

# Impartiality and Neutrality in Humanitarian Law and Practice

by Frits Kalshoven

## 1. The International Court of Justice on U.S. Humanitarian Assistance to the Contras

On 27 June 1986, the International Court of Justice (ICJ) gave judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua.<sup>1</sup> The case, involving Nicaragua against the United States of America, is remarkable in many respects, and so is the judgment.<sup>2</sup> I should like to single out two special features: it deals with a situation of armed conflict, and it mentions the Red Cross.

The rarity of the Hague Court dealing with an actual situation of armed conflict is a consequence of the reluctance of States to submit such matters to its jurisdiction. The fact that in the present instance the Court could address the issue at all is an accident of procedure rather than the effect of an exceptionally commendable attitude of the parties to the dispute.<sup>3</sup> As it seems unlikely that the example will soon be followed by many others, I can leave it at that.

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<sup>1</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports, 1986, p. 14.

<sup>2</sup> As the judgment went against the United States, it sparked off a hot debate among American international lawyers; see the immediate reactions of some twenty lawyers, in: 81 *Am. J. Int'l Law* (1987), pp. 1-183.

<sup>3</sup> The case began with an Application by Nicaragua, filed on 9 April 1984; neither this State nor the U.S. had excluded disputes relating to armed conflict from their relevant instruments of acceptance of the Court's jurisdiction. As the U.S. rather than availing itself of its reservation to the effect that any matter declared by the U.S. to be an internal affair is outside the jurisdiction of the Court, chose to stay away from the proceedings once the Court had by its judgment of 26 November 1984 decided that it had jurisdiction, nothing stood in the way of the Court's dealing with the matter.

Of greater current interest is the reference made to the Red Cross. How did it come about, and what are we to make of it?

The story starts with the assistance provided by the United States to the Contras in and around Nicaragua. During the initial stages of its active involvement, this included all sorts of supplies, including weapons and other military equipment. Then, in June 1985, Congress decided that the administration would henceforth have to restrict its support to humanitarian assistance. The relevant paragraph in the legislation defines permissible “humanitarian assistance” as:

*the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles or material which can be used to inflict serious bodily harm or death.*<sup>4</sup>

While this text may appear clear enough, it still left room for interpretation. Thus, rumour has it that after Congress had published its decision, there were those in administration circles who held that the supply of means of communication could be continued as these fell within the category of humanitarian assistance. It may readily be conceded that communications equipment is not a weapon or weapons system, and neither can it in and of itself “be used to inflict serious bodily harm or death”. Yet it is not food, clothing, or medicine either, nor does it particularly resemble any one of those items on the list of “humanitarian” goods. It is, indeed, a well-known fact that means of communication are of vital importance in all military operations, not least in those of a guerrilla type.

The Court did not deal with this particular rumour but rather with the whole business of “humanitarian assistance” to the Contras. It noted that:

*There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.*<sup>5</sup>

Crucial in this paragraph is the phrase “strictly humanitarian aid to persons or forces in another country”. What are we to understand by it? The Court did not provide a definition of its own. Instead — and this is where the Red Cross comes in — it went on to quote the first and

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<sup>4</sup> As quoted in ICJ Reports 1986, p. 47, para. 97; p. 115: para. 243.

<sup>5</sup> *Ibid.*, p. 114, para. 242.

second of the seven Fundamental Principles of the Red Cross, as proclaimed in 1965 by the Twentieth International Conference of the Red Cross, i.e., the principles of humanity and impartiality. The relevant passages of these read as follows:

*The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours — in its international and national capacity — to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being...*

*It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals and to give priority to the most urgent cases of distress.*<sup>6</sup>

Inspired by these lofty principles, the Court asserted that:

*An essential feature of truly humanitarian aid is that it is given “without discrimination” of any kind. In the view of the Court, if the provision of “humanitarian assistance” is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely “to prevent and alleviate human suffering”, and “to protect life and health and to ensure respect for the human being”; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the Contras and their dependents.*<sup>7</sup>

With all due respect, I very much doubt the correctness of this part of the Court’s reasoning; and I should like to avail myself of this opportunity to vent my misgivings.

My point of departure is the fact that States often limit the material support they give one party to an armed conflict to what they describe as “humanitarian assistance”. This they do when they are in sympathy with that party yet want to avoid the all too direct involvement that might ensue, for instance, from the overt supply of weapons. Especially when it is a matter of providing support to the insurgent party in an internal armed conflict, for a State to confine its material support to “humanitarian assistance” may be a useful device to obviate protests of unlawful intervention in the internal affairs of the belligerent State, without hiding that one’s sympathies lie with the insurgents.

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<sup>6</sup> *International Red Cross Handbook*, 12th ed., Geneva, 1983 (hereinafter: *Handbook*), p. 17: Resolution IX of the Twentieth International Conference of the Red Cross, Vienna, 1965.

<sup>7</sup> ICJ Reports 1986, p. 115, para. 243.

In particular at the time of the so-called wars of national liberation that marked the post-World War II decolonization process, the international community never condemned this practice as unlawful intervention in the internal affairs of another State. On the contrary, it welcomed it as an entirely legitimate mode of action and, indeed, a highly desirable expression of support for the cause of self-determination of the peoples involved.

