

## Dunant's pyramid: thoughts on the "humanitarian space"\*

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### **Abstract**

*This article uses the metaphor of a pyramid bounding the humanitarian space as a means of portraying what it is that constitutes humanitarian law and humanitarian action. Whereas humanity as the tip of the pyramid forms the aim and international humanitarian law the base, the sides are the principles of impartiality, neutrality and independence, which enclose the humanitarian space and make the humanitarian endeavour possible.*

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That, I think, is the best way to establish a lasting peace: show all these different people from all sides that we are all human. We all have families, lives, ambitions, fears just like them. We are all humans and we can all live together. But, we have to be able to understand and appreciate our differences *as much as our similarities* ... sorry about preaching ... moving right along!<sup>1</sup>

War ends nothing.<sup>2</sup>

Our thinking is becoming ever more complex, more technical, more cryptic. This is especially true of the natural and social sciences. Who can understand even the basics of why Professor X was awarded the Nobel Prize for physics in 2006 (in contrast to Albert Einstein, Max Planck and other leading, well-known thinkers)?

\* This article is a slightly adapted version of an article in German by the same author "Dunants Pyramide, Gedanken zu einem "humanitarian Raum"", in Stephan Breitenmoser et al. (eds.), *Menschenrechte, Demokratie und Rechtsstaat, Liber amicorum Luzius Wildhaber*, DIKE/Nomos, Zürich/St. Gallen/Baden-Baden, 2007.

Other than those who have studied the respective subjects, who can understand the content or aims of the various schools of philosophy or social science that exist today (in contrast to the works of Hannah Arendt, Max Weber or Carl Gustav Jung)? A tendency to fragmentation, over-specialization and formalization can also be observed in the legal field. And yet law – as debated in parliaments and argued over in courtrooms – is supposed to form and determine the everyday lives of human beings. International humanitarian law is intended to influence the moral climate and guide decisions that affect the lives and deaths of combatants and civilians in armed conflict, yet this branch of law has a particularly marked tendency to be “law for experts”, difficult to internalize.<sup>3</sup> These laws, consisting of over a thousand articles – many of them detailed and technical – are largely the preserve of military, diplomatic and international law experts, and yet they should be central to the consciousness of soldiers and citizens – indeed, to the consciousness of the public at large.<sup>4</sup>

It is becoming increasingly important, in my opinion, for socio-professional elites to reflect upon the essence of their thinking and to think in context. But what modern society also needs is a new culture of comprehensible, accessible, imaginative and readily absorbed communication, a culture that includes dialogue between those with specialist knowledge on the one hand and a broad spectrum of people on the other. This does not mean foregoing the scientific, precise use of terms and language. But professional specialists must not forget that symbolic language, as opposed to merely abstract, is of particular efficacy. People think in pictures and ideas too.<sup>5</sup> To quote I. A. Richards, “Thinking is radically metaphoric.”<sup>6</sup> On the following pages we shall attempt to present three forms, or steps, of distillation and illustration of what constitutes the core issues of international humanitarian law and humanitarian action. We shall

- 1 From an e-mail sent by Erin Schuler in Bosnia to her family in the United States concerning Serbian atrocities. Quoted in a melancholy book edited by Andrew Carroll containing much “hidden literature”: *War Letters – Extraordinary Correspondence from American Wars*, Rocket, New York, 2001, p. 470.
- 2 An African proverb, from Gerd de Ley, *African Proverbs*, Hippocrene Books, New York, 1999, p. 114.
- 3 Staff Sergeant Dan Welch, Tank Commander with the First Infantry Division, Seventh Corps, wrote on 8 March 1991 from the second Gulf War to his wife Marianne and son Chris: “I still think of the guy I shot the day before we attacked. If I hadn’t done it, he could have been in an EPW camp right now, waiting to go home, just like me. He probably would have surrendered along with most of the others, just one day later.” Carroll, above note 1, p. 459.
- 4 There are various reasons for the technical nature and jargon of international humanitarian law: one is that specialists from the armed forces and national civil services had a major influence on the drafting process at the diplomatic conferences where the instruments of international humanitarian law were created; above all it is of importance for their implementation on the ground that the individual rules be clear and unambiguous. Nevertheless, one might sometimes wish for more accessible, more memorable language. The French Declaration of the Rights of Man and of the Citizen (1789) and the Universal Declaration of Human Rights (1948) both speak of “brotherhood”, and the helpers at Solferino exclaimed “Siamo tutti fratelli” (we are all brothers). The instruments of international humanitarian law bear little trace of such rhetoric.
- 5 Ernst Cassirer defined man as an “animal symbolicum” rather than an “animal rationale”. See Ernst Cassirer, *Essai sur l’homme*, Les Editions de Minuit, Paris, 1975, pp. 44 ff.
- 6 Cited in Jeremy Rayner, “Organic and Mechanical Metaphors in Late Eighteenth-Century American Political Thought”, *Harvard Law Review*, Vol. 110, 1997, pp. 1832 ff.

