

Armed Forces as Carrying both the Stick and the Carrot?

Humanitarian Aid in U.S. Counterinsurgency Operations in Afghanistan and Iraq

Alice Gadler*

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* PhD Candidate, School of International Studies, University of Trento. The author would like to thank Dr. Marco Pertile, the fellows and visiting fellows at the Lauterpacht Centre for International Law, and all participants in the conference for their useful comments.

Abstract

The fight against insurgents in Afghanistan and Iraq has led the U.S. and its allies to devote growing attention and resources to counterinsurgency strategies, stability operations and civil-military operations. Humanitarian and development assistance have acquired an important role in military strategies. However, the activities carried out by armed forces in the field of humanitarian assistance in Afghanistan and Iraq have been criticized for blurring the distinction between civilian and military actors and thus increasing the risk of being targeted for humanitarians and civilians. The article analyzes the conduct of U.S. armed forces in Afghanistan and Iraq and the challenges it has posed to humanitarian actors. It then examines U.S. military doctrines and manuals and argues that their most recent versions have increasingly taken into account the needs of humanitarian actors and the principles of humanitarian action, but reasons for concern remain. The engagement of the military in humanitarian assistance has not been definitely limited. In addition, humanitarians should be careful in their relationships with the armed forces in the field of information-sharing.

A. Introduction

Over the last few years, insurgency and other methods of so-called “irregular warfare” have gained increased attention. In particular, the conflicts in Afghanistan and Iraq have posed complex challenges to the U.S. and its allies, in the sense that both have been characterized by the confrontation with insurgents, enemies who do not distinguish themselves from civilians and thus are difficult to identify among the population and to defeat.¹

These realities have led to a partial re-thinking of military doctrines and strategies, with the publication in 2006 of the first U.S. military field manual on counterinsurgency (COIN) after 20 years.² Central to

¹ See, for example, G. Sitaraman, ‘Counterinsurgency, the War on Terror, and the Laws of War’, 95 *Virginia Law Review* (2009) 7, 1745, 1771-1773. See also U.S. Headquarters Department of the Army, *Counterinsurgency*, Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5 (December 2006), 1-23 [COIN FM 2006]; U.S. Joint Chiefs of Staff, *Counterinsurgency Operations*, Joint Publication 3-24 (October 2009), II-3 – II-4 and II-13 – II-14 [COIN JP 2009].

² See COIN FM 2006, *supra* note 1, Foreword.

counterinsurgency strategies is the assumption that, given that it is difficult to identify insurgents among the population, it is necessary not only to use hard means of combat, in the sense of military force to defeat the enemy, but also soft means, meaning methods and instruments to gain the trust of the local population, which may then deny support to the insurgents and possibly help identify them.³ Growing importance has thus been attributed to so-called ‘stability operations’ and to the need for armed forces to cooperate with civilian actors, for example in the framework of civil-military operations (CMO). Emphasis has been put on the need for armed forces to be trained and ready to carry out not only traditional combat functions, but also functions related to assistance to the population, in order to gain their “hearts and minds”, and to nation-building.⁴ Interventions of the army in these fields are not a completely new phenomenon, but what is new is their importance in current military strategies, since official U.S. doctrine considers that “[i]nsurgency will be a large and growing element of the security challenges faced by the United States in the 21st century”⁵ and that “[a]chieving victory will assume new dimensions as [the U.S.] strengthen[s] [its] ability to generate ‘soft’ power”⁶.

Afghanistan and Iraq have witnessed American and allied forces performing tasks typically carried out by civilian actors, such as the provision of humanitarian and development assistance to the local population. However, scholars and practitioners have raised vocal complaints against the activities of the military especially in the field of humanitarian assistance, arguing that they have led to a blurring of the distinction between civilian and military actors and thus have increased both the risk for humanitarian actors of being targeted and the actual number of attacks against them.⁷ This article examines the use of humanitarian

³ See, for example COIN JP 2009, *supra* note 1, X-2.

⁴ COIN FM 2006, *supra* note 1, Appendix A: A Guide for Action, A-5.

⁵ United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide* (2009), Preface.

⁶ U.S. Headquarters Department of the Army, *Stability Operations*, Field Manual No. 3-07 (FM 3-07) (October 2008), Foreword [Stability Operations FM 2008].

⁷ A clear example of an attack against a humanitarian organization was the one against the ICRC headquarters in Baghdad in October 2003. See, for example, BBC News, ‘Baghdad terror blasts kill dozens’ (27 October 2003) available at http://news.bbc.co.uk/1/hi/world/middle_east/3216539.stm (last visited 27 April 2011). For an analysis of data regarding attacks against aid workers, see A. Stoddard, A. Harmer & K. Haver, ‘Providing Aid in Insecure Environments: Trends in Policy and Operations’ (September 2006) available at <http://www.odi.org.uk/resources/>

assistance as a resource in the conflicts in Afghanistan and Iraq and in recently developed U.S. counterinsurgency and stability strategies, in the sense of a tool available to the armed forces to achieve their mission and objectives. The aim is to understand what role this resource has played and may play in the future and what problems have emerged and may arise.

After an analysis of the meaning traditionally assigned to humanitarian assistance and of the principles associated with this activity, a description of the role played by the military in the field of humanitarian assistance in Afghanistan and Iraq is provided, together with an overview of the relationships between humanitarian and military actors and of related problems. The trend that sees the military claiming a role in humanitarian assistance and increasingly collaborating with NGOs raises questions of whether belligerents are allowed to give relief to civilians and whether this relief can be classified as humanitarian assistance. It is argued that, while belligerents are not prohibited from providing relief to civilians in need under international humanitarian law (IHL), humanitarian assistance in conflict has traditionally referred to activities that are supposed to be apolitical and thus carried out by actors different from combatants and in accordance with certain rules and principles. The use of the term “humanitarian assistance” for activities carried out by combatants without respecting these principles may lead to higher risks for actors traditionally involved in humanitarian action, first of all because of the blurring of the distinction between humanitarians and the military, and the perception of the former as legitimate targets. Also, humanitarian actors may lose entitlement to the specific privileges provided under IHL, in case their action favors one of the parties to the conflict (and thus does not respect the principles of humanitarian assistance). Finally, the military may endanger respect for the principle of distinction if they wear non-standard uniforms or civilian clothes when involved in humanitarian assistance, so that negative consequences may derive not only for traditional humanitarian actors, but also for the civilian population more in general, including the beneficiaries of relief.

The article examines recent military documents issued by the U.S., to verify the use they make of the term “humanitarian assistance”, the role they assign to this kind of activity, and the instructions they give regarding humanitarian-military relations. It concludes with reflections regarding gaps

download/231.pdf (last visited 27 April 2011); A. Stoddard, A. Harmer & V. DiDomenico, ‘Providing aid in insecure environments: 2009 Update: Trends in violence against aid workers and the operational response’, (April 2009) available at <http://www.odi.org.uk/resources/download/3250.pdf> (last visited 27 April 2011).

and possible improvements in recent U.S. military doctrines and manuals in the field of humanitarian assistance. Increasing attention has been given to the need to respect the identity of humanitarian agencies and organizations and the principles that characterize such identity. Still, concerns remain regarding both the role envisaged for the military in the provision of humanitarian assistance and the relationships between military and humanitarian actors, especially in the field of information-sharing.

B. Humanitarian Assistance in Armed Conflict

There is no international treaty or binding document providing a clear definition of the term “humanitarian assistance” or “humanitarian relief”. The Institute of International Law defined the term as “all acts, activities and the human and material resources for the provision of goods and services *of an exclusively humanitarian character*, indispensable for the survival and the fulfillment of the essential needs of the victims of disasters”⁸. By emphasizing its attitude to satisfy only immediate basic needs in order to allow people to survive, humanitarian assistance has been traditionally distinguished from development assistance, which deals with longer-term problems and thus presents a more political character, since tackling the root causes of a conflict implies political choices regarding how to build or rebuild a society.⁹

In addition to the fact that humanitarian assistance is related to the provision of goods and services to save lives and reduce suffering, humanitarian action coming from outside and carried out by a state or non-state actor in situations of armed conflict has been traditionally characterized by three principles—humanity, impartiality, and neutrality—which would allow it to be identified as such, and not be considered an unlawful interference in the conflict. These principles are embodied in international treaties dealing with the law applicable in armed conflict, and they have also been reaffirmed in the case-law of the International Court of

⁸ Institute of International Law, ‘16ème Commission: L’Assistance Humanitaire; Sixteenth Commission: Humanitarian Assistance: Resolution. Bruges Session, September 2, 2003’ (2 September 2003) available at http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF (last visited 27 April 2011), para. I(1) (emphasis added); see also J. Salmon, *Dictionnaire de Droit International Public* (2001), 98-99.

⁹ See, for example, 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* (2004), 41, 57.

Justice and in other documents adopted in international fora. The Fourth Geneva Convention of 1949 and the two Additional Protocols of 1977,¹⁰ a source of binding law dealing with the provision of humanitarian assistance to civilians in armed conflicts, make explicit reference to the principles of humanity and impartiality for relief actions. These treaties do not use the term “humanitarian assistance”, but rather frequently mention “relief” in terms of the provision of specific goods.¹¹ Notwithstanding the different regulation for international armed conflicts, non-international armed conflicts, and occupation, in general when mentioning the possibility for external (state and non-state) actors to offer their services to the parties to the conflict in the field of humanitarian assistance or to provide humanitarian assistance to civilians under the control of a party, constant reference is made to relief actions which are “humanitarian and impartial in character and conducted without any adverse distinction”¹² or to “impartial humanitarian organisation”¹³ or “impartial humanitarian body”¹⁴. The consequence following from respect of these principles is that special privileges are afforded to the personnel carrying out humanitarian actions, including the right to have access to victims with the consent of the parties

¹⁰ *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 [GC IV]. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3 [AP I]. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S. 609 [AP II]. The U.S. is not a party to AP I and AP II, but it is a signatory to both of them and it has “recognized that certain provisions of Protocol I reflect customary international law or are positive new developments, which should in time become part of that law”, including “much of th[e] part” on the protection of the civilian population. M. J. Matheson, ‘Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions’, 2 *American University Journal of International Law & Policy* (1987), 419, 421, 426-428.

