
INTERNATIONAL REVIEW

OF THE RED CROSS

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**To subscribers and readers of the
*International Review of the Red Cross***

The International Committee of the Red Cross has decided that the *International Review of the Red Cross* will appear in a single bilingual (English/French) edition from the beginning of 1999. Articles will be published in the language in which they are submitted, together with a summary in the other language. However, official texts and articles of documentary importance will continue to appear in both English and French.

The Spanish, Arabic and Russian-language editions will be replaced by a yearly selection, in those languages, of the best articles published in the *Review* during each year. It is also planned to publish selected texts in other languages.

The first issue for 1999 will appear in March of that year and will be sent to all subscribers, irrespective of the language in which they used to receive the *Review*. They will then be asked to decide whether they wish to continue to subscribe to the publication in its new form.

We regret any inconvenience this decision may cause, especially for readers who currently receive the Spanish, Arabic or Russian-language editions. Sadly, the workload and yearly cost of translating into four languages some 800 pages of sometimes highly complex material is placing too great a strain on our resources. By publishing once a year a selection of the best articles we nevertheless hope to ensure that the *Review* will continue to reach readers all over the world.

Further innovations will be introduced with a view to strengthening the *Review's* role as a forum for comment on all topics relating to humanitarian policy, law and activities. The editors trust that in its new form the *Review* will continue to stimulate the interest of its readers in the humanitarian issues which concern us all.

The Review

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A note from the Editor

On 18 July 1998 the plenipotentiary representatives of 120 States from all parts of the globe signed the Final Act of the Rome Diplomatic Conference that drew up and adopted the Statute of the International Criminal Court. This is a truly remarkable achievement. Indeed, for the first time in history a permanent international court will be empowered to enhance respect for rules that form part of the heritage of the world's civilizations. Admittedly, the new court does not provide the perfect solution that many were hoping would result from the lengthy negotiations that led up to its creation, but on the other hand, the ground has now been laid for more decisive action in combating impunity.

This issue of the *Review* features an initial assessment by Marie-Claude Roberge of the outcome of the Rome Conference. On behalf of the ICRC, the author closely followed the preparatory work done in both New York and Rome. In-depth analyses of issues relating more specifically to the implementation of international humanitarian law will be published at a later date.

Another article by media expert Roy Gutman describes what it is like to work as a journalist in conflict situations. He discusses how the media could persuade players in a conflict to respect the basic rules of humanitarian law and puts forward a practical proposal which should arouse the interest of media professionals in the humanitarian cause and humanitarian law. Urs Boegli, head of the ICRC's media services, raises one of the thorniest issues faced by any humanitarian organization in determining its communication policy: what to do when disaster strikes in the humanitarian sphere — denounce violations or remain silent? The article offers a few answers to the problem, without, however, challenging the obvious principle that the ICRC must first and foremost take action in aid of the victims. Various accounts by communication experts are followed by a study by Yves Sandoz, the ICRC's Director for International Law and Communication, on rights and obligations in terms of being informed and

spreading information about conflict situations, viewed from the standpoint of international humanitarian law.

In a different vein, Rohan Hardcastle and Adrian Chua advocate the right to receive assistance in the event of natural disaster. The author invites experts to consider a draft convention that would guarantee such a right through the establishment of international obligations. Peter Walker offers a number of comments on this proposal.

Several contributions discuss measures aimed at more effective monitoring and even the banning of certain particularly abhorrent weapons. For example, a good insight into the Ottawa Convention prohibiting anti-personnel mines is given by Stuart Maslen and Peter Herby, who followed the drafting process.

A page of ICRC history is written by historical research officer Françoise Perret, who describes the ICRC's action in Cuba during the Castro revolution of the early fifties. In another article, Ly Djibril describes the humanitarian rules aimed at restricting recourse to violence in the tradition of the Pulaar of West Africa.

Lastly, we should like to draw your attention to the note on the *Review's* new look as from next year.

The Review

Humanitarian Assistance: towards a right of access to victims of natural disasters

by **Rohan J. Hardcastle and Adrian T. L. Chua**

If recent estimates are to be believed, more than two million people may have died in the famine that engulfed North Korea in 1997 and 1998.¹ In 1997, the United Nations estimated that 4.7 million North Koreans were in danger of starvation.² In response, the international community pledged food aid. The International Federation of Red Cross and Red Crescent Societies presented an expanded appeal for aid in June 1997. In January 1998, the World Food Programme (WFP) launched its biggest appeal, setting a target of 380 million US dollars in food aid, nearly double the amount requested for 1997.³ Yet, the international community has met resistance in attempting to assist North Koreans suffering from malnutrition and facing starvation.

Other governments, unable to provide aid to victims within their own territories, have also been unwilling to promptly permit humanitarian assistance from outside. When in 1990 a severe earthquake hit the Gilan province in Iran, killing more than 50,000 people and destroying entire villages,⁴ the Iranian government was slow to ask for international

Rohan J. Hardcastle and **Adrian T. L. Chua** are from the Faculty of Law, University of Western Australia, Perth.

¹R. McGregor, "Hidden holocaust", *The Australian*, 21 February 1998.

²"Koreans agree on food aid to the North", *The Washington Post*, 27 May 1997.

³"North Korea offers dialogue in rare ouverture", *The Washington Post*, 20 February 1998, p. 1.

⁴"When the world shook", *The Economist*, 30 June 1990, p. 45.

assistance. In fact, Iran appealed to its people to “pass this test with pride through patience, endeavor and cooperation”.⁵ The government forbade direct rescue flights from abroad and initially requested that aid workers stay away. Although Iran eventually sought assistance from the international community, the delay resulted in the otherwise preventable death of a large proportion of the injured.⁶

Six days after the February 1998 earthquake which claimed 4,500 lives in Afghanistan,⁷ there were reports that victims in Ghanj, the worst hit village, had not received any international aid and were in danger of dying from hunger.⁸ Whilst bad weather was partly responsible, the provision of assistance was also hampered by Afghanistan’s purist Islamic Taliban militia, which controls several approaches to the region, and a strict border regime under the command of Russian troops at the border with neighbouring Tajikistan.⁹

Ironically, these recent events have come towards the end of the International Decade for Natural Disaster Reduction,¹⁰ which has seen natural disasters occur with increasing frequency and severity.¹¹ These catastrophes have raised fundamental questions about the adequacy of the current international regime dealing with the provision of humanitarian assistance to victims of natural disasters. Currently, there is no multilateral treaty equivalent to the 1949 Geneva Conventions,¹² which apply to victims of armed conflict, that provides for the right of victims of natural disasters to receive humanitarian aid. As the International Decade draws to a close, it is timely to reconsider the status of humanitarian assistance in times of natural disaster as a human right.

⁵“The politics of humanitarianism”, *Time*, 9 July 1990, p. 36.

⁶“Death in the afternoon: Iran’s earthquake”, *The Economist*, 8 March 1997.

⁷United Nations Office for the Coordination of Humanitarian Affairs, “UN, ICRC seek \$2.5 million for Afghan air drop”, *Reuters*, 12 February 1998.

⁸“Desperate Afghan quake victims await help”, *Reuters*, 10 February 1998.

⁹*Ibid.* See also “Politics of the Afghan earthquake”, *The Economist*, 14 March 1998, p. 30.

¹⁰UNGA resolution 44/236, 22 December 1989.

¹¹*Agenda for development*, UN doc. A/AC.250, 1996, para. 157. For example, the United Nations Department of Humanitarian Affairs’ Disaster Mitigation Branch coordinated international assistance in 45 natural disasters in 1992, 75 natural disasters in 1994, and 85 disasters in 1995.

¹²In particular, the Fourth Geneva Convention relative to the protection of civilian persons in time of war, of 12 August 1949.

This paper begins by defining the concept of humanitarian assistance in light of the practice of international organizations such as the components of the International Red Cross and Red Crescent Movement. It examines the criteria for the development of new human rights and considers whether the right to humanitarian assistance exists as a principle of customary international law. The uncertainty surrounding the existence and content of such a right in custom has led to procrastination by States and international organizations in delivering aid at a time when the increasing frequency of natural disasters requires decisive action. In light of the inadequacy of the current international regime the paper recommends the adoption of an international agreement on the issue. The proposed principles of international disaster relief discussed are distilled in the Annex to this paper.

I. Humanitarian assistance and the practice of the International Red Cross and Red Crescent Movement

The term "humanitarian assistance" has been used to refer to a wide range of international action including aid to victims of conflict and armed intervention to restore democracy.¹³ It will be confined here to the provision of commodities and materials required during a *natural disaster* relief operation. Natural disasters include epidemics, famines, earthquakes, floods, tornadoes, typhoons, cyclones, avalanches, hurricanes, volcanic eruptions, drought, and fire. Assistance in such circumstances is likely to consist of food, clothing, medicines, temporary shelters and hospital equipment.¹⁴

In the context of armed conflict, the International Court of Justice defined permissible humanitarian aid as "the provision of food, clothing, medicine and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment,

¹³ L. Fielding, "Taking the next step in the development of new human rights: the emerging right of humanitarian assistance to restore democracy", *Duke Journal of International and Comparative Law*, No. 5, 1995, p. 329; M. Stopford, "Humanitarian assistance in the wake of the Persian Gulf War", *Virginia Journal of International Law*, No. 3, 1993, p. 491.

¹⁴ See the UN Draft Convention on expediting the delivery of emergency assistance, Art. 1, para. 1(c), UN Doc. A/39/267/Add. 2, 1984. See also "Strengthening the coordination of humanitarian emergency assistance of the UN", UNGA resolution 46/182 of 19 December 1991.

vehicles, or material which can be used to inflict serious bodily harm or death".¹⁵

Humanitarian assistance is to be distinguished from foreign aid by its emergency character and use for relieving victims of natural disasters.

The practice of humanitarian assistance to victims of natural disasters is perhaps best illustrated by the work of the International Federation of Red Cross and Red Crescent Societies. Under Article 5 of the Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement,¹⁶ the Federation acts as the lead agency in managing international operational activities in the event of natural disasters occurring in peacetime, while the International Committee of the Red Cross acts as the lead agency in times of armed conflict, which may be concomitant with a natural disaster. Assistance coordinated by the Federation or the ICRC is provided through the National Societies. Two recent natural disasters illustrate the significant and effective measures taken by the Red Cross following natural disasters.

Despite initial difficulties, within two weeks of the February 1998 Afghanistan earthquake, the ICRC provided food and non-food relief supplies to 16 of the 27 villages struck by the earthquake.¹⁷ In this case, as the natural disaster occurred in a conflict situation, where the ICRC was already at work, its delegates took the lead. Acting as the lead agency for the International Red Cross and Red Crescent Movement, the ICRC provided food, blankets, tents, sheets of plastic, stoves and coal. Given the atrocious weather conditions, air drops and distribution by helicopter were the only way that aid could quickly and effectively be delivered to the survivors.¹⁸ Despite the enormity of the task, by early March 1998 everybody injured in the earthquake had received emergency surgical treatment, and essential supplies had reached even the outlying villages.¹⁹

¹⁵ *Military and Paramilitary Activities in and against Nicaragua (Merits), Judgment*, ICJ Rep., 1986, pp. 57 and 125. Although this statement was made in the context of an armed conflict, there is no objection, in principle, to its application in natural disasters.

¹⁶ *IRRC*, No. 322, March 1998, p. 159-176.

¹⁷ "Update No. 98/02 on ICRC activities for victims of the earthquake in Afghanistan", 17 February 1998.

¹⁸ "Update No. 98/03 on ICRC activities for victims of the earthquake in Afghanistan", 25 February 1998.

¹⁹ "Update No. 98/04 on ICRC activities in Afghanistan", 3 March 1998.

Similarly, the Red Cross provided prompt relief after the January 1998 earthquake in China. Following an appeal on 13 January 1998, the Federation was granted exceptional access to the disaster area by the Chinese government, enabling an extensive plan of action to be prepared.²⁰ Consequently, despite harsh winter weather conditions, distributions of food, clothing and emergency shelter by the Red Cross Society of China met the most immediate needs of the victims.²¹ Significantly, the capacity of the Red Cross to respond to the China earthquake was enhanced by the willingness of the Chinese government to seek assistance from international non-governmental organizations.

II. The right to humanitarian assistance in international law

Ascertaining whether victims of natural disasters have a right to receive humanitarian assistance in international law is problematic because it raises fundamental questions relating to the development of international human rights. In recent years, there has been a tendency on the part of United Nations organs and other international organizations to proclaim new "human rights" without giving adequate consideration to their desirability, their scope or the viability of their implementation. Although it has long been recognized that to continue to be relevant, human rights as a concept must respond to the changing needs and perceptions of individuals and the international community,²² the need for dynamism must be balanced against the equally important need to preserve the integrity and credibility of human rights as a "common standard of achievement for all peoples and all nations".²³ Thus, it is incumbent on those who propose new rights to justify their claims to "the highly prized status of

²⁰"Earthquake in Hebei Province, Situation Report No. 1", 16 January 1998, www.reliefweb.int.

²¹"China: Earthquake in Hebei province, Situation Report No. 2", 3 February 1998, www.reliefweb.int.

²²P. Alston, "A third generation of solidarity rights: Progressive development or obfuscation of international human rights law", *Netherlands International Law Review*, No. 29, 1982, pp. 307, 309; P. Alston, "Conjuring up new human rights: A proposal for quality control", *American Journal of International Law*, No. 78, 1984, p. 607; R. Bilder, "Rethinking international human rights: Some basic questions", *Wisconsin Law Review*, 1969, p. 175; Dissenting Opinion of Luis Demetrio Tinoco Castro, Resolution No. 23/81, Case 2141 (United States), 6 March 1981, *Annual Report of the Inter-American Commission on Human Rights 1980-1981*, doc. OEA.Ser.L/V/11.54, doc. 9, 1981, p. 54.

²³Preamble to the Universal Declaration of Human Rights, 10 December 1948.

a human right".²⁴ This task is difficult because fifty years after the adoption of the Universal Declaration of Human Rights, the criteria for determining which claims have attained the status of internationally recognized human rights remain the subject of debate. To pursue this issue is beyond the scope of this paper.

For the purposes of the present discussion, claims are said to attain the status of internationally recognized human rights if they have satisfied the law-creating process of international law. According to the classical sources of international law as codified in Article 38 of the Statute of the International Court of Justice, international law rules are primarily found in treaties, international custom, and general principles of law recognized by civilized nations. Presently, there is no multilateral treaty setting out the right of victims of natural disasters to receive humanitarian assistance. Given that the International Court of Justice has never made express reference to general principles of law, these do not provide an irreproachable basis for the emergence of new human rights. Thus, apart from its inclusion in treaties, the right to humanitarian assistance is more likely to derive from international custom.

Humanitarian assistance as customary international law

The question of whether victims of natural disasters have the right to receive humanitarian assistance in customary international law is not new. Together with the rights to development, peace, and to benefit from the common heritage of mankind, the claim to humanitarian assistance was raised for inclusion as a human right under the rubric of "third generation solidarity rights".²⁵ Similarly, the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief states that "[t]he right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries".²⁶ Despite this, there has been little analysis of

²⁴P. Alston, *op. cit.*, 1984, (note 22), p. 614.

²⁵P. Alston, *op. cit.*, 1982, (note 22), p. 308; S. Marks, "Emerging human rights: A new generation for the 1980s?", *Rutgers Law Review*, No. 33, 1981, pp. 435, 449; K. Vasak, "For the third generation of human rights: The rights of solidarity", Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, Strasbourg, July 1979.

²⁶*IRRC*, No. 310, January-February 1996, pp. 119-127, at p.120.

whether the proposed right satisfies the requirements of international custom. Under the classical doctrine of customary international law, for a right to be binding upon a State, there must exist extensive and uniform State practice carried out so as to show a general recognition that a rule of law or legal obligation is involved.²⁷

Practice of the international community in the provision of humanitarian assistance

In 1984, the Office of the United Nations Disaster Relief Co-ordinator (UNDRO) attempted to draft a convention in relation to the delivery of emergency assistance.²⁸ The Preamble to the Draft Convention stated that “the international community has willingly rendered assistance in individual cases of disaster and continues to do so whenever necessary”.²⁹ Such assistance has been provided by various States and international organizations, both intergovernmental and non-governmental. Although customary international law is usually said to derive from State practice, a “modernized view of customary international law” has emerged which would accord the “ability to create custom” to non-State actors, such as international organizations and “certain non-governmental organizations [that] have a distinct, measurable impact on international affairs”.³⁰

International organizations

One such organization is the United Nations, which plays a coordinating role in large-scale relief operations. UNDRO, established in 1971, was created to be the focal point in the United Nations system for disaster-related matters. Further, a multiplicity of specialized United Nations agencies are involved in natural disaster emergency relief. In 1995 the Department of Humanitarian Affairs provided 55 Member States with assistance in combating natural disasters.³¹ In particular, WFP has been

²⁷ Article 38, para. 1(b), of the Statute of the International Court of Justice; *North Sea Continental Shelf Cases*, ICJ Rep., 1969, p. 43, para. 74.

²⁸ *Supra* (note 14).

²⁹ *Ibid.*

³⁰ I. Gunning, “Modernizing customary international law: The challenge of human rights”, *Virginia Journal of International Law*, No. 31, 1991, pp. 212, 221-222; F. Bugnion, “Red Cross law”, *IRRC*, No. 308, September-October 1995, pp. 491, 508-518.

³¹ Press release, ECOSOC/5675, 19 July 1996.

an important source of emergency food aid. It plays a significant role in disaster assistance operations through the supply of basic foodstuffs, "establishing adequate and orderly procedures on a world wide basis for meeting emergency food needs".³² Following the 1998 Afghanistan earthquake WFP contributed 1,215 MT of wheat flour, 55 MT of oil and 55 MT of sugar.³³ Similarly, the World Health Organization (WHO) has taken on an active role in providing humanitarian aid in times of natural disaster. The significant part it played in the wake of the 1998 Afghanistan earthquake was a case in point.³⁴ Recent reforms to the United Nations, such as replacement of the Department of Humanitarian Affairs with an Office for the Coordination of Humanitarian Affairs (OCHA), are aimed at strengthening the United Nations' role in disaster relief by facilitating quicker reactions to crises.³⁵

Intergovernmental organizations

Various intergovernmental organizations are also involved in humanitarian assistance. They include the European Union, the North Atlantic Treaty Organization, the Organization of African Unity and the Association of South East Asian Nations. Of these, the European Union has been playing a major role, through the European Community Humanitarian Office (ECHO), which was established in 1992. For example, the European Commission allocated two million ECU to finance programmes carried out by humanitarian organizations for victims of the February 1998 Afghanistan earthquake.³⁶

Non-governmental organizations on the international level

It is widely acknowledged that non-governmental organizations are instrumental in providing emergency humanitarian assistance.³⁷ Within

³² See UNGA resolution 1714 (XVI), 1961, and the World Food Programme Constitution, para. 10(a).

³³ "Afghanistan — Earthquake", OCHA Situation Report No. 10, 25 February 1998, www.reliefweb.int.

³⁴ *Ibid.*

³⁵ Press release, OCHA, 26 January 1998.

³⁶ "European Commission is ready to mobilize up to ECU 2 million for the victims of the earthquake in Afghanistan", 9 February 1998, www.reliefweb.int.

³⁷ Y. Beigbeder, *The role and status of international humanitarian volunteers and organizations: The right and duty to humanitarian assistance*, Martinus Nijhoff Publishers, London, 1991, Chapters 5-7.

any discussion of non-governmental organizations, particular mention should be made of the Red Cross and Red Crescent, and especially the International Federation of Red Cross and Red Crescent Societies, which renders significant and effective assistance in natural disaster situations.³⁸ In 1995, the 26th International Conference of the Red Cross and Red Crescent adopted two instruments which set out guidelines for relief operations: the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief³⁹, and the Principles and Rules for Red Cross and Red Crescent Disaster Relief.⁴⁰ Based on provisions contained in previous resolutions and taking into account an extensive practice, the two texts lay down the roles of the various components of the Movement and establish the conditions for an effective coordination of assistance to disaster victims.

The Principles and Rules for Red Cross and Red Crescent Disaster Relief, as amended by the 26th International Conference of the Red Cross and Red Crescent, provide that the Red Cross and Red Crescent “has a fundamental duty to provide relief to all disaster victims”.⁴¹ Similarly, the Code of Conduct states that “[a]s members of the international community, [the Red Cross and the NGOs supporting the Code] recognize [the] obligation to provide humanitarian assistance wherever it is needed”.⁴² The Code seeks to maintain the independence and effectiveness of all components of the International Red Cross and Red Crescent Movement in responding to disasters.⁴³

Secondly, mention must be made of *Médecins sans frontières* (MSF), which is recognized as the world’s largest medical assistance organization.⁴⁴ Following natural disasters, MSF sends in medical teams, equipment and supplies.⁴⁵ For example, in the February 1998 Afghanistan

³⁸ D.P. Forsythe, “Human rights and the International Committee of the Red Cross”, *Human Rights Quarterly*, No. 12, 1990, p. 265.

³⁹ *Op. cit.* (note 26), pp. 119-127.

⁴⁰ *Ibid.*, pp. 102-112.

⁴¹ *Ibid.*, para. 2.1, p.102.

⁴² *Ibid.*, para. 1, p. 120.

⁴³ *Ibid.*, Purpose, p. 119.

⁴⁴ *Médecins sans frontières/Suisse*, Annual Report 1991.

⁴⁵ Y. Beigbeder, *op. cit.* (note 37), p. 263.

earthquake it provided immediate medical assistance and emergency surgery.⁴⁶

States

A right of victims of natural disasters to assistance is also supported by domestic legislation in a broad cross-section of States mandating the provision of aid to victims of disasters.⁴⁷ Further, there are a number of regional and sub-regional agreements concerning the coordination of relief efforts in times of natural disaster.⁴⁸ Like international non-governmental organizations, States have responded to recent disasters with prompt humanitarian assistance. For example, the United States, the United Kingdom, Australia, Denmark, France, Germany, Japan and the Netherlands made substantial financial commitments for the provision of humanitarian aid to the victims of the 1998 China earthquake.⁴⁹ Similarly, the United States government has pledged an additional \$75 million worth of food aid for North Korea in 1998.⁵⁰

The problem with customary international law

The willingness of States to render assistance does not necessarily imply the existence of a right under international law for victims of natural

⁴⁶“Afghanistan — Earthquake”, OCHA Situation Report No. 4, 3 March 1998, www.reliefweb.int.

⁴⁷ *Directory of National Emergency Response Offices, Disaster Emergency Plans and Legislation, and Regional and Sub-Regional Agreements for Disaster Assistance*, UNDRO, 1992. The directory lists the legislation of 64 countries.

⁴⁸ *Ibid.* The relevant agreements include: Agreement for non-aggression and assistance in the field of defence between Member States of the West African Economic Community; Association of South-East Asian Nations — Declaration for mutual assistance on natural disasters; Caribbean Disaster Emergency Response Intergovernmental Agreement; North Atlantic Treaty Organization’s Civil Emergency Planning Department; Permanent Inter-State Committee on Drought Control in the Sahel; Agreement between countries of the European Free Trade Association and those of the European Community concerning collaboration in the field of civil defence and disaster assistance; Horn of Africa Declaration of commitment to the observance and promotion of humanitarian principles and norms; Council of Europe — Open Partial Agreement on the prevention of, protection against, and organization of relief in major natural and technological disasters; Pan-American Health Organization’s Emergency Preparedness and Relief Co-ordination Program.

⁴⁹“China Earthquake”, Situation Report No. 2, 21 January 1998, www.reliefweb.int.

⁵⁰“North Korea says it is running out of food”, *The Washington Post*, 3 March 1998, p. 11.

disasters to receive humanitarian aid. The International Court of Justice in the *North Sea Continental Shelf Cases* stated that the frequency or even habitual character of acts is not in itself enough for a proposed rule to have evolved into a principle of customary international law. For such a right to exist, provision of humanitarian assistance must be evidence of a belief that such assistance is rendered obligatory by a rule of law or a human right requiring it.⁵¹ Whilst the requisite *opinio juris* can arguably be derived from a number of basic human rights, including the rights to life,⁵² food,⁵³ clothing⁵⁴ and shelter,⁵⁵ this argument is not irreproachable.

Even if the requisite *opinio juris* exists, the scope and content of this right in customary international law remains uncertain. For example, are neighbouring States under an obligation to render assistance or is it primarily the obligation of each State to provide humanitarian aid to its nationals? What are the roles and rights of international organizations in a natural disaster? Is there a corresponding obligation on States unable to provide adequate assistance to accept aid given by international organizations? Uncertainty raised by these issues, when natural disasters are occurring with increasing frequency and severity,⁵⁶ has led to procrastination by States and international organizations at a time when urgent assistance is needed.⁵⁷

This situation is untenable. Failure on the part of certain governments to deliver aid or to promptly seek external assistance has clearly resulted in human suffering on a wide scale. An international agreement, in the

⁵¹ *Supra* (note 27), p. 44, para. 77.

⁵² Universal Declaration of Human Rights, Art. 3; International Covenant on civil and political rights, Art. 6, para. 1; Convention on the rights of the child, Art. 1; European Convention for the protection of human rights and fundamental freedoms, Art. 2; African Charter on human and peoples' rights, Art. 4; American Declaration of the rights and duties of man, Art. 1.

⁵³ International Covenant on economic, social and cultural rights, Art. 11; Declaration of the rights of the child, UNGA resolution 1386 (XIV), 1959; Universal Declaration on the eradication of hunger and malnutrition, UNGA resolution 3348 (XXIX), 1974, para. 1; Food and Agricultural Problems, UNGA resolution 39/166, 1984, Principle 6.

⁵⁴ Universal Declaration of Human Rights, Art. 25; International Covenant on economic, social and cultural rights, Art. 11.

⁵⁵ *Ibid.*

⁵⁶ World Health Organization, *The Challenge of African Disasters*, UNITAR, 1991, p. 1.

⁵⁷ See the examples given at the beginning of this paper.

form of a multilateral convention, is therefore necessary to ensure better protection for victims of natural disasters. Such an agreement would help the international community in the provision of relief and provide an incentive for expanding this form of activity. The value of such a convention was already recognized in the Final Report on the Reappraisal of the Role of Red Cross: “[a]n International Relief Convention, while not repudiating the ancient doctrine of national sovereignty and non-interference in the internal affairs of other states, could nevertheless establish a set of reasonable criteria outlining when and through what administrative mechanisms states would be expected to accept humanitarian aid on behalf of their populations.”⁵⁸

In fact, the potential for an international agreement was considered by a Task Force on Ethical and Legal Issues in Humanitarian Assistance set up in 1994 by the Program on Humanitarian Assistance at the World Conference on Religion and Peace.⁵⁹ The outcome was the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies.⁶⁰ On the basis of those criteria the Task Force called upon the UN Member States to:

- recognize the right to humanitarian assistance and the responsibility to provide it, and
- acknowledge and ensure the right of access by humanitarian assistance organizations to endangered populations in complex emergencies.⁶¹

The paper now turns to a proposed agreement.

III. An international agreement

Guidelines for the development of human rights instruments

Concerned about the effect of the proliferation of new human rights on the integrity and credibility of the United Nations’ human rights

⁵⁸ Donald D. Tansley (ed.), *Final Report: An Agenda for Red Cross*, Geneva, 1975, p. 80.

⁵⁹ J. Ebersole, “The Mohonk criteria for humanitarian assistance”, *Human Rights Quarterly*, No. 17, 1995, p. 192.

⁶⁰ For the purposes of that document, a “complex emergency” is a humanitarian crisis, which may involve armed conflict or natural disasters.

⁶¹ J. Ebersole, *loc. cit.* (note 59), p. 195.

tradition, the General Assembly established guidelines for developing international instruments in the field of human rights. Article 4 of the General Assembly resolution on setting international standards in the field of human rights⁶² requires proposed new human rights instruments to:

- “(a) be consistent with the existing body of international human rights law;
- (b) be of fundamental character and derive from the inherent dignity and worth of the human person;
- (c) be sufficiently precise to give rise to identifiable and practicable rights and obligations;
- (d) provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
- (e) attract broad international support.”

The rest of this paper considers the first three requirements, which represent the most significant obstacles for concluding an international agreement on the right to humanitarian assistance. The proposals made during the course of the discussion are distilled in the Annex to this paper. Once agreement on these principal rights and obligations is reached, consideration can be given to the creation of effective institutional structures and reporting systems for disaster relief.

The right to humanitarian assistance: a necessary implication from fundamental human rights

The right to humanitarian assistance is not only consistent with the existing body of international human rights law, it is necessary to give effect to the fundamental human rights to life, food, clothing and shelter. These rights are well established in customary international law and have arguably achieved the status of *jus cogens*.⁶³ Although it is the primary responsibility of the State concerned to render assistance and satisfy these

⁶² UNGA resolution 41/120, 3 December 1986.

⁶³ Shaw argues that the right to life can be characterized as a principle of *jus cogens*: M.N. Shaw, *International Law*, Grotius Publications, 3rd edition, Cambridge, 1991, p. 240. See also R. Ago, “Droit des traités a la lumière de la Convention de Vienne. Introduction”, *Recueil des Cours*, 1971, No. 3, p. 324.

rights in a natural disaster,⁶⁴ where that State is unable to provide relief and unwilling to promptly permit external humanitarian assistance to the victims, satisfaction of these fundamental rights entails that the victims have a right to receive humanitarian aid from external sources. This in turn imposes on the State the correlative obligation to allow prompt outside access to the victims. This does no more than to fulfil the obligation on every State to secure “universal respect for, and observance of”⁶⁵ the most fundamental of human rights — the right to life. Denial of the right to receive humanitarian assistance from external sources in natural disasters results in widespread death, as exemplified by the recent events in North Korea and Afghanistan, “shocking the conscience of mankind” and contrary to “elementary considerations of humanity”.⁶⁶

State sovereignty objections to the right to humanitarian assistance

The primary objection to the above argument is that requiring States to allow external access to victims is inconsistent with the fundamental principle of State sovereignty in international law.⁶⁷

The Final Report on the Reappraisal of the Role of Red Cross stated: “[c]urrent international law, which is largely based on traditional practice, does not obligate a State in any way to accept emergency aid even when its population is in extremely grave danger”.⁶⁸ Although such an objection might have been persuasive in the past, it is now an anachronism. International law and human rights are inherently dynamic concepts. In its *Advisory Opinion on South-West Africa*, the International Court of Justice

⁶⁴ International Decade for Natural Disaster Reduction, UNGA resolution 49/22, 13 December 1994, Preamble; Strengthening the capacity of the United Nations system to respond to natural disasters and other emergency situations, UNGA resolution 36/225, 17 December 1981, Principle 2; Humanitarian assistance to victims of natural disasters and similar emergency situations, UNGA resolution 43/131, 8 December 1988, Principle 2; Humanitarian assistance to victims of natural disasters and similar emergency situations, UNGA resolution 45/100, 14 December 1990, Principle 2; Y. Beigbeder, *op. cit.* (note 37), p. 9.

