Chapter 45
Impartiality and Neutrality in Humanitarian Law and Practice*

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.¹ The case, pitting Nicaragua against the United States of America, is remarkable in many respects, and so is the judgment.² I single out two special features: it deals with a situation of armed conflict, and it mentions the Red Cross.

The rarity of the 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.³ As it seems unlikely that the example will soon be followed by many others, I can leave it at that.

Of greater current interest is the reference the Court makes 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

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2 As the judgment went against the U.S., it sparked off a hot debate among American lawyers; see the immediate reactions of some twenty lawyers in 81 AJIL (1987) pp. 1–183.

3 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. With the U.S. not relying on 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, the Court by its judgment of 26 Nov. 1984 decided that it had jurisdiction. When the U.S. thereupon chose to stay away from the proceedings nothing stood in the way of the Court’s dealing with the matter.
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.\(^4\)

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, nor can it in and of itself “be used to inflict serious bodily harm or death.” Yet it isn’t food, clothing or medicine either, nor does it particularly resemble any 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 the 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.\(^5\)

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 second of the seven Fundamental Principles of the Red Cross, as proclaimed in 1965 by the XXth International Conference of the Red Cross, *i.e.*, the principles of humanity and impartiality. The relevant passages of these Principles 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 …

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