¹¹ See Arts 23, 59 and 108 GC IV; Art. 69 AP I; Art. 18 AP II.

¹² Art. 70 AP I. Similarly, see Art. 18 AP II. As far as relief provided by states is concerned, this possibility is expressly envisaged by Art. 59 GC IV in favour of the civilian population of the occupied territory, but the commentary states that “[o]nly those States which are neutral [...] are capable of providing the essential guarantees of impartiality.” Also, the Commentary to Art. 70 AP I simply notes that relief actions undertaken by a state in favor of the civilian population of one party to the conflict only would still satisfy the principles.

¹³ Arts 10 and 59 GC IV.

¹⁴ Art. 3 GC IV.

concerned (which arguably cannot be denied for arbitrary reasons), the protection from attack, and the possibility to move freely in the territory controlled by the parties (except in case of imperative military necessity).¹⁵

The ICRC Commentaries to the Fourth Geneva Convention and to the two Additional Protocols specify that, in order to be humanitarian, an organization “must be concerned with the condition of man, considered solely as a human being, regardless of his value as a military, political, professional or other unit” and its activities in order to be “purely humanitarian in character ... must be concerned with human beings as such, and must not be affected by any political or military consideration”¹⁶. Impartiality of relief actions is considered to be different from “mathematical equality,” since “[t]he degree and urgency of the need should, for example, be taken into consideration when distributing relief”¹⁷. Relief shall thus be granted to all the victims without discrimination, and priority shall be established only on the basis of needs.¹⁸

In the case *Military and Paramilitary Activities in and against Nicaragua* in 1986, the International Court of Justice highlighted that the provision of humanitarian assistance must “be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering,’ and ‘to protect life and health and to ensure respect for

¹⁵ See Arts 3, 10, 59, 61, 63 GC IV, Arts 70, 71, 81 AP I, and Art. 18 AP II, and the respective commentaries by the ICRC. Also, see, J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (2005), 105-111 and 193-202; J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Volume II: Practice, Part I* (2005), 588-639 and 1174-1243; and, on the position of the U.S., J. B. Bellinger, III & W. J. Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’, 89 *International Review of the Red Cross* (2007) 866, 443, 448-454.

¹⁶ J. S. Pictet (ed.), *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), 96-97 (commentary to Art. 10). Also, in order for a relief action to be humanitarian it is necessary that “the action is aimed at bringing relief to victims” and that the crucial issue is “to avoid deception, that is to say, using the relief action for other purposes.” However, “the humanitarian character of an action could not be contested merely on the basis of its intention”, but rather on a factual basis only. Y. Sandoz *et al.* (eds), *Commentary to the Additional Protocols of 8 June 1977 of the Geneva Conventions of 12 August 1949* (1987), 817-818 (commentary to Art. 70 AP I).

¹⁷ Pictet, *supra* note 16, 97 (commentary to Art. 10).

¹⁸ See Sandoz *et al.*, *supra* note 16, 818 (commentary to Art. 70 AP I).

the human being”¹⁹. The Court added that relief “must also, and above all, be given without discrimination to all in need in Nicaragua”²⁰. In other words, humanitarian assistance to be classified as such should respect the principles of humanity, meaning that it should have the aim to “prevent and alleviate human suffering wherever it may be found [...] protect life and health and [...] ensure respect for the human being;”²¹ and the principle of impartiality, meaning that aid should be given solely on the basis of needs, without any “discrimination as to nationality, race, religious beliefs, class or political opinions”²².

In addition to humanity and impartiality, another principle that has been usually associated with the provision of humanitarian assistance is neutrality, which for the International Red Cross and Red Crescent Movement means that “[i]n order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”²³. This definition has been often questioned by other humanitarian actors for its breadth, since it comprises both military neutrality, in the sense of not favoring any party to the conflict with the assistance, and ideological neutrality, implying the duty not to take a position on the conflict or any other dispute.²⁴ The requirement of ideological neutrality for humanitarian actors has been the subject of a wide debate, started with the Biafra conflict and the creation of Médecins Sans Frontières (MSF) and continued with the discussion about the so-called “new humanitarianism”²⁵. On the other hand, there is general agreement among scholars and practitioners on the need to

¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, 115, para. 243.

²⁰ *Id.*

²¹ International Committee of the Red Cross (ICRC), ‘The Fundamental Principles of the Red Cross and Red Crescent’ (1996) available at http://www.icrc.org/eng/assets/files/other/icrc_002_0513.pdf (last visited 27 April 2011), 2.

²² *Id.*, 4.

²³ *Id.*, 7.

²⁴ *Id.*, 7-8.

²⁵ See, for example, A. De Waal, *Famine Crimes: Politics & the Disaster Relief Industry in Africa* (1997); D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2002); M. Barnett, ‘Humanitarianism Transformed’, 3 *Perspectives on Politics* (2005) 4, 723; F. Fox, ‘New Humanitarianism: Does It Provide a Moral Banner for the 21st Century?’, 25 *Disasters* (2001) 4, 275; M. Duffield *et al.*, ‘Editorial: Politics and Humanitarian Aid’, 25 *Disasters* (2001) 4, 269; K. Mills, ‘Neo-Humanitarianism: The Role of International Humanitarian Norms and Organizations in Contemporary Conflict’, 11 *Global Governance* (2005) 2, 161.

respect military neutrality in order for an action to be recognized and protected as humanitarian assistance and not to constitute an unlawful interference in a conflict.²⁶

The three fundamental principles of humanity, impartiality, and neutrality have been included in various UN documents dealing with humanitarian assistance, and one can note that the principles have often been related to the concept of humanitarian assistance *per se*, independently from the actor carrying out the action. For example, already in 1988 the UN General Assembly in resolution 43/131 “recall[ed]” that “in the event of natural disasters and similar emergency situations, the principles of humanity, neutrality and impartiality must be given utmost consideration by all those involved in providing humanitarian assistance”²⁷. The second of the “Guiding Principles on the strengthening of the coordination of humanitarian emergency assistance of the United Nations”, annexed to resolution 46/182 of 1991, explicitly states that “[h]umanitarian assistance *must* be provided in accordance with the principles of humanity, neutrality and impartiality”²⁸. A General Assembly resolution adopted in 2004 for the first time “[e]mphasizes the fundamentally *civilian character* of humanitarian assistance, reaffirms the leading role of civilian organizations in implementing humanitarian assistance, particularly in areas affected by

²⁶ See, for example, R. Ojinaga Ruiz, *Emergencias Humanitarias y Derecho Internacional: la Asistencia a las Víctimas* (2005), 269-274; F. Zorzi Giustiniani, *Le Nazioni Unite e l'Assistenza Umanitaria* (2008), 140-142 and 193-196; R. Abril Stoffels, *La Asistencia Humanitaria en los Conflictos Armados: Configuración Jurídica, Principios Rectores y Mecanismos de Garantía* (2001), 361-362 [Abril Stoffels, *La Asistencia Humanitaria*]; R. Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’, 86 *International Review of the Red Cross* (2004) 855, 515, 542-543 [Abril Stoffels, *Legal Regulation*]; K. Mackintosh, ‘The Principles of Humanitarian Action in International Humanitarian Law’ (March 2000) available at <http://www.odi.org.uk/resources/download/249.pdf> (last visited 27 April 2011), 8-9.

²⁷ GA Res. 43/131, 8 December 1988, preamble. Similarly, see GA Res. 45/100, 14 December 1990, preamble.

²⁸ GA Res. 46/182, 19 December 1991, Annex, para. 2 (emphasis added). In 2003, the General Assembly, in addition to “[r]eaffirming the principles of humanity, neutrality and impartiality for the provision of humanitarian assistance,” introduced the guiding principle of independence, “meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented”. GA Res. 58/114, 17 December 2003, preamble. This definition is different from that of independence as a fundamental principle of the International Movement of the Red Cross and Red Crescent: see ICRC, *supra* note 21, 9-10.

conflicts, and affirms the need, in situations where military capacity and assets are used to support the implementation of humanitarian assistance, for their use to be in conformity with international humanitarian law and humanitarian principles”²⁹. The Security Council has also recalled at various times the “importance of the activities of the relevant United Nations bodies, agencies and other international humanitarian organizations and the need for these activities to continue to be carried out in accordance with the principles of humanity, neutrality and impartiality of humanitarian assistance”³⁰, first in presidential statements and subsequently in resolutions.³¹

Similarly, the (non-binding) *Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict* prepared by the UN Office for the Coordination of Humanitarian Affairs (OCHA) mentions “the basic humanitarian principles of humanity, impartiality and neutrality” as principles that “*must*” be respected when providing humanitarian assistance, “as stated in General Assembly Resolution 46/182”³², and the (binding) Treaty on the Functioning of the European Union (TFEU) states in Article 214 that “[h]umanitarian aid operations shall be conducted in

²⁹ GA Res. 59/141, 15 December 2004, para. 11 (emphasis added). See also GA Res. 60/124, 15 December 2005, para. 7; GA Res. 61/134, 14 December 2006, para. 5; GA Res. 62/94, 17 December 2007, para. 6.

³⁰ SC Pr.St. 1997/34, 19 June 1997.

³¹ SC Res.1296, 19 April 2000, para. 11. A more general reference was then made by “Stress[ing] the importance *for all, within the framework of humanitarian assistance*, of upholding and respecting the humanitarian principles of humanity, neutrality, impartiality and independence”. SC Res. 1674, 28 April 2006, para. 21 (emphasis added). Reference has been then added to “the importance for Humanitarian [sic] organizations to uphold the principles of neutrality, impartiality, humanity of their humanitarian activities and independence of their objectives.” SC Pr.St. 2004/46, 14 December 2004.

³² The *Glossary* defines the principles as well: UN Office for the Coordination of Humanitarian Affairs (OCHA), ‘Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict’ (2003) available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=100572> (last visited 27 April 2011), 13 and 15 (emphasis added). The 2003 resolution by the Institute of International Law on humanitarian assistance states that “[h]umanitarian assistance shall be offered and, if accepted, distributed without any discrimination on prohibited grounds, while taking into account the needs of the most vulnerable groups” and that “[t]he assisting State or organization may not interfere, *in any manner whatsoever* in the internal affairs of the affected State.”, Institut de Droit International/Institute of International Law, *supra* note 8, paras II.3 and IV.3 (emphasis added).

compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination”³³.

