

ARTICLES

Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy

By Volker Heins*

A. Introduction

A number of recent voices in contemporary political and legal philosophy have suggested that something is wrong with international humanitarian relief and human rights advocacy. Such a critique no longer seems to be motivated by ideologies of Social Darwinism or by beliefs in the unconditional primacy of a *raison d'État* over the needs and rights of individuals. Rather, it derives from a perspective that sees humanitarian activism as an ill-conceived, often merely compensatory gesture.¹

A more forceful and radical critique has been put forth by the Italian political philosopher Giorgio Agamben.² In noticeable contrast to the sociology of globalization, which has assured us for years that state sovereignty is gradually disappearing to the benefit of a "world of flows" comprising goods, individuals, capital and information, Agamben argues in his book *Homo sacer* that we continue to live under the auspices of a classical state as it was conceived in early modern Europe. Accordingly, the primary characteristic of the state is its capacity to define and occasionally erase the boundary between "normality" and "emergency" and thus the capacity to transform society into a "camp" or *Lager* populated by citizens reduced to "bare life." Moreover, the current western state is said to blur the line between the normal and the exceptional, between peace and war, by increasingly taking an interest in us not only as citizens, but also as embodied beings—an interest illustrated, for example, by the growing tendency towards biometric

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¹ See, e.g., J. RANCIÈRE, DISAGREEMENT: POLITICS AND PHILOSOPHY (1999); Z. Bauman, *From Bystander to Actor*, 2 JOURNAL OF HUMAN RIGHTS 137-51 (2003).

² See G. AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (1998).

registration of travelers at border crossings. Agamben, in all seriousness, has placed this trend in an epochal relationship with the tattooing of concentration camp inmates.³

His essay's far-reaching appeal rests on the fact that it combines in a single formula the moral and legal achievements of western societies—in particular the ethos of human rights—with their slides into totalitarianism. By suggesting that human rights are deeply intertwined with the forces of inhumanity against which they are being invoked, Agamben plays to a primarily Continental European public once again afflicted by self-doubts about the moral standing of liberal societies and their legal systems. The vaguely dystopian perspective of his legal theory explains why Agamben is considered "interesting" by many.⁴ Since Agamben's theses are already well-known and much-discussed, I will confine myself to a nutshell summary of his main argument before I offer a concise critique of his ideas on the place of humanitarian law and humanitarian action in today's legal and political world.

Agamben maintains that since the Habeas Corpus Act of 1679 the "bare life" of the individual has been subjected to a twofold move: it was given a protected, even "sacred" status beyond the immediate grasp of political power, but it was also isolated and separated from the wider range of human forms of expression. The bare life of physical individuals, stripped of moral agency and social intercourse, became the object of a particular juridical mode of attention. Agamben mistrusts the human right to physical integrity in a way that is reminiscent of Michel Foucault, who felt that the discursive isolation of "sexuality" along with its construction as a singular object of attention was far more significant than the fluctuating history of its "liberation" or "repression."⁵

There is, of course, some *prima facie* plausibility that the trafficking of human beings, medical end-of-life issues or the detention of "illegal combatants" have indeed turned the bare life of individuals into an object of widespread concern and debate.⁶ The concern for the life of others is also nurtured by the reporting

³ See G. Agamben, *Bodies Without Words: Against the Biopolitical Tattoo*, 5 GERMAN LAW JOURNAL 168 (2004).

⁴ See M.S. Davis, *That's Interesting!*, 1 PHILOSOPHY OF THE SOCIAL SCIENCES 309-44 (1971) (discussing why some texts are perceived as more interesting than others).

⁵ See M. Foucault, *Histoire de la sexualité*, vol. 1: LA VOLONTE DE SAVOIR (Paris: Gallimard, 1976).

⁶ See, e.g., S. Millns, *Death, Dignity and Discrimination: The Case of Pretty v. United Kingdom*, 3 GERMAN LAW JOURNAL No. 10 (2002); K.S. Ziegler, *CRIMINAL VICTIMS/WITNESSES OF CRIMES: THE CRIMINAL OFFENCES OF SMUGGLING AND TRAFFICKING OF HUMAN BEINGS IN GERMANY, DISCRETIONARY RESIDENCE RIGHTS, AND OTHER WAYS OF PROTECTING VICTIMS*, 6 GERMAN LAW JOURNAL 605 (2005); A. Fischer-

mechanisms of U.N. human rights bodies as well as the continuous attention of specialized NGOs and the media. In all these cases, Agamben's principal cause for vexation lies in the persistent separation of this core aspect of the human from wider political and communitarian questions. Drawing on the distinction between human rights and civil rights made by Hannah Arendt, he writes:

The separation between humanitarianism and politics that we are experiencing today is the extreme phase of the separation of the rights of man from the rights of the citizen. In the final analysis, however, humanitarian organizations – which today are more and more supported by international commissions – can only grasp human life in the figure of bare and sacred life, and therefore, despite themselves, maintain a secret solidarity with the very powers they ought to fight [...]. A humanitarianism separated from politics cannot fail to reproduce the isolation of sacred life at the basis of sovereignty, and the camp – which is to say, the pure space of exception – is the biopolitical paradigm that it cannot master.⁷

This paragraph contains four propositions that are questionable on both empirical and normative grounds. In what follows, I will either reject these propositions outright or extract the kernel of truth contained within them before making a suggestion about how we might theoretically classify Agamben's position. The four propositions are:

- 1) The distinction between the humanitarian and the political is an expression of the opposition between human rights and civil rights.
- 2) The goal of humanitarian organizations is the identification and preservation of "bare life."

Lescano, *Torture in Abu Ghraib. The Compliant against Donald Rumsfeld under the German Code against Crimes under International Law*, 6 GERMAN LAW JOURNAL 689 (2005).

⁷ AGAMBEN, *supra* note 2, at 133-4.

3) Because of their reliance on the political/humanitarian divide, such organizations become unwitting accomplices of those who are responsible for the very social suffering that they aim to minimize.

4) The separation between humanitarianism and politics can and should be overcome in favor of something completely new.

B. How Political Are Human Rights and Humanitarian Concerns?

The political/humanitarian divide is indeed a real one, but Agamben is inaccurate when he holds (a) that humanitarian law and human rights are essentially the same thing, and (b) that human rights are apolitical in the sense of being outside the scope of serious political conflicts or unenforceable outside the domestic jurisdiction of states. While Agamben places civil rights within the political realm, he simultaneously seems to attribute the acceptance of presumably apolitical human rights not to the salience of transnational legal norms, but to the contingency of humanitarian feelings. Even Hannah Arendt indicted in her own day the harmlessness of human rights groups and discovered "an uncanny similarity" between their language and that of certain "societies for the prevention of cruelty to animals."⁸ Today, however, we have good reasons to reject this rigid dualism of enforceable civil rights versus merely declaratory human rights as outdated.

Agamben is certainly right to draw a broad analogy between humanitarianism and human rights law, although he skips the important issue of how the two relate to each other. Both bodies of law share the objective of protecting individuals under any circumstances. As Agamben seems to realize, the classic separation between the law of war and law of peace, which limited the applicability of human rights to the latter, was gradually replaced after 1945 by legal opinions and treaties containing clear stipulations regarding basic human rights obligations which cannot be suspended even in times of war or other public emergencies. Thus, both Article 27 of the American Convention on Human Rights (ACHR) and Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) list a number of "non-derogable" human rights, including the rights to life

⁸ H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 289 (1951).

and the right of belief, which are to be applied without exception in all circumstances.⁹

However, while we may say that to some extent humanitarian law and human rights law tend to converge in their common pursuit of protecting the "bare life" and other rights of individuals, they clearly differ in terms of implementation and enforcement. Compared to international human rights, it is much more difficult to ensure compliance with humanitarian law. This is even more true when lawyers and policy-makers have to deal with armed nonstate groups which are not susceptible to the same pressures as governments and are also immune against public "shaming" by NGOs. Furthermore, individuals have no way of requesting national courts to assess the compatibility of certain acts with international humanitarian law or to sue countries for alleged violations. To the present, charges filed by war victims or their relatives against individual countries have always been rejected.¹⁰

Human rights are also frequently invoked when they cannot be guaranteed within the customary purview of a sovereign state. But this does not imply that the implementation record of international human rights is as weak as that of humanitarian law. In Germany, the European Convention on Human Rights and the decisions of the European Court for Human Rights have the status of federal laws and serve as a resource for the interpretation of constitutional law.¹¹ Similarly, the European Charter on fundamental rights, incorporated in the draft Treaty establishing the Constitution for Europe, is already being referred to by public interest groups and EU lawyers, although the draft Treaty is still in the process of ratification by the Member States. In the United States, the Alien Tort Claims Act (ATCA) of 1789 gives foreigners the right to seek redress in US federal courts for human rights violations that have occurred anywhere in the world, if they were "committed in violation of the law of nations or a treaty of the United States."¹² Although for a long time considered an obscure provision of the United States Code, courts have in-

⁹ See T. Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, 12 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 917 (2001).

