

International humanitarian law, State sovereignty and the erosion of the humanitarian consensus: the end of humanitarianism?

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This article examines the dilution of the legal framework on which humanitarian action has historically been based, primarily through the prism of international humanitarian law and related challenges posed to State sovereignty. The authors trace key changes over recent decades, including those regarding needs, the corresponding impact on policy enacted by aid organisations, effects on classic principles of neutrality, impartiality and independence, and the undermining of long-standing rights. By doing so, they highlight the risks to a needs-based humanitarianism clearly in retreat.

Dire conclusions on the current state of international humanitarian law (IHL) are not uncommon, to the point where a former president of the International Committee of the Red Cross (ICRC) provocatively asked if the rules of war are “a thing of the past?”.¹ A former president of *Médecins Sans Frontières* (also known as Doctors Without Borders or MSF) in turn argued that its “foundations are totally biased since they are defined by those who wage the war, revealing the absurdity of IHL”.² Whether through the high-profile targeting of medical care centres or the more banal dilution of protection norms, there is no shortage of examples. However broad generalisations between epochs are not necessarily instructive and comparing historic violations of IHL is problematic given the number of variables at play. Already in the 1960s it was being claimed that attacks on hospitals were so frequent that “some consider these practices as inherent to the conduct of hostilities”.³

In reality, each conflict is subject to its own transgressions and should be analysed in reference to its specific context with longstanding factors of change duly integrated. The Italian air force systematically targeting structures displaying the Red Cross emblem following the 1935 invasion of Abyssinia tells us much about colonial attitudes and the early impact of air power

¹ Peter Maurer, ex-President of ICRC, *Rules in war – A thing of the past?*, panel discussion, Centre for Strategic and International Studies, 10 May 2019, <https://www.icrc.org/en/document/speech-icrc-president-rules-war-thing-past>

² Rony Brauman, ex-President of MSF, *Does international humanitarian law legitimise wars?*, panel discussion, International Film Festival and Forum on Human Rights (FIFDH), 7 March 2020, <https://www.geneva-academy.ch/event/all-events/detail/212-does-international-humanitarian-law-legitimise-wars>

³ ICRC Archives, *Bombardement de l'hôpital d'Owa Omamma au Biafra*, 27 December 1968 (author's translation).

but very little about why medical care centres remain a prominent casualty almost a century later in radically different settings. Humanitarian operations on the periphery of cold war conflicts are unlikely to illuminate access challenges of today.⁴

With these caveats in mind, there are undoubtedly profound changes afoot in our own epoch, some accelerating, some slow burning. One approach could be to juxtapose the challenges facing IHL with what this issue’s editorial refers to as “breaches of liberal international order based on the law”.⁵ The latter should certainly not be underestimated. Humanitarianism takes as a “core normative principle” that all human lives are deserving of assistance, justifying consequent “transnational practices of intervention”.⁶ While historically debatable, such assumptions are arguably in retreat.

A complementary approach might be to examine the broader legal framework that underpins humanitarianism by looking at key elements of change in recent decades. Closely intertwined with interpretations and projections of State sovereignty, the world is very different from the time the major humanitarian organisations were created (mostly in the Global North), a period referred to as “neo-humanitarianism” by Barnett.⁷ If a humanitarian consensus ever existed in this “second age” of humanitarianism, at least as far as rationales and prerogatives are concerned, there has clearly been an unravelling. This can be unpacked by looking at the changes to the logic of humanitarian action over time in a hierarchy of purpose: how changing *needs* lead to changing *policies*, which in turn change the nature of the *principles* and at the apex challenges the *rights* of those receiving assistance. These insights may be gleaned into current challenges as well as the broader risks to a conceptual framework that has been taken for granted since the end of WWII and the 1949 Geneva Conventions.

Unsurprisingly, most of the attention in the last two decades of humanitarian organisations and their affiliated think tanks and academic institutions has focused on changing needs and how this requires changes in policy in an attempt to adapt the output of the enterprise. Only belatedly, as hospitals continue to be bombed and access is denied to refugees, have MSF and others acknowledged a serious challenge to the self-declared moral primacy of the humanitarian model: its principles of independence, neutrality and most worryingly impartiality and the international legal rights that underwrite these principles by imposing obligations – limitations on sovereignty – on those in power.