start with three “figures” or “stories”, shall then project onto the background of those concrete stories a number of abstract, general principles of international humanitarian law, as highlighted and developed by international jurisprudence, principles that underlie the individual rules. Finally, we shall attempt to encapsulate all the elements and methods of international humanitarian law and humanitarian action within the geometrical metaphor of a pyramid, which will enclose a “humanitarian space”, or “concept become space”. I shall focus primarily on the third aspect, hence the title “Dunant’s pyramid”. This is an attempt at a *mise en forme*<sup>7</sup> of a variety of principles, rules, doctrines, practices and experiences (both historical and contemporary).

### Three stories, three figures

#### Solferino: the story of how it all started<sup>8</sup>

If it is true that organizations develop successfully when they remain faithful to their founding ideas (the theory of “path-dependent development”), then humanitarian organizations, whose task it is to relieve the suffering of the victims of war and other forms of disaster, must likewise at decisive points in their development recall and reflect upon the stories of their creation. Most prominent among these is Henry Dunant’s book *Un souvenir de Solferino*,<sup>10</sup> the origin of the idea and initiative that created the Red Cross. His book had an immediate and powerful effect, with Dunant describing the shocking scenes that followed one of the bloodiest battles of the nineteenth century, a situation he had the rare privilege of witnessing as – to use his words – “a mere tourist with no part whatever in this great conflict”.<sup>11</sup> In emotive language, he recounts his impressions of the events that took place between Friday 24 and Sunday 26 June 1859 near Solferino in Lombardy: 500,000 French and Austrian troops marching into battle, “drums

7 Christophe Bouriau, *Qu’est-ce que l’imagination?*, Vrin, Paris, 2003, p. 44.

8 It may appear somewhat anachronistic to recount the story – or legend – of Dunant in our age of complex, technological, electronic warfare. I shall do so nonetheless, both because at the time the initiator of the Red Cross embodied a new and basic idea and because I feel that he continues to serve as an ethical example – or perhaps even a template – imbued with contemporary relevance and the power to inspire. I feel strengthened in taking such an “un-modern” approach by the fears that Umberto Eco expresses on the “end of ethics”: “Ethics”, Eco reminds us with an eye to the future, “requires a model for living that is both hard to follow and demands a degree of effort. The media, however, will increasingly promote as models for living such people as possess very few heroic virtues yet have become an example for all because of their continuous exposure on television, in the press or on the Internet. Not so much St Catherine or Florence Nightingale as Princess Diana or Monika Lewinsky.” Umberto Eco, *Schüsse mit Empfangsbestätigung – Neue Streichholzbriefe*, München/Wien, 2006, s. 7 (ICRC translation).

9 One characteristic of path-dependent development is that structures that arose through a particular historical situation tend to reproduce themselves. Changes are possible, but only as variations of a path with particular characteristics, a path that of itself is irreversible. See for instance the work by Nobel prize-winner Douglas C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge, 1991.

10 Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986 (original, French edition 1862).

11 *Ibid.*, p. 16.

beating and bugles sounding", and "like men going to a feast".<sup>12</sup> But then came a "hand-to-hand struggle ... sheer butchery; a struggle between savage beasts, maddened with blood and fury".<sup>13</sup> When the sun rose on 25 June, it "disclosed the most dreadful sights imaginable" – the sick and wounded of all nations lying side by side "on the flagstone floors of the churches of Castiglione".<sup>14</sup> But along with desperation and suffering, there are also scenes of hope: the local women who, at Dunant's initiative, come together on the Sunday to offer help;<sup>15</sup> Dunant's promise to the young corporal whose condition is hopeless and begs him to "write to my father to comfort my mother";<sup>16</sup> but also the "humanity of simple troopers" whose "kindness and sympathy towards defeated or captured enemies" Dunant described as "qualities as valuable as their fearlessness and bravery".<sup>17</sup> From these images emerges Dunant's vision that two initiatives should be taken, which were to become the origins of the Red Cross: (i) the setting up in peacetime of national relief societies consisting of volunteers; and (ii) the drawing up of a "Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries".<sup>18</sup> It is striking how the story that Dunant tells already contains in embryonic form all those elements that are later to constitute the form and organizational system of the Red Cross and, to some extent, of other humanitarian organizations.<sup>19</sup> In the nineteenth century, when sovereignty was becoming so important, the Geneva Convention for the amelioration of the condition of the wounded in armies in the field, drawn up in 1864 at Dunant's initiative, constituted a radical break with the past. Following the direct experience of the shocking scenes at Solferino, this convention placed centre stage not the leaders and the generals but those who had become the victims of war – the wounded and the dying – and who had hitherto enjoyed but scant attention. The Convention was also an expression of the European tradition of natural law that had started to emerge in the sixteenth century, under which legal experts strove to overcome the particularity of laws and practices and replace them with universally applicable principles.<sup>20</sup> The original Geneva Convention of 1864 constituted a first step

