, and the withdrawal of 'foreign witnesses' to the violations which may have acted as a deterrent; (ii) potential cessation of hostilities towards civilians due to raised public consciousness which increases international pressure on a belligerent government to end violations against its civilian population.[26]

For the purposes of this thesis it will be assumed that a greater number of civilian lives will be lost over the long-term in the case of maintaining silence (given that human rights violations can be expected to continue unabated). At the same time, it will be assumed that a greater number of civilian lives will be lost in the short-term in the case of public denunciation (given that relief facilities are expected to be discontinued).

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[25] Kingsland (1998):ch. 2.
[26] Kingsland (1998): ch. 4.

The Application of Utilitarianism Theory of Justice

It has been argued that utilitarian theory of justice is attractive because it appeals to our intuition that moral rules should be tested against their consequences on human well-being. Utilitarianism requires that an action result in some identifiable *good.* With respect to the ethical dilemma faced by our humanitarian worker, it can therefore be argued that if the *action* of public denunciation results in the *consequence* of a greater number of lives saved due to the complete cessation of hostile activity directed towards the civilian population, then this *action* can be said to conform with the principle that it results in an identifiable improvement in human well-being. It is important to note, however, that this improvement in human well-being may not be realized until the long-term.

Another attractive requirement of utilitarianism theory is that it demands the pursuit of human well-being be done impartially for all members of a society. Each persons interests must be given equal weight. Applying this requirement against the practice of public denunciation it can be argued that civilian lives are being 'sacrificed' in the short-term in order to save civilian lives over the long-term. If one accepts the principle that each persons interests must be given equal weight, and that all people matter - and *matter equally*, then it would not be acceptable to 'sacrifice'even a few civilian lives in the short-term for potential gains in the long-term. For it has already been established that if relief operations are discontinued civilian lives will surely be jeopardized. In light of this, the *action* of maintaining silence and continuing relief operations which serve the civilian population in question, no matter how few, conforms with the principle that the pursuit of human well-being be done impartially.

Further on this principle of utilitarianism theory is the requirement that no single individual stands in a privileged position or has a greater claim to benefit from an act over any other. The morally right action, therefore, is the one which satisfies the preferences of the greater number of people. In other words, the 'winners' must outnumber the 'losers' as there is no argument why the needs of the lesser number should in any way take precedence over the needs of the greater number. Put simply, in utilitarian theory 'majority rules'.

If one accepts this principle of utilitarian theory then there is no argument for why the needs of the *fewer* civilians treated at the relief facility should take precedence over the greater number of civilians whose lives could be saved if efforts were directed into ending hostilities altogether, as opposed to maintaining the status quo. It can be argued, therefore, that the *action* of public denunciation conforms with this principle.

Proponents of *negative* utilitarianism argue that it is easier to achieve the minimization of suffering rather than the maximization of 'happiness'. In other words, it may be easier to agree upon what consequences one does not want over what consequences one does want. Taken in the context of the ethical dilemma it could be argued that it would be easy to agree that the continued wanton massacre of civilians is an undesirable consequence. However, the virtual abandonment of a civilian population to hostile forces could be considered an equally undesirable consequence.

Therefore, taken alone, the principle of the minimization of suffering does not appear to support either action unequivocally as the consequences of either action will invariably result in a significant degree of suffering for some portion of the civilian population.

However, the principle of the minimization of suffering taken with the utilitarian principle of seeking to satisfy preferences based on full information while rejecting preferences based on mistaken or irrational information changes the scenario somewhat. For instance, it could be argued that there are no guarantees that pressure from the international community would be successful in ending hostilities toward civilians. Therefore, the decision to publicly denounce human rights violations would be based on a false premise that it would result in some good. At the same time, one could argue that there is reasonably perfect or full information about what degree of suffering would be minimized if one were to continue relief operations despite continued human rights violations elsewhere.

Therefore, the *action* of maintaining silence appears to conform with the principle of satisfying the preference to minimize suffering based on full information and to reject those based on mistaken or partial information.

Proponents of rule-utilitarianism argue the morally right action is to be judged by the consequences of the rule which stipulates that everyone perform said action in like circumstances. However, it has been argued that to follow a rule when it has been shown to no longer be beneficial is a case of rule-worship and is therefore irrational.

This supports the argument that solutions to the ethical dilemma should be taken on a case-by-case basis as opposed to dogmatic adherence to 'Charters', founding principles or even 'International Conventions'. It may not be sufficient to consistently argue "We've always done it this way." In order to avoid cases of rule-worship, it may be necessary to review and revise past practices and to adopt a more flexible approach. Therefore, the practice of strict adherence to a code of conduct could be considered a case of rule-worship and would be considered irrational.

Proponents of act-utilitarianism demand the evaluation of the consequences of an action followed by an evaluation of the actions that lead to the consequences. Based on this double evaluation one must then recommend one set of action and consequences over another. However, it has been argued that it is unjust to commit to one set of actions and its consequences based solely on the merit of the evaluation because one may have *promised* to do another action altogether.

This principle speaks to the point that humanitarian organisations such as Médecin Sans Frontières (*Doctors* Without Borders) are mandated as *medical* relief organisations first and foremost which are primarily committed to provide medically based care to civilians in war zones (as their title suggests). Similarly, the International Committee of the Red Cross is primarily a humanitarian relief organization mandated to relieve suffering of civilian and combatant populations caught in war zones. Neither organisation professes to be a primarily human rights organisation. Though human rights activity may become an area of increasing focus and commitment it can be argued that it is unjust to jeopardize humanitarian relief activities in the name of human rights activity as they have in essence 'promised' to provide humanitarian relief by way of their *raison d'être*. Therefore, the *action* of maintaining silence which results in the consequence of continued humanitarian relief operations would seem to conform with this principle of act-utilitarianism.

It has been shown that utilitarian (consequentialist) theory allows for extreme situations. I point to the argument that the utilitarian wil: have something to say regarding the death of seven million and seven million and one people. In other words utilitarian theory will consider the otherwise *unthinkable*. Though taken as criticism of utilitarianism, this argument can be used to add more weight behind the utilitarian principle whereby majority rules, even a 'majority' of one.

