

Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts

Kenneth Anderson*

I. INTRODUCTION

Humanitarian inviolability is the ability of humanitarian relief agencies, whether official agencies such as the office of the United Nations High Commissioner for Refugees (UNHCR) or private organizations such as the International Committee of the Red Cross (ICRC), to act in situations of extreme human need and suffering, particularly in circumstances of armed conflict, with the assurance that their personnel, their property, and their activities will not be made the object of attack. It is a concept that is at the core of all humanitarian relief work, especially during war, when the cooperation of the belligerent parties is essential to the relief of suffering and privation. It rests upon two pillars: neutrality, which is the assurance given by humanitarian agencies that their efforts are not in military support of either side, and impartiality, which means such effort is rendered to the non-combatant population of each side without distinction and according to need.

The noble concept of inviolability is now under attack and in crisis. It is under attack in part because belligerents involved in conflicts increasingly

* Professor of Law, Washington College of Law, American University and Research Fellow, the Hoover Institution, Stanford University. My thanks to Tod Lindberg, John Ryle, my research assistant Lisa Sestile, and especially to the NGO and development and relief agency workers, as well as U.S. government staff who have been kind enough to speak with me in the course of preparing this Article. Their views have been invaluable to me in informing my thinking on matters on which we agree and as well as those on which we disagree—but, for obvious reasons, prefer to remain unidentified. The great debt that this Article owes to my close friend David Rieff and especially his book *A Bed for the Night: The Crisis of Humanitarianism* (2002) will be evident to anyone who has read it, although Rieff, a strong opponent of the Iraq war and prominent critic of the U.S. Iraq occupation regime, cannot be held responsible for any views expressed here; all views in this Article are strictly my own. Finally, this Article is dedicated to the memory of Arthur Helton, friend and colleague, a leading advocate for the world's refugees and migrants, who perished in the August 19, 2003 bombing attack on the U.N. headquarters in Baghdad; alas, in drafting this Article, I sadly came across my last e-mail from Arthur, from March 2003, reminding me to call him at the Council on Foreign Relations to discuss the legality of assassination. E-mail: kanders@wcl.american.edu.

do not view humanitarian agencies as true neutrals, but instead as agents of outside powers; radical Islamic terrorist organizations are one example, but there are others, such as guerrilla forces in Columbia. These groups are willing to kidnap, bomb, and kill humanitarian aid agency workers. Such ideologically driven attacks have dramatically escalated the risks of humanitarian relief work in the field.

The concept of inviolability and its associated twin pillars are also in intellectual and moral crisis: there is growing conceptual confusion over what inviolability is and what morally justifies it. Traditional justifications for humanitarian inviolability, based on analogies to state neutrality, such as the neutrality of Switzerland, appear inadequate as the scope of humanitarian activity and its reach within belligerent territory grows. Yet it is not clear what justification for humanitarian inviolability ought to take their place. As humanitarian action extends increasingly across a range of activities—from crisis relief to post-conflict reconstruction—the justification for humanitarian inviolability appears difficult to sustain by analogy to the ideal of purely neutral humanitarian relief that takes no sides on social or political questions. Nation building and the reconstruction of a society are politically laden, distinctly non-neutral activities that, although closely associated in the field with humanitarian relief, do not operate from the same conceptual basis of neutrality and, hence, inviolability. Confusion thus arises as to what realm of activities genuinely ought to be protected as purely humanitarian, neutral and impartial, and inviolable on that basis.

This confusion has grown with the wars in Afghanistan and Iraq. In the aftermath of both conflicts, humanitarian relief and reconstruction have been partly based on models developed by aid agencies and the U.N. in places such as Kosovo and East Timor. In this process, opponents of the developing political order have gradually come to see the aid agencies themselves as easy targets for violence and terror. These trends culminated with the devastating attacks by Iraqi terrorists against the U.N. headquarters in Baghdad on August 19, 2003, and against the ICRC Baghdad headquarters on October 27, 2003. Together the bombings killed scores of people and caused both organizations, and many more, to withdraw from Iraq.

This Article explores the nature and justification of humanitarian inviolability and the closely related concepts of neutrality and impartiality as understood in humanitarian relief work today. It does so in the context of both U.N. and international nongovernmental (NGO) humanitarian work. The Article's central claim is that the goals of humanitarian relief agencies in Iraq, particularly those of the U.N., were contradictory. On the one hand, they sought to portray themselves as neutrals in a war conducted by the United States and not sanctioned by the U.N. They considered themselves neutrals between an occupier and a terrorist resistance. On this basis, they claimed the inviolability of neutral, impartial, and apolitical relief workers. On the other hand, the U.N. and humanitarian NGOs undertook activities that were frankly not apolitical at all—efforts to start rebuilding Iraqi state and

social institutions, efforts which require serious political commitments to democracy, pluralism, and human rights, including the rights of women. These activities are not neutral in nature. In an effort to claim a place in the post-war circumstances, the U.N. and NGOs effectively moved back and forth between these two concepts of relief work, the neutral and the non-neutral, hoping to claim the inviolability of the genuinely neutral for the activities of the non-neutral. Iraqi terrorists, with greater political clarity, attacked.

Establishing this first claim requires a close examination of a very painful period in the history of the U.N. and international humanitarian NGOs, that of the reaction to the August 19 bombings. Although it is an exceptionally ugly moment in the relations between these organizations and the United States, it is necessary to confront and examine precisely the double claims, and the sliding between them, invoked by the U.N. and NGOs. The Article's second claim is that inviolability of the kind invoked by humanitarian relief workers is secured by neutrality and impartiality. Rather than relying on traditional analogies of state or territorial neutrality, however, the claim asserts that humanitarian inviolability rests upon the idea that humanitarian relief work of the most basic kind is a form of "justified intercourse" grounded in the "rational incontestability" of relief aid in moments of extreme privation. A third claim is that the justification for humanitarian inviolability in situations of extreme breakdown and privation—rational incontestability—does not justify inviolability of aid groups engaged in the broad social reconstruction of a society. The work of such groups is not, and cannot be, apolitical, but involves choices subject to challenge and contestation. A fourth claim is that the value of neutrality is an important one, but is not the highest value, and actually is morally restricted to a narrow range of humanitarian activities in moments of extreme human need. The Article's fifth and final claim focuses on the withdrawal of the U.N. and NGOs from Iraq and considers charges that their departure constituted a conscious policy of "passive sabotage." It concludes that although some groups and individuals likely harbor these motivations, such charges underestimate profoundly the security risks to humanitarian groups in Iraq.

This Article is informed in part by off-the-record conversations with staff of both U.N. agencies and international NGOs, as well as with members of the Bush administration and the U.S. government. The nature of the claims and counter-claims debated here makes it impossible to identify sources and informants. Where possible, the Article seeks to corroborate the off-the-record views of its informants with statements in the press. Still, this Article and its conclusions rely in part on anecdotal evidence obtained and private conversations conducted in past months by the author. The reader will have to judge whether such sketchy and necessarily incomplete information is credible.

Part II of this Article closely examines U.N. statements made in response to the August 19 bombing that invoke neutrality and impartiality as a basis

for inviolability. Part III offers the model of justified intercourse as a basis for inviolability. The model is based on the concept of “rational incontestability,” but Part III contends that this justification of “rational incontestability” only defends inviolability for humanitarian crisis relief and not for the larger tasks of state, social, and political reconstruction. Part IV argues that the U.N. and NGOs have claimed neutrality while engaging in non-neutral activities, the consequences of which undermine humanitarian inviolability. Part V then considers the limits of neutrality. The Article finally concludes, in Part VI, by discussing whether the U.N. or NGO departure from Iraq will make any humanitarian difference over the long term. The Article’s tone is uncompromising and, at times, unapologetically polemical.

II. THE U.N. AND ICRC BAGHDAD HEADQUARTERS BOMBINGS¹

A. *The U.N. Baghdad Headquarters Bombings: Horror, Outrage, and Consternation*

Reaction at the U.N. in New York to news of the suicide truck bombing of its Baghdad headquarters on August 19, 2003² that took twenty-three lives³ fell into three principal categories: horror, outrage, and consternation.⁴

1. *Horror*

The world reacted in horror at the injuries and deaths caused by the August 19 bombing of the U.N. headquarters in Baghdad. News reporters

1. On reflection, after completing the draft of this Article, it seems to me one of those writings in which it would be disingenuous for the author not to be clear about his own political position. I strongly favored the Iraq war, and I favor it no less strongly today, writing in February 2004, than I did prior to the war’s beginning. I have never thought that the Iraq war required the permission of the Security Council any more than the Kosovo war did, and despite the many stumbles of the U.S. coalition in this current period of occupation and terrorist-guerrilla war, starting with its excessively optimistic assumption that there would be little and only ineffective guerrilla opposition to the occupation, on balance I believe the U.S. coalition occupation has been making steady, if slow, progress. I also believe that it is far better that security as well as overall reconstruction remain for some considerable period of time directly in the hands of the United States, rather than transferring any significant part of it to the U.N., with all respect to the memory of Sergio Vieira de Mello.

2. For some of the initial accounts of the August 19 bombing, see generally WASH. POST, Aug. 20, 2003, A1; N.Y. TIMES, Aug. 20, 2003, A1. A second suicide bomber killed himself and one other person, wounding nineteen more, in a detonation in the parking lot of the U.N. Baghdad headquarters on September 22, 2003. Ian Fisher, *Suicide Attacker Who Struck at U.N. Carried 2 Bombs*, N.Y. TIMES, Sept. 23, 2003, at A13.

3. Dexter Filkins, *Inquiry in U.N. Bombing Focuses on Possible Ties to Iraqi Guards*, N.Y. TIMES, Aug. 22, 2003, at A1.

4. This Article argues that U.N. officials effectively wanted to claim apolitical humanitarian inviolability while asserting substantive political commitments. The August 19 bombings revealed that the U.N. cannot have it both ways. Close textual examination of what U.N. officials said in response to the bombing is necessary to understand expressions which indicate an ambiguous notion of neutrality permitting the U.N. to both distance itself from the United States while placing all responsibility for any difficulties on the United States. Whether directly or indirectly, these expressions indicate attitudes toward the underlying issue of humanitarian inviolability and its conditions, when it exists or should exist, and who should have it.

and cameras quickly reported live from the scene, amidst the chaos and attempts at rescue. The whole world was witness to the results of an attack against an undefended, quintessentially “soft” target consisting of international aid workers and their offices. The pain at the loss of the U.N. Head of Mission and Special Representative, Sergio Vieira de Mello, almost cannot be overstated.⁵ The Brazilian U.N. diplomat was one of the U.N.’s most trusted and experienced senior leaders, having served as chief U.N. official in Kosovo following the NATO bombing campaign and head of the U.N. East Timor Transitional Administration. At the time of the bombing, he was on leave as U.N. High Commissioner for Human Rights.⁶ Popular and respected within and outside the U.N.—including by U.S. government senior officials who admired his efficiency and ability to get things done⁷—Vieira de Mello’s lingering and eventual death caused grief to the many, many people who, quite simply, revered him.