¹⁰ See the judgment on the Varvarin Case, District Court of Bonn (1 O 361/02), December 10, 2003, available at: http://www.justiz.nrw.de/RB/nrwe/lgs/bonn/lg_bonn/j2003/1_O_361_02urteil20031210.html. See also *Banković and Others v. Belgium and 16 Other Contracting States* ((dec.) [GC], no. 52207/99, ECHR 2001-XII) concerning the bombing of the Radio Televizije Srbije (Radio-Television Serbia) headquarters in Belgrade on 23 April 1999 as part of NATO's campaign of air strikes against the FRY during the Kosovo conflict.

¹¹ See the ruling of the Second Senate of the German Constitutional Court, Oct 14, 2004 (2 BvR 1481/04).

¹² 28 U.S.C. Sect. 1350 (ATCA). See G.C. HUFBAUER AND N.K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003); C. Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 *YALE JOURNAL OF INTERNATIONAL LAW* 487 (2001).

ferred from it a right to action on behalf of aliens to enforce non-ratified human rights treaties or even non-binding resolutions of the United Nations General Assembly. In a case involving a citizen of Paraguay residing in the United States who had sued a former official of Paraguay for alleged torture of his brother, the court declared that in favor of the plaintiff that "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind".¹³ In a number of similar cases, federal courts in the United States have decided on civil suits alleging human rights violations abroad.¹⁴ The U.S. Supreme Court has so far rejected attempts by lobbyists and politicians to abolish the statute which can be invoked in cases of genocide, extra-judicial killing, torture, war crimes, slavery and extreme arbitrary detention.¹⁵

These examples illustrate that there is more at stake in human rights than well-meaning declarations of intent. Even in the case of distant civil wars or other disasters, it would be wrong to see public kind-heartedness as the only source of recognition for human rights. Even where the observance of human rights norms cannot be directly enforced, they may still convey behavior-changing messages that can lead in different ways to an effective transformation of the respective situation. National or regional anti-discrimination laws are a good example of norms that have an impact not only through what they do, but through what they signal. Thus, European anti-discrimination policy explicitly refers to standards of socially acceptable or unacceptable behavior to be strengthened by specific legislative measures.¹⁶ Similarly, international human rights norms have an expressive quality that affects the social conduct of groups and organizations independent of measures of judicial enforcement.¹⁷ It is this expressive component that provides concrete behavioral incentives and encourages the articulation of forms of public denunciation or collective anger in appropriate ways. The infringement of widely held norms often causes anger and protest, and sometimes this anger and protest triggers a cycle of positive legal consolidation of these norms.

¹³ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), 30 June 1980, at 890.

¹⁴ See B. STEPHENS AND M. RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (1996); B. Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgements Convention*, 42 *HARVARD INTERNATIONAL LAW JOURNAL* 141-200 (2001).

¹⁵ See *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) and the case note discussing this landmark decision: (<http://a257.g.akamaitech.net/7/257/2422/29june20041115/www.supremecourtus.gov/opinions/03pdf/03-339.pdf>). See also L. Greenhouse, *Human Rights Abuses Worldwide Are Held to Fall Under U.S. Courts*, *NEW YORK TIMES*, June 30, 2004, at 21.

¹⁶ See the Racial Equality and Employment Equality Directives of the EU Council (2000/43/EC, 29 June 2000 and 2000/78/EC, 27 November 2000).

¹⁷ See A. Wax, *Expressive Law and Oppressive Norms*, 86 *VIRGINIA LAW REVIEW* 1731-80 (2000).

One of the best researched examples of this kind of "proto-judicial emergence of norms"¹⁸ in international politics are the human rights laid down in the Helsinki Accords, which were negotiated by the Conference on Security and Cooperation in Europe (CSCE) in the mid-late 1970s. Despite their apparent toothlessness, these documents achieved two goals: they provided a crucial symbol to an evolving "Helsinki network" of human rights groups in Eastern Europe, and they helped to curb the appetite for repression among communist government leaders *vis-à-vis* these groups.¹⁹

