

# A Matter of Principle(s): The Legal Effect of Impartiality and Neutrality on States as Humanitarian Actors

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## **Abstract**

*This article examines the legal nature of the principles of impartiality and neutrality of humanitarian action, focussing on States as humanitarian actors. It argues that international law does not provide a general legal basis for the universal applicability of these principles, contrary to a common interpretation of the ICJ's 1986 judgment in the Nicaragua case. Nevertheless, impartiality and neutrality may have significant legal effect on the conduct of States. They may be directly binding on States through the operation of Security Council resolutions drafted in mandatory language. In addition, they may have indirect effect due to the States' obligation to respect the adherence to the principles by humanitarian organizations. On the basis of this argument, the article pleads for increased conceptual clarity and, in turn, effectiveness of humanitarian action.*

**Keywords:** humanitarian action, humanitarian principles, impartiality, neutrality, international humanitarian law.

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In spite of its crucial significance for the unification of Italy, the battle of Solferino between France and Austria in 1859 is now better known as an historical watershed event marking the onset of modern humanitarianism. By organizing assistance to the thousands of wounded soldiers left on the battlefield, Swiss businessman Henry Dunant laid the foundations for the Fundamental Principles of humanitarian action. “He negotiated access, he chose to act impartially, he used his position of neutrality, and he organized civil society in a voluntary, non-coerced fashion.”<sup>1</sup> Dunant’s selfless acts and his impassioned book *A Memory of Solferino*<sup>2</sup> inspired, among many other things, the formulation of modern humanitarian principles.<sup>3</sup>

In virtually any rendition,<sup>4</sup> these principles include the principles of impartiality and neutrality of humanitarian assistance.<sup>5</sup> Naturally, their significance in times of armed conflict

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<sup>1</sup> Peter Walker and Daniel G. Maxwell, *Shaping the Humanitarian World*, Routledge, New York, 2014, p. 22.

<sup>2</sup> Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986 (original, French edition first published in 1862).

<sup>3</sup> See generally Jean Pictet, *The Fundamental Principles of the Red Cross: Commentary*, Henry Dunant Institute, Geneva, 1979; see also Daniel Thürer, “Dunant’s Pyramid: Thoughts on the ‘Humanitarian Space’”, *International Review of the Red Cross*, Vol. 89, No. 865, 2007, p. 50 (“It is striking how the story that Dunant tells already contains in embryonic form all those elements that are later to constitute the form and organizational system of the Red Cross and, to some extent, of other humanitarian organizations.”); Michael Barnett, *Empire of Humanity: A History of Humanitarianism*, Cornell University Press, New York, 2011, p. 1 (“The Battle of Solferino became to modern humanitarianism what the Treaty of Westphalia was to modern politics.”); but see *ibid.*, pp. 78–79 (noting that Dunant was not a lone voice at the time and that there had been others before him who had advocated for the improvement of medical relief in wartime).

<sup>4</sup> Most attempts to list humanitarian principles contain at least the following four: humanity, impartiality, neutrality, and independence. See, e.g., Humanitarian Accountability Partnership (HAP), *The 2010 HAP Standard in Accountability and Quality Management*, 2<sup>nd</sup> ed., Geneva, 2010, p. 8, available at: <http://www.hapinternational.org/pool/files/2010-hap-standard-in-accountability.pdf> (all internet references were accessed in July 2015); Office for the Coordination of Humanitarian Affairs (OCHA), *What are Humanitarian Principles?*, June 2012, p. 1, available at: [https://docs.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples\\_eng\\_June12.pdf](https://docs.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf); Core Humanitarian Standard, *Core Humanitarian Standard on Quality and Accountability*, 2014, p. 8, available at: <http://www.corehumanitarianstandard.org/files/files/Core%20Humanitarian%20Standard%20-%20English.pdf>. These four humanitarian principles are derived from the Fundamental Principles guiding the work of the Red Cross and Red Crescent Movement, proclaimed in 1965 in Vienna. See XX<sup>th</sup> International Conference of the Red Cross, “Proclamation of the Fundamental Principles of the Red Cross”, *International Review of the Red Cross*, Vol. 5, No. 56, November 1965, pp. 573–574.

cannot be overstated. Assistance provided exclusively to one party to the conflict or denied to some of the victims only because of their race, ethnicity, or sex would not only lead to justified criticism on moral grounds, but it may also worsen human suffering during wartime, contribute to the escalation of conflicts, and undermine the efficiency of humanitarian action in general.

Despite their undoubted importance, the normative nature of the principles remains little understood. Although they are sometimes described as binding on States and other humanitarian actors<sup>6</sup> as a matter of international law, such assertions are usually accompanied by little or no analysis as to their specific legal basis.<sup>7</sup> This state of affairs may to some extent

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<sup>5</sup> For a definition of these principles, see text to notes 15–18 below. The principle of neutrality of humanitarian assistance should be distinguished from neutrality as the status of a State which is not participating in an international armed conflict. In the present article, the term “neutrality” is used only in the former sense. For a general overview of the law of neutrality in the latter sense, see, e.g., Michael Bothe, “The Law of Neutrality”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2013, p. 549. For the overlaps between neutrality as a humanitarian principle and the law of neutrality, see Denise Plattner, “ICRC Neutrality and Neutrality in Humanitarian Assistance”, *International Review of the Red Cross*, Vol. 36, No. 311, April 1996, pp. 163–165.

<sup>6</sup> References to “humanitarian actors” throughout the text should be read broadly as encompassing all actors involved in the provision and distribution of humanitarian aid, including States, international organizations, non-governmental organizations, and private entities. In the same vein, see, e.g., Toni Pfanner, “Humanitarian Actors: Editorial”, *International Review of the Red Cross*, Vol. 89, No. 865, March 2007, p. 5 (“Multiple humanitarian actors with different objectives, principles and modi operandi intervene in situations of armed conflict and internal violence in order to alleviate the plight of the victims of those situations: governmental and nongovernmental organizations, international organizations, [N]ational Red Cross and Red Crescent [S]ocieties, private companies and even the armed forces.”).

<sup>7</sup> See, e.g., Marion Harroff-Tavel, “Neutrality and Impartiality—The Importance of these Principles for the International Red Cross and Red Crescent Movement and the Difficulties Involved in Applying Them”, *International Review of the Red Cross*, Vol. 29, No. 273, December 1989, p. 550; Maurice Torrelli, “From Humanitarian Assistance to ‘Intervention on Humanitarian Grounds’?”, *International Review of the Red Cross*, Vol. 32, No. 288, June 1992, p. 239; François Bugnion, “Red Cross Law”, *International Review of the Red Cross*, Vol. 35, No. 308, October 1995, p. 507; Vincent Chetail, “The Contribution of the International Court of Justice to International Humanitarian Law”, *International Review of the Red Cross*, Vol. 85, No. 850, June 2003, p. 265; Sylvain Beauchamp, “Defining The Humanitarian Space Through Public International Law”, *On the Edges of Conflict Working Paper*, 2008, p. 14; François Bugnion, “The International Conference of the Red Cross and Red Crescent: Challenges, Key Issues and Achievements”, *International Review of the Red Cross*, Vol. 91, No. 876, December 2009, p. 702. Some of the authors seek this legal basis in the ICJ’s judgment on the

be explained by the perceived moral desirability of the two principles. It is undisputed that a convincing moral case can be made in favour of the impartial and neutral character of any humanitarian aid. Nonetheless, more is needed to establish the legal validity of any norm under international law.

The importance of understanding the normative nature of humanitarian principles is particularly pressing in modern-day conflicts characterized by the asymmetry of belligerent parties<sup>8</sup> and the proliferation of humanitarian actors.<sup>9</sup> The militarily more powerful party to a conflict now typically finds itself taking on a multiplicity of tasks going beyond strict military engagement.<sup>10</sup> These frequently involve activities previously reserved to a handful of humanitarian organizations committed to a similar set of values.<sup>11</sup> In this connection, concerns have appeared about the alleged “blurring of the lines” between military, political, and humanitarian efforts.<sup>12</sup> Today, States, inter-governmental organizations, NGOs, and others compete to achieve their goals in an increasingly shrinking humanitarian space.<sup>13</sup> The

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merits in the *Nicaragua* case. It will be shown below that this ruling does not provide a satisfactory justification for such a conclusion and amounts to little more than an instance of judicial fiat: see text to notes 28–43 below.

<sup>8</sup> See further Toni Pfanner, “Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action”, *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 149–174.

<sup>9</sup> See, e.g., Elizabeth Ferris, “Megatrends and the Future of Humanitarian Action”, *International Review of the Red Cross*, Vol. 93, No. 884, December 2011, pp. 935–936.

<sup>10</sup> See, e.g., Antonio Donini, “Between a Rock and a Hard Place: Integration or Independence of Humanitarian Action?”, *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, pp. 149–151 (describing these so-called “comprehensive” approaches to conflict resolution undertaken by the western forces in Afghanistan after 2002).

<sup>11</sup> See also text to notes 134–140 below (outlining the nature, aims, and objectives of the so-called “Dunantist” humanitarian agencies).

<sup>12</sup> See, e.g., Kenneth 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”, *Harvard Human Rights Journal*, Vol. 17, 2004, p. 64; Alice Gadler, “Armed Forces as Carrying both the Stick and the Carrot? Humanitarian Aid in U.S. Counterinsurgency Operations in Afghanistan and Iraq”, *Goettingen Journal of International Law*, Vol. 3, No. 1, 2011, p. 231; A. Donini, above note 10, pp. 156–157; Claudia McGoldrick, “The Future of Humanitarian Action: An ICRC Perspective”, *International Review of the Red Cross*, Vol. 93, No. 884, December 2011, p. 966.

<sup>13</sup> See, e.g., Cynthia Brassard-Boudreau and Don Hubert, “Shrinking Humanitarian Space? Trends and Prospects on Security and Access”, *Journal of Humanitarian Assistance*, 24 November 2010, available at: <https://sites.tufts.edu/jha/archives/863>.

extent to which international law constrains the activities of these diverse humanitarian actors therefore demands close attention.