⁶⁵ Art. 55 of the Charter of the United Nations.

⁶⁶ *Corfu Channel (UK v. Albania)*, ICJ Rep., 1949, p. 22.

⁶⁷ During discussions that took place in the UN General Assembly on the resolution on humanitarian assistance to victims of natural disasters and similar emergency situations (UNGA res. 46/182, 19 December 1991), the principles of national sovereignty and non-interference were continually advanced by the delegations of Brazil, India, Pakistan, Mexico, Chile, Nicaragua, Peru, Ethiopia and Sudan.

⁶⁸ *Op. cit.* (note 58), p. 80.

indicated the absurdity of mechanically applying an old norm without reference to fundamental constitutive changes to the international legal system.⁶⁹ The adoption of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and more recently the widespread ratification of the Convention on the Rights of the Child signal a constitutive shift in emphasis from sovereignty to fundamental rights. This shift has been accepted even by governments which traditionally propounded “the rhetoric of statism”.⁷⁰ States cannot take shelter behind the legal doctrine that what they do to their citizens is a matter within their exclusive jurisdiction.⁷¹ As Thomas Pickering, the United States Permanent Representative to the United Nations, puts it, “people, not governments, are sovereign”.⁷² Thus, norms such as State sovereignty must be reinterpreted in light of this constitutive change, to avoid anachronisms.⁷³

Guiding principles for humanitarian assistance

Article 4(c) of the General Assembly resolution on setting international standards in the field of human rights⁷⁴ requires not only that proposed new human rights be consistent with the existing body of international human rights law, but also that they be defined with sufficient precision so as to give rise to identifiable and practicable rights and obligations. The remainder of this paper outlines a practical solution to State sovereignty objections to the right to humanitarian assistance.

⁶⁹ *South-West Africa — Voting procedure (Advisory Opinion)*, ICJ Rep., 1955, p. 77; M. McDougal, H. Lasswell & J. Miller, *The interpretation of agreements and World Public Order*, Yale University Press, New Haven, 1967, Chapter 4.

⁷⁰ A. D’Amato, “The invasion of Panama was a lawful response to tyranny”, *American Journal of International Law*, No. 84, 1990, p. 518.

⁷¹ Tommy Koh, in *The Quest for World Order*, Times Academic Press, Singapore, 1998, pp. 42-43. The author is Singapore’s Ambassador-at-Large. Similar sentiments were expressed by Malaysian Deputy Prime Minister Anwar Ibrahim in “Cultural differences or Asian values no excuse”, *The Straits Times*, 8 December 1994.

⁷² UN doc. S/PV/2902, 23 December 1989, p. 8.

⁷³ K. Mills, “Reconstructing sovereignty: A human rights perspective”, *Netherlands Quarterly of Human Rights*, No. 15, 1997, pp. 267, 278-279; M. Reisman, “Sovereignty and human rights in contemporary international law”, *American Journal of International Law*, No. 84, 1990, pp. 866, 873; T. Fleiner-Gerster and M. Meyer, “New developments in humanitarian law: A challenge to the concept of sovereignty”, *International and Comparative Law Quarterly*, No. 34, 1985, pp. 267, 277.

⁷⁴ *Supra* (note 62).

1. Overcoming State sovereignty objections: a proposal

It is unrealistic to expect States to agree to a multilateral convention requiring them to provide third States with a right of access to their territories even in times of natural disaster. The creation of such a right impinges on a State's national sovereignty. However, a balance must be struck between the urgency of giving aid to victims and State sovereignty. This point is recognized in the Mohonk Criteria which state that "[t]he principles of non-intervention and sovereignty should not be used as an obstacle to humanitarian assistance. The objective of humanitarian assistance is to save lives and is not intended to challenge the State on whose territory aid is to be delivered".⁷⁵ Primarily, this is because humanitarian aid can be seen as "international efforts to alleviate human suffering".⁷⁶

Objections based on State sovereignty can be circumvented by limiting the obligation to provide access to neutral non-governmental relief organizations only. This could prevent the arousal of nationalistic sentiments and avoid action in aid of victims being perceived as interference by another State. Indeed, this limiting principle is supported by the decision of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua*, where the Court defined humanitarian assistance in terms of the practice of a leading neutral non-governmental relief organization, i.e., the Red Cross: "[I]f the provision of 'humanitarian assistance' is to escape condemnation as an intervention (...) not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need (...)".⁷⁷

Although this statement was made in the context of an armed conflict, there is no objection, in principle, to its application in natural disasters. Thus, Principle 3 of the Annex to this paper imposes an obligation on States which are unable or unwilling to provide humanitarian aid to promptly permit external assistance from neutral relief organizations.

⁷⁵ J. Ebersole, *op. cit.* (note 59), p. 198.

⁷⁶ P. Macalister-Smith, *International humanitarian assistance*, Martinus Nijhoff Publishers, Boston, 1985, p. 72.

⁷⁷ *Ibid.*, p. 125.

2. *Register of qualified non-governmental relief organizations*

The prevention of death and human suffering in disaster situations requires that relief be provided without delay. To reduce the scope for disputes over which relief organizations are neutral and non-governmental, it is proposed that the United Nations Office for the Coordination of Humanitarian Affairs maintain a register of "qualified organizations". OCHA will not register an organization unless it is satisfied of its independence from government control and effectiveness in providing humanitarian assistance. It is expected that only a limited number of relief agencies will fulfil these criteria. Obvious candidates for inclusion in the register include National Red Cross Societies, *Médecins sans frontières*, as well as United Nations agencies such as WFP. The obligation to provide access will apply only to registered organizations. Discretion to allow access to foreign government agencies and officials will remain with the State affected by the disaster.

3. *Coordination and receipt of humanitarian assistance*

Principle 5 of the Annex proposes that the overall coordination of disaster relief remain with the receiving State. However, Principle 4 requires that the provision of assistance be governed by the principles set out by the International Court of Justice in the Nicaragua Case.⁷⁸ That is, humanitarian assistance must be provided without discrimination of any kind and for the sole purpose of preventing and alleviating human suffering.

IV. Conclusion

The present international regime dealing with provision of humanitarian assistance to victims of natural disasters is unacceptable. Although arguably a right to receive humanitarian aid exists in customary international law, uncertainty relating to rights and obligations during natural disasters has led to delays in the provision of emergency relief. Further, governments unable to provide aid to victims of natural disasters have been unwilling to promptly permit external humanitarian assistance.

To address this increasingly significant problem, this paper has argued that an international agreement is required, codifying and elaborating on

⁷⁸ *Op. cit.* (note 15), p. 125.

the principles relating to humanitarian assistance enunciated in *Military and Paramilitary Activities in and against Nicaragua*. In order to ensure that the right to humanitarian aid is respected, neutral non-governmental organizations need a right of access to States whose governments cannot provide relief. Provision for a right of access is essential because natural disasters are increasingly occurring in developing countries, such as China and North Korea, which do not have the economic resources to render the assistance required to secure the survival of their nationals. Limiting such a right of access to neutral non-governmental organizations overcomes traditional objections based on State sovereignty. Once States accept that State sovereignty is not necessarily threatened, it is conceivable that pressure from the international community and non-governmental organizations⁷⁹ will motivate them to become party to a convention on humanitarian assistance.

The proposed international agreement represents an important preliminary step in ensuring that victims of natural disasters receive prompt and effective relief. Once agreement on principle has been reached, practical measures for disaster relief, such as the adequacy of institutional structures providing such aid, can be strengthened and developed.

⁷⁹ It has been acknowledged that non-governmental organizations, such as the ICRC, play a significant role in encouraging States to ratify international agreements. See H.P. Gasser, "Persuading States to accept humanitarian treaties", *IRRC*, No. 320, September-October, 1997, p. 529.

Draft

**Principles of international relief
in natural disaster situations**

Definitions

“Humanitarian assistance” means the provision of commodities and materials required to prevent and alleviate human suffering, and does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict bodily harm or death.

“Natural disaster” includes epidemics, famines, earthquakes, floods, tornadoes, typhoons, cyclones, avalanches, hurricanes, volcanic eruptions, drought, fire, and other non-man-made calamitous events resulting in death, human suffering and material damage.

“Qualified organization” means an organization fulfilling the criteria in Article 2.

“Receiving State” means the State on whose territory a natural disaster occurs and in which victims require humanitarian assistance.

1. Right of victims to receive humanitarian assistance

Every person has the right to request and receive the humanitarian aid necessary to sustain life and dignity in natural disasters from governmental organizations or qualified organizations.

2. Qualified organization

A qualified organization is a non-governmental organization which

- (a) is not aligned or associated with any government;
- (b) has a proven record in the effective provision of humanitarian assistance; and
- (c) is registered with the United Nations Office for the Coordination of Humanitarian Affairs as a humanitarian disaster relief organization.

3. Obligations of the receiving State

- (a) The primary responsibility for the protection of civilian populations in times of natural disaster rests with the receiving State.
- (b) Where victims in the receiving State do not receive the humanitarian assistance necessary to sustain life and dignity in natural disasters, the receiving State is obliged to allow qualified organizations to provide such aid.
- (c) Principles of non-interference and sovereignty should not be used as obstacles to humanitarian assistance.

4. Principles for the provision of humanitarian assistance by qualified organizations

- (a) The sole purpose of humanitarian assistance is to prevent and alleviate human suffering, to protect life, and to ensure respect for the human being.
- (b) Humanitarian assistance shall be provided without discrimination as to race, colour, sex, language, religion, birth or other status to all in need.
- (c) Priority in the delivery of humanitarian assistance shall be given to the most urgent cases of distress.
- (d) Humanitarian assistance shall not be used to further a particular political or religious position.
- (e) Humanitarian assistance shall, where possible, respect the culture, structure and customs of communities and countries.
- (f) Reporting mechanisms shall be implemented to ensure appropriate monitoring of aid distribution and regular assessments of the assistance programme carried out.
- (g) Humanitarian assistance shall be free of charge unless otherwise agreed between the assisting qualified organization and the receiving State.

5. Principles for the receipt of humanitarian assistance

- (a) The overall coordination of disaster relief remains within the control of the receiving State. However, in coordinating disaster relief, the receiving State shall give consideration to the advice of the assisting qualified organization.

- (b) Humanitarian assistance rendered by the qualified organization shall be used by the receiving State to prevent and alleviate human suffering, to protect life, and to ensure respect for the human being.
- (c) The receiving State shall ensure that the qualified organization has prompt access to victims of natural disasters by ensuring the expedited processing of entry visas.
- (d) The receiving State shall provide the qualified organization with unrestricted access to the disaster-affected regions for the purpose of providing humanitarian assistance.
- (e) The receiving State shall ensure that goods and equipment brought into its territory for the purpose of providing humanitarian assistance are allowed unrestricted passage and are not subject to import or export requirements.
- (f) Goods or funds remaining after the provision of humanitarian assistance shall be used by the receiving State for subsequent rehabilitation programmes or for any other purpose agreed upon by the qualified organization and the receiving State.

Victims of natural disaster and the right to humanitarian assistance: A practitioner's view

by **Peter Walker**

A number of authors, notably Hardcastle and Chua writing in this issue of the *Review*,¹ have recently argued the case for either the existence of an international legal right to humanitarian assistance or the need to speedily establish such a right.

The International Federation of Red Cross and Red Crescent Societies is one of the world's largest providers of humanitarian aid to the victims of natural disasters, both through the local work of the member Societies themselves and through the Federation's international support for that work. For the Federation, discussions about the need for and/or legality of an international right to assistance prompt reflection on a number of fundamental issues that lie at the heart of the way in which humanitarian assistance, apart from that provided in the maelstrom of the battlefield, is currently delivered.

What is a natural disaster?

The question of what constitutes a natural disaster — not to mention how to gauge its magnitude — invariably arises in any discussion on rights to assistance.

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¹Rohan J. Hardcastle and Adrian T. L. Chua, "Humanitarian Assistance: towards a right of access to victims of natural disasters", *supra*, p. 589

Changing disaster patterns

In the course of what has been a decade of turbulent political and economic change around the globe, the attention of humanitarian agencies — particularly at the level of policy and politics — has been focused on conflict, chaos and collapsing States. The so-called complex emergencies of Somalia, the former Yugoslavia, Liberia and the Great Lakes region of Africa seem to have absorbed most of our intellectual and operational energy.

It is in this atmosphere that the United Nations Department of Humanitarian Affairs and its successor, the Office for the Coordination of Humanitarian Affairs, were formed. However, in focusing on these high-profile, acute and all-embracing disasters, the humanitarian-response community seems to have forgotten that its work is not confined to war victims, refugees and internally displaced persons. Humanitarianism is an ethos that should benefit all people. And they include the 65.8 million flood victims and 59.3 million people who suffer drought-induced famine in an average year. The recent floods in China have been the worst in a generation, affecting the lives of over 240 million people. According to press reports, so far they have caused at least one billion dollars worth of damage.

In the past two years the Federation has seen a major change in the global pattern of needs. In the early 1990s, victims of floods and cyclones made up some 6% of those assisted by the Federation around the world, while refugees, internally displaced persons and people caught up in economic crisis accounted for 70-80% of that total. The Federation continues to work with refugees, victims of technological disaster and people affected by rapid economic and social change. The overall picture, however, is rapidly changing: nearly half of the 22 million people helped by the Federation in 1997 were victims of floods or drought.

While this development is partly due to there being fewer refugees and internally displaced persons, much of it is also the result of an increase in the number and severity of natural disasters.

Although floods in China and drought in Africa can legitimately be called catastrophic natural phenomena, it is a moot point whether or not the disasters they cause are “natural”. The disasters brought about by flooding often have as much to do with present and past land use as with the amount of rain. In the past decade most African “drought-induced” famines coincided with conflicts of varying intensity, and even as natural a disaster as the Tsunami that hit Papua New Guinea in the summer of

1998 was made much worse by the deforestation that had resulted from logging in the area.

In many instances, therefore, it is human activity, whether at the level of the individual, the private sector or the State, that turns a spectacular natural phenomenon into a tragic disaster.

Scale

The second issue is that of scale. There is no internationally recognized definition of how great a tragedy has to be before it acquires the label “disaster”. Similarly, there is no agreement as to which parameters should be used to measure the size of a disaster. Some disasters, like earthquakes and the final stages of drought-induced famine, are associated with high death rates. Others, like the recent floods in China, affect the livelihoods of millions of people, rendering them vulnerable to further harm but killing relatively few. Is disaster to be defined by the number of deaths, potential deaths or people affected, or by the magnitude of the resulting economic loss?

Any attempt to determine whether victims of natural disasters have a “right to assistance” must take account of the many different views as to what constitutes a natural disaster.

Who provides assistance?

There is a tacit assumption amongst many international observers that humanitarian assistance is that which is provided by international bodies. In reality, the first help to arrive, and often the most effective, frequently comes from local sources. Hardcastle and Chua refer to the Iran earthquake of 1990, in the aftermath of which many outside observers railed against the apparent delays in providing international assistance. In fact, local citizens and national organizations like the Iranian Red Crescent Society were by no means slow in responding. And given the critically short time-span in which earthquake victims can be saved, only local organizations were in a real position to respond.

The same holds true for most disasters in industrialized countries — whether avalanches in the Alps or floods along the Mississippi, local organizations are the ones to respond first.

This is not to deny the role of international assistance but rather to emphasize that it is most effective when it takes the form of support for local structures.

This line of argument allows us to separate two issues: the right to receive assistance *per se* and the right of international agencies to cross borders to provide that assistance. Perhaps these two “rights” should be examined separately.

The legitimacy of the provider

Any discussion on strengthening the right of organizations to provide assistance must at some point address the issue of those organizations’ legitimacy and competence. Before pursuing this question, however, there is a more fundamental issue which both individuals and agencies involved in humanitarian assistance need to recognize.

As one writer has put it, the business of humanitarian assistance is driven by two ethics, that of the priest and that of the prophet. In many ways humanitarianism is a moral code: the priests among the humanitarian community tend to want to codify it, to define the business, set standards, and specify who can and who cannot provide assistance. The prophets, in contrast, believe that providing humanitarian assistance is the responsibility of all people. They seek to spread this message and stimulate more humanitarian action at the grass roots level.

Of course, both approaches are needed. The creed of the priests can survive only if a certain degree of commitment is generated by the prophets. Moreover, one could legitimately argue that while all individuals have a duty to render impromptu assistance to the best of their ability when they see suffering, once that assistance takes the shape of an organized, professional programme, codes, rules and standards are needed to safeguard the rights of the individual.

International mechanisms to ensure quality

Any system of rights intended to legitimize the role of non-State providers of assistance must devise a way of ensuring that they are legitimate and competent, and work in the interests of disaster victims. No such mechanism yet exists. The code of conduct² drawn up in 1994 and widely recognized by both NGOs and States goes a short way in this direction but not nearly far enough.

²“Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in disaster relief”, reprinted in *IRRC*, No. 310, January-February 1996, p. 119. See also <http://www.ifrc/pubs/code>.

However, a recent initiative, emerging from an extensive coalition of humanitarian agencies, promises to bring us much closer to the goal of objective quality assurance in humanitarian work.

The Sphere Project³

The *Sphere Project — Humanitarian Charter and Minimum Standards* is the result of cooperation between various independent agencies engaged in humanitarian assistance, including most major NGOs and the Red Cross and Red Crescent. Its aim is to define basic practical standards that should govern humanitarian assistance, specifically that immediately relevant to saving lives, such as water and sanitation, food, health care and shelter. Such minimum standards already exist for many areas of humanitarian work. The problem is that there are often different standards competing with each other, or that the existing standards are out-of-date or incomplete. The Sphere Project is the first initiative to provide a coherent and complete set of standards to which a wide range of agencies are prepared to agree and against which their performance can be measured.

Using basic human rights as its foundation, the Sphere Project seeks to erect an edifice consisting of clearly defined levels of assistance and the competence required to deliver it. This is intended to serve as a yardstick for humanitarian agencies in planning and assessment.

Meeting critical human needs and restoring people's dignity are core principles for all humanitarian action. The Humanitarian Charter and Minimum Standards of the Sphere Project establish an explicit link between fundamental human rights and humanitarian principles on the one hand, and clearly defined standards in terms of water supply, sanitation, nutrition, food aid, shelter and site selection, and health care on the other.

Accountability and effectiveness

The Humanitarian Charter and Minimum Standards also reflect the determination of humanitarian agencies to make their work more effective and improve the way they report to their sponsors. In agreeing to abide by these standards, humanitarian agencies commit

³“The Sphere Project — Humanitarian Charter and Minimum Standards”, <http://www.ifrc.org/pubs/sphere>.

themselves not only to providing defined levels of service but also to being held accountable for their actions. The standards are designed with this in mind and each is accompanied by a series of measurable indicators, which are important not only for planning and implementing an agency's programmes, but also for giving disaster victims, agency staff, donors, the wider public and others the possibility to assess the services provided under those programmes. Thus, the Humanitarian Charter and Minimum Standards provide a practical framework for accountability.

Applying the Minimum Standards

The Minimum Standards apply to any situation in which, owing to natural or man-made disaster, people have lost the means by which they are normally able to support themselves with a degree of dignity. The standards apply specifically to the acute phase of an emergency and describe what people have a right to expect during that period. They specify the minimum acceptable levels for water supply and sanitation, nutrition, food aid, shelter and site selection, and health services. They have been made as specific as possible while remaining widely applicable to different emergency situations.

Communities hosting those displaced by disasters or conflicts are by definition also affected by such calamities and they too may need assistance. The Minimum Standards therefore apply to both populations.

The burden of responsibility for providing humanitarian relief falls on many shoulders. The people directly affected by a disaster and their neighbours are always those who respond first in any crisis. Yet it is the duty of governments and international bodies to demonstrate political will in preventing, mitigating and alleviating disasters wherever possible. When people and their normal support systems are no longer able to meet human needs, assistance from humanitarian agencies is required.

What next?

There is no doubt that the Humanitarian Charter and Minimum Standards will generate at least as many questions as answers. Foremost among these are those relating to dissemination, implementation, training and compliance. The concern must also be taken seriously that establishing standards for humanitarian response may actually lead to a decision not to intervene if the outcome cannot reasonably be expected to meet the minimum requirements.

The next phase of the Sphere Project will include extensive promotion and dissemination of the Minimum Standards, emphasizing the importance of training and of developing the systems required to provide services that meet the agreed Minimum Standards. Possibilities will be explored for assessing compliance and responding to complaints. The Minimum Standards apply not only to individual agencies but to the humanitarian community as a whole. Given the interdependence of all involved, if any of the people affected by a disaster do not receive adequate assistance, we will all have failed the test of compliance.

The Sphere Project's standards represent a tremendous opportunity for humanitarian agencies. The challenge now is to ensure that good use is made of this opportunity, that the standards are put into practice and that agencies, donors and host governments are held accountable to them.

Conclusion

From a practitioner's perspective it is clear that moves to define and promote the right to humanitarian assistance must run parallel to attempts within the humanitarian community to ensure that we have the means to respond appropriately when disaster strikes. This entails clear standards, international procedures to verify quality, mechanisms for promoting the quality required, and systems to ensure that the agencies involved are accountable to those they are meant to assist, to the States and to their donors.

Pursuing these goals may well in itself further strengthen the legitimacy of calls for a right to humanitarian assistance.

Spotlight on violations of international humanitarian law

The role of the media

by Roy W. Gutman

Fifty years after the United Nations proclaimed its ambitious Universal Declaration of Human Rights, skeptics will have no trouble demonstrating that the international community's commitment to the document is shallow at best. The pretense was laid bare by the UN's inadequacy to stop genocide in Bosnia-Herzegovina and Rwanda, compounded by the institution's failure to conduct a thoroughgoing self-examination to determine the lessons of the debacle in Bosnia.

That being said, the United Nations is not a monolith, nor is it synonymous with the international community; and attitudes have shifted at the top of the organization itself, among many UN Member States, non-governmental organizations, and the media, with many groups in many locations focusing attention on war crimes. The most significant sign of change was the Security Council's establishment of ad hoc international tribunals to address the genocide, crimes against humanity, and war crimes in the Bosnia and Rwanda conflicts. A third tribunal may be created to address the massive crimes against humanity in Cambodia during the 1970s. Finally, States recently adopted in Rome the terms of reference for a permanent criminal court. Despite these steps toward ending impunity, major powers have yet to fulfil their obligations under the Geneva Conventions to arrest indicted war criminals in Bosnia.

Non-governmental organizations have also drawn lessons from these terrible events of the post-Cold War era, some by adopting a more militant

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stance on war crimes and other gross human rights abuses, others by redrafting their training manuals or by attempting to open more of their operations to the public.

There is soul-searching among news reporters as well. Human rights abuses, war crimes, and impunity are the stuff of journalism for the simple reason that crime is news. The traditional watchdog function requires media to report on disregard for the law, especially if that is the attitude of a State or an institution supported by taxpayer's money.

Yet media coverage of international or internal conflict is rarely framed in terms of the infractions of the laws of war. International humanitarian law is a thicket of inter-connected assumptions, principles, statements and caveats that most laypersons find impenetrable. Would a grasp of human rights and the Geneva Conventions produce better news coverage? Personal experience leads this reporter to think it would.

A journalist's experience

For many journalists, coverage of armed conflicts of the past decade has left a feeling of frustration and discouragement.

Reporters were among the first to discover that major governments, far from upholding humanitarian law, would just as soon walk away from it in the absence of vital or commercial interests or a carefully trained spotlight. Early in August 1992, following my own reports disclosing systematic killing at detention camps in northern Bosnia, the stunning television footage by the British *ITN* network, and the on-site reporting by Ed Vulliamy of *The Guardian*, United States President George Bush issued a stern-sounding but evasive statement that nonetheless reflected a clear grasp that international humanitarian law had been violated. He did not denounce crimes against humanity, demand the closure of the camps, the freeing of the prisoners, or even an investigation to determine whether crimes had occurred. His only demand was that the ICRC be granted access to Omarska and other camps. Other major governments were slower to respond. France waited more than a week to comment on the existence of the camps, and Britain, which organized a major diplomatic conference later that month, declined to provide air fare to the meeting for Tadeusz Mazowiecki, the former Polish Prime Minister, whom the UN had named its special human rights rapporteur to examine charges of atrocities in Bosnia.

Far from learning the lessons of the beginning of the Nazi Holocaust, many European governments and the United States seemed all too ready

to repeat the mistake of the 1930s — all but closing their borders to refugees fleeing for their lives. French and then British troops arrived in Bosnia starting in mid-1992, but their mission was severely limited to protection of food and humanitarian aid shipments, and often not even that, rather than the protection of innocent, suffering civilians.

It was after the deployment of the UN Protection Force or UNPROFOR that the real erosion in denouncing violations of the Geneva Conventions occurred. The Conventions have few enforcement mechanisms, except that the parties pledge to uphold them and see to it that they are upheld. A lengthy investigative research project I undertook in 1993 convinced me that the international community's evasion of responsibility at the time of the Omarska reporting was not inadvertent but the result of a mind-set that had developed over decades. UNPROFOR personnel, instead of monitoring observance of the Conventions, were repeatedly present at the scene of crime and did not investigate or report.

The very idea that Blue Helmets, the ultimate good soldiers, would look away when crimes are being committed in their presence might strike the naive observer as an abdication of a responsibility more basic than any UN mandate.¹ Even without knowing the content of the Geneva Conventions and other key treaties of international humanitarian law, common sense would suggest that a citizen of the modern world cannot simply witness gross violations of human rights without investigating and urging that someone put the matter right. The United Nations, however, takes the legalistic attitude that Blue Helmets are not bound by the Geneva Conventions. This I learned in the course of reporting on events in Bihac.

In November 1994, Bihac, northern Bosnia, a UN declared "Safe Area", was threatened with attack. To enter the town, Bosnian Serb forces would have had to attack the municipal hospital. Anticipating catastrophic results, a UN civil affairs officer cited the Geneva Conventions when he asked the local military commander to protect the hospital. The civil affairs officer, an American, argued that UN forces were duty bound to ensure that Bihac hospital received the high level of protection stipulated for hospitals by the fourth Geneva Convention. He secured the agreement of the head of civil affairs in Sarajevo, a Russian. The commander, a

¹The French essayist Jean Baudrillard calls the UN soldier in Bosnia the "virtual soldier", who "does not die, but is paralysed and immobilized, a stand-in for the dead". He adds that "the military paralysis is not surprising, however, since it is related to the mental paralysis of the civilized world". Jean Baudrillard in Thomas Cushman and Stjepan Mestrovic, *This time we knew*, New York University Press, 1996, p. 88.

Canadian, deployed his Bangladeshi forces on the hospital grounds, and successfully blocked the offensive. But two weeks later, a legal officer ruled that the United Nations had no obligations under the Geneva Conventions, for the world body is not a party to the 1949 Conventions; and that the commander was bound only by Security Council mandates.

If anyone assumed that UNPROFOR felt an obligation to prevent — or even monitor — genocide, crimes against humanity, and the grave breaches listed under the Conventions, the fall of Srebrenica in July 1995, proved the ultimate wake-up call. Before Dutch forces were evacuated to safety, they witnessed the Bosnian Serb army separating out men and boys from the women, children and old people, loading the latter onto buses and trucks and dispatching the men and boys, it later became clear, to be massacred. The first 54 Dutch “peacekeepers”, who had been seized by Serb forces at their observation posts, stripped of their weapons and equipment, and held hostage in violation of international law, were freed and bused out of Bosnia on 15 July. En route to safety and while still inside Bosnian Serb territory, the Dutch witnessed powerful evidence of massacres — shoes and backpacks of more than 100 people lined up along the side of the road, dozens of corpses piled in a cart, and bodies along the road. Witnesses from Srebrenica say the main executions occurred a day earlier, on 14 July. One would have thought that anyone who saw such evidence of extra-judicial executions, a war crime under the Geneva Conventions, would have reported it immediately.

These events — Omarska, Vogosca, Bihac, and Srebrenica — which I researched and wrote about at the time, added up, I later realized, to a disturbing pattern, and I inquired at the ICRC for an explanation. I was told that the UN, not being a party to the Conventions, nor to the conflict, does not require full observance of the Geneva Conventions by Blue Helmets; instead, prior to most deployments, the UN Secretary-General issues general instructions about respecting the principles of the Conventions. In Bosnia, those instructions were never given. This raises another question: who in the international community is supposed to see to it that the Conventions are upheld? The ICRC has a conflicting double-mandate under the Conventions: both to work for compliance and to provide all possible protection to prisoners of war and other protected persons. Denouncing violators can directly and adversely affect access. So the ICRC’s practice of making discreet approaches to the violating party is an understandable response. Unfortunately, as a result, the violation rarely becomes known to the public. Foreign troops, if they wear Blue Helmets, can argue that they are there as part of a force which is not a party to the Conventions. They can and do look the other way. That leaves the parties

to the conflict themselves, those who are violating the laws and are unlikely to turn themselves in, and the victims, whose allegations are rarely taken at face value. Thus, there really is no one on or near the battlefield who in real time can identify for the general public infractions of international humanitarian law. And violators are likely as not to enjoy impunity.

A role for the media?

Many discussions provided the germ of an idea that there might be a role for the news media. How many times has a reporter observed a gross abuse and not called it by its real name, a war crime? But how is a reporter to know a war crime when he or she sees it?

I thought back to events I had seen but had not adequately reported. In October 1991, in the thick of the Serb-Croat war, I visited a hospital on the front line at Vinkovci, Croatia, where every above ground ward had been destroyed, every red cross on the building or the hospital vehicles had been turned into a target and demolished. The Croat doctors tended their patients, mostly military casualties, including Serbs, in the basement. My story was a dramatic account of the soldiers in one ward, the multi-ethnic crew of a Yugoslav tank, and the Croat gunner who had disabled it. Only in passing did I mention the fate of the building itself, and then as another example of the “tragedy” of Eastern Slavonia. Tragedy? A little research would have determined that it was also a grave breach of international law.

Years later, I learned that an ICRC delegate had concluded at the time that the hospital at Vinkovci was a “perfect” example of a violation of the Geneva Conventions. Moreover, it was only one hospital under constant attack. ICRC staff identified Karlovac and Osijek as others. The ICRC of course could not provide a complete account for attack on the hospital in Vukovar, which took, according to Croatian information, hundreds of shells and two 500-pound gravity bombs. When that did not destroy the hospital, after Serbs captured the town they carted off all the survivors and shot them.

Thus Vinkovci was not an isolated example, but part of a pattern whereby hospitals were targeted. That would have made quite a story: of course, a careful journalist would have had to cross to the other side, obtain its version of events, then return to the Croat side, perhaps go back and forth again, until the facts added up. Hundreds of reporters from dozens of countries covered that war, but not one, so far as I know, documented the crime of the destruction of Vinkovci hospital. And there is a lesson in that.

