

1949 and 1999: Making the Geneva Conventions relevant after the Cold War

by
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AFTER the Second World War, two documents symbolized the moral aspirations of the international community: the 1948 Universal Declaration of Human Rights, and the 1949 Geneva Conventions for the protection of war victims. The Declaration promised universal human rights in peacetime, the Conventions established the basic rules for humanitarian behaviour in war. Each has acquired a special status in international relations, but each has to be adjusted, or remade, to take account of the changing nature of world affairs. Universal principles may remain valid, but they have to be contextualized in different situations. In the case of the Geneva Conventions and their two Additional Protocols of 1977, their adaptation to the world after the Cold War places special responsibility on the International Committee of the Red Cross (ICRC) as the guardian of international humanitarian law.

Introduction

The Universal Declaration and the Geneva Conventions exhibit differences, but the similarities remain striking. The Declaration was originally a non-binding United Nations General Assembly resolution, a

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statement of aspirations, in the words of one of its champions, Eleanor Roosevelt. The four interlocking Geneva Conventions were detailed treaty law produced by a diplomatic conference. It may be that parts of the Declaration have passed into customary international law, just as much of the 1949 Conventions may have done. The larger point is that each set of norms carries significant moral weight in the world, far beyond the relatively few court cases that have made reference to them.

Of the 185 member States of the United Nations, few refuse to at least pay lip service to the Human Rights Declaration. It is true, however, that in 1993 at the UN conference on human rights in Vienna a number of States, mostly from Asia, argued that the Declaration was too Western and individualistic and needed to be either revised or supplemented by a “Universal Declaration of Responsibilities”, meaning responsibilities to the national community as a whole. Likewise, the 1949 Geneva Conventions have now been ratified or otherwise legally accepted by virtually all States. In specific situations, however, a number of States argue that these Conventions are not applicable. Nevertheless, for States in contemporary international relations, joining the UN, with its provisions on human rights, and accepting the 1949 Geneva Conventions, both symbolize responsible statehood — the responsible exercise of State sovereignty.

It bears stressing that neither the Declaration nor the Conventions have been the basis for frequent adjudication. In the United States, for example, the Supreme Court rarely refers to the Universal Declaration.¹

As for the 1949 Conventions, the number of national courts martial for violations of the law of war, which refer to international humanitarian law, remains relatively small. However, to listen to participants at the Diplomatic Conference of 1974–1977 wrangle over the details of the two Additional Protocols of 1977, one would have thought that adjudication was a frequent occurrence, thus requiring that every legal nuance be treated in excruciating detail. It is true that in the 1990s the two ad hoc international criminal courts for the former Yugoslavia and Rwanda have begun to provide more judgements on war crimes, crimes against humanity, and genocide. Also, in July 1998 a diplomatic conference approved the statute for a standing international criminal court.

¹ Louis Henkin, “The Universal Declaration and the U.S. Constitution”, *Political Science: The*

Magazine of the American Political Science Association, September 1998, pp. 512–515.

But the larger point remains valid: the Human Rights Declaration and the 1949 Conventions exercise considerable influence through extrajudicial processes such as foreign policy and military training, through private action and through UN field operations. The international instruments remain fundamental reference points for correct conduct in peace and war. They exercise more influence through the “soft law” of extrajudicial policy-making than through the “hard law” of court pronouncements.

The ICRC has been the guardian of international humanitarian law, now centering on the 1949 Conventions and their 1977 Protocols, for about 140 years. In 1998 it released a statement about a strategy for the future. This *Avenir* statement is the rough equivalent of the UN Secretary-General’s 1992 “Agenda for Peace”.² The Secretary-General laid out a vision for making the UN relevant to international security problems after the Cold War. The ICRC has laid out its view of how to make the 1949 Conventions and the rest of humanitarian law, and Red Cross/Red Crescent principles, relevant to international humanitarian problems after the cold war. The UN’s “Agenda for Peace” was much analysed and led to a second version. The ICRC’s *Avenir* statement deserves the same scrutiny. The UN has become quite marginal to certain security problems in places like Kosovo, Algeria, Chechnya, and Sri Lanka, to name only a few. It is fair to raise the question of whether the Geneva Conventions, and Additional Protocols, will also become marginal to humanitarian problems at the turn of the century. Or does the *Avenir* statement give us cause for optimism?

ICRC *Avenir* statement: the context

In its *Avenir* statement the ICRC starts by giving its view of important factors in contemporary world affairs. Parts of this statement seem accurate, but other parts could perhaps be expressed more clearly.