It is quite obvious that this type of governmental humanitarian assistance, resting as it does on more or less open sympathy for one party if not antipathy for the other, is inherently partial in nature. To measure it, as the Court asks us to do, by the standards governing Red Cross assistance appears somewhat far-fetched, to say the least.

## **2. The Red Cross Principles of Impartiality and Neutrality**

The Court's argument about the "essential feature of truly humanitarian aid" leads me to another, more fundamental question. This is connected with the interpretation the Court places on the notion of impartiality as a principle governing Red Cross aid. To cast my question in terms directly related to the case before the Court: Suppose it had not been the government of the United States but the American Red Cross that had supplied humanitarian assistance to the Contras, would this activity have amounted to a violation of Red Cross principles if that Society had not at the same time attempted to provide similar relief for "all in need in Nicaragua", i.e., including the Sandinistas?

Two Red Cross principles are at issue here. Besides the principle of impartiality, relied on by the Court, equal relevance attaches to the principle of neutrality. The Proclamation of 1965 gives the following definition:

*In order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.*

Before we go any further, the point should be stressed that while the principles may have been officially proclaimed in 1965 by the Twentieth International Conference of the Red Cross, they had, in one form or another, governed Red Cross activities from the very

beginning.<sup>8</sup> And as we shall see, they are reflected in the treaty law relating to the treatment of the wounded and sick and other victims of armed conflict.

Among those who have tried their hand at explaining the principles underlying the International Red Cross and Red Crescent Movement in all its aspects, one man has more than anyone else contributed to their correct understanding, and that man is Jean Pictet.<sup>9</sup> In a recent study,<sup>10</sup> he distinguishes within the principle of impartiality, as defined in 1965, three separate notions: non-discrimination, proportionality, and impartiality proper. Non-discrimination is the absence of objective discrimination, or in other words, the non-application of adverse distinctions to people on the sole ground that they belong to a specified category: a race, a political party, a religious creed, or whatever. Proportionality requires that every person in need of help shall be aided according to his need. And impartiality implies that no subjective distinctions shall be applied among those who suffer: they are all equally entitled to help, whether they are good or bad, innocent victims or persons guilty of hideous war crimes.

In a sense, neutrality is a necessary negative complement to the essentially positive notion of impartiality. As Pictet explains, the Red Cross principle of neutrality has two aspects. For one thing, it requires non-participation, whether direct or indirect, in active hostilities. For another, it signifies ideological neutrality, or in other words, the non-acceptance of any ideology other than its own (which in effect has found expression in the principle of humanity). The neutrality of the Red Cross implies, therefore, that none of its components part may take sides in any political controversy, whether national or international and no matter what the issues. As we shall see, this may be less easy in practice than it sounds.

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<sup>8</sup> An earlier, somewhat tentative and less authoritative list of principles was adopted by the then Board of Governors (now the General Assembly) of the League of Red Cross Societies, in its 19th session, 1946, and reaffirmed at its 20th session, 1948; *Handbook*, p. 549.

<sup>9</sup> His long series of writings on the subject starts out with the magisterial: *Les principes de la Croix-Rouge*, published in 1955; from this study stem the endeavours that ten years later resulted in the adoption and proclamation of the Fundamental Principles.

<sup>10</sup> "The Fundamental Principles of the Red Cross and Peace", in *International Review of the Red Cross* No. 239, March-April 1984, p. 74. It may be of interest to refer here to an earlier study by the man who in many respects was Jean Pictet's predecessor, Max Huber, "Croix-Rouge et neutralité", in *Revue internationale de la Croix-Rouge* No. 209, May 1936, p. 353, republished in Huber, Max, *La pensée et l'action de la Croix-Rouge*, 1954, pp. 77-86.

Before coming to that, we should try to gain an insight into the legal aspect of the matter. What is, from that point of view, the impact of these principles on Red Cross activities and, in particular, on the question at issue of whether a National Society, such as the American Red Cross, would violate any principle if it were to supply humanitarian assistance to one party to an armed conflict only?

By way of introduction, let us cast a glance backwards at the early history of the Red Cross Movement, which was founded just about a century and a quarter ago. The first National Red Cross Societies (though not yet so named) were established for the purpose of assisting the army medical services in the performance of a task with which the latter had more than once (and not only in 1859 at Solferino) proved unable to cope. In the words of resolutions adopted at the founding conference of the movement, the International Conference held in Geneva in 1863:

*Each country shall have a Committee whose duty it shall be, in time of war and if the need arises, to assist the Army Medical Services by every means in its power...*

*In time of war, the Committees of belligerent nations shall supply relief to their respective armies as far as their means permit; in particular, they shall organize voluntary personnel and place them on an active footing and, in agreement with the military authorities, shall have premises made available for the care of the wounded.*<sup>11</sup>

We may readily admit, with Donald Tansley, that the original purpose of the National Societies "has somehow been forgotten over the years", and that most of them have "turned to other activities".<sup>12</sup> One obvious cause is the development of ever more sophisticated military medical services, taking away the need for supplementary Red Cross field teams.