The aim of this article is to address this need by scrutinizing the position of the principles of impartiality and neutrality of humanitarian action in international law. In particular, the article challenges the view that a general legal basis underpinning both principles exists in international law with a resulting binding effect on all humanitarian actors in their activities. The analysis focusses on States as humanitarian actors and it further explores the effect of the principles on States' interaction with other stakeholders including the United Nations (UN) Security Council and humanitarian organizations such as the International Committee of the Red Cross (ICRC).

The article proceeds in three consecutive steps. First, it defines and distinguishes the notions of impartiality and neutrality of humanitarian action. Second, the article analyses whether a general legal basis providing for the universal applicability of the two principles may be found in one of the three principal sources of international law set out in Article 38(1) of the Statute of the International Court of Justice (ICJ): treaties, customary international law and general principles of law. Third, the article examines whether the principles may produce legal effects for the conduct of States even without such a legal basis. It considers the potential direct effect of UN Security Council resolutions demanding compliance with the principles as well as the indirect effect brought about by the States' obligation to respect the adherence to the principles by humanitarian organizations.

### **(Head 1) Conceptualization of the principles of impartiality and neutrality**

Although the principles of impartiality and neutrality support and reinforce each other, the difference between them should be noted at the outset. It is true that in general parlance, the two principles are frequently used as synonyms; indeed, dictionaries often use one to define the other.<sup>14</sup> However, in the field of humanitarian action each carries a separate meaning and, as will be shown, is of a different legal nature.

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<sup>14</sup> See, e.g., "Neutral", Thesaurus.com, available at: <http://thesaurus.com/browse/neutral> ("Definition: *impartial*, noncommittal") (emphasis added); Joseph R. Nolan and Jacqueline M. Nolan-Haley (eds), *Black's Law Dictionary*, 6<sup>th</sup> ed., West Publishing, St. Paul, 1990, p. 1042 (defining the term "Neutral" as the state or quality of being "[i]ndifferent; unbiased; *impartial*") (emphasis added).

On the one hand, the principle of neutrality is a macro-level principle of abstention. It requires the provider of humanitarian action to abstain from associating with the ideological or political aims of any of the parties to the conflict. It is the embodiment of the idea that humanitarian actors must remain ideologically free and they may not take sides in political or religious controversies.<sup>15</sup>

The principle of impartiality, on the other hand, is a micro-level principle of action. It requires that all humanitarian action be undertaken only on the basis of, and in proportion to, the need of the victims. In line with Jean Pictet's useful systematization, it can thus be better seen as a set of the three intertwined but separate sub-principles of non-discrimination, proportionality and impartiality *stricto sensu*.<sup>16</sup> It has been suggested that impartiality also operates (or should operate) on a global scale in the form of a demand for equitable treatment of victims of all conflicts.<sup>17</sup> However, in this article, impartiality is understood in its

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<sup>15</sup> See further J. Pictet, above note 3, pp. 34–39; Hugo Slim, “Relief Agencies and Moral Standing in War: Principles of Humanity, Neutrality, Impartiality and Solidarity”, *Development in Practice*, Vol. 7, No. 4, November 1997, p. 347; M. Harroff-Tavel, above note 7, p. 537; K. Anderson, above note 12, p. 56; Ruth Abril Stoffels, “Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps”, *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 542–544.

<sup>16</sup> J. Pictet, above note 3, pp. 24–33. Pictet understood non-discrimination as the avoidance of “distinction or segregation which one makes to the detriment of certain other persons, for the sole reason that they belong to some specific category” (p. 24); proportionality as the endeavour “to relieve the suffering of individuals in proportion to the degree of their suffering and to give priority according to the degree of urgency” (p. 27); and impartiality *stricto sensu* as the provision of aid “without taking sides, either for reasons of interest or sympathy” (p. 31).

<sup>17</sup> cf. Yves Sandoz, “Foreword”, in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), p. xiv (“For the ICRC, impartiality means not only avoiding discrimination between the different victims of a given conflict, but also constantly striving to ensure that *all the victims of all the conflicts on the planet* are treated equitably, without regional or ethnic preference and independently of the emotions sparked by media-selected images.”) (emphasis added); see also Dirk Salomons, “The Perils of Dunantism: The Need for a Rights-Based Approach to Humanitarianism”, in Andrej Zwitter, Christopher K. Lamont, Hans-Joachim Heintze and Joost Herman (eds), *Humanitarian Action: Global, Regional and Domestic Legal Responses*, Cambridge University Press, Cambridge, 2015, p. 41 (arguing that true impartiality would “require a methodology whereby we could compare relative needs on a global scale, assessing the relative value of helping flood victims in Pakistan versus providing food aid for the victims of famine in East Africa”).

traditional sense of a victim-oriented micro-level principle of humanitarian action with impact on conduct within a particular armed conflict.<sup>18</sup>

Together, the two principles “serve the overarching goal of humanity” by their operational and instrumental nature.<sup>19</sup> It is sometimes said that aid given to one side of the conflict does not necessarily have to be in violation of these principles.<sup>20</sup> To some extent, this is obviously true. A humanitarian actor should not be expected to provide a strictly equal amount of aid to both sides. Such a goal might not reflect the size of the affected population or the need of the victims. After all, a conflict may disproportionately affect the population in a territory controlled by one conflict party only, while leaving the situation relatively stable for those on the territory of the other side. For instance, it would be absurd to claim that humanitarian aid distributed in the Federal Republic of Yugoslavia during the 1999 aerial bombing campaign would not have been neutral and/or impartial unless matched by equal assistance to the NATO countries.<sup>21</sup>

Nevertheless, unilateral actions undertaken on the basis of the nationality of the victims or their other association with one conflict party should be seen as *prima facie* inconsistent with the principles of impartiality and neutrality. Such assistance takes into account an extraneous consideration other than the need of the victims and thus lends itself to an

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<sup>18</sup> See further J. Pictet, above note 3, pp. 24–33; H. Slim, above note 15, pp. 348–349; M. Harroff-Tavel, above note 7, pp. 537–538; K. Anderson, above note 15, p. 56; R. A. Stoffels, above note 15, pp. 540–541.

<sup>19</sup> D. Thürer, above note 3, p. 55.

<sup>20</sup> See, e.g., Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 818, para. 2803; Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, p. 486; Frits Kalshoven, “Impartiality and Neutrality in Humanitarian Law and Practice”, *International Review of the Red Cross*, Vol. 29, No. 273, December 1989, pp. 523–524.

<sup>21</sup> Whether relief provided in relation to the 1999 conflict did in fact comply with all humanitarian principles is a separate question. For criticism of the western involvement in the conflict from this angle, see, e.g., Toby Porter, “The partiality of humanitarian assistance – Kosovo in comparative perspective”, *Journal of Humanitarian Assistance*, 17 June 2000, available at: <https://sites.tufts.edu/jha/archives/150> (arguing that the principle of impartiality “was compromised or even discarded during the Kosovo crisis”).

accusation of partiality.<sup>22</sup> It additionally specifically assists one side of the conflict only and thus impinges on the principle of neutrality.<sup>23</sup>

The ICRC Commentary to the Additional Protocols to the Geneva Conventions seems to take the opposite view, arguing that a “unilateral action cannot be considered as indicating a lack of neutrality”.<sup>24</sup> The explanation in the commentary is remarkably frank, stating that “traditional links, or even the geographical situation, may prompt a State to undertake such actions, and it would be stupid to wish to force such a State to abandon the action”.<sup>25</sup> It is, however, difficult to see what would be left, in particular of the principle of neutrality, if a humanitarian actor could escape an accusation of a violation simply by remaining silent about its true incentives.

It is suggested in response that the better view is to separate the question whether such conduct breaches the principles and the question whether that would mean that the State must abandon the action (which depends on the normative nature of the principle in question). As will be shown, in the present state of international law, there is no general requirement for States to abide by the principles at all times, and thus assistance of the kind suggested in the ICRC Commentary may still be permissible in law despite not being neutral in principle.

### **(Head 1) Search for a general legal basis of the principles of impartiality and neutrality**

If one accepts that impartiality and neutrality are essential for the furtherance of “the overarching goal of humanity” on the international plane,<sup>26</sup> one would be forgiven for

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<sup>22</sup> See, e.g., D. Salomons, above note 17, p. 43 (criticizing humanitarian assistance disbursed to persons in Darfur at the expense of those living in other parts of the Republic of Sudan); Fiona Terry, *Condemned to Repeat?: The Paradox of Humanitarian Action*, Cornell University Press, Ithaca, 2013, pp. 74–75 (criticizing assistance provided by the United States during the Afghan conflict in the 1980s as aimed at the strengthening of the resistance forces and even specific commanders).

<sup>23</sup> See, e.g., S. Neil MacFarlane, “Humanitarian Action and Conflict”, *International Journal*, Vol. 54, No. 4, Autumn 1999, pp. 543–544 (criticizing the majority of humanitarian assistance provided during the Spanish Civil War as one-sided and thus decidedly “non-neutral” due to the politicization of many contemporary humanitarian actors).

<sup>24</sup> Y. Sandoz, C. Swinarski and A. Zimmermann, above note 20, p. 818, para. 2803.

<sup>25</sup> *Ibid.*

<sup>26</sup> D. Thürer, above note 3, p. 55; see also text to note 19 above.

assuming that these principles must be firmly anchored in the binding corpus of international law. This is also, as will be seen, a frequent interpretation of the ICJ's judgment on the merits in the *Nicaragua* case.<sup>27</sup> Accordingly, this section revisits the relevant part of the *Nicaragua* judgment to unpack the analysis provided by that Court. It then considers whether any of the three main sources of international law—treaties, custom, and general principles of law—can be said to provide a general legal basis for the two principles.