The ICRC says that a fundamental tension exists between “globalization and the assertion of individual identity”. It might have been more insightful to say that after the Cold War we are seeing a clash between globalization and, as a backlash, renewed assertions of romantic (and dangerous)

² For the *Avenir* statement see “International Committee of the Red Cross, ‘Avenir’ Study: Strategic content”, *IRRC*, No. 322, March 1998, pp. 127-136. For the UN’s Agenda for Peace, see “Report of the Secretary-General pursuant to the

statement adopted by the Summit Meeting of the Security Council on 31 January 1992”, United Nations, New York, 1992.

particularism.³ On the one hand, we have global economics and global standards of human rights and humanitarian affairs. On the other hand, we see chauvinistic nationalism, virulent ethnicity, and intolerant religion. Globalism seeks to draw humanity together through common values and action. Romantic particularism seeks to assert emotional or sentimental differences and diversity of a pernicious sort.

Romantic particularism as demonstrated, for example, by certain forms of Serb nationalism, Hutu dominance, and Hindu or Islamic supremacy submerges the value of the individual in larger causes of group identity. (These are but three cases and their citing should not suggest bias. One might talk as well about certain forms of Croat nationalism, Tutsi repression, or Christian intolerance.) The number of examples given is limited only for reasons of space. True, individual identity is frequently bound up in group identity. But it is not the assertion of individual identity that matters so much for the future of the Geneva Conventions (and their Protocols) as it is the assertion of romantic group causes. They result all too often in inhumanity to individuals, and groups of “outside” individuals, which violates the basic principles of the Geneva Conventions. Serb nationalism led to ethnic cleansing, Hutu quest for dominance to genocide, and Hindu and Islamic superiority to attacks on Christians (of course, in some places only).

The West is not free from this resurgence of romantic particularism, as seen especially in events in Northern Ireland and the Basque region of Spain. One also sees disturbing events in other areas like Germany, France, and the United States, where sub-national groups exhibit neo-Nazi or other racist attitudes towards, and sometimes even perpetrate attacks against, those in “foreign” or “other” groups. But in general, the Western backlash against a global and mostly secular universalism is not virulent and threatening to humanitarian values. Principles of tolerance, human rights, and humanitarianism are at present sufficiently strong in Western societies to keep these forms of romantic particularism confined to a marginal status. For example, German authorities prosecute for, and large numbers of Germans protest against, neo-Nazi attacks. To shift to a different type of example, Denmark may not want to lose its group identity by being suffocated in the European Union, but it is not going to abuse foreigners in the process (although, like the rest of the West, it has adopted more restrictive immigration policies).

³ See Benjamin R. Barber, *Jihad vs. McWorld: the World, Ballantine Books, New York, 1996. How Globalism and Tribalism Are Reshaping*

There is a difference between wanting to preserve one's group identity or culture and being willing to attack or otherwise abuse those in the "other" category. The former constitutes a moderate or reasonable particularism — for example, Danish nationalism. The latter makes up romantic particularism — which is dangerous by the very fact of asserting an unreasoned superiority. The former is compatible with the Geneva Conventions; the latter is not.

So the ICRC could have stated more clearly this fundamental tension in world affairs between universalism and romantic particularism for its own concerns and purposes. But much of the rest of its introductory statement seems accurate. It is well to state that "globalization is a cultural as well as an economic phenomenon". Indeed, the movement for global human rights and humanitarian values is part of this cultural universalism, and the ICRC could have made this more explicit. We have heard much about global markets, and not enough about these latter principles that seek to unify humanity in progressive ways.

It is also well to note that "States remain the key players in the international system". We hear much about international organizations, non-governmental organizations (NGOs), private armies or rebel forces, indeed social movements like the Red Cross and Red Crescent. They all have their importance, and that importance is probably increasing. But it is still States that take the most important decisions within international organizations, and it is primarily States that respond or not to NGO pressures. It is also States that adopt the rules of international humanitarian law, and it is States that have the primary (but not exclusive) obligation to see that the law is correctly applied. It is States that provide most of the material resources for the ICRC. (It is striking in the 1990s how little non-Western States, some of them quite wealthy, provide in this regard.) In some places, like Somalia in the early 1990s, we see failed States and the absence of central governing authority. But the ICRC is correct to focus on States as the key players with respect to humanitarian values and action.