The point is well illustrated by recent Dutch experience. Some years ago, plans were laid in the Netherlands for a reorganization of civil defence and disaster preparedness and, in that context, for a distinct role for the Netherlands Red Cross. When, in an attempt to incorporate the new situation in the legislation in force, the Royal Decree that recognizes the society and regulates its relations with the authorities was brought up for revision, the Ministry for Defence initially let it be known that they did not wish to reserve any claim on the services of

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<sup>11</sup> *Handbook*, p. 547.

<sup>12</sup> Tansley, Donald D. *Final Report: An Agenda for Red Cross*, July 1975, p. 23.

Red Cross teams, as they did not foresee any active role for such teams alongside military medical personnel in potential battle areas. (They later changed their attitude, if only to keep a finger in the inter-departmental pie).<sup>13</sup>

Until 1986, the conditions for the international recognition of a National Society included the requirement of being duly recognized by its government "as a Voluntary Aid Society, auxiliary to the public authorities, in particular in the sense of Article 26 of the First Geneva Convention of 1949"; in the sense, that is, of rendering assistance, whenever necessary, to the national military medical service.<sup>14</sup> In October 1986, the Twenty-fifth International Red Cross Conference adopted new Statutes of the International Red Cross and Red Crescent Movement, and these no longer specifically refer to Article 26. Instead, they require in somewhat vaguer terms that a National Society "be duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field".<sup>15</sup>

This raises the matter of the treaty law relating to the wartime activities of National Societies. The treaties in force include the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.<sup>16</sup> With the exception of one article, the Conventions of 1949 are applicable in international armed conflicts, and so is Additional Protocol I of 1977. The one remaining article of the Conventions, common Article 3, together with Additional Protocol II, may with some simplification be said to apply in internal armed conflicts.<sup>17</sup>

Article 26 of the First Convention, "for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field", reflects the classic role of National Societies; it provides that the staff of a National Society that is employed on the same duties as the military medical personnel of their country shall be placed on the same footing

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<sup>13</sup> See Royal Red Cross Decree, dated 22 December 1988; *Staatsblad* 680, 17 January 1989.

<sup>14</sup> *Handbook*, p. 498.

<sup>15</sup> Art. 4, para. 3, of the Statutes of the International Red Cross and Red Crescent Movement, adopted by the Twenty-fifth International Red Cross Conference at Geneva in October 1986.

<sup>16</sup> Convention I, 75 UNTS (1950) p. 41, *Handbook*, p. 23; Convention II, 75 UNTS (1950) p. 85, *Handbook*, p. 47; Convention III, 75 UNTS (1950) p. 135 *Handbook*, p. 67; Convention IV, 75 UNTS (1950) p. 287, *Handbook*, p. 136; Additional Protocol I *Handbook*, p. 216; Additional Protocol II, *Handbook*, p. 286.

<sup>17</sup> For a more precise description of the scope of application of Art. 3 and Protocol II, respectively, see Kalshoven, Frits, *Constraints on the Waging of War*, ICRC, Geneva, 1987.

as that personnel. Article 24 defines those duties as “the search for, or the collection, transport or treatment of the wounded or sick”. The point should be emphasized that these duties are by definition performed in areas under the control of their country and, hence, on one side only.

While this already suggests that the Court’s stern requirement of assistance to all sides can hardly be a correct interpretation of Red Cross principles, this suggestion is strengthened to the point of becoming a certainty when we consider the case of the Red Cross Society of a neutral State that lends medical assistance to a State party to the conflict (and, hence, outside its own territory). The International Conference of 1863, anticipating this possibility, stated that “They [i.e., in its terminology, the “Committees of belligerent nations”] may call for assistance upon the Committees of neutral countries”.<sup>18</sup> Nor has this remained a mere theoretical possibility: by way of example, and as a matter of historical interest, the fact may be recorded here that in the war between Russia and Turkey, 1877-1878, the Netherlands Red Cross, at the request of the Turkish Red Crescent Society and with due permission from both sides to the conflict, operated a field hospital on the Turkish side.<sup>19</sup>

Article 27 of the First Convention requires in such a case both the previous consent of the Society’s own government and the authorization of the State party to the conflict concerned; the medical personnel of the Society are then placed under the control of the belligerent party, and both this party and the neutral government must notify the adverse party of the arrangement. For the sake of completeness, I should note that none of this was significantly modified in 1977: as far as relevant here, the provisions of Protocol I reaffirm the legal situation of a neutral Society and its personnel by the simple device of referring back to Article 27 of the 1949 Convention.<sup>20</sup>

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<sup>18</sup> *Supra*, note 11.

<sup>19</sup> Verspyck, Jonkheer G. M., *Het Nederlandsche Roode Kruis* (1867-1967), p. 86.

<sup>20</sup> Art. 8(c) (iii), Art. 9(2), Art. 12(2)(c). It should be noted that Art. 9 develops the legal situation in several respects which, however, are not relevant in the present context; thus, it adds a reference to the permanent medical units and transports and their personnel of “a neutral or an other State which is not a Party to that conflict” (para. 2a) and of “an impartial international humanitarian organization” (para. 2c); see International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, pp. 138-143, paras. 407-440.



