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Recommended Citation

Gidon A. G. Gottlieb, "Committee on International Medical Law Report," 1969-1970 Proceedings of the American Branch of the International Law Association 58 (1969).

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COMMITTEE ON INTERNATIONAL MEDICAL LAW

Report of Professor GIDON GOTTLIEB, *Chairman*

I

International Humanitarian Law

Studies of the application of the Geneva Red Cross Conventions for the Protection of War Victims by the International Medical Law Committee are part of an international effort to develop humanitarian law. The World Assembly on Human Rights which met in Montreal in the spring of 1968, the International Conference on Human Rights which met in Teheran in the same year and the International Conference of the Red Cross at Istanbul in 1969 devoted considerable attention to the protection of civilians in armed conflicts. At the United Nations, Resolutions 2435 (XXIII) and 2597 (XXIV) were adopted on human rights in armed conflicts and a significant report of this subject was prepared by the Secretary-General (U N General Assembly, Respect for Human Rights in Armed Conflicts, A/7720). At the 24th General Assembly, the United Nations also took action on bacteriological and chemical warfare (Resolution 2603 (XXIV)). It will be recalled, that the General Assembly had already declared at its 16th Session that the use of nuclear weapons constitutes a violation of the United Nations Charter and of international law.

In a related development, the 23rd Session of the General Assembly adopted resolutions upon a review of all aspects of the activities of organizations in the United Nations system with a connection to natural disaster problems (2435 (XXIII)). A very useful report on assistance in cases of natural disasters has been issued earlier this summer.* It also contemplates the possibility of United Nations assistance for emergencies arising from non-natural disasters, including civil conflicts, where arrangements within the United Nations system to meet the impact of such disasters might be brought into effect with the consent of the governments concerned. In another development standards for the treatment of detained persons will be considered at a United Nations conference at Kyoto this year. Finally, reference should also be made to conferences held under the auspices of the Carnegie Endowment for International Peace and of the University of Brussels touching on various aspects of humanitarian law.

These related efforts now require a disciplined overview. Divisions between the separate elements of international humanitarian law arise

*U N Economic and social Council, Assistance in Cases of Natural Disasters, E/4853, 12 May 1970.

largely from historical and organizational reasons. The emergence of international humanitarian law as a separate field concerning the rights and protection of persons in emergencies, in wartime, in civil strife, in national emergencies and in natural disasters is not new. It encompasses also humanitarian intervention and emergency assistance by international organizations, by private organizations and by states.*

The work of this Committee will be concerned with major components of international humanitarian law and their application. For our purposes we shall consider that international humanitarian law includes,

- the Geneva Conventions for the Protection of War Victims;
- the Hague Conventions and Regulations on the Laws of War;
- the customary laws of war and other obligatory standards and rules governing warfare including those declared by the United Nations;
- the law of Human Rights in Armed Conflicts;
- the law of Humanitarian Intervention;
- international law and arrangements governing emergency assistance to persons in time of emergencies;
- standard minimum rules for the treatment of detained persons;
- the law governing the rights of children;
- international relief machinery for emergency assistance.

Renewed international concern with international humanitarian law was only to be expected at a time of rapid developments in weapon technology and large scale conflicts in Vietnam, Nigeria, the Middle East and elsewhere causing untold suffering to the inhabitants of these areas. The most recent codification of the "laws of war" dates back to 1907, long before the invention of new methods of mass destruction such as aerial bombardments, nuclear weapons, napalm, defoliants and other chemical substances. Without attempting to be in any way exhaustive, it should be possible to outline a cluster of current issues in international humanitarian law reflecting recent changes:

I. The need for a review of international relief machinery and procedures for assistance to civilian victims of all disasters, from natural and other causes. Such a review of the practices of government and private relief agencies as well as of proposals for new international relief

* Pictet, *Principles of International Humanitarian Law* (Geneva 1966) is concerned primarily only with the so called Law of Geneva, Law of the Hague and Human Rights Law.

machinery has been undertaken by the Panel on Humanitarian Problems and International Law of the American Society of International Law.

2. Questions about the legal protection of civilian populations against the dangers of indiscriminate warfare. Such a study may include a review of the human rights of civilian populations in areas torn by armed conflicts.