## (Head 2) *Nicaragua* revisited

In *Nicaragua*, the ICJ had to decide on the lawfulness of the assistance provided by the US government in the early 1980s to the *contras* fighting against the Nicaraguan government.<sup>28</sup> Notably for the present purposes, the assistance in question was provided by a State, not by a humanitarian organization or any other non-State actor. In the first step of its analysis, the Court asserted that humanitarian assistance could not be seen “as in any ... way contrary to international law” as long as it was in line with the principles of humanity and impartiality declared by the Twentieth International Conference of the Red Cross.<sup>29</sup> However, on the facts of the case, the US assistance *was* limited to one side of the conflict only and thus it was, the Court observed, not “given without discrimination to all in need in Nicaragua, [but] merely to the *contras* and their dependents”.<sup>30</sup> In the second step of its reasoning, the Court held that this amounted to an intervention in the internal affairs of Nicaragua and ultimately a violation of international law by the US.<sup>31</sup>

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<sup>27</sup> International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports 1986*, p. 14.

<sup>28</sup> See *ibid.*, para. 20.

<sup>29</sup> *Ibid.*, para. 242. The present name of the conference is the International Conference of the Red Cross and Red Crescent. It brings together governments, policy makers, and the components of the Red Cross and Red Crescent Movement (“the Movement”). See further ICRC, “International Conference of the Red Cross and Red Crescent”, 27 September 2014, available at: <https://www.icrc.org/en/document/international-conference-red-cross-and-red-crescent>.

<sup>30</sup> *Nicaragua*, above note 27, para. 243.

<sup>31</sup> *Ibid.*, paras. 246 and 292(3).

The ICJ judgment thus appeared to require any actor providing humanitarian assistance to abide by the Fundamental Principles of the Movement.<sup>32</sup> In this connection, it should be mentioned that the ruling spoke expressly only of the principles of humanity and impartiality.<sup>33</sup> However, in its analysis of the facts of the case, the Court placed the greatest emphasis on the fact that aid was disbursed to one side of the conflict only.<sup>34</sup> In this sense, the US conduct primarily amounted to a breach of the principle of neutrality due to the not-so-subtle US alignment with the political and ideological aims of one conflict party.<sup>35</sup>

The ICJ did not, however, cite any law in support of its analysis in this part of the judgment apart from the declaration of the Fundamental Principles of the Movement<sup>36</sup> which it (correctly) did not describe as legally binding with respect to either of the parties to the dispute.<sup>37</sup> In fact, the Court merely stated that it is “[a]n essential feature of truly humanitarian aid” that it is provided without any discrimination (thus invoking an aspect<sup>38</sup> of the principle of impartiality).<sup>39</sup> The ICJ all but admitted that its position amounts to little more than judicial fiat in the following sentence, which it opened simply with the words “In the view of the Court...”<sup>40</sup>

In spite of these deficiencies, the judgment has been widely interpreted as confirming the mandatory legal nature of the principles in question for humanitarian actors both public and private. In particular, it has been described as having recognized the general binding force of the Fundamental Principles of the Movement,<sup>41</sup> as laying down “the essential conditions for

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<sup>32</sup> Accord F. Kalshoven, above note 20, pp. 517–519. This is also how the ruling has been interpreted by proponents of the extensive view: see notes 41–43 below.

<sup>33</sup> *Nicaragua*, above note 27, para. 242.

<sup>34</sup> See also D. Plattner, above note 5, p. 176 (viewing this passage in the judgment as confirming an aspect of the principle of neutrality).

<sup>35</sup> See text to note 15 above.

<sup>36</sup> See “Proclamation of the Fundamental Principles of the Red Cross”, above note 4.

<sup>37</sup> cf. *Nicaragua*, above note 27, para. 242.

<sup>38</sup> For Jean Pictet’s classification of the three subprinciples of the principle of impartiality, see note 16 above.

<sup>39</sup> *Nicaragua*, above note 27, para. 243.

<sup>40</sup> *Ibid.*

<sup>41</sup> V. Chetail, above note 7, p. 265 (“the Court not only confirms the customary character of the fundamental principles of the Red Cross, but considers that these principles have to be respected with regard to any kind of

all humanitarian action”<sup>42</sup> and as providing “a source of obligations for states themselves, if [they] claim to be engaged in humanitarian activity”.<sup>43</sup> Therefore, it is necessary to investigate whether the legal basis for the two principles could be properly located in any of the three main sources of international law. Accordingly, each of the following subsections examines one of these sources.

## (Head 2) Treaties: Geneva Conventions and their Additional Protocols

The treaty law relating to the provision of humanitarian relief in times of armed conflict includes primarily the four Geneva Conventions<sup>44</sup> and their two Additional Protocols.<sup>45</sup> With the exception of one provision replicated in all four Conventions—designated as Common Article 3—the Conventions and the First Additional Protocol apply in situations of

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humanitarian assistance, whether it is provided by the Red Cross, or through the United Nations or by States individually”).

<sup>42</sup> M. Torrelli, above note 7, p. 239 (emphasis added).

<sup>43</sup> F. Bugnion, “The International Conference”, above note 7, p. 702 (“The International Court of Justice thus clearly recognized the mandatory force of the Fundamental Principles of the Red Cross; they not only oblige states to allow Red Cross and Red Crescent bodies to abide by them, but they are also a source of obligations for states themselves, if the latter claim to be engaged in humanitarian activity.”).

<sup>44</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (hereinafter GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (hereinafter GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (hereinafter GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (hereinafter GC IV).

<sup>45</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (hereinafter AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 UNTS 609 (entered into force 7 December 1978) (hereinafter AP II).

international armed conflict.<sup>46</sup> Conversely, Common Article 3 and the entirety of the Second Additional Protocol apply in non-international armed conflicts.<sup>47</sup>

### *(Head 3) Principle of impartiality*

To begin with, this body of treaty law does not contain any general endorsement of either principle with respect to all humanitarian action undertaken in situations of armed conflict. Of the two, the position of impartiality is more prominent in the instruments, with several provisions mentioning this principle expressly.<sup>48</sup> However, these provisions do not endow the principle with a general binding force with respect to all humanitarian actors. Instead, they serve two principal functions.

First, the relevant provisions in the Geneva Conventions that refer to impartiality use it mainly as a defining characteristic of humanitarian bodies which are to be given access to victims of war.<sup>49</sup> For instance, Article 59(2) of Geneva Convention IV provides that relief schemes on behalf of the occupied population may be undertaken “either by States or by *impartial* humanitarian organizations such as the International Committee of the Red Cross”.<sup>50</sup> That means that only bodies whose “impartiality is assured”<sup>51</sup> are legally privileged in the sense that they are entitled to free passage and protection of their relief consignments.<sup>52</sup>

Second, the two Additional Protocols stipulate that in case of a lack of supplies essential for the survival of the civilian population, “humanitarian and impartial” relief actions “shall be undertaken”.<sup>53</sup> These provisions, however, do not designate the subject of this obligation nor do they forbid assistance that would not meet the criterion of impartiality. Undoubtedly,

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<sup>46</sup> Common Art. 2 to the GCs; Art. 1(3) of AP I.

<sup>47</sup> Common Art. 3 to the GCs; Art. 1(1) of AP II.

<sup>48</sup> See, in particular, Common Art. 3(2) to the GCs; Common Art. 9/9/9/10 to the GCs; Arts. 59(2) and 61(1) of GC IV; Art. 70(1) of AP I; Art. 18(2) of AP II.

<sup>49</sup> Common Art. 3(2) to the GCs; Common Art. 9/9/9/10 to the GCs; Arts. 59(2) and 61(1) of GC IV.

<sup>50</sup> Art. 59(2) of GC IV (emphasis added).

<sup>51</sup> Jean Pictet (ed.), *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958, p. 321.

<sup>52</sup> Art. 59(3) of GC IV; see also J. Pictet, above note 51, pp. 321–322.

<sup>53</sup> Art. 70(1) of AP I; Art. 18(2) of AP II; see also *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Bern, 2009, rule 100(a).

the prohibition of adverse distinction in the application of international humanitarian law (IHL) is one of the fundamental tenets of this body of law.<sup>54</sup> However, it should be recalled that this prohibition corresponds to the subprinciple of non-discrimination only and does not cover the entire scope of impartiality.<sup>55</sup> Therefore, to the extent that the rules in question are to apply generally, the relevant phrase should be seen as exhortatory only, encouraging relief action of the kind described, but not requiring in itself that such aid be in fact provided by a specific actor designated *ex ante*.

Nevertheless, the modifiers “humanitarian and impartial” are certainly not without any legal effect. Assistance that meets the said criteria is privileged and protected under the terms of the Protocols. In the context of international armed conflicts, Protocol I expressly provides that “[o]ffers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.”<sup>56</sup> This serves to address potential claims by the territorial State to that effect and exclude them as a legal basis of objections to humanitarian action.<sup>57</sup> In the context of non-international armed conflicts, no corresponding stipulation has found its way into the text of the second Additional Protocol.<sup>58</sup> Nonetheless, assistance which meets these criteria must be perceived as endorsed by the Protocol<sup>59</sup> and hence can only be refused by the territorial State for reasons that are neither arbitrary nor capricious.<sup>60</sup>

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<sup>54</sup> See Common Art. 3 to the GCs; Art. 16 of GC III; Art. 13 of GC IV; Art. 75(1) of AP I; Art. 4(1) of AP II; ICRC Customary Law Study, above note 17, p. 308, rule 88.

<sup>55</sup> See text to notes 16–18 above and particularly note 16 above (detailing Pictet’s classification of the subprinciples of the principle of impartiality).

<sup>56</sup> Art. 70(1) of AP I.

<sup>57</sup> M. Bothe, K. J. Partsch and W. A. Solf, above note 20, p. 486.

<sup>58</sup> cf. Art. 18 of AP II.

