OTHER INTERNATIONAL ISSUES

THE ICRC: AN ALIBI FOR SWISS NEUTRALITY?

Refraining from participation and abstaining from interference can be for various reasons: it may be a question of self-preservation and self-assertion, of the judgment that good and bad, true and false are to be found on both sides, of holding back in the interests of a higher purpose or a special task. Neutrality may however have its origin in indifference, fear and cowardice. Neutrality in itself is therefore not a virtue.

I. INTRODUCTION

This Note recognizes at the outset that the foreign policy of neutrality has been seriously questioned, and at times, severely criticized. It acknowledges the concern that despite its valid legal stature, the moral basis for a policy of neutrality is far from clear. In the contemporary world setting, where states are required to answer for past transgressions, including inaction, history can be a harsh judge of neutral powers. It has become clear that at any given moment, a state’s foreign policy must have both legal and moral justification.

These requirements pose special problems for Switzerland, both because of its status as a neutral and because of recent class action lawsuits against the Swiss government and private Swiss banks for their conduct during the Second World War. Both the Swiss gov-

4. Reports on recovering holocaust assets prepared by Stuart E. Eizenstat, Undersecretary of Commerce for International Trade and Special Envoy of the Department of State on Property Restitution in Central and Eastern Europe, and other key documents involved in the
ernment and the banks adopted a highly legalistic defense, suggesting that moral considerations are not relevant in establishing liability. This legalistic approach offended the plaintiffs, descendants of Holocaust victims organized through Jewish-American organizations and represented by New York attorney Ed Fagan. The plaintiffs asserted that the legal “neutrality” defense was merely an excuse for otherwise unacceptable behavior. This expression of outrage is compelling evidence that if neutrality is to remain a viable foreign policy, it clearly needs solid moral ground to stand on.

This Note examines the validity of a possible moral justification for Switzerland’s continuing foreign policy of neutrality. It analyzes the argument that Swiss neutrality is an essential element allowing for the promotion of human rights law through humanitarian efforts. Examples are drawn from the experience of the International Committee of the Red Cross (ICRC), a non-governmental organization (NGO) based in Geneva which itself has a long-standing practice of neutrality, and which has a tradition of strong ties with the Swiss state.

Section II examines the evolution of the concept of neutrality from its inception to the present time. Section III addresses the relationship between human rights law and humanitarian law. Section IV evaluates neutrality’s relationship to human rights and humanitarian law, and the extent to which their interdependence is essential to the fulfillment of common goals. Section IV then considers whether Switzerland’s neutral foreign policy is of sufficient consequence to humanitarian endeavors and the development of human rights law to justify its perpetuation. The Note’s evaluation of the relationship between Swiss neutrality and the effectiveness of the ICRC suggests that while there is an undeniable link between the two, Swiss neutrality is an element neither essential to ensuring the provision of quality humanitarian work, nor to the development of related customary law of human rights.

controversy over Swiss behavior during the Second World War are available via links at [http://www.giussani.com/holocaust-assets/]
II. THE CONCEPT OF NEUTRALITY

A. History of Neutrality

Though limited in scope, the concept of state neutrality was known at the time of Grotius. He identified two rules for neutrals that, to this day, are recognized rules of international law. First, neutrals should neither strengthen the position of a belligerent power with an unjust cause, nor hinder the position of a belligerent with a just cause. A nd second, the warring parties should be treated alike when the cause of the war is in doubt. Neutral status is connected with war in that it is descriptive of states that choose not to participate in war. Oppenheim defines neutrality as “the attitude of impartiality adopted by third States towards belligerents and recognized by belligerents, such attitude creating rights and duties between the impartial States and the belligerents.” Unless expressly stated in a treaty, the decision to remain neutral in time of war is a political decision rather than a legal right or duty.

B. Evolution of Neutrality

The law of neutrality has evolved significantly since its inception. During the eighteenth century, both theory and practice came to recognize a neutral power’s duty to remain impartial and the belligerent’s duty not to violate neutral territory. In the nineteenth century, this emerging tradition was institutionalized with the permanent neutralization of Belgium and Switzerland. Switzerland was the first to declare itself a neutral with its international declaration at the Congress of Vienna on November 20, 1815. This declaration obligated Switzerland to “refrain from unequitable activities,” while requiring

7. See generally HUGO GROTIUS, DU JURE BELLI AC PACIS [OF THE LAW OF WAR AND PEACE] (1715).
9. See id.
10. Id. § 293, at 653.
other states to refrain from interfering with Switzerland’s sovereignty.\textsuperscript{14}

Switzerland’s neutral status was cause for special consideration in the context of the Covenant of the League of Nations. While the Covenant did not abolish neutrality as such (it permitted Members of the League to remain neutral when other Members resorted to war in violation of the Covenant),\textsuperscript{15} Article 16 of the Covenant imposed a binding obligation upon Members to impose economic sanctions under certain circumstances.\textsuperscript{16} However, Switzerland benefited from a special exemption upon admittance to the League, stating that Switzerland “shall not be forced to participate in a military action or to permit the passage of foreign troops, or the preparation of military enterprises upon her territory.”\textsuperscript{17}

Under the Charter of the United Nations, the rights of Members to remain neutral have been dramatically altered. Article 25, which obligates Members to comply with decisions of the Security Council, and Article 2(5), which obligates members to assist the United Nations in any action taken in accordance with the Charter, combine to abolish the right to neutrality when the Security Council commands unanimous action by its Members.\textsuperscript{18} Thus, only abstention from United Nations membership, or the declaration of perpetual or permanent neutrality by treaty, can grant true, autonomous neutrality.