3. Questions about the legal protection of civilian victims in armed conflicts not of an international character. Such a study may include a review of questions of concern to the ICRC arising out of Article 3 of the 1949 Geneva Conventions. Such a study has been undertaken by the International Committee of the Red Cross.

4. A study of steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts requested in Resolution 2444 (XXIII) of the General Assembly and more recently in its Resolution 2597 (XXIV). A study on the application of the Geneva Conventions has been undertaken by the International Medical Law Committee.

5. A study of the need for additional humanitarian international conventions and for other appropriate legal instruments to insure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.

6. A general study of the international law of humanitarian intervention in light of recent developments in the law relative to intervention. Such a study is considered in the report of the Committee on Human Rights of the International Law Association.

7. The application of international humanitarian law to armed bands and other non-governmental forces and the protection of civilians and combatants in armed conflicts with such irregular forces.

8. A study of the legal effects of various international instruments, protocols, resolutions and decided cases on the legality of the use of bacteriological, chemical, nuclear and other modern forms of warfare.

9. A study of published regulations, manuals, procedures and other practices in effect in the armed forces of states with respect to the use of different types of modern weapons.

10. A study of institutional and legal norms governing the protection of children.

11. A study of minimal standards for the treatment of all detained persons whether or not they be protected by the provisions of the Geneva Red Cross Conventions.

While there is some evident overlap among these items, they do suggest a range of subjects ripe for consideration under the general heading of international humanitarian law. War-like violence in defiance of international law and of the United Nations Charter is still rampant. This makes a general review of the *jus in bello* of the nuclear and space age imperative without prejudice to developments in the field of *jus ad bellum*.

II

International Humanitarian Policy

It has been said that existing international instruments authorize a dynamic role for impartial humanitarian organizations. It is thus sometimes not apparent why the political limitations operating on the United Nations Secretariat and on the foreign policies of governments should also be replicated in the work of the International Red Cross, Joint Church Aid or other private relief agencies. The explanation may emerge more plainly from a consideration of the quasi-universal acceptance of the Swiss International Committee of the Red Cross. It is due in part to its relatively consistent policy not to break the "consent barrier" of governments and to operate strictly within the limits painstakingly hewn out by the Geneva Conventions. The ICRC has therefore generally decided to refrain from embarrassing sovereign states by damaging disclosures and open condemnations of violations of the laws of war and humanity. This policy has enabled it to carry out mercy missions even in Nazi occupied Europe — missions that would almost certainly have been barred if the Red Cross had publicized all it knew of Nazi practices. It has been less successful, however, in gaining the confidence of Asian Communist regimes embattled with the United States. In adopting a morality of choosing the lesser evil — often requiring a measure of accommodation with heinous regimes amounting almost to complicity — the ICRC has put its mercy missions above its self-righteousness. Much stands to be lost if the only truly international humanitarian intermediary, which is also the oldest, most universal, and best established, were to jeopardize its access to barbarous systems of government by adopting a morality of principle and of idealism that would threaten the effectiveness of its mercy missions.

Traditional Red Cross policies have required both restraint and self-control from its personnel. They have required silence in the face of accusations that atrocities are hushed up, and silence when silence was

the price for doing anything at all. The ICRC has thus at times opened itself to criticism from two perspectives:

— from those who would adopt a morality of principle and of idealism exposing and denouncing inhumanity wherever it is encountered;

— from those who would adopt a dynamic humanitarian policy and who, like the Joint Church Aid in Nigeria, disregarded political and legal objections to relief and pursued it at the risk of losing access to the government side in the conflict.

In addition, the restriction on ICRC membership to Swiss citizens only and the modesty of its resources led to a difficult dilemma. It had either greatly to restrict the scope of its activities or to accept extensive support from a few wealthy nations at the risk of becoming unduly identified with them and jeopardizing its neutrality. And it was precisely this unique role as a *neutral*, impartial humanitarian intermediary with universal access which led to the ICRC's assumption of responsibility for Red Cross action in armed conflicts both of an international and non-international character.