Evidently, then, even such overtly one-sided assistance is not deemed to bring a National Society of a neutral country in conflict with the Fundamental Principles of the International Red Cross and Red Crescent Movement. Needless to say, its decision to opt for one or another party to the conflict may not be based, say, on plain political grounds. More generally, its activity must always be assessed against the twin principles of impartiality and neutrality.

While on the face of it, respect for these principles may not appear to pose any particular difficulties, it should be remembered that an armed conflict is a manifestation of a political process, and any activity connected with the conflict, no matter how disinterested, risks being given a political twist or otherwise used for political purposes. After all, the very fact that two interested governments have to stamp the action with their seal of approval provides an indication of the political context in which our National Society is bound to carry out its task. What, indeed, if its action happens to be coincidental with an operation by its own government to supply "humanitarian assistance" to the same belligerent party?

The only thing one can probably say is that, like justice, neutrality must not only be respected but must be seen to be respected. For the rest, it may suffice to base the forbidden non-neutral service on entirely valid grounds such as, in the Turkish case, the objective need for supplementary medical assistance to the wounded and sick of one party, as evidenced by a credible request from the National Society of the country concerned.

Impartiality (including, with Jean Pictet, proportionality and non-discrimination) requires, in the words of Article 12 of the First Convention, that assistance shall always be given "without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria"; moreover, "only urgent medical reasons will authorize priority in the order of treatment to be administered".

Impartiality and non-discrimination apply as soon as and wherever the Red Cross team is able to perform its functions. The point to emphasize here is that neither principle decides where the team is able to operate: this depends entirely and exclusively on the consent of the party in control of the territory. The point can hardly be overemphasized that the territorial scope of the team's activities will of necessity be restricted to the area to which they have been given access; it does not, in other words, extend to territory under the control of the adverse party, whatever the need for assistance to the wounded and sick on that side.

In view of all this, the conclusion appears inescapable that neither the Red Cross principle of impartiality, including non-discrimination, nor that of neutrality require a National Society to lend, or even offer, assistance to all parties to an international armed conflict.

Does this lead to the equally inescapable conclusion that the Hague Court in its judgment in the Nicaragua case has misinterpreted these principles? Our argument has so far been entirely based on practice and law relating to international armed conflicts, and the relations between Sandinistas and Contras could not be characterized as such an armed conflict, but at most, according to the Court, as an internal one.<sup>21</sup> As there are perhaps as many differences as similarities between the treaty regimes for either situation, we should ask ourselves whether a situation of internal armed conflict requires a different interpretation of the Red Cross principles as well.

A first point to note is that the Red Cross has, ever since the adoption of Resolution XIV by the Tenth International Conference of 1921, "affirm[ed] its right and duty of affording relief in case of civil war and social and revolutionary disturbances".<sup>22</sup> While this phrase does not specify who should provide the relief, the Resolution goes on to state that in principle, "In every country in which civil war breaks out, it is the National Red Cross Society of the country which, in the first place, is responsible for dealing, in the most complete manner, with the relief needs of the victims; for this purpose, it is indispensable that the Society shall be left free to aid all victims with complete impartiality". Without making it a condition for the Society to be simultaneously active on both sides, the quoted text expresses clearly the desire that this shall be the case<sup>23</sup>.

Other Red Cross Societies enter the picture when Resolution XIV comes to deal with the situation where the National Society of a country involved in civil war "cannot alone, on its own admission, deal with all the relief requirements". In that case, "it shall consider appealing to the Red Cross Societies of other countries". The Resolution emphasizes

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<sup>21</sup> ICJ Reports, 1986, p. 104, para. 219.

<sup>22</sup> *Handbook*, p. 641; a more complete text of the Resolution is contained in the 10th ed. of the *Handbook* (1953), pp. 414-415.

<sup>23</sup> In an enumeration of exceptional cases, the Resolution goes into the possibility that the Society has been dissolved or is unable or unwilling "to request foreign aid or accept an offer of relief received through the intermediary of the International Committee of the Red Cross"; when, in such a case, "the unrelieved suffering caused by civil war imperatively demands alleviation", the Committee "shall have the right and the duty to insist to the authorities of the country in question, or to delegate a National Society to so insist, that the necessary relief be accepted and opportunity afforded for its unhindered distribution".

that any such request must emanate from the National Society rather than from one or another of the parties to the conflict.<sup>24</sup>

While the Red Cross had thus broached the problem of relief in civil war, the Diplomatic Conference that in 1929 took up the revision of the Wounded and Sick Convention of 1906 left the whole matter of civil war outside its deliberations.<sup>25</sup> As mentioned above, it was only in the 1949 revision that a single article on internal armed conflict was incorporated in the four Conventions of that year, and this article, common Article 3, is completely silent on the matter of relief and does not refer to National Societies at all.