C. Neutrality Today

Some commentators hold that the moral standing of neutrals has declined over time. Josef Kunz writes, “neutrality [is now] looked upon as something immoral, if not criminal.”\textsuperscript{19} The recent international concern regarding the role of the Swiss government and Swiss private institutions during World War II speaks volumes about the changing attitude toward political neutrality.\textsuperscript{20}

\textsuperscript{14} Id.
\textsuperscript{15} Covenant of the League of Nations, art. 16, para. 3 (requiring Members of the League to “mutually support one another in financial and economic measures” taken against warring Members, but not requiring military support).
\textsuperscript{16} See Covenant of the League of Nations art. 16, para. 1.
\textsuperscript{18} See U.N. Charter art. 25; U.N. Charter art. 2, para. 5.
\textsuperscript{20} A detailed analysis and resources concerning Switzerland and the controversy over holocaust assets are available at Switzerland and the Holocaust Assets (visited Apr. 12, 1999) <http://www.giussani.com/holocaust-assets>.
clear that Swiss conduct during World War II (both official and private) was not free of moral reproach, it is far from clear that the Swiss government actually violated international law.  

The change in public opinion towards neutral states can be explained by a number of factors. First, the forces of globalization and the prevalence of news media have contributed to an increased awareness of human rights violations and humanitarian catastrophes. More than that, they have cast light upon the actions and inactions of all states. When the collective conscience of the international community declares a moral obligation to act, it is no longer acceptable for a state, which is capable of taking a stand, to refrain from taking action because it has no strict legal obligation to do so. Second, it may well be true that Switzerland’s original decision to declare itself neutral stemmed from a laudable “ethic of conviction,” in the words of Max Weber. Neutrality was believed to be an end in

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21. For an analysis of official Swiss conduct during World War II under international law, see generally Vagts, supra note 13.  
23. This view is reflected in contemporary Swiss political discourse: “La Suisse ne peut pas définir à un moment donné sa politique de neutralité indépendamment des données internationales et ensuite l’appliquer continuellement. Le monde est l’objet de transformations permanentes. Les modifications apparaissant dans notre entourage et dans l’attitude des autres Etats sur le plan de politique étrangère ont - que nous le voulions ou non - des répercussions sur notre politique de neutralité . . . . [Celle-ci] doit donc - comme toute action politique - prendre en considération les nouvelles nécessités apparaissant dans un monde en changement . . . . [N]otre neutralité doit être maintenue dans la mesure où elle contribue mieux que d’autres concepts à la réalisation de nos valeurs et de nos objectifs fondamentaux.” [Switzerland cannot define at a given moment its policy of neutrality independently of international realities, and apply it continually. The world is subject to permanent transformations. The modifications appearing in our environment and in the attitude of other states in the realm of foreign policy have whether we like it or not—repercussions on our policy of neutrality . . . . It must therefore, like all political action, take into account the new necessities appearing in a changing world . . . . Our neutrality must be maintained to the extent that it contributes better than other concepts to the realization of our values and our fundamental objectives.] Parti Radical-démocratique, Neutralité: Prise de position [Communication from the Swiss Radical-Democratic Party] (last modified May 25, 1998), <http://www.prd.ch/prd/pap_pos/neutralite.html> (translation by author).  
24. “[Max] Weber’s Weltanschauung was based on the conviction that it was impossible, objectively, rationally, and scientifically, to pass judgment on the value of a fact, theory, or mode of behavior; on the contrary, the individual must autonomously choose between alternatives. This is especially true of ethical decisions, wherein an ethic of absolute value is opposed to an ethic of responsibility . . . . The latter ethic bases action upon responsibility to a group, such as the family, the state, the church or the party; therefore, whoever decides and acts according to this ethic assumes the obligation, if occasion arises, or sacrificing his own integrity and—in religious sense—thus becomes a sinner.” PAUL HONIGSHEIM, ON MAX WEBER 113-14 (1968).
itself, an absolute value which a nation could strive to attain and maintain. In today's interconnected society, individuals have access to a wealth of information, allowing them to become familiar with, and pass judgment on the actions of global players. Whereas the world of realpolitik called for political absolutes, the current "universal awareness" calls for an "ethic of responsibility." The neutral state, like any other, is required to be responsive to victims of human rights abuses, or else it will be obligated to justify its failure to take action.

Some contemporary commentators suggest there is no room for neutrality in this current ethical setting. William Galston takes the following view:

Thinkers such as John Rawls, Ronald Dworkin, Bruce Ackerman, and Charles Larmore insist that the state must be "neutral" toward all individual conceptions of the good life. There are at least three reasons why the neutrality thesis cannot be sustained. First, it represents a deep misunderstanding of the Lockean argument, which embodies, and requires, consensus concerning the substance and importance of key secular goods such as the minimization of violent conflict. Liberal neutrality toward competing accounts of salvation thus cannot be extended straightforwardly to competing conceptions of the good. Second, it cannot be squared with the reality of liberal politics, which can hardly take a step without appealing to some understanding of the good. Finally, the thesis fails in its own terms: Each of its proponents tacitly relies on a more than formal and more than instrumental conception of the good to move his argument forward.