Another critique of utilitarian theory questions whether or not social goods are intersubstitutable. It has been argued that things like *justice* should not be negotiable. This reinforces Rawls's argument that utilitarianism fails to do justice to the conviction that every individual possesses "an inviolability founded on justice or, as some say, on natural right which even the welfare of every one else cannot override". This argument seems to refute the utilitarian principle that majority rules. The very notion of an inviolable 'natural right' founded on justice suggests that some things are superordinate to all others, even individual human well-being. This argument undermines the very essence of utilitarian theory whereby "human well-being matters and matters equally".

According to Rawls, human well-being matters but is not subject to the 'tyranny of the masses' that utilitarian theory seems to call for. Instead Rawls calls for a 'tyranny of the least advantaged', however, for the purposes of this thesis the merits of utilitarian and social contract theory will not be discussed in depth. As previously stated, utilitarian theory is not a decision procedure but a standard of rightness against which one may measure the moral rightness of ones actions. In light of this a few elements of utilitarian (consequentialist) theory of justice have been employed to help support, or refute, the solutions to the ethical dilemma.

The Application of Rawls's Social Contract Theory of Justice

This thesis will now turn to Rawls's social contract theory of justice to help 'solve' the ethical dilemma. A 'game' will be constructed whereby the parties to the game will be acting behind a modified version of Rawls's original position, and veil of ignorance. The purpose of the game will be to choose, not principles of justice, as was Rawls's original intent, but a solution to the ethical dilemma. For the purposes of 'solving' the ethical dilemma, Rawls's *Liberty* and *Difference* principles, along with his

Liberty and *Justice* priority rules will be dispensed with. The game will retain Rawls's fundamental premise that inequalities be allowed only if they benefit the least advantaged. Similarly, the players in the game will know the conditions of the society that they are going to be living in. Again, it is not universal principles of justice that the parties to the game are deciding, but a solution to a specific situation, therefore Rawls's specifications need not apply in this instance.

The underlying premise of the game will be to ensure that the least advantaged participant comes out of the game in the best possible condition given the limitations of the ethical dilemma. This game will consider the least advantaged to be the civilian, specially the child civilian. The parties to the game may include any combination of: (i) a humanitarian field worker from the ICRC, and MSF; (ii) a representative of a government authority; (iii) a member of the media; (iv) a major donor to the ICRC; (v) a representative of a UN peacekeeping agency; (vi) an adult civilian; (vii) a child civilian.

Assume the parties to the game would vote the following ways:

(1) A humanitarian worker from MSF would advocate *public denunciation* in conformance with their ogranisational philosophy.

(2) A humanitarian worker from the ICRC would advocate *maintaining silence* in conformance with the Geneva Conventions' position on neutrality.

(3) A member of the government authority hostile to the civilian population would advocate *maintaining silence* in the hopes of carrying out its policy of ethnic cleansing out of the public eye.

(4) A member of the media would advocate *public denunciation* as the situation would make a good story and sell papers.

(5) A major donor to the ICRC would advocate *public denunciation* as they do not want to be seen supporting a repressive regime (shades of the holocaust legacy).

(6) A member of the UN agency would advocate *maintaining silence* and opt for quiet diplomacy as they do not have the troops or funding for yet another peace-keeping operation.

(7) The adult civilian would advocate *public denunciation* as they can flee the troubled area and survive until hostilities cease.

(8) The child civilian would advocate *maintaining silence* as they literally could not survive 24 hours without emergency medical facilities if need be.

Taken at face value the position of the parties to this particular game represent a tie therefore a simple solution to the dilemma which draws upon the utilitarian principle of 'majority rules' will be of no help to us. Therefore, another method for resolving the dilemma must be employed. Rawls advocates a maximin strategy whereby one chooses the distribution which maximizes ones position if one was in the least advantaged position of all the parties in the game. It can therefore be argued that if all the parties in the game thought they were going to be the civilian child they would advocate for *maintaining silence* as access to emergency medical relief would be a matter of life and death with little or no room for error or flexibility.[27]

In so saying, Rawls does allow for situations where one may have faithfully followed the 'rules' of the social contract, and chosen a maximin strategy which lead to principles that do not match one's *intuition* of what is just. In these instances Rawls suggests that one can alter the conditions of the contractual circumstances until one yields principles which match one's judgments "duly pruned and adjusted" (Rawls 1971:20). In other words he allows us to change the rules of the game until we are happy with the result. Rawls also asserts one must discard those judgments made "when we stand to gain one way or the other" (Rawls 1971:47-48).

I have chosen to interpret this as Rawls giving us room to alter either the position of the parties to the game, or alter the parties to the game altogether. For instance if an individual party is not to gain one way or the other, than the positions of the government authority and the member of the media should be discounted or eliminated from the game altogether. Similarly, if the member of the UN agency thought less of the needs of the UN agency and more about the needs of the least advantaged their position may change. It will be assumed the position of the members of the ICRC and MSF will remain unchanged. There is no reason why the position held by the donor would change as it is assumed they would want to maintain a good public image above all. This leaves us with the position of the adult and child civilian. It can be assumed the child civilian is

[27] For the effects of war on infant mortality rates *see* Kingsland, "The Public Health Effects of War",

in no position to change their preference. Sheer physical necessity and vulnerability will dictate the appropriate course of action in their case. Finally we come to the adult civilian. On the one hand the adult civilian may be highly motivated to bring hostilities to a halt against their friends, family, and neighbours. Given, the adult civilian is better equipped to bear the hardship that would result from the cessation of humanitarian relief activities. On the other hand, the adult civilian may feel differently if they were the parent to the child civilian in question. In this instance it is easy to see how the scales can be tipped towards *maintaining silence* in order to ensure reasonable access to emergency medical facilities in order to save the life of one's child.

It is interesting to note that both the approaches I have examined are weighted towards choosing to *maintain silence* in the face of massive human rights violations. I want to remind the reader that I am not advocating that this is the morally right thing to do. I have simply constructed this 'game' to help 'tease out' the moral implications of any decision made. The underlying premise of this particular dilemma was to protect the civilian population. If the underlying premise were instead to defend human rights, the results may be very different indeed. For instance, the parties to the game would need to include human rights activists who would undoubtedly argue for public denunciation. Whatever the underlying premise, whoever the parties to the game are, whatever the result, it is important to ensure that the people making the judgments "have the ability, the opportunity, and the desire to reach a correct decision (or at least, not the desire not to) (Rawls 1971:47-48).