The almost universal acceptance of and respect for the Red Cross, still makes it the most valuable instrument for international action despite unease in some developing countries about alleged western domination. Side by side with it, a large number of private and religious relief organizations have established a pattern of international relief action in addition to programs conducted by UNICEF, the World Food Program, the Office of the U. N. High Commissioner for Refugees and other international relief instrumentalities. Thus while some of the problems faced by civilian populations have fallen within the competence of agencies dealing with refugees, many have not. Problems of coordination and cooperation between the numerous international relief instrumentalities have therefore arisen.

Other "humanitarian organizations" within the meaning of Article 3 of the Geneva Red Cross Conventions have been able to operate on a more dynamic construction of the terms of the Conventions and to bring relief to non-combatant victims of civil wars notwithstanding objections of recognized governments. In Nigeria these objections centered upon the control of relief and methods of distribution of the kind referred to in Article 23 of the Fourth Geneva Red Cross Convention. (Strictly speaking, and in the absence of express agreement to the contrary, this Article should apply only to conflicts of an international character.) Joint Church Aid relief flights to Biafra-controlled territory over the objections of the Federal Military Government in Lagos demonstrated

that the operations of ad hoc associations and private relief organizations were relatively immune to many of the long-term political considerations that must be weighed by the ICRC. Relief of this nature however is likely to be limited both in extent and in duration. Ad hoc private relief organizations can therefore adopt a dynamic humanitarian policy founded on a broad interpretation of the Red Cross Conventions which permanent humanitarian organizations can ill afford to follow.

The maintenance of moral humanitarian standards in the face of massacres, atrocities and the decimation of civilian populations requires also the exposure and condemnation of such practices. This role can ill be assumed by relief organizations fearful of jeopardizing their own activities. Religious, moral and political leaders may have to undertake the burden of exposing abuses leaving humanitarian relief organizations free to do their work in silence. Occasionally, trials and investigations may also be appropriate for the enforcement of these standards. Experience with humanitarian relief in the recent past suggests a fourfold division of international humanitarian concerns reflecting the delicate nature of political considerations in this area.

a. *Neutral Humanitarianism.* This is pursued by the ICRC, as a universally acceptable neutral intermediary prepared to work with governments of all kinds for humanitarian ends and to refrain from publicizing abuses which might jeopardize humanitarian missions. It does not preclude the ICRC from acting and taking initiatives on a very broad interpretation of the Geneva Conventions.

b. *Revolutionary Humanitarianism.* This is practiced by private volunteer relief organizations engaged in humanitarian intervention over political and legal objections of governments involved in civil strife, which are prepared to be excluded from the government side of such conflicts;

c. *Moralistic Humanitarianism.* This involves leadership, investigation and exposure of massacres, atrocities and other violations of humanitarian laws leading to the repression of such violations.

d. *International Humanitarianism.* This could be the role of a new international instrumentality for managing political objections to relief and for marshalling relief units on a large scale. This is also the role of international agencies such as UNICEF, UNHCR and the League of Red Cross Societies.

Evidently, motives for humanitarian concerns are frequently mixed—political ambitions, military objectives and missionary rivalries some-

times enter into their formulation. Perhaps only neutral humanitarianism is immune from such impure motivation.

Little can be gained from expecting every humanitarian organization to fulfill all these roles simultaneously and from criticizing the Red Cross, for example, for not exposing war crimes. Though the temptation is strong for humanitarians to give expression to their moral outrage as well as to try to help the victims of barbarous acts, the best results can be achieved by keeping these principal roles or concerns separate. There is therefore not only room, but a positive need for the continued operation of a multiplicity of humanitarian agencies, some assuming one role, others a combination of different concerns.

The Nigerian civil war episode is rich in lessons about the risks of playing more than one humanitarian role at a time. Thus, attempts by the ICRC to extend relief beyond the limits acceptable to the Nigerian government led to the suspension of its relief flights when an ICRC plane was shot down over Biafra-controlled territory by government aircraft. With the collapse of Biafran resistance, the Lagos government continued to shun the Swiss Committee despite the suspension of flights. The urgency of civilian suffering also led the ICRC to accept considerable support from a small group of western countries led by the United States some of which were suspected of harboring political designs in Nigeria. The Committee's vacillating course between neutral humanitarianism and revolutionary humanitarianism exposed it to criticism from all sides and deepened divisions within it. It led to suggestions that the more representative League of Red Cross Societies assume responsibilities also in conflict situations. The division of functions between the League and the Committee had however just been decided upon in an agreement between them which provided for a League role primarily in peacetime relief.