In a comparable process, even transnational corporations have recently committed themselves to the observance of human rights standards in their respective fields of operation without being directly coerced into such commitments. In order to avoid any potential damage to their reputations, they have also allowed third parties to monitor their behavior. In the near future, norms relating to basic human rights as well as to consumer and environmental protection are likely to be used as benchmarks for procurement requirements for the U.N. and many other agencies. Various reporting mechanisms are being discussed with the goal of putting pressure on corporate accomplices in human rights abuses.²⁰ The anxiety to avoid reputational losses and the "naming and shaming" by public interest groups has also affected the credit-granting procedures of the World Bank as well as some industrial sitting decisions of global firms.²¹ The signaling effect of human rights has gone so far in recent years as to mobilize citizens in favor of military intervention on behalf of distant populations threatened by or suffering under ethnic hatred and genocide.²² These cases are remarkable because they illustrate a significant transformation of the semantics of human rights: while historically human rights functioned exclusively as a defense mechanism against the state, today they are increasingly being invoked to make claims for protection against third parties—claims which are addressed either to one's own state or to foreign states constituting the "international

¹⁸ N. Luhmann, *Ethik in internationalen Beziehungen*, 50 *SOZIALE WELT* 247-54 (1999).

¹⁹ See D.C. Thomas, *Boomerangs and Superpowers: International Norms, Transnational Networks and US Foreign Policy*, 15 *CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS* 25-44 (2002).

²⁰ See C.F. Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 4 *GERMAN LAW JOURNAL* 1065 (2003).

²¹ M. BUSSE, *DEMOCRACY AND FDI* (HWWA Discussion Paper Nr. 220/2003), available at: <http://www.hwwa.de/hwwa.html>.

²² See N.J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* (2000).

community". In contrast to the times of Hannah Arendt, human rights have thus literally become "a fighting creed, a call to arms."²³

All of this escapes Agamben who assumes in a positivistic manner that human rights norms are essentially empty and possess little or no validity if they are not backed by national laws. At the same time, he misjudges the fundamental *differences* between humanitarian and human rights organizations as well as the more recent *convergences* between both forms of moral engagement. The humanitarian impulse did not initially arise from the idea of human rights, but from the Christian ideal of love that implies the self-abnegation of the high-ranking person for the lowly one, the healthy for the sick, the passerby for the roadside victim—a gesture that is not motivated by any rights of the lowly, the sick or the victims.²⁴ Empirical evidence shows that religious aid organizations are still very much aware of their uniqueness in relation to human rights groups and sometimes actively distance themselves from the latter. Human rights groups are seen as too "political," which in the older humanitarian discourse means vain and ineffective.²⁵

Since the late 1960s, however, some aid organizations have begun to question both the ideal of neutrality that formerly characterized the humanitarian movement and the premise of state immunity. In the early 1990s, humanitarian NGOs in the United States contributed not only to humanitarian intervention in Somalia, but also to the first President Bush's decision to ignore the sovereignty of Iraq in favor of the security of the Kurds. In a similar fashion, French groups have repeatedly advocated interventions particularly in Africa.²⁶ The concept of humanitarian action has thus undergone an important transformation. The "new humanitarianism"²⁷ of a younger generation of aid organizations no longer defines the measure of the human person solely in terms of survival needs, but rather in terms of subjective rights which include a right to humanitarian assistance guaranteed by democ-

²³ M. IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 22 (2001).

²⁴ It should be noted, however, that recent documents of the Vatican, in particular, contain numerous positive references both to the idea of universal human rights and to specific human rights treaties. See, e.g., JOHN PAUL II, SOLLICITUDO REI SOCIALIS (December 30, 1987), available at: http://www.vatican.va/edocs/ENG0223/_INDEX.HTM.

²⁵ See V. HEINS, HOW TO MEET THE FIRST PUBLIC OBLIGATION: CONTENDING DISCOURSES IN HUMANITARIAN ORGANIZATIONS 32-38 (Harvard University, Carr Center for Human Rights Policy, Working Paper 2004), available at: http://www.ksg.harvard.edu/cchrp/news_wpapers.shtml.

²⁶ See C. SEIPLE, THE U.S. MILITARY/NGO RELATIONSHIP IN HUMANITARIAN INTERVENTIONS 53 (1996); HUMANITARIAN CHALLENGES AND INTERVENTION 67-68 (T.G. Weiss and C. Collins eds., 2nd ed 2000).