At the same time the ICRC is correct to note the "proliferation of [non-governmental] humanitarian agencies" and "the growing complexity of the humanitarian environment". One would expect this accuracy from the ICRC, which has been deeply involved in many of the armed conflicts and complex emergencies around the world.

***Avenir*: strategy?**

Beyond this point, it is not totally clear that the ICRC has really stated a strategy for making the Geneva Conventions and their Protocols — and the Red Cross/Red Crescent Principles — relevant in the future. The debate may hinge on what one means by the word “strategy”. But we should not get distracted by semantical arguments. The larger point is that the *Avenir* statement is mostly a reaffirmation of ICRC traditional views. There is little that is fundamentally new. This is not necessarily bad. If one has a useful mission, mandate, a way of operating, there is little reason to pretend that one is doing something new and different. On the other hand, if world affairs have changed in a structural sense, a traditional approach may not suffice. And on this fundamental question, namely the extent of change in world affairs and what it means for traditional Red Cross action, the ICRC is largely silent.

The *Avenir* statement says that “a major change of strategy is required”. It then outlines four goals: (1) to restore a proper respect for humanitarian values; (2) to bring “humanitarian action close to the victims”, look “to the long term” and establish “priorities”; (3) to strengthen dialogue with all players; and (4) to increase ICRC efficiency. If setting goals is a strategy, then we have one here.

Usually, however, a strategy refers to a general approach to achieving goals. In this second sense, the ICRC never indicates a new, much less a major change of, strategy. There are two possible strategies articulated by the ICRC in passing. One is so general as to provide no real guidance for action: “the ICRC must strive to enhance the overall coherence of humanitarian thinking and action and must adapt to the circumstances without losing its identity”. That is indeed a general approach, but quite vague. The second possible strategy consists of a restatement of the ICRC’s traditional mission: to focus on victims of war and internal violence, to take direct action for the victims, to be a neutral and independent institution, and to persuade all parties to adopt and respect humanitarian values. This is not a major change. It is no change at all.

Goal number one

As for the first specific goal of restoring a proper respect for humanitarian values as found in the Geneva Conventions (and their Protocols) and in the Red Cross/Red Crescent principles, this is indeed a worthy

objective. Everyone knows that in the 1990s respect for these values, and even for the Red Cross emblem itself, has declined. The murder of ICRC staff in Bosnia, Chechnya, Burundi, and Rwanda demonstrates the point all too vividly. But when the ICRC says it will take a moral approach, “putting persuasion before condemnation”, and “reaffirms its resolve to assume the role of guardian of humanitarian law”, it is not laying out a new strategy. Likewise, when it stresses dissemination in peacetime, or a “code of professional ethics for humanitarian players”, it is stressing important points — but not new ones.

Perhaps more creative is the statement that “the relationship between humanitarian law and human rights law must be strengthened”. But many words have been written on this subject and it is not clear in the “Avenir” statement what is intended here. Perhaps this critique is unfair, because a short and general statement cannot contain all specifics. But historically the ICRC has resisted too close an identification with human rights, believing that “humanitarian affairs” seem less political and controversial. The ICRC has not been one to speak about “human rights in armed conflict”.

Others have long argued that there is a substantial overlap between the Geneva Conventions (and their Protocols) and the international law of human rights applicable to situations other than armed conflict. It seems that the ICRC is now willing to help develop this common foundation. The *Review* published a special edition about the convergence of humanitarian law and human rights law, and how they were both devoted to the principle of humanity.⁴ This would seem important in so far as many governments are reluctant to trigger the application of international humanitarian law, and since many situations of concern to the ICRC occur on the boundary between what passes for domestic peace and internal armed conflict (whether falling under Article 3 common to the 1949 Conventions and/or Protocol II). Establishing common values that transcend these legalistic arguments and distinctions would be useful. When the ICRC acts to oppose torture or starvation, does it make any real difference to maintain that it is not working for human rights?

Goal number two

As for the second goal, it doesn't exist. “Bringing humanitarian action close to the victims, looking to the long term and establishing

⁴ *IRRC*, No. 324, September 1998.

priorities” is not one goal; it is a statement of three different things, none of which is new. Since at least the time of Marcel Junod during the Spanish Civil War, the ICRC has subscribed to the official policy of paying great deference to the delegate in the field so that he (or she, increasingly) can bring humanitarian action directly to victims. Like all institutions, the ICRC has not always followed stated policy, and at times it has tried to rein in delegates in the field whom it found too independent, as was true when Italy invaded Ethiopia in the mid-1930s.⁵ But finding the proper balance between policy made in Geneva, and discretion in the field tailored to particular circumstances, is a very old subject at the ICRC. There is growing awareness that what counts in the final analysis more than words in a legal text is the personal dynamism of ICRC delegates in the field, as in Hungary during the Second World War.