In contrast, Article 18, para.1, of Protocol II of 1977 does refer to National Societies. More specifically, it provides that relief societies located in the territory of the State involved in an internal armed conflict, such as Red Cross or Red Crescent Societies, “may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict”. So, unlike in 1921, the reference is to local societies only. Supposing for a moment that Nicaragua were a party to the Protocol, this much is certain: the American Red Cross, not being located in the territory of that State, could not derive from Article 18 a right to bring relief to the wounded and sick or other victims of the conflict, whether on the side of the Contras, or the Sandinistas, or both. But, once again, this is not to say that it would have been precluded from offering its services: merely that National Societies other than the one located in the country at war have no recognized right to make such an offer, and any offer they make may be rejected out of hand.

In view of all this, I am firmly convinced that if in such a situation of internal armed conflict a National Society not located in the country at war provides assistance to those in need on one side only, this activity need not bring it into conflict with the Fundamental Principles of the Red Cross, any more than bringing assistance to one side in an international armed conflict. An obvious condition is that in doing so it duly respects the principles of neutrality and impartiality. Thus, always in our imaginary example, the American Red Cross should have had no political motive in bringing humanitarian aid to the Contras: rather, its

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<sup>24</sup> Among the further principles laid down in the Resolution is the requirement that the request must be addressed to the International Committee of the Red Cross (which thereupon, “having ensured the consent of the Government of the country engaged in civil war”, shall organize the relief). On the role of the ICRC in these matters, see hereafter in Part 3.

<sup>25</sup> Des Gouttes, Paul, *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les armées en campagne du 27 juillet 1929, Commentaire*, 1930, pp. 186-87.

action should have been prompted by considerations such as the human suffering caused by the conflict and the absence on the side of the Contras of adequate medical and other needed facilities.

### 3. The ICRC and National Societies

Following this criticism of the ICJ's judgment in the Nicaragua case, I feel obliged to make a guess at what may have made it embark on its incorrect interpretation of the Red Cross principles of neutrality and impartiality. This brings me to a member of the Red Cross family that I have so far studiously ignored, viz., the International Committee of the Red Cross. Contrary to what its name suggests, this is not formally an international organization at all, but a Geneva-based association of Swiss citizens. Yet, materially, the word "international" in its name is entirely justified by the functions it performs and has been performing for many years. With the National Societies, it has shared from the outset the function of assisting the wounded and sick in armies in the field. The first time it ventured on that path was in April 1864, during the war between Prussia and Denmark, quite a while before it assumed its present name and even before the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field had been signed (an event that took place on 22 August of that year).<sup>26</sup>

Over the years, the task of bringing outside protection and assistance to the victims of armed conflict, and especially internal armed conflict, came to fall more and more exclusively to the Committee. This is apparent in resolutions adopted by International Conferences of the Red Cross,<sup>27</sup> as well as in the actual practice of the various members of the Movement. While, as we have seen, the right of National Societies to take part in this type of activity has survived to

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<sup>26</sup> Boissier, Pierre, *History of the International Committee of the Red Cross: from Solferino to Tsushima*, Henry Dunant Institute, Geneva, 1985, translation from original French, first published in 1963, p. 93.

<sup>27</sup> The tendency is already apparent in Resolution XIV of the Tenth International Conference, mentioned in Part 2: while the National Society of the country engaged in civil war may appeal to the Red Cross Societies of other countries, it must do this through the intermediary of the ICRC, which then shall organize the relief; if the government refuses its consent, it is the ICRC that "shall make a public statement of the facts"; indeed, "Should all forms of Government and National Red Cross be dissolved in a country engaged in civil war, the International Committee of the Red Cross shall have full power to endeavour to organise relief in such country, in so far as circumstances permit". See also Resolution XIV of the Sixteenth International Conference of the Red Cross, London, 1938, *Handbook*, p. 642; Resolution XXXI of the Twentieth International Conference of the Red Cross, Vienna, 1965, *Handbook*, p. 643.

this day, it is the Committee that literally always and everywhere attempts to come to the succour of the victims in question; so much so that at times it looked as if it had established a monopoly in the field. The agreement it concluded in 1969 with the League of Red Cross Societies “for the purpose of specifying certain of their respective functions” confirmed its dominant position in this area of Red Cross activity.<sup>28</sup>

The unremitting efforts of the Committee in favour of the victims of all armed conflicts have resulted in general recognition of its “right of humanitarian initiative”; the right, that is, to offer its services whenever and wherever necessary. It is reflected in the Statutes of the International Red Cross and Red Crescent Movement, where it is stated that:

*The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.*<sup>29</sup>

The treaties in force reaffirm and reinforce the Committee’s predominant position. The Conventions of 1949 not only assign it a variety of specific tasks, but also expressly recognize its right of humanitarian initiative, a right it nominally shares, according to the relevant articles, with “any other impartial humanitarian organization”.<sup>30</sup> While these articles apply in international armed conflicts, common Article 3 similarly provides that in the event of internal armed conflict, “an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”.

Much to the regret of the Committee, Protocol II of 1977 does not reiterate this recognition of its right of initiative.<sup>31</sup> Yet it is worth casting a glance at Article 18, para. 2, which provides that:

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<sup>28</sup> *Handbook*, p. 475.