If the "good life" includes respect for human rights, Galston's argument makes intuitive sense. It is important not to confuse philosophical notions with legal definitions of neutrality. However, if neutral legal status is to have a moral purpose, political philosophy provides insight. Belief in human rights may not be morally consistent with a neutral foreign policy that does not allow for action to be taken in the event of human rights violations. The following sections demonstrate how neutral status can promote the defense of international human rights indirectly, through the implementation of humanitarian intervention.

25. Id.
D. The Continued Viability of Neutrality

In addition to the strong incompatibility between neutrality and membership in the United Nations, neutrality may not subsist outside of the United Nations either.27 According to this argument, the obligations of neutral powers under the Hague Conventions conflict with their obligations under the Charter, and Charter obligations prevail pursuant to Article 103 thereof.28 Thus, should the Security Council deem that measures must be taken to ensure international peace and security, and should these measures involve, for example, a violation of neutral airspace, Member States will have no choice but to violate traditional principles of neutrality.29

This argument is refuted by the four Geneva Conventions of August 12, 1949, which make many references to neutral powers and assign important roles to them.30 The signatories to the Geneva Conventions were, in large part, U.N. Members.31 Thus, although traditional notions of neutrality may be incompatible with the U.N. Charter, the Charter itself is not sufficient to deny the legitimacy of political neutrality. Signatories to the Conventions consented to the continued existence of neutral nations and the role of neutrals in time of conflict.32
After World War II, the Swiss government stated its position on the issue of neutrality. It understood the concept as a permanent status, conferring duties upon the nation in peacetime. In addition, the Swiss government recognized that in time of war, the rights and obligations of permanent neutrals are identical to those of ad hoc neutrals. This policy demonstrates Switzerland’s intent to be bound by traditional principles of neutrality despite the collective action requirements of the Charter. Further indication of the continued existence of political neutrality is evidenced by the fact that Austria and Laos have both declared their permanent neutral status since the U.N. was established (in 1954 and 1962, respectively).

The most recent challenge to Swiss neutrality occurred in 1990 during the Gulf War. As a result of Security Council Resolution 661, “all States” were asked to impose economic sanctions on Iraq, the aggressor state. The Swiss Federal Council complied with this request, finding it not incompatible with Switzerland’s status as a permanent neutral. The Council justified its decision by stating that “[neutrality] does not impose on the neutral State the obligation to maintain economic relations with a party involved in a conflict . . . . [I]mplementation [of a State’s policy of neutrality] should be left to its discretion.” Future international crises will most likely continue to call into question the purposes of a policy of neutrality. Only if


34. This is in accordance with the 1907 Hague Conventions. See Convention Respecting the Rights and Duties of Neutral Powers in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540; Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545.


38. Id.

39. Questions concerning Switzerland’s initially pro-NATO stance during the Kosovo crisis provide fuller evidence that this issue is not resolved. D.S. Mélville, Offrir des bons offices au nom de la neutralité, ce serait paver d’or la voie de l’Alléngang, L E TEMPS, 1 A pr. 1999, available at <http://www.letemps.ch/archive/1999/04/01/suisse_1.htm> (visited Apr. 11, 1999).
neutrality can be proven to serve the greater international good, will Switzerland be able to justify its continued existence as a neutral.

III. HUMAN RIGHTS LAW AND HUMANITARIAN LAW

The proposition under scrutiny is that Swiss neutrality contributes to the creation of customary international law of human rights by facilitating humanitarian action. In order to understand this chain of events, it is necessary to examine briefly the relationship between international law and humanitarian law, in particular, the role of humanitarian law in promoting awareness and respect for human rights.

A. Evolution

If international law were divided into its two traditional components, the law of peace and the law of war, human rights law would undoubtedly fall within the umbra of the law of peace, while humanitarian law would be included in the law of war. This is due to the historical roots of each discipline; while humanitarian law developed out of international agreements during wartime, human rights law arose in the form of domestic constitutional guarantees. The law of war is substantially older than human rights law, which did not become recognized at the international level until after World War II. The atrocities committed during World War II focused worldwide attention on the need to institutionalize international human rights instruments that form today’s human rights guarantees. The effect of war on the development of human rights law is an indication of the latter’s relationship to humanitarian law.