The cost of revolutionary humanitarianism to private relief organizations became apparent soon after the collapse of Biafra when the Lagos Government announced that it would have nothing to do with organizations that had continued to fly to Uli Field over its objections. Clearly, if all humanitarian organizations had indulged in revolutionary humanitarianism the situation in the aftermath of war would have been even more serious. Nigerian reactions to a Papal pronouncement on the dangers of genocide demonstrated the importance of keeping relief and moralistic activities separate. The Quakers for example had kept their efforts quiet and shunned publicity and condemnations of all kind.

International humanitarianism through UNICEF succeeded precisely because of that Organization's sensitivity to the attitude of the Govern-

ment in Lagos. International humanitarianism is likely to be particularly responsive to the expectations of Receiving States. Revolutionary humanitarianism on the other hand responds primarily to the needs of civilians in rebel controlled territories—there being no need for “revolutionary” humanitarianism in order to offer assistance to recognized governments. International humanitarianism is also more likely to be susceptible to political pressures within international organizations and to the will of political majorities. It is therefore distinct from revolutionary humanitarianism which can ride roughshod over objections of a diplomatic or juridical character. In complex situations in which political obstacles to relief are numerous, it is likely that these various types of humanitarian activities will take place side by side.

New States and Humanitarian Concerns. In the nineteenth century humanitarian concerns received their impetus in Europe and in North America. The establishment of the Anti-Slavery Society and the work of Christian missionaries provided the background for humanitarian intervention policies by the major powers of the Concert of Europe. In this century, the advent of total warfare, of guerilla warfare and of unparalleled atrocities committed not by totalitarian regimes only, dwarfs the work performed by private relief organizations.

If humanitarian traditions are to survive the relative decline in the power of Europe and of the Christian churches, they must be adapted to the expectations and cultures of the newly independent states. Impartial humanitarian intervention cannot, in the present age, remain the prerogative of any one race, faith or nation. In assuming leadership in humanitarian affairs, new states could draw on the great traditions of the Eastern Religions and fill a role waiting for an actor. While international humanitarian assistance requires facilities and personnel normally available only in relatively developed societies, it is developing countries that usually find themselves in need of such assistance. When disasters strike they are generally poorly equipped to face them without outside help. International humanitarian assistance can lead to a unilateral flow of personnel and supplies across the dividing lines between wealthy societies and developing states frequently corresponding also to racial color lines. Japan is practically the only non-white country with the capability to extend emergency assistance on a large scale to stricken societies. This state of affairs can only exacerbate national pride in countries recently freed from colonial domination and acutely preoccupied by threats to their sovereignty and independence. The intrusion of white men and of foreign teams can be both humiliating and irritating at a time of national distress. Developing societies have moreover grown wary of the activities of some western missionaries who have not infre-

quently treated local populations as hordes of savages in need of salvation. Missionaries in South Africa, for example, were frequently seen to have given no mean assistance to colonial rulers and entrepreneurs in the name of humanitarian and religious ideals. Moreover, memories of colonial excesses have contributed their share to scepticism about the genuineness of the white man's humanitarian commitments. Africans rapidly learned to distrust all white presence in their midst. This distrust may have contributed to the mixed reception which the ICRC has encountered in the Nigerian conflict. The humanitarian doctrines emanating from Europe were thus tarnished by their very origin and by the record of European powers; they fell moreover on some singularly unreceptive cultures many of whom were accustomed to the waging of total wars on tribal enemies. Humanitarianism can appear as a somewhat peculiar notion in societies in which local economic and social conditions as well as the almost total absence of medical care mean widespread disease, high mortality rates and the acceptance of one's destiny in the best of times.