12 Ibid., p. 34.

13 Ibid., p. 19.

14 Ibid., pp. 41, 61.

15 Ibid., p. 62.

16 Ibid., p. 66.

17 Ibid., pp. 52, 53 (ICRC translation).

18 Ibid., p. 126.

19 In particular, these are the principles of humanity, impartiality (bringing help and protection to both sides of an armed conflict on the basis of need, relieving the suffering of the victims of war and other forms of disaster), neutrality (making no distinction between just and unjust, good and bad wars – indeed, making no distinction between the guilty and the innocent), independence and voluntary action.

20 See Michael Ignatieff, *Die Ehre des Kriegers-I*, in Hans Magnus Enzensberger (ed.), *Krieger ohne Waffen, Das Internationale Komitee vom Roten Kreuz*, Frankfurt am Main, 2001, p. 18: "The natural law on which the Geneva Convention was based attempted, for the first time in history, to promulgate rules that applied to all people, Christians and heathens, believers and non-believers, nationals and foreigners" Eichborn (ICRC translation).

towards a fundamental change in the structure of international law, gradually opening it up to embrace individuals and civil society.

### The Good Samaritan as archetype?<sup>21</sup>

Is there a model for the idea of humanity (embodied in the Red Cross and elsewhere) – that is, the idea of helping those who suffer, whoever they may be? Max Huber, president of the International Committee of the Red Cross from 1928 to 1944, had some interesting thoughts on the parable of the Good Samaritan.<sup>22</sup> The story comes from Christianity (Luke 10.30–7), but its message transcends any single religion and is of universal validity. The parable tells of a figure from outside the (religious) establishment – a Samaritan – who, after a priest and a Levite have passed by indifferently, spontaneously helps a man of whom we know only that he was “going down from Jerusalem to Jericho and fell among thieves”. The Samaritan takes him to an inn and pays for his board and lodging. What is interesting is that the person who helped was an outsider and that the identity of the victim is not a matter for discussion; as Huber says, it is the human being as such who is being helped, the human being as he is and not because he is like this or like that.<sup>23</sup> What is also striking is what is missing from the story: any criticism of the thieves or of the authorities who tolerated such banditry, any accusations levelled at those who could have helped earlier – because as Huber says, in an emergency “the duty is to act, not to talk”.<sup>24</sup> It is astonishing how many of the features that define the Red Cross and other humanitarian endeavours are encapsulated in the parable of the Good Samaritan.

### The “third combatant”

Marcel Junod was an ICRC delegate during the Italian war against Abyssinia and during the Spanish Civil War, and he was in Japan when the atomic bombs fell on Hiroshima and Nagasaki. He writes, “Il n’y a jamais que deux adversaires, mais auprès d’eux et parfois entre eux survient un troisième combattant.”<sup>25</sup> Wars are

21 I realize that in a period of resurgent religious fundamentalism the use of a Christian parable to present a universal, worldwide humanitarian endeavour may be controversial. I do so because this parable embodies an archetype of thought and action that recurs in various civilizations, albeit expressed in other terms and through other figures. On compassion in Buddhism, for instance, see Hans Küng, *Projekt Weltethos*, 4th edn, Piper, Munich, 1998, pp. 118 ff., 124; and *Wozu Weltethos? Religion und Ethik in Zeiten der Globalisierung*, Herder Freiburg im Breisgau, 2002, pp. 118 ff., 124.

22 Max Huber, *Vermischte Schriften*, Vol. II, Glaube und Kirche, Zurich, 1948, pp. 293 ff.

23 *Ibid.*, p. 309.

24 *Ibid.*, p. 310.