Appendix (1998).

Conclusion

It has been argued that if genocide is allowed to go unchecked it may have a corrosive effect upon the global system as destructive behavior tends to "spill over" from one nation to another. For instance, the genocide perpetrated during the war in the former Yugoslavia from 1991-1995 triggered massive refugee flows. This plus the proliferation of weapons and violence in the Balkans raised security concerns that other European nations would be engulfed in the conflict. It is precisely this security concern which drove Germany to seek international intervention to put a stop to the war in the Balkans. Given the importance of Germany to NATO, grave threats to the security and prosperity of Germany can be considered an equally grave threat to the security of the NATO alliance (Kaiser 1992).

Furthermore, destructive behavior such as unchecked genocide may undermine international cooperation required for the successful functioning of organisations such as the G-8, the World Trade Organisation, and the Non-Proliferation Treaty. A breakdown of international cooperation may well result in diplomatic paralysis, trade conflicts, economic retrenchment, and a renewed arms race with its concomitant effect on regional stability (Campbell 1997:5).

The momentum for violent conflict appears to be increasing. As David Scheffer (1996:34) observed "genocide seems to have become, in the post-Cold War period, a new "growth industry"(Scheffer 1996:34). For example, in 1995 the United Nations identified 28 complex emergencies affecting some 60 million people. War, political instability and the collapse of the state are the defining features of these humanitarian crises. The implications on development assistance are significant. For instance, the amount of Official Development Assistance (ODA) allocated to humanitarian relief activities by the Organisation for Economic Cooperation and Development (OECD) countries increased from less than $500 million in 1980 to more than $3500 million in 1993. This shift in official development assistance reflects not only the number of complex emergencies but also a change in the political priorities of the donor countries. This speaks to the point wherein the international community needs to further consider how much more the existing political and humanitarian aid structures can be expected to mediate and respond to increasing political and social instability.[28]

In response to this I have attempted to show that initiatives such as International Criminal Tribunals of the type for the war in the former Yugoslavia, facilitate the accurate recording and publicizing of massive human rights violations. An accurate public record of human rights violations is significant as it can have a cathartic and thereby healing effect on the surviving victims of such abuses which, hopefully, can only be of benefit to a society in the process of rebuilding itself. Furthermore, International Criminal Tribunals with their intrinsic respect for the rule of law may help in the establishment of democratic institutions. International Criminal Tribunals may help to restore a sense of justice to the surviving victims of human rights violations which

[28] "Aid Under Fire", In *Relief and development in an unstable world,* Issues in focus series: no. 1, Geneva:

may diffuse the notion of collective guilt which history has shown fosters intergenerational desires for revenge. Finally, newly democratic states such as Malawi, Mali, Niger and Argentina, are relying upon the efficacy of International Criminal Courts (ICC) to act as an effective deterrent against military coups that can threaten to restore former repressive orders.[29]

In July 1998, delegates from 120 countries approved what is considered to be a historic treaty which has created the world's first permanent war-crimes tribunal. The International Criminal Court (ICC) will try cases of genocide, war crimes, crimes against humanity, crimes of aggression, and crimes of sexual violence, all of which were lobbied for by a coalition of 800 citizens groups from around the world.[30] I believe this demonstrates a genuine desire by the international community to end impunity for massive human rights violations. Furthermore, I believe accountability for how a nation treats its civilian population will become an expected precondition for membership in that community.

Publicizing human rights violations on an individual basis as per humanitarian relief workers operating on the front lines of a conflict, remains a complex matter with no easy solution. This thesis has shown that two very different organisations such as the ICRC and MSF, both with divergent views on the issue, have each achieved success with their individual approaches to the dilemma. Similarly, the application of the

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The United Nations Department of Humanitarian Affairs (DHA) (August 1995): 7.

[29] Richard Dicker of the New York based Human Rights Watch In "Reviving Nuremberg Prosecute persecutors or give them amnesty?", *Globe and Mail,* (11 July, 1998).

two moral theories have demonstrated that either course of action may be considered acceptable and appropriate depending on which aspect of the theories one chooses to apply. I maintain that neither approach can be considered 'absolutely right' or 'absolutely wrong' as some would have you believe. I contend that the best approach is a case-by case analysis of each situation as they occur while acting in accordance with the fundamental principle of humanitarian aid which calls for the immediate relief of suffering based on objective human need. Whatever choices the individual relief worker is compelled to make in the face of massive human rights violations, if they seek to satisfy this fundamental principle then chances are they can be secure in the knowledge that they have made the right choice, at the right time, for the right reasons.

[30] "World war-crimes court approved", *Globe and Mail*, (18 July, 1998).

APPENDIX

The Origins of Public Health Activism and the Humanitarian Ideal

It has been shown that the social activism, rooted in the origins of the public health movement of the 18th century, helped to pave the way for the rise of the humanitarian ideal. The connection between social activism and the humanitarian ideal is an important one because, for the first time in history, the political will was united with the ability to deliver humanitarian aid on a large scale. The review of the history of the rise of the science of public health, though interesting for its own sake, is principally to demonstrate the significance of the early public health movement in bringing about social change coupled with a better standard of living which, for the first time, reached beyond the Royal houses of Europe to citizens around the world.

C.E.A. Winslow (1923:12) asserts the roots of the modern public health campaign 'struck down into the dawning social consciousness of the 1800s'. The scientific discoveries of the 18th century made it possible for the practical amelioration of disease whilst the humanitarian ideal elicited extraordinary efforts towards the accomplishment of such amelioration in the interest of humans previously existing in misery (Winslow 1923:12) The literature expands on the first phase of public health concern and practice (1840-1890), which involved the flourishing of empirical sanitation and the appreciation that diseases are caused by a wide range of social and environment conditions.[1]

When considering the public health campaign in terms of social activism, the development of the humanitarian ideal is closely linked. For instance, the first phase of the humanitarian movement which influenced public health was seen in the prison reform efforts of John Howard in the England of 1773.[2] These reforms are significant as they set in motion the introduction into the minds of the public the fundamental concepts of sanitation as it relates to public health.

