Neutrality, impartiality and our responsibility to uphold international law

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Published in Ola Engdahl & Pål Wrange (eds.), Law at War: The Law as it Was and the Law as it Should Be: Liber Amicorum Ove Bring (Martinus Nijhoff Publishers, 2008), 273-292

~~1.~~1. – Ove Bring, Dag Hammarskjöld and Neutrality

Ove, in particular over the past two decades, has shown a great interest in the law of neutrality, both with respect to the law of armed conflict at sea and – perhaps most of all – how it relates to UN collective security. We worked together on the law of neutrality and the European Community at the Swedish Ministry for Foreign Affairs in the late 1980s, and as Ove supervised my thesis on neutrality doctrine, I also ventured to put him - or rather his texts - on the analytical couch, so to speak, to be examined along with those of Hersch Lauterpacht, Alfred Verdross, Paul Guggenheim, and others. In that process of close reading, I must confess, I came to appreciate even more the attractiveness of his views, which by and large I share as a doctrinalist.[2] Less than a year ago, our common interest culminated in book form, though not in the same book.[3]

Another interest of Ove has been the work of former UN Secretary-General Dag Hammarskjöld (1905-1961).[4] Dag Hammarskjöld was almost brought up on the law of neutrality. His father, Hjalmar Hammarskjöld, was an international lawyer of greatness who

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[2] I write 'confess', since the purpose of the analysis in the thesis was not to judge the arguments from a doctrinalist, i.e., legal dogmatic point of view, but to analyse them from other perspectives.

[3] ~~Ove~~ O. Bring, *Neutralitetens uppgång och fall – eller den kollektiva säkerhetens historia* (Bokförlaget Atlantis AB, Stockholm, 2008), and ~~Pål~~ P. Wrange, *Impartial or Uninvolved? The Anatomy of 20th Century Doctrine on the Law of Neutrality* (Dokumaten.se, Visby, 2007).

[4] O.~~ve~~ Bring, 'Dag Hammarskjöld and the Issue of Humanitarian Intervention', in J.~~arna~~ Petman and J.~~an~~ Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff Publishers, Leiden, 2003) pp. 485-518; 'Dag Hammarskjöld and his approach to Collective Security and Intervention', lecture delivered at The Swedish Institute Alexandria, 5 May 2005.

taught on the law of neutrality at the first summer course at The Hague in 1922.[5] Hammarskjöld senior was also prime minister of Sweden in 1914-1917, when he applied the law of neutrality so scrupulously in the first world war, that Swedish imports were hampered. As explained by his son, Hjalmar Hammarskjöld believed that "for a small country, international law, in the final analysis, is the only remaining argument, and that its defence is therefore worth sacrifices even in the egoistical interest of the country itself".[6] The Swedish public, however, was not impressed, and he was forced to resign.

Conspicuous coincidences apart, the most important reason for juxtaposing Dag Hammarskjöld and neutrality, and to do so in Ove's honour, is a different one. In my dissertation, I finished with a plea for impartiality, which was a discussion where I took my cues from such different people as Carl Schmitt (whose mind I will always admire as much as I will detest his politics) and Dag Hammarskjöld (whose supreme standards of ethics did match his intellectual capacity). I laid out some speculative thoughts on the future of neutrality, which were summarised in my final paragraph:

> Perhaps this is how I should end. There is not much room for integral neutrality under the 1907 Hague Conventions, and neutrality as abstention in the sense of staying aloof is no longer possible. However, be it in a liberal, anarchic,

[5] Hjalmar Hammarskjöld was Minister of justice in 1901-02, was appointed member of the Hague Permanent Court of Arbitration in 1904, was a delegate at the 1907 Hague Peace Conference, was a mediator and arbitration judge in several international disputes – including as the Chairman of the Court of Arbitration in the Casablanca affaire, served as Chairman of the Committee of Experts for the Progressive Codification of International Law of the League of Nations during the 1920s, and was President of the International Law Association. ~~Oscar~~ O. Schachter, 'Dag Hammarskjold and the Relation of Law to Politics', 56 *American Journal of International Law* (1962) pp. 1-8, p. 1 footnote; O.~~ve~~ Bring, 'Dag Hammarskjöld and the Issue of Humanitarian Intervention', *supra* note ~~44~~35, p. 488; M.~~anuel~~ Fröhlich, *Dag Hammarskjöld und die Vereinten Nationen: Die politische Ethik des UNO-Generalsekretärs* (Ferdinand Schöningh, Paderborn, 2002) p. 108.

[6] K.~~ai~~ Falkman (ed.), *To Speak for the World: Speeches and Statements by* Dag Hammarskjöld, *Secretary-General of the United Nations* 1953-1961 (Atlantis, Stockholm, 2005) p. 38.

collective or regionalised system, there will always be a need for impartiality, call it neutrality or not.[7]

These ideas were quite rudimentary in the thesis, and, in fact, much of the discussion during the public dissertation defence circled around them. I vaguely promised to develop them further, at some time in the future. I need to make good on that, not least for my supervisor, Ove.

The more I think about it, a response would, in fact, involve most if not all aspects of my professional life in international law, and will have to await a future date to be more fully developed.[8] However, this short piece[9] serves to provide a bridge between the dissertation and the rest of my international law life. It is an effort to elaborate a little on the intuition I have had for a couple of years, that reading Hammarskjöld would be relevant to the future of neutrality, and of international law.[10]

I will begin by briefly touching upon a few samples of neutrality discourse around the turn of the millennium (thus picking up where I left off in my thesis), then bring in Hammarskjöld and with him as a springboard analyse the concept of neutrality and give some hints of what might be its role in the future. I shall move from traditional neutrality in war to humanitarian affairs, to the international civil service to peacekeeping and then back to the position of third states in a war, before my argument ends in the field of professional ethics.

[7] Wrange, *supra* footnote 3~~3~~534, p. 1051. Neutrality as abstention and as impartiality, when analysed *in extremis*, collapse into one another (Torrelli, *infra* footnote, 2020~~20~~551, pp. 31 ff; Wrange, *supra*~~–~~ footnote 3~~3~~534, p. 991), but as I will argue in section 3.3, it does matter where one starts the debate.

[8] I have tried to present some ideas in 'Downtown, Midtown, Uptown, Review of Louis Henkin, "International Law: Politics and Values" and Thomas M. Franck, "Fairness in International Law and Institutions"', 68 *Nordic Journal of International Law* (1999) pp. 53-83 and in 'The Prince and the Discourse: On Commenting and Advising on International Law', in J.~~arna~~ Petman & J.~~an~~ Klabbers (eds.), *Nordic Cosmopolitanism: Essays for Martti Koskenniemi* (Martinus Nijhoff Publishers, Leiden, 2003) pp. 33-47.

[9] Which, in fact, was in principle conceptualised even before the dissertation.

[10] That was not my original notion, of course. *See infra* note 3030~~560~~, which refers to Theo van Boven.

~~2.~~1. Neutrality Today

The law of neutrality is no longer spoken of very often. One author even asks, in his heading, "[i]s neutrality a really dead concept?" (he answers negatively), and notes that "neutrality has almost disappeared as a research object in international relations in this high time of norms, values, and identity~~.~~".[11] But the continued validity and relevance – albeit limited – of the law of neutrality is still recognised.[12]

However, as implied, what interests me here – both intellectually and pragmatically – is the employment of neutrality in other, though related contexts, namely humanitarian affairs, international civil service and peacekeeping. Neutrality has been in these contexts for a long time,[13] but the discussion has taken on a particular relevance after the end of the Cold War. While neutrality for third states may be ignored as a legal regime (most states can ignore most armed conflicts most of the time), neutrality in the other three contexts is something that each ~~h actor has to take a stand on constantly.~~ actor has to take a stand on constantly.