Anyone who has worked in or around humanitarian relief or human rights agencies, public or private, could flip on CNN that day, as I did, and think, there but for the grace of God go I. The U.N. office served as a liaison point for international NGOs of all kinds and possessed one of the few internet connections through which NGO workers could contact friends and family outside the country. The headquarters served, as U.N. offices do in many places around the world, as both a place of work and as a temporary refuge from the urgently pressing demands of relief work that never let up. It was only too easy for those in the international NGO community, wherever they were in the world, to look at the television coverage and imagine what it was like to be there that day. One American, Arthur Helton, a widely admired expert and advocate for refugees and migrant rights, had been at Vieira’s office awaiting a meeting and died when the blast occurred.⁸

This was not, of course, the end of the bombings of humanitarian agencies. On October 27, 2003, for example, suicide car bombers attacked the ICRC Baghdad headquarters.⁹ At least thirty-five people were killed and some 200 wounded as part of coordinated attacks across the city.¹⁰ The reactions following the ICRC attack, while less vocal than those surrounding the August 19 U.N. bombing, were similar. Within a few days, and despite pleas by U.S. officials, nearly all of the already much reduced ICRC staff left Baghdad, as essentially all U.N. staff and staff of many other humanitarian NGOs

5. Neil MacFarquhar, *Amid Blood and Rubble, a Sense of Helplessness*, N.Y. TIMES, Aug. 20, 2003, at A9.

6. See Paul Lewis, *Sergio Vieira de Mello, 55, of the U.N.: A Shining Reputation Built on Tough Tasks*, N.Y. TIMES, Aug. 20, 2003, at A8.

7. *Id.* (“His firm but elegant style . . . improved relations with the Bush administration.”).

8. *American Refugee Expert Among Dead in Baghdad; Veteran U.N. Spokeswoman, Canadian Aid Worker Also Killed in Bombing*, WASH. POST, Aug. 21, 2003, at A11.

9. Dexter Filkins & Alex Berenson, *Suicide Bombers in Baghdad Kill at Least 34*, N.Y. TIMES, Oct. 28, 2003, at A1; Rajiv Chandrasekaran, *Car Bombs Kill at Least 35 in Baghdad; Red Cross, 3 Police Stations Hit, Killing 1 American; Foreign Fighters Blamed*, WASH. POST, Oct. 28, 2003, at A1.

10. *Id.*

had already done or were in the process of doing.¹¹ The departure of international humanitarian organizations and the U.N. from Baghdad was, by late 2003, nearly complete.

2. *Outrage*

Outrage soon supplanted horror. Immediately following notice of the atrocity, U.N. Secretary General Kofi Annan said, "Nothing can excuse this act of unprovoked and murderous violence against men and women who went to Iraq for one purpose only: to help the Iraqi people recover their independence and sovereignty, and to rebuild their country as fast as possible under leaders of their own choosing."¹² That view was widely echoed around the world; even the Syrian Deputy Ambassador to the United Nations, in the capacity of Security Council president, characterized the attack as a terrorist incident, and added that it "cannot break the will of the international community . . . to help the people of Iraq."¹³

Yet outrage was not directed solely at the perpetrators of the blast. It was also directed against the United States, because it was claimed that America should somehow bear responsibility for the deaths of the U.N. and international aid workers. The view that the United States was somehow indirectly responsible for the crime is, I believe (on the basis of private discussions I have had in both the United States and Europe in the months since the bombing), widely held among U.N. agency staff, staffs of other international organizations such as the World Bank and the IMF, and staffs of many international humanitarian NGOs. It is expressed as outrage, as resentment, and as anger at the U.S. government. Indeed, it is highly personalized against George W. Bush: "Sergio is dead because of Bush," was how one NGO worker bluntly put it to me.¹⁴

For these people, outrage was directed at the Bush administration as having been responsible, if not precisely for the blast itself, then for having fought a war that was not authorized by the Security Council and that created a situation in which the blast became possible. U.N. and NGO workers were only in this dangerous situation, in other words, because of illegal actions of the United States.

11. Rajiv Chandrasekaran, *Car Bombs Kill at Least 35 in Baghdad*, WASH. POST, Oct. 28, 2003, at A1, A16; Theola Labbe & Colum Lynch, *Red Cross And U.N. To Reduce Iraq Staffs: Threat of More Attacks Outweighs U.S. Pleas*, WASH. POST, Oct. 30, 2003, A1; Karl Vick, *Facing 'Different Kind of War,' Aid Groups in Iraq Adopt Lower Profile*, WASH. POST, Sept. 29, 2003, at A15.

12. Felicity Barringer, *Questions About Role of World Agencies in Hot Spots*, N.Y. TIMES, Aug. 20, 2003, at A9.

13. *Id.*

14. It can be thought of as the international elite equivalent of the personal hatred that U.S. domestic liberals increasingly express toward President Bush. See, e.g., Jonathan Chait, *The Case for Bush Hatred*, NEW REPUBLIC, Sept. 29, 2003, at 20; Howard Kurtz, *A Dislike Unlike Any Other? Writer Jonathan Chait Brings Bush-Hating Out of the Closet*, WASH. POST, Oct. 19, 2003, at D1.

a. Security Arrangements: Annan Blames the United States

For others, the United States was responsible because it had not prevented the attack from taking place, despite the fact that, according to U.S. officials, the U.N. mission had turned down U.S. offers to increase security at the site.¹⁵ Kofi Annan publicly took this view. “Surprised to learn,” according to the Wall Street Journal, that “U.N. officials in Iraq rejected a U.S. offer of a security detail,” Annan stated that the United States, “as occupying power, is obliged to protect people nonetheless.”¹⁶

The Secretary General’s platitudinous invocation of a general maxim of the 1907 Hague Regulations governing the laws and customs of war is nothing short of extraordinary. He essentially puts the United States, operating in one of the most difficult security environments in the world, in the position of being responsible for the security of people who have rejected such measures as U.S. forces are able to offer. One might doubt that the Secretary General’s standard of strict liability is legally or morally plausible in the midst of a mixed war and occupation. Annan went on to say, however, that while, if the U.N. mission in Iraq had turned down U.S. offers of security help, it “was not correct,” they should “not have been *allowed* to turn it down.”¹⁷

The Special Representative of the Secretary General not “allowed” to turn down a security offer—should not be allowed by whom? Prior to the bombing, would the Secretary General conceivably have suggested that the United States as the occupying power had both the legal right and the responsibility to *impose* security arrangements on an unwilling U.N.? Yet that is precisely what he suggested after the bombing.

Moreover, Annan went on to assert that even if the U.N. had turned down U.S. provisions of security at the only place it mattered from the point of view of U.N. safety—at its headquarters—the United States still had the responsibility to ensure safety. It was to do so, apparently, by providing protection in the wider neighborhood, yet without appearing to be specially protecting the U.N. Referring to the U.N. headquarters in New York City, Annan added that “we all live in this city, and nobody tells you if they want police to patrol your neighborhood. They make the assessment that patrol

15. Colum Lynch & Bradley Graham, *U.S., U.N. Differ on Issue of Protection: Responsibility Over Site of Blast Disputed*, WASH. POST, Aug. 21, 2003, at A10.

16. *What’s News*, WALL ST. J. WORLD-WIDE, Aug. 21, 2003, at A1. Annan presumably refers to Art. 43 of the Hague Regulations of 1907. See Convention Concerning the Laws and Customs of War on Land (Hague IV), with Annex of Regulations, Oct. 18, 1907, art. 43, 36 Stat. 2277, 2306, 1 Bevans 631, 651 (“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, *as far as possible*, public order and safety . . .”) (emphasis added). Annan’s strict liability reading of this article is, in my view, belied by the italicized language and legally not tenable.

17. Lynch & Graham, *supra* note 15 (emphasis added).

and protection is needed, and it is done. And that's what should be done in Iraq."¹⁸

Even allowing for understandable grief over the loss of Vieira and other aid workers, Annan's claim is at once breathtakingly inapposite and remarkably telling. Annan seems to imagine that the situation of Iraq, following the fall of the Saddam regime but in the midst of guerrilla war and terror, can be likened to policing New York City. The Secretary General appears to believe that war is merely a matter of police work, taken to a higher level, and that maintaining order in a hostile environment of guerrilla war, terror, and suicide bombing attacks is not different in principle, but merely in degree, from maintaining order in a large city in a settled, peaceful, domestic democratic society.¹⁹ It is therefore not the responsibility of the U.N. to seek or accept U.S. military aid in securing its perimeter in a situation that is at once occupation and war, any more than it is for a resident of a New York City neighborhood to have to tell police that it is necessary to patrol the streets.

In giving voice even to this narrow matter of security, the Secretary General was, I believe, articulating feelings of much deeper anger toward the United States on the part of the Secretariat staff—an anger shared by the wider community of international aid workers and organizations. The feelings were not just grief over the dead, but a far deeper and, drawing on my off-the-record conversations with U.N. and NGO staffers in recent months, a *sullen* anger against the United States, a sullen anger for having created a situation that, supposedly, put the U.N. in this position in the first place. Such complaints, even with little justification, about narrow security matters is just code for a much deeper anger at the United States and specifically a detesting of George W. Bush. Yet apart from this coded affair of who was responsible for security, the sullenness toward the United States I have repeatedly heard expressed in discussions among international civil servants and NGO aid workers is almost entirely privately, not publicly, expressed.

Sometimes hints of it slip out. *Washington Post* columnist Jim Hoagland, for example, has noted that "Annan has faced intense behind-the-scenes pressure from within his own secretariat to withdraw all U.N. staff from Iraq rather than cooperate with the U.S.-led occupation."²⁰ A *Washington Post* story cited a feeling "sometimes heard among U.N. rank and file that Annan allowed the world body to be linked too closely to the U.S.-led occupation."²¹ The article quoted an unnamed U.N. official as saying that the "travesty is that with our presence, we are legitimizing the occupation of a

18. *Id.*

19. For a discussion of what separates war from policing, see Kenneth Anderson, *What Kind of War Is It? Law, Language, and Terror: Soldiers or Policemen in the War Against Terror*, TIMES (LONDON), Sept. 21, 2001, at 13 (Literary Supplement).

20. Jim Hoagland, Editorial, *Ships in the Night at the U.N.*, WASH. POST, Sept. 24, 2003, at A29.

21. Peter Slevin, *Aug. 19 Blast Reverberating in U.N. Debate on Role in Iraq*, WASH. POST, Sept. 14, 2003, at A21.

country”²²—quite without reference, naturally and as ever, to the nature of the regime that was deposed and the occupation replaced.²³ And that unnamed official has got his wish; the U.N. is gone.

b. The Ugly Implications of Malloch Brown's Ambiguity

Statements by other U.N. senior officials also warrant close analysis. U.N. Development Program head Mark Malloch Brown, for instance, expressed careful ambiguity with respect to establishing law and order in Iraq, saying that “a coalition based on a narrow number of countries is insufficient to manage the peace.”²⁴ Did Malloch Brown mean this merely descriptively, because he thought the coalition too narrow to be effective? Or did he mean, instead, that the coalition was narrow, by definition because it had not been authorized by the Security Council and hence was illegal? Is “narrow” here proxy for “illegal”?²⁵ If Malloch Brown judges the occupation to be illegal, does he consider insurgents, if not terrorists, justified in their violent opposition to it, as long as they direct their attacks at the occupier and not the U.N.?