Whatever the UN may require of its peacekeeping troops in future with regard to the Geneva Conventions, the news media can do their own monitoring of compliance. And by searching for unambiguous examples, investigating what really occurred, and then reporting in near-real time, journalists can convey a human drama that the public in almost any country can relate to the observance or violation of universally accepted norms. The potential impact on public awareness is hard to assess in the abstract, but in certain circumstances it could be substantial. Had the media covered the abuses in the Croatia war of 1991 more skilfully, the reportage would have alerted the world to the true nature of the conflict and prepared the world better for the explosion of crimes in the 1992-1995 Bosnia conflict. And had reporters supplied the legal frame of reference for the systematized maltreatment in the camps, the destruction of culture and the attacks on cities and civilians during the Bosnia conflict, the public and major governments might have had a better frame of reference for determining a response.

The 1949 Geneva Conventions, far from being outdated or overtaken by events, might provide the public with a normative guide to what matters in conflict. After all, they represent the lessons learned after the century's worst conflict; and their content, much of which dates back a good deal further, has a certain logic to it. While the ICRC properly seeks to encourage observance by citing positive examples, the news media can properly put the spotlight on war crimes. Public grasp of what is at stake in war will be enhanced if reporters have an idea which acts are legal, illegal, or criminal, particularly in the era now opening of international courts to try abuses. At the end of what may well be remembered as the decade of ethnic cleansing, at the close of a century of total wars against civilians, and at the turn of a tumultuous millennium, perhaps it is time to make the public more aware of these same distinctions.

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**Preventing suffering and crimes:
making the media aware of international humanitarian law
A project**

In an effort to raise awareness of international humanitarian law, a group of reporters and law scholars, with the backing of the American University's Washington College of Law and its Department of

Communications, have organized the "Crimes of War Project". The project's aim is to educate the news media in the United States and abroad about humanitarian law. With financial support from the Sandler Family Foundation and the Ford Foundation, our first objective is to publish a pocket guide to war crimes. This will consist of about 60 articles by reporters on specific grave breaches of the Geneva Conventions and on crimes against humanity. Each will feature an unambiguous example that the reporter witnessed or can vouch for, together with a discussion of the applicable law, what to watch for, and such caveats as may apply. To facilitate legal discussion, a graduate from the Washington College of Law researched the law journals for articles on each grave breach and prepared a short cover-sheet.

Every article is being edited by journalists and by legal scholars, with input from ICRC legal staff as well as from leading military experts. There are also articles on nine major wars, with reporters taking a fresh look from the perspective of international humanitarian law and, more specifically, war crimes. Each is intended to be a paradigm of a conflict. Those chosen: the Arab-Israeli conflict, as a typical example of a war that extended far beyond anything the Geneva Conventions ever envisioned; Bosnia, as a case study in nearly every violation of humanitarian law; Cambodia, an example of the artificial limits of the Genocide Convention; Chechnya, a case study in both sides violating the Geneva Conventions; Colombia, demonstrating how paramilitary forces take on a life of their own; the Gulf War, showing how major powers attempted to observe the Conventions; Iran-Iraq, one of the last major international armed conflicts; Liberia, the barbarism that characterizes small African wars; and Rwanda, the world community's failure before, during, and after the genocide.

A number of articles on other topics have been drafted by leading experts. To enhance the impact of the pocket guide, each major article will be illustrated. A former Magnum researcher is photo editor, and the book is being designed by a professional team: Gilles Peress, a Magnum photographer, and Jeff Streeper, a New York graphics designer.

The book, expected to come out in 1999, will be launched with a series of seminars for the media on covering wars and war crimes. A supplementary publication is also planned on the professional and ethical issues in war coverage. An Internet site, a film, a journalism school curriculum, and photo exhibitions are to follow.

A few thoughts on the relationship between humanitarian agencies and the media

by Urs Boegli

Modern conflict often takes place in a communication vacuum, and it is time that something were done to fill it.

Those engaged in war today appear to have ever less desire to make their voices heard, in most cases for good reason. In this post-Cold War era, the belligerents do not care as much as they once did about what the rest of the world thinks. They no longer live in fear of annoying or embarrassing their sponsors; indeed in most cases they no longer have sponsors at all, nor do they need them. It is no longer their dream to make speeches at the United Nations in New York, as it was for so many national liberation movements a few decades ago. Many simply care nothing about their international image, or about the outside world.

The other “key players” in such crises — today’s international activists: organizations like the ICRC, government representatives, and internationally mandated military officials — also usually prefer silence. Here too there are valid reasons. There is often something afoot, something involving a painstaking process of preparation, a fragile edifice that the slightest whiff of publicity could bring crashing down. If the ICRC is arranging a prisoner exchange between two mutually hostile States, for example, there is little point in a journalist telephoning about it ten days

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This article is based on a talk he gave at a conference in London entitled “Dispatches from Disaster Zones” (28 May 1998).

ahead of time. The situation will probably be so sensitive at that point that silence is the only reasonable policy. But there are also some very poor reasons for silence, such as when diplomats simply have nothing to say because — as is too often the case these days — the political will is lacking to deal with political problems politically.

Nature does not like a vacuum, and eager humanitarian agencies have a tendency to thrust themselves into the void left when those who could make a true difference choose to efface themselves. The goals of humanitarian organizations are naturally different from those of diplomats, peace-keepers and others. The former frequently feel the need to take a stand. Though this desire is quite often prompted by fund-raising considerations and the requirement these impose to raise one's public profile, speaking out is also emotionally satisfying and gratifying to the ego. The "communication" that results tends to be short and shrill, because that is its nature but also because the exposure you actually receive does not allow you the time to explain what is really going on. Humanitarian workers, often posing with dying babies in their arms, have become the prime source of information from many conflict zones, but their message has been encapsulated in a few shots and sound bites wedged into a two-minute-and-thirty-second bracket.

The result is that issues of purely humanitarian concern (how to save the lives of starving people, for example) have recently dominated news coverage of multifaceted events. Far too many disasters with political causes and for which there can be only political solutions are today labelled "humanitarian crises". An acquaintance from *Médecins sans frontières* put this very well when he observed that rape is rape — nobody would describe it as a "gynaecological disaster". But numerous conflicts are repeatedly referred to as "humanitarian disasters" while in reality they are much more. This steers the international response in the wrong direction, toward purely humanitarian action in cases where what is required is *political* action. In an age of instant and graphic television coverage, politicians have little stomach for the hard decisions that are actually needed, including sometimes sending troops to restore order in situations that hold the electorally unwholesome menace of casualties. Increasingly, political leaders tend to let things slide. Humanitarian action, by contrast, is always possible, and at little political cost. It is duly filmed and shown to an admiring public. And, inevitably, the reality behind the "event" is distorted.

Another aspect of the unfair share of media coverage devoted to humanitarian operations is its potential effect on the safety of those engaged in such endeavour and on their access to those they seek to help.

Like many other organizations, the ICRC is convinced that impromptu statements can be very risky. There is something that BBC news presenter Nik Gowing calls “the tyranny of real time”: the fact that the slightest misstep in an interview may be broadcast instantly worldwide, resulting in incalculable damage of the most startling kind and in the most unexpected places. Recent ICRC field experience shows how true this is. The ICRC’s *annus horribilis* was 1996, during which nine of our expatriate staff were murdered, six of them in Chechnya. Only a few days after the Chechnya murders, a boy soldier — one of Africa’s “new warriors” — approached an ICRC delegate, who was probably being a bit too pushy, and said, “If you aren’t careful, we’ll do a Grozny on you!” That was chilling. It was a genuine threat that brought home to us just how fast news travels these days, and what a problem this can be. The people one meets in the middle of the bush probably have access to a satellite dish somewhere. They learn from *CNN* and *BBC World* how things work; they see how vulnerable relief agencies are; and they use this knowledge.

The ICRC’s response to this reality is not to communicate less. On the contrary, somehow we have to get through to those waging the modern conflicts — no easy task when the belligerents are so often youngsters armed to the teeth and stoned out of their minds. At the same time we also need better communication with the type of media that broadcasts the hour-long background/discussion programmes late of an evening.

This brings us to the problem of denunciation. The ICRC showed extreme caution and reserve during the Second World War, at one stage keeping to itself knowledge about the concentration camps because it was frightened of the consequences for its POW operation that might follow any public appeal. Much soul-searching ensued, and it is clear today that there are times when the ethical imperative requires you to speak out. As a tool for actual change, however, going public is grossly overrated. I speak from experience as one of those who have both talked to the media about General Mladic and ethnic cleansing, and made representations about ethnic cleansing to General Mladic himself. Talking to the media is easier, believe me. The point is, however, that you can denounce whomever you want nowadays — the cavalry will not come. Humanitarian agencies should therefore think twice before taking that course. They should bear the ethical imperative in mind — as a last resort — but should not overplay the condemnation card at a time when the response that can be realistically expected in no way matches the problem.

What makes the dilemma facing the ICRC during the Second World War so harrowing in retrospect is the impression that despite the horrific

facts known to the ICRC, the Allies and a few others, we failed to leave no stone unturned. Such a situation would be unlikely to arise today since that knowledge would be — is — freely available to those who could make a difference. The problem is rather the lack of political will to take the action needed.

Finally, in response to the exaggerated media focus on issues of humanitarian concern, we should acknowledge the complexity so often involved in these situations. If what we are dealing with is a conflict, let us describe it as a conflict; if it has a political crisis at its core, talk about a political crisis. Any humanitarian response should naturally be given its fair share of attention, but not the lion's share. The public deserves to be told what is really going on; there is no justification for glossing over the complexity involved. The larger picture should be amply reported.

Unfortunately, gathering and conveying information about complex emergencies is a difficult, painstaking process that requires preparation. It makes no difference whether you are a humanitarian worker or a journalist, you need time to understand. Humanitarian organizations have to learn to dispense information about multifaceted situations in a clearer, more credible fashion. In 1984, when relief agencies had a better image than they have today, that great iconoclast Germaine Greer wrote something about the Ethiopian famine of that time that I found wrong, unjust and certainly inapplicable to my own organization. Still, her statement stuck in my mind: relief workers should be encouraged, they should be supported, but for heaven's sake they should not be believed. It was a terrible thing to say; I hope it is wrong. But it is salutary for us always to bear that harsh judgment in mind, to make a point of proving her wrong.

If you do not know something, you can always say "I don't know". There is no justification for improvising. Perhaps you can say "Nobody knows", because that is often indeed the case. Shortcuts are a poor idea. I know few people in humanitarian agencies who have ever been happy with monumental statistics, such as that the Khmer Rouge killed one million people — or now perhaps two million, according to a recently revised estimate — or the number of rape cases in Bosnia, or the number of innocent civilians killed in the former Yugoslavia. The ICRC encountered this problem when it stated that there were 110 million landmines laid worldwide, basically a UN figure that we used quite freely. When a British agency challenged it, we had to do some rapid back-peddalling. Shocking figures will naturally boost your chances of appearing on the evening news; there is a huge demand for them. But if you do not know who did the counting, think twice or you may end up regretting your lack of circumspection.

Finally, it must be said that relief agencies no longer have privileged knowledge of what is happening in the field. When I started working for the ICRC, reporters were queuing up in front of our field offices because we went further and we knew more. But journalism has since developed into a very tough profession. Just consider the risks that many journalists take these days as a matter of course. Some know more than relief workers, or at least as much. This reality should serve to foster dialogue.

In conclusion, if we stick to the facts and do not shrink from admitting that the world is a complex place, if we recognize the value of taking the trouble to listen to those who truly know a situation, if we exercise caution, if we spontaneously distrust the shocking figures that pop up so often in our line of work, then we will at least be taking steps towards greater credibility. And credibility is vital.

Is there a ‘*droit d’ingérence*’ in the sphere of information?

The right to information from the standpoint
of international humanitarian law

by Yves Sandoz

International humanitarian law does not deal directly with the right to information, but it is useful to highlight some of the law’s features in considering people’s right to information in wartime.

The right to indispensable items

International law stipulates that civilians have a right to items indispensable to their survival.¹ This entails an obligation for the parties to the

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Text based on a paper prepared for the symposium organized by the *Fondation Hirondelle* (Geneva, 3 and 4 July 1998) and entitled “L’intervention d’un média de paix dans un pays étranger: quelle légitimité?”. The *Fondation Hirondelle* is a non-governmental organization founded by Swiss journalists in 1995. Its aim is to provide impartial and independent information to people deprived of this by war or natural disasters.

Original: French

¹ Art. 54 and Art. 69ff. (for occupied territories) of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I); Art. 14 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). See also the commentaries on these articles: Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentaries on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC and Martinus Nijhoff, Geneva, 1987.

conflict, both in enemy territory occupied by them and in their own territory, to allow international action to provide these items if they themselves are unable to do so.

Although objective information is not regarded as an indispensable item, it is nevertheless possible to draw a parallel with this idea, particularly as the warring party in question retains the right to refuse its consent.

So far as humanitarian action is concerned, the warring party concerned must, firstly, acknowledge that the population does indeed lack indispensable items and, secondly, decide whether the proposed activity is purely humanitarian, neutral and impartial. The major problem that then arises is the question whether such decisions are objective. The party required to give its consent does not have arbitrary power since it is bound by the principle that this action must be authorized if it is necessary.²

If this principle is clearly being flouted, the humanitarian organizations concerned have the right and the duty to insist on acting. This is the origin of the well-known debate on the 'right to intervene'. Since humanitarian organizations, for obvious reasons relating to their security, cannot impose large-scale relief activities in territory controlled by warring parties which do not want them, these organizations are forced in such cases to alert the international community. International humanitarian law in fact places a collective obligation on the States party to the Geneva Conventions and their Additional Protocols to respect and ensure respect for that law,³ and this obligation may be invoked in such circumstances.

In practice, what is involved is not intervention as such but rather the alerting of the international community to an intolerable situation which, to the extent that a serious violation of human rights is regarded as a threat to international peace, could prompt the United Nations Security Council to decide on some form of intervention.

The crucial question, however, which shall be considered in the light of the right laid down by international humanitarian law to have access

² Art. 70 of Protocol I and Commentary, *op.cit.* (note 1).

³ Art. 1 common to the 1949 Geneva Conventions and Art. 1 of Protocol I; see also Luigi Condorelli and Laurence Boisson de Chazournes, "Quelques remarques à propos de l'obligation des États 'de respecter et faire respecter le droit international humanitaire en toutes circonstances' ", in Christophe Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp.17-35.

to items indispensable to one's survival, remains the approach taken by the media or individual journalists to a government which they feel is either abusing its power or not in a position to meet its obligations regarding the right to information.

Promoting and teaching international humanitarian law

Experience with international humanitarian law is another factor, which is more directly connected with the spreading of information. Article 83 of Additional Protocol I stipulates, among other things, that the States party to it must "in time of peace as in time of armed conflict, disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population".

If the educational process is to be effective, it must start in peacetime, without the burden of emotion and hatred which an armed conflict inevitably imposes.⁴ In peacetime, it is easier to accept the need for the protection provided for in humanitarian law. The emphasis should be placed, particularly when addressing young people, on the universality and validity in all circumstances of the values underlying international humanitarian law, especially compassion for those who suffer, solidarity, non-discrimination and respect for every person's dignity.

But the more imminent war becomes — to say nothing of when it has actually broken out — the less the teaching of international humanitarian law can be dissociated from everyday reality. The interpretation and presentation of the facts are often central to political and military strategies. The importance of the role played in Nazi Germany by Joseph Goebbels before and during the Second World War is well known, and it has to be recognized that dehumanizing and portraying the enemy as the devil incarnate is common practice in the psychological preparation of young people whose task will be to kill. Major studies of this question have recently been carried out.⁵

⁴Marion Harroff-Tavel, "Promoting norms to limit violence in crisis situations: challenges, strategies and alliances", *IRRC*, March 1998, No. 322, pp. 5-20.

⁵See, in particular, Dave Grossman, *On killing: the psychological cost of learning to kill in war and society*, Little Brown, Boston, 1995.

Presenting international humanitarian law in wartime thus constitutes a delicate balancing act in which it is necessary to concentrate on averting the worst excesses, especially those committed against the civilian population, and explaining the role of and the rules governing the activities of humanitarian organizations.

It is certainly very important to provide people with objective and factual information in these areas, but this work will often be viewed as political in nature and those who aspire to it may very well find themselves rejected by one or more of the parties to the conflict. It should not be forgotten that war is no longer a legitimate means of achieving what it has not been possible to achieve by diplomacy, and that the justifications for it generally involve lies, on one side or the other.

Even if it has to be supported by specific examples — facts — wartime promotion of compliance with international humanitarian law must not be confused with the spreading of information.⁶

Establishing the facts and condemning violations of international humanitarian law

Neutrality — one of the fundamental principles of the International Red Cross and Red Crescent Movement — is often presented as an obligation to remain silent. This is wrong. In the Red Cross context, the principle is defined as follows: “In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”.⁷ Periods of conflict are the most dramatic examples of this kind of controversy. However, the entire philosophy underlying international humanitarian law tends to consider compliance with that law, and consequently the values that it seeks to protect, as non-political and above controversy, even in the throes of war. As guardian of international humanitarian law, the ICRC cannot be accused of violating the principle of neutrality when it defends these values and condemns their violation.

⁶In this connection see the proceedings of the 22nd Round Table of San Remo, International Institute of Humanitarian Law, 1997: “Impact of humanitarian assistance and of the mass media on the evolution of conflict situations”, to be published.

⁷The Principles and their definitions were adopted by Resolution VIII of the 20th International Conference of the Red Cross (Vienna, 1965). See the Conference Report and *IRRC*, No. 56, November 1965, p. 573.

It has no duty to remain silent in the face of violations of international humanitarian law, and public condemnation must be judged in terms of appropriateness, not of principle.

The ICRC has always believed that going public should be a last resort and that it is more effective to try dialogue and persuasion first. Immediate public condemnation without at least attempting dialogue may give rise to serious security problems for ICRC delegates and make concrete action to help the victims very risky, or even lead to the expulsion of ICRC staff. But reminding the States of their collective responsibility to respect international humanitarian law nevertheless remains, like public condemnation, a possibility should confidential moves fail.

One of the main problems facing us today, however, is the politicization of values which were meant to be above politics. Ethnic conflicts and other conflicts aimed at asserting group identity leave very little room for respect for the integrity and dignity of all, or for any distinction between civilians and combatants. It thus becomes difficult to condemn violations of international humanitarian law without at the same time condemning the policy of the party responsible, which runs counter to the values underpinning that law. This difficulty also faces protection and assistance operations because the very fact that you are assisting a given group, however needy, may run counter to this policy. In confronting this problem, the first priority must be to defend these values. However, practical solutions must also be urgently found in order to help as much as possible those in need. And it is particularly important here for responsibilities to be clearly shared and for journalists truly to fulfil their role of information providers.

Protection for journalists under international law

Article 79 of Protocol I of 1977 contains provisions protecting journalists "engaged in dangerous professional missions".⁸ It is a useful complement to Article 4 A. (4) of the Third Geneva Convention, which accords journalists prisoner-of-war status as "persons who accompany the armed forces without actually being members thereof", war correspondents being closely linked to one of the armed forces, working with their

⁸ Hans-Peter Gasser, "The protection of journalists engaged in dangerous professional missions", *IRRC*, January-February 1983, No. 232, p.3 ff., and Alain Modoux, "International humanitarian law and the journalist's mission", *ibid.*, p.19 ff.

consent and in general receiving their logistic and other support. Article 79 of Protocol I takes a different approach, referring to independent journalists “engaged in dangerous professional missions in areas of armed conflict” and emphasizing that they “shall be considered as civilians”. In so doing, this provision implicitly recognizes the legitimacy of such work and seeks to lessen the mistrust which journalists often arouse in these circumstances, and even to prevent the ill-treatment to which they are sometimes subjected.

However, journalists are protected only “provided that they take no action adversely affecting their status as civilians”. This is especially important in situations in which seeking information can easily serve as a pretext for accusations of spying. Article 79 does not in fact give journalists the right to enter a territory without the consent of the authority controlling it.

The effectiveness of this provision is thus limited, even though the implicit recognition of the legitimacy of a journalist’s work in conflict zones is far from negligible. We should also be aware that granting any additional international guarantees would inevitably entail stricter monitoring. The parties to a conflict are often quite willing to accompany journalists, but though their safety is a real problem, it often also serves as a pretext for controlling their work. Journalists know this and often prefer to take risks rather than to subject themselves to the rigours of control.

An analysis of the security problems encountered by representatives of humanitarian organizations in conflict zones reveals, in addition to those stemming from the very nature of war, the confusion caused by the increasing number of such organizations. Emergency relief is an undertaking much more complex than it seems as it can seriously influence the outcome of the war or the socio-economic fabric of an entire region. The restrictive measures taken by some States faced with this disorderly influx are therefore understandable. To ensure that measures resulting from excesses committed by certain humanitarian organizations do not penalize them all, the International Red Cross and Red Crescent Movement has drawn up a Code of Conduct which it has, with some success, promoted among the main humanitarian organizations.⁹

⁹26th International Conference of the Red Cross and Red Crescent, Resolution 4: “Principles and action in international humanitarian assistance and protection”, *IRRC*, January-February 1996, No. 310, p. 69; Council of Delegates, Resolution 3: “Future of the Movement: report of the Policy and Planning Advisory Commission established by Resolution 1/1993”, *ibid.*, p. 142.

Can the principles and contents of such a Code inspire journalists? Some of its features, such as respect for local cultures and customs and, in particular, the commitment to respect the dignity of victims when engaged in the spreading of information, are certainly of interest for journalists. We believe, however, that there is a fundamental difference between “humanitarian” and “journalist”, in the broad sense of these terms.

The humanitarian is expected to be disinterested in his setting of objectives to meet strict requirements. This is not necessarily the case for the journalist, whose trade also brings with it the need for commercial success. He may also be held responsible for what he says in relation to information which may harm persons or groups of persons, as defamation, calumny and incitement to racial hatred are prohibited internationally and regarded, in varying degrees, as criminal offences under national legislation. Journalists' codes of ethics probably hinge on these factors. In any event, it is clear that journalists on the whole cannot be required to avoid acting in accordance with political or religious convictions. This is, however, precisely one of the principles set out in the Red Cross and Red Crescent Movement's Code of Conduct. Journalists do not have an obligation to be neutral.

More specifically, the question remains open regarding the rules which international journalists engaged in the spreading of information might set for themselves in conflict zones or areas in which there are lesser disturbances. Are they ready to tackle this issue? Is there any chance that such rules will find sufficient support within their profession to enable their overall image to be appreciably improved, and with it the degree to which they are welcome in conflict zones?

Is there a 'right to intervene' in the sphere of information?

There is no simple answer to this question. The right to information must be considered on three levels. Firstly, it puts forward the principle of freedom of information. It then softens this principle by permitting derogations in certain circumstances, particularly with a view to guaranteeing public order. Finally, it sets limits to that right to derogate. The problem is to know who judges these things, and who judges the judge.

International arrangements do not work with sufficient coherence to provide exact answers to these questions. True, the 1966 International Covenant on Civil and Political Rights set up the Human Rights Committee, but its mandate is too limited for it truly to act as a universal arbiter.

The 1952 Convention on the International Right of Correction also stipulates, in Article V, that “any dispute between any two or more Contracting Parties concerning the interpretation or application of the present Convention which is not settled by negotiations shall be referred to the International Court of Justice for decision unless the Contracting States agree to another mode of settlement.” However, this obligatory manner of settling disputes — clearly loses much of its importance by reason of the fact that the Convention is binding on only a few States.¹⁰

The real questions concern the role that civil society must play in defence of human rights and the balance which must be sought between that society, governments and supranational organizations in consolidating the international order. It is proper and legitimate that everyone should feel concerned and should mobilize, within the limits of his means and respective sphere of competence, against violations or other failings in the sphere of human rights. This is doubtless how we should understand the words of Dostoevsky which stand at the entrance to the International museum of the Red Cross and the Red Crescent in Geneva: “Every one of us is responsible to all men for everyone and everything.” We might speak of a moral duty to remain vigilant. However, action in this area also involves responsibility, i.e. irreproachable motivation and competence in the action undertaken. It has been said that humanitarian endeavour can kill, and it is true that goodwill alone is not always enough, especially on an international scale.

The work of the Fondation Hironnelle can be seen in this general context of a moral duty to remain vigilant and a responsibility to act with integrity and competence. It seems to us completely justified that an open discussion should be initiated in countries where it does not already exist. Despite everything which can be said about the ‘CNN effect’ and the danger which certain information can pose, it seems clear that we cannot build a future based on obscurantist doctrines and that we can no longer imagine a peace founded on keeping peoples in ignorance.

However, this action must be carried out with a great deal of caution, carefully weighing its scope and respecting local values and sensitivities. In particular, we cannot disregard the fact that in some regions of the world social cohesion is accorded more importance than individual freedom.

¹⁰At present 20 States.

Once these precautions have been taken, we believe that moves in this direction are quite legitimate, even if they contradict formal legality. A consensual approach is naturally preferable, but we cannot make ourselves completely dependent on the goodwill of tyrants, and it will always be legitimate to combat discrimination based on "race, colour, sex, language, religion or social origin", to quote the list set out in Article 4 of the International Covenant on Civil and Political Rights, items that cannot be subject to any derogation.

We can indeed, therefore, speak of a 'right to intervene' in the sphere of information. However, it is important to make clear what we mean by it: when faced with the violation of fundamental rules, it becomes legitimate in certain extreme cases to infringe laws which may be in force locally. To do so is not to infringe a State's national sovereignty but to rectify violations committed in its name.

The practical difference between humanitarian action and providing information lies in the fact that, in contrast with the requirements for relief work, physical presence in the territory concerned is not necessarily essential for the spreading of information, which can be more easily undertaken without the consent of the authorities controlling the territory. In the sphere of information, intervention corresponds to a reality over which States increasingly no longer have any control. The debate about the existence and contents of such a right may therefore be rapidly overtaken by facts on the ground. The non-availability of technology continues to shelter many governments from this reality, but they will inevitably diminish in number.

In our view, this reality should strengthen the 'right to intervene' of those who aspire to use it only as a last resort and within the limits set by human rights law. The assault which a flood of unsorted information of all kinds represents should be a matter of concern for each one of us and for all societies. We see no other answer, however, than education. Only education can enable everyone to develop a critical mind. And it is through education that we can try not only to develop a right to information but to cultivate a duty to remain informed. By recognizing this duty and helping to fulfil it we shall be able to advance in the direction of a peace based on individual responsibility.

The very ambitious nature of this role and the great responsibility which it entails should also be stressed. In our view, the objective cannot be limited to respect for international humanitarian law. The open dissemination of information and the establishment of a dialogue between communities which are tearing themselves apart should be more ambitiously

aimed at restoring peace. The objective is therefore political, in the noble sense of the term; as a result, it must be seen as different from the much more mundane, but nevertheless necessary, objective of international humanitarian law, even if it contributes to attaining that objective. The conclusions of a round table organized by the International Institute of Humanitarian Law, in San Remo, which considered the respective roles of the staff of humanitarian organizations and of journalists¹¹ has confirmed this. It was recognized that humanitarian endeavour and providing information are both such complex tasks as to require great professional competence, especially when carried out in connection with conflict. Although the importance was noted of better understanding the modus operandi of the two groups, it was also stressed that cooperation must be within strict limits and must not lead to any confusion of roles. We believe that this conclusion remains very relevant, even if the complementarity of the two roles needs to be emphasized.

Lastly, it cannot be stressed enough that the ambitious nature of the objective implies great responsibility. The legitimacy and acceptability of any information activity are dependent on the clarity of its criteria, the rigour with which they are applied and the critical, open and constant monitoring of the manner in which that activity is carried out.

¹¹See note 6.

The bases of humanitarian thought in the Pulaar society of Mauritania and Senegal

by Ly Djibril

For the outside world, images of division, conflict and suffering today largely sum up the African continent. Even when these images do not reflect Afro-pessimistic clichés, they fail — deliberately or not — to take account of the secular traditions of respect for the individual and the enlightened humanity that exist virtually throughout Africa.

Africa's shortcomings, so prominent in human rights discussions regarding the continent, are surely proof, if not of the ineffectiveness, at least of the vagueness of the positive rules that are supposed to cover areas in which tradition has been relegated to the background.

The present text, which deals with the humanitarian rules of Pulaar society in Mauritania and Senegal, is therefore particularly relevant. Its aim is to try to understand the spirit of the rules rather than to sublimate them; to compare them rather than to over-simplify differences between positive and customary rules. Because written sources are scarce, we must tread carefully when assessing these rules, which can be slotted into two categories: those that aim to prevent armed conflicts and those that govern hostilities when these do erupt.

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Original: French

Conflict prevention

Relations between the various groups that live along the Senegal river, cradle of the Haalpulaaren civilization of Senegal and Mauritania, have not been without a wide range of conflicts.¹ The Haalpulaaren have what seems to be a well-established expression — *waak koda*² — to characterize what were for many years often hostile relations with their neighbours. This expression was also much used during the colonial period.

Despite the mistrust between communities living in close proximity, two methods of preventing conflict were developed and are of interest to the researcher: the groups' interest in forming alliances and the fact that these were supplemented by diplomatic modules.

Alliances

It was possible to form alliances depending on explicit or implicit political or military expectations. The power relationships which gradually emerged often reflected the demographic, political and military influence of the towns and villages that came and went throughout the history of the river valley. It should be mentioned, however, that in most cases, the alliances between the various groups took the form of marriages between members of families that were in some cases former enemies. Once these unions were established, they acted as a shield between in-laws and as a means of reconciliation.

The delicate balance of power in the sub-region resulted in political and military alliances that were as numerous as they were significant. For some historians this practice also provides a key to understanding the history of Senegal and Mauritania. In this regard, Boubacar Barry, a Guinean, has rightly noted that the alliances formed according to the dictates of changing circumstances gave a special dimension both to relations between the two geographical entities and to their history.³

In Europe as well, in medieval times, political and military alliances had pride of place. They were influential and often provided the best way

¹ A.B. Diop, *Société toucouleur et migration*, University of Dakar, IFAN, 1965, p. 15.

² The idea can be translated as "a people has to be able to defend itself so that it can claim the right to be master of the place where it has made its home."