25 Marcel Junod, *Le Troisième Combattant – De l’ypérite en Abyssinie à la bombe atomique d’Hiroshima*, Payot, Geneva, 1989, p. 8. Jakob Kellenberger, president of the ICRC, still recommends this famous book to every delegate, in Erica Deuber Ziegler (ed.), *Soixante ans après Le Désastre de Hiroshima de Marcel Junod*, Labor et Fides, Geneva, 2005, p. 11. For further, impressive testimony to the work of the Red Cross see Stefan Zweig, “Das Herz Europas – Ein Besuch im Genfer Roten Kreuz”, in his *Die schlaflose Welt – Essays 1909–1941*, 4th edn, Fischer, Frankfurt am Main, 2003, pp. 74 ff.; Enzensberger, above note 20; Michael Ignatieff, *The Warrior’s Honor*, Metropolitan Books, New York, 1997.

cruel, hate-filled and arbitrary. Nonetheless, there are basic rules concerning such questions as the protection of prisoners, the wounded, the sick and the displaced, and there are organizations and individuals committed to mitigating the suffering of war. They are often the only connection, in the midst of disaster and barbarity, between the victims and the world of peace and civilization, a world from which they have been cut off and yet which, surely, they cannot have left? *Le troisième combattant* tells stories like that of the heroic Belgian Red Cross nurse during the Spanish Civil War. The nurse, who was working in a castle near Barcelona that the Republicans had turned into a prison, managed to hoist the flag of the Red Cross. This caused Franco’s troops to stop shooting, avoiding the massacre of hundreds of defenceless prisoners cooped up in their cells and allowing them to leave in safety.<sup>26</sup> Junod also describes how, as the only ICRC delegate in the Third Reich, he made his way to France despite war and totalitarian dictatorship to find out whether – as the German Foreign Office in Berlin was claiming – German paratroopers were being shot in contravention of the Geneva Convention. He reported that they were not. His report arrived just in time to prevent the carrying out of threatened reprisals, whereby for each German soldier killed, ten French prisoners of war were to be executed.<sup>27</sup> The reports compiled by delegates and staff of the Red Cross and other humanitarian organizations contain hundreds more such stories. “Étrange soldat”, writes Junod with respect to the outer fragility and inner firmness of the ICRC, “dont les armes sont deux conventions. Deux conventions et quelque chose en plus ... un esprit.”<sup>28</sup>

### **The principles underlying international humanitarian law, seen in the light of international jurisprudence**

International humanitarian law, of whose spirit we have just been speaking, has in four cases in particular become a matter for the International Court of Justice in The Hague – in the *Corfu Channel* and *Nicaragua* cases and in two advisory opinions: on the legality of the threat or use of nuclear weapons and on the building of the wall in Palestine.<sup>29</sup> It is interesting and significant that the Court’s first concern was to identify among the many conventional and customary law norms those basic principles that underlie such rules or form their basis. In the *Corfu Channel* case, the Court referred to “elementary considerations of humanity” as “a general and well-recognized principle”,<sup>30</sup> and in the *Nicaragua* case it cited the “fundamental principles of international humanitarian law”, “to which the Geneva Conventions are no more than the expression of such principles”. In armed conflict these rules were – of this there can be no doubt – “a

26 Junod, above note 25, pp. 152 ff.

27 Ibid., pp. 182 ff.

28 Ibid., p. 14.

29 See Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, 2000, vol. 94, pp. 239 ff.

30 *Corfu Channel Case (UK v. Albania)*, Merits, 1949 ICJ Rep. 4, 22.

minimal yardstick, in addition to the more elaborate rules which are also to apply to international conflicts”; the core provisions of Article 3 common to the four Geneva Conventions of 1949 constituted a set of minimum rules which, in the view of the Court, reflected what it had described as “elementary considerations of humanity” in 1949.<sup>31</sup> There also existed a duty to respect and ensure respect for international humanitarian law under all circumstances, as specified in Article 2 of the Conventions. The duty to respect the Conventions at all times could not be derived from the Conventions themselves, but solely from the general principles of humanitarian law, of which the Conventions were “no more than the expression”. There could also be no doubt, given the manner in which the Court fleshed out what had hitherto been a purely formal category, that providing strictly humanitarian assistance to members of the armed forces or other persons in another country, whatever their political affiliations or aims, could not be described as an inadmissible intervention or an illegal act. The judgment stated the following:

An essential feature of truly humanitarian aid is that it is given “without discrimination” of any kind. In view of the Court ..., humanitarian assistance ..., not only must be limited to the purposes hallowed in the practice of the Red Cross, namely to prevent and to alleviate human suffering, and to protect life and health and to ensure respect for the human being; it must also, and above all, be given without discrimination to all in need.

In its advisory opinion concerning the legality of the threat or use of nuclear weapons, the International Court of Justice found as follows: “The intrinsically humanitarian character of the legal principles in question permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and to those of the future.”<sup>32</sup> The Court confirmed the Martens Clause,<sup>33</sup> with its references to the laws of humanity and the dictates of public conscience, as a rule of customary international law, despite the disagreement that existed as to its meaning and the absence of any generally accepted interpretation.<sup>34</sup> Finally, in its advisory opinion concerning the wall in occupied Palestinian territory,<sup>35</sup> the Court applied various rules of humanitarian law governing the protection of the civilian population in occupied territory to a concrete situation – Israel’s construction of a wall in occupied Palestinian territory.