<sup>59</sup> Y. Sandoz, C. Swinarski and A. Zimmermann, above note 20, p. 1479, paras. 4882–4883.

<sup>60</sup> M. Bothe, K. J. Partsch and W. A. Solf, above note 20, pp. 800–801; see also Y. Sandoz, C. Swinarski and A. Zimmermann, above note 20, p. 1479, para. 4885 (the refusal of humanitarian and impartial relief without good grounds may amount to a violation of the prohibition of the use of starvation as a method of combat); International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, San Remo, 2006, available at: <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf>, p. 61, para. 5.1.4 (measures taken by the conflict party in control of an area should not unduly impede or delay the provision of humanitarian assistance); ICRC Customary Law Study, above note 17, p. 193, rule 55 (“parties to the conflict

*(Head 3) Principle of neutrality*

In contrast to impartiality, the principle of neutrality of humanitarian action is not expressly mentioned in the text of the Geneva Conventions or their Protocols. To some extent, this can be explained due to the fact that the notion of neutrality already carries a different contextual connotation in the law of armed conflict, namely as a reference to the law of neutrality and the drafters may have wanted to avoid confusion between these two terms.<sup>61</sup>

It would be inaccurate, however, to claim that the principle of neutrality of humanitarian action does not feature at all in the treaty framework of IHL. Both the Geneva Conventions and Additional Protocol I refer to “fundamental principles of the Red Cross” in a number of provisions.<sup>62</sup> Interestingly, the formulation of these principles at the time of drafting of the Geneva Conventions did not yet expressly include the principle of neutrality.<sup>63</sup> It was first included at the 25<sup>th</sup> session of the Board of Governors of the Red Cross<sup>64</sup> in 1959<sup>65</sup> and incorporated into the present-day list of seven fundamental principles in 1965 (comprising the principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality).<sup>66</sup> Therefore, at least since 1965, neutrality has been accepted as one of the

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must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control”).

<sup>61</sup> Kate Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law*, Humanitarian Policy Group (HPG) Report No. 5, Overseas Development Institute (ODI), London, March 2000, p. 8. For the difference and overlaps between these two meanings of “neutrality”, see further note 5 above and the references cited therein.

<sup>62</sup> Art. 44(2) of GC I; Art. 63(1)(a) of GC IV; Art. 81(2)–(3) of AP I.

<sup>63</sup> See Board of Governors, XIX<sup>th</sup> Session, Oxford, 1946, Resolution 12 and Board of Governors, XX<sup>th</sup> Session, Stockholm, 1948, Resolution 7, reproduced in ICRC, *Handbook of the International Red Cross and Red Crescent Movement*, 14<sup>th</sup> ed., ICRC, Geneva, 2008, pp. 723–724.

<sup>64</sup> In 1979, this body was replaced by the General Assembly of the International Federation of Red Cross and Red Crescent Societies.

<sup>65</sup> Board of Governors, XXV<sup>th</sup> Session, Athens, 1959, Resolution 16, reproduced in ICRC, *Handbook*, above note 63, pp. 724–725 (“it is essential for the Red Cross to observe strict neutrality in political spheres”).

<sup>66</sup> “Proclamation of the Fundamental Principles of the Red Cross”, above note 4, pp. 573–574. The text was further revised in 1986 in order to replace references to “Red Cross” for “Movement”. For this final version, see ICRC, “The Fundamental Principles of the International Red Cross and Red Crescent Movement”, 31 October 1986, available at: <https://www.icrc.org/eng/resources/documents/red-cross-crescent-movement/fundamental-principles-movement-1986-10-31.htm>.

Fundamental Principles of the Movement and it can thus be said that the Geneva Conventions and Protocol I indirectly recognize this principle, as well.

However, this does not mean that the treaties somehow elevate neutrality or any of the other principles to become principles of general application. Instead, the provisions in question should properly be read as conditioning the duty of States to facilitate access to components of the Red Cross and Red Crescent Movement upon these components' compliance with their own principles. Oddly, Additional Protocol I refers to these principles with respect to the National Red Cross and Red Crescent Societies<sup>67</sup> and the League (now Federation) of Red Cross and Red Crescent Societies,<sup>68</sup> but not the ICRC.<sup>69</sup> Nevertheless, the ICRC made it clear in the text of its own commentary to Protocol I that as “the traditional guardian of the Movement’s principles”, it considers itself equally bound to observe these principles.<sup>70</sup>

As with the specific principle of impartiality discussed above, the treaty framework does not generalize the applicability of the Fundamental Principles of the Movement to all humanitarian actors. With respect to “other humanitarian organizations”, Additional Protocol I merely stipulates that they conduct their activities “in accordance with the provisions of the Conventions and this Protocol.”<sup>71</sup> On the basis of the legal framework described above and in particular due to the operation of common Article 9/9/9/10 of the Geneva Conventions,<sup>72</sup> this may import yet again a condition of impartiality.<sup>73</sup> If the actors in question do not meet this condition, the territorial State may lawfully refuse access.<sup>74</sup> Nevertheless, no requirement of

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<sup>67</sup> Art. 81(2) of AP I.

<sup>68</sup> Art. 81(3) of AP I.

<sup>69</sup> cf. Art. 81(1) of AP I.

<sup>70</sup> Y. Sandoz, C. Swinarski and A. Zimmermann, above note 20, pp. 941–942, para. 3322.

<sup>71</sup> Art. 81(4) of AP I.

<sup>72</sup> The article reads as follows (emphasis added):

“The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other *impartial humanitarian organization* may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.”

<sup>73</sup> cf. M. Bothe, K. J. Partsch and W. A. Solf, above note 20, p. 563.

<sup>74</sup> In the same vein, see, e.g., ICRC, “Strengthening of the coordination of emergency humanitarian assistance of the United Nations”, Statement by the ICRC to the UN General Assembly, New York, 12 December 2013,

neutrality should be seen as imposed upon these actors by operation of the treaty framework. In addition, none of these requirements, applicable as they are only to Movement components and humanitarian organizations proper, can be extended to States or the providers of humanitarian action in general.

It can be concluded that despite their frequent invocation, as a matter of treaty law, the significance of the principles of impartiality and neutrality is limited and mutually distinguishable. The legal effect of the principles is almost exclusively limited to humanitarian organizations and in particular to the components of the Red Cross and Red Crescent Movement. The effect on States is indirect only, obliging them under certain circumstances to accept assistance that is in line with the principles. The treaty language does not, however, oblige States (or parties to armed conflicts more generally) to provide assistance of this kind themselves.

Although this interim conclusion may appear somewhat unsatisfying, it is congruous with the specific role anticipated for States under the Geneva Conventions and their Protocols. Under the treaty framework, States are primarily seen as potential belligerents and not as humanitarian actors in their own right. Insofar as the treaties consider the question of the provision of humanitarian relief, they focus not on States, but on international and domestic organizations such as the National Societies of the Red Cross and Red Crescent Movement. The specific conduct of the States in that regard is thus largely left *praeter legem* as far as the treaties are concerned.

## (Head 2) Customary international law

It could certainly be argued that the ICJ's intuitive conclusion in *Nicaragua* reflected the position of the States and thus amounted to a correct analysis of the applicable customary international law.<sup>75</sup> Undoubtedly, customary law contains both rules and principles.<sup>76</sup> As a matter of legal theory, principles are norms which “operate at a higher level of generality than

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available at: <https://www.icrc.org/eng/resources/documents/statement/2013/united-nations-humanitarian-coordination-2013-12-12.htm> (“a State may refuse access to relief only for valid reasons, such as ... if the relief being offered is not considered to be humanitarian or impartial”).

<sup>75</sup> cf. V. Chetail, above note 7, p. 265; A. Gadler, above note 12, p. 228.

<sup>76</sup> See, e.g., Hugh Thirlway, *The Sources of International Law*, Oxford University Press, Oxford, 2014, p. 94.

rules”<sup>77</sup> and which help to explain the individual rules or provide the reason for them.<sup>78</sup> There is thus no conceptual barrier to recognizing the principles of impartiality and neutrality as principles of customary law. However, their existence would have to be “established ... in the same way as rules (by practice and *opinio juris*) or derived by extrapolation or analysis from such rules.”<sup>79</sup>

### *(Head 3) Opinio juris*

Already the identification of the *opinio juris* in this connection poses considerable difficulty. It is true that many proclamations have been made by a plethora of actors endorsing the principles of impartiality and neutrality on the international plane. The UN General Assembly set out the principles of humanity, neutrality and impartiality as the “guiding principles” of humanitarian assistance in a non-binding resolution in 1991.<sup>80</sup> In the following years, the General Assembly frequently reaffirmed the said principles.<sup>81</sup>

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<sup>77</sup> International Law Association (ILA), *Statement of Principles Applicable to the Formation of General Customary International Law*, London, 2000, p. 11.

<sup>78</sup> Gerald Fitzmaurice, “The General Principles of International Law Considered from the Standpoint of the Rule of Law”, *Recueil des cours*, Vol. 92, 1952, p. 7. But see, e.g., Michael Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, Cambridge University Press, Cambridge, 2013, p. 29 (arguing that the terms “norms”, “principles” and “rules” of customary law may be used interchangeably as normative equivalents).

<sup>79</sup> H. Thirlway, above note 76, p. 94. The two traditional constituent elements of custom are (1) sufficient State practice backed by (2) evidence of the view that such practice is required by law (i.e. *opinio juris*). See further, e.g., James Crawford (ed.), *Brownlie’s Principles of Public International Law*, Oxford University Press, 8<sup>th</sup> ed., 2012, pp. 23–27; H. Thirlway, above note 76, pp. 56–79; ICRC Customary Law Study, above note 17, pp. xxxvii–li.

<sup>80</sup> UN GA Res. 46/182, 19 December 1991, Annex, para. 2.