The next great movement which propelled social reform was the first British Factory Act introduced by Sir Robert Peel in 1802. Though seen as mild by today's standards, this initiative is significant as it established for the first time the far-reaching principle of the right and duty of the state to interfere between employer and employee. (Winslow 1923:18) This principle is similar to the concept that humanitarian considerations may supercede notions of state sovereignty. This issue remains a point of debate and contention to this day. Further discussion on the right and/or obligation to intervene on humanitarian grounds, with its limits and conditions, will be covered in the thesis.

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[1] The 18th century is spoken of as the Scientific Renaissance with the works of Cavendish and Priestley in chemistry, Franklin,Galvani and Volta in physics, Linnaeus, Bonnet, and Spallanzani in biology. Advances in public health included the compulsory use of lemon juice as a preventive measure from scurvy in the British Navy, and inoculation with the first true smallpox vaccine in 1799-1801 at the London Small-pox Hospital , with complete protection. See Sir John Simon "History and Practice of Vaccination", *Public health reports, vol. I*, London (1887) In Winslow (1923):15.

The third and most significant public health reform movement was initiated by Sir Edwin Chadwick and Sir John Simon. For the first time in British history physicians were employed to study the social conditions which might contribute to ill-health. The forceful reports of 1838 and 1842 disclosed the burden of sickness and poverty that was the result of unsanitary conditions. These reports were landmark as they led to the movement for clean water supply and sewage disposal throughout the world (Winslow 1923:25). [3]

This author asserts it is to our disadvantage that public health has evolved away from the concern with the underlying societal conditions of ill-health to focus solely on information, education, and communication (Mann 1995). Perhaps it is the humanitarian health care worker in the field engaging in human rights activity who will be well placed to revive the tradition of public health activism for the benefit of humanity.

Health and National Security

The literature explores the notion that the health of a population is essential for the domestic stability of a nation (Alleyne 1996). The attempt here is to

[2] With his influence a bill was passed in 1774 that abolished the fee system of paying gaolers; prisons were whitewashed yearly, ventilated, and rooms set aside for the sick. Hot and cold baths were provided, clothes were lent to prisoners, and surgeons and apothecaries were appointed (Winslow 1923:17).
[3] The public health movement began in North America with the 1850 Report of the Massachusetts Sanitary Commission that drew its inspiration directly from Chadwick and Simon (Winslow 1923:25).

establish a connection between public health and civil obedience by reviewing the history of how disease has been a catalyst for violence and civil unrest. In zones of conflict, health is only one component of the many institutions, political and educational for instance, that break down. Therefore, when competing for limited humanitarian resources it is important to establish why one institution should take priority over another. It therefore becomes important to establish the connection between public health, or lack of it, and the civil unrest that can be provoked out of fear, want, and ignorance.[4]

The study of cholera is valuable because there are lessons to be learnt from the response to this disease which marked the impetus to public health reform throughout the world due to its unpredictability and its savagery (Morris 1976). Cholera, in 1832 England, tested every aspect of medical, theological, technological and administrative skills and found them wanting. This can be compared to the forced migrations and internal conflicts which are testing the same of today's humanitarian organizations. To emphasise this point I draw upon the words of Sir George Alleyne (1996:158) of the Pan American Health Organization who asserts:

> Today, security is no longer defined in terms of ideologies or boundaries. Environmental deterioration, massive uncontrolled migrations, international crime, drug trafficking, AIDS, overpopulation, and underdevelopment are the names of today's threats. Our security requires a deeper awareness of them.

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[4] The approach and arrival of the cholera epidemics of 1832 created a crises atmosphere in England unlike that produced by any other threat apart from foreign invasion. Cholera killed 50 million people in 14 years. The symptoms were a source of terror. It demanded and got attention from everyone though other diseases were in fact more lethal. This is its value for the historian (Morris 1976:14).

"To see a number of our fellow creatures, in a good state of health, in full possession of their wonted strength, and in the midst of their years, suddenly seized with the most violent spasms, and in a few

Alleyne (1996) draws upon examples of history to show how the lack of public health can disrupt the political balance of power and, in the extreme, can lead to the fall of nations.[5] McNeill (1976) goes on to show how the power of disease can discredit traditional leadership and authority. For instance, McNeill (1976) credits this power of disease with paving the way for the reception of European medicine in Moslem society.[6] Furthermore, the hold disease held over public health put further pressure on the debate about rival schools of thought over the cause and control of disease. This pressure was increased by demonstrations of the power of disease to blunt military force[7] and was only relieved by the triumph of 'germ theory'.

There is support for the premise put forward by Alleyne (1996) that national security is among other things, dependent on alliances, and that alliances are driven by mutual interest areas of which health is a powerful one.[8] One relatively recent example of how mutual interest affected strategic policy, which would ultimately have a profound effect on national security and public health, can be found in the domestic and

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hours cast into the tomb, is calculated to shake the firmest nerves, and to inspire dread in the stoutest heart." (Fraser's Magazine, vol. 4, (1831) In Morris 1976:16).

[5] "History showed disease as the fifth column of the Spanish conquest. It was germs and not guns which made Tenochtitlan fall before Cortes: in spite of his technological advantage he was on the verge of defeat until a massive epidemic probably of smallpox, decimated the Aztecs, and he entered a capitol city reeking with the stench of death his musketeers and bowmen had not caused." (Alleyne 1996:161)

[6] Moslems had long been resigned to bouts of plague and found European quarantine efforts amusing. The unfamiliar and sudden nature of death by cholera amongst the population of Egypt caused alarm where neither Moslem medical nor religious traditions were able to cope (McNeill 1976:264).

[7] Germ theory was put on the defensive when French troops were sent to Santo Domingo in 1802. Within a few months yellow fever utterly destroyed a force of 33,000 veterans and the setback to Napoleon is credited with his willingness to sell the Louisiana Territory to the U.S. in 1803 (McNeill 1976:266).