Malloch Brown’s and Annan’s statements reveal a reticence about speaking publicly and directly. The reasons are a complex mixture of extraordinary concern within the Secretariat about relations with the United States and the effect of being seen as blaming the United States, even while privately longing to blame the United States. And there is the question of the U.N. possible future role in Iraq, such as in elections monitoring or power handovers.

International humanitarian NGOs also are conflicted by a sometimes fundamental desire to blame the Bush administration, and a humanitarian concern for the civilian population in Iraq. They face concerns about funding, access, and relations with the United States on other matters. International NGOs will not be sustained by the E.U., E.U. governments, and Japan alone. As U.N. Undersecretary General Shashi Tharoor put it, the “worst fear of any of us is that we fail to navigate . . . between the Scylla of being seen as the cat’s paw of the sole superpower and the Charybdis of being seen as so unhelpful to the sole superpower that they [sic] disregard the value of

22. *Id.*

23. *Id.*

24. Nicolas Pelham & Gareth Smyth, *UN Rethinks Work Amid Baghdad Chaos*, FIN. TIMES (London), Aug. 27, 2003, at 6.

25. The fundamental issue here, as Michael Glennon has recently pointed out in an extraordinary article on the collapse of any rule of law regarding the Security Council and the use of force, is that many of those who want to criticize the United States for not obtaining Security Council authorization to strike in Iraq still want to approve of the action in Kosovo, which was also not authorized by the Security Council and was widely understood at the time to be in nearly certain peril of a Russian veto had authorization been sought. See Michael Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS May-June 2003, available at <http://www.foreignaffairs.org/20030501faessay11217/michael-j-glennon/why-the-security-council-failed.html>; see also Michael Glennon, *Sometimes a Great Notion*, WILSON QUARTERLY, Autumn 2003, at 45.

the United Nations.”²⁶ Nonetheless, the mere ambiguity of Malloch Brown’s comments amounts to a very ugly charge-by-implication.

The U.S. government, too, whether out of a desire not to inflame passions further or enter into an unseemly argument even as the dead have barely been buried, did not address the blame that both the U.N. and international community have directed at it both implicitly and explicitly. The evasion of discussion of blame by all sides is understandable, but a mistake.

The United States, out of politeness and respect for the dead and for the work of Vieira, has failed to address a central charge of culpability that continues to fester even today. Yet it ought not to forbear, even if from politeness, from challenging so fundamental and deeply felt a charge about its blameworthiness for the attack upon the U.N., especially one that amounts to an *a priori* claim of strict liability based upon an assumption of the illegality of the war. The United States cannot skirt around the issue by simply debating security arrangements in Baghdad—especially when claims of strict liability based on the war’s presumed illegality are at stake.

The U.N. Secretariat, for its part, cannot, out of fear of a bitter debate with the United States, ignore the fact that its staff—including the Secretary General himself—harbors the view that the United States is responsible for any and all evils of the Iraq occupation presuming the war’s illegality. In other words, they used a sort of analogy to the “felony murder” rule: if it is the fruit of your illegal action, then it is your responsibility. There is a debate to be had here, and it deserves to take place in the open. This is not a matter in which diplomatic papering over deeply felt differences will produce anything other than a more serious rupture in the future.

c. The Report of the Independent Panel

To the U.N.’s credit, the Secretary General took the extraordinary step of appointing an independent panel to examine the security issues involved in the Baghdad bombing.²⁷ The panel was headed by a former president of Finland, Martti Ahtisaari, and included police and military experts, among others.²⁸

The Panel’s Report, released in October 2003, is as candid, trenchant, and uncompromising a U.N. document as any I have read in decades. Among its conclusions, the document states that the U.N. team under Vieira operated from untenable premises about its security.²⁹ The U.N. assumed that it was not a target, leading it to ignore the most basic matters of physical security,

26. Felicity Barringer, *U.N. Senses It Must Change, Fast, or Fade Away*, N.Y. TIMES, Sept. 19, 2003, at A3.

27. *Report of the Independent Panel on the Safety and Security of UN Personnel in Iraq*, Oct. 20, 2003, available at <http://www.reliefweb.int/w/rwb.nsf/0/A63412043388FFC785256DC700652680?OpenDocument>.

28. *Id.* at 1.

29. *Id.* at executive summary.

such as putting blast film on the windows.³⁰ Vieira insisted on operating from a second floor office with a window literally visible from the street.³¹ Coalition security forces providing outside protection for the building were constrained, by U.N. request, to a platoon that provided limited security, often with limited hours;³² even this minimal U.S. military presence caused “UN senior management in Baghdad” to be “uneasy.” It asked the U.S. military:

[to] withdraw their heavy equipment from the front of the compound, dismantle the observation post on the roof top of the building and remove the obstacle on the access road because the United Nations did not own the property. No alternative security measures were requested. Later, the United States military laid concertina wire across the access road, but again the United Nations requested that the obstructions be removed. The access road was open to traffic on 19 August and was used by the attackers to approach and target the UN building.³³

Yet, these security deficiencies were not remedied despite the fact that by August 10 and 11:

information became available to the UN security team in Baghdad of an imminent bomb attack in the Canal Road [where the UN headquarters was located] area of Baghdad. The target or method of delivery of the attack was not indicated. It was also reported that other information was available around mid-July that the UN headquarters in Baghdad was under threat from a group loyal to the former regime.³⁴

Hindsight, of course, is perfect. Still, it was in part the experience of the U.N. in other post-conflict situations that led to such tragically misplaced assumptions as those made in Baghdad. The U.N. had developed its methodologies and assumptions working in Kosovo and East Timor—two places, however, where a majority of the local population believed itself to have been liberated *from an outside aggressor*—the Albanians from the Serbs and the East Timorese from the Indonesian army. The presence of outside forces ensured that once the oppressor departed, it would not return.

In one sense the Iraqis had been liberated, but not from an outside military force. And so, at least in the Sunni triangle, the meaning of liberation was and remains vastly more ambiguous than it ever was for the Kosovar Albanians or the East Timorese. The reason why is simple: although the re-

30. *Id.* at 12.

31. *Id.* at 10.

32. *Id.* at 11.

33. *Id.* at 11–12.

34. *Id.* at 13.

gime is gone, those who had been the oppressors, and who benefited from oppression, are not.³⁵ They remain, continuing to act and hoping yet to return as oppressors in the name of a specious “self-determination.” The U.N. team in Baghdad operated somewhere between the assumption that the situation was like Kosovo or East Timor, and the assumption that even if it was not, it was not the occupation.³⁶

3. Consternation

If you genuinely believe, however, that your humanitarian, relief, and reconstruction activities are indeed *separate* from the occupation, whether because you believe the occupation was illegal while your relief operations are legal, or simply because you are not part of the occupying forces, then horror and outrage at the August 19 attack must be accompanied by a certain amount of consternation.³⁷

Malloch Brown gave voice to this consternation among U.N. workers and the aid community when he said on the day of the attack, “We do this out of vocation. We are apolitical. We were there to help the people of Iraq and help them return to self-government. Why us?”³⁸ According to the *New*

35. The misplaced optimism of the U.N. team’s assumptions parallels the overly optimistic assumptions by U.S. military planners that Coalition forces would be received as liberators in the war’s aftermath.

36. The assumptions were flawed, and with tragic consequences. The Report makes a number of specific recommendations for the security and safety of U.N. personnel in operations worldwide, not just in Baghdad. It is to be hoped that the Secretary General takes the Report as offering some of the best advice, however bitter, the U.N. has ever received, and act accordingly.

37. As the Report recognizes, because the U.N. saw itself as a “benevolent agency, supported and respected by all parties,” it was unable to comprehend the view from the ground in Iraq, that the long history of the U.N. in the Iraqi sanctions regime would emerge as “a liability as the Organization [the U.N.] is redefining its role in the country.” *Report of the Independent Panel on the Safety and Security of UN Personnel in Iraq*, *supra* note 27, at 23, 20–21. Iraqis did not necessarily see it as benevolent, neutral, or separate from the occupation. Of course, the question of *violence* against the U.N. is different. Whether ordinary Iraqis see the U.N. as part of the occupation is less important, at this juncture, than what those Iraqis engaged in violence and terrorism against the occupation think, and whether they think of it as part of the occupation is less important than simply whether they regard it, and other aid agencies, as a target which will inevitably influence world public opinion over the value of occupying Iraq. It does not follow from the view of ordinary Iraqis, whether they see the U.N. as separate or as part of the occupation, that the U.N. will be targeted for violence; those calculations are quite different and made by a different set of actors.

38. Barringer, *supra* note 12. It bears noting, given the confusion sometimes heard in conversation with international organization staff, the NGO community, and especially the media, that occupation forces have the specific right, under the Fourth Geneva Convention, to punish those who engage in violent acts against the occupier, including under some circumstances capital punishment. I have spoken with many who seem to be under the impression that violent Iraqi or foreign Islamist resistance to occupation forces may not be punished by occupation authorities, or that captured fighters must be treated as POWs not liable for punishment for their violence. They should consult, *inter alia*, IV Geneva Convention,

Articles 64 and 68, providing for circumstances and mechanisms for penal sanctions against those resisting the occupation. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 6 U.S.T. 3516, 3558, 3560, 75 U.N.T.S., 287, 328, 330. There is no “right” to resist violently the occupier, if “right” is equated with “free from possible punishment.”

York Times' account, Malloch Brown gave voice to "a sense of betrayal"³⁹ on behalf of U.N. New York headquarters staff.

I can confirm this sense of betrayal from many private conversations with U.N. and NGO workers. It is a sense of betrayal, however, that leaves dismayingly open the question of "betrayal" by *whom*—the Iraqi terrorists who organized the attack and sent the suicide bombers, or the United States for allegedly having betrayed the U.N. by undertaking an unsanctioned war? Who, for Malloch Brown, betrayed humanitarian values: the terrorists or the Bush administration? The answer matters a great deal, not least in what the attitude of the Bush administration ought to be toward the U.N. and its agencies; it goes to a fundamental question of political morality. It is a question to which the United States cannot afford to be left with ambiguity rather than an answer.

Malloch's statement raises other questions too. The attack, he added, was also a "blow at the neutrality and the impartiality of the U.N. flag."⁴⁰ In one sense, this is simply the sort of officious banality that public officials are supposed to utter in times of crisis. In another sense, however, we might take him at his word and plainly query, what *is* this neutrality that the U.N. flag and agencies supposedly offer and is it part of the stock in trade of the international aid community, official agency and NGO alike?