²⁷ THE NEW HUMANITARIANISMS: A REVIEW OF TRENDS IN GLOBAL HUMANITARIAN ACTION. (J. Macrae ed., HPG Report 11, April 2002), available at: <http://www.odi.org.uk/hpg/papers/hpgreport11.pdf>.

ratic nations ready to coerce recalcitrant states. In this way, humanitarian and human rights groups become a potential *avant-garde* for the expansion of *jus cogens* norms in international law.²⁸

In light of such an aspiration, exemplary network organizations like Médecins Sans Frontières (MSF) have replaced the ideal of aiding victims in silence with the concept of bearing witness (*témoignage*), which combines the provision of emergency aid with documentary work about the war settings in which the aid workers operate. In April 1998, for instance, doctors of MSF at the Connaught Hospital in Freetown, Sierra Leone, suddenly had to care for numerous traumatized, severely bleeding men and women whose arms or forearms had been violently dismembered. The organization documented dozens of such mutilations that we now know were deliberately inflicted by a local "liberation army." Later on, these data were probably passed on to the *ad hoc* war crimes tribunal for Sierra Leone—in defiance of the Red Cross "privilege not to testify."²⁹

These examples illustrate that humanitarianism is now deeply enmeshed in political conflicts, although it "still *wants* to be outside of power."³⁰ Ironically, instead of effectively criticizing international humanitarian law or the modern aid business, Agamben accepts and fosters their own self-illusion of being "separated" from politics.

C. Who or What is Being Protected by Humanitarian Organizations?

In relation to the modern nation state, the "moral entrepreneurs"³¹ who founded the International Committee of the Red Cross (ICRC) had a simple deal in mind, one that has continued to provide the foundation for the political/humanitarian divide until today. They argued that in the course of events, the assistance given to the wounded, sick and captured neither affects the outcome of battles nor interferes in any other way with the pursuit of victory by warring states; taking care of those

²⁸ See S. KADELBACH, *ZWINGENDES VÖLKERRECHT* (1992).

²⁹ Here I am drawing on interviews with anonymous sources. The investigation unit of the *ad hoc* tribunal in Sierra Leone does everything not to "jeopardize [its] future cooperation" with humanitarian organizations (personal communication from the Chief Prosecutor's office in Freetown, Sierra Leone, April 22, 2004). See G. Rona, *The ICRC Privilege Not to Testify: Confidentiality in Action*, *INTERNATIONAL REVIEW OF THE RED CROSS* No. 845, 207-19 (2002).

³⁰ D. KENNEDY, *THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 338 (2004).

³¹ H.H. Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 *YALE LAW JOURNAL* 2599 (1997).

whose suffering was senseless even from the point of view of the states themselves. The neutrality of the victims (their irrelevance for the outcome of power struggles) was to be tightly coupled with the neutrality of those providing assistance (their nonpartisanship with respect to the combatants).³²

According to this basic Principle of Distinction, modern humanitarian action is directed towards those who are caught up in violent conflicts without possessing any strategic value for the respective warring parties. Does this imply that classic humanitarianism and its legal expressions reduce the lives of noncombatants to the "bare life" of nameless individuals beyond the protection of any legal order? I would rather argue that humanitarianism is itself an order-making activity. Its goal is not the preservation of life reduced to a bare natural fact, but conversely the protection of civilians and thereby the protection of elementary standards of civilization which prevent the exclusion of individuals from any legal and moral order. The same holds true for human rights, of course. Agamben fails to appreciate the fact that human rights laws are not about some cadaveric "bare life", but about the protection of moral agency.³³

His sweeping critique also lacks any sense for essential distinctions. It may be legitimate to see "bare life" as a juridical fiction nurtured by the modern state, which claims the right to derogate from otherwise binding norms in times of war and emergency, and to kill individuals, if necessary, outside the law in a mode of "effective factuality."³⁴ Agamben asserts that sovereignty understood in this manner continues to function in the same way since the seventeenth century and regardless of the democratic or dictatorial structure of the state in question. This claim remains unilluminated by the wealth of evidence that shows how the humanitarian motive not only shapes the *mandate* of a host state and nonstate agencies, but also serves to *restrict* the operational freedom of military commanders in democracies, who cannot act with impunity and who do not wage war in a lawless state of nature.³⁵

Furthermore, Agamben ignores the crisis of humanitarianism that emerged as a result of the totalitarian degeneration of modern states in the twentieth century. States cannot always be assumed to follow a rational self-interest which informs

³² For a classic explication of the norm of neutrality, see H. Haug, *Neutrality as a fundamental principle of the Red Cross*, INTERNATIONAL REVIEW OF THE RED CROSS No. 315, 627-30 (1996).

³³ See IGNATIEFF, *supra* note 23.