The rationale behind the principles characterizing humanitarian actions under IHL is the need to ensure that those providing humanitarian assistance do not interfere in the conflict and are perceived as neutral by the belligerents, so as to have access to all the victims. The principles are thus a means to an end, and a very important role in achieving this end is played by the perception belligerents have of humanitarian actions. If the actors involved in the provision of humanitarian assistance are perceived as not being concerned with the needs of the victims only, their safety may be at risk. Following this reasoning, relief provided by combatants that aims to achieve a specific military or political objective and that blurs the distinction between politico-military and humanitarian action and between military and humanitarian actors, runs against the intention of the law, namely ensuring humanitarian actors’ safety. For example, the Fourth Geneva Convention and the First Additional Protocol envisage a role for the military of one party to the conflict in the distribution of relief in occupation, but still this aid has to be given “without any adverse distinction” (and nonetheless it is not classified as “humanitarian”).³⁴

In conclusion, even if there seems to be no universally agreed upon definition of humanitarian assistance contained in a binding international document, the term has been arguably used to describe, generally, not the activities undertaken by armed forces in conflict (especially of a party to it), but rather by UN specialized agencies and other humanitarian

³³ Council of the European Union, *Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union*, 30 April 2008, 6655/1/08 REV 1, 187. While these principles are not defined in the treaty itself, the previous (non-binding) European Consensus on Humanitarian Aid of 2008 provides that “humanity means that human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population,” “[n]eutrality means that humanitarian aid must not favour any side in an armed conflict or other dispute,” and “[i]mpartiality denotes that humanitarian aid must be provided solely on the basis of need, without discrimination between or within affected populations.”, Council of the European Union, *Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission: The European Consensus on Humanitarian Aid*, OJ 2008 C 25/1, C 25/2, paras 11-13.

³⁴ See Arts 55 GC IV and 69 AP I. The requirement of absence of any adverse distinction is explicitly provided in Art. 69 AP II. The adjective “humanitarian” to characterize this aid is used neither in Arts 55 GC IV and 69 AP I, nor in the ICRC Commentaries to them.

nongovernmental organizations. Moreover, there has been a constant trend towards recognition of the need for actions to comply with the principles of humanity, impartiality, and neutrality in order to be classified as humanitarian, so that scholars have affirmed the customary nature of these three traditional principles for external humanitarian assistance to be considered as such and not an unlawful interference in a conflict.³⁵

Using the term “humanitarian assistance” for actions that do not respect these principles risks leading to a blurring of the distinction between military and humanitarian actors, endangering the latter and running contrary to the rationale behind the principles themselves.³⁶ For armed

³⁵ This is true especially in armed conflict, with the principles being enshrined in the GCs and in the APs; however, some of the aforementioned documents containing the principles deal with humanitarian assistance more in general, also in the case of natural disasters. For the purpose of this article, only situations of armed conflict are taken into consideration. See, for example, J. Alcaide Fernández, ‘La Asistencia Humanitaria en Situaciones de Conflicto Armado’, in J. Alcaide Fernández *et al.*, *La Asistencia Humanitaria en Derecho Internacional Contemporáneo* (1997), 77-79; Mackintosh, *supra* note 26, 8-9; M. Torrelli, ‘From Humanitarian Assistance to “Intervention on Humanitarian Grounds”?’’, *32 International Review of the Red Cross* (1992) 288, 228, 239-241; Zorzi Giustiniani, *supra* note 26, 193-197; Abril Stoffels, *La Asistencia Humanitaria*, *supra* note 26, 412-416; Abril Stoffels, *Legal Regulation*, *supra* note 26, 539-544; D. Plattner, ‘ICRC Neutrality and Neutrality in Humanitarian Assistance’, *36 International Review of the Red Cross* (1996) 311, 161. See also, *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 19, paras 242-243.

³⁶ Blondel affirms that “[w]ithout actually defining the word ‘humanitarian’, IHL, like other branches of law, makes clear its aims, which are to ensure respect for human life and to promote health and dignity *for all*. It is concerned with men and women *for their own sake*, setting aside weapons, uniforms and ideologies, men and women who could very well be ourselves.” J. L. Blondel, ‘The Meaning of the Word “Humanitarian” in Relation to the Fundamental Principles of the Red Cross and Red Crescent’, *29 International Review of the Red Cross* (1989) 273, 512 (emphasis added). On the need to maintain a distinction between humanitarian and military actors “at all times”, see J. Grombach Wagner, ‘An IHL/ICRC Perspective on “Humanitarian Space”’, *Humanitarian Exchange* (2005) 32, 25. Spieker affirms the need for the military to satisfy the criteria provided in Art. 70 AP I as conditions to the right to offer humanitarian assistance, but she adds that it is not necessary to satisfy such principles as preconditions of “humanitarian action as such” (for example, the armed forces of an occupying power may provide “humanitarian assistance” even if taking part in hostilities). She also adds that “as a legal concept, the provision of humanitarian assistance by governments and by governmental authorities, including the military, is nothing exceptional”: H. Spieker, ‘The International Red Cross and Red Crescent and Military-Humanitarian Relationships’, in D. Dijkzeul (ed.), *Between Force and Mercy: Military Action and Humanitarian Aid* (2004), 206 and 221. Other

forces, a first consequence deriving from the fact of presenting themselves as involved in a humanitarian action may be a positive image in the eyes both of the beneficiaries and of their own national constituencies. Also, while it does not seem to be arguable that armed forces who do “humanitarian assistance” are entitled to the protection and the privileges envisaged for the civilian actors traditionally involved in this activity during armed conflict, another consequence may be the adoption of behaviors that jeopardize the principle of distinction. The risk is indeed that military actors carrying out “humanitarian” and not combat tasks may decide, in order to increase their security, to wear civilian clothes and not to distinguish themselves from the civilian population, as happened in Afghanistan.³⁷ In addition to offending the principle of distinction, this conduct may lead to negative consequences for civilian humanitarian actors involved in humanitarian assistance, for whom it is important not only to respect the principles in order to have safe access to victims, but also to be perceived as such. Moreover, increased risks of being targeted for humanitarian actors imply increased risks for civilians who get in contact with these actors in order to receive relief.

Humanitarian actors who interact with the military must be aware that “[t]heir activities or location may [...] expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities”³⁸. Furthermore, they must be careful both not to commit acts that exceed their mission, thus leading to the loss of entitlement to their specific privileges, and not to get involved in activities that may amount to direct participation in hostilities and thus to the loss of protection from attack.³⁹

authors affirm that the term “humanitarian assistance” under IHL refers only to relief actions coming from outside (thus not to the actions carried out by the parties to the conflict themselves): see, for example, Zorzi Giustiniani, *supra* note 26, 15; Abril Stoffels, *La Asistencia Humanitaria*, *supra* note 26, 41.

³⁷ See W. H. Parks, ‘Special Forces’ Wear of Non-Standard Uniforms’, in R. B. Jaques (ed.), *Issues in International Law and Military Operations*, Naval War College International Law Studies, Volume 80 (2006), 69, 71. The article analyses the principle of distinction and the possibility and limits for members of the armed forces to wear non-standard uniforms or civilian attires.

³⁸ N. Melzer (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), 37. This statement is made with reference to “[p]rivate contractors and employees of a party to an armed conflict”.

³⁹ *Id.* For example, the transmission of tactical intelligence to carry out an attack may amount to direct participation in hostilities, in case the act “meet[s] three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a

Below the article provides an overview of the practice that has taken place in Afghanistan and Iraq, to examine problems that have emerged, their consequences in the field and in the formulation of U.S. instructions for its armed forces.

C. The Conflicts in Afghanistan and Iraq: A New Role for the Military in Relief?

The interventions in Afghanistan and Iraq have presented the U.S. and its allies with complex challenges connected to the nature of the conflict, and more specifically to the difficulties in defeating enemies who do not distinguish themselves from the civilian population.⁴⁰ Indeed, after an initial brief military campaign to remove the Taliban and Saddam Hussein from government, in both these situations the U.S. has found itself confronting an insurgency, meaning “an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control”⁴¹.

According to U.S. military doctrine, insurgents are characterized by the fact that they “use subversion, guerrilla warfare, and terrorism, in the face of capable counterinsurgent forces”⁴² and that they are “complex, dynamic, and adaptive” and “can rapidly shift, split, combine, or reorganize”⁴³, so that in order to defeat them, it is not sufficient to fight and kill them, but equally important is to gain the trust of the population, so as to deprive insurgents of their primary source of support.⁴⁴ In this sense, in

belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.”, *id.*, 35 and 46.

⁴⁰ See *supra* note 1.

⁴¹ COIN FM 2006, *supra* note 1, 1-1. U.S. military sources also define insurgency as “[t]he organized use of subversion and violence by a group or movement that seeks to overthrow or force change of a governing authority.” U.S. Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 (12 April 2001, as amended through April 2010), 233 [DoD Dictionary 2010].

⁴² COIN JP 2009, *supra* note 1, I-1.

⁴³ *Id.*, I-2.