[8] Throughout July and August 1892, the civil and medical authorities in Hamburg Germany were well aware a cholera epidemic was threatening their city. Most doctors in Hamburg would not bring themselves to take the very grave responsibility of pronouncing the diagnosis. Pressures on medical men to avoid such a diagnosis with all the damage to trade implied by quarantine measures were strong. This resulted in the

international pressure for biological and chemical weapons disarmament.[9] This resulted in the Nixon administration 'unconditionally' renouncing the development, production and stockpiling of biological and chemical weapons in the 1972 Convention on the Prohibition of the Development, Prevention, and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction.[10]

The Public Health Effects of War

The literature reviewed in this section concerns public health in zones of conflict and deals with the direct and indirect effects wars have on civilians and combatants alike. The literature supports the premise that whilst combatant mortality and morbidity has declined steadily, the social disruptions caused by war are raising mortality and morbidity rates amongst civilian populations to unprecedented levels. This review presents empirical evidence that conflict is profoundly destructive of civilian health. This becomes an important factor when one considers the previous literature which shows that when public health declines the probability of peaceful reconstruction is diminished significantly.

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policy of not diagnosing isolated cases of cholera and waiting until an epidemic had broken out before confirming the presence of the disease (Evans 1987:285).

[9] As a result of the indiscriminate use of herbicides in Vietnam and accidents at U.S. military test sites, military planners realized biological weapons have intrinsic limitations. With the advent of recombinant DNA and hybrid strain construction prophylactic drug defense is rendered virtually useless. The possibility of mutation to more virulent strains that evade immunity make biological weapons no substitution for conventional weapons (Gould and Connell 1997:105).

[10] For a report on the public health effects of biological weapons *see* Robert Gould and Nancy D. Connell "The Public Health Effects of Biological Weapons", In *War and Public Health*, (Oxford: Oxford

The first thing of note is that whilst there are numerous studies on casualty data of combatants, there is little research or public policy debate oriented toward reducing the impact of war on civilian populations (Garfield and Neuget 1997). This gap in the literature is one of several reasons why this represents an appropriate topic for further study. One needs to be cautioned that the data that is made available for public consumption is generated by parties to the hostilities, therefore, casualty reports of civilians may be underestimated.[11]

Whilst improvements in curative and preventive health have reduced the potential impact of modern non-nuclear warfare on some combatants,[12] social disruptions of conflicts, such as embargoes,[13] have contributed to the increase in the proportion of civilian to military mortality and morbidity rates. For instance, the percentage of civilian deaths in the Korean War was 34%. In the Vietnam war it climbed to 48% and in Croatia it reached as high as 64% (Garfield and Neuget 1997:30). The

University Press) 1997, and "Health aspects of chemical and biological weapons", *Report of a WHO group of consultants* (1970).

[11] Most research on the subject of the human consequences of war has been speculative and focused recently on the potential effects of nuclear war (Dyer 1985). The first experimental and statistical analyses of the management of mass casualties can be found in early 19th century nursing studies, *see* Florence Nightingale. *Selected Writings, 1829-1910*, New York: Macmillan, 1954. For quasi-experimental studies on the direct and indirect effects of war on combatants, prisoners and civilians since World War II *see* Bellamy (1984,1985); Dudley, Knight, McNeur, and Rosengarten (1968); Hill (1942); Richardson (1960).

[12] For studies on the effects on combatant mortality of new techniques for rehabilitation, circulatory volume replacement, rapid evacuation and epidemic prevention, resulting from war related research *see* Dudley, Knight, McNeur and Rosengarten (1968); Pfeffermann, Rozin, Durst, and Marin (1976); Simon and Hyman (1988).

[13] Iraqi embargo related food shortages, destruction of water and infrastructure resulted in a tripling of the under five child mortality rate with conservative estimates of 200,000 deaths. The lack of electricity rendered surgical operating theatres and laboratories inoperable. Heat sensitive vaccines were destroyed. Typhoid and cholera became epidemic. The number of adult post-war deaths in the first year approached the 100,000 killed during the war (Lee 1991). The Centers for Disease Control in Atlanta extrapolated from a population census in one transit camp a minimum of 6,700 deaths on the Iraqi-Turkish border from 29 March to 24 May. This number is up from an expected mortality of 500 under 'usual' conditions (Lee 1991:303).

United Nations Children's Fund (UNICEF) estimates that both indirect and direct civilian deaths resulting from wars in the 1990s constituted 90% of all deaths in war.

The disruption of epidemiological surveillance via breeding site reduction, case finding, and mass drug administration campaigns that cannot be carried out under unstable conditions resulted in 2,500 cases of malaria in excess of expected levels in the war zones of Nicaragua (Kissinger 1984:127). This underscores the notion that effective disease (malaria) control is strategically important for economic development and social stability, as was reported to Congress by the Kissinger Commission in 1984(Kissinger 1984:76).

So far the focus has been on studies that support the notion that war is increasingly destructive to civilian health. It can be argured that, if left unchecked, such a downward spiral can at best, impede effective peacebuilding initiatives. At worst, it may further undermine domestic security. The problem, as this author sees it, is becoming increasingly unmanageable. For example, the American Public Health Association (APHA) cites more than 18 million refugees worldwide which are causing unworkable strains on today's humanitarian agencies. One insoluble dilemma is that resources are few whilst instabilities persist. Unfortunately, the most practical solution of the prevention of war altogether via the introduction of responsible government, civil society, rational healthcare and internal economic prosperity seems highly improbable in the immediate future. Therefore, conventional wisdom asserts that what remains is to improve the lot of the civilian in conflict by changing the way wars are conducted (Allen, Cherniak and Andreopoulos 1996:750).

The Origins of International Humanitarian Law - The Rules of 'Civilized' Warfare

International humanitarian law is often perceived as a part of human rights law. This trend can be traced back to the 1968 United Nations Human Rights Conference held in Tehran which marked the beginning of the growing use, by the United Nations, of humanitarian law when examining human rights situations. An awareness of the relevance of humanitarian law to protect civilians in armed conflicts, coupled with the increasing use of human rights law in international affairs means both areas of law are being increasingly used together in the work of international and non-governmental organizations (Doswald-Beck and Vité 1993).

Before exploring the debate over how best to protect the civilian from the worst ravages of war, it is important to understand how the concept of civilian immunity from hostilities came to pass. Placing this concept in its proper historical setting helps to illustrate that something that was first conceived of over 250 years ago, and has evolved and endured until the 21st century may well be worth protecting, preserving, and reinforcing.