³⁴ C. SCHMITT, DIE DIKTATUR. VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF 175 (4th ed. 1978).

³⁵ See T. FARRELL, THE NORMS OF WAR: CULTURAL BELIEFS AND MODERN CONFLICT (2005).

them that there is no point in killing others indiscriminately. The Nazi episode in European history has shown that sometimes leaders do not spare the weak and the sick, but take extra care not to let them escape, even if they are handicapped, very old or very young. Classic humanitarianism depends on the existence of an international society whose members feel bound by a basic set of rules regarding the use of violence – rules which the ICRC itself helped to institutionalize. Conversely, classic humanitarianism becomes dysfunctional when states place no value at all on their international reputation and see harming the lives of defenseless individuals not as useless and cruel, but as part of their very mission.³⁶

The founders of the ICRC defined war as an anthropological constant that produced a continuous stream of new victims with the predictable regularity and un-avoidability of floods or volcanic eruptions. Newer organizations, by contrast, have framed conditions of massive social suffering as a consequence of largely avoidable political mistakes. The humanitarian movement becomes political, to paraphrase Carl Schmitt,³⁷ in so far as it orients itself to humanitarian states of emergency, the causes of which are located no longer in nature, but in society and politics. Consequently, the founding generation of the new humanitarian organizations have freed themselves from the ideals of apolitical philanthropy and chosen as their new models historical figures like the Swedish diplomat Raoul Wallenberg, who saved thousands of Jews during the Second World War.³⁸

In a different fashion than Agamben imagines, the primary concern in the field of humanitarian intervention and human rights politics today is not the protection of *bare* life, but rather the rehabilitation of the *lived* life of citizens who suffer, for instance, from conditions such as post-traumatic stress disorder. At the same time, there is a field of activity emerging beneath the threshold of the bare life. In the United States, in particular, pathologists working in conjunction with human rights organizations have discovered the importance of corpses and corporal remains now that it is possible to identify reliable evidence for war crimes from exhumed bodies.³⁹

³⁶ See the conclusion in J.-C. FAVEZ, *THE RED CROSS AND THE HOLOCAUST* (1999).

³⁷ See C. SCHMITT, *DER BEGRIFF DES POLITISCHEN. TEXT VON 1932 MIT EINEM VORWORT UND DREI COROLLARIEN* 39 (1963).

³⁸ See B. KOUCHNER, *CE QUE JE CROIS* 107-8 (1995).

³⁹ See E. Stover, W.D. Haglund and M. Samuels, *Exhumation of Mass Graves in Iraq: Considerations for Forensic Investigations, Humanitarian Needs, and the Demands of Justice*, *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION* No. 290, 663-6 (2003).

The expansion of the radius and the reach of humanitarian organizations sensitized to human rights concerns accelerated the disintegration of the historically tight connection between the strategic irrelevance of civilian victims and the taboo surrounding armed attacks on humanitarian aid workers. We now see that aid workers used to protect civilians must themselves be protected against militant groups who do not even shrink from killing members of the ICRC.⁴⁰ In some conflicts today not even the barest attempt is made to preserve even a semblance of respect for international humanitarian law.

D. Do Humanitarian Organizations Contribute to Human Suffering?

Sometimes it only requires a small shift in perspective to see those who bear the suffering of catastrophes not as endangered and thus worthy of protection, but instead as dangerous and worthy of containment or rollback. Ironically, aid organizations themselves may inadvertently contribute to such a *gestalt* switch. This is precisely what happened when, in the summer of 2004, the German aid organization *Cap Anamur* rescued African refugees in the Mediterranean Sea only to use them as anonymous extras in a spectacle that was perceived by many as an unfortunate attempt to advertise the organization itself.⁴¹ Individuals from Nigeria, Niger und Ghana, who had hoped to reach the European coast in the still of the night and then quickly disband found themselves transformed into captives of a media event that, in the end, made the lives of Africans willing to flee their continent even more dangerous: first, because it signaled to other Africans that when in distress at sea they could count on being rescued by such selfless friends of humanity; and second, because a false impression was created in the media that Europe is being flooded by immigrants from Africa, whereas in reality only a tiny number ever actually undertake such a practically hopeless voyage. By inciting false hopes where warnings would have been warranted and by creating anxieties where accurate information was necessary, the aid organization arguably contributed to a net increase in human suffering.