What then does neutrality entail? Neutrality in traditional international law, in the context of international armed conflict, was a combination of abstention and impartiality, with the latter basically meaning equal treatment. Equality in treatment related foremost to those factors relevant to the licensing of arms export, while it was generally held to be less important if one party or the other was favoured in various ways by the neutral government.[14] In the context of humanitarian operations, as well as that of civil service and peace operations, neutrality has the broader meaning of "~~"~~not taking sides in the conflict"~~"~~, as will be developed below. Neutrality within this understanding, however, does not exclude judgments on issues that are within the mandate of the respective organisation, as we shall see.

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[11] ~~Laurent~~ L. Goetschel, 'Neutrality, a Really Dead Concept?', 34 Cooperation and Conflict (1999) pp. 115-139, p. 132.

[12] *See infra*, page 10~~196~~.

[13] As far as the ICRC is concerned, it goes back to the very start. ~~Geoffrey~~ G. Best, *War and Law Since 1945* (Clarendon Press, Oxford, 1994) p. 374.

[14] However, there were certainly limits; writers mostly found that participation in economic warfare on the side of one belligerent was prohibited~~not allowed~~. *See* Wrange, *supra* note ~~33~~34, p. 1028.

~~2.1.~~2.1 *Humanitarian A~~a~~ffairs*

Humanitarian assistance is firmly linked to the law of neutrality. There are provisions within the 1949 Geneva Conventions as well as in the 1977 First Additional Protocol, which pertain to neutrality and humanitarian assistance.[15] These provisions invest neutrality with a valuable role and they provide a good political argument for state neutrality. Further, they offer a space where actions are non-political; humanitarian aid should never be regarded as being interference in an armed conflict. As we shall note later, the permanent neutrals have often justified their position with this link, Switzerland also by being the host of the ICRC.

But neutrality has a further specific ‘~~“~~humanitarian~~”~~’ meaning as one of the three main principles of the Red Cross.[16] The ICRC seems to apply the word ‘~~“~~neutrality~~”~~’ to cover mainly abstention from involvement in a dispute. It is defined thus: “In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.” It is further explained as being abstention from “acting in a way that could facilitate the conduct of hostilities by any of the parties involved”.[17] Neutrality is the basis for humanitarian assistance, and the Red Cross does not in fact take a position with regard to the causes of a conflict.[18]

Beside this principle of neutrality (leaning towards abstention) there is the principle of impartiality, which the ICRC explains thus: “It endeavours to relieve the suffering of individuals, being guided solely by their needs [and] makes no discrimination as to

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[15] *See*, i.a., Articles 27 & 37 of the First Geneva Convention of 1949 (GCI), Articles 21 & 25 of GCII, Article 110 & 122 of GCIII, and Articles 24 & 59, GCIV, and Articles 9, 19, 31 & 22(2,a), 39(1), 64 & 69-71 of the 1977 Additional Protocol I.

[16] *See* Article 4~~—~~(1)~~—~~(a), the Statutes of the International Committee of the Red Cross; <www.icrc.org/Web/eng/siteeng0.nsf/html/icrc-statutes-080503>, visited on 31 January 2008.

[17] *The Fundamental Principles of the Red Cross and Red Crescent* (ICRC, Geneva 1996), <www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0513?OpenDocument&style=Custo_Final.4&View=defaultBody2>, visited on 12 March 2007.

[18] In the hierarchy of principles of the Red Cross, this principle ranks just below impartiality. *See* also ~~Charlotte~~ C. Ku and ~~Joaquin~~ J. ~~Caceres~~ C. Brun, ‘Neutralitv and the ICRC Contribution to Contemporary Humanitarian Operations’, 10 *International Peacekeeping* (2003) pp. 56-72, p. 59. The principle of neutrality in humanitarian assistance was confirmed i.a. in UNGA resolution 43/131, along with humanity and impartiality, not only for the ICRC but also for services of other NGOs and states.

nationality, race, religious beliefs, class or political opinions."[19] Impartiality hence relates to the distribution of humanitarian assistance, disbursed only on the basis of the needs of the recipients. All humans, though not in comparable circumstances, have the same rights.[20] Both neutrality and impartiality imply an absence of the taking of sides, but they have different addressees - neutrality towards the belligerents, impartiality towards the victims.[21] However, impartiality also refers to the state of mind of someone making a judgment, and impartiality in ICRC doctrine covers this notion: "In other words, impartiality implies the objective scrutiny of problems and the 'depersonalization' of humanitarian work."[22]

According to Maurice Torrelli, the policy (*politique*) of neutrality takes precedence over impartiality, because in order to fulfil its mission the ICRC has to retain the confidence of the parties, and therefore it cannot complain of breaches of humanitarian law.[23] It is neutrality as a principle, which permits the Red Cross movement to be universal.[24] However, ''the second generation'' of humanitarian organisations, such as *Médecins sans frontières* and others, who ''pretend'' to also pose as proponents of human rights, have abandoned this strict conception of neutrality and ~~in fact~~ denounce violations of human rights and international humanitarian law.[25] A recent survey of humanitarian relief organisations in the United Kingdom revealed that neutrality has become ~~a somewhat~~ something of a ''dirty word''.[26] ',[27] The ICRC has therefore felt obliged to explain itself. As Pierre Krahenbühl notes, "[n]ot taking sides in a conflict does not mean being indifferent. The ICRC is not neutral in the face of violations of international humanitarian law. … It strives to ensure that all those taking part in the

[19] ICRC, *supra* note 17~~17~~~~548~~, *ibid.*
[20] As Torrelli explains, in distinction to the principled abstention "inherent in neutrality", impartiality (in the supply of assistance) is *relative* and dependent~~ing~~ on the circumstances. ~~Maurice~~ M. Torrelli, 'La Neutralité en Question', 96 RGDDIP (1992) pp. 1 ~~ff~~*et seq.*, p. 40.
[21] Torrelli, *supra* note 20~~20~~~~551~~, p. 38.
[22] ICRC, *supra* note 17~~17~~~~548~~, *ibid.*
[23] Torrelli, *supra* note 20~~20~~~~551~~, p. 40.
[24] Torrelli, *supra* note 20~~20~~~~551~~, p. 39.
[25] Torrelli, *supra* note 20~~20~~~~551~~, p. 31.
[26] Ku and Brun, *supra* note 18~~18~~~~549~~, p. 62.
[27] Ku and Brun, *supra* note 18~~18~~~~549~~, p. 62.

hostilities respect humanitarian law. Neutrality is therefore a means to an end, not an end in itself."[28] And there are some actions towards which the ICRC cannot be neutral. In 1996, when the Fundamental Principles were last revised, the ICRC stated that it does make "public representations" "when it observes grave and repeated breaches of international humanitarian law [and] its confidential representations have been in vain and it considers that the only means of helping the victims is to ask for the support of the international community".[29]

~~2.2.~~2.2 *Neutrality and the C~~c~~ivil S~~s~~ervant*

So, humanitarian neutrality means neutrality regarding the goals of the conflict but not in relation to international humanitarian law. I shall now pass to another field where the concepts of neutrality and impartiality have been heavily debated, and where they have also been connected with the neutrality of states – namely, the role of the international civil servant in general, and the position of UN Secretary General in particular. In a speech in 1961 Dag Hammarskjöld said this:

> "If a demand for neutrality is made … with the intent that the international civil servant should not be permitted to take a stand on political issues, in response to requests of the General Assembly or the Security Council, then the demand is in conflict with the Charter itself. If, however, 'neutrality' means that the international civil servant … must remain wholly uninfluenced by national or group interests or ideologies, then the obligation to observe such neutrality is ... basic to the Charter concept of the international civil service ..." And, "the international civil servant cannot be accused of lack of neutrality simply for taking a stand on a controversial issue when this is his duty and cannot be avoided."[30]

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[28] ~~Pierre~~ P. Krahenbühl, 'The ICRC's approach to contemporary security challenges: A future for independent and neutral humanitarian action', 81 *International Review of the Red Cross* (2004) p. 511 ~~ff,~~*et seq.*, p. 511.
[29] ICRC, *supra* note 17~~1~~7~~5~~48, *ibid.* Recently, it has revised its policy slightly further in a 'non-neutral' direction; *see* 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', 858 *International Review of the Red Cross* (2005) pp. 393 ~~ff,~~*et seq.*, 395-398 .
[30] ~~Dag~~ D. Hammarskjöld, 'The International Civil Service in Law and Fact', in *The United Nations Political System* (D. Kay, ed., 1967) p 142 ~~ff,~~*et seq.*, p. 150, quoted from Falkman, *supra* note 6~~6~~5~~37~~, pp. 98-100. For

Furthermore, "the United Nations must oppose any policy in conflict with the principles of the Charter and must support a policy in accordance with those principles, not in a spirit of partiality, but as an expression of loyalty to the Charter. The attitude proper to the United Nations is thus not one of neutrality but one of active effort to further its most fundamental principles".[31] Theo van Boven favours Hammarskjöld's attitude of active efforts ~~–~~ '~~"~~positive'~~"~~ neutrality, as Hammarskjöld once called it -- but preferred to refer to it as impartiality, as did Manuel Fröhlich and Hammarskjöld's legal adviser, Oscar Schachter, and so shall I.[32]

~~2.3.~~2.3 *Peace ~~O~~operations*

The neutrality or impartiality of the Secretary-General was linked to the concept of neutrality of states in the sense that it was held to be useful or even necessary to have a Secretary-General from a neutral or non-aligned state (Sweden for Hammarskjöld, Burma for U Thant and Austria in the case of Kurt Waldheim).[33] Closely related to that was the concept of peacekeeping, developed by Hammarskjöld; it was an extension of the neutrality of the organisation as such, but also an activity particularly amenable to neutral countries, as will be

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Hammarskjöld, this concept meant being "completely detached from any national interest or policy and based solely on the principles and ideals" of the United Nations." *Ibid.*, p. 73.

Hammarskjöld's views have been commented on by many; *see*, for instance, Peter Wallensteen, *Dag Hammarskjöld* 39 (1995). I have been inspired by ~~Theo~~ T. C. van Boven, 'Some reflections on the principle of neutrality', in *Etudes est essais sur le droit international humanitaire et les principes de la Croix- Rouge en l'honneur de Jean Pictet*~~—~~ (ICRC Publications, Geneva, 1984) pp. 643 *~~ff~~et seq*, pp. 651 ~~.ff~~*et seq*. On Hammarskjöld's attitude to civil service in general, *see* ~~Mats~~ M. Svegfors, *Dag Hammarskjöld: Den förste moderne svensken* (Norstedts, Stockholm, 2005) pp. 265 *~~ff.~~et seq.*

[31] Annual Report of the Secretary-General on the Work of the Organization, 1954, p. 328, cited from Fröhlich, *supra* note ~~55~~536, p. 74.

[32] *See* van Boven, *supra* note 3030~~560~~. (I do not, however, subscribe to his analysis of Hammarskjöld and the UN's and the ICRC's respective mandates. *See* Wrange, *supra* note 33~~534~~, pp. 971-973.) *See* also Fröhlich, *supra* note ~~55~~536, pp. 74 and 88. Schachter wrote that Hammarskjöld held that "the obligation of impartiality required in the first instance adherence to the principles of the Charter". ~~Oscar~~ O. Schachter, 'The International Civil Servant: Neutrality and Responsibility, in ~~Robert~~ R. S. Jordan (ed.) *Dag Hammarskjöld Revisited: The UN Secretary-General as a Force in World Politics* (Carolina Academic Press, Durham, 1983) pp. 39-63, p. 47.

[33] *See* Schachter, *supra* note 3232~~562~~, p. 44; ~~Sverker~~ S. Åström, *Ögonblick: Från ett halvsekel i UD-tjänst*, 2nd ed. (Lind & Co, Stockholm) p 13.

discussed further in the next section. Ambassador Marianne von Grüningen of Switzerland explained this link in the 1970s: "To be compatible with the status of neutrality, peace-keeping operations must comply with certain conditions in order to guarantee that they do not bear any coercive elements. The most important conditions are the consent of the host State, the impartial function of the Force and the prohibition of coercive actions."[34] Above all, she emphasised, the force must "behave in such a way as not to take part in a conflict, which means that it must itself be of a neutral character".[35]

However, after the experiences of the 1990s, the concept of neutrality was excluded from the doctrine of peacekeeping. Kofi Annan observed that the United Nations had "learned that while impartiality is a vital condition for peacekeeping, it must be impartiality in the execution of the mandate – not just an unthinking neutrality between warring parties.", .[36] And the Brahimi Report on UN Peace Operations concluded in 2000 that "[i]mpartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement".[37] Dominick Donald explains that an "impartial entity is active, its actions independent of the parties to a conflict, based on a judgement of the situation; it is fair and just in its treatment of the parties while not taking sides. A neutral is much more passive; its limited actions are within restrictions imposed by the belligerents".[38] 'Neutrality'

[34] Marianne M. von Grünigen, 'Neutrality and Peace-Keeping, in Antonio Cassese (ed), *United Nations Peace-Keeping: Legal Essays* (Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands, 1978) pp. 125-153 p. 135.
[35] von Grünigen, *supra* note 3434564, p. 137.
[36] Quoted from Dominick D. Donald, 'Neutrality, Impartiality and UN Peacekeeping at the Beginning of the 21st Century', 9 *International Peacekeeping* (2002) pp. 21-38, pp. 23-24.
[37] UN Doc A/55/305– S/2000/809, p Donald, *supra* note 3636566, p. 26. In this context 'impartiality' is different from its traditional meaning of 'equal treatment', but there is still a connection. Equal treatment means treatment equal *under a certain regime*, and in the context of the traditional law of neutrality the regime in question is usually a national export regime, in the context of humanitarian operations the relevant regime is the criteria for delivery and in peace- operations it is the UN Charter and the mandate of the operation.
[38] Donald, *supra* note 3636566, p. 22. Baros, too, distinguishes between neutrality and impartiality: "[L]osing *neutrality*– does not necessarily imply becoming *partial* in a certain conflict situation." "[N]eutrality implies a lack of support for one side in a conflict, which is an externally observable phenomenon, while someone's

has been disconnected from 'impartiality' and disappeared from the vocabulary of peacekeeping in both the Security Council and the General Assembly,[39] and this "certainly represents progress".[40] As one UN official put it: "After the Safe Havens, neutrality is a four-letter word…"[41]

~~2.4.~~2.4 *Neutrality of states*

So, we have talked about neutrality in humanitarian assistance, in international civil service and in peacekeeping, and have noted that impartiality seemed to be the favoured concept (even the ICRC conception of neutrality appeared to boil down to something similar to the impartiality practised in civil service and peacekeeping.) What of the traditional law of neutrality between states? von Heinegg confirms the continued validity of the law of maritime neutrality, in particular as updated in the San Remo Manual and the Helsinki Principles on the Law of Maritime Neutrality.[42] This law is applicable to "every international armed conflict at sea, at least insofar as the belligerents are taking measures affecting the shipping (and aviation) of third states".[43]

However, the scope of application, and perhaps also the content of the law, has been modified by the provisions of collective security. von Heinegg continues: "In view of the primary responsibility of the Security Council for international peace and security, in such a situation [where the Council has taken action under Chapter VII] there is no room for …

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impartiality means the 'ability to act fairly because they are not personally involved in a situation'." ~~Miroslav~~ M. Baros, 'The UN's Response to the Yugoslav Crisis: Turning the UN Charter on its Head', 8 *International Peacekeeping* (2001) pp. 44-63, pp. 53 and 54. Citation from BBC's English Dictionary. Emphasis in original.