What, for that matter, does it mean for the U.N. to be "apolitical"? What, if anything, does it mean to describe yourself as "apolitical" and yet have as your goal to help the people of Iraq "return to self-government"—as though becoming self-governing were some sort of neutrally self-defining category that did not involve a thousand inevitably *political* choices in which the U.N. would, somehow, "apolitically" not aim at any particular outcome? "Apolitical" as between a criminal such as Saddam and his Baathists and the United States? "Apolitical" as between totalitarian dictatorship and democratic self determination? "Apolitical" as between genocide and crimes against humanity and armed action to remove their author? It is ever a source of wonder that amidst the endless moralizing of the U.N.'s defenders and their criticism of the United States, more questions are not directed to the former's fundamental aims and the morally obtuse attitudes of its senior officials, no matter how delicately and diplomatically phrased.

And so consternation abounds among the international aid community that it might be targeted. Consternation abounds especially when the sense among U.N. staff seems to carry an overtone—filling in, perhaps uncharitably but likely not, Malloch Brown's unstated premise underlying the question "Why us?"—that if anyone ought to be a target, it is the United States, not the "neutral and impartial" aid community. And consternation finally abounds that the aid agencies might be targets because intellectual and moral

39. *Id.*

40. Barringer, *supra* note 12.

confusion (some of it I suspect deliberate) also abounds on two fundamental issues.

4. *Two Fundamental Questions About Neutrality and Inviolability*

(1) *Are* these aid agencies, public or private, but the U.N. in particular in fact neutral and impartial?

(2) Is it good, honorable, virtuous, or otherwise desirable for an organization that, at least in its own ideology, proclaims its special legitimacy⁴¹ in matters ranging from war and peace to reconstruction and development to proclaim further that this unique legitimacy derives from *being neutral* in a world that abounds not merely in “actors” and “parties” and “states” and “organizations,” but also, alas and not infrequently, good and evil?

The U.N.’s self-conception—the conception accepted by, for example, some of its strongest supporters, European governments, and largely their peoples—is that the U.N. is the highest political authority, the “embodiment of international law and world order.”⁴² Sometimes the issues in international life are only modestly moral ones—this or that issue in world trade, for example, or international postal rates. But sometimes they are plainly and unavoidably moral. In a world in which there is good and evil, good leaders and evil leaders, good regimes and evil regimes, how is it that a political body can assert itself as the world’s highest political authority (or at least aspire to that role in some hoped for liberal internationalist utopian future) on the basis of its *neutrality*? Why should moral human beings accept that as the *sine qua non* of political legitimacy for global governance?

III. INVIOABILITY AND THE PROVISION OF NARROW “INCONTESTABLE” AID

A. *Justified Intercourse and Moral and Rational Incontestability*

Traditionally, humanitarian inviolability has been based on the conditions of neutrality and impartiality, and these, in turn, have been justified by analogy to the rights of a neutral state. As Denise Plattner has authoritatively written, the paradigmatic ICRC has long viewed its own neutrality as a humanitarian organization as “understood only on the basis of the first status of neutrality derived from international law, i.e., that of a neutral State.”⁴³

This Article will not seek to explain why that view, while historically true of the ICRC in its intertwined history with the neutral state of Switzerland,

41. See generally Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49.

42. Barringer, *supra* note 26.

43. Denise Plattner, *ICRC Neutrality and Neutrality in Humanitarian Assistance*, 311 INTERNATIONAL REVIEW OF THE RED CROSS, 161, 164 (1996), available at <http://www.icrc.org>. This Article not only does not argue the case against the state or territorial analogy, but also does not draw important distinctions between state neutrality and the neutral state, preferring to leave them to a more extended discussion on another occasion.

is inadequate to capture the nature of humanitarian inviolability. Instead, it will assert, without argument, that the only justification for inviolability that properly captures the international humanitarian aid community's sense of entitlement to inviolability is the plainest, least philosophical, least tortured reasoning of all: inviolability is justified because humanitarian action is a form of intercourse, undeniably a form of intercourse on the normally inviolable territory of a belligerent, but one that is morally justified. It is justified first, because of the undeniable needs of the noncombatant population and, second, because the satisfaction of those needs will not compromise the military necessity of belligerents.

The categories sustaining inviolability, therefore, are the morally irreducible claims of essential human need, on the one hand, and neutrality and impartiality with respect to the military necessity of the belligerents on the other. No appeal to analogies of territoriality, state neutrality, or other legal constructs really helps; the two categories of essential human needs and military necessity are themselves irreducible. Even if belligerents choose to deny the moral fact of human necessities of noncombatants, either by denying access to humanitarian actors or making them or their property objects of attack, they are simply morally—and legally—wrong to do so. Any less categorical a claim for the basis of inviolability would seem mistaken in principle and ultimately not faithful to what those in the humanitarian action community actually believe.

Put differently, the claim of the humanitarian action community is that its aid is morally *incontestable*. At least in the purest case (and many situations are not so clear), no one could rationally dispute either its necessity for human good or, given that it is destined for noncombatants, claim that it will impair military necessity. Having met those two conditions, no one can rationally deny the provision of such aid. Humanitarian action is a form of justified intercourse—"intercourse" because it involves activities involved with and indeed on the territory of belligerents—and "justified" because no moral, indeed no rational, actor could deny it. And this is precisely what international humanitarian law on this issue, such as Art. 70 of 1977 Additional Protocol I, governing civilian relief action by outside humanitarian actors, fundamentally intends when it says that such relief efforts shall not be considered "unfriendly." Such efforts constitute, by law, justified intercourse insofar as they meet these two conditions and are impartial and neutral between noncombatants in need.⁴⁴

44. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1978, Art. 70(1), 1125 U.N.T.S. 4, 35. It should be noted that the United States has not ratified Protocol I and has stated that it will not be bound by it as treaty, although it accepts parts of it as declarative of customary international law. In the absence of any official declaration by the U.S. Department of Defense as to what is and what is not considered by the United States to constitute customary international law in Protocol I, I am not aware of any statement by the United States that would lead me to believe that it does not accept Art. 70(1) as customary law or, at a minimum, custom or state practice which it would follow even if not legally

If these two categories are the morally irreducible categories that matter—combining to form a justification fundamentally about *incontestability*—then the importance of neutrality and impartiality becomes much more comprehensible. They become essential links in defending the essential human needs of the noncombatant population against the claims of military necessity. “Neutrality” becomes an assurance that humanitarian actors do not tilt their activities in favor of the military necessity of either side. And “impartiality” is understood as aid distributed in proportion to need, likewise not tilting the military balance.

Rational incontestability, therefore, seems both the proper way in which the delivery of humanitarian services and goods, and the inviolability of humanitarian actors and their work, must ultimately be justified. It is the way in which humanitarian actors do in fact justify it. It is the principle which neutrality, impartiality, and inviolability all serve. To be sure, there are innumerable actors—belligerents, warring parties, local warlords, bandits and thieves, religious fanatics, thugs, totalitarian commissars, terrorists—who think such categories are nonsense and, of course, do not respect them. The issue, however, is on what basis the humanitarian action community, committed to providing such services, regards its activities as morally, politically, and legally justified.

But there is a profound consequence of this way of thinking about claims to inviolability, neutrality, and impartiality of humanitarian actors: it puts humanitarian action on a *single* continuum of “justified intercourse”—justified *interference*, we might call it. It has at one extreme such actions as the ICRC’s polite, unenforceable requests to be allowed neutral and impartial access to the civilian population. At the other extreme lies forcible military humanitarian intervention. But the concept of rational incontestability places them, ultimately, on the same continuum.

Neither the ICRC nor very many other humanitarian organizations would want to see it suggested that those two instances of “intercourse” are separated merely by degree and not by principle. Most would prefer to draw a principled difference between requests for access and humanitarian action backed by force or the threat of force. Yet I would suggest that a difference of degree, not kind, is precisely their relationship. Indeed, I would suggest that this is in fact how the humanitarian aid community, when it thinks plainly and without diplomacy, circumlocution, or politesse about its concept of incontestability, views the relationship between humanitarian aid and intervention. The point is to understand that what is at stake in the apparently scholastic exercise of locating justifications for neutrality is not finally scholastic at all, but something important about the nature of humanitarian action of any kind.

binding as customary international law. See, e.g., Kenneth Roth, *Cheney Must Explain Why Populated Areas of Iraq Were Deliberately Bombed, A Violation of International Law*, L.A. TIMES, Feb. 4, 1992, at B7.

B. The Contradiction Between Narrow “Incontestable” Aid and Broad Social Reconstruction

Let us accept provisionally that a criterion of incontestability can yield a justification for humanitarian inviolability if conditioned by neutrality and impartiality. Even if that is so, a great difficulty remains with respect to Iraq, Afghanistan and, for that matter, the reconstruction efforts in East Timor, Kosovo, and a vast array of post-conflict situations.

It is simply that a criterion of rational incontestability can justify the provision of immediate human needs. It can do so even between hostile political systems, as seen in the provision of aid by a hostile U.S. government to Iran following the earthquake that leveled the Iranian city of Bam. Everyone agreed that overwhelming immediate human needs are incontestable and overcome politics.⁴⁵

What a criterion of incontestability *cannot* do, however, is provide justification for the broader reconstruction of society and its institutions, notwithstanding that how those institutions are constructed and reconstructed will impact profoundly how fundamental human needs are met. The reconstruction of society requires a politics, and choices about all matters in society—political, economic, cultural—which, by their nature, *are* contestable. Reconstruction depends not merely upon the rational agreement that basic human needs must be met, but instead on highly disputed and highly contestable visions of the good society, the good politics, the good economy, and the good culture.

This is not to suggest a puerile relativism—relativism claiming that no one can say what the good is. On the contrary, there are many matters in which there are better and worse arrangements, matters ranging from the organization of the economy to the participation of women in public life to the rights of minority religions. But in matters which are not simply about undeniable human needs of this very moment, choices that are better and worse must be argued for, debated, and defended because they are contestable, because they are not self-evident. Those who engage in post-conflict reconstruction must make choices that are not beyond all rational question. Their work is rationally contestable.⁴⁶

45. Never fully, of course. Consider, for example, the outpouring of aid in the Bam, Iran earthquake of December 2003, generally without reference to politics, although obviously donors hoped to reap some indirect public relations benefit. Iran was willing to take even U.S. aid, although the offer sparked a sharp debate over the presence of uniformed U.S. military personnel. See, e.g., Neil MacFarquhar, *U.S. Offer of Quake Aid Sparks Debate in Iran*, N.Y. TIMES, Jan. 4, 2004, at A4.

46. This distinction has a cognate in U.S. domestic political theory. Some American liberal theorists—Ronald Dworkin’s *Law’s Empire* is perhaps exhibit A and Amy Guttmann and Dennis Thompson’s *Democracy and Disagreement* exhibit B—have a distressing tendency to assume that *their* political preferences are more than just preferences, more than just a morally, politically, or legally better choice within a democratic discourse of argument and plural values, but instead their preferences are what rationality requires. See RONALD M. DWORKIN, *LAW’S EMPIRE* (1986); AMY GUTTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996).