31 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, 1986 ICJ Rep. 14, 113–14.

32 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep., para. 86.

33 Theodor Meron, “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, *American Journal of International Law*, 2000, vol. 94, pp. 78 ff.

34 Judge Shahabuddeen, above note 32, Dissenting Opinion, para. 86.

35 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep. (9 July), paras. 89 ff.

## A pyramid to protect the humanitarian space

### A “humanitarian space” in the wider sense

So far I have attempted to present the *raison d’être* of humanitarian law and humanitarian action in the form of three stories of basic principles or principles of justice that underlie positive law. I shall now seek a metaphor that will enable the basic principles (embodied in particular figures and both revealed and cited in international jurisprudence) to “become space”.<sup>36</sup> It was Rony Brauman, founder of Médecins Sans Frontières, who created the image of a “humanitarian space”.

Je parle d’un espace symbolique, hors duquel l’action humanitaire se détache du fondement éthique ... et qui se constitue à l’intérieur des repères suivants: d’une part, la liberté de dialogue, la possibilité de parler librement avec les gens au service de qui on travaille, sans subir la présence systématique de quiconque. C’est une question élémentaire de dignité qui ne va pourtant pas d’elle-même. D’autre part, la liberté de mouvement et d’évaluation des besoins, dans toute la mesure où les conditions pratiques le permettent, bien sûr. Condition importante pour éviter de délivrer un instrument de propagande, un ornement dans la vitrine de tel chef de guerre ou de tel dictateur. Et enfin, liberté de vérification de la distribution des secours. Pour éviter tout simplement qu’ils ne soient prélevés pour nourrir les combattants, les cadres politiques.<sup>37</sup>

The doctrine of neutrality, which is a defining element of the RedCross’ identity does not form part of the humanitarian space conceived of by Médecins Sans Frontières and other humanitarian non-governmental organizations (NGOs).

The UN Office for the Co-ordination of Humanitarian Affairs (OCHA) uses the term “humanitarian space” as a synonym for “humanitarian operating environment”, the environment in which humanitarian agencies and organizations are obliged to operate. OCHA defines “humanitarian operating environment”:

[A]dherence to the key operating principles of neutrality and impartiality in humanitarian operations represents the critical means by which the primary objective of ensuring that suffering must be met wherever it is found, can be achieved. Consequently, maintaining a clear distinction between the role and function of humanitarian actors and that of the military is the determining

36 See Johanna Grombach Wagner, “An IHL/ICRC perspective on “humanitarian space””, available at [http://www.odihpn.org/report, asp?ID=2765](http://www.odihpn.org/report,asp?ID=2765); Béatrice Mégevand Roggo, “After the Kosovo Conflict, a genuine humanitarian space”, *International Review of the Red Cross*, No. 837, January–March 2000, pp. 31 ff.

37 Rony Brauman, *Humanitaire – le dilemme*, Les Editions Textuel, Paris, 1996, p. 43. See also Joelle Tanguy and Fiona Terry, “On humanitarian Responsibility”, available at <http://www.cceia.org>.

factor in creating an operating environment in which humanitarian organisations can discharge their responsibilities both effectively and safely.<sup>38</sup>

It is typical of the definition of humanitarian action within the UN that independence – a strict distinction between state and humanitarian actors – does not play a central role, in contrast to the philosophy of the Red Cross.

### A pyramidal structure as a prototype humanitarian space

What I am attempting here is to develop the concept of a humanitarian space into the form that it has acquired in the Red Cross. I have chosen the geometrical form of a pyramid.<sup>39</sup> The tip of the pyramid is the aim of humanity on which the space is focused or, conversely, from which light shines into the space. The base consists of the basic rules and principles of international humanitarian law, as they exist in the form of conventional and customary international law and general legal principles, and as they are to be interpreted with respect to the *telos* or “goal” of humanity. The sides, which enclose the humanitarian space and are what make humanitarian endeavour possible, are the principles of impartiality, neutrality and independence. They are primarily operational and instrumental in character, and serve the overarching goal of humanity.<sup>40</sup> What is important about the model, and about the form of the pyramid, is its hierarchical structure; a distinction is made, as in a constitutional law system, between the multiplicity of norms. In its structure of regulation and action we distinguish between the essential *raison d'être* that gives it its very identity<sup>41</sup> and the straightforward rules of behaviour for the humanitarian space. A further distinction is made between the material, normative levels and the operational, protective principles. Despite these distinctions, it is important that within the pyramid's complex system of references every point is connected with every other and that its parts form a coherent whole. Of itself, the humanitarian space is an abstract, figurative structure. It can, however, take on concrete, physical form, with examples including prisons, hospitals, ambulances or safe areas.<sup>42</sup>

The builder of this structure owes the reader a few definitions. What does he mean by the principle of humanity? The three *modi operandi*? Or the norms of

38 UN Office for the Coordination of Humanitarian Affairs (OCHA), *Glossary of Humanitarian Terms*, available at <http://ochaonline.un.org/GetBin.asp?DocID=1328>.