³ Boubacar Barry, *Le royaume de Walo. Le Sénégal avant la conquête*, Paris, Karthala, 1985, p. 421.

peacefully to solve the conflicts of the day.⁴ With regard to marriage-based alliances, though they could be justified by geographical proximity alone, they also helped keep the peace between the various families brought together by this circumstance.⁵

The history of the *fuuta* (the area in which the Haalpulaaren are the majority group, basically along the banks of the Senegal river from the Malian border to the river's mouth) is full of such accounts, one as illuminating as the next. The alliances with the Ouolofs, the Moors, the Soninkés and the Sérères in particular bore eloquent witness to the encounter of cultures in that part of West Africa. Though they could not guarantee unshakeable and everlasting peace, these institutions promoted conciliatory attitudes during peacetime and even in war. Note the military alliances of El-Hadj Omar during his holy war. The American historian David Robinson records that during his travels, El-Hadj Omar entered into marriage-based alliances for political reasons.⁶ However, Robinson qualifies his statement of the facts, believing that the hearsay surrounding the sources of his information, and the contradictory nature of that information, meant that the effects of those alliances in political relationships between the Sheik and the provinces and empires under his control should be interpreted with care. Other forms of union are listed, including marriage-based unions entered into by students of Koranic schools or their masters during their seasonal peregrinations.⁷

Diplomatic procedures

Many exchanges and other contacts which the Haalpulaaren had with their neighbours facilitated the emergence of significant modes of arbitration and conciliation. Studies of these institutions have not been numerous. Though this fact inevitably restricts the possibilities for analysis, the existing studies cannot be discredited completely. Diplomacy has always

⁴ See, C.A. Colliard, *Institutions des relations internationales* (8th edition), Paris, Dalloz, 1985, starting on p. 23.

⁵ See in particular M. Dupire, *Organisation sociale des Peuls*, Paris, Plon, 1970, p. 262 and elsewhere.

⁶ David Robinson, *The Holy War of Umar Tal — the western Sudan in the mid-nineteenth century*, Oxford, Clarendon, 1985. For example, the author mentions the marriage with Mariatu, who was sent from Nigeria as a sign of reconciliation.

⁷ See B. Barry, *op. cit.* (note 3), p. 83; see also L'Abbé D. Boilat, *Esquisses sénégalaises*, Paris, Karthala, 1984, starting on p. 398.

been part of human history, particularly in cases of international disagreement, and it is almost impossible not to take them into account in any consideration of the development of social relations in this area.

African jurists explain the enthusiasm for diplomatic procedures as an extension of attitudes that reflect little patience for more procedurally oriented and formalistic techniques. Tensions between opposing parties can often be eased by diplomatic practices characterized by disregard for legal mechanisms and all their disadvantages. Negotiation, discussion and deference to the wise men of opposing groups often seem the best possible institutions in societies where the moral code and custom play the dominant role.

In addition to the so-called diplomatic procedures, arbitration was a favoured course of action. Written history is full of references to this. Consider the use reportedly made of it in the fratricidal dispute between El-Hadj Omar Tall and Amadou III. Without going into details, let us merely recall that the avowed cause of the conflict lay with the fact that the King of Macina had given sanctuary to an animistic Bambara king whom El-Hadj Omar and his troops were trying to forcibly convert to Islam.⁸ The refusal of the King of Macina to cooperate led to conflict. El-Hadj Omar sent a delegation to the King of Macina, proposing that the disagreement be settled through arbitration but the Peul of Macina appeared not to support the proposal. Omar Tall submitted to making a speech for the defence in the form of a statement which is reproduced in the opusculum entitled "*bayan ma waqa a bayna shaikh umar wa ahmad ibn ahmad*".⁹ This process is still widely cited by the Haalpulaaren as a salutary example.

Analogical reasoning was used in Omar Tall's defence. Since he had protected a non-believer, the King of Macina was *ipso facto* considered to sympathize with such practices. Hence, the act of declaring a holy war against someone who, by analogy, was seen as a heathen, was not necessarily considered reprehensible, either by Omar Tall's troops or the public.

Though the justifications put forward remain difficult to support, the process used conveys the hesitations that preceded the outbreak of hostilities. This marked caution seems somewhat premonitory: for Omar

⁸ For details, see D. Robinson, *op. cit.* (note 6).

⁹ "This is what happened between Sheik Omar and Ahmed, son of Ahmed."

Tall's troops the Macina campaign was one of the most difficult and costly operations ever.

The conciliation process was also important in Haalpulaaren tradition. In his consideration of El-Hadj Omar Tall's holy war, David Robinson stressed the conciliatory role that the chief of the Tijaniya brotherhood had played in settling many conflicts in the Sudan-Sahel sub-region.

The use of force remained an exceptional measure, even in the event of a breakdown in so-called diplomatic processes. This is confirmed by a Pulaar saying which extols the virtues of dialogue: "*Fuunti laami, buri felli laami*".¹⁰ Summing up as it does the pacifism inherent in the Pulaar tradition, this widely-quoted saying recognizes the judiciousness of debate and dialogue given the uncertainties of hate and violence.

The rules of the law of war

New fighting techniques are perfected through warfare. Because these techniques grow ever more destructive, corresponding humanitarian rules need to be constantly developed. Where there is no law as such, the warring parties can still resort to customs as they react to events.

Linguistic affinities and relationships also provided other essential parameters for the application of the humanitarian rules in force. As we will see below, this is referred to when applying relevant provisions in the event of armed conflict. In certain situations, justification probably lies in the fact that, particularly during the eighteenth century, the Haalpulaaren emphasized the contrast between their intelligence, honour and honesty — which characterized them as dominant classes — and the uncivilized behaviour of their slaves.¹¹

The advent of Islam in the Tekrour of the ninth century and its gradual consolidation in Pulaar tradition and culture encouraged the introduction into warfare of rules that were more extensive because they were observed by all believers, without discrimination. This kind of juxtaposition of what amount to quasi-positive and customary standards contained possibilities for sanctions. It also prompted a new type of conduct on the part of combatants already accustomed to sparing a category of persons and

¹⁰ "It is better to reign through dialogue than to rule by force."

¹¹ D. Robinson, *op. cit.* (note 6).

objects and according a particular status of prisoners of war and other captives.¹²

The conduct of war

The weapons of the Pulaar soldier, the *sofa*, were usually rudimentary: assegais, sabres, arrows, guns and so forth. War was waged according to the means available but it was also prepared beforehand during the *sofa's* training, which taught him how to comport himself both during combat and in his everyday life.¹³ This training was also tried out in other regions of Senegal, as pointed out by Yolande Diallo, who writes that there was a real ethic of warfare taught to all young noblemen for use in their future soldiering career.¹⁴

But what was the basis for these rules? Into which category should they be placed? Though roughly similar to customary rules, there are two important reasons why they cannot be systematically viewed as such.

Firstly, the increasing hostilities in the region became so frequent that the people themselves used the well-known term *waaw koodaa* to refer to the fighting. Therefore, relations between neighbours were more likely to determine both the specific rules in times of armed conflict and their applicability. Given the disparity of the relationships along the river and of the areas in which the Haalpulaaren lived alongside other groups, it is not easy to draw conclusions about where these relations tallied, how clear they were and where they were repeated, which makes it possible to classify the facts and customary acts at the same time as the *opinio juris* is being discerned.

Finally, populations on the move — whether in search of new, more congenial areas or because the weaker group was being forced to leave a given area — often impeded the orderly development of more precise rules of conduct.

¹² See P. Alexandre, *Les africains. Initiation à une longue histoire et à de vieilles civilisations, de l'aube de l'humanité au début de la colonisation*, Paris, Lidis, 1981, p. 267.

¹³ For the teaching related to the laws of war of Omar Tall's troops, see D. Robinson, *op. cit.* (note 6).

¹⁴ Yolande Diallo, "Humanitarian law and traditional African law", *IRRC*, No. 179, February 1976, pp. 57-63.

These standards, which were often inspired by pragmatism and experience in war, had a marked philosophical content. They were part of everyday conduct — no legislation was necessary. Considerations such as honour and dignity can be more of a deterrent than all the rules combined, even those of positive law.¹⁵

The positivism of law can truly be asserted only in a favourable sociological climate. To be convinced of this one need look only at the numerous attacks on legal rights in many countries where moral and cultural points of reference have been displaced, whether in Africa, Europe, the United States or Asia.

These standards, which adumbrated law, were refined and gradually adapted as necessary. With Islam they would come to resemble positive law. It is possible to identify a few rules that apparently commanded consensus.

1. In the Pulaar warring tradition, it seems that armed conflict was generally resorted to only after hostilities had been declared. Obviously, that could mean a number of things and take various forms. In the various empires and towns that grew up along the river Senegal, intelligence agents were given the job of providing information on conflicts. Their role was acknowledged and tolerated. These agents, who often belonged to the Griot caste, informed their sovereigns of impending wars, which enabled the troops to prepare themselves, move individuals enjoying special protection to a safe place, protect crops and conceal information that might be useful to the other side. The informers were therefore viewed as delicate peace envoys and the development of humanitarian rules lay partly with them.¹⁶

2. When military operations began, troops confronted each other face to face. This was a matter of honour and dignity. In the Pulaar tradition, victories gained through surprise attacks were meaningless. Fighting was viewed as balanced only if the adversaries were able to confront each other fairly and according to the rules, in accordance with the views of Pierre Corneille, i.e. that a victory without danger was a triumph without glory. The general attitude was that even in the face of death, a condemned

¹⁵ A nineteenth-century French author wrote in this regard that the Haalpulaaren were proud of having outstripped [the Europeans] in reason, justice and humanity: Keledor, *Histoire africaine*, quoted by B. Barry, *op. cit.* (note 3), p. 195.

¹⁶ Interviews with Oumar Ba, a renowned Mauritanian sociologist.

person should comport himself with dignity and courage: “*So neddo ina maaya, yoo maaydu et ndimaagu mum.*”¹⁷

3. Fighting at night was forbidden. Difficult visibility at night made the relative strength between the opposing troops disproportionate. Wisdom dictated that troops should make faces at the enemy if they encountered him at night, as stated in the following maxim: “*Hai so jamma kawrudaa e gano maada, biin dum, duum fof ko e hare jeyaa*”. The ban on night attacks is the result of a view shared with many other societies including India, as confirmed by the former President of the International Court of Justice, Judge Nagendra Singh, when he wrote that in ancient India “night attacks were forbidden”.¹⁸

4. Not everyone was allowed to take part in combat, and recruitment was particularly restrictive. Children, the elderly and women were basically not allowed to fight. Children, in particular, could be recruited only if they had reached puberty, whereupon they adopted the role played by adults in the group, including the right to go to war. In general, this rule was respected, since it is quoted by way of example in the case of the conflict between Almami of the Fuuta Abdel Kader and the Ouolof Prince Amadi Ngoné in the name of holy war.¹⁹ It should be stressed that the combatant also had to be of sound mind and body.

5. Perfidy (*jamfo*) was also prohibited because it conflicted with the virtues of honour and courage. Surprise attacks or attacks not in keeping with what had been agreed beforehand between warring troops were also considered perfidy.

¹⁷ This view is taken to extremes in certain circumstances. Samba Geleajo Jeegi, an eighteenth-century Pulaar prince, committed suicide by confiding to his consort the secret of his relative invulnerability in the various battles that he had successfully waged, despite the fact that he was convinced that his wife was going to use that information to kill him. In his final moments, he defended his action by stating that he should not refuse to reveal his secret for fear of being called a coward. So for him, “*wataa wad maaya, hattaa kam wadde. Hadatami wadde tan ko wataa wad koyaa*” was important. This can be translated as “I would not refrain from doing such a thing out of fear of death, only if I had to be ashamed of it”. For the fascinating story of Samba Gallajo Jeegi, see O. Kane “La tragique histoire de Samba Gellajo Jeegi qui regna sans avoir été sacré”, *Afrique Histoire*, No. 7, 1993, p. 60.

¹⁸ Nagendra Singh, “Armed conflicts and humanitarian laws of ancient India” in C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet*, Geneva/The Hague, International Committee of the Red Cross/Martinus Nijhoff, 1984, p. 535.

¹⁹ See l'Abbé D. Boilat, *op. cit.* (note 7), p. 398.

6. A combatant who had fled was no longer considered to be taking part in the conflict, as reflected in the saying “*so dimo riddi dimo haa naati e ngaska foolidum*”.²⁰ Any violation of this rule made the perpetrator liable to punishment by his superiors following or even during the hostilities, depending on the seriousness of his act.

7. Attacking a combatant who had surrendered was not allowed unless he himself attacked the soldiers who were capturing him. If he did not resist, any violence against him would be considered an unequal struggle.

Protected individuals and objects

Several categories of persons and objects enjoyed special protection. In this respect there was nothing original about the Pulaar tradition. However, though the rules underlying this protection — usually based on common sense — were shared, their psychological and cultural bases sometimes differed.

1. Specific considerations prompted the protection enjoyed by women. However, this protection could be invoked only if the woman was not directly involved in the fighting. Curiously, this belief was based on superstition. Combatants imagined that an attack on a woman would quite simply be the harbinger of their own defeat. Protection, therefore, had nothing to do with women’s role as givers of life. The belief nevertheless stayed firmly rooted in the minds of combatants.²¹

2. The elderly were also protected during armed conflicts. As repository of the history of their groups and arbiters in social conflicts, they played an extremely important role in maintaining the equilibrium of African traditional societies in general. In the celebrated saying originated by the late lamented Amadou Hampaté Bâ, “in Africa, an old man who dies is like a library that burns to the ground.”

3. Children — symbols of innocence and promise for the future — also enjoyed special protection during military campaigns. In principle, they could not be attacked. When they took part in campaigns and were arrested, children had to be treated more leniently than adults in view of their relative physical weakness.

²⁰ “One who is being chased and chooses to go to ground is no longer a combatant”.

²¹ Interviews with Oumar Ba.

More generally, inculcating respect for children was not contingent only on military operations. In many Pulaar villages, parents and teachers were urged to instil in children a high degree of respect for what is good and a love of peace. The Haalpulaaren had a proverb that epitomized this: “*So neddo ina woowa, yoo woow jam; goowdo jam suusataa bone*”.²² This idea highlights the benefits of raising people to love peace. Today, this message should be based on easily identifiable cultural themes in order to ensure that the target audience can identify with it.

Prisoners of war and other captives

The manner in which the prisoner-of-war status was determined frequently varied according to the respective military force of the various neighbouring groups that conflicts pitted against each other. The hierarchical and traditionalist character of Pulaar society provides an additional argument in assessing the status of prisoner of war or captive. The traditional Pulaar system draws a distinction between nobles — *toroodbe* — and other castes. This stratification ensured a dual standard in categorizing the prisoner. Thus, combatants from the *toroodbe* cast who had embraced the Muslim religion were not described or treated as prisoners of war, or simply as slaves. What was unthinkable was the forced submission of these people.

The French practice of capturing people and selling them into the slave trade provoked the anger of the Almamy of Fuuta Abdel Kader. In May 1789 he wrote to the French governor, warning that “anyone who comes to our homeland to engage in the slave trade will be killed and massacred”.²³

This willingness to differentiate between prisoners seemed to have been widely shared. A contemporary of El-Hadj Omar was unsparing in his criticism of how the latter’s troops breached this rule when the Sheik’s army held the wife of the prince of Macina, Seku Amadou, captive. The accusations against the Sheik must have been particularly serious to judge by the tone of a letter sent by El Bekaye Kounta: “I have heard that your men have treated her like a slave and that they have justified their

²² “If you must become accustomed to something, become accustomed to peace. A person accustomed to peace cannot love violence”.

²³ Quoted by B. Barry, *op. cit.* (note 3), starting on p. 194.

behaviour by claiming that she is a heathen. Who among the Peuls — least of all Seku Amadou — is a heathen?”²⁴

The dual-standard rule meant that armed forces in conflict had to give special preferential treatment to certain prisoners as long as they were held captive. Other combatants were essentially treated according to their army rank. Relations with them were decided case by case.

Observing this rule also meant that procedures for freeing prisoners differed as one went down the hierarchy. Nobles and Muslims were freed after an exchange of prisoners or unilaterally, but others were usually kept as prisoners of war. They were part of the spoils of war and therefore tended to be relegated to the status of domestic servants in royal courts, where they nevertheless had to be treated humanely. Under Islam, respect for a person temporarily or permanently in a position of weakness and vulnerability is a fundamental rule, which naturally extended to prisoners of war. Verse 4 of sura 36 states: “Adore God and imagine not that he has an equal, whomsoever it may be. Treat with kindness father and mother, relatives, the orphans, the poor, the neighbour belonging to your group and the foreign neighbour, the close companion and the street child, and whomsoever may be your slave”. The freeing of a prisoner as part of an exchange or following a ransom could be viewed as consistent with this.

Conclusion

Two points thus emerge that provide food for thought. First, we have the accidental nature of recourse to the use of force. The desire to protect individuals in all circumstances made it essential for the group to improve its own rules.

Second is the simplicity of the body of law applicable to armed conflict. This takes its inspiration from custom and common sense and is the product of reciprocity. These standards were essentially the fruit of specific issues that the hardships of war inflicted on the group’s equilibrium.

In the face of resurgent internal armed conflict in Africa, the teaching of humanitarian traditions inspired by African experience would give a more useful context for discussion of the need to strengthen culture and practice for greater respect for the rights of the individual.

²⁴ Quoted by D. Robinson, *op. cit.* (note 6).

Activities of the International Committee of the Red Cross in Cuba 1958-1962

by **Françoise Perret**

On 26 July 1953, a group opposing the regime of General Fulgencio Batista, led by Fidel Castro, made an abortive attempt to storm the Montecada barracks at Santiago de Cuba. Castro was captured and sentenced to 15 years in prison. In May 1955 he was released under a general amnesty; he left Cuba and emigrated to Mexico.

A year and a half later, on 2 December 1956, 82 armed men landed in Cuba. Government troops, however, surprised them: several men were killed, others arrested. Twelve rebels, including Fidel Castro, his brother Raúl and Che Guevara escaped and reached the Sierra Maestra. They managed to win the support of hundreds of partisans and by the end of 1957 were in control of part of the country. Gradually the conflict spread over the entire island, ending on 31 December 1958 with the victory of the rebels.

The new Cuban government set up a revolutionary regime in Havana, focusing its efforts on land reform. From 1960, Cuba moved closer to the communist bloc and its relations with the United States deteriorated. The Cuban government nationalized the assets held by North American companies. The United States hit back, reducing the quota of Cuban sugar it

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Original: French

imported and then, on 10 October 1960, imposing a total embargo on all imports from and exports to Cuba. Cuba then received economic assistance from the Soviet Union and other East European countries, a source which was to dry up with the collapse of the communist regimes.

Opponents of the Castro regime found refuge in the United States, which helped them to attempt a landing in Cuba. On 14 April 1961 some 2,000 men landed at Playa Girón, better known as the “Bay of Pigs”. After three days of fighting they were crushed by the Cuban army, which took several thousand prisoners.

ICRC action

On 10 April 1958, as rebels and government forces fought in Cuba, the ICRC Presidential Council discussed the developments on the island. It came to the conclusion that the situation did not justify an offer of services to the two parties to the conflict. However, it accepted the Directorate’s proposal to send a telegram to the Cuban Red Cross, inviting the National Society to provide aid to the victims of the events and to ensure that the parties to the conflict respected Article 3 common to the four Geneva Conventions of 1949, which is applicable in non-international armed conflicts.¹

A telegram to this effect was sent to the Cuban Red Cross on 11 April 1958.

Three months later, on 3 July, the ICRC received the following telegram from Fidel Castro, sent via Caracas²:

After the latest battle in the Sierra Maestra, a great many wounded Batista soldiers remain in our hands. It has always been the rebels’ custom to care for enemy soldiers wounded in the fighting in our improvised hospitals, thereby saving the lives of many of them. This time, however, we cannot put our humanitarian principles fully into practice because there are too many casualties. For lack of beds, seriously wounded soldiers are lying on the ground, without even a blanket, and we are unable to provide them with the food which their condition requires. Medicines are in short supply because for a long

¹ Record of the ICRC Presidential Council meeting of 10 April 1958, ICRC Archives.

² Telegram of 3 July 1958 from Fidel Castro to the ICRC, ICRC Archives — 200 (40). — Original Spanish: ICRC translation.

time now Batista's army has taken strict measures to prevent their coming into rebel territory; and most of the medicines we had have been used to care for wounded prisoners. We have publicly proposed that a commission of the Cuban Red Cross should come to fetch the wounded and have stated that we are ready to hand them over so that they can receive the treatment they need. We have not set any conditions in exchange for their release and transfer to the Red Cross. However, incredible as it may seem, 72 hours have elapsed and we still have no reply. It seems clear that the Red Cross has not yet received the necessary authorization. These wounded men cannot wait. This is inhuman. It is absurd that Batista should object. These are not wounded rebels, but wounded soldiers of his own army, and only a traitor and a man feeling no gratitude towards the men who serve him would refuse the Red Cross, a humanitarian institution not involved in the conflict, permission to give them care they need. We cherish the hope that your glorious organization, with all the weight of its worldwide prestige and the nobility of its aims, will take steps to obtain from Batista, with no further delay, the safe-conduct needed to perform this humanitarian service.

Respectfully,

Fidel Castro, Commander-in-Chief of the rebel army
Sierra Maestra (Cuba), 3 July 1958

The ICRC communicated the content of this message the same day to the Cuban Red Cross, asking it what measures it intended to take and offering all necessary assistance. In particular, it suggested that a delegate should go to Cuba immediately. Not having any address at which to reach Fidel Castro, the ICRC broadcast a message on short-wave Swiss radio, telling Castro that it had forwarded his message to the Cuban Red Cross.

Castro confirmed his offer in a further telegram sent to the ICRC via Caracas on 6 July; the ICRC passed this information on to the Cuban Red Cross.³

On 9 July, the ICRC sent one of its delegates, Pierre Jequier, to Havana. His instructions were:

³ Telegram of 6 July 1958 from Fidel Castro to the ICRC, ICRC Archives — 200 (40).

- to contact the Cuban Red Cross and provide it with any assistance it might require to carry out its humanitarian tasks;
- to discuss with the Cuban Red Cross all humanitarian matters “falling within the traditional competence of the ICRC as a neutral intermediary providing assistance to victims of international or internal conflicts”;
- to draw the attention of his contacts to the provisions of Article 3 common to the four Geneva Conventions of 1949;
- to contact the rebel forces “so as to ascertain their needs and, if necessary, make all appropriate arrangements with the Cuban Red Cross for equitable distribution of any relief supplies which might be required”. In this connection, the ICRC referred to Resolution XIX of the 19th International Red Cross Conference (New Delhi, 1957).⁴

Pierre Jequier was received by the leaders of the Cuban Red Cross, and subsequently by the President of the Republic, Fulgencio Batista. The Cuban government then declared itself ready to give the necessary orders to enable the Cuban Red Cross to take charge, in the presence of the ICRC delegate, of the wounded prisoners whom Fidel Castro had offered to hand over unconditionally. The government proposed that the transfer should take place near Bayamo, a town situated in an area close to the territory controlled by Castro's men.

Pierre Jequier cabled this information to the ICRC on 12 July with the request that it be passed on to the leaders of the “rebel army”, as he himself had not been able to make direct contact with them. Castro was in fact communicating with the outside world through a radio transmitter in the Sierra

⁴ Instructions dated 9 July 1958 from Roger Gallopin, Executive Director of the ICRC, to Pierre Jequier for his mission to Cuba, ICRC Archives — 200 (4).

Resolution XIX, relating to relief in the event of internal disturbances, states:

“The XIXth International Red Cross Conference, *considering* it necessary to ensure maximum efficiency and equity in the distribution of relief supplies in the event of internal disturbances,

declares that relief supplies of all types must be distributed equitably among the victims by the National Red Cross Society, without hindrance on the part of the local authorities,

considers that, in the event of the National Red Cross Society being unable to come to the assistance of the victims, or whenever it may be deemed necessary or urgent, the International Committee of the Red Cross should take the initiative for the distribution of relief supplies, in agreement with the authorities concerned,

requests authorities to grant the Red Cross every facility in carrying out relief actions.”

Maestra, whose broadcasts were relayed by a radio station set up in Caracas. The ICRC thus served as an intermediary between Castro and the Cuban government by forwarding their messages via Geneva and Caracas.

On 14 July, Fidel Castro informed the ICRC via Caracas that he accepted the proposal passed on by Jequier, but that the wounded soldiers could not be taken to the Bayamo area since that would mean a four-day march through the mountains. He suggested another meeting-point, but this proved to be difficult of access from the Sierra Maestra.

Castro also made the following appeal to the soldiers of the regular Cuban army, which were surrounded by his troops:⁵

Sierra Maestra, 16 July 1958

Soldiers,

The rebel army, convinced that resistance is useless and would only lead to greater bloodshed — with this battle which has already lasted for five days, and because this is a fight between Cubans —, offers you surrender on the following terms:

1. Only arms will be taken. All other personnel possessions will be respected.
2. The wounded will be handed over to the Red Cross, as is currently the case for the wounded soldiers taken prisoner during the battle of Santo Domingo.
3. All prisoners — soldiers, rank and file, officers — will be freed within 15 days.
4. Until handed over to the Red Cross, the wounded will be cared for in our hospitals by competent doctors and surgeons.
5. All members of this troop under siege will immediately receive cigars, food and everything they need.
6. No prisoner will be interrogated, maltreated or humiliated, by word or by deed; [on the contrary, every captured soldier] will receive the

⁵ Appeal of 16 July 1958 from the Sierra Maestra: Fidel Castro presented a photocopy of the handwritten appeal to ICRC President Cornelio Sommaruga during the latter's official visit to Cuba on 13 September 1988. — Original Spanish: ICRC translation.

7

Soldados:

Al ejército rebel-
 de, seguro de
 que toda resis-
 tencia es inútil
 y solo conduciría
 a mayores derramamientos de san-
 gre así esta bata-
 lla que dure, ya
 5 días, ~~o 6 días~~
~~y por~~ ~~que se prolongue~~
 de una u otra

7

~~de~~ ni saber, la
 suerte que pue-
 den correr. Los
 P: ~~Lo que dicen~~
~~resumen.~~

~~Fidel Castro~~
~~Comandante Jefe~~
~~de las Fuerzas Rebeldes~~
 si se aceptan estas
 condiciones, envíen
 un hombre con bar-
 das blancas y diciendo
 en voz alta: Parlamento,
 Parlamento. ^{Fidel Castro} C. Jefe de las F. R.

generous and humane treatment which we have always afforded to soldiers taken prisoner.

7. We shall immediately inform by radio the wife, mother, father and other members of the family of each one of you — all those who are at this moment weeping, in despair at having no news of you and not knowing what has become of you.

8. If you accept these conditions, send a man carrying a white flag and saying out loud that he wishes to parley.

Fidel Castro
Commander-in-Chief of the rebel forces

On 15 July, Pierre Jequier travelled with staff from the Cuban Red Cross to Bayamo, where he talked to the head of military operations in the region. With the latter's agreement, he proposed a new plan for evacuating the wounded prisoners. The ICRC, which had sent a second delegate, Pierre Schoenholzer, to Cuba, passed on this proposal to Fidel Castro. On 20 July Castro sent the following counter-proposal: the wounded men would be transported by his men bearing a white flag to the nearest and most accessible point, where they would be handed over to the ICRC delegates. On receiving this proposal, the delegates forwarded it to the Cuban Red Cross and the authorities, which accepted it.⁶

A truce was thus declared on 23 and 24 July. The ICRC delegates travelled to the meeting-place proposed by Castro, an advance post of the Cuban army. There, they watched as a woman bearing a white flag approached on horseback. The woman told them that 50 wounded prisoners were nearby. She was then joined by Che Guevara, who told the delegates that 200 more prisoners were a bit further away, to the rear. The Cuban army agreed to accept all these prisoners and they arrived in small groups, the most seriously wounded being carried by their comrades. They were immediately given first aid by three Cuban Red Cross doctors and then transported in an army helicopter. In this operation 253 wounded and sick men were handed over to the Cuban Red Cross and the Cuban army, under the auspices of the ICRC.

⁶Note of 12 July 1958 from Pierre Jequier to the ICRC, ICRC Archives — 200 (40). Radiogram of 15 July 1958 from Ernesto Capo (Caracas) to the ICRC, ICRC Archives — 200 (40). Internal note of 20 April 1958 from Pierre Jequier to Pierre Vibert, ICRC Archives - 200 (40).

On 24 July Che Guevara sent a note signed in his hand to the ICRC delegates. Its aim was to seek the ICRC's "recognition of a delegation of our Revolutionary Movement in the Republic of Venezuela" so that the said delegation could give the ICRC a list of the medicines urgently needed by Castro's army. In fact, the ICRC was already in contact with the representative of Castro in Caracas who was transmitting messages between Geneva and the Sierra Maestra. In response to the request for medicines, the ICRC delegates gave the Cuban Red Cross 2,000 US dollars⁷ to buy them locally and send them to its contacts with the revolutionary army.⁸

In the belief that its two delegates had concluded their mission in Cuba, the ICRC recalled them to headquarters on 28 July.⁹

Second ICRC mission to Cuba

The Cuban Civic Revolutionary Front in exile (*Frente Cívico Revolucionario*), made up of all the parties opposed to the Batista government, sent an official representative to the ICRC on 13 August 1958. This was Professor Roberto Agramonte, who had taught at the University of Havana and would be appointed Minister for Foreign Affairs in the new Cuban government after Castro's victory. He handed over a detailed report on the situation in Cuba and requested that ICRC delegates visit Cuban prisoners held by the government forces on one side and by the revolutionary forces on the other.¹⁰

The ICRC now decided to send another delegate, Maurice Thudichum, to Cuba. He arrived in Havana on 9 September 1958 and made a number of approaches to the Batista government with a view to undertaking protection and assistance activities for all the victims of the conflict. However, he was rebuffed and returned to Geneva on 10 October.

⁷The dollar was worth much more then than it is now.

⁸Note of 24 July 1958 from Che Guevara, ICRC Archives — 200 (40). Telegram of 26 July 1958 from Pierre Jequier to the ICRC, ICRC Archives — 202 (40). Record of the meeting of the Presidential Council of 14 August 1958, ICRC Archives. See *Revue internationale de la Croix-Rouge (RICR)*, No. 476, August 1958, pp. 413-414, and "Le Comité international de la Croix-Rouge et le conflit de Cuba", *RICR*, No. 485, May 1959, pp. 227-236.

⁹Telephone call of 28 July 1958 from Pierre Jequier to Roger Gallopin, ICRC Archives — 251 (45).

¹⁰Professor Agramonte's report to the ICRC of 13 August 1958, ICRC Archives — 200 (40).

The ICRC continued its efforts to persuade the representatives of General Batista to allow further action in Cuba. These efforts resulted in failure.¹¹

On 30 December 1958, on the eve of the collapse of the Batista regime, the ICRC launched an appeal to the two parties by cable and radio, urging them to respect the spirit of the 1949 Geneva Conventions (ratified by Cuba on 15 April 1954) and to apply all the provisions of common Article 3.¹²

The ICRC's return to Cuba after Fidel Castro's victory

On 1 January 1959, the ICRC received a call from the new leaders of the Cuban Red Cross and decided to send an envoy to Cuba. Pierre Jequier left on 3 January. His instructions for this mission were to assist the Cuban Red Cross and "to carry out the ICRC's traditional activities for all victims of the events", in accordance with the ICRC's humanitarian principles and Article 3 common to the four Geneva Conventions.