<sup>29</sup> Art. 5(3) of the Statutes, adopted in 1986 by the Twenty-Fifth International Conference of the Red Cross, Geneva.

<sup>30</sup> Art. 9 of Conventions I-III, Art. 10 of Convention IV.

<sup>31</sup> Draft Art. 39, submitted by the Committee in 1974 to the Diplomatic Conference, had repeated the text of common Art. 3, i.e., that “the ICRC may offer its services to the parties to the conflict”; in 1977, in the course of the final session, the Conference in plenary session deleted this proposed text by consensus; 7 *Official Records* 151-152: CDDH/SR.53 paras. 64-70; and see Kalshoven, Frits, “Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: the Diplomatic Conference, 1974-1977, Part I: Combatants and Civilians”, in 8 *Neth. Yb Int’l Law* (1977) pp. 107-135, at p. 115.

*If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival... relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.*

This passive construction was purposely chosen to avoid any indication as to who should undertake the relief actions, let alone any specific reference to the Red Cross. Yet the paragraph evidently refers to relief coming from abroad, and it enumerates the conditions such actions have to fulfil.

Three of these conditions reflect the fundamental Red Cross principles of humanity and impartiality, i.e., non-discrimination. When we combine this with the reference in Article 3 common to the 1949 Conventions, to an “impartial humanitarian body, such as the International Committee of the Red Cross”, the conclusion is readily drawn that the Committee is, to say the least, undoubtedly qualified to undertake relief actions for a civilian population suffering undue hardship as a consequence of an internal armed conflict. And indeed, it has undertaken such actions on many occasions.<sup>32</sup>

However, it is not always successful in its endeavours; there is, after all, the remaining condition in Article 18, para. 2, of “consent of the High Contracting Party concerned”. This wording leaves little doubt which party the authors of the provision had in mind: obviously, none other than the incumbent government, and definitely not the insurgent party.<sup>33</sup>

Here we come across the crucial problem of access to the territory of a country at war; a problem with which the Committee has to struggle in its day-to-day practice and which frequently entangles it in

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<sup>32</sup> In its *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), the Committee simply states that “What is meant in particular is relief actions which may be undertaken by the ICRC or any other impartial humanitarian organization”; p. 1479, para. 4879 (emphasis added).

<sup>33</sup> For a different interpretation, see Prof. Bindschedler-Robert, Denise, “Actions of Assistance in Non-international Conflicts — Art. 18 of Protocol II”, in *European Seminar on Humanitarian Law*, Jagellonean University, Krakow, report, 1979, pp. 71-83. Her attempt to solve the problem by interpreting the term “High Contracting Party” as the State, thus leaving the question of its representation by the “legal” government or the other party entirely open, was already challenged on that occasion, among others by the present author; report, p. 84. My participation in a number of the negotiations that resulted in the text of Art. 18 has given me the strong conviction that, to most participants, “High Contracting Party” simply meant the incumbent government.

delicate negotiations with the authorities in power. I note in passing that while this obstacle may be particularly hard to overcome in situations of internal armed conflict (witness, for example, recent experience in Ethiopia), the governments of countries involved in an international armed conflict (say, the war between Iran and Iraq) are apt to erect equally formidable barriers.

To return to the case of internal armed conflict, no incumbent government is eager to acknowledge that it has even temporarily lost control over part of its territory. As a consequence, it goes on claiming the right to determine who will be admitted, even to parts of the territory firmly under the control of the insurgents (who may themselves apply their own criteria for admission). Whoever wants to bring relief to the victims in these areas is faced with a dilemma: whether to respect the claim of the government, perhaps even when this is plainly absurd, or to go ahead regardless.

It is not my purpose to examine this question in any detail. May it suffice to note that the Committee usually appears prepared to negotiate at length with the governmental authorities about access to insurgent-held areas and apparently has more than once made its entry into such areas dependent on their prior consent. This may often be a commendable policy. Yet it can also lead to very precarious situations, for instance if a government, in plain disregard of its solemn obligations under international law as expressed in Article 14 of Protocol II, is determined to apply starvation as a method of warfare and accordingly persists in withholding its consent.<sup>34</sup>

There are only two ways out of the resultant impasse. One is for the Committee to accept failure and confine its assistance to the victims on the governmental side. This may go against its fervent aspiration to implement to the fullest the task of “preventing and alleviating human suffering wherever it may be found”; an aspiration, incidentally, that the Hague Court may well (though erroneously) have taken for the only possible interpretation of the principle of humanity. It must be stressed that the words quoted, set out in the principle of humanity as defined in 1965, represent no more than a sort of ideal or ultimate goal, and they are not meant to constitute a yardstick by which the legitimacy of every single humanitarian act should be measured. It may be repeated that an

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<sup>34</sup> Art. 14, first sentence, lays down the principle that “Starvation of civilians as a method of combat is prohibited”. As regards Art. 18, see: the commentary by Michael, Bothe, in Bothe, Michael, Partsch, Karl Joseph and Solf, A. Waldemar, *New Rules for the Victims of Armed Conflicts*, 1982, pp. 696-697, and the ICRC *Commentary*, p. 1479: paras. 4884, 4885.

act of assistance to one side to the conflict only need not violate the principle of humanity, any more than it does those of impartiality or neutrality.