42. See id.
43. See id.
Only recently have international guarantees of human rights included provisions ensuring their respect in times of armed conflict.\textsuperscript{45} The proliferation of armed conflict, often internal in nature, has necessitated international legal safeguards.\textsuperscript{46} Conflicts in recent decades, including those in Nigeria-Biafra, Vietnam, South Asia, and Bosnia-Herzegovina, have highlighted an important link between humanitarian and human rights law. In each conflict, self-determination, a guaranteed human right, was being fought for. The quest for self-determination led to the request for recognition as a party to an international armed conflict--an aspect of humanitarian law.\textsuperscript{47}

Human rights law has greatly influenced humanitarian law, while the converse is not the case.\textsuperscript{48} The Geneva Conventions were drafted in the year following the Universal Declaration of Human Rights and bear traces of its language.\textsuperscript{49} For example, the Geneva Conventions mention the rights of protected persons rather than those of contracting parties.\textsuperscript{50} The two Protocols Additional to the Geneva Conventions (opened for signature in 1977) make express reference to human rights.\textsuperscript{51} Article 75 of Protocol I and Article 6 of Protocol II are derived from the International Covenant on Civil and Political Rights. The Preamble to Protocol II refers to "international instruments relating to human rights [that] offer a basic protection to the human person."\textsuperscript{52} Some have argued that without the momentum of the international human rights movement, the 1977 Protocols would not exist today.\textsuperscript{53}

\begin{itemize}
  \item \textsuperscript{46} See Draft Statute for the International Criminal Court, June 17, 1998, at 11.
  \item \textsuperscript{47} See Schindler, supra note 41, at 935.
  \item \textsuperscript{48} See id. at 937.
  \item \textsuperscript{49} See, e.g., Convention on the Protection of Civil Persons in Times of War, supra note 30.
  \item \textsuperscript{50} See id.
  \item \textsuperscript{52} Id.; see also Schindler, supra note 41, at 937-38.
  \item \textsuperscript{53} See Schindler, supra note 41, at 937-38.
\end{itemize}
B. Common Objectives, Different Uses

While human rights law applies both in peacetime and in armed conflict, humanitarian law is designed only for the latter. However, the human rights conventions allow states to derogate their human rights obligations in times of war or emergency.\(^{54}\) This substantially reduces the extent to which human rights and humanitarian law overlap, because states are likely to take advantage of their derogation rights during crises.

The critical area of overlap occurs in the area of internal (non-international) armed conflict. The humanitarian law provisions governing internal armed conflicts are Article 3, common to all four Geneva Conventions, and Additional Protocol II.\(^{55}\) It is precisely in these conflicts, where the most and the worst human rights violations are likely to occur, that human rights law and humanitarian law mesh. In an internal armed conflict, “the dispositive question for the individuals concerned will be which of the two sets of conventions will guarantee more rights and which will have a better mechanism to enforce those rights.”\(^{56}\)

Humanitarian law instruments are specially designed for armed conflict situations. Their aim is to secure the right of personal liberty and to prevent inhumane treatment of civilians, injured soldiers, and prisoners of war.\(^{57}\) Prisoners of war are better protected under humanitarian law than human rights law because humanitarian law is directly binding on the actors in conflict.\(^{58}\) In contrast, human rights law is premised on the notion that rights-bearing individuals will not be stripped of those rights and will therefore be in a position to defend them.\(^{59}\)

\(^{54}\) See, e.g., The International Covenant on Civil and Political Rights, supra note 44, art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 44, art. 15; The American Convention on Human Rights, supra note 44, art. 27.

\(^{55}\) See Geneva Conventions of 1949, supra note 30, art. 3; Protocols, supra note 51, Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts).

\(^{56}\) Schindler, supra note 41, at 939.

\(^{57}\) See Geneva Conventions of 1949, supra note 30. The fourth Convention protects civilians during times of war. The second Convention is designed for the amelioration of the condition of wounded and sick soldiers in the field. And the third Convention establishes rules for the treatment of prisoners of war.

\(^{58}\) See id.

\(^{59}\) See Schindler, supra note 41, at 939 (explaining that “human rights primarily concern relations between states and their own nationals, an area traditionally regarded as a domestic matter”). The assumption is that the sovereign state’s judicial system will provide mechanisms for the defense of individual rights.
Human rights instruments create an individual right of action for aggrieved individuals. The international human rights conventions allow individuals to bring judicial proceedings in the appropriate venue, whether the European Court of Human Rights or domestic courts. The focus of human rights law is to guarantee the existence of rights that can be defended and vindicated. Human rights law is not concerned with the manner in which this is accomplished.

Humanitarian law, on the other hand, is concerned with aiding those who cannot help themselves. As such, the ICRC is empowered by the Geneva Conventions and the 1977 Protocols to oversee and ensure compliance with these instruments. While the parties are bound to allow ICRC delegates to privately visit prisoners of war in instances of international conflict, they are not legally bound to do so in cases of internal conflict. In these cases, the ICRC still offers its services, but may be rejected by the belligerent state. Due to its neutral stature, the ICRC is not perceived as an agent of anything but the humanitarian cause. The extent to which Swiss national neutrality affects ICRC neutrality is examined in the next section.

C. Humanitarian Action as a Pillar of Human Rights Awareness

Humanitarian intervention promotes respect for human rights in two ways. First, in instances of conflict, it provides an enforcement mechanism for rights that are common to human rights law and humanitarian law. This stems from the fact that human rights instruments allow states to deviate from their obligations in times of crisis, precisely when the most egregious human rights violations are likely to occur. Second, humanitarian intervention is an expression of international sentiment against the actions of a given regime. The


61. See id.

62. Hans-Peter Gasser, International Humanitarian Law and the Protection of War Victims, Why do we Need International Humanitarian Law? (last modified Nov. 1, 1998) <http://www.icrc.org/unicic/icrcnews.nsf/5845147e4e6b36399c12af5170044a447/1ac0308be0f68b2142152061e300360910#1> (noting "there is a need for international rules which limit the effects of war on people and property, and which protect certain particularly vulnerable groups of persons. That is the goal of international humanitarian law").

