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ARTICLES

The Humanitarian Principles: Relativity Revisited

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Abstract
The principles of humanity, impartiality, neutrality, and independence are widely viewed as integral to humanitarian assistance. Yet, despite shaping the work of many humanitarians, the international legal status of these principles is unclear. This article revisits recent scholarship that presents the bindingness of these humanitarian principles as "relative." Through a close reading of the British Columbia Court of Appeal case of *R v Rajaratnam*, a decision that, to date, has received only limited scholarly attention, this article points to the role of national court decisions in the development of these humanitarian principles in international law. It explores how such decisions can help elaborate the legal meaning of the humanitarian principles and be integral to the crystallization of the humanitarian principles in customary international law. Far from merely theoretical, and with diverse humanitarian crises ongoing worldwide, this article's inquiry into the *Rajaratnam* decision underlines the wide-ranging implications of national decisions on humanitarian practice in public international law.

Keywords: Humanitarian principles; humanitarian assistance; public international law; international disaster law; international humanitarian law

Résumé
Les principes d'humanité, d'impartialité, de neutralité et d'indépendance sont largement considérés comme indissociables de l'action humanitaire. Pourtant, bien qu'ils orientent le travail de nombreux acteurs humanitaires, leur statut juridique international demeure incertain. Cet article réexamine des travaux récents qualifiant de "relative" la force contraignante de ces principes humanitaires. À travers une analyse approfondie de l'arrêt *R c Rajaratnam* rendu par la Cour d'appel de la Colombie-Britannique — une décision qui, à ce jour, n'a suscité que peu d'intérêt doctrinal — cet article met en lumière le rôle des décisions des tribunaux nationaux dans l'évolution de ces principes en droit international. Il explore la manière dont de telles décisions peuvent contribuer à préciser la portée juridique des principes humanitaires et jouer un rôle clé dans leur cristallisation en droit international coutumier. Loin de se limiter à une approche théorique, et dans un contexte marqué par la persistance de crises humanitaires à travers le monde, l'étude de l'arrêt *Rajaratnam* proposée ici souligne les répercussions considérables des décisions nationales sur la pratique humanitaire au regard du droit international public.

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Mots-clés: Aide humanitaire; droit international public; droit international humanitaire; droit international des catastrophes; principes humanitaires

1. Introduction

In the summer of 2010, a fifty-nine-metre-long cargo ship, the *MV Sun Sea*, entered Canadian territorial waters. Carrying 492 Tamil Sri Lankan men, women, and children claiming refugee status in Canada, the ship was intercepted by Canadian authorities and escorted to Canadian Forces Base Esquimalt on Vancouver Island. After fleeing the Sri Lankan civil war, these individuals found themselves aboard a ship with deplorable living and safety conditions. Royal Canadian Mounted Police captain and witness Phillip Nelson said that they "were the worst of any vessel he had ever seen," an account corroborated by Tamil witnesses aboard the ship.[1] Following the incident, Thampeernayagam Rajaratnam, Lesly Jana Emmanuel, and Nadarajah Mahendran were charged with human smuggling in violation of section 117 of Canada's *Immigration and Refugee Protection Act* (*IRPA*).[2] While Rajaratnam, Emmanuel, and Mahendran had been involved in the organization and transport of these Sri Lankan migrants, they claimed before the British Columbia Court of Appeal (BCCA) that they should be excused from this offence based on a "humanitarian exception" to section 117 of the *IRPA*.

The legal implications of this situation are manifest. The transboundary nature of the incident involved evidence from a foreign police service, which raises hearsay concerns.[3] The invocation of the "humanitarian aid" defence gave scope for the BCCA to elaborate the humanitarian, mutual, and family aid exceptions to human smuggling,[4] acknowledged by the Supreme Court of Canada in *R v Appulonappa*[5] and *B10 v Canada*.[6] Subsequent cases such as *Baleeyoos v Canada (Public Safety and Emergency Preparedness)*[7] and *R v Boule*[8] relied on *Rajaratnam* in this regard. However, a crucial element of this case, which to date has remained largely unexplored,[9] is what it reveals about the "humanitarian principles" of humanity, impartiality, neutrality, and independence — insights that can have important implications for the laws of humanitarian assistance more broadly. Engaging with recent scholarship on the humanitarian principles, this article revisits the description

[1] *R v Rajaratnam*, 2019 BCCA 209 at para 21 [*Rajaratnam*].

[2] *Ibid* at para 2; *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Two other individuals were also charged, though one died prior to trial and the other was tried separately.

[3] See Robert J Currie, "Admissibility of Hearsay Gathered under MLAT: A Tempest in Canada" (2022) 1 Transnational Crim L Rev 123; Gib Van Ert, "Canadian Cases in Public International Law in 2019" (2019) 57 Can YB Intl L 558 at 573–74. On subsequent cases engaging with this issue, see also *R v Lalji*, 2023 ONCJ 45; *R v Raja*, 2020 ONCJ 250; *R v Boyce*, 2019 ONCA 828.

[4] See Van Ert, *supra* note 3 at 574–76; Elise Mercier, Sean Rehaag & Francisco Rico-Martinez, "Canadian 'Dreamers': Access to Post-Secondary Education" (2023) 60:3 Osgoode Hall LJ 699 at 735.

[5] 2015 SCC 59 [*Appulonappa*].

[6] 2015 SCC 58.

[7] *Baleeyoos v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 666 [*Baleeyoos* 2024]; *Baleeyoos v Canada (Public Safety and Emergency Preparedness)*, 2023 CanLII 39045 (CA IRB).

[8] *R v Boule*, 2020 BCSC 1846 [*Boule*].

[9] A brief engagement with this matter in *Rajaratnam* is provided in Mercier, Rehaag & Rico-Martinez, *supra* note 4 at 741–42.

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of the bindingness of the principles as "relative." Through a close reading of the BCCA's *Rajaratnam* decision, this article moves beyond a discourse concentrated on international cases, United Nations (UN) resolutions, and organizational bylaws to consider the role that the decisions of national courts can play in both the interpretation and substantive development of these humanitarian principles in international law. As a subsidiary means for the determination of rules of international law, the decisions of national courts can play an important role in elaborating the legal meaning of the humanitarian principles. Moreover, as an expression of state practice, national court decisions can be integral to the crystallization of the humanitarian principles in customary international law.

The article begins by describing the four humanitarian principles. It considers their general meanings and how they emerge in the practice of humanitarian assistance. Section 2 then discusses the legal basis of the humanitarian principles. It presents a traditional view that the principles are generally binding as a matter of public international law before outlining the emerging critique of this view; that the bindingness of the humanitarian principles is instead relative (that is, binding only on certain actors in certain circumstances). Turning to *Rajaratnam*, section 3 provides a close reading of this decision and its treatment of the humanitarian principles. Finally, revisiting relativity, section 4 explores the broader implications of *Rajaratnam* for the applicability of the humanitarian principles in public international law. Far from being merely theoretical, and with diverse humanitarian crises ongoing worldwide, this applicability has wide-ranging implications for humanitarian practice. We begin by describing the humanitarian principles.

2. The humanitarian principles explained

In April 2025, UN Secretary-General António Guterres reiterated the UN's position about humanitarian assistance in Gaza: "Let me be clear: We will not participate in any arrangement that does not fully respect the humanitarian principles: humanity, impartiality, independence and neutrality."[10] These four principles appear as "the" humanitarian principles[11] across regional treaties like the *Kampala Convention*[12] and soft law codes of conduct like the *Sphere Standards*.[13] Modified versions are found in the International Law Commission's (ILC) *Draft Articles on the Protection of Persons in the Event of Disasters* (*ILC Draft Articles*) and Resolution 46/182,[14] as well as the 1994 *Code of Conduct for the International Red Cross and Red Crescent Movement*

[10]United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Press Release, "The Secretary General: Remarks to the Press on Gaza" (8 April 2025), online: <ochaopt.org/content/secretary-general-remarks-press-gaza> [perma.cc/KPP8-4VX5].

[11]Marina Sharpe, "It's All Relative: The Origins, Legal Character and Normative Content of the Humanitarian Principles" (2024) 106:925 Intl Rev Red Cross 12 at 13.

[12]*African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, 23 October 2009, 3014 UNTS 3, art 5(8) (entered into force 6 December 2012) [*Kampala Convention*].

[13]Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*, 4th ed (Geneva: Practical Action Publishing, 2018) [*Sphere Standards*].

[14]On the principles of humanity, neutrality, and impartiality, though not to the principle of independence, see International Law Commission (ILC), *Draft Articles on the Protections of Persons in the Event of Disasters*, UN Doc A/71/10 (2016) at 35, s E(2), art 6 [*ILC Draft Articles*]; *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UNGAOR, 46th Sess, UN Doc A/RES/46/182 (1991) at para 2 [Resolution 46/182].

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and Non-Governmental Organizations in Disaster Relief.[15] They are also referenced in national public and private law regimes where "they operate within the framework of general or specific legal regulations imposing the principles upon [humanitarian actors] as a matter of law."[16]

As a set, the four humanitarian principles of humanity, impartiality, independence, and neutrality emerged from the Red Cross movement in the mid-1950s and a key commentary by Jean Pictet,[17] but, as individual principles, they have a richer history.[18] This section delves into the meaning of the four humanitarian principles and situates their importance in the practice of assistance. Considering their role from early conceptions of humanity, impartiality, neutrality, and independence as aspirational principles rather than "unbending and rigorous law,"[19] to being put forward by the UN Secretary-General as a *sine qua non* of humanitarian assistance, this section discusses the meaning of the humanitarian principles and how they animate contemporary humanitarian practice.

A. The meaning of the four humanitarian principles

The first humanitarian principle — humanity — is often considered a general principle or *grundnorm* of public international law.[20] It has a long legal history — stretching from Hugo Grotius's allusion to obligations to give aid based on "laws of humanity"[21] to Fydor Martens' foundational preambular clause in the 1899 *Hague Convention*, which provides for protections in war to inhabitants and belligerents stemming from "the laws of humanity and the dictates of public conscience."[22] As a general principle, humanity has applicability during both armed conflicts[23] and times

[15]International Federation of Red Cross and Red Crescent Societies, *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief* (1994) at 3–5.

[16]Marc Weller, "The Relativity of Humanitarian Neutrality and Impartiality" (1997) 91 Am Soc'y Intl L Proc 441 at 449.

[17]Jean Pictet, "The Fundamental Principles of the Red Cross" (1979) 19:210 Intl Rev Red Cross Archive 130 at 130, 133; Sharpe, *supra* note 11 at 23.

[18]See e.g. Dug Cubie, *The International Legal Protection of Persons in Humanitarian Crises: Exploring the Acquis Humanitaire* (Oxford: Hart Publishing, 2019) at 11; Sharpe, *supra* note 11 at 9–19.

[19]Pictet, *supra* note 17 at 137.