<sup>81</sup> See, e.g., UN GA Res. 51/194, 10 February 1997, preambular para. 12; UN GA Res. 58/114, 17 December 2003, preambular para. 4; UN GA Res. 60/124, 8 March 2006, preambular para. 4; UN GA Res. 61/134, 1 March 2007, preambular para. 4; UN GA Res. 62/94, 25 January 2008, preambular para. 3; UN GA Res. 63/139, 5 March 2009, preambular para. 3; UN GA Res. 66/119, 7 March 2012, preambular para. 3; UN GA Res. 69/243, 23 December 2014, preambular para. 2.

Significantly, many States have since endorsed these principles and committed themselves to adhere to them in undertaking humanitarian action.<sup>82</sup> However, these have almost exclusively been western States and it would thus be premature to speak of any general acceptance of the said principles.<sup>83</sup> In fact, when non-western States do make a reference to the humanitarian principles in international fora, they typically limit their import to international organizations and humanitarian agencies.<sup>84</sup>

Moreover, with respect to those States who are member States of the European Union (EU), it is arguable that the statements in question are in fact referable to EU law, and not to international law. This is due to the operation of Article 214(2) of the Treaty on the Functioning of the European Union (TFEU), which provides that “Humanitarian aid operations shall be conducted in compliance with the principles of international law and with

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<sup>82</sup> See, e.g., Ministry of Foreign Affairs of Denmark, *Strategy for Danish Humanitarian Action 2010–2015*, September 2009, available at: <http://um.dk/en/~media/UM/Danish-site/Documents/Danida/Det-goer-vi/Udv-indsats/Stabilitet/StrategyforDanishHumanitarianAction2010-15.ashx>, pp. 10–11; Swiss Federal Department of Foreign Affairs, *Humanitarian Access in Situations of Armed Conflict: Field Manual—Version 1.0*, 2011, available at: [www.cdint.org/documents/PAIV\\_111118\\_Humanitarian\\_Access\\_Field\\_Manual\\_mit\\_Inhalt.pdf](http://www.cdint.org/documents/PAIV_111118_Humanitarian_Access_Field_Manual_mit_Inhalt.pdf), section 3.2; UK Department for International Development, *Saving lives, preventing suffering and building resilience: The UK Government’s Humanitarian Policy*, 2011, available at: [www.gov.uk/government/publications/the-uk-governments-humanitarian-policy-september-2011-final](http://www.gov.uk/government/publications/the-uk-governments-humanitarian-policy-september-2011-final), p. 6; Ministry of Foreign Affairs of France, *Humanitarian Strategy*, 6 July 2012, available at: [http://www.diplomatie.gouv.fr/fr/IMG/pdf/Strategie\\_Humanitaire\\_ANGlais\\_2012\\_cle89af5f.pdf](http://www.diplomatie.gouv.fr/fr/IMG/pdf/Strategie_Humanitaire_ANGlais_2012_cle89af5f.pdf), p. 14; Federal Foreign Office of Germany, *Strategy of the Federal Foreign Office for Humanitarian Assistance Abroad*, November 2012, available at: [http://www.auswaertiges-amt.de/cae/servlet/contentblob/634144/publicationFile/177866/121115\\_AA-Strategie\\_humanitaere\\_hilfe.pdf](http://www.auswaertiges-amt.de/cae/servlet/contentblob/634144/publicationFile/177866/121115_AA-Strategie_humanitaere_hilfe.pdf), p. 8; Ministry for Foreign Affairs of Finland, *Finland’s Humanitarian Policy*, 14 June 2013, available at: <http://formin.finland.fi/public/default.aspx?contentid=101288>, p. 11.

<sup>83</sup> cf. International Law Association (ILA), *Statement of Principles Applicable to the Formation of General Customary International Law*, London, 2000, p. 32, para. 16 (a belief on the part of the generality of States is sufficient to prove the existence of a customary rule).

<sup>84</sup> See, e.g., United Nations Security Council (UN SC), Meeting Record, UN Doc. S/PV.7244, 19 August 2014, p. 14 (China) (“United Nations humanitarian agencies and relief organizations ... should ... uphold the principles of humanitarianism, namely neutrality, impartiality and independence”), p. 20 (Jordan) (“We must also ensure that humanitarian workers are committed to upholding the basic humanitarian principles related to neutrality, impartiality and independence”).

the principles of impartiality, neutrality and non-discrimination.”<sup>85</sup> It is thus questionable to what extent can States’ individual commitments be taken to signify a belief on their part that conduct in line with these principles would actually be required by international law. Such doubts remain particularly strong with respect to those States that specifically refer to the TFEU as the applicable legal framework.<sup>86</sup>

What is more, most of the proclamations referred to above are found in documents designated as the individual States’ “humanitarian strategy” or “humanitarian policy”, thus again indicating that the commitments in question were not entered into on a legal level—in other words with the intention to be bound as far as international law is concerned—but only as a matter of policy or even international morality.<sup>87</sup>

### *(Head 3) State practice*

Even if it could be accepted that the statements referred to above amount to *opinio juris* sufficient to justify the customary character of the principles under scrutiny, one cannot draw the same conclusion with respect to the parallel requirement of State practice. Although in general statements of the kind discussed above, States typically refer to impartiality and neutrality alongside one another,<sup>88</sup> it is more accurate to distinguish between them as far as actual practice is concerned.

First, as far as impartiality is concerned, there is strong evidence to the effect that States have frequently permitted extraneous considerations in addition to the simple need of the victims in their decision-making about the disbursement of aid. These have often featured an element of politicization and conditioning of aid.

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<sup>85</sup> Consolidated Version of the Treaty on the Functioning of the European Union, 9 May 2008, O.J. C 115/47, Art. 214(2).

<sup>86</sup> See, e.g., Ministry of Foreign Affairs of France, *Humanitarian Strategy*, 6 July 2012, available at: [http://www.diplomatie.gouv.fr/fr/IMG/pdf/Strategie\\_Humanitaire\\_ANGlais\\_2012\\_cle89af5f.pdf](http://www.diplomatie.gouv.fr/fr/IMG/pdf/Strategie_Humanitaire_ANGlais_2012_cle89af5f.pdf), p. 14.

<sup>87</sup> cf. ICJ, *Nuclear Tests (Australia v. France)*, Judgment, *ICJ Reports 1974*, para. 43; ICJ, *Nuclear Tests (New Zealand v. France)*, Judgment, *ICJ Reports 1974*, para. 46; ILC, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, 9 September 2006, UN Doc. A/61/10, principle 1.

<sup>88</sup> See sources cited in note 82 above.

Politicization of humanitarian action can take a number of different forms. For example, in a study about the instrumentalization of aid in the context of the conflict in Afghanistan, Fiona Terry observed that western military forces “dropp[ed] pamphlets over southern Afghanistan that told residents they were to give information on the Taliban and Al Qaeda if they wished to continue receiving ‘humanitarian’ aid, and generally us[ed] aid as a tool to ‘win the hearts and minds’ of the Afghan population”.<sup>89</sup> Another well-documented example concerns the US humanitarian aid to Cambodian refugee camps along the Thai-Cambodian border after the fall of the Khmer Rouge regime in 1979.<sup>90</sup> As summarized by Christine Mikolajuk, the assistance motivated by the US opposition to the communist government of Cambodia in fact served to revive the Khmer Rouge and contributed to the continuation of the conflict, thus worsening rather than alleviating the plight of the refugees.<sup>91</sup>

A more problematic practice has been to subject the provision of humanitarian assistance to express conditions set by the potential donor. This is a well-accepted feature of international development aid<sup>92</sup> but it goes against the nature of humanitarian assistance as a way of relieving the suffering of the victims of crisis and conflict.<sup>93</sup> A prominent example in this regard is the withdrawal of humanitarian staff and emergency assistance from Sierra Leone after a coup d'état in 1997.<sup>94</sup> The UN political leadership took the decision and the UK government supported it; both actors' aim was “to try and effect the political objective of regime change”.<sup>95</sup> In reality, this conditioning not only failed to bring about the intended

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<sup>89</sup> Fiona Terry, “The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action”, *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, p. 175.

<sup>90</sup> Christine Mikolajuk, “Thanks, But No Thanks: The Other Face of International Humanitarian Aid”, *Harvard International Review*, Vol. 26, No. 4, Winter 2005, pp. 33–34.

<sup>91</sup> *Ibid.*, p. 33.

<sup>92</sup> See, e.g., Jonathan R. W. Temple, “Aid Conditionality”, in Vandana Desai and Robert B. Potter, *The Companion to Development Studies*, 3<sup>rd</sup> ed., Routledge, New York, 2014, pp. 547–551.

<sup>93</sup> But see K. Mackintosh, above note 61, p. 11 (arguing that limited forms of human rights conditionality may be in conformity with IHL, as long as the aim of such measures is “genuinely ... to improve the condition of individuals”).

<sup>94</sup> See further Henry Dunant Centre for Humanitarian Dialogue, *Politics and Humanitarianism: Coherence in Crisis*, February 2003, available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/2356D2703EB313DE85257138007053DF-politics%20and%20humanitarianism.pdf>, pp. 9–12.

<sup>95</sup> *Ibid.*, p. 10.

political objective but it has been excoriated for contributing to the unnecessary loss of lives in Sierra Leone.<sup>96</sup>

Although these instances have been criticized by academics and NGOs, they have not been subject to any international condemnation by States or inter-governmental organizations for failing to live up to the demands of impartiality. Hence, the recurring practice of politicization and conditionality of aid places significant doubts on any claim that the adherence to the principle of impartiality by States providing humanitarian aid has been “constant and uniform” as required by international law for the establishment of custom.<sup>97</sup>

Second, the principle of neutrality has been treated even more liberally by the States. Writing in 1989, Professor Frits Kalshoven noted that States had frequently described as “humanitarian assistance” the material support provided to the sympathetic party to an armed conflict, in particular in the context of decolonization.<sup>98</sup> He added that far from inviting any international condemnation, such support was welcomed by the international community as “a highly desirable expression of support for the cause of self-determination of the peoples involved”.<sup>99</sup>

The post-Cold War era changed very little about this practice. The alliances have shifted, but the powerful States have generally continued playing the dual role of providing aid and projecting their own political aims at the same time. The United States was open about its aim to integrate the delivery of assistance within its counter-insurgency strategy, so much so that the US Secretary of State at the time Colin Powell described humanitarian agencies with arresting candour as “such a force multiplier for us, such an important part of our combat team”.<sup>100</sup> For instance, international “coalitions of the willing” such as the Friends of Syria grouping of 11 western States or the informal “Libya contact group” of about forty nations have been open about their aim to channel “humanitarian assistance” to the opposition in both

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<sup>96</sup> *Ibid.*, pp. 10–11.