63. See Geneva Conventions, supra note 30, pmbl. (stating "[a]n impartial humanitarian body such as the International Committee of the Red Cross may offer its services to the Parties to the conflict").

mere presence of an ICRC humanitarian delegation in a conflict area signals that human rights violations most likely have been committed by one or more of the parties. Such action helps to highlight practices which are deemed unacceptable by the international community. This, in turn, aids in the creation of customary international law of human rights, particularly in the “gaps” which are not covered by treaty law.65

The work of humanitarian actors and human rights activists is anchored, first and foremost, in the principle of humanity.66 All relevant instruments, whether the UN Charter, the Universal Declaration of Human Rights, or the Geneva Conventions, stem from considerations of humanity.67 The primacy of principles of humanity has been affirmed by the International Court of Justice (ICJ) in both peace and war.68 Today, the extent human rights law is recognized as customary remains unclear. The following enjoy jus cogens status: the “hard core” of non-derogable human rights outlined in Article 4 of the International Covenant on Civil and Political Rights and in common Article 3 of the Geneva Conventions.69 The law of the Hague prohibiting attacks on civilians during armed conflicts, as well as the obligation to provide due judicial process and humane treatment to prisoners is similarly considered to be jus cogens.70 The ICJ deemed the provisions of common Article 3 to be “fundamental general principles of law” in the Nicaragua v. U.S. case.71

D. Internal Conflicts and Customary International Law

Given the complex nature of internal conflicts, characterizing international law as customary is essential for justifying international or non-governmental humanitarian intervention. The extent to which second and third generation human rights are recognized as custom-
ary law depends on states’ expressions and actions to that effect, indicating consent. The humanitarian endeavors of the ICRC, particularly when they are “offered” to the parties in conflict rather than imposed by law, help identify practices that the international community will not tolerate, thereby rendering the practices in violation of generally accepted notions of human rights. Because human rights instruments have been ratified by far fewer states than the number that ratified the Geneva Conventions, the human rights instruments are less authoritative in their expression of customary law than the Conventions.

This process of forming customary human rights law through humanitarian activity is exemplified in the activities of the ICRC. Since 1949, the ICRC routinely has issued appeals to specific governments to respect the Geneva Conventions whenever it learns of probable violations. Other third parties, including many state governments, have followed suit. While the 1977 Additional Protocols currently do not entirely reflect customary law, they may be in the process of becoming requisite peremptory norms for human rights purposes. The “basic core of human rights [contained in Protocol II has] already been recognized as customary in human rights instruments and should also be considered as such when stated in instruments of humanitarian law.”

The development of further customary human rights law will depend on opinio juris and upon the continued application and observance of the human rights components of the Protocols. The prevalence of opinio juris is itself dependent on repetitio facti: rulings based on the invocation of humanitarian and human rights instruments are influenced by the existence of judicial opinions invoking the same instruments. By providing the impetus for application and observance of these instruments, the ICRC contributes to the formation of customary law: “the invariable sequence of events has seen an ad hoc ac-

72. See Meron, supra note 67, at 79.
73. See id. at 29.
75. See Meron, supra note 67, at 73; see also Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 1341 (Yves Sandoz et al. eds., 1987). This assertion finds support in the ICRC Commentary on Protocol II, which states that “Protocol II contains virtually all the irreducible rights of the Covenant on Civil and Political Rights . . . . These rights are based on rules of universal validity to which States can be held, even in the absence of any treaty obligation or any explicit commitment on their part.”
tion of the ICRC develop into a general practice that later achieved the status of a customary norm in international law and was finally codified by treaties and conventions.\textsuperscript{76} Given the nature of the ICRC’s work and the necessity that it remain impartial, its actions often serve as an indication of whether international norms are being respected in a given conflict. When challenged by uncooperative governments, the ICRC may publicly threaten to withdraw its personnel and operations, thereby bringing to international attention the likelihood that gross abuses of human rights are being concealed.\textsuperscript{77} Such action can prompt third states to officially announce their position regarding the situation and sometimes leads to multilateral U.N. action.\textsuperscript{78}

Finally, the ICRC promotes human rights law through its ability to provide services during internal disturbances and other situations of internal violence. As ICRC President Cornelio Sommaruga explained:

\begin{quote}
The ICRC’s activities in situations which are not within the purview of humanitarian law may undoubtedly be seen as safeguarding some human rights held to be fundamental . . . . \textsuperscript{79} In its contacts with authorities, the ICRC bases its arguments on the principle of humanity, although the occasional reference to human rights instruments is not ruled out.
\end{quote}

Thus, humanitarian law and human rights law are tightly interwoven. Humanitarian considerations and actions contribute to the ongoing development of human rights law and the general acceptance of peremptory norms resulting therefrom. The repeated invocation of humanitarian and human rights law instruments by the ICRC represents a significant portion of the repetitio facti critical to the formation of customary international law.

\textsuperscript{76} J.D. Armstrong, The International Committee of the Red Cross and Political Prisoners, 39 INT’L ORG. 615, 621 (1985).