39 Rupert Emerson described the circle, which recurs time and again throughout the natural world, as the “principal figure without end; it is the highest emblem in the community of the world” in *Essays*, Zurich, 1983, p. 233 (ICRC translation). Here we have chosen a figure consisting of straight lines and points.

40 Marion Harroff-Tavel, “Neutrality and impartiality – the importance of these principles for the International Red Cross and Red Crescent Movement and the difficulties involved in applying them”, *International Review of the Red Cross*, No. 273, November–December 1989, pp. 536 ff.; Frits Kalshoven, “Impartiality and neutrality in humanitarian law and practice”, *ibid.*, pp. 516 ff.

41 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan, Geneva, 2003, p. 373: “take away the principle of humanity, and the Red Cross loses its *raison d'être*; take away the other principles, and its work is paralysed”.

42 See Mégevand Roggo, above note 36, pp. 837 ff.

international humanitarian law that form the foundations of the building? In describing the individual components, I shall draw primarily on four basic principles laid down in the preamble to the 1986 Statutes of the International Movement of the Red Cross and Red Crescent, as defined below.<sup>43</sup>

### *Humanity*

*Humanity* – according to the International Court of Justice in the *Nicaragua* judgment mentioned above<sup>44</sup> – means preventing and alleviating human suffering, protecting life and health and ensuring respect for human existence. Max Huber described humanity as the “unconditional recognition of the value of whatever has a human face, in particular where people are helpless, weak, sick, imprisoned, endangered, deprived of their rights and impoverished”.<sup>45</sup> The Red Cross principles describe “humanity” as follows:

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.

Jean Pictet described “humanity” as the most important principle within Red Cross doctrine, determining the movement’s ideals, motivation and objectives; he saw all other principles as flowing from this one, describing it as the “essential principle”.<sup>46</sup> It is important to be aware – bearing in mind the parable of the Good Samaritan – that while the principle of humanity is neither an ethical system nor the idea of a just order in the political community (which would be incompatible with the principle of neutrality), it is at the same time within its limited sphere of influence both absolute and universal. The principle of humanity is rooted in the idea of human dignity, linking it with the constitutional law of modern states, based on the rule of law, and with international human rights law. The basic principle of humanity is the standard to be applied when creating, interpreting and applying material law and operational principles in the humanitarian space.

43 The preamble to the Statutes, as adopted in October 1986 at the 25th International Conference of the Red Cross in Geneva, lists seven fundamental principles for the International Red Cross and Red Crescent Movement: humanity, impartiality, neutrality, independence, voluntary service, unity and universality. For our purposes it is the first three that are of particular importance. See Jean Pictet, *The Fundamental Principles of the Red Cross – Commentary*, Henry Dunant Institute, Geneva, 1979; Harroff-Tavel, above note 40, pp. 536 ff.

44 Above note 31. See also Kalshoven, above note 40, pp. 541 ff.

45 Above note 22, p. 302 (ICRC translation).

46 Jean Pictet, *The Fundamental Principles of the Red Cross and Peace*, Henry Dunant Institute, Geneva, 1984, p. 7; Jean Pictet, “The Fundamental Principles of the Red Cross: Commentary”, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5mje9n?opendocument>. See also Jean-Luc Blondel, “The meaning of the word “humanitarian” in relation to the Fundamental Principles of the Red Cross and Red Crescent”, *International Review of the Red Cross*, No. 273, November–December 1989, pp. 507 ff.