[39] Donald, *supra* note 3636~~566~~, p. 30.

[40] Donald, *supra* note 3636~~566~~, p.30.

[41] Anonymous official, quoted in Donald, *supra* note 3636~~566~~, p. 32. The "safe havens", or "safe areas" referred to were declared in UN Security Council resolutions 819 and 824 for six towns in Bosnia and Herzegovina. As we know, what ensued was the genocidal killing of 7,000-8,000 men and boys after the fall of Srebrenica.

[42] ~~Wolff~~ W. Heintschel von Heinegg, 'The Protection of Navigation in Case of Armed Conflict', 18 *The International Journal of Marine and Coastal Law* (2003) pp. 401-422, p. 403. *See* further ~~Louise~~ L. Doswald-Beck (ed.) *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), 'Helsinki Principles on the Law of Maritime Neutrality', Final Report of the Committee on Maritime Neutrality, *International Law Association, Report of the 68th Conference, Taipei* (London, 1998) pp. 496 et seq.

[43] von Heinegg, *supra* note 4242~~572~~, p. 404.

neutrality."[44] Furthermore, after the post-Cold War triumph of the restricted interpretation of neutral duties in trade (only as regards governmental exports) and the willingness of states such as Switzerland to participate in sanctions, the law of neutrality seems to have been reduced to a bare minimum of abstention from military measures.[45] Nevertheless, this does not mean that neutrality has lost all importance.

As Goetschel puts it, in former times the most important realistic political function of neutrality was "to guarantee a country's political independence … to enable a country to maintain its basic trade relationships … [and to contribute to domestic] political cohesion".[46] In addition, neutrality served the general interest in containment. However, more interestingly for the purposes of my discussion, "neutrality also has an *idealistic* side ... Neutral states were … subject to internal and external pressure to justify their policy … by some other fundamentals or ideas of 'grandness'."[47] Consequently, "[n]eutral states have always tried to underline their policy's usefulness for the international system.".[48]

It is obvious that this connects neutrality in armed conflict to humanitarian assistance, the international civil service and peacekeeping. von Grüningen explained that "Secretary-General … Dag Hammarskjold … designed [peacekeeping] in such a manner as to induce the cooperation and participation of neutral States, thereby giving a new importance to permanent neutrality",[49] and she and other representatives of neutral countries have never tired of

[44] von Heinegg, *supra* note 4242572, p. 405. von Heinegg refers to impartiality, but I deleted that from the quote to avoid confusion in this context, since he used the word 'impartiality' for 'equal treatment', as is the case in classical law of neutrality doctrine.
[45] Ove has recounted this development convincingly in 'The Changing Law of Neutrality', in O.Bring & S.Mahmoudi (eds.), *Current international law issues : Nordic perspectives essays in honour of Jerzy Sztucki* (Norstedts Juridik, Stockholm, 1994) pp. 25 *ff, et seq.*, p. 44.
[46] Goetschel, *supra* note 11111542, p. 120.
[47] Goetschel, *supra* note 11111542, p. 120. Goetschel cites Pertti P. Joenniemi, 'Neutrality beyond the Cold War', 19 *Review of International Studies* (1993) p. 289.
[48] Goetschel, *supra* note 11111542, p. 121.
[49] von Grünigen, *supra* note 34334564, p. 126. Further: "One can consider peace-keeping operations as a modern form of good offices" of Powers not participating in a given conflict, provided for in Article 3 of the First Hague Convention, of 18 October 1907. *Ibid.*, p 135.

pointing out that neutrality may usefully lead to humanitarian action, good offices or mediation.[50]

This ‘“idealistic”’ role used to be a by-product or an argument for the legitimacy of neutrality, but not the core of the concept. However, as Torrelli expressed it, as policy, permanent neutrality has developed from the principle of abstention to become “a principle of action envisaged to construct peace”, and impartiality is “manifested” as “universality”.[51] Goetschel finds that while the “role conceptions of neutral states linked to their non-participation in a military conflict (realistic roles) have lost their significance”,[52] the “idealistic” “roles and functions of neutrality may have become even more important on a concrete policy level than they were in the past”.[53] This requires an active promotion of peaceful relations and not “passive contemplation of injustice, violence, and oppression.”.[54] Switzerland, the arch-neutral, has revised its understanding of its rule: There can be no neutrality between the community of states - or “the international community acting as a single entity” - and a state that severely disregards the international legal order.[55] For Switzerland, the participation in such measures is a matter of both the protection of its interests and the obligations of solidarity.[56]

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[50] von Grünigen, *supra* note 3434564, p. 128.
[51] Torrelli, *supra* note 2020551, p. 30.
[52] Goetschel, *supra* note 1111542, p. 121.
[53] Goetschel, *supra* note 1111542, p. 122. The doyen of Swedish diplomacy, and the perhaps leading policy-maker at the non-political level during of the Cold War era, Sverker Åström, said that many people, even within the Ministry, wanted to describe the policy of neutrality as morally superior, and that it actually mandated Sweden to criticise other countries. For Åström that was not the point. The policy of neutrality was determined by security policy. Nevertheless, it enabled Sweden to sometimes speak with a freer mind than allied countries, and as a neutral, Sweden could stand up for international law. As long as both parties to the ~~c~~Cold ~~w~~War could be criticised “according to the same values”, criticism of this policy was easy to live with. Åström, *supra* note 3333563, pp. 12-13. What is interesting about this is that for many policy-makers, the idealistic role conception actually seemed to take over. Whether it remains fully as a second-nature of the foreign services of neutral (or “ex-neutral”) countries is doubtful, but that is not necessary for the normative argument of this article.
[54] Goetschel, *supra* note 1111542, p. 124 Citation. omitted.
[55] ‘Bericht zur Neutralität: Anhang zum Bericht über die Aussenpolitik der Schweiz in den 90er Jahren vom 29 November 1993’, section 412, <www.eda.admin.ch/etc/medialib/downloads/edazen/doc/publi.Par.0005.File.tmp/Bericht%20zur%20Neutralitaet%201993.pdf>, visited on 31 January 2008; Swiss Neutrality in Practice – Current Aspects. (Report of 30 August 2000 by the Interdepartmental Working Group).
[56] ’.Bericht zur Neutralität’, *supra* note 5555585, section 413.

~~2.5.~~2.5 *Summary*

Hammarskjöld's neutrality does not demand total indifference or inactivity, it only demands indifference towards that which is not relevant to the purpose of the organisation. In other words: the impartial civil servant, like the judge, shall be indifferent to all circumstances not relevant from the point of view of his official aims and purposes, be it to maintain peace or to uphold the law. Applied to humanitarian assistance and peacekeeping, the terms of the debate could thus be cast as a question of which factors should be relevant and which should not – that is, as a matter of impartiality. And, in such a discussion the distinction between, say, the ICRC and *Médecins sans frontières* or the UN would be one of focus rather than of kind – impartial in relation to whom and to what factors?