Likewise, for a considerable time the ICRC has been talking about developing better relations with other components of the International Red Cross and Red Crescent Movement, and about linking humanitarian values to local customs in the different areas of the world where its delegates operate. Happily, many of these policies are already under way.

When the *Avenir* statement says that “the ICRC would like to enhance the overall coherence of humanitarian activities by being available to ensure the coordination of emergency assistance operations, under conditions that guarantee the independence of its action”, this may be more a statement of a problem than an indication of its solution. As a private agency, the ICRC is not going to be given a superior coordinating role over United Nations agencies like UNICEF or UNHCR. Conversely, with its stress on independence and neutrality, the ICRC is not going to accept being coordinated by the likes of these other bodies. The creation of a weak UN Office of the Emergency Relief Coordinator does not really alter anything, since that body lacks both the authority and the material resources to compel change on the part of other humanitarian players. So we are left, as before, with “coherence” based on mutually agreed divisions of labour. This has happened on occasion in a reasonable way, and will happen again. But the structural problem remains of many humanitarian players not fully coordinated by any superior body, and thus with considerable potential for conflicting policies.

⁵ See further Caroline Moorehead, *Dunant's Dream: War, Switzerland, and the History of the Red Cross*, Harper Collins, New York, 1998.

This section of the *Avenir* statement may indicate some progressive thinking from a quarter of a century ago, when the Tansley Report or “Big Study” identified some needed changes — particularly with regard to the isolation of the ICRC.⁶ But what we have on this second point is a listing of a variety of steps already under way — a listing of tactical decisions to make humanitarian values and action more influential and effective. They seem well considered, at least when they are not vague, but they do not add up to a bold or sweeping new strategy.

Goal number three

As for the third goal, “strengthening dialogue with all concerned”, this is really a continuation of part of the second goal of reaching out to others — in the first place other components of the Red Cross Movement and in the second place other humanitarian players. As noted already, the isolation and excessively secretive nature of the ICRC was observed a quarter of a century ago, so it is well that the ICRC is now professing “greater openness and complementarity”. It was, for example, an active participant in both the broad movement to ban anti-personnel landmines and that to establish a permanent international criminal court. Once again, goal number three is more a statement of changes already under way — desirable changes — than a completely new strategy for the future.

Goal number four

As for the fourth goal of “enhancing the ICRC’s efficiency”, once again this is hardly new. At least from the time of the Nigerian Civil War of 1967-1970, the ICRC has been considering the relationship between its Assembly of co-opted Swiss notables that makes general policy and its professional staff, more internationalized since the early 1990s. Every few years the ICRC tries a new diagram for linking these two elements. The agency has tried various forms of “cabinet government,” in which the President of the house is joined by various vice-presidents and/or the Director of Operations and/or other members of the professional staff. This scheme is then periodically revised.

⁶ Donald D. Tansley, *Final Report: An Agenda for Red Cross*, Henry Dunant Institute, Geneva, 1975.

It is not a bad thing to review the most effective form of administration. It is not a bad thing to experiment with presumed improvements. But again, there is nothing much new here, and certainly not a bold and striking strategy.

Final thoughts

Implicit in the ICRC's *Avenir* statement is a rejection of some alternative thinking about international humanitarian action. On the one hand, some have called for less humanitarian involvement, on the grounds that it does more harm than good. They emphasize the hell of good intentions. Importantly, some of these accounts do not cite ICRC examples of misdeeds, distortions, or lack of careful action. Criticism is directed to others, but not to the ICRC.⁷

On the other hand, some have called for more openly political action — even more muscular humanitarian action up to and including humanitarian war — on the grounds that impartial and neutral humanitarian action is not possible in many situations. This is the basic position of Doctors Without Borders, as well as of some independent experts.⁸

Unfortunately the “Avenir” statement does not take on these positions directly. The ICRC has sponsored a publication in which some of these views are represented,⁹ but in the “Avenir” statement it simply assumes these other views are inadequate while reaffirming *a priori* its own traditional understanding of humanitarian action. Had the ICRC sought to demonstrate how and why impartial and neutral humanitarian action was still viable in the contemporary world, it would have made an important contribution.