\textsuperscript{78} Crises where the ICRC halted operations and removed its personnel in protest include South Vietnam, Portuguese Mozambique, South Africa, and El Salvador. See David Forsythe, Human Rights and the International Committee of the Red Cross, 12 HUM. RTS. Q. 265, 275 (1990).

IV. HOW ESSENTIAL IS SWISS NEUTRALITY?

Given the ICRC’s ability to create customary international law through its actions in internal conflicts, this section addresses the extent to which Switzerland’s neutrality is essential to such intervention. Without Swiss neutrality, would the ICRC be perceived as less than neutral, thus limiting its ability to fulfill its humanitarian mission and develop human rights law?

A. Two Neutralities and Independence

ICRC President Cornelio Sommaruga recently declared that the world needs an International Committee of the Red Cross such as it is: neutral, independent, mono-national and Swiss. Without Swiss conviction to neutrality, the ICRC’s sacred impartiality would be compromised, impairing the execution of its mandate. Swiss conviction to neutrality is so strong that the Federal Council’s rhetoric has been modified in recent years to attempt to use neutrality as an instrument of “active” foreign policy.

The neutrality of the ICRC must be distinguished from the neutrality of the Swiss state. As noted in Section II, a state’s neutrality is a means to ensure security, and carries with it the obligations of non-participation in hostilities and impartiality among warring parties. In return, belligerents must not violate a neutral state’s territory. Be-

81. See Stephan Kux, Europe’s Neutral States: Partners or Profiteers in Western Security? 16 (1986) (explaining that “[a]n attitude of solidarity and availability has its roots in the century-old Swiss tradition of humanitarian activity and philanthropic thought that has found its most visible modern reflection in the work of the Swiss-sponsored [ICRC], whose emblem - a red cross on a white background - is the reverse of Switzerland’s national colours. The ICRC would almost certainly be unable to function if it could not rely on the international reputation of Swiss neutrality”); see also Daniel Frei, La politique étrangère de la Suisse 32 (Pro Helvetia ed., 1987). “[Le CICR] est intrinsèquement suisse par le strict souci d’impartialité et de neutralité qui caractérise [son] activité; en fait, le CICR ne serait pas à même de remplir sa mission s’il ne pouvait s’appuyer sur la neutralité perpétuelle de la Suisse.” [The ICRC is intrinsically Swiss by the strict concern of impartiality and of neutrality which characterizes its activity; in fact, the ICRC would not be able to fulfill its mission if it could not depend on the perpetual neutrality of Switzerland.] (translation by author).
82. See Switzerland: General Information, Swiss Neutrality, (last modified Apr. 23, 1998) <www.swissemb.org/egal/html/neutrality.html> (stating that “[c]ontrary to the rights and duties laid down in The Hague Convention, the policy of neutrality is a flexible concept defined by the neutral state itself. The evolution of the world’s affairs thus require a constant adaptation of the policy of neutrality, which will tend to be more restrictive in times of international tension. In this way, neutrality can best serve its purposes as a means of Switzerland’s foreign policy.”).
83. See Oppenheim, supra note 8, § 288, at 626-27.
cause ICRC neutrality is a necessary condition precedent to the exercise of its duties, it has a very material “active” component. Neutrality is one of the ICRC’s core operational principles, together with independence and impartiality. In practical terms, this means that ICRC officials may not express political opinions or otherwise take a stance on political issues. The ICRC strongly believes that if it were to stray from a policy of neutrality, its ability to carry out its mandate would be damaged: “neutrality is quite simply the only possible way of preserving the necessary scope for humanitarian action.” In contrast with Swiss neutrality, ICRC neutrality is empowering. It is the very means by which the organization’s delegates are granted access to war zones and detention centers.

Independence, another core ICRC principle, must be considered to understand the link between ICRC and Swiss neutrality. The ICRC is adamant that credible independence is crucial to its ability to operate effectively. Safeguarding this independent status “involves withstanding the attempts of donor nation governments to gain influence and the greater or lesser pressure exerted by the parties to an armed conflict, in order to be able to work according to exclusively humanitarian criteria.” A potential conflict of interest arises from the fact that the ICRC is funded by voluntary contributions from the states party to the Geneva Conventions, supranational organizations (such as the European Union), the National Red Cross and Red Crescent Societies as well as other public and private sources. While the ICRC claims that “major efforts are constantly being made to broaden the donor base,” certain contributors stand out. Switzerland is the second largest government donor, providing nearly CHF 83m of the CHF 450m total government contributions for 1996. When local Swiss public contributions and private donations are included, Swiss payments total about a fifth of the entire ICRC

85. See id. at 379.
86. Id.
88. See Sommaruga, supra note 80, at 377.
90. Id.
budget, making the Swiss the largest donors by far on a per capita ba-
sis.  

The important Swiss dimension in ICRC affairs does not end there. Sommaruga insists that the independence of the ICRC is maintained by “its own structure, its mononational composition and the system used to designate its members.” This system involves “the cooptation of Swiss citizens for a period of four years, by secret ballot and a two-thirds majority.” It is believed that this will lead to entirely impartial management because external pressure is avoided, and members voluntarily accept the public commitment. The fact that all of the members are Swiss is perceived as a advantage in ensuring neutrality.