<sup>97</sup> Cf. ICJ, *Right of Passage over Indian Territory (Portugal v. India)*, Judgment, *ICJ Reports 1960*, p. 40.

<sup>98</sup> F. Kalshoven, above note 20, pp. 518–519.

<sup>99</sup> *Ibid.*, p. 519.

<sup>100</sup> United States, *Remarks of Secretary Colin Powell 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](http://avalon.law.yale.edu/sept11/powell_brief31.asp).

Syria and Libya.<sup>101</sup> Even more recently, Russia dispatched a convoy described as carrying “humanitarian relief” to the separatist-controlled part of the Ukrainian territory.<sup>102</sup>

Admittedly, it is conceivable that this conduct, while inconsistent with the principle of neutrality, would nonetheless not frustrate the customary status of that principle. The ICJ held in *Nicaragua* that practice corresponding with a putative rule of customary law need not be “in absolute rigorous conformity with the rule”; it suffices that instances of inconsistent conduct “should generally have been treated as breaches”.<sup>103</sup> However, this has emphatically not been the case here. It is true that some of the non-neutral conduct described above was condemned on the international plane. In particular, the Russian “humanitarian convoy” was decried as tantamount to invasion by both Ukraine<sup>104</sup> and a number of third States.<sup>105</sup> Notably, however, with one known exception,<sup>106</sup> the condemnatory statements referred to other norms of international law as being violated, in particular the territorial integrity and sovereignty of Ukraine<sup>107</sup> and—with respect to humanitarian assistance specifically—the need to secure the consent of the territorial State for any relief action.<sup>108</sup> It can thus be

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<sup>101</sup> See Foreign & Commonwealth Office of the United Kingdom, “*London 11*” *Friends of Syria Core Group Ministerial Communiqué*, London, 15 May 2014, available at: [www.gov.uk/government/news/london-11-friends-of-syria-core-group-ministerial-communication](http://www.gov.uk/government/news/london-11-friends-of-syria-core-group-ministerial-communication) (concerning the Friends of Syria); Steven L. Myers, “\$1 Billion Is Pledged to Support Libya Rebels”, *New York Times*, 9 June 2011, available at: [www.nytimes.com/2011/06/10/world/africa/10diplo.html?\\_r=0](http://www.nytimes.com/2011/06/10/world/africa/10diplo.html?_r=0) (concerning the Libyan contact group).

<sup>102</sup> Ministry of Foreign Affairs of the Russian Federation, *Russian Foreign Ministry Statement on the Start of the Delivery of Humanitarian Relief Aid to Southeastern Ukraine*, 22 August 2014, available at: [http://www.mid.ru/brp\\_4.nsf/0/8CBBD5BF558C6E344257D3C003D4DF0](http://www.mid.ru/brp_4.nsf/0/8CBBD5BF558C6E344257D3C003D4DF0).

<sup>103</sup> *Nicaragua*, above note 27, para. 186.

<sup>104</sup> See, e.g., UN SC, Meeting Record, UN Doc. S/PV.7253, 28 August 2014, p. 15 (Ukraine); UN SC, Meeting Record, UN Doc. S/PV.7289, 28 October 2014, p. 83 (Ukraine).

<sup>105</sup> See, e.g., UN SC, Meeting Record, UN Doc. S/PV.7253, 28 August 2014, p. 3 (Lithuania), p. 7 (Australia); UN SC, Meeting Record, UN Doc. S/PV.7269, 19 September 2014, p. 14 (Lithuania).

<sup>106</sup> NATO, *NATO Secretary General condemns entry of Russian convoy into Ukraine*, 22 August 2014, available at: [http://www.nato.int/cps/en/natohq/news\\_112112.htm](http://www.nato.int/cps/en/natohq/news_112112.htm) (condemning the “disregard of international humanitarian principles” by Russia).

<sup>107</sup> See, e.g., UN SC, Meeting Record, UN Doc. S/PV.7253, 28 August 2014, p. 3 (Lithuania), p. 5 (Luxembourg), p. 13 (United Kingdom).

<sup>108</sup> See, e.g., European Union (EU), *EU Statement on the Violation of OSCE Principles and Commitments by the Russian Federation and the Situation in Ukraine*, 28 August 2014, available at: [http://eeas.europa.eu/delegations/vienna/documents/eu\\_osce/permanent\\_council/2014/pc\\_1014\\_eu\\_on\\_ukraine](http://eeas.europa.eu/delegations/vienna/documents/eu_osce/permanent_council/2014/pc_1014_eu_on_ukraine).

summarized that existing State practice with respect to the principles of impartiality and neutrality does not support their existence in customary international law as generally binding principles.<sup>109</sup>

## (Head 2) General principles of law

Given that the principles have not been found to bear the force of customary law, it remains to be seen whether they might nevertheless be considered as “general principles of law” in the sense of Article 38(1)(c) of the ICJ Statute. Some arguments in favour of this proposition could certainly be made. First, since impartiality and neutrality are “principles” by their designation, their nature seems to be more readily aligned with the category of general principles of law than with any other type of sources of international law. Second, they are closely connected with the principle of humanity, which some<sup>110</sup> have considered to have received legal recognition as a general principle of law by the ICJ in the *Corfu Channel* case.<sup>111</sup> It could thus be argued that the same conclusion could be reached with respect to these two principles.<sup>112</sup>

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pdf, p. 1 (“we deeply regret that a Russian convoy of 227 vehicles entered Ukrainian territory without the consent of the Ukrainian authorities and in violation of previous understandings and the involvement of the ICRC”). See also European Union External Action, *Statement by the Spokesperson on the second Russian “humanitarian convoy” dispatched to Eastern Ukraine*, Brussels, 15 September 2014, available at: [http://www.eeas.europa.eu/statements/docs/2014/140915\\_02\\_en.pdf](http://www.eeas.europa.eu/statements/docs/2014/140915_02_en.pdf).

<sup>109</sup> cf. ICRC Customary Law Study, above note 17. This comprehensive study of existing customary IHL has equally not included impartiality and neutrality among the customary rules it had identified. See also *ibid.*, p. 193, rule 55 (stipulating a specific duty to “allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is *impartial* in character and conducted without any adverse distinction”) (emphasis added).

<sup>110</sup> See, e.g., Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge University Press, 1986, p. 4; Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 187.

<sup>111</sup> ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Judgment, *ICJ Reports 1949*, p. 4.

<sup>112</sup> Interestingly, the International Law Commission (ILC) has recently faced the same issue in the context of its work on the protection of persons in the event of disasters. However, its brief treatment of the matter can at best be described as avoiding the question. In fact, the ILC’s commentary to the Draft Articles on the Protection of Persons in the Event of Disasters expressly declined to determine whether these principles also qualify as general principles of international law. *Report of the International Law Commission on the work of its sixty-*

The two contentions should be analysed separately. The first one is problematic in that it does not square with the prevailing conception of general principles of law as a source of international law. According to this conception, general principles are properly understood as “those which can be derived from a comparison of the various systems of municipal law and the extraction of such principles as appear to be shared by all, or a majority, of them”.<sup>113</sup> General principles of law are thus emphatically not moral principles or general principles of international relations. Significantly in this respect, impartiality and neutrality of humanitarian action originate on the international plane and not within the domestic legal systems. Their origins lie in international humanitarian law and in the activities of the components of the Red Cross and Red Crescent Movement.<sup>114</sup> Although they have now been adopted as guiding principles by some international organizations and even States,<sup>115</sup> it can hardly be suggested that they can now be extracted from the domestic law of all or even just a majority of States, if only for the reason that most States do not in fact actively and regularly engage in the provision of humanitarian assistance.<sup>116</sup>

The second contention requires a closer look at the ruling of the ICJ in the *Corfu Channel* case and the subsequent jurisprudence of that Court. It can be accepted *arguendo*<sup>117</sup>

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*sixth session*, UN Doc. A/69/10, 2014, chapter V, p. 103, para. 1 (“the principles [of humanity, neutrality and impartiality] are considered by the Commission to constitute humanitarian principles that underlie disaster relief and assistance. On this basis the Commission did not find it necessary to determine whether these principles are also general principles of international law[.]”).

<sup>113</sup> H. Thirlway, above note 76, p. 95, relying on Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, Longmans, Green and Co., London, 1927. See also, e.g., American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1986, §§ 102(1)(c) and 102(4) (referring to “general principles common to the major *legal* systems”) (emphasis added).

<sup>114</sup> See generally Jean-Luc Blondel, “The Fundamental Principles of the Red Cross and Red Crescent: Their Origin and Development”, *International Review of the Red Cross*, Vol. 31, No. 283, August 1991, pp. 349–357.

<sup>115</sup> See notes 81–82 above.

<sup>116</sup> See, e.g., Global Humanitarian Assistance, *Global Humanitarian Report 2013*, available at: <http://www.globalhumanitarianassistance.org/wp-content/uploads/2013/07/GHA-Report-2013.pdf>, pp. 20–27 (reporting official humanitarian assistance as coming from a total of 77 governments).

<sup>117</sup> See note 110 above.