Disconnecting policy from needs

Changes in need are the simplest to identify, the consequences of conflict and displacement foremost among them. However, at a more fundamental level, population growth is the most dramatic of changes as this has an impact on everything else. More people in general means more people are likely to be affected by both man-made and natural disasters. Whether the result of living in flood plains, urban shanty towns or famine-prone regions, greater demographic concentration increases vulnerability. Resulting resource scarcity, especially food

⁴ Duncan McLean, “Medical care in armed conflict: Perpetrator discourse in historical perspective”, *International Review of the Red Cross*, vol. 101, no. 911, August 2019, pp. 771–803, <https://library.icrc.org/library/docs/DOC/irrc-911-mclean.pdf>

⁵ Clara Egger, “International humanitarian law at a crossroads”, in this issue, p. 2.

⁶ Stephen Hopgood, “When the music stops: Humanitarianism in a post-liberal world order”, *Journal of Humanitarian Affairs*, vol. 1, no. 1, January 2019, pp. 4–14, <https://www.manchesteropenhive.com/view/journals/jha/1/1/article-p4.xml>

⁷ Michael Barnett, *Empire of Humanity: A History of Humanitarianism*, Cornell University Press, 2011, p. 107.

and water, combined with the burden of disease are very likely to be amplified by climate change.

These changes did not occur in a political vacuum and corresponding policy reflects the strategies and tools used by humanitarian organisations to effectively address their stated aim to help those in need. As the dominant military, political and economic powers, the Cold War years saw Europe and North America embrace the humanitarian idea as a useful soft power for their foreign military and trade interests. During this period of ideological confrontation, aid was used along blatant partial lines, supporting states and non-state armed groups (NSAGs) with humanitarian action according to their anti-communist credentials.

In the first ten years after the fall of the Berlin wall humanitarians were re-asserting themselves, again championing a principled approach. Declaring independence from the states that finance them, rigorously focusing on needs and applying neutrality, and working where possible on all sides of conflicts including those opposing the parties favoured by their Western paymasters. Described as the “high watermark of political humanitarianism”, dogmatic interpretations of State sovereignty were optimistically seen as waning.⁸ Meanwhile the North Atlantic Treaty Organization’s (NATO) clumsy attempts at co-opting humanitarians in their military actions (read the “humanitarian bombing” of Belgrade in 1999)⁹ led to a distancing from any military becoming the norm.

The 11 September 2001 attacks changed the landscape for humanitarians again, completely. A peripheral doctrine of counterterrorism was resurrected with a vengeance, not only as a globally applied concept by the West and the United Nations (UN) but by almost every nation at war. Domestic legislation was duly adapted in addition to declaring almost any armed political opposition as “terrorist”. Military actions by the United States (US) and its allies in Afghanistan and Iraq succeeded where NATO failed in Kosovo, largely co-opting the mainstream humanitarian agencies into their military and political strategy.

State sovereignty, boosted by this anti-terror logic, was further empowered as the global economy, and with it political and military power, started to seriously shift away from the unipolar US-Europe axis to a multipolar reality. The UN, as a club of nations of which most of these newly assertive states are voting members, became the favoured conduit to control humanitarian aid, adapting its policies to fit this new reality – epitomised by the “integrated mission”: all UN humanitarian agencies and those of their implementing partners were required to work towards a common objective of stabilisation, peacebuilding and state-building.¹⁰ Given that most conflicts are non-international in nature, aid framed as such is neither impartial – solely needs based – nor neutral, as it is intended to give advantage to one of the parties to a conflict.

This trend of redefining policy away from the classic needs-based approach was not limited to the UN machinery – who have little choice but to adapt to the wishes of their member states – but also applied to so-called “independent” organisations through pressures linked to their reliance on state funding. “Resilience” became institutionalised at the 2016 World

⁸ Conor Foley, *The Thin Blue Line: how humanitarianism went to war*, Verso, 2010, pp. 4–5.