On his arrival, Pierre Jequier was welcomed by the Cuban Red Cross. On 10 January he was received by the new President of the Republic, Dr Manuel Urrutia, who promised to respect the provisions of the Geneva Conventions relating to the treatment of "military prisoners".¹³ The next day, Pierre Jequier visited an internment camp in which about 400 officers and soldiers, as well as policemen and civilians, were being held.¹⁴

The ICRC delegate also met Fidel Castro. On 30 January 1959 he had a meeting with Foreign Minister Roberto Agramonte, who expressed his disappointment on hearing that the ICRC had been unable to take any action to protect civilians who had fallen into the hands of the Batista police. In his view, the ICRC enjoyed great moral standing but had not used it to exert pressure on the former government. Pierre Jequier

¹¹ Record of the meeting of 14 August of the Presidential Council, ICRC Archives. Note of 14 September 1998 from Maurice Thudichum to the ICRC, ICRC Archives — 200 (40). Record of the meetings of 13 November and 11 December 1958 of the Presidential Council, ICRC Archives, *RICR*, No. 485, May 1959, pp. 232-234.

¹² ICRC's message of 30 December 1958, ICRC Archives — 200 (40). *RICR*, No. 485, May 1959, p. 234.

¹³ ICRC press release of 9 January 1959, ICRC Archives — 200 (40). Mission report of 14 January 1959 by Pierre Jequier, ICRC Archives — 200 (40).

¹⁴ Mission report of 18 January 1959 by Pierre Jequier, ICRC Archives — 200 (40).

explained that the ICRC's inability to help civilian victims of the regime had been due to the fact that in a situation of conflict within a State it could act only with the consent of the government in power, and that in this case all its approaches had been rebuffed. He requested permission to continue his visits to detainees, but the Minister reserved his decision.¹⁵

At its meeting of 12 February 1959, the ICRC Presidential Council discussed the organization's attitude during the Cuban conflict. Some members of the Council expressed regret that the ICRC had not "followed a firmer and better-defined line" and had not "devoted a little more attention at the time to the appeals made by the rebels". They also regretted the fact that the three delegates sent to Cuba had not stayed there longer, but noted that, although they had been "impotent witnesses to acts which were totally unacceptable in humanitarian terms", the delegates might have given the impression that the ICRC was endorsing those acts by its presence. The Council further wondered, in general, whether the ICRC should publicly denounce facts of which it was aware. It noted that all those questions of principle had already been discussed several times within the ICRC, without any final conclusion emerging, and it asked the Directorate to consider them again as a matter of urgency.¹⁶ The working group set up for this purpose met on 25 February and the following day proposed to the Presidential Council that the ICRC should convene, on 1 October 1959 (after the meeting of the Board of Governors of the League,¹⁷ due to take place in Athens on 30 September), a commission of experts with special competence in the sphere of conflict situations within a State. The Council accepted this proposal, recalling that the ICRC had already convened two expert commissions in 1953 and 1955 to examine the question of aid to political detainees.¹⁸

However, on 20 February Pierre Jequier received Foreign Minister Agramonte's permission to resume visits to political detainees. On 9 March, he visited the country's main prison, La Cabaña, where a thousand prisoners were being held.¹⁹

¹⁵Note of 30 January 1959 from Pierre Jequier to the ICRC, ICRC Archives — 202 (40). *RICR*, No. 485, May 1959, p. 235.

¹⁶Record of the meeting of the Presidential Council of 12 February 1959, ICRC Archives.

¹⁷Now the International Federation of Red Cross and Red Crescent Societies.

¹⁸Record of the meeting of the Presidential Council of 26 February 1959.

¹⁹Mission report of 19 March 1959 by Pierre Jequier, ICRC Archives — 200 (40).

Pierre Jequier returned to Geneva on 14 March to report to the ICRC. He left again for Cuba on 26 April with another delegate, Pierre Claude Delarue. On their arrival they approached the Cuban authorities and Red Cross with a view to drawing up a comprehensive plan of visits to places of detention throughout the country.

The first visits started on 7 February 1959: without giving any advance warning of their arrival, the delegates visited El Castillo del Principe, a large municipal prison in Havana where 600 political detainees were being held at the time. They moved freely through the premises and talked without witnesses to any detainees they wished. They also visited, for the second time, the fortress of La Cabaña, where they noted that conditions of detention had improved considerably.

On 12 May 1959 the delegates visited the Cuban national penitentiary on the Isle of Pines, where almost 600 political prisoners were being held. The visit proceeded in the same conditions as in the other prisons. Next, they visited the women's penitentiary at Guanajay, near Havana. At the end of each visit, the delegates sent a report to the authorities and to the Cuban Red Cross, which took part in the visits.

The delegates subsequently extended their visits to all Cuban prisons and were not required to give any advance notice.²⁰ Having completed their tour, they left Cuba in July.

During the meeting of the League Board of Governors held in Athens on 30 September 1959, the ICRC raised the question of "ICRC action in aid of victims of civil wars and internal disturbances" in a paper presented by its Executive Director, Roger Gallopin. The situation in Cuba was described as follows:

Attempts, mostly unsuccessful, were made in the course of last year and under the former regime to come to the assistance of all victims of the Cuban conflict.

The difficulties encountered by the ICRC were outlined at the last meeting of the Executive Committee of the League. If the delegation of the Cuban Red Cross had been present, it would doubtless have

²⁰ Record of the meeting of 23 July 1959 of the Presidential Council, ICRC Archives, *RICR*, No. 488, August 1959, pp. 392-394. *Le CICR et le conflit de Cuba 1958-1959*, Geneva, 1963, pp. 16-19.

described its experiences itself. Suffice it to say that, immediately following the establishment of the new regime in Cuba, the ICRC delegates drew up a comprehensive plan of visits to places of detention throughout Cuba, in cooperation with the Cuban Red Cross and authorities.

The ICRC in fact cancelled a meeting on Red Cross action in the event of civil war, scheduled to take place in Geneva on 1 October 1959, because too few participants had registered. The meeting was not in fact held until October 1962.²¹

Unsuccessful approaches in Havana

The year 1960 was marked by a serious deterioration in US-Cuban relations. The Cuban government, which had gravitated closer to the communist bloc since the end of 1959, began to nationalize American companies in the summer of 1960. The United States responded on 10 October 1960 by imposing a total ban on imports from and exports to Cuba. In addition, the United States government gave its support to opponents of the Castro regime who had fled to the United States, and this led to the landing at the "Bay of Pigs" on 14 April 1961.

The Cubans in exile, however, appealed to the ICRC for help because, they said, the conditions of detention in Cuban prisons were deteriorating daily.

In a letter of 11 February 1960 addressed to the Cuban Red Cross, the ICRC mentioned its earlier action in Cuba and suggested that ICRC delegates might carry out a further series of visits in the country. The President of the Cuban Red Cross replied to the ICRC President on 6 April, stating that his National Society had visited the main Cuban prisons and that although they were indeed overcrowded work was under way to enlarge them. He also said that his Society was in contact with the families of detainees, but that in some cases the Cuban authorities had had to suspend family visits because there had been uprisings in the prisons where they had taken place. The letter contained no reference to the ICRC's proposal to send a delegate to Cuba.

²¹ "Action du CICR en faveur des victimes de guerres civiles et troubles intérieurs", *RICR*, No. 491, November 1959, pp. 571-578. "Humanitarian aid to the victims of internal conflicts", *International Review of the Red Cross*, No. 23, February 1963, pp. 79-91. Record of the meeting of the Presidential Council of 15 October 1959, ICRC Archives.

On 29 April the ICRC President again proposed to the President of the Cuban Red Cross that an ICRC delegate be sent to Cuba.²² The reply was negative. The ICRC nevertheless continued its representations, and on 18 July the Executive Board decided that Pierre Jequier would carry out a general mission to several Latin American countries, including Cuba, in September. In Cuba, he would endeavour to obtain permission to visit places of detention.

When the ICRC informed the Cuban Red Cross of Pierre Jequier's forthcoming mission, however, the President of the National Society replied that the presence of an ICRC delegate in Cuba was unnecessary and that when the Cuban Red Cross felt that such a visit was timely it would immediately inform the Committee.²³

Subsequently, the ICRC continued to receive appeals for help from Cubans in exile. It informed them that it could not send a mission to Cuba because the government would not permit it to do so. Finally, on 20 February 1961, when United States-Cuban relations were very strained, the ICRC tried one last approach to the authorities in Havana. ICRC President Léopold Boissier sent Fidel Castro a letter in which he mentioned the visits carried out by the ICRC in Cuba and other countries to assist political detainees; he proposed dispatching another mission to Havana so that its delegates could visit persons arrested and deprived of their freedom for political reasons.²⁴ The ICRC received no reply to this letter and renewed its offer in vain in a telegram dated 24 April 1961, or 10 days after the "Bay of Pigs" landing.

In July 1961, the Executive Director of the ICRC asked Pierre Jequier, then on mission in Latin America, to do everything possible to go to

²²Letter of 11 February 1960 from Roger Gallopin, ICRC Executive Director, to Gilberto Cervantez Núñez, President of the Cuban Red Cross, ICRC Archives — 225 (40). Record of the meeting of 25 February 1960 of the Presidential Council, ICRC Archives. Letter of 6 April 1960 from Gilberto Cervantez Núñez, President of the Cuban Red Cross, to Léopold Boissier, President of the ICRC, ICRC Archives — 225 (40). Letter of 29 April 1960 from Léopold Boissier to Gilberto Cervantez Núñez, ICRC Archives — 225 (40).

²³Letter of 6 June 1960 from Gilberto Cervantez Núñez, President of the Cuban Red Cross, to Léopold Boissier, President of the ICRC, ICRC Archives — 225 (40). Record of the meeting of 28 July 1960 of the President's Council, ICRC Archives. Letter of 4 August 1960 from Roger Gallopin, Executive Director of the ICRC, to Gilberto Cervantez Núñez, ICRC Archives — 225 (40). Letter of 22 August 1960 from Gilberto Cervantez Núñez to Roger Gallopin, ICRC Archives — 225 (40).

²⁴Letter of 20 February 1961 from Léopold Boissier, President of the ICRC, to Fidel Castro, Prime Minister, ICRC Archives — 225 (40).

Havana and meet Cuban Red Cross leaders in order to obtain permission to visit political detainees. However, as the President of the Cuban Red Cross had informed Jequier that he could not receive him, Jequier had to abandon his plans to visit Cuba.

In October 1961 the Council of Delegates (made up of delegations from National Societies, the ICRC and the League of Red Cross Societies) met in Prague; there, Pierre Jequier met representatives of the Cuban Red Cross, including its President, Gilberto Cervantez Núñez, to whom he repeated the ICRC's proposal to send a mission to Cuba.²⁵ Following this contact, the ICRC Executive Director, Roger Gallopin, proposed to the Cuban Minister for Foreign Affairs, Raúl Roa, that Pierre Jequier should go to Havana to observe the work being done by the Cuban Red Cross and, perhaps, to assist it in its new activities. Mr Roa replied to the ICRC on 18 January 1962 that the delegate's mission was not advisable.

On 23 March, when the fighters captured during the "Bay of Pigs" landing were about to be tried, the ICRC sent the following telegram to Fidel Castro:

Cuban Government — Havana

Informed by families trial 29 March next of fighters captured Playa Girón April 61 stop If this information correct presume that provisions Article 3 Geneva Conventions ratified by Cuban Government will be fully applied stop Remind you our earlier offers of services and renew them in hope that as is customary these prisoners will be able receive visit by ICRC delegate for strictly humanitarian assistance stop Highest consideration President International Committee Red Cross = intercroixrouge A6070.²⁶

On 6 April 1962, the Federal Political Department (the Swiss Ministry of Foreign Affairs) communicated to the ICRC the contents of a letter

²⁵ Telegram of 24 April 1961 from the ICRC to Fidel Castro, ICRC Archives — 225 (40). Note of 12 July 1961 from Roger Gallopin to Pierre Jequier, ICRC Archives — 225 (40). Telegram of 19 July 1961 from Pierre Jequier to the ICRC, ICRC Archives — 225 (40). Note of 9 October 1961 from Pierre Jequier to the ICRC, ICRC Archives — 225 (40).

²⁶ Telegram of 23 March 1962 from the ICRC to Fidel Castro, ICRC Archives — 225 (40). See also letter of 3 November 1961 from Roger Gallopin, ICRC Executive Director, to Raúl Roa, Minister for Foreign Affairs, ICRC Archives — 225 (40), and letter of 18 January 1962 from Raúl Roa to Roger Gallopin, ICRC Archives — 225 (40).

which it had just received from the Swiss ambassador to Cuba concerning the trial of 1,179 prisoners captured during the attempted invasion of Cuba in April 1961. The Swiss diplomat stated that, during an audience with ambassadors to Cuba held at the house of the Minister for Foreign Affairs, Raúl Roa, the latter had asked him whether he had any request to make in connection with the trial. The ambassador had reminded Mr Roa of the offer of services made in a telegram from the ICRC to Fidel Castro, and Mr Roa had said that he would immediately contact the Head of State on the matter. The ambassador concluded: "In my view, depending on the way the trial turns out, it is by no means certain that a specific intervention by the ICRC in this matter would be unwelcome to the Cuban Government."

In the next few weeks Ambassador Stadelhofer continued his approaches to the Cuban authorities, but did not achieve any tangible result.²⁷

On 6 June, Roger Gallopin and Pierre Jequier went to the Cuban embassy in Bern, where they met Ambassador José Ruiz Velasco. They informed him of the recent representations made by the ICRC to the Cuban authorities and of the contacts in Cuba between the Swiss ambassador and Mr Roa. They repeated the proposal to send an ICRC delegate to Cuba and the ambassador agreed to pass the proposal on to his country's authorities.²⁸

Ambassador Stadelhofer pursued his contacts with Mr Roa and the President of the Cuban Red Cross over the next few months, but to no avail. The doors were closed to the ICRC, which did not obtain permission to send delegates to Cuba for many years to come.

²⁷ Letter of 6 April 1962 from the (Swiss) Federal Political Department to the ICRC, ICRC Archives — 225 (40).

²⁸ Record of the conversation of 6 June 1962, ICRC Archives — 225 (40).

The new International Criminal Court

A preliminary assessment

by Marie-Claude Roberge

After years of relentless effort and five weeks of intense and difficult negotiations, the Statute of the International Criminal Court (ICC) was adopted and opened for signature in Rome on 17 July 1998. This historic event represents a major step forward in the battle against impunity and towards better respect for international humanitarian law. For too long it has been possible to commit atrocities with total impunity, a situation which has given perpetrators *carte blanche* to continue such practices. The system of repression established by international law clearly has its shortcomings, and the time has come to adopt new rules and set up new institutions to ensure the effective prosecution of international crimes. A criminal court, whether at the national or international level, does not put a stop to crime, but it may serve as a deterrent and, consequently, may help reduce the number of victims. The results achieved in Rome should thus be welcomed, in the hope that the new Court will be able to discharge its mandate to the full.

The purpose of this article is to offer a preliminary assessment of the outcome of the Rome Conference in the light of existing international humanitarian law and the ICRC's activities in behalf of war victims.

The ICRC is, of course, intensively involved in conducting relief and protection operations in the midst of armed conflicts. Moreover, it has a

Marie-Claude Roberge is a legal adviser in the ICRC's Legal Division. She followed, on behalf of the ICRC (which had observer status at the Diplomatic Conference in Rome), the negotiation and adoption of the Statute of the International Criminal Court.

This article reflects the views of the author and not necessarily those of the ICRC.

mandate conferred on it by the States party to the 1949 Geneva Conventions to work towards greater respect for international humanitarian law on the part of all those under an obligation to comply with it, and to encourage its development. Accordingly, the ICRC welcomes all steps taken with a view to meeting the obligations arising under humanitarian law, whether preventive activities such as education and training or measures of repression. Through its Advisory Service the ICRC provides States with technical assistance for the adoption of legislation necessary for the investigation and prosecution of suspected war criminals, as required by the Geneva Conventions.

For this reason, representatives of the ICRC took an active part in the negotiations conducted in New York and Rome on the establishment of an international criminal court. They made statements before the Preparatory Committee (PrepCom), the United Nations General Assembly and the Rome Diplomatic Conference on matters directly linked to the ICRC's mandate to act as guardian of international humanitarian law, and submitted a working paper at the February 1997 meeting of the PrepCom listing the war crimes the ICRC considered should come under the jurisdiction of the Court. Subsequently, a written commentary was prepared to explain and substantiate the structure and content of this working paper. The ICRC also prepared a document entitled "State consent regime *vs.* universal jurisdiction"¹, which set out in point form the precedents and developments which led to recognition of the principle of universal jurisdiction over war crimes, crimes against humanity and genocide, thus making a concrete contribution to the negotiations.

A first assessment of the Statute adopted by the Rome Conference

At first glance, the results of the Rome Conference are positive. There can be no doubt that the adoption of the Statute of the International Criminal Court is a milestone in the history of international humanitarian law and makes a decisive contribution to its implementation. However, it is important to look beyond this overall assessment and to examine more closely the results obtained in Rome in the light of the concerns expressed in the ICRC's position paper, since not all of these were addressed.² Accordingly, the present assessment of the Statute will concentrate on the

¹ These working documents can be found on the ICRC Website: www.icrc.org.

² See *supra*, note 1.

definition of war crimes, including the proposal to establish a threshold in that respect, the ICC's automatic jurisdiction, and the role of its Prosecutor.

Jurisdiction of the ICC over war crimes committed in both international and non-international armed conflicts

Although not all serious violations of international humanitarian law appear on the list of war crimes given in Article 8, it does contain a large number of offences.³ The major accomplishment in this regard is certainly the inclusion — despite some resistance — of a paragraph on war crimes committed during non-international armed conflicts.

As regards particular offences, it is worth noting that the Statute specifies rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization as war crimes. Conscripting or enlisting children under the age of fifteen years into national armed forces (or, in the case of internal armed conflicts, into armed groups) or using them to participate actively in hostilities is also recognized as a war crime falling within the jurisdiction of the Court.

- (a) The exclusion of some war crimes from the list adopted in Rome is regrettable.⁴ To mention but a few examples, there are no provisions on unjustifiable delay in the repatriation of prisoners of war or civilians or on the launching of indiscriminate attacks affecting the civilian population or civilian objects. The provision on the use of particularly cruel weapons was kept to a minimum as it proved difficult to reach a consensus, largely because of the desire expressed by some States to see nuclear weapons included on the list of prohibited weapons and the resistance of others to such a move. Accordingly, nuclear, biological and blinding laser weapons, as well as anti-personnel mines, were omitted. The ICRC favoured the inclusion of a generic clause stating the long-standing rule regarding the prohibition of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, or which are inherently indiscriminate. It is hoped that the list of prohibited weapons will be extended at the first Review Conference.

³For the complete list of war crimes see Article 8 of the Statute (Annex 1).

⁴See Article 8, para. 2 (b) (xx) in Annex 1.

- (b) As regards war crimes committed during non-international armed conflicts, the Statute sadly fails to include a ban on intentionally starving the civilian population, using certain weapons or wilfully causing widespread, long-term and severe damage to the natural environment. We believe that a greater effort should be made to complete the list of war crimes during the Review Conference due to take place seven years after the Statute comes into force. This should be possible, as the number of States party to 1977 Protocols I and II additional to the Geneva Conventions (to date 151 and 143 respectively) has continued to grow and these States should have less difficulty in accepting a more comprehensive list of war crimes.⁵
- (c) The question as to whether the Court should have jurisdiction only over war crimes committed on a large scale or also over single criminal acts was the subject of protracted negotiations. The Statute at present provides that the Court shall have jurisdiction in respect of war crimes “in particular” when committed as part of a plan or policy or on a large scale. In other words, a threshold was introduced, but not an exclusive one. The Court still has the authority to investigate individual criminal acts — a commendable solution.
- (d) The most serious disappointment lies in a provision relating specifically to war crimes. Article 124 of the Statute provides that on becoming party to the Statute a State may declare that it does not accept the jurisdiction of the Court for a period of seven years after the entry into force of the Statute with respect to war crimes alleged to have been committed by its nationals or on its territory. This, in fact, creates a regime for war crimes which is different from that relating to other crimes within the jurisdiction of the Court, and appears to send out the message that war crimes are not as serious as the other core crimes mentioned in the Statute. However, international law already recognizes the obligation of States to prosecute war criminals, irrespective of their nationality or the place where the crime was committed. States should be encouraged not to make the above declaration and the provision should ultimately be removed by the Review Conference.

⁵ The effect of the exclusion of some war crimes from the list, or the departure from texts agreed upon in the 1977 Protocols, may, however, be limited. Article 10 of the Statute provides specifically that “[n]othing in this Part [which includes the definition of war crimes] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

Automatic jurisdiction over the four core crimes

After intense debate, States finally agreed to accept the principle that when a State becomes party to the Statute it accepts the jurisdiction of the Court over the four core crimes: genocide, crimes against humanity, war crimes and acts of aggression. Thus the Court may exercise its jurisdiction if the State on whose territory the act or omission in question occurred, or the State of which the person being investigated or prosecuted is a national, is bound by the Statute or has accepted the jurisdiction of the Court. If, in view of the above conditions, the consent of a State which is not a party to the Statute is necessary, that State may make a declaration to the effect that it accepts the jurisdiction of the Court with respect to a particular crime.

No consent is required from a State when the Security Council refers a situation to the Prosecutor under Chapter VII of the Charter of the United Nations. The Security Council may also require that no investigation or prosecution commence or proceed for a renewable period of 12 months. This can only be done once a resolution to that effect is adopted under Chapter VII of the Charter.

It is regrettable that the proposal to give the Court automatic jurisdiction if the custodial State is bound by the Statute was not accepted. In practice, custodial States can play an important role in the prosecution of war criminals. This may be illustrated by the following imaginary scenario. A person who is suspected of having committed a war crime during an internal armed conflict on the territory of State X, and who is a national of that same country, has fled to State Y. State X is not party to the Statute and refuses to accept the ICC's jurisdiction over the suspect. In the absence of automatic jurisdiction, the Court would not be able to take action and prosecution would be possible only if the Security Council referred the situation to the Prosecutor or if State Y were willing and able to bring the suspect before its own courts.⁶ Once again, only broad acceptance of the Statute by States would break the deadlock.

The issue of jurisdiction was certainly among the most difficult and important questions to be resolved. Although the outcome is positive it will not have any clear, practical impact until a large number of States

⁶This would imply that the domestic legislation of State Y allows for the prosecution of a foreign national for crimes committed in a foreign country before its own courts. To date, only a limited number of States has adopted such legislation.

has ratified the treaty, thus allowing the Court to exercise its jurisdiction whenever necessary.

An independent Prosecutor

Agreement was reached in Rome to give the Prosecutor the power to initiate *proprio motu* (on his/her own initiative) an investigation with respect to the four core crimes. Once the Prosecutor decides that there is a reasonable basis for proceeding with an investigation, he or she must submit a request to the Pre-Trial Chamber for authorization. If the Pre-Trial Chamber authorizes an investigation the Prosecutor has to notify all States Parties and States concerned. Within one month of receipt of notification a State may inform the Prosecutor that it is investigating or prosecuting the case at the national level and that the Prosecutor should therefore defer the proceedings to the State's authority. The Prosecutor may, however, decide to seek a ruling of the Court on a question of jurisdiction or admissibility.

The solution found in Rome with regard to the power of the Prosecutor to initiate proceedings reflects a compromise between States that feared having an overburdened and "politicized" Prosecutor and those that hoped an independent Prosecutor would guarantee a non-political and efficient Court. Only time will tell whether or not the supervisory role played by the Pre-Trial Chamber will permit speedy investigations.

The ICRC's role after Rome

Now that the Statute of the International Criminal Court has been adopted, a vast amount of work remains to be done before the Court will be fully established and operational, as some issues remain to be resolved. One of the tasks still to be accomplished is the drafting of an Annex to the Statute outlining the elements of the various crimes, to assist the Court in the interpretation and application of Articles 6, 7 and 8 relating to genocide, crimes against humanity and war crimes.⁷ ICRC jurists will take an active part in this process, in particular with respect to the elements of war crimes.

⁷ A proposal containing the elements of these crimes will be prepared by a Preparatory Commission comprising representatives of States having signed the Final Act of the Conference and of other specially invited States. A draft text is to be finalized before June 2000.

Clearly, for the Court to be truly effective a large number of States must ratify the Statute, and the ICRC will no doubt play an important role in encouraging governments to do so. National Red Cross and Red Crescent Societies have also been invited to promote ratification of the Statute by their respective governments.

Furthermore, in the light of the principle of complementarity between the ICC and national criminal courts, efforts must be intensified to develop national legislation implementing the universal obligation to prosecute suspected war criminals wherever they may be. Despite the establishment of the ICC, States will continue to have a duty to exercise their criminal jurisdiction over persons alleged to have committed international crimes, as the Court has jurisdiction only when a suspected criminal has not been tried in a national court. This is likely to encourage States to put in place national implementation measures. In this context, the ICRC Advisory Service will continue to offer its technical assistance to States in adopting legislation necessary for the investigation and prosecution of suspected war criminals.

Concluding remarks

It is to be hoped that the new Court will make a significant contribution to improving respect for international humanitarian law and hence will help reduce the number of victims. States are invited to become party to the Statute of the International Criminal Court and to take all necessary steps to ensure that the Court will have a successful start and will function effectively.

Statute of the International Criminal Court

Adopted by the United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment
of an International Criminal Court on 17 July 1998

(extract)

Article 8 — War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, “war crimes” means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;

- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
3. Nothing in paragraphs 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

(The text adopted on 17 July 1998 may be slightly amended.)

International criminal court: A reality at last

On 17 July, after years of relentless effort and five weeks of intense and sometimes arduous negotiations, the Statute of the permanent International Criminal Court was finally adopted.

The ICRC welcomes this historic event. It sincerely hopes that the Statute will allow the Court to take effective action against criminals who defy the international community and whose impunity is an invitation to crime.

It should be emphasized, however, that the Statute's substantial rules can be further improved. It is regrettable, for instance, that States becoming party to it will have the possibility to opt out, for a period of seven years, from the Court's jurisdiction over war crimes. Furthermore, war criminals who have committed crimes on the territory of States that do not adhere to the Statute or who are nationals of those States cannot be prosecuted by the Court.

It is therefore essential that a very large number of States sign and ratify this treaty, and that the Court be provided with adequate funding and high-quality staff.

The road ahead of us is still long, and war criminals must be swiftly and relentlessly prosecuted so as to ensure that the law does have a deterrent effect for the benefit of all potential victims of massacres, looting, rape and torture.

International Committee of the Red Cross
Press Release 98/27 of 18 July 1998

Arms transfers, humanitarian assistance and international humanitarian law

by Peter Herby

The International Committee of the Red Cross has witnessed in its work for war victims throughout the world the increasingly devastating effects for civilian populations of the proliferation of weapons, particularly small arms. The difficulties of providing humanitarian assistance in an environment where arms have become widely available to many segments of society are well known to most humanitarian relief agencies today. However, until recently the relationships between the availability of weapons, the worsening situation of civilians during and after conflict and the challenges of providing humanitarian assistance have not been addressed directly.

The exceedingly high levels of civilian death and injury in recent conflicts, from Bosnia to El Salvador to Liberia to Afghanistan, are no longer being seen simply as an inevitable by-product of these conflicts. Rather, these results are increasingly viewed as a result of inadequate or non-existent control of the flow of weapons — both internationally and domestically. Although few would claim that the weapons themselves are the primary source of recent conflicts, it can be argued convincingly that the easy availability of arms and ammunition increases tensions, heightens civilian casualties, prolongs the duration of conflicts and renders post-war reconciliation and rebuilding far more difficult.

The unregulated availability of weapons, in particular small arms, combined with their frequent use in violation of the most basic humanitarian norms, poses a direct challenge to the dual mandates of the

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International Committee of the Red Cross — to assist the victims of conflict and to promote respect for international humanitarian law.

It is clear that the high levels of civilian casualties, which have steadily increased in this century in parallel with the development and proliferation of sophisticated military technology, are *facilitated* (though not necessarily *caused*) by the availability of arms and ammunition. Weapons previously available primarily to organized armed forces are now in the hands of a wide variety of people involved in conflict and post-conflict situations. These include highly destructive weapons such as automatic rifles capable of firing hundreds of rounds per minute, rocket-propelled grenades, mortars and landmines. Whereas previously a single shot fired might have been fired into a crowded market and would have constituted an isolated criminal incident, today it is equally feasible for an individual to fire several hundred bullets from one of the automatic weapons now readily available and thereby unleash an orgy of ethnic killings and civil unrest.

The suffering of civilians affected by conflict grows still worse when the ICRC and other agencies are denied access to the victims owing to direct attacks, mined transport lines or the threat of armed violence. In a large number of recent conflicts, specific regions or even entire countries have become “no go” areas for humanitarian workers on account of attacks or the credible threat of attacks on them. ICRC field staff experienced a growing number of casualties through the mid-1990s. Although this may have been due to the changing nature of conflict, increased proximity to front-lines and the perceived politicization of humanitarian aid, the availability of small arms undoubtedly also played an important role. In addition to the impact on the safety of personnel, weapon availability increases the cost of humanitarian operations. When relief supplies have to be transported by air because landmines have been used to block roadways, the operation’s cost must be multiplied up to 25 times.

Beyond the immediate problems described above, the widespread availability of arms threatens to undermine the fabric of international humanitarian law — one of the principal means of protecting civilians in times of conflict. In addition to its assistance mandate, the ICRC is charged with helping States to promote knowledge of and respect for humanitarian law. However, this body of law assumes that military-style arms are in the hands of armed forces with a certain level of training, discipline and control. When such weapons become available to broad segments of the population, including undisciplined groups, bandits, mentally insecure individuals and even children, the task of ensuring basic knowledge of

humanitarian law among those in possession of such arms becomes difficult if not impossible.

Compared with distributing arms, creating an understanding and acceptance of humanitarian rules is a profoundly difficult and time-consuming task. It should come as no surprise that as highly lethal weapons spread throughout a given population, the potential for violations of humanitarian law increases. In the most generous interpretation, the direct and illegal attacks of 1996 on clearly identified Red Cross vehicles and on a hospital reflect a lack of understanding of basic humanitarian norms and of the role of a neutral intermediary in conflict zones. But such attacks may also represent intentional attempts to destabilize the areas concerned.