⁴⁴ See, for example, International Security Assistance Force (ISAF), Headquarters, Kabul, Afghanistan, ‘Tactical Directive’ (6 July 2009) available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (last visited 28 April 2011): “Protecting the people is the mission. The conflict will be won by persuading the population, not by destroying the enemy.” Similarly, see Lieutenant General

addition to offensive and defensive operations, it is necessary for “counterinsurgents to address the insurgency’s causes through stability operations as well”, which “initially involves securing and controlling the local populace and providing for essential services”⁴⁵. Actions to respond to the humanitarian needs of the population and to stimulate economic development and good governance have been recognized as playing a role as relevant as that of traditional military activities, in both Afghanistan and Iraq. However, the involvement of the military in the provision of relief and their relationships with humanitarian actors have prompted numerous complaints from humanitarian agencies and NGOs. In particular, it has been claimed that the strategies adopted in Afghanistan and Iraq have led to a blurring of the distinction between military and humanitarian actors and to the perception of the latter as aligned with the former and as legitimate targets for insurgents.⁴⁶

As far as Afghanistan is concerned, the opinion of the U.S. on the contribution by humanitarian organizations was already made clear in October 2001: the then Secretary of State Colin Powell explicitly described U.S. NGOs as “a force multiplier” of the coalition and as “an important part of our combat team”⁴⁷. Highly controversial initiatives were then the distribution of leaflets making the delivery of humanitarian assistance conditional upon the provision of intelligence information,⁴⁸ and the choice

D. H. Petraeus, ‘Learning Counterinsurgency: Observations from Soldiering in Iraq’, 86 *Military Review* (2006) 1, 2, 8-9: “[...] *success in a counterinsurgency requires more than just military operations*. Counterinsurgency strategies must also include, above all, efforts to establish a political environment that helps reduce support for the insurgents and undermines the attraction of whatever ideology they may espouse.” (emphasis in the original).

⁴⁵ COIN FM 2006, *supra* note 1, 1-3.

⁴⁶ While this article focuses on problems that emerged in Afghanistan and Iraq in relation to actions and positions taken by states/military actors, it has been highlighted that the conduct of so-called humanitarian actors themselves has sometimes contributed to the blurring of the distinction and to increasing risks for them in Afghanistan and Iraq. See, for example A. Donini, ‘Afghanistan: Humanitarianism under Threat’ (March 2009) available at <https://wikis.uit.tufts.edu/confluence/download/attachments/22520580/Donini-Afghanistan.pdf?version=1> (last visited 28 April 2011). Anderson, *supra* note 9, 64.

⁴⁷ Secretary of State C. L. Powell, ‘Remarks to the National Foreign Policy Conference for Leaders of Nongovernmental Organizations’ (26 October 2001) available at http://avalon.law.yale.edu/sept11/powell_brief31.asp (last visited 28 April 2011).

⁴⁸ See K. Gluck, ‘Coalition Forces Endanger Humanitarian Action in Afghanistan’ (6 May 2004) available at <http://www.msf.org/msf/articles/2004/05/coalition-forces-endanger-humanitarian-action-in-afghanistan.cfm> (last visited 28 April 2011). See also E. MacAskill, ‘Pentagon Forced to Withdraw Leaflet Linking Aid to Information

by the U.S. and other coalition forces to move around in civilian clothes and sometimes with concealed weapons, even “claim[ing] they [we]re on a ‘humanitarian mission’ to assist NGOs in their work”, thus leading civilians to suspect humanitarian workers of being in reality American soldiers.⁴⁹ Similarly, it has been affirmed that in Iraq “a dangerous blurring of the lines between humanitarian and political action” has taken place, also due to the fact that the occupying powers were among the main providers of funds to NGOs, so that the preservation of an appearance of independence was particularly difficult.⁵⁰ Two other tools developed for the first time in Afghanistan and Iraq by American and coalition forces in the field of relief have further stimulated concerns from humanitarian agencies and NGOs regarding the blurring of the distinction between military and humanitarian actors—Provincial Reconstruction Teams (PRTs) and the Commander’s Emergency Response Program (CERP).

In 2002 the first PRT was established by the U.S. in Afghanistan, as “[a]n interim interagency organization designed to improve stability in a given area by helping build the legitimacy and effectiveness of a host nation local or provincial government in providing security to its citizens and

on Taliban’, *The Guardian* (6 May 2004) available at <http://www.guardian.co.uk/world/2004/may/06/afghanistan.usa> (last visited 28 April 2011).

⁴⁹ See M. Kelly & M. Rostrup, ‘Identify Yourself: Coalition Soldiers in Afghanistan Are Endangering Aid Workers’ (1 February 2002) available at <http://www.guardian.co.uk/world/2002/feb/01/afghanistan.comment> (last visited 28 April 2011). See also P. M. Diskett *et al.*, ‘Civil-Military Relations in Humanitarian Assistance: Where Next in the Aftermath of 11 September?’, in D. Dijkzeul (ed.) *Between Force and Mercy: Military Action and Humanitarian Aid* (2004), 321. N. de Torrente, ‘The War on Terror’s Challenge to Humanitarian Action’, *Humanitarian Exchange* (2002), 22, 44. Against these criticisms, see for example J. J. Collins & M. J. McNerney, ‘Security and Humanitarian Assistance: The US Experience in Afghanistan’, in D. Dijkzeul (ed.), *Between Force and Mercy: Military Action and Humanitarian Aid* (2004), 187.

⁵⁰ A. Donini *et al.*, ‘Between Cooptation and Irrelevance: Humanitarian Action after Iraq’, 17 *Journal of Refugees Studies* (2004) 3, 260, 261-262. One sign of the use of the humanitarian activity as a political tool was the fact that before the intervention in Iraq, the U.S. Department of Defense (DoD) created an Office for Reconstruction and Humanitarian Assistance (ORHA) within the Pentagon, instead of relying on the U.S. Agency for International Development (USAID) as usual practice. See S. Kenyon Lischer, ‘Military Intervention and the Humanitarian “Force Multiplier”’, 13 *Global Governance* (2007) 1, 99, 105. On this and other aspects of the politicization of humanitarian aid before, during, and after the attack in Iraq in March 2003, see N. de Torrente, ‘Humanitarian Action under Attack: Reflections on the Iraq War’, 17 *Harvard Human Rights Journal* (2004), 1.

delivering essential government services”⁵¹. The number of PRTs in Afghanistan rapidly grew, with other nations establishing them and then NATO’s International Security Assistance Force (ISAF) taking control over all the existing ones by 2006.⁵² Since 2005 PRTs have been established in Iraq as well. At present, 27 PRTs are operating in Afghanistan and 18 in Iraq,⁵³ and they have been classified as “[p]erhaps the most important of new initiatives” by the U.S. in the field of counterinsurgency, since they “bring together civilian and military personnel to undertake the insurgency-relevant developmental work that has been essential to success in both Iraq and Afghanistan”⁵⁴. The central characteristic of PRTs is that they include both civilian and military components, however the size of each of them, the ratio between military and civilian members, and the military or civilian leadership can vary. Indeed, there are important differences not only between the structure and activities of PRTs in Afghanistan and Iraq respectively, but also among the various PRTs operating in Afghanistan, since different lead nations have interpreted the broad mandate assigned to PRTs in different ways.⁵⁵ In particular “[t]he PRTs’ open-ended mandate of

⁵¹ DoD Dictionary 2010, *supra* note 41, 379.

⁵² ISAF is a multinational force which “was created in accordance with the Bonn Conference in December 2001” and whose leadership was then assumed by NATO on 11 August 2003. NATO thus “became responsible for the command, coordination and planning of the force, including the provision of a force commander and headquarters on the ground in Afghanistan.” ISAF, ‘About ISAF: Mission’ available at <http://www.isaf.nato.int/history.html> (last visited 28 April 2011). Each PRT is now led by an ISAF nation (including the U.S.). See, for example, ISAF, *ISAF PRT Handbook, Edition 4* (2010), 2 [ISAF, PRT Handbook]; see also Special Inspector General for Afghanistan Reconstruction (SIGAR), *Quarterly Report to the United States Congress, 30 July 2010*, 76.

⁵³ SIGAR, *supra* note 52, 76; In Iraq, the 18 PRTs are differentiated between 15 PRTs, two embedded PRTs (e-PRTs), and one Regional Reconstruction Team (RRT). They are supplemented by 15 satellite offices, designated as “Forward Presences”. See *id.*

⁵⁴ United States Government Interagency Counterinsurgency Initiative, *supra* note 5, preface.

⁵⁵ In 2005, the PRT Executive Steering Committee stated that PRTs “will assist The Islamic Republic of Afghanistan to extend its authority, in order to facilitate the development of a stable and secure environment in the identified area of operations, and enable Security Sector Reform (SSR) and reconstruction efforts.” B. R. Rubin, H. Hamidzada & A. Stoddard, ‘Afghanistan 2005 and Beyond: Prospects for Improved Stability Reference Document’, Netherlands Institute of International Relations ‘Clingendael’ (April 2005) available at http://www.clingendael.nl/publications/2005/20050400_cru_paper_barnett.pdf (last visited 28 April 2011), Appendix I. See also NATO, ‘NATO’s role in Afghanistan’ (last updated 9 August 2010) available at

‘enabling reconstruction’ has been interpreted differently across ISAF’s 26 PRTs⁵⁶.

PRTs in Afghanistan have been strongly criticized for contributing to the blurring of the distinction between humanitarian and military actors, since in certain cases they have been involved in the direct provision of assistance, not respecting the traditional principles.⁵⁷ Aid organizations have thus complained about the misuse of the term “humanitarian assistance” in connection to relief provided by military components of the PRTs and by the military more in general: not being provided solely on the basis of the needs of the beneficiaries but rather being guided by military objectives, such aid would not be impartial and thus not humanitarian.⁵⁸ Furthermore, it

http://www.nato.int/cps/en/natolive/topics_8189.htm (last visited 28 April 2011). On the absence still in 2008 of “[any] clear definition of the PRT mission, [any] concept of operations or doctrine, [any] standard operating procedures”, see U.S. House of Representatives, Committee on Armed Services, Subcommittee on Oversight & Investigations, *Agency Stovepipes vs Strategic Agility: Lessons We Need to Learn from Provincial Reconstruction Teams in Iraq and Afghanistan* (2008), 18.

⁵⁶ British and Irish Agencies Afghanistan Group (BAAG) & European Network of NGOs in Afghanistan (ENNA), ‘Aid and Civil-Military Relations in Afghanistan’, BAAG and ENNA Policy Briefing (October 2008) available at <http://www.baag.org.uk/publications/category/reports> (last visited 28 April 2011). On the different U.S., British, and German PRTs models, see, for example, Institute for the Study of War, ‘Provincial Reconstruction Teams (PRTs)’ (15 April 2009) available at <http://www.understandingwar.org/themenode/provincial-reconstruction-teams-pts> (last visited 28 April 2011); N. Abbaszadeh *et al.*, ‘Provincial Reconstruction Teams: Lessons and Recommendations’ (January 2008) available at http://www.princeton.edu/research/pwreports_f07/www591b.pdf (last visited 28 April 2011), 5 and 7.