Some may ask if discourse on the principled role of the UN Secretary-General, peacekeepers and the ICRC is really relevant for states. However, there is no reason why Members of the Security Council – or, for that matter, the General Assembly – should be any less guided by the Charter than should the Secretary-General. There is no bar to transposing the guiding principles (or ethics; see *infra*) of an international institution to the plane of sovereigns. As I shall argue in the next section, governments are organs of the international society no less than the Secretary-General, and neutral – or ex-neutral – governments have often acted as if they were (though not necessarily under that conceptual umbrella).

~~3.~~3 The Future

~~3.1.~~3.1 *States as U~~u~~pholders of I~~i~~nternational L~~l~~aw*

What does this discussion on different conceptions of impartiality have to do with upholding international law? As Hedley Bull asserts, order in international society builds on "a sense of

common interests in the elementary goals of social life", and for that rules provide the guidance.[57] However, since an aggrieved state is often not in a position to effectively defend its right, the enforcement of the rules is uncertain.[58] I would like to relate this predicament to Georges Scelle's notion of *dédoublement fonctionnel* – that state organs (and the individuals managing them) have double functions, namely as organs of two or more societies, for instance where a national Parliament, which approves a treaty, thereby legislates not only for the national but also for the international society. This entails that national governments participateing in the administration of international society.[59]

That notion could also perhaps be detected in Hammarskjöld's thinking.[60] In his annual report of 1960, he wrote that "[t]he United Nations is an organic creation of the political situation facing our Generation. At the same time, however, the international community has,

[57] Hedley H. Bull, *The Anarchical Society: A Study of World Order in World Politics* (Columbia University Press, New York, 1977) p. 67.

[58] Bull, *supra* note 575758, p. 72. Morgenthau was even clearer: "What for the legislative and judicial functions required elaborate proof is clear for all to see in the case of the executive function: its complete and unqualified decentralization." Hans H. J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* 3rd ed., (Alfred A. Knopf, New York, 1961) p. 294. It can be mentioned that Morgenthau was very impressed with Hammarskjöld and emphasised "the intellectual and moral qualities of the holder of that office.". Only a man of Mr. Hammarskjold's personality could have tried to do what he has tried to do in this respect, and have achieved what he has achieved. *Ibid*., p 495.

[59] Martti M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, Cambridge, 2002) p. 333. As Cassese explains, "since there were no institutions for lawmaking or execution with general competence, states exercise the functions of establishing, verifying and executing international law on behalf of the international collective. The two roles are not performed simultaneously, but in a Dr Jekyll and Mr Hyde fashion.". Antonio A. Cassese, 'Remarks on Scelle's Theory of "Role-Splitting" (*dédoublement fonctionnel*) in International Law', 1 *European Journal of International Law* (1990) pp. 210-231, accessed from <www.ejil.org/journal/Vol1/No1/art10.html#TopOfPage>, visited on 31 January 2008.

Based in Kampala at the time of writing, I have not had direct access to Scelle's work. However, I feel confident that the reviews by Antonio Cassese, Pierre-Marie Dupuy and Martti Koskenniemi are accurate. At any rate, what is important is not whether I have understood Scelle correctly, but whether my understanding is fruitful.

[60] Like Scelle, Hammarskjöld was influenced by "sociological theory". Manuel M. Fröhlich, 'The Quest for a Political Philosophy of World Organisation', in S.ten Ask and A.nna Mark-Jungkvist, *The Adventure of Peace: Dag Hammarskjöld and The Future of the UN* (Palgrave Macmillan, New York, 2006) pp. 130-145, p. 132. Hammarskjöld spoke of the "growth of social organisms" and a transition from an "institutional system of international coexistence" to a "constitutional system of cooperation". *Ibid*., p. 134. There are similarities here to the Scelle student Charles Chaumont; *see* Charles C. Chaumont, *Nations Unies et neutralité*, 89 RDC (1956) pp. 1 *ff*,*et seq*., p. 46. Furthermore, Hammarskjöld was influenced by Scelle's compatriot Henri Bergson, and Fröhlich noted similarities between Hammarskjöld and Scelle's contemporary Maurice Hariou. Fröhlich, *supra* note 606059, pp. 89 and 92.

so to say, come to political self-consciousness in the Organisation".[61] He even spoke of "international constitutional law", which is still in "an embryonic stage".[62] The word ""constitutional"", as employed by Hammarskjöld on several occasions, stands for the existence of a constitution that provides "organs with different functions and a division of responsibilities representing a balance of power".[63] Under a domestic constitution, there are institutions tasked with applying and upholding the law. In the international system, common institutions have a much smaller role.

As far as can be ascertained, Hammarskjöld never said explicitly that governments have roles as organs of the international community, but I believe that he did hold that states have responsibilities to uphold international law. He often expressed the view that the processes of law and the principles of justice were necessary for a secure and decent international order.[64]

Now, according to traditional international legal doctrine, "the victim, and nobody but the victim, of a violation of the law has the right to enforce the law against the violator. Nobody at all has the obligation to enforce it".[65] However, that is changing. Like many others, Erika de Wet has noted the role that international law has given to states in the enforcement of its basic rules. The ICJ determined in the Barcelona Traction case of 1970 that some obligations are the concern of all States (*erga omnes*), and that all States can be held to have a legal

[61] Fröhlich, *supra* note 6060590, p. 134.
[62] Falkman, *supra* note 66537, p. 160.
[63] Fröhlich, *supra* note 6060590, p. 135. Hammarskjöld even gave an address named 'Development of a Constitutional Framework For International Cooperation', in May 1960 at the University of Chicago Law School. The use of the word 'constitution' in this context was not novel; President Truman had used that word already during the San Francisco Conference in 1945. Bardo B. Fassbender, 'The United Nations Charter as Constitution of The International Community', 36 *Columbia Journal of International Law* (1998) pp.529-619, p. 531. To speak of the UN Charter as a constitution for the organizsation is, of course, different from talking about it as the constitution of the international community (as the authors of Alfred A. Verdross and Bruno B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (Wien, 1976)). It is submitted that Hammarskjöld's view was closer to Verdross's and Simma's than to Truman's.
[64] Schachter, *supra* note 55536, p. 1. ""Indeed, how could it ever become a living reality if those who are responsible for its development were to succumb to the immediate difficulties arising when it is still a revolutionary element in the life of society?" Falkman, *supra* note 66537, p. 68.
[65] Morgenthau, *supra* note 5858588, p. 294.

interest in the protection of the corresponding rights.[66] Furthermore, Article 48 of the Articles on State Responsibility[67] gives individual States a role in enforcing "the international value system" by entitling states other than directly injured states to invoke responsibility in such cases. The Articles thus enable states to "complement in a decentralized fashion the existing, institutionalised mechanisms for enforcement of the core values of the international legal order".[68]

But some would suggest that there is even a duty for third states to that effect. The International Commission on Intervention and State Sovereignty launched the notion of "[t]hinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice.". This means that national political authorities are responsible both internally to their own citizens and externally to the international community through the UN. (Furthermore, as I shall develop below, this notion entails that the agents of state are responsible as individuals for their acts and omissions.)[69] One may note here that the ICJ, in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, found that there was a duty for a State to prevent genocide, if it could thus ""influence effectivelyy"", but that the Court did not elucidate exactly what measures such a state should take.[70] To that could be added treaty provisions such as common Article 1 of the 1949 Geneva Conventions ("… undertake to respect and to ensure respect for the present Convention in all circumstances"), Art. Article 89 of the First Additional Protocol to

[66] Erika E. De Wet, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* (2006) pp 51-76, p. 54. Barcelona Traction, Light and Power Company Ltd (Second Phase) [1970] ICJ Rep 32. *See* also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. ' Advisory Opinion 9 July 2004 para 155 ff available at <www.icj-cij.org>, visited on 31 January 2008.