Even after armed conflict has ended, civilian suffering often continues for years as the widespread possession of fire arms fosters a “culture of violence”, undermines the rule of law and threatens efforts at reconciliation between the former warring parties. A recent study of the ICRC’s medical database on weapons-related casualties showed a decrease in such casualties of only 20-40 % (depending on weapon type) during the eighteen months following the end of armed conflict in one particular region.¹ One might have expected a far more dramatic drop in arms-related death and injury in a post-conflict period.

Given the trends described above, the International Red Cross and Red Crescent Movement has become increasingly concerned with the problem of arms transfers and availability. In 1995, the 26th International Conference of the Red Cross and Red Crescent, which included 135 States party to the Geneva Conventions of 1949, mandated the ICRC to use its first-hand experience to conduct a study on “the extent to which the availability of weapons is contributing to the proliferation and aggravation of violations of international humanitarian law in armed conflicts and the deterioration of the situation of civilians”.² This work is currently being carried out on the basis of interviews with a wide variety of current and former field delegates, the ICRC’s medical database and its analysis of international humanitarian law.

¹ David Meddings, “Weapons injuries during and after periods of conflict: retrospective analysis”, *British Medical Journal*, No. 7120, 29 November 1997, pp. 1417-1420.

² Meeting of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, 1995), Recommendation VIII, as endorsed by Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995, reprinted in *IRRC*, No. 310, January-February 1996, pp. 88 and 58 respectively.

The preliminary findings were reviewed by a panel of experts on arms transfers in Oslo in May 1998, with a final report and possible recommendations expected by the end of the year. The Expert Group meeting concluded, *inter alia*, that

“The growth of a culture of violence — encouraged by the easy availability of arms — is a major obstacle to developing peaceful, prosperous and just societies, particularly in countries recovering from violent conflict... The control of arms availability based on humanitarian law, development, human rights and other criteria should be among the international community’s highest priorities.”

The ICRC report will serve as the basis of further discussion at the 27th International Conference of the Red Cross and Red Crescent in November 1999.

In addition to the efforts of the ICRC, other components of the Red Cross and Red Crescent Movement have begun to address arms availability as a matter of humanitarian concern. The December 1997 session of the Council of Delegates, which brings together all National Red Cross and Red Crescent Societies, their International Federation and the ICRC itself, expressed its alarm at “the easy access of combatants and civilian populations unfamiliar with the requirements of international humanitarian law to a wide variety of weapons, particularly small arms, and their frequent use against civilian populations and in violation of basic humanitarian principles”.³ It called on the Movement to develop over the next two years a unified position on arms transfers and to clarify what role it could play in dealing with the problem. This process will move forward on the basis of the upcoming ICRC study and broad consultations within the Movement.

In a preliminary assessment of the problems from a humanitarian perspective caused by arms transfers, the ICRC made a number of observations and suggestions which will provide a conceptual framework for its forthcoming study on arms availability.⁴ These may be summarized as follows:

³ Resolution 8, section 4, Council of Delegates, Sevilla, 1997, reprinted in *IRRC*, No. 322, March 1998, pp. 152.

⁴ “Arms Transfers, Humanitarian Assistance and International Humanitarian Law”, ICRC document, 19 February 1998.

- The unregulated transfer of weapons and ammunition can heighten tensions, increase civilian casualties and prolong conflicts.
- Because it is largely outside of international control, the current pattern of small arms transfers is a matter of urgent concern.
- While the primary responsibility for compliance with international humanitarian law falls upon the actual users of weapons, States and businesses engaged in production and export bear some responsibility toward the international community for the use made of the weapons and ammunition they sell.
- Although States have an undisputed right under international law to retain armaments required for their security, they also have a solemn moral and legal responsibility, under Article 1 common to the Geneva Conventions of 1949, to “respect and ensure respect” for international humanitarian law. The transfer of arms and ammunition should be examined in this light. States should, in particular, consider whether the sale of weapons and ammunition can be viewed as simply another form of commerce.
- Given the serious threat to compliance with international humanitarian law, to international peace and security and to the social fabric of societies which the unregulated spread and undisciplined use of weapons presents, the ICRC will encourage States to consider the adoption of rules, based on humanitarian law and other criteria, governing the transfer of arms and ammunition.

In past decades small arms and light weapons have been almost entirely overlooked as a subject of arms control or even research interest. Attention focused on major conventional, nuclear and chemical weapon systems — where research could be more precise and where the presence of such weapons was considered particularly destabilizing. Meanwhile, the diffusion of tens of millions of small arms — the cause of most death and injury — flourished. In the last two years governments, regional organizations and NGOs have become increasingly involved in considering new mechanisms, including “codes of conduct”, to limit small arms proliferation. As they do so they should consider the importance of criteria based on international humanitarian law. It can be argued that humanitarian law is often the body of law most relevant to the stated purpose for which military arms and ammunition are transferred — to fight an armed conflict.

Although some have suggested using the worldwide campaign for a prohibition on anti-personnel landmines as a model for future work on

arms availability, any attempt simply to replicate that effort is unlikely to succeed. The appalling suffering caused by anti-personnel mines could be traced to a single small weapon of questionable military utility. The proposed solution — a complete prohibition — was as simple as it was dramatic. And even in the case of anti-personnel mines, decades of continued effort to universalize the “Ottawa Treaty”,⁵ to clear existing mines and to assist the victims will be required before the process can be said to be entirely successful.

While it is clear that the unregulated availability of weapons and their use to commit violations of human rights and humanitarian law exact a clearly unacceptable price in human terms, finding solutions is far from simple. The supply of small arms currently available in known and in hidden stockpiles around the world is truly enormous. Most of the weapons concerned would not in themselves be considered illegal in humanitarian law terms. Some are held by government armed forces for legitimate purposes; others by groups seeking justice through armed violence and yet others by criminal elements or other civilians who may be simply seeking a measure of personal security in the absence of any other form of protection in situations of extreme violence.

Even in situations where governments wish to limit the flow of armaments onto their territory, considerable resources and regional cooperation will be required. The success of the national moratorium on arms production, import and export being attempted by the government of Mali will require significant investment in police and customs forces which are beyond the capacity of the government to provide without outside help. Even with that help, much cooperation along with similar moratoria by neighbouring States will be required to reinforce Mali’s initiative.

Despite these differences, certain lessons may be drawn from recent efforts to end the “landmines epidemic”. A central element in the landmines campaign was a demonstration of the link between the mines and their victims. The appalling effects of unregulated arms flows before, during and after conflicts will need to be clearly demonstrated in a manner which engages the public conscience. Credible research and its exchange through modern communications technology will be just as important as

⁵ Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and their destruction, of 18 September 1997, reprinted in *IRRC*, No. 320, September-October 1997, pp. 563-578.

it was for the work on landmines. Specific and realistic proposals for addressing the problem will need to be advanced, this time as part of a far more multifaceted approach. As was the case with landmines, progress will demand a high level of cooperation and trust among governments, non-governmental organizations and international humanitarian agencies — based on a sense of humanity and common purpose.

In the short term the challenge will be to raise awareness of the human costs of arms availability and to put the issue squarely on the international agenda. It will be necessary to challenge the fatalistic acceptance of daily news reports of armed attacks on civilians for which no one is held responsible. The principle needs to be established that those who supply arms in situations where violations of international law can be expected share responsibility for the use of their weapons.

“Codes of conduct” for arms transfers are one promising approach to developing agreement on what constitutes responsible practice. One such draft code drafted by a group of Nobel laureates led by former Costa Rican President Oscar Arias includes criteria based on international humanitarian law. The European Union integrated a reference on respect for humanitarian law in the code of conduct on arms transfers it adopted in May 1998. The United States Congress is also discussing a code for exports which includes human rights but, not yet, humanitarian law criteria.

Success in reducing the human cost of unregulated arms proliferation will depend on creating a sense of responsibility and accountability among both those who produce and those who use arms. Weapons serve as tools for implementing life-and-death decisions and are instrumental both in enforcing and undermining the rule of law. They cannot be considered as simply another form of commercial goods to be governed by the law of supply and demand.

An international ban on anti-personnel mines

History and negotiation of the “Ottawa treaty”

by **Stuart Maslen and Peter Herby**

The background to the Ottawa process

As the First Review Conference of the 1980 Convention on Conventional Weapons¹ (CCW) closed in Geneva on 3 May 1996, there was widespread dismay at the failure of the States Parties to reach consensus on effective ways to combat the global scourge of landmines. The CCW Protocol II as amended on 3 May 1996² (Protocol II as amended) introduced a number of changes that were widely welcomed, but it fell far short of totally prohibiting these weapons, a move already supported by more than 40 States. Keen to sustain the international momentum that might otherwise have slackened, the Canadian delegation announced that Canada would host a meeting of pro-ban States later in the year to develop a strategy to move the international community towards a global ban on anti-personnel mines.

That meeting, the “International strategy conference: Towards a global ban on anti-personnel mines” (usually referred to as “the 1996 *or* the first

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¹ United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, of 10 October 1980.

² Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996), annexed to the CCW, *supra* note 1.

Ottawa Conference”), was held in the Canadian capital from 3 to 5 October 1996; it set the scene for what would become known as the “Ottawa process” — a fast-track negotiation of a convention banning anti-personnel mines. At the closing session of the Conference the host country’s Foreign Minister, Lloyd Axworthy, ended his address with an appeal to all governments to return to Ottawa before the end of 1997 to sign such a treaty. This bold initiative was immediately supported by ICRC President Cornelio Sommaruga, who was attending the Conference, by the UN Secretary-General and by the International Campaign to Ban Landmines (ICBL), but it came as a surprise to the governments taking part, and it was by no means certain that it would be successful. Indeed, at that stage only about 50 governments had publicly declared their support for a comprehensive, worldwide ban on anti-personnel mines,³ and Protocol II as amended was widely considered to be the most stringent international agreement possible in the prevailing climate.

Yet only 14 months later, at the Treaty Signing Forum held in Ottawa in December 1997, representatives of 121 governments queued up to sign the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*,⁴ and three of them — Canada, Ireland and Mauritius — also deposited their instruments of ratification. As at the end of April 1998, there were a total of 124 signatories and 11 States had already ratified the Convention, which will enter into force six months after 40 States have formally adhered to it. The present article aims to discuss this remarkable achievement in the context of the negotiation of the treaty and its various provisions. It also considers some of the implications of the process and its successful outcome for the future development of international humanitarian law. It

³ Fifty States were full participants at the first Ottawa Conference: Angola, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cambodia, Cameroon, Canada, Colombia, Croatia, Denmark, Ethiopia, Finland, France, Gabon, Germany, Greece, Guatemala, Guinea, Honduras, Hungary, Iceland, Iran, Ireland, Italy, Japan, Luxembourg, Mexico, Mozambique, the Netherlands, New Zealand, Nicaragua, Norway, Peru, the Philippines, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, the United Kingdom, the United States, Uruguay, and Zimbabwe. A further 24 countries — Albania, Argentina, Armenia, the Bahamas, Benin, Bulgaria, Brazil, Brunei Darussalam, Chile, Cuba, the Czech Republic, Egypt, the Federal Republic of Yugoslavia, the Holy See, India, Israel, Malaysia, Morocco, Pakistan, the Republic of Korea, Romania, the Russian Federation, Rwanda, and Ukraine — attended as official observers.

⁴ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, of 18 September 1997, reprinted in *IRRC*, No. 320, September-October 1997, pp. 563-578.

does not, however, purport to serve as a commentary of the treaty *per se*, a task which is best left to a later date.

The negotiation of the treaty

Only a few weeks after the challenge issued by Canada's Foreign Minister, the Austrian government circulated a first draft of a treaty banning anti-personnel mines. The text was clearly inspired by the negotiations in the First Review Conference of the CCW and by disarmament law, especially the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, adopted by the UN General Assembly on 30 November 1992. It contained clear prohibitions of the development, production, stockpiling, transfer and use of anti-personnel mines — though it maintained the ambiguous definition of anti-personnel mines contained in Protocol II as amended⁵ — and required destruction of stockpiles within one year and clearance of emplaced anti-personnel mines within five years. In December 1996, the UN General Assembly adopted its landmark resolution 51/45S (157 votes in favour, 10 abstentions and none against) in which States were urged to “pursue vigorously an effective, legally binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines with a view to completing the negotiation as soon as possible.”

Thus began the process of negotiating a treaty providing for a comprehensive ban on anti-personnel mines, the target date for its adoption and signature being the end of 1997. A core group of committed governments from different geographical regions began meeting informally to discuss how to push the Ottawa process forward. The Austrian government, which had prepared a draft text in late 1996, hosted a meeting in Vienna from 12 to 14 February 1997 to enable States to exchange views on the content of such a treaty. The Expert Meeting on the Text of a Convention to Ban Anti-personnel Mines (the Vienna Expert Meeting), which was attended by representatives of 111 governments, heard the ICRC outline what it considered to be the key issues at stake. First, the ICRC emphasized the crucial importance of having an unambiguous

⁵ Article 2, para. 3, of Protocol II as amended defines an anti-personnel mine as one “primarily designed to be exploded by the presence, proximity or contact of a person”. The use of the phrase “primarily designed” was strongly opposed by the ICRC which feared its abuse in cases where a munition which was clearly an anti-personnel mine could be claimed to have another “primary” purpose.

definition of anti-personnel mines. Second, if a prohibition was to be effective, the new treaty should comprehensively ban the production, stockpiling, transfer and use of anti-personnel mines and require their destruction. A phased approach should begin with an immediate prohibition on new deployments, production and transfers; a second phase, which should be as short as practical constraints allow, could provide for the destruction of existing stockpiles and the clearance and destruction of mines already deployed.

Third, the ICRC noted that compliance monitoring would be an important element of a regime put in place to end the use of anti-personnel mines, and suggested that the best method would be for an independent mechanism to investigate credible reports of their use following the entry into force of the new treaty. But while advocating the maximum possible degree of verification, the ICRC specifically encouraged States not to allow this question to stand in the way of the basic norm prohibiting anti-personnel mines. It reminded States that earlier norms of humanitarian law prohibiting the use of specific weapons had been enacted without provisions on verification, but this did not prevent them from being very largely respected.

Fourth, the ICRC addressed the issue of universality. Universal application of legal norms is an important objective and the ICRC, in keeping with its mandate under the Geneva Conventions, has devoted a great deal of time and effort to the promotion of existing agreements. It is a fact, however, that no major instrument of humanitarian law has attracted universal adherence from the outset. Indeed, a number of States took decades to ratify the 1925 Geneva Gas Protocol,⁶ and in 1899 two of the major powers of the day voted against a prohibition of dum-dum bullets. And yet the vast majority of States have observed the norms laid down by these agreements.

Following the Vienna Expert Meeting, and taking into account the comments made by participating governments, the Austrian government revised its original text and on 14 March 1997 issued its second draft of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*. The title, and much of the text, would remain the same in the treaty ultimately adopted.

⁶ Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare.

The discussions at the Vienna Expert Meeting had made it clear that the question of verification would give rise to considerable debate, for some governments favoured a humanitarian law approach (i.e., one entailing a minimum of verification) while others sought a complex verification regime similar to those enshrined in negotiated disarmament agreements. Given its interest in the issue of verification, the German government offered to host a meeting devoted exclusively to this question.

The International Expert Meeting on possible Verification Measures to ban Anti-Personnel Landmines (the Bonn Expert Meeting) was held on 24 and 25 April 1997. To stimulate debate on the topic, Germany had drafted an "Option Paper for a possible Verification Scheme for a Convention to Ban Anti-Personnel Landmines". A total of 121 countries were represented at the meeting, and views were again divided between States which felt that detailed verification was essential to ensure that any agreement was effective and those which followed an approach similar to that of the ICRC, arguing that the proposed agreement was essentially humanitarian in character and stressing the overriding importance of a clear norm prohibiting anti-personnel mines.

From 24 to 27 June 1997, the Belgian government hosted the International Conference for a Global Ban on Anti-Personnel Mines (the Brussels Conference), the official follow-up to the 1996 Ottawa Conference. Its primary task was to adopt a declaration forwarding the latest (third) Austrian draft text for negotiation and adoption to the Diplomatic Conference being convened in Oslo, Norway, in September 1997. Out of the 156 States attending the Brussels Conference, a total of 97 signed the "Brussels Declaration", as it came to be known, which affirmed that the essential elements of a treaty to ban anti-personnel mines were:

- a comprehensive ban on the use, stockpiling, production and transfer of anti-personnel mines;
- the destruction of all stockpiled and cleared anti-personnel mines;
- international cooperation and assistance in the area of mine clearance in affected countries.

Notable by their absence from the declaration were references to the importance of international support for assistance to mine victims and to an absolute duty to clear emplaced mines (the duty being only to destroy "cleared" anti-personnel mines).

In addition to forwarding the Austrian draft text to the Oslo Diplomatic Conference, States supporting the Brussels Declaration also reaffirmed the

goal set by the Canadian Foreign Minister of signing the treaty in Ottawa before the end of 1997. The outcome of the meeting was hailed by the ICRC as a major step forward. In the words of its President, “[t]he Brussels Conference has demonstrated that the momentum towards a ban on this pernicious weapon is now irreversible.”

The Diplomatic Conference on an International Total Ban on Anti-Personnel Land Mines (the Oslo Diplomatic Conference), convened by Norway, opened in Oslo on 1 September 1997. It was scheduled to last a maximum of three weeks. The host country had already announced the draft Rules of Procedure at the end of the Brussels Conference. Modelled on those used in the negotiation of the 1977 Protocols additional to the Geneva Conventions of 12 August 1949, they provided for resolution of issues by a two-thirds majority vote in cases where consensus proved impossible. Only those States which had formally supported the Brussels Declaration were officially recognized as participants in the Oslo Diplomatic Conference and therefore entitled to vote. All other States present were officially classed as observers, together with the United Nations, the ICRC, the International Federation of Red Cross and Red Crescent Societies, and the ICBL.

The success of the Oslo Diplomatic Conference can be attributed to many factors: the creation and sustenance of the necessary political will, and extensive media attention following the tragic death of Diana, Princess of Wales, are of obvious significance. But the crucial role played by the Chairman of the Conference, Ambassador Jakob Selebi of South Africa, should not be forgotten. With skill and determination he drove the process forward to a successful conclusion without the need for the full three-week negotiation period. His contribution to the favourable outcome of the Ottawa process should be duly recognized.

Key issues in the Ottawa negotiations

The scope of the treaty

The first Austrian draft text contained an article on the proposed scope of the treaty to the effect that the Convention would apply “in all circumstances, including armed conflict and times of peace.” The issue of whether such a provision was needed in a treaty entirely prohibiting a weapon was debated at the Vienna Expert Meeting. As a result of those discussions the scope article was dropped from the second Austrian draft, for it was deemed superfluous in an agreement in which States Parties

undertook “never under any circumstances” to develop, produce, stockpile, transfer or use anti-personnel mines.

The lack of such a provision, however, entailed the absence of a specific reference to the application of the treaty to all parties to a conflict. This dashed the hopes of a number of countries, particularly Colombia,⁷ and the ICBL that the treaty would expressly regulate the behaviour of all protagonists in a conflict, and not only that of States. However, on signing the Ottawa treaty Colombia stated its understanding that while it had no effect on the legal status of the various parties involved, the Convention applied to all warring parties which are subjects of international humanitarian law (i.e., under Article 3 common to the 1949 Geneva Conventions and their Additional Protocol II of 1977). This understanding was not contested.

In its Article 9 the Ottawa treaty sets out the duty of each State Party to take all appropriate legal, administrative and other measures at the national level to prevent and suppress violations of the Convention. This means that the production, stockpiling, transfer or use of anti-personnel mines by individuals under the jurisdiction *or* control of States Parties, including members of insurgent forces, are covered, at least in theory. Moreover, one of the preambular paragraphs states that the agreement by the States Parties is based on “the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants.”⁸ These principles are elements of customary international law which apply to all parties to any conflict.

Definitions

(a) Mine

Although it had been suggested that “improvised explosive devices” were regulated as mines under Protocol II as amended, a number of States were keen to ensure that they were encompassed by the Ottawa treaty. The definition of a mine given in Protocol II as amended was therefore

⁷ See APL/CW.46 of 3 September 1997.

⁸ 11th preambular paragraph.

supplemented by the expression “designed to be” inserted immediately after the word “munition”, so that the new definition read: “a munition designed to be placed under, on or near the ground or other surface area and exploded by the presence, proximity or contact of a person or vehicle.”⁹ As a result of an Australian initiative, in the course of the Oslo negotiations on definitions it was accepted that the Convention also prohibited explosive devices improvised or adapted to serve as anti-personnel mines (i.e., if a device functions as an anti-personnel mine, it is to be considered as such).

(b) Anti-personnel mine

The definition of anti-personnel mines was inevitably one of the most highly charged issues. The definition given in Protocol II as amended was unnecessarily ambiguous, a fact recognized even by some of those States which were in favour of keeping it in the new treaty. At the Vienna Expert Meeting opinions appeared fairly evenly divided as to whether the wording contained in the first Austrian draft should be maintained or amended. The ICRC and the ICBL, for their part, made a strong call for the word “primarily” to be removed from the definition.

In the months following the Vienna Expert Meeting, however, more and more States — particularly those most active in the Ottawa process — espoused the view that the definition of anti-personnel mines had to be clarified. Accordingly, in its second draft text the Austrian government removed the term “primarily” from the definition and included an exemption for anti-vehicle mines equipped with anti-handling devices.¹⁰ The phrase on anti-handling devices mirrored the text of an interpretative statement made by Germany and more than 20 other delegations at the adoption of Protocol II as amended concerning the meaning of the word “primarily”.

At the Brussels Conference a number of States, such as Ethiopia, commented favourably on the removal of the word “primarily” from the text. Others, such as Sweden and the United Kingdom, concerned by an apparent discrepancy with the definition contained in Protocol II as amended, indicated that they might wish to discuss the definition further.

⁹ Article 2, para. 2.

¹⁰ “Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.”

Indeed, at the Oslo Diplomatic Conference there was considerable debate on the issue. The United States, for instance, sought to include an exception for anti-personnel mines contained within mixed weapons systems,¹¹ but this was not acceptable to other delegations. Likewise, a proposal by Australia to exempt mines whose effects could be limited exclusively to combatants¹² was not approved, in part at least because no such mines were believed to exist or to be under development. Finally, Norway's proposal to clarify the exemption for anti-vehicle mines, "including those equipped with anti-personnel mines",¹³ was not retained. The definition of anti-personnel mines in the Ottawa treaty thus covers all anti-personnel mines, including tripwire-activated directional fragmentation devices, but excludes anti-vehicle mines equipped with anti-handling devices. The ICRC will continue to monitor the development of anti-vehicle mines to ensure that they are not capable of detonation under the weight of a person.

(c) Anti-handling device

The second Austrian draft included a definition identical to that contained in Protocol II as amended.¹⁴ At the Oslo Diplomatic Conference, following a proposal by the United Kingdom,¹⁵ language was added to the effect that in addition to activation upon tampering with the mine, a device that detonated the mine when an attempt was made to "otherwise intentionally disturb [it]" would also be considered as an anti-handling device. A number of States invoked the so-called "doctrine of the innocent act", which holds that a mechanism so sensitive that merely touching it would cause the mine to detonate should not be considered an anti-handling device. Such a mine would therefore fall within the definition of an anti-personnel mine. If it did not, innocent passers-by would be exposed to excessive risk of injury; this would betray the very aim of the treaty, namely preventing the indiscriminate effects of anti-personnel mines. The ICRC intends to monitor developments in this field closely to ensure that both the spirit and the letter of this provision are fully observed.

¹¹ See APL/CW.9 of 1 September 1997.

¹² See APL/CW.2 of 1 September 1997.

¹³ See APL/CW.4 of 1 September 1997.

¹⁴ "Anti-handling device means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with the mine." See Protocol II as amended, Art. 2, para. 14.

¹⁵ See APL/CW.32 of 2 September 1997.

(d) Transfer

The definition of transfer given in the Ottawa treaty is an exact replica of that contained in Protocol II as amended. This in turn was based on the definition of “transfer” used since 1993 for the UN Register of Conventional Arms. It was introduced into the second Austrian draft and adopted in Oslo without major changes (the word “anti-personnel” was added to the Protocol II definition). Thus, under Article 2, para. 4, of the Ottawa treaty “[t]ransfer’ involves, in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines.” There is, however, some disagreement as to whether the first two possibilities are cumulative or alternative. This issue has some relevance to the discussions within NATO as to the possibility of transit of United States anti-personnel mines through NATO countries.

Core prohibitions

(a) The prohibition on the use of anti-personnel mines

The prohibition on the use of anti-personnel mines was central to the success of the treaty and represented its primary object and purpose. Without an absolute prohibition on use, the other prohibitions could not be absolute, either. The first Austrian draft had stated that “it is prohibited to use anti-personnel mines as they are deemed to be excessively injurious and to have indiscriminate effects.” After some negative comments regarding the implication that States had in fact been violating international law by using anti-personnel mines, in the second draft the prohibition became simply an undertaking “never under any circumstances to use anti-personnel mines”. This remained the text of the provision as it was finally adopted despite the wish of a number of countries to include exceptions or transition periods. At the Brussels Conference, for example, one State called for an exception to the prohibition on use “in exceptional circumstances”. In Oslo, the same State proposed a “temporary arrangement”, whereby a State “under exceptional circumstances for its national security, may resort to the use of anti-personnel mines in accordance with the international laws of armed conflict.” This proposal was roundly rejected by the other participating States which felt that any such exception would undermine the entire treaty.

(b) The prohibition on the development of anti-personnel mines

The prohibition on the development of anti-personnel mines¹⁶ represents the first time that such a provision has been included in a humanitarian law treaty. States will have to take great care in their military research and development programmes to ensure that the rule is fully respected. Special attention will have to be paid to dual-use technologies and anti-handling devices which could cause an anti-tank mine to function as an anti-personnel mine.

(c) The prohibition on “inciting” a violation

It is also prohibited to “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”¹⁷ This provision covers, for example, the granting of licences to manufacture anti-personnel mines. It is also relevant to the situation of some NATO countries. On ratifying the treaty, Canada entered an understanding that mere participation by Canadian soldiers in a United Nations operation involving a State not party to the Convention and the use of mines by such a State would not constitute assistance within the meaning of the treaty. This would also apply to the transit of anti-personnel mines owned by a State not party to the Convention across the territory of a State Party.

(d) Proposed exceptions to the general obligations

At the Oslo Diplomatic Conference, with the situation in Korea uppermost in its mind, the United States proposed that an exception be made to the general treaty obligations with respect to “activities in support of a United Nations command or its successor, by a State Party participating in that command, where a military armistice agreement had been concluded by a United Nations command.”¹⁸ This issue was discussed at great length, both inside and outside the conference hall, but ultimately it was decided that such an exception was not acceptable. The possibility of a general transition period under which any State could defer implementation of the Convention for a set period was also considered. However, the United States did not feel that the provision as it stood was sufficient to ensure its early adherence to the treaty, and the issue was dropped.

¹⁶ See Art. 1, para. 1(b).

¹⁷ Art. 1, para. 1(c).

¹⁸ See APL/CW.8 of 1 September 1997.

The destruction of stockpiled anti-personnel mines

The original Austrian draft text had called for stockpiled anti-personnel mines to be destroyed within one year, though it offered the possibility of an additional one-year deferral period.¹⁹ Following remarks by a number of States that the allotted time was unrealistically short, the second draft raised the limit to three years, but removed the possibility of deferral. At the Oslo Diplomatic Conference the limit was again raised, this time to four years, at which point final agreement was secured. The United States had suggested that an exception be made for mines not owned or possessed by a State Party though present on its territory,²⁰ but this proposal was rejected. Finally, Article 6, para. 5 of the Ottawa treaty specifically requires States Parties in a position to do so to provide assistance in the destruction of stockpiled anti-personnel mines. A good many States had emphasized the importance of international cooperation and assistance in fulfilling the obligation within what is, undoubtedly, a fairly short time period.

Exception for training in demining: the first Austrian draft contained a proposed exception to the prohibition on acquiring or retaining anti-personnel mines “if they are exclusively used for the development and teaching of mine detection, mine clearance, or mine destruction techniques and if the responsible institutions, the amount and the types are registered with the Depository.” A suggestion by Spain at the Brussels Conference that an exception be made to the prohibition on production in order that stocks of mines for training be replenished was not retained. At the Brussels Conference, Italy had called for a more specific limit on the number of mines needed for training in detection and clearance. This proved impossible to achieve during the negotiations in Oslo, so that the provision finally read: “[t]he amount of such mines shall not exceed the minimum number absolutely necessary” for such purposes.²¹ At the adoption of the treaty a number of States declared that they considered one to two thousand anti-personnel mines to be sufficient for training purposes.²² This was not contested. Under Article 7 (“Transparency measures”), the types, quantities and, if possible, lot numbers of all anti-

¹⁹ Art. 5, first Austrian draft treaty text.

²⁰ See APL/CW.10 of 1 September 1997.

²¹ Art. 3, para. 1, Ottawa treaty.

²² Canada stated it would retain around 1,500, the Netherlands 2,000, and Germany “thousands, not tens of thousands”. Belgium supported this interpretation.

personnel mines retained for training purposes must be reported annually to the UN Secretary-General.

Clearance and destruction of emplaced anti-personnel mines

The original Austrian draft required that emplaced anti-personnel mines be destroyed within five years, with the possibility of an additional two-year period for States requesting an extension. At the subsequent Vienna Expert Meeting it was rightly pointed out that the ability of a State to remove and destroy anti-personnel mines depended on its technical capacity and resources, and that in the case of States with massive problems this process could take decades. It was clear that the treaty needed to allow such States to adhere without fear that they might find themselves in breach of its provisions because of the continued presence of uncleared mines. It was even suggested that emplaced mines should be fenced and marked but that their removal and destruction should not be subject to a strict timetable.

Taking account of those concerns, the second Austrian draft differentiated between the destruction of anti-personnel mines laid within minefields (deemed to be a "defined area in which mines have been emplaced") and those laid in areas outside minefields. The former were to be marked in accordance with international standards and then destroyed within 10 years of the treaty's entry into force, whereas in the case of the latter the obligation was simply to destroy the mines, without a fixed deadline, and to give an immediate and effective warning to the population of the danger posed by their presence.

A number of States pointed out that a 10-year fixed period for the clearance of minefields was unrealistic. In addition, at the Brussels Conference the United Kingdom, referring to the problems of clearing "undetectable" plastic mines in the Falkland Islands, proposed that an exception be made in the case of land of marginal economic value where the risk to the civilian population was minimal. The ICRC, however, asked States not to extend the time period and reminded them that the recently adopted obligation in Protocol II as amended to clear mines at the end of hostilities should not be weakened. The ICRC insisted, as did a number of others, that an open-ended commitment to clear all anti-personnel mines "as soon as possible" was inadequate, as it risked detracting from some of the undoubted urgency that would be contained in a specified time-period. The shortest possible time frame was desirable from a humanitarian point of view; on the other hand, a number of countries were so severely contaminated by mines that too short a period would be unrealistic and might deter their adherence to the treaty.