Thus, rational incontestability is a splendid basis for defending the provision of narrow immediate humanitarian assistance—for defending the inviolability of such assistance. And the additional conditions of neutrality and impartiality make perfectly good sense in defense of an inviolability that, particularly in time of armed conflict, raises questions about bias as between belligerents and their perceptions of military necessity. This is, after all, what is faced in Iraq and Afghanistan, but as well as East Timor, Kosovo, and other places where U.S. wars are not at issue; reconstruction *always* requires a politics.

C. Can or Should the Broad Social Reconstruction of Society Be Neutral?

Of course, there is a scope, mandated by the value of self-determination, for outsiders to act as “honest brokers” in debates within a political community about the nature of its institutions. But to act as an honest broker in such debates *presupposes* a commitment to far more basic things—to democracy, to pluralism, to human rights, to a great many things. Neutrality of the kind required in the provision of narrow and immediate humanitarian aid, the rationally incontestable aid, is pernicious nonsense in circumstances of longer term social reconstruction—nation-building, if you will.

And so Malloch Brown was profoundly mistaken when he proclaimed that the U.N. flag represented “neutrality and impartiality,” and that the U.N. in Iraq was, or could ever be, “apolitical.” Neutrally and impartially abstain from controversies of a political or ideological nature? How could the reconstruction authorities anywhere, whether the U.N.’s Sergio Vieira de Mello in Kosovo or East Timor, or United States and coalition occupation authorities in Afghanistan or Iraq, *not* directly involve themselves in these matters, ranging from the decision that these societies shall be political democracies, to giving the vote and other rights to women, to requiring some measure of separation of religion and state, to protecting the rights of ethnic or religious minorities? *Of course* reconstruction agencies have views and mandates on these issues which they must carry out in their efforts.⁴⁷

Those who attacked the U.N. and ICRC headquarters surely understood this. They surely understood it better than those who, relying on what they believed to be a shared anti-Americanism, on the one hand, and a puerile multiculturalism that erected a faux relativistic neutrality on the other, believed themselves immune from attack. The problem is that the U.N. wanted—and wants—it both ways.

47. It is cause for concern, not for reassurance, that parts, at least, of the aid community and the U.N. are well aware of this conflict. As Larry Minear, director of the Humanitarianism and War Project at Brown University, notes, “the UN system and NGOs that collaborate with UN agencies situate humanitarian activities for the most part within a broader political framework. Unlike the ICRC, many of them embrace explicitly political tasks such as addressing the underlying causes of suffering . . . the alternate [i.e., politically non-neutral] paradigm has comparative advantages as well as disadvantages . . .” Larry Minear, *The Theory and Practice of Neutrality: Some Thoughts on the Tensions* 833 INT’L REV. RED CROSS, 63, 65 (1999), available at <http://www.icrc.org>.

On the one hand, the U.N. wanted to be able to undertake the task of social reconstruction. It wanted to do so partly, as Malloch Brown said, from an idealistic sense of vocation. It wanted to do so partly from a genuine belief (a respectable, honorable belief, however improbable a skeptic like I find it to be) that it, rather than any single nation or “narrow coalition,” has the special legitimacy to undertake the task. It wanted to do so partly in order to survive institutionally by finding a genuine role for itself in matters of war and war’s aftermath in a world of a single superpower. And it wanted to do so partly because it believes itself to be the institutional bearer of global governance. Sergio Vieira de Mello and his team understood, if for no other reason than its experience in Kosovo and East Timor, that its policy choices are far from neutral.

But, on the other hand, when the U.N. came under attack—when its principles came under attack—and having refused security assistance of the only kind reasonably possible in the midst of a guerrilla and terrorist war, then suddenly it lost its values and concluded that, after all, it was merely a neutral. Suddenly the long-term reconstruction process of the U.N. agencies was to be portrayed as, in Malloch Brown’s phrase, “apolitical,” as though those agencies were merely purveyors of incontestable short-term relief aid to *people* rather than the re-builders of a *political community*.⁴⁸ Small wonder that the U.N., unstable, inconstant, and unreliable, lost its courage and its way, pulling out of Baghdad and, in my view, betraying the final wish of its finest representative, whose dying words were a call upon the U.N. not to abandon its mission in Iraq.⁴⁹

IV. INVIOABILITY AND BROAD SOCIAL RECONSTRUCTION

A. A U.N. Policy of Bait-and-Switch, or, Wanting It Both Ways

The U.N.’s moral sleight of hand concerning its supposed neutrality was made especially apparent in Iraq because it was a war it did not sanction. Hence it was a war for which it had no obligation to assume any responsibility, even as it asserted moral and political values in the reconstruction effort. Seeking to bolster its claim to neutrality even in the teeth of the

48. Then there is the problem of the U.N.-administered “oil for food” program, on which some sixty percent of the country has depended for food. Billed as a humanitarian relief program to alleviate the effect of U.N. sanctions on the Hussein regime, it increasingly appears to have served as a font of massive corruption, both within Iraq and in dealings with other countries and individuals, but also, and more significantly, as an important mechanism by which Hussein purchased influence abroad. See Therese Raphael, *Saddam’s Global Payroll*, WALL ST. J., Feb. 9, 2004, at A26. As Raphael points out, the U.N. has been strongly resisting efforts by the Iraqi Governing Council to account for connections to the Saddam Hussein regime. But it might be suggested that the failure of the Iraqi people to appreciate the “neutrality” of the U.N. mission in post-war Iraq stems from their experience of the oil-for-food program, and what may appear as the U.N.’s complicity with the Hussein regime, in the guise of humanitarianism.

49. Theola Labbe, *Don’t Let Them Pull the U.N. Out of Iraq: Envoy’s Final Words Related by Army Sergeant Who Tried to Free Him*, WASH. POST, Aug. 23, 2003, at A1.

moral and political values that its long-term reconstruction programs must actually embody, the U.N. could declare itself as neutral between the Iraqi guerrillas and terrorists on the one hand and U.S. and coalition forces on the other.

But neutral with respect to the war and occupation while quietly not neutral with respect to reconstruction? How more morally confused could things become? It is in my view a shabby bait-and-switch, unworthy of the organization and its leaders. After all, the U.N. did not have to go to Iraq; it could have said to the United States, it's your affair, good luck and good riddance—just as it has now done by pulling out. No doubt, as Hoagland has noted and certainly my private conversations have confirmed, some in the U.N. and international NGO community preferred and continue to prefer to see Iraqi terrorists win if it means that Bush loses. There are those, it must be said, who prefer the failure of the occupation in order to stick it to the Bush administration, even at the cost of Iraqi civilian welfare and the future political peace of that country. Some of them are, in my estimation, to be found in the U.N. Secretariat and others are to be found among the NGOs.⁵⁰

Yet the U.N. had self-interested institutional reasons for being in Iraq. Annan plainly understood, as did Vieira, that the U.N. would be rendered entirely irrelevant if it could not play a constructive role in the long term rebuilding of Iraq. Hence the U.N. strategy of pressuring the United States to hand over its resources on the questionable claim that the U.N. "brand" would contribute irreplaceably to the reconstruction effort. To be sure, its leaders genuinely believe that the U.N. brings unique expertise and legitimacy. But if U.N. leadership really believed those assets are irreplaceable in rebuilding a society, then it was surely morally obligatory for it to remain in Iraq.

B. Can U.N. Reconstruction Efforts in Iraq Be "Neutral" and Inviolable Simply Because It Did Not Sanction the War?

This leaves us able, therefore, to answer on both practical and conceptual grounds the first question posed in Part II—are U.N. agencies, as well as NGOs and other international workers, in fact neutral and impartial? Insofar as their work carries them beyond the realm of "incontestable" relief aid, they are not. Once international aid passes that relatively narrow band and begins to enter into the realm of social, political, cultural, and physical reconstruction of society and the political community then it is no longer neutral or impartial. But if such aid is not neutral, and if neutrality is a condition of inviolability, then humanitarian workers engaged in longer-range reconstruction will have to give up the claim of inviolability based on rational incontestability.

50. Hoagland, *supra* note 20. See also Slevin, *supra* note 22.

This observation belies the hope expressed by various U.N. spokespeople and NGO workers that the problem of their inviolability is merely one of separating themselves from the occupation, physically as well as in public perception.⁵¹ This is a mistake that partakes of the same bait-and-switch policy that attempts to be neutral with respect to the occupation but not neutral with respect to rebuilding a sovereign, self-determining, and democratic Iraq. This view treats the idea of neutrality as if this is a matter of public education, making sure that those who would attack the occupation understand that although you operate in the occupation's wake, you do not operate in its shelter. Nor do you share its values, although you share some *other* set of values that include self-determination, democracy, human rights, and sovereignty, but *not* the values of self-determination, democracy, human rights, and sovereignty as understood by the occupiers. One can understand how Iraqi terrorists may have trouble in distinguishing one from the other.

But of course the claim of neutrality is not a question of public relations or mere perception. Those who attacked the U.N. were not mistaken as to their targets or what they stood for. They understood both that the U.N. had stood aside from the U.S.-led war but also that the U.N. and NGO groups collectively are not neutral or impartial about the nature of a future peace. This is a point that is understandably hard for those NGOs that perceive themselves as dealing with discrete, narrow humanitarian relief work.⁵² These groups are busy getting the local hospital going again or distributing food, the same as they might do in any other conflict or post-conflict situation in which their neutrality is paramount and is the only guarantor of their inviolability.⁵³

Beyond these narrow tasks, all humanitarian groups collectively really are about restarting and reestablishing a society's infrastructure. In that way they are also about reconstructing and rebuilding society. From a long-term vantage point, even the narrowest aid groups contribute to an activity that, in its totality, is not neutral. Even the crisis aid given by the ICRC might very well contribute, as part of the larger collective effort, to rebuilding an Iraqi society that will undergo wrenching changes. Leaving aside democratization and the elimination of an evil dictator, it will likely be a society in which Sunni privileges are narrowed, Shia majorities are able to assert them-

51. Slevin, *supra* note 22 (noting "teh opinion sometimes heard among U.N. rank and file that Annan allowed the world body to be linked too closely to the U.S.-led occupation"). Certainly my own conversations confirm this, in much stronger and angrier terms.

52. On the other hand, it is a point admirably noted in the Independent Panel report, which identifies as a risk to U.N. staff, and by extension to humanitarian personnel, the "spreading of religious and fundamentalist ideologies, some of whose adherents openly oppose key U.N. tenets"—thus acknowledging the obvious: that the U.N. does, and should, have actual tenets, values, beliefs, and political goals. United Nations, *Report of the Independent Panel on the Safety and Security of the UN Personnel in Iraq* (Oct. 20, 2003), at 19, available at <http://www.un.org/News/dh/iraq/safety-security-un-personnel-iraq.pdf>.

53. See generally Karl Vick, *Facing "Different Kind of War," Aid Groups in Iraq Adopt Lower Profile*, WASH. POST, Sept. 29, 2003, at A15 (accounts of Merlin [a British medical aid NGO], the ICRC, and other NGO groups working in Iraq).

selves, and changes with winners and losers will result materially as well as ideologically.

Against this reality, what matters is not so much the general Iraqi public perception of the relationship between international aid groups and the occupation. Instead, what matters is that Iraqi *terrorists* correctly understand that these groups, whether the aid groups and agencies admit it or even understand it, contribute to rebuilding an Iraq in the long term that aims to have no place in it for terrorists and guerrillas.

C. *A Private Peace with Terrorists?*

The targeting of aid workers by radical Islamists leads directly to a disturbing possibility for aid organizations, that of striking a private peace with their attackers. The murder a few months ago by Taliban forces in Afghanistan of an ICRC water engineer illustrates the dilemma that might confront at least some aid organizations.⁵⁴ The ICRC convoy was stopped by Taliban-linked forces, and the ICRC staffer pulled out.⁵⁵ It was known to the attackers that he was ICRC, and indeed they called for their commanders' instructions before executing him.⁵⁶ It was no merely local atrocity; his execution was part of a Taliban policy of targeting Western organizations, including aid organizations such as the ICRC which had a long history of working even in Taliban-governed Afghanistan and was able to have at least functional relations even with the Taliban.

Every international aid NGO with which I have had contact in the last few months has told me that relations and legitimacy in the Muslim world are a high priority. Many aid workers have told me that they believe that nothing less than the universalism of the international humanitarian movement is at stake. But this raises the troubling possibility that an aid organization could attempt to reach a "private peace" with a radical terrorist organization—one, such as Al Qaeda or the Taliban, that systematically violated the laws of war to which an aid organization would be committed as a matter of principle. An aid organization might be tempted by the possibility of such a private arrangement in order to obtain inviolability and protection for its own aid workers and staff or headquarters.

In general, of course, one wants to be solicitous of humanitarian agencies operating in the most incontestably difficult circumstances and delivering needed aid to suffering human beings, possibly even to the extent of allowing deals with regimes and actors otherwise beyond the pale. It was morally correct of the ICRC, for example, to negotiate with the Nazis on matters of POWs in the Second World War. The question, really, was how strongly they should have pressed publicly and privately to deal with Jewish civilians

54. See, Carlotta Gall, *In Afghanistan, Helping Can Be Deadly*, N.Y. TIMES, Apr. 5, 2003, at B13 (describing murder in Afghanistan of ICRC worker of Salvadoran citizenship).

55. *Id.*

56. *Id.*

in the camps, not whether they should have had no contact with a German government that happened to consist of Nazis.⁵⁷ This is not a judgment about the culpability of those with whom an agency such as the ICRC deals; it is a practical and, of necessity, ruthless judgment of human needs. That said, it seems to me that an attempt to reach an accommodation with an organization such as Al Qaeda or the Taliban, now operating out of Pakistan and the border regions of Afghanistan, would be profoundly wrong. There is still a difference between a government, even the government of Adolf Hitler or Saddam Hussein, and terrorist groups who will recklessly violate the laws of war in pursuit of their cause.

Put another way, would the United States, if it had evidence that a humanitarian organization was setting up a secret meeting with a senior Al Qaeda leader be justified in targeting the meeting as a way of killing the senior terrorist leader? Would it be justified even if such an attack killed the humanitarian organization's representative collaterally if that were the best way of tracking and killing the terrorist? Should the United States treat the aid organization as neutral and inviolable in those circumstances or instead as having violated its own principles of neutrality?

The answer, in my view, is plainly that the United States would be entitled to attack—and it is highly unlikely that the Bush administration would think differently. “Right authority,” in the sense of the just-war tradition,⁵⁸ matters and governments, even evil governments, have some claim to it in ways that nongovernmental terrorists do not. This is so if for no other reason than that even evil governments have populations for which they are responsible. The arrangements that morally may be tolerated between humanitarian organizations and wicked regimes are not quite so easily justified when it comes to terrorist organizations. With the latter, there can be no local truce and no private peace.

Inviolability even of humanitarian actors in situations of rational incontestability is therefore now in play when dealing with Islamic radicals in a way that it has not been during the last several decades. There is no answer to that except the possibilities of persuading them that respecting such neutrality will not damage them, or the imperial possibilities of killing them. A private peace between aid agencies and terrorists or groups that systematically violate the laws of war is morally wrong, legally indefensible, and politically ill-advised.

57. See generally CAROLINE MOOREHEAD, *DUNANT'S DREAM: WAR, SWITZERLAND, AND THE HISTORY OF THE RED CROSS* (1998).

58. According to Aquinas, “three things are required for any war to be just. The first is the authority of the sovereign on whose command war is waged.” George Weigel, *Tranquillitas Ordinis: The Present Failure and Future Promise of American Catholic Thought on War and Peace* at 36, (citing THOMAS AQUINAS, *SUMMA THEOLOGIAE*, II-II, q. 40, art. 1); the “right authority” criterion of the just war is restated and discussed by U.S. Catholic bishops in *The Challenge of Peace: God's Promise and Our Response—A Pastoral Letter on War and Peace*, NAT'L CONF. OF CATHOLIC BISHOPS (U.S. Catholic Conf., Wash., D.C.), May 3, 1983. However, Weigel and other Catholic social theorists have pointedly dissented from the neo-pacifist assertions of the Pastoral Letter.

And what of the inviolability of those who admittedly are engaged in the value-laden activity of the reconstruction of a whole society, post-conflict? They do not benefit from the inviolability of incontestability of which neutrality is a condition. On the other hand, this does not mean that they are subject to violent attack. On the contrary, those values are open to political debate, not violence. Violence against these reconstruction actors is a crime, by criminals who are also enemies of democratic self-determination, and deserve to be punished as such. In the circumstances of occupation, it must be enforced by the occupation regime; under other circumstances, this inviolability takes the general form of ordered liberty, otherwise known as the rule of law. It is that to which those engaged in long term reconstruction should and must have recourse as the basis of their inviolability.

V. HUMANITARIAN NEUTRALITY AS A JUSTIFIED SUSPENSION OF MORAL JUDGMENT

This now puts us in a position to address the second question raised in Part II of this Article—under what circumstances is it honorable, good, and morally justified for an organization or agency to be neutral?

This Article has thus far argued that the value of neutrality is that it is a condition of the inviolability of humanitarian actors who act in conditions of dire human necessity. It is a condition of those whose acts are rationally, incontestably for the good. We have also seen that the circumstances of this incontestability are necessarily and properly narrow. It represents a limited claim on human values, the full honoring of which requires, far from neutrality, commitments and compromise, many contestable moral and political commitments—particularly in the reconstruction of a society following conflict, the collapse of a state, or the toppling of a totalitarian regime.

We have seen, too, that the U.N. and the international humanitarian aid community have blurred this difference in Iraq, sliding from neutrality to commitment and back again. It is therefore appropriate to ask of the U.N., in particular, whether it is good, honorable, virtuous, or otherwise desirable that the U.N. should claim a unique legitimacy to act in world affairs, to claim the role of embodiment of international law and legitimate order in the world, on the basis of *being neutral*, as Malloch Brown would seem to have done.

Framed this way, it is particularly a question about the U.N. and its legal, political, and moral authority. And we understand, as previously discussed, that neither the U.N. nor the NGO aid community can in fact be genuinely neutral insofar as they pursue agendas of reconstruction and development that extend beyond the provision of narrow immediate humanitarian assistance. But the question is not only whether they can actually act in that way, it is also a question of whether neutrality is indeed the highest value in the way that Malloch Brown's paradigm of humanitarianism seems to urge. This is not just a question for the U.N., but also a broader question for NGOs,

such as the ICRC, which make neutrality a primary value. We have already considered what is good, useful, and essential about neutrality and impartiality. The question now is what, if one is automatically and always neutral, does one give up and at what cost?

A. *The Moral Poverty of Neutrality*

The fundamental objection to making neutrality the highest moral value is very simple: there is good and evil in the world. There are good actors and bad actors, good regimes and bad regimes. A world of neutrals eventually surrenders to bad actors and evil regimes. It is not possible for *everyone* to stand aside as neutrals, even for the worthy purpose of treating evil's victims humanely, lest evil be allowed to triumph. If the world is not to be run by bad regimes and bad actors, then neutrality as a moral position is necessarily a marginal one, never the primary one.

This is, of course, the central moral story of contemporary Western history—the *necessary* opposition to Hitler, the good war and the good fight. We all understand that it was not won by neutrals, but by parties willing to fight.⁵⁹ The highest moral value cannot be neutrality because, as Michael Walzer stresses in *Just and Unjust Wars*, the claims of justice call upon us to resist aggression, not merely to stand aside. Indeed, justice calls upon us to *win*.⁶⁰

And with winning the just war can come the prerogative to judge aggression. This sounds profoundly wrong to the ears of most international elites, in thrall to the ideals of international tribunals and the virtues of a neutral, impartial international criminal court to try war crimes and, perhaps eventually, according to its statute, the crime of aggression.⁶¹ Who is going to defend the idea of victor's justice?⁶²

But even among the many worthy moralists who reject victor's justice because they believe it contravenes the values of neutrality and impartiality in criminal justice, there is still room to ask, should the Allies at the close of the Second World War have turned over the judgment of the Nazi leaders to neutral countries who would not suffer the taint of victor's justice? Should ideals of neutrality and impartiality have led them, for example, to have asked Switzerland or Costa Rica or Ireland to judge the Nazi leaders? Would

59. A striking corollary is that national societies in Europe still tend to occupy, in their own moral imaginations, approximately the positions they did at the end of the Second World War. For a current discussion of the differences between Europe and the United States on these and other issues, see Robert Kaplan, *Power and Weakness*, POLICY REV., June 2002, available at <http://www.policyreview.org/Jun02/kagan.html>.

60. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 51 (1977).

61. Rome Statute of the International Criminal Court, available at <http://www.un.org/law/icc/statute/romefra.htm>.

62. A good place to begin in the obviously voluminous literature on this subject is GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).

that not have been fair and just; that is, judgment by neutrals standing outside the passions of the war?

This example of the question of victor's justice illustrates precisely the moral limits of the value of neutrality and impartiality. It was the victors in the Second World War who earned the right and, indeed, obligation through blood to try the Nazi leadership. It would have been morally monstrous to have entertained the idea of turning them over to neutrals for trial.⁶³ Neutrality in the Second World War was not a badge of honor, but a matter of prudence and, in some cases perhaps, necessity. It did not reflect on the honor, but merely the prudence, of the United States that it stayed out of the war as long as it did, until it was finally attacked. The same goes for the rest who stayed out.⁶⁴ To suggest that the neutrals who, from prudence or necessity, remained out of the struggle against Nazism somehow would have had a more worthy position from which to judge the Nazi leaders elevates neutrality from being a position of prudence to being a value in which one achieves the highest moral authority precisely by standing aside and doing nothing.⁶⁵

To be sure, it can be objected that what is at stake in being able to try the Nazis is not neutrality, but instead that which neutrality can bring, and which is essential to criminal justice—impartiality. It is for the sake of impartiality, one can argue, that in the case of a criminal trial, one turns to neutrals or, even better, to a genuinely universal court that has impartiality

63. See Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281, 292 (1994) ("Nuremberg was a 'lovely hood ornament on the ungainly vehicle that liberated Western Europe, but it was not a substitute for D-day.' A military victory is not simply a practical prerequisite to a trial . . . but a moral necessity."); see also Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 CHI. J. INT'L L. 445 (Fall 2003).

64. The great French poet and Resistance fighter René Char captured the sentiment exactly in his Second World War journal, *Feuillets d'Hypnos*: "TO THE PRUDENT: It is snowing on the maquis and there's a perpetual chase after us. You whose house does not weep, with whom avarice crushes love, in the succession of hot days, your fire is only a male nurse. Too late. Your cancer has spoken. The country of your birth has no more powers." RENÉ CHAR, *LEAVES OF HYPNOS* 22 (Cid Corman trans., Grossman Publishing 1973) (1946). Contemporary American Francophobes who believe, in this moment of strained relations, that we share no common values with the spirit of France would do well to read Char and his great friend Albert Camus. On the other hand, France itself could do worse than a revival today of Char's indomitable belief in that human freedom of which he dreamed as he lived the dangerous days of what he called "France-of-the-caverns."

65. Or as I have more forcefully put it elsewhere:

It would have been morally contemptible for the Second World War Allies to have proclaimed, in a fit of political correctness, that they should turn the judgment of the Nazi leaders over to those countries which were neutral and impartial to have them tried in a genuinely unbiased manner. On the contrary, partiality can be a moral badge of honor and goodness. Partiality entitled countries to sit in judgment after World War II, because it evidenced having fought for the good rather than letting evil flourish and go unpunished. If there were to be trials at all, the Allies owed a solemn obligation to their own and all victims to conduct such procedures themselves. They earned the right and obligation to conduct such trials not only because of victory; but also because of their own payment in blood.

Kenneth Anderson, *What to Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J. L. & PUB. POLICY 2 (Spring 2002), 591, 597.

without belonging to a neutral state or to any state. Yet this question of impartiality is one which applies to any criminal justice system in any state in which the state prosecutes; the state is not itself neutral or even impartial. Neither should it be: the morally preferable criminal justice system is not one which takes place with the neutrality and impartiality of a court system as though on the planet Mars, removed from everything, but instead one which preserves the twin values of being *both* impartial but rooted in a particular political community.⁶⁶

The issue of where to try the Nazis is one of insuring that the victor's court that tries them is impartial, even while unapologetically attached to the political community of those who fought for the good, rather than those who stood aside. The quality of impartiality in those circumstances requires, however, a certain suspension of judgment about guilt and innocence—a concept to which we shall return momentarily in considering the proper role of neutral and impartial humanitarian organizations.

It is against this backdrop of the moral limits of neutrality, however, that international human rights organizations' "victor's justice" arguments about a potential Iraqi court to try Saddam Hussein and his senior associates appear increasingly threadbare.⁶⁷ To raise the charge of "victor's justice" is not the show-stopping argument that some seem to think as it is increasingly asserted more as a conclusion than an argument. Indeed, the fundamental moral commitment of the leading human rights NGOs, such as Human Rights Watch or Amnesty International, in matters of international justice for massive human rights violations seems less about the substance of these crimes and more about the assertion of the moral and legal primacy of international courts and international legal mechanisms for their own sake. Belying their otherwise shrill calls against official impunity, such assertions arise from an *a priori* commitment to internationalism, rather than a recognition that just as universalism and internationalism are not the same thing, neither are justice and international justice.

66. To be sure, the victor's justice court of Nuremberg lacked a connection to the political community of the defendants; it was not the "jury of one's peers" ideal, which conjoins a jury that is formed from one's own political community with impartiality. For this reason today, justice in a collapsed state should not be secured through an international tribunal such as the International Criminal Court, whose impartiality, in the eyes of its advocates, seems to have been confused with its remoteness, but instead the model of the "mixed" international-local tribunal exemplified today, for example, by the tribunal in Sierra Leone. The simple problem with the Sierra Leone model applied to Iraq today is that it refuses the possibility of the death penalty. See Geoffrey Robertson, *Powerful Enough to Bring Justice: Setting Up the Special Court for Sierra Leone*, U.N. Chronicle, Nov. 2003 at 74, available at <http://www.un.org/Pubs/chronicle/2003/issue4/0403p74.asp>. This refusal is a form of international elite and Western European *bien-pensant* sentimentality mixed with the appearance of high-minded principle. It masks, a profound contempt for justice itself and, in the case of an Iraq which has long had the death penalty, a form of imperialism far more imperious than anything the United States has evinced since September 11.

67. As of this writing, Saddam has been designated a POW by the United States, protected by the Third Geneva Convention. See Federal News Service, Department of Defense briefing, Donald Rumsfeld and Peter Pace, Jan. 13, 2004, available at <http://usinfo.state.gov/topical/pol/terror/texts/04011303.htm>; see also *Hussein's Status Could Change*, WASH. POST, Jan. 14, 2004, at A4.

Why internationalism should have such a privileged position is less than self-evident. The crimes committed by Saddam and his henchmen were overwhelmingly against fellow Iraqis, and it is hard to see that they do not have overwhelmingly first claim on justice against Saddam, including the choice to execute him and his henchmen. It requires an extraordinary and hardhearted prior commitment to the virtue of international tribunals—justice as remoteness, we might call it—just because they are international to deny the claim of Iraqis to judge Saddam for his crimes.

B. The Humanitarian NGO Turn Against Neutrality in the 1990s

Put this way, the moral critique of neutrality sounds stereotypically American; the heroic story of the Second World War, the importance of resisting tyranny and aggression then as now, and thinking that one is worthy to judge matters in which one so evidently has a passionate interest. But it is today a moral critique with far wider resonance, in Europe as well as the United States. “I have my doubts,” said Emma Bonino, European Commissioner for Humanitarian Affairs in a 1998 meeting:

that being neutral is still at all possible, or indeed ethically just . . . should [humanitarian agencies] be unable to distinguish right from wrong, the aggressor from the victim, the killers from the dead bodies? What absurd wisdom could call for this organized ethical confusion?⁶⁸

This skepticism about putting neutrality at the apex of morality has a history.⁶⁹ It begins with Médecins Sans Frontières’ break with the ICRC’s model of silence in the Biafra conflict in the late 1960s, adopting instead a model of delivering humanitarian aid while bearing witness publicly to what it saw. Yet this did not constitute a break with the ideal of neutrality as such; it was instead a break with the ideal of humanitarian silence in order to have access to suffering people over the value of publicizing human rights abuses.

The debate over humanitarian neutrality in the 1990s began with the Bosnia war and then continued with the Rwanda genocide and finally the Kosovo war. The ideal of neutrality was publicly challenged when, for example, moralists such as David Rieff pointed out that international aid NGOs provided humanitarian assistance to perpetrators of genocide in Rwanda and Zaire.⁷⁰ The horror of the Srebrenica massacre and the siege of Sarajevo

68. Francis Amar, Emma Bonino, Larry Minear, panel discussion on question “Is Neutrality Still Possible?” at Conference on Humanitarian Aid Challenges in the New Millennium (Sept. 22, 1998) (see Larry Minear, *The Theory and Practice of Neutrality: Some Thoughts on the Tensions*, 833 INT’L REV. RED CROSS 63–71, Mar. 31, 1999.)

69. I am here ruthlessly summarizing from DAVID RIEFF, *A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS* (2002), and I encourage the reader to take up his account in full.

70. *Id.*

played crucial parts in convincing increasing numbers in the humanitarian NGO community that pure neutrality could *not* be taken as the highest moral value. Just as in the Second World War, the highest moral honor went to those who identified evil and fought it, and even more to those who identified evil and fought it when the odds of victory were abysmal.

And so today the highest moral position has to be fighting evil, not merely relieving the suffering of the victims.⁷¹ Experienced, prominent intellectuals in the NGO community, such as Michael Ignatieff, unconstrained by institutional roles, actively called for intervention on human rights grounds in Kosovo.⁷² By the late 1990s, not only was the issue of armed humanitarian intervention and its criteria on the table,⁷³ the question of plainly identifying those who perpetrated atrocities and taking sides against them was a live question.

Today, to be sure, Western European elites are rediscovering their neutralist impulses in the course of the Iraq conflict and its aftermath, now that the close-to-home wars of the former Yugoslavia are over and safely in the past. Still, the question remains: what is the place of humanitarian neutrality, besides simply being a guarantor of inviolability? What is its moral status as a value in and of itself?

C. Humanitarian Neutrality as the Justified Suspension of Moral Judgment

Humanitarian organizations, and the ICRC in particular, have spent much time thinking about the value of neutrality on its own terms, and not simply those we have already considered, as a support to the claim of humanitarian inviolability.⁷⁴ I want to make only four modest points about the proper role and value of neutrality and impartiality with respect to humanitarian organizations and humanitarian aid, beyond the consideration of inviolability.

First, humanitarian neutrality is not the *only* moral category in conflicts and post-conflict situations. Because neutrality involves a willful silence as to rights and wrongs of a conflict, and because, sometimes, there are right sides and wrong sides, neutrality cannot be the end of the moral discussion. Neutrality and impartiality are adjuncts to the main question of justice, because, in the name of the practical value of humanitarian relief, they refuse to address the question of justice.

71. This comes as a surprise, however, only to those who believe that the basis for using force in the world is to arrest bad people and see to the victim's humanitarian needs; for those of us still imbued, instead, with the just war tradition, the highest moral obligation is to fight against aggression. In the world as we know it, that means fighting and war, not merely sending out police officers to arrest bad guys.

72. MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* (2001).

73. See, e.g., INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE KOSOVO REPORT* (2000).

74. I should add that with respect to the ICRC, the senior staff members I have known have all been quite clear that neutrality is merely a tool, not the only or highest value.

Second, humanitarian neutrality is not the *highest* moral value at play in conflicts and post conflicts in which humanitarian aid is, nonetheless, a necessity. There is a marked tendency, in my experience, for humanitarian workers to see themselves, in their neutrality and their refusal to engage with the questions of right and wrong in the conflict, as somehow speaking for the highest value precisely because it is neutral. To be sure, humanitarian workers should avoid simply becoming partisans for one side or the other. But in a conflict in which right and wrong are at issue—and this assuredly does not describe every conflict—neutrality is not the highest value. It is easy for humanitarian workers to adopt a radical relativism, as a humanitarian relief worker recently did in conversation with me, saying, “Each side thinks it’s right, and who’s to say?”

Well, borrowing from Bonino, sometimes it *is* for us to say, this is right and this is wrong. Yes, it may cause disagreement, and it may contribute to greater violence on occasion. And there are instances where all sides are wrong and evil, and occasions where it is simply impossible for outsiders to see that what the parties fight over is worth armed struggle. It is indeed not for humanitarian workers necessarily to make and declare those judgments. But it does not follow that such judgments do not need to be made, or that the partiality that necessarily follows means that such judgments are less universal or morally exalted than the neutrality of humanitarianism. On the contrary, it is humanitarian neutrality that is the side category, the residual category, an adjunct to the higher value of justice. And this is true *even if* we disagree over which side justice favors.

Third, even if humanitarianism and humanitarian neutrality are not the only or even the highest values, they are still a moral necessity. Justice is also not the only value; the urgent and overriding demands of human need likewise call upon us. The question is how to reconcile justice with neutrality. The best solution is that which has evolved in the field of humanitarian aid—to separate the groups which fundamentally serve one or the other value; to let certain humanitarian groups serve only the goal of humanitarianism without making judgments about rights and wrongs, and let others sort out the issues of justice if there are any in a given conflict. Different values are at stake. The longstanding practice of separating the groups that serve one or another value seems still the way to ensure none is lost.

This call for separating humanitarian and political roles expresses nothing more, of course, than the hard won practical wisdom of the ICRC. But it is no less important for that. And there are exceptions, where the needs of one value or the other, justice or humanitarianism, become overwhelming. Moral judgments about which to favor in such cases—for example, whether and what the ICRC should have done in the Second World War—are the hardest questions in this field.⁷⁵

75. See Kenneth Anderson, *First in the Field*, TIMES LITERARY SUPPLEMENT (London), July 31, 1998, at 3, reviewing CAROLINE MOOREHEAD, *DUNANT’S DREAM: WAR, SWITZERLAND, AND THE HISTORY OF*

Fourth, the best way to conceptualize humanitarian neutrality is as a morally justified suspension of judgment about the causes of the conflict, and the conflict's rights and wrongs. To be in the position of humanitarian neutrality means deliberately to suspend one's moral judgment about matters about which, all other things being equal, one *ought* to form judgments. One ought to be willing to learn the facts and judge the rights and wrongs of a conflict. But all things are not equal, because justice is not the only value at issue in a conflict. The urgent requirements of humanity and humanitarianism also must be acknowledged, and that can only be done by a deliberate suspending of one's public, at least, capacity to make moral judgments. This suspension of moral judgment defines—in the sense of both establishing and limiting—the social space of humanitarian neutrality and impartiality, because it refuses to say, indeed refuses to judge, or at least publicly refuses to judge, who is right and who is wrong. And it is that refusal, and the suspended space that it creates, that allows the other value, humanitarianism, to be served.

It is too easy, however, to confuse this suspension of judgment with a relativism urging that claims really cannot be made about the rights and wrongs of at least some conflicts. It is possible to be a humanitarian worker and hold such relativism; in that case the suspension of judgment is neither a suspension nor a refusal, but a general belief that such judgments cannot be made. But if the only way to practice humanitarianism were on the basis of such a relativism—if humanitarianism were thought to rest upon the moral view that no judgments can be made about the rights and wrongs of war—then I, at least, would have to consider humanitarianism as profoundly insufficient.

It seems to me, however, that humanitarianism is always both necessary and insufficient. One *can* avoid relativism while still preserving a space for a necessary but insufficient humanitarianism, by understanding humanitarianism as a suspension of judgment that has the effect of creating a sort of temporary relativism, or a public relativism, one that is deliberately artificial and shielded from having to answer to the full range of morality. This approach recognizes the moral necessity of neutral humanitarianism, yet acknowledges that humanitarianism does not exhaust the field of morality.⁷⁶

THE RED CROSS (1998).

76. The question of how to avoid falling into moral relativism while at the same time preserving decent grounds for doubt and uncertainty as to the right is a question of contemporary ethics, and this is an instance of seeking a way through it. No doubt it is subject to many profound objections, but my purpose here is not so much to provide a philosophically defensible account as to give a conceptual account of the practical wisdom that humanitarian organizations, and the ICRC in particular, have won in so many years of experience in dealing with the worldly task of reconciling humanitarianism with just cause in war.

VI. CONCLUSION: EXEUNT THE U.N., ICRC, AND OTHER HUMANITARIAN ORGANIZATIONS FROM IRAQ, AND DOES IT MATTER?

The U.N. is essentially gone from Iraq, as are the ICRC and most of the other leading humanitarian NGOs. Perhaps they will return. Perhaps the U.N. will return in a different function, that of superintending elections or other power transfers. At this writing it is simply too early to know.

The reasons given for the exodus are reasons of security. Although no one doubts that it is a hugely important factor, not everyone is convinced that it is the only or even the most important. Martin Peretz, for example, writing in the *Wall Street Journal*, has squarely charged the U.N. and the humanitarian relief agencies of playing politics, of being motivated by a desire to see the U.S. occupation fail.⁷⁷ Who, Peretz asks, is:

abandoning Iraq and its still considerable deficiencies in sanitation, clean drinking water, medicine, medical care and an equitable distribution of food? The answer is astonishing because the deserters are many of those nongovernmental organizations and other groupings organized by governments whose precise moral singularity is that they arrive and stay to dispel human distress when no one else will.⁷⁸

In this fierce charge, Peretz is unfair to the U.N. and humanitarian NGOs, particularly the ICRC, when he dismisses their security concerns. It is simply unfair to say, as Peretz does, that it is more dangerous to maintain operations in Liberia than in Iraq.⁷⁹ The risk of violence in Liberia is limited to certain “wrong place, wrong time” contingencies—dangerous and frightening, to be sure—that are entirely different from the systematic risk of being thought a prime, highly attractive target in a terrorist war against an occupation regime.

Put another way, U.N. and humanitarian NGOs bear the label, in Peretz’s words, of “moral singularity,” the willingness to stay when no one else will. Yet it is precisely this moral singularity which is lost when the concept of inviolability, of political neutrality, is attacked. The moral singularity of the humanitarian relief NGOs was never in their hands alone; it rested also in the hands of actors in the conflict. Deprived of inviolability, the NGOs have been largely deprived of their ability to act. Peretz is entirely too dismissive of legitimate security concerns of these organizations.

The assumption is, and must be, that the inviolability of those who provide incontestable aid will hold. This *is* their singularity and their only singularity. If it does not, then the very mission of the organization is at stake. Inviolability from the *parties* to the conflict—even if they are terrorists—and

77. Martin Peretz, *Passive Saboteurs*, WALL ST. J., Sept. 8, 2003.

78. *Id.*

79. *Id.*

not inviolability from contingent banditry, is a *sine qua non* of being a humanitarian relief NGO.

That said, it must be admitted that motives of those organizations who have left Iraq are almost certainly mixed. Even if all are not “passive saboteurs,” it is surely true, from my experience and conversations, that for some, the failure of the American occupation is worth the disaster that would mean for the Iraqi people. More common, and more troubling, is the dual but contradictory hope among many that the occupation will fail—but, some way, somehow, without damage to the Iraqi people.⁸⁰

The U.N.’s exit raises an additional question, raised to me privately by people engaged in the current reconstruction of Baghdad. Simply put: Does the departure of the U.N. and the international NGOs make any difference to the reconstruction and relief efforts? At this point, reconstruction lies in the United States’ hands, its military and civil affairs units, its development agencies and the private contractors it has hired. Perhaps that will change in the future, perhaps not. But at this moment, the U.N. and the international humanitarian NGOs are out of the picture.

It is an open question whether the U.N.’s and international agencies’ presence makes any difference. It is a question no one can answer at this point, and perhaps always will be a speculative, counterfactual question. But sources in Iraq are seriously questioning whether the value added by the U.N. and associated agencies is worth that much. This is not *bien-pensant* opinion in the United States or Europe, where the value of the U.N. is axiomatic because it is considered indispensable for the occupation’s legitimacy. If one moves, however, beyond the kind of narrow political categories of liberal international elites, the narrowly reflexive thinking of the New York Times or the Guardian or Le Monde, then the question has to arise: of what value is it to re-circulate U.S. reconstruction funds through the U.N. merely in order to “brand” them with the U.N. logo, and meanwhile giving the U.N. an administrative cut of those funds and a certain control over operations?

Asserting the value of the “U.N. brand” relies on the assumption that the U.N. has a monopoly on legitimacy, which only it can dispense. This seems more a mystical belief of liberal internationalism than a proven claim. It might well turn out that reestablishing the physical infrastructure is more relevant to Iraqis than the political legitimacy of the U.N., precious as the latter, secure in lights and power and potable water, is to Western liberal elites. Bechtel and Halliburton, overcharges and all, may yet prove more important to Iraq than the U.N. Secretariat.

The lapses of judgment that the Independent Panel found with security arrangements for the U.N. team in Baghdad go far beyond mere matters of

80. It echoes the essential contradiction of one of the European peace campaigners’ slogans, “No to War, No to Saddam.” See, e.g., *Bombs Away*, ECONOMIST, Feb. 15, 2003. But how does one get rid of a Saddam, or his sons, without war? How indeed?

security. They get to the fundamental assumptions about the nature of reconstruction in Iraq. Unless one is axiomatically tied to the view that the U.N. is necessary for legitimacy and that it has some special wisdom in how to undertake reconstruction, then it is an open question whether the U.N. would have known better than the occupation forces how to achieve both physical reconstruction and political legitimacy in Iraq. It is practically an urban legend of the chattering classes in the United States and Europe that it would have, just as it is an urban legend that the United States cannot. Perhaps that is so, but both remain open, exploratory questions. The answers may not be known for years.

All these matters of reconstruction and legitimacy remain speculative, and what is said in this Article may turn out to have little to do with Iraq tomorrow. What is not a matter of speculation, however, is that the concept of humanitarian inviolability is in crisis, not just in Iraq, but across large parts of the world, the Islamic world in particular. This crisis must necessarily prompt reconsideration of how that inviolability should be justified.

Rather than traditional analogies to state and territorial neutrality, this Article has suggested as an alternative the idea of “rational incontestability,” with the commensurate corollary that its domain must remain narrow, if it is indeed to remain incontestable. It can fairly be said that this suggestion, rooted as it is in an idea of justified intercourse, indeed interference, is fundamentally an imperialist one, even if a fundamentally humanitarian imperialist one. I acknowledge that.

This Article has also suggested that the predicate conditions of rational incontestability as the basis for inviolability, impartiality and neutrality, must be understood as sharply limited in their moral reach; they are neither the only nor the highest moral values. The highest honor in political morality is active and, if necessary, violent resistance to plain evil, not comforting its victims. And beyond immediate humanitarian needs stretches forth the domain of contested politics, which is where most of the work of reconstruction lies in Iraq, Afghanistan, and elsewhere in the world.

The U.N. and international aid NGOs cannot have it both ways in Iraq—committed to values and yet neutral—as suits their purpose for that moment. The result is willful self-deception, a malicious confusion that is not shared by the Iraqi terrorists who exploit it to sow injury and destruction and death, all of it with utter political clarity. Assertions that the U.N. or humanitarian NGO actors are, or can be, apolitical and neutral in reconstruction, as distinguished from immediate relief efforts, are simply mistaken. And those who believe—based on the presumed illegality of the war and occupation—that the U.N. and international aid NGOs ought to passively, not to say sullenly, resist U.S. reconstruction efforts doom themselves to irrelevance, precisely as President Bush has warned.