⁹ Adam Roberts, “NATO’s ‘humanitarian war’ over Kosovo”, *Survival: Global Politics and Strategy*, vol. 41, no. 3, Autumn 1999, pp. 102–123.

¹⁰ Michiel Hofman, “The evolution from integrated missions to ‘peace keepers on steroids’ – How aid by force erodes humanitarian access”, *Global Responsibility to Protect*, vol. 6, no. 2, 12 June 2014, pp. 246–263.

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Humanitarian Summit, where pledges were made to build humanitarian-development-peacekeeping bridges (“Triple Nexus”) through a “Grand Bargain”, morphing into the UN doctrine of the “New Way of Working” (NWOW). As a side effect, to get emerging powers on board who abhor Western humanitarianism as a new form of imperialism, this Grand Bargain and NWOW includes the ambition to “localise” aid efforts, placing the sovereign state at the forefront of deciding who gets aid and by whom. As these trends became apparent leading up to the actual summit, MSF pulled out shortly before the event, calling it “a fig leaf of good intentions”, amongst other reasons, because “the summit neglects to reinforce the obligations of states to uphold and implement the humanitarian and refugee laws which they have signed up to”.¹¹

Changes in principles and rights

It can be argued that independence was always fleeting, with MSF and some of the larger faith-based agencies being the only ones having financial autonomy from powerful nations who are often militarily engaged in conflicts where independence is most important. Now, with state-building, national security and sovereignty at the forefront of their policies, this perhaps-always virtual independence is reverting to a partiality of aid last seen during the Cold War.

The emergence of the anti-terrorist “with us or against us” credo had a dramatic impact on neutrality, exactly the opposite of what the latter means. Initially in Afghanistan and Iraq as the exceptions, now mainstream where the most prominent designated (“terrorist”) groups are involved such as Yemen, Somalia, Syria and the Sahel and Lake Chad regions. Inversely, many “designated” NSAGs adopt a similar polarised rhetoric which often rejects humanitarianism altogether, seen as part of this anti-terror coalition. These developments are significant. If the principle of neutrality is intended to “set a concrete limit on what states can legitimately do to their own citizens”,¹² it is also a pre-condition for accessing humanitarian aid that always favoured NSAGs. IHL in essence is the only state-approved legal framework that gives agency to such groups and medical protection for its fighters. By denying these fighters the formal status of “combatant” under IHL, states effectively exclude them from the right to medical care.

Impartiality, arguably the only real “principle” of all humanitarian principles, is the most fundamental challenge. Humanitarian assistance has indeed become the alibi of choice for a multitude of political and military objectives. Whether linking humanitarian assistance to the objectives of state-building and state legitimacy; explicitly integrating aid into counter-terrorism strategies, or transforming assistance into a form of migration control and containment, the results are the same. Needs are no longer the primary criterion on which assistance is decided, the latter now overtly aligned with national self-interest.

All of these factors have eroded the international legal framework that underpins humanitarian assistance: IHL that gives the right to people in conflict to access medical and

¹¹ Sam Jones, “MSF brands humanitarian summit ‘a fig-leaf of good intentions’ as it pulls out”, *The Guardian*, 5 May 2016, <https://www.theguardian.com/global-development/2016/may/05/medecins-sans-frontieres-world-humanitarian-summit-istanbul-fig-leaf-pulls-out>

¹² Stephen Hopgood, “When the music stops...”, *art. cit.*

humanitarian aid; refugee law giving the right to seek asylum and protection from conflict and, in a wider sense, human rights law that also guarantees basic rights to food, water, shelter and medical care. These laws put restrictions on the unfettered autonomy of states, so are naturally resisted and challenged as an existential threat to their sovereignty.