[20]See e.g. Anne Peters, "Humanity as the A and Ω of Sovereignty" (2009) 20 Eur J Intl L 3; Ruth Teitel, *Humanity's Law* (New York: Oxford University Press, 2011).

[21]See e.g. Hugo Grotius, *De Jure Belli ac Pacis* (Kitchener, ON: Batoche Books, 2001), bk 3, ch 11; Hersch Lauterpacht, "The Grotian Tradition in International Law" (1946) 23 Brit YB Intl L 1 at 46.

[22]*Hague Convention (II) with Respect to the Laws and Customs of War on Land*, 29 July 1899, 32 Stat 1803, preamble.

[23]*Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31, Can TS 1949 No 20, arts 3(1), 12 (entered into force 21 October 1950) [*Geneva Convention I*]; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85, arts 3(1), 12 (entered into force 21 October 1950) [*Geneva Convention II*]; *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135, art 3(1), 13 (entered into force 21 October 1950) [*Geneva Convention III*]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 at arts 3 (1), 5, 27 (entered into force 21 October 1950) [*Geneva Convention IV*]; *Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977 1125 UNTS 3, art 75 (entered into force December 7, 1978) [*Additional Protocol I*]; *Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International*

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of peace.[24] In armed conflicts, Emily Crawford and Alison Pert suggest that humanity can be thought of as a "limiting factor," offering outer boundaries to what is permissible in times of armed conflict.[25] Others like Yoram Dinstein,[26] Kjetil Larsen, Camilla Cooper,[27] and Gary Solis,[28] however, question whether humanity is in fact a binding legal principle. Dinstein, for instance, refers to humanity as an "extra-legal consideration" that may be "inspiring and instrumental" but does not entail an "obligation (or set of obligations) incorporated *per se* in positive IHL [international humanitarian law]."[29]

In the context of humanitarian assistance, humanity has a particular meaning. It has been described as the "essential principle,"[30] with the commentary to the *Humanitarian Charter* noting that humanity is a principle that is "both universally shared and universally applicable," acting as a moral foundation for humanitarian action.[31] While ostensibly a guiding moral principle, humanity is often expressed practically as the provision of assistance focused on protecting life and health, alleviating suffering, and safeguarding human dignity.[32] Some sources go so far as to suggest that preventing or alleviating human suffering represents a moral and ethical "humanitarian imperative"[33] with possible positive obligations.[34]

Next is impartiality, which the UN Office for the Coordination of Humanitarian Affairs (OCHA) describes as humanitarian action "carried out on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions."[35]

Armed Conflicts (Protocol II), June 8, 1977, 1125 UNTS 609 at art 4(1) (entered into force December 7, 1978) [*Additional Protocol II*]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 392 at para 218 [*Nicaragua*].

[24]*Corfu Channel* (*UK v Albania*) (Merits), [1949] ICJ Rep 4 at 22 [*Corfu Channel*]; Eduardo Valencia-Ospina, *Third Report on the Protection of Persons in the Event of Disasters*, UN Doc A/CN/4/629 (2010) at para 47.

[25]Emily Crawford & Alison Pert, *International Humanitarian Law*, 3rd ed (Cambridge: Cambridge University Press, 2024) at 48–50.

[26]Yoram Dinstein, "The Principle of Proportionality" in Larsen, Cooper, and Nystuen, *Searching for a "Principle of Humanity"* (Cambridge: Cambridge University Press, 2013) 72 at 73.

[27]Kjetil Larsen, Camilla Cooper & Gro Nystuen, "Introduction by the Editors: Is There a 'Principle of Humanity' in International Humanitarian Law? in Larsen, Cooper, and Nystuen, *Searching for a "Principle of Humanity."* (Cambridge: Cambridge University Press, 2013) 1 at 1.

[28]Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 3rd ed (Cambridge: Cambridge University Press, 2022), at 236–38.

[29]Dinstein, *supra* note 26 at 73.

[30]Pictet, *supra* note 17 at 135.

[31]James Darcy, "User Guidance and Commentary on the Humanitarian Charter," *Sphere Project* (2011) at 4–5, online: <spherestandards.org/wp-content/uploads/2018/07/humanitarian-charter-user-guidance-and-commentary.pdf>; Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response* (Rugby, UK: Practical Action Publishing, 2013).

[32]See e.g. OHCA, Press Release, "Humanitarian Principles" (1 July 2022), online: <unocha.org/publications/report/world/ocha-message-humanitarian-principles-enar> [perma.cc/J9QW-QAAQ]; International Committee of the Red Cross (ICRC), "Our Fundamental Principles" (2016), online: <icrc.org/en/our-fundamental-principles> [perma.cc/F9ZK-SAM2]. On human dignity see *Prosecutor v Zlatko Aleksoveski*, IT-95-14/1-T, Trial Judgment (1999) at para 49 [*Aleksoveski*]; *Sphere Standards*, *supra* note 13 at 28.

[33]Darcy, *supra* note 31 at 4–5.

[34]*ILC Draft Articles*, *supra* note 14, art 4, para 6.

[35]See e.g. OCHA, *supra* note 32. See also ICRC, *supra* note 32; Jean-Marie Henckaerts et al, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (Cambridge: Cambridge University Press, 2021) at para 1343 [*Commentary on GC-III*].

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This principle is often expressed as covering several sub-principles, including non-discrimination,[36] proportionality, and impartiality proper.[37] Based on these sub-principles, relief should be provided on the basis of "differences in peoples' needs" and not differences between peoples.[38] Impartiality is noted in sources like Common Articles 3(2) and 9/9/9/10 to the *Geneva Conventions*[39] and Article 18(2) of *Additional Protocol II*, which describe the provision of relief of an "exclusively humanitarian and impartial nature and which [is] conducted without any adverse distinction."[40] This principle can further be found in bilateral peace agreements, like the *Protocol on the Establishment of Humanitarian Assistance in Darfur*, between the Government of the Republic of Sudan and the Sudanese Liberation Movement, which holds that assistance is "guided only by urgent distress" and is "provided regardless of ethnic origin, gender, nationality, opinions, race or religion."[41] Interestingly, "impartiality in the implementation of humanitarian aid" is the only humanitarian principle mentioned in European Commission's (EC) Council Regulation 1257/96 in outlining eligibility requirements for receiving EC financing.[42] Impartiality, ultimately, is a principle of action.[43] It manifests in the tangible, day-to-day activities of humanitarians, requiring them to provide aid strictly "on the basis of, and in proportion to, the need of the victims."[44] Practically, then, impartiality is composed of the sub-principles of "non-discrimination, proportionality, and impartiality *stricto sensu*."[45]

Neutrality, the third humanitarian principle, is about not "taking sides,"[46] either in hostilities or "in controversies of a political, racial, religious or ideological nature."[47] As Kubo Mačák sees it, neutrality exists as a "macro-level principle of abstention," contrasting impartiality's micro-level actionability.[48] It requires humanitarians to

[36]See also *Obligations of Israel in Relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in Relation to the Occupied Palestinian Territory*, Advisory Opinion (22 October 2025) at para 115 [*Obligations of Israel*].

[37]Pictet, *supra* note 17 at 136; *ILC Draft Articles*, *supra* note 14 at art 6, para 5. Ruth Stoffels, by contrast, describes three varieties of impartiality: overall impartiality — all the actions that a specific actor undertakes — resulting impartiality — the combined actions of all actors — and non-discrimination — basing humanitarian assistance on no distinctions other than humanitarian need. Ruth Abril Stoffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps" (2004) 86:855 Intl Rev Red Cross 515 at 540.

[38]Hugo Slim, "Relief Agencies Moral Standing in War: Principles of Humanity, Neutrality, Impartiality and Solidarity" (1997) 7:4 Development in Practice 342 at 348–49 [Slim, "Relief Agencies"].

[39]*Commentary on GC-III*, *supra* note 35 at para 828; Jean-Marie Henckaerts et al, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field* (Cambridge: Cambridge University Press, 2016) at para 1160 [*Commentary of GCI*].

[40]*Geneva Conventions*, *supra* note 23, Common Articles 3, 9/9/9/10; *Additional Protocol II*, *supra* note 23, art 18(2).

[41]See *Protocol on the Establishment of Humanitarian Assistance in Darfur*, Sudan, 8 April 2004, art 2 (signed 8 April 2004) [*Darfur Protocol*].

[42]Council Regulation No 1257/96 of 20 June 1996 Concerning Humanitarian Aid, [1996] OJ L163, art 7(2)(g) [Council Reg 1257/96].

[43]Weller, *supra* note 16 at 443; Kubo Mačák, "A Matter of Principle(s): The Legal Effect of Impartiality and Neutrality on States as Humanitarian Actors" (2015) 97:897/898 Intl Rev Red Cross 157 at 161.

[44]Mačák, *supra* note 43 at 161.

[45]*Ibid.*

[46]*Obligations of Israel*, *supra* note 36 at para 115.

[47]OCHA, *supra* note 32. See e.g. *Darfur Protocol*, *supra* note 41, art 3.

[48]Mačák, *supra* note 43 at 161.

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"remain ideologically free."[49] Neutrality can relate to the actions of humanitarians. Giving material support to an armed group (like providing food aid to them in order to facilitate access to vulnerable populations), for instance, can be a non-neutral action (and, in the international criminal law context, can even be implicated in criminal liability, as Miles Jackson has illustrated in his article on "virtuous accomplices"[50] in international crime).[51] Neutrality can also relate to the statements of humanitarians — are humanitarians taking sides in what they say? It is harder to determine neutrality in instances where humanitarians remain silent in the face of suffering[52] or express a "principled position, based on firm ideals."[53] Unlike impartiality, Common Articles 3[54] and Article 9/9/9/10[55] to the *Geneva Conventions* are silent on the matter of neutrality. It is also a principle that has been the subject of theoretical, historical, and practical critiques from scholars who question its usefulness.[56]

Neutrality is a "close relation" of impartiality.[57] As the International Court of Justice (ICJ) notes in its advisory opinion in *Obligations of Israel*, "the two concepts are related and neutrality plays a role in assessing the impartiality of the activities of humanitarian organizations."[58] Yet, while impartiality and neutrality are "partially overlapping principles," they should not be mistaken to be "synonyms."[59] In *Nicaragua*, for instance, the ICJ referenced non-discrimination (which, as noted earlier, falls under impartiality),[60] in finding that the assistance was not humanitarian.[61] Its reasoning, however, describing assistance being provided only to the *Contras* and their dependents, reflects more the absence of neutrality.[62] One important distinction that is revealed by this common conflation is that, whereas impartiality addresses discrimination within groups, neutrality reflects picking sides between groups. In the

[49]*Ibid.*

[50]*Rome Statute of the International Criminal Court*, 17 July 1998, Can TS 2002 No 13 (entered into force 1 July 2002), art 25(3)(d) [*Rome Statute*]; Miles Jackson, "Virtuous Accomplices in International Criminal Law" (2019) 68:4 ICLQ 820.