⁵⁷ See, for example, ISAF, PRT Handbook, *supra* note 52, 196. See also Actionaid *et al.*, ‘Quick Impact, Quick Collapse: The Dangers of Militarized Aid in Afghanistan’ (26 January 2010) available at <http://www.oxfam.org/en/policy/quick-impact-quick-collapse> (last visited 28 April 2011), 3; S. Cornish & M. Glad, ‘Civil-Military Relations: No Room for Humanitarianism in Comprehensive Approaches’ (2008) available at http://www.atlanterhavskomiteen.no/files/atlanterhavskomiteen.no/Publikasjoner/Sikkerhetspolitisk_bibliotek/Arkiv/2008/Sik.pol_5_2008_final.pdf (last visited 28 April 2011).

⁵⁸ See G. Mc Hugh & L. Gostelow, Save the Children UK, ‘Provincial Reconstruction Teams and Humanitarian–Military Relations in Afghanistan’ (2004) available at http://www.rusi.org/downloads/assets/Save_the_Children_UK_-_PRTs_and_Humanitarian-Military_Relations_in_Afghanistan_2004_09.pdf (last visited 28 April 2011), 39-40. See also Médecins sans Frontières (MSF), ‘NATO Speech – Rheindalen, Germany, December 8, 2009’ (9 December 2009) available at <http://www.msf.org/msf/articles/2009/12/nato-speech-.cfm> (last visited 28 April 2011); P. Krähenbühl, ‘Humanitarian Security: “A Matter of Acceptance, Perception, Behaviour...”’, ICRC Official Statement (31 March 2004) available at <http://www.icrc.org/web/eng/>

has been claimed that PRTs, at least in certain cases, have engaged in the collection of intelligence while providing relief and thus have generated suspicion among the population that actors providing humanitarian assistance more generally may be allied with a belligerent and collectors of intelligence.⁵⁹

Regarding the situation in Iraq, it appears that PRTs have been less dangerous than in Afghanistan in terms of generating confusion between civilians and the military, partly because Iraqi PRTs have been more focused on “improv[ing] the capacity of provincial government bodies” and “improving budget execution”.⁶⁰ Also, differently from those in Afghanistan, U.S. PRTs in Iraq are civilian-led, with a member of the Department of State playing the leading role in each of them.⁶¹ However, notwithstanding the civilian leadership of the PRTs and the fewer complaints against them, it has been reported that in Iraq the military has been active in providing humanitarian assistance and contingents have sometimes “portray[ed] their presence as essentially humanitarian,” so that it has been “often virtually impossible for Iraqis (and sometimes for humanitarian professionals) to distinguish between the roles and activities of local and international actors, including military forces, political actors and other authorities, for-profit contractors, international NGOs, local NGOs, and U.N. agencies”⁶².

Some initiatives have been adopted following the concerns and vocal criticism of the humanitarian community, such as the approval by the PRT Steering Committee in Afghanistan of the *PRT Policy Note Number 3* in 2007, which states *inter alia* that “[h]umanitarian assistance is that which is

siteeng0.nsf/html/5XSGWE (last visited 28 April 2011). On the allocation of aid to the various regions on the basis of insecurity rather than needs, see also Actionaid *et al.*, *supra* note 57, 3-4; BAAG & ENNA, *supra* note 56, 11. It is also arguable that aid provided by military actors supporting a party to a conflict can hardly be classified as neutral.

⁵⁹ NATO itself in 2007 contributed to a perception that “[h]umanitarian assistance operations” helped in gathering information for “tracking down anti-government forces” and contributed to “fight[ing] the global war on terror.”, NATO, ‘ARSIC-N and ANA travel outside boundaries to deliver aid’ (23 December 2007) available at <http://ocha-gwapps1.unog.ch/rw/RWB.NSF/db900SID/PANA-7A7FC7?OpenDocument> (last visited 28 April 2011).

⁶⁰ Abbaszadeh *et al.*, *supra* note 56, 12.

⁶¹ U.S. House of Representatives, *supra* note 55, 14.

⁶² G. Hansen, ‘Taking Sides or Saving Lives: Existential Choices for the Humanitarian Enterprise in Iraq: Humanitarian Agenda 2015: Iraq Country Study’ (June 2007) available at <https://wikis.uit.tufts.edu/confluence/download/attachments/14553635/H2015+Iraq+Country+Study.pdf?version=1> (last visited 28 April 2011), 43-44.

life saving and addresses urgent and life-threatening humanitarian needs”, that “[i]t must not be used for the purpose of political gain, relationship building, or ‘winning hearts and minds’”, and that it “must be distributed on the basis of need and must uphold the humanitarian principles of humanity, impartiality and neutrality”⁶³. In 2007 the U.S. Department of Defense (DoD) and InterAction, “the largest coalition of U.S.-based international development and humanitarian non-governmental organizations”⁶⁴, adopted the *Guidelines for Relations between U.S. Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments*. These guidelines list a series of instructions for the U.S. armed forces, which “should be observed consistent with military force protection, mission accomplishment, and operational requirements”, such as the recommendation that military personnel wear uniforms or other clothes to distinguish themselves from humanitarian actors when carrying out relief activities, and the recommendation to arrange meetings with NGOs in advance and possibly outside military installations, for the exchange of information. Recommendations are also formulated for humanitarian NGOs, including not to wear military clothes, not to co-locate with the military and not to travel in military vehicles.

However, a limitation of these guidelines is that they do not apply to the relationships of U.S. armed forces with humanitarian NGOs in general, but only with “Non-Governmental Organizations [...] belonging to InterAction that are engaged in humanitarian relief efforts in hostile or potentially hostile environments”⁶⁵. Furthermore, notwithstanding these initiatives, the UN Humanitarian Coordinator in Afghanistan, Robert Watkins, affirmed as recently as 17 February 2010, that “[t]he 26 Provincial

⁶³ PRT Executive Steering Committee, ‘Policy Note Number 3: PRT Coordination and Intervention in Humanitarian Assistance’ (22 February 2007, updated on 29 January 2009) available at https://www.cimicweb.org/Documents/PRT%20CONFERENCE%202010/Policy_Note_3_Humanitarian_Assistance.pdf (last visited 28 April 2011), para. 4 (emphasis omitted). On the membership and function of the PRT Executive Steering Committee see ISAF, ‘PRT Executive Steering Committee Meets’ (23 February 2007) available at <http://www.nato.int/isaf/docu/pressreleases/2007/02-february/pr070223-124.html> (last visited 28 April 2011).

⁶⁴ United States Institute of Peace, InterAction & U.S. Department of Defense, ‘Guidelines for Relations between U.S. Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments’ (July 2007) available at http://www.usip.org/files/resources/guidelines_pamphlet.pdf (last visited 19 March 2011), ‘Key Terms’ section. Interaction is reported as comprising “over 165 members operating in every developing country”.

⁶⁵ *Id.*

Reconstruction Teams (PRTs) currently in Afghanistan represent the varying agendas of different nations and each PRT allocates aid to the specific area where they are located” and thus “aid is being distributed on a geographical basis rather than according to needs”⁶⁶. In his view, “[d]istribution of humanitarian assistance should remain solely within the realm of humanitarian actors and not the military”⁶⁷.

The Commander’s Emergency Response Program, another innovation introduced by the U.S. in the framework of the interventions in Afghanistan and Iraq and related to the provision of aid to civilians, was established for the first time in Iraq in 2003. The U.S., as an occupying power, fulfilled its obligations under IHL to satisfy the basic needs of the population by using seized funds belonging to the former Iraqi regime.⁶⁸ When, towards the end of 2003, it was realized that the seized funds had been almost entirely spent, Congress decided to continue the program with U.S. funds and to start the program in Afghanistan as well.⁶⁹ Since then, Congress has annually assigned a growing amount of money to CERP in Afghanistan and in Iraq: cumulatively, until 2010 the Congress has appropriated for CERP \$3.82 billion in Iraq and almost \$2.64 billion in Afghanistan.⁷⁰ For the Fiscal Year 2011, the DoD has requested \$1.3 billion for CERP, of which \$1.1 billion for Afghanistan and \$0.2 billion for Iraq.⁷¹

CERP is defined as a program “designed to enable local commanders in Iraq and Afghanistan to respond to urgent *humanitarian relief* and reconstruction requirements within their areas of responsibility by carrying

⁶⁶ UNAMA, ‘UN Humanitarian Coordinator Press Conference’ (17 February 2010) available at <http://unama.unmissions.org/Default.aspx?tabid=1761&ctl=Details&mid=1892&ItemID=7810> (last visited 28 April 2011).

⁶⁷ *Id.* He added that “the military may be called upon only in exceptional circumstances and by the appropriate authorities”, since “[t]he distribution of aid by military personnel gives the wrong signal to communities who then perceive all aid to be associated with the military” and “[t]his has led to threats of violence against the humanitarian community and hampered their ability to deliver needed services”.

⁶⁸ For a detailed description of the origins of CERP, see M. Martins, ‘No Small Change of Soldiering: The Commander’s Emergency Response Program in Iraq and Afghanistan’, *The Army Lawyer* (2004) 2, 1, 3-6. As far as the duties of an occupying power to satisfy the basic needs of the civilian population of an occupied territory are concerned, see in particular Arts 55 and 59 GC IV, and Art. 69 AP I.

⁶⁹ Martins, *supra* note 68, 9-10.

⁷⁰ SIGIR, *supra* note 53, 34; SIGAR, *supra* note 52, 46.