The survival of humanitarian traditions is equally threatened in the United States which is involved in counter-insurgency warfare against the NLF in Vietnam, warfare which has led to the death of over two million Vietnamese military and civilians. Movements for bringing the war to an end have largely overshadowed the puny efforts to lend effective assistance to the civilian population of Vietnam and to protect it from the ravages of combat and bombing.

In such an international climate, there is an acute need for leadership in restoring a dimension of compassion to the turbulent politics and merciless natural environment of the Third World. An assumption of moral leadership would also do much to heighten the prestige and morale of the countries and organizations involved. Unless leaders from the countries of Asia, Latin America and Africa assume this role, humanitarian traditions may become the preserve of a shrinking group of political and religious leaders increasingly ineffectual in their actions in other parts of the world.

At this juncture the governing policy considerations for the development of international humanitarian law and organizations require restatement:

— Humanitarian policies must first be adapted to the expectations and sensibilities of new states and to their fear of intervention in order to make them universally acceptable again;

— Emergency assistance under U. N. auspices requires the consent of Member States receiving such assistance;

— Where political objections to humanitarian relief efforts are evident, political efforts should be made to overcome them, efforts best conducted by a representative international organization to avoid direct big power involvement;

— Recognition must be given to the different types of humanitarian concerns and to the need for a multiplicity of humanitarian relief agencies, both public and private;

— Efforts to enhance the role of the United Nations and of other international institutions should not be permitted to jeopardize the activities of existing international humanitarian organizations;

— Efforts to secure universal acceptance of humanitarian policies should not lead to the erosion of standards set in the Geneva Red Cross Conventions and in other international instruments;

— No new international organization should be established where existing ones could be adapted or enlarged to perform additional tasks.

There is some evidence that efforts to enhance the United Nations role in emergency assistance are beginning to bear fruit.

III

International Humanitarian Action:

A U. N. Emergency Assistance Service

In 1968, a proposal was made to the Chairman of this Committee to expand the role of the United Nations in connection with assistance to civilian population in emergencies arising from natural and other causes by establishing a United Nations Emergency Relief Force. This proposal was included in the Final Report of President Johnson's Commission for the Observance of Human Rights Year, 1968.* It was subsequently endorsed by the Senate Subcommittee on Refugees which recommended the establishment of such a United Nations instrumentality.**

The proposal was further studied by the Panel on Humanitarian Problems and International Law established by the American Society of International Law under the chairmanship of Ambassador Clyde Ferguson. The principal features of such proposed United Nations machinery for emergency assistance would involve:

* The President's Commission for the Observance of Human Rights Year, 1968, Final Report, 1969.

** The United States Senate 91st Congress, First Session, Committee on the Judiciary, Subcommittee to Investigate Problems Connected with Refugees and Escapees, November 3, 1969, U. S. Assistance to Refugees Throughout the World for endorsement of Relief Force Project.

- provision for emergency assistance in disasters from all causes not limited to natural disasters;
- the voluntary contribution of assistance facilities through existing operating agencies in the United Nations System;
- the establishment of an effective and speedy decision-making apparatus for organizations in the United Nations system to deal with emergencies;
- the creation of an administrative center for handling them through existing operating agencies in the United Nations system;
- an effective high-level diplomatic leadership for concluding arrangements for procuring and developing emergency assistance.

These arrangements would be designed to respond to the needs of civilian populations while respecting the legal and political demands of states concerned with the preservation of their sovereignty. These arrangements need not involve the creation of a new United Nations organ.

The need for an effective U. N. role in emergency assistance is now gaining recognition. In two reports on Assistance in Cases of Natural Disasters and on Human Rights in Armed Conflicts, which reflect the mounting concern of states from both East and West and which also reflect the proposal for a United Nations Emergency Assistance Service, the Secretary General recently indicated a willingness to consider arrangements for emergency assistance in situations other than those caused by natural disasters. He mentioned specifically civil conflicts. He undertook to make recommendations on this subject in the near future. He also referred to the limitations on resources available to private organizations and on the type of activities they may undertake. He pointed out that both international and non-international armed conflicts create disaster or near-disaster situations and that relief on a grand scale by impartial international and non-governmental humanitarian organizations is often needed. He indicated that it would be useful to consider guidelines aimed at improving the efficiency, strengthening the coordination and expanding the scope of relief activities undertaken in situations of armed conflict. [A/7720 ¶153] Considering the magnitude of the problem it is addressing, the establishment of a United Nations Emergency Assistance Service would be a modest step only. It would be an expression of the fiduciary relationship between the Organization and the peoples of the world which arises in situations in which the United Nations finds that it is unable to keep the peace it is committed to maintain. It would further develop the efforts of the United Nations in

assistance to the victims of natural disasters and in making available standby volunteer relief units for such disasters.