(although this view is not universally endorsed<sup>118</sup>) that *Corfu Channel* recognized “elementary considerations of humanity” as general principles of law and applied them as a basis for the finding of a legal obligation in the case.<sup>119</sup> Furthermore, the principles of humanitarian action indisputably find their basis in considerations of humanity; after all, “humanity” is such a principle on its own and there are many links between impartiality and neutrality on the one hand and humanity on the other.

However, in the *South West Africa* cases, the ICJ forcefully rejected the suggestion “that humanitarian considerations are sufficient in themselves to generate legal rights and obligations”.<sup>120</sup> In *Nicaragua*, the Court further elaborated that the notion of “elementary considerations of humanity” had a more limited meaning which was in fact reflected in common Article 3 to the Geneva Conventions.<sup>121</sup> As discussed above, this provision does not contain a general endorsement of the principles of humanitarian action any more than the other provisions in the Conventions and their Protocols.<sup>122</sup> It is thus submitted that, whatever the true impact of the inclusion of the term “elementary considerations of humanity” in the *Corfu Channel* case was, it did not in itself serve to transform the connected notions of impartiality and neutrality into binding sources of international law.

In summary, one may concede that equating humanitarian principles with general principles of law holds certain superficial appeal. However, closer scrutiny of the origins and nature of impartiality and neutrality, as well as of the relevant international jurisprudence, reveals that these principles do not in fact qualify as general principles of law in the sense of an autonomous source of international law.

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<sup>118</sup> See, e.g., Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications*, Cambridge University Press, Cambridge, 2010, p. 146 (“the Court’s precise reasoning is ambiguous ... [it] implies that “elementary considerations of humanity” may, because of their moral character, be a basis for recognizing a customary legal obligation”); Christian Tomuschat, “General Course on Public International Law”, *Recueil des cours*, Vol. 281, 1999, p. 355 (arguing that the ICJ had in fact derived binding legal precepts from “the constitution of the international community”).

<sup>119</sup> *Corfu Channel*, above note 111, p. 146.

<sup>120</sup> ICJ, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, *ICJ Reports 1966*, p. 34, para. 49.

<sup>121</sup> *Nicaragua*, above note 27, para. 218.

<sup>122</sup> See section “Treaties” above.

## **(Head 1) Potential direct and indirect legal effect of the principles of impartiality and neutrality**

As seen in the previous part, the examination of the three principal sources of international law suggests that the ICJ's position in *Nicaragua*—in particular as interpreted in subsequent writing<sup>123</sup>—does not square with the current state of international law. Nevertheless, it would be wrong to dismiss the importance of the principles of impartiality and neutrality from the perspective of international law altogether. In fact, there are at least two important ways in which these principles may bring about significant legal effects for States in international law.

### **(Head 2) United Nations Security Council resolutions**

First, adherence to the principles may be specifically demanded of humanitarian actors by the UN Security Council. On a number of occasions, the Security Council has done that, while expressly acting under Chapter VII of the UN Charter.<sup>124</sup> For example, in resolution 1341 (2001) concerning the situation in the Democratic Republic of the Congo, the Council called upon “all the parties to respect the principles of neutrality and impartiality in the delivery of humanitarian assistance”.<sup>125</sup> Due to the operation of Articles 25 and 103 of the Charter, resolutions adopted under Chapter VII are binding on all member States of the UN and prevail over conflicting obligations under any other agreement.<sup>126</sup>

In other instances, the Council endorsed the principles of impartiality and neutrality (frequently alongside with other principles of humanitarian action) with lesser force. On some occasions, in resolutions not adopted under Chapter VII, the Council has included

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<sup>123</sup> See text to notes 41–43 above.

<sup>124</sup> See, e.g., UN SC Res. 2060, 25 July 2012, op. para. 6; UN SC Res. 2093, 6 March 2013, op. para. 21 (regarding the UN Mission to Somalia); UN SC Res. 1341, 22 February 2001, op. para. 12; UN SC Res. 2109, 11 July 2013, op. para. 2 (regarding the UN Missions in Sudan).

<sup>125</sup> UN SC Res. 1341, 22 February 2001, op. para. 12.

<sup>126</sup> ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Order, Provisional Measures, *ICJ Reports 1992*, para. 39; ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, Order, Provisional Measures, *ICJ Reports 1992*, para. 42.

demands that humanitarian assistance be delivered in accordance with these principles.<sup>127</sup> In accordance with the ICJ's ruling in the *Namibia* Advisory Opinion, the language used in such resolutions supports the view that these "demands" should also be seen as binding on the concerned States.<sup>128</sup> The view that all Council decisions are legally binding has been openly endorsed in the recent practice of the Council itself.<sup>129</sup> In two resolutions concerning the situation in Syria, it "underscor[ed] that Member States are obligated under Article 25 of the UN Charter to accept and carry out the Council's decisions".<sup>130</sup>

In addition, the Council has frequently limited itself to "underscoring" or "emphasizing" the importance of upholding the principles of humanitarian action: at times specifically with respect to UN organs<sup>131</sup> or humanitarian organizations,<sup>132</sup> but most commonly it has done so in a general way without stating which actors it had in mind.<sup>133</sup> However, such language is

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<sup>127</sup> See, e.g., UN SC Res. 2113, 30 July 2013, op. para. 16; UN SC Res. 2134, 28 January 2014, op. para. 26; UN SC Res. 2228, 29 June 2015, op. para. 17.

<sup>128</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Reports 1971*, paras. 113–114 ("Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. ... The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.").

<sup>129</sup> For an early commentary, see, e.g., Marie Jacobsson, "A Snapshot of a Legal Time-Frame: The United Nations Security Council Resolution 2118 (2013) and the OPCW Executive Council Decision", in Jonas Ebbesson et al., *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi*, Brill, Leiden, 2014, pp. 142–146.

<sup>130</sup> UN SC Res. 2118, 27 September 2013, preambular para. 14; UN SC Res. 2165, 14 July 2014, preambular para. 19.

<sup>131</sup> See, e.g., UN SC Res. 2102, 2 May 2013, op. para. 7 (re UNSOM).

<sup>132</sup> See, e.g., UN SC Res. 1296, 19 April 2000, op. para. 11; UN SC Res. 1502, 26 August 2003, preambular para. 4; UN SC Res. 2147, 28 March 2014, preambular para. 17; UN SC Res. 2175, 29 August 2014, op. para. 5.

<sup>133</sup> See, e.g., UN SC Res. 1674, 28 April 2006, op. para. 21; UN SC Res. 1814, 15 May 2008, preambular para. 17; UN SC Res. 1894, 11 November 2009, op. para. 13; UN SC Res. 1972, 17 March 2011, preambular para. 6; UN SC Res. 2041, 22 March 2012, preambular para. 28; UN SC Res. 2063, 31 July 2012, op. para. 14; UN SC Res. 2096, 19 March 2013, preambular para. 27; UN SC Res. 2098, 28 March 2013, preambular para. 15; UN

probably better seen as exhortatory and thus the resolutions in question would not amount to creating a binding legal obligation on the member States to abide by the principles of humanitarian action beyond their already existing legal duties. *A contrario*, resolutions by which the Security Council “demands” or “calls on” the member States to adhere to these principles in the provision of humanitarian assistance have the effect of conferring binding force on the said principles within the scope of such resolutions.

(Head 2) Commitments made by humanitarian organizations to respect impartiality and neutrality

Second, the principles of impartiality and neutrality carry constitutional significance with respect to “Dunantist” humanitarian organizations.<sup>134</sup> These organizations, such as the components of the Red Cross and Red Crescent Movement or Médecins Sans Frontières (MSF), enshrine the legacy of Henry Dunant by incorporating the principles of humanitarian action in their constitutive documents.<sup>135</sup> In addition to the two organizations already mentioned, several other international organizations and NGOs have likewise committed themselves to comply with these principles in all their humanitarian activities, with

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SC Res. 2100, 25 April 2013, preambular para. 8; UN SC Res. 2127, 5 December 2013, preambular para. 19; UN SC Res. 2145, 17 March 2014, preambular para. 27; UN SC Res. 2200, 12 February 2015, preambular para. 5; UN SC Res. 2210, 16 March 2015, preambular para. 23; UN SC Res. 2227, 29 June 2015, preambular para. 23.

<sup>134</sup> See, e.g., Abby Stoddard, *Humanitarian NGOs: Challenges and Trends*, HPG Briefing, No. 12, London, July 2003, available at: <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/349.pdf>, p. 2; Michael Barnett, *The International Humanitarian Order*, Routledge, London, 2008, pp. 181–182; A. Donini, above note 10, p. 146; Rony Brauman, “Médecins Sans Frontières and the ICRC: Matters of Principle”, *International Review of the Red Cross*, Vol. 94, No. 888, Winter 2012, p. 1527 fn. 10. By contrast, organizations which are willing to abandon strict neutrality and impartiality and promote instead transformative policies in line with specific political and ideological aims are described by these authors as “Wilsonian”. Notably, the classification of some organizations may pose problems, for example, while the HPG brief considers Save the Children as an example of a Dunantist organization, Barnett calls it one “of the most famous members of [the Wilsonian] camp”. See A. Stoddard (*op. cit.*), p. 2; M. Barnett (*op. cit.*), p. 181.