⁷¹ U.S. Department of Defense, ‘Fiscal Year 2011 Budget Request: Overview’ (February 2010) available at http://comptroller.defense.gov/defbudget/fy2011/fy2011_budget_request_overview_book.pdf (last visited 28 April 2011), 6-9.

out programs that will immediately assist the indigenous population”; “urgent” means “any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate action”⁷². The primary destination of CERP funds should be “small-scale projects that, optimally, can be sustained by the local population or government”, meaning projects of less than \$500,000 each, while special procedures are required for approval of more expensive ones.⁷³ Areas in which CERP funds can be spent include water and sanitation, food production and distribution, healthcare, education, battle damage/repair, condolence payments, hero payments, and other urgent humanitarian or reconstruction projects.⁷⁴

With these various uses, CERP has been identified as “ammunition”⁷⁵, as a critical instrument “provid[ing] local commanders with the funds and flexibility required to bring needed urgent *humanitarian assistance* and reconstruction to areas that have been affected by years of conflict and neglect” and thus as representing “a unique, rapid, high-impact *COIN tool*”⁷⁶. Indeed, it has been highlighted that in the absence of CERP, U.S. local commanders would not have funds at their disposal to spend on discretionary humanitarian and reconstruction programs, so that an important instrument for “winning hearts and minds” in counterinsurgency and stability operations would be missing.⁷⁷ In Iraq, CERP has allowed commanders to undertake “quick-impact, high-visibility projects” intended to “help tactical units on the ground gain community support, improving public perceptions of the Coalition (‘winning hearts and minds’) and enhancing troop safety (force protection)”, however not really “foster[ing] long-term change on their own, but rather serv[ing] as vehicles for allowing the military to operate with greater local cooperation in the short-term”⁷⁸.

⁷² U.S. Department of Defense, ‘DoD Financial Management Regulation Volume 12, Chapter 27’ (January 2009) available at http://comptroller.defense.gov/fmr/12/12_27.pdf (last visited 28 April 2011), 27-3 (emphasis added).

⁷³ *Id.*, 27-3 – 27-4.

⁷⁴ See *Id.*, 27-4 – 27-5. For definitions of these categories and a list of potential projects, see U.S. Department of Defense, *supra* note 72, Annex A.

⁷⁵ Petraeus, *supra* note 44, 4 (emphasis omitted).

⁷⁶ U.S. Department of Defense, ‘Fiscal Year 2010 Budget Request: Summary Justification’ (May 2009) available at http://comptroller.defense.gov/defbudget/fy2010/fy2010_SJ.pdf (last visited 28 April 2011), 4-5 (emphasis added).

⁷⁷ See Martins, *supra* note 68, 12-15.

⁷⁸ SIGIR, *Hard Lessons: The Iraq Reconstruction Experience* (2009), 237-238.

CERP has been again subject to the criticism that it comprises the distribution of relief on the basis of political and military strategic objectives, rather than purely on the basis of needs, and that it leads to a blurring of the distinction between military and humanitarian actors and roles.⁷⁹ Concerns have been expressed also regarding the lack of reporting and accountability for how CERP funds are spent and for the high percentage of funds used for expensive, development-type projects, with inadequate mechanisms for maintenance and follow-through.⁸⁰ These complaints and criticisms against CERP, PRTs, and the role of the military in providing relief more generally, have been partly taken into account in the most recent versions of American military doctrines and manuals.⁸¹ These doctrines and manuals are analyzed in the next section, in order to verify the role they assign to humanitarian assistance and whether they provide responses to the aforementioned concerns, or whether problematic issues still remain unsolved.

⁷⁹ For example, it has been affirmed that “[o]ne-third of CERP funds for the coming year (approximately \$400 million, or \$285 per capita) are reportedly earmarked for Helmand province, while more secure provinces will receive just a fraction of this assistance through civilian institutions.”, Actionaid *et al.*, *supra* note 57, 3-4. On the blurring of the distinction between humanitarian and military actors, see, for example, Hansen, *supra* note 62, 58.

⁸⁰ See D. Hedgpeth & S. Cohen, ‘Money as a Weapon: A Modest Program to Put Cash in Iraqis’ Hands Stretches Its Mandate with Big Projects’ (11 August 2008) available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/10/AR2008081002512.html> (last visited 28 April 2011). See also the quarterly reports issued by SIGIR and SIGAR available at <http://www.sigir.mil/publications/quarterlyreports/index.html> and at <http://www.sigar.mil/ReportToCongress.asp> (last visited 20 March 2011).

⁸¹ On the debate on the role of military manuals in the formation of customary international law, see, for example, Bellinger & Haynes, *supra* note 15; J.-M. Henckaerts, ‘Customary International Humanitarian Law: A Response to US Comments,’ 89 *International Review of the Red Cross* (June 2007) 866, 473; C. Garraway, ‘The Use and Abuse of Military Manuals,’ 7 *Yearbook of International Humanitarian Law* (2004), 425; D. Turns, ‘Military Manuals and the Customary Law of Armed Conflict,’ in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* (2009), 64.

D. U.S. Instructions to Its Armed Forces

Over the last five years, the shift in the importance of soft power in relation to hard power in the strategy to win contemporary wars has led the U.S. DoD to devote growing attention to activities that have been traditionally considered in the realm of civilian actors, including the provision of humanitarian assistance and development assistance. In 2005 the Secretary of Defense signed a directive dedicated to “stability operations”, which provided that these operations “are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support” and “[t]hey shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DoD activities”⁸². Stability operations are defined as “various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and *humanitarian relief*”⁸³.

Stability operations are a primary component of counterinsurgency campaigns, which combine them with offensive and defensive operations, and which in order to be successful not only require the existence of a “unity of effort” among the military and other actors present in the theater of operations,⁸⁴ but also “require[] Soldiers and Marines to employ a mix of familiar combat tasks and skills more often associated with nonmilitary agencies”, to be “nation builders as well as warriors”⁸⁵. Given the importance of traditionally civilian activities in COIN and in stability

⁸² U.S. Department of Defense, ‘Directive 3000.05, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations’ (28 November 2005) available at <http://www.scribd.com/doc/27538315/DoD-Directive-3000-05-Military-Support-for-Stability-Security-Transition-And-Reconstruction-SSTR-Operations> (last visited 28 April 2011), para. 4.1. In this Directive, stability operations were defined as “[m]ilitary and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions” (para. 3.1).

⁸³ U.S. Department of Defense, *Instruction Number 3000.05, Stability Operations* (16 September 2009), para. 3 (emphasis added).

⁸⁴ COIN FM 2006, *supra* note 1, 2-1. Unity of effort means “[c]oordination and cooperation toward common objectives, even if the participants are not necessarily part of the same command or organization - the product of successful unified action.” DoD Dictionary 2010, *supra* note 41, 493.

⁸⁵ *Id.*, Foreword.

operations, civil-military operations are essential, since they are “[t]he activities of a commander that establish, maintain, influence, or exploit relations between military forces, governmental and nongovernmental civilian organizations and authorities, and the civilian populace in a friendly, neutral, or hostile operational area *in order to facilitate military operations, to consolidate and achieve operational US objectives*” and that “may include performance by military forces of activities and functions normally the responsibility of the local, regional, or national government”⁸⁶.

Clearly, these new doctrinal developments may lead to activities in the field that affect humanitarian actors and the “humanitarian space”⁸⁷, as seems to have been the case in Afghanistan and Iraq. This calls for a careful analysis of official military documents, to examine whether they take into account these possible problems and how they try and solve them. A brief overview of the provisions regarding the delivery of humanitarian assistance and NGOs, in particular humanitarian NGOs, contained in the most recent American joint doctrines and field manuals demonstrates that over the last few years increasing attention has been devoted to the special needs of humanitarian actors, their concerns related to being perceived as neutral, impartial, and independent, and the rationale behind these concerns. Nonetheless, reasons for caution still remain, both in relation to the use of the term “humanitarian assistance” (and the possible blurring of the distinction between activities carried out by the military and activities carried out by humanitarian actors) and to the use of NGOs as a source of information for the military.

A development in the consideration of humanitarian actors’ identity and point of view is represented by the appendix on “Humanitarian Response Principles” contained in the 2008 Stability Operations Field Manual.⁸⁸ While the manual still advocates for unity of effort and even

⁸⁶ U.S. Joint Chiefs of Staff, *Civil-Military Operations*, Joint Publication 3-57 (JP 3-57) (July 2008), GL-6 (emphasis added) [CMO JP 2008].

⁸⁷ “Humanitarian space” is defined by OCHA as “an operating environment in which humanitarian organisations can discharge their responsibilities both effectively and safely”, which is best guaranteed through “[t]he perception of adherence to the key operating principles of neutrality and impartiality in humanitarian operations”. OCHA, *supra* note 32, 14.

⁸⁸ Stability Operations FM 2008, *supra* note 6, Appendix E. The 2003 version of this manual already acknowledged that “[t]he first line of security for most NGOs is adherence to a strict principle of neutrality” and that “[a]ctions which blur the distinction between relief workers and military forces may be perceived as a threat to this principle, resulting in increased risk to civilian aid workers”, but the new version

introduces the term “comprehensive approach”⁸⁹, the appendix explicitly recognizes that “many actors, particularly nongovernmental organizations, participate in unified action at their own discretion”, since “their activities are driven by fundamental humanitarian principles and may have goals separate from the United States Government (USG) or the international community”⁹⁰. It further states that “[p]roviding humanitarian aid and assistance is primarily the responsibility of specialized *civilian*, national, international, governmental, and nongovernmental organizations and agencies”, but that “military forces are often called upon to *support* humanitarian response activities either as part of a broader campaign, such as Operation Iraqi Freedom, or a specific humanitarian assistance or disaster relief operation”⁹¹. After mentioning General Assembly resolution 46/182, which “articulates the principal tenets for providing humanitarian assistance—humanity, neutrality, and impartiality—while promulgating the guiding principles that frame *all humanitarian response activities*”⁹², parts of four different documents enunciating humanitarian principles are reproduced or summarized.⁹³ The principles of humanity, neutrality, and

complements the paragraph with a reference to the principles of impartiality and independence and devotes much more space to humanitarian organizations. U.S. Headquarters Department of the Army, *Stability Operations and Support Operations*, Field Manual No. 3-07 (2003), A-11. Stability Operations FM 2008, *supra* note 6, A-10.

⁸⁹ The term is defined as “an approach that integrates the cooperative efforts of the departments and agencies of the United States Government, intergovernmental and nongovernmental organizations, multinational partners, and private sector entities to achieve unity of effort toward a shared goal”. Stability Operations FM 2008, *supra* note 6, 1-4 – 1-5.