Hartigan (1982) points to the 18th and 19th centuries as the high-water mark of civilian immunity from the hardships of internal and external conflicts that have surrounded them throughout the ages. With the abandonment of the Crusade mentality, war in the 18th century became limited, not in its incidence, but in its scope. Newly formed guarantees specifically pertaining to civilians emerged for the first time in history. For instance, the recognition of neutral shipping rights, the honoring of passports, the immunity of military hospitals, and prisoner exchanges are all evidence of the growing recognition that armed conflicts should affect only those who are armed and in conflict (Hartigan 1982).

Emmerich von Vattel (1758), considered the most important author from the standpoint of civilian immunity and its first conception, speaks as a contemporary when he refers to women, children, the elderly, and the sick, though counted among the enemy:

> "...the belligerent has no right to maltreat or otherwise offer violence to them, much less put them to death. There is today no Nation in any degree civilized which does not observe this rule of justice and humanity."[14]

The next attempt to limit wars of attrition against civilian populations is found in the American Civil War where the combination of conscription, ideology, and weapons technology conjoined to kill more Americans than in all of America's foreign wars combined (Hartigan 1982). In light of this, the notion of civilian immunity from hostilities was to emerge once again as an idea of some importance. So much so that the Union Army commissioned a Columbia law professor, Francis Lieber, to draw up a manual designed to make explicit, once and for all, the 'rules of warfare'.

The significance of the so-called 'Lieber Code'[15] was in its far-reaching influence whereby it formed the basis of the Hague Conventions of 1899 and 1907, which marked the next step in affording civilian immune status in both theory and practice. The Hague Convention of 1899 marked the first time in history where an international congress met to codify and ratify the 'rules of civilized warfare' (Hartigan 1982). The fundamental concepts of the laws of war have remained essentially unchanged and are still based on the balance between military necessity and humanity. The major characteristic of humanitarian law, which differs from human rights law, is that it makes allowances for actions necessary for military purposes and in so doing may not seem very 'humanitarian' (Doswald-Beck and Vité 1993).[16] The way humanitarian law incorporates military necessity in its provisions is an important point to note when comparing the protection afforded by this branch of law with human rights law.

The balance between military necessity and humanity is achieved in four ways. First, actions that do not have any military necessity tend to undermine the

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[14] Vattel *Le droit des gens* (1758) In Hartigan (1982).
[15] "The Lieber Code" is properly called *General Orders, Number 100, Instructions for the Government of Armies of the United States in the Field, 1863.*
[16] Article 15 of "The Lieber Code" describes military necessity as:

"Military necessity admits of all direct destruction of life and limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy;...Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."

The U.S. Air Force Law of War Manual describes military necessity as:

"Measures of regulated force not forbidden by international law, which are indispensable for securing the prompt submission of the enemy, with the least possible expenditure of economic and human resources."

professional discipline of the armed forces. Secondly, though some acts may have a certain military value, it is an accepted notion that humanitarian considerations can override these. Recalling, it is on this very principle that the Chemical and Biological Weapons Convention was conceived. Thirdly, given that the rules of proportionality in attacks accepts that some civilians will suffer incidental damage, such attacks must not take place if the incidental damage would be considered excessive in relation to the value of the target (Doswald-Beck and Vité 1993). Finally, some provisions allow that military needs override the normal humanitarian considerations. For instance, medical personnel may be attacked if they engage in hostile military behavior (Article 15 of the First Geneva Convention of 1949).

International Humanitarian Law and Human Rights Law : Their Mutual Influence and Impact

The primary difference between international humanitarian law (IHL) and human rights law is that the former indicates how a party to a conflict may behave toward people at its mercy. Whereas human rights law refers to the rights of people to a certain level of treatment (Doswald-Beck and Vité 1993). Difficulties arise with the existence of both universal and regional treaties that make a distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other. It is important to note that civil and political rights require instant respect, whilst economic, social and cultural rights require the State to take only the appropriate measures in order to achieve a progressive realization of these rights (Doswald-Beck and Vité 1993).

International humanitarian law was clearly founded on the premise that civilized behavior is expected from professional armies. Human rights law, however, has less clearly defined origins which can lead to some confusion. For instance, a number of theories put forward on the origins of human rights law include: the law of God which binds all humans; the law of nature which, by its permanence, elicits respect. The most commonly cited classical natural lawyer is John Locke, whose premise is that the state of nature is one of peace, goodwill, mutual assistance and preservation. Locke asserts the protection of individual rights assures the protection of the common good because people are obligated to respect the same of others. Locke saw the role of the State as forming a social contract whereby the people confer power on the State on the understanding that the government will work to protect and preserve their natural rights. In contrast, Positivist human rights theorists[17] do not feel bound by any overriding natural law but see protection of human rights as based on reason which concludes that cooperation and mutual respect are the most advantageous behavior for society (Doswald-Beck and Vité 1993).

A conceptual question of importance arises when one considers whether or not human rights law[18] is applicable at all times, including during armed conflict. On the one hand, the simple answer would be a resounding yes given the philosophical basis that by virtue of the fact that people are human they will therefore possess human rights at all

[17] *See* J. Bentham and J. Austin In ed. T. Meron, *Human Rights in International Law*, volume I, (London: Oxford University Press, 1984):79.

times. On the other hand, most human rights treaties make allowances for parties to derogate from them in times of war. Despite this, there does remain some rights that are non-derogable at any time. These rights are termed the 'hard-core' rights to life, the prohibition of torture, and other inhumane treatment. Human rights lawyers are increasingly turning to humanitarian law for the reason that compliance with it results in the protection of these most essential human rights. The major legal difference between the two is that humanitarian law is formulated as a series of duties, not as a series of rights. The advantage of this difference, from a legal theory point of view, is that humanitarian law is not subject to as much debate as economic and social rights are (Doswald-Beck and Vité 1993). The most important similarity between human rights law and international humanitarian law is that they are both based on the premise that protection must be accorded without any discrimination.[19]

In international humanitarian law, the most important contribution in the protection of civilians from the hostilities of war is the Additional Protocol I of 1977 which protects life in a way that goes beyond the traditional civil right to life.[20] Humanitarian law contains an absolute prohibition of the 'hard-core' right not to be

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[18] The first major international legal instrument defining human rights is the 1948 *Universal Declaration of Human Rights.*

[19] This is a fundamental rule of human rights specified in the U.N. Charter and in all human rights treaties. Similarly, Article 27 of the Fourth Geneva Convention of 1949 declares:

"...all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."