They are all of the same nationality, thus precluding any State influence on the Committee’s decisions through different national allegiances. Moreover, they are all Swiss, but they all have an international outlook, as they have accepted their posts with full knowledge of what is involved, to carry out the ICRC’s specific mission . . . .

Sommaruga goes even further, praising the merits of this single nationality by contending that this state of affairs obliges the ICRC members to “act as citizens of the world” and to “set aside as much as possible of their own social and cultural context” in performing their duties.

Thus there is an undeniable link between Switzerland and the ICRC, reflected both by the funding and by the management of the organization. It is not clear from the president’s comments exactly how or why such a mononational structure contributes to greater overall neutrality. While vested interests will not arise through different national allegiances, one State and its nationals are nevertheless in complete control of the manner in which the organization conducts its activities. All of this suggests that Swiss neutrality may be more significant than one might initially believe.

This question is likely to become increasingly relevant in the years to come. Despite the traditional links between Switzerland and the ICRC, the latter has suggested that increased independence from

92. See id.
93. Sommaruga, supra note 87, at 270.
94. Id. at 270.
95. Id. at 269-70.
96. Id. at 270.
Switzerland is desirable. During the Gulf War, the Federal Council opted to apply economic sanctions against Iraq independently of U.N. Security Council resolutions. Fearing this would compromise the impartiality of the ICRC delegates in Iraq, the ICRC redefined its legal status. On March 19, 1993, by creating an agreement with the Swiss government that declared the ICRC to be an international organization, not a Swiss entity. Since signing the agreement, the ICRC has taken a more active role in cooperation with other U.N. agency initiatives, but in doing so, it has reaffirmed its own neutral status and impartiality.

B. The Gulf War

The Gulf War is the only example to date providing an indication of how ICRC activities will be perceived in the absence of concurrent Swiss neutrality. It is the only conflict where the humanitarian organization and the government took different stances. In the last two years, the Swiss Federal Council found both the presidency of the OSCE and participation in NATO’s Partnership for Peace compatible with its policy of neutrality. Some have declared this to be evidence of yet another nail in neutrality’s coffin, suggesting that it is nonsensical for Switzerland to pretend to be neutral while it is a member of a military alliance. Switzerland’s current stance will create more situations where the ICRC and the Swiss government differ in their policy toward armed conflicts. The ICRC must continue to maintain its neutrality despite its association with the Swiss state (if only by the very symbol of the Red Cross, an inverted Swiss flag).

What can be inferred from the differing policies toward Iraq? The ICRC claimed a positive outcome resulting from publicly announcing its independence from the Swiss state. Sommaruga made the following comment:

97. Id. at 269.
98. Id.
100. See id.
102. See id.
[T]he Iraqis no doubt questioned the ICRC’s presence and the impartiality of its operations. They rediscovered the Committee’s independence and neutrality (known to them in fact since the Iran-Iraq war, if not before) when, beginning in early February 1991, the ICRC played a role essential for its humanitarian operations: providing a liaison with the governments and armed forces of the parties to the conflict and of neutral countries, as well as with international organizations.  

In this case, the ICRC benefited from the reputation it has built over the years for actions consistent with a policy of true neutrality. While the “presumption of neutrality” might be enhanced by an equally neutral official Swiss policy, it appears that in the Gulf War the ICRC’s mere assurance of impartiality was sufficient to allow delegates to perform their duties. This situation will be tested in future conflicts in which the Swiss government opts to take a political stance, or is obligated to do so due to an alliance commitment. In addition, the ICRC’s long-standing tradition of exclusively hiring Swiss personnel to work in the field is changing. Opening up ICRC delegation staffing to other nationalities provides governments with additional reasons to be skeptical of the motives of humanitarian teams allowed into their territory in the absence of a binding legal obligation. The UNSCOM experience in Iraq aptly illustrates the dangers of multinational teams when individual members can be singled out as agents of a particular government.

C. Sufficient Justification?

Is the humanitarian role played by Switzerland sufficient to justify a continued foreign policy of neutrality? The question is complicated by the fact that it is not one of law nor one of fact, but rather one which will ultimately be decided by international public opinion. As noted at the outset, the lack of popularity of a neutral foreign policy is due to the fact that it per se fails the moral basis test. Neutrality is perceived as the failure, unwillingness, or inability to take a moral stance. It is not perceived by the public to be a legitimate stance in itself. Its justification depends, therefore, on whether it

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103. Sommaruga, supra note 87, at 272.
104. See id. at 270 (Sommaruga writes, “I feel it would be advisable for the ICRC to pursue a policy of openness towards other nationalities, whether in the recruitment of headquarters and field staff, for specific projects carried out by National Societies under the auspices of the ICRC, or in seeking high-level international expertise”). Id.
plays a significant and meaningful role in promoting a higher moral purpose. Two factors that confirm the legitimacy of humanitarian endeavors in the public eye are international cooperation on humanitarian efforts and donations to the ICRC by governments. Continued humanitarian intervention in internal conflicts confirms the notion that certain human rights violations are unacceptable and holds perpetrators accountable to the media if not to international legal bodies (the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as the new International Criminal Court).