If the Committee finds this solution unacceptable nonetheless, there remains the other way out, which is to disregard the government's refusal. This may go against its policy of co-operation with all governments, good or bad. However, it is only a policy, not a sacred principle; and even if it were, it must be remembered that *Jede Konsequenz führt zum Teufel*: any attempt to maintain absolute consistency leads to the devil. Put differently, for an institution like the Committee to operate in a political environment as chaotic and corrupt as the international community requires a readiness to accept compromise if, and to the extent that, principle cannot be upheld.

As opposed to the straight road of principle, the path of compromise is tortuous and full of pitfalls. To mention only one: the powers that be are as likely as their opponents in an internal armed conflict to exploit the situation to their political advantage, and they may be very ingenious in turning a purely humanitarian action into an ostensible political act. In such circumstances, the decision whether to continue or discontinue the action may become agonizingly difficult to take.<sup>35</sup>

Be that as it may, the difficulties attending the Committee's policy of respecting governmental authority to the utmost may have contributed more than anything else to its sometimes apparent disapproval of National Societies becoming too active in bringing assistance to the victims of internal armed conflict. An obvious exception is the National Society located in the country at war: as already recognized in 1921, the latter may be particularly well suited to take part in such activity. Thus, the Uganda Red Cross Society played a crucial role throughout a seemingly endless period of internal conflict, and the same is true of the Lebanese Red Cross: without their unfailing and at times extremely courageous endeavours, the International Committee could not have functioned as it did.<sup>36</sup>

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<sup>35</sup> See Rufin, Jean-Christophe, *Le piège — Quand l'aide humanitaire remplace la guerre*, Lattès, Paris, 1986.

<sup>36</sup> Information about events in Uganda was provided by Tom W. Buruku, Head of the Africa Department of the League of Red Cross and Red Crescent Societies and former Secretary General of the Uganda Red Cross Society; as for Lebanon, the reader may be referred to the periodic reports in the media. Obviously, this may work both ways; thus, in the Lebanon, the ICRC helped the Lebanese Red Cross survive.



An instance of assistance by a National Society located elsewhere than in the country at war is the food airlift operated by the French Red Cross from Libreville into Biafra, that is, to the separatist party to the civil war in Nigeria. The French Red Cross engaged in this activity without the consent of the government in Lagos, at a time when the Committee was for all practical purposes precluded from bringing aid to that part of the country.<sup>37</sup> In doing so, the French Red Cross did not help the Committee in its efforts to obtain from the authorities concerned the necessary consent to resume the despatch of relief into Biafran territory. The French action was, moreover, regarded with some suspicion because the airfield at Libreville was also used for the shipment of weapons. Yet the point deserves to be emphasized that while the independent action by the French Red Cross may have been regarded with a bleak eye, it was never denounced as a violation of Red Cross principles. After all, the French action came at a time when public opinion in Europe and elsewhere was raising its voice in protest against the policy of starvation as a method of warfare, as applied by the Nigerian Government against part of its own population.

Quite recently, in 1986, the Committee submitted to the Twenty-fifth International Conference of the Red Cross a Guide for National Societies that explicitly acknowledges their role in situations of conflict.<sup>38</sup> As regards internal armed conflict, the document attributes a particular function to the Society of the country concerned; it identifies the many difficulties it may encounter and emphasizes the need for it "to retain its freedom of movement throughout the country, subject only to the military situation"<sup>39</sup>—words strongly reminiscent of the language used in 1921 by the Tenth International Conference<sup>40</sup>. Yet the text does not stop at that: it also goes into the position of National Societies of countries not parties to an internal armed conflict. On this score, it explains that in spite of the silence in the relevant treaty provisions:

*there is nothing to prevent humanitarian activities and Protocol II provides for relief actions of an exclusively humanitarian and impartial nature conducted without any adverse distinction to be undertaken for*

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<sup>37</sup> As regards the role of the French Red Cross in relation to Biafra see Jacobs, Dan, *The Brutality of Nations*. Knopf, New York, 1987.

<sup>38</sup> *Guide for National Red Cross and Red Crescent Societies to Activities in the event of Conflict*, document drawn up by the International Committee of the Red Cross Geneva, October 1986.

<sup>39</sup> *Ibid.*, p. 34.

<sup>40</sup> *Supra*, note 22.

*the civilian population, subject to the consent of the authorities concerned. A National Society can therefore offer aid to the victims of an internal conflict.*

Having said that, the Committee hastens to add that "In practice... [the National Societies] generally work in close co-operation with the ICRC, whose assistance is an additional guarantee of the neutrality and humanitarian nature of the relief activities".<sup>41</sup> Just so; but the fact remains that in the quoted paragraph the Committee unreservedly recognises the right of National Societies to "offer aid to the victims of an internal conflict"; it does not specify that the offer should always extend to both sides, and it leaves open the question of who are the "authorities concerned" whose consent is required.