[20] Additional Protocol I of 1977:
prohibits the starvation of civilians as a means of warfare (Art. 54 of Prot. I); it provides for the declaration of special zones of peace that may not be attacked (Art. 59 & 60 of Prot. I); it provides for the collection of the wounded to be given the medical care they require (Art. 14 & 15 of the Fourth Geneva Convention); it provides for physical conditions necessary to sustain life and to accept outside relief shipments as necessary

tortured or subject to cruel, inhumane or degrading punishment. It states the prohibition explicitly and goes further in practice to give detailed descriptions of how to carry out one's duty to treat victims humanely (Doswald-Beck and Vité 1993).

The point in which international humanitarian law and human rights law began to converge came in 1968 during the International Conference on Human Rights in Tehran, where the United Nations, for the first time, considered the application of human rights in armed conflict. The adoption the two Additional Protocols in 1977 is a direct reflection of this. We can see this influence in the wording of Protocol I, Article 75, entitled "Fundamental guarantees" which was directly inspired by human rights instruments which articulate the principles of non-discrimination, physical and mental well-being of the individual, and the prohibition of arbitrary detention (Doswald-Beck and Vité 1993). Conversely, the 1990 Islamic Declaration of Human Rights derives its inspiration directly from humanitarian law in its protection of the aged, women, children, the wounded, the sick, and prisoners. Further evidence of the link between human rights and humanitarian law can also be seen in the efforts to monitor and enforce international law. An example of this can be found in the United Nations Security Council citing humanitarian law in support of its 1993 Resolution 808 whereby the Security Council established an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the

(Art. 69 of Prot. I); it provides restrictions on the imposition of the death penalty (Art. 68 & 75 of the Fourth Geneva Convention).

former Yugoslavia since 1991." [21] Further discussion of the tribunal proceedings in the former Yugoslavia will follow in chapter two.

There is now consensus within the international community that fundamental human rights of all persons are to be respected and protected in times of peace and war. In support of this I point to three fundamental rules of international humanitarian law which embody the customary principles of human rights protection. They are: (i) the right of the parties to a conflict to adopt the means of injuring the enemy are not unlimited; (ii) a distinction must be made between military and civilian populations whereby the latter is spared as much as possible; (iii) it is prohibited to launch attacks against civilian populations.[22]

The distinction between human rights and international humanitarian law is becoming increasingly blurred. Such was the intention behind the 1990 Declaration of Minimum Humanitarian Standards which proclaims principles "which are applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances." [23]

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[21] See also Resolution 780 (1992) establishing a commission of Experts to inquire into breaches of humanitarian law committed in the territory of the former Yugoslavia (Interim Report DOC. S/25274).
[22] The rules of *customary law* include Article 3 common to all 1949 Geneva Conventions; Article 75 of the 1977 Add. Prot. I; the 1948 *Universal Declaration of Human Rights.*
The terms of *positive law* include the 1966 *International Covenant on Civil and Political Rights*; the 1966 *Covenant on Economic, Social and Cultural Rights*; and the 1949 Geneva Conventions.
[23] For the full *Declaration of Minimum Standards* see the *International Review of the Red Cross*, no. 282, (May-June 1991): 330-336.

The advantages of using international humanitarian law to enforce human rights are: (i) IHL treaties are all universal and do not vary from one continent to another; (ii) IHL does not involve theoretical debates as does human rights law;[24] (iii) the most politically sensitive aspect of human rights law, that of political rights and modes of government, are absent form international humanitarian law (Doswald-Beck and Vité 1993). Therefore, there is support for the notion that the application of international humanitarian law is an appropriate strategy to employ when arguing against human rights violations.

Principles of Impartiality, Neutrality and the International Committee of the Red Cross

Much of the literature on this subject deals with the rights and duties of members of recognized medical services providing assistance to combatants in international conflicts (MacAlister-Smith 1988; Bothe 1988). For instance, in 1993 International Committee of the Red Cross (ICRC) delegates visited 143,610 detainees at 2,367 detention sites in forty-seven countries. The ICRC, operating under the provisions of Articles 10 and 11 of the 1949 Fourth Geneva Convention, [25] is able to accomplish

[24] There is some debate over 'first' - civil and political; 'second' - economic, social and cultural; and 'third'- peace and development - generation human rights.

[25] Article 10 of the Fourth Convention stipulates:

"The provisions of the present Convention constitute no obstacle to the humanitarian activities which the ICRC or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief."

all of this primarily because they operate in an environment of strict neutrality[26]. Their involvement during a conflict is entirely dependent on the invitation of the High Contracting Parties. This dependency limits the activities of the Red Cross to appeals to reason and matters of ethics in instances where conventions of the Treaties are being violated. This dependency also commands a procedural etiquette whereby the ICRC deals with issues of human rights abuses entirely in private with the offending party. Infractions are not to be made public by ICRC personnel until hostilities have ceased (Allen, Cherniak and Andreopoulos 1996:759).[27]

The ICRC, by charter, cannot publicly document non-compliance with the Geneva Conventions or Additional Protocols. It has been argued that the ICRC's mandate to not respond to Treaty violations may involve the potential for collusion with the offending party (Allen *et al,* 1996:759).[28] Whether or not the ICRC's mandate to maintain neutrality and impartiality remains an effective instrument in safeguarding civilians from the worst abuses of war will be examined in chapter two.

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[26] "Medical neutrality" is a principle enshrined in medical ethics and international humanitarian and human rights law. It is a normative construct which provides standards for health professionals with respect to their rights and duties in their efforts to limit injury and death to civilians and combatants during times of war. Violations of medical neutrality constitute a "grave breach" of international humanitarian law under Article 54 and 70(2) of the 1977 Additional Protocol I. (*War Crimes in the Balkans,* Physicians for Human Rights Report, 1996:3).

[27] In 1965 the ICRC included the principle of neutrality as one of the Seven Fundamental Principles of the Red Cross Movement which stipulates:

"In order to continue to enjoy the confidence of all, the movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature."