⁹⁰ *Id.*, 1-3 – 1-4. It is then highlighted that NGOs “must retain independence of action” and “[r]econciling that independence with the mission requirements may pose specific challenges to unity of effort and must be considered throughout the operations process.”, *id.*, 1-5.

⁹¹ *Id.*, E-1. The actions of the military in this field usually “fall under the primary stability task, restore essential services.”, *id.*

⁹² *Id.*, E-1 (emphasis added).

⁹³ These documents are the 2007 U.S. DoD-InterAction, Guidelines, *supra* note 64), the 1994 *International Red Cross and Red Crescent Movement and Nongovernmental Organization Code of Conduct in Disaster Relief*, the 1994 *Oslo Guidelines on The Use of Foreign Military and Civil Defence Assets In Disaster Relief* (which were updated in 2006 and revised in 2007), and the 2004 *IASC Reference paper on Civil-Military Relationship in Complex Emergencies* (this paper “complements the ‘Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies’ of March 2003”, which are neither reproduced nor mentioned in the Field Manual).

impartiality are thus presented together with other generally agreed operational principles for actors involved in the provision of humanitarian assistance. Also, the whole InterAction-U.S. DoD guidelines are reproduced, except for the definitions of key terms, so that it seems that “non-governmental humanitarian organization” may be interpreted by the U.S. administration to include non-InterAction members.⁹⁴

While the core humanitarian principles have been increasingly taken into consideration, the term “humanitarian assistance” is still used in U.S. military doctrines and manuals to describe actions that do not satisfy these traditional principles. In this way, no clear difference is made between truly humanitarian actions and actions pursuing political or military objectives. It seems that humanity, neutrality, and impartiality are given relevance only as tools that humanitarian actors choose to follow in order to enhance their security, not as necessary characteristics for an action to be truly “humanitarian” according to the letter and spirit of IHL. In the U.S. military doctrine, Humanitarian Assistance (HA) is defined as “[p]rograms conducted to relieve or reduce the results of natural or manmade disasters or other endemic conditions such as human pain, disease, hunger, or privation that might present a serious threat to life or that can result in great damage to or loss of property”⁹⁵. It is clarified that “[h]umanitarian assistance provided by US forces is limited in scope and duration” and that “is designed to supplement or complement the efforts of the host nation civil authorities or agencies that may have the primary responsibility for providing humanitarian assistance”⁹⁶. However, no reference is made to the duty to distribute assistance solely on the basis of needs or not to use it for political ends, and the ambiguous use of the term and the use of assistance as a tool for military objectives is illustrated, for example, by the description of Operation Anaconda carried out in Afghanistan in 2002, which encompassed Civil Affairs personnel “support[ing] UW [unconventional warfare] operations” through the provision of “HA to the distressed populace in the area”⁹⁷.

⁹⁴ Reference to the InterAction-U.S. DoD *Guidelines* as “official guidance on dealing specifically with humanitarian NGOs” is contained also in COIN JP 2009, *supra* note 1, IV-3.

⁹⁵ DoD Dictionary 2010, *supra* note 41, 218.

⁹⁶ *Id.*

⁹⁷ U.S. Headquarters Department of the Army, *Civil Affairs Tactics, Techniques, and Procedures*, Field Manual No. 3-05.401 (September 2003), 1-11 – 1-12. The role of civil affairs personnel in humanitarian assistance implied not only “overseeing HA operations in 17 provinces of the area”, but also “plann[ing] and manag[ing] the

Humanitarian and Civic Assistance (HCA) is a military term used to describe “assistance to the local populace provided by predominantly US forces in conjunction with military operations and exercises”⁹⁸, which “must fulfill unit training requirements that *incidentally* create humanitarian benefit to the local populace”⁹⁹. With respect to CERP, the 2009 U.S. *Operational Law Handbook* classified it among the “DoD GWOT [Global War on Terror] Humanitarian Assistance (HA) Authorizations and Appropriations”, together with rewards programs, thus clearly connecting HA to a political and military strategy. The title has been changed in the 2010 U.S. *Operational Law Handbook* to “Special Authorities in Counterinsurgency”¹⁰⁰.

Finally, the 2009 Handbook *Money as a Weapon* published by the Multi-National Corps-Iraq (MNC-I) lists as the three primary components of CERP “Humanitarian Assistance, Condolence/Battle Damage payments, and Reconstruction”¹⁰¹. However, no explicit reference is made to the requirement to assign CERP funds exclusively on the basis of the objective needs of the beneficiaries and not on the basis of military and political considerations, since it is acknowledged that “[r]esources, particularly money, have a central role in ongoing operations given the effects they bring to bear on the fight” and money “is truly a ‘weapons system’ [...] in Iraq”, so that “[u]nits must manage their limited resources (labor, material, time and money) to achieve the Commander’s intent, Joint Campaign objectives and desired end state”¹⁰². The corresponding Handbook *Money as a Weapon System* issued by the U.S. Army Combined Arms Centre – Center for Army Lessons Learned, highlights the purpose of CERP as “enabl[ing] local commanders in Afghanistan and Iraq to respond with a *nonlethal weapon* to urgent, small-scale, *humanitarian relief*, and

delivery of HA supplies”, therefore with a direct involvement of the military in the distribution of relief.

⁹⁸ DoD Dictionary 2010, *supra* note 41, 218.

⁹⁹ U.S. Joint Chiefs of Staff, *Joint Operations*, Joint Publication 3-0 (17 September 2006, Incorporating Change 2, 22 March 2010), VII-7 [Joint Operations JP 2010].

¹⁰⁰ International and Operational Law Department, The Judge Advocate General’s Legal Center & School (TJAGLCS), *Operational Law Handbook* (2009), 281. International and Operational Law Department, The Judge Advocate General’s Legal Center & School (TJAGLCS), *Operational Law Handbook* (2010), 241.

¹⁰¹ Multi-National Corps-Iraq (MNC-I), *Money As A Weapon System (MAAWS)* (January 2009), B-5.

¹⁰² *Id.*, 3 (emphasis added).

reconstruction projects and services that immediately assist the indigenous population and that the local population or government can sustain”¹⁰³.

It may be argued that terminology does not play a significant role in the distinction between military and civilian actors or in influencing action in the field, or that the use of the term “humanitarian” to describe actions carried out to fulfill political or military objectives does not really have practical consequences. However, the members of the Interagency Standing Committee (IASC) concluded that “calling an act *relief* or *humanitarian* does have practical consequences that go beyond mere wording”, meaning that, “[f]or example, as military relief activities conducted in support of a military mission are not civilian humanitarian acts, these must be carried out wearing military uniforms (not in civilian clothing as was seen in parts of Afghanistan in 2003 and early 2004) in order to maintain a distinction between civilians and the military.”¹⁰⁴ Similarly, humanitarian actors have complained about the employment of white vehicles, traditionally used by humanitarian actors, by ISAF in Afghanistan.¹⁰⁵ This conduct may illustrate

¹⁰³ U.S. Army Combined Arms Centre – Center for Army Lessons Learned, *Commander's Guide to Money as a Weapon System: Tactics, techniques, and Procedures* (April 2009), 13 (emphasis added). Again urgent is defined as “as any chronic or acute inadequacy of an essential good or service that *in the judgment of the local commander* calls for immediate action” (emphasis added). The four key elements for selecting projects to finance with CERP funds are: “Execute quickly. Employ many people from the local population. Benefit the local population. Be highly visible.” However, it also states that commanders should “[e]nsure local, donor nation, nongovernmental organization, or other aid or reconstruction resources are not reasonably available before using CERP funds”.

¹⁰⁴ M. Bessler & K. Seki, ‘Civil-Military Relations in Armed Conflicts: A Humanitarian Perspective’, 3 *Liaison – A Journal of Civil-Military Humanitarian Relief Collaborations* (2006) 3, 4, 8-9 (emphasis in the original). The IASC is a “unique inter-agency forum for coordination, policy development and decision-making involving the key UN and non-UN humanitarian partners”. It “was established in June 1992 in response to United Nations General Assembly Resolution 46/182 on the strengthening of humanitarian assistance” and that “General Assembly Resolution 48/57 affirmed its role as the primary mechanism for inter-agency coordination of humanitarian assistance.”, IASC, ‘About the Inter-Agency Standing Committee’, available at <http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=about-default> (last visited 28 April 2011).

¹⁰⁵ See United Nations Humanitarian Information Unit – IRIN, ‘Afghanistan: Aid Agencies Win NATO Concession on Vehicle Markings’ (1 June 2009) available at <http://www.irinnews.org/Report.aspx?ReportId=84634> (last visited 28 April 2011). While reporting that “[i]nternational forces under NATO command in Afghanistan w[ould] stop using white vehicles from 1 June in response to calls from NGOs for clearer markings to distinguish between civilian and military vehicles”, it was

a worrying trend not only towards the involvement of the military in traditional humanitarian assistance, but also towards the adoption by armed forces of some of the distinctive signs of NGOs or of other behaviors to make their recognition more difficult, in order to avoid attack. By blurring the distinction between military and humanitarian actors, these actions increase the risk for humanitarians.

Another source of risk for humanitarian personnel is being perceived as allied with the military. The international President of MSF argued in a 2009 speech that “aid efforts undertaken to assist counterinsurgency strategies or build the state cannot be impartial because they are not based with an exclusive eye upon need” and that “[s]uch aid should not be attached to the term ‘humanitarian’”¹⁰⁶. The consequence of “[n]on-aid actors [...] hav[ing] portrayed [them]selves as somehow part of this humanitarian project” has been that “[t]he humanitarian project [has] become[] militarized, either in terms of its modus operandi or its public perception,” and thus it “[has] become[] a military target”¹⁰⁷. This statement underlines the importance not only of the actual respect of the principles by humanitarian actors in order to maintain their identity and not to be attacked, but also of the perception by the beneficiaries and the belligerents regarding the respect of these principles and the non-allegiance to any of the parties to the conflict. In 2004, when five MSF staff were killed in Afghanistan and the organization decided to leave the country (where it then returned in 2009), it openly blamed the “coalition’s attempts to co-opt humanitarian aid and use it to ‘win hearts and minds’”¹⁰⁸.