For this reason, the ICRC proposed that the obligation to clear anti-personnel mines laid in minefields within 10 years should be maintained, but that States Parties needing more time could apply for an extension period.²³ In this way progress in mine clearance and the need for greater international assistance and support could be objectively assessed. Given the difficulty of distinguishing “minefields” from “mined areas”, at the Oslo Diplomatic Conference the obligation to demine within 10 years of the treaty’s entry into force for each State was expanded to include all emplaced anti-personnel mines, though with the possibility for severely mine-affected States to be granted extension periods of up to 10 years at a time. As a result of this agreement the definition of a minefield was removed and only that of a mined area remained; this was deemed to be “an area which is dangerous due to the presence or suspected presence of mines.”²⁴

The final issue of importance to note is that the obligation to demine covers all territory under the jurisdiction *or* control of a State Party.²⁵ This means that the obligation extends to a situation where an insurgent or separatist armed force controls a certain portion of territory within the boundaries of a State. Of course, when deciding whether to grant an extension period, States Parties can be expected to sympathize with a fellow State unable to clear emplaced mines because it does not have physical control of all of its territory.

International cooperation and assistance

It was evident that where both the clearance of emplaced anti-personnel mines and the destruction of stockpiled mines were concerned, international cooperation and assistance would play an essential role in ensuring early adherence to the treaty and its successful implementation on the ground.²⁶ At the Vienna Expert Meeting, the ICRC pointed out that the treaty’s technical demands would be entirely different from those set out in Protocol II as amended, which envisages the use of new types of

²³ *Comments of the International Committee of the Red Cross on the Third Austrian Draft (13/5/97) of the Convention on the Prohibition of Anti-personnel Mines*, Informal Working Paper for the Oslo Negotiations, September 1997. A similar extension period is contained in section C (paras. 24-28) of the Verification Annex of the 1992 Chemical Weapons Convention.

²⁴ Art. 2, para. 5.

²⁵ Art. 5, para. 1.

²⁶ Art. 6.

mines. Therefore, the text relating to technical assistance could not be identical to that painstakingly put together in the CCW negotiations.

Assistance to mine victims

Similarly, international support would be a crucial element with regard to the need to provide long-term care and assistance for mine victims. In its formal comments on the third Austrian draft,²⁷ the ICRC called for the inclusion of a provision requiring each State Party in a position to do so to provide assistance for the care and rehabilitation of landmine victims and for mine-awareness programmes. A further proposal that States Parties accept a duty under Article 1 to assist mine victims was, however, not retained. The relevant provision incorporated in the final text of the treaty expressly mentioned the possibility of channelling assistance to mine victims through relevant non-governmental organizations (NGOs), the United Nations and components of the International Red Cross and Red Crescent Movement.²⁸ Following a proposal by the ICBL, the provision also set out an obligation to provide international assistance for the social and economic reintegration of survivors of mine explosions.²⁹ As ICBL representatives rightly noted during the negotiations in Oslo, comprehensive assistance to mine victims demands more than surgical care and physical rehabilitation.

Promoting compliance and implementation

As already mentioned, the issue of verification of compliance with the treaty was the subject of very detailed debate. At the Vienna Expert Meeting, differences arose between States which thought that little or no verification was necessary to oversee what was essentially a humanitarian treaty, and those which felt very strongly about the security implications of a ban and therefore pushed for comprehensive verification procedures similar to those provided for in earlier disarmament agreements. One country, Saint Lucia, speaking on behalf of the Organization of American States, pointed out that countries in Central America were eager to comply with the treaty and to cooperate fully where transparency and exchange of information were concerned in order to obtain outside assistance in eliminating their anti-personnel mines. This positive approach, it

²⁷ *Supra*, note 23.

²⁸ Article 6, para. 3.

²⁹ *Idem*.

suggested, was preferable to attempts to “catch” treaty violators through traditional verification mechanisms.

In the same spirit, at the subsequent Bonn Expert Meeting one government proposed the creation of an implementation or fact-finding commission which would work on a cooperative basis. While no consensus on any approach emerged from the discussions, the Chairman’s summary mentioned the need to ensure that any mechanism was cost-effective and practical, stressed the value of information exchange and raised the possibility of providing for fact-finding missions. The Chairman declared that a possible adoption of the approach used in arms control agreements would require further discussion and emphasized the reference to an “effective” ban in UN General Assembly resolution 51/45S.

Discussions continued in June 1997 at the Brussels Conference, during which a number of countries, including Norway, Sweden and Switzerland, asserted that since this was primarily a humanitarian law treaty, detailed verification was not essential, and might even dissuade adherence. Ecuador claimed that the prohibitions on production and export were needed to ensure that the treaty would be respected. Others, notably Australia, called for a disarmament treaty that would attract universal adherence, suggesting that the Ottawa treaty might be a “permanent partial solution”. Uruguay called for a “balanced formula” including effective verification provisions so that the treaty did not become merely an expression of good intentions.

Several “transparency measures” had already been included in the first Austrian draft. By the time the definitive text was drawn up, the list of items to be reported had grown considerably. Under Article 7 of the Ottawa treaty, each State Party must provide the Depositary with a detailed report on many compliance-related matters within 180 days of the treaty’s entry into force. Provision is also made for fact-finding missions to clarify any doubts as to the compliance with the treaty by a State Party.³⁰ For obvious reasons, this was a difficult provision to negotiate and it is easily the longest article in the treaty. Less controversially, it was agreed that States Parties would meet annually following the treaty’s entry into force up until the date of the first review conference, scheduled to take place five years after the treaty comes into force. Amendments may, however, be proposed at any time after the treaty has become legally binding. The relatively simple procedures regarding the facilitation and clarification of

³⁰ See Art. 8.

compliance are likely to be complemented by a “citizen-based monitoring mechanism”, the details of which are to be elaborated during the course of 1998.

National implementation

Taking up a proposal made by the United States during the negotiations leading to the adoption of Protocol II as amended, the first Austrian draft text had incorporated a provision for compulsory universal jurisdiction for wilful acts committed during armed conflict and causing death or serious injury. In the second draft, however, the proposed provision had been considerably watered down to a duty only to take “all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party (...) undertaken by persons or on territory under its jurisdiction or control.”³¹ Accordingly, at the Bonn Expert Meeting the ICRC circulated an informal proposal on detailed national implementation measures. At the Oslo Diplomatic Conference, Switzerland introduced a proposal for compulsory jurisdiction over any national of a State Party who has used anti-personnel mines or ordered them to be used. Unfortunately, and perhaps as a consequence of the largely disarmament background of many of the negotiators, this proposal was not retained. The provision finally adopted is largely that contained in the second Austrian draft, and therefore normally — though not always — requires the adoption of national legislation.

Reservations

An article prohibiting reservations to the provisions of the treaty, similar to the one found in the 1992 Chemical Weapons Convention, was already included in the first Austrian draft. It remained unchanged throughout the period of negotiations, although at the Oslo Diplomatic Conference several States tried to weaken it by inserting an exception for periods of armed conflict or to have it deleted altogether.³²

Entry into force

The first Austrian draft had proposed that the treaty should enter into force six months after the deposit of the fortieth instrument of ratification.

³¹ See Art. 10, Second Austrian Draft.

³² Art. 19.

Some States felt that the number was too high; the ICRC, for its part, reminded the participants at the Oslo Diplomatic Conference that the 1949 Geneva Conventions and their 1977 Additional Protocols had entered into force after the deposit of just two ratifications. Indeed, from a humanitarian viewpoint the application of the new treaty even by a limited number of States would provide significant benefits and encourage others to follow. However, some other States felt that the security implications of forgoing anti-personnel mines were significant and that even more than 40 ratifications should be required.

Ultimately, a compromise agreement was reached, stipulating that 40 ratifications would be needed for the treaty to come into force.³³ As at the time of writing, 11 States — Belize, Canada, the Holy See, Hungary, Ireland, Mauritius, Niue, San Marino, Switzerland, Trinidad and Tobago, and Turkmenistan — had deposited their instruments of ratification with the Depositary, the UN Secretary-General. It is hoped that the number of 40 ratifications may be reached well before the end of 1998, so that the treaty could come into force in early 1999.

Following a suggestion by Belgium, an opportunity was given to the first 40 States to declare, at the time of ratification, that they would provisionally apply the treaty's core provisions, set out in Article 1, para. 1 (i.e., the prohibitions on use, development, production and transfer) until the entry into force of the treaty as a whole.³⁴ As at the time of writing, two States — Mauritius and Switzerland — had taken advantage of this possibility.

Withdrawal

The first Austrian draft text had provided for withdrawal from the treaty on 90 days' notice if a State decided that "extraordinary events [had] (...) jeopardized [its] supreme interests." At the Vienna Expert Meeting a number of different approaches to this question were already emerging. Some States were of the opinion that no right of withdrawal should be permitted in view of the danger that it might be used when a country was engaged in an armed conflict, which was precisely when compliance with the treaty's provisions was most important. Mexico made a proposal along the lines of the withdrawal clause contained in 1977 Additional Protocol I whereby withdrawal was possible but would not be effective during an

³³ Art. 17.

³⁴ Art. 18.

ongoing armed conflict.³⁵ Other States proposed a straightforward withdrawal clause similar to that contained in the Austrian draft text. At the Oslo Diplomatic Conference there was extensive negotiation on this issue. Finally, agreement was reached on a provision that allows effective withdrawal six months after receipt of the relevant instrument by the Depository. If, however, at the end of that six-month period the withdrawing State Party is engaged in an armed conflict, the withdrawal will not take effect before the end of the armed conflict.³⁶

The implications of the Ottawa process for international humanitarian law

The success of the Ottawa process marks a welcome return to the traditional approach to the development of international humanitarian law whereby treaties are adopted without a consensus rule. Indeed, recent negotiations in the domain of international humanitarian law, such as those on the 1980 CCW, were governed by the practice of consensus. The formal CCW review process demonstrated the limitations of this method where landmines were concerned. With this in mind, it may well be necessary to review the practice of adopting agreements by consensus for future CCW negotiations (a Second Review Conference is scheduled for 2001).

In addition, the continuing importance of the CCW should be stressed. It is the only framework, based on international humanitarian law, for the specific regulation of existing conventional weapons and for responding to the emergence of new weapons. The regulation of the employment of anti-personnel mines by Protocol II as amended should be seen as the absolute minimum norm for States which continue to use them. Protocol II as amended also remains the only international instrument specifically governing the use and transfer of anti-vehicle mines and establishes the rule that those who use mines of whatever type are responsible for their removal at the end of hostilities. This could prove to be an important protection, even for Parties to the Ottawa treaty, in situations of conflict with a State not party to it.

For the ICRC, and indeed for the International Red Cross and Red Crescent Movement as a whole, the mines campaign has provided an

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Article 99.

³⁶ Art. 20.

example of how successful advocacy in the interests of war victims can be carried out in the post-Cold War environment. Dozens of National Red Cross and Red Crescent Societies, including many new to campaigning, have felt empowered to advocate on behalf of mine casualties present and future. The campaign has been conducted without compromising the fundamental principle of neutrality, which prohibits components of the Movement from taking sides in a conflict or favouring particular political parties or groups. This principle is intended to ensure that all victims of war receive protection and assistance — it is therefore a means to an end, not an end in itself.

The Ottawa process has also shown that civil society has a crucial role to play in strengthening international law. The complementary role played by key governments, the ICBL and the ICRC augurs well for the future development of international humanitarian law. In contrast to the ICRC, the ICBL has been able to criticize the positions of specific governments directly and publicly. On the other hand, the ICRC's special status as an international organization and its network of professional military officers working with armed forces on humanitarian law issues give it access to governmental and military circles, which NGOs often do not have.

The global mobilization that has been necessary to achieve an international legal norm prohibiting anti-personnel mines has also clearly shown that the international community must seek a more preventive approach to the control or prohibition of weapons which go against international humanitarian law, and a more dynamic method of developing that law. The Ottawa process has raised awareness among the general public of the limits that must be placed on the conduct of warfare. As a result, higher expectations will be placed on the behaviour of States. At present the ICRC is examining, together with medical experts, possible objective medical criteria to determine whether the effects on health of a given weapon are of a nature to cause superfluous injury or unnecessary suffering.³⁷

Despite its success, the Ottawa process has most clearly demonstrated the need for a more preventive approach to arms issues under international humanitarian law. One must ask whether appalling levels of civilian death and injury have to be reached before the use of each new weapon which

³⁷ See Coupland, R. M. (ed.), *The StrUS Project, Towards a determination of which weapons cause "superfluous injury or unnecessary suffering"*, ICRC, Geneva, 1997.

may violate international humanitarian law is either regulated or prohibited, as the case may be. Far more systematic analysis and informed debate is needed before any new weapon is deployed. The recent agreement to prohibit, in advance, the use and transfer of blinding laser weapons is a basis for hope.³⁸ Given the rapid development of new technologies, the protection provided by humanitarian law will be of crucial importance in making sure that humankind is the beneficiary, and not the victim, of technical advances which have profound implications on the waging of war.

³⁸ Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, May-June 1996, pp. 272-299.

Civil Defence 1977-1997: from law to practice¹

by Stéphane Jeannet

Concern has been expressed recently that the rules of international humanitarian law pertaining to civil defence² have been somewhat neglected since 1977 and that, 20 years on, the time has come to assess whether these rules are sufficiently realistic and have retained their validity. The purpose of civil defence rules is clear, i.e. "to mitigate the losses, damage and suffering inflicted on the civilian population by the dramatic developments of the means and methods of warfare".³ But while the primary purpose of civil defence rules may be formulated quite simply, the means of achieving it are naturally far more complex, indeed increasingly so given the effects of the ever more destructive methods of warfare as well as the changing nature of conflicts, which is resulting in a larger proportion of civilians being killed. It has also been recognized that the rules governing civil defence would remain a dead letter if they were not made known to those for whom they are intended. The current lack of awareness has therefore made efforts to spread knowledge of these rules a matter of necessity.

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¹ A shorter version of this article was published in the *International Civil Defence Journal*, Vol. X, N° 4, December 1997, pp. 25-27. The full report of the meeting, S. Jeannet (ed), 1977 - 1997, *Civil Defence: From Law to Practice*, 1997, 89 pages (in English, with a French summary), can be obtained either from the ICDO or from the ICRC.

² Articles 61 to 67 of Protocol I, which grant civil protection a status comparable to that of medical units. See below, Section I.

³ See Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 2319.

The International Civil Defence Organization (ICDO) and the International Committee of the Red Cross (ICRC) therefore jointly organized a meeting of experts on the implementation of international humanitarian law relating to civil defence. Held from 30 June to 2 July 1997 in Gollion, Switzerland, the meeting was prompted by Resolution 2 (A[j]) of the 26th International Conference of the Red Cross and Red Crescent (1995), which "invites States party to Additional Protocol I to implement and disseminate the rules of the Protocol regarding civil defence and recommends that the [ICRC], in collaboration with [ICDO], encourage international cooperation in this field and the inclusion of this question in international meetings on international humanitarian law".⁴

Before examining the main findings of the meeting of experts, it may be useful to briefly outline the legal framework dealing with civil defence.

The legal framework: Protocol I, Part IV, Section I, Chapter VI⁵

Civil defence organizations are intended to protect the civilian population against the dangers presented by war and other disasters and to help it recover from their immediate effects, as well as to ensure the conditions necessary for its survival (warning, evacuation, shelters, rescue, medical services, fire-fighting, public services, etc.). These organizations and their personnel are entitled to carry out their tasks in all but cases where imperative military necessity makes this impossible. Civil defence personnel must be respected and protected. Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the State to which they belong.⁶ These rules also apply to occupied territory, where civil defence organizations must receive from the authorities the facilities needed to carry out their tasks. The occupying power may not requisition buildings or equipment belonging to civil defence organizations nor divert them from their proper use.⁷ The same rules apply to the civil defence organizations of neutral States operating on the territory of a party to the conflict with the consent and under the control of that party.⁸

⁴ Reprinted in *IRRC*, No. 310, January-February 1996, p. 62.

⁵ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). - Regarding Section I, see Jean de Preux, "Protection of civilian populations against the effects of hostilities", Synopsis II, *IRRC*, No. 246, May-June 1985, pp. 153-160.

⁶ Protocol I, Articles 61 and 62.

⁷ Protocol I, Article 63

⁸ Protocol I, Article 64.

This protection ceases only if civil defence organizations are used to commit, in addition to their rightful tasks, acts harmful to the enemy, and then only after an appropriate warning with a reasonable time limit has been given and disregarded. Civil defence organizations may be formed along military lines, cooperate with military personnel or placed under the direction of military authorities and incidentally benefit military victims. None of these may be considered as a harmful act. The same applies to the carrying of light individual weapons by civilian personnel for the purpose of maintaining order or for self-defence.⁹ The distinctive emblem of civil defence organizations is an equilateral blue triangle on an orange background.¹⁰

Members of the armed forces and military units permanently and exclusively assigned to civil defence organizations must be respected and protected, provided that the conditions stated above are observed and that those individuals prominently display the international, distinctive civil defence emblem. If they fall into enemy hands, they become prisoners of war.¹¹

1977-1997: the changing nature of the world

Those taking part in the Gollion meeting expressed the view that our world, and the way it was perceived, had changed considerably since Protocol I was signed in 1977. New factors included the following:

- a much stronger United Nations presence in the field, i.e. peace-keeping and humanitarian operations;
- a proliferation of NGOs involved in humanitarian work;
- an apparent lessening of the threat of nuclear conflict and therefore less attention devoted to it by civil defence organizations;
- a shift in the type of conflicts being fought, which had resulted in problems different from those encountered at the time when the Protocol was signed;
- a change in the manner in which civil defence itself was perceived, particularly in Eastern Europe, where it was now less closely linked to military structures.

⁹ Protocol I, Article 65.

¹⁰ Protocol I, Article 66 and Annex I.

¹¹ Protocol I, Article 67.

The participants felt that civil defence organizations had in the past sometimes had an important role to play in the event of armed conflict. But that role — in particular as set out in international humanitarian law — was relatively unknown, even within the ICRC. Not enough had been done to promote knowledge of that role.

The Gollion meeting went on to draw the following conclusions.

Tasks assigned to civil defence

A distinction had to be drawn between the civil defence tasks set out in Protocol I — and performed by a number of different organizations — and the civil defence organizations themselves. The list of tasks laid down by the Protocol was fairly comprehensive, though this view was not shared by all. Activities such as protecting the environment and cultural objects were not covered by Protocol I, Art. 61, but nor were they precluded. The list of tasks enumerated in that provision therefore remained valid. It must moreover be understood that tasks and priorities would vary according to different conditions in different regions and at different levels of economic development, and thus be interpreted and carried out in different ways as a result. While civil defence organizations could engage in all kinds of work in peacetime, it was necessary that their tasks in times of conflict — those protected by international law — be clearly defined. Any work that could be viewed as having military implications could not be expected to enjoy protection in wartime. In long-lasting conflicts, repairs to damaged housing — as opposed to the building of temporary shelters (the usual method) — was an approach requiring further discussion but did not appear incompatible with the function of civil defence.

Action by outside organizations

In many situations, there was international support for national civil defence activities but this rarely functioned as intended by Protocol I, i.e. that foreign organizations should take action under the direction of the national civil defence body. The reality was that international support tended to take the form of relief work or peace-keeping. The United Nations humanitarian organizations (in particular the UNHCR), the ICRC and various NGOs often worked in support of local civil defence organizations, with the international bodies essentially retaining their separate identities. This seemed preferable since if they allowed themselves to be identified with a civil defence organization when carrying out certain

tasks, confusion might result. A shared identity would then present more disadvantages than advantages.

Such cooperation should be developed and encouraged in wartime. In peacetime, there was often cooperation with National Red Cross and Red Crescent Societies on such matters as first-aid training. It was important that the various organizations recognize each other's existence and act in complementary fashion, not as rivals.

Role of the military

Consideration must also be given to the possible use of military personnel for civil defence activities. The placing of civil defence organizations under the direction of — or even merging them with — the military (which is tolerated by Protocol I) would seem to entail a number of disadvantages since it would then be more difficult to discern a separate role for civil defence, and there would be a greater temptation to use civil defence organizations for military purposes. In addition, the impression given to the outside world would make it more difficult for them to obtain protection. There was therefore a broad view that emphasis should be laid on the civilian nature of civil defence organizations. The trend in Russia and other Eastern European countries — to switch from military to civilian control over civil defence — was noted with approval at Gollion.

Nevertheless, placing civil defence under military command, which was increasingly the case in Africa in particular, might also present some advantages because of the facilities and means available to the armed forces. The Gollion meeting felt that this matter required further investigation, especially as it was not clear in such cases who would replace the military for conventional civil defence tasks in the event of armed conflict.

Security issues

There was debate in Gollion about whether civil defence organizations should be armed. While their members were entitled under Protocol I to carry light weapons, it was felt that this might give them a false sense of security, especially as they could easily forfeit their protection under humanitarian law by using their weapons inappropriately. Moreover, the bearers of those weapons might be viewed as a threat and become targets for military attack. It was therefore recommended that the arming of civil defence personnel should, as far as possible, not be considered.

The safety of the personnel of both civil defence and humanitarian organizations remained a delicate problem, in particular in situations where State structures had collapsed. No ideal or simple solutions were available; each present-day conflict had its specific nature and must be considered separately in an attempt to find a solution.

Non-international armed conflicts

Non-international armed conflicts were today the most widespread type of conflict. However the international rules applying to them did not specifically include protection for civil defence work, though they did not prohibit those activities either. Clearly, certain provisions applicable to international conflicts (such as those regarding occupied territories) were not, strictly speaking, applicable to internal conflicts, but the general trend was to apply these *mutatis mutandis* and confer similar protection in the case of internal conflict. This trend should obviously also be encouraged with regard to provisions on civil defence, in keeping with Article 18 of Additional Protocol II, which deals with relief societies and relief operations in non-international armed conflicts.

In most cases, civil defence organizations were State entities and it was therefore difficult for them to continue performing their duties on territory controlled by a dissident party engaged in an internal conflict. They should nevertheless do their utmost to do so. If this was not possible, civil defence services should be provided by the dissident party.

Another even more acute problem was that of conflicts in which basic humanitarian rules were themselves called into question and civil defence activities (as well as humanitarian action generally) ran counter to military objectives. This arose in cases involving forced displacement of entire populations and genocide. The problem was obviously a very broad one and went beyond the realm of civil defence. It would require further analysis, in particular regarding its root causes. Under international humanitarian law, the only possible way to deal with this was through action of a preventive nature: promoting respect for and compliance with the basic rules and principles of that law. Such programmes should also aim at raising the awareness of members of civil defence organizations regarding the meaning of their mission in such conflicts. Though civil defence workers were often employees of the State, they had a humanitarian role, i.e. one with a moral content. This fact should be greatly stressed.

Promoting compliance

Civil defence rules must be known and complied with and the international emblem for that activity must be widely recognized. Public awareness of the rules regarding civil defence work should therefore be raised.

It was important that national legislation clearly set out the steps to be taken to protect civil defence organizations in wartime and that measures to repress violations of international humanitarian law include the field of protection for civil defence work.

Cooperation between civil defence organizations from different countries was also desirable and there should be an exchange of ideas regarding promotional activities. The ICDO could serve as a link for this.

Regarding compliance with the rules by armed forces, stress was laid on promoting knowledge of those rules and the meaning of the emblem as part of general dissemination by the States. Emphasis was also laid on ensuring adequate knowledge of the rules and the emblem among the members of United Nations forces. The United Nations Department for Peace-keeping Operations had a role to play in this respect by reminding States providing peace-keeping contingents of their responsibilities in this area.

In order to reassure their potential enemies, the States should be invited to declare clearly and publicly (possibly through a notification circulated by the depositary among the States party to Protocol I) that their civil defence organizations would carry out the tasks laid down in Art. 61 of that treaty and comply with the rules of international humanitarian law. This could be done even by States not yet party to Protocol I.

Regarding the role of the organizations that had convened the Gollion meeting, the ICRC should place greater emphasis on civil defence and its emblem in the ICRC's work to promote knowledge of the law. It could also share its expertise in such matters. As the umbrella body for the various civil defence organizations around the world, the ICDO had an important role to play in promoting the sharing of experience between its members and promoting knowledge of the international emblem.

Civil defence emblem

No additions should be made to the emblem, referred to in Protocol I as "the international distinctive sign". Governments that had made additions should be asked not to do so and to amend their legislation.

If States not party to the Protocol wished to use the emblem, they should be allowed and encouraged to do so provided that they accepted the entire civil defence chapter of Protocol I. The importance was strongly emphasized of adopting appropriate national legislation to regulate use of the emblem and impose penalties for misuse. It was agreed that the States party to Protocol I should be reminded of that obligation. National legislation might be modelled on the law regarding the red cross and red crescent emblem.

There was lengthy discussion of the use by civil defence personnel of other emblems in addition to the international civil defence emblem. It was clear that medical services operated by civil defence organizations should indicate that they were protected by displaying either the red cross or red crescent emblem or the international civil defence emblem. Other emblems would not afford protection under international humanitarian law.

On the question of whether the international civil defence emblem should be the only one used in peacetime, it was stated that existing symbols and identification marks aroused strong feelings of identity among the members of certain organizations. Private organizations working officially in the civil defence field should therefore not be forbidden to use their own signs or symbols — which were often a long-standing means of identification and recognized nationally — in addition to the international emblem. It was noted in passing that the logo of the ICDO was different from the international emblem.

It should be made clear, however, that only the international civil defence emblem provided protection. The civil defence authorities should therefore ensure that the international emblem was used only when justified by the activities undertaken.

The peacetime range of civil defence activities actually carried out was broader than that entitled to protection. It was noted that care must be taken to ensure that, in wartime, the emblem was displayed only in connection with activities entitled to protection under Protocol I.

Regarding the need to improve the visibility and recognition of the protective emblem, it was agreed that States should be invited to adopt relevant measures and conclude agreements as specified in Protocol I and that the ICRC, which had done considerable work on the subject in connection with the red cross emblem, should be asked to exchange information with the ICDO on the subject.

General conclusions

An item on the Gollion agenda asked whether the rules on civil defence were sufficiently realistic and had retained their validity in modern wars. The experts' conclusion was that the rules remained valid and that efforts must be made to implement them. Those rules should therefore be reaffirmed in order to dispel any doubt and ensure that they remained the basis for future action.

There was agreement that, in contrast with the provisions regarding Red Cross and Red Crescent activities, the rules laid down in Articles 61 to 67 of Protocol I were not well enough known, even in civil defence circles. There was therefore a need for broader and more determined work to spread knowledge of them. The Red Cross and Red Crescent Movement's dissemination work was well known but other specialized institutions in this field (such as the International Institute of Humanitarian Law, which held courses for military personnel in particular, and the ICDO) should be encouraged to give greater attention to the rules regarding civil defence activities for the protection of conflict victims.

Finally, some States not party to Protocol I had agreed, for humanitarian reasons, to implement and include in national legislation the rules set out in that Protocol. Other States in a similar position should be encouraged to do likewise.

International Committee of the Red Cross

Public statement by the ICRC on the situation in Kosovo

The ICRC has a long-standing policy of approaching parties to a conflict in a confidential manner, if it deems it necessary to draw their attention to violations of international humanitarian law or to issues which are otherwise unacceptable from a humanitarian standpoint, and to ask those responsible to change course. However, the ICRC has always kept open the option of making a public statement on conditions in a conflict situation, if the circumstances so require. This is normally the case when its delegates are faced with particularly serious humanitarian problems caused or aggravated by repeated or ongoing violations of fundamental humanitarian obligations.

On 15 September 1998, the ICRC published its "position on the crisis in Kosovo". The Review brings this document to the attention of its readers, as an example of a public statement made in a situation of conflict or internal strife.

ICRC position on the crisis in Kosovo

Events in Kosovo have taken a turn for the worse. The International Committee of the Red Cross (ICRC) is convinced that the situation in the region has reached a critical stage in terms of its humanitarian implications for the civilian population, forcing all those involved in the conflict to face up to their responsibilities.

At this very moment, as has been the case for several weeks now, tens of thousands of civilians are caught up in a devastating cycle of attacks and displacements. They are exposed to violence, including threats to their lives, destruction of their homes, separation from their families and abductions. Thousands of them have nowhere left to go and no one to turn to for protection.

From a humanitarian perspective, it has become apparent that civilian casualties are not simply what has become known as “collateral damage”. In Kosovo, civilians have become the main victims — if not the actual targets — of the fighting. The core issue to be addressed immediately is that of the safety of, and hence respect for, the civilian population. First and foremost, this means that every civilian is entitled to live in a secure environment and to return to his or her home in safe and dignified conditions.

The authorities of the Federal Republic of Yugoslavia have pledged to facilitate the return of displaced persons to their villages and have designated a dozen locations where aid will be distributed with their support. For their part, Western governments have in recent weeks put forward a number of proposals aimed at encouraging return to selected areas in Kosovo. In principle, all measures that can contribute to improving security conditions and building confidence are welcome. Indeed, a number of people are reported to have made their way back to some villages in central and western Kosovo.

However, a significant discrepancy has emerged between the policy of favouring returns and the very nature of the operations carried out by the security forces in past weeks. These operations have led to further killings and wounding of civilians, to large-scale destruction of private property and to further mass displacements. They have also created a climate of deep and widespread fear.

These latest events have added to the heavy price already paid by the civilian population, including the killing of dozens of Serb civilians and the abduction of over a hundred more, whose fate remains unknown.

The discrepancy between the policy of inviting the displaced to return to their homes and the manner in which operations are being conducted is illustrated by certain practices witnessed by ICRC delegates in the field.

Large-scale operations have been carried out against villages and other locations where displaced people have sought refuge. These have had the following consequences:

- The killing or wounding of civilians, large-scale destruction of property, and the flight of vast numbers of residents and people who had already been displaced. This was the situation on 10 September between Istnic and Krusevac, where panic-stricken civilians were forced to take to the roads once again just when the authorities were planning to open an additional aid centre in that very place.

- Fleeing civilians becoming trapped in remote areas or very exposed terrain. Some of them have suffered further attacks, for example the shelling on 29 August of people sheltering in a gorge near Sedlare.
- The screening of entire population groups for the stated purpose of identifying individuals having taken part in operations against the security forces, ill-treatment and intimidation during interrogation, and failure to notify families of the whereabouts of those being held. For instance, this happened in Ponorac on 5 September, when several dozen men were taken away. Their families are without news of them to date.
- Difficulties in securing access to medical treatment for the wounded and the sick in hospitals in Kosovo.