[28] The ICRC maintains it's policy of neutral witness despite the controversy over lending credibility to Nazi Germany by its favourable review of the World War II 'workcamps' (Allen *et al* 1996:760).

In contrast, there is a notable lack of discussion regarding foreign non-governmental organizations (NGOs) providing assistance to civilians caught in a localized internal conflict. There appears to be a gap in both theory and practice regarding the unqualified rights and duties of a specific nature. Coupled with the weak legal situation, it is the non-international conflicts which become the most problematic from the humanitarian point of view.

On one side of the debate we find the International Court of Justice arguing for the delivery of humanitarian aid despite a nations refusal to grant safe passage whereby: "elementary considerations of humanity limit measures the state may take in order to protect its sovereignty."[29]

This argument opens up the debate of whether or not humanitarian considerations take precedence over state sovereignty. Bothe (1988) reminds us that if a state violates the border of another state, for whatever 'honorable' reason, will constitute a use of force. Bothe (1988) argues there should be no distinction between uses of force for 'good' or 'bad' purposes. He further claims this sets a precedent for returning to the old days of using humanitarian intervention as a pretext for intervening in the internal affairs of another nation. The argument for and against uses of armed force to deliver humanitarian aid will be covered in chapter two whereby the nature of the conflict, international or non; the nature of the agency, duly authorized or not; the nature of the

[29] *Corfu Channel Case*, International Court of Justice Report, 1949.

victims, combatant or civilian; will all come into play to dictate what actions will be taken and by whom.

Health Care Personnel as Human Rights Activists

Policies in the name of public health have been known to provide sufficient reason to limit or restrict human rights. The special status of public health policy over human rights considerations derives directly from the history of traditional communicable disease control (Mann 1995). The relationship between human rights and public health recognizes that human rights violations have profound health impacts, i.e., victims of torture, violations of civilian neutrality in conflicts (Mann 1995). If one accepts the notion that human rights and dignity are a precondition and a necessary facilitating factor for the promotion and protection of health, it can be argued, therefore, that societal disregard for human rights can sustain and amplify vulnerability to preventable disease, disability and premature death (Mann 1995). Humanitarian relief workrs can be considered well placed to play a vital role in combating human rights violations in their field of operation.

Mann (1995) points out that health care professionals are used to operating within highly specific boundaries of their standards of practice and will therefore find combating human rights abuses a challenge. Despite these limitations, medically based organizations like Medicins Sans Frontieres (MSF) have formed to provide medical relief and human rights action premised on "le droit d'ingerence" - the right to interfere - which over time has evolved into "le devoir d'ingerence" - the duty to interfere (Fox 1995). The notion of justified and, beyond that, mandatory interference is anchored in the belief that there is an "ardent obligation to act".[30]

The spirit of MSF is to stand above the constraints and compromises of 'classical humanitarian aid' dispensed by agencies such as the ICRC. MSF's fundamental principle of action differs from the ICRC's in their resolve to bear public witness to violations of human rights and dignity as they encounter them in the field. MSF continue to openly challenge the so-called 'sacred' principle of sovereignty of the State by emphasizing a global vision governed by the principles of the 1948 Universal Declaration of Human Rights.

Over the last few decades more and more health professionals have followed MSF's lead to organize themselves to conduct systematic investigations and documentation of human rights violations during conflicts. The aim has been to publicize their findings and help to mobilize national and international medical communities to help them in their efforts to hold the perpetrators accountable (Geiger and Cook-Deegan, 1993; Swiss and Giller 1993).[31]

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[30] One is reminded of Jenks' concept of international law and interdependency which led him to argue the will of the world community is the basis of obligation. If one accepts this premise, it can be argued that this is one place where theory meets practice in concrete and applicable terms. *See* C. Wilfred Jenks *Law, Freedom and Welfare,* New York: Oceana Publications (1963): 403.

[31] For documentation of the work physicians have conducted in the field regarding human rights activities see: *New Scientist, vol. 138, (*1993); *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution* 780, DOC S/25274, (1992); Sandler, Epstein, Cook-Deegan and Shukri (1991); Leaning, Shapiro and Simon (1988).

Finally, health care personnel constitute an external point of reference which introduces a dimension other than that of force and violence to a population caught in a zone of conflict. Coupled with their efforts to denounce human rights violations, a collective awareness can be generated in such a population, which may help to assert the fundamental humanitarian values which often become obscured in times of war. It is believed the reassertion of humanitarian values can help to resolve situations that threaten the health of a population and therefore reverse the trend of poverty, disease and premature death (Russbach 1991:4).

Conclusion

In order to safeguard the health of the civilian population in an armed conflict, one of the first steps is to identify the main problems and constraints that can impede relief assistance in such situations. In wartime, when health services are needed to cope with the increasing influx of casualties, they are paradoxically, often on the point of collapse. In war zones, the social and economic balance is severely disrupted and priorities and values systems are sorely tested. Civilians, often already existing in precarious circumstances, are at even greater risk of losing what little resources they have left in order to survive.

The reader is reminded the thoroughness of the documentation is almost always subject to concerns about the representativeness and safety of those interviewed and examined. These reports should be taken as "snapshots" in time, partial, rather than complete accounts (Geiger, Cook-Deegan 1993).

Medical services, partially or totally destroyed, are soon overwhelmed whereby even the most motivated health care worker may become profoundly disheartened. The worst case scenario involves situations where conditions become too dangerous to function. Curative services and endemic disease control are abandoned altogether leaving the health of the civilian population vulnerable to an extreme degree (Russbach 1991:2).

It is in this environment that humanitarian organizations are called upon to work. The incalculable impact of humanitarian relief can be said to reach well beyond the sphere of health and may constitute the very first step towards a country's economic, social and cultural recovery. Agreement to lift a blockade, or guarantee due respect for hospitals and medical personnel can go far to restore hope, confidence and badly needed psychological support for civilians caught in zones of conflict. [32]

[32] Dr. Remi Russbach " Health protection in armed conflicts", *The International Review of the Red Cross*, no. 284 (1 September 1991): 460-468.

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IMAGE EVALUATION TEST TARGET (QA-3)

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