[51]See also *Prosecutor v Calixte Mbarushimana*, ICC-01/04-01/10 OA 4, Separate Reasons of Silvia Fernandez de Gurmendi J (30 May 2012) at para 12 (International Criminal Court, Appeals Chamber).

[52]See e.g. Stuart Gordon & Antonio Donini, "Romancing Principles and Human Rights: Are Humanitarian Principles Salvageable" (2015) 97:897/898 Intl Rev Red Cross 77 at 90–91, 94.

[53]Slim, "Relief Agencies," *supra* note 38 at 348.

[54]*Commentary on GC-III*, *supra* note 35 at para 835.

[55]*Commentary of GCI*, *supra* note 39 at para 1164.

[56]Hugo Slim, "You Don't Have to Be Neutral to Be a Good Humanitarian" (27 August 2020), online: <thenewhumanitarian.org/opinion/2020/08/27/humanitarian-principles-neutrality>; Hugo Slim, "Look Back and Learn: Notable Humanitarians Who Took Sides" (22 September 2020), online: <thenewhumanitarian.org/opinion/2020/09/22/humanitarians-who-took-sides>; Daniel Maul, "The Politics of Neutrality: the American Friends Service Committee and the Spanish Civil War, 1936–1939" (2016) 23:1–2 European Review of History 82; Emily Baughan & Juliano Fiori, "Save the Children, the Humanitarian Project, and the Politics of Solidarity: Reviving Dorothy Buxton's Vision" (2015) 39:2 Disasters 129.

[57]Slim, "Relief Agencies," *supra* note 38 at 348.

[58]*Obligations of Israel*, *supra* note 36 at para 116.

[59]Weller, *supra* note 16 at 443.

[60]Slim, "Relief Agencies," *supra* note 38 at 348.

[61]*Nicaragua*, *supra* note 23 at para 243.

[62]Interestingly, Schwebel J in dissenting opinion writes: "[I]t is lawful … to give to a people struggling for self-determination moral, political, and humanitarian assistance," implying that neutrality is not necessary for assistance to be humanitarian in the context of self-determination struggles. *Nicaragua, supra* note 23 at para 180, per Schwebel J, dissenting.

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advisory opinion in *Obligations of Israel*, the ICJ seemed to read neutrality into the concept of impartiality.[63]

The fourth humanitarian principle — independence — describes humanitarian actors' freedom from the influence of other actors like states and donors. The OCHA notes that "[h]umanitarian action must be autonomous from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented."[64] Independence is important to preserve operational flexibility, maintain unimpeded decision-making, and ensure that humanitarian needs are not subordinated to other objectives. Though independence is a core humanitarian principle within the International Federation of Red Cross and Red Crescent Societies' *Code of Conduct*, it is omitted from numerous international normative instruments.[65] For instance, independence is absent from Resolution 46/182, which only lists humanity, neutrality, and impartiality.[66] Resolution 46/182 goes on to note that inter-governmental organizations and non-governmental organizations (NGOs) should "make a significant contribution in supplementing national efforts,"[67] suggesting an expectation of coordination with, rather than independence from, the state where a shock has occurred.

Similarly, the ILC's *Draft Articles* list humanity, neutrality, and impartiality, but not independence, as humanitarian principles.[68] While several countries, regional bodies, and organizations — including the Czech Republic, Thailand, Ecuador, the European Union (EU), and the OCHA[69] — supported the inclusion of independence in the *Draft Articles*, a position recommended by the Special Rapporteur,[70] it was ultimately excluded from the final articles. Article 214 of the *Treaty on the Functioning of the European Union*, which articulates how the EU is to engage with humanitarian assistance, similarly includes impartiality and neutrality but omits independence.[71] Common Articles 3 and 9/9/9/10 to the *Geneva Conventions* do not demand that impartial humanitarian bodies adhere to the principle of independence.[72] Elsewhere, independence might be included as a humanitarian principle, but it is qualified or specified. For instance, the *Jeddah Declaration of Commitment to Protect the Civilians of Sudan* lists "*operational* independence" alongside the other principles of humanity, impartiality, and neutrality.[73]

[63]See *Obligations of Israel*, *supra* note 36 at paras 113–16. See also Eliav Lieblich, "The ICJ's Advisory Opinion on Israel's Obligations towards UNRWA and Other International Organizations in the Occupied Territories: Key Issues" (23 October 2025), online: <justsecurity.org/123215/icj-advisory-opinion-israel-unrwa> [perma.cc/JT89-RMTW].

[64]See e.g. OCHA, *supra* note 32; ICRC, *supra* note 32.

[65]International Federation of Red Cross and Red Crescent Societies, *supra* note 15.

[66]Resolution 46/182, *supra* note 14 at para 2.

[67]*Ibid* at para 5.

[68]*ILC Draft Articles*, *supra* note 14, art 6.

[69]ILC, *Eighth Report on the Protection of Persons in the Event of Disasters*, UN Doc A/CN.4/697 (2016) at paras 132–33, 138 [*ILC Eighth Report*].

[70]*Ibid* at para 140.

[71]*Treaty on the Functioning of the European Union*, OJ 2016 C 202/47, art 214.

[72]*Commentary of GCI*, *supra* note 39 at para 1164; *Commentary on GC-III*, *supra* note 35 at para 835.

[73]With our emphasis, see the Third Commitment of the *Jeddah Declaration of Commitment to Protect the Civilians of Sudan*, Sudanese Armed Forces and the Rapid Support Forces, 15 April 2023, online: <2021-2025.state.gov/jeddah-declaration-of-commitment-to-protect-the-civilians-of-sudan/> [https://perma.cc/8YD7-TLE2] [*Jeddah Declaration 2023*].

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B. The humanitarian principles in practice

For humanitarians, adherence to these four principles can be challenging. Even the most principled humanitarians are often unable to adhere to all the principles all the time. The practice of assistance, in other words, regularly involves some level of compromise on the humanitarian principles. At a contextual level, it is important to acknowledge that the four humanitarian principles are "only very partially accepted outside the Western world."[74] Chinese humanitarians have privileged principles like a well-ordered state and comprehensive development,[75] and Latin American humanitarians have favoured solidarity over neutrality and independence.[76] While, factually, humanitarian assistance is not the exclusive preserve of Western humanitarians, there is a risk that a strict adherence to the principles privileges Western humanitarians while crowding out others from more diverse cultures and countries.

At an organizational level, different types of humanitarians may depart from particular principles. A common schema for classifying humanitarians differentiates between classic/principled, practical/pragmatist, faith-based, and political/solidarist humanitarians.[77] In this schema, classic humanitarians are organizations whose work closely adheres to the four humanitarian principles. They are described as subscribing to narrower definitions of assistance centred primarily on life-saving or needs-based interventions, while being hesitant to work with government donors or advance political motives.[78] The International Committee on the Red Cross (ICRC), Médecins Sans Frontières (MSF), and Save the Children are common examples.[79] Practical/pragmatist humanitarians are more "action"-oriented organizations, focused on operational efficiency and more willing to stray from the humanitarian principles in order to achieve results.[80] They tend to be more willing instruments of their home governments' foreign policies.[81] For instance, there is CARE International.[82] Faith-based humanitarians are organizations steeped in religious traditions. They have a long history of providing assistance that continues to this day.[83] Prominent examples include World Vision and Islamic Relief Worldwide. Finally, the political/solidarist organizations have broader definitions of humanitarian activities. Unlike the narrower lifesaving or needs-based focus of the principled humanitarians, the solidarists have more expansive mandates that often seek to address the "root causes of conflict"

[74]Gordon & Donini, *supra* note 52 at 101–02.

[75]See e.g. Miwa Hirono, "Three Legacies of Humanitarianism in China" (2013) 37:S2 Disasters 202 at 203.

[76]Gordon & Donini, *supra* note 52 at 101.

[77]See e.g. Antonio Donini et al, *Humanitarian Agenda 2015: Final Report: The State of the Humanitarian Enterprise* (Medford, MA: Feinstein International Center, 2008).

[78]*Ibid* at 11. See also Dorothea Hilhorst, "Classical Humanitarianism and Resilience Humanitarianism: Making Sense of Two Brands of Humanitarian Action" (2018) 3:15 J Intl Humanitarian Action 1 at 3.

[79]Joost Herman, 'International Law and Humanitarian Space' in Andrej Zwitter et al, eds, *Humanitarian Action: Global, Regional and Domestic Legal Responses* (Cambridge: Cambridge University Press, 2015) at 16.

[80]Donini et al, *supra* note 77 at 11.

[81]Gordon & Donini, *supra* note 52 at 89.

[82]Abby Stoddard, "Humanitarian NGOs: Challenges and Trends" (2003) 12 Humanitarian Policy Group Briefing 1 at 2–3.

[83]See e.g. Bruno De Cordier, "Faith-Based Aid, Globalisation and the Humanitarian Frontline: An Analysis of Western-Based Muslim Aid Operations" (2009) 33:4 Disasters 608; Miriam Ticktin, "Transnational Humanitarianism" (2014) 43:1 Annual Rev Anthropology 273 at 273–74, 281.

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or vulnerability.[84] These organizations are more willing to take sides when providing assistance. Norwegian Peoples's Aid is a notable example.[85]

Based on this schema, the pragmatists do not necessarily align with the humanitarian principles of independence and neutrality. As actors more willing to reflect the foreign policies of their home governments, these actors might be more readily influenced by those states (thus, compromising independence) or more prone to assist a party to a conflict aligned with their home state (thus, compromising neutrality). Actors within the faith-based and political/solidarist categories may similarly align less well with the principle of neutrality. They might be quicker, for instance, to speak out against a party to a conflict involved in rights abuses or to provide aid to a resistance or liberation group (thus, compromising neutrality).

Beyond this schema of more established categories of humanitarian organizations, adherence to the humanitarian principles with less visible humanitarians is even more tenuous. Diaspora organizations committed to providing relief exclusively to a particular ethnic group might not exhibit the principle of neutrality. Local NGOs and civil society organizations who are guided by solidarity with vulnerable peoples may similarly depart from the principle of neutrality, and the pressure that local governments are able to exert on them may reduce their independence. Moreover, as these actors can have larger mandates than those typically associated with humanitarian activities — from state building to economic development — they can depart from narrower conceptualizations of humanity. Finally, informal or irregular actors — those individuals who help simply because they are there[86] — give no guarantees that they will be impartial.