Increasingly narrow interpretations of the obligations imposed on states by international law have been made possible by a calculated effort to change the perception of the general public. The undefined and unwinnable abstract concept of “war on terror” has ingrained the notion of the anonymous “terrorist” as a non-human, therefore not entitled to any rights bestowed under human laws. Meanwhile, Europe has led the way in rebranding refugees fleeing war, persecution and deserving of protection as economic migrants. A successful rhetoric which in its extremes even denies refugees the right to exist at all, by labelling the people concerned as “illegal”. This has created an environment where not only are humanitarians restricted on who they can reach, and sometimes even prosecuted when they do, but essentially defining who is considered deserving and has the “right” to receive aid based on political expediency.

Sovereignty looming large: examples from Pakistan, South Sudan and Tanzania

Given that the provision of assistance is a key factor that qualifies a state, there is no shortage of examples that illustrate the above trends, a few of which can be examined in more detail. In the case of Pakistan, the role of international aid is significantly smaller when compared to local capacity, as illustrated in the response to the 2005 Kashmir earthquake that established a precedent of military-humanitarian cooperation. Such cooperation has not withstood subsequent crises, including the 2010 and 2022 floods and, more significantly, counter-insurgency operations that continue to this day. With the military considering itself the “guardian of Pakistan’s image abroad”,¹³ there are fundamental issues of perception closely intertwined with projections of national sovereignty.¹⁴

An obvious point of reference was the fake polio vaccination campaign that led to the killing of Osama Bin Laden in 2011.¹⁵ As concerns the intentions of humanitarian organisations, well-placed Pakistani observers have noted that their country is “fertile ground for conspiracy theorists” and that “one example out of 120 is enough to shut 120”.¹⁶ But if subsequent crackdowns on aid organisations reinforce a perception of “guilty first until proven otherwise”, there is an underlying stabilisation agenda that undermines the argument of needs-based assistance.¹⁷ This includes an array of counter-terrorism restrictions, be they access related or purely bureaucratic, that bely a reduction in incidents affecting international actors.¹⁸

As opposed to being seen as an “affront to Pakistani sovereignty and an admission of weakness”, the experience of international aid in South Sudan has an entirely different point

¹³ Interview with member of an international humanitarian organisation, 2 May 2019.

¹⁴ Overseas Development Institute, *A clash of principles? Humanitarian action and the search for stability in Pakistan*, Humanitarian Policy Group, Policy Brief 36, September 2009, <https://www.humanitarianlibrary.org/sites/default/files/2014/02/4854.pdf>

¹⁵ “Activities of international NGOs to be strictly regulated”, *The News*, 25 August 2012.

¹⁶ Interview with local humanitarian organisation, 30 April 2019.

¹⁷ Interview with former police officer, 1 May 2019.

¹⁸ Interview with member of an international humanitarian organisation, 1 May 2019.

of reference.¹⁹ Given the resource limitations in Juba, humanitarian actors have been used to furnish the leadership with “legitimacy, both domestic and internationally”.²⁰ And unlike Pakistan, where the levers of power are largely hidden by a ministerial facade, the South Sudanese authorities are accessible. With varying degrees of success, legitimacy and control have been sought through “regulatory norms”, many copied from East African neighbours, notably Sudan’s Humanitarian Affairs Commission.²¹ Such “predatory rent-seeking activities” reflect global trends in both restrictions and oversight.²²

There are likewise suspicions over the intentions of aid workers, although very much linked to the perception that these have never been neutral or impartial in the region’s conflicts. South Sudanese officials openly admit that they “infiltrated” humanitarian organisations during the independence struggle and assume that any armed opposition does the same today.²³ But in practical terms insofar as IHL is concerned, this translates to a total lack of respect for healthcare neutrality. During the various incarnations of the post-independence civil wars, close to 200 aid workers have been killed, the vast majority South Sudanese. Medical facilities have regularly been looted, depriving vast areas of healthcare.²⁴

Tanzania certainly has similar aid restrictions as those seen in Pakistan and South Sudan. Despite the serious consequences, these are often seemingly bureaucratic such as limits on the importation of medical items to challenges in obtaining work and travel permits. Prior to the 2021 death of President John Magufuli, there was particular reluctance from his administration to act without specific direction for fear of the repercussions.²⁵ But it is in the interpretation of refugee law that the more dramatic shifts in Tanzanian policy can be seen, a change that mirrors the hardening of global perceptions on those seeking refuge.