It can be recalled that the ICRC withdrew its relief operation from Ethiopia in the 1980s because of “political” conditions imposed by the government. Is that part of a strategy for the future? It can be recalled that the ICRC accepted military protection for its relief operation in Somalia and for the release of prisoners in the former Yugoslavia in the early 1990s. Is that part of a strategy for the future? On occasion the ICRC has not

⁷ See, for example, Michael Maren, *The Road to Hell: The Ravaging Effects of Foreign Aid and International Charity*, The Free Press, New York, 1997.

⁸ See, for example, Rony Brauman, “Refugee camps, population transfers, and NGOs”, in Jonathan Moore (ed.), *Hard choices: Moral*

Dilemmas in Humanitarian Intervention, Rowman & Littlefield, Lanham, MD, 1998, pp. 177-194, and Adam Roberts, “Humanitarian war: Military intervention and human rights”, *International Affairs*, No. 69, 3 July 1993, p. 429 ss.

⁹ Jonathan Moore (ed.), *Hard Choices, ibid.*

deferred to the political will of public authorities but has carried out relief operations without the consent of those authorities. Is that part of a strategy for the future? Increasingly the ICRC has engaged in public criticism of public authorities. Is that part of a strategy for the future? Sometimes it has been said that the ICRC has been impartial and discreet in official circles, but has been more judgmental and candid in other ways.¹⁰ Is that part of a strategy for the future?

A concern for full consistency may indeed be the preoccupation of little minds, and Biafra was not Somalia, Somalia was not Bosnia, Bosnia was not Cambodia. Civilian relief has been getting the lion's share of attention. Has anything changed regarding detention visits? — the ICRC purports to lay out a general approach to managing humanitarian problems, a reader can fairly expect to find real and clear strategy. And if that reader is promised “a major change of strategy”, it should be there. The *Avenir* statement fails on both counts. ICRC strategy is implicit rather than explicit, assumed rather than explained; and the real strategy is old, not new. A series of tactical steps, partially new, does not necessarily add up to a real and new strategy.

Thankfully for the future of the Geneva Conventions, ICRC pragmatic action comes across better than this “*Avenir*” statement. The ICRC remains one of the “Big Four” relief agencies in the world for action in war and similar violence (the others being UNHCR, UNICEF and the World Food Programme).¹¹ This is because the ICRC record of delivering relief in complicated situations continues to please the major donors — above all the United States Agency for International Development (US/AID) and the European Community Humanitarian Office (ECHO). The ICRC runs the largest private relief operation in the world, and was absolutely crucial to managing starvation in places like Somalia. The ICRC also remains the most experienced agency for the monitoring of detainees, and served as the model for the European Committee for the Prevention of Torture.

But it is to be regretted that the ICRC record of practical accomplishment in the field was not matched by a clear and forward-looking statement of real strategy. If the traditional Red Cross approach to humanitarian

¹⁰ Michael Ignatieff, “The stories we tell”, in *Hard Choices*, *ibid.*, pp. 287-302.

¹¹ See further Alexander Natsios, *U.S. Foreign Policy and the Four Horsemen of the Apocalypse: Humanitarian Relief in Complex Emergencies*, Praeger, Westport, 1997.

affairs is still valid, we will have to deduce it ourselves. It is not adequately explained in the *Avenir* statement.

Résumé

1949 et 1999 : Donner une signification aux Conventions de Genève après la fin de la guerre froide

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Après un bref survol de l'évolution du droit international humanitaire et, en parallèle, du droit international des droits de l'homme depuis 1945, l'auteur pose la question de savoir comment le CICR, en sa qualité de gardien des Conventions de Genève, comprend aujourd'hui sa tâche. Le texte publié par le CICR sous le titre « Projet Avenir : les défis, la mission et les orientations stratégiques » (RICR, n° 829, mars 1998, p. 134) lui sert de point de départ pour son analyse. Produit d'un long processus de réflexion, ce texte examine les défis posés par les conflits d'aujourd'hui et tente de définir les lignes de conduite pour l'organisation. L'auteur approuve en bonne partie les conclusions auxquelles arrive l'étude, conclusions qui ne s'écartent guère de la ligne suivie jusqu'à ce jour. Toutefois, le « projet Avenir » ne donne que peu d'indications sur la stratégie que le CICR entend suivre pour accomplir son mandat découlant des Conventions de Genève.