Humanitarian assistance as provided by states also puts the principles into tension. While states may endorse and promote the humanitarian principles as governing norms for humanitarian assistance,[87] their capacity to adhere to principles when serving as humanitarian actors diverges from the capacity of non-state humanitarians. Take independence, for instance. On one level, states are characteristically independent, conditioned by sovereign will and shaped by foreign policy interests. On another, however, static humanitarian entities — like Global Affairs Canada or the Australian Government Department of Foreign Affairs and Trade — are largely (if not entirely) conditioned by the interests of the states of which they form a part. As such, though states are competent to exercise a form of independence, it is a form of independence fundamentally distinct for the humanitarian independence that preserves operational flexibility, maintains unimpeded decision-making, and ensures that humanitarian needs are not subordinated to other objectives.

Turning from organizations to individuals, the humanitarian principles are more easily adhered to by international as compared to national staff. While individual humanitarians can, and often do, manage to adhere to the humanitarian principles for the purposes of their employment, various dynamics can complicate or compromise this capacity. Myfanwy James's ethnography of humanitarian assistance in the

[84]Donini et al, *supra* note 77 at 11.

[85]Marnie Lloydd, "Sticking Together While Standing One's Own Ground: The Meanings of Solidarity in Humanitarian Action" (2024) 106:925 Intl Rev Red Cross 269 at 279–80.

[86]For contemplation of this, see *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864, art 5, online: <ihl-databases.icrc.org/en/ihl-treaties/gc-1864> [https://perma.cc/2NQD-3HVZ].

[87]Sharpe, *supra* note 11 at 43–44.

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Democratic Republic of Congo, for instance, discusses how domestic humanitarians are unable to shed their local identities[88] and are thus not perceived as being neutral and impartial, either by local actors or international staff.[89] For individuals who are local to a context, it is harder to escape (or be perceived as escaping) the politics of that context. These distinctions are particularly important given the composition of humanitarian offices. MSF's field staff, for example, comprises 90 percent nationals.[90] Thus, even where an organization adheres to the four humanitarian principles, individuals within that organization may not be able to adhere to those principles.

The relationship between the humanitarian principles and the practice of assistance has come under increased scrutiny more recently with regard to humanitarian assistance in the Gaza Strip, particularly concerning the Gaza Humanitarian Foundation (GHF). Launched in May 2025[91] and wound down about six months later,[92] the GHF was a private humanitarian foundation established with support from Israel and the United States[93] to distribute aid in Gaza. The work of the GHF was widely criticized by states,[94] UN bodies,[95] and NGOs.[96] Some critiques focused on the GHF's capacity to meet humanitarian needs,[97] its role in displacing existing

[88]Myfanwy James, "Who Can Sing the Song of MSF?: The Politic of 'Proximity' and Performing Humanitarianism in Eastern DRC" (2020) 2:2 J Humanitarian Affairs 31 at 34.

[89]*Ibid* at 35–36; Hilhorst, *supra* note 78 (who similarly argues that principled assistance "seems unaware of other trust-forgers, … such as accountability and reliability or … longstanding solidarity," at 4).

[90]Renée C Fox, *Doctors without Borders: Humanitarian Quests Impossible Dreams of Médecins Sans Frontières*, (Baltimore: Johns Hopkins University Press, 2014) at 105–06.

[91]*Obligations of Israel*, *supra* note 36 at para 73.

[92]"Controversial US-Backed Gaza Humanitarian Foundation Ends Aid Operations," *BBC News* (24 November 2025), online: <bbc.com/news/articles/cj01jr13277o> [perma.cc/K486-DKWK].

[93]See *Obligations of Israel*, *supra* note 36 at paras 73, 123. See also Office of the United Nations High Commissioner for Human Rights (OHCHR), Press Release, "UN Experts Call for Immediate Dismantling of Gaza Humanitarian Foundation" (5 August 2025), online: <www.ohchr.org/en/press-releases/2025/08/un-experts-call-immediate-dismantling-gaza-humanitarian-foundation>.

[94]Government of Canada, Press Release, "Joint Donor Statement on Humanitarian Aid to Gaza" (19 May 2025), online: <canada.ca/en/global-affairs/news/2025/05/joint-donor-statement-on-humanitarian-aid-to-gaza.html>.

[95]OHCHR, *supra* note 93; United Nations, Press Release, "Statement of the Bureau of the General Assembly's Committee on the Exercise of the Inalienable Rights of the Palestinian People" (30 May 2025), online: <un.org/unispal/document/ceirpp-press-statement-600-days-war-gaza-30may2025> [perma.cc/3BCF-UFR7] [United Nations, "Statement"]; United Nations, News Release, "Gaza Is the 'Hungriest Place on Earth,' as Israel Continues Stranglehold on Aid," *United Nations News* (30 May 2025), online: <news.un.org/en/story/2025/05/1163861> [perma.cc/7Z98-VYQV] [United Nations, "Gaza"].

[96]Amnesty International, "Israel and US-Backed Gaza Humanitarian Foundation Is an Illegitimate and Inhumane Aid Scheme That Risks Violating International Law" (29 May 2025), online: < www.amnesty.org.au/israel-and-us-backed-gaza-humanitarian-foundation-is-an-illegitimate-and-inhumane-aid-scheme-that-risks-violating-international-law/> [perma.cc/T5FU-8AJH]; Eric Reidy & Will Worley, "Outcry as Aid Sector Risks Normalising the Gaza Humanitarian Foundation" (20 August 2025), online: <thenewhumanitarian.org/news/2025/08/20/outcry-aid-sector-risks-normalising-gaza-humanitarian-foundation-ghf-palestine>; Doctors without Borders, "US-backed Aid Distribution Points in Gaza Are Sites of Orchestrated Killing" (7 August 2025), online: <www.doctorswithoutborders.org/latest/us-backed-aid-distribution-points-gaza-are-sites-orchestrated-killing> [perma.cc/J9MJ-EJP2]; Scott Paul, "The Gaza Humanitarian Foundation Wasn't a 'Success.' Here's Why," *Oxfam* (25 November 2025), online: www.oxfamamerica.org/explore/emergencies/gaza-and-israel-emergency-appeal/the-gaza-humanitarian-foundation-wasnt-a-success-heres-why/> [perma.cc/E8LR-HPDA].

[97]Michelle Nichols, "UN Humanitarian Chief Slams Aid Plan for Gaza Proposed by Israel, Backed by US," *Reuters* (14 May 2025), online: <reuters.com/world/un-aid-chief-slams-israels-gaza-aid-plan-cynical-sideshow-2025-05-13>.

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aid structures,[98] or the legitimacy of privatizing humanitarian assistance.[99] Others concentrated on civilian safety and risk exposure at distribution sites;[100] the Office of the UN High Commissioner for Human Rights reported in July 2025 that "875 people [were] killed in Gaza while trying to get food; 674 of them … in the vicinity of GHF sites."[101] Amidst these events, the GHF's ability to deliver aid in a manner consistent with the humanitarian principles was a major concern.

A joint statement from Canada, Australia, New Zealand, and a number of European nations and institutions, for instance, acknowledged with respect to this "new model" that the UN and other humanitarian partners would "not participate in any arrangement that does not fully respect the humanitarian principles" and stated that "[h]umanitarian principles matter for every conflict around the world and should be applied consistently in every warzone."[102] The UN Bureau of the General Assembly's Committee on the Exercise of the Inalienable Rights of the Palestinian People echoed this sentiment, stating:

> [The GHF] is an attempt to circumvent the UN and its agencies on the ground, foremost UNRWA [UN Relief and Works Agency], that have long delivered humanitarian aid and basic services in assistance of the Palestinian people in accordance with international law, including humanitarian law, relevant UN resolutions and the humanitarian principles of independence, neutrality, impartiality and independence [*sic*]. The GHF fails the test of the humanitarian principles.[103]

Indeed, even Jake Woods, the initial executive director of the GHF resigned within weeks of the organization's creation, stating that "it is clear that it is not possible to implement this plan while also strictly adhering to the humanitarian principles of humanity, neutrality, impartiality, and independence, which I will not abandon."[104] Despite such criticisms, the legal significance of an actor providing assistance in a manner that does not adhere to the humanitarian principles remains in question. The next section explores this significance considering what, if any, is the legal basis of the humanitarian principles.

3. The legal basis of the humanitarian principles

The practice of humanitarian assistance points to a centrality of the humanitarian principles. Humanitarian organizations and individuals hold themselves out as

[98]Paul, *supra* note 96.

[99]See e.g. Julia Emtseva, "Privatizing Aid: The Gaza Humanitarian Foundation Affair," *EJIL:Talk1!* (4 June 2025), online: <www.ejiltalk.org/privatizing-aid-the-gaza-humanitarian-foundation-affair/> [perma.cc/HW63-NVXJ].

[100]*Obligations of Israel*, *supra* note 36 at para 73.

[101]United Nations, News Release, "Gaza: 875 People Confirmed Dead Trying to Source Food in Recent Weeks," *United Nations News* (15 July 2025), online: <news.un.org/en/story/2025/07/1165396> [perma.cc/3GJS-N67Y].

[102]Government of Canada, *supra* note 94.

[103]United Nations, "Statement," *supra* note 95; United Nations, "Gaza," *supra* note 95; Amnesty International, *supra* note 96.

[104]Jeremy Diamond, Hira Humayun & Jessie Yeung, "Head of Controversial US-Backed Gaza Aid Group Resigns, Citing Concerns over Independence and Impartiality," *CNN* (27 May 2025), online: <www.cnn.com/2025/05/26/middleeast/gaza-humanitarian-foundation-aid-resigns-intl-hnk> [perma.cc/DZA8-WMWP].

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adhering to these principles across a variety of contexts — from armed conflicts, to disasters, to refugee responses. But whether these organizations and individuals are under a legal obligation to adhere to the humanitarian principles is a different matter. This section considers what sources point to the bindingness of the humanitarian principles as a matter of public international law. It then presents a growing literature that frames the bindingness of the humanitarian principles as relative.

A. The humanitarian principles in public international law

If you ask an operational humanitarian actor if they understand the humanitarian principles to be binding on them as a matter of international law, you may well receive an affirmative reply. This presumption is not entirely without merit. The principles are referenced in various sources of international law, including regional treaties, UN resolutions, and soft law instruments. Recognition of the principles in two UN General Assembly (UNGA) resolutions has largely contributed to the perception that they are rooted in public international law. Resolution 46/182 in 1991 holds that "humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality,"[105] while Resolution 58/114 in 2004 reaffirms "the principles of neutrality, humanity and impartiality for the provision of humanitarian assistance."[106] While UNGA resolutions are not binding in themselves, they can have certain legal effects.[107] Other references to the humanitarian principles appear in treaties with universal applicability, including the *Geneva Conventions*[108] and its *Additional Protocols.*[109]

Certain of the humanitarian principles have also been referenced in ICJ judgments. At a general level, the *Corfu Channel* case took note of "elementary considerations of humanity, even more exacting in peace than in war."[110] More narrowly, in the *Nicaragua* case, the ICJ followed a practical conception of humanity when considering whether the United States' provision of "humanitarian assistance" to the *Contras* in Nicaragua constituted an unlawful intervention.[111] The Court found that this assistance was legitimate insofar as it was limited to life-saving and suffering alleviating provisions — like food, medicine, and clothing — and that it did not include weapons or equipment that could be used to cause injury or death.[112] And, yet, in the *South West Africa* case, the Court writes:

> Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions

[105]Resolution 46/182, *supra* note 14.