In the *Furundzija* judgment, the International Criminal Tribunal for the former Yugoslavia emphasized that the general principle of respect for human dignity forms the common foundation of both human rights law and international humanitarian law:

The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is ... the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.<sup>47</sup>

Humanity is the exclusive goal of the Red Cross and defines its sphere of competence. Indeed, it constitutes the basis for its values and its *raison d'être*. According to the jurisprudence of the International Court of Justice, the principle of humanity is part of international humanitarian law, and not something imposed on it from outside. Everything that humanitarian organizations such as the Red Cross do must be undertaken with the sole aim of helping the victims – and potential victims – of armed conflict and other situations of violence, and of respecting their rights.<sup>48</sup> At the same time, the Red Cross intervenes without violence. As Jean Pictet has said, this is the only great idea for which no blood has been shed.<sup>49</sup>

### *Impartiality*

After humanity, *impartiality* is the most important principle for a humanitarian organization such as the Red Cross. It had already appeared in the original Geneva Convention of 1864. It is the concrete expression of the principle of equality that has been proclaimed in national constitutions and international treaties since the Enlightenment. But it is also of central operational significance. It means that humanitarian action makes no distinction according to nationality, race, religion, social position or political conviction. In other words, discrimination is forbidden. Humanitarian endeavour aims simply to help people – be they friend or foe – in proportion to their need, giving priority to the most urgent cases (the principle of proportionality). Resources are therefore to be allocated according to the principle that equal suffering demands equal help. At the same time, all victims cannot be

47 *Prosecutor v. Furundzija*, No. IT-95-17/1-T, Judgement, Para. 185 (Dec. 10, 1998), in *International Legal Materials*, 1999, pp. 317 ff.

48 Cornelio Sommaruga, in Massimo Lorenzi, *Entretiens avec Cornelio Sommaruga, Président du Comité international de la Croix-Rouge*, Favre, Lausanne, 1998, p. 19.

49 Pictet, above note 46, p. 9.

treated equally, with no account taken of the different reasons for their suffering and the different degrees of urgency in providing aid.<sup>50</sup>

### *Neutrality*

*Neutrality* on the part of a humanitarian agent means abstaining from participating in hostilities and at all times refraining from involvement in controversies of a political, racial, religious or ideological nature.

The principle of neutrality imposes two obligations on neutral parties: (i) maintaining a distance from the hostilities, that is abstaining from actions that would help or hinder one party or the other; and (ii) taking no part in political, racial, religious or ideological controversy. Neutrality prohibits a humanitarian organization such as the ICRC from condemning or supporting either point of view in an ideological controversy, and forbids it to “say on which side justice lies. It takes sides only with the victims, and works actively and pragmatically to alleviate their plight.”<sup>51</sup> Neutrality is not a value of itself, but a means of obtaining access to the victims and of being able to help them on the ground. Only by strict conformity with the principle of neutrality can a humanitarian organization such as the ICRC acquire and maintain the trust of all, and especially that of donors and of parties to a conflict. No conflict party would tolerate the presence of a humanitarian organization such as the ICRC if it believed that the ICRC was being used as a Trojan horse to promote the political interests of the other side.<sup>52</sup> Neutrality is an essential basis for “humanitarian diplomacy”.<sup>53</sup>

### *Independence*

The *independence* of a humanitarian organization means its autonomy with regard to states, international organizations and other authorities. The strategy of independence is of particular importance to the ICRC and the other components of the movement. They must be able to act in conformity with the principles of the movement at all times. They act only on humanitarian grounds. True humanitarian action must not become mixed up with politics or military action, and humanitarian agencies must be masters of their own decisions. This is the only way to ensure the credibility and effectiveness of their work.

### *International humanitarian law*

*International humanitarian law* protects human values in war and ensures that help is provided. The primary task of humanitarian organizations such as the Red

50 See *ibid.*, pp. 14 ff.

51 See Harroff-Tavel, above note 40, pp. 542 ff.

52 Wagner, above note 36.

53 Marion Harroff-Tavel, “La diplomatie humanitaire et le Comité international de la Croix-Rouge”, *Relations internationales*, 2005, vol. 121, pp. 73 ff.

Cross is not to denounce, but to gain access to the victims. Implicitly, the idea of a humanitarian space crops up throughout international humanitarian law. The Red Cross has been able to ensure that specific groups of people – in particular doctors and nursing staff – and certain locations, such as hospitals and ambulances, enjoy a status that affords them immunity<sup>54</sup> from the effects of war. It is also possible to create protected areas.<sup>55</sup> Humanitarian law also obliges parties to the conflict, in particular the occupying power, to the fullest extent of the means available and without any adverse distinction, to ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population and objects necessary for religious worship. The parties must also allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel, even if such assistance is destined for the civilian population of the adversary. Such offers of relief constitute neither interference in the armed conflict nor unfriendly acts.<sup>56</sup>

## Recognition

The idea of a humanitarian space has been proposed in a number of variants. For the founders of Médecins Sans Frontières, freedom of analysis, movement and evaluation were the key aspects. The UN emphasizes the environment and the operational conditions for effective humanitarian action. The Red Cross – and in particular the ICRC – attaches particular importance to its independence, as enshrined in international law via the Geneva Conventions and the statutes of the movement. One could see the principles on which the Red Cross is based as a prototype humanitarian space. The pyramid outlined here, which encloses a humanitarian space and corresponds especially closely to the Red Cross, would appear to be a coherent expression of the formulas developed in respect to Médecins Sans Frontières and UN humanitarian action. The freedom of opinion (analysis), movement (accessibility) and verification (evaluation) demanded by the NGOs and the maintaining of a clear distinction between humanitarian and military action emphasized by the UN are underpinned by the fundamental principle of independence.