[67] Attached to UNGA RES/56/83.

[68] De Wet, *supra* note 66665596, p. 69.

[69] *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (The International Development Research Centre, Ottawa, 2001) p. 13.

[70] *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, judgment of 26 February 2007, p. 154, available at <www.icj-cij.org>, visited on 31 January 2008. *See* also Andrea A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', 18 *European Journal of International Law* (2007) pp. 695-713, pp. 697-706. This condition, of course, limits the *legal* obligation of a third state to prevent genocide, but it does not necessarily affect the moral judgment.

the Geneva Conventions ("[i]n situations of serious violations … undertake to act jointly or individually …"), the preambular provisions in the Rome Statute for the International Criminal Court ("… their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, … [r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes") and Article 56 of the UN Charter ("[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of [respect for human rights]". And so on. These expressions both reflect and support a tendency for third states to enforce rules of international law, through decentralised and centralised (UN Security Council) collective countermeasures.[71] As Pierre-Marie Dupuy notes, this fits well with Scelle's scheme.[72]

Many state representatives would surely deny the suggestion that each state has an obligation to work for the upholding of international law in general, or even for the fundamental rules invoked by the above-mentioned quotes. However, even though far from being uncontroversial as a legal proposition, it could still be a guiding principle as a moral imperative or as a political maxim, or both, at least when it comes to what Andreas Paulus has termed "the international 'public' law".[73] If so - and I think it should be so – to where would it lead?

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[71] On countermeasures for third states, *see* ~~Nigel~~ N. White and ~~Ademola~~ A. Abass, 'Countermeasures and Sanctions' in ~~Malcolm~~ M. D. Evans, *International Law*, 2nd ed.~~,~~ (Oxford university Press, Oxford, 2006) pp. 509-532, pp. 517-521. Christine Chinkin, who basically welcomes this development, is nevertheless concerned about the risk for diverse responses in decentralised enforcement. ~~Christine~~ C. Chinkin, *Third Parties in International Law* (Oxford University Press, Oxford, 1993) p. 333.

Interestingly, in a publication by the Swiss Federal Council, the view is expressed that when the UNSC takes military measures under Chapter VII, the participating states act not as parties to a war but as organs for the enforcement of international law. 'Bericht zur Neutralität', *supra* note 5555~~585~~, section 412.

[72] ~~Pierre-Marie~~ P.-M. Dupuy, 'Unité d'Application du Droit International à l'Echelle Globale et Responsabilité des Juges', 1 *European Journal of International Law* (1990), accessed at <www.ejls.eu/download.php?file=./issues/2007-12/DupuyFR.pdf>, visited on 31 January 2008.

[73] "At least on paper, *jus cogens* and obligations *erga omnes* have indeed merged into a unified concept of an international 'community interest' or international 'public' law." ~~Andreas~~ A. L. Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation: An Attempt at a Reappraisal', 74 *Nordic Journal of International Law* (2005) pp. 297-334, p. 317.

~~3.2.~~3.2 *Impartiality*

As I discussed in my thesis, there are many conceptions of neutrality as an abstract idea, and, as has been more than implied *supra*, the most interesting one for the purposes of this discussion is neutrality as impartiality, or as objectivity on the basis of a recognised norm. This is the neutrality of a judge, so long as that judge adheres to a substantively determined law[74] (a figure that Hammarskjöld also referred to[75]), or to that of an international body, such as the Security Council, if it acts according to rules and principles, rather than caprice.[76]

Impartiality does not exclude action - on the contrary. However, any action by an impartial is based upon an assessment of the facts in the light of norms (be they legal rules or moral principles), and not with regard to the identity of the parties. That means that the impartial should be committed to principles.[77] This also means that while one should be impartial as to interests as such, after an analysis it may emerge that some interests are protected or even promoted on principle (such as the interests of a civilian population in an armed conflict), whereas other interests would be rejected on principle.

Consequently, impartiality should lead to abstention *a priori*, that is, before and at the time of the outbreak of the conflict in question, before one knows who is in the right.[78] *A posteriori*, by contrast, a position may well be taken - and perhaps should be (if there is a violation of a *jus cogens* norm of the "international 'public' law"). That position might be to support one of the parties morally or materially, or to be more or less neutral (abstention and

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[74] *See* ~~Carl~~ C. Schmitt, ~~'~~Übersicht über die verschiedenen Bedeutungen und Funktionen der innerpolitischen Neutralität des Staates', in ~~Carl~~ C. Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles* (Berlin, 1940) p. 160.

[75] Falkman, *supra* note ~~66~~537, p. 100.

[76] As Kaj Falkman wrote in the introduction to the collection of excerpts from Hammarskjöld, "[t]he superpower sees the UN as relevant only when it consents, while the UN security requirements imply neutrality in the sense of freedom from partial interests~~.~~". Falkman, *supra* note ~~66~~537, p. 36. Nevertheless, the Council sometimes does act in a principled manner in a credible common interest, as in the rightly celebrated resolutions 1325 and 1612 on women, peace and security and on children in armed conflict, respectively.

[77] There is, however, no impartiality *between* principles, although there might be a need for balancing and pragmatism.

[78] For some states it might be difficult to exercise impartiality, because they are tied up with one of the parties in an alliance. Cf the US distinction between friends and allies. A friend is someone who shares your values, while an ally is someone who shares a certain goal.

equal treatment).[79] For certain, once a decision has been taken to participate with economic, political, military or other means, the ensuing engagement may necessitate a measure of compromise, because of the need to be loyal to or coordinate with other members of a coalition. Nevertheless, even the participant in a coalition must allow a state to impartially assess consequential choices, for instance, the selection of targets in a bombing campaign.

For those who think that this sounds unrealistic in an interdependent world, it should be pointed out that this attitude does not preclude membership of a security organisation. Goetschel notes the increasing importance for states to "anchor their norms of behavior in international cooperation mechanisms".[80] Thus, the main task ~~in relation to~~ for neutrality today is to exercise its 'beliefs' for all Europe.[81] Indeed, Goetschel asserts that "[n]eutral states are predestined to becoming a credible moral instance of the EU's military crisis management".[82] And Hammarskjöld encourages us to stay independent even as members: "The concept of loyalty is distorted when it is understood to mean blind acceptance. It is correctly interpreted when it is assumed to cover honest criticism",[83] - and honest dissent, I would add.

~~3.3.~~3.3 *Basis for I~~i~~mpartial E~~e~~ngagement*

What does it mean, then, that a state should act on the basis of norms? Firstly, it covers norms that are already given, namely those of international law. Is it possible to ascertain what they say? Hammarskjöld asserted with confidence: "Of primary importance in this respect are the principles and purposes of the Charter which are the fundamental law accepted by and

[79] I believe that there is no necessary opposition between neutrality and institutions. To use a domestic analogy: In the modern, institutionalised State, citizens are best neutral and let the State take care of law and order. Therefore, even if citizens are non-neutral in their capacities as citizens of this order, they are neutral in their capacities as private individuals. Consequently, the opposition between neutrality and collective security appears only in a society in which there is still no central enforcement machinery and where law enforcement is dependent upon the participation of all or most States.
[80] Goetschel, *supra* note 11~~11~~542, p. 132. Citation omitted.
[81] Goetschel, *supra* note 11~~11~~542, p. 132.
[82] Goetschel, *supra* note 11~~11~~542, p. 127.
[83] Falkman, *supra* note ~~66~~537, p~~p~~. 199-200.

binding on all States. [They] are specific enough to have practical significance in concrete cases. The principles of the Charter are, moreover, supplemented by the body of legal doctrine and precepts that have been accepted by States generally ... In this body of law there are rules and precedents that appropriately furnish guidance to the Secretary-General"[84] so that he can form "what may be called the independent judgment of the Organization~~.~~".[85]

When states apply international law, all of the materials mentioned by Hammarskjöld do in fact provide guidance, if applied impartially, *bona fide*.[86] However, while legal rules have a special weight (Hammarskjöld stressed the binding character of law[87]), there are many situations where international law is silent or of little help. First of all, there are many situations in which international law actually empowers states as members of institutions that have the authority to take decisions that bind or otherwise affect other states in a way beyond the capacities of these member states *qua* single states.[88] In the situation of an armed conflict, a member of the Security Council has to decide how to vote within the wide - but not unlimited - discretion given by Articles 24, 39-51 and 103. Whether or not that is beneficial and acceptable depends upon whether or not that body acts as an impartial body on the basis of recognised norms.[89] Secondly, the law may leave a wide margin of appreciation for states

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[84] Falkman, *supra* note 66~~537~~, p. 91.

[85] Falkman, *supra* note 66~~537~~, p. 94. My own view, though a rule-sceptic in theory, is similar from the pragmatic point of view. *See* Wrange, *supra* note 33~~534~~, pp. 42 ~~*ff.*~~*et seq.*

[86] Of course, this is not to say that the rules determine the outcomes in a logical way. I have written about this in other contexts, to a large degree building on the work of Martti Koskenniemi and David Kennedy. *See*, for example, ~~'~~'En konversation utan innehåll? Folkrätten och CLS', 2 Juridisk Tidskrift (1990) pp. 256-270 and ~~'~~'Från domstolssession till jamsession eller Martti Koskenniemi och juridikens slut', 64 Retfærd (1994) pp. 3-22.

[87] Schachter, *supra* note 55~~536~~, p. 2.

[88] This is what has been called the 'secondary law' of the Charter, in line with the terminology of EC law. *See* Fassbender, *supra* note 636~~3593~~, p. 574.

[89] As Ben Ferencz and Marcel Brus have averred, respectively, "the Security Council … will have to be guided by principles that will make its decisions and actions acceptable to the international community as a whole," and "the decisions of the Council should be in accordance with the principle of integrity", because "[i]t is the responsibility of the Council to uphold the principles of the international community, rather than to secure their individual interests." ~~Benjamin~~ B. B. Ferencz, *New Legal Foundations for Global Survival: Security through the Security Council* (Oceana, 1994) p. 250; ~~Marcel~~ M. M. T. A. Brus, *Third Party Dispute Settlement in an Interdependent world: Developing a Theoretical Framework* (Martinus Nijhoff Publishers, Dordrecht, 1995) p. 176.

I have argued elsewhere that it is impossible for a Great Power to act in this~~that~~ way. *See* ~~'~~'Kollektiv säkerhet', in ~~Per~~ P. Ahlin (ed), *Tandlös eller tiger -- sju uppsatser om FN* (Juristförlaget, Stockholm, 1995) pp. 147-189. A sorry illustration of the Security Council at its worst, is the passing of Resolution 1530 on

in its application, or it may leave states freedom to do what they please within certain limits. Hence, in the absence of a binding decision by an authoritative organ, a State must choose between taking action against an aggressor or staying more or less neutral (support to the aggressor should be out of the question, as provided by law).

One therefore needs to go beyond black-letter law. Hammarskjöld "viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and direction of collective action",[90] or some basic rules of international ethics.[91] This body of principles could influence the Security Council even within its discretionary mandate. Furthermore, as already suggested, while there is no hard and fast duty to assist a victim, the *erga omnes* and *jus cogens* character of certain norms certainly imply that states have some sort of responsibility to uphold such norms.

However, such a duty must always be weighed against other concerns, and while such a balancing is not an act of mathematics, principles assist. To assert this, however, is just the beginning of the exercise. For instance, if one formulates principles in terms of international responsibility, they might consist of respect for equal rights and legitimate interests of other states - to "act in good faith; observe international law; punish aggressors; observe the laws of war; … and so forth".[92] A cosmopolitan, humanitarian responsibility, by contrast, might provide that "statesmen first and foremost are human beings and as such they have a fundamental obligation not only to respect but also to defend human rights around the

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the Madrid bombings. *See* ~~Therese~~ T. O'Donnell, 'Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)' 17 *European Journal of International Law* (2006) pp. 945-968. *See* in particular the conclusions, at pp. 961-967.

By the way, it is not a coincidence that Scelle was particularly interested in the new phenomenon of international supervision by bodies composed of states. The difficult question was to determine when these individuals act in the national or in the common interest. ~~Antonio~~ Cassese, *supra* note 5959589.

[90] Schachter, *supra* note 55536, p. 2.

[91] Fröhlich, *supra* note 55536, p. 88. Kadelbach agrees, but remarks that this is a case of thin rather than ~~a~~ thick ethics. ~~Stefan~~ S. Kadelbach, ~~'~~ '~~,~~Ethik des Völkerrechts unter Bedingungen der Globalisierung', 64 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrrecht* (2004) pp. 1-20, p. 19.

[92] ~~Robert~~ R. H. Jackson, 'The Political Theory of International Society', in ~~Ken~~ K. Booth and ~~Steve~~ S. Smith (eds.), *International Relations Theory Today* (Polity Press, Cambridge, 1995) pp. 110-128, p. 116.

world".[93] While an internationalist, and probably also a cosmopolitan, might say, as does Charles Kegley, that "[i]ndividual interest cannot prevail over the larger collective good" and that "violators of law's prohibitions against aggression" must be policed,[94] Michael Walzer reminds us that a decision by a state to engage in war "condemns an indefinite number of its citizens to certain death".[95] Hence, "[t]he same solidarity that makes noninvolvement at home morally questionable may well make it obligatory in the international arena: this group of men and women must save one another's lives first".[96]

I have now left the comparatively safe terrain of international law for that of ethics - international ethics, which is an increasingly popular field. And this brings me to another notion of impartiality, namely that of the philosophical concept of ~~"~~"moral impartiality"~~"~~, which in essence means that all interests should be accorded equal consideration, including – perhaps – those of the acting agent. This view is in contrast to that which accepts a loyalty to certain people - for instance, the population in the state of the government concerned.[97] This debate can neither be settled nor even begun here. But to show where it might lead, I would suggest that prudence on behalf of one's population in time of danger could be the basis for an

[93] Jackson, *supra* note 92~~92~~622, p. 117. *Cf* also "This general duty to help others is the most basic ground within common morality for interference in the internal affairs of one nation by outsiders, including other nations and international bodies." ~~Joseph~~ J. Boyle, 'Natural Law and International Ethics', in ~~Terry~~ T. Nardin and ~~David~~ D. R. Mapel (eds.), *Traditions of International Ethics* (Cambridge University Press, Cambridge, 1992) pp. 112-135, p. 123. *See* further ~~Axel~~ A. Honneth, ~~?~~'Is Universalism a Moral Trap? The Presuppositions and Limits of a Politics of Human Rights', in ~~James~~ J. Bohman and ~~Matthias~~ M. Lutz-Bachmann (eds.), *Perpetual peace: essays on Kant's cosmopolitan ideal* (MIT Press, Cambridge, Mass, 1997) pp. 155-178, p. 172.

[94] ~~Charles~~ C. W. Kegley, Jr, 'Thinking Ethically about Peacemaking and Peacekeeping', in ~~Tom~~ T. Woodhouse, ~~Robert~~ R. Bruce and ~~Malcolm~~ M. Dando (eds.), *Peacekeeping and Peacemaking: Towards Effective Intervention in Post-Cold War Conflicts* (Macmillan, London, 1997) pp. 17-38, p. 36.

[95] ~~Michael~~ M. Walzer, *Just and Unjust Wars*: *A Moral Argument With Historical Illustrations* (Basic Books, 1977) p. 236.

[96] Walzer, *supra* note 9595625, p. 237. *Cf* also: "In practice, and quite sensibly, we recognize degrees of obligation towards family, friends, acquaintances, fe~~ta~~llow- citizens, and so on, and as long as this recognition does not lead us to disregard the interests of those in the outer circles of our concern there is no reason to see this as immoral." ~~Chris~~ C. Brown, 'International Political Theory and the Idea of World Community', in ~~Ken~~ K. Booth and ~~Steve~~ S. Smith (eds.), *International Relations Theory Today* (Polity Press, Cambridge, 1995) pp. 90-109, p. 96.

[97] See 'Impartiality', *Stanford Encyclopedia of Philosophy*, sections 2.3 and 4.1, < plato.stanford.edu/entries/impartiality/>, visited on 31 January 2008.

acceptable principle,[98] whereas opportunistic deferral to a great power is not. Perhaps, to connect the *Genocide* judgment to a mild cosmopolitanism, one could at least prescribe the following: "[i]f you are the person in the best position to prevent something really awful, and it won't cost you much to do so, do it".[99]

To sum up, to be impartial involves more than just applying the law in good faith – it is to act so that one's actions can be rationalised in terms of universally applicable principles,[100] even beyond the law. And it is more than being 'principled', because the term 'impartiality' implies that the impartial subject is an institution of a society, whose rights and duties are, in fact, exercised by a human being, such as a judge.[101]

However, this is not to pretend to give practical advice on what to do in a given ~~situation of~~ 'here and now'. To reason in terms of principles and impartiality can produce a number of different outcomes - some good and some bad.[102] It does not take hegemony out of the ~~frame~~picture, nor politics~~ – even if it were preferable to exclude politics~~.[103] But neither is it the case that arguments over legal rules or principles are always determined from some other privileged or meta-discourse, such as power or interests. Those are merely other terms, which also participate in discourses about what to do in a 'here and now'.[104] I therefore believe that an impartial reasoning, based upon law and the principles of ethics, will often contribute to *other* decisions, and sometimes better ones, than does reasoning in terms of power or

[98] Kadelbach holds that strategic acting can be legitimate in cases where~~ ~~the opponent acts strategically and the protagonist acts to protect its population. Kadelbach, *supra* note 919~~1~~621~~, p. 16. I agree in essence, but would base even that on a principle.

[99] K. ~~Kwame Anthony~~ A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (W. W. Norton & Company, New York, 2006) p. 161.

[100] To say that something is universally applicable is not to say that it should always be applied, because contradicting principles may apply to the same situation.

[101] The terms 'impartial body' and 'impartial institution' yielded 28,000 and 2,000 hits on Google, respectively (2 February, 2008), and the samples I looked at were relevant. By contrast, 'principled body' gave 289 hits – mostly or all irrelevant – while 'principled institution' gave 114. 'Principled policy' gave 8,170 hits, with a high degree of relevance.

[102] Hammarskjöld expressed principles in terms of opposites and also recognised the tension between principles and concrete needs. Schachter, *supra* note 3~~2~~32~~5~~62~~2~~, p. 49.

[103] Which is not to say that it is even preferable to take politics out of the picture.

[104] Certainly,~~For sure,~~ ~~–~~ power – or rather the instruments of power – is~~are~~ out there, but it is only through our conceptualisation of them that they have effects.

interests. Such terms do not determine the answers, but they condition the possibilities for certain results - they limit somewhat the horizon of possibilities and increase the likelihood of certain outcomes. Adopting the language of universalisable norms will allow a more open discussion, and will disallow references to ‘~~“~~solidarity~~”~~ ’ with a certain party without explaining that that party actually is right or invocations of ‘~~“~~the national interest~~”~~ ’ without asking whether such an interest is justified.

~~3.4.~~3.4 *Personal R~~r~~esponsibility?*

In public discourse, governments generally do use altruistic or principled terms. My point, though, is that it is also incumbent on the single office holder to positively do this even in the actual deliberations. And this leads me to personal responsibility, indicated by the International Commission on State Sovereignty and Intervention. Scelle holds that the real subjects of international law are individuals, and it is ultimately they who perform the double role, including the upholding of international law.[105]

For the officeholder, the office could be a shield from responsibility. But, as I have suggested, the office can also ~~represent~~ be the mantle that carries responsibility. To me - and I am not unique in this respect - the position of public official is not any less morally relevant than that of a family man,[106] and to say anything else is to start to ~~begin~~ walk down the road that ~~the journey that~~ led to Auschwitz.[107] And that applies to any person serving in an office in any organ playing a part in the international community - whether the legal adviser in a Foreign Ministry, the advocate of an authoritative human rights NGO, or the CEO of a multinational company exercising *de facto* authority in a failed or corrupt state. (Ove has masterfully played two of these three roles, and has advised holders of the third one.) Is it not,

[105] Cassese, *supra* note ~~59~~59~~589~~.
[106] For a moving account of what that might mean, *see* the contribution by Hans Corell in this volume.
[107] *See* ~~Zygmunt~~ Z. Bauman, *Auschwitz och det moderna samhället* (trans. ~~Gustaf~~ G. Gimdal och ~~Richard~~ R. Gimdal, Daidalos, Göteborg, 1989) pp. 240-241 and *passim.*

~~In last analysis,~~ when it comes down to *praxis*, ~~is it not~~ in the last instance a question of professional ethics?

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Few people have battled so intensively with these issues as did Hammarskjöld. For him, it was all to do with the office *and* the man or woman - the duties flowing from the office and lying with the incumbent - and the approach to "international life which … is concerned mainly with problems of personal ethics".[108]

In his personal diary, later published as *Vägmärken* (*Markings*), Hammarskjöld wrote: "You must know life, and be recognised by it, after your measure of transparency – after the measure of your ability to disappear as an end and remain just as a means."[109] As Ove noted, although Hammarskjöld on a general level accepted Kant's postulate that human beings can only be ends, not means, he applied the opposite guidelines for the governance of his own life - "namely by suppressing himself as a subject and striving to function as an object/means to achieve something".[110] I would add that it is only the human subject that can turn itself into a means rather than an end, and perhaps that is exactly what one does in assuming a public office, to the extent demanded by that office.[111]

How do you know whether or not you have responded adequately to such a calling? Hammarskjöld offers no answer because in the end, there is none: On the one hand, "the results of the inner dialogue are evident to all, evident as independence, courage and fairness

[108] Dag Hammarskjöld cited from Fröhlich, *supra* note ~~55~~536, p. 214.
[109] ~~Dag~~ D. Hammarskjöld, *Vägmärken* (Albert Bonniers förlag, Stockholm, 1963, 1999) p. 123. My translation.
[110] ~~Ove~~ O. Bring, 'Dag Hammarskjöld and the Issue of Humanitarian Intervention', *supra* note ~~44~~535, p. 514.
[111] For Hammarskjöld himself, that went very far, of course.

in dealing with others, evident in true international service",[112] but on the other "[a] mature man is his own judge".[113] "[T]he final reply is not one that can be given in writing, but only in terms of life … The rest is silence."[114]

[112] Falkman, *supra* note ~~6537~~, p. 205.
[113] Falkman, *supra* note ~~6537~~, p. 203.
[114] Falkman, *supra* note ~~6537~~, p. 205.