<sup>135</sup> “Proclamation of the Fundamental Principles of the Red Cross”, above note 4, pp. 573–574; Médecins Sans Frontières (MSF), *MSF Charter and Principles*, 2015, available at: <http://www.msf.org/msf-charter-and-principles>.

prominent examples including the International Office for Migration,<sup>136</sup> International Rescue Committee,<sup>137</sup> and the World Food Programme.<sup>138</sup> These self-commitments have an indisputable role in these organizations internally and serve as guidance for their conduct.<sup>139</sup> Moreover, initiatives such as the Humanitarian Accountability Partnership (2010) or the Core Humanitarian Standard on Quality and Accountability (2014) further promote the principles to participating organizations, increasing the likelihood that “Dunantist” commitments will continue being made in the future, as well.<sup>140</sup>

The inclusion of the principles in charters and constitutive documents of humanitarian organizations may also have an indirect effect on States. This is most apparent with respect to the components of the Red Cross and Red Crescent Movement. Significantly, States agreed that they “shall at all times respect the adherence by all the components of the Movement to the Fundamental Principles” when they adopted the Statutes of the Movement in 1986.<sup>141</sup> Although the Statutes were not concluded in the form of an international treaty, an argument has been advanced as to their binding nature under international law on the basis of their content and method of adoption.<sup>142</sup> Whatever the merits of this argument and thus

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<sup>136</sup> International Office for Migration (IOM), Res. 1243 (CI), *IOM Migration Crisis Operational Framework*, 27 November 2012, available at: [https://www.iom.int/files/live/sites/iom/files/About-IOM/governing-bodies/en/council/101/MC\\_2362.pdf](https://www.iom.int/files/live/sites/iom/files/About-IOM/governing-bodies/en/council/101/MC_2362.pdf), pp. 12–14.

<sup>137</sup> International Rescue Committee (IRC), *IRC, Fellow Humanitarian Agencies Express Concern Regarding an Upsurge in Fighting in Somalia*, 17 July 2011, available at: <http://www.rescue.org/news/irc-fellow-humanitarian-agencies-express-concern-regarding-upsurge-fighting-somalia-6928>.

<sup>138</sup> World Food Programme (WFP), *Consolidated Framework of WFP Policies*, Rome, October 2008, available at: <http://www.wfp.org/sites/default/files/wfp187807~1.pdf>, p. 16.

<sup>139</sup> See further Marc Weller, “The Relativity of Humanitarian Neutrality and Impartiality”, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 91, 1997, pp. 445–446.

<sup>140</sup> See Humanitarian Accountability Partnership (HAP), *The 2010 HAP Standard in Accountability and Quality Management*, 2<sup>nd</sup> ed., Geneva, 2010, p. 8, available at: <http://www.hapinternational.org/pool/files/2010-hap-standard-in-accountability.pdf>; Core Humanitarian Standard, *Core Humanitarian Standard on Quality and Accountability*, 2014, p. 8, available at: <http://www.corehumanitarianstandard.org/files/files/Core%20Humanitarian%20Standard%20-%20English.pdf>.

<sup>141</sup> Art. 2(4) of the Statutes of the International Red Cross and Red Crescent Movement adopted by the 25<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, October 1986, *International Review of the Red Cross*, Vol. 27, No. 256, February 1987, pp. 25 ff.

<sup>142</sup> See F. Bugnion, “Red Cross Law”, above note 7, pp. 501–502.

irrespective of the legal status of the entirety of the Statutes, the duty of States to respect the commitment of the components of the Movement to adhere to their Fundamental Principles may also be inferred from the text of the Geneva Conventions and their Protocols which expressly endorse these Principles.<sup>143</sup>

This indirect obligation of the States has direct and observable real-world consequences. For instance, in the *Simić* case, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) inferred on this basis that the ICRC had a right to non-disclosure of information relating to its activities in judicial proceedings in order to effectively discharge its mandate.<sup>144</sup> The Trial Chamber specifically held that the parties to the Geneva Conventions and their Protocols “must be taken as having accepted the fundamental principles on which the ICRC operates, that is impartiality, neutrality and confidentiality, and in particular as having accepted that confidentiality is necessary for the effective performance by the ICRC of its functions.”<sup>145</sup> This reasoning led it to decide that a former ICRC employee should not be called as a witness in that case.<sup>146</sup>

To sum up, the principles of impartiality and neutrality can be said to have an indirect legal effect due to the States’ duty to respect the commitment to these principles undertaken by certain humanitarian organizations. Nevertheless, it would be overstating the point to claim that the principles are “binding upon the States Parties to the Geneva Conventions *because* they were incorporated into the Statutes of the Movement.”<sup>147</sup> It bears reminding that States are not members of the Movement. As such, they are merely bound to respect the adherence to the Fundamental Principles by the components of the Movement, but the Statutes do not contain a separate legal basis for a directly binding obligation for the States when they engage in humanitarian action themselves.

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## **(Head 1) Conclusion**

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<sup>143</sup> See section “Treaties” above.

<sup>144</sup> International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-PT, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (Trial Chamber II), 27 July 1999, para. 73.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.* part IV (Disposition).

<sup>147</sup> S. Beauchamp, above note 7, p. 14 (emphasis added).

In a 1979 commentary on the Fundamental Principles of the Red Cross aimed at a general lay audience,<sup>148</sup> Jean Pictet warned that:

[W]e must avoid confusion of the principles of the Red Cross with the principles of international humanitarian law, mainly embodied in the Geneva Conventions for the protection of the victims of war. The former serve at all times to inspire the action of the Red Cross as a private institution, whereas the latter, which have an official character, *regulate in wartime the conduct of States vis-à-vis their enemies.*<sup>149</sup>

It would appear that his reminder is no less relevant today than it was over 35 years ago. It is understandable that the indisputable moral force of the principles of impartiality and neutrality may at times tempt academic writers to overestimate their legal position under international law. The ICJ's desire in *Nicaragua* to distinguish between forms of aid that are benign and those that amount to unlawful interference is equally comprehensible. However, neither of these tendencies has converted the two principles in question into norms which would directly, in Pictet's turn of phrase, "regulate in wartime the conduct of States".

Yet, the principles have proven to have important indirect effect on the conduct of States in particular in their interaction with humanitarian organizations of the "Dunantist" type. Assistance that is provided in line with these principles is privileged and protected under IHL and organizations that commit themselves to the same principles may under certain circumstances expect privileged treatment, too. Additionally, States may find themselves directly affected by the two principles within the narrow confines of an appropriately worded binding resolution of the UN Security Council.

Although the conclusion advocated here may at first blush find little favour with the proponents of the humanitarian cause, it is submitted that its consequence may in fact be more optimistic upon closer inspection. It would be unrealistic to expect the States to abandon all aid efforts undertaken as part of their counterinsurgency strategies or State-building efforts during the time of armed conflict. As shown above, these types of assistance

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<sup>148</sup> cf. J. Pictet, above note 3, p. 5 (noting that the commentary answers a call "for a simple and modern commentary which would make these principles understandable to everyone, and especially to the young people, who represent the future").

<sup>149</sup> *Ibid.*, p. 6 (emphasis added).

form a central component in the States' toolkit for the times of crisis. Still, by its nature, such aid cannot but deviate from strict impartiality and neutrality.

A clue for the resolution of this conundrum may be found in repeated calls made by representatives of established humanitarian agencies concerned with the trend of “blurring the lines” between military, political, and humanitarian efforts. For instance, in December 2009 the President of Médecins Sans Frontières told an audience composed primarily of NATO military personnel that “we have no principled objection to military units delivering aid as part of the war effort [or] to aid being part of hearts and minds campaigns”.<sup>150</sup> What is key, he insisted, is that “[s]uch aid should not be attached to the term ‘humanitarian’.”<sup>151</sup> Similar public statements have been made on a number of occasions by leading representatives of the ICRC.<sup>152</sup>

Although these comments were not made in relation to the legal basis of impartiality and neutrality, they confirm the need for a more nuanced understanding of the role these principles play vis-à-vis the relevant actors in modern-day conflicts. To describe them as generally and uniformly binding on all actors involved in the provision of aid only results in conceptual confusion and fruitless accusations of violation on part of those actors who cannot

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<sup>150</sup> MSF, “Our Purpose is to Limit the Devastations of War: Speech by Christophe Fournier”, 8 December 2009, available at: <http://www.doctorswithoutborders.org/news-stories/speechopen-letter/our-purpose-limit-devastations-war>.

<sup>151</sup> *Ibid.*

<sup>152</sup> See, e.g., ICRC, “An ICRC Perspective on Integrated Missions: Speech by ICRC’s Vice-President Jacques Forstier”, Oslo, 31 May 2005, available at: <https://www.icrc.org/eng/resources/documents/misc/6dcgrn.htm> (“armed and police forces ... should not claim that humanitarian action will “win the war” – by winning hearts and minds ... the military, when they engage in activities of a humanitarian nature, should clearly identify themselves as military”); ICRC, “Humanitarian Principles – The Importance of Their Preservation During Humanitarian Crises: Speech by ICRC’s Director-General Angelo Gnaedinger”, Lisbon, 12 October 2007, available at: <https://www.icrc.org/eng/resources/documents/statement/humanitarian-principles-statement-121007.htm> (“Armed forces also have a very important *military* role to play in providing security. They should devote their efforts to these key responsibilities and avoid blurring the line between military, political, and humanitarian action by labelling all of them as *humanitarian*.”) (emphasis original); ICRC, “World Humanitarian Day – Protection of Humanitarian Workers: Statement by ICRC’s President Peter Maurer to the United Nations Security Council”, Geneva, 19 August 2014, available at: <https://www.icrc.org/eng/resources/documents/statement/2014/08-19-world-humanitarian-day-protection.htm> (“The Security Council should not be – and should not be expected to behave as if it were – a humanitarian actor, for that risks blurring further the distinction between political and humanitarian functions.”).

by the nature of some of their activities fully abide by these principles. At the same time, States should refrain from appropriating the terminology of humanitarian assistance for activities inconsistent with humanitarian principles. It needs no emphasis that doing so undermines genuine humanitarian efforts, creates the pretext for arbitrary refusal of aid, and even increases the risk that humanitarian personnel will be targeted during armed conflicts.

As a matter of international law, the principles of impartiality and neutrality play an important role, although they are not endowed with general binding force. A clear understanding of the legal scope and impact of the two principles—in particular insofar as States are concerned—is essential for the accurate calibration of expectations that are legitimately placed on various humanitarian actors. Only this way may we, at the same time, advance Pictet’s call for conceptual clarity of IHL while heeding the legacy of Solferino, forever reminding us of the importance of principled and efficient humanitarian action.