⁴⁰ Consider the case of the devastating suicide bomb attack against the Red Cross headquarters in Baghdad on October 27, 2003. See K. Anderson, *Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts*, 17 HARVARD HUMAN RIGHTS JOURNAL 41-74 (2004).

⁴¹ See, e.g., *Germany: Schily criticises Cap Anamur over immigrant affair*, ANSA ENGLISH MEDIA SERVICE, July 15, 2004, at 1.

In this light, the claim that humanitarian organizations, "despite themselves, maintain a secret solidarity with the very powers they ought to fight,"⁴² is vague, but not completely off the mark. Yet the question is whether the separation of narrow humanitarian concerns from politics can be held responsible for such misdirection. In my view, the problem lies rather in the paradoxes inherent to humanitarian action—paradoxes that have less to do with the illusions of those who provide assistance than with the structure of the field in which they operate. In many crises, international aid does not benefit those in need, but instead the very local authorities who are responsible for the fact that external assistance is needed in the first place. The following prominent example illustrates this point.

In the summer of 1994, one and a half million Hutus fled Rwanda for Tanzania and eastern Zaire. Among them were thousands who were responsible for the genocide of the Tutsis committed in April of that same year, but who were now forced to flee as the political tides had turned. The refugee camp in the area around Goma, Zaire, in particular, which filled up with over 800,000 individuals in a breathtakingly short amount of time, landed in the headlines and became the focal point of one of the most comprehensive emergency relief efforts in recent memory. Motivated not least by international aid that totalled US \$1.4 billion for the year 1994 alone, countless organizations undertook the task of saving the lives of the refugees. Aid organizations quickly realized, however, that the political structures of the Hutu community were reconstituting themselves and preparations were being made for a renewed assault on the new regime in neighbouring Rwanda. The dominance of a well-functioning leadership among the camp population led to a sinister redefinition of international aid organizations, which were to a large extent used as logistical supply units for genocidal militias and were also accused as such by human rights organizations. "Goma" has since become a symbol epitomizing the loss of innocence of humanitarianism. It also shows, incidentally, that Agamben's morbid fascination for "bare life" mystifies the complexity of life and survival inside modern camp structures.⁴³ After Goma, many groups have begun to make aid contingent on behavioral changes in target regions, thereby narrowing the gap between the humanitarian and the political.⁴⁴ This recent trend, however, has placed humanitarian organizations in some conflict settings before the tragic choice of either abandoning populations in need altogether or providing aid in a manner

⁴² AGAMBEN, *supra* note 2, at 133.

⁴³ See P. Mesnard, *The Political Philosophy of Giorgio Agamben: A Critical Evaluation*, 5 TOTALITARIAN MOVEMENTS AND POLITICAL RELIGIONS 139-157 (2004).

⁴⁴ See *Terms of Engagement: Conditions and Conditionality in Humanitarian Action* (N. Leader and J. Macrae eds., HPG Report 6/2000), available at: <http://www.odi.org.uk/hpg>.

that will contribute to more suffering by fuelling civil wars or by legitimizing warlords.⁴⁵

E. Conclusion

The distinction between politics and humanitarianism and its corollary of neutral, impartial assistance to victims of disasters and wars are in no way historical constants, but rather subject to considerable change. Even intellectuals close to the Red Cross movement have identified such a distinction as itself politically grounded and hence negotiable.⁴⁶ Agamben's premise that humanitarian action is directed towards a single and carefully demarcated field of a "bare life" stripped of attributes is thus highly debatable. In reality, humanitarianism is not a distinct *field* at all, but rather a *point of view* from which intricate political crises can be assessed and judged. In this sense, humanitarian organizations will periodically engage in making sure that certain crises that are largely being interpreted as "humanitarian" are also understood and treated as "political." Western governments, on the other hand, are inclined to judge the human suffering produced by strategically insignificant regimes in faraway regions from a "humanitarian" point of view in order to delegate responsibility to private or international aid agencies. While we should refrain from objectifying the political/humanitarian divide as distinct fields of real world phenomena, we should nonetheless accept it as a methodological principle of investigation that identifies and makes visible the human costs of otherwise legal political or military endeavors.

Agamben is not interested in such weighing of costs and benefits because he assumes from the outset that taking care of the survival needs of people in distress is simply the reverse side of the modern inclination to ignore precisely those needs and turn life itself into a tool and object of power politics. By way of conclusion, I will indicate briefly how his view differs from two other, often no less shattering critiques of modern humanitarianism. Martti Koskenniemi warned that humanitarian demands and human rights are in danger of degenerating into "mere talk."⁴⁷ The recent crisis in Darfur, Sudan, can be cited as an example for a situation

⁴⁵ See S.K. LISCHER, DANGEROUS SANCTUARIES: REFUGEE CAMPS, CIVIL WAR, AND THE DILEMMAS OF HUMANITARIAN AID (2005).