I do not believe that as a result of the new Guide National Societies of countries not involved in an ongoing internal armed conflict will soon be developing independent humanitarian activities on a grand scale in favour of the victims. Nor do I particularly advocate such a market shift in policy: a multiplicity of unco-ordinated relief efforts tends to affect efficacy and is therefore undesirable in any disaster situation, let alone in the intractable mess an internal armed conflict usually creates.<sup>42</sup>

Another matter is that the statement in the Guide that "there is nothing to prevent" relief activities being undertaken by National Societies of countries not involved in an internal armed conflict, while legally correct, may strike the reader as somewhat defeatist from a practical point of view. One wonders whether from that point of view the potential contributions of such Societies might not deserve a more positive approach. Pursuing this line of thought, I venture to suggest that the Committee might welcome or even actively seek the regular co-operation of interested National Societies in its field work in conflict situations. It might do this, more specifically, in the many cases of internal armed conflict (including the mixed, part-internal part-international variety) as well as in the nowadays relatively rare event of purely inter-State armed conflict.

I am thinking not so much of the Committee's general task of "protection and assistance", with its complex features of diplomacy, negotiation and representation at all levels. What I have in mind is, rather, participation in specific relief activities: setting up and running

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<sup>41</sup> *Op. cit.*, note 38, p. 55.

<sup>42</sup> See, Kalshoven Frits, *Assisting the Victims of Armed Conflict and Other Disasters*, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1989.

emergency hospitals for the wounded and sick of all categories, organizing centres for the distribution of food and other vital supplies to the thousands of displaced persons who have fled the scene of the fighting, and so on. Many National Societies have, through their peacetime disaster relief activities, built up quite a bit of expertise in these matters, and this may make them extremely useful here. Needless to say, the modalities of such co-operation would have to be carefully worked out in every single instance, as they are in the relatively few instances where it can already be seen at work (as in Angola, where the Swedish Red Cross has for some time been operating an orthopaedic workshop in Luanda and a similar activity by the Netherlands Red Cross has started more recently).

While I am making this suggestion entirely on my own account and without prior consultation with any National Society, I may add that, in my view, such a policy might have three significant positive effects: it could relieve the Committee of some of its burden, offer National Societies an opportunity to actively (and not merely financially) contribute to the alleviation of human suffering in an area that is very much on the public mind, and, last but not least, enhance and improve relations between the Committee and the National Societies. The situation would be even further improved if the Committee were prepared to publicly acknowledge these contributions by National Societies, for instance, by regularly reporting them in its monthly *Bulletin*, alongside its own activities.

If such systematic co-operation between the Committee and National Societies could be achieved for the great many more or less "normal" wartime relief activities, the latter could be expected to reserve their inclination to "go it alone" for the really exceptional situations of the Biafra type, where one belligerent's policy of starvation as a method of warfare thwarts the endeavours of the Committee to bring relief to all the victims and entails a degree of human suffering which the international public conscience is not prepared to tolerate. I am convinced that in such extreme situations the Committee would not protest such independent actions too loudly, even if they only benefit the victims on the side to which it is being refused access.

Traumatic crisis situations of the Biafra type have led not only to much public outcry, but also to the emergence of new voluntary aid agencies such as *Médecins sans frontières* and *Médecins du Monde*. These agencies sometimes claim that the human right of the victims to receive humanitarian assistance implies a right for the agencies to give such assistance, including the right to enter a country involved in armed

conflict without the consent of the governmental authorities. Practice shows that in particular the latter part of the claim may involve them in serious difficulties, and prior consent may be an invaluable asset for a successful operation.

Obviously, everything depends here on the situation: if in a country involved in internal armed conflict, the incumbent government exerts no more than nominal sovereignty over the part of the territory where the agency wishes to bring its aid, and if for the moment that relief action is the agency's only concern, it may fairly safely pass over the formality of acquiring prior governmental consent. In the majority of less evident cases, however, an open application for admission appears to be the wiser course.

There is also a growing awareness that while overt sympathy with the cause for which an insurgent movement is fighting may raise political or financial support at home, it does not necessarily help and may actually impede the accomplishment of the mission in the field. The lesson is, in other words, that impartiality and neutrality are valuable principles, not only for the Red Cross but for all those who wish to engage in humanitarian activities.

### Frits Kalshoven

**Frits Kalshoven** is a retired professor of international law, and of international humanitarian law in particular ("Red Cross Chair"), of the University of Leiden. He currently is an adviser on international legal affairs to the Netherlands Red Cross Society. His publications include: *Belligerent Reprisals*, thesis, Leiden (1971); *The Law of Warfare* (1973); a series of articles on "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", in *Neth. YIL* (1971-1978); "Arms, Armaments and International Law", in the Hague Academy *Recueil des Cours* 1985-II; *Constraints on the Waging of War* (1987); *Assisting the Victims of Armed Conflict and other disasters* (ed., 1989); *Implementation of International Humanitarian Law* (ed. with Sandoz, Yves, 1989). In 1971, he received the Royal Shell Award for his work in the domain of humanitarian law and in 1973 the Ciardi Award of the International Society for Military Law and the Law of War for his thesis. The above text represents his farewell address delivered on 3 February 1989 in the University of Leiden.