In contrast to the sometimes ambiguous use of the term “humanitarian assistance” in U.S. military documents, the fourth edition of the *ISAF PRT Handbook* states a duty to apply and respect the traditional core humanitarian principles for all actors involved in the provision of humanitarian assistance, including the military “while undertaking to be a partner to humanitarian agencies”, and it differentiates humanitarian assistance, with the principles that characterize it, from the “the activities of

underlined that this policy “w[ould] not apply to thousands of US troops operating beyond the writ of NATO/ISAF and engaged mainly in counter-insurgency and ‘anti-terrorism’ military activities.”

¹⁰⁶ MSF, *supra* note 58. See also, for example, Krähenbühl, *supra* note 58: “We do on the other hand want to avoid the current blurring of lines produced by the characterisation of military ‘hearts and minds’ campaigns or reconstruction efforts as humanitarian.”

¹⁰⁷ MSF, *supra* note 58.

¹⁰⁸ MSF, ‘MSF Pulls Out of Afghanistan’ (28 July 2004) available at <http://www.msf.org/msf/articles/2004/07/msf-pulls-out-of-afghanistan.cfm> (last visited 28 April 2011).

a military force”, which “are not always driven by the same constraints”,¹⁰⁹. The handbook is thus similar to *PRT Policy Note Number 3*, which unambiguously relates humanitarian assistance to the traditional principles, independently from the actor implementing it.¹¹⁰ These two documents have been taken into consideration in the recent handbook *Money As A Weapon System Afghanistan* of December 2009 adopted by the U.S. Forces in Afghanistan (USFOR-A).¹¹¹

However, U.S. field manuals contain some ambiguous statements, which may lead one to think that there is still space for disrespect for humanitarian space and the use of aid as a political tool. Not only in the field manual and in the joint doctrine on counterinsurgency it is stated that “[t]he organizing imperative is focusing on what needs to be done, not on who does it”, but the Counterinsurgency Field Manual also contains an appendix entitled “A Guide for Action” which incorporates a statement affirming that “[t]here is no such thing as impartial humanitarian assistance or CMO in COIN”, since “[w]henver someone is helped, someone else is hurt, not least the insurgents”¹¹². In other words, there seems to be in reality an implied acknowledgement that whenever humanitarian actors operate in COIN, their identity is automatically undermined and their perception by the insurgents as well, so that there can be no humanitarian space left. Also, the recommendation contained in an article annexed to the 2009 Tactics in Counterinsurgency Field Manual to practice “so-called blue-green patrolling, where you mount daylight, overt humanitarian patrols, which go covert at night and hunt specific targets”, further diminishes the distinction between humanitarian and military activities and actors.¹¹³

Finally, while U.S. military documents increasingly take into account the need for humanitarian actors to be perceived as distinct from military efforts, room seems to be left for an instrumental use of these NGOs, in particular as an important source of intelligence. This military strategy calls for increasing caution on the part of humanitarian actors in order to preserve a truly impartial, neutral, and independent nature and in order to continue to

¹⁰⁹ ISAF, PRT Handbook, *supra* note 52, 185-186.

¹¹⁰ PRT Executive Steering Committee, *supra* note 63, para. 4.

¹¹¹ U.S. Forces, Afghanistan (USFOR-A), *Money As A Weapon System Afghanistan (MAAWS-A)* (2009), 60-61.

¹¹² COIN FM 2006, *supra* note 1, Annex A, A-7.

¹¹³ U.S. Headquarters Department of the Army, *Tactics in Counterinsurgency*, Field Manual No. 3-24.2 (FM 3-24.2) (April 2009), C-5. The article by David Kilcullen, entitled ‘Twenty-Eight Articles: Fundamentals of Company-Level Counterinsurgency’, was originally published in the May-June 2006 issue of *Military Review*.

be perceived as such. In the 2006 Counterinsurgency Field Manual, NGOs are listed among the “key counterinsurgency participants” and thus they arguably fall among those which commanders should “seek to persuade and influence [...] to contribute to achieving COIN objectives” in their attempt “to achieve unity of effort”¹¹⁴. Attention to NGOs seems to be strictly connected to the fact that, as underlined in various field manuals and joint doctrines, information coming from them, for example on “local and regional affairs and civilian attitudes”, “[l]ocal political structure, political aims of various parties, and the roles of key leaders”, and “[s]ecurity situation”, can be “invaluable”¹¹⁵.

The 2008 Joint Doctrine for Civil-Military Operations clarifies that information obtained from NGOs should be “acquired in a collateral fashion, and not part of intelligence collection operations”¹¹⁶. However, the reason for this is that NGOs “will hesitate or refuse to cooperate if there are any implications that this comes under the heading of ‘intelligence gathering’”¹¹⁷. Recent documents also provide that the relationship of the armed forces with NGOs should be managed primarily by civil affairs personnel, who are explicitly defined as not being intelligence gatherers.¹¹⁸ The reasoning offered is that, since NGOs may have valuable information that “is frequently not available through military channels”, “[t]herefore, it is important not to compromise the neutrality of the IGOs [intergovernmental organizations] and NGOs and to avoid *the perception by their workers* that their organizations are part of an intelligence gathering mechanism”¹¹⁹. In the end, even if civilian affairs personnel are not

¹¹⁴ COIN FM 2006, *supra* note 1, 2-4 and 2-3.

¹¹⁵ CMO JP 2008, *supra* note 86, IV-15 – IV-16; U.S. Joint Chiefs of Staff, *Interagency, Intergovernmental Organization, and Nongovernmental Organization Coordination During Joint Operations Vol I*, Joint Publication 3-08 (March 2006), III-25 [Coordination JP 2006]. See also, *id.*, II-26 and III-25 – III-26; Stability Operations FM 2008, *supra* note 6, A-10.

¹¹⁶ CMO JP 2008, *supra* note 86, IV-16.

¹¹⁷ *Id.* Still, this clarification represents a positive development compared to the previous version of the joint doctrine, which merely stated that “[b]ecause of NGOs’, international organizations’, and other organizations’ and agencies’ sensitivities regarding negative perceptions generated by working with military organizations, the term ‘information’ should be used in place of ‘intelligence.’”, U.S. Joint Chiefs of Staff, *Joint Doctrine for Civil-Military Operations*, Joint Publication 3-57 (February 2001), III-23.

¹¹⁸ CMO JP 2008, *supra* note 86, II-14.

¹¹⁹ Coordination JP 2006, *supra* note 115, III-26 (emphasis added). See also Joint Operations JP 2010, *supra* note 99, VII-10.

intelligence gatherers, they are nonetheless personnel who collect information that “can supplement the intelligence effort” and “general information provided by personnel from IGOs and NGOs may corroborate intelligence gained from other sources”¹²⁰. Furthermore, in counterinsurgency operations all counterinsurgents are potential collectors.¹²¹

In sum, increasing attention seems to be given to the need not to compromise the neutrality of humanitarian NGOs and not to generate in their workers *the perception they are used* as a source of intelligence, but merely because otherwise they may choose not to collaborate and share information. The importance of these strategies was underlined by the U.S. Special Representative for Afghanistan and Pakistan Richard Holbrooke, who, in 2009, lamented the deficit in U.S. intelligence on Afghanistan and the Taliban and affirmed that “the U.S. would ‘concentrate on that issue, partly through the intelligence structure’ and partly through private aid groups that provide humanitarian and other services in Afghanistan”, since “[h]e estimated that 90 percent of U.S. knowledge about Afghanistan lies with aid groups”¹²². Humanitarian actors should therefore be careful in their interactions with the military, being aware both of the risk of being caught in attacks directed against members of the armed forces and of the possibility of losing entitlement to their specific privileges or even protection from attack, in case they exceed the terms of their mission or directly participate in hostilities respectively.

E. Conclusion

In Iraq, in the same way as in Afghanistan, the provision of humanitarian assistance has been seen as part of the “hearts and minds” approach, and thus as part of a trend towards so-called comprehensive or integrated approaches which consider soft power as important as traditional means of hard power to win armed conflicts in the 21st century. The implementation of these approaches in the field, with the involvement of the

¹²⁰ U.S. Headquarters Department of the Army, *Civil Affairs Operations*, Field Manual No. 3-05.40 (FM 3-05.40) (September 2006), 3-30; and Coordination JP 2006, *supra* note 115, III-22.

¹²¹ COIN JP 2009, *supra* note 1, V-3 and V-4.

¹²² R. Burns, ‘Envoy Laments Weak US Knowledge about Taliban’ (7 April 2009) available at <http://www.foxnews.com/wires/2009Apr07/0,4670,USAfghanistan,00.html> (last visited 21 March 2011).

military in activities traditionally considered to be in the realm of civilian actors, has seriously blurred the distinction between military and humanitarian actors and increased the risk of attacks against the latter, and it has led to complaints and changes in military doctrines and manuals.

Some changes have been introduced in American military doctrines and strategies following the complaints voiced by humanitarian actors both in Afghanistan and Iraq against the instrumental use of relief and NGOs and the labeling as “humanitarian assistance” of aid given without respecting the traditional principles of humanity, impartiality, and neutrality, thus representing a political and not a truly humanitarian action,. However, while increased attention has been devoted to the principles and needs of humanitarian actors, a skeptical reader still finds reasons for inviting humanitarians to exercise caution in their relationships with the military. The U.S. military doctrine has not consistently followed the trend of international bodies and the humanitarian movement to use the term “humanitarian assistance” to describe only actions carried out in accordance with the principles of humanity, impartiality, and neutrality, thus placing clear limits on the involvement of armed forces in these activities. It may not therefore be excluded that instances of blurring of the distinction between military and humanitarian actors will continue to take place in the future. Possible improvements in the American instructions to its armed forces are clear, when looking at the provisions contained in the *ISAF PRT Handbook* and in the recent USFOR-A’s handbook.

Also, there seems to be no real prohibition in U.S. military doctrines and strategies on the use of information gained from nongovernmental organizations for intelligence purposes. Thus, humanitarian agencies and NGOs should be careful in their relationships with the military as far as the sharing of information is concerned. Otherwise, they will risk compromising their neutrality and the neutrality of their action, thus losing entitlement to the specific privileges they are afforded under international humanitarian law and, in certain cases, being classifiable as direct participants in hostilities.