Humanitarian organizations such as the Red Cross must not only meet these requirements objectively, but must also be seen to be neutral, impartial and independent.<sup>57</sup> There are clear parallels with national and international courts,

54 The original 1864 Geneva Convention spoke in non-technical terms of hospitals, ambulances, medical services and doctors being “neutral”.

55 In 1870, during the Franco-Prussian war, Dunant unsuccessfully proposed declaring Paris a protected area, to protect the civilian population against attack. Protected areas were set up during the wars in the former Yugoslavia, on the basis of existing Geneva law. However, little notice was taken of them by the conflict parties (e.g. in Srebrenica).

56 Protocol I of 1977 to the Geneva Conventions of 1949, Article 70.

57 One fundamental challenge to these principles is the doctrine of a “just war”, put forward since the Crusades and continuing right through to the jihad. It is this doctrine that is used to justify such attacks as those in Baghdad on the UN offices in August 2003 and the ICRC delegation in October of the same year. Regarding the current context, see Toni Pfanner, “Asymmetrical warfare from the perspective of

especially with regard to the principles of independence and impartiality (or lack of prejudice).<sup>58</sup> In both cases, the first issue is the subjective impartiality of the people who represent the organizations, the second being that of the structural characteristics of the organizations themselves – they must have room for manoeuvre with respect to the government and/or the parties to the conflict; independence and impartiality must be integral characteristics of the organization, and these characteristics must be guaranteed. Furthermore, their impartiality and independence must not only exist objectively, but must also be experienced and perceived by the outside world. All concerned must acquire and retain the expectation – borne out by experience – that the organization and its personnel do indeed act in an independent and neutral manner.<sup>59</sup>

Naturally, the model of the humanitarian pyramid has its strengths and weaknesses. This is inherent in the reductive, simplifying nature of the structure.

One weakness of the model is its static character. Humanitarian action is effective over time. It moves<sup>60</sup> and flows. The image of a pyramid emphasizes the organization, and its mechanical nature is incapable of adequately expressing the spirit, the dynamic side of humanitarian activity. Indeed, it is worth considering whether organic images could at least express the essence of practical humanitarian work, as described by Dunant.

An advantage of the pyramid model lies in the ability of the structure it confers on the law and its human-scale orientation to supplant the axiom that modern international humanitarian law is restricted to the basic tenet of the old law of war, as put forward by Hugo Grotius, namely limiting the use of arms to “military necessity”.<sup>61</sup> The pyramid, with its goal of humanity and its three-dimensional form, is more complex and fits better with the panoply of international law, dominated as it is today by human rights.<sup>62</sup> The aim of modern international humanitarian law is not simply to prevent excesses in time of war (e.g. superfluous suffering) and ensure a balance of military force on the principle of “checks and balances”. The key issue is that of human dignity.

## Conclusion

“Thinking”, we said at the start, “is radically metaphoric.” The aim of this text was to get away, however briefly, from the detailed examination of legal norms that forms the lawyer’s bread and butter, and to attempt to make the normative basis

humanitarian law and humanitarian action”, *International Review of the Red Cross*, No. 857, January–February 2005, pp. 149 ff.

58 See for instance the European Court of Human Rights.

59 See Luzius Wildhaber, “Gerichte und Richter im europäischen Verfassungsraum”, *Zeitschrift für Schweizerisches Recht*, 2006/I, pp. 93 ff.

60 Not for nothing do we speak of the Red Cross *Movement*.

61 See Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, Cambridge, 2004.

62 See Michael Bothe, “Humanitäres Völkerrecht als Schutz der Menschenrechte: Auf der Suche nach Synergien und Schutzlücken”, in Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw and Karl-Peter Sommermann (eds.), *Festschrift für Christian Tomuschat*, Engel, Kehl/Strasbourg/Arlington, 2006, pp. 28 ff.

of international humanitarian law discernible to a wider circle of interested persons by means of several figures and stories. Despite the weakness of a simplifying model, an attempt has been made to use the idea of a pyramid bounding the humanitarian space to portray what it is that constitutes international humanitarian law and humanitarian action. This attempt to illustrate the idea and the reality of humanitarian endeavour in the form of a model should not tempt one to forget that the concrete problems that lawyers encounter day after day will still have to be approached and solved by interpreting, clarifying and applying the principles and rules of law.