The contribution made by Swiss neutrality to the ICRC's humanitarian efforts needs to be considerable to warrant the status of justification. If reactions to Swiss conduct during World War II are any indication, the potential positive effects of neutrality tend to be overlooked in favor of highlighting the drawbacks. The relationship between Swiss neutrality and the work of the ICRC suggests that while there is an undeniable link between the two, Swiss neutrality is far from being the most crucial element in ensuring the provision of quality humanitarian work. The ICRC itself stresses independence rather than neutrality as being of primary consequence. Independence allows the ICRC to practice its own neutrality, that which it deems particularly necessary to be perceived as impartial.

Swiss neutrality would be easier to defend if the ICRC had not recently taken steps to distinguish its independence from Switzerland, and if the organization were not so outspoken in drawing the distinction between its own policies and those of the Swiss state. While this is a recent phenomenon, the fact that it did not visibly hinder the ICRC's humanitarian efforts in Iraq during the Gulf War suggests that the organization will continue to seek to define its identity as separate from that of the Swiss state, despite its "mononational" structure. Switzerland's demonstrated willingness to join military alliances and impose economic sanctions along with U.N. member states suggests that ICRC independence from Swit-
zerland is a necessary policy if the organization is to continue its efforts effectively.

Justification for Swiss neutrality may exist on other grounds. Over the years, the Swiss have developed a reputation as effective mediators and arbitrators that goes beyond the scope of humanitarian considerations. With its roots in the work of the likes of Henri Dunant, founder of the ICRC, and the U.S.-British Alabama arbitration, Switzerland continues today to play a mediating role, albeit on a small scale. Switzerland played a role in resolving conflicts between Argentina and Britain after the Falklands War. It has been entrusted to represent the interests of states at war (or suffering from a breakdown in dialogue) before the U.S., Israel, Iran, South Africa, New Zealand and Cuba. And it continues to formally represent the U.S. in Cuba to this day. Thus, Swiss neutrality may still have a moral argument to stand on when examined in the broader scope of such efforts. However, it is difficult to maintain that Swiss neutrality continues to be necessary, if it ever was, in the humanitarian work of the ICRC.

V. CONCLUSION

It is clear that neutrality, previously embraced by global public opinion as an end in itself, is no longer a venerated foreign policy objective. In fact, it is now viewed with a jaundiced eye. From a philosophical standpoint, it is difficult to reconcile neutrality with noble objectives. It cannot be justified as an ethic of conviction. Legalistic arguments, such as incompatibility with United Nations Charter provisions on collective action, are no longer sustainable, and are likely to be perceived as weak excuses for avoiding responsibility. As a result, states seeking a politically neutral status now bear the burden of explaining why inaction is a responsible course of action.

Switzerland, as it continues to pursue a policy of neutrality, has come increasingly under attack for its activities, both official and private, during the Second World War. Absent a coherent justification for its foreign policy, it will continue to be subject to international

111. See id.
112. See id.
113. See id.
114. See id.
criticism. As a possible justification, this Note explored the argument that Swiss neutrality is essential to the promotion of human rights through the chief humanitarian organization it hosts—the International Committee of the Red Cross.

Human rights law and humanitarian law are interconnected in that they both seek to promote respect for humanity, although by different means. Humanitarian law buttresses derogable human rights law provisions during war and conflict, when protection against human rights abuses is needed most. Human rights principles, which are at the origin of the primary texts of humanitarian law, oblige states to abide by certain standards when individuals are not in a position to assert their rights themselves.

Humanitarian intervention promotes respect for human rights by providing an enforcement mechanism for rights common to human rights and humanitarian law. Neutrality is an important element in the second way that humanitarian objectives contribute to furthering awareness and respect for human rights—the expression of international sentiment against human rights violations. The ability of actors such as the ICRC to intervene and minimize human rights abuses in cases of internal conflict is directly correlated to the neutral status of the institution and its agents. This relationship exists because the decision of a government to allow humanitarian workers into its territory is purely elective and is, as of yet, not mandated by international law.\(^{115}\) When the interests of a humanitarian or human rights organization are not believed to be truly neutral, their ability to help is severely hindered. This, in turn, reduces the number of humanitarian interventions in times of conflict, and lessens the repetitio facti which are crucial to establishing new customary international law of human rights. Switzerland’s neutral status allows it to provide nonpartisan funds and staffing to an organization whose actions are slowly establishing both new international law and an international moral climate that will continue to be more critical of human rights abuses, whether they are across borders or within the territorial confines of statehood.

Whether the contribution made to the ICRC’s humanitarian efforts will be enough justification for a continued Swiss policy of neutrality remains uncertain. The pervasiveness of information and the globalization of media ensures that the behavior of neutral states will continue to be scrutinized. Those who sit in judgment will continue to require neutral states to account for past actions. Recent actions

\(^{115}\) See generally Abi-Saab, supra note 64, and accompanying text.
taken by the ICRC to highlight their independence from the Swiss state suggest that Swiss neutrality is not an essential element in the formula for effective humanitarian efforts. As a result, it is doubtful Swiss neutrality is morally justified on this basis. The safe course of action is a moral one—if neutrality ever fails to fulfil the requirements of a “responsible ethic of responsibility,” which is designed to promote human rights, it may be time for a new policy.

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