Today, thousands of civilians — Albanians, Serbs and others — are living in a climate of extreme insecurity and fear. The ICRC therefore wishes to state the following:

- Responsibility for ensuring the safety of and respect for the civilian population lies with the Serbian authorities. They must take every possible measure to protect civilians. Specifically, the ICRC calls on the Serbian authorities to put an end to the disproportionate use of force and to specific acts of violence directed against civilians, including the wanton destruction of property. The ICRC renews its appeal for rapid access, in accordance with its recognized working procedures, to all persons arrested in connection with the events in Kosovo.
- The ICRC calls on Albanian political representatives and on the UCK (Kosovo Liberation Army) to do everything possible to help put an end to the reported killings, and to enter into a meaningful dialogue on, and provide information about, the fate and whereabouts of abducted Serbs in Kosovo.
- Beyond the humanitarian implications lies the issue of the political settlement of the crisis. The ICRC is convinced that the international community needs to draw lessons from the experience gained in this respect elsewhere in the Balkans. The ICRC considers it crucial to keep the political and the humanitarian dimensions of the crisis clearly separate.

Displaced persons have only one wish, and that is to return home. They should be allowed to do so freely. However, until the conditions are created that enable them to do so, they should receive assistance wherever they are, and the places where humanitarian aid is provided ought not be limited to particular sites.

The ICRC is well aware of its responsibility to use all available means to reach civilians both in remote areas and in their own villages, to attempt to gain access to persons arrested, to establish the whereabouts of those abducted, and to ensure that the wounded and the sick receive adequate treatment. The ICRC currently has 17 expatriates and some 50 locally recruited staff operating under difficult conditions throughout Kosovo. It has the additional responsibility of mobilizing resources within the broader context of the International Red Cross and Red Crescent Movement.

The ICRC will vigorously pursue its efforts to establish a dialogue with the Yugoslav authorities and the representatives of the Albanian community with a view to finding the most appropriate humanitarian response to the present crisis. It will seek to maintain close coordination with other humanitarian agencies in the field, such as UNHCR. It will also continue to coordinate and cooperate closely with the International Federation of Red Cross and Red Crescent Societies and with the Yugoslav Red Cross.

All those involved in the conflict must acknowledge and assume their respective responsibilities. This is a prerequisite if they are to succeed in alleviating the widespread insecurity and fear and in avoiding a potentially disastrous deterioration in the situation.

International Committee of the Red Cross
15 September 1998

The ICRC Advisory Service on International Humanitarian Law will henceforth be publishing a biannual update on legislation and jurisprudence relating to national measures for the implementation of humanitarian law.

This new column forms part of the mandate entrusted to the Advisory Service. Indeed, in addition to offering advice to States, the aim of the Service is to promote the widest possible exchange of information regarding the implementation of humanitarian law, pursuant to the Recommendations of the Intergovernmental Group of Experts for the Protection of War Victims adopted by the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995).¹

The update will feature legal texts and court decisions obtained by the Advisory Service documentation centre. We hope that this new section will be as comprehensive as possible and we invite governments and individuals to inform us (see address below) of new developments in national legislation and case law relating to the implementation of international humanitarian law. The Advisory Service also publishes an annual report.

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¹ *IRRC*, No. 310, January-February 1996, pp. 58 ff.; Recommendations of the Intergovernmental Group of Experts for the Protection of War Victims, Recommendation VI, *ibid.*, p. 86.

Implementation of international humanitarian law
Biannual update of national legislation
and jurisprudence
January to June 1998

A. Legislation

Canada

The Canadian National Committee on International Humanitarian Law was set up in March this year pursuant to the memorandum of understanding of 18 March 1998 between the Departments of Foreign Affairs and International Trade, National Defence and Justice, the Royal Canadian Mounted Police, the Canadian International Development Agency and the Canadian Red Cross Society.

Colombia

Decree No. 860, issued on 8 May 1998, provides for the protection and use of the Red Cross name and emblem and for the protection of Red Cross activities. It also facilitates the delivery of humanitarian services in Colombia.

France

On 25 June 1998 the National Assembly unanimously adopted an Act aimed at banning antipersonnel mines,² based expressly on the Ottawa Convention of 3 December 1997. This Act supplements the Act of 1 July 1998 authorizing ratification of the Convention.³

Besides prohibiting the development, manufacture, stockpiling, supply, transfer and use of anti-personnel mines, the Act provides for the destruction of existing stocks by 31 December 2000. A national committee for the banning of anti-personnel mines will monitor enforcement of the Act, which will come into effect on the date of the Ottawa treaty's entry into force on 1 July 1999.

²Loi n° 98-564 du 8 juillet 1998 tendant à l'élimination des mines antipersonnel, *Journal officiel*, 9 July 1998, p. 10/456.

³Loi n° 98-542 du 1er juillet 1998 autorisant la ratification de la Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction, *Journal officiel*, 2 July 1998, p. 10/078.

Germany

The Act relating to cooperation with the International Criminal Tribunal for Rwanda was issued on 4 May 1998.⁴ It is almost identical to the Act of 10 April 1995 on cooperation with the International Criminal Tribunal for the former Yugoslavia. Both refer to the Act on mutual international assistance in criminal matters (*Bundesgesetzblatt*, I, 1537), which becomes widely applicable by analogy.

Italy

On 16 February 1998 the Minister for Foreign Affairs issued a Decree⁵ establishing the Italian National Committee for International Humanitarian Law. The Committee was set up to examine measures necessary to adapt domestic law to the rules of international humanitarian law. The Decree makes specific reference to the measures to stem from the decision of the July 1998 Rome Diplomatic Conference to establish a permanent international criminal court.

Peru

The Official Gazette of 21 February 1998 published Act No. 26/926 modifying various articles of the Penal Code and incorporating a chapter on crimes against humanity.⁶ The crimes covered include genocide, forced disappearance and torture.

Switzerland

On 20 March 1998 the Federal Assembly modified the Federal Act relating to military *materiel*.⁷ The purpose of the amendment is to bring the definition of anti-personnel mines, prohibited under Article 8 of the Act, in line with that contained in Article 2 of the Ottawa Convention. No date has yet been set for the amendment's entry into force.

⁴ Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für Ruanda (Ruanda-Strafgerichtshof-Gesetz) vom 4. Mai 1998, *Bundesgesetzblatt*, 1998, I, No. 25, 8 May 1998.

⁵ Decreto del Ministro degli Affari Esteri n° 215 bis del 16 febbraio 1998, hitherto unpublished.

⁶ Ley que modifica diversos artículos del Código Penal e incorpora el Título XIV-A, referido a los delitos contra la humanidad, *El peruano — diario oficial*, 21 February 1998, No. 6450, p. 157/575.

⁷ Loi fédérale sur le matériel de guerre, Modification du 20 mars 1998, *Feuille fédérale*, 31 March 1998, p. 1159.

Tajikistan

On 21 May 1998 Tajikistan adopted a new Penal Code containing various provisions regarding the implementation of international humanitarian law. Articles 403 to 405 punish grave breaches of humanitarian law committed in either international or internal armed conflicts. Article 333 states that abuse of the emblem and name of the Red Cross/Red Crescent is a punishable offence. The Code entered into force on 1 September 1998.

B. National jurisprudence

Belgium

In a highly criticized decision,⁸ the Brussels Military Court on 17 December 1997 confirmed the acquittal of two Belgian servicemen belonging to the Belgian contingent of the UNOSOM II operation in Somalia in 1993. They had been charged with threatening and committing assault and battery on Somali children at a checkpoint. The Court held that the Act of 16 June 1993 relative to the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their two additional Protocols was not applicable since these international instruments themselves did not apply. According to the Court, the situation in Somalia in 1993 could not be defined as an international armed conflict because the United Nations troops were conducting a peace-keeping mission and could not be deemed a party to the conflict or an occupying power. The Court further held that the events in Somalia in 1993 could not be regarded as a non-international armed conflict within the meaning of Article 3 common to the four Geneva Conventions, since the hostilities did not take place between organized armed forces, but between irregular factions behaving in an anarchical manner without an established chain of command.

In a subsequent decision handed down on 7 May 1998,⁹ the Military Court found a Belgian sergeant posted with the UNOSOM II troops guilty of assault and battery, threats and racial discrimination with regard to a Somali child, as well as incitement to immorality and indecent assault in a military camp. The Court remained silent as to the applicability of international humanitarian law to the situation in Somalia.

⁸Military Court, Brussels, 17 December 1997, *Journal des tribunaux*, 4 April 1998, pp. 286-289.

⁹Military Court, Brussels, 7 May 1998, hitherto unpublished.

France

On 6 January 1998 the Court of Cassation¹⁰ quashed a decision of the Indictment Division of the Nîmes Court of Appeal in the judicial investigation regarding W. Munyeshyaka, a Rwandan national charged with genocide and crimes against humanity. The Indictment Division had ruled that this case did not lie within the jurisdiction of the investigating judge, arguing that the alleged acts were crimes of genocide committed abroad by a foreigner on foreigners and that the Code of Penal Procedure contained no provisions regarding the jurisdiction of the French courts for such a case. The Court of Cassation held that the Indictment Division had violated the law by limiting its criminal charges to genocide, whereas the acts perpetrated could also be deemed crimes of torture, for which universal jurisdiction is provided for under Article 689-2 of the Code of Penal Procedure. The Court's decision referred the case to the Indictment Division of the Paris Court of Appeal.

Olivier Dubois
Advisory Service on
International Humanitarian Law

¹⁰Criminal Division of the Court of Cassation, 6 January 1998.

To mark the 50th anniversary of the 1949 Geneva Conventions

ICRC testing opinions on war to prompt worldwide debate

From November 1998 to August 1999, the International Committee of the Red Cross (ICRC) will be gathering the opinions of thousands of people in a dozen countries who have been directly affected by armed conflict. They will be asked to share their views on the limits to warfare set by international law and on how to improve compliance with the Geneva Conventions and other humanitarian treaties. These will be published along with the results of a parallel survey conducted in countries at peace. The participants' personal stories will be portrayed in publications, the media and on an interactive web site. The project is intended to increase awareness around the world of the rules that already exist to protect people in wartime and to encourage discussion of humanitarian law in the context of modern-day conflict.

In Colombia, the first round of the study is currently being conducted among displaced civilians, former hostages, soldiers, guerrillas, security detainees, medical personnel and members of the general public. The interviews conducted so far have yielded a fascinating insight into how people perceive the conflict in Colombia and its consequences for their country, as well as their views on the limits set by humanitarian law and the dilemmas that arise in practice.

The project, entitled "People on war", reflects the ICRC's desire to give a voice to those who have personal experience of war as well as to stimulate discussion. It will also mark the 50th anniversary of the Geneva Conventions, on 12 August 1999. For the ICRC, the anniversary is an opportunity for the world to reflect on what has occurred in the half-century since the Conventions were adopted, to take stock of the present and to consider the future of international law and humanitarian action.

The survey in each country will result in an individual report published both locally and worldwide. The findings will then be summarized in a final report drawn up at the end of the process. This will be presented at the 27th International Conference of the Red Cross and Red Crescent, scheduled to take place in Geneva in November 1999. (The International Conference brings together the 188 States party to the Geneva Conventions, 175 Red Cross and Red Crescent Societies, the International Federation of those Societies, and the ICRC itself.)

The various surveys will be conducted by means of a questionnaire among a representative sample (involving at least 1,000 individuals in each country) of the populations concerned. The opinions of people directly affected by conflict — refugees, prisoners of war, relatives of missing people, soldiers, war-wounded, etc. — will also be sought by means of detailed interviews and group discussions. This work will be carried out by ICRC staff and volunteers from the respective National Red Cross or Red Crescent Society, supported and assisted by local professional agencies. The ICRC has engaged an international opinion-survey specialist to advise it on methods, to help draft the questionnaires and to analyse the results.

International Committee of the Red Cross
Press release 98/36
10 November 1998

Henry Dunant Medal

The idea of having a medal bearing the name of the founder of the International Red Cross, which later became the International Red Cross and Red Crescent Movement, was submitted to and approved in principle by the Council of Delegates, meeting on the 100th anniversary of the Red Cross in 1963. Thanks to the generosity of the Australian Red Cross, the Henry Dunant Medal was established by the International Red Cross Conference in Vienna in 1965. The first awards were made at the next Conference, held in Istanbul in 1969.

The purpose of the Medal is to acknowledge and reward outstanding service and acts of great devotion by a member of the Movement to the Red Cross and Red Crescent cause. The Standing Commission of the Red Cross and Red Crescent is the body that selects recipients and, as a general rule, not more than five awards are made every two years. This enhances the Medal's value and maintains its prestige as the highest honour the Movement can bestow upon one of its members.

The Standing Commission proceeds according to regulations adopted in 1965 and revised in 1981. Whether it decides to recognize a single outstanding act or dedicated service over the years, under the regulations the Standing Commission has to give special weight to the international significance of the act or service. If this dimension is lacking, the Commission would tend not to select the individual concerned, whose merits, though no doubt great, should be recognized rather by his or her National Society.

In recent years, owing to the large number of staff involved in international operations and the growing insecurity in the contexts where those operations are conducted, there has been a sharp increase in deaths and injuries among members of the Movement. Since the regulations relating to the Henry Dunant Medal specifically allow for the possibility of posthumous recognition, and in that case the number of awards is obviously not limited to five, a large proportion of the Medals awarded (or almost

all of them, as was the case during the Council of Delegates in Seville in 1997) go to individuals who have died recently.

There is a growing body of opinion, including among the members of the Standing Commission, that this tendency to use the Medal as a means of honouring the memory of deceased staff members is changing the nature of the award. The Standing Commission feels that it would be preferable to devise other ways of expressing the gratitude of the Movement's components¹ to men and women who have perished or whose health has been severely affected in the service of the Red Cross and Red Crescent. The Standing Commission does not, however, support the establishment of a new medal or other type of award applicable to all members of the Movement.

The Standing Commission feels it is important — except in certain cases — that those who receive the Medal know why they have been selected. They should be looked up to as examples to be followed during their lifetime. It is thus the wish of the Standing Commission that priority be given to individuals still in active service or having recently retired, and that most of the awards should go to persons in this category. There is no intention, however, to overlook the tragedies for which the Medal has been awarded so often in the past. On the contrary, the components of the Movement (National Societies, the ICRC and the Federation) are invited to set up their own procedures, if they have not already done so, to pay tribute to their staff members who have lost their lives or have suffered bodily or psychological harm in the course of their duties. This would also make it easier to respect local custom. Depending on its situation, resources and traditions, each component of the Movement will certainly find the most appropriate solution, whether in the form of medals, certificates, commemorative plaques, publications or artistic events, gardens or other places for quiet reflection. In any case, it is important that the event receive due publicity.

In accordance with the regulations, it will still be possible to make a posthumous award of the Henry Dunant Medal. However, the components of the Movement, all of which should henceforth establish other forms of recognition in such circumstances, should submit posthumous nominations for the Henry Dunant Medal only in truly exceptional cases.

* * * * *

¹National Red Cross and Red Crescent Societies, International Federation of Red Cross and Red Crescent Societies, International Committee of the Red Cross.

CRITERIA FOR AWARDING THE HENRY DUNANT MEDAL

adopted by the Standing Commission at its meeting
of 20 and 21 April 1998

1. Intent of the Henry Dunant Medal and criteria for awarding it

“The Henry Dunant Medal is intended to recognize and reward outstanding services and acts of great devotion, mainly of international significance, to the cause of the Red Cross [and Red Crescent] by any of its members.” It may be awarded on the basis of “risks run and arduous conditions endangering life, health and personal freedom [or ...] for a long period of devoted service to the International Red Cross [and Red Crescent Movement]”. In addition to the above criteria, the Standing Commission announced publicly that it would not award the Medal to persons still working within the Movement.² Only a very small number of Medals are to be awarded at one time. The Medal may be awarded posthumously.³

The Standing Commission takes the view that the Henry Dunant Medal should be awarded to individuals who belong to the Movement and who have distinguished themselves either by their long and outstanding service to the ideals of the Movement, or because they acted with exceptional courage and dedication in a given situation or situations. Furthermore, the Standing Commission will evaluate candidates according to the following interpretation of the Regulations.

1.1 Member

A “member” of the Red Cross/Red Crescent may be an individual volunteering his or her time without thought of pecuniary gain, or a paid professional (delegate, staff member) earning a living from his or her work for the Movement. When putting forward or judging a candidate, the accent should be on the exceptional nature of the act rather than on the member’s status.

² See the Standing Commission’s circular letters concerning the award of the Henry Dunant Medal, addressed to National Societies on 27 November 1994 and 15 November 1996.

³ See Articles 1, 2, 5 and 6 of the Regulations.

When the Standing Commission decided that persons still active in the Movement should not receive the Medal, it was in order to judge candidates more even-handedly, to avoid using the award simply to recognize long careers, and to eliminate any actual or perceived exertion of personal influence by certain leaders. This rule is maintained, and applies to all candidates still occupying a senior position within one of the Movement's components or statutory bodies.

The Medal will not be awarded to a member of the Red Cross/Red Crescent who is also engaged in activities outside the Movement in a field that could be contrary to the Fundamental Principles of neutrality and independence.

1.2 International significance

The Regulations state that the Henry Dunant Medal should mainly recognize acts or services of "international significance". This is to distinguish the Henry Dunant Medal from other medals that individual National Societies have established or may establish to pay tribute to their members on the national level. Thus candidates should be put forward and judged in terms of their specific contribution to the international aspects of the Movement's work, be it in the field of general policy, governance or operations.

1.3 Risks run and arduous conditions endangering life, health, and personal freedom

When the Henry Dunant Medal was established, it was primarily meant to recognize acts of great courage during a field operation. Indeed, many of those who initially received the Medal distinguished themselves through their exceptional courage and devotion to the humanitarian ideal during major operations. Over time, and particularly in recent years when respect for humanitarian personnel has declined in many contexts, the Medal has been awarded to delegates or personnel who were killed or seriously wounded in the line of duty. While there is no doubt that it is important and necessary to recognize those who have given their lives or suffered serious physical or psychological harm in the course of their duties, it would be preferable that each component of the Movement establish its own award in order to preserve the unique character of the Henry Dunant Medal.

Naturally, if a member of the Red Cross/Red Crescent who has been killed or wounded in the line of duty also acted with great courage and devotion and took risks in order to help others, he or she could be awarded

the Medal. In judging a candidate, the accent must be placed on the exceptional merits of the individual rather than on the danger inherent in many operational activities.

2. Posthumous Henry Dunant Medals

A candidate for a posthumous award of the Medal should be judged according to the criteria outlined above. Posthumous Medals should not be automatically awarded to those who have died in the service of the Red Cross/Red Crescent, unless they personally distinguished themselves (see point 1.3). The Medal should be awarded to the living, rather than the dead, as it is important that the individuals receiving it know that their peers valued their contribution to the humanitarian cause and consider them as an example to others.

3. Tributes to members of the Movement killed in the line of duty

Considering the growing number of volunteers and delegates who have been seriously wounded or killed during an assignment, the Standing Commission encourages each of the Movement's components to establish its own medal or other award to pay tribute to those who have given their lives or sacrificed their health to the Red Cross/Red Crescent cause, according to the following main criteria.

3.1 Criteria to be met for honouring members of the Movement killed or injured on assignment

Many humanitarian operations take place in dangerous settings, whether conflict situations or the aftermath of a natural or technological disaster. Fortunately, many members of the Red Cross/Red Crescent who have had to work in life-threatening conditions have survived serious security incidents.

While it is difficult to establish absolute criteria for an award in the event of death or serious injury, a distinction should be nevertheless made between accidents and killings. Thus those who have died or have suffered serious bodily or psychological harm in the line of duty should receive some kind of recognition (e.g. murder or injury perpetrated by a combatant or act of banditry, hostage-taking, rape, accident during a natural or technological disaster relief operation). A death or injury that was not premeditated, but caused by a mine, a stray bullet, etc. might also be considered deserving of recognition.

3.2 Type of award

The distinction awarded to those killed or injured on assignment does not necessarily have to be in the form of a medal. Alternatively, there might be a document, such as a certificate of recognition, and a ceremony which would either be public or else publicized afterwards in the press. Indeed, the publicity given to the award is an important aspect of the recognition that the Red Cross/Red Crescent gives to its members, who often take risks for the sake of others.

4. Conclusion

The Standing Commission will award the Henry Dunant Medal to members of the Movement in accordance with the intent and criteria laid down in the Regulations, as interpreted in points 2 and 3 of the present document. In addition, it recommends that components of the Movement which have not already done so establish their own form of recognition for members who have died or suffered serious bodily or psychological harm in the course of their duties.

Geneva Conventions and Additional Protocols

Accession to the Additional Protocols by Grenada

Grenada acceded on 23 September 1998, without making any declaration or reservation, to the Protocols Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted in Geneva on 8 June 1977.

The Protocols will come into force for Grenada on 23 March 1999.

This accession brings to 152 the number of States party to Protocol I and to 144 those party to Protocol II.

International Humanitarian Fact-Finding Commission (Article 90 of Protocol I)

The International Humanitarian Fact-Finding Commission (IHFFC) now has an Internet site at the following address:

www.ihffc.org

Books and reviews

Cees de Rover, *To serve and to protect: Human rights and humanitarian law for police and security forces*, International Committee of the Red Cross, Geneva, 1998, 455 pages

The manual *To serve and to protect: Human rights and humanitarian law for police and security forces*, by Cees de Rover, Coordinator for Police and Security Forces at the ICRC, represents a significant and welcome departure from the ICRC's traditional view of its role in disseminating the law of war and of the target groups it addresses. The manual also reflects the ICRC's pragmatism in acknowledging the changing nature of conflicts and the increasingly significant part police and security forces play in maintaining peace and order in society. This is especially true in the current environment marked by the emergence of a wide variety of situations of internal violence which cause misery and suffering even greater than that generated by international or non-international armed conflicts. In the preface to the manual ICRC President Cornelio Sommaruga rightly states: "The ICRC has recognized that in order to ensure adequate protection and assistance to victims of situations of armed violence, it is important — indeed essential — to focus attention on members of police and security forces". The book seeks to further this objective. Cees de Rover, with his background in training and as a field police officer, brings his vast international experience and legal knowledge to this comprehensive and well-structured document. In sponsoring and publishing it, the ICRC has rendered a great service to police and security forces.

The manual comprises six main sections divided into a total of 16 chapters. Each section deals with separate but closely related subjects centred around the core issues of international law in general, human rights law and international humanitarian law, such as law enforcement powers and responsibilities, identification of specific duties and obligations, and patterns of liability.

The section entitled "Legal framework" contains background information which is especially valuable for police trainers and senior officers.

Issues pertaining to custom and treaties, national and international criminal jurisdiction, matters of State and diplomatic immunity, etc., are put in proper perspective. The chapters on human rights law and international humanitarian law and their interrelationship are well presented. The part devoted to “Enforcement mechanisms and machinery” is especially informative and offers answers to the probing and at times irreverent questions that users of the manual are likely to encounter.

In the section entitled “Basic premises of law enforcement” the author states: “Law enforcement officials must not only know the powers and authorities given to them by law — they must also understand their potentially harmful (and potentially corrupting) effects”, and “Law enforcement is not a profession that consists of applying standard solutions for standard problems (...). It is rather the art of understanding both the letter and the spirit of the law, as well as the unique circumstances of a particular problem in hand”. He advises all law enforcement officials to ask themselves three questions before exercising their authority or power: (1) Is the action they propose to take legal? (2) Is it strictly necessary? and (3) Is it in proportion to the seriousness of the situation? The police should hone their professional skills, temper them with moral and ethical codes of conduct based on the rule of law, and serve society with tools acceptable to the community. The author repeatedly emphasizes that in pursuing an objective one ought not to forget to apply “means and methods” conforming to professional ethics.

Maintaining public order, the author insists, is not merely a matter of regulating assemblies, processions and demonstrations. Correct handling of such situations may be of critical importance when they rapidly change from peaceful to violent. History is full of examples where the mishandling of a single incident resulted in the eruption of a violent movement. The risks of abuse of power by law enforcement officials and/or armed forces tempted to use “disappearances” or extrajudicial killings to prove their effectiveness are appropriately highlighted. The author also points out that the enactment of repressive laws or the proclamation of a state of emergency in order to cope with a developing situation is no justification or excuse for the waiving or wanton violation of human rights. This chapter is relevant not only for law enforcement officials but also for lawmakers and national security strategists.

Chapters 8, 9 and 10 — entitled “Arrest”, “Detention” and “Use of force and firearms” respectively — deal expertly with the relevant concepts, principles and safeguards. Very well documented, these guidelines, supplemented by national laws and regulations, could become standard

operating procedure for police officers of any country. The material on detention is well presented and most useful for all law enforcement officials engaged in the administration of criminal justice.

Juvenile delinquency is a serious social problem and as such should be handled by police in a sensitive and compassionate manner. Issues relating to other vulnerable groups, like victims of crime or abuse of power, particularly women, are also treated with sensitivity. Current political upheavals and ethnic, social and economic crises have aggravated the plight of internally displaced persons, refugees and economic migrants, and this in turn has implications for police forces. The author advises law enforcement officials to develop “an empathic capacity to understand the particular situation and circumstances of individual refugees” so as to ensure that protection, care and appropriate treatment do not remain empty words. He also highlights the very special role and mandate of the ICRC in helping refugees and internally displaced persons.

At the beginning of each chapter a list of key questions establish a framework for the issues to be discussed and explain their relevance to the subject. These questions enable the instructor to gauge the capacity of his audience and to set the level of instruction. Chapter highlights and study questions aimed at testing knowledge and understanding further enhance the quality of the manual. The study questions at the end of each chapter comprise a short section entitled “Application”, which in fact distils the essence of the topic covered. These small but useful tips, coupled with selected references and a detailed bibliography, make the manual an indispensable guide for instructors and a handy reference work for anyone wishing to learn more about how police and security forces function.

This book is more than a mere compilation of the rules of international humanitarian law and human rights law. As an instructor’s manual it is readable, comprehensive and immensely usable, and sets international standards for police work.

D. K. Arya
Former Director General
Border Security Force
India

Miscellaneous

Telford Taylor

1908 — 1998

Law professor, author and former Nuremberg war-crimes prosecutor Telford Taylor died in New York on 23 May 1998, at the age of 90.

A graduate of Williams College and Harvard Law School, Telford Taylor worked as an attorney in the Roosevelt Administration and as a staff member in the United States Senate prior to the Second World War. During that conflict he served in the European theatre as an Army intelligence officer, playing an important diplomatic role in the Allied effort to break the German communications codes. When the war ended he joined the U.S. prosecution team at Nuremberg. Initially he served as one of the senior deputies to U.S. Supreme Court Justice Robert Jackson, the American Chief of Counsel (chief prosecutor) for the principal proceedings against the German leadership before the International Military Tribunal. Taylor simultaneously held the post of head of the Subsequent Proceedings Division in the U.S. Office of Chief Counsel.

With the conclusion of the International Military Tribunal on 1 October 1946, and Justice Jackson's resignation on 17 October, Taylor was promoted to the rank of Brigadier General and designated the Chief Counsel for War Crimes under Military Government for the subsequent proceedings against other senior, but lower-ranking, members of the German military and civilian leadership. His work continued through the remaining German trials, which concluded on 14 April 1949, and he submitted his final report to the Secretary of the Army on 15 August 1949 — ironically only three days after completion of the diplomatic conference that produced the four 1949 Geneva Conventions for the protection of war victims, now regarded as a major part of the foundation of the law of war.

The International Military Tribunal (and the limited number of military trials that preceded it or ran concurrently) established the precedent of

individual criminal responsibility for war crimes, crimes against humanity and crimes against peace. But it was through the efforts of General Taylor and his staff, and the civilian judges in the U.S. military tribunals, that discussion and elaboration of many law-of-war principles — such as military necessity, superior orders, command responsibility, and reprisal — gave substance to the principles laid down by those earlier trials.¹ The twelve subsequent proceedings under Control Council No. 10 against German lawyers, doctors, SS personnel, police, industrialists, financiers, field marshals, generals and government ministers resulted not only in 161 convictions (out of 199 accused) but well-reasoned judgements that have proved invaluable through the years in their discussion of above-mentioned principles.²

Taylor left the Army and returned to the practice of law and teaching law at Columbia University School of Law and the Benjamin Cardozo School of Law. He parlayed his military experience into a well-regarded trilogy of books: *Sword and Swastika: Generals and Nazis in the Third Reich* (1952) covering the story of the Nazis and the generals up to the fall of 1939; *The March of Conquest: the German victories in Western Europe, 1940* (1958) which analysed the German victories in Western Europe in the spring of 1940; and *The Breaking Wave: World War II in the summer of 1940* (1967), still regarded as one of the best analyses of the Battle of Britain. Subsequently he authored *Munich: The Price of Peace* (1979), which won the National Book Critics Circle Award for best non-fiction work of 1979, and *The Anatomy of the Nuremberg Trials* (1992), an historical analysis and partly autobiographical effort that is undoubtedly the best volume on the process that led to Nuremberg and the trial of the principal accused.

The highly controversial and divisive U.S. war in Viet Nam prompted Professor Taylor to write his small but strongly-worded *Nuremberg and Vietnam: an American tragedy* (1971) in which he was critical of many, but not all, aspects of U.S. military operations in that conflict. He also was — correctly — critical of the erroneous instructions relating to command responsibility by the military judge in the prosecution of the U.S.

¹ Reported in “Trials of war criminals before the Nuremberg Military Tribunals under Control Council Law No. 10”, 15 vols., 1946-1951.

² In addition to his official report and the official cases, see T. Taylor, “Nuremberg Trials — War Crimes and International Law”, *International Conciliation*, No. 450, April 1949, pp. 241-371.

Army company commander during the 16 March 1968 massacre of hundreds of civilians at My Lai, instructions that resulted in his acquittal.

It was my pleasure to share the stage with Professor Taylor on more than a dozen occasions as we addressed U.S. military officers at the senior staff and war colleges. We agreed far more than we disagreed, and in the very few cases of the latter our disagreements were not major. Taylor was a man whom I held in great respect, a gentleman possessed of considerable experience and knowledge.

He was not always right. He argued unsuccessfully in the subsequent Nuremberg proceedings that the December 1945 conviction of General Tomoyuki Yamashita by a U.S. military tribunal in the Philippines stood for the proposition of strict liability on the part of commanders for crimes committed by their subordinates; the courts did not accept this argument.³ In our last presentation together, in 1992, he suggested that military necessity might permit the execution of prisoners of war captured by an enemy patrol operating deep behind enemy lines, an act that would constitute a violation of Article 13 and a grave breach under Article 130 of the Third Geneva Convention. Given the considerable length of his distinguished service to his nation and to respect for the law of war, two missteps (which did not result in suffering by anyone) can be overlooked when compared with his invaluable contributions.

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³ See, for example, *United States v. von Leeb (The "High Command" Case)*, *op. cit.* (note 1), vol. XI, 1948, pp. 510-511, 544.

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