In considering the recommendations of the Secretary General on emergency assistance the concept of a United Nations Emergency Relief Service merits attention. It may be therefore timely to outline its principal features.

The 25th anniversary of the U.N. would be a fitting time for the establishment of an emergency assistance service made up of agencies and programs in the U.N. system for humanitarian assistance to civilian populations. Standby volunteer units would be made available in case of need. The service should be placed under the effective and impartial diplomatic leadership required for negotiating the consent of States to the deployment of aid. The world organization has already established relief agencies to meet special situations in Palestine and in Korea and it has also set up other permanent agencies like the Children's Fund, the Office of the U.N. High Commissioner for Refugees and the World Food Program.

With the approval of receiving countries a U.N. relief and salvaging service would be in a position to provide through its operating agencies and the International Red Cross, massive emergency assistance with medical teams, medical and food supplies and transportation facilities. Such relief would be forthcoming on a scale commensurate with the suffering of populations in the wake of armed conflicts and major natural disasters. It would be an exclusively humanitarian enterprise with no military or political responsibilities of any kind.

A U.N. emergency service could make available to operating agencies acting on its behalf, nationally financed volunteer technical units of experienced men and women, organized, trained and equipped for use in war-torn and famine-stricken areas, in flooded provinces, in refugee camps and in devastated cities. These units could operate on a standby basis. They could be molded on the pattern of the Swedish and Norwegian units made available in connection with natural disaster relief. They could be placed under the direction of existing operating agencies in the event of an emergency and deployed with maximum speed to stricken areas. They would have at their disposal airlift capabilities and medical resources on a governmental scale. The impartiality of such an enterprise would be assured both by the character of its personnel — medical men, nurses and other social welfare workers — and by the impartial nature of the agencies controlling them.

This service could achieve much that is beyond the political power and material means of existing Red Cross Societies. U.N. agencies and other relief programs would be invited to participate in the direction of the service under United Nations auspices and work closely with the International Red Cross.

The vast proportions of the disasters in the conflicts in Vietnam and Nigeria and in the earthquakes in Iran and Peru require the mobilization of resources on an international scale. Millions of persons require emergency assistance in the aftermath of war. The passions of civil war in Nigeria for example have demonstrated the fears and suspicions of all outside intervention, including humanitarian intervention and the political problems involved in getting relief through to the victims of conflict.

An impartial world emergency assistance service could operate in accordance with the terms of the 1949 Geneva Red Cross Conventions to which 126 States are parties. It could operate in conjunction with regional organizations such as the Organization of African Unity and the Organization of American States. Its composition and resources could be designed to meet the requirements of every special situation. It would be able to act with speed beyond the capability of private organizations and to coordinate relief efforts under its umbrella. Pre-disaster planning and standing arrangements for emergency relief units could also go a long way towards cutting the cost of ad hoc assistance programs and coordinating the activities of non-governmental aid groups. No state party to an armed conflict could, without considerable political cost, refuse to allow the operation of a humanitarian, international emergency service under impartial direction at a time when civilian populations are exposed to disaster and death. The mere presence of an international emergency mission would deter countless acts of brutality and violence in theatres of war and disaster areas.

The time has come for a firm and enduring commitment to use all the necessary resources to heal and save those who suffer through the failure of governments to abolish wars and banish destruction. The integrity and the humanitarian quality of this commitment can best be secured by turning over the instrumentalities of relief to an impartial humanitarian body. It would be urgent for this commitment to be solemnly proclaimed before the clouds of war lift to reveal the immensity of human wretchedness left in their wake.

GIDON GOTTLIEB