[106]*Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations*, GA Res 58/114, UNGAOR, 85th Sess, UN Doc A/Res/58/114 (2003) [Resolution 58/114].

[107]Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2005) 16:5 Eur J Intl L 879 at 879–906.

[108]See e.g. *Geneva Convention I*, *supra* note 23, arts 3, 9; *Geneva Convention II*, *supra* note 23, arts 3, 9; *Geneva Convention III*, *supra* note 23, arts 3, 9; *Geneva Convention IV*, *supra* note 23, arts 3, 10.

[109]See *Additional Protocol II*, *supra* note 23, art 18(2).

[110]*Corfu Channel*, *supra* note 24 at 22.

[111]*Nicaragua*, *supra* note 23 at para 242.

[112]*Ibid* at para 243.

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> thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested — have an interest — in such matters. But the existence of an "interest" does not of itself entai1 that this interest is specifically juridical in character.[113]

This quotation presents a more circumspect consideration of the bindingness of humanitarian considerations.

The most explicit reference from the ICJ to the humanitarian principles in relation to humanitarian assistance comes from the 2025 advisory opinion in *Obligations of Israel*. In this opinion, the ICJ took note of the criticisms levelled against the GHF and the allegations that its operations had been "inconsistent with core humanitarian principles."[114] Still, the Court goes on to emphasize how the obligation to allow impartial humanitarian organizations like the ICRC stems from the civilian population being inadequately supplied.[115] An important implication, which sheds light on a common misconception, is that, if the GHF had been capable of adequately supplying the civilian population, their lack of adherence to the humanitarian principles would neither invalidate that assistance, nor would it establish an obligation on the part of Israel to allow impartial humanitarian assistance.[116] While humanitarians that do not act consistently with the humanitarian principles may, practically speaking, be unable to meet humanitarian needs, the focus of the obligation remains on meeting needs rather than on adherence to the humanitarian principles. This poses the question of whether adherence to the humanitarian principles is indeed an obligation under public international law?

Further, humanitarian principles have also featured in resolutions aimed at relieving humanitarian actors from the liability associated with sanction or counter-terrorism regimes — what are frequently called humanitarian exemptions. In the humanitarian assistance context,[117] humanitarian exemptions refer to carve-outs from particular laws' punitive reach. While not a "term of art,"[118] humanitarian exemptions have been used across a range of contexts. The goal of these carve-outs is to enable humanitarians to provide assistance free from the fear of liabilities that contravening these regimes would normally entail.[119] UN Security Council (UNSC) Resolution 2664, for instance, makes reference to the "guiding principles of General

[113] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, [1966] ICJ Rep 6 at paras 49–50 [*South West Africa*].

[114] *Obligations of Israel*, *supra* note 36 at para 123.

[115] *Ibid* at paras 125–27.

[116] *Ibid.*

[117] The term "humanitarian exemption" can also be used in a separate context where sanctioned individuals or groups are temporarily granted relief from those regimes on compassionate groups to receive life-saving treatments or consignments.

[118] Katie King, Naz K Modirzadeh & Dustin A Lewis, "Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action," *Harvard Law School Program on International Law and Armed Conflict: Working Group Briefing Memorandum* (2016) at 7, online: <dash.harvard.edu/bitstream/handle/1/29998395/Understanding_Humanitarian_Exemptions_April_2016.pdf?sequence=1&isAllowed=y>.

[119] *Ibid* at 8; Dustin Lewis, "Humanitarian Exemptions from Counter-Terrorism Measures: A Brief Introduction" (2017) 47 *Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law* 141 at 143.

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Assembly Resolution 46/182 of humanitarian emergency assistance, including humanity, neutrality, impartiality and independence."[120]

B. The relative bindingness of the humanitarian principles

Pushing against any presumed universal applicability of the humanitarian principles, a small but growing scholarship has begun to frame their bindingness as "relative." This literature includes Marc Weller's "The Relativity of Humanitarian Neutrality and Impartiality,"[121] Mačák's "A Matter of Principle (s): The Legal Effect of Impartiality and Neutrality on States as Humanitarian Actors,"[122] and Marina Sharpe's "It's All Relative: The Origins, Legal Character and Normative Content of the Humanitarian Principles."[123]

Weller's article, a short piece from the 1997 *Proceedings of the American Society of International Law Annual Meeting*, considers the bindingness of the principles of humanity and impartiality. Weller argues that, contrary to the conventional view, the applicability of these principles is, in fact, relative. This relativity has both a legal and a contextual aspect.

Legally, Weller advances two ways in which the principles can become binding. The first is when the principles are integrated into international law-making processes — treaty obligations, bilateral agreements, and UNSC resolutions, for instance. In this case, the principles are relative in the sense that they are only binding within the scope of those general or specific instruments and only insofar as they are imposed by those instruments. The second is where particular organizations integrate the principles into their internal corporate constitutions or codes of conduct. The principals thus become a constitutional requirement for that organization but only for that organization. This legal quality is thus "entirely a matter of internal regulation [and] a violation of these principles would not necessarily be a violation of international legal obligations."[124] Contextually, Weller proposes that, in different contexts, the meaning of neutrality and impartiality will differ, as will what is demanded of actors held to these principles. He writes that the "standard of action demanded by the principles of neutrality and impartiality varies according to the context of application."[125] How humanitarians are obliged to adhere to these principles in situations where a state has consented to assistance differs, for instance, from where assistance has been compelled by a UNSC resolution.

Like Weller, Mačàk's 2015 article in the *International Review of the Red Cross* focuses on the principles of impartiality and neutrality. But, whereas Weller is most interested in the applicability of these principles to international and non-government humanitarians, Mačàk considers the applicability of these principles to states when they are acting as humanitarians. Ultimately, Mačàk argues that the bindingness of impartiality and neutrality is contingent — these principles are only binding insofar as they are incorporated into legal instruments. Looking across sources of public international law — treaty, custom, and general principles —

[120]UNSC Resolution 2664 (9 December 2022) (notably, UNSC Resolution 2664 seems to read in the principle of "independence," which is not present in UNSC Resolution 46/182).

[121]Weller, *supra* note 16.

[122]Mačák, *supra* note 43.

[123]Sharpe, *supra* note 11.

[124]Weller, *supra* note 16 at 444.

[125]*Ibid.*

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Mačàk finds that, while impartiality and neutrality "have important indirect effect on the conduct of States,"[126] they do not stem from international law. In treaties, Mačàk contends that allusions to these principles in sources like the *Geneva Conventions* and their *Additional Protocols* is "limited and mutually distinguishable," with implications for some actors and no implications for others.[127] As far as states are concerned, adherence to the principles is desirable but not legally required in treaty law. Under customary international law, though the UNGA and Western states have endorsed impartiality and neutrality, Mačàk advances that such endorsements have not had such a character as to establish *opinio juris.* Moreover, in providing humanitarian assistance, which is often politicized, conditional, and motivated by foreign policy objectives, state practice does not suggest that impartiality and neutrality are a customary requirement. Finally, stemming from the internal constitution of the Red Cross movement and not national legal systems, Mačàk proposes that impartiality and neutrality cannot be classified as general principles of international law.

Finally, and most comprehensively, Sharpe addresses the relativity of humanitarian principles in a recent piece in the *International Review of the Red Cross.*[128] Building on Weller and Mačàk, Sharpe considers the legal bindingness of the principles of impartiality and neutrality as well as humanity and independence. She argues that these four principles neither have a basis in international humanitarian law (IHL) specifically nor in public international law more generally. While the principles are often conflated with IHL due at least in part to their "perceived moral desirability,"[129] unlike IHL, adherence to these principles is not obligatory. Nonetheless, though not universally binding based on international law, Sharpe advances that the principles can be relatively binding for particular actors.

A first aspect of the relativity of the humanitarian principles is what principles are included and excluded from the set. Are humanity, neutrality, impartiality, and independence *the* principles? Could there be more principles? Could there be fewer? As Sharpe writes, "these four are not the only humanitarian principles — some organizations use them along with other additional principles."[130] For the Red Cross movement, these four principles sit alongside principles of voluntary service, unity, and universality.[131] Indeed, even Jean Pictet's foundational article discusses seven (not four) fundamental principles.[132] For the Humanitarian Accountability Partnership Standard principles, similarly, the four are complemented by participation and informed consent, duty of care, witness, redress, transparency, and complementarity.[133] By contrast, UNGA resolutions prior to 2003, as well as the ILC's *Draft Articles*, advance a more concise lists of principles that do not include independence.[134] The absence of independence in these disaster-focused sources points to different orientations and emphasis of the principles between assistance in armed conflicts and assistance in disasters.

[126]Mačák, *supra* note 43 at 180.
[127]*Ibid* at 168.
[128]Sharpe, *supra* note 11.
[129]*Ibid* at 31.
[130]*Ibid* at 23.
[131]*Ibid* at 16.
[132]Pictet, *supra* note 17 at 130, 133; Sharpe, *supra* note 11 at 23.
[133]Sharpe, *supra* note 11 at 16.
[134]*Ibid* at 17–18.

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The next aspect of relativity of the humanitarian principles is their respective normative content. Individually, these four principles do not have "fixed or objective meaning."[135] Between different sources, the scope of humanity, neutrality, impartiality, and independence varies. There are no global or universal definitions of these principles. Relatedly, interpretations vary on whether there is a hierarchy of humanitarian principles or if each principle is equally important.[136] The relative normative content of the individual principles stems from their basis in a hodgepodge of legal sources. And this hodgepodge engenders a third aspect of relativity — their relative bindingness on different actors.

For the Red Cross movement, the principles have become binding by virtue of the Red Cross statutes and further supported by the incorporation of the principles — namely, impartiality — in the *Geneva Conventions* and their *Additional Protocols.* Similarly for other NGOs, the principles are binding due to being incorporated into governing documents — be it codes of conduct, constitutions, or regulatory guidelines. These NGOs choose to be bound by the principles. However, the meaning and bindingness of the principles for those NGOs "is entirely a matter of internal regulation" rather than a legal obligation.[137] Non-compliance may lead to internal disciplinary actions or certain public ramifications for the NGO as a whole, but, without something more, the NGO could not be said to be violating international law.