Historically Tanzania has been admirably receptive to asylum seekers. Whether fleeing wars of independence or post-colonial conflicts in Southern Africa, relatively open borders were accompanied by policies of inclusion and integration. The decision to naturalise 162,000 “old caseload” Burundians in 2010 was both unprecedented and a sign of continuity.²⁶ However, the expulsion of 500,000 Rwandan refugees in 1996 demonstrated a darker side, echoed by more recent rhetoric. Of the 248,000 refugees and asylum seekers currently in the country, the majority have resided in camps in the western Kigoma region since 2015.²⁷ The “official and unofficial attitude is that the sooner the camps are closed the better”, often accompanied by

¹⁹ Médecins Sans Frontières, *Jumping through hoops: the challenge of providing humanitarian assistance in Pakistan*, Internal document, 26 July 2013.

²⁰ Clea Kahn and Andrew Cunningham, “Introduction to the issue of state sovereignty and humanitarian action”, *Disasters*, vol. 37, no. 2, 22 July 2013.

²¹ Interviews with member of *Médecins Sans Frontières*, 19 and 21 February 2019.

²² Lindsay Hamsik, “A thousand papercuts: the impact of NGO regulation in South Sudan”, *Humanitarian Exchange*, no. 68, 26 January 2017, pp. 25–28, <https://odihpn.org/publication/a-thousand-papercuts-the-impact-of-ngo-regulation-in-south-sudan/>

²³ Interview with member of South Sudan Ministry for Information, Culture, Youth and Sports, 22 February 2019.

²⁴ Médecins Sans Frontières, *South Sudan at 10: an MSF record of the consequences of violence*, 16 July 2021, <https://www.msf.org/south-sudan-10-msf-record-consequences-violence>

²⁵ Interviews with member of *Médecins Sans Frontières*, 4 October 2019 and 31 August 2020.

²⁶ James Milner, “A history of asylum in Kenya and Tanzania: Understanding the drivers of domestic refugee policy”, *Monde(s), Histoire, Espaces, Relations*, vol. 1, no. 15, May 2019, pp. 69–92, <https://www.cairn.info/revue-mondes-2019-1-page-69.htm>

²⁷ UNHCR, “In Tanzania, UNHCR’s Grandi urges more backing for solutions as the country continues to host refugees”, 27 August 2022, <https://www.unhcr.org/news/press/2022/8/6309c8f34/tanzania-unhcrs-grandi-urges-backing-solutions-country-continues-host-refugees.html>

insinuations of a “manufactured rather than genuine crisis”.²⁸ Despite recent improvements, the move from solidarity to repatriation “whether voluntarily or not” has been facilitated by a broader hardening of attitudes towards those seeking protection.²⁹

The end of humanitarianism?

Intentionally provocative and obviously not: a multi-billion-dollar enterprise is not going to simply disappear altogether. But at a time when needs are at a historical high – if for no other reason than the simple fact that a larger global population has exposed more people to conflict and natural disasters – needs-based reactive humanitarianism is in retreat. Culturally, politically and financially this approach is no longer supported. And of greater concern, this retreat is also evident on a purely existential level as fundamental rights and humanitarian principles are successfully challenged by states with the backing of general public opinion.

Perhaps a more relevant question is whether it is feasible to push back on these developments and challenge the state-building, anti-terror, anti-migrant supporting approach? Not only by defending the international legal framework that underwrites humanitarianism, but also by countering the public discourse that has allowed states to chip away at previously untouchable rights to aid and protection.

The views expressed in this article are those of the authors and in no way represent the organisation to which they belong.

Biographies

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²⁸ Interview with a member of a local humanitarian organisation, 9 October 2019.

²⁹ Human Rights Watch, *African Leaders Should Raise Concerns About Tanzania’s Pressure on Refugees to Return to Burundi*, 4 December 2019, <https://www.hrw.org/news/2019/12/04/african-leaders-should-raise-concerns-about-tanzanias-pressure-refugees-return>

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