⁴⁶ See D. Warner, *The Politics of the Political/Humanitarian Divide*, INTERNATIONAL REVIEW OF THE RED CROSS No. 833, 109-18 (1999).

⁴⁷ See M. Koskenniemi, *The Effect of Rights on Political Culture, in THE EU AND HUMAN RIGHTS* 99-116 (P. Alston ed., 1999).

in which the repeated invocation of human rights standards and *jus cogens* norms, like those articulated in the Genocide Convention, might ultimately damage those norms themselves if states are unwilling to act on them.⁴⁸ This criticism implies that human rights should be taken seriously and applied in a reasonable manner.

Both David Kennedy and Oona Hathaway have gone one step further by taking issue even with those who proved to be serious by joining treaties or engaging in advocacy. In a controversial quantitative study, Hathaway contended that the ratification of human rights treaties by sets of given countries not only did not improve human rights conditions on the ground, but actually correlated with *increasing* violations.⁴⁹ In a similar vein, David Kennedy radicalized Koskenniemi's point by arguing that human rights regimes and humanitarian law are rather part of the problem than part of solution, because they "justify" and "excuse" too much.⁵⁰ To some extent, this is an effect of the logic of legal reasoning: marking a line between noncombatants and combatants *increases* the legitimacy of attacking the latter, granting privileges to lawful combatants delegitimizes unlawful belligerents and dramatically *worsens* their status. On the whole, Kennedy is more concerned about the dangers of leaving human rights to international legal elites and a professional culture which is blind for the mismatch between lofty ideals and textual articulations on the one side, and real people and problems on the other side.⁵¹

Whereas these authors reveal the "dark sides" of overly relying on human rights talk and treaties, the moral fervor of activists or the routines of the legal profession, Agamben claims that something is wrong with human rights as such, and that recent history has demonstrated a deep affinity between the protection and the infringement of these rights. Considered in this light, the effort of the British aid organization Save the Children, for instance, to help children in need both in Britain and abroad after World War I – faithful to George Bernard Shaw's saying, "I have no enemies under seven" – is only the flip side of a trend to declare total war on others regardless of their age and situation. This assertion clearly goes far beyond the voices of other pessimists.

⁴⁸ See S. Giry, *A Losing Strategy on War Crimes*, INTERNATIONAL HERALD TRIBUNE, February 12-13, 2005, at 6.

⁴⁹ O.A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE LAW JOURNAL 1935 (2002).

⁵⁰ KENNEDY, *supra* note 30, at 25-6.

⁵¹ *Id.* at 26-30.

Agamben's work is understandable only against the backdrop of an entirely familiar mistrust of liberal democracy and its ability to cultivate nonpartisan moral and legal perspectives. According to Agamben, democracy does not threaten to *turn into* totalitarianism, but rather both regimes smoothly cross over into one another since they ultimately rest on the same *foundation* of a political interpretation of life itself.⁵² Like Carl Schmitt, Agamben sees the invocation of human rights by democratic governments as well as the "humanitarian concept of humanity"⁵³ as deceptive manouvers or, at least, as acts of self-deception on the part of the liberal bourgeois subject. The difference between Agamben and Schmitt lies in the fact that Schmitt fought liberal democracy in the name of the authoritarian state, while Agamben sees democracy and dictatorship as two equally unappealing twins. Very much unlike Schmitt, the Italian philosopher confronts us with a mode of thinking in vaguely felt resemblances in *lieu* of distinctly perceived differences. Ultimately, he offers a version of Schmitt's theory of sovereignty that changes its political valence and downplays the difference between liberal democracy and totalitarian dictatorship—a difference about which Adorno once said that it "is a total difference. And I would say," he added, "that it would be abstract and in a problematic way fanatical if one were to ignore this difference."⁵⁴

⁵² AGAMBEN, *supra* note 2, at 121.

⁵³ SCHMITT, *supra* note 36, at 55.

⁵⁴ Th.W. Adorno, *Über Mitbestimmung, Regelverstöße und Verwandtes. Diskussion im Rahmen einer Vorlesung am 5.12.1967*, in VI FRANKFURTER ADORNO BLÄTTER 155, 167 (2000).