For the UN system, the principles are rooted in UNGA Resolutions 46/182 and 58/114. However, whether a state or other actor is bound by the principles as articulated in the resolutions "depends on its relationship with the General Assembly," which is in turn "determined by the UN Charter and, to a lesser extent, by established practice."[138] For example, the OCHA was created by Resolution 46/182 and is therefore governed by it. Such is also the case with other subsidiary bodies of the UNGA, provided that Resolution 46/182 has some basis in the organ's mandate. If the subsidiary body was created for humanitarian purposes, such as UNRWA, it will be bound by Resolution 46/182. Akin to NGOs, these bodies are bound by the principles to the extent that the principles are incorporated into their constitutive documents. That same bindingness, however, does not translate to states or other actors.

Further, recalling the "humanitarian exemptions" described in the previous section, the humanitarian principles have also featured in domestic counterterrorism laws. Chad's 2020 counterterrorism law, for instance, carves out "activities of an exclusively humanitarian and impartial character brought by neutral and impartial humanitarian organizations."[139] As narrow exemptions from counterterrorism laws, limited to humanitarians falling within the reach of certain domestic jurisdictions, such laws further showcase the relative bindingness of the principles to particular actors in particular jurisdictions.

Ultimately, Weller, Mačàk, and Sharpe provide somewhat distinct understandings of the relativity of the humanitarian principles. However, they seem to agree on the

[135] *Ibid* at 15.

[136] *Ibid* at 20.

[137] Weller, *supra* note 16 at 444.

[138] Sharpe, *supra* note 11 at 38; *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945).

[139] Law No 003/PR/2020, Portant Répression des Actes de Terrorism en République du Tchad, art 1(4), online: <ihl-databases.icrc.org/en/national-practice/law-suppression-terrorist-acts-2020> [our translation] (Chad).

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basic circumstances in which the principles are binding and those instances in which they are not: the humanitarian principles are not generally binding on humanitarians as a matter of public international law, but they can become binding on particular humanitarians by means of, for instance, internal governance mechanisms (like corporate charters and bylaws) or UNSC resolutions. We agree that this position is the current state of public international law on this matter. Nonetheless, it is important to recognize that Weller, Mačàk, and Sharpe's conclusions are based largely on inquiries into treaty law, ICJ decisions, UN resolutions, ILC draft articles, and internal organizational statutes and bylaws. National court decisions, by contrast, have not featured prominently in this discourse. As the following section considers, however, there is potential richness within the decisions of national courts that can both advance understandings of the humanitarian principles and push us to revisit the relativity of the principles in public international law.

4. *Rajaratnam* and the humanitarian principles

While the humanitarian principles are not presently binding as a matter of public international law, it does not mean that they do not have the capacity to become binding. It is in this light that we turn back to the *MV Sun Sea*, the 496 Sri Lankan asylum seekers, and the resulting case of *R v Rajaratnam* brought before the BCCA. The decision of the BCCA showcases a national court incorporating the four humanitarian principles into domestic law. In doing so, we argue that *Rajaratnam* offers a window into one avenue whereby the humanitarian principles may become binding.

A. Introducing *Rajaratnam*

As noted in the introduction, *Rajaratnam* concerned the entry into Canadian territorial waters of a ship carrying 492 Sri Lankan Tamil asylum seekers. At first instance before the Supreme Court of British Columbia, the orchestrators of this operation faced charges of human smuggling in contravention of section 117 of the *IRPA*. At the close of the Crown's case, the four accused brought a motion for a directed verdict in light of the Supreme Court of Canada's decision in *R v Appulonappa*.[140] In *Appulonappa*, the Supreme Court of Canada read down section 117 to hold that the offence of human smuggling does not apply to persons providing humanitarian, mutual, or family assistance to asylum seekers (the three exceptions).[141] The core issue on the motion was whether the three exceptions created by *Appulonappa* operated as defences or as elements of the offence itself — with implications on jury instruction and the Crown's burden of proof.[142] Justice William Ehrcke determined in a companion case that the three exceptions constituted an element of the offence.[143] Ultimately, three of the accused were acquitted at trial,

[140]*R v Christhurajah*, 2017 BCSC 60 [*Christhurajah*]. The case of *R v Christhurajah* was the sister case of *Rajaratnam*, dealing with one of the five orchestrators of the *MV Sun Sea:* Kunarobinson Christhurajah.

[141]*Appulonappa*, *supra* note 5 at paras 84–86.

[142]*Christhurajah*, *supra* note 140 at paras 13–16.

[143]*Ibid* at para 27.

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while a mistrial was declared with respect to the fourth accused.[144] A fifth accused died before trial, and his charges were abated.

Three issues were raised on appeal in *Rajaratnam*: the first, on the constitutionality of advancing hearsay evidence in certain circumstances;[145] the second, on the motion for the directed verdict described above — whether the three exceptions created in *Appulonappa* operated as a defence or a new element of section 117 of the *IRPA*; and, finally, the third, on the particular elements of *Appulonappa*'s "humanitarian" exception and any requirements of humanitarian motivation. For our purposes, we focus only on the second and third grounds of appeal.[146]

The BCCA held that the three exceptions operated as defences.[147] The Court of Appeal interpreted the Supreme Court of Canada's use of the term "reading down" when conceptualizing the three exceptions in *Appulonappa* as limiting the reach of the offence but not making the offence wholly inapplicable to individuals providing humanitarian, mutual, or family aid.[148] While broad enough to encompass the creation of defences, this term was not so broad as to represent a constitutive part of the offence. Afterall, suggested the Court of Appeal, if the three exceptions were elements of the offence, the Crown would face significant hurdles trying to prove that a smuggler was not engaged in mutual aid,[149] an interpretation that the Court of Appeal suggested "would be absurd."[150]

Having determined that the three exceptions identified by the Supreme Court of Canada in *Appulonappa* served as defences rather than elements of the offence of human smuggling, the BCCA considered the substantive content of these exceptions. Recognizing that the exceptions invoke language that is capable of dual meaning — its everyday use and its specific legal meaning — the Court of Appeal engaged in this interpretive exercise to imbue the exceptions with legal meaning, ensure consistent application,[151] and allow for special jury instruction.[152] Since *Rajaratnam* was decided in 2019, it has been considered in only a handful of cases, and only two that engage with the humanitarian exception to human smuggling.[153] The cases of *Boule*[154] and *Baleeyoos*[155] both involved separate instances of human smuggling. *Boule* involved an American citizen charged with human smuggling under section 117 of the *IRPA* for helping migrants cross into Canada via his property situated on the Canada-US border. *Baleeyoos* considered the humanitarian exception in the context of immigration proceedings, where the claimant was found inadmissible to Canada for committing a human smuggling offence abroad. These cases, though few at present, reflect the relevance of the humanitarian defence, the humanitarian principles as incorporated therein, and their entrenchment within Canadian law.

[144] *Rajaratnam*, *supra* note 1 at para 2.

[145] *Ibid* at para 4, in respect of the constitutionality of section 36 of the *Mutual Legal Assistance in Criminal Matters Act*, RSC 1985, c 30 (4th Supp).

[146] *Rajaratnam*, *supra* note 1 at paras 5–7.

[147] *Ibid* at paras 6–7.

[148] *Ibid* at para 165.

[149] *Ibid* at para 170.

[150] *Ibid.*

[151] *Ibid* at para 184.

[152] *Ibid* at paras 185–86.

[153] *Boule*, *supra* note 8; *Baleeyoos* 2024, *supra* note 7.

[154] *Boule*, *supra* note 8.

[155] *Baleeyoos* 2024, *supra* note 7.

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With this judicial history of the Court of Appeal's reasoning in *Rajaratnam* in hand, the following section delves into the Court's engagement with the substantive content of the humanitarian exception, particularly into its reliance on the humanitarian principles. In doing so, we explore how the Court concretized these somewhat amorphous principles into domestic law with practical application.

B. The Court's treatment of the humanitarian principles in *Rajaratnam*

The Court approached the substantive content of the *IRPA*'s section 117 humanitarian exception based on what might be described as a purposive or mental aspect — whether the "accused's purpose was to save the lives or alleviate the suffering of asylum seekers" — along with what might be presented as a principled or external aspect — whether the "the accused's actions sufficiently conformed to the principles of neutrality, impartiality and independence."[156] Expanding on these aspects, they elaborated four elements of a humanitarian aid defence: (1) whether the purpose was to provide humanitarian aid; (2) whether the aid was provided to save a life or alleviate suffering; (3) whether the conduct conformed to the principles of impartiality, neutrality, and independence; and (4) whether the accused reasonably believed they were assisting an asylum seeker.[157]

Within the first element, the Court held that humanitarian aid need not represent the "sole" motivation for eligibility. Recognizing the challenges of transporting asylum seekers, the Court affirmed that "no one would expect a volunteer professional with [MSF] or another aid group to ignore their professional development or be completely altruistic in their motivation."[158] Further, the Court held that an "ancillary financial motive" does not preclude the accused from relying on the defence.[159] In other words, while a humanitarian purpose is required, an exclusively humanitarian purpose is not. Significantly, and drawing on the *Human Smuggling Protocol*,[160] the Court considered whether criminal activity precludes access to the defence. While it found that any motive that relates "in whole or in part … to human smuggling for profit in the context of transnational organized crime" would negate the defence,[161] other criminal motives would not necessarily bar access.[162] It thus seems that only criminal activity which is connected and adverse to the humanitarian defence is preclusive. This approach to humanitarian motivation is nuanced, recognizing that, while such motivation is a significant consideration, it may only be determinative in extreme circumstances.

The second element, requiring that the aid be lifesaving or suffering alleviating, implies that eligibility is dependent on the relief being needs-based and fitting a particular definition of humanitarian activity. The Court's approach — focused on lifesaving, suffering alleviating, and needs-based relief — falls within the narrower

[156]*Rajaratnam*, *supra* note 1 at para 205.
[157]*Ibid* at para 208.
[158]*Ibid* at para 218.
[159]*Ibid* at para 221.
[160]*Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004).
[161]*Rajaratnam*, *supra* note 1 at paras 219, 223.
[162]*Ibid* at para 222.

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understandings of humanitarian assistance described in section 2.A above. Still, the principle behind this element has broader relevance. Essentially, it reinforces that the question of "who is a humanitarian" is intimately connected with the question of "what is legitimate humanitarian assistance" and that, for the humanitarian category to be relevant, there must be limits on the characterizations of humanitarian relief.

On the third element, the Court of Appeal turned to the humanitarian principles as indicators of what actions qualify as humanitarian actions. According to the Court, "actions can be classified as humanitarian based on how closely they align with the principles of impartiality, neutrality and independence considered in all the circumstances," omitting humanity due to its inherent inclusion in a lifesaving or suffering alleviating purpose.[163] Here, the Court did something quite interesting by emphasizing that assessing compliance with the principles requires a textured and holistic approach. The Court found that consideration of the humanitarian principles is not a "box-ticking exercise" or "strict requirement for access to the defence."[164] The Court wrote that, to be eligible, the accused need not "raise an air of reality for each and every one of these principles."[165] Instead, the principles are indicia, "relevant to the fact-finding process of determining whether the purpose was to provide humanitarian aid."[166]

The external analysis is thus inherently contextual. The trier of fact is instructed to assess the conformity of the accused's actions with the principles of impartiality, neutrality, and independence,[167] an assessment that "will look different in different contexts."[168] The resulting conclusion is, accordingly, a factual determination rather than a question of law. In framing the principles in this way, the Court indicates that there may be circumstances where a party should be able to rely on the humanitarian defence despite "partially sacrific[ing] one or more principles."[169] Giving the example of humanitarian workers paying bribes, the Court acknowledges that humanitarian assistance often takes place in "difficult circumstances."[170] The complex environment in which the assistance takes place thus becomes a relevant factor for assessing alignment with the principles and excusing instances where absolute fidelity to the principles is impossible or implausible. The principles are relevant legal factors, not determinative requirements.

Finally, the fourth element requires that the accused reasonably believe that they were assisting asylum seekers. In other words, would a reasonable person in the position of the accused believe that the people they were assisting were asylum seekers. According to the Court, this objective reasonableness standard "helps to ensure that [the accused's] behaviour is reasonable and responsible."[171] At least insofar as section 117 of the *IRPA* is concerned, this element ensures that individuals are not shielded from the prohibition on human smuggling where they have actual

[163] *Ibid* at para 239.
[164] *Ibid* at para 242.
[165] *Ibid* at para 239.
[166] *Ibid.*
[167] Notably, the Court held that humanity, not included here, was better considered at the purpose stage. *Ibid* at para 239.
[168] *Ibid* at para 240.
[169] *Ibid* at para 242.
[170] *Ibid* at para 246.
[171] *Ibid* at para 254.

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(yet ultimately reckless) beliefs about the asylum-seeking status of those they are assisting.[172]

Looking across these four elements, the BCCA's reasons in *Rajaratnam* ultimately provide a detailed, measured, and nuanced assessment of the humanitarian aid defence. In doing so, the reasons assist not only in elaborating the meaning of the humanitarian principles but also the bindingness of the humanitarian principles in Canada. Insofar as the contents of the humanitarian aid defence in Canada are concerned, the humanitarian principles are not merely hortatory, they are law; individuals seeking to rely on the humanitarian aid defence must align with these principles. Thus, what does this crystallization of the humanitarian principles in a national decision mean for the development of the humanitarian principles in public international law more generally? The following section explores this question, revisiting the relativity of the humanitarian principles.

5. Revisiting relativity: national case law and the development of the humanitarian principles in public international law

The holding of a single national case is a far cry from a determination of international law. International jurisprudence, of course, does not have precedential value in international law, much less domestic case law.[173] In this instance, where the main thrust of that national case is the interpretation of a domestic statute, that is particularly true. Nonetheless, national cases play a critical role in the interpretation and develop of international law. As former Supreme Court of Canada Justice Rosalie Abella notes in *Nevsun Resources Ltd v Araya*, "[u]nderstanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the 'choir' of domestic court judgments around the world shaping the 'substance of international law'."[174]

This final section considers two ways in which a case like *Rajaratnam* is relevant for understanding the status of the humanitarian principles in international law.[175] First, it explores *Rajaratnam* as a subsidiary means for the determination of the meaning of the humanitarian principles. Second, it looks at *Rajaratnam* as evidence of state practice. Here, it considers this case as part of a hardening of the principles as rules of customary international law. While short of a fully crystallized rule of customary international law, we argue that we may be seeing development from pure relativity. Importantly, our aim here is predominantly descriptive — to outline implications of the *Rajaratnam* decision for public international law. While we view *Rajaratnam* as a valuable decision that provides important insights into how a Canadian Court has relied on the humanitarian principles, our objective is not to

[172]*Ibid.*

[173]*Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993 art 59 (entered into force 24 October 1945) [*ICJ Statute*].

[174]*Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 71–72 [*Nevsun*], citing Osnat Grady Schwartz, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015) 23 Cardozo J Intl & Comp L 587 at 616.

[175]Anthea Roberts describes these two means as the "distinctive dual role" of national court decisions. Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011) 60:1 ICLQ 57 at 62.

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provide a wholesale assessment on whether the various moves made by the Court are desirable — this is a different type of inquiry that is beyond the scope of this article.

A. National cases and the application of the humanitarian principles

The judicial decisions of national courts play an important role in the interpretation of international law. While not binding as precedent, they do represent "subsidiary means for the determination of rules of [international] law."[176] What this means according to the ILC — which is presently undertaking a program of work on these subsidiary means — is that they can help establish both the "existence and content" of international law rules.[177] This role in determining the existence and content of international law rules is particularly important given the comparatively limited volume of international court decisions. As Hersch Lauterpacht wrote in 1929, the reasons of national courts offer "lessons of judicial treatment of international law in a world in which these opportunities are not frequent."[178] In such contexts, international courts often reference nations' court decisions as "evidence of the meaning of international law."[179]

A first element of the humanitarian principles that *Rajaratnam* can help to distinguish is instances where they are relied on as a sword as compared to instances where they are used as a shield. Often, the humanitarian principles are invoked as a means of pushing for humanitarian access. Humanitarian actors clothed in the humanitarian principles may push to provide assistance in a particular context on that principled basis. The prospect of withheld consent being arbitrary is higher where the humanitarian actor adheres to the principles. But, as *Rajaratnam* illustrates, the humanitarian principles can also be woven into protections for humanitarians, like defences to criminal liability. There are a variety of cases from different jurisdictions that have grappled with such humanitarian defences — be it in relation to the motivations of an individual in Australia providing material support to the Liberation Tigers of Tamil Eelam,[180] an individual charged with smuggling Somalian refugees into Canada,[181] an individual involved in people smuggling out of Iran and into the United Kingdom,[182] or individuals charged with conspiracy to unlawfully assist Afghan nationals to immigrate to the United Kingdom.[183] Here, *Rajaratnam* helps populate the meaning of "humanitarian" in such defences, suggesting that following the humanitarian principles is a means to avoid liability. An actor is not obliged to follow the principles, except insofar as they wish to rely on the defence. In pushing for access, the humanitarian principles are being used as a sword. By

[176]*ICJ Statute*, *supra* note 173, art 38(1)(d).

[177]ILC, *Subsidiary Means for the Determination of Rules of International Law*, UNGA, 76th Sess, UN Doc A/CN.4/L.1019 (2025), Draft Conclusion 5 [*ILC Subsidiary Sources of Law*]. See also Charles Chernor Jalloh, *First Report on Subsidiary Means for the Determination of Rules of International Law*, UNGA, 74th Sess, UN Doc A/CN.4/760 (2023).

[178]Hersch Lauterpacht, "Decisions of Municipal Courts as a Source of International Law" (1929) 10 Brit YB Intl L 65 at 67.

[179]Roberts, *supra* note 175 at 63.

[180]*R v Vinayagamoorthy*, [2010] VSC 148.

[181]*R v Abdulle*, [2014] ONSC 7455.

[182]*R v Bina (Arya)*, [2014] EWCA Crim 1444 at paras 10, 11.

[183]*R v Kapoor*, [2012] EWCA Crim 435 at paras 14, 19.

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contrast, as constitutive elements of a criminal law defence, the humanitarian principles are being used as a shield. While the meaning of the principles in these circumstances may be consistent, the application can be quite different.

Relatedly, *Rajaratnam* offers a distinct contextual approach to the application of the humanitarian principles. Instead of holding out these principles as requirements to which humanitarians are obligated to adhere, the case presents them as factors that are collectively weighed to determine eligibility for humanitarian status. In doing so, *Rajaratnam* offers valuable insight into the varied potential legal uses of the humanitarian principles. The humanitarian principles can be applied across a range of circumstances — from a state determination on whether to consent to humanitarian assistance, to a funding organization's determination of eligibility to apply for a grant, to a court's determination on status for a humanitarian defence, to name a few. While some of these circumstances may be well served by rigid humanitarian requirements — threshold questions of consent, for instance — others, such as eligibility for a humanitarian defence in criminal proceedings, may be better served by the latitude afforded by a basket of humanitarian factors.

Next, *Rajaratnam* adds a nuanced perspective on humanitarian motivation. Whereas the principles may give the impression of humanitarians as altruistic and singularly motivated, the day-to-day realities of humanitarian assistance present a messier portrait of humanitarian motivation. Indeed, humanitarians often have multiple motivations. As *Rajaratnam* notes, "it is unrealistic to expect someone to have a sole motivation in respect of an action as complex and demanding as transporting asylum seekers."[184] Further, humanitarians may be engaged in activities whose motivation is difficult to interpret. As Justice Nitya Iyer comments about *Rajaratnam* in *Boule*, the "Court of Appeal recognized that those engaged in humanitarian aid may be complicit in corruption because of the extremely difficult circumstances in which such aid occurs."[185]

Finally, *Rajaratnam*'s reading of the substantive content of the humanitarian principles can help inform ongoing treaty processes. In 2024, the UNGA decided to "elaborate and conclude a legally binding instrument on the protection of persons in the event of disasters."[186] This prospective treaty builds on the ILC's *Draft Articles*,[187] which in turn indicates at Article 6 on humanitarian principles that responses "to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable."[188] As a subsidiary means for the determination of the rules of international law, *Rajaratnam* offers insights into the challenges and opportunities of applying the humanitarian principles in practice and before a trier of fact.

B. National cases in the crystallization of the humanitarian principles in customary international law

Beyond representing a subsidiary means for the determination of rules of international law, national cases can also provide evidence in support of customary

[184] *Rajaratnam*, *supra* note 1 at para 218.

[185] *Boule*, *supra* note 8 at para 63.

[186] *Protection of Persons in the Event of Disasters*, GA Res 97/128, UNGAOR, 79th Sess, UN Doc A/Res/79/128 (2024).

[187] *ILC Draft Articles*, *supra* note 14.

[188] *Ibid* at art 6.

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international law.[189] On the one hand, decisions of national courts can provide evidence of the state (or general) practice element of customary international law.[190] The ILC's draft conclusions on the identification of customary international law concludes that "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, *judicial* or other functions."[191] On the other hand, the decisions of national courts can qualify as the *opinio juris* element of customary international law[192] — the belief that the state practice is undertaken on the basis of an international legal obligation.[193]

So where does *Rajaratnam* fit? What rule (or rules) of customary international law is the case helping to crystallize? To be clear, *Rajaratnam* is a case involving the interpretation of an exception to the Canadian offence under the *IRPA* of "knowingly organizing, inducing, aiding, or abetting the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by the Act."[194] The matter certainly intersects with international treaty law related to both the prevention of human smuggling and refugee rights.[195] Still, its main focus is on the substantive content of an exception carved into a provision of a domestic statute. Nonetheless, as an expression of state practice, *Rajaratnam* has important implications for the crystallization of customary international law.

To begin, *Rajaratnam* shows a national court imbuing a domestic statute with meaning by allusion to the humanitarian principles as found in certain international sources. These sources reflect a mix of hard and soft law. More particularly, *Rajaratnam* draws on UNGA Resolution 46/182, the EU's *Consensus on Humanitarian Aid*, the OCHA's *Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflicts*, the Good Humanitarian Donorship Initiative's *Principles and Good Practice of Humanitarian Donorship*, and the ICJ's reasons in *Nicaragua*. In doing so, *Rajaratnam* showcases state practice of a national court imbuing a domestic legal definition of "humanitarian" with meaning through the invocation of the four humanitarian principles as defined internationally. Yet, while the Court's use of these sources points to state practice of viewing them as compelling authority on the meaning of the humanitarian principles, it does not seem as though the Court feels obliged to rely on them (such that the subjective element of customary international law would be satisfied).

Next, in relation to humanitarian assistance, *Rajaratnam* presents the understanding that "humanitarian" is defined in relation to the humanitarian principles. As the Court writes, "would aid caught by this defence be sufficiently 'humanitarian' without recourse to the three additional principles [impartiality, neutrality, and

[189] *ICJ Statute*, *supra* note 173, art 38(1)(b).

[190] See e.g. *Nevsun*, *supra* note 174 at para 79; *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits), (1926) PCIJ (Ser A) No 7 at 19, cited with approval in *Prosecutor v Zejnil Delalic et al*, IT-96-21-A, Judgment (20 February 2001) at para 76 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[191] ILC, *Fifth Report on Identification of Customary International Law*, UNGA, 70th Sess, UN Doc A/CN.4/717 (2018) at 58 [emphasis added].

[192] ILC, "Draft Conclusions on Identification of Customary International Law, with Commentaries," UN Doc A/73/10 (2018) at 140, para 2.

[193] See e.g. *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)*, [1969] ICJ Rep 4 at para 77.

[194] *IRPA*, *supra* note 2, s 117.

[195] *Rajaratnam*, *supra* note 1 at paras 134–38.

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independence]? In our view, it would not be."[196] The Court thus advances the idea that "humanitarian" should be defined through a nexus with the humanitarian principles. Here, we thus see state practice of defining "humanitarian" in terms of the principles. While the Court's omission of humanity as an explicit principle[197] demonstrates that the Court does not feel obliged to follow all four principles, its language does suggest a belief that the principles are integral to how "humanitarian" is defined. This understanding resonates with how the Canadian *Criminal Code* defines the humanitarian exemption to the crimes of terrorism and financing terrorism.[198] Section 83.03(4) reads that these crimes do not apply to persons carrying out such activities "for the sole purpose of carrying out humanitarian assistance activities conducted under the auspices of impartial humanitarian organizations in accordance with international law."[199] As in *Rajaratnam*, the reference to "humanitarian assistance activities conducted under the auspices of impartial humanitarian organizations" indicates the legislator's understanding that the humanitarian principles are integral to understandings of humanitarian assistance but not necessary as a complete set.

Further, *Rajaratnam* points to a common core of legal meaning for the individual humanitarian principles. While the contextual relevance of the humanitarian principles is relative in the sense that it is particularized to the issue of a defence in the context of the *IRPA*, the substantive meaning of the humanitarian principles themselves is not particularized. In other words, the Court is not saying: "This is meaning of the humanitarian principles *in the context*" but, rather, saying: 'This is the meaning of the individual humanitarian principles, and we will apply that meaning in this context." The case thus proceeds as if the meaning of these principles is general and widely applicable. Beyond the state practice of relying on the substantive meaning of the humanitarian principles found in these sources as the meaning of the individual principles, the BCCA in *Rajaratnam* does not seem to entertain the possibility that the meaning of the individual principles in Canada would diverge from the international source meaning. This reliance is closer to the subjective element of customary international law — that when invoking the humanitarian principles, states feel obliged to follow the substantive meaning of those principles as found in international sources.

Finally, *Rajaratnam* points to a possible universal legal application of the principles. Unlike the instances of relativity described above — where the bindingness of the principles is conditioned by constitutive documents, bylaws, or charters, for instance — here, the principles have potential legal relevance to any actor (even human smugglers). This use of the humanitarian principles resonates with some further state practice related to the humanitarian exemptions described above. In Canada, this includes the Canadian *Criminal Code* exemption just described to the crimes of terrorism and financing terrorism for activities "conducted under the auspices of impartial humanitarian organizations."[200] Other states have similar

[196]*Ibid* at para 240.

[197]The Court views inclusion of humanity as an explicit principle as redundant, writing, we "omit "humanity" because it is covered by the requirement that the purpose of principle of humanitarian aid be to save lives or alleviate suffering." *Rajaratnam*, *supra* note 1 at para 239.

[198]*Criminal Code*, RSC 1985, c C-46.

[199]*Ibid*, s 83.03(4).

[200]*Ibid*, s.83.03(4).

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humanitarian exemptions to terrorism offences.[201] Rather than being bound by the principles *ex ante*, *Rajaratnam* showcases the principles having legal significance only *ex post* and insofar as an individual wishes to rely on the humanitarian defence.

This last point has perhaps the most interesting implications for the crystallization of a rule related to "who gets to call themselves a humanitarian in international law." Here, *Rajaratnam* is not saying that humanitarian actors are obliged to follow the humanitarian principles; it is silent on this point. It is saying, however, that for an actor to rely on privileges and advantages of being a humanitarian — in this case, eligibility for a humanitarian defence — that actor must demonstrate a nexus with the humanitarian principles. This last point thus presents both state practice and *opinio juris* that humanitarian actors must have a nexus with the humanitarian principles if they want to rely on humanitarian protections (like defences from criminal liability).

Importantly, the other side of this coin is that humanitarians' failure to adhere to the humanitarian principles can furnish states with powers to exclude those humanitarians. A humanitarian may clothe themselves in the principles to rely on certain benefits just as a state may deny those benefits where adherence to the principles is absent. This implication resonates in IHL with what has been called the "rule of reasonableness."[202] In IHL, state consent is needed for humanitarian assistance, but it cannot be arbitrarily withheld.[203] While a full account of the valid (and invalid) reasons for denying consent is beyond the scope of this article, it is noteworthy for our purposes that a failure to adhere to humanitarian principles can offer a valid reason for a state to deny a humanitarian consent to assistance. As Dapo Akande and Emanuela-Chiara Gillard note, "if the actor offering its services will not provide the assistance in a principled manner — i.e. in a manner which is exclusively humanitarian and impartial in character and carried our without any adverse distinction — it will not be arbitrary to refuse consent."[204] Akin to *Rajaratnam*, a failure to follow the principles can offer a valid basis for excluding humanitarians from certain benefits and privileges.

On balance, *Rajaratnam*'s reliance on the humanitarian principles is more reflective of state practice than it is of *opinio juris*: the decision is more of a demonstration of the Court using the principles than it is an indication of a belief that it had an obligation to do so. But applying international norms that might be described as being on the cusp of crystallization is consistent with the approach taken by Canadian courts in recent years. The Supreme Court of Canada has recently acknowledged the critical role that domestic decisions play in the crystallization of customary international law.[205] As a result, as Abella J writes, "Canadian courts, like all courts, play an

[201] Australia's *Criminal Code*, for instance, offers narrow sectoral humanitarian exemptions to the offences of associating with terrorists and entering/remaining in designated areas. *Criminal Code Act 1995* (Australia), divisions 102.8(4)(d), 119.2(3)(a). It does not, however, mention the humanitarian principles.

[202] Cedric Ryngaert, "Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective" (2013) 5 Amsterdam Law Forum 2 at 7.

[203] This rule derives from Common Article 9/9/9/10 to the *Geneva Conventions*, *supra* note 23 and Article 70(1) of *Additional Protocol I*, *supra* note 23 (for international armed conflicts), and Common Article 3(2) to the *Geneva Conventions*, *ibid*, and Article 18 of *Additional Protocol II*, *supra* note 23 (for non-international armed conflicts).

[204] Dapo Akande & Emanuela-Chiara Gillard, "Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict" (2016) 92 International Law Studies 483 at 500. See also Tom Gal, "Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance" (2017) 50 Israel LR 1 at 35.

[205] *Nevsun*, *supra* note 174 at paras 70–74.

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important role in the ongoing development of international law … [and] there is no reason for Canadian courts to be shy about implementing and advancing international law."[206] As an expression of a Canadian court implementing and advancing customary international law, *Rajaratnam* presents early crystalline forms with the potential to grow and harden into established customary rules related to the humanitarian principles.

6. Conclusion

Things have changed since 2019 when *Rajaratnam* was released. The intervening years have seen a re-emergence of major international armed conflicts and a worsening of climate-related disasters. Meanwhile, they have also seen a retreat of major donors and a contraction of humanitarian funding. Amidst this rise in humanitarian need and fall in humanitarian funding, there is a real risk that the funds that remain will become more politicized, influenced by geopolitical considerations, and shaped by security concerns. As Michael VanRooyen, director of the Harvard Humanitarian Initiative, writes, the concern is that "[h]umanitarian principles such as neutrality, impartiality and independence will be sidelined and overshadowed by these diplomatic considerations."[207] And whereas a widely applicable obligation to adhere to the principles could help arrest this marginalization, a relative obligation has less staying power.

In this context, *Rajaratnam* provides a helpful perspective on the relativity of the humanitarian principles. As this article has demonstrated, *Rajaratnam* showcases a national court relying on the humanitarian principles in a manner that is distinct from the relativity highlighted by authors like Weller, Mačák, and Sharpe. Instead of binding specific humanitarians merely by virtue of internal governance mechanisms or UNSC resolutions, it points back towards the possibility of more general legal applicability and shared normative content. In this way, the article has worked to open a conversation into the use, and potential, of national court decisions in the development and crystallization of the humanitarian principles in public international law. There are undoubtedly contexts in which the humanitarian principles are not fit for purpose. Indeed, there are important reasons to ask questions and offer critiques of the principles, as this article has done earlier. But entering a period of unprecedented precarity for the humanitarian sector, a more robust and frank conversation about the principles can help build a bulwark against further erosion. *Rajaratnam* offers an important and nuanced contribution to this conversation.

[206] *Ibid* at para 71. See also Jutta Brunnée & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Intl L 3; Osnat Grady Schwartz, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015) 23 Cardozo J Intl & Comp L 587; René Provost, "Judging in Splendid Isolation" (2008) 56 Am J Comp L 125.

[207] Michael VanRooyen, "The Future of Humanitarian Aid: Navigating a Politicized and Fragmented Landscape," *Harvard News* (2 June 2025), online: <hhi.harvard.edu/news/2025/06/future-humanitarian-aid-navigating-politicized-and-fragmented-landscape> [perma.